INSTITUT ZA UPOREDNO PRAVO

INSTITUTE OF COMPARATIVE LAW

ISSN 0039 2138 **UDC 34**

FOREIGN LEGAL LIFE

STRANI PRAVNI ŽIVOT

4/2016

Beograd, 2016.

Prof. dr Dejan Đurđević
Full Professor, Faculty of Law University of Belgrade
redovni profesor Pravnog fakulteta u Beogradu

Prof.dr Dušan Vranjanac
Associate Professor, Faculty of Law University „Union" Belgrade
vanredni profesor Pravnog fakulteta Univerziteta Union u Beogradu

Ratomir Slijepčević
Secretary of the Commission for drafting the Civil Code of the Republic of Serbia
sekretar Komisije za izradu Građanskog zakonika Republike Srbije

Doc. dr Goran Dajović
Associate Professor, Faculty of Law University of Belgrade
vanredni profesor Pravnog fakulteta u Beogradu

Dr Branislava Knežić
Principal Research Fellow, Institute of Criminological and Sociological Research, Belgrade
naučni savetnik u Institutu za kriminološka i sociološka istraživanja

Branka Babović
Assistant, Faculty of Law University of Belgrade
asistent na Pravnom fakultetu u Beogradu

Dr Jovan Ćirić
Principal Research Fellow, Institute of Comparative Law, Belgrade
naučni savetnik u Institutu za uporedno pravo

Prof.dr Nataša Mrvić Petrović
Principal Research Fellow, Institute of Comparative Law, Belgrade
naučni savetnik u Institutu za uporedno pravo

Prof. dr Vladimir Čolović
Principal Research Fellow, Institute of Comparative Law, Belgrade
naučni savetnik u Institutu za uporedno pravo

Dr Aleksandra Rabrenović
Research Associate**,** Institute of Comparative Law, Belgrade
naučni saradnik u Institutu za uporedno pravo

Doc. dr Jelena Ćeranić
Research Associate**,** Institute of Comparative Law, Belgrade
naučni saradnik u Institutu za uporedno pravo

Dr Katarina Jovičić
Research Associate**,** Institute of Comparative Law, Belgrade
naučni saradnik u Institutu za uporedno pravo

Prof. dr Vladimir Đurić
Research Associate**,** Institute of Comparative Law, Belgrade
naučni saradnik u Institutu za uporedno pravo

Dr Ana Knežević Bojović
Research Associate**,** Institute of Comparative Law, Belgrade
naučni saradnik u Institutu za uporedno pravo

EDITOR IN CHIEF
Glavni i odgovorni urednik
Prof.dr Vladimir Čolović

DEPUTY OF EDITOR IN CHIEF
Zamenik glavnog i odgovornog urednika
Prof. dr Nataša Mrvić Petrović

SECRETARY OF EDITORIAL BOARD
Sekretar redakcije
Aleksandra Višekruna

TECHNICAL EDITOR
Tehnički uednik
Miloš Stanić

PUBLISHER
Izdavač
INSTITUT ZA UPOREDNO PRAVO

Institute of Comparative Law
Beograd, Terazije 41
e-mail:institut@icl.org.rs, www.comparativelaw.info
tel. + 381 11 32 33 213

Print
Štampa
GORAGRAF

Circulation
Tiraž
300 copies - primeraka

TABLE OF CONTENTS:

SADRŽAJ:

Prof. Nataša Mrvić Petrović, Ph. D.[1]
Prof. Zdravko Petrović, Ph. D.[2]

Original scientific paper
UDC: 347.426.6

COMPENSATION FOR SUFFERED PHYSICAL PAINS

Abstract

The authors analyzed the foreign legislation and the legislation of the Republic of Serbia relating to compensation for physical pain. They recognize that the old civil codes from 19.century (in French or German Civil Codes e.g.) does not define the concept of damage, nor immaterial, while in modern codes accurately are determine which forms of non-pecuniary losses be legally justified. And the legal systems of the former socialist countries recognize the right to pecuniary compensation for non-material damage in case of serious violations of personal rights, for example Russia and Poland. In the law of obligations Serbia (as well as Slovenian, Croatian, Macedonia, Montenegro, Bosnia and Herzegovina) suffered physical pain is stipulated as a legally recognized form of non-material damage. Pecuniary compensation is determined on the duration and intensity of pain and other circumstances related to an event when the damage occurred, medical treatment and recovery and of the personality characteristic of the injured person.

Keywords: *tort law, non-material damage, bodily injury, psysical pain, compensation*

1. Introduction

The pain is a subjective feeling which regularly occurs with a conscious person and healthy body when his bodily integrity is impaired. The key feature of physical pain is that it is highly subjective feeling. There are no objective critera for measuring the intesity and duration of pain. Different people experience pain differently. Therefore, it could be said that the pain thereshold is individual and changeable.

There are various types to the nature of pain: neuralgic, pulsationg, diffuse and vegetative. It is very important to establish the nature of pain

[1] Principal Research Fellow, Institute of Comparative Law, Belgrade; mail: mrvicnata@gmail.com
[2] Attorney and Professor of John Neisbitt University Belgrade; petroviczdravko@ikomline.net

in order to be able to determine its intensity. Thus, the neuralgic pain is the most intense and it appears in regular time intervals and shootings. A pulsating pain is weaker than neuralgic, it intensifies with each heartbeat, and then it decreases its intensity. A diffuse pain is a skin or mucous membrane pain whose intensity remains unchanged. It is usually weaker than the first two. Vegatitive pain is characterized by burning sensation, but it appears very rarely. In practice, the most common are combinations of all listed pains[3].

The pain can be felt only by a body whose receptors and conductors were completely funcitonal at the time of injury. For this reason, the pain may be felt only by a fully conscious person, since the quantitative reduction of consciousness reduces, in general, the experience of pain intensity. This is very important for injuries or the central nervous system, which very often compromise the consciousness for longer or shorter period of time.

There is no universally accepted definition of physical pain in medicine. Also is absent exact explanation mechanism of pain. It is reasonable to be warned that psychological elements are important in pain syndromes and that is and that it is difficult to separate the organic and psychological causes of pain [4].

All these circumstances impact that is in judicial practice is difficult to award reasonable compensation for suffered physical pain as specific type of non-material damage if it is permitted under national legislation.

2. Compensation for non-material damages for suffered physical pain from comparative perspective

Compensation for non-material damages for suffered physical pain is present in almost every European legislation. But, previous and significant civil codes enacted during the 19th century, such as French and German, which made a historical influence on later civil codes throughout Europe, contain neither provisions reffering to compensation for non-material damages as a consenquence of bodily injury, health impairment or death of a person, nor compensation for non-material damages as a consecquence of suffered physical pains. In fact, notes that Olivier

[3] Z. Petrović, N. Mrvić Petrović, „Pravo na naknadu štete po Zakonu o obligacionim odnosima Republike Srbije“, in: *Sudskomedicinsko veštačenje nematerijalne štete* (eds. G. Šćepanović, Z. Stanković, Z. Petrović), Beograd, 2015[2], 657.

[4] J. H. Olender, „Proof and Evaluation of Pain and Suffering in Personal Injury Litigation“, *Duke Law Journal*, 1962.„354-355.

Moréteau "French law has nothing to say on compensation of damage"[5], however it is nothing to say on compensation of non-material damage[6].

Thus, it was necessary for the judical practice to, by extensive interpretation, find ways for damages. Consequently, based on the general provision of Article 1382 Civil Code[7] the French Court of Cassation imposed an obligation of compensation for non-material damages (for sufffered physical and mental pains caused by injury or course of medical treatment). The compensation for non-material damages is awarded for suffered physical and mental pains which were the consequence of bodily injury or medical treatment pain (*prétium dolores*). Therefore, according to the decision from French law and judical practice, the compensation for suffered paid is only for pains of relevant duration and intensity, and the severity of pains is determined solely on the basis of medical expertise ordered by the court. Compensation is given for sustained pain at the time of the injury and for the pain that will continue to suffer injuries. In practice is difficult to assess the occurrence of future pain, so, usually considered that they exist if there is a reduction of life activities of the injured[8]. The same solutions are accepted by Belgian and Luxemburg civil codes and practice. Similarly, in Spain as well, which generally does not envisage right to non-material damage caused by suffered physical and mental pains, the judicial practice has started awarding this kind of compensation.

German Law[9] (*Bürgerlichen Gesetzbuch* – BGB) enacted in 1896, does not provide the definition of damage in general and consequenty there is no definition of non-materal damage. From paragraph 253 is stipulated that basically only material damage can be awarded and that „pecuniary compensation for non-material damage may be claimed only in cases stipulated by law". According to the paragraph 847 the plaintiff may claim a fair pecuniary compensation (so called pain and suffering - *Schmerzensgeld*) in cases when the damage was caused deliberatily or throuht negligence resulting in life or body or impairments of helth, or

[5] O. Moréteau, „The law of damages within the system for the protection of rights and legal interests", in: *Basic Questions of Tort Law from a Comparative Perspective* /ed. H. Koziol), Wien 2015., 10.

[6] Z. Petrović, „Naknada neimovinske štete u francuskom pravu", u: *Uvod u pravo Francuske* (ur. O. Nikolić, V. Petrov), Beograd 2013., 242.

[7] Consolidated version from October 17, 2016, available at: *http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070721*, 17. 10. 2016.

[8] M. Cannarsa, „Compensation for Personal Injury in France", *The Cardozo Electronic Law Bulletin*, 8/2002, 17, *http://www.jus.unitn.it/cardozo/Review/2002/Cannarsa.pdf,* 15. 9. 2016.

[9] Civil Code in versions promulgated from 2 January 2002 (*Federal Law Gazette* [*Bundesgesetzblatt*], last amended by art. 6 G from 19. 2. 2016 I, *http://www.buergerliches-gesetzbuch.info/,* 12. 10. 2016.

as special saffisfaction for infringment of sexual freedom (only for raped women). German Civil Code was significantly reformed in 2001 (has been in force since 2002), but , provision on damage compensation have not be fundamentaly changed. New paragraph 253. legally permited the right to pecuniary compensation for non-material damage caused by bodily injury, health impairment or freedom restrictions[10]. So, non-material damages may be awarded only if the damage was caused by a severe and the intentional infringement of personal rights specified by law[11]. Therefore, the pain is not recognize as special form of non-material damage, but only in context the total suffered non-material damage (pain and suffering)[12]. But, fair pecuniary compensation for non-material damages is awarded if another form of compensation and is not possible and only in case of more serious injury. The compensation amount is a lump sum determined according to circumstances of a concrete case (severity of injury, the degree of guilt of perpetrator, duration and intensive suffering pain, etc.).

In the Scandinavian legislation the compensation for non-material damage for suffered physical and mental pains, as recognized by Danish, Finnish and Swedish law, was introduced exclusively for the benefit of a claimant and is awarded upon the submission of the medical expert's report proportionally to severity of the suffered injury, duration of hospital treatment and recovery period, that is, incapacity to work[13]. Pursuant to provision of the Finnish Traffic Insurance Act this right may not be exercised by the claimant who did not undergo hospital treatment. On the other hand, according to the Swedish legislation, it is possible to claim this compensation even though the painful bodily injury did not have permanent harmful consequences on the claimant's health. Compensation is calculated using tables containing data on medical tretment duration and severity of suffered injury, applied both by insurance organizations and courts. In order to determine damages for pain and suffering, the most important is disability duration, wheres other circumstances have secondary significance (severity of insury, intensity of pain, duration of

[10] Reform of German tort law in 2002 did not change earlier concepts, except that the extends right to pecuniary compensation for non-material damage (see: Z. Petrović, N. Dožić, „Naknada nematerijalne štete u njemačkom pravu", in: *Uvod u pravo Nemačke* (eds. M. Vasiljević, V. Čolović), Beograd 2011., 455-457).

[11] U. Magnus, J. Fedtke, „Non-Pecuniary Loss under German Law", in: *Damages for Non-Pecunniary Loss in a Comparative Perspective* (ed. W. V. H. Rogers), Tort and Insurance Law, vol. 2, Wien-New York 2001., 109; E. Deutsch, H-J. Ahrens, *Deliktsrecht (Unerlaubte Handlungen, Schadenersatz, Schmerzengsgeld)*, Köln-Berlin 2002[4]., 214.

[12] Z. Petrović, N. Mrvić Petrović, „Fear as a Form of Non-Pecuniary Damage", *Foreign Legal Life [Strani pravni život]*, 4/2015, 35-36.

[13] Characteristics of the Scandinavian laws listed by: M. Ćurković, *Obvezna osiguranja u prometu*, Zagreb 2007., 130-134.

medical treatment). The Norwegian law does not recognize compensation for suffered pain in classical sense, although the Law on Damages Claim according to sec.3, paragraph 2 awards compensation to the claimant for particular sufferings caused by bodily injury. The right to compensation is recognized only if the damage is caused on purpose or by reckless carelessness of the tortfeasor. The compensation amount is determined according to medical expert's reports and is protportional to severity of suffered injury, duration of medical treatment and recovery period, as well as the incapacity to work, that is, determined level of permanent disability which must be at least 15%. That is why this compensations functions more like satisfaction for claimant's suffering caused by decreased adtivities of daily living as a consequence of injury, than damages for pain and suffering.

The right to compensation for damage to non-material damages in the name of endured pains, had never been allowed in erlier legislation of Socialist countries (with the exeption of ex-Yugoslavia), because the pecuniary compensation for suffered physical and mental paints was not in correlation with the verdict moral. Buth, today, the right to pecuniary compensation for suffered physical and mental paints is guaranteed when the harm is caused by wrongfull activities. So, Russian Civil Code allow, in general, compensation for non-material (moral) damage endured due to the undertaken wrongul anti-legal activity of another person (Art. 12, 151 paragraph 1)[14]. It is paid in money or ahother kind of material value, and the concrete amounts is detemined for each case individually by court verdict. According to the Article 1101, a court awards the compensation takes into account the nature and degree of physical and mental suffering (connected with specific circumstances of the injuried person), the degree of guilt of the offender and other actual circumstance for witch the harm is caused[15]. Even when it is granted, the right to compensation for suffered physical and mental pains is linked to the severity of consequence of injury.

[14] Civil Code of the Russian Federation Parts I-IV from 30. 11. 1994, *Federal Law Gazette*, 51/1994, 14/1996, 146/2001, 230/2006 with the Amendments and Additions of February 20, August 12, 1996, October 24, 1997, July 8, December 17, 1999, April 16, May 15, November 26, 2001, March 21, November 14, 26, 2002, January 10, March 26, November 11, December 23, 2003, June 29, July 29, December 2, 29, 30, 2004, March 21, May 9, July 2, 18, 21, 2005, January 3, 10, February 2, June 3, 30, July 27, November 3, December 4,18, 30, 2006, January 26, February 5, April 20, June 26, July 19, 24, October 2, 25, November 4, 29, December 1, 6, 2007, April 24, 29, May 13, June 30, July 14, 22, 23, November 8, December 25, 30, 2008, February 9, April 9, June 29, July 17, December 27, 2009, February 21, 24, May 8, July 27, October 4, 2010, February 7, April 6, July 18, October 18,19, November 21, 28, 30, December 6, 8, 2011, March 8, 2015.

[15] P. B. Maggs, O. Schwartz, W. Burnham, *Law and Legal System of Russian Federation*, Huntington 2015[6]., 495; O. A. Papkova, „Reparation of Moral Damages and Judicial Discretion in Russian Civil Legislation", *Review of Central and East European Law,* 3-4/1988, 269.

Similar to that, the article 445 § 1 of the Polish Civil Code[16] grants the right to compensation for sufferings and mental pains caused by bodily injury or death a person, as well as a deprivation of liberty (article 445 § 2), sexual assault or misconduct (article 445 § 2) and infringement upon personal rights (interests) - article 448 CC. The amount for such compensation is usually determined through litigations according to the previously ruled individual cases in the judicial practice. For estimation of the the scope of suffered damage, the following is taken into account: how the injury occured, recovery period, the claimant's age and degree of disability, which is estimated by a medical committee or medical expert engaged by the insurance organization and/or authorized by the court[17].

3. Right to compensation for suffered pains in the legislation of the Republic of Serbia

Pecuniary compensation could be awarded pursuant to the Law of Obligations[18] (article 200 Paragraphs 1 to 203) for different type of non-material damage: for suffered and future physical pains, for mental anguish suffered due to reduction of life activities, for becoming disfigured, for offended reputation, honor, freedom or rights of personality, for death of a close person, as well as for suffered fear, for suffered mental anguish of victims of sexual violence. The court shall award appropriate damages, after finding that the circumstances of the case and particularly the intensity of pains and fear, and their duration, independently of redressing the property damage, even if the latter is not awarded. So, the claimant has the right to pecuniary compensation only if he is suffered pain of a particular intensity and particular duration.

As it was already mentioned, the key feature of pain is that it is purely subjective feeling. However, when determining physical pains and their scope, objective criteria should be applied. Namely, a subjective element in determining pain involves uncertainty, as it deals with inner phenomenon of person which is very difficult to grasp.

---

[16] Act of 23 April 1964, *Civil Code of the Republic of Poland*, *Law Gazette* [*Dziennik Ustaw,* Dz. U.] 16/1964, item 93 as later amended in *Dz. U*. 380/2016, item 585.

[17] E. Bagińska, "Poland : Developments in Personal Injury Law in Poland: Shaping the Compensatory Function of Tort Law", *Journal of Civil Law Studies*, 2/2015, vol. 8, article 17, 322-323, *http://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=1149&context=jcls*, 7. 10. 2016.

[18] *Federal Law Gazette* Social Federal Republic of Yugoslavia [*Službeni list SFRJ*], br. 29/78, 39/85, 45/89, 57/89, *Federal Law Gazette* Federal Republic of Yugoslavia [*Službeni list SRJ*], no. 31/93, *Federal Law Gazette* State Union of Serbia and Montenegro [*Službeni list SCG*], no. 1/2003; English version on *http://www.mpravde.gov.rs/files/The%20Law%20of%20 Contract%20and%20Torts_180411.pdf,* 15. 10. 2016.

It should be noted that when awarding compensation for sustained pains, the court shall award a fair pecuniary compensation if it finds that case circumstances, especially pain severity and its duration, justify that. In deciding on the request for redressing non-material loss, as well as on the amount of such damages, the court shall take into account the significance of the value violated, and the purpose to be achieved by such redress, but also that it does not favour ends otherwise incompatible with its nature and social purpose (Article 200 Paragraph 2 Law of Obligations). It would mean that the claimant would not have the right to damages for sustained physical pains caused by minor bodily injury, unless he suffered pains of higher or medium intensity, or if they (although minor) lasted for longer period of time. Thus, one of the decisions of the Supreme Court of Serbia states: "Regarding the defendant's audit, the Supreme Court has decided that the claimant may exercise the right to compensation for non-proprietary damage for sustained physical paints caused by minor bodily injury, if they were of higher or medium intensity, or if they lasted for longer period of time, as it is the case with the plaintiff"[19].

When determining damage and deciding upon compensation amount, all pains from the beginning of the adverse event up to completion of medical treatment should be taken into account, whereas pains that appeared later should be awarded within the compensation for mental anguish suffered due to reduction of life activities. Also, when deciding upon compensation amount, the court should take into account every uneasiness felt by the claimant during the medical treatment. In that respect, the following standpoint was adopted at the joint meeting of the Federal Court, republic supreme courts and Supreme Military Court held on 15 and 16 October 1986:

"1. Uneasiness during the course of treatment (e.g. short periods of unconsciousness, hospitalization, being confined to bed, various kind of immobilization and fixation, infusions, transfusions, injections, bandaging wounds, removing stitches, using wheelchairs, going to the clinic, physiotherapy et cet.), sustained by the claimant, it taken into account when deciding upon compensation amount for physical pains.

2. It should also be estimated, taking into account all circumstances of the case, whether and under which conditions may any of the uneasiness listed above grow into some other kind of independent non-material damage (e.g. mental anguish suffered due to reduction of life activities)"[20].

[19] The decision of the Supreme Court of Serbia Rev. No. 627/82, dated 29/3/1982 (*Zbornik sudske prakse*, 43/1982, decision 4461).

[20] Z. Petrović, N. Mrvić Petrović, *Naknada nematerijalne štete*, Službeni glasnik, Beograd 2012., 104-105.

Earlier judicial practice provided guidelines for estimating the compensation amount, emphasizing that it is measured not only according to the duration and intensity of pain, but also according to the character of injuries suffered by the claimant. Other circumstances accompanying the treatment are also taken into consideration: number of surgical operations, being confined to bed for a long time, difficulties with eating, physical therapy and similar. In addition, it was taken into account that coronary patients or emotionally unstable persons, children in particular, were more sensitive to physical pain.

The fact that the claimant was given painkillers during treatment is significant since it is considered that the damage caused by physical pains was thereby reduced. There were opinions in the civil law theory that for each specific case it should be assessed if and to what extent was the damage decreased (having in mind some detrimental effects of painkillers). Also, it would be unfair not to admit the loss, which obviously exists, as personal damage, although the person sustaining that loss does not have subjective feeling of pain because of painkillers he is taking (for example, high degree burns). Nonetheless, as medical experts support the view that in given cases victims do not feel pains, we are of the opinion that the court is obliged to reject such damages claims, as according to the article 200 of the Law of Obligation (the compensation is awarded for suffered physical pains).

The same problem arises when an injured person is not capable of feeling pains because of his unconscious state. The theory has seen mixed opinions regarding awarding compensation for sustained physical pains during unconsciousness. Thus, the first group of opinions supports the view that an unconscious person does not feel pain and there are no grounds for awarding compensation. On the other hand, there is an opposite opinion, which emphasizes that the state of unconsciousness has several levels of consciousness and that the person is unresponsive to physical pain only in total coma (which is also detrimental for human body)[21].The fact that an unconscious person has lost some days of his life, which is another form of sustained mental sufferings, should be evaluated separately[22].

It is true that the time a claimant spent in an unconscious state cannot be made up for and that the loss of that time presents special form of mental suffering. However, according to the explicit provision of Article 200 of the Law on Obligations, pecuniary compensations is awarded for specifically determined forms of mental pains, providing that certain

[21] Compare: M. and N. Milićević, „Vještačenje intenziteta i dužine trajanja fizičkih bolova posle saobraćajnih povreda, *Pravni život*, 5/1979, 65; opposite: B. Boras, „Evolucija stanja s poremećenom svešću i postupak sa komatoznim bolesnikom“, *The Conference on Neurology and Psychiatry*, Ljubljana 1969, 191.

[22] L. Koman-Perenić, „Oblici, obim i visina neimovinske štete“, *Sudska praksa*, 2/1983, 77.

prerequisites have been met. So, it is necessary to ask an expert whether the claimant could have sustained pains in an unconscious condition, and based on his report to decide whether to determine pecuniary compnsation or not. In our opinion, it would not be in line with Article 200 of the Law of Obligations, when determining pecuniary compensation for physical pain, to assess separately weather the claimant lost a certain number of days due to unconsciousness. Although it is certain that such a loss really represents special form of mental sufferings, for which a claimant should be, *de lege ferenda*, awarded a fair pecuniary compensation[23].

Ahother problem whith this kind of non-material damage is definitely lack of generally accepted criteria which would enable determining the character of injuries, particularly intensity and duration of pain, as objectively as possible. The help to asset medical expertize suffered physical and mental pain (*Schmerzengeld*) in Germany is widely used so called Fischer's system of classifying bodily injuries into six categories from very easy cases (I group) to extremely difficult cases (VI group)[24].

Although this system proved to be functional in our judicial practice as well, especially for achieving objective criteria which shoud exclude unjustified differences in experts' opinions, it should be noted that in the science has not yet developed a method which would enable determining the existence of physical pain or measurement of its intensity in concrete cases. Sometimes physical symptoms may indicate existence of pain: rapid pulse, fast breathing, higher blood pressure, EKG changes, excessive sweating. But these symptoms are not always relilable indicators of sustained pain - in some cases blood presure and pulse may decrease, not increase[25].

So, it could be said that there is not a measurement which could calculate the quantity of pain and suffering of a person, because variablity of level of pain is almost endless. This is supported by the fact that in some cases the feeling of pain is purely psychological without any valid psysical reasons (e.g. placebo efect, „phantom pain" in amputated leg, psychoneuroses etc). Also, it happens that a victim bexomes obsessed with the injury and feels pain long after they had been cured.

Therefore, when determining this kind of non-material damage the following circumstances have to be taken into account: personality of the plaintiff, duration and intensity of pain, character of the injury, plaintiff's age, application of painkillers.

---

[23] Z. Petrović, N. Mrvić Petrović, *Naknada štete zbog povrede fizičkog integriteta ličnosti*, Vojnoizdavački zavod, Beograd 2008., 73.

[24] A. W. Fischer, *Schmerzengeld in Haftpflichtsachen vom Medizinischen Standpunkt*, 1932. On this most used classification in German pratice see in: B. Bloemertz, *Die Schmerzensgeld-begutachtung*, Berlin-New York 1984[4]., 56-57.

[25] J. H. Olender, 361.

When giving expert's opinion, circumstances which frequently occur should definitely be takeninto account: that the plaintiff feels pain caused by more simultaneous injuries. In that case the pain should be expertized uniquely, because the feeling is unique. If the pain is felt in more than one spot, then the most intensive pain „covers" for other pains. This is called pains, their duration and intensity are expertized together by an expert neuropsychiatrist and expert traumatologist, where the former can give complete opinion on personal characteristics of the plaintiff, time of occurence and quality of pain, and the latter gives opinion on continuity of pain and effect of painkillers.

The compensation amount for suffered physical pains is determined at court own discretion. However, that discretionis conditioned by the obligation of the court to take into account all circumstances causing damage and other condiction stipulated by Article 200 Paragraph 2 of the Law of Obligations.

4. Conclusion

The compensation for non-material damage can be explicitly provided for in legislation or tacitly acknowledged in the case law based on the principle of the prohibition of committing harm another. Different national legal tradition and different socio-economic conditions affect on regulation of the right to compensation for non-pecuniary losses. Mostly in modern European legislatives are regulated when and where the non-material damage can be compensated. The right to pecuniary compensation for suffered physical pains in a series of legislations (German, French, Italian, Russian, Poland, in Scandinavian legislations and etc.) are approved within the overall suffering as a result of bodily injuries. Legislation of Republic of Serbia can be classified in the group rare legislations in which the suffered physical pain are compensable as a special type of non-material damage. In addition to Serbia in this group are legislations of Slovenia, Croatia, Macedonia, Montenegro, Bosnia and Herzegovina – all these laws stipulate the suffered pain as the legally recognized forms of non-material damage. This is the result of accepting the solution of the former Yugoslav Law on Obligations in the new legislations in these countries.

In Serbian judicial practice pecuniary compensation for suffered physical pain depends on personality or age or the damaged person, duration and intensity of pain, character of injury and application of painkillers. At that, injuries and part of body which is injured influence the amount of compensation. Small intensity or short duration of suffered pain may lead to situation that the injured person is admitted the right to pecuniary compensation of non-material damages.

Prof. dr Nataša Mrvić Petrović
naučni savetnik, Institut za uporedno pravo, Beograd
Prof. dr Zdravko Petrović
advokat, profesor Univerziteta „Džon Nezbit“, Beograd

NAKNADA ŠTETE ZA PRETRPLJENE FIZIČKE BOLOVE

Rezime

Autori analiziraju strana zakonodastva i zakonodavstvo Republike Srbije koje se odnosi na naknadu štete zbog pretrpljenih fizičkih bolova. Oni konstatuju da stari građanski zakonici (francuski, nemački) ne određuju pojam štete, pa ni nematerijalne, dok se u savremenim zakonicima tačno određuje koji se oblici nematerijalnih gubitaka priznaju. I u pravima ranijih socijalističkih zemalja priznaje se pravo na novčanu naknadu nematerijalne štete za slučaj teških povreda prava ličnosti. To pokazuju primeri Rusije i Poljske. U obligacionom pravu Srbije (kao i Slovenije, Hrvatske, Makedonije, Crne Gore, Bosne i Hercegovine) pretrpljeni fizički bolovi su regulisani kao jedan od pravno priznatih oblika nematerijalne štete. Novčana naknada određuje se na osnovu trajanja i intenziteta bolova i drugih okolnosti vezanih za štetni događaj, lečenje i oporavak i za ličnost samog oštećenog.

Ključne reči: građansko odštetno pravo, nematerijalna šteta, telesne povrede, fizički bolovi, naknada štete.

Ivana Stevanović, Ph.D[1]
Milena Banić[2]

Original scientific paper
UDC: 343.815

MONITORING MECHANISMS IN JUVENILE JUSTICE PLACES WHERE CHILDREN ARE DEPRIVED OF THEIR LIBERTY

Abstract

This article is based on national research conducted in Serbia by authors in the name of Belgrade Child Rights Centre as a part of international project "Children's Rights Behind Bars – Human Rights of Children Deprived of Liberty: Improving Monitoring Mechanisms" coordinated by DCI Belgium and Juvenile Justice Project coordinated by International Management Group. The article intention is to present how the respect of children's rights within places where children may be deprived of their liberty in the field of Serbian Juvenile Justice System is monitored and how children can enforce their rights in case of violation.

Key words**:** *children's rights, deprivation of liberty,monitoring mechanisms*

1. Introduction

Deprivation of liberty can be defined as any form of detention or imprisonment or the placement of a person in a public or private custodial setting from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority.[3] In recent years, the Republic of Serbia has taken major steps to harmonize national legislation and to provide implementation of the rights on the children deprived of the liberty according to ratified conventions and international standards. Serbian legislation contains a number of statutory provisions

[1] Senior Research Fellow, Institute for Criminological and Sociological Research and President of the Child Rights Centre, Belgrade, mail: ivanacpd@gmail.com
[2] PhD Student, Law School, UNION University, Belgrade, Attorney at Law specialised in the filed of human rights and child rights and permanent expert consultant and trainer of the Child Rights Centre, Belgrade.
[3] United Nations Rules for the Protection of Children Deprived of their Liberty UN General Assembly A/RES/45/113 of 14 December 1990, Article 11.

which clearly regulate the supervision mechanisms as well as complaint mechanisms available to juveniles, particularly in the institutions for enforcement of criminal sanctions.

This article is based on national research conducted in Serbia by authors in the name of Belgrade Child Rights Centre as a part of international project "Children's Rights Behind Bars – Human Rights of Children Deprived of Liberty: Improving Monitoring Mechanisms" coordinated by DCI Belgium and Juvenile Justice Project coordinated by International Management Group.[4] The Serbian national research has attempted to assess the existence, efficiency and utility of both monitoring mechanisms of the conditions of children deprived of personal liberty and the complaint mechanisms available to them in the different types of facilities present in Serbia within the Juvenile Justice System. Methodology used on national research conducted in Serbia was mostly based on desk research that involved gathering and analysing of information and data relevant for the analysed subject. Gathering of data involved the following methods: overview and analysis of international policies and standards, overview and analysis of the contents of the relevant legislative framework, existing literature, reports, policies and statistical data combined with a field research based on individual interviews with professionals and juveniles. The interviews were conducted following a common questionnaire as a guideline suggested from DCI Belgium as a part of mentioned project but adapted to properly respond to the national requirements. Research was carried out from May 2014 to February 2016. Presented results from field research in this article are based on interviews with children, management and stuff conducted in 2014 in the Juvenile Correctional Home in Kruševac and the the Juvenile Penitentiary (juvenile prison) in Valjevo.

2. The rights of the child and children deprived of their liberty in juvenile justice system

The Convention on the Rights of the Child (CRC) guarantees every children deprived of liberty right to dignity and protection against torture or other cruel, inhuman or degrading treatment or punishment or unlawfully or arbitrarily arrest, detention or imprisonment.[5] Also, CRC guarantees children in detention all rights aside ftom rights to liberty as any other children living outside. CRC emphasises that that children should only be

[4] Children's Rights Behind Bars - National Reports in *http://www.childrensrightsbehindbars.eu/outputs/national-reports.*

[5] Convention on the Rights of the Child General Assembly resolution 44/25 of 20 November 1989, Article 37.

detained as a measure of last resort and for the shortest appropriate period of time. Vulnerability of children deprived of liberty requires standards and broader safeguards for the prevention of torture and ill-treatment or violation of their rights based on efficient monitoring mechanisms. The UN Committee on the Rights of the Child declared in General Comment No. 10 that "Independent and qualified inspectors should be empowered to conduct inspections on a regular basis and to undertake unannounced inspections on their own initiative; they should place special emphasis on holding conversations with children in the facilities in a confidential setting."[6] Importance of independent monitoring mechanisms is also recognized in the UN Rules for the Protection of Juveniles Deprived of their Liberty[7] (Havana Rules), the UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules)[8], The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[9], the Standard Minimum Rules for the Treatment of Prisoners[10] and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment[11]. According to these standards, independent monitoring mechanisms should have the following characteristics and powers: 1. Independent (meaning not part of the administration of the detention facility) 2. Well qualified teams of inspectors that include medically trained inspectors as part of the team 3. Inclusion of women as part of inspection team particularly where detention facilities are being inspected which hold girls and women 4. Regular visits 5. Liberty to make unannounced visits 6. Access to all places under a state's jurisdiction where children are deprived of their liberty 7. Access to all information and records about the treatment and conditions of detention 8. Access to conduct interviews with children in detention on a confidential basis 9. Liberty to choose which detention facilities they visit and which children to interview 10. Access to all employees of a detention facility where children are held 11. Reports of inspectors must be made available publicly 12. Systematic follow-up to reports 13. Ability to follow up

[6] General Comment No. 10 on the Convention on the Rights of the Child UN Committee on the Rights of the Child CRC/C/GC/10 of 25 April 2007.

[7] United Nations Rules for the Protection of Children Deprived of their Liberty UN General Assembly (A/65/457of 16 March 2011.

[8] United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (2010) (Bangkok Rules).

[9] The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment UN General Assembly resolution 39/46 of 10 December 1984 (CAT).

[10] The Standard Minimum Rules for the Treatment of Prisoners, The Economic and Social Council resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

[11] The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment UN General Assembly A/RES/43/173 of 9 December 1988.

allegations of abuse or violence[12]

There are several international human rights institutions that conduct monitoring visits to places of detention following-up on the conditions of detention and preventing torture and violations of other human rights such as the European Committee for the Prevention of Torture and Inhuman or Degrading Tratment or Punishment[13], the Subcommittee on Prevention of Torture and Inhuman or Degrading Tratment or Punishment and The National Prevention Mechanisms[14]. The United Nations Commission on Human Rights, in resolution 1985/33, decided to appoint an expert, a special rapporteur, to examine questions relevant to torture. The mandate was extended for 3 years by Human Rights Council resolution 25/13 in March 2014. Also, the Committee on the rights of the Child, the Committee against Torture and the Human Rights Committee exercise monitoring through their reporting process especially when making concluding observations about the human rights of children deprived of liberty.

3. Legal and regulatory framework for children deprived of liberty in juvenile justice system in Serbia

The Republic of Serbia is a signatory state to many documents on human rights and children rights. Serbia ratified the Convention on the Rights of the Child in 1990. Optional Protocol on the involvment of children in armed conflict and Optional Protocol on the sale of children, child prostitution and child pornography were ratified in 2002. Republic of Serbia is a signatory state to the Third Optional protocol on the communication procedure. Serbia is a State party to all the most important treaties concerning prohibition i.e. prevention of torture. International Covenant on Civil and Political Rights[15], which in its Article 7 adopts a provision regarding prohibition of torture from the Article 5 of the Universal Declaration of Human Rights[16], was ratified in 1971[17]. The Convention against Torture and Other Cruel, Inhuman or Degrading

[12] Penal Reform International: Justice for Children Briefing No. 2 Independent monitoring mechanisms for children in detention in *http://www.penalreform.org/wp-content/uploads/2012/08/justice-for-children-briefing-2-v7-cmyk.pdf*

[13] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment y General Assembly resolution 39/46 of 10 December 1984 entry into force 26 June 1987.

[14] Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199 entered into force on 22 June 2006.

[15] Signed on 19th December 1966 in New York.

[16] Adopted by the United Nations General Assembly on 10th December 1948 in Paris.

[17] Official Gazette of the Socialist Federal Republic of Yugoslavia. No. 7/71.

Treatment or Punishment (Convention against Torture) was ratified in 1991[18]. The Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) had been signed on 25 September 2003, and ratified on 1 September 2005 by the Republic of Serbia[19]. By the Law on amending the Law on Ratification of Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in the Republic of Serbia, adopted in 28th July 2011 it has been determined that the Ombudsman of the Republic of Serbia shall operate the National Preventive Mechanism against Torture.[20]

Serbia is Member State of the Council of Europe. European Convention for the Protection of Human Rights and Fundamental Freedoms[21] and European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment[22] (European Convention for the Prevention of Torture - CPT) were ratified in 2003[23]. European Convention for the Prevention of Torture establishes a European Committee for the Prevention of Torture[24].

In recent years, the Republic of Serbia has taken major steps to harmonize national legislation and to provide implementation of the rights on the children deprived of the liberty according to ratified conventions and also international standards incorporated in the UN Standard Minimum Rules for the Administration of Juvenile Justice from 1985 (The Bei- jing Rules), the and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, the UN Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines) and CPT standards.

The Constitution of the Republic of Serbia[25] guarantees human dignity, the sanctity of life and inviolability of physical and mental integrity, and explicitly prohibits illtreatment. The Constitution of the Republic of Serbia, Article 25 Paragraph 2 regulates that nobody can be subjected to torture, inhuman or degrading treatment or punishment. Prohibition of torture is foreseen by other legal regulation, among others by the Criminal

[18] Official Gazette of the Federal Republic of Yugoslavia – International treaties, No. 9/91.
[19] Official Gazette of Serbia and Montenegro – International treaties , No. 16/2005, modifications 2/2006.
[20] Article 2a of the Law on amending the Law on Ratification of Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in the Republic of Serbia.
[21] Opened for signature on 4 November 1950 in Rome.
[22] Signed on 26 November 1987 in Strasbourg.
[23] Official Gazette of Serbia and Montenegro – International treaties, No. 9/2003, 5/2005 and 7/2005 – modified and Official Gazette of Serbia and Montenegro – International treaties , No. 9/2003)
[24] European Convention for the Prevention of Torture, Article 1.
[25] Official Gazette of the Republic of Serbia, No.98/200.

Procedure Code[26], Law on Police[27] and Law on Execution of Criminal Sanctions[28]. Criminal Code[29] determinates torture and illtreatment as a separate offense.

The Law on the Execution of Criminal Sanctions regulates the status of prisoners and guarantee the respect for prisoners' dignity, protection of their fundamental rights in keeping with the Constitution and the tenets of international law, and ban torture and any form of discrimination. The Law lays down that the functioning of the Central Prison Administration and the entire penal system shall be open to public scrutiny and, in this context, domestic and international organizations and agencies concerned with human rights, the media and experts shall be entitled to visit the institutions accommodating the persons deprived of their liberty.

Law on Juvenile Justice (Law on juvenile criminal offenders and criminal protection of juveniles)[30] establishes legal framework for imposition criminal sanctions to juveniles in conflict with law. The Law was enacted in 2005 and it is based on concept of restorative justice and alternative sanctions.

The Law on Juvenile Justice proscribes criminal responsibility for juveniles who at the time of commission of the crime have attained 14 years of age and excludes enforcement of criminal sanctions as well as initiation of criminal proceedings against children, i.e. persons who have not yet attained 14 years of age. The Law makes a distinction between younger juvenile (person who at the time of commission of the criminal offense has attained 14 and is under 16 years of age) and elder juvenile (person who at the time of commission of the criminal offense has attained 16 and is under 18 years of age).

The Law specifies different types of criminal sanctions that may be pronounced to juvenile offenders, namely: educational measures, juvenile detention and security measures.

With regard to educational measures, the Law includes open protection measures[31] and close protection measures – institutional

[26] Official Gazette of the Republic of Serbia, No. 72/11, 101/11, 121/12, 32/13, 45/13, 55/14).

[27] Official Gazette of the Republic of Serbia, No. 101/2005, 63/2009 - Constitutional Court's decision and 92/2011.

[28] Official Gazette of the Republic of Serbia, No. 55/2014.

[29] Official Gazette of the Republic of Serbia, No. 85/2005, 88/2005 - modification 107/2005 - modification 72/2009, 111/2009 and 121/2012.

[30] Official Gazette of the Republic of Serbia, No. 85/05.

[31] Open protection measures are: 1. Warning and guidance: court admonition and alternative sanctioning 2. Measure of increased supervision: increased supervision by parents, adoptive parent or guardian, increased supervision in foster family, increased supervision by guardianship authority, increased supervision with daily attendance in relevant rehabilitation and educational institution for juveniles.

measures. Close protection measures are: remand to educational institution[32], remand to juvenile correctional home[33], committal to special institution for treatment and acquiring of social skills[34].

An elder juvenile (16-18 years of age) who committed a criminal offense punishable by imprisonment of over five years may be sentenced to juvenile prison if due to high degree of guilt an educational measure would not be appropriate. Juvenile detention may last from 6 months to five years, and juvenile detention of up to ten years may be pronounced for criminal offenses carrying a statutory punishment of twenty years imprisonment or more severe punishment or in case of joinder of at least two criminal offenses punishable by more than ten years imprisonment[35].

Law on Juvenile Justice also regulates the measures of deprivation of liberty during criminal proceedings[36]. Exceptionally, the Juvenile judge may remand the juvenile to detention when grounds exist specified by law[37].

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has already twice implemented the programmes of periodic visits to Serbia in 2007 and 2011. When it comes to children deprived of liberty in the field of juvenile justice system, the CPT's delegation has during their visit in 2007 visited police stations in the Belgrade District Prison and made recommendations regarding the improvement of juveniles' rights in the pre-trial proceedings,

[32] The juvenile is remanded to an educational institution for a minimum of six months and maximum of two years, and every six months the Court shall reconsider whether grounds for suspension of enforcement of this measure or its substitution with another educational measure exist. / Article 20 Law on Juvenile Justice.

[33] The juvenile shall remain in the correctional home for the minimum of six months and maximum of four years, and every six months the Court shall reconsider whether grounds for suspension of enforcement of this measure or its substitution with another educational measure exist / Article 21 Law on Juvenile Justice.

[34] The juvenile may remain in the institution for treatment and acquiring of social skills for a maximum of three years, and the Court shall reconsider the grounds for suspension of this measure or its substitution by another measure every six months / Article 23 Law on Juvenile Justice.

[35] Articles 28-30 Law on Juvenile Justice.

[36] Detention in preparatory proceeding on grounds of the detention order issued by the Juvenile judge may not exceed one month, and the juvenile Court bench of the same Court may, on justifiable grounds, extend detention for maximum one more month. Following conclusion of preparatory proceeding and from the moment of filing a motion for pronouncing of criminal sanction, detention of an elder juvenile may not exceed six months, and four months for a younger juvenile. From the moment of ordering an educational measure of remand to a juvenile correctional home, and pronouncing a juvenile prison sentence, detention of a juvenile may not exceed six months.

[37] Article 66 Law on Juvenile Justice.

as well as during the time they spend in detention centres[38]. The improvement of conditions in detention centres has also been recommended to Serbia by the Universal Periodical Review[39] mechanism, while the Committee on the Rights of the Child has in their Concluding Observation recommended to Serbia to develop alternatives to detention in order to reduce detention of juveniles in prisons in Serbia to a minimum[40]. However, during this visit the CPT's delegation has not visited any institutions for the enforcement of educational measures or juvenile prison sentence.

During the visit in 2011, the CPT's delegation had, besides visits to police stations and detention centres, also visited the Juvenile Penitentiary in Požarevac which runs juvenile detention for juvenile women, as well as the Juvenile Educational Institution in Niš which implements the educational measure of remand to educational institution. At the time of their visit to the Juvenile Penitentiary in Požarevac, there were no persons in the execution of juvenile detention. In relation to their visit to the Juvenile Educational Institution in Niš, CPT's delegation has suggested a number of different recommendations for the improvement of juveniles' rights in this institution. Particularly, the delegation recommended that the Serbian authorities ensure regular visits to this institution by bodies which are independent of the Ministry of Labour, Employment and Social Policy, i.e. the Ministry responsible for the work of this institution as an institution from the social protection system. Also, the CPT's delegation has recommended the improvement of the system of informing juveniles about their rights and obligations[41].

4. Detention facilities for children in juvenile justice system in Serbia

In the Republic of Serbia there are different types of institutions accomodating children deprived of liberty, especially in the field of juvenile justice system, which enforce the educational measures, juvenile prison sentence and security measures ordered to juveniles.

There are three educational institutions on the territory of the

[38] Council of Europe: Report to the Government of Serbia on the visit to Serbia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), CPT/Inf (2009) 1.

[39] Office for the High Commissioner for Human Rgiths: Universal Periodical Review Serbia A/HRC/WG.6/15/SRB/3.

[40] Committee on the Rights of the Child: Concluding Observation Republic of Serbia, CRC/C/SRB/CO/1, Para 73.

[41] Council of Europe: Report to the Government of Serbia on the visit to Serbia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), CPT/Inf (2012) 17.

Republic of Serbia which can accommodate juveniles who have been sentenced to educational measure of remand to educational institution in the criminal proceedings. These institutions are in the jurisdiction of the Ministry of Labour, Employment and Social Policy, and they are the following: Juvenile Educational Institution in Belgrade, Juvenile Educational Institution in Niš, Juvenile Educational Institution in Knjaževac. During 2013, in the Republic of Serbia the number of ordered measures of remand to educational institution was 79, while in 2014 the number of ordered measures was 56.[42]

The Juvenile Correctional Home is situated in Kruševac and this facility accommodates juveniles who have in the juvenile criminal proceedings been sentenced to educational measure of remand to a juvenile correctional home. This institution is in the jurisdiction of the Ministry of Justice of the Republic of Serbia. The institution is organized into several parts and forms of treatment – closed, semi-open and open department. The institution has the capacity to receive and accommodate about 400 juveniles. The average number of juveniles in this institution is 105. Although intended for minors, the vast majority of the population in the Educational- Correctional Institution in Kruševac are the persons of age (by two thirds) with a court sentence for a crime they had committed as minors. However, their stay at this institution poses a serious challenge both for the management and for those minors who are referred to the institution for minor offenses. All of this leads to the creation of serious informal groups.[43] According to the latest data provided by the Institution for execution of criminal sanctions, on February 2016 the total number of persons serving educational measures in the Juvenile Correctional Home in Kruševac amounted to 200 persons (190 males and 8 females).

The Juvenile Penitentiary in Valjevo (juvenile prison) is a facility specialized in enforcement of juvenile prison sentence. This facility is in the jurisdiction of the Ministry of Justice of the Republic of Serbia. The institution has the capacity of 250 persons, and on average this facility accommodates 160 convicts and 20 detainees. This facility accommodates juvenile males. [44] According to the latest data provided by the Institution for execution of criminal sanctions, on February 2016 the total number of persons serving juvenile prison sentence in the Juvenile Penitentiary in

[42] Republic Institution for Social Welfare, „Children in the Social Welfare System", Belgrade 2013, 42.

[43] Helsinki Comitee For Human Rights in Serbia, „Monitoring of the Prison System Reform, Prison System in Serbia 2011", Belgrade 2011.

[44] Ministry of Justice of the Republic of Serbia, Directorate for the Execution of Criminal Sanctions, „Annual Report on the work of the Directorate for the Execution of Criminal Sanctions for 2012", Belgrade 2014, 34.

Valjevo amounted to 20. In 2015, this facility accommodated 20 persons serving juvenile prison sentence. Juvenile females who have been sentenced to juvenile detention are placed in the Penitentiary for Women in Požarevac, as the only institution for the enforcement of criminal sanctions in the Republic of Serbia for the remand of women sentenced to prison. At this moment, there are no persons serving juvenile detention in this facility.

Juvenile detention is implemented in the detention units. Detentions units are organised within the district prisons and penitentiary units in Serbia (26 of units). Conditions in these facilities are not adapted to the juveniles and therefore are not in accordance with international standards either. According to the statistics of the Ministry of Justice of the Republic of Serbia, Directorate for the Execution of Criminal Sanctions, 15 juveniles were found in detention on the day on 1st January 2014.[45]

During detention, psycho-social and educative support is not available for the juveniles so stay in custody is considered as the most risky period for the juveniles.

5. Monitoring mechanisms in juvenile justice places in Serbia where children are deprived of their liberty

5.1. National preventive mechanism (NPM) under OPCAT

By the Law on Ratification of Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in the Republic of Serbia a National Preventive Mechanism against Torture has been established which is responsible to perform continuous monitoring in all facilities where there are persons deprived of liberty, above all police stations, prisons and juvenile correctional homes, stationary social protection institutions, psychiatric hospitals, asylums, and with an objective to prevent torture and other cruel, inhuman or degrading treatment or punishment. The National Preventive Mechanism against Torture is responsible for monitoring all institutions in Serbia where there are children deprived of liberty. Under the Law amending the Law on the Ratification of the Optional Protocol, adopted on 28 July 2011 at the sitting of the Republic of Serbia National Assembly, the Protector of Citizens was designated as the authority performing the duties of the NPM.

The Model of the NPM in the Republic of Serbia is defined by the relevant law. It stipulates that the Protector of Citizens shall carry out the duties of the NPM in collaboration with the Ombudsmen of the

[45] *Ibid.*, 36

autonomous provinces and the associations whose statute intended goal is the promotion and protection of human rights and freedoms[46].

Preventive Mechanism is entitled to: 1. Unimpeded and unannounced visits to institutions 2. Unrestricted access to all institutional premises 3. Unrestricted and unsupervised interview with all persons deprived of liberty 4. Unrestricted and unsupervised interview with the personnel 5. Unrestricted access to all records, regardless of degree of confidentiality 6. Unrestricted copying of documentation, regardless of degree of confidentiality. Main goals of visits to institutions are: 1. Determining the real situation (establishing reliable, clear, precise and comparative facts suitable for analysis) 2. Identifying irregularities in work, that is, identifying violations of rights of persons deprived of liberty 3. Recommending measures for elimination of work irregularities 4. Control of the change of situation and implementation of measures for elimination of work irregularities.

In the process of preparation of monitoring of places of detention of persons deprived of liberty, the first step is to identify the priority visits according to the type of institutions and their situations and on the basis of the findings prepare the plan of visits to institutions (hereinafter: Plan of visit). The following types of visits exist: regular, control and emergency. Regular visits are periodic visits carried out with the view of systematic control of situation in institutions in relation to the respect of rights of persons deprived of liberty. Regular visits are planned ahead and carried out according to the designed plan of visit. Regular visits are announced. Control visits are those carried out in order to check the situation in institutions in relation to the respect of persons deprived of liberty and compare it to the situation identified in the course of previous visit. Control visit are planned ahead and carried out according to the designed plan of visit. Control visits are, as a rule, announced. Emergency visits are visits carried out in case of learning of the existence of serious irregularities related to the respect of rights of persons deprived of liberty. A decision to carry out an emergency visit is made by the coordinator. Emergency visits are not foreseen by the plan of visit. Emergency visits are, as a rule, unannounced.

5.2. Juvenile Judge and Juvenile Public Prosecutor

In addition to the National Preventive Mechanism against Torture, and in relation to children deprived of liberty within juvenile justice

[46] Law on Ratification of Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in the Republic of Serbia a National Preventive Mechanism against Torture.

system, the supervision over enforcement and inspection of enforcement of educational measure is exercised by the Juvenile judge of the Court adjudicating in the first instance[47]. The Juvenile judge and Juvenile Public Prosecutor shall at least once a year undertake direct supervision and inspection of enforcement of educational measures[48]. Furthermore, the Juvenile judge of the Court adjucating in the first instance and the competent Juvenile Public Prosecutor shall at least twice a year visit the juvenile remanded in a facility or institution for enforcement of educational measures where, in direct contact with the juvenile and the professionals engaged in enforcement of the educational measure and through inspection of relevant documents, they shall determine the lawfulness and correctness of treatment and evaluate the achievement in educational and proper growth of the juveniles' personality, as well as by direct inspection and review of the reports on the progress of the enforcement of the pronounced educational measure. In case they notice any irregularities they shall promptly notify the bodies and institutions in charge of supervision and enforcement of educational measures[49], as well as the facility, i.e. institution where the educational measure is enforced. Following notification of the Juvenile judge and/or the Juvenile Public Prosecutor the bodies and institutions in charge of professional supervision as well as the management of the institution or facility where the educational measure is served, shall promptly institute relevant investigations and undertake measures to rectify the unlawfulness and irregularities and shall accordingly inform the Juvenile judge, and the Juvenile Public Prosecutor[50].

The results of the field research indicate that the professionals in institutions are satisfied with the method of the realization of inspection visits by courts. These visits usually last one day during which the judge and the public prosecutor undertake direct supervision, conduct interviews with employees in the institutions as well as the juveniles and perform inspections of the relevant documents, after which they have a meeting with the employees where they discuss potential needs for improvement. The results of the research show that a regular contact with the juvenile judges is of great importance. However, the results also indicate that there is an inconsistent practice in the enforcement of supervision and inspection of the educational measures by different courts. A number of courts act in accordance with the legal obligations and make visits regularly, every six

[47] Article 99 Law on Juvenile Justice.
[48] Article 100 Law on Juvenile Justice.
[49] Ministry of Justice of the Republic of Serbia, Directorate for the Execution of Criminal Sanctions and Ombudsman of the Republic of Serbia.
[50] Article 115 Law on Juvenile Justice.

months, while other courts, especially from economically less developed areas do not make the supervisory visits at all or do so very rarely.

5.3. Directorate for Execution of Criminal Sanctions

The Directorate for Execution of Criminal Sanctions shall organize, implement and oversee the execution of juvenile detention as well as the educational measure of remand to juvenile correctional home[51]. The Directorate is an authority attached to the Ministry of Justice of the Republic of Serbia.

The results of the field research indicate that this type of supervision regarding both enforcement of juvenile prison sentence and educational measure of remand to juvenile correctional home is performed regularly. This type of supervision lasts for several days during which professionals undertake direct supervision over the respect of the rights of persons serving criminal sanctions, such as the right to humane treatment, visits, telephone contacts, correspondence, receiving parcels, food, hygiene, health care, legal assistance, education, religious rights etc. the supervision includes inspection of documents, direct supervision, conducting interviews with the employees in the institutions and persons serving educational measure or juvenile prison sentence. After the supervision has been completed, the Directorate for Execution of Criminal Sanctions shall issue a Measure Order and set a deadline for the institution to follow the order and correct the determined irregularities. After six months have passed, the Directorate for the Execution of Criminal Sanctions shall perform inspection in order to determine whether the institution has followed the order. The results of the field research show that the professionals in institutions are satisfied with the method of the realization of inspection visits by the Directorate for Execution of Criminal Sanctions.

5.4. Other institutions

Supervision over the enforcement of criminal sanctions are also exercised by other independent bodies, particularly non-governmental organizations that have established cooperation with the National Preventive Mechanism against Torture such as Helsinki Human Rights Committee in Serbia, Belgrade Center for Human Rights, Dialogue and the Committee for Human Rights – Valjevo, MDRI-S, IAN, the Victimology Society of Serbia and other non-governmental organizations within their own activities. Non-governmental organizations publish the results of the

[51] Article12 Law on Execution of Criminal Sanctions.

performed inspections in their reports.

Ombudsman as an independent body with the authority to control the work of the authorities and protect human rights also regularly acts on citizens' complaints and acts in accordance with his/her powers in order to protect the rights of persons serving criminal sanctions in the Republic of Serbia. The results of the field research indicate that the visits by the Ombudsman are relatively frequent and that the supervision by this body is undertaken regularly. The Commissioner for Information of Public Importance and Personal Data Protection is also authorized to perform supervision within his/her powers in order to protect personal data.

Despite a solid legislative framework in relation to the supervision mechanisms, previous reports show a variety of problems in the implementation of supervision in practice. Thus, for example, the Report by Helsinki Committee for Human Rights indicates the problem arising from the fact that supervisory bodies spend insufficient time in their visits, particularly judges in institutions, as well as the problem of a lack of specific knowledge of professionals for evaluating all aspects significant for exercising rights of children deprived of liberty in the institutions during inspection visits[52].

The results of the field research also point to the need for improving the knowledge and capacity of professionals performing supervision in order to adequately evaluate all aspects significant for the determination of exercising the rights of children deprived of liberty in institutions during supervisory visits. The professionals in institutions find that sometimes the supervision is provided by persons who lack sufficient experience in the field of supervision or who lack experience in the work in institutions for enforcement of criminal sanctions, while they are also insufficiently informed about the particularities of the work of certain institutions for the enforcement of criminal sanctions. Moreover, the respondents believe that it is necessary to work on improvement of the knowledge and capacities of a number of professionals performing supervision regarding skills of conducting interviews with employees and minors, as well as skills of giving feedback and developing and strengthening collaborative relationships.

Results of the research indicate that the professionals in institutions for enforcement of criminal sanctions understand the significance of performing supervision. Mostly, they see supervision as support for further improvements of work. However, a number of professionals pointed out that supervision is sometimes perceived as "spotting errors" and pressures, especially if it is performed by inexperienced persons who do not possess

[52]Helsinki Committee for Human Rights in Serbia: Monitoring of the Prison System Reform, Prison System in Serbia in 2011.

adequate communication skills but instead behave arrogantly.

Supervision of respecting the rights of children deprived of liberty in the social protection institutions is carried out by the Ministry of Labour, Employment and Social Policy (professional and inspection supervision). On the basis of the minutes establishing certain irregularities, the social protection inspector reaches a decision ordering measures or imposing prohibitions and setting deadlines for enforcement of the measures and prohibitions ordered to the social protection institution.[53] In the field of juvenile justice, this type of supervision is relevant for institutions where the educational measure of remand to educational institution is enforced, having in mind that these institutions are in the jurisdiction of the Ministry of Labour, Employment and Social Policy.

Supervision of respecting the rights of children deprived of liberty in the social protection institutions is also performed by the Ministry of Health (supervision over the legality of work of health care facilities and private practice as well as inspection supervision). The supervision shall be exercised by the Ministry of Health through health inspectors and inspectors in charge of the area of drugs and Medical devices. The health inspector, on the basis of the minutes establishing certain irregularities, shall hand down the decision ordering the measures, imposing prohibitions and setting deadlines for implementation of the measures ordered to health care facility or private practice.[54] In the field of juvenile justice, this type of supervision can be relevant for institutions which enforce security measure of mandatory psychiatric treatment and confinement in a health care institution, compulsory alcohol addiction treatment and compulsory drug addiction treatment.

By the new Law on Execution of Criminal Sanctions[55], a new institution has been established – judge executive responsible for protecting the rights of persons serving criminal sanctions, as well as detainees. Proceedings before the judge executive is initiated upon the request for the protection of courts or upon appeal by the detainee, and in the second instance the judge executive rules against the decision of the superintendent of the Institution or the Head of Management within three days from the announcement of the decision. Convicted person or detainee has the right to file an appeal to the judge executive within three months from the occurrence of the violation of rights, and exceptionally within six months if there was an objective impediment[56].

[53] Articles 166-173 Law on Social Welfare.
[54] Law on Health care, Articles 243, 248.
[55] RS Official Gazette, No. 55/2014.
[56] Article 33-37 Law on Execution of Criminal Sanctions .

6. Conclusions

In recent years, the Republic of Serbia has taken major steps to harmonize national legislation and to provide implementation of the rights on the children deprived of the liberty according to ratified conventions and international standards. Serbian legislation contains a number of statutory provisions which clearly regulate the supervision mechanisms as well as complaint mechanisms available to juveniles, particularly in the institutions for enforcement of criminal sanctions. The supervisory visits by the international and national authorities are usually carried out regularly, and the employees in the institutions are mostly aware of the significance of these visits to the improvement of their work. In the Republic of Serbia there are several national monitoring mechanisms / bodies, and in relation to the institutions in the field of juvenile justice system, the supervision by the following institutions is especially relevant: NPM, Directorate for the Execution of Criminal Sanctions, Juvenile judge and Juvenile prosecutors, Ombudsman and non-governmental organizations. The visits by these bodies present a crucial link for further improvement of rights and protection of juveniles in the institutions for enforcement of criminal sanctions, as well as for further improvement of the work of professionals employed in these institutions.

In spite of solid legislation, the implementation of supervisory visits in practice has shown that it is necessary to further work on strengthening of the supervision mechanisms especially in the field of further improvement of the capacities of the professionals engaged in supervision so that they could be able to detect all aspects significant for the assessment of the degree of exercising of rights as well as to undertake supervision in a professional and efficient way. In particular, there is the need to strengthen the capacities of professionals performing supervision for improvement of skills of interviewing employees in the institutions and juveniles, as well as skills of active listening and providing feedback. Furthermore, it is necessary to simultaneously work on the improvement of knowledge of professionals employed in the institutions where the supervision is performed about the significance of supervision for further improvement of work as well as further respect and protection of rights of juveniles. At the same time, it is important to work on further improvement of the supervision and establishment of regular supervisions by those bodies that have not yet been able to perform supervision regularly even though they have the legal possibility or those bodies that did not undertake supervision regularly in the legally defined deadlines.

Dr Ivana Stevanović,
viši naučni saradnik, Institut za kriminološka i sociološka istraživanja
Milena Banić,
advokat, doktorand na Pravnom fakultetu Univerziteta Union u Beogradu

NADZORNI MEHANIZMI U INSTITUCIJAMA U KOJIMA SE NALAZE DECA LIŠENA SLOBODE U SISTEMU MALOLETNIČKOG PRAVOSUĐA

Rezime

Ovaj članak je zasnovan na nacionalnom istraživanju koje je sprovedeno u Srbiji od strane autora u ime Centra za prava deteta u Beogradu, a u okviru međunarodnog projekta „Prava dece iza rešetaka - ljudska prava dece lišene slobode: Unapređenje nadzornih mehanizama" koordinisanog od strane DCI Belgija i projekta "Maloletničko pravosuđe" koordinisanog od strane International Management Group. Namera članka je da predstavi na koji način se nadzire poštovanje prava dece lišene slobode u institucijama za izvršenje krivičnih sankcija u sistemu maloletničkog pravosuđa u Srbiji i na koji način deca mogu da ostvare svoje prava u slučaju njihovog kršenja.

Ključne reči: prava deteta, lišenje slobode, nadzorni mehanizmi.

Prof. Gordana Gasmi, Ph.D[1]

Original scientific paper
UDC: 34(410):(4-672 EU)

BREXIT – RELEVANT LEGAL ASPECTS

Abstract

Although there are many drastic economic consequences of the exit of Great Britain from the EU (Brexit), the accent of this paper is put on relevant legal aspects (Lisbon Treaty) and possible scenarios of the forthcoming establishing of the new relations between Great Britain, on the one side and the EU, on the other. The European Union (EU) is faced with the turning point in its evolution in contemporary conditions. Besides putting the question about the future of the EU after Brexit, it is important to consider relevant legal aspects of Brexit.

The fact that, for the first time, one Member State has legally decided to leave this very significant trading block and this sui generis organization with clearly exposed supranational features, dramatically points out that interdependence of states in modern world obviously is shaken. Many Eurosceptics predicted in vain the imminent end of the Union, this especially after a British referendum - BREXIT on the exit of the Great Britain from the Union. As the Community existed before joining Great Britain (1973), also the Union, as its legal successor will exist after British withdrawal. There is no doubt that this is a serious blow for further development of the EU, which imposes the necessity of implementation of comprehensive reforms of the Union. If in the EU practice of implementation of the Lisbon Treaty, would prevail an effectiveness of the functioning of the EU institutions, it will be a realistic conclusion that it is a democratic Union with the optimal institutional architecture. In case of opposite development, the EU will face with further rise of extremism in its Member States.

***Key words*:** *European Union, Brexit, Lisbon Treaty*

[1] Institute of Comparative Law, Belgrade, Senior Research Fellow, mail: gordana.gasmi@gmail.com.

1. Introductory notes

It is important to discuss relevant legal aspects of Brexit, since the European Union (EU) is faced with the turning point in its evolution in contemporary conditions. Furthermore, Brexit is the reason to put the question about the future of the EU. The fact that, for the first time, one Member State has legally decided to leave this the most important trading block and this *sui generis* organization with clearly exposed supranational features, dramatically points out that interdependence of states in modern world obviously is shaken.

Namely, in Great Britain the stream of self-sufficiency achieved the victory on June referendum (2016) on "Yes or No to exit from the Union". However, although there are many drastic economic consequences of the exit of Great Britain from the EU (Brexit), the accent of this paper is put on relevant legal aspects and possible scenarios of the forthcoming establishing of the new relations between Great Britain, on the one side and the EU, on the other. Namely, the process of negotiating the new collaboration model between Great Britain and the EU is expected to start in the first trimester of the 2017, but the duration is legally limited to maximum two years, by the provisions of the Lisbon Treaty[2]. The high officials of the EU have already expressed strong willingness to start and finish negotiations with the Great Britain at the most quick and the most effective manner. The objective of such attitude of the Union is to avoid legally vague situation and simultaneously, to foster intraregional economic stability that is hampered since the end of 2008.

2. Legal framework of exit from EU - Lisbon Treaty on EU

At the EU summit held on 21/22. June 2007, the political decision was brought on convening a new intergovernmental conference in order to formulate the text of the EU Reform Treaty. After the failure of the Draft Constitutional Treaty of the EU (2005) in the process of its ratification in France and the Netherlands, the idea of constitutionalization of the EU was abandoned and the Lisbon Treaty on EU replaced the creation of the EU Constitution. The Intergovernmental Conference was opened at the beginning of October 2007. The first draft of the Treaty on reform of the EU saw the light of day on 17 / 18 October 2007. It was the moment of signing the Lisbon Treaty on EU, thus ending several years of negotiations of the Member States on the EU institutional reform.

[2] G. Gasmi, *Quo Vadis EU?: relevantni pravni i institucionalni faktori*, Institut za uporedno parvo, Beograd 2016, 92.

At the EU Summit in Lisbon, agreement was reached on the remaining provisions of the Treaty on the reform of the EU, on 13 December 2007. The EU Reform Treaty is named after the venue of the Summit of Heads of State and Government of the EU in Lisbon, at the end of the Portuguese Presidency of the EU. The enforcement of the Lisbon Treaty on the EU needed ratification of all Member States. The initial ambitious plan was that the ratification process is to be completed during the year 2008, so the new EU Treaty would have entered into force on 1 January 2009 before the European Parliament elections in June 2009. The main difference compared to the Draft Constitution of the EU's is the fact that the Lisbon Treaty on EU has no form of constitution and does not abolish existing primary legislation, but rather complements Rome Treaties and the Treaty establishing the European Union (Maastricht Treaty).

The new EU Treaty was signed on 13 December 2007 at the EU Summit in Lisbon. This was followed by the ratification process in 2008 and 2009, which had the usual turbulent flow, as the previous ratification procedures of the EU Treaties of Maastricht up to Nice. The main blow to ratification of the Lisbon Treaty took place in Ireland refusal in a referendum held on June 13, 2008, when more than half of Irish people voted negatively on the Lisbon Treaty. Nevertheless, the ratification process is continued by the adoption of the Lisbon Treaty in the Parliament of the United Kingdom on 18 June 2008. The ratification process lasted throughout 2008 and at the beginning of October 2009 there has been repeated the referendum in Ireland, this time with the positive outcome. There has been put successful political pressure on Ireland, the Czech Republic and Poland as the Member States that were opponents of the Lisbon Treaty on EU.

The conditions for the entry into force of the Lisbon Treaty have been met at the end of 2009, when the President of the Czech Republic (V. Havel) had put his signature on the text of the Treaty. This was preceded by consideration of whether the proposal of the Lisbon Treaty on EU is in accordance with the Constitution of the Czech Republic and a positive decision of the highest court in the Czech Republic in this case. Entry into force of the Lisbon Treaty therefore happened on the 1st of December 2009.

Deepening integration in the EU shows its falls and is sometimes late, but it took place at continuous and irreversible manner. Political concessions and internal negotiations among EU Member States are an integral part of the process of adoption of primary legislation, i.e. amendments of the founding Treaties. At the time of the conclusion of the Treaty of Rome the European Community membership counted only six Member States, and at the time of the signing of the Lisbon Treaty, the EU has grown to twenty seven members, with a tendency of further expansion of membership. EU

institutions, in such conditions, must meet the requirements of efficiency of decision-making, provided that there is no loss of legitimacy and of the democratic functioning. Such complex context has imposed the necessary institutional reforms of the Union with the aim of its efficient functioning.

Status of the legal entity was explicitly established by the EU Treaty of Lisbon for the first time for the Union. Furthermore, for the first time, the Lisbon Treaty formulated the legal possibility for a Member State to withdraw from membership of the Union ("exit clause", in Art. 50). A legal entity means the capacity of the EU to conclude international treaties and a membership of the Union as a whole in international organizations. Until the Lisbon Treaty, it was reserved for the two European Communities (EEC and Euratom) that both had a legal entity, which is in practice of international relations led to problems and uncertainties. EU Treaty of Lisbon has changed the earlier tripartite structure of the EU, introduced by the Maastricht Treaty (1993) and the former three pillars have been merged into one. Thus the Union is a unity, which has legal personality.

Prevailing view in the literature[3] is that the EU Reform Treaty of Lisbon largely kept many solutions from a failed Treaty on the EU Constitution, but the term „Constitution of the EU" is avoided as the term, in the EU official documents and in political proclamations. Draft Treaty on the EU Constitution was supposed to revoke and replace all previous Treaties of the European Community and the EU, while the Lisbon Treaty on EU rests on them, only amending it and in this respect there is a legal continuity of the EU primary law. Changes to the Treaty on European Union (Maastricht, Amsterdam, and Nice) refer to the EU institutions, improved cooperation among Member States, common foreign policy, security and defence policy of the EU. Compared to the provisions of the Treaty of Rome establishing the EEC (1957), the modifications envisaged by the Lisbon Treaty are aimed at the distribution of competences between the EU institutions and the Member States. Previous Treaty of Nice (2003) consists practically of two treaties - the European Union and the European Community, while in the Treaty of Lisbon a former Rome EEC Treaty is replaced by the Treaty on the Functioning of the European Union.

The question is why has been established such a complex legal structure[4] by the Lisbon Treaty. This is done as a compromise with the demands of certain EU Member States (Czech Republic, Great Britain and the Netherlands), who have asked to explicitly give up the constitutional symbols, such as the terms "Constitution", "European Foreign Minister", "European laws" and "European framework laws", as well as the symbols

[3] J.C. Piris, *The Lisbon Treaty – A Legal and Political Analysis*, Cambridge University Press, New York 2010, 63 – 70.

[4] *Ibid.*, 69 – 70.

of the Union (flag, anthem, motto, etc.). European Union of XXI century became very complex and full of diversity due to successive enlargements and the accession of very different countries, so legal appearance of the voluntary withdrawal of a Member State from the Union, formulated in the Lisbon Treaty was logical consequence. Therefore, Article 50 of the Lisbon Treaty states that:

„Any member State may decide to withdraw from the Union in accordance with its own constitutional requirements".

Those provisions regulate process of withdrawal of Member State, for the first time in the history of European integration. Specific kind of „divorce procedure"[5] requires the conclusion of the agreement between the Union and a Member State concerned, which previously made notification to the Union. This agreement is to settle out the arrangements for the withdrawal, as well as future relations between the EU and a Member State concerned. Internal EU procedure foresees that the Council of ministers makes decision by qualified majority after the negotiations on the agreement, but the European parliament is to give assent before decision making in the Council. If there would be no agreement on conditions for withdrawal, the exit from the EU becomes effective within two years from the notification of the withdrawal intention to the European Council[6].

It is possible that the European Council extends this deadline with the consent of a Member State concerned. European Council decided unanimously. Legal effect of the agreement on withdrawal is to abolish implementation of the EU Treaty in a Member State concerned, from the date of entry into force of that agreement. Representatives of the country which intends to leave the EU may participate in the work of the European Council and the Council of Ministers of the EU, except for the work of these institutions in which they are engaged in consultations on an agreement on the withdrawal of that Member State, or vote on it.

If the country which has withdrawn wishes to be re-admitted to the EU, it must submit a new application for membership and fulfil the criteria for accession. The most critical attitude towards the expansion of the Union, towards the Lisbon Treaty and other forms of deepening of integration within the EU (such as the acceptance of a single currency, the Euro and the entry into the Schengen zone) showed British people. They almost exactly represent the official policy of the Great Britain, unlike most of other NGO representatives in other EU Member States, which were openly opposed to some decisions of their governments. Fortunately

[5] G. Gasmi, 92.

[6] S. Zečević, *Institucionalni sistem i pravo Evropske unije*, Institut za evropske studije, Beogad 2015, 153 – 155.

for British people, the Lisbon Treaty for the first time provides for the possibility of leaving the EU membership, which they used during the June 2016 referendum with a negative outcome in terms of the stay-in of Great Britain in the EU.

3. British withdrawal from the EU

Great Britain organized on 23 June 2016 a referendum on leaving the EU membership (BREXIT - Britain exit). According to the final results of a British referendum 51.9 percent of citizens voted for leaving the EU, while 48.11 percent voted for stay-in the EU. Prime Minister David Cameron immediately after the presentation of the results of the referendum offered his resignation. His campaign months-long for Great Britain to stay-in the EU was fruitless. The analysis of the votes shows that the majority of residents in small British towns opted to exit from the Union. This happened after forty three years of membership.

After a couple of months of discussions, the new prime-minister Theresa May announced that Great Britain will initiate the procedure based on Article 50 in March 2017. At the time of writing this paper, total consequences of the referendum in the UK with a negative response to the question about the stay-in the EU, are still not completely figured out. However, there is a serious blow to further institutional and economic development of the Union, with the long-term consequences. It can be assessed that the Union is indeed at a crossroads of its functioning.

It has not helped the fact that on 19 February 2016, the European Council had decided on the special status guaranteeing to Great Britain in the event that a vote at referendum would be to stay in the Union. *Inter alia*, in terms of social benefits for European immigrants, access to certain types of social benefits[7] will be frozen for an indefinite period if the "public services would have been exhausted".

Despite February decision of the European Council, Eurosceptics won the victory at the British referendum[8]. Their main argument was that the Union represents a big threat to British national sovereignty, especially because of centralized decision-making in Brussels (Council of ministers, European Council and the Commission as an initiator). Besides, the other essential reason for leaving the Union was urgent migrant crisis that endangers economic prosperity of internal market, so there is no need to stay in such Union.

[7] C. Deloy, Supporters and adversaries to the UK remaining in the European Union are running neck and neck in the polls just one month before the referendum, *http://www.robert-schuman.eu*, last visited 24 June 2016.

[8] *http://www.electoralcommission.org.uk*, last visited 24th June 2016.

Opposite to those reasons, supporters of European future of Great Britain pointed out that the exit would produce a significant loss of jobs, specifically in financial domain, but also in other sectors of British economy. In addition, local opponents to Brexit warned that it will be necessary to re-negotiate trade agreements with the remaining twenty-seven EU Member States, which could take over ten years, with all the negative consequences for the British economy that globally accounts for only 3% of the world economy and less than 1% of the world's population. The prevailing logic of V. Churchill won victory. Churchill saw strategic guidelines for the development of Great Britain in turning the country away from the rest of Europe.

Immediately after the referendum the resignation of the British Commissioner Lord Hill followed, a member of the EU Commission responsible for financial services and capital markets. President Junker reacted with the regret to this resignation and nominated Vice-President of the Commission V. Dombrovski, who was in charge of the euro and social dialogue. A special declaration of the Commission on the EU's official portal was published on this occasion[9]. The resignation came immediately after the British referendum, despite the fact that Commissioners are elected in their personal capacity (Art. 17 par 3 of the Lisbon Treaty), on the basis of general competence and taking into account their European engagement that guarantees their independence from national governments.

The response of the EU officials on the BREXIT result has come in the form of the Declaration of Ministers of Foreign Affairs of the founding Member States of the European Communities. Ministers of foreign affairs of France, Germany, Italy, Luxembourg, the Netherlands and Belgium met on 25 June 2016 and expressed regret at the decision of the British people to leave the Union. Declaration estimated that it is a turning point for the EU, which has lost its Member State. Therefore, a proposal for special status of United Kingdom has ceased to exist, which was passed at the February meeting of the European Council. Bearing in mind that the provisions of Art. 50 of the Lisbon Treaty on EU provides for the voluntary exit from the EU, the Ministers called on the United Kingdom to activate the mechanisms provided for the commencement

[9] Commission européenne, Déclaration concernant la décision de Lord Hill de démissionner de la Commission européenne et le transfert du portefeuille des services financiers au vice-président Valdis Dombrovskis, *http://europa.eu/rapid/press-release_STATEMENT-16-2332_fr.htm*, last visited 25 June 2016.

of negotiations on the Agreement on withdrawal, as soon as possible[10]. Special political significance of the Declaration lies in the momentum of its launching and in its authors, the high political representatives of the founding countries of the European Economic Community (1958), as a predecessor of today's the EU. The ministers of those countries have highlighted the great contribution of the Community and a contemporary Union to the modern processes of economic development and peace on the European continent, which lasts the longest period in recent times in Europe.

The unification of West and East Europe under the auspices of the Union has been achieved, i.e. the end of „Cold war" era. Ministers have highlighted the mutual benefits of the peoples united under the umbrella of the Union and have pointed to the strong political will of the new Europe of twenty seven Member States to follow European values based on founding treaties and the rule of law, in accordance with the aspirations of its citizens. Hence, the Declaration emphasized the need to strengthen solidarity and cohesion within the Union. At the same time the need was identified to improve the functioning of the EU, faced with many challenges of globalization, among which the most vulnerable point is endangered safety of EU citizens, both external as well as internal. In this context, it was accentuated the need to build a stable framework of cooperation among Member States in managing migration crisis and taking care of refugees.

In second place the Declaration emphasized the importance of sustainable economic growth and improvement the convergence of the Member States' economies. Progress towards the realization of monetary union in the EU and towards ensuring full employment has also been formulated in the form of important objective of the Union and a response to the British exit from the EU. The Declaration expressed strong confidence of founding countries of the Community in the common future under the auspices of the Union, in spite of great geopolitical changes and global instability. It remains to be seen in the upcoming period, to which extent stated goals for the future development of the Union will be achieved, which will certainly require the implementation of institutional reforms of the Union.

Some authors reasonably assess[11] that after the Brexit there are a possibility of „domino effect", taking into account the situation in the

[10] France Diplomatie, Déclaration conjointe, *http://www.diplomatie.gouv.fr/fr/politique-etrangere-de-la-france/europe/evenements-et-actualites-lies-a-la-politique-europeenne-de-la-france/article/declaration-conjointe*, last visited 25 June 2016.

[11] C. Deloy, 43 ans après leur adhésion, les Britanniques décident de quitter l'Union européenne, *http://www.robert-schuman.eu*, last visited 24 June 2016; G. Gasmi, 238.

Netherlands, where elections are to be held in Spring of the 2017, coloured with strong opposition of local population to future enlargements of the Union. Precisely, the Netherlands has rejected the Association Agreement between Ukraine and the EU at the referendum held on 6th of April 2016, when 61% negative votes appeared. The same situation could happen in France also[12], where public discussion had launched the idea of so-called "Frexit", i.e. possibilities for French exit from the Union.

Great Britain, however, for more than four decades of its membership, was one foot outside the EU, first and foremost, by the fact that during the launching of the EU, the Great Britain won so-called „opt-out clause", or waiver of entry into the monetary union and acceptance of the single currency. Second example is the refusal of the Social Protocol on the rights of workers, also during the adoption of the EU Treaty of Maastricht (1993) as well as its absence from the formal system of common Schengen visa list and Schengen zone, based on the freedom of movement and residence for EU citizens (third example). Besides, Great Britain managed to obtain special Protocol concerning EU Charter on fundamental human rights and freedoms (Piris, 2010). EU Charter is an integral part of the Lisbon Treaty on the EU, but by the virtue of that Protocol, the Charter is not legally binding for Great Britain, although it is not explicitly stated in that Protocol (fourth example).

It follows that those examples are very serious exceptions to the obligations of the EU membership that led to the final compromise proposal on the special status of Great Britain in the event of her stay in the EU, adopted in February 2016 in the European Council. Finally, concept of preserving a strong national political and economic sovereignty of Great Britain has prevailed. Prime Minister Theresa May has explained[13]: "… Brexit has to mean the full repatriation of political power from Brussels. Anything less was unacceptable…it means having the freedom to make our own decisions on a whole host of different matters, from how we label our food to the way in which we choose to control immigration".

4. Legal models of future cooperation between EU and UK - options

It is possible to point out the legal modalities of future cooperation, taking into account the existing legal factors, although bearing in mind that negotiations between the UK and the EU are to start in the first

[12] T. Chopin, J.F. Jamet., „After the UK's EU referendum: redefining relations between the 'two Europes'", *Policy Paper European issues*, n°399, *http://www.robert-schuman.eu*, last visited 5 July 2016.

[13] T. McTague, C. Cooper, Theresa May sets Brexit course on hard, *http://politico.eu/article/theresa-may.sets-brexit-course-on-hard,* last visited 2 October 2016.

trimester of the 2017, it is not realistic at the time of writing this paper, to predict precisely the shape of future cooperation between the Union and the Great Britain.

In the UK political confusion after a referendum and a big 'No' to the Union was noticeable, because many influential sectors of society highlighted their interests for future close ties and strong economic presence at the EU internal market, as opposed to the expressed will of the people to exit from the Union. Especially big companies expressed their fear of financial loss due to the forthcoming absence from the EU single market. In addition to the internal political welter, a huge future task for the UK will be negotiation process with the rest of the Union on the exit agreement in line with the provisions of the Art 50 of the Lisbon Treaty. Those negotiations could last maximum two years.

Exactly it was the reason for high officials of the EU to urge Great Britain to define own attitudes and start the official exit procedure. However, beside exit conditions, there are also the issues of future obligations and rights of the UK in relation to the Union, which wait for their precise establishment. In this regard, there are several possible legal modalities of future cooperation between the UK and the EU.

"Norwegian" model means that Britain would join the European Economic Area. European Economic Area (abbreviation: EEA) is the Agreement signed on 2 May 1992 to ensure that the benefits of the EU single market can expand to the EFTA States (European Free Trade Association), except for Switzerland, which had not ratified the establishment of the EEA. So this agreement has united economies of the EU Member States, on the one hand, and Norway, Iceland and Liechtenstein, on the other. This means that those non-EU countries enjoy the benefits of the single market based on four freedoms: free movement of goods, services, capital and labour. In return those countries must apply the EU regulations, except when it comes to taxation, agriculture and fisheries. Also they are not bound by the common trade policy of the EU.

Swiss model provides an opportunity for the Great Britain to regulate bilateral economic relations with the EU on the basis of an agreement on free trade zone, or on the basis of the Association Agreement. Swiss federation itself has regulated relations with the EU on the basis of several bilateral agreements (agriculture, free movement of people, trade, taxation etc.). For the UK the first problem would be that this status does not give Switzerland access to the Single Services Market, including financial services[14]. Swiss banks use branches that are established in

[14] P.A. Coffinier, „Soft or Hard Brexit?", *European issues*, n° 408, *http://www.robert-schuman.eu*, last visited 25 October 2016.

London. This relationship allows no control over community migrants. The EU Member States presumably will not want to apply this model with the UK, since it brought many disputes with Swiss.

Finally, so-called "Turkish" model for the Great Britain could provide customs union with the EU. Should the two sides fail in reaching an agreement, Article 50 of the Treaty calls for an automatic transition to trade based on WTO rules, both the UK and the EU being members, which implies having the same rules regarding foreign trade as, for example, with the Russian Federation. Neither of these options is satisfactory for the British government.[15] Those options do not provide the United Kingdom adequate way to participate in decision making on the functioning of the EU single market, although the Great Britain will continue to do business with this very important market. *Exempli causa*, in 2015 44% of its goods and services exports were directed to the continent (i.e. EU market), whilst 53% of its imports originated from the EU market. London is the world's leading financial market and a great deal depends, in many areas (insurance, clearing in euro) on its inclusion in the European Economic Area[16]. It is hard to imagine a complete interruption of economic cooperation between the EU and the UK, especially as the Scottish determined to stay in the framework of the Union, as well as a large percentage of the population in major cities.

Hence the internal political confusion and economic uncertainty for British economic tomorrow is present. If the UK opts for the so-called "Norwegian" model, the country could resort to amending the Agreement on the European Economic Area that would allow the State of EEA, although not in the Union, to vote on policies involving, especially the policy concerning the internal market. On the other hand, to clarify several levels of European integration, there is the idea of equating the European Union with the Economic and Monetary Union, i.e. Eurozone, which is currently composed of nineteen member countries of the remaining twenty seven Member States. In return ***the European Economic Area would legally regulate the functioning of the single market. The*** institutional framework for the two possible solutions would be the same, however the EU institutions should adapt to different ways of governance in the Eurozone and within the European Economic Area.

Opponents of the "Norwegian" model in Britain point out that it suffers from dangerous lack of democracy, as members of the EEA have

[15] HM Government, Alternatives to membership: possible models for the United Kingdom outside the European Union, 2016, *https://www.gov.uk/ government/publications/alternatives-to-membershippossible-models-for-the-unitedkingdom-outside-the-europeanunion*, last visited 4 July 2016.

[16] P.A . Coffinier.

no right to vote on EU regulations, concerning the EU internal market, and are subsequently bound by these rules. Certainly this is a serious drawback that can be eliminated by the revision of the Agreement on the EEA (section 7).

Possible institutional changes would mean that the Council EEA, instead of the Council of Ministers, would be authorized to decide on directives, regulations and decisions concerning the internal market, in the co-decision procedure with the European Parliament[17]. It would be very convenient for Britain to continue enjoying benefits of the EU internal market, but without coercion to participate in other obligations of the EU membership.[18]

At the same time, in the UK would reduce internal tensions, primarily by Scotland and Northern Ireland, which are opposed to the break-up with the Union. Bearing in mind the great fear of foreign labor migration in the UK, the EEA Agreement provides advantages, because it allows unilateral application of safeguard mechanisms (Art. 112) in relation to the free movement of workers. The agreement with the UK to withdraw from the EU has to be approved by the European Parliament. Attentive to the interests of European citizens, the Parliament would reject a text that would include an exception to the free movement of people in the country's participation in the EU single Market. On the other hand, the susceptibility of these institutional changes lies in the fact that they could cause a huge resistance in other EU Member States and could disrupt the achieved level of inter-institutional (dis)balance within the Union.

In any case, the inevitability of the EU institutional reform entails the necessity of answering the question whether there are some other EU Member States to follow the British example[19], which would be black scenario for the Union. Second option is also possible. Namely, there is the open question of deepening integration through the expansion of the Eurozone, or whether other EU Member States will start to apply the single currency through the fulfilment of the convergence criteria, but also by strengthening political union within the EU. Furthermore, third alternative exists. One cannot reduce the importance of Member States who seek to preserve the political *status quo* in the institutional structure of the Union, although it is unsustainable in the long run.

All those reasons leave open avenues of development of contemporary Union, indicating the negative result of the British withdrawal, both for the UK and the EU as well. The UK which is the

[17] T. Chopin, J.F. Jamet.
[18] G. Gasmi, *op.cit.*
[19] G. Gasmi, *op.cit.*

second or third European economy (depending on the value of the £), accounts for 10% of its continental partners' trade[20]. For the EU, British departure would be a real economic, political, strategic, civilization and cultural amputation. On the other side, the new economic advisor at the ministry responsible for the Brexit, Raoul Ruparel estimates that in the long term the UK's departure from the European Customs Union (which does not include Norway and Iceland) would cost the UK between 1 and 1.2% of the GDP, i.e. £25 billion per year[21]. However, there are also assessments in favour of greater coherence of the future EU consisted of the remaining twenty-seven EU Member States, which will be able to make decisions easier, especially on strengthening the Eurozone. This could be relevant in the field of future unified tax policy, except Denmark, which remains an exception to the economic and monetary union that is legally established by the provisions of the Treaty on EU from Maastricht (1993).

5. Concluding remarks

EU summit meeting of Heads of States or Governments will be held in Rome in March 2017 in order to celebrate the anniversary of the Rome Treaties of EEC. For this occasion, the European Commission is the author of a White Paper with the aim to address ways of strengthening and reforming the Economic and Monetary Union. Many Eurosceptics predicted in vain the imminent end of the Union, this especially after a British referendum - BREXIT on the exit of the Great Britain from the Union. As the Community existed before joining Great Britain (1973), also the Union, as its legal successor will exist after British withdrawal, which was announced by the result of the referendum in June, 2016. There is no doubt that this is a serious blow for further development of the EU, which imposes the necessity of implementation of comprehensive reforms of the Union[22].

Previous European integration processes within the Union seem to indicate the accuracy of the famous "bicycle theory", which rightly points out to the ongoing updating of the EU as being the modality of its survival and prosperity. Through the creation of new imbalances and by seeking new answers to the political and economic challenges, the EU is moving forward step by step, as Jean Monnet once said.

[20] P.A. Coffinier.

[21] A. Asthana, R. Mason, R. Syal, Brexit adviser: leaving EU customs union will cost UK £25bn a year, *https://www.theguardian.com/politics/2016/oct/11/government-adviser-leaving-eu-customs-union-uk-25bn*, last visited 12 October 2016.

[22] J.D. Giuliani, Les possibilités d'un continent, *http://www.robert-schuman.eu*, last visited 27 June 2016.

Hence the conclusion that the latest text of the Treaty on EU (Lisbon Treaty) is not the last word in the EU primary legislation and in the institutional evolution of the Union. We should not be surprised that in the near future the amendments to the Lisbon Treaty on EU will be proposed. It is no coincidence that in the new EU Treaty of Lisbon is removed any reference to the EU Constitution, which was a failed attempt of constitutionalisation of the Union and a collapse try to convert the Union into a super-state.

Member States are the main constituent entities of the EU and as such, they dictate the flow and pace of institutional reforms of the Union. In fact, for all EU institutional reforms an unanimity of the Member States is necessary. There is an evident growth of nationalism and populism in many EU Member States. It is the result of previous failure of the EU institutions to resolve majority of issues that tackle ordinary EU citizens, such as unemployment, migratory pressures, economic crisis, lack of political unity, geographically unclear external borders, fight against terrorism and organized crime, etc. Some of those issues are not completely in the exclusive competence of the EU institutions, especially employment (regulated in art 145-150 of the Lisbon Treaty, but only as the field for coordination of national policies). The same is valid for national economic policies of the Member States that are subjected to complex mechanism of multilateral coordination in the EU context.

The lack of real competence of the EU in those domains resulted in the imperfection of the functioning of the Union on the one side, but also in rather bad image of the Union in the eyes of its citizens[23]. The erosion of cohesion within the Union began since the year 2000. The reactions after the adoption of the Treaty of Nice were negative, followed by European analysts' estimates, as well as the assessment of the president of the European Parliament Nicole Fontaine about the Nice summit that it had not met the expectations specified. The spirit of unity and solidarity among Member States, which is so widely propagated within the Union, was visibly absent during the session of the European Council in Nice. Each Member State has sought to maintain their positions within the existing institutional structure of the EU. Therefore, it was very difficult to achieve the necessary consensus and compromise on key reforms of the EU. The outcome was that the confidence of public opinion in the EU in the perspective of the integration process was weakened.

In other words, the gap between those who make decisions in the EU and public opinion, i.e. the majority of ordinary citizens is particularly

[23] J.C. Piris, „How can we make Europe popular again?", *European issues*, n° 401, *http://www.robert-schuman.eu*, last visited 6 September 2016; G. Gasmi, 271 – 286.

increased in recent years. This caused the alarm and pointed to the necessity of stopping the present democratic deficit and to the need to strengthen the democratic legitimacy of the Union. Majority of the EU citizens have a prevailing feeling of the limited achievements made by legal and institutional reforms of the EU. The process of institutional reform of the European Union is characterized primarily by its evolutionary character, with the long-term feature, but with varying dynamics depending on economic conditions and political milieu in the Member States of the EU[24].

Certainly institutional change of the EU is some kind of "story without end", and is therefore impossible to give resolute and definitive conclusions and estimates. However, the challenge of defining and tracing of future EU developments, especially after Brexit, lies in finding the answers to the following questions, such as the question how to remove still present democratic deficit in the EU. Furthermore, there is also important issue of optimal mechanisms to strengthen financial discipline in the Member countries and to encourage economic growth in the entire EU internal market. Equally significant are the following: to strengthen stability and properity of the single currency, to manage effectively migration crisis within the Union; to improve security against terrorism in the EU; to strengthen solidarity and cohesion in the complex structure of the Union and to ensure implementation of functional EU common foreign and defence policy.

In this long process of the EU emergence, which takes place in complex circumstances of globalization and the technological revolution at the beginning of XXI century, the EU seeks to gain a recognizable international personality and to overgrow the contours of classical international organization[25]. The Union has succeeded to a large extent, thanks to many features of supranational functioning of European Parliament, the Commission and the European Court of Justice. Especially after the takeover of military capacities (1999), the Union seeks to obtain political and military credibility, with the help of its own military forces. In gaining international political influence and international identity, Union, however, lacks a single foreign policy, as well as unified executive bodies to represent that policy in international relations[26].

The capacity of the effective EU decision-making is significant and needed at the foreign policy field, and even more in the internal domain to

[24] G. Gasmi, 271 – 286.

[25] S. Samardžić, *Evropska unija kao model nadnacionalne zajednice*, Institut za evropske studije, Beograd 1999, 58; V. Dimitrijević, „Evropska unija kao međunarodna organizacija", in: *Pravo Evropske unije* (eds. D. Mitrović, O. Racić), Centar za međunarodne studije, Beograd 1996, 37.

[26] G. Gasmi, S. Zečević, „Evropski bezbednosni i odbrambeni identitet i migrantska kriza", *Strani pravni život* 2/2016, 73-74.

promote economic growth, employment and sustainable development, but also to resolve migrants' crisis. The problem of ensuring the democratic legitimacy of the Union is constantly backing those issues[27].

Within the EU there is a problem of perception[28]. The trend of an increase in the number of euro-sceptics in the EU is the best evidenced by the increased rate of abstention from the vote in direct elections for the European Parliament every five years. Certainly it is a bad phenomenon, because there is no lasting political union without the active participation and support of EU citizens. Some authors[29] consider this in the light of the negation of the thesis that the empowerment of the Parliament will also strengthen its democratic accountability. Consequently, they leave the assessment of the long-term impact of the strengthening of the position of the EP as an open issue.

It remains to be seen whether the enlarged Union, in the situation of greatly reduced internal cohesion, due to differences in the level of development of its member countries, would be able to project stability to its neighbours. Decrease of the EU cohesion is directly mirrored in the reduction of autonomy of the EU institutions in their daily activities. Next outcome of the absence of cohesion is the lack of really common foreign policy of the Union[30].

Hence the conclusion of a permanent legal and institutional development of the Union, which does not allow for establishing the final determinant of the future EU. The Treaty of Nice and after it, the Treaty of Lisbon are just a stage on the path of the EU development that is conditioned by external factors (enlargement, globalization, migrant crisis, economic and monetary crisis) and also by internal necessities for greater competitiveness, economic growth, full employment and prosperity of the Union.

The eternal duality of action of the Union: supranationality and intergovernmental cooperation continue to coexist in contemporary international relations[31], while producing the complicated legal forms of decision-making and institutional pattern of the EU.

The only viable answer to the challenges of reducing the democratic legitimacy of the Union and the present trend of turning the EU citizens back to the Union is in the institutional responsibility

[27] M. Đurković, *Iluzija Evropske unije*, Catena Mundi, Beograd 2015, 63.
[28] J. C. Piris (2016).
[29] A. Rasmusen, „Institutional Games Rational Actors Play – The empowering of the European Parliament", *European Integration online Papers (EioP)*, Vol. 4, No. 1.
[30] S. Zečević, *op.cit.*.
[31] G. Gasmi, „Pravne i institutcionalne perspektve Evroopske unije", *Strani pravni život* 3/2015, 92-95.

of each of the EU institutions and in clear competencies within the EU structure. The essential notions in this context are: stability, credibility and effectiveness of the functioning of the EU institutions. To the extent that this is ensured in the EU practice of implementation of the Lisbon Treaty, it will be a realistic conclusion that it is a democratic Union with the optimal institutional architecture. In case of opposite development, the EU will face with further rise of extremism in its Member States.

Prof. dr Gordana Gasmi
vanredni profesor, Institut za uporedno pravo, Beograd

BREXIT – RELEVANTNI PRAVNI ASPEKTI

Rezime

Iako postoje mnoge drastične ekonomske posledice izlaska iz Velike Britanije iz članstva EU (Brexit), akcenat ovog rada je usmeren ka relevantnim pravnim aspektima (Lisabonski sporazum) i mogućim scenarijima u budućem uspostavljanju novih odnosa između Velike Britanije, na jednoj strani i EU, s druge strane. Evropska unija (EU) je suočena sa prekretnicom u svojoj evoluciji u savremenim uslovima. Pored postavljanja pitanja o budućnosti EU posle Brexit-a, važno je razmotriti relevantne pravne aspekte u pogledu Brexit-a.

Činjenica da je, po prvi put, jedna država članica EU legalno odlučila da napusti ovaj vrlo značajan trgovinski blok i ovu *sui generis* organizaciju sa jasno izraženim nadnacionalnim odlikama, dramatično naglašava da je međuzavisnost država u modernom svetu očigledno uzdrmana. Mnogi evroskeptici uzalud su predvideli skorašnji kraj Unije, ovo posebno nakon britanskog referenduma - BREKSIT o izlasku Velike Britanije iz Unije. Kako je Zajednica postojala i pre pristupanja Velike Britanije (1973), takođe i Unija, kao njen pravni naslednik će nastaviti da postoji nakon britanskog povlačenja. Nema sumnje da je to ozbiljan udarac za dalji razvoj EU, što nameće neophodnost sprovođenja sveobuhvatnih reformi Unije. Ako u praksi EU implementacije Lisabonskog ugovora prevlada efikasnost funkcionisanja institucija EU, realan zaključak biće da se radi

o demokratskoj Uniji sa optimalnom institucionalnom arhitekturom. U slučaju suprotnog razvoja, EU će se suočiti sa daljim rastom ekstremizma u zemljama članicama.

Ključne reči: Evropska unija, Brexit, Lisabonski sporazum

Ana Knežević Bojović, Ph.D.[1]
Olivera Purić, Ph.D.[2]

Original scientific paper
UDC: 347.962(4)

IN-SERVICE TRAINING OF JUDGES IN EUROPE

"Training for judges – justice for all"
Serbian Judicial Training Centre, 2002.

Abstract

It is essential that judges receive detailed, in-depth, diversified training so that they are able to perform their duties satisfactorily. Facing a quickly-evolving world, where technologies, social context and law change on monthly basis, judges and prosecutors need to constantly improve their professional knowledge, skills and behaviour. Knowledge of substantive law is no longer sufficient – holders of judicial offices need to know more about the social context of law and judicial processes, skills related to the activity in the court. In order for judicial training to truly contribute to the improved functioning of the judicary and secure for every person the right to a fair trial, the training must respond both to the needs of the judicary and also to the needs of the society. This article will present the current and emerging trends in assessing the training needs within European judicial systems and developing continuous judicial training curricula. The article underlines the need to shift the process of assessing the need for training of holders of judicial offices from a justice-centered exercise to a consultative and inclusive process that engages a wider stakeholder community. The authors also argue that the emerging trend of developing judicial competence models can be instrumental in securing both that the training needs are met and that access to justice is provided to all.

***Keywords**: judiciary, training, training needs assessment, competency-based training, judicial competency models.*

[1] Research Fellow, Institute of Comparative Law, Belgrade, mail: akbojovic@gmail.com.
[2] Adviser, Judicial Training Academy, Belgrade.

1. Judicial training as a prerequisite of an independent and efficient judiciary

It is essential that judges receive detailed, in-depth, diversified training so that they are able to perform their duties satisfactorily. Facing a quickly-evolving world, where technologies, social context and law change on monthly basis, judges and prosecutors need to constantly improve their professional knowledge, skills and behaviour. Knowledge of substantive law is no longer sufficient – holders of judicial offices need to know more about the social context of law and judicial processes, skills related to the activity in the court, management in particular, and how to interact with the public and the media, use new technologies, etc.[3]

As Thomas points out[4] judicial education and training are perceived, in European continental-law countries in particular, as an essential element of judicial independence – since training helps to ensure the competency of the judiciary. It is possible to take this claim even further – when one thinks of a model of education of judges, one also necessarily thinks of desired model of a judge or a prosecutor. To contemplate a model of a judge or a public prosecutor also implies the obligation of contemplating the ideal of a society one wishes to build, of considering its political, economic and social organisation, and on the system of checks and balances.[5] Judicial independence and judicial education are intrinsically related.

In order for judicial training to truly contribute to the improved functioning of the judicary and secure for every person the right to a fair trial, the training must respond both to the needs of the judicary and also to the needs of the society. This article will present the current and emerging trends in assessing the training needs within European judicial systems and developing continuous judicial training curricula.

Several international instruments recognise the importance of judicial independence and hence judicial education and training.

Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms provides that "*everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*." The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and

[3] EJTN, Handbook on Judicial Training Methodology in Europe, 2016, 20, *http://www.ejtn.eu/Documents/EJTN_JTM_Handbook_2016.pdf*.

[4] C. Thomas, Review of Judicial Training and Education in Other Jurisdictions, 13, *https://www.ucl.ac.uk/laws/judicial-institute/files/Judicial_Training_and_Education_in_other_Jurisdictions.pdf*.

[5] A. Cluny, *Training of judges and public prosecutors in the function of quality of judicial system*, Judge's Association of Serbia, Belgrade 2015, 17.

Political Rights both guarantee the exercise of those rights, and the International Covenant on Civil and Political Rights further guarantees the right to be tried without undue delay[6]. The United Nations Basic Principles on the Independence of the Judiciary of 1985 recognises that "consideration be first given to the role of judges in relation to the system of justice and to the importance of their selection, training and conduct." There are a number of regional framework documents that also provide guidance to states on their obligations with respect to judicial training – among these, the European framework is of particular interest.

The Council of Europe has also developed a set of instruments governing key aspects for establishing an efficient system of education and training of judges. These include:

- The European Charter on the Statute of Judges of 1998, which makes direct references to the level and scope of appropriate training that judges should receive both pre-service and in-service.[7]
- Committee of Ministers Recommendation No. (2010) 12 on Judges independence, efficiency and responsibilities – in its Article 56 the Recommendation states that judges should be provided with theoretical and practical in-service training, entirely funded bz the state, which should include economic, social and cultural issues related to the exercise of judicial function.
- Recommendation No. (2004) 4 on the European Convention on Human Rights in university education and professional training, recommending that training concerning the Convention and the case-law of the Court exist at national level as a component of the continuous training provided to judges, prosecutors and lawyers;
- Opinions of the Consultative Council of European Judges (CCJE) No 1[8] (2001) and No 3 (2002)[9] and, most importantly, Opinion No 4 (2003)

[6] Article 14, paragraph 3 of the Covenant.

[7] Articles 2.3, 4.4 of the Charter. The explanatory memorandum to the Chater underlines that judges 'must have regular access to training organized at public expense, aimed at ensuring that judges can maintain and improve their technical, social and cultural skills...'

[8] Opinion No 1 (2001) of The Consultative Council Of European Judges (CCJE) for the attention of the Council of Europe on standards concerning the independence of the judiciary and the irremovability of judges (Recommendation no. R (94) 12 on the independence, efficiency and role of judges and the relevance of its standards and any other international standards to current problems in these fields).

[9] Opinion no. 3 of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality. It states that the effectiveness of the judicial system also requires judges to have a high degree of professional awareness, and that judges are required to ensure maintain a high degree of professional competence through basic and further training.

of Consultative Council of European Judges (CCJE) on appropriate initial and in-service training.[10] The need for the independence of judicial training institutions, the importance of appropriate training for young judges, particularly focused on the acquisition of skills and ”judgecraft” qualities, as well as the recognition of time spent on training as an investment in the quality of justice, are amongst the core principles enshrined in these instruments.

Recently, on 28 June 2016, the General Assembly of the European Judicial Training Network adopted Nine Principles of Judicial Training.[11] The principles establish key statements relating to the nature of judicial training, the importance of initial training, the right to regular continuous training and the integral nature of training in daily work. The principles also address the dominion of national training institutions regarding the content and delivery of training, clarify who should deliver training and stress the need for modern training techniques as well as express the need for funding and support commitments from authorities.

2. Training Needs Assessment as a key step in judicial training development and delivery

Regardless of its form, development and cultural context, judicial training programmes are designed to improve judicial performance by preparing new judges for performing their duties, guaranteeing greater consistency in judicial decisions and updating judges in new methods, laws and other knowledge.

Training-needs assessment is perhaps the most critical element of the training cycle that comprises training objectives, plan and design of the training, implementation, and evaluation of the training.

When it comes to the institutions that provide judicial education, the key European regulatory instrument – the Opinion No 4 (2003) of the Consultative Council of European Judges (CCJE) on appropriate initial and in-service training – remains neutral when it comes to the authority responsible for delivering judicial training. In Europe the training of holders of judicial offices is either organised by a judicial school, academy or a training centre as a self-standing instiuttion, established by the state, as the case is in France, Spain, Poland, Croatia, Germany, Greece and many other countries, by the competent ministry of justice or its department or

[10] Opinion no 4 of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on appropriate initial and in-service training for judges at national and European levels.

[11] EJTN, Judicial training principles, 2016, *http://www.ejtn.eu/PageFiles/15004/Judicial%20Training%20Principles_EN.pdf*.

of the Supreme court, as the case is in e.g. Luxembourg, Slovenia and Estonia.[12] They are almost always independent of the executive and the legislature, although these branches of the State may in some way contribute to management. In most cases, the same training institution is competent for the training of bothj udges and prosecutors, though different training arrangements may exist for initial and inservice training.[13]

While the choice of training curricula and training approaches will be unique to each jurisdiction, a judicial training and education programme should be determined by an objective assessment of existing needs, available resources and the relative merits of each approach. However, this rarely happens. Judicial training in most jurisdictions is often the result of ad hoc development over time, where new courses are introduced to meet specific needs and there is little comprehensive evaluation or integrated planning of judicial training programmes.

Ideally, judicial training programmes and curricula should respond to concrete problems, be based on a needs assessment, have specific objectives that shape the training programme and be subject to periodic evaluation.[14]

Good training planning begins with the proper assessment of learning and training needs within the target group, and that it ends with a thorough and sustainable post- event evaluation and assessment of what has been achieved.[15] Training-needs assessment is the first and perhaps the most critical element of the training cycle that comprises training objectives, plan and design of the training, implementation, and evaluation of the training.[16] It is a structured and systematic process that can be applied to organisations, functions (e.g. civil judge, court president, mediator) and/or individuals.

Needs analyses evaluate the skills requirements, by comparing the current competences against the desired state, and determining the gap

[12] For more details see: National training structures for the judiciary, *https://e-justice.europa.eu/content_national_training_structures_for_the_judiciary-406-en.do*. For more information on judicial training institutions,parcticularly in countries utilizing the so-called multi-organisational approach to judicial training such as USA, Canada and Australia, see C.Thomas, 29-33.

[13] Council of Europe, Eastern Partnership Enhancing Judicial Reform in the Eastern Partnership Countries Working Group on "Professional Judicial Systems" Project Report Training of Judges, 10,*http://www.coe.int/t/dghl/cooperation/capacitybuilding/Source/judic_reform/Eastern%20Partnership_Report%20on%20Training%20of%20Judges_English_Final%20version_15%2005%202012.pdf*.

[14] C. Thomas, 37.

[15] See, in-depth, chapters 2 (needs assessment and its role for curriculum building) and 5 (evaluation landmarks) EJTN (2016a).

[16] J. Cooper, „EC Study of the Best Practices in the Training of Judges and Prosecutors in EU Member States", *Judicial Education and Training* 3/2015, 53.

in knowledge to be closed. Many of the techniques used for assessing customer expectations of service delivery or citizens' experience of the justice system can be used for conducting needs analyses, i.e. surveys (face- to-face, telephone, written, online), panels / focus groups, and feedback on previous training events.

However, in most jurisdictions there is little to distinguish between needs assessment, curriculum development and training evaluation. One study shows that in most jurisdictions these activities rely on feedback questionnaires completed by holders of judicial offices at the end of training sessions, which is sometimes accompanied by wider periodic surveys of the judiciary on their training needs.[17] The same study points out that there is little involvement by individuals outside of the judiciary in the design of judicial training programmes. However, evidence shows that in recent years European countries have developed more elaborate and inclusive methods in order to collect inputs for training needs analysis and ultimately curriculum and training development.[18]

The TNA methods used in comparative practice by national or regional training institutions can be classified in the following manner:

- **Training committees/coordinators** – This method implies that judges, lawyers and others responsible for assessing training needs collect and filter information on training needs of holders of judicial offices and report their findings to the body responsible for the development of the curriculum.[19] In comparative practice, this method is used often, both in judicial training bodies that do not have regional outposts/ antenna offices and in systems where these are developed, such as Croatia.[20] Sometimes, this method is also combined with the results of other methods e.g. questionnaires and surveys – so as to complement or verify their results. For instance, in Austria, an Advisory Board on Judicial Training comprises the president of the Supreme Court, presidents of the four courts of appeal, the general procurator, the heads of the four senior public prosecutors' offices and the associations of judges and prosecutors. It meets twice a year and serves as a forum for evaluation of training needs and exchange of ideas. In Spain, information collected from end users through questionnaires is analysed by a group of members from the CEJ in order to verify the proposals and also differentiate between training needs and training wishes. In

[17] EJTN, Study on Best Practices in training of judges and prosecutors Final report, 2015, *http://www.ejtn.eu/Documents/Resources/Lot1_final_Jan2015.pdf*.
[18] EJTN (2015).
[19] *Ibid*., 32 – 41.
[20] *Ibid*., 36.

Spain and Croatia, where the judicial training body has geographically decentralized outposts, the specific knowledge of employees in those outposts is used to identify specific training needs in this area.

- **Questionnaires or surveys of holders of judicial offices** – this is the most common approach to TNA, where holders of judicial offices are asked what kind of training is needed or what kind of knowledge they feel they lack or should improve. These surveys may be general and addressed to all holders of judicial offices or targeted towards heads of specific judicial units (territorial or functional). Most often, however, the questions regarding future training needs is a part of questionnaires filled in by holders of judicial offices after the training they have attended. This information is then fed in the system and used for curricula and programme development. In a survey conducted by the European Judicial Training Network (EJTN) a total of 22 judicial trainings institutions have reported the use of post-training questionnaires to be filled-in by the training participant as a method for collecting proposals for further suitable training topics.[21] Some institutions, such as the European Institute of Public Administration, also use pre-training questionnaires for trainees in order to ensure that the training truly responds to the needs of the training participants.[22] In Spain, survey of judges is an integral part of the process for continuous training, where questionnaires are sent to all holders of judicial offices and are filled in online. In Germany, leaders of court/prosecution offices gather information on career development, and hence on individual training needs of every holder of judicial office, through structured interviews with every judge/prosecutor once a year. In Bulgaria, extensive annual or bi-annual surveys are used to assess the training needs within the judiciary. Also, regional training needs assessments are also conducted once a year. In the Czech Republic, the judicial academy asks the management of court and prosecutor's offices to send them a letter containing their training needs for the forthcoming year. The Czech system also relies on inputs provided through online registration system. In Sweden, the needs for training of judges are identified based on a comprehensive bi-annual survey

[21] EJTN Working Group, „Judicial Training Methods" Survey on Evaluation and Assessment of Training Events - presentation of results available at *http://www.ejtn.eu/Documents/benedetta/Results_%20E-Survey_Evaluation_Assessment.pdf*.

[22] This specific practice is reportedly developed was specially designed to evaluate the outcome of the workshops organised to implement the training modules in the area of EU family law for the European Commission. EJTN, Best Practices in training of judges and prosecutors, 2014, *http://www.ejtn.eu/Documents/Methodologies_Resources/Best%20practices%20Lot%201%20EN/TNA_08_ERA_EU_en%20(4).pdf*.

sent to all judges. In England, a phone survey was used to identify the training needs of coroners, a specific yet not a small group. [23]

- **Court users and community assessment exercise** – this method is used to identify areas where the community or other stakeholders believe that judicial training or education would improve the overall functioning of the judicial system. This approach can complement surveys and also increase ownership of the judicial training programme by a wider community and also help create confidence in the judicial training and consequently, judicial independence. This type of information is often collected through informal meetings with key stakeholders, such as the case is in Bulgaria or through participation of professional associations, including professional associations of judges and prosecutors, in the bodies responsible for developing training programmes and curricula. The approach used to be characteristic of USA and Canada[24], but some European countries, such as Romania, have introduced the community assessment exercise as a formal and integral part of their continuous training needs analysis.[25]
- **Research** – this is method used to identify best comparative practices (research into other programmes in other jurisdictions) and to keep track of public policy and strategic documents and regulations on both national and EU level are assessed in order to identify training needs to outsource part of the programme/curricula development. For example, In Bulgaria, court practice is researched through informal communication or specific meetings with the Supreme court.
- **Creation of competence models for judges and holders of judicial offices/gap analysis**. This system is a complex one and has been piloted in Poland and Belgium, and will be elaborated more further in the text..

In addition to national or regional judicial training institutions, different bodies have developed training needs assessment tools for judicial training. For example, USAID developed a methodology for assessing the training needs of judges in 12 district courts in Indonesia.[26] The European

[23] See: European Parliament, Directorate General for Internal Affairs, Judicial Training in the European Union Member States - Study, 2011, *http://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/453198/IPOL-JURI_ET(2011)453198(ANN01)_EN.pdf*.

[24] According to Thomas, non-judicial input included experts in pedagogy, curriculum development, social context advisory committee and community advisory committees at court level. C. Thomas, 50.

[25] European Commission, Best practices in training of judges and prosecutors, *http://www.ejtn.eu/Documents/Methodologies_Resources/Best%20practices%20Lot%201%20EN/TNA_02_Romania_EU_en%20(2).pdf*.

[26] USAID, Training Needs Assessment for 12 District Courts, 2010, *http://pdf.usaid.gov/pdf_docs/pnaea584.pdf*.

Commission for the Efficiency of Justice (CEPEJ) developed a Judicial Training and Education Assessment Tool for European Judges,[27] which identifies key factors to consider in assessing current judicial training programmes, future judicial training needs and the most effective means of delivering judicial training.

3. Emerging trends in judicial training needs assessment

It is impossible to offer each of the judicial officials every kind of training or education at any time. Competency based training[28] seems to be emerging response to this challenge. Consequently, it is crucial to focus resources and efforts on those competencies that are critical.

The structure of competency based learning comes from creating, managing, and aligning sets of competencies to learning resources, assessments, and rubrics, with analytics to track performance[29].

Key characteristics of the competency based training include as the minimum i)**the l**earner-centric content that provides opportunities for each individual to develop skills at their own pace, collaborate with others, collect evidence of learning, and become successful lifelong learners ii) **well – defined learning outcomes** by reorient curricular design to start with learning outcomes rather than starting with time/ term structures and iii) **differentiation** that refers to competency based learning practices that recognize and adjust to meet the needs of individual learners. Differentiation is multi-faceted and applies to learner support, communications, and interventions, as well as learning processes.

More specifically competency based training for judicial officials needs to focus on i) **results** through integrated and blended learning paths to be developed on the basis of judicial expertise and experience, ii) **added value of technical and generic competences** linked to jurisdiction, i.e., the judicial competences iii) **efficiency** by investing in institutional culture, processes, training, support, and quality control and

[27] CEPEJ, Judicial Training and Education Assessment Tool, 2007, *https://www.ucl.ac.uk/laws/judicial-institute/files/Judicial_Training_and_Educational_Assessment_Tool.pdf*.

[28] Competency-based education has been defined in multiple ways and interpreted differently across academics. See more in: C. Le, R. Wolfe, A. Steinberg, „The past and the promise: Today's competency education movement. Students at the Center: Competency Education Research Series", *Jobs for the Future*, 2014, 4.; D. Riesman, „Society's demands for competence", in: *On competence: A critical analysis of competence-based reforms in higher education* (eds. G. Grant, P. Elbow, T. Ewens, Z. Gamson, W. Kohli, W. Neumann, V. Olesen, D. Riesman), Jossey-Bass Publishers, San Francisco 1979, 18–65; W. G. Spady, „Competency based education: A bandwagon in search of a definition", *Educational Researcher*, 6, 1/1977, 9-14.

[29] D. Everhart, 3 key characteristics of competency based learning, *http://blog.blackboard.com/3-key-characteristics-of-competency-based-learning/,* last visited on 12 October 2016.

iiii) **organizational readiness of the training institutions** to capture and process different trends.

As mentioned above, Belgium and Poland have recently piloted judicial competency models. In the present article, the authors will present the Belgian model, as the more developed one.[30]

The most illustrative example of the competency based training model in judiciary could be found with The Judicial Training Institute that holds a special position in the Belgian judiciary. To a certain extent, the Institute can be regarded as a kind of "crossroads bank" of legal or judicial competences.[31] The Institute exclusively focus in offering an absolute added value for practical or professional training.

The competency based model that Institute developed defines the competencies in three distinct domains (see Figure 1[32]):

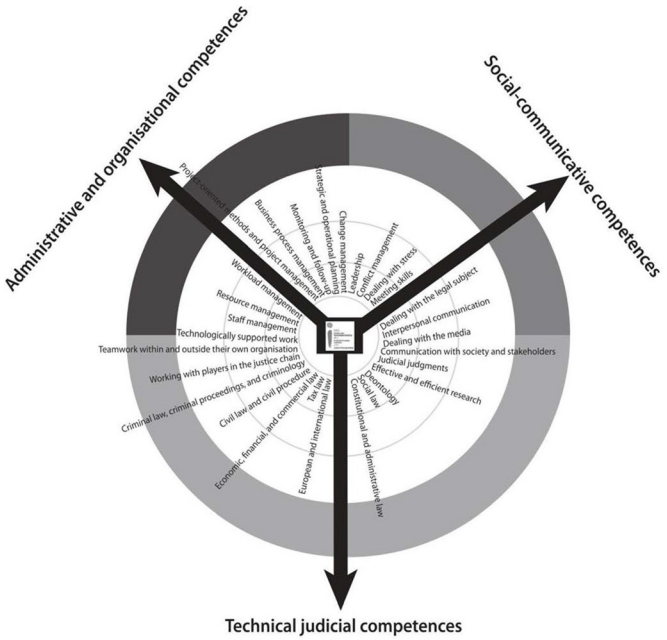
- ***Technical judicial competences***
- These competences focus on the technical/substantive aspects of the role or function. In other words, they are often linked to rules and procedures in the context of criminal law, social law, private international law, etc.
- Administrative and organisational competencies
- These are mainly aimed at planning, controlling, and directing the organisation, but also deal with skills such as project management or business process management.
- Social-communicative or psychosocial competences
- These include aspects such as communication skills and stress management, or, for example, analytical skills in the context of legal judgments.

[30] The Polish National School for Judiciary and Public Prosecution (KSSiP) has, for example, defined, based on an ample survey carried out in the courts and in the prosecution service, the competence profiles for 25 different affectations of judges and prosecutors from basic to leadership levels. During IOJT's 6th International Conference on the Training of the Judiciary, 3 to 7 November 2013, in Washington, D.C., the then head of KSSIP's International Department, the Honourable Judge Wojciech Postułski, today secretary general of the EJTN, presented the Polish approach in Session 1.7 dedicated to "Curriculum Design and Development." His PowerPoint presentation is accessible via the link *http://www.iojt-dc2013.org/~/media/Microsites/Files/IOJT/11042013- Development-Profiles-Competences-Judges.ashx*.

[31] E. Van Den Broeck, „A realistic and future-oriented vision on competence development of judges,Prosecutors, and court staff, Judicial education and training**,** *Journal of the International Organization for Judicial Training*, 3/2015, 35-36.

[32] *Ibid.*, 42.

Figure 1
Judicial Competence Model



The model emphasizes competences versus functions and roles since it is important to correctly assess the expected level of competence for each of the competences in the model. Obviously, not every competence is equally important or necessary for each role or function and does not have to be present to the same extent. Further to this, the training needs assessment process need to standardize every competence for every function (or every function profile). This standardization will be adjusted repeatedly according to the changing circumstances and after the job profiles have been fine-tuned or extended. This process, in return, will enable increasingly effective, focused, and transparent competence management essential for the merit based judiciary appointments and advancements.

The training needs assessment starts with **the identification of the existing competences** (at the individual, team, or organisational level). The model excises sufficiently pragmatic and practical approach. Therefore, the Institute collaborates with the chief justices of the courts to perform a basic assessment of the existing competencies of the members of their teams. This will not provide a completely accurate picture, but does suffice as an initial indication. Based on this information, the existing competences can be benchmarked against the expected level per function or role to determine the competence deficit and, thus, the explicit needs. Similarly, a forecast can be made of future needs arising from the expected outflow of court staff.

Initially, based on the information collected (the competence standardization and the existing availability), **an objective GAP analysis** can be carried out. This analysis will indicate where the largest deficit is (and thus also indicate the competences to which special attention should be paid). It is important that in addition to this analysis, the necessary attention is given not only to spontaneous requests for specific trainings, but also to innovation or established social, technological, or judicial evolutions for which JTI can or should proactively develop training initiatives.

The final priorities, validated by the Institute management under its responsibility, provide a reference for the various domain managers to propose, within their own specializations, the necessary training initiatives to give an adequate response to the identified needs. The starting point will always be a **"blended" approach**, in which different learning methods, aligned with each other and with the intended learning objectives, are used. These different proposals are discussed in the internal expert group and evaluated or adjusted if necessary.

Following **the final validation and approval, the training portfolio will be implemented**, meaning that every training initiative is launched within the agreed time frame, that all initiatives are introduced and made available.

4. Conclusion

The above discussion has referred to the regulatory framework and instruments developed on international and regional level, but the training needs assessment models were the ones developed on the national level. However, European judges and prosecutors can no longer consider themselves as only national judges or prosecutors, as prosecutor Antonio Cluny[33] duly notes – European judges belong to a true judicial network and must apply numerous international and regional regulatory instruments, which is particularly true with regards to judges and prosecutors in EU countries. In the past decade, EU has witnessed the growth of judicial training as a new policy field aimed at the completion of the European Area of Justice.[34] In this respect, the development of judicial networks, where the European Judicial Training Network (EJTN) has the most prominent role, and various joint judicial training facilities have become instrumental in ensuring proper and uniform implementation of European law. In addition, the Academy of European Law (ERA) and the European Institute of Public

[33] A. Cluny, 18.

[34] Articles 81 and 82 of the Treaty on the Functioning of the European Union, which explicitly refer to the "support for the training of the judiciary and of judicial staff" in civil and criminal matters as a task of the European Union have been the cornerstone of these efforts. See S. Benvenuti, „The European Judicial Training Network and its Role in the Strategy for the Europeanization of National Judges", *International Journal of Court Administration*, vol. 7, 1/2015, 59-67.

Administration (EIPA) organise trainings for judges and prosecutors aimed at improving their knowledge on EU law. This European perspective must not be neglected in the training needs assessment and development of judicial training programmes.

Despite the diversity of existing practices, presently, the handing-out questionnaires in the framework of a training event and the regular surveys in the courts remain the most usual method for the assessment of judges' training needs. Regardless of their undisputable value, they are often rather generic and unspecific. A fine-tuned analysis of learning and training needs, which change considerably when important legislative and societal developments take place demands more complex and reliable instruments involving judicial administration and senior officials in the courts. To address that, judicial training institutions need to develop more complex and more sophisticated methods for conducting training needs analysis. In doing that, different countries and judicial education institutions take a variety of approaches and use diverse methods to assess the training needs off the judiciary. All systems rely on some form of input from the end users. However, this must not suffice – as recommended in the *EJTN Handbook on Judicial Training Methodology in Europe* a wider stakeholder involvement is a necessary part of the training needs assessment. Namely, a "justice-centered" training needs assessment carries: "a risk of a certain blindness when it comes to detecting inherent deficiencies of the judicial system and the corresponding training needs."[35] Therefore, the academia, the civil sector and other interested stakeholders need to be included in the continuous training needs assessment, preferably through institutionalized mechanisms. Another important issue that should be borne in mind is that mechanism need to be created – e.g. through cross-referencing and verification - to prevent the information collected within the training needs assessment from becoming a training wish list and ensuring that the training needs identified and curricula developed based on them truly respond to the current needs of the system. It seems that the creation of judicial competency models may well prove to be instrumental in achieving that. But why is quality judicial training so important?

It no longer suffices for judges only to know the law of the land. In the words of judge Boysen, "they must be aware of their responsibility towards society as a whole and towards minorities in order to fulfil the promise of law in a pluralistic society, putting special emphasis on human rights and incorporating them into their daily practice."[36]

---

[35] EJTN (2016a), 14.

[36] U. Boysen, „Legal training for German judges and prosecutors", in: *Training of judges and public prosecutors in the function of quality of judicial system*, Judges' association of Serbia, Belgrade 2014, 72.

Dr Ana Knežević Bojović
naučni saradnik, Institut za uporedno pravo, Beograd
Dr Olivera Purić
saradnik, Pravosudna akademija, Beograd

STALNA OBUKA SUDIJA U EVROPI

"Obuka za sudije – pravda za sve"
Pravosudni centar Srbije, 2000.

Rezime

Od ključnog je značaja da se sudijama omogući pohađanje temeljno razrađenih i raznolikih obuka, kako bi im se omogućilo da svoju funkciju obavljaju valjano. U svetu koji se brzo razvija, gde se tehnologija i propisi menjaju svakog meseca, sudije i javni tužioci moraju stalno da unapređuju svoja stručna znanja, veštine I ponašanje. Poznavanje prava više nije dovoljno – nosioci praovsudnih funkcija moraju znati više o društvenom kontekstu prava i sudskih postupaka, imati veštine koje su neophodne u radu suda. Da bi obuka nosilaca pravosudnih funkcija zaista mogla da doprinese boljem radu pravosuđa i pomogne u obezbeđivanju prava na pravično suđenje svakome, obuka mora odgovoriti kako na potrebe pravosuđa tako i na potrebe celog društva. U članku se predstavljaju postojeći sistemi i nove tendencije u postupku procene potreba za obukom u evropskim pravosudnim sistemima i u razvijanju programa stalne obuke nosilaca pravosudnih fukcija. U članku se ukazuje na neophodnost da se u postupku utvrđivanja potreba za obukom napravi iskorak od procesa koji je usmeren samo na pravosuđe ka participativnom procesu u koji je uključen širok krug zainteresovanih strana. Autorke takođe ukazuju na novi pristup koji se oslikava u usvajanju modela kompetencija za nosioce pravosudnih funcija, koji mogu imati ključnu ulogu u tome da se obezbedi da su ispunjene potrebe za obukom u okviru pravosudnog sistema i istovremeno da je pristup pravdi omogućen svima.

Ključne reči: pravosuđe, obuke, procena potreba za obukom, obuka zasnovana na kompetencijama, modeli kompetencija za nosioce pravosudnih funkcija

Aleksandra Rabrenović, Ph.D[1]

Original scientific paper
UDC: 35:34.047(497-15)

REFORM OF THE PUBLIC SERVICE LEGAL FRAMEWORK IN THE WESTERN BALKANS AT A TIME OF ECONOMIC CRISIS

Abstract

The objective of the paper is to examine the systemic legal changes in the area of public service introduced as a response to the economic crisis in the countries of the Western Balkans. Three different aspects of the reform are analysed: regulation of the legal status of a broad range of public sector employees, especially their salary levels; introduction of more flexible working arrangements in public administration and improving the efficiency in the recruitment and selection process. The author concludes that most of the countries have introduced modern legal frameworks in at least one of the analysed fields, which is an important step forward in the right direction. It, however, still remains to be seen how these new pieces of legislation will be implemented, especially bearing in mind a fairly large number of employees they cover. The paper especially raises attention to the case of blatant politicisation of the senior civil service in the Federation of BiH, which has been justified by the need to introduce more flexible working arrangements in the public administration. This example shows real difficulties in improving human resource management regulations and practices in the public administration at a time of economic crisis and strong external political pressures for partisan employment in the public sector. In this case, the crisis itself has proven to be an important reform obstacle, which should to be taken into account as an important risk in the process of planning future reform efforts during the times of economic and fiscal constraints.

Key words: *public service reform, legal framework, Western Balkans, economic crisis.*

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

1. Introduction

The economic crisis and deterioration in service delivery that confronted all Western Balkans countries in the end of 2000s have brought public service employment at the fore of the policy agenda. The crisis has underlined the need for all countries to fundamentally review and strengthen both their economic governance and institutional structures, including the public service. Although initial impetus for public service reform has emanated from severe fiscal deficits, the objective of the reform was also to create a structure that enables better establishment and wage bill control and recruitment and retention of needed skilled personnel for the public service to perform efficiently and effectively. In some countries, unfortunately, the economic crisis was used only as a pretext in order to blatantly politicise the civil service, as is the case with the level of Federation of BiH.

The objective of this paper is to analyse the systemic legal changes introduced as a response to the economic crisis in the area of public service. Three different aspects of the reform measures are analysed: regulation of the status of broader range of public sector employees; introduction of more flexible working arrangements in the public administration and improving efficiency in the recruitment and selection process.

2. Regulating the legal status of public sector employees

Over the past couple of years, several Western Balkan countries have started considering the idea of stricter legal regulation of the status of a broad range of public sector employees. In 1990s and early 2000s, at the time when civil service legislation was introduced for the first time in most of the Western Balkan countries,[2] it was widely accepted that civil service scope should not be overly extended, but include administrative type of positions that support the work of the central Government (Government departments, central agencies, parliament and judiciary). Status of personnel of other parts of the public sector, such as health, education, social protection institutions etc., that was subject

[2] The Republic of Montenegro adopted the first Law on Civil Servants back in 1991, which was rendered ineffective by the 2004 Law on Civil Servants and Employees. Only four years later, a new revised Law on Civil Servants was adopted, followed by the latest 2011 Law, which came into force in January 2013. Macedonia adopted the Law on Civil Servants back in 2000, which was subject of 17 amendments. The Bosnia and Herzegovina state-level Law on Civil Servants was adopted in 2002, and has seen 11 amendments to date. In Serbia, after the obsolete 1991 Law on Labour Relations in State Authorities (Zakon o radnim odnosima u državnim organima), which partially governed the civil servants relations, modern Civil Service Law was adopted in 2005.

to rather loose labour codes rules, was not subject of immediate policy makers attention. The global economic crisis, which strongly hit Western Balkan countries at the end of the first decade of the new millennium, has, however, triggered the need for tighter regulation of human resource management rules, especially with regard to planning and control of the number and salary levels of a large number of public sector employees.

Before starting the analysis of the recent legal changes, it is interesting to note that most of the Western Balkan countries, i.e. those which were part of ex-Yugoslavia, have a largely forgotten tradition of uniform HRM rules applicable to all public sector employees. Namely, the ex-Yugoslav Law on Public Servants adopted in 1957[3] governed the legal status of not only staff of state authorities, but also of public services (education, science, and culture institutions; health institutions; social insurance funds and social security institutions, and in other institutions established by law to provide public services). Due to this Law, during the period from 1957 until 1978, Yugoslavia did have a fairly well developed system of human resources management not only in the civil service, but also in the public sector. Such as system did recognise all modern institutes of human resources management that promote the merit principle, such as a competition procedure, performance appraisal, promotion based on merit, civil service stability and performance related pay. Unfortunately, the 1978 legislation, which to a high extent aligned the status of civil servants with private sector workers, did not keep the majority of the advanced human resource management instruments that existed beforehand. Due to the imminent passage of time, the regulations that existed at the end of 1980s (i.e. 1978 Law) have to some extent been kept in the memory of civil servants, while those from the earlier period have been largely forgotten, leaving an important part of the ex-Yugoslav tradition covered with a veil of oblivion.[4]

Macedonia is one of the first Western Balkan countries which got back to "traditional principles" and started to extend modern HRM rules to other parts of the public sector. In 2014, the Macedonian Parliament adopted the Law on Administrative Servants, which entered into force on 13 February 2015. The new Law has considerably expanded the scope of the civil service rules to a new category of personnel, so called "administrative civil servants" in the whole public sector. According to the Law, administrative civil servants are defined by the nature of activity they

[3] Law on Public Servants, *Official Gazette of FNRJ*, No. 53/1957.

[4] A. Rabrenović *et al*, „Historical Development of Corruption Prevention Mechanisms in Southeast European Countries", in *Legal Mechanisms for Prevention of Corruption in Southeast Europe with Special Focus on Defence Sector* (ed. A. Rabrenović), Institute of Comparative Law, Belgrade 2013, 13-36.

carry out, i.e. as persons who have been hired to carry out administrative activities.[5] Administrative activities comprise the following types of activities: expert-administrative, legal drafting, implementing, statistical, administrative-supervisory, planning, IT, human resource management, financial, accounting and other work of administrative nature.[6] The Law covers administrative servants who work in the civil service institutions, other state bodies and local Government units. What is more, the Law covers personnel who carry out administrative activities in public sector institutions, such as education, health sector and scientific institutions etc.,[7] who were traditionally excluded from the human resource management rules applicable to civil servants. In this way the scope of the civil service rules has been significantly extended.

The Ministry of Finance has been given an important role of providing an approval for financial plans of all budget users (including public enterprises) who have administrative servants. It is also required to approve each administrative servant's working post which is financed from the Macedonian budget.[8] In this way establishment control of administrative posts throughout the public sector has been significantly strengthened.

Another important step in extension of regulation of the legal status of public sector employees was the adoption of the Law on Public Sector Employees (hereinafter LPSE), which governs different aspects of the status of all public sector employees. The LPSE, adopted also in 2014, is a framework law which includes four types of employees: 1) administrative servants 2) officials with special powers (defence and security) 3) public services employees (e.g. education, health, culture, science etc.) and 4) auxiliary and technical staff. It has been estimated that the number of administrative bodies covered by the new Law will increase from 376 to 1340, which constitutes an impressive extension of the scope of the public service.[9]

The transition to the new system, however, is not an easy process. The conversion is based on the Catalogue of Jobs in the Public Sector

[5] Article 3, paragraph 1 of the Law on Administrative Servants, *Official Gazette of the Republic of Macedonia*, No. 27/2014; 199/2014; 48/2015 – Law on Administrative Servants.
[6] Article 2 of the Law on Administrative Servants.
[7] Article 3, paragraph 1, point 2 of the Law on Administrative Servants.
8 Article 8, Law on Administrative Servants.
[9] SIGMA, *Baseline Measurement Report: The Principles of Public Administration, the Former Yugoslav Republic of Macedonia*, OECD publishing, 2015, http://www.sigmaweb.org/publications/Baseline-Measurement-2015-fYRMacedonia.pdf, last visited 12 October 2016.

regulated by a special Rulebook,[10] and acts on internal organisation and systematisation of each individual institution. One of the major concerns in this respect is that on the basis of job descriptions in the act of internal organisation and systematisation a large number of personnel will automatically become administrative civil servants, without the need to pass merit based recruitment tests required in civil service and local government institutions, which goes against merit system standards.[11]

Over the past couple of years, Serbia has also started working on introducing comprehensive human resource management regulations for all public sector employees. The key piece of legislation which for the first time governs the salary system of all public sector employees in Serbia is the Law on the Salary System in the Public Sector,[12] adopted in January 2016. It is a very comprehensive law covering a broad range of public sector employees (around 510,000).[13] The objective of the Law is to increase the transparency of the pay system and provide a uniform framework for pay systems of different parts of the public sector. The Law covers all public sector employees, including: civil servants, police officers, members of armed forces, employees of Autonomous province and local self-governments, employees of public agencies, employees of public services and organisations of social security services and public office holders (functioners).[14] It is stipulated that all public sector employees will be classified within 13 pay grades (which will be multiplied with a unique base determined by the budget law), on the basis of common job evaluation system, which is introduced in the public sector for the first time. Different parts of the public sector (civil service, police, local self-government, health, education etc.), are required to have their specific laws governing the legal status of their employees and their salaries, which are to be aligned with the Law on Salary System in the Public Sector. The deadline for aligning the legislative salary framework for most parts of the

[10] Rulebook on the content, form and manner of keeping of the Catalogue of job positions in the public sector institutions, the method of preparation of the job position codes and how to insert and delete job positions from the Catalogue, *Official Gazette of the Republic of Macedonia*, No. 132/2014.

[11] SIGMA, *Baseline Measurement Report: The Principles of Public Administration, the Former Yugoslav Republic of Macedonia,* 45-46.

[12] The Law on the Salary System in the Public Sector, *Official Gazette of the RS*, No. 18/2016 – Law on the Salary System in the Public Sector.

[13] SIGMA, *Monitoring Report: The Principles of Public Administration, Serbia,* May 2016, OECD publishing, http://www.sigmaweb.org/publications/Monitoring-Report-2016-Serbia.pdf, last visited 15 October 2016.

[14] The Law is not applicable only to employees in public enterprises public sector companies, employees of the National Bank and media services and bodies established by international treaties. See: Article 1 of the Law on Salary System in the Public Sector.

public sector is the end of 2017, except for police, military and security services, which need to align their salary legislative framework by the end of 2018.[15] Given that the Law on Salary System in the Public Sector is applicable to a large number of public sector employees and regulates a very important aspect of HRM – remuneration in a coherent and unified fashion, the adequacy, transparency and coherence of the current public service legal framework has been significantly increased. It, however, still remains to be seen how the provisions of this Law and the Law on Police will be implemented in practice.

Montenegro has also recently introduced a comprehensive legal framework on salaries of public sector employees. Just two months after Serbia adopted its Law on Salaries in the Public Sector; in March 2016 Montenegro also adopted a Law on Salaries of Employees in the Public Sector.[16] The objective of the Law is to establish better wage bill control, correct salary inequalities and enhance transparency and fiscal accountability.[17] Montenegrin salary Law also has quite a broad coverage, governing the salaries of the following categories of personnel: civil servants, local government officials, employees of independent or regulatory bodies, public institutions (such as health, education, social protection etc.), agencies or commercial bodies with a majority ownership of the state or local self-government, employees of armed forces and the police.[18] The Law determines coefficients for all employees of central government bodies (Government departments and agencies, regulatory bodies, office holders and judiciaries),[19] while the coefficients of other public sector institutions are to be determined in special legislation in a rather short time frame of 60 days after entering into effect of the Law (8 days since its publication in the Official Gazette).[20]

Special attention in the new Montenegrin public sector pay framework is placed on principles of fiscal accountability and better control of the payroll. Fiscal accountability is to be ensured by envisaging that the wage bill may be increased only when the budget is balanced of when there is a budget surplus and has to be reduced in case of budget deficit at the level of 2 per cent of GDP.[21] Local self-governments, independent and regulatory bodies and commercial entities which have deficits in their

[15] Article 39 of the Law on Salary System in the Public Sector.
[16] Law on Salaries of Public Sector Employees, *Official Gazette of Montenegro*, No. 016/16, adopted on 8/3/2016 – Law on Salaries of Public Sector Employees.
[17] Article 5 of the Law on Salaries of Public Sector Employees.
[18] Article 2 of the Law on Salaries of Public Sector Employees.
[19] Article 22 of the Law on Salaries of Public Sector Employees.
[20] Article 45 and Article 50 of the Law on Salaries of Public Sector Employees.
[21] Article 9 of the Law on Salaries of Public Sector Employees.

own budgets are obliged to reduce the levels of their wage bills by 10 per cent.[22] The Law also limits the salary allowances, such as membership in commissions, advisory or working bodies. The only exception to this rule is selection commissions which are formed for the purposes of filling the vacancies or promotion (attaining a higher rank).[23] Finally, the Law provides the basis for better control of payroll by requesting all public bodies to submit the payroll data to the Ministry of Finance, which will be recorded in the special MoF Register.[24] Although this new legal framework represents an important step forward in controlling the public sector wage bill, transparency and enhancing equality its effects are yet to be seen during its implementation in the upcoming years.

3. Improving flexibility of working conditions in the civil service – an excuse for civil service politicisation?

Financial crisis has prompted Western Balkan countries to take fiscal consolidation measures which include increasing the flexibility of working arrangements in labour legislation, including both private and public sector. Enhancing adaptability in working conditions is expected to bring about higher employment rates and reduce the level of grey economy. This trend has also been promoted in public administration and civil service, especially in Bosnia and Herzegovina.

In the mid-2015 all the levels of Government in Bosnia and Herzegovina adopted a Reform Agenda for 2015-2018 which outlines the main measures for socio-economic reforms to reduce the effects of the crisis, including flexibility of working arrangements in the civil service.[25] One of the key measures envisages by the Agenda is that entity Governments will improve their labour codes by increasing flexibility in working conditions. Furthermore, it requires all levels of government to draft new laws on civil servants and employees, to facilitate public administration reform and introduce "greater flexibility in working arrangements".[26] New civil service legislation should be adopted shortly following the adoption of the new Entity labour laws. The Agenda also emphasises the need for competitive recruitment and assessment of candidates for public service employment, which would be "assessed on the basis of pre-established eligibility criteria and the results of

[22] Article 10 of the Law on Salaries of Public Sector Employees.
[23] Article 26 of the Law on Salaries of Public Sector Employees.
[24] Article 37 of the Law on Salaries of Public Sector Employees.
[25] Reform Agenda for Bosnia and Herzegovina, 2015-2018, http://europa.ba/wp-content/uploads/2015/09/Reform-Agenda-BiH.pdf, last visited 8 November 2016.
[26] *Ibid*.

competency tests and administrations will ensure the recruitment of those ranked highest".[27]

Shortly after the Reform Agenda was adopted, the FBiH Parliament adopted the new Labour Code[28] and controversial amendments of the Civil Service Law,[29] which envisage full exclusion of senior civil servants from the scope of the civil service system. Although exclusion of the senior civil servants from the scope of the civil service system constitutes an obvious breach of human resource management standards and European Principles of Public Administration,[30] it was justified by the need to introduce more flexibility in working arrangements of the civil service and requirements of the Reform Agenda.

As soon as the amendments became publicly available, they immediately sparked a public and political debate. The amendments were prepared under the veil of secrecy, without a proper consultation process and were publicly released only shortly before their announced adoption in the Parliament. The amendments prompted strong reaction of civil society organisations which sent an open letter to the Delegation of the EU in BiH requesting it to urge the FBiH authorities to withdraw the amendments shortly before they were adopted.[31] The Delegation of the EU and the Office of High Representative for BiH also reacted, but they were not able to stop the process. After the adoption of the amendments in the FBiH Parliament in October 2015, representatives of the Serbian people's club in the FBiH Parliament initiated a procedure for challenging the amendments before the FBiH Constitutional Court. The Court, however, dismissed the initiative and the amendments came into force at the end of December 2015.

In accordance with the Civil Service Law amendments, all positions that were previously defined as senior managerial positions of

---

[27] *Ibid*.

[28] The Labour Law which entered into force on 20 August 2015 has been repealed and as of 16 March 2016 hasn't longer had any legal effect. On 17 February 2016, the Constitutional Court of the Federation of Bosnia and Herzegovina (FBiH) issued a judgment stating that the Labour Law of FBiH (Labour Law) was adopted in a procedure contrary to the Rules on Procedures of the House of People of the Parliament. The Judgment was published on 16 March 2016 in the Official Gazette of FBiH and as of this date the Labour Law no longer had any legal effect.

[29] Law on the Amendments of the Civil Service Law, *Official Gazette of the Federation BiH*, No. 99/15 – Law on the Amendments of the Civil Service Law FBiH.

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

[31] *Cf*. Transparency International, Center for Investigative Reporting, Centers for Civic Initiatives, CPI Foundation, Open Society Fund BiH, CA Why Not, "Civil Society Organisations' Open Letter in the Occasion of the Draft Law on Amendments to the Law on Civil Service of the Federation of BiH", https://ti-bih.org//wp-content/uploads/2015/10/Open-Letter-to-EU-Delegation-in-BiH.pdf, last visited 10 October 2016.

the FBiH Government (heads of Government services, assistant ministers, secretary generals etc.) have become a new, undefined category, which does not have a civil service status. The amendments of the Civil Service Law have introduced this new category of personnel under the Article 11a. Since the status of these positions is unclear, the legislation refers to them as either „officials from the Article 11a" or "persons who are not civil servants". The only provision which may be considered as "positive" under these circumstances is Article 11b, which envisages that officials from article 11a are recruited on the basis of a competition, in line with the criteria outlined by secondary legislation.[32] This provision was inserted in the Civil Service Law just before the amendments were adopted by the FBiH Parliament, and under the strong pressure of the EU.

In early 2016, the FBiH Government passed a Decree on Conditions, Criteria and Procedure of Recruitment and Selection of Persons Who Are Not Civil Servants,[33] to regulate appointment and dismissal of senior management posts, aiming to remedy the drawbacks of the amendments of the Civil Service Law. The Decree establishes clear criteria for recruiting persons to the senior managerial positions[34] and promotes principle of equal opportunities. It also provides the right to appeal against unfair recruitment decision and establishes clear criteria for dismissal of persons in senior managerial posts,[35] which is in line with best practices and SIGMA Principles of Public Administration. The Decree, however, does not fully ensure merit-based selection of senior managerial positions, since it envisages an interview as the only selection method,[36] without any written examination. This is a step back in comparison to previous FBiH legislation and practice where candidates for senior civil service posts had to pass two written exams followed by an interview in order to be placed on a list of successful candidates. The Decree also provides a high degree of discretion in the process of appointment as it gives the right to a head of an institution to select any candidate from an open list of successful candidates. This also raises concerns with respect to ensuring a merit-based selection. Finally, although the Decree did improve the legal framework for recruitment

[32] Article 11b of the Law on Amendments of the Civil Service Law of FBiH.

[33] Decree on Conditions, Criteria and Procedure of Recruitment and Selection of Persons Who Are Not Civil Servants, *Official Gazette of Federation BiH*, No. 9/16 - Decree on Conditions, Criteria and Procedure of Recruitment and Selection of Persons Who Are Not Civil Servants.

[34] Article 3 of the Decree on Conditions, Criteria and Procedure of Recruitment and Selection of Persons Who Are Not Civil Servants.

[35] Article 10 of the Decree on Conditions, Criteria and Procedure of Recruitment and Selection of Persons Who Are Not Civil Servants.

[36] Article 6 of the Decree on Conditions, Criteria and Procedure of Recruitment and Selection of Persons Who Are Not Civil Servants.

and selection of senior level staff, it does not change the fact that senior managerial posts have been excluded from the FBiH civil service system, which is an obvious example of blunt politicisation of senior civil service.

At the level of the Republic of Srpska, adoption of the new Labour Code was also followed by the amendments of the Civil Service Law,[37] in mid-2016. However, contrary to the FBiH level, these amendments are mainly technical nature and aim to align the provisions of the Civil Service Law with the new Labour Code, adopted in January 2016,[38] which is in line with the Reform Agenda objectives.[39]

4. Improving efficiency and merit in recruitment regulations and practices

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

Albania may be considered as the front-runner of reforms with respect to improving the efficiency and merit based recruitment and selection process in the civil service. Albanian Parliament adopted the new Law on Civil Servants in 2013 [40], which entered into force in February 2014. The Law has introduced several new recruitment instruments: permanent recruitment commissions, pool recruitment process and new procedure for recruitment of senior civil servants.

In order to improve the capacities of the members of selection panels, the new Civil Service Law introduced permanent recruitment

[37] Law on the Amendments of the Law on Civil Servants, *Official Gazette of Republic of Srpska*, No. 57/16.

[38] Labour Code, *Official Gazette of Republic of Srpska*, No. 1/2016.

[39] Thus, for example, articles 1, 2 and 3 of the CSL amendments deal with the annual leave of civil servants and are fully aligned with articles 84 and 88 of the Labour Code which regulate annual leave. Articles 4 and 5, which deal with paid and unpaid leave, are fully aligned with Article 89 (which regulates paid leave) and Article 92 (which regulates unpaid leave) of the Labour Code. Article 8, which regulates a probation period, is fully aligned with Article 37, paragraphs 1 and 2 of the Labour Code. Articles 9, 10 and 11, which deal with employment of trainees, are fully aligned with Articles 48 and 49 of the Labour Code. Finally, Articles 12 and 13 of the CSL amendments, which deal with professional training agreement concluded for the purposes of taking a professional examination (which is a mandatory exam in the selection process) is fully aligned with Article 206 (para 1, 4 and 5) of the Labour Code.

[40] Law on Civil Servants, *Official Gazette of Albania*, No. 152/2013. - Albanian Law on Civil Servants.

commissions with a term of office of one year. These commissions comprise of one employee of the Public Administration Unit, one civil servant from the authority that fills a vacancy and one external expert, normally a member of university staff.[41] The composition of recruitment commissions, where the majority of members is not from the authority that fills a vacancy, should improve impartiality and merit based selection.

Unlike the previous practice of carrying out a separate public competition procedure for each vacancy, the new legal framework has introduced so called "pool recruitment" in order to increase the efficiency of the recruitment process. Pool recruitment means that public competitions are announced periodically for several positions (usually entry level positions) at once. This is expected to significantly reduce the recruitment and selection costs. Selection of all candidates is based on the written test, oral test and other selection methods, along with the assessment of work experience.[42] Successful candidates must exceed the 70% threshold of the total number of points, in which case they are included in the list of successful candidates.[43] The results of interviews account for 25% of the total number of points scored.

Appointment to a vacant position is done on the basis of a list of successful candidates, where the best ranked candidate(s) can choose one of the vacant positions. If there are more successful candidates than vacant posts, these candidates can be recruited once a new position becomes vacant within the next two years, which is how long the list will be valid.[44] In this way, the recruitment process become cheaper and more efficient, as there is no need to carry out additional recruitment procedures for new vacancies. If, in the meantime, another recruitment procedure is organized for the same group of jobs, all successful and not appointed candidates will be re-ranked in accordance with the new competition requirements.[45]

Appointment to a top level-management position[46] is linked to completion of a comprehensive managers training, in order to ensure professionalism at the top of the civil service. The training course is

[41] *Ibid*.
[42] Article 20, para 2 of the Albanian Law on Civil Servants.
[43] Article 22, para 5 of the Albanian Law on Civil Servants.
[44] Article 23, para 3 of the Albanian Law on Civil Servants.
[45] Article 23, para 3 of the Albanian Law on Civil Servants.
[46] The category of top-level management includes the following positions: secretaries general, directors of departments, directors of general directorates and other equivalent positions, Article 19, para 4 of the Albanian Law on Civil Servants.

provided by the Albanian School of Public Administration.[47] The Civil Service Law in principle allows only middle-level civil servants who meet specific requirements to apply for this training when the School announces a national competition, in order to ensure that civil servants have a priority in filling in senior positions and are able to develop their careers to the top levels of administration. There is, however, an exception to this rule, as the Government is allowed to identify those situations when other candidates, outside the state administration, are eligible for the training. The selection of candidates for top-level management positions is conducted by the National Selection Committee, comprising one representative of the Department of Public Administration, two representatives of the Albanian School of Public Administration, one representative of the top-level management staff and five independent experts.[48] The candidates who scored highest and exceeded the 70 percent threshold are appointed to top-level management positions and become members of this staff category. Persons who complete training for top-level management positions, subject to their consent, may also be appointed to positions of special coordinators and middle-level management.

Although Albania has undoubtedly modernised its civil service legislation, it is still early to assess its effect in practice. Nevertheless, the Albanian example may serve as a source of inspiration to other countries in the region, especially in the process of developing ideas to improve their recruitment and selection rules.

5. Conclusion

In all Western Balkan countries the economic crisis has triggered the need to undertake a number of measures to fight fiscal deficits, which include control of the rising wage bills. For this reason, most of the analysed countries (Macedonia, Montenegro and Serbia) have taken steps to regulate the status of a wide range of public sector employees, with special regard to control of establishments (number of positions to be financed by the budget) and the level of their salaries. Although adoption of new legislation is certainly a major step forward in the right direction, it still remains to be seen how these new pieces of legislation will be implemented, especially bearing in mind a fairly large number of employees they cover. In order to ensure effective implementation, it is very important to work on enhancing institutional capacities for

[47] Article 27, para 4 of the Albanian Law on Civil Servants. The sole exception to this rule was made immediately after adoption of the Law – when the first class of students was still in school so the top-level management positions were filled through a competition.

[48] Article 31 of the Albanian Law on Civil Servants.

monitoring and evaluation of the new legal framework in the ministries of finance and those in charge of public administration affairs. If, as it usually happens in this region, insufficient attention is paid to the process of implementation, it is unlikely that the adoption of the comprehensive legislative package will be effective and sustainable.

This paper also shows how sometimes well intended anti-crisis measures can be misused by politicians in order to meet the appetites of their parties' members and supporters. The case of the Federation of Bosnia and Herzegovina which fully excluded its senior civil servants from the civil service, justifying it by reform measures, serves as an example which demonstrates difficulties to increase professionalization in the civil service at the time when the employment opportunities in both private and public sector are fairly limited and political pressures for partisan recruitment in the public administration are huge. This further raises the question of whether it is realistic to expect that human resource management regulations and practices in the civil service and public administration can be improved at the time of the economic crisis. Example of the FBiH shows that the crisis itself is an important reform obstacle, which should to be taken into account as an important risk in planning further reform efforts during the times of economic and financial constraints.

Finally, the Albanian example paints a much more brighter and optimistic picture and shows that it is possible to substantively improve the legal framework for human resource management, especially recruitment and selection, even at the time of the economic crisis. However, it still remains to be seen how this new legal framework will be implemented in practice. It seems that for this purpose it would be necessary to work on building awareness of all stakeholders, including politicians, that it is in their best interest to recruit the best candidates into the public service, as it would also enable them to carry out their their programs more effectively, win citizens' trust in the next elections and assist them in overcoming the economic crisis challenges.

Dr Aleksandra Rabrenović
naučni saradnik
Institut za uporedno pravo, Beograd

REFORMA PRAVNOG OKVIRA JAVNE UPRAVE U ZEMLJAMA ZAPADNOG BALKANA U VREME EKONOMSKE KRIZE

Rezime

Cilj rada je da istraži sistemske promene pravnog okvira u oblasti javne uprave, koje su uvedene kao odgovor na ekonomsku krizu u zemljama Zapadnog Balkana. Analiziraju se tri različita aspekta reforme: regulisanje pravnog statusa zaposlenih u javnom sektoru; uvođenje fleksibilnijih radnih aranžmana u javnoj upravi i poboljšanje efikasnosti procesa zapošljavanja. Autor zaključuje da je većina analiziranih zemalja uvela moderne pravne okvire u bar jednoj od analiziranih oblasti, što predstavlja korak napred u dobrom smeru. Ostaje, međutim, da se vidi kako će novo zakonodavstvo biti primenjeno u praski, posebno imajući u vidu veliki broj zaposlenih na koje se primenjuje. Rad posebno skreće pažnju na slučaj očigledne politizacije rukovodeće strukture državne uprave u Federaciji BiH, koji je pravdan potrebom za uvođenjem fleksibilijih radnih odnosa u javnoj upravi. Ovaj primer pokazuje realne teškoće u unapređenju procesa upravljanja ljudskim resursima u javnoj upravi u vreme ekonomske krize i jakih političkih pritisaka za partijskim zapošljavanjem u javnom sektoru. U ovom slučaju ekonomska kriza se pokazala kao važna prepreka reformama, što treba uzeti u obzir kao važan rizik pri planiranju budućih reformskih napora u ovoj oblasti u vreme ekonomskih i fiskalnih ograničenja.

Ključne reči: reforma javne (službe) uprave, pravni okvir, Zapadni Balkan, ekonomska kriza.

Vladimir Čolović, PhD[1]

Original scientific paper
UDC: 341.981:347.736

LEX FORI CONCURSUS AS THE BASIC RULE IN THE INTERNATIONAL BANKRUPTCY

Abstract

The rule lex fori concursus determines the law of place of the initiation of the bankruptcy proceeding as a law to be applied in these proceedings, i.e., that is the law of head office or branch of bankruptcy debtor or of the place where we can find debtor's assets. Lex fori concursus is used as a basic rule of international bankruptcy, with which explains the conduct of the main and more secondary bankruptcy proceedings against the same debtor, as well as the interdependence of these proceedings. However, the Regulation 848/2015 on insolvency proceedings provides for the possibility of avoiding initiation of secondary bankruptcy proceedings. Then, creditors, charge their claims in the special proceedings which are not secondary bankruptcy proceeding. The trustee from the main bakruptcy proceeding decides about that. Also, the Regulation 848/2015 on insolvency proceedings provides for the possibility of initiation of bankruptcy proceeding against the member or members of affiliated companies. The paper explains the status and application of the rule lex fori concursus in these cases. Attention is paid to the application of this rule in the Model Law on Cross-Border Insolvency (UNCITRAL).

Key words: *international bankruptcy, lex fori concursus, main bankruptcy proceeding, secondary bankruptcy proceeding, affiliated companies.*

1. General information on the status of *lex fori concursus* in the international bankruptcy

International bankruptcy or bankruptcy proceedings with a foreign element implies the connection of the debtor, its assets and creditors with another country other than the one in which the bankruptcy proceedings have been instituted, and/or other than the country in which the debtor has its registered office, i.e., in which it performs the main business activity. It means that the bankruptcy proceedings will include a foreign element when the debtor's assets in whole or in part are located abroad or when the debtor or creditors are persons

[1] Principal Research Fellow, Institute of Comparative Law, Belgrade; mail: vlad966@hotmail.com

holding a foreign citizenship, and/or when they are seated or residing abroad. There are two conflicting interests here. First, there is the interest of the country where the assets are located. That country tends to keep the assets in the national territory for the settlement of domestic creditors while eliminating foreign ones. Secondly, there is the interest of the country of establishment i.e., the registered office of the debtor (the country in which the bankruptcy proceedings have been instituted). That country tends to encompass all the debtor's assets, to accumulate the debtor's assets, regardless of where they are located.

With respect to the international bankruptcy when there exists the principle of integrity of the bankruptcy proceedings and the bankruptcy estate, there is an issue of enforcement of applicable law, since the implementation of the said principle is subject to conducting several bankruptcy proceedings against the same debtor as well as ensuring that these proceedings produce the effects in the country where the other bankruptcy proceeding is conducted. The most important rule applied in this field is the rule (the linking point) *lex fori concursus*, which defines that the bankruptcy proceeding shall be subject to the application of the right to institute and conduct the proceeding, and/or the right of the place of initiation and conducting of such proceeding, and/or the right to the place related to the debtor through its registered office, its branch office or its assets. *Lex fori concursus* ensues from the doctrine of domicile that accepts the integrity of the bankruptcy proceeding as the basic principle of that proceeding. This doctrine is based on the domicile of the debtor, regardless of how it will be defined, as the registered office, the principal place of business or otherwise[2]. However, the domicile can be regarded as the place where the debtor's branch office is located. Otherwise, the doctrine of domicile is a product of the English theory of law, but it has never been part of the English law and practice[3].

In order to speak about the integrity of the bankruptcy proceedings in general, it must be taken into account that the bankruptcy proceeding must be comprehensive, which means that it must encompass the whole assets of the debtor so that the bankruptcy proceeding is "successful", i.e., so that the creditors' claims are settled. However, when determining the domicile of the debtor there may arise problems that actually consist of determining where the debtor has its registered office or principal place of business, as the integrity of the bankruptcy proceeding and the integrity of bankruptcy estate require determining of the place where the debtor performs its business activity or where its assets are located. If *lex fori concursus* should ensure the integrity of the bankruptcy proceeding and bankruptcy estate, then all the elements constituting such integrity should be taken into account[4], and this does not relate only to the registered office or the

[2] V.Čolović, „Međunarodni stečaj u domaćem i uporednom pravu", *Strani pravni život* br. 1-3/2001, Beograd 2002., 108

[3] G.C.Cheshire and P.M.North, *Private International Law*, London, Butterworths 1979., 561

[4] V.Čolović (2002), 99

principal place of business. If the said rule was linked to those two places, then this rule would explain the exclusive competence for initiating the bankruptcy proceeding, other than the integrity of bankruptcy proceeding and bankruptcy estate. However, the possibility for conducting several bankruptcy proceedings against one and the same debtor, out of which one will be the main bankruptcy proceeding and the other secondary bankruptcy proceeding, must be explained by applying *lex fori concursus*. This rule will also explain the possibility that a liquidator appointed in the main bankruptcy proceeding initiates actions in the secondary bankruptcy proceeding. This applies also to the influence of the main bankruptcy proceeding on the initiation of the secondary proceeding, transfer of bankruptcy estate assets from the secondary bankruptcy proceeding to the main proceeding, possibility that the creditors from the country in which the main bankruptcy proceeding has been initiated are settled their claims in the country in which the secondary bankruptcy proceeding has been initiated, etc.

However, within the amendments to the act under the EU law governing bankruptcy proceedings[5], there has been a change in understanding the rule *lex fori concursus*. Namely, the possibility of not initiating the secondary bankruptcy proceeding in spite of legal grounds as well as conducting bankruptcy proceeding against affiliated companies, has defined a different meaning of the said rule. This paper will try to answer three questions regarding the status *lex fori concursus* in the international bankruptcy. These questions are as follows: 1. Taking into account the basic meaning of the rule *lex fori concursus,* can it be said that it is the basic rule in the field of international bankruptcy and that it ensures the integrity of the bankruptcy proceeding and bankruptcy estate? 2. Must *lex fori concursus* be regarded separately for each bankruptcy proceeding, the main and secondary proceeding and can we speak about the comprehensive character of that rule in that case? 3. Finally, do the optional nature of initiating the secondary bankruptcy proceeding (in accordance with the new act in the EU) and discretionary rights of liquidators in case of conducting bankruptcy proceeding against affiliated companies annul the initial significance of the rule *lex fori concursus* and link it only for the cases when the main and secondary bankruptcy proceedings are conducted simultaneously against one and the same debtor?

2. Concept of universal character of bankruptcy and *lex fori concursus*

The essence of the concept of universality refers to the possibility of conducting several bankruptcy proceedings against the same debtor simultaneously, in such a manner that the open bankruptcy proceeding in one country is recognized in all countries in which such proceeding has effects[6].

[5] In 2015.

[6] B.Eisner, *Međunarodno privatno pravo*, Zagreb 1956., 368

The most important element of this concept is the rule *lex fori concursus*. But the universality concept has certain limitation in its applications. Namely, the limitation relates, in particular, to the debtor's immovable assets located outside the country in which the debtor has its registered office, principal place of business, and/or in which it conducts its main business activity[7]. Apart from the concept of universality, there is also the concept of territorial character which is more conservative and which is characteristic for regulating international bankruptcy in the past[8]. It is the concept that limits the effects of the bankruptcy proceeding only to the country in which the proceeding has been initiated and if the debtor has assets in other countries, then the following situations are possible. First, it is possible to request enforcement on the assets located in another country based on already adopted decision. There are two possible types of decisions. The first decision is the decision on the initiation of the bankruptcy proceeding, when such decision is enforced in the territory of another country in view of collecting the debtor's assets for the purpose of constituting the bankruptcy estate, when such assets will be transferred to the country in which the bankruptcy proceeding has been initiated based on the exclusivity basis. The second decision is the decision on the conclusion of the bankruptcy proceeding, when such decision will be enforced in the territory of the other country, again, for the purpose of collecting the bankruptcy estate from which the creditors' claims will be settled in the subsequent division of assets. In addition, it is possible to initiate the secondary (specific, dependent) bankruptcy proceeding on the debtor's assets located in the territory of another country[9]. It is the secondary bankruptcy proceeding that contributes to the implementation of the rule *lex fori concursus* and the concept of universality, which should result in the integrity of the bankruptcy proceeding and the bankruptcy estate and the enforcement of one right[10].

The principle of bankruptcy universality is defined by the international bankruptcy in the last 25 years. This principle defines the status of a foreign bankruptcy decision and all its effects. This principle is also found in international legislation systems as well as in the international sources, such as acts adopted within the EU and within the UN Commission on International Trade Law (UNCITRAL). Finally, this principle and the implementation of the rule *lex fori concursus* are found in the USA legislation, where other institute is used – the institute of *comity*, which explains that principle. The institute of *comity* explains the recognition of a foreign bankruptcy proceeding by the need for international politeness. Namely, the USA Insolvency Code in Chapter 15 regulates subordinate or accessory and other cross-border cases of bankruptcy proceedings. In this

[7] H.Hanisch, „Probleme des internationalen Insolvenzrecht" in *Probleme des Internationalen Insolvenzrecht Festschrift für W. Marschal*, Frankfurt 1982., 12
[8] V.Čolović, *Međunarodni stečaj*, Istočno Sarajevo 2005., 36
[9] H.Hanisch, 12
[10] J.H.Dalhuisen, *International Insolvency and Bankruptcy*, vol.I, New York 1984., 3-170

field, the USA bankruptcy legislation applies the Model Law on cross-border insolvency[11]. However, some authors define the institute of *comity* correctly, other than by means of international politeness. They define that the purpose of conducting several bankruptcy proceedings against one and the same debtor is to prevent the loss of assets located in the branch offices of the company against which the bankruptcy proceeding has been initiated[12]. Based on the above, in its essence this institute is close to the meaning of the rule *lex fori concursus*.

3. *Lex fori concursus* and *lex fori*

If *lex fori concursus* is regarded as the rule ensuring the enforcement of one right in the bankruptcy proceeding, and/or bankruptcy proceedings against one and the same debtor, it must be said that it ensues from the rule *lex fori*, as the rule of place and there arises an issue of the place in which the court or other authority adopts a decision. If it is regarded *lex fori*, then it can be said that the rule governs the exclusive competence defined based on the registered office or principal place of business of the debtor and based on which the main bankruptcy proceeding is initiated[13]. If *lex fori concursus* ensues from the rule *lex fori*, then it can be concluded that *lex fori concursus* is the rule of the main bankruptcy proceeding and the issue is raised why this rule is the basic element by which the principle of integrity of the bankruptcy proceeding and bankruptcy estate is defined. This issue can be explained only if the relationship of the main and secondary (or several secondary) proceeding is considered. Namely, the secondary bankruptcy proceeding is initiated without considering the bankruptcy of the debtor in the other country-contracting party[14]. However, the secondary bankruptcy proceeding can be initiated without initiating the main proceeding, and such proceeding is called particular proceeding[15], which will not be paid particular attention. The dependence of the secondary proceeding on the main bankruptcy proceeding is reflected not only in the effects but in the settlement of creditors' claims as well as in the actions of the liquidator under the main bankruptcy proceeding and/or in his actions that he may perform in the secondary bankruptcy proceeding, based on the decision on the initiation of the main bankruptcy proceeding. This also applies to

[11] L.Salafia, „Cross-Border Insolvency Law in the United States and its application to Multinational Corporate Groups", *Connecticut Journal of International Law*, vol.21, 2006., 20

[12] J.N.Saltzman, Cross Border Insolvencies and the United States Bankruptcy Code, http://lawfirm.ru/article/print.php?id=3773, 01.11.2016.

[13] Art. 3.1 Regulation 848/2015

[14] Art. 34 Regulation 848/2015

[15] J.Garašić, „Posebni tzv. partikularni stečajni postupak u hrvatskom pravu", *Zbornik Pravnog fakulteta Sveučilišta u Rijeci* v. 33, br. 1, 85-108 (2012), Rijeka 2012., 87

the transfer of bankruptcy estate assets from the secondary to the main bankruptcy proceeding. As regards applicable law, applicable law as per *lex fori* is applied in the secondary proceeding[16]. Therefore, applicable law of the country in which the secondary bankruptcy proceeding is initiated will be applied. But, it can be said that applicable law to be applied in the secondary bankruptcy proceeding will also be determined as per *lex fori concursus* and the same result, and/or right will be achieved, or exercised, respectively.

4. Regulating *lex fori concursus* in the EU act – case when the secondary bankruptcy proceeding is not conducted

The act regulating, among other things, the application of the rule *lex fori concursus* in the international bankruptcy is the Regulation (EU) no. 848/2015 of the European Parliament and Council of 20 May 2015 on the proceeding in case of insolvency (hereinafter referred to as: the Regulation 848/2015)[17], which differently regulates the secondary bankruptcy proceeding than the previous Regulation no. 1346/2000 of the European Parliament and Council on insolvency proceedings[18] and which envisages the possibility of avoiding the initiation of that proceeding with the settlement of creditors' claims in the country in which the proceeding should be initiated. Namely, it relates in the first place to assuming liabilities in case of avoidance of the secondary bankruptcy proceeding. In accordance with the provisions of the Regulation 848/2015, a liquidator appointed in the main bankruptcy proceeding assumes unilateral obligation when it comes to the assets located in a member state in which the secondary bankruptcy proceeding might be initiated, to act in accordance with the law of that country, the country in which the secondary bankruptcy proceeding might be initiated during distribution of the said debtor's assets and income generated by such assets. By such obligation it is practically guaranteed that creditors will have all the rights as if the secondary bankruptcy proceeding were initiated. When it comes to the obligation assumed by the liquidator under the main bankruptcy proceeding, it can be said that it is the guarantee that the creditors will be settled their claims. We are interested in the fact that the creditors' rights regarding collection of claims are subject to the law of the country in which the secondary bankruptcy proceeding could be initiated (*lex fori*), while the definition of the debtor's assets will be connected with the issuance of the

[16] Art. 35 Regulation 848/2015

[17] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings - *Official Journal of the European Communities*, L 141, 05/06/2015, pp. 19-72

[18] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings - *Official Journal* L 160 , 30/06/2000 pp. 1 – 18

guarantee. This paper will not consider the procedure for the issuance of the guarantee or the issuance of approvals by local creditors. Instead, it will try to analyse on the one hand the application of law as per *lex fori* to the said actions and the role of a liquidator appointed in the main bankruptcy proceeding on the other. Namely, *lex fori concursus* as the bankruptcy proceeding law includes the possibility that a liquidator appointed in the main bankruptcy proceeding performs the actions in the country of initiation of the secondary bankruptcy proceeding. In accordance with the provisions of the Regulation 848/2015 this rule gives the right to the said liquidator to take other actions that are not related to the secondary bankruptcy proceeding. If the role of the liquidator appointed under the main bankruptcy proceeding is considered in this light, then it must be concluded that *lex fori concursus* has an advantage compared to *lex fori* of the secondary bankruptcy proceeding. Regulation 848/2015 upholds this. Namely, it may happen that the secondary bankruptcy proceeding is initiated anyway, although the liquidator appointed in the main bankruptcy proceeding has started to take actions related to the issuance of guarantees, under which he will be authorized to transfer the assets transferred from that country to another to the liquidator appointed in the secondary bankruptcy proceeding. Practically, the liquidator appointed in the main bankruptcy proceeding administers the debtor's assets all the time. There is an interesting provision of the Regulation 848/2015 stipulating that a liquidator appointed under the main bankruptcy proceeding is obliged to inform all creditors in the territory of that state on the distribution of the assets that must be in accordance with the guarantee and applicable law (*lex fori*) of the country in which the secondary bankruptcy proceeding might be initiated, and if this is not the case each local creditor may dispute such distribution before the court of a member state in which the main bankruptcy proceeding has been initiated. Therefore, a creditor from the country in which a secondary bankruptcy proceeding may be initiated may exercise its right in the country in which the main bankruptcy proceeding has been initiated. It ensues from this that the rule *lex fori concursus* should be regarded as the law of the main bankruptcy proceeding although it is not the case as per other provisions relating to the application of law in the secondary bankruptcy proceeding.

Anyway, the possibility of avoiding the initiation of the secondary bankruptcy proceeding arose from the term "synthetic" bankruptcy proceeding, created in the United Kingdom, when in some cases it was established that secondary bankruptcy proceedings unnecessarily burdened the whole bankruptcy proceeding against the debtor. There arose the issue of the protection of local creditors to include the tax administration, social insurance agencies and other persons that had to be issued the guarantee when

it came to collection of claims in the main bankruptcy proceeding[19]. But then there is an issue of protection of foreign creditors in these proceedings, which must have a universal character since claims can be reported in both proceedings (both in the main and in the secondary proceedings, while the "synthetic" bankruptcy proceeding relates to, in the first place, to the protection of status of local creditors[20]. It can be said that *lex fori concursus* has its place in this case as well, since local creditors must be protected in any case. The universal character of these cases ensues from such protection, since the secondary bankruptcy proceeding will be initiated if the creditors' claims are not settled in accordance with the guarantee.

5. Bankruptcy Proceedings Against Affiliated Companies and *lex fori concursus*

The bankruptcy proceeding may be conducted against affiliated companies as well subject to provisions of the Regulation 848/2015 and certain national legislation, but this paper will not pay attention thereto. The Regulation 848/2015 defines affiliated companies in a simple way, leaving space for interpretation, which in our opinion is not good when provisions on international bankruptcy are applied. Namely, this act defines affiliated companies as members of trading companies group that consists of a parent company and all daughter companies [21]. The Regulation 848/2015 here ends the definition of the term of affiliated companies[22] . In case of conducting the bankruptcy proceeding against affiliated companies please note that this does not refer to bankruptcy proceedings conducted against all members of that group, against all affiliated companies, but against one affiliated company or several affiliated companies. Also, this mostly refers to the cooperation of liquidators and courts, but note that this does not refer to the cooperation between liquidators and the courts where the

[19] E.T. Mendiola, "Synthetic" insolvency proceedings", *Analysis Gomez-Acebo&Pombo*, November 2015.,
1,http://www.gomezacebo-pombo.com/media/k2/attachments/synthetic-insolvency-proceedings.pdf, 31.10.2016

[20] E.T. Mendiola, 1-2

[21] Art.2, p.13 Regulation 848/2015

[22] Insolvency proceedings: the new EU Regulation 2015/848, http://www.google.rs/url?sa=t&rct=j&q=&esrc=s&source=web&cd=8&ved=0CFUQFjAHahUKEwiK_6DLo7LHAhUMECwKHeMgCzk&url=http%3A%2F%2Fwww.legance.it%2F00651%2FDOCS%2FF-ENG_Newsletter_Legance.pdf&ei=bfXSVcqUB4ygsAHjwazIAw&usg=AFQjCNGKNHsb1rcN_Y0zHfBpyBExXLaT9A, 01.11.2015.

main and secondary bankruptcyproceedings are conducted[23]. A liquidator in the proceeding initiated against one of the members of the group of affiliated companies is obliged to cooperate with the liquidator appointed in the proceeding conducted against the other member of the same group of affiliated companies, if this facilitates conducting of such proceedings, then if it is not contrary to the rules applied in these proceedings as well as if this does not result in the conflict of interests. In order to implement the above cooperation, an agreement or an adequate protocol of cooperation should be concluded between liquidators in the above proceedings. Please note that these are independentbankruptcyproceedings, other than the main and secondary bankruptcy proceeding[24] . Please note the liquidator's authorizations due to the application of the rulelexforiconcursus. A liquidator is entitled to make a statement in each of these proceedings conducted against members of affiliated companies. In addition, the liquidator may seek postponement in the enforcement of any measure relating to the disposal of assets. This applies also to the case of submission of the restructuring plan for all or only for some members of the group of affiliated companies. The liquidator is entitled to request the initiation of the coordination proceeding before any court exercising the competence for initiating the bankruptcyproceeding against members of the group[25] . The application is filed in accordance with applicable law for the proceeding in which a liquidator has been appointed. The Regulation 848/2015 highlights the need to cooperation and communication between affiliated companies, by which it highlights interdependence of those companies, regardless of their legal autonomy. The provisions of the Regulation 848/2015 that apply to the members of groups of affiliated companies show that these are separate bankruptcyproceedings. However, the cooperation of liquidators and coordination between proceedings witness otherwise. These are companies under the relationship of dependence. The interesting thing, though, is that no provision relates to a parent and affiliated company, but only to members of the group. The fact is that lexforiconcursusexists also in the case of bankruptcy of affiliated companies, as the rule defining international bankruptcy and the principle of universality. The affiliation of companies under any form of affiliation supports this, although these

[23] The procedures can be initiated against the same bankruptcy debtor, which are governed by the Regulation 848/2015, as well as by the earlier Regulation 1346/2000

[24] Anderson H., Oliver R., The recast EC regulation on insolvency (Regulation 2015/848 of 20 may 2015), July 2015,file:///C:/Users/Vlada/Desktop/clanci/848-15/The%20recast%20EC%20regulation%20on%20insolvency%20(Regulation%202015-848%20of%2020%20may%202015)%20%20Norton%20Rose%20Fulbright.htm, 30.10.2015

[25] Tett R., Crinson K., „The recast EC Regulation on Insolvency Proceedings: a welcome revision", *Corporate Rescue and Insolvency*,Freshfields Bruckhaus Deringer, April 2015.,68EY

are independent legal entities. On the other hand, the fact of coordination necessity supports the necessity oflexforiconcursus application in such situations as well. Of course, there are limitations to the acceptance of the coordinator's plan, which is explained by the autonomy of those legal persons, but this does not impair the significance oflexforiconcursusin any way.

6. *Lex fori concursus and* the Model-Law on cross-border insolvency

The Model Law on cross-border insolvency adopted by the UN Commission on International Trade Law (UNCITRAL) (here in after referred to as: the Model-Law)[26] governs the issue of integrity of the bankruptcy proceeding and bankruptcy estate differently than the Regulation 848/2015. Namely, the application of law as per *lex fori concursusis* identified here as well, but to a limited extent. That limitation is reflected in defining and the method of initiating an ancillary bankruptcy proceeding, which cannot be regarded as the secondary proceedings in terms of provisions of the Model-Law. We will present the provisions of the Model-Law that relate to the application of *lex fori concursus*. The principles of the national bankruptcy law and of the national legal system should be taken into account. The simplest way to do this is to define presumptions and/or requirements that a foreign decision must meet. The Model-Law defines that, upon recognition of a foreign decision on bankruptcy, the bankruptcy proceeding can be initiated in the country of recognition only if the debtor owns assets in the territory of that country and the decision adopted in that proceeding will apply only to the said assets[27] . The Model-Law defines the initiation of the ancillary (particular, dependent) bankruptcy proceeding in relation to other sources governing international bankruptcy. Namely, the only requirement for the initiation of such proceeding is that the debtor has assets in the territory of the home country.

The Model-Law governs the coordination of two bankruptcy proceedings, the main and the ancillary one, as well. The coordination takes place in two situations. First, when the bankruptcy proceeding is already conducted in the home country at the time of filing the application for recognizing a foreign decision on bankruptcy. The coordination of both proceedings is conducted in accordance with provisions relating to providing assistance after recognition of a foreign decision on bankruptcy. The second situation is when the bankruptcy proceeding in the home

[26] General assembly resolution 52/158 of December 15, 1997 – Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law

[27] Art. 28 Model-law

country is initiated after filing the application for recognition of a foreign decision on bankruptcy. The provisions governing providing assistance after recognition of a foreign decision on bankruptcy will be applied also, but to a limited extent. Namely, a domestic court will deny this type of assistance if it is contrary to domestic law[28]. The possibility of initiation of the ancillary bankruptcy proceeding, impact of a foreign decision on bankruptcy and the coordination of the main and ancillary proceeding represent the elements supporting the application of the right as *per lex fori concursus*. However, the impossibility of initiation of the ancillary bankruptcy proceeding based on the place of the branch office of the debtor gives rise to two questions. First, if the bankruptcy proceeding is initiated against the debtor in the country of establishment, and/or the place of registered office, will the proceeding have influence on the branch office located in another country? The answer depends on the status of the branch office in another country, and/or whether the legislation of that country will define the branch office as an independent legal entity or as a part of a parent company. Secondly, if the bankruptcy proceeding is initiated against the branch office located in another country, how will that proceeding influence the operations of the debtor in the country in which it is established, and/or in which it has a registered office? Such proceeding would be particular and it would be specific in relation to the country in which the debtor is established, but the Model-Law does not regulate such situation.

7. Conclusion – Is lex fori concursus the rule that defines the principle of integrity of bankruptcy proceeding and bankruptcy estate?

Notwithstanding the basic meaning of the rule *lex fori concursus*, as well as the fact that this rule, in accordance with provisions of the Regulation 848/2015 (and in accordance with regulations of the Model-Law), please note that the international bankruptcy relies on the application of *lex fori concursus*[29]. This rule "explains" the relationship between the main and secondary bankruptcy proceeding, and their interdependence. Further, *lex fori concursuscan* explain the purpose of initiating the secondary bankruptcy proceeding[30]. However, if such proceeding is not initiated, does this mean that *lex fori concursus* will not be applied? Such conclusion could not be accepted since, in that case, the status of a liquidator appointed in the main bankruptcy proceeding ensures the disposal of assets of the debtor

[28] Art. 29 Model-law
[29] J. Israël, *European Cross-Border Insolvency Regulation,* Antwerpen-Oxford, 2005., 243
[30] J. Israël, 244

located in the country in which the secondary bankruptcy proceeding may be initiated. Further, the cooperation of courts and other bodies in these proceedings upholds this fact[31] .

On the other hand, why is it required to initiate a secondary bankruptcy proceeding at all? First of all, so that the local courts, and/or the courts of the country in which the business unit or debtor's assets have exercised competence over such facts. In that case, the secondary bankruptcy proceeding opposes to the cross-border "sovereignty" of the main bankruptcy proceeding in the country in which the facts giving rise to the initiation of the secondary proceeding exist[32]. In addition, the secondary bankruptcy proceedings protect creditors of the country in which the requirements for the initiation of such proceeding are met. The rules of bankruptcy proceeding by which the business capacity is limited or revoked to the debtor, by which disposal of assets representing bankruptcy estate is limited, as well as other rules guarantee the settlement of creditors' claims. The said "synthetic" bankruptcy proceeding is one of the solutions that could protect creditors on the one hand, while on the other hand it could speed up and make more efficient the bankruptcyproceeding by not conducting the secondary bankruptcyproceeding[33] . However, the rules of the bankruptcy proceeding would not be applied then which may bring the creditors with lower claims into more unfavourable position.

We can say that in cases when the secondary bankruptcy proceeding is not initiated, the rule *lex fori concursus* comes to the fore. The role of a liquidator appointed in the main bankruptcy proceedingis reflected in the fact that the liquidator could not take certain actions in the country which is in any way related to the debtor (through the branch office or assets) and which is not the country of initiation of the main bankruptcy proceeding initiated based on the criterion of exclusive jurisdiction, without full application of this rule and the application of the principle of integrity of the bankruptcy proceeding and bankruptcy estate. The basic meaning of the rule *lex fori concursus* is the right of the place of initiation of the bankruptcy proceeding, which means that it is used as a rule in the initiation of a secondary bankruptcy proceeding. However, regardless of whether it is the main or secondary bankruptcy proceeding, the rule *lex fori* may also be applied when determining applicable law. Due to the difference between *lex fori* and *lex fori concursus*, when the latter has

[31] P.Franzina, The new European Insolvency Regulation, http://conflictoflaws.net/2015/the-new-european-insolvency-regulation/, 31.10.2016.

[32] J.A.E. Pottow, „A New Role for Secondary Proceedings in International Bankruptcies", University of Michigan Law School 2011, Texas International Law Journal, vol.46:579, 581, http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1613&context=articles, 30.10.2016.

[33] J.A.E. Pottow, 585

more specific meaning, it can be said that in case of conducting several bankruptcy proceedings against the same bankruptcy debtor, this rule has a wider application. If the main bankruptcy proceeding is initiated based on the criterion of exclusive jurisdiction, and/or based on the place of registered office or principal place of business of the debtor, then the effects of that proceeding should be justified in another country in which the assets or branch office of the debtor are located, whose status depends on the country in which it conducts its business operations. The rule *lex fori concursus* enables the effects of the main bankruptcy proceeding in another country but the law of the country in which the proceeding has been initiated is applied to the secondary bankruptcy proceeding. What is the basic element of the main bankruptcy proceeding with the effects on the territory of another country? It is the decision on the initiation of such proceeding that produces effects. It produces effects based on the rule *lex fori concursus*. A foreign decision on bankruptcy facilitates the actions of the liquidator appointed in the main bankruptcy proceeding, exercise of the rights of creditors from the country in which the said proceeding has been initiated and the dependence of the secondary on the main proceeding is defined, which is reflected in the transfer of bankruptcy estate assets from the secondary into the main bankruptcy proceeding. On the other hand, *lex fori concursus* would not have the said application if the principle of integrity of the bankruptcy proceeding, inseparable from the principle of integrity of bankruptcyestate, was not recognized.

Prof. dr Vladimir Čolović
naučni savetnik, Institut za uporedno pravo Beograd

LEX FORI CONCURSUS KAO OSNOVNO PRAVILO U MEĐUNARODNOM STEČAJU

Rezime

Pravilo lex fori concursus određuje da će se na stečajni postupak primenjivati pravo mesta pokretanja tog postupka, odnosno, pravo mesta stečajnog dužnika (sedište, filijala i imovina). Lex fori concursus se primenjuje kao osnovno pravilo međunarodnog stečaja, pomoću koga se

objašnjava vođenje glavnog i više sekundarnih stečajnih postupaka protiv istog dužnika, kao i međuzavisnost tih postupaka. No, u Uredbi (EU) br. 848/2015 o postupku u slučaju insolventnosti predviđena je mogućnost da se ne pokrene sekundarni stečajni postupak, kada se u toj državi namiruju poverioci van stečajnog postupka, a o čemu odlučuje stečajni upravnik iz glavnog stečajnog postupka, kao i mogućnost pokretanja stečajnog postupka protiv člana ili članova povezanih društava. U radu se objašnjava status i primena pravila lex fori concursus u tim slučajevima. Posvećuje se pažnja i primeni ovog pravila u Model-zakonu o prekograničnoj insolventnosti (UNCITRAL).

Ključne reči: međunarodni stečaj, lex fori concursus, glavni stečajni postupak, sekundarni stečajni postupak, povezana društva.

Marina Matić Bošković, Ph.D[1]

Original scientific paper
UDC: 347.962:346

JUDGES AND COURT SPECIALIZATION IN COMMERCIAL MATTERS-HOW IT CONTRIBUTES TO EFFICENCY OF COURTS AND QUALITY OF DECISIONS

Abstract

Author analyzes comparative experience in court specialization as it is commonly recommended as an important justice reform initiative to improve efficiency and quality of the system. The comparative experience and practice do not show clear link between specialization and successful judicial systems. Studies have shown that specialization can be helpful in improving efficiency in more complex cases that require special expertize, such as in bankruptcy, intellectual property rights or business cases. The studies also pointed some challenges. Allocation of additional resources for handling business cases can lead to the perception that a court provides preferential services to the business community, or special courts have been created when the case load did not actually justify the additional investment. In addition, judges who work on only one type of case may develop narrow expertise that may limit their focus. Author provides overview of the comparative practices related to the specialized commercial courts and variations in specialization models.

Key words: *specialization of court and judges, organization of courts, commercial cases, comparative specialization models, selection and training of judges, efficiency and quality of justice, consistency in decision-making.*

1. Introduction

Court specialization is increasingly advocated for as laws become more complex and range further into areas beyond traditional bounds. It is expected that court specialization increases efficiency of courts, expertise of judges, and quality of decisions, yet can also create special interest capture, and a two-tiered judicial system that benefits repeat users,

[1] Research Associate, Institute of Comparative Law, Belgrade, mail: maticmarina77@yahoo.com

potentially lowering the quality of decisions. A potential disadvantage of specialization is the reduced potential for judges to benefit from knowledge spillovers across different areas (e.g. competition and bankruptcy law). Also, specialization may introduce rigidity in the use of resources, limiting the possibility to reallocate judges from one area to another.

The debates regarding the benefits of specialization of judges and the movement towards specialization of judges in many countries may suggest that specialization of judges has more beneficial than negative effects on judges' work. However, few empirical studies have been carried out so far and the empirical evidence on the impact of specialization is limited.[2]

Systematic evidence on the performance of specialized courts is fairly slim; there is only fragmentary information about the actual effects of specialization. The OECD Report "What makes civil justice effective" stated that one of the factors associated with shorter trial length is existence of specialized commercial courts.[3] Based on OECD data, specialization in commercial matters, as measured by the presence of specialized commercial courts or sections covering at least three commercial matters, appears to have some association with shorter trial length.[4] According to OECD data trial length is inversely related to the indicator capturing commercial specialization, while the productivity of judges does not show any clear correlation with it. The result could be due to non-homogeneity of the specialization and the productivity measures, the former only referring to commercial cases while the latter encompassing different matters and instances.[5]

The existing cross-country evidence is indeed mixed. The impact of court specialization on performance is also analyzed in Voigt and El Bialy.[6] Using the CEPEJ dataset, the authors find a negative correlation between court specialization, as measured by the ratio of specialized first instance courts to all first instance courts of a country, and the number of resolved cases divided by caseload. As discussed in Voigt and El Bialy, expert judges may want to be more precise regarding their area of expertise, taking more time per case, or their productivity may be negatively affected by the routine that derives from specialization.

---

[2] L. Baum, „Probing the Effects of Judicial Specialization*"*, *Duke Law Journal* 58/2009, 1680.
[3] OECD (2013), *What makes civil justice effective?,* OECD Economics Department Policy Notes, 18 June 2013.
[4] G. Palumbo, et al. (2013), "The Economics of Civil Justice: New Cross-country Data and Empirics", OECD Economics Department Working Papers, No. 1060, OECD Publishing.
[5] *Ibid.,* 29.
[6] S. Voigt, N. El Bialy, „Identifying the determinants of aggregate judicial performance: taxpayers' money well spent?", *European Journal of Law and Economics*, Vol 41, 2/2016, 283-319.

In 2013 year, the World Bank published guidance that specifically highlights the information that is needed to determine when examining if specialization is required in particular areas, as well as the specialization model that may be most appropriate.[7] Report concluded that there is no one preferred option and that in each specific case there is a essential to examine the potential need and demand for further specialized judicial services and to consider what would be needed to meet goals that are justified.

The European Commission for the Efficiency of Justice (CEPEJ) report on European Judicial Systems in its 2008 edition states that "specialization in courts is a growing trend among European countries".[8]

The new 2016 Doing Business methodology introduced a new measure in the enforcing contracts indicator, the quality judicial processes index.[9] This indicator tests whether each economy has implemented a series of good practices in the areas of court structure and processing, such as specialized courts, effective case management, court automation and alternative dispute resolution.

The data show that 97 of the 189 economies covered by Doing Business have a specialized commercial jurisdiction. Specialized commercial jurisdiction appears in different forms as a dedicated stand-alone court, a specialized commercial section within an existing court or specialized judges within a general civil court.[10]

According to 2016 Doing Business there is no clear link between commercial court specialization and contract enforcement time. Some Council of Europe countries that have strong economies, do not specialize in commercial cases and have low average days to enforce contracts (Norway ranked 10th at 280 days), Sweden and Finland (ranked 14th at 321 days and 23rd at 375 days respectively).

Countries results in contract enforcement show that specialized commercial jurisdiction is not sufficient measure for economic development and sustained growth. Countries that are ranking well in enforcing contract index more consistently applied good judicial practices such as availability of arbitration, pretrial conference, small claims court or procedure, effective case management including electronic case management, etc.

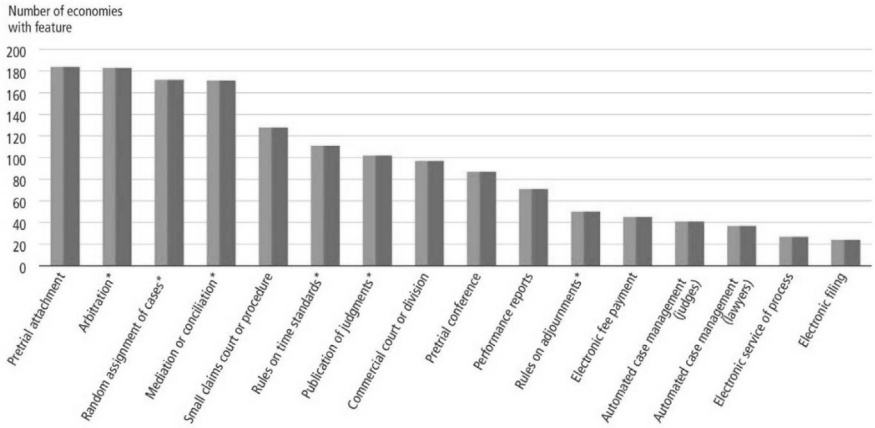
---

[7] H. Gramckow, J. Walsh, *Developing specialized court services – International Experience and Lessons Learned,* the World Bank, 2013.

[8] European Commission for the Efficiency of Justice (CEPEJ), European judicial systems. Edition 2008 (data 2006): Efficiency and quality of justice, Council of Europe 2008.

[9] *http://www.doingbusiness.org/reports/global-reports/~/media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB16-Chapters/DB16-What-is-Changing-in-Doing-Business.pdf* .

[10] Doing Business 2016, *Measuring Regulatory Quality and Efficiency*, *http://www.doingbusiness.org/~/media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB16-Full-Report.pdf* .



Features covered by the quality of judicial processes index and its existence evaluated economies[11]

The density, number and types of specialized courts in the Council of Europe states varies greatly.[12] There are countries with a very low level of judicial specialization. Among the countries that do not have any specialized first instance courts the CEPEJ report lists Andorra, Bosnia and Herzegovina and Czech Republic.

2. Advantages and Limits of Specialized Courts

Specialization of judges is a subject that can be interpreted from different perspectives and which is decided taking into consideration the opportunities and specific local context.[13] It is strongly linked to the management of the judiciary and takes various forms in various jurisdictions, such as judges specialized in a specific field, specialized departments/panels in courts, or specialized courts.

There is no international standard that firmly recommends or disapproves specialization of judges or the manner of specialization of judges. Specialization of judges means different things depending on the context. The Consultative Council of European Judges (CCJE) uses the term "specialist judge" to mean "a judge who deals with limited areas of law (e.g. criminal law, tax law, family law) or who deals with cases concerning particular factual situations in specific areas (e.g. those

[11] Source 2016 Doing Business.

[12] European Commission for the Efficiency of Justice (CEPEJ), European judicial systems. Edition 2014 (data 2012): Efficiency and quality of justice, Council of Europe 2014.

[13] R.C. Dreyfuss, „Forums of the Future: the Role of Specialized Courts in Resolving Business Disputes", *Brooklyn Law Review* 61, 1/1995, 1-44.

relating to social, economic or family law)".[14]

Various studies and legal opinions of specialized bodies acknowledge the fact of specialization of judges and seem to suggest that it became a reality in particular due to complexity of legislation and the need to adapt to these changes.[15] Nevertheless, CCJE has stressed the fact that "all judges, whether generalist and specialist, must be expert in the art of judging. Judges have the know-how to analyze and appraise the facts and the law and to take decisions in a wide range of fields. To do this they must have a broad knowledge of legal institutions and principles".[16]

Proposals for specialized courts generally argue that specialized courts have three advantages:

- improved efficiency - diverting a class of cases to specialized courts will take some of the burden of growing caseloads off the shoulders of general courts;
- higher quality - a specialist judiciary will enhance the quality of decisions, particularly in complex areas of law;
- uniformity of case law - creating a single court with exclusive jurisdiction over particular areas of the law will enhance uniformity in those areas.[17]

---

[14] Para 5 of the Opinion (2012) No. 15 of the Consultative Council of European Judges on the specialization of judges, adopted at the 13th plenary meeting of the CCJE (Paris, 5-6 November 2012). In the CCJE's questionnaire that was used for drafting the Opinion (2012) No. 15, the following specializations were identified as examples common in many European countries: Family courts, Juvenile courts, Administrative courts/councils of state, Immigration/Asylum Courts, Courts of public finances, Military Courts, Tax Courts, Labor/social courts, Courts for agricultural contracts, Consumers' claims courts, Small claims courts, Courts for wills and inheritances, Patent/copyrights/trademark courts, Commercial courts, Bankruptcy courts, Courts for land disputes, Cours d'arbitrage, Serious crimes courts/courts of assize, Courts for the supervision of criminal investigations (e.g. authorizing arrest, wire-tapping etc.), Courts for the supervision of criminal enforcement and custody in penitentiaries. European Union law stipulates the creation of specialist chambers or courts in specific legal fields such as Community trademarks and Community designs.

[15] See for example: p. 8 and 28, Opinion (2012) No. 15 of CCJE; A similar conclusion stems from the article – S. V. Damle, „Specialize the Judge, Not the Court: A Lesson from the German Constitutional Court", *Virginia Law Review*, Vol. 91, 5/Sep. 2005, 1267-1311, *http://www.jstor.org/stable/3649438*. The author included a powerful statement of a US federal judge: "Judge Henry Friendly noted shortly after leaving the practice of law to join the bench: Whereas it was not unreasonable to expect a judge to be truly learned in a body of law that Blackstone compressed into 2400 pages, it is altogether absurd to expect any single judge to vie with an assemblage of law professors in the gamut of subjects, ranging from accounting, administrative law and admiralty to water rights, wills and world law, that may come before his court." (1268-1269. Note: the article refers to the practice of US Court of Appeals for the Federal Circuit, which included generalist judges).

[16] CCJE Opinion No 15 assessed advantages of judge's specialization in para 24.

[17] CCJE Opinion No 15 assessed advantages of judge's specialization in para 8-13.

Arguably, these gains are established through greater experience and skill level of judges due to specializing. Judges may select into these courts due to their higher ability and interest in these areas of law, and they gain further experience in the subject matter over time. Judges quickly become experts in the field as they focus on their specialization. In turn, this expertise potentially fosters greater efficiency in deciding cases and greater effectiveness in reaching high-quality decisions. Importantly, even if a judge has no prior experience in the field of their court's work, due to specialization, they gain expertise in their field quicker than judges on a generalist court. By doing so, they likely increase the efficiency and effectiveness with which cases are decided.

There are also some arguments that specialization can have negative effects.[18] Issues arising from increased reliance on specialized courts include judicial tunnel-vision, judicial capture by special interests, and the formation of a two-tiered judiciary. Judicial tunnel-vision is the phenomenon that occurs when a judge focuses on one area of law, becoming unaware of legal changes outside of their field, which may potentially impact their cases. Secondly, an issue with specialization may be that judges have a greater chance of capture by special interests. Individuals and groups have a greater incentive to seek influence over a specialized court in their field, which has a greater impact on their interests, than over a generalist court. Another issue with increased judicial specialization is the potential creation of a two-tiered system where those interests that are frequent users of the court gain an advantage through repeat player status.

Limitation of judicial specialization is the fact that it makes easier for litigants to gain the benefits of repeat player status in a court.[19] There is concern, that since actors involved in the litigation of cases handled by specialized courts tend to be a small group in each jurisdiction, judges will become very familiar with these actors, resulting in more informal and potentially preferential engagement, thus increasing the danger of corruption.[20]

The evidence that does exist shows that effects of specialization are not straightforward.[21] OECD assessed how trial length is related to some of the underlying characteristics of the systems:[22] the amount of financial resources allocated to justice and some characteristics of the

[18] CCJE Opinion No 15 assessed limits and dangers of judge's specialization in para 14-22.
[19] L. Baum, „Probing the Effects of Judicial Specialization", *Duke Law Journal* 58/2009, 1667–84.
[20] High perception of corruption was a reason for abolishment of economic courts in Moldova in 2012. More in *Specialization of judges and feasibility of creating administrative courts in the Republic of Moldova,* Legal Resource Centre from Moldova, 2014.
[21] H. Gramckow, J. Walsh, *Developing specialized court services – International Experience and Lessons Learned,* the World Bank 2013, 6-7.
[22] G. Palumbo, et al. (2013), 25.

production structure of judicial services (composition of resources, task specialization, diffusion of case flow management techniques and ICT, the governance structure of the courts). It is clear that court specialization cannot have positive impact if system is not functional.

Inevitably, the impact of judicial specialization depends on the conditions under which generalist and specialized courts operate. The actual effects of giving jurisdiction over a field to a specialized court will depend on variables such as the mechanisms for selection of judges, the technicality of their work, the substantive and procedural legal rules that govern the court, the configuration of interest groups in the field, and focused and systematic training prepared. As a result, the relationship between specialization and the outputs that courts produce is highly complex. Notably, if specialization can improve judges' efficiency and effectiveness in deciding cases, these effects would likely increase with the difficulty of the cases. It is further possible that judicial specialization might ease the pressure of heavy caseloads on judges simply by enhancing efficiency, but, because these gains in efficiency from specialization are assumed rather than measured, it is uncertain how substantial those gains actually are. Improvements in judicial efficiency and quality due to specialization then are inevitably dependent on the needs and context surrounding the courts and cannot be assumed to exist in all cases.

Specialization can only be justified if it promotes the administration of justice and if it proves preferable in order to ensure the quality of both the proceedings and the judicial decisions.[23] If states introduce specialization of judges, the basic requirements should be met: specialist courts and judges must meet all fair trial requirements set out in art. 6 of the European Convention on Human Rights (ECHR); the creation of specialist chambers or courts must be strictly regulated, both generalist and specialist judges must provide the same safeguards and quality; special procedures for specialist courts should be avoided unless they respond to the needs which led to setting up the respective court (e.g. specific rules for examining cases involving children); all courts should enjoy the same conditions in terms of resources.[24]

3. The Different Models of Specialized Courts and Judges

The practice in Europe regarding specialization of judges varies. It includes setting up specialist chambers within existing courts or creating specialized courts. Specialization of judges may also be done

[23] Para 30, Opinion (2012) No. 15, CCJE.
[24] Para 29-36, Opinion (2012) No. 15, CCJE.

in an informal way, with judges in the court taking a particular interest in certain areas of law in which they eventually become "experts". Empirical studies have shown that even in countries with a strong belief in the value and desirability of the generalist judge, judges in practice tend to specialize in certain areas. For example, when judges sit together in a panel, certain judges may more often than others write the opinion for specific types of cases.[25]

In most European countries commercial courts are specialized courts which handle cases related to commerce, traders and companies. However, there are significant differences between commercial courts in European countries in relation to the organization and jurisdiction. In some countries there are commercial courts in each province or district while in others there are just one or two commercial courts for whole country. The structure of chambers in most countries is mixed of professional judges and lay judges who are practitioners in business, but in France judges are only business people. Commercial courts have jurisdiction for commercial disputes or bankruptcy (Denmark) but in some countries they also have competences to deal with disputes related to industrial and intellectual property (Austria).

The model that specific country selected depends on the underlying problem that it aims to address as well as local circumstances. The higher the number of cases that require special treatment, be it in the form of judicial expertise, processes, or services, the greater the need for more comprehensive specialization and the higher the justification for investing in it.

Distinction regarding specialization of judges is important since any generalization about the effects of specialization apply more accurately to some forms of specialization than to others.[26] The Assessment of comparator jurisdictions shows that we can distinct three specialization models based on comprehensiveness: a) specialized separate court; b) specialized court department within a court; c) mixed models.

According to CCJE, the most widespread means of achieving specialization is by the creation of specialist chambers or departments.[27] This can be achieved often by means of internal court rules. Specialist courts in commercial cases do not appear to be among the most widespread specialist courts in Europe, although many countries have specialized commercial jurisdiction courts.

---

[25] See E. K. Cheng, „The Myth of the Generalist judge*"*, *Stanford Law Review*, vol. 61 2008.
[26] L. Baum, „Probing the Effects of Judicial Specialization", *Duke Law Journal* 58/2009, 1673-1675.
[27] CCJE Opinion No. 15, para 42.

3.1. Specialized separate court

Specialized separate courts can be organizationally part of the jurisdiction's general court system or a separate hierarchy of specialized courts that may include distinct specialized appeals courts. This form of specialization requires division of work among courts, which operate as several branches of jurisdiction that have separate appellate instances and form a separate pyramid of hierarchical institutions, eventually meeting (or not) with other branches of jurisdiction at the top level (the level of 'supreme' court).

These courts may be established either to provide better response on differences in the procedural codes (commercial vs civil procedural rules), or because administrative processes and internal court rules have been adjusted to better address the special needs of the cases the courts handle.[28] The idea of specialization, namely, does not only suggest that there is a special institution or individual that is best suited to deal with a special type of case, but also that there may be special methods and ways how different cases should be treated. If these methods are regulated and prescribed by law, they may grow into special procedural codes that will have to be applied in different type of cases.

Specialization into several branches of jurisdiction also assumes that the users of the courts know about it, and that they are required to address the appropriate court, facing risks that their case will otherwise be dismissed due to the lack of jurisdiction.

The essence of specialization is in the engagement of "specialized judges and their assisting staff", who have knowledge in specific areas and successfully passed specialized trainings.[29]

European countries that have specialized commercial court(s) are: Belgium, Croatia, Denmark, France, Finland, Montenegro and Serbia. However, competence and organization of commercial courts differ from country to country.

In Belgium, commercial courts will always hear disputes between traders. Apart from this general jurisdiction, the Commercial Court has its special jurisdiction determined according to the nature of disputes even where the parties are not traders: disputes between managers, directors and third parties in companies; bankruptcy; all judicial reorganization procedures of companies; maritime and fluvial disputes; Intellectual and industrial property disputes (trademarks, patents, protection of plant varieties, topographies, designs); also, Commercial Court serves as an appellate court for certain decisions of the Justice of Peace (Civil

[28] H. Gramckow, J. Walsh, *Developing specialized court services – International Experience and Lessons Learned,* the World Bank 2013, 10.

[29] Central European and Eurasian Law Initiative, *Specialized Courts: A Concept Paper,* 1996, 1.

magistrate's Court).[30]

Similar competences have commercial courts in Croatia: disputes between corporations and entrepreneurs and disputes between other whose registered activity is commerce and trade; disputes between members of corporations; proposals related to establishment and cease of corporations; keep Register for corporations; conduct the procedure of recognition of foreign decisions and arbitral decisions; bankruptcy; maritime disputes and disputes related to aviation law; disputes related to intellectual and industrial property; disputes related to unfair competition.[31]

In France Commercial courts handle business litigations, summary proceedings, and insolvencies. The French Code of Commerce determines competences of Tribunals of Commerce: disputes between traders and credit institutions; disputes related to commercial companies; and disputes related to commercial acts between all persons (traders and non-traders).[32]

Composition of commercial courts chambers is different from country to country. In some countries only professional judges are sitting in the panels, in some countries only lay judges experienced in business sector and in some countries panels are composed of professional and lay judges.

Country	Professional judges	Lay judges	Mix
Belgium			■
Croatia	■		
Denmark			
France		■	
Finland			
Montenegro	■		
Serbia	■		

3.2. Specialized court department within a court

Specialized judges may work within specialized court department or unit within the court of general jurisdiction. The division of tasks in the particular court may be invisible for the court users, as they will only be required to approach the territorially competent court, while the distribution of the cases to "specialized" department or unit within the court will be done internally, as a matter of administrative assignment of internal routine within that court.

A specialized court department of an existing court may be established with less formality than by special legislation (if that is legally

[30] *http://ec.europa.eu/civiljustice/org_justice/org_justice_bel_fr_2c.pdf* and article 574 of Commercial Code of Belgium

[31] *http://www.zakon.hr/z/134/Zakon-o-parni%C4%8Dnom-postupku* .

[32] Article L.721-3, French Commercial Code.

possible), sometimes only by administrative direction or by rules adopted by the court itself.

A court department of this kind can have several judges, staff members, and courtrooms assigned to it. It may also have a separate building. Judges may be allocated to a special department either indefinitely or as needed to meet temporary specialization needs.

The good example of the use of specialized departments is Amsterdam's Companies and Business Court as an independent section of the Court of Appeal in Amsterdam. The Companies and Business Court does not address all company law issues. The cases are heard by chambers consisting of five people, three of them are professional specialized judges. The other two have financial experience as an auditor, a businessman or a labor union official depending on the issue in the case of question.[33] One of the issues that is seen as disadvantage of the Netherlands system is the fact that the Court of Cassation as court of general jurisdiction has oversight and can set aside the decisions of the Companies and Business Court.

Special departments can be a highly flexible way of pursuing specialization without significantly greater administrative effort and costs. In Europe, this model is increasingly used, but tend to require a more formal approach, which may mean a change in the law pertaining to courts, and sometimes even a change in the procedural code.[34]

The specialized court departments require engagement of specialized staff. The experience from the Netherlands shows that having the judicial assistants working together in teams can be a major advantage because it allows for specialization.[35] The judicial assistants are assigned to one department, not to a particular judge. In this way judicial assistants are inclined to specialize in one branch of the law, and they also contribute to the department jurisprudence uniformity. In addition, working in teams may be seen as way to avoid situation that judicial assistants working for one judge focus too much on adjusting to the specific preferences of the particular judge.

Ireland also applied model of specialized commercial departments. The Ireland's High Court has a commercial division which is exclusively

[33] M. J. Kroeze, *The Companies and Business Court as Specialized Court, https://www.oecd.org/daf/ca/corporategovernanceprinciples/37188740.pdf* .

[34] H. Gramckow, J. Walsh, *Developing specialized court services – International Experience and Lessons Learned,* the World Bank 2013, 11.

[35] See for details Exploratory study on the position of: Judicial Assistants and Media Spokespersons in selected Council of Europe member states, report by Marco Fabri, September 2013, Joint Programme between the European Union and the Council of Europe on „Strengthening the Court Management System in Turkey" (JP COMASYT).

hears commercial disputes of high value and all intellectual property right cases. Judges in Commercial Court cases manage the litigation and impose short deadlines, allowing the court to fast-track disputes.[36]

3.3. Mixed models

Each country decides what model of specialization would be beneficial and effective to specific country circumstances. In adjusting specialization models to the country needs some countries developed mixed – establishment of one or several specialized courts and establishment of several specialized court departments.

In Austria only the state's capital, Vienna has specialized civil courts for commercial cases, District Court for Commercial Matters (*Bezirksgericht für Handelssachen)* and the Vienna Commercial Court (Handelsgericht Wien), which has the status of a regional court. In all other districts, commercial cases are heard by the courts of ordinary jurisdictions, more precisely by the commercial departments (Handelssenate) within the courts of ordinary jurisdiction.

Commercial hambers are composed of three judges: two professional judges and one commercially experienced lay judge. The lay judges work on a voluntary basis and are assigned to work on cases together with professional judges. They form a panel and take joint decisions together with the professional judges.[37]

Provincial Court of Appeal is a second instance court, for appeals against decisions of commercial courts. Chambers in the appellate courts are composed of three professional judges but when hearing a commercial case, one of the professional judges is replaced by an expert lay judge.[38] The highest court of appeal is the Supreme Court (Oberster Gerichtshof) in Vienna.

Similar situation is in Switzerland, where the cantons of Aargau, Bern, St Galen and Zurich have each established a Commercial court (*Handelsgericht*) to deal with national and international commercial disputes in the first instance. In other cantons court of general jurisdiction are competent for commercial disputes.[39]

Among 4 commercial courts in Switzerland, the Commercial Court of the Canton of Zurich is the most important due to Zurich's position

[36] *Study on Specialized IPR Courts,* Joint project of the International Intellectual and United States Patent and Trademark Office, Property Institute and 2012, *http://iipi.org/wp-content/uploads/2012/05/Study-on-Specialized-IPR-Courts.pdf* .

[37] *https://www.justiz.gv.at/web2013/file/8ab4ac8322985dd501229ce2e2d80091.de.0/broschuere_oesterr_justiz_en_download.pdf* .

[38] N. Foster, *Austrian legal system and laws*, 2003, 37.

[39] *http://www.homburger.ch/fileadmin/publications/RESCUE.pdf* .

in national and international commerce. One of the reasons of its good reputation is its composition. Each case is heard by a panel consisting of professional judges and lay judges, specialized experts in the relevant business sector. It is currently composed of 8 professional judges and 70 lay judges who work in 10 chambers.[40] Chambers are composed of two professional judges of the High Court and three lay judges. Lay judges are from: banks and insurance companies, audit and trust services, construction and architecture, chemicals, pharmaceuticals and health, mechanical and electrical industries, patent invention, overseas and wholesale trade as well as freight forwarding, textile industry and trade and other various industries.

The appeal against the decision of commercial courts in Switzerland can be submitted to Federal Supreme Court which serves as an appellate court. Also, some cantons have introduced a Cassation Court to handle appeals which are not eligible for appeal to Federal Supreme Court which generally reviews applications of federal law.[41]

4. Conclusion

Specialization of judges and courts are an increasing trend across the globe, driven in large part by the growing complexity of the law and rising demands for faster and better court services. Some international indicators, such as the World Bank's Doing Business Report, recognize that special commercial courts tend to be beneficial to addressing the needs of the business community and give extra points to countries with such courts. There is no unified model of court specialization in commercial matters: some countries established specialized courts in one or several larger jurisdiction where the case load justified it, other established across the entire country, while other opted for specialized chambers within the court of general jurisdiction.

This article has attempted to outline comparative practices and impact of court specialization on efficiency and quality of justice services. However, there is no clear link that shows correlation between specialization and improvement of clearance rate and disposition time.

[40] *http://www.gerichte-zh.ch/organisation/handelsgericht/aufgaben.html* .
[41] *http://www.bakermckenzie.com/files/Uploads/Documents/Global%20Dispute%20Resolution/Dispute%20Resolution%20Around%20the%20World/dratw_switzerland.pdf* .

Dr Marina Matić Bošković
istraživač saradnik
Institut za uporedno pravo, Beograd

SPECIJALIZACIJA SUDIJA I SUDOVA U PRIVREDNOJ MATERIJI – DOPRINOS EFIKASNOSTI SUDOVA I KVALITETU ODLUKA

Rezime

Autor analizira uporedna iskustva u specijalizaciji sudova, s obzirom da se specijalizacija često preporučuje kao važna reformska mera koja unapređuje efikasnost i kvalitet pravosuđa. Uporedna iskustva i praksa ne pokazuju jasnu vezu između specijalizacije i uspešnog pravosudnog sistema. Studije pokazuju da specijalizacija može doprineti unapređenju efikasnosti u složenijim predmetima koji zahtevaju posebna znanja, kao što su stečaji, intelektualna svojina ili poslovno pravo. Studije ukazuju i na određene izazove. Ulaganje dodatnih resursa za rešavanje privrednih predmeta može da stvori percepciju da se poslovnoj zajednici daje preferencijalni tretman ili da su osnovani specijalizovani sudovi u slučajevima kada obim posla ne opravdava dodatna ulaganja. Pored toga, sudije koje rade na samo jednoj vrsti predmeta mogu da razviju usku specijalnost koja može da ograniči njihov fokus. Autor daje i pregled uporedne prakse specijalizovanih privrednih sudova i razlike u modelima specijalizacije.

Ključne reči: specijalizacija sudova i sudija, uređenje sudova, privredni predmeti, uporedni modeli specijalizacije, izbor i obuka sudija, efikasnost i kvalitet pravosuđa, ujednačena sudska praksa.

Velimir Živković, LL.M, MJur (Oxford)[1] **Original scientific paper**
UDC: 341.6

IDEOLOGICAL, LEGAL AND EMPIRICAL FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW – A FEW OBSERVATIONS

Abstract

There seems to be little doubt in both practice and doctrine that international investment law presents a regime striving for, if not already achieving, substantive multilateralism and uniformity of applied principles, rules and interpretations. This article, however, takes another look at what can be described as the foundations of such a regime – international investment agreements – and in particular ideological, legal and empirical issues surrounding them. A number of observations thus made significantly problematize the assertion that international investment law was indeed made and expected to become a multilateralized, uniform edifice in a substantive sense.

Keywords: *international investment law, international investment arbitration, international conventions*

1. Introduction

There seems to be little doubt in both practice and doctrine that international investment law presents a regime striving for, if not already achieving, substantive multilateralism and uniformity of applied principles, rules and interpretations. This article, however, takes another look at what can be described as the foundations of such a regime – international investment agreements – and in particular ideological, legal and empirical issues surrounding them. The aim is not to offer a comprehensive account of the IIL development – this has been done in

[1] PhD Candidate (LSE), Research Associate, Institute of Comparative Law, Belgrade, mail: velimir85@yahoo.com.

literature.[2] Rather, the goal is to focus on a number of problematic features of IIL's development and existing foundations that indicate that its current form and manner operation is nothing predestined or inevitable.

The primary aim is to problematize a number of the regime's foundations, specifically the IIAs. After focusing on particular ideological (section 2.), legal (section 3.) and IIA conclusion-related (section 4.) controversies, the argument is made that there was no firm support for expecting (at least from the perspective of a number of actors) that the foreign investment protection will necessarily coalesce into an autonomous legal regime characterized by the quasi-legislative nature of dispute-settlement or by the de facto multilateralization of its rules. Section 5. thus concludes.

2. Ideological controversies

The first issue of normative importance is the one of the ideological orientation of the IIAs themselves. Existence of a clear cut economic (if not broader socio-political) ideology that underpins the network of IIAs would certainly offer a good starting position for normatively orienting their interpretation in practice. It is indeed important that the study of IIL is placed in its proper policy and political context, particularly bearing in mind its chequered and turbulent past.[3] Identification of an unambiguous ideological pivot point would arguably reinforce the conclusion that ideological and legal struggle over the rules and standards in this area has been conclusively settled.[4]

There is indeed a strong argument to be made that, as a starting ideological point, IIAs fit the (neo)-liberal policy bill.[5] *Grosso modo,* their preambles call for the promotion and protection of private investment

[2] Notably in C. Lipson, *Standing Guard: Protecting Foreign Capital in the Nineteenth and Twentieth Century*, University of California Press, Berkeley 1985 and K. Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital*, Cambridge University Press, 2013.

[3] PT Muchlinski, „Policy Issues" in *The Oxford Handbook of International Investment Law* (eds. Peter Muhclinski, Federico Ortino, Christoph Schreuer), Oxford University Press, 2008, 5.

[4] See for earlier work suggesting this A. Gunawardana, J. E. Alvarez, „The Inception and Growth of Bilateral Investment Promotion and Protection Treaties", *American Society of International Law Proceedings*, 86/1992, 544, and more recently S. Hindelang, „Bilateral Investment Treaties, Custom and A Healthy Investment Climate: The Question of Whether BITs Influence Customary International Law Revisited", *Journal of World Investment and Trade* 5/2004, 789.

[5] S.W. Schill, *The Multilateralization of International Investment Law*, Cambridge UniversityPress, 2009, 377.

as a path towards economic development.[6] In their essence, IIAs are seen to be credible instruments that curb potential state interference and protect private property,[7] particularly through the '*enlightened* standards for the treatment and taking of foreign investment'.[8] The newer IIAs are seen as the expression of a 1980's and 1990's backlash against the New International Economic Order (NIEO), as a generation of leaders emulating Thatcherism and not socialism came to power and 'Asian tigers' were seen as the trailblazers for stagnating African and South American economies.[9] IIAs were put in place to allow 'market forces to unfold'.[10] Yet, it seems possible to problematize and reassess these often repeated tenets in a number of ways, in particular the necessarily and permanently (neo)-liberal economic understanding of these instruments.

Firstly, it is questionable that the commitment to securing private (foreign) investment in itself is an indication of a specific prevailing economic ideology in a concluding State. Foreign investment is practically universally desirable, with historically rare and ultimately unsuccessful attempts at economic and investment autarchy. Perhaps it is not necessary to go further than the arguably only surviving examples of liberalism's direct opposites – regimes in Cuba and North Korea. Both have made continuous attempts (as did other former Communist countries)[11] to attract foreign investment (including conclusion of IIAs)[12] without at the same time making parallel wholesale changes in their economic systems. While, of course, these countries are rather exceptional and interpretation of their IIA obligations would still certainly not be conducted in accordance with the North Korean ideology of *Juche* or Marxism-Leninism, the point is

[6] See for early works P.O. Proehl, „Private Investments Abroad", *Journal of Public Law* 9/1960, 362, 364 and C.N. Brower, S.W. Schill, „Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?", *Chicago Journal of International Law* 9/2008-2009, 471, 489.

[7] As Salacuse notes, while the investment and market liberalization was not always specifically stated in the IIAs, that goal 'has clearly been in the minds of developed country negotiators and is sometimes reflected in background documents', J.W. Salacuse, „The Treatification of International Investment Law", *Law and Business Review of the Americas* 13/2007 155, 160.

[8] S.M. Schwebel, „The Overwhelming Merits of Bilateral Investment Treaties", *Suffolk Transnational Law Review* 32/2009, 263, 267 (emphasis added).

[9] D. Vagts, „Foreword to the Backlash against Investment Arbitration", in: *The Backlash Against Investment Arbitration: Perceptions and Reality* (eds. Michael Waibel *et al.*), Kluwer, Alphen aan den Rijn 2010, xxiv.

[10] S.W. Schill, 364.

[11] For the former Socialist Federative Republic of Yugoslavia, see S. Woodward, „The Political Economy of Ethno-Nationalism in Yugoslavia", *Socialist Register* 39/2009, 73, 85-90.

[12] Cuba has 39 BITs in force (and 19 more signed) with countries from all across the globe. See *http://investmentpolicyhub.unctad.org/IIA/CountryBits/52#iiaInnerMenu* for details. It has also enacted the latest incarnation of its Foreign Investment Act in 2014, guaranteeing considerable incentives and substantive protections.

still there – desiring FDI or even concluding IIAs does not equal automatic across the board acceptance of any particular economic ideology.

Secondly, even under the assumption that entering into an IIA meant accepting a very particular economic vision at a particular point in time, it is highly questionable if this would mean adherence to the same vision *ex tunc ad infinitum*. As will be revisited in section 1.3.3. below, the diffusion of BITs was given an immense impulse by coordinated efforts of international organizations, Western governments and private arbitration industry.[13] The subtle or less subtle pressures to conclude BITs as part of loan conditions[14] and the UNCTAD 'speed-dating' sessions for mass BIT signings[15] might indeed suggest that conclusion of BITs was seen by all those involved as an entry ticket into the contemporary economic logic of the neo-liberal Washington Consensus.[16] But what happens is that (or any other) consensus stops being accepted as such?[17] How can, in other words, IIAs cope with the need to interpret their (broad) provisions in an evolutionary manner?[18] Saying that IIAs are somehow excluded from the evolving interpretation would not only be doctrinally questionable, but also beg the question when the canon of their (ideological/teleological) interpretation was irrevocably entrenched. Was it in 1959 or 1991 or in 2008? There would hardly seem to be a satisfying answer.

Thirdly, and relatedly, it is hard to establish that any sort of sufficiently clear and precise economic 'gospel' ever existed so as to provide the interpretational guidance and tie-break solutions in the proverbial 'hard' cases. Following the 'multilateralization' premise, the same ideological underpinning would have to be assumed for IIAs concluded among more than 150 States participating in the regime, forming countless pairs of treaty signatories. Arguably, from the earliest phase of the IIA era, the lack of any universally acceptable ideological

[13] L.N. Skovgaard Poulsen, „Bounded Rationality and the Diffusion of Modern Investment Treaties", *International Studies Quarterly* Vol. 58, 1/2014, 1 and S. Jandhyala, W.J. Henisz, E.D. Mansfield, „Three Waves of BITs: The Global Diffusion of Foreign Investment Policy", *Journal of Conflict Resolution* 55/2011, 1047, 1054-55.

[14] Z. Elkins, A.T. Guzman, B.A. Simmons, „The Diffusion of Bilateral Investment Treaties, 1960-2000", *International Organization* 60/2006, 811, 833.

[15] L. N. Skovgaard Poulsen, 11.

[16] S. Jandhyala, W.J. Henisz, E.D. Mansfield, 1054.

[17] As is argued, the scrutiny and shift of policies away from the Washington Consenus puts the whole rationale of IIL into question. See in that sense G. Van Harten, „Investment Rules and the Denial of Change", *University of Toronto Law Journal* 60/2010, 893, 899.

[18] See P.T. Muchlinski, „Towards a coherent international investment system: key issues in the reform of international investment law", in: *Prospects in International Investment Law and Policy: World Trade Forum* (eds. Roberto Echandi, Pierre Sauvé), Cambridge University Press, 2013, 413-414.

underpinning to the treaties was evident to those in the field. Writing as early as 1960, Proehl states:

> [h]owever, experiences with earlier proposals for multilateral treaty protection for investments have already indicated rather clearly that the capital-importing nations are unwilling to go along with an agreement which commits them to an 'open-end' investment system and puts ultimate control over any segment of national economic life beyond governmental reach by reason of treaty right. Our sound and stable way of doing business cannot simply be extended by fiat to the underdeveloped countries. It cannot be unilaterally imposed nor less than freely accepted.[19]

It is equally unlikely that this has universally changed over the course of intervening decades. Despite thousands upon thousands of treaties signed, as Calamita notes, 'these treaties in the main did a poor job of creating or articulating a political settlement on the underlying debate with respect to the appropriate standard of treatment of foreign investors.'[20]

Finally, the commitment to certain key tenets of treatment and property protection by a host State as embodied in an IIA does not allow concluding that *exceptions* to these tenets are likewise conclusively settled.[21] The broadness and yet appealing superficial appearance of these provisions makes them almost impossible to disagree with as a matter of principle. A State announcing beforehand (even implicitly) that it will not treat investors fairly or will not pay anything for what it expropriates is indeed (especially today) a rather difficult one to find. But at the same time, this does not mean that adherence to a broad commitment to protection of investments and property necessarily implies agreement

[19] P.O. Proehl, 364 (footnotes omitted). See also generally K. J. Vandevelde, „The Political Economy of a Bilateral Investment Treaty", *American Journal of International Law* 92/1998, 621.

[20] N.J. Calamita, „The Rule of Law, Investment Treaties, and Economic Growth: Mapping Normative and Empirical Questions"" in *Rule of Law Symposium 2014: The Importance of the Rule of Law in Promoting Development* (eds. Jeffrey Jowell, J Christopher Thomas, Jan van Zyl Smit), Bingham Centre for the Rule of Law, Singapore Academy of Law, Singapore 2015, 110. See also in a similar vein P. T. Muchlinski (2008), 17 and M. Waibel, A. Kaushal, L.K.H. Chung, C. Balchin, „The Backlash against Investment Arbitration: Perceptions and Reality", in: *The Backlash Against Investment Arbitration: Perceptions and Reality* (eds. Michael Waibel *et al*.), Kluwer, Alphen aan den Rijn 2010, xlvii.

[21] As sometimes noted, there is the issue of the State 'striving for the public good, however imperfectly.' (M. Waibel *et al.*, xlvii) that simply cannot be ignored. Paraphrasing Karl Llewelyn, Salacuse notes the 'continuing conflict between the legal form imposed by investment treaties and host governments legitimate right to regulate in response to the demands of life.' J. W. Salacuse (2007), 166.

on the exceptions to this protection. This is particularly so regarding the 'older generation' BITs (characterised by cursory provisions) which still form an immense part of existing BITs.[22] But even the newer ones with more specific exceptions and carve-outs, as Mills points out, have not done a particularly good job in clarifying the issues.[23]

Put simply, even the developed Western capitalist democracies which are rightfully seen as the progenitors of the IIL foundations for most of its history, differ so significantly in their approaches to market economy that it would be illusory to believe the IIAs concluded by them implied a single, uniform model of 'free market capitalism'. As Fritz Scharpf stated it the context of the EU:

> […]the economic, institutional, cultural and political heterogeneity of European states is extreme. […] In effect, not only the German model of capitalism is, in Wolfgang Streeck' words 'parochial' and cannot be generalised, but the same qualification also applies in principle to all non-liberal models of capitalism and the welfare state.[24]

Likewise, the evolution of a particular economy and its needs over time cannot be ignored. As was again recognized from the dawn of the IIA era, the measures that developing countries must take may be seen as unacceptable in a mature economy – yet they were quite acceptable to those mature economies in their earlier stages.[25] Can it be said that there is anything so definite in the content of IIAs that prevents different readings of the underlying economic logic depending on the particular host State, its level of development and particular circumstances?

That does not seem to be the case. While particular specificities cannot completely take over so as to justify whatever measure a State has taken, it is also correct to say that history did not end in 1991. It keeps posing economic and political challenges of different magnitude to

[22] As Vandevelde argued, the IIAs were almost universally silent on such issues as various facets of a market failure (restrictive business practices, taxes, subsidies etc.) K. J. Vandevelde, 640-641.
[23] See generally A. Mills, „Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration", *Journal of International Economic Law*, 14/2011, 469.
[24] F. W. Scharpf, „After the Crash: A Perspective on Multilevel European Democracy", *European Law Journal* 21, 2015, 384, 395.
[25] P. O. Proehl, 365. A. A. Shalakany, „Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism", *Harvard International Law Journal*, 41, 2000, 419, 465-468. See also D. Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise*, Cambridge University Press, Cambridge 2008 on the earlier phase of US economy and its far more permissive approach to public interest expropriation.

practically every country participating in the IIL regime.[26] Saying that the same, clear and precise economic dictum underlies thousands of *bilateral* instruments between vastly differing treaty parties – providing at the same time reliable guidance for interpretation – seems highly doubtful. It is exactly this bilateral nature of arrangements that will be examined next, with a focus on further challenges that it poses for a uniform and '*de facto* multilateral' edifice of the IIL.

3. Legal controversies – multilateralism *via* bilateral treaties?

The dense network of IIAs that undergirds the IIL regime is bilateral to a vast extent. The number of plurilateral agreements in this field (often measured on the fingers of both hands) is statistically negligible when compared to the total number of IIAs. This, of course, does not represent an accurate picture in terms of importance of these agreements otherwise. Agreements such as NAFTA (Chapter 11) and Energy Charter Treaty (Part III) have, for example, played a very prominent role in the development of IIL in terms of generating ISDS jurisprudence.

Yet, the fact remains that we are facing a largely bilateral framework of operation. This fundamentally differs, *inter alia,* from the IIL's perhaps 'closest relative' – the international trade law regime, embodied in the WTO and its set of agreements. It is worth noting that WTO multilateralism is also an aspect deemed so critical that the reappearance of even plurilateral trade frameworks (such as mega-regionals) has been received with dismay and fears about the (fragmented) future of the legal regulation of world trade.

Can such a fundamental difference be waived away in terms of legal consequences – i.e. can both regimes be seen as 'equally multilateral' regardless of their different treaty bases? For some authors there is little doubt in this regard. According to Sauvant, the IIL is an even stronger regime than WTO law.[27] For others, a legal 'glue' for the whole regime can be found in the operation of the MFN clauses. As Schill suggests:

---

[26] As Alvarez noted in 2005, it was 'premature to suggest that history is over and that old north-south divisions […] cannot reemerge […].' J. E. Alvarez, „The Emerging Foreign Direct Investment Regime", *American Society of International Law Proceedings*, 99, 2005, 94, 96. Somewhat presciently in the light of events to come, he also noted that '[n]otably, the FDI regime has not yet been tested by a major crisis […]. It is not yet clear how much of a bite the BITs will actually have when push comes to shove.' *Ibid*. See also M. Waibel *et al*., xlvii – xlviii.

[27] K.P. Sauvant, „Foreword", in: *Yearbook on International Investment Law & Policy 2012-2013* (ed. Andrea K. Bjorklund), Oxford University Press, Oxford 2014, xxxv.

> MFN clauses not only multilateralize the level of substantive investment protection, but also have a multilateralizing impact on dispute settlement procedures available to foreign investors. […] MFN clauses, therefore, create a uniform regime for the protection of foreign investors in any given host State independent of the investor's nationality.[28]

Another common argument for overcoming the bilateral character of IIAs is the sufficient similarity of wording of substantive provisions that would make differing interpretations unacceptable from the viewpoint of consistency and predictability. The wording which is so similar, the argument goes, points toward an implicit striving for multilateral interpretation and regime building.

Both of the said arguments doubtlessly have merit. It is however possible to problematize them to a certain extent. Interestingly enough, they seem to (at least partially) contradict each other. Speaking in terms of substantive provisions, the fact that there is a need and readiness to resort to MFN suggests that provisions are dissimilar enough to warrant differing interpretations. Substantive standards of treatment are not, as is often cautioned, really uniform despite their often similar language. It is also perhaps questionable how useful the MFN clauses actually are outside the relatively straightforward cases of very specific provisions that clearly differ among two IIAs. The culprit in that sense is again the recurring issue of the broad wording of these instruments. It remains highly doubtful if a variation in a used phrase - which does not have a previously settled meaning in any case - is sufficient to trigger the MFN mechanism. For example, is 'reasonable' different from 'appropriate' and how? Which one is necessarily more favourable? Such distinctions arguably can become relevant due to the accumulation of jurisprudence through the 'output' of the IIL's dynamic element, but they do not seem on their own to have critical intrinsic value or decisively contribute to seeing a bilateral framework as a multilateral one.

The role of the dynamic element further gains importance if the lack of potential analogies is taken into account. The '*de jure* bilateral-turning- *de facto* multilateral' dynamic of IIL does not seem to have a clear counterpart elsewhere in public international law. A somewhat analogous situation might exist with bilateral extradition treaties – yet the lack of any de-localised dispute settlement seems to prevent any sort of transnational regime of extradition law emerging. Similar issue arises with double

[28] S. W. Schill, 366.

taxation treaties.[29] All this adds weight to the *sui generis* character of IIL development, thus raising further questions if its developmental path was indeed inevitable and is irreversible in all regards.

Even under the assumption that all IIA provisions were identical, it would still be far from settled that their 'multilateralized' interpretation was necessary. If these treaties are indeed *leges speciales* in the matter of investor-State regime aimed at differing from the pre-existing 'universal' law on the topic (whatever its content and merits/demerits might be),[30] it would seem that a reversal towards universalism would have to be more than lightly justified. The 'autonomous legal system'[31] of each IIA is limited or ignored altogether by such a reversal. The canon of interpretation in international law, as embodied specifically here by VCLT Articles 31 and 32, simply does not support the critical step of introducing a previous interpretation of an unrelated bilateral agreement to aid and guide the interpretation of a provision of the IIA on which a dispute at hand is based. It is the very lack of such a rule that has prompted practitioners and academics, such as Gary Born, to propose the introduction of a new rule in that regard – in order to formally legalise a practice that seems to be prevalent and yet on murky legal grounds.[32] While all the problematic aspects of such proposals cannot be addressed here,[33] their very existence is indicative of a certain discomfort regarding the bilateral foundations of IIL.

This discomfort can arguably only be accentuated when taking into account the unmitigated failure of the attempt to formally multilateralize the IIL rules in the form of Multilateral Agreement on Investment (MAI). The OECD-led attempt to formulate a multilateral agreement that would build upon the common denominators of existing IIAs ended without agreement in 1996, in the whirlpool of NGO protests, poor political management of the process, lukewarm business support and lack of

[29] See generally E.A. Baistrocchi, „Patterns of Tax Treaty Disputes: A Global Taxonomy", in *A Global Analysis of Tax Treaty Disputes* (ed. Eduardo A. Baistrocchi), Cambridge University Press, Cambridge 2017 (Forthcoming) on the limited and necessarily court-led attempt to provide the uniform meaning of terms found in tax treaties.

[30] See generally on this B. Kishoiyian, „The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law", *Northwestern Journal of International Law & Business*, 14, 1993-1994, 327 and A. Gunawardana, J. E. Alvarez, 548-550.

[31] A. Stone Sweet, F. Grisel, „The Evolution of International Arbitration: Delegation, Judicialization, Governance", in *International Arbitration and Global Governance: Contending Theories and Evidence* (eds. Walter Mattli, Thomas Dietz), Oxford University Press, Oxford 2014, 30.

[32] Gary Born, Should Investment Treaties Have Their Own Rules of Interpretation?, *http://kluwerarbitrationblog.com/2015/02/03/should-investment-treaties-have-their-own-rules-of-interpretation/*, last visited 2 October 2016.

[33] See for some preliminary remarks Velimir Živković, Rethinking Interested Parties in ISDS: The case of 3rd States, *http://kluwerarbitrationblog.com/2015/12/03/rethinking-interested-parties-in-isds-the-case-of-3rd-states/*, last visited 10 October 2016.

definite will among participating States.[34] For some, it was 'doomed' as it was an effort to 'replace the regulatory sovereignty of governments with absolute standards of investor protection'.[35] The resistance to MAI, it has to be noted, was coming even from key countries that would have been expected to push vigorously for it within OECD and beyond.[36]

It would be wrong to assume MAI efforts demonstrated a complete lack of agreement among OECD countries involved. A large number of issues were successfully negotiated before the collapse.[37] But it seems highly implausible to suggest that failure to fully agree even between 'like-minded' OECD countries, followed by a similar failure of WTO efforts, plays no role in normatively assessing the practice of IIL regime building. The failure to specifically agree simply has to account for something and is arguably more meaningful than if the attempt had never even occurred.[38]

The issue of what the states 'have been comfortable' with, or simply what they actually agreed to when concluding IIAs is thus an important one. Going beyond the ideological and legal aspects of the IIA network development, it is warranted to delve into more 'subjective', consent-related issues surrounding IIA conclusion. Discussing at both theoretical and empirical level what at least some states (could have) wanted and were aware of when entering into IIAs seems warranted when thinking about how the regime of IIL is to operate in normative terms.

4. Controversies surrounding IIA conclusion

The issue tackled in this section can also be phrased as the one of 'legitimate expectations' of States when entering into IIAs. To anyone with even a passing knowledge of the area, the concept of investor's 'legitimate expectations' in ISDS jurisprudence is impossible to miss. It is however desirable to re-orient the lens towards the States as well –

[34] R. Geiger, „Multilateral Approaches to Investment: The Way Forward", in: *The Evolving International Investment Regime: Expectations, Realities, Options* (eds. Jose E. Alvarez *et al*.), Oxford University Press, Oxford 2011, 159-160 and D. Schneiderman, 174-175. See also generally J. Kurtz, „NGOs, the Internet and International Economic Policy Making: The Failure of the OECD Multilateral Agreement on Investment", *Melbourne Journal of International Law* 3/2002, 214.

[35] R. Geiger, 160.

[36] On the situation in Canada, see D. Schneiderman, 196-197.

[37] See D. Schneiderman, 174-175 and generally R. Stumberg, „Sovereignty by Substraction: The Multilateral Agreement on Investment", *Cornell International Law Journal*, 31, 1998, 491.

[38] See in this sense, for example, J. J. Saulino, J.S. Kallmer, „The Emperor Has No Clothes: A Critique of the Debate over Reform of the ISDS 'System'", *Transnational Dispute Management* 11/2014, 2.

the same 'masters of the treaties' from whom, arguably, the rights of the investors stem from in the first place.

It is also warranted for this discussion to distinguish between the expectations relating to the operation of IIL as a regime, particularly in the ISDS sphere from the expectations that IIAs will translate into increased FDI flows – something that remains empirically controversial. The key question is if the States concluding the IIAs, both developed and developing ones, and primarily during the pre-ISDS explosion era of 2000's, could have expected (and thus fully rationally consented to) the IIL regime as it stands today? Could have a relatively homogenous, self-referencing, strongly enforced regime of foreign investment protection been legitimately expected based on all the surrounding circumstances?

This is important as every new emerging regime necessarily institutionalises new priorities and, critically, new bias of those actors and experts (such as arbitrators) operating within it.[39] As long as bias is 'well established, widely known, and resonates in the community to which the institution speaks'[40] this is not a problem. Potential redeeming quality if this is not the case is a level of political control over the regime – something that, however, is largely absent in PIL sub-regimes and tends to strengthen the role of functional experts.[41] As Buchanan and Keohane state: 'It is not enough that that the relevant actors agree that *some* institution is needed; they must agree that *this* is the institution that is worthy of support.'[42]

It is, with a degree of simplification, possible to identify two 'schools' of thought on the subject of IIA conclusion. One can best be described as the one of 'rational choice', in the sense that it presents the narrative of a generally rational approach of States IIA conclusion, with sufficiently clear understanding of aims, potential benefits and arising liabilities. A different view is one presented by what has been dubbed the 'bounded rationality' narrative, which seriously problematizes such assumptions.

4.1. *'Rational choice'*

While allowing for certain differences, the crucial point of agreement of those authors within the 'rational choice' camp is that the IIA conclusion was a rational response to the unsatisfactory state of investor-

[39] M. Koskenniemi, „The Fate of Public International Law: Between Technique and Politics", *The Modern Law Review*, 70, 2007, 1, 5-6. See also A. Shalakany, 465-468.
[40] M. Koskenniemi, 6.
[41] *Ibid*., 9.
[42] A. Buchanan, R.O. Keohane, „The Legitimacy of Global Governance Institutions", in: *Legitimacy in International Law* (eds. Rüdiger Wolfrum, Volker Röben), Springer, Berlin-Heidelberg 2008, 29.

State international law pre-1959, a response which aimed at ensuring clearness and consistency and was put into place with general awareness of the cost-benefit calculus that accompanied entering into the IIAs.[43] Portraying the process of IIA conclusion as a response to uncertainty undeniably has appeal and is plausible in that regard. As Salacuse puts it, from a legal side of things, it was an attempt to provide rules which were 'complete, clear, specific, uncontestable, and enforceable'.[44] But it can also be legitimately seen as a political choice. According to Calamita, the added goal was 'reducing the likelihood of renewed disagreement with respect to the content or existence of protections in customary international law',[45] an important goal in the age of the New International Economic Order battles.

It should be noted that he stated goal of clarity and specificity is not *necessarily* marred by the open-textured nature of the substantive provisions. Not only that such provisions in themselves can be a rational choice in face of uncertainty about future developments, they are also something widespread in international treaty-making. As is sometimes remarked – a treaty is a 'disagreement reduced to writing'.[46] This all potentially indicates that States were not necessarily any less rational about IIAs than they were about other concluded treaties – further implying that they could perhaps rationally expect the burgeoning of the IIL regime based on those provisions.

The said rationality is arguably most emphasised in the work of Elkins, Guzman and Simmons.[47] According to them, the proliferation of BITs is propelled in good part by the competition among potential host countries for credible property rights protections that investments require.[48] BITs are therefore viewed by hosts and investors as devices that raise expected return on investment by assuming government is making a credible commitment to treat foreign investment 'fairly' – thereby provided 'competitive edge' in attracting capital especially for those

[43] The most important works in this general vein are A. T. Guzman, „Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties", *Virginia Journal of International Law*, 38, 1998, 639 and Z. Elkins, A.T. Guzman, B.A. Simmons.

[44] J. W. Salacuse, „The Emerging Global Regime for Investment", *Harvard International Law Journal*, 51, 2010, 427, 439.

[45] N. J. Calamita, 111.

[46] P. Allot, „The Concept of International Law", *European Journal of International Law*, 10, 1/1999, 31, 43. See also in similar vein M. Koskenniemi, 11.

[47] Z. Elkins, A.T. Guzman, B.A. Simmons; J. W. Salacuse (2007), 158-161 follows the same basic idea of rationality, although not necessarily with the similarly strong emphasis on the competitiveness aspect.

[48] Z. Elkins, A.T. Guzman, B.A. Simmons, 812.

States with known low credibility.[49] BITs raise ex post cost of reneging on contracts by reducing the ambiguity of the host government obligations and making a clear statement with much greater reputational costs if later reneging.[50]

Perhaps the most critical assumption for the purposes of the present discussion is however the one that a decision to sign a BIT *always* involves an assessment by the host of the expected benefits of attracting FDI outweighs the *sovereignty costs*.[51] Simply put, this presupposes that sovereignty costs could be known in advance, and that the operation of the IIA enforcement mechanism in that sense could have been rationally foreseen.

While there are certainly other aspects of rational behaviour that can explain IIA 'explosion',[52] the focus on rational and informed competitiveness with other capital-importing States is argued to provide best explanations at least for developing countries.[53] It can also explain, according to Guzman, the collective resistance portrayed by the NIEO activity and the piecemeal acceptance of IIAs on the other hand. As for the position of the developed countries, the rationality seems clear enough – it was a rational response to the emerging resistance of newly independent countries. While the existing PIL rules were still unclear, in comparison to newly proposed NIEO concepts they were likely to be a far more protection-friendly set. In that sense, 'rational choice' theorists also suggest host countries are 'price-takers' with respect to the terms of treaties – they realize that they must compete with others and therefore cannot demand changes to the core provisions of the treaties.[54] Whether or not developed states could have from their side be more aware how the protection regime will operate does not seem to be specifically addressed, but if the assumption of knowing sovereignty costs applies to developing

[49] *Ibid*., 822-823.
[50] *Ibid*., 823.
[51] *Ibid*., 825. Similar assumption of availability of full information for 'hard-nosed' negotiations seems to be present in J. J. Saulino, J.S. Kallmer, 5.
[52] Z. Elkins, A.T. Guzman, B.A. Simmons, 819.
[53] Z. Elkins, A.T. Guzman, B.A. Simmons, 841-842 suggests that such explanation has strong theoretical foundation and is most consistently supported by data. For a more nuanced, but important look on competitiveness and emulation, see also S. Jandhyala, W.J. Henisz, E.D. Mansfield, 1049-1052 and 1065. See also P. Ranjan, „Indian Investment Treaty Programme in Light of Global Experiences", *Economic and Political Weekly*, Vol. 45, 2010, 68-70.
[54] Z. Elkins, A.T. Guzman, B.A. Simmons, 822. See similarly T. Allee, C. Peinhardt, „Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Resolution Provisions", *International Studies Quarterly*, Vol. 54, 1/2010, 22-24 and more generally B. A. Simmons, F. Dobbin, G. Garrett, „Introduction: The International Diffusion of Liberalism", *International Organization*, 60, 2006, 781.

states, the same assumption would presumably apply (if not more) to developed ones.

4.2. *'Bounded rationality'*

The 'rational choice' of States when entering into the IIAs can be questioned at both the theoretical and empirical level. The questionable nature of rationality extends to both the expectations of increased FDI and to how the IIL will be enforced in practice. A closer scrutiny of a number of claims and tenets of the 'rational choice' approach seems to lead to a conclusion that a considerable number of States engaged, at best, in wishful thinking more than a cost-benefit analysis with anticipated sovereignty costs fully included.

The expectation of increased FDI as a result of IIA conclusion would arguably be rational in face of consistent and convincing evidence of causation, or at least some form of correlation between the two events. It has been already mentioned and is relatively often discussed in theory that any such evidence is not present, as studies are on the whole inconclusive.[55] But more importantly, one should not fall into a trap of anachronism. When the tidal waves of IIA conclusion were the strongest, those same studies were not actually available. Measuring of these correlations seems to be a relatively recent phenomenon, arguably inspired to a considerable extent by the backlash against IIL, and the need to set the record straight on the issue if IIAs are actually 'doing anything'. Two other factors seem to have been more relevant at least for a number of capital-importing countries. One is simply a form of confirmation bias, as in the readiness to believe in anecdotal evidence that IIAs will indeed increase FDI.[56] The second one is emulation – the strive to 'compete' with other capital-importing countries by concluding IIAs seems to have been more alike to herd-like emulation out of fear that they will somehow be left behind, regardless of whether or not IIAs indeed prove beneficial.[57] Whether selective belief, fear and peer pressure lead to 'rational choice' is indeed highly debatable.

The case for 'rational choice' regarding expectation of increased FDI is further weakened by the lack of factual backing for some of the key assumptions put forward by its theorists. Perhaps critically, it is far

[55] See generally P. Karl Sauvant E. Lisa Sachs (eds.), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows*, Oxford University Press, Oxford 2009.

[56] L. N. Skovgaard Poulsen, 3-4.

[57] L. N. Skovgaard Poulsen, 4. See also O. Chung, „The Lopsided International Law Regime and Its Effect on the Future of Investor-State Arbitration", *Virginia Journal of International Law*, 47, 2007, 953, 962.

from clear that States lacked credible means of guaranteeing security of property to foreign investors. As discussed in detail by Jason Yackee, investment contracts were not only known but widely used and strictly enforced by international tribunals, resulting in a number of famous arbitral awards.[58] Portraying IIAs as a revolutionary tool in that regard is at least questionable.

But equally, if not more, the rationality regarding understanding of IIAs legal and regime-building implications is suspect from a theoretical viewpoint when considering the wording of the IIAs themselves, as well as the legal situation preceding and surrounding them. It seems highly suspect that either developed or developing countries could have predicted how the IIA provisions will indeed be put into practice and whether or not they might emerge into a homogenous regime.[59] If, for example, one could suggest that States would have relied on international law rules to help in their interpretation, not only the 'ephemeral' nature of law preceding IIAs is an immediate obstacle,[60] but it concurrent development as well. In the *Barcelona Traction* case, the ICJ remarked regarding investor-State relations that (in 1970) no generally accepted rules in the matter have crystallized on the international plane. But even 13 years later, (then) Judge Rosalyn Higgins commented that state liability in the context of the regulatory state is a newer theme for international law.[61] It is perhaps only after the US-Iran Tribunal activity was in full swing that development took place within the PIL sphere,[62] although that occurred roughly quarter of a century after the IIAs appeared on the scene.

But even if there were concurrent PIL developments, to see their effect regarding ISDS there would have to have been cases to test them.

---

[58] See generally J.W. Yackee, „Pacta Sunt Servanda and State Promises to Foreign Investors Before Bilateral Investment Treaties: Myth and Reality", *Fordham International Law Journal*, 32, 2009, 1550. See also L. N. Skovgaard Poulsen, 4.

[59] See generally on this G. Van Harten, M. Loughlin, „Investment Treaty Arbitration as a Species of Global Administrative Law", *European Journal of Interantional Law,* 17, 1/2006, 121, 150 and G. Kahale III, „Is Investor-State Arbitration Broken?", *Transnational Dispute Management* 9/2012, 20-21. See also A. T. Katselas, „Exit, Voice, and Loyalty in Investment Treaty Arbitration", in *The Role of the State in Investor-State Arbitration* (eds. Shaheeza Lalani, Rodrigo Polanco Lazo), Brill Nijhoff, Leiden 2015, 212-213.

[60] J. W. Salacuse, N. P. Sullivan, „Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain", *Harvard International Law Journal*, 46, 2005, 67, 68. See also specifically on this P.O. Proehl, 367-368.

[61] As cited in S. Mont, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation*, Hart Publishing, Oxford 2012, 8. This was not helped, as noted by Van Harten and Loughlin, by the fact that states were simply reluctant to refer investment disputes to the ICJ. G. Van Harten, M. Loughlin, 128.

[62] R. Dolzer, C. Schreuer, *Principles of International Investment Law*, Oxford University Press, Oxford 2012^2, 244.

What sometimes seems to be overlooked in literature is that IIAs did not start including arbitration-based ISDS provisions some 10 years after the first BIT, and ICSID heard its first case (non-BIT based, to be clear) only in 1972. As some authors suggest, up until the first BIT-based arbitration – *AAPL v Sri Lanka* (occurring in 1990, 31 year after the first BIT) it was questionable if these treaty-based tribunals were truly envisioned to be investor-state (as opposed to state-state) dispute settlers at all.[63] As is noted, IIAs and ISDS truly languished in obscurity for many years, spatially and temporally dispersing the arrival of important information about the potential costs of BITs.[64]

Both the more general research on treaty conclusion, and that aimed particularly at BITs, seem to point to conclusions of limited or 'bounded' rationality of governments when entering into IIAs. This can be argued at least (but certainly not exclusively) on the capital-importing States' side. On a more general note, it is empirically doubtful that it is possible to identify State as speaking with one voice and mind in concluding a treaty, and that rigorous cost-benefit analysis precedes such a conclusion. As Marti Koskenniemi puts it succinctly, '[t]ry to find out the national position on a matter and you will hear different answer depending on whom you ask'.[65] The reality of treaty-making is a heterogenous picture, with different ministries, conflicting motives and often spontaneous reactions to events.[66] In developing countries, the additional problem is the often-present lack of expertise in international (investment) law in general.[67] Furthermore, bureaucratic staff turnover is often excessively high, which obstructs learning and specialization.[68]

On top of these constraints, the various subtle and less subtle forms of pressure aimed at IIA conclusion also hardly helped the capital-importing States in conducting a rational cost-benefit analysis. As previously mentioned, promotion of IIAs (especially during the 1990's boom) was a coordinated effort of international organizations, multilateral agencies, Western governments and the private arbitration

[63] J. Pauwelyn, „At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, How it Emerged and How It Can Be Reformed", *ICSID Review*, 29, 2014, 372, 397.

[64] O. Chung, 954 and L. N. Skovgaard Poulsen, E. Aisbett, „When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning", *World Politics* 65/2013, 273, 274.

[65] M. Koskenniemi, 28.

[66] B. Simma, D. Pulkowski, „Of Planets and the Universe: Self-contained Regimes in International Law", *European Journal of International Law* 17/2006, 483, 489 and J. J. Saulino, J.S. Kallmer, 4.

[67] L. N. Skovgaard Poulsen, 6.

[68] See generally M. Busch, E. Reinhardt, G. Shaffer, „Does Legal Capacity Matter? A Survey of WTO Members", *World Trade Review* 8/2009, 559. One similar example in that regard is the lack of awareness of existing obligations among different departments, resulting in legislative drafting that directly contravenes even sufficiently clear IIA obligations. See P. Ranjan, 71-73.

industry.[69] Examples varied from 'speed-dating' IIA conclusion sessions organised by UNCTAD to different pressures on States with balance-of-payments problems in need of loans.[70] An example of an arguably unequal bargaining position regarding IIAs is the effective mirroring of developed countries templates, despite the availability of less stringent models.[71] The negotiation process was often reduced to a 'take it or leave it' type of deal – described sometimes as an 'intensive training seminar' for the representatives of the other party.[72] As Alvarez noted as early as 1992, these relationships reflect 'hardly a voluntary, uncoerced transaction'.[73]

Perhaps by far the most informative empirical look at IIA conclusion is offered by the research conducted by Lauge Skovgaard Poulsen, as well as in cooperation with Emma Aisbett. In short, Skovgaard Poulsen and Aisbett lay out the theoretical framework of the 'bounded rationality' hypothesis, where State actually conduct a cost-benefit analysis (or even merely become aware of IIAs they 'rationally' concluded) only after being subject to an investment claim.[74] The empirical testing of this proposition was conducted through 30 interviews with officials from 13 developing countries worldwide.[75] While taking into account the limits of such a study, and potentially different learning processes for developed countries,[76] what has been revealed is a clear lack of actual understanding on the side of key IIA negotiators regarding the potential effects of these agreements in terms of State liability to be imposed through ISDS.

While the States had a genuine desire for economic improvement through FDI, this was coupled with overly optimistic views which were not supported by corrective data of any sort.[77] Coupled with the system's dormancy, the effect was that potential risks of IIAs were largely ignored until the State was 'hit' with an ISDS claim.[78] The interviews with the negotiators confirmed a prevailing opinion that IIA conclusion would not lead to practical implications, as these have been perceived as merely diplomatic gestures.[79] Importantly, the countries included were not from the least developed or even developing list – they included South Korea,

[69] S. Jandhyala, W.J. Henisz, E.D. Mansfield, 1054-55; L. N. Skovgaard Poulsen, 1.
[70] Z. Elkins, A.T. Guzman, B.A. Simmons, 833 and 840. See also generally B. A. Simmons, F. Dobbin, G. Garrett.
[71] L. N. Skovgaard Poulsen, 1-2.
[72] O. Chung, 958.
[73] A. Gunawardana, J. E. Alvarez, 552. See also D. Schneiderman, 62.
[74] See generally L. N. Skovgaard Poulsen, and L. N. Skovgaard Poulsen, E. Aisbett.
[75] L. N. Skovgaard Poulsen, E. Aisbett, 281.
[76] *Ibid*., 275.
[77] L. N. Skovgaard Poulsen, 5 and L. N. Skovgaard Poulsen, E. Aisbett, 296 and 301.
[78] *Ibid*.
[79] L. N. Skovgaard Poulsen, E. Aisbett, 282-283.

Czech Republic and Chile.[80]

To illustrate with one example among a number of others, the Advocate-General of Pakistan, the country which signed the very first BIT, upon receiving the Swiss investor's BIT claim in 2001 (starting the *SGS v Pakistan* case) had to Google what a BIT was.[81] There was practically no trace of Pakistan-Switzerland BIT negotiations and of the ratification process, coupled with a fact that there was no copy of the BIT either in Pakistan's possession, so a copy from Switzerland had to be procured.[82] The fact that by 2001 there has been a number of initiated claims globally and Pakistan was thus made explicitly aware about the potency of the treaties made little difference in actually appreciating their importance. Perhaps the crowning example of the dismal level of attention given to IIA conclusion is Mali. In the process of concluding a BIT with South Africa, Mali returned the signed template of the proposed BIT by email without even putting the name of the country in the blank field in the beginning of the document.[83]

Similar points have been raised, for example, by Christoph Schreuer in his capacity as an expert witness in the *Wintershall* case. When asked about the level of awareness about the contents of BITs by the States concluding them, Professor Schreuer stated that:

> [...] many times, in fact in the majority of times, BITs are among clauses of treaties that are not properly negotiated. BITs are very often pulled out of a drawer, often on the basis of some sort of a model, and are put forward on the occasion of state visits when the heads of states need something to sign, and the typical two candidates in a situation like that are Bilateral Investment Treaties, and treaties for cultural co-operation. In other words, they are very often not negotiated at all, they are just being put on the table, and I have heard several representatives who have actually been active in this Treaty-making process, if you can call it that, say that, 'We had no idea that this would have real consequences in the real world'[84]

The actual learning about what IIA provisions meant, and how the IIL is now operating as a regime, often came only after a State was subject

[80] L. N. Skovgaard Poulsen, 8-10.
[81] *Ibid.*
[82] *Ibid.*
[83] Ibid, 10.
[84] *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14 (Award of 8 December 2008), para. 85.

to a claim. This is confirmed by South African,[85] Indian[86] and Pakistani[87] experiences – they all resulted in moratoriums and halting of further IIA conclusion, at least before a systematic review and analysis was conducted. But even more generally, analysis of behaviour of 138 countries shows strong support for hypothesis that when a country is subject to at least 1 BIT claim it reduces its participation in the BITs conclusion process considerably, and that this effect is over and above any effect that might exist from observing claims against other countries.[88] These findings thus provide robust evidence of 'highly narcissistic' learning about the risk of treaty claims,[89] something that seems increasingly recognized in literature.[90] For some authors, no language seems off limits in explaining the full impact of bounded rationality:

> [i]n far too many cases, those negotiating the treaties had little idea of the *monster* they were creating in the form of unclear provisions that could be molded by international arbitral tribunals set up pursuant to the treaties' arbitration provisions into a set of state obligations far beyond what the negotiators intended.[91]

5. Conclusion

The conclusions necessarily imply important caveats. The sheer number of IIAs, the often fundamentally asymmetrical power of the parties involved, and specific circumstances of conclusion prevent a 'single cause' explanation for IIA diffusion, wording, bilateral nature, or underlying economic ideology.[92] It would be hard to claim that factors influencing a conclusion of an IIA in 1959 and 2009 were identical.

But, regardless of that, some larger scale conclusions can be offered. The broad wording and open-textured character of both preambles and substantive provisions of IIAs generally points toward realization of a free market economy with a protection of property rights from unabated State *fiat*. Arguably, however, these same provisions do a remarkably

[85] L. N. Skovgaard Poulsen, 11.
[86] See generally P. Ranjan.
[87] L. N. Skovgaard Poulsen, E. Aisbett, 281.
[88] *Ibid.*, 292.
[89] *Ibid.*, 296 and 301.
[90] S. Jandhyala, W.J. Henisz, E.D. Mansfield, 1056; A. T. Katselas, 212-213; M. Waibel *et al*., xlvi.
[91] G. Kahale III, 20 (footnotes omitted, emphasis added).
[92] See in similar vein L. N. Skovgaard Poulsen, 2; B. Allee, C. Peinhardt, 22-24; W. Shan, „From "North-South Divide" to "Private-Public Debate": Revival of the Calvo Doctrine and the Changing Landscape in International Investment Law", *Northwestern Journal of International Law & Business* 27/2007, 631, 659-664.

poor job of going beyond the level of a 'principle' to a level of a 'rule', in particular when it comes to exceptions to property protection (protection which is, comparatively speaking, never absolute) and the universally acknowledged right of States for measures in collective, societal interest. This arguably leaves considerable leeway to investment arbitrators in how this 'gap' is to be approached, not least in terms of methodology – a 'one-size-fits-all' or a pluralistic, context-dependent view?

Furthermore, the understanding that the edifice of IIL is largely built on bilateral foundations should provide a form of a cautionary restraint, an additional reason to justify and legitimize further substantive harmonization on more than just 'similarity of wording'. The lack of a multilateral framework, and a sound failure in agreeing one, should at both legal and normative levels provide an incentive for thorough and transparent reasoning by arbitrators as to why an 'treaty-overarching framework'[93] is indeed generated by the bilateral network.

Finally, there is the issue of the questionable character of the rational consent to IIAs in particular and IIL as a regime in general, regarding at least a considerable number of participating States. This should arguably result in a further significant pause before proclaiming offered substantive interpretations of IIAs as self-evident or the only way possible. At least, justifying these interpretations as expected by states when entering the regime should be seriously questioned. To be sure, the argument is not that contract law doctrines (such as duress or mistake) should be employed, potentially tainting the legal validity of IIAs - as indeed no State has even attempted to do. In summary, the (at least relatively) shaky foundations of the IIL regime opened the path for its dynamic element – ISDS - to provide (for better or worse) the key engine of its development. The normative aspect thus gains in importance. For the IIL operation to remain legitimate, it would have been important for these considerations to be taken into account

[93] S. W. Schill, 367.

Velimir Živković master, MJur (Oxford), doktorand (LSE)
istraživač - saradnik
Institut za uporedno pravo, Beograd

IDEOLOŠKI, PRAVNI I EMPIRIJSKI TEMELJI MEĐUNARODNOG INVESTICIONOG PRAVA – NEKOLIKO ZAPAŽANJA

Rezime

Čini se da se u praksi i doktrini ne dovodi u pitanje da režim međunarodnog investicionog prava teži (ili već ostvaruje) multilateralizam i uniformnost supstantivnih principa, pravila i tumačenja. Cilj ovog članka je novi osvrt na ono što bi se moglo nazvati temeljima takvog režima – međunarodne sporazume o zaštiti stranih investicija – i pogotovo na ideološke, pravne i empirijski istražene kontroverze koje ih okružuju. Nekoliko zapažanja u ovom pogledu u značajnoj meri dovode u pitanje stav da je međunarodno investiciono pravo bilo inicijalno formulisano i stoga očekivano kao multilateralni i uniformni režim u supstantivnom smislu.

Ključne reči: međunarodno investiciono pravo, međunarodna investiciona arbitraža, vladavina prava.

Jelena Kostić, PhD[1]

Scientific review paper
UDC: 343.359.2 (450)

TAX CRIMES IN THE ITALIAN LEGISLATION

Abstract

In spite of the fact that tax crimes are offences mala prohibita, rather than mala per se, a social consensus has long existed according to which certain behaviours that harm the state budget should be stipulated by criminal legislation. According to some data, penalties for failure to pay dues to the state existed even in ancient Egypt. The only things that have changed over time were the number of tax-related criminal offences and the type of sanctions prescribed for these offences. Most certainly, such solutions were conditioned by concrete social circumstances. Nowadays, all legislations provide for tax criminal offences. In some countries they are a part of the primary criminal legislation, in others they are provided for by the secondary criminal legislation, while some countries have separate regulations, which in the matter relating to tax criminal offences represent lex specialis. Given that it contains specific solutions, the subject of the analysis of this paper are the provisions of the Italian Law on Tax Crimes, which in addition to the substantive criminal law, also regulate some mechanisms of the criminal procedure law.

Keywords: *taxes, criminal offences, secondary criminal legislation, primary criminal legislation, Italy.*

1. Introductory remarks

In order to preserve and have the efficient fiscal policy, of great importance for every country is to strike a balance between public revenue and expenditure. The public expenditure is financed from taxes and other duties paid by the citizens. According to some variants of natural law thought which start from the existence of the social contract, humans were autonomous and sovereign beings in their natural state; when they entered a community they concluded a contract by which they gave up some of their

[1] Research Fellow, Institute of Comparative Law, mail: suputjelena@yahoo.com.

powers in favour of the state, but they also retained some of their rights.[2] The rights that they waived in the favour of the state are their obligations towards the state, and the rights that they retained are human rights proclaimed by the international and national documents. Thus, the obligation towards the state to pay taxes represents a waiver of a part of the right to property, i.e. a part of their property, but it is at the same time a precondition for achieving the economic, social and cultural rights, whose achievement is financed from the taxes and other duties that citizens pay to the state.[3]

However, it seems that sometimes the citizens show a resistance towards the obligation to pay dues. This is why in such situations it is necessary to apply additional pressure aimed at fulfilling these obligations. The resistance towards the obligation of paying statutory dues is likely to be the greatest if the citizens do not see the effects in terms of achieving their economic, social and cultural rights. The reasons for such an attitude may be various, and persons not paying the statutory dues may be both poor citizens and those with greater incomes. For these reasons, some behaviours by which payment of taxes and other dues is avoided, are provided for in the national legislations as tax delicts (tax violations and tax criminal offences). Given the fact that a part of tax revenues at the territory of Member States represents the revenue of the European Union, the said community is very much interested in improvement of the mechanisms which affect the prevention of tax delicts, but which also improve the cooperation of Member States in detection and processing of these offences and their perpetrators.

The main goal of prescribing tax criminal offences is not the protection of the fiscal system and the economy, but of the human rights guaranteed by international documents. The stability of the fiscal and economic system serves the achievement of human rights. Thus, the Universal Declaration of Human Rights stipulates that every member of society has the right to social security and the right to realization of the economic, social and cultural rights indispensable for his/her dignity and the free development of his/her personality, which he/she realizes with the support from the state. Likewise, the Declaration stipulates that everyone has the right to a standard of living ensuring the health and well-being of him/herself and of his/her family, including food, clothing, housing, medical care, necessary social services, as well as the right to security in the event of unemployment, sickness, disability, widowhood, old age or

[2] V. Dimitrijević *et a*l, *Ljudska prava*, Beogradski centar za ljudska prava, Dosije, Beograd 1997., 47.
[3] *Ibid.,* 370-371.

other cases of lack of livelihood in circumstances beyond his/her control.[4] Without the well-being of a state as a community, there is no well-being for an individual. The authors dealing with human rights also believe that, although human rights are protected by different mechanisms, a special place and importance still belongs to criminal sanctions.[5]

2. Tax delicts

According to some sources, a complex tax system was established way back in the ancient Egypt, during the XVIII dynasty of pharaohs, in the XV century B.C. Pharaohs requested and received once a year, in goods, one-fifth of all revenues earned in the kingdom. They then stored the goods in the royal warehouses in order to pay their civil servants. According to Herodotus, if the citizens of Egypt failed to fulfil these obligations, they could have been sentenced to a death penalty.[6] Nevertheless, the understanding of the type and severity of penalty for crimes that prevent the inflow of state revenues has changed over time. Consequently, nowadays there are various tax offences, as well as different types of sanctions, depending on the degree of social danger that any particular behaviour carries.

In addition to the fact that they contain a certain degree of social danger, punishable offences are behaviours of natural and legal persons towards which the state takes certain measures in order to prevent their further commission, that is, behaviours that are prohibited by legal norms, because they are contrary to the functioning of the state and must be prevented in order to provide the basic conditions necessary for life in a community, but also those conditions that are necessary to promote its development.[7]

However, not all behaviours deserve a criminal law sanction. The type of sanction that will be prescribed for them depends on the very degree of their social danger. Taking into account the previously mentioned, many legislations prescribe two types of sanctions: for violations and for criminal offenses. Nevertheless, even the violations contain a certain degree of social danger, however lower compared to the criminal offences.

The elements of tax criminal offences have developed through a dynamic process that has lasted for a very long time. However, tax delicts

[4] The mentioned rights are stipulated in Articles 22 and 25 of the UN's Universal Declaration of Human Rights. The Declaration was adopted and declared the Resolution of the UN General Assembly 217 A (III) of 10 December 1948.

[5] M. Paunović *et al*., *Osnovi međunarodnih ljudskih prava*, Megatrend univerzitet, Beograd 2007., 99.

[6] B. Tičar, *Uvod v korporacijsko davčno pravo*, Institut za javno upravo pri Pravni fakulteti v Ljubljani, Ljubljana 2001., 18.

[7] F. Antolisei, *Manuale di diritto penale, parte speciale*, Giuffre editore, Milano 2008., 7. e, 8.

have occurred very early in criminal legislation and have constantly been present in all countries throughout their historical development.[8]

All countries strive to combat tax crime. There are certain differences in criminal legislations in terms of determining the elements of tax criminal offences. However, their primary goal is the same – a threat of sanctioning those who would avoid reporting data and facts of relevance for assessing tax or other fiscal dues to the competent authorities, or those who would present false information on these facts in order to avoid total or partial fulfilment of such obligations.[9]

In Italy, tax criminal offences are provided for by a single law – the Law on Tax Crimes (hereinafter referred to as LTC)[10], while in Germany – by the Federal Fiscal Code.[11] Unlike in Italy, where this is not a secondary, but a separate law that is the integral part of the criminal legislation given that it exclusively regulates the matter concerning tax crimes, in Germany, the tax criminal offences, together with the customs criminal offences, are provided for exclusively by the secondary criminal legislation. Prescribing tax criminal offences in laws governing the tax matter has both advantages and disadvantages. Specifically, having in mind that these are criminal offences with incomplete description[12], defining the specific elements of the crime is easier when they are provided for by the secondary criminal legislation. The disadvantages are reflected in poor nomotechnics, which differs from the one contained in the criminal law provisions. Likewise, the question may arise on the adequate assessment of the social danger of a tax criminal offence when prescribing sanctions, and it is therefore a better solution when all criminal offences are provided for exclusively by the criminal code. Naturally, this is also a better solution in terms of legal certainty. However, it seems that the highest legal uncertainty is created by a situation where tax criminal offences are provided for by two laws. This is the case in the Republic of Serbia, where the mentioned offences are provided for by both the Law on Tax Procedure and

[8] M. Kulić, G. Milošević, „Poreski kriminalitet", *Revija za kriminologiju i krivično pravo* 3/2010, 108.
[9] *Ibid*.
[10] Legge sui reati tributari, Decreto Legislativo 10 marzo 2000, n. 74 sul reati tributari Pubblicato sulla *Gazzeta Ufficale-Serie Generale*, n. 76 del 31. marzo 2000, Testo e aggiornato al Decreto legislativo 24 Settembre 2015, n. 158.
[11] Fiscal Code of Germany in the version promulgated on 1 October 2002 (Federal Law Gazette (Bundesgesetzblatt) l p. 3866; l p. 61), last amended by Article 5 of the Ordinance of 3 December 2015 (Federal Law Gazette l p. 2178), *https://www.gesetze-im-internet.de/englisch_ad.html,* last visited 11 October 2016.
[12] Incomplete description of a crime only partially determines specific elements of criminal offence. For complete determination of a criminal offence, application of other regulations is necessary. When it comes to tax criminal offences, those are regulations governing tax matters.

Tax Administration[13] and the Criminal Code.[14] Since in Italy the problem of tax criminal offences is approached in a specific manner, the subject of the analysis in this paper are, first of all, the provisions of the Italian LTC. The said law, in addition to the provisions of substantive law nature, also contains provisions of procedural law nature, bearing in mind the specific nature of the matter it regulates.

3. Tax criminal offences in the Italian legislation

The tax criminal offences in Italy are regulated by a special LTC. These offences are characterized by a high degree of social danger, since the loss caused by failure to pay taxes or other dues is extremely harmful for the fiscal interests of the state.[15] As has already been said, the tax criminal offences in Italy are provided for by a special regulation. The reason for such legislator's approach, above all, lies in the specific nature of the mentioned offences, as well as in the manner of their detection and elimination of the harmful consequences of their commission, which through endangering the fiscal interest of the state also endanger the rights of its citizens.

The Italian LTC prescribes two groups of criminal offences. The first group, envisaged within the first part of the said Law, contains criminal offences relating to filing information of relevance for assessing the tax liability[16], while the second group contains criminal offences relating to the tax documentation and tax payment[17]. In addition, the Law also foresees security measures[18], which can be imposed on the perpetrators

[13] Zakon o poreskom postupku i poreskoj administraciji [The Law on Tax Procedure and Tax Administration], *Službeni glasnik Republike Srbije,* broj 80/2002, 84/2002 - ispr., 23/2003 - ispr., 70/2003, 55/2004, 61/2005, 85/2005 - dr. zakon, 62/2006 - dr. zakon, 63/2006 - ispr. dr. zakona, 61/2007, 20/2009, 72/2009 - dr. zakon, 53/2010, 101/2011, 2/2012 - ispr., 93/2012, 47/2013, 108/2013, 68/2014, 105/2014, 91/2015 - autentično tumačenje, 112/2015 i 15/2016.

[14] Krivični zakonik Republike Srbije [The Criminal Code of the Republic of Serbia], *Službeni glasnik Republike Srbije*, broj 85/2005, 88/2005-ispr., 107/2005-ispr., 72/2009, 111/2009, 121/2012, 104/2013 i 108/2014).

[15] S. Gennai, A Traversi, *I deliti tributari, profili sostanziali e processuali*. Giuffre Editore, Milano 2011., 41.

[16] All tax criminal offences are provided for in the Chapter II of the Italian LTC. Offences relating to filing information relevant for determining the tax liability are provided for in the said Chapter, in the first section, Articles 2-7 of the mentioned Law.

[17] Criminal offences relating to the tax documents and tax payment are provided for in the section II, Articles 8-11 of the Italian LTC.

[18] The additional sanctions are foreseen within the provisions that are mutual for all tax criminal offences stipulated by the Law. They are prescribed in the Chapter III, Article 12 of the LTC. Within the same Chapter, Article 12-bis foresees the provision on seizure of assets, while Article 13 foresees a possibility of exemption from punishment, if the perpetrator of the offence, under conditions stipulated by law, pays his/her tax debt. In addition, the Chapter III also foresees the mitigating and aggravating circumstances which the court takes into account when determining the punishment.

of tax criminal offences, as well as some provisions of the procedural law nature, such as the provision on the territorial jurisdiction of the court[19]. The Law also contains the provision on handling the objects confiscated during a tax control[20], as well as provisions governing the relation between the criminal and administrative sanctions.[21]

3.1. Tax criminal offences relating to filing information of relevance for assessing the tax liability

The Italian LTC foresees two groups of the mentioned offences. The group of offences relating to filing information of relevance for assessing the tax liability contains the following criminal offences: filing false information contained in invoices or other documents for non-existing transactions[22], filing false information by using other fraudulent means[23], Filing a false tax return[24] and failure to file a tax return[25].

3.1.1. Filing false information contained in invoices or other documents for non-existing transactions

The criminal offence of filing false information contained in invoices or other documents for non-existing transactions exists if a person, in order to evade payment of income tax or value-added tax, files to the competent authorities false information contained in invoices or other documents for non-existing transactions for the purpose of presenting a false amount of relevance for assessing the tax liability. Perpetrator of the mentioned offence can be a person who, in accordance with the tax regulations, is obliged to pay the income tax or the value added-tax. The prescribed punishment for the perpetrator of this offence is imprisonment from one year and six months, up to six years. Bearing in mind that the act is undertaken for the purpose of presenting a false amount relevant for assessing the tax liability, the criminal offence of filing false information contained in invoices or other documents for non-

[19] The territorial jurisdiction of the court is prescribed in Article 18 of the LTC.
[20] The procedure of handling the confiscated objects is prescribed in Article 18-bis of the LTC.
[21] The relation between the criminal and administrative sanctions, as well as between the competent authorities in tax, administrative and criminal proceedings, is prescribed within the Chapter IV, Articles 19-21.
[22] The criminal offence of filing false information contained in invoices or other documents for non-existing transactions is prescribed in Article 2 of the LTC.
[23] The criminal offence of filing false information by using other fraudulent means is prescribed in Article 3 of the Law.
[24] The criminal offence of filing a false tax return is prescribed in Article 4 of the Law.
[25] The criminal offence of failure to file a tax return is prescribed in Article 5 of the Law.

existing transactions can be committed only with an intent. However, in order for this offence to occur, it is not necessary that the competent authorities, due to committed criminal offence, have really determined the lower amount of the tax liability. The mentioned punishment is foreseen in the case when filing false information contained in invoices or other documents for non-existing transactions was committed for the purpose of evasion of payment of income tax or value-added tax in the amount of EUR 154,937.07 or ITL 300 million. In cases when the amount is lower, a less serious form of this criminal offence will exist, with the punishment of imprisonment from six months up to one year.

The term *issuing invoices or other documents for non-existing transactions* is defined in Article 1, Paragraph 1, Item a) of the LTC. According to this provision, in order for the criminal offence prescribed in Article 3 of the said Law to exist, it is necessary that invoices or other documents that can be used as a basis for assessing the tax liability in accordance with tax regulations, were issued in connection with business operations that were not carried out in whole or in part, or that do not match the actual value of the performed transaction. This means that, for example, the criminal offence will exist even if an amount that is lower than the value of purchased goods is entered in the invoice or other documents in order to assess or calculate a lower amount of tax liability.

In addition to the punishment, some of the following security measures foreseen in the LTC can be imposed on the perpetrator of the criminal offence: ban on working of a legal person from six months up to three years, inability to conclude contracts (i.e. business operations) with the state administration from one up to three years[26], ban on practising a duty of a tax representative or advisor from one up to five years, permanent exclusion from membership in a tax commission and publication of the judgement in accordance with Article 36 of the Penal Code.[27]

The security measure of ban on working of a legal person from six months up to three years, as well as the security measure reflected in the inability to conclude contracts (i.e. business operations) with the state

[26] In a way, this measure seems like retaliation. Given that the legal person has not paid a certain amount in the budget in accordance with tax regulations, it is denied the possibility of receiving certain funds from the budget, for example, based on a concluded public procurement contract.

[27] Article 36 of the Criminal Code of Italy foresees the publication of the judgement on the website of the Ministry of Justice. The duration of the public display of the judgement is up to 30 days, and for how long the judgement will be available to the public depends on the court's decision. In the absence of such a decision, the judgement will be available to the public on the website of the Ministry for fifteen days. The judgement is published in the enacting terms of the decision, unless the judge decides otherwise. The judgement is published at the expense of the convicted person. Codice Penale, Regio Decreto 19 ottobre 1930. n. 1398, Decreto Legislativo 21. guiguno 2015, n. 125, L 11 luglio 2016, n. 133 e L. 28 luglio 2016, n. 153. *http://www.altalex.com/documents/codici-altalex/2014/10/30/codice-penale*, last visited 20 October 2016.

administration from one up to three years, largely affects all business entities, given the fact that during this period they could lose a large part of the potential revenues. Therefore, it appears that the said security measures may have adequate preventive effect on potential perpetrators of tax criminal offences. Unlike the previously mentioned security measures, ban on practising a duty of a tax representative or advisor from one up to five years, as well as permanent exclusion from membership in a tax commission, are imposed on natural person who is a perpetrator of some of the criminal offences provided for by the LTC. The measure of publication of the judgement may be imposed on both legal and natural persons who, in accordance with the Law, can be considered a perpetrator of tax criminal offences.

In addition, the Law stipulates the mandatory imposition of the security measure of ban on practising public service from one up to three years. This measure is not imposed for a less serious form of the criminal offence of filing false information contained in invoices or other documents for non-existing transactions. The said security measures deprive the perpetrator of a criminal offence of or limit his/her certain rights, however at the same time they represent means of protection of a society from criminal offences that harm it.[28] Therefore, in each specific case the court should assess whether there is a need for its application.

For this criminal offence, as well as for other tax criminal offences in cases provide for in Article 163 of the Italian Criminal Code, a suspended sentence can be imposed.[29] Nevertheless, the suspended sentence won't be imposed if the amount of the unpaid tax exceeds 30% of the value of turnover, as well as if the amount of the tax intended to be evaded exceeds EUR 3 million. Article 6 of the LTC explicitly stipulates that one cannot be punished for the attempted criminal offence of filing false information contained in invoices or other documents for non-existing transactions exists. Although not explicitly stipulated by law, it can be concluded from the legal description of *actus reus* of the criminal offence that an attempt of such criminal offence is not even possible.

[28] D. Jovašević, *Leksikon krivičnog prava*, Službeni glasnik, Beograd 2006., 295.

[29] Pursuant to Article 163 of the Italian Criminal Code, a suspended sentence can be imposed if the perpetrator has committed a criminal offence punishable by up to two years imprisonment. A suspended sentence can also be imposed if the perpetrator was punished with a fine (be it a basic punishment or auxiliary punishment that complements punishment of up to two years imprisonment). According to Article 163 of the Italian Criminal Code, a suspended sentence can be delayed for three months.

3.1.2. Filing false information by using other fraudulent means

Except in the cases provided for in Article 2 of the LTC, the punishment of imprisonment from one year and six months up to seven years can be imposed on a person who, in order to evade tax payment or assessment of the tax liability, uses false business operations, false documents or other means to deceive the authorities competent for tax assessment and collection of tax liabilities, as well as in case if he/she files an incomplete tax return in terms of the amount of liabilities. Precondition for the criminal offence of filing false information by using other fraudulent means is that *actus reus* was undertaken for the purpose of assessing the lower amount of tax liability or accepting a false amount of tax credit. In addition to these preconditions, the following conditions must also be met: that the amount of the duty whose assessment is being evaded, in relation to certain taxes (duties), exceeds EUR 30,000, and that the amount of the tax that would have been paid, if there had been no misrepresentation of data, is by five per cent higher than the amount that would have been assessed by filing false data, or if the amount of the tax that would have been paid, if there had been no misrepresentation of data, is higher by EUR 1 million than the amount that would have been assessed by filing false data.

The above-mentioned conditions represent a legislative motive for criminalization, that is, the reason why a specific behaviour is defined as a criminal offence.[30] Perpetrator of this criminal offence can be both a person who is a taxpayer and a person who has the right to a tax credit in accordance with tax regulations. For the existence of this offence, it is not necessary that its consequence really occurred – that the false amount of the tax liability or tax credit was really assessed. It is sufficient that *actus reus* was undertaken in order to assess a lower amount of tax to be paid or to accept the false amount of the tax credit, together with the fulfilment of the previously mentioned conditions.

In addition to the punishment stipulated for the criminal offence of filing false information by using other fraudulent means, the perpetrator of

[30] However, one should have in mind the provision of Article 3, Paragraphs 2 and 3 of the LTC, according to which for the existence of the criminal offence under this Article, it has to include documents that are a part of the mandatory accounting documentation in accordance with the relevant regulations, which can be used as evidence before the competent financial authorities in certain procedures, including the tax liability assessment procedure. In addition, for the existence of the criminal offence stipulated in Article 3 of the LTC, it is not sufficient that a false invoice was issued, i.e. invoice which contains false information, as well as that false information whose amount is smaller than the actual are reported in the accounting books. It is necessary that these are documents and records used for the purpose of tax liability assessment that are presented to the competent tax authorities. Likewise, *actus reus* must be undertaken with the purpose of deceiving the competent tax authorities and assessment of a lower amount of tax liability.

this offence can also be imposed with some of security measures that can also be imposed on perpetrators of other tax criminal offences stipulated by law: ban on working of a legal person from six months up to three years, inability to conclude contracts (i.e. business operations) with the state administration from one up to three years, ban on practising a duty of a tax representative or advisor from one up to five years, permanent exclusion from membership in a tax commission, and publication of the judgement in accordance with Article 36 of the Italian Criminal Code. Of course, the said security measures are imposed depending on the perpetrator's status (natural or physical person), as well as on the court's assessment in each specific case. Likewise, the measure of confiscation of material gain can also be imposed on the perpetrator of the criminal offence of filing false information by using other fraudulent means. When it comes to the criminal offence stipulated in Article 3, the mandatory security measure of ban on practising public service from one up to three years is imposed on its perpetrator.[31]

Article 6 of the LTC explicitly prescribes that it is not possible to punish a person for the attempted criminal offence of filing false information by using other fraudulent means. Nevertheless, this attitude of the legislator stems from the very legal description of the specific elements of the criminal offence of filing false information by using other fraudulent means.

3.1.3. Filing a false tax return

The criminal offence of filing a false tax return is stipulated in Article 4 of the Italian LTC. Imprisonment from one up to three years is foreseen for a person who with intent to avoid the assessment of the obligation of payment of income tax or value-added tax, reports in the annual tax return information of relevance for assessment of tax liability in the amount lower than the actual. The following conditions must be met for this criminal offence to exist: that the amount of the liability whose payment is evaded exceeds EUR 150,000, and that the amount of the liability whose payment is evaded is higher by 10% than the amount reported in the tax return or that it exceeds EUR 3 million.

The mentioned amounts represent a legislative motive for criminalization, and for the existence of the criminal offence of filing a false tax return, the existence of the perpetrator's intent is necessary, given that *actus reus* was undertaken with a specific purpose. Depending

[31] Cases in which the security measure of ban on practising public service from one up to three years is mandatory imposed are provided for by Article 12, Paragraph 2 of the LTC.

on the perpetrator's status and the court's assessment in each specific case, some of the following security measures prescribed by law can be imposed: ban on working of a legal person from six months up to three years, inability to conclude contracts (i.e. business operations) with the state administration from one up to three years, ban on practising a duty of a tax representative or advisor from one up to five years, permanent exclusion from membership in a tax commission, and publication of the judgement in accordance with Article 36 of the Italian Criminal Code. In addition to the said measures, the measure of confiscation of material gain obtained by this criminal offence can also be imposed.

For the existence of the criminal offence of filing a false tax return, it is necessary that it is an annual tax return, with the fulfilment of the additional conditions, which refer both to the amount of the tax liability and the amount whose payment is evaded. In addition, for the existence of the criminal offence stipulated in Article 4 of the LTC, it is not required that a smaller amount of the tax liability was really assessed – it is sufficient that the perpetrator had the intent that the tax authorities assessed a smaller amount of the tax liability than the real one.

Article 6 of the LTC explicitly prescribes that it is not possible to punish a person for the attempted criminal offence of filing a false tax return. From the very legal description of the specific elements of the criminal offence of filing a false tax return stems that its attempt is not possible, hence such an attitude of the legislator contained in the said Article.

3.1.4. Failure to file a tax return

Article 5 of the LTC foresees the criminal offence of failure to file a tax return, as a last resort for combating this unlawful act.[32] This offence is a so-called criminal offence of omission, given that its *actus reus* consists of the omission.[33] The thing in common for the criminal offence of failure to file a tax return and other offences that consist of avoiding of filing a tax return or documentation of relevance to the tax authorities, is the inability to evident and asses the tax liability in total or partially.[34]

Imprisonment from one year and six months up to four years is foreseen for a person who with intent to evade the payment of income tax or value-added tax, fails to file a tax return to the tax authorities in accordance with the relevant regulations, if the amount of the concrete tax liability exceeds EUR 50,000. The same punishment will be imposed

[32] G .L. Soana Gianluca*, I reati tributari*, Giuffre editore, Milano 2009., 193.
[33] *Ibid*., 194.
[34] A. Lorio, *I nuovi reati tributari,* IPSOA Gruppo Wolters Kluwer, Milano 2012., 9.

also in the case of failure to file a withholding tax return, if the amount of the withholding tax that is intended to be evaded exceeds EUR 50,000. Article 5, Paragraph 2 stipulates that the criminal offence of failure to file a tax return will not exist if the tax return is filed within ninety days from the date of expiry of the deadline for its filing, as well as in the case when the tax return is not signed or filed in accordance with the template, that is, in the manner prescribed by relevant regulations. Depending on the perpetrator's status and the court's assessment in each specific case, some of the following security measures prescribed by law can be imposed: ban on working of a legal person from six months up to three years, inability to conclude contracts (i.e. business operations) with the state administration from one up to three years, ban on practising a duty of a tax representative or advisor from one up to five years, permanent exclusion from membership in a tax commission, and publication of the judgement in accordance with Article 36 of the Italian Criminal Code. In addition to these measures, the measure of confiscation of material gain obtained by this criminal offence can also be imposed.

3.2. Criminal offences relating to the tax documents and tax payment

Criminal offences relating to the tax documents and tax payment are foreseen in the Chapter II, section 2 of the Italian LTC. These include the following: issue of invoices or other documents for non-existing transactions[35], concealment or destruction of account books[36], non-payment of withholding tax[37], non-payment of value-added tax[38], unlawful compensation[39] and fraud relating to tax payment.[40]

3.2.1. Issue of invoices or other documents for non-existing transactions

The criminal offence of issuing of invoices or other documents for non-existing transactions exists if a person who with intent to enable

[35] The criminal offence of issuing of invoices or other documents for non-existing transactions is prescribed in Article 8 of the Italian LTC.
[36] The criminal offence of concealment or destruction of account books is prescribed in Article 10 of the LTC.
[37] The criminal offence of non-payment of withholding tax is prescribed in Article 10, Paragraph 2 of the LTC.
[38] The criminal offence of non-payment of value-added tax is prescribed in Article 10, Paragraph 4 of the LTC.
[39] The criminal offence of unlawful compensation prescribed in Article 10, Paragraph 3 of the LTC.
[40] The criminal offence of fraud relating to tax payment is prescribed in Article 11 of the LTC.

tax evasion for him/herself or other person, issues invoices or other documents for non-existing transactions. Prescribed punishment for the perpetrator of this offence is imprisonment from one year and six months up to six years. If several documents or invoices were issued for non-existing transactions during one tax year, it will be considered that one criminal offence was committed (this probably refers to the application of the provisions of the Criminal Code that define the extended criminal offence).

In addition to its basic form, the Law also prescribes a less serious form of the criminal offence, which will exist if the amount in invoices or other documents is smaller by EUR 154,937.07 or ITL 300,000,000 million from the amount that would otherwise be paid if the invoice or other documents for non-existing transactions had not been issued, which also includes a transaction performed in an amount different from actual. The punishment for the perpetrator of this offence is imprisonment from six months up to two years.

Article 9 of the LTC also regulates the question of complicity while committing the criminal offence of issuing of invoices or other documents for non-existing transactions. Notwithstanding Article 110 of the Criminal Code, issuing of invoices or other documents for non-existing transactions is not punishable as complicity in committing the criminal offence provided for in Article 2 of the LTC. Furthermore, a person who uses invoices or other documents for non-existing transactions will not be punished for complicity in the criminal offence of issuing of invoices or other documents for non-existing transactions. In fact, in this particular case, it is actually a criminal offence that precedes the commission of the criminal offence provided for by Article 2 of the LTC. The act of issuing invoices or other documents for non-existing transactions is committed for the purpose of concealment of the criminal offence of filing false information contained in invoices or other documents for non-existing transactions, i.e. for the purpose of making it difficult to detect the criminal offence prescribed in Article 2 of the LTC. This is why the offence prescribed in Article 8 is foreseen as a separate criminal offence. The perpetrator of the offence can be a person who will later, for the purpose of evading the assessment of the actual amount of the tax liability, file to the competent authorities false information contained in invoices or other documents for non-existing transactions in order to evade his/her tax liability[41], as well as a person who assists him/her in commission of the criminal offence prescribed in Article 2 of the LTC.

[41] In case that the perpetrator of the criminal offence of filing false information contained in invoices or other documents for non-existing transactions and of the criminal offence of issuing of invoices or other documents for non-existing transactions is the same person, a concurrence of criminal offences will exist.

In addition to the justified attitude of the legislator to prescribe assistance in committing the mentioned offence as a separate criminal offence, in such situations it is also justified to impose certain security measures. Of course, all security measures provided for by Article 12 of the LTC can be imposed on the perpetrator of the offence, and if the perpetrator is a person engaged in a business activity, a very strong preventive effect have the following security measures: ban on working of a legal person from six months up to three years, and inability to conclude contracts (i.e. business operations) with the state administration from one up to three years.

3.2.2. Concealment or destruction of account books

The LTC provides for the criminal offence of concealment or destruction of account books. If it doesn't fall under the legal description of specific elements of some other criminal offence, punishment of imprisonment from one year and six months up to six years can be imposed on a person who with intent to evade the payment of income tax or value-added tax, as well as to enable another person to avoid the criminal responsibility for reporting false data in account books, conceals or destroys the whole or a part of account books for which the obligation of keeping is prescribed by law, and thus prevents the assessment of the amount of income or volume of business. Perpetrator of the criminal offence of concealment or destruction of account books can be any person. However, a precondition of this offence is that *actus reus* was undertaken for the purpose of realization of some of the aforementioned goals. *Actus reus* of the criminal offence provided for in Article 10 of the LTC is also an act of aiding, since it is undertaken in order to enable another person to avoid the criminal responsibility for reporting false data in account books. When it comes to the criminal offence of concealment or destruction of account books, it is necessary that undertaken *actus reus* prevented the assessment of the amount of income or volume of business, which also reflects on the assessment of the tax liability. This at the same time is a consequence of the criminal offence. *Actus reus* is undertaken exclusively with intent. Some of the security measures provided for by Article 12 of the LTC can be imposed on the perpetrator of this offence.

3.2.3. Non-Payment of withholding tax

The LTC provides for a punishment of imprisonment from six months up to two years for a person who within the deadline for filing the annual tax return reports in the said return an amount smaller by EUR 150,000 than the actual one. Perpetrator of this criminal offence

can be a person who, according to tax regulations, is obliged to pay the withholding tax. For the existence of this offence, it is not required that the non-payment of tax really occurred, it is sufficient that a person obliged to pay duties reported an amount smaller than the actual. In addition, it is required that the actual amount is by EUR 150,000 higher than the one reported in the tax return. This amount also represents a legislative motive for criminalization of the criminal offence of non-payment of withholding tax. In addition to the punishment stipulated for this offence, some of the security measures prescribed in Article 12 of the LTC can also be imposed on the perpetrator. Nevertheless, since perpetrators of the criminal offence of non-payment of withholding tax are mostly responsible persons in legal persons, which are obliged to pay withholding tax, some of the following security measures will have the greatest impact on them: ban on working of a legal person from six months up to three years, inability to conclude contracts (i.e. business operations) with the state administration from one up to three years, as well as confiscation of gain obtained by this criminal offence.

3.2.4. Non-payment of value-added tax

The criminal offence of non-payment of value-added tax will exist if a person, within the prescribed deadline, does not pay the amount of value-added tax based on the annual tax return, in the amount of EUR 250,000 Punishment is imprisonment from six months up to two years. Perpetrator of this offence is a person who, in line with tax regulations, is obliged to pay the value-added tax. However, in this particular case, precondition is that amount of tax liability exceeds the amount of EUR 250,000, which at the same time represents a legislative motive for criminalization. In addition to the punishment prescribed for this criminal offence, some of the security measures provided for by the LTC can be imposed on the perpetrator, including the confiscation of gain obtained by this criminal offence.

3.2.5. Unlawful compensation

The criminal offence of unlawful compensation will exist if a person does not pay the amount of taxes he/she owes, but instead uses compensation pursuant to Article 17 of the Legislative Decree No. 241 of 9 July 1997. Precondition of this offence is that in this way the annual tax debt was not paid in the amount that exceeds EUR 150,000. For the perpetrator of this offence, punishment is imprisonment from six months up to two years. This offence will also exist if a person uses

compensation pursuant to Article 17 of the Legislative Decree No. 241 of 9 July 1997 for the realization of the non-existing tax credit in the amount higher than EUR 50,000. Perpetrator of this offence will be punished by imprisonment from one year and six months up to six years. Perpetrator of this criminal offence can be any taxpayer, as well as a person who has the right to tax credit. When it comes to the criminal offence of unlawful compensation, it contains incomplete description, since the determination of its contents depends exclusively on application of Article 9 and Article 17 of the Legislative Decree No. 241 of 9 July 1997. Of course, some of the security measures provided for by the LTC can be imposed on the perpetrator of this criminal offence, including the confiscation of gain obtained by this criminal offence.

3.2.6. Fraud relating to tax payment

The criminal offence of fraud relating to tax payment will exist if a person, with intent to evade the payment of income tax or fine imposed for a tax violation relating to the obligation of payment of tax in the total amount that exceeds EUR 50,000, fictively alienates or undertakes some other fraudulent actions towards his/her or the property of another, in order to complicate or prevent enforced tax collection procedure. Punishment is imprisonment from six months up to four years. If the amount of the liability or fine for a violation whose payment is evaded exceeds EUR 200,000, a more serious form of the criminal offence will exist under Article 11 of the LTC. For this offence, the prescribed punishment is imprisonment from one up to six years. The criminal offence will also exist if a person with intent to achieve for him/herself or another person payment of smaller amount of taxes and other duties, suggests that the documentation presented in the tax collection procedure contains elements according to which the amount of tax liability is by EUR 50,000 smaller than the one claimed in the enforced collection procedure. For this offence, punishment is imprisonment from six months up to four years. If the same is claimed for the amount of EUR 200,000, the more serious form of the offence will exist. In that case, punishment is imprisonment from one up to six years. In addition to the criminal sanctions, some of the security measures provided for by the LTC can be imposed on the perpetrator, including the confiscation of gain obtained by this criminal offence.

3.3. Optional grounds for impunity and mitigating and aggravating circumstances under which a criminal offense was committed

Bearing in mind that these criminal offences cause damage to the state budget, it seems that the provision of Article 13 of the LTC gives priority to the public interest rather than to the imposition of criminal sanctions, although the optional grounds for impunity are applied in order to provide an opportunity to the perpetrator of the criminal offence to repent for his/her deeds and timely prevent the occurrence of harmful consequences. The mentioned Article foresees the optional grounds for impunity that will exist if the taxpayer pays the tax debt for the following criminal offences: non-payment of withholding tax, non- payment of value-added tax and unlawful compensation before the detection of the criminal offence, including the administrative sanctions and interest, as well as if the debt is paid in the settlement proceedings in connection with the payment of arrears provided for by tax laws. This is considered to be the act of so-called active remorse, given that the person, by paying the tax debt, shows remorse for the crime he/she has committed. Likewise, the perpetrator of the criminal offence of filing a false tax return and the criminal offence of failure to file a tax return will not be punished if the tax debt, including the administrative sanctions and interest, are paid in the settlement proceedings, which also represents a sort of active remorse (in case of the criminal offence of filing a false tax return), or if the person files a tax return within the prescribed deadline for the timely assessment of the tax liability. Naturally, criminal sanctions will not be imposed on the perpetrator of the mentioned offences if he/she prior to the payment or filing of the tax return had not been notified of the inspection or audit, or of any other action which could have resulted in initiation of criminal proceedings. This is entirely justified, given that in such cases there is no act of active remorse, but the fear of criminal liability. Even when the provisions of Article 13 of the LTC are applied, the court finds the perpetrator guilty, but does not impose criminal sanctions. In such cases criminal liability is not excluded – it is stated in the decision of the competent authority, however, the punishment is not being imposed.

Article 13, Paragraph 2 of the LTC stipulates that when imposing criminal sanctions on perpetrators of tax criminal offences, the court takes into account specific mitigating or aggravating circumstances. Thus, punishment prescribed for a particular criminal offense will be reduced by half and statutory security measure will not be applied if before filing charges, the perpetrator pays the amount of tax owed, including the administrative sanctions and interest. The same applies if the tax liability is paid in the settlement proceedings (mediation) provided for

by tax regulations. The said circumstance does not constitute grounds for exemption from punishment since it does not represent active remorse; this activity can also be undertaken after the audit or tax inspection, and it is required that the tax debt is paid before filing charges to competent authorities in this case as well.

When imposing a punishment, it is considered an aggravating circumstance if some of the tax criminal offences was committed with the involvement of a person (as an accomplice) who participates in tax consulting, as well as with the assistance of a financial or banking intermediary. Aggravating circumstance is the very fact that the service of a professional was used in order to conceal the execution of the offence. In these cases, it is envisaged that when sentencing a perpetrator of some of the tax criminal offenses, prescribed punishment will be doubled.

The LTC contains many referral provisions in relation to the Criminal Code. Pursuant to Article 17 of the LTC, limitation on criminal prosecution is suspended in cases provided for in Article 160 of the Criminal Code. However, given that tax criminal offenses are detected in the financial control procedure (including control of auditors, tax or other financial inspection), it is stipulated that the statute of limitations for the mentioned offences expires after elapse of a period longer by 1/3 than the one provided for by law for criminal offenses eligible for the same sanctions.

4. Conclusion

Only a small number of countries prescribe tax criminal offences in other regulations outside the criminal legislation. Bearing in mind the specific nature of these offences, as well as the harm they cause to the social community, the Italian legislator, with intent to regulate in the best possible manner some important issues relating to the tax criminal offences, has prescribed the said offences in the Law on Tax Crimes. Of course, this Law does not belong to the secondary criminal legislation, but is a part of the system of criminal legislation, given that the phrase secondary criminal legislation is used for regulations which do not govern the criminal law matter, but which still contain provisions that provide for criminal offences in specific areas. Bearing in mind the provisions of the Italian LTC, specific solutions are already contained in the titles of the chapters which contain provisions providing for tax criminal offences. The first part provides for criminal offenses relating to filing information of relevance for assessing the tax liability, while the second part contains criminal offenses relating to tax documentation and tax payment.

In addition to the mentioned specific feature, the LTC also provides for the possibility of acquittal, if the perpetrator of the offence

due to his/her remorse for the committed offence, before being noticed that the control of financial operations will be varied out, pays the tax debt, including the interest and other accompanying debts. The goal of such a solution is the very protection of the public interest by payment of taxes. Perpetrator is given the opportunity to show remorse and thus contribute to the achievement of this interest. In addition to the aforementioned, another specific provision is the one according to which an aggravating circumstance in sentencing will be the fact that a person, in order to commit a criminal offence, has engaged a tax advisor or some other financial expert. In such cases, it is evident that the perpetrator's motive was to conceal the commission of the offence and obtain material gain. Taking into account that in such situations the court may double the prescribed punishment, that fact will have an additional preventive effect on potential perpetrators. This attitude of the legislator is justified due to the fact that a professional was hired in order to more efficiently conceal the tax liability, that is, with intent to prevent the assessment of the tax liability and tax collection. But, regardless of the large number of quality solutions, and taking into account that these are criminal offences with incomplete description and that the LTC includes a large number of referral provisions, it can be said that this form of prescribing tax criminal offences has its shortcomings, despite the need to regulate this matter in a specific manner. Still, it can be concluded that even such a solution is much better in comparison to the Serbian legislation, in which tax criminal offences are stipulated by both the Law on Tax Procedure and Tax Administration and the Criminal Code of the Republic of Serbia. If one takes into account the legal certainty, as well as other advantages of prescribing criminal offences by primary criminal legislation, it seems that the best solution is when tax criminal offences together with other offences are provided for by a criminal code of a country.

Dr Jelena Kostić
naučni saradnik
Institut za uporedno pravo, Beograd

PORESKA KRIVIČNA DELA U ITALIJANSKOM ZAKONODAVSTVU

Rezime

Iako su poreska krivična dela dela mala in prohibita, a ne mala per se, odavno postoji društveni konsenzus da određena ponašanja kojima se nanosi šteta državnom budžetu treba da budu propisana krivičnim zakonodavstvom. Prema nekim podacima kazne za neplaćanje dažbina državi postojale su još u starom Egiptu. Jedino se vremenom menjao broj poreskih krivičnih dela i vrsta sanckcije propisane za ta dela. Naravno takva rešenja bila su uslovljena konkretnim društvenim prilikama. Danas su poreska krivična dela predviđena u svim zakonodavstvima. U nekim zemljama ona su deo osnovnog krivičnog zakonodavstva, u nekim su predviđena sporednim krivičnim zakonodavstvom, dok neke zemlje imaju posebne propise koje u materiji poreskih krivičnih dela predstavljaju lex specialis. S obzirom da sadrži specifična rešenja, predmet analize u ovom radu jesu odredbe Zakona o poreskim krivičnim delima Italije.

Ključne reči: porezi, krivična dela, sporedno krivično zakonodavstvo, osnovno krivično zakonodavstvo, Italija.

Vesna Ćorić, Ph.D[1]
Rajko Radević, MSc[2]

Scientific review paper
UDC: 341.231.14+341.24:351.74

INDEPENDENT INVESTIGATION OF VIOLATIONS OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ATTRIBUTABLE TO POLICE ACTIVITIES

Abstract

In the course of last two decades some European countries have created independent police complaints bodies with investigative powers, which were originally established in Canada and Australia. The creation of these bodies is in line with the independent investigation standards which have been determined by the European Court of Human Rights in its extensive body of case law as well as by the Commissioner for Human Rights in his Opinion concerning Independent and Effective Determination of Complaints against the Police.

This article argues that the reluctance of many European states to comply with the specific independent investigation standards is a consequence of inconsistent and insufficiently clear case law of the European Court of Human Rights as well as of the incomplete wording of the Commissioner's Opinion when it comes to the investigation of human rights violations which are allegedly attributable to police activities.

Key words: *independent investigation, independent police complaints bodies, European Court of Human Rights, Commissioner for Human Rights.*

1. Introduction

There is a clear tendency of so called „proceduralisation" of substantive rights which are guaranteed by a number of articles of the European Convention on Human Rights (ECHR)**.** Namely, the European Court of Human Rights (ECtHR) distinguishes between the substantive and procedural aspects of various ECHR articles, such as Article 2, Article 3,

[1] Research Associate, Institute of Comparative Law, Belgrade; mail: vesnacoric@yahoo.com.
[2] PhD student at the University of Ljubljana, International Security Program; Coordinator and Expert of the Norwegian Project *Strengthening Integrity in the Defence and Security Sector* in Montenegro; mail: biproject.mnenor@gmail.com.

Article 4, Article 5, Article 8 and Article 10.[3] However, the procedural limbs are detachable and autonomous from the articles' substantive obligations. Thus, in certain circumstances, the ECtHR may have temporal jurisdiction over a party's procedural obligation to investigate, but not over a party's substantive obligations.[4] The procedural limbs concern positive state obligations which include but are not limited to investigation of anticipated violations of the ECtHR as well as to provision of remedies for the alleged violations.[5]

The ECtHR has developed the procedural obligations through its specific interpretation of the ECHR, which is based on the states' general duty under Article 1 of the ECHR "to secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention."[6] A common justification for this judicial creativity has been to ensure that the relevant rights guaranteed under the ECHR are "practical and effective" in their exercise and not "theoretical or illusory".[7]

However, the mere introductions of the procedural rights cannot provide sufficient safeguards of effective human rights protections unless guarantees of a fair procedure are clearly and consistently developed and applied by the ECtHR case law. These guarantees include but are not limited to effectiveness, independence, promptness and victim involvement.[8]

In the following sections, analysis will be focused on the examination of the aforementioned requirement of independence applied in one specific area where its application should sanction the widespread practice of police investigating police without any external civilian oversight provided. Thus, although the independence principle as one of safeguards of fair procedures is applicable in much broader context involving various types of state agents and different procedures, authors will analyze only ECtHR case law and related international instruments which are relevant for the independent investigation in this particular field.

More specifically, after the determination of the scope of application of the standards of independence in the ECtHR case law and in the Opinion

[3] E. Brems, „Procedural Protection: An Examination of Procedural Safeguards Read Into Substantive Convention Rights" in: *Shaping Rights in the ECHR: The Role of the European Court of Human Rights* (eds. E. Brems, J. Gerards), Cambridge University Press, New York 2014, 141-158.

[4] J. Coch, „The Difficulty of Temporal Jurisdiction in *Janowiec and Others v. Russia", Boston College International and Comparative Law Review*, vol. 38, 3/2015, 48; *Šilih v. Slovenia*, App. No. 71463/01, Judgment of 9 April 2009 (ECtHR), p. 159 (2009).

[5] E. Brems, 159.

[6] *Ibid*., 142.

[7] *Ilhan v Turkey,* App. No. 22277/93, Judgment of 9 November 2004 (ECtHR), para. 91, taken from: A. Mowbray, *The Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Rights*, Hart Publishing, Oxford 2004, 29.

[8] E. Brems, 156-160.

of the Commissioner for Human Rights concerning Independent and Effective Determination of Complaints against the Police (Commissioner's Opinion**)**, the authors will provide a short overview of the European countries which created independent police complaints bodies (IPCBs) with investigative powers. Finally, the authors will try to identify the reasons for the reluctance of many European countries to comply with the existing independent investigation standards pertaining to violations of the ECHR which are attributable to police activities**.**

2. Scope of the application of the independent investigation standards

According to the case law of the ECtHR, the requirement to conduct an effective investigation means, *inter alia*, that it is necessary for the investigators to be independent from those who were allegedly implicated in the violations of human rights.[9]

The procedural obligation to undertake effective investigation under Article 2 was rapidly developed in the mid 1990s.[10] This period has been referred to as the final era of the ECtHR development of states positive obligations, as the process of development of some other positive obligations already started in 1970s.[11] Soon after, the analogous investigation obligations had been developed under Articles 3 and Article 5 through the ECtHR jurisprudence.[12] However, some authors warn that the ECtHR has not been entirely consistent in applying the obligation to conduct independent investigations under Article 3 and that more explicit standards should be tailored as to enable a robust application of the effective investigation obligations**.**[13]

The obligation to conduct independent investigation thus arises in the context of alleged violations of various substantive articles of the

[9] *Gulec* v. *Turkey* , App. No. 54/1997, Judgment of 27 July 1998 (ECtHR), para. 81-82; *Al-Skeini and Others v. the United Kingdom,* App. No. 55721/07, Judgment of 7 July 2011 (ECTHR), para. 167, *Shanaghan v. the United Kingdom,* App. No. 37715/97, Judgment of 4 May 2011 (ECtHR), para. 89.

[10] This obligation was recognized for the first time by the ECtHR in its case *McCann v. United Kingdom,* See. *McCann v. United Kingdom*, App.No. 18984/91, Judgment of 27 September **1995** (ECtHR). para. 161, taken from J. Coch, 48; *Šilih v. Slovenia*, App. No. 71463/01, Judgment of 9 April 2009 (ECtHR).

[11] *Luedicke, Belkacem and Koc v. Germany,* App. No. 6210/73, 6877/75 and 7132/75, Judgment of 10 March 1980, (ECtHR), taken from A. Mowbray, 228.

[12] For Article 5 related obligations see: *Akdeniz v. Turkey,* App. No. 25165/94, Judgment of 31 May 2001(ECtHR) and *Kurt v. Turkey*. App. No. 24276/94, Judgment of 25 May 1998 (ECtHR), while for Article 3 see *Assenov v. Bulgaria,* App. No.90/1997/874/1086, Judgment of 28 October 1998.

[13] See for instance the case: *Ilhan v. Turkey,* App.No. 22277/93, Judgment of 27 June 2000 (ECtHR), taken from A. Mowbray, 227-228.

ECHR such as Article 2, Article 3 and Article 5. The requirement of independent investigation will be satisfied in cases where do not exist any institutional or personal connection between the decision-makers and the relevant state agents who are implicated in the alleged ECHR violations. Both members of the police and armed forces come under the notion of state agents.[14]

According to the ECtHR case law, which is also reflected in the Commissioner's Opinion, independent investigation requires not only a lack of hierarchical or institutional connection but also a practical independence between the investigators and persons who are implicated in the events.[15] The ECtHR has developed an extensive body of case law elaborating when the violation of obligation to conduct independent investigation is attributable to existence of institutional or hierarchical connection.[16]

On the contrary, the Commissioner did not sufficiently clarify the notion of institutional or hierarchical connection in its opinion apart from making a mere reference to the list of some ECtHR cases which are relevant in that regard. It only specified that in accordance with the ECHR independence principle, a member state through its primary legislation should create fully-fledged independent bodies with general responsibilities for oversight of the police complaints system and express responsibility for investigating Article 2 and Article 3 complaints in accordance with the ECHR independence principle.[17]

Commissioner further states in its Opinion that in accordance to the *Khan v. UK* judgment, the IPCBs should be appointed by and answerable to a legislative assembly or a committee of elected representatives in order to satisfy ECHR principle of independent police complaints investigation.[18] Commissioner's Opinion thus excludes any role of other two branches of government from the process of its creation, although it does not provide a sound argumentation for its stance. Namely, in coming up with a justification

[14] H. van der Wilt, „Procedural Obligations under the European Convention on Human Rights: Useful Guidelines for the Assessment of 'Unwillingness' and 'Inability' in the Context of the Complementarity Principle", *International Criminal Law Review* 9/2009, 52.

[15] *Shanaghan v. the United Kingdom*, App. No. 37715/97, judgment of 4 May 2001, (ECtHR*),* para 89; *Ramsahai and Others v. the Netherlands,* App. No. 52391/99, Judgment of 15 May 2007 (ECtHR), para 325; *Bati v Turkey,* App.Nos. 33097/96 and 57834/*00,* Judgment of 3 June 2004 (ECtHR).

[16] *Kelly and Others v. the United Kingdom*, App.No.30054/96 para 95, Judgment of 4 May 2001, (ECtHR); *Ramsahai and Others v. the Netherlands,* App.No. 52391/99, Judgment of 15 May 2007 (ECtHR), para 325.

[17] Commissioner for Human Rights, Opinion of the Commissioner for Human Rights concerning Independent and Effective Determination of Complaints against the Police, CommDH(2009)4, 12 March 2009, 8, para. 34, *https://wcd.coe.int/ViewDoc.jsp?p=&id=1417857&direct=true*, last visited 29 November 2016.

[18] *Ibid*., 8, para. 36.

it mentioned only one ECtHR case without even literally invoking the concrete text of that judgment. In doing so, it did not contribute to the better understanding of these notions.

While the determination of the hierarchical or institutional connection should not constitute a complex task in practice, the same does not apply to the determination whether or not the standard of practical independence was fulfilled. In the absence of the clear hierarchical or institutional connection, it might be quite difficult to determine in some cases whether certain investigations can be qualified as reaching the practical independence threshold as this standard is vague and implies various forms of personal connections. Practical independence is **not** easily measurable concept and thus it is not always clear to determine a degree of practical dependence which would constitute a violation of the requirement of independent investigation.

However, neither ECtHR in its judgments, nor the Commissioner in its Opinion made any additional effort to clearly explain when certain conducted investigations do not fulfill the requirement of practical independence. Some indicators were provided by the ECtHR in the case of *Ergi v Turkey.* The ECtHR found in this case that the threshold of independent investigation was not met due to heavy reliance of the public prosecutor on the information provided by the gendarmes implicated in the incident in the course of investigation conducted by the public prosecutor.[19]

Mowbray is more explicit in determining the meaning of the requirement of the practical independence. He explains that in order satisfy the requirement of practical independence, investigators must exercise a critical professional and independent assessment of evidence obtained from all sources and conduct further relevant inquiries, without automatically accepting the veracity and accuracy of reports or statements by state agents.[20] The incorporation of this clarification of the concept of practical independence in the Commissioner's opinion as well as in the ECtHR case law would be welcome as it would remove any doubts concerning its exact content.

While a risk of conducting investigation which does not meet the standard of "practical investigation" is almost unavoidable as it depends on the human factor, it seems that violations of the ECHR attributable to investigations not meeting the independent standards due to existence of institutional or hierarchical connections could be easily avoided through the introduction of an adequate regulatory and institutional framework. However, the quickly evolving line of jurisprudence of the ECtHR sanctioning the police misconduct and the related absence of independent

[19] See para. 33-34 *Ergi v. Turkey,* App.No. 40/1993/435/514, Judgment of 28 July 1998 (ECtHR).
[20] A. Mowbray, 31-33.

investigations did not sufficiently triggered the regulatory and institutional reforms within the state parties of the Council of Europe (CoE).

3. Low impact of the Commissioner's Opinion and its main causes

In response to the immanent risk of further violations of the procedural obligations of the CoE member states to effectively investigate certain alleged violations of human rights, the Commissioner for Human Rights launched a police complaints initiative in 2008. Apart from the Commissioner for Human Rights and ECtHR, the Committee for the Prevention of Torture also represents relevant institution of the CoE in this regard.[21] The Committee for the Prevention of Torture has found it necessary to make recommendations on combating police impunity for ill-treatment and misconduct following visits to various member states. Similarly to the Opinion of the Commissioner for Human Rights, the Committee for the Prevention of Torture recommends that the creation of a fully-fledged independent investigating body would be the most welcome development.[22] In some of its judgments, the ECtHR acknowledges the recommendations of the Committee for the Prevention of Torture pointing to a state's need to create a fully independent body in charge of investigating the ECHR violations attributable to police activity.[23]

Emerging of international human rights law in this regard was not limited only to Europe. Beyond the Europe, the Inter-American Court of Human Rights also emerged as a significant driver of development of the standard of independent investigation in the context of the police complaints reform**.** In the course of last decade, significant roles were played also by, the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions, the Amnesty International and the Human Rights Watch, which have been especially vocal on the subject of police impunity for misconduct and the need to investigate complaints.[24]

Some authors argue that recent case-law of supranational courts and acts of the aforementioned bodies strongly influenced the creation

[21] G. Smith, „Every Complaint Matters: Human Rights Commissioner's Opinion concerning independent and effective determination of complaints against the police", *International Journal of Law, Crime and Justice*, Vol. 38, 2/ 2010, 60-61.

[22] J. Harrison, M. Cunneen, *An Independent Police Complaints Commission*, London 2000, 1.

[23] See the judgment in *Kelly and Others v. the United Kingdom*, App.No. 30054/96 para 95, Judgment of 4 May 2001, (ECtHR), para. 114, taken from: A. Mowbray, 32.

[24] However, an initial platform for further initiatives against the police investigating police approach have been laid down, *inter alia*, in the Code of Conduct for Law Enforcement Officials (United Nations 1979) and subsequent European Code of Police Ethics (CoE 2001). Both of these acts include provision for effective and impartial complaints procedures (Art. 8 in the UN Code and para. 61 in the European Code) and recommend that states incorporate the principles laid down in their national legislation. G. Smith (2010), 61-63.

of the independent police complaints bodies (IPCBs) with powers to investigate the police within a number of countries around the globe.[25] However, the achievements look quite different when approached from the European standpoint. Namely, regardless of the extensive body of ECtHR jurisprudence and Commissioner's Opinion which calls for the creation of a fully-fledged independent investigative body, many European countries still did not create independent police complaints bodies (IPCBs) with powers to investigate the police.[26]

Furthermore, it appears that the Commissioner's Opinion was not enough influential as even the countries which created IPCBs did that before the opinion was adopted (Belgium in 1993, the United Kingdom (for England and Wales in 2004, while for Northern Ireland in 2000), Ireland in 2007, Hungary in 2008, and Cyprus in 2007).[27] In addition, there are police complaints bodies operating in France (National Commission of Deontology of Security) and Hungary (Hungarian Independent Police Complaints Board). However, they are not fully in line with the model recommended by the ECtHR principles contained in the Commissioner's Opinion. They are not provided with express powers to investigate complaints, although they operate in a similar capacity. Moreover, the French National Commission of Deontology of Security members are designated by the three branches of the government, instead by only one as it has been recommended in the Commissioner's Opinion.[28]

Actually, only Denmark and Scotland established the IPCBs after the Commissioner's Opinion was adopted. This clearly proves the low influence which the Commissioner's Opinion had on development of the institutional prerequisites for the achieving the independence of the police complaints investigations.

The causes of the states' poor response to the Commissioner's Opinion are twofold. While one group of reasons is attributable to the wording and structure of the Opinion, the other is attributable to the lack of consistency and clarity of the ECtHR case law on this matter.

Firstly, the Commissioner's Opinion aimed to distinguish the core duties that have to be fulfilled in each case as they do constitute the minimum requirement in line with ECtHR case law, from the institutional arrangements

[25] D. H. Bayley, *Changing the guard: Developing democratic police abroad*, Oxford University Press, 2006; G. Smith, International Police Complaints Reform, 2015, *http://www.cpt.coe.int/en/conferences/cpt25-Panel1-Smith.pdf*, last visited 29 November 2016; Senior Police Adviser to the OSCE in Europe, International Police Standards: Guidebook on Democratic Policing. Geneva Centre for the Democratic Control of Armed Forces, 2009, *http://www.dcaf.ch/Publications/International-Standard-Guidebook-on-Democratic-Policing*, last visited 29 November 2016.

[26] G. Smith (2010), 65.

[27] *Ibid*., 62.

[28] D. Wisler, *Police Governance: European Union Best Practices*, DCAF, Coginta, 2011, 30.

which are not mandatory, but only advisable.[29] In doing so, it seems that Commissioner did not make clear distinction as it did not addressed all relevant issues.

While it is clear from the Commissioner's Opinion that five ECtHR principles for the effective investigation of complaints against the police are applicable to the alleged violation of Article 2 or Article 3 of the ECHR, it remained silent whether in the case of alleged violations of substantive rights protected under some other articles (such as Article 5 or Article 8), there is also a strict duty to conduct the effective investigation in line with these five principles. Although the ECtHR case law explicitly specifies that the procedural dimension is not limited only to case of violations of Article 2 and Article 3 of the ECHR, the Commissioner's Opinion remained silent on this point.

Furthermore, the Commissioner's Opinion specifies five ECtHR principles for the effective investigation which are applicable in the context of complaints against the police. However, it does not substantially elaborate on their meaning and content, in particular when it comes to the independence principle. It neither explicitly clarifies the meaning of practical independence, nor it elaborates sufficiently on requirement of the lack of the existence of institutional or hierarchical connection.

The mere referral to the ECtHR judgment in *Khan v. UK* was aimed to provide justification for the creation the independent body which shall be appointed by and answerable to a legislative assembly or a committee of elected representatives seems is insufficient.[30] However, in order to provide a sound justification for such structure of the independent investigative body, the Commissioner's Opinion should have invoked more judgments which were relevant in this regard. Also, it had to make more specific reliance on the text of the concerned judgment as to provide a stronger legitimacy for its recommendations.

In addition, the ECtHR jurisprudence is not fully coherent on the issue of independent investigations what gives rise to legal insecurity and apparently undermines states' efforts to fully comply with the case law of the ECtHR as well as with the recommendations from the Commissioner's Opinion. Much of the confusion has been triggered by the approach taken by the ECtHR in some judgments, which may be interpreted as undermining the importance of the requirement of the existence of independent investigative bodies.

Namely, the ECtHR in certain judgments applies the test, according to which the initial deficiencies of the non-independent investigation are

[29] Commissioner for Human Rights, 8, para. 32.
[30] *Ibid*., 8, para. 36.

capable to be remedied by the subsequent criminal proceedings.[31] By allowing this subsequent correction of initially deficient investigation, the ECtHR shows disrespect towards the independent police complaints investigations standards when adjudicates on the violation of states' procedural obligations.

Furthermore, the ECtHR occasional avoidance to strictly apply general criteria and check lists when assessing the effectiveness of the investigation in question is also detrimental for the creation of the independent investigative bodies. Namely, the ECtHR view that the minimum threshold of the investigation's effectiveness (including thus its independency) should be tailored according to the circumstances of each particular case, leaves a wide margin of appreciation to the states and certainly demotivates them from the reform of their institutional frameworks.[32] More consistent approach of the ECtHR will surely lead to more uniform application of independence principle when it comes to the reform of national bodies in charge of police complaints investigation.

4. Conclusion

The trend of "proceduralization" of substantive articles of ECHR partly coincides with the trend of the institutional reform aimed at creation of independent police complaints bodies with investigative powers in Europe. However, while the given "proceduralization" approach have produced widespread, substantial and far-reaching effects, the targeted institutional reform focused on the application of the ECtHR principle of independent police complaints investigation was thus far only of limited success.

The low impact of the Commissioner's Opinion on reform of institutional frameworks of European states can be explained by various deficiencies which were identified in the text of the Commissioner's Opinion as well as in the ECtHR case law pertaining to investigation of violations which are attributable to police activities. Neither the ECtHR case law nor the Commissioner's Opinion explained the notion of practical independence which constitutes the necessary prerequisite for reaching compliance with the independent investigation principle. The incorporation of this clarification would be welcome as it would remove any doubts concerning the content of not easily measurable concept of practical independence.

When it comes to sanctioning the existence of the hierarchical or institutional connection, the ECtHR developed extensive body of case

[31] *Đekić and Others v. Serbia*, App. No. 32277/07, Judgment of 29 April 2014 (ECtHR), para. 38.
[32] *Velikova v. Bulgaria,* App.No. 41488/98, Judgment of 18 May 2000 (ECtHR), para. 80.

law. However it did not take explicit and coherent approach regarding these components of the independent police complaints investigation. By avoiding to provide a specific and uniform answer about the structure of the investigative mechanism which is necessary for disabling the existence of hierarchical or institutional connection, the ECtHR contributed to development of a great variety of institutional investigative frameworks in Europe, which were only occasionally sanctioned by the ECtHR. The legal insecurity in this area is apparently a consequence of the lack of transparent and consistent ECtHR standards of effective police complaints investigation. The Commissioner, on its part, so far missed the opportunity to at least make more transparent those standards which are uniformly applied by the ECtHR in the given matter. On the other hand, it is up to the ECtHR to try to develop more explicit and consistent standards on independent police complaints investigation and by doing so to contribute to increase of legal certainty in this area.

Dr Vesna Ćorić
naučni saradnik, Institut za uporedno pravo, Beograd
Mr Rajko Radević
doktorand na programu međunarodne bezbednosti na Univerzitetu u Ljubljani;
Koordinator i ekspert norveškog projekta *Jačanje integriteta u sektoru bezbednosti i odbrane* u Crnoj Gori

NEZAVISNA ISTRAGA ZBOG POVREDA PRAVA GARANTOVANIH EVROPSKOM KONVENCIJOM O LJUDSKIM PRAVIMA KOJE SE PRIPISUJU DELOVANJU POLICIJE

Rezime

U toku poslednje dve decenije pojedine evropske države su osnovala nezavisna istražna tela za podnošenje pritužbi na rad policijskih službenika, koji su izvorno bila uspostavljena u Kanadi i Australiji. Ova tela formirana su u skladu sa standardima nezavisne istrage koje je razvio Evropski sud za ljudska prava kroz svoju bogatu praksu, kao i Komesar

za ljudska prava u svom mišljenju koje se odnosi na nezavisno i efikasno postupanje po pritužbama protiv policijskih službenika.

U radu se iznosi teza da je slaba primena pomenutih standarda posledica nedovoljno jasne i neusklađene prakse Evropskog suda za ljudska prava, kao i nepotpunih formulacija sadržanih u Mišljenju Komesara za ljudska prava u pogledu koncepta istrage zbog povreda ljudskih prava koje su navodno počinili policijski službenici.

Ključne reči: nezavisna istraga, nezavisna tela za podnošenje pritužbi protiv policijskih službenika, Evropski sud za ljudska prava, Komesar za ljudska prava.

Prof. Dragana Petrović, Ph.D.[1]

Scientific review paper
UDC: 343.2.01:179.7

INSTRUCTIONS FOR ASSESSING PROS AND CONS "DEATH WITH DIGNITY"

Abstract

Whether it is called "dignified", "proud" or "privileged death", "voluntary killing", killing at request", "assisted suicide", "mercy killing" or "pity killing"... euthanasia's legal, ethical and actual aspects have been the subject of discussions for centuries. The name of our topic, consisting of just two words, mercy killing, which are at first sight so contradictory (mutually exclusive), speaks for itself. In this paper the author underlines that, due to its increasing application, euthanasia has become unavoidable subject of criminal considerations and social interest. It draws the attention with its controversy, complexity, versatile forms of execution and possibilities for abuse. Through a prism of different theoretical streams and studies and reviews of its application in practice, the author at the very beginning of this paper presents the following view. Reviewing contemporary trends in the field of legal regulation of euthanasia, comparative legislations meander through chaotic paths of mutually connected and confronted stands which can easily turn into a pure façade, that is into an illusion of ideal solutions. This is, unfortunately, the existing general frame within which we can seek answers to some of the questions that this topic raises.

Key words: *authentic human needs, empathy, compassion, and abuse of ordinary murder.*

1. Introductory considerations

In no other form of life, but human life, time plays major role. Human life is not just present time, it is the "touching point" between the past and the future, the epicenter of the unbearable contradiction between life and death.

For all of us time is primary factor since future offers the possibilities of living a quality life, opens new horizons for the realization of our motivations, expectations and achieving of human freedom.

[1] Research Fellow, Institute of Comparative Law, Belgrade, mail: draganapetrovic079@gmail.com

Discussions on this topic are older than life itself, which is a passing phenomenon, while the deliberation on euthanasia is a constant.

Therefore, the opinions on this issue can be both temporary and inadequate, satisfactory and definite - constantly being upgraded with new stands and changes and critics of the old ones. The history of this issue is full of speculations, scrutiny, unproven and disputable statements…

This is so much true about euthanasia since this phenomenon is complex, extremely plural in its form, with "many faces" of merciful ending of life of a dying patient and with many possibilities for the abuse.

To attempt to explain this phenomenon actually means to shed light on both moments, that is its both sides and make conclusions on the basis of these findings. This is even more important in this moment of the civilization's growth glorifying individual freedoms, but at the same time facing moral alienation as its recognizable trait. Thus, unveiling all the aspects of this human drama becomes a prerequisite by itself.

However, we have decided to take another road.

At the beginning, the author pointed that "mercy killing" is the topic discussed from the aspect of medical ethics, law, philosophy, theology…

But, medicine, before all.

All these disciplines allow a thorough insight into the essence of the discussed issue, but this does not mean that they have established a unique, uniform and undivided stand, mutually shared by all. On the contrary, a number of different opinions have been established, each of them pretending to be "the right one" offering broader, more rightful and adequate postulates, that is arguments in favor or against euthanasia.

Yet, we decided to focus on medical and legal aspects of this problem with a note that it seems that doctors, starting from basic, fundamental principal of their profession, look on human beings and their lives not only as purely existing reality, but also attempting to describe it in a more virtual reality. In other words, they attempt to prolong life of a dying patient by extending "the natural boundaries" over their maximum. In this context, we can understand their stand that, generally, they are against the legalization of euthanasia.

This paper is not the place for bringing up and explaining every single of these arguments. Our intention is to focus only on critical points that should be legally better regulated and reshaped. In other words, we are moving in the direction of bringing up the arguments for and against of limiting human reactions, that is restricting or allowing individuals to realize personal initiative and autonomy, but only taking into consideration all possible aspects and conditions of this form of ending a person's life.

We are here presenting some of extraordinary circumstances over which law should exercise "general control" since the law is the only

medium that can comprise all aspects and conditions related to this form of ending of life, that is all objective circumstances at the same time strictly regulating subjective human reactions , thus maybe restricting their freedom, but offering them security in exchange, as well as preventing the abuse. [2]

2. Arguments pro significance and contesting

- The right of a person to choose life or death

Legalization of euthanasia allows a person to have a complete control over his own life. He may or may not choose to resort to euthanasia. As long as euthanasia remains illegal, a person does not have a total control over his life, that as, he cannot legally opt for this form of dying. Should individuals be deprived of such a choice?[3]

- The right of a person to choose the quality of life over the light of life

This problem is also connected with the right to choice, that is to choose according to your beliefs whether the quality of your life is more important than its length.[4] As long as euthanasia remains illegal, those who believe in the quality over quantity of life are deprived of the freedom of expressing their beliefs.

- Suffering is painful

Does a person suffering from incurable painful condition and wishes to die have the right to end his life or is forced to live on by law.[5] Should we force a suffering individual to live in pain against his will?

- Relying on the latest and expensive medical equipment and medications and/or knowledge

Since the price of medical treatments is in a constant growth, is it justifiable to use the latest expensive medical equipment, procedures medications in cases where the only expected positive result is the prolongation of life, without hope for recovery ofr for the improved quality of life?

---

[2]http://www.iaetf.org/fctholl.htm/*nowwhat.cog7.**org**/life_death_and_euthanasia-resources/, 15.07.2016.*

[3] *http://on-ramp.ior.com/čjeffw/faqsfin.htm*, 16.12.2014.

[4] *http://euthanasia.com/britain,* 28.01.2015.

[5] http://*www.nhs.uk/.../Euthanasiaandassistedsuicide/.../Introduction, 16.07.2016.*

- Decreasing the risk of legal implications of those who are helping these patients

Since euthanasia is today covertly happening, its legalization would prevent criminal investigation of those allegedly involved. Although euthanasia is still illegal, courts are often reluctant to prosecute these cases or judges are lenient towards the offenders. Moreover, given the fact that these cases are difficult to prove, legalization of euthanasia would prevent long and expensive court processes.[6]

2.1. Fearing euthanasia

The problem of God -fearing people?
Euthanasia represents a very complex religious problem.
Five religious views on life
1 "It is forbidden to end life"

Biblical laws forbid any form of killing. Ending a human life includes killing out of mental instability, hatred and animosity (killing), as well as mercy killing (euthanasia). Regardless the mental state or motives, the bible forbids any form of ending life.

2 "Life makes sense"

Atheism rejects the belief that life full of suffering makes sense. From the atheistic perception of life, it makes sense only if it is fun and enjoyable. If fun and joy disappear and life is not optimally enjoyed due to old age or disease, the life loses its sense and may be ended through euthanasia.

Almost all religions, namely monotheistic, believe that life (existence) on this world has its purpose – there are many things that need to be fulfilled in one's lifetime, and not all of them are pleasant and enjoyable. This means that even if something in our lives is not functioning well and in optimal way, there is still a reason to carry on with life.

3 "Life has a mission"

The view that life makes sense is in line with the belief that life is something more than daily existence, that is, that every human being has a mission, assignment or a role to be fulfilled in his lifetime. This view is in accord with the opinion that line "life makes sense" cannot be applied to coma patients and those suffering from severe dementia. One's life makes sense only when there is an assignment to be fulfilled. Also, it is possible to imagine that someone lives on, even in deep coma, just to test

[6] *http://www.rochford.org/suicide/infor/esseys/9802*, 12.02.1998.

his family members.

Fulfillment of this assignment varies depending on one's religious beliefs and way of life. The main argument is that what you do in your life has strong impact on your afterlife and reincarnation.

In their declaration issued after the Bishops Conference of the Netherlands, this body stated that it was a good thing that euthanasia remained a punishable offence as a reminder of God's gift of human life, meaning that, no one, but God, has a right to govern anyone's life. Even the right to govern your own life is not absolute. A person cannot be the owner of his life and decide when he will be born and when he will die, and how his life will be governed.

Responsibility

Law enforcement and abiding

The Bishops believe that by punishing those who end life, life preserves its effectiveness. They demand from the authorities and the Parliament to monitor whether effective punishable measures are being applied to those who violate the laws, and not only in cases of the patients with diminished capacities.[7]

According to the conducted researches, the main goal of the Law on euthanasia (to determine the scope if this practice) has not been achieved, since only 40 % of such cases have been reported. The fact that almost 60% of cases of the intentional ending of life remained unreported, that is concealed, speaks about the possibility of serious offences being committed in theses cases. The research was conducted for the year of 1995 when 3 200 requests for euthanasia were reported. In 1990 the number of requests for assisted dying was 2200. It has been estimated that the number of "unrequested" assistances, that is the number of unreported cases of euthanasia is about 900 per year. The Bishops therefore concluded that officials' control over physician-assisted dying had not been applied according to law.[8]

2.2. Who is a "candidate" for assisted suicide or active voluntary euthanasia?

The most conservative responders to this question would allow assisted suicide or active voluntary euthanasia only in cases when the patient who is suffering from a permanent physical disease causing serious uncontrollable problems places such a request. But these requirements

[7] *http: //euthanasia.com/colum2.html*, 17.07.2016.

[8] Choice between life and death, Joint body of Dutch Reformed Church Pastorate, Dutch Reformed Church and Evangelical Lutheran Church in the Netherlands, established in the General meeting of July 5th, 1997

considerably narrow the scope of candidates for assisted suicide and, very often, the situation goes to quite opposite direction – towards the liberation of these conditions on which grounds several laws on euthanasia are based. For example, the condition of permanent illness is missing in Hawaiian legislation in N.V. 342 (1975): the only condition is that the patient is suffering form an incurable disease causing severe problems. In this way, for example, quadriplegic patients would be allowed to request an assisted suicide. In this context, the draft of this law excludes another condition – incurability of disease, so that a patient with small chances of being cured, or even with a possibility of being cured, but only if he undertakes painful and excruciating treatments (for example, in case of severe burns) could resort to this unorthodox measure. On the other side, this way of determining the conditions can be interpreted extensively, so that the nature of disease can be extended to include mental illnesses. This is what N.V. 137 (1973) and N.V. 256 (1975) Montana laws and N.V. 143 Idaho law (1969) exactly do, only restricting the scope of mental diseases to those caused by "brain injury". However, the proposed law could be interpreted in a more liberal way to include mental diseases that cause severe problems, such as some forms of depression or anxiety, but which are not caused by organic brain disorders with no chances of recovery (cure).

Finally, we can raise the question of the patient's competence, which is the case of N.V. 1207 Wisconsin law that allows a seven-year old patient to request assisted dying. This can go further and, in order not to discriminate mentally handicapped persons, laws can be further liberalized and allow these category of patients a possibility to resort to euthanasia.[9]

If the question: Who is a "candidate" for assisted suicide was asked in a simple context of determining who has reasons to die, liberalization would, undoubtedly reach its maximum. Life cannot be considered as something unconditionally good, but rather as something which is worth only in cases when a person has a "possibility to get desired experience". Thus, if a person cannot have desired experiences, or any other experience but unwanted ones, then, such a person has a reason to die. This means that, according to this rational, the group of patients who would like to die, would include those with permanent, incurable conditions, as well as those with mental problems.[10]

However, we cannot raise the questions about the candidates for euthanasia by asking who has a reason to die. We also have to take

[9] *http://www.rights.org/deathnet/understanding.htm*l, 16.12.2014.
[10] *Ibid.*

into consideration possible dramatic abuses and wrong interpretations where such legalization may lead us? Allowing children and mentally handicapped persons to choose assisted suicide opens an opportunity for various abuses. Once we abandon the notion that the patient's disease must be physical and his death unavoidable, we have to face the possibility of an increasing number of wrong medical diagnosis and prognosis whether a patient will accept his situation and adapt to it and what is going to be considered as worth to continue living for. A mistake can be made if the patients suffering from mental conditions, such as severe incurable depression, or from permanent diseases, such as quadriplegia or severe injuries, are allowed to request assisted suicide.[11]

This reasoning has led us to face a liberal answer to the question related to the selection of candidates for euthanasia and a conservative answer that there are numerous possibilities for mistakes and abuse. It is clear that it is not easy to choose the right path. Legalization is an experimental process which cannot solve once and for all the question - what will be the impact of this law? Therefore, we have to risk and try one solution in order to see what results it will yield. Unfortunately, our discussions on this matter, which is always a heated topic to argue about, without the attempts to be implemented in practice turn into pure theoretical debates about all its deficiencies.[12]

Incompetent persons should not be the actors included in the Law on voluntary euthanasia due to the fact that they are not capable of taking voluntary actions. They may be capable of making a request for assisted suicide, but cannot do it with understanding which characterizes voluntary request. This means that they should be denied voluntary euthanasia, something we should no longer discuss here, since it should be the subject of involuntary euthanasia whose justification goes in other direction – what is discussed here is not autonomy, but relieving of suffering – and diverts us from our topic.[13]

However, should we restrict the law on voluntary euthanasia only to competent patients, it needs to be liberalized in some other way – there is a doubt whether we will get the best law if we allow that the question: Who has the right to die, exhausts all other relevant questions. There is a need to make a difference between those who are denied to request euthanasia and those who want it with good reason, even if this increases the possibility of abuse. It is considered that the importance to preserve a person's autonomy is so great that only a great danger of possible abuse can restrict it, but it seems that here there is no danger of that. The

[11] *Ibid.*
[12] *Ibid.*
[13] *Ibid.*

possibility of abuse can be brought to minimum by ensuring a careful implementation of all procedures and by avoiding misdiagnosis seeking a second opinion. Still, medical errors and misdiagnosis will remain, abuses too. But it would be rather paranoid to predict a scenario with so frequent cases of abuse to reject the entire law.[14]

If we seriously consider to allow competent persons take care about their own lives, logically, they have to be given freedom to make their own decisions related to the medical advice they receive and make best judgment accordingly, although there is always a risk of making a mistake. If we allow people freedom to make major decisions, we allow them a possibility to make major mistakes, as well.[15]

2.3. Why criminal sentence is often avoided ?

The jury members are more often lenient to those facing court trials for assisted suicide than to other offenders. They are often doctors, or family members, or friends of the assisted suicide victims.[16] Even when the prosecutors and judges are convinced that these people committed a criminal offence, although they subjectively believed they were doing the right thing, it is difficult to try and punish them as ordinary criminals. Indeed this is the area in which all law enforcement officers are reluctant to enter and would rather resort to preventive than punitive measures.

Thus, in one article related to some legal reviews the local prosecutor wrote: "District attorney's office does not investigate such cases and initiates a criminal investigation only in cases when one of the actors files a complaint". One other prosecutor stated: The criminal investigators should avoid these cases as much as possible". Here should be mentioned that our system foresees an absolute "prosecution discretion" and there is no legal obligation for a prosecutor to investigate and prosecute a person, even if he openly admitted a wrongdoing.

If a law suit leads to a trial and the prosecution is, even against odds, secured, then a dilemma is opened. If a judge sentences an offender to prison, he may very well be viewed as a martyr, but if the sentence is lenient, then the law loses its preventive role of deterring future offenders. In any case, the adhering to the law is decreasing and the pressure for the its abolishment is rising since it is viewed to be either draconic or inefficient.

What can be done to make laws that sanction assisted suicide more effective? The ultimate goal should be to protect possible suicide victims from those who "would like to help" them in this act, rather than to make

[14] *Ibid.*
[15] *http://www.iaetf.org/whatnow.htm*, 20.01.2015.
[16] *http://www.istor.org/stable/1141990*, 26.03.2010.

law a means of symbolic punishment. It seems reasonable to believe that if a person assisting a suicide knew he would be sued and found liable for compensation payments to the victim's family, they might be able to experience the deterring effects of civil law, which could not be said for criminal law which will not be able to secure a sentence for the same act. Even if a person assisting a suicide obtains a consent from the victim's family (as was the case with Jack Kevorkian), he can never be sure that a family member will not eventually sue him, either because he changed the mind or because of financial incentive. If the law could find a simple way to prosecute serial "assistants" such was Jack Kevorkian, than the court would be able to enforce its deterring role in a greater number of cases, except in those involving the most determined euthanasia activists.[17]

2.4. How and why civil law measures may be effective?

The concept of civil law allows individuals (such as the family members of suicide victims) to give testimony in court and thus accuse those involved in assisted suicide. This means that discretion policy of public officials can no longer stop the undertaking of concrete measures against the assisted suicide offenders. Also, it has been underlined that assisted suicide is not a crime if there is no victim and in this case there are also many "secondary victims, that is the victim's family members which is powerful element for exercising pressure on the judge and jury.

There are two types of civil measures: civil orders and civil damages. Court order has many advantages. It foresees the measures for preventing death before its occurrence. It also allows a case to be quickly brought before judge who can immediately respond and prevent a possible offender to commit offence. That person knows that if he violates the court order the judge can seek harsh punishment for civil contempt. To a great number of physicians this may be more frightening and deterring than when he knows that there is no chance to receive a prison sentence.

As much as doctors fear punishment for their malpractice, financial "punishment" is also extremely efficient since the court may order the confiscation of property or taking money from their wages.

Civil damages assume that the defendant must pay monetary compensation to the family of the assisted suicide victim, similar as to paying damages for malpractice. It can be expected that insurance companies will put a big pressure on doctors making them avoid the practices that may lead them to such lawsuits.

---

[17] *Ibid.*

Kevorkian,[18] who obviously enjoys his role of controversial martyr, would possibly wave off the word bankruptcy. But there are few men like him. Although there are some eminent doctors who would like to come out and legally practice euthanasia without fear of criminal investigation, civil liability still remain powerful deterring weapon.

If a law foresees that the family of the assisted suicide victim may file a law suit against the physician although they gave him a consent, doctors will be reluctant to perform this practice without family on their side, who can resort to lawsuit in any time driven by financial incentive.

Civil measures have one more advantage – criminal prosecutors are paid out of public funds and the prisons are also financed by tax payers, including the offenders who pay reasonable fees to their attorneys if the case was won.[19]

What happens if the civil law measures lead to proliferation of groundless law suits?

If a law suit is filed without evidence or with bad intention, the plaintiff may also be punished by paying all legal fees to the defendant, including the fees of his attorney. This practice not only compensates the wrongly accused defendant, but also serves as an efficient deterring measure for those who would like to file a lawsuit without sufficient evidence.

2.5. Is there any precedent for using civil law measures?

A large number of adopted civil laws "were not derived from criminal laws" but rather through the use of orders which were issued either during the civil cases led by government officials or those initiated by ordinary citizens represented by the counselors who defend public interest.

Law suits filed to get orders against discrimination in schools, public institutions, etc. have often resulted in the decisions empowering the plaintiffs to follow and monitor future actions of defendants checking whether they would be violating the order.

These measures are often used today as principal means for preventing racial discrimination. Now it is time that civil law measures are added to the existing preventive and protective measures against assisted suicide. We have to be active in our fight to protect vulnerable patients from those who are ready to help them die instead of offering them comfort and medical help.[20]

[18] http:///*www.ohiolife.org/issues, 26.07.2016.*
[19] *Ibid.*
[20] *Ibid.*

2.6. Why assisted suicide should not be legalized?

Many think that a decision to commit a suicide is a one's private choice that should not be the subject of public discussion.

This view assumes that suicide is the result of an independent rational decision of competent people to end life. Society cannot interfere with the individual decisions to live or to die which do not affect anyone else, but those who commit suicide.

But, according to the opinion of the professionals who conducted research on suicide, these assumptions are wrong.

A British study from 1974 which included detailed research of medical reports and numerous interviews established that 93% of the research patients who committed suicide were mentally ill. The similar St. Luis study, published in 1984, revealed that 93% of the patients who committed suicide had mental disorders. There are also numerous psychological studies suggesting that those who attempt suicide are ambivalent, that is that they want to kill themselves for different reasons and do not want to die. In most of the cases these people are suffering from various mental diseases.[21]

2.7. Shouldn't the choice, after all, reside with the individual?

Almost all the people who attempt suicide, in this way subconsciously seek help rather that believe that they would be better off dead..

Suicide attempt[22] is a powerful means to draw attention to someone's state of mind. We should respond to this cry for help in a human way by mobilizing all psychological and social services in order to attempt to resolve problems that could lead to this extreme behavior. These counseling and psychological services seem to be efficient in preventing death. One study that included 886 suicide survivors shows that only 3.84% of them died in the following 5 days after the suicide attempt. Another Swedish study (that is being conducted in continuation for 36 years) reveals that only 10.9% repeated the suicide and eventually killed themselves. Surprisingly, it seems that those who once attempted suicide and were saved, had a better chance for a happy life than those who never attempted a suicide but suffered from the same disorders. According to dr Ervin Stangel, the physiatrist "a suicide attempt is an efficient, but dangerous way of alerting others and its consequences are often permanently damaging."

In short, suicidal persons should be offered help to solve their problems instead of assisting them to die.[23]

---

[21] *Ibid.*

[22] *http://www.iaetf.org/sus.htm*, 20.01.2015.

[23] *Ibid.*

3. Conclusion

Cruel reality often puts us in a position to make certain choices and reach decisions. On the border between life and death, making choices is inevitable responsibility. Such decisions, that is choices between two evils, are often subject to legal evaluation and contesting. Which decisions are competent and which are disputable depends on various views and starting points. However, this does not mean that individual choices and decisions should not be respected. Everyone is responsible for his own choices and his own deeds.

Prof. dr Dragana Petrović
naučni saradnik, Institut za uporedno pravo, Beograd

UPUTSTVA ZA RAZMIŠLJANJE ZA I PROTIV "dostojanstvene smrti"

Rezime

Nazivali je "dostojanstvena", "ponosna", "privilegovana" smrt ili "ubistvo na zahtev", "na molbu", "milosrdno", "ubistvo iz samilosti", "ubistvo iz milosrđa",... eutanazija je etički, zakonski i praktično, predmet rasprave stotinama godina. Naša tema od dve reči: ubistvo iz milosrđa, već na prvi pogled toliko protivurečne (međusobno isključujuće), dovoljno govori sama o sebi. Autor u ovom tekstu ističe, da prilikom eksplikacije odnosnog fenomena, zbog sve veće učestalosti, "eutanazija" postaje sve više nezaobilazni predmet krivičnopravne misli i društvenog interesovanja. Ona koncentriše pažnju svojom kompleksnošću i atraktivnošću, raznovrsnošću u svojim oblicima ispoljavanja, mogućnošću strašnih zloupotreba. Kroz panoramu različitih teorijskih struja i kroz proučavanje i razjašnjavanje primene ove mere u praksi, vladajuće mesto, odmah, na početku zauzima sledeća konstatacija. U razmatranju savremenih tendencija na terenu zakonskog regulisanja eutanazije, danas preovlađujuća zakonodavstva "funkcionišu" kroz pravu "haotičnu masu" međusobno nepovezanih i suprotstavljenih gledišta koji se lako pretvaraju u puku fasadu, ili pak daju privid idealnih rešenja. To je, nažalost, nužan opšti okvir koji u sadašnjem,

aktuelnom trenutku može da nam ponudi odgovore na neka od postavljenih pitanja.

Ključne reči: autentične ljudske potrebe, saosećanje, samilost, zloupotreba i obična ubistva

Milica V. Matijević, M.A.[1]

Original scientific paper
UDC: 347.214.2+347.51 (497.115)

ON THE MAIN CHARACTERISTICS OF COMPENSATION CLAIMS ARISING FROM THE WIDESPREAD DESTRUCTION OF RESIDENTIAL PROPERTY IN THE AFTERMATH OF THE KOSOVO* CONFLICT[2]

Abstract

The violence which spread through Kosovo in the first months after the arrival of the UN and NATO troops left many Serbs, Roma and members of other minority communities without homes. Their houses were set on fire, demolished and looted. In the following years almost nothing was done to enable their return. The reconstruction projects were scarce, while the extra-judicial property restitution mechanisms had no mandate to deal with the destroyed property. Left with no other remedy, between 2004 and 2005, the owners of demolished property lodged a great number of compensation claims before the courts in Kosovo. The plaintiffs sought damages from UNMIK, KFOR and the local institutions established after June 1999. Despite the fact that the compensation claims had become well known for the controversial decision of UNMIK to order stay of proceedings in these cases, as well for the complex legal issues they posed, so far there have been no official accounts of their basic characteristics. The author aims to fill that lacuna by presenting results of the research conducted on the copies of the compensation claims lawsuits archived in the Court Liaison Office in Gračanica/Graçanicë.

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

* This designation is without prejudice to positions on status, and is in line with UNSCR 1244/99 and the International Court of Justice Opinion on the Kosovo Declaration of Independence.

[2] This paper is second in the series of papers analysing the compensation claims lodged before the courts in Kosovo in relation to the widespread destruction of residential property in Kosovo after the conflict. The first paper, which deals with the legal destiny of these claims, was published in *Strani pravni život* no. 3/2014, Institute of Comparative Law (ICL), Belgrade, pp. 185 – 2006, available at: *http://www.comparativelaw.info/spz20143.pdf*) As was the case with the previous paper, the present study is based on the results of a comprehensive research on the violations of property rights of internally displaced persons in Kosovo, which was conducted within the EU-funded Project "Further support to refugees and IDPs in Serbia" (EuropeAid/129208/C/SER/RS; implemented by Diadikasia Business Consultants S.A. in consortium with Hilfsverk Austria International, ICMPD and Group 484).

Key words: *compensation claims, pecuniary damage, post-conflict property restitution, Kosovo, UNMIK*

1. Introduction

Between 2004 and 2005 the courts in Kosovo received a large number of lawsuits lodged by Serbs and members of other minority communities in relation to the widespread demolition of their homes and other property, which occurred in the aftermath of the conflict.[3] The lawsuits' subject matter was compensation for pecuniary damages caused by the acts of destruction and/or damaging of the immovable and movable property belonging to private persons, which were committed by unidentified groups and individuals. On the basis of the principle of objective responsibility, guaranteed by the laws in force at the time, the compensation was claimed from the authorities established in Kosovo after June 1999: the United Nations Mission in Kosovo (UNMIK), Kosovo Force (KFOR), Provisional Institutions of Self-Governance in Kosovo (PISG) and local municipalities. Due to the volatile security situation and the fact that the claimants were predominantly displaced persons, many claims were lodged with the assistance of domestic and international organizations and national/local authorities.[4]

Although by the end of 2004 it became clear that thousands and thousands of the compensation claims reached the Kosovo courts, UNMIK had never come up with a strategy on how to deal with them. The lack of strategy was coupled with the lack of reliable data.[5] The "veil of mystery" has been surrounding both the compensation claims lawsuits and the so initiated proceedings. Apart from the well-known fact that the proceedings were stayed for several years, there are no official reports on whether, when

[3] Without an intention to understate the importance of the question of compensation for damages inflicted on private properties while the authorities of the Republic of Serbia were present in Kosovo, this article deals exclusively with the compensation claims lodged in relation to the destruction of property that took place after 10th of June 1999.

[4] There is anecdotal evidence that great number of claims was filled before the courts with the assistance of the Coordination Centre for Kosovo and Metohija, the former body of the Government of Serbia dealing with the matters related to Kosovo until 2007.

[5] It is unknown whether UNMIK and other responsible international and local authorities have ever collected these data. The Housing and Property Directorate (HPD) alone confirmed almost 11,000 of the compensation cases. *See e.g.* HPD/CC, "Final Report of the Housing and Property Claims Commission", 2007, 79, available at *http://www.hpdkosovo.org/pdf/HPCC-Final_Report.pdf* , 11.01. 2013. There are also sources that refer to 20.000 cases filed. *See e.g.* Report of the COE Commissioner for Human Rights' Special Mission to Kosovo of 2 July 2009, para. 174. The Government of Serbia holds a similar view.

and in which way the courts have adjudicated these claims.[6]

The cases initiated by the compensation claim lawsuits are important for broader understanding of the peacebuilding activities undertaken in Kosovo. Although the international human rights law establishes a duty of the responsible authorities to provide conditions for the post-conflict property restitution, no mechanism has been created that would enable monetary or other compensation for the destroyed property. On the other hand, the reconstruction projects available to the owners of these properties have been extremely scarce.[7] That led to the situation where the only remedy left, at least in theory, was to address the ordinary judicial system.

This paper was written with the aim of saving the compensation claims from the oblivion and bringing them back to the attention of the stakeholders through a set of statistical data on their number and basic features. The data were collected during the field research conducted in the archive of the Court Liaison Office in Gračanica/Graçanicë[8] in June and August 2013.[9] The field research was undertaken with two main objectives. The first one was to determine the total number of compensation claims stored in the Court Liaison Office archive in order to test the generally held presupposition that these claims were filled in great numbers. The second one was to identify their basic characteristics.

The paper is divided into two parts. In the first part the author gives a short account of the facts so far known about the compensation claims, explains the method used during the research and provides a brief description of the Court Liaison Office archive. Following that the research findings are presented in relation to eight specific research sub-questions aimed at determining the basic features of the compensation claims. In the conclusion these findings are summarised and placed in the broader context of the post-conflict property restitution in Kosovo.

---

[6] *See* Milica V. Matijević, "The Judicial Proceedings on Compensation Claims Arising from the Widespread Destruction of Residential Property in the Aftermath of the Kosovo Conflict", *Strani pravni život* 3/2014, Institute of Comparative Law, 187-206, *http://www.comparativelaw.info/spz20143.pdf* , 1.11.2016.

[7] Another problematic aspect of the reconstruction projects was that they were by definition tied with the return projects *i.e.* open only to the owners who expressed an undoubted intention to return permanently to their place of origin.

[8] The names of places are written in accordance with UNMIK Regulation No. 2000/43 on the Number, Names and Boundaries of Municipalities of 27 July 2000, which sets the rule that they should be written in both official languages and that the first in the order of names should be the name in the language of the community which makes the majority population in the given municipality.

[9] The field research was conducted within the EU-funded Project "Further support to refugees and IDPs in Serbia" (EuropeAid/129208/C/SER/RS), implemented by Diadikasia Business Consultants S.A. in consortium with Hilfsverk Austria International, ICMPD and Group 484.

2. A brief history of the compensation claims

On 24 June 1999 the UN Security Council Resolution 1244 was signed and the conflict in Kosovo was officially over. NATO-led Kosovo Force (KFOR) entered the province in parallel to the withdrawal of the Yugoslav army and the Serbian police. It took several months before the UN Mission in Kosovo (UNMIK) deployed the adequate number of peacekeepers to guard the law and order. This lack of law enforcement forces created conditions for a new wave of violence in which "the victim became the perpetrator". In months that followed, brutal attacks against Serbs, Roma and other minority communities spread throughout Kosovo coupled with the destruction of their residential property.[10] The new images of burnt households added to the desolation emanating from the ruins left by the conflict. As in many other war zones around the globe, the destruction of homes became a powerful tool "to displace members of unwanted minorities and make their return difficult."[11]

Soon after its arrival in the province, UNMIK had established an extra-judicial mechanism for the claims over the immovable residential property,[12]yet this mechanism was of no significance in the cases of damaged and destroyed property. Until 2004, the Housing and Property Directorate/Claims Commission (HPD/CC) was merely informing the claimants about its lack of competence and was advising them to fill the claims before the local courts. In 2004 this practice was slightly changed and those who afterwards submitted claims to the HPD/CC were served with the so-called "category C declaratory orders" – an official document confirming the claimant's right onto the property at the time of its destruction.[13]

[10] *See e.g.* Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo [S/1999/779] of 12 July 1999, para. 5; Human Rights Watch, "Abuses against Serbs and Roma in the New Kosovo", August 1999, Volume 11, No. 10, available at: *http://www.hrw.org/reports/1999/kosov2/*, 1.11.2016;

[11] Walter Kälin, *Internal Displacement and the Protection of Property*, vol. 1, Swiss Human Rights Book, 2006, 176.

[12] See UNMIK Regulation No. 1999/23 On the Establishment of the Housing and Property Directorate and the Housing and Property Claims Commission of 15 November 1999; UNMIK Regulation No. 2000/60 On Residential Property Claims and the Rules of Procedure and Evidence of the Housing and Property Directorate and the Housing and Property Claims Commission of 31 October 2000; UNMIK Regulation No. 2006/50 on the Resolution of Claims relating to Private Immovable Property, including Agricultural and Commercial Property of 16 October 2006.

[13] Claims related to the destroyed properties amounted to more than 1/3 of the total number of claims submitted to this body. In: Bjorn Vagle, Fernando de Medina, "An Evaluation of the Housing and Property Directorate in Kosovo", Nordem Report 12/2006, 40, 80. See also, Margaret Cordial, Knut Rosandhaug, *Post-conflict property restitution: the approach in Kosovo and lessons learned for future international practice*, Martinus Nijhoff 2008, 88-90.

It is unknown when exactly had the owners of the damaged/destroyed real estates started submitting lawsuits, yet in 2004 the judicial authorities in Kosovo became faced with the massive influx of these claims. Apart from their numerousness, the proceedings in compensation claims have become known as a notorious example of the denial of access to court. Namely, the adjudication of these cases was on several occasions stopped by the order of the international or local executive authorities.

On 26 August 2004 the Director of UNMIK Department of Justice (UNMIK DoJ) introduced an official stay of all proceedings initiated in relation to the destroyed/damaged immovable property. In a circular notification sent to the presidents of the courts, he requested stay of the proceedings "until such time as we have jointly determined how best to effect the processing of these cases."[14] The letter referred to "huge influx of claims" that posed problems to the courts' functioning[15] and to the necessity to design proper strategy given that "many claimants will require escorts in order to travel to the courts".[16] Although UNMIK had never developed the strategy for dealing with the compensation claims, shortly before it was replaced by the EU Mission in Kosovo (EULEX) at the end of 2008,[17] the head of UNMIK DoJ advised the local courts to continue with processing the cases "which had not been scheduled according to the 26 August 2004 DoJ request".[18]

While examining these matters, the Human Rights Review Panel (HRAP), a body established to investigate the human rights violations allegedly committed by UNMIK, found in a number of cases that the UNMIK's interference breached the plaintiffs' right of access to courts:

> "The Panel finds that UNMIK did not manage to achieve a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. The four years of

[14] UNMIK Department of Justice Letter of 26 August 2004.

[15] According to CoE Commissioner for Human Rights from 2009, at that time they represented "half of the backlog in the civil court system", in: Report from the CoE Commissioner for Human Rights' Special Mission to Kosovo, 2 July 2009, para. 174.

[16] UNMIK Department of Justice Letter of 26 August 2004. The stay was only partly lifted on 15 November 2005, when UNMIK DoJ issued another instruction that called on the courts to begin processing compensation claims for damages caused by identified natural persons after October 2000. In practice, this only enabled the courts to process the claims arising from the March 2004 riots.

[17] On 9 December 2008, UNMIK's responsibility with regard to the judiciary in Kosovo ended with the European Union Rule of Law Mission in Kosovo (EULEX) assuming full operational control in the area of the rule of law, following the Statement made by the President of the United Nations Security Council on 26 November 2008 (S/PRST/2008/44).

[18] *Milogorić and Others against UNMIK*, cases no. 38/08, 58/08, 61/08, 63/08 and 69/08, para. 8.

> uncertainty experienced by the complainants over whether and when their cases would be processed by the courts was intensified during the relevant time by the fact that the August 2004 letter contained no time-frame to enable anyone to reasonably anticipate when the courts would start processing the cases, if at all. As noted already, no new legislation was adopted in the meantime nor were any mechanisms provided to assist the courts to enable the complainants to have their claims determined. In sum, instead of ensuring access to justice to vulnerable minority plaintiffs, UNMIK in fact denied them this access."[19]

In the succeeding years the adjudication of the compensation claims followed two directions. Certain number of courts started processing the claims and rejecting them on the ground of the lack of passive legitimacy of defendant(s). These courts assumed the position that UNMIK and KFOR could not be sued because of their legal immunity[20], while the local authorities could not be held liable for the acts occurring before they had assumed responsibility for governing Kosovo.

Other courts had taken a completely different approach by resorting to a 180-day stay of proceedings throughout 2009 and 2010. These decisions were based on the 2008 Law on Public Financial Management and Accountability, which stipulated that the Ministry of Justice and the Ministry of Economy and Finance should be notified about any compensation claim against any public authority in Kosovo before their processing.[21] In 2010 the Law on Amendments on the Law of Public Financial Management and Accountability was passed, which effectively suspended the proceedings in the compensation cases for up to 18 months or until Kosovo's Ministry of Justice notifies the court in writing that it assumed representation on behalf of the government or public authority.[22] Reportedly, it was not before 2011 that this group of courts started processing the claims without restrictions.[23] According to the available information, so far most of the compensation claims adjudicated by the courts were rejected on the grounds of the lack of the defendants' passive legitimacy. It was also observed that significant

[19] *Milogorić and Others against UNMIK*, cases no. 38/08, 58/08, 61/08, 63/08 and 69/08, para. 43.
[20] *See e.g.* UNMIK Regulation No. 2000/47 On the Status, Privileges and Immunities of UNMIK, KFOR and their Personnel in Kosovo, of 18 August 2000.
[21] Articles 67 and 68 of the Law on Public Financial Management and Accountability, No. 03/L-048, of 13 March 2008.
[22] Article 25 (amending Article 68.2) of the Law on Amendment to the Law on Public Financial Management and Accountability No. 03-L-221, of July 2010.
[23] *See* Milica V. Matijević, "The Judicial Proceedings on Compensation Claims Arising from the Widespread Destruction of Residential Property in the Aftermath of the Kosovo Conflict", *Strani pravni život*, 3/2014, Institute of Comparative Law, 187-206.

number of courts has ordered the unsuccessful claimants to pay court fees arising from the judicial proceedings.[24]

3. Methodology and purpose of the research

The paper presents data obtained through the analysis of the copies of lawsuits archived in the Court Liaison Office in Gračanica/Graçanicë. The field research took place on 10 - 14 of June and 5 - 9 of August 2013.

As already noted, the first objective of the research was to determine the number of the compensation claims archived in this public institution. The second one was to investigate what are their basic features by analysing a representative sample of the compensation claims in relation to the following questions:

1. Does the lawsuit contain the endorsement stamp? If so, does the endorsement stamp contain the date of the court registration and the court file number?
2. In which year was the lawsuit registered in the court?
3. Where is the domicile of the plaintiff?
4. Who is the defendant?
5. On what legal ground was the compensation claim based?
6. Does the lawsuit contain the court fees waver?
7. Was the lawsuit submitted personally by the plaintiff or by his/her representative? Does the lawsuit contain the contact details of the plaintiff/representative?
8. What type of evidence was provided with the lawsuit?

The questions were chosen with regards to their relevance to the overall thematic objective of the research, *i.e.* to provide elements for a comprehensive analysis of the restitution process carried on in Kosovo after the 1999 conflict. For instance, the data about the plaintiff's domicile were collected and analysed to enable a further understanding of the relationship between the conflict-related demolition of residential property, forced displacement and access to the reconstruction projects in Kosovo. To know the percentage of lawsuits with the court fees waiver can be useful *vis-à-vis* the practice of many courts in Kosovo to order payment of court fees in the conflict-related compensation cases. The part of the research that deals with the quantity and type of evidence submitted with the lawsuits allows a closer look at the amount of resources invested in these claims and could answer the question of their authenticity.

[24] *Ibid.*

3.1. The Court Liaison Office in Gračanica/Graçanicë

In 2003 the UNMIK Department of Justice established the Court Liaison Office in Gračanica/Graçanicë in order to facilitate access to courts of the minority communities impeded by the volatile security situation and other obstacles.[25] Its task was to enhance access to justice of the minority communities by accompanying their members to courts, filling in documents on their behalf and providing them with other types of support during the judicial proceedings.[26] The Court Liaison Office played very important role in facilitating filling in of the compensation claims. Due to the adverse security situation a claimant would usually bring the lawsuit to the Court Liaison Office whose staff would then pass it to the court.

Each compensation claim lawsuit that was in this way submitted to the court was drawn up in five copies: two copies were retained by the court after being certified; two were handed back to the plaintiff; one was stored in the Court Liaison Office's archive.[27] The copies kept by the Court Liaison Office were assigned a registration number and a note on the year of submission. Together with the copies of evidence submitted by the plaintiff, they were then placed in the office folders and classified according to the seat of municipal court before which the lawsuits were lodged. The folders were labelled according to the range of registration numbers of the lawsuits stored in them.[28]

3.2. Sampling

The total number of lawsuits for compensation of damages inflicted on residential property in the aftermath of 1999 conflict contained in the archive was determined though an examination of all the copies of the lawsuits found therein. Due to limited resources, the part of the research investigating the main characteristics of the lawsuits was conducted on a sample. The sample comprised **769 lawsuits** randomly selected from the pool of all the archived lawsuits for compensation of damages related to the 1999 conflict. As it will be shown later, the sample presents **4.29%** of the total number of the compensation claims lawsuits stored in the archive.

[25] Yearbook of the United Nations, v. 57, United Nations publications, 425. Shortly after, the Court Liaison Office got a number of sub-offices in areas with significant presence of the minority communities.

[26] UNMIK, Pillar I Presentation Paper, June 2004, 18.

[27] Interview with Trifun Jovanović, Head of the Court Liaison Office in Gračanica/Graçanicë, held on 10 June 2013 in Gračanica/Graçanicë (record of the interview on file with author).

[28] The only exception concerns the lawsuits lodged by the Serbian Orthodox Church, which are kept in a separate archive. The examination of the archive also showed that it does not contain any case files registered by the Municipal Court in Leposavić/Leposaviq.

For the purpose of taking the representative sample, all the case files were divided into 3 categories depending on the seat of the municipal court to which the lawsuits were submitted. This classification is based on the systematization used by the Court Liaison Office, which reflects the network of municipal courts in place in Kosovo until January 2013.[29]

The first group covers the courts in which a small number of the compensation claim lawsuits registered. Given their small number, all the lawsuits from this group were included in the sample.

Seat of the municipal court	Total number of compensation claims	Number of analysed claims	Percentage of analysed claims in the total number of compensation claims
Kaçanik/Kačanik	43	43	100%
Dragash/Dragaš	22	22	100%
Zubin Potok	16	16	100%
Gllogovc/Glogovac	13	13	100%
Shtërpcë/Štrpce	9	9	100%
Malishevë/Mališevo	6	6	100%

The second group encompasses the compensation claim lawsuits registered before the municipal courts, where the number of archived lawsuits was superior to 100 and inferior to 1000 lawsuits per court. From this group 30 randomly selected copies of lawsuits were included in the sample.

Seat of the municipal court	Total number of compensation claims	Number of analysed claims	Percentage of analysed claims in the total number of compensation claims
Vushtrri/Vučitrn	757	30	4%
Gjakovë/Đakovica	687	30	4.3%
Gjilan/Gnjilane	552	30	5.4%
Suharekë/Suva Reka	538	30	5.5%
Viti/Vitina	464	30	6.4%
Podujevë/Podujevo	376	30	8%
K. Mitrovica/Mitrovicë	362	30	8.2%
Deçan/Dečane	349	30	8.6%
Lipjan/Lipljan	224	30	13.4%
Skenderaj/Srbica	266	30	11.2%
Kamenicë/Kamenica	191	30	15.7%
Rahovec/Orahovac	122	30	24.6%

[29] Law on Courts No. 03/L-199, adopted on 22 July 2010 and entered into force on 1 January 2013.

The third group covers the courts that received more than 1000 compensation claim lawsuits. Here, 50 lawsuits were randomly drawn from the case-files registered for each of these courts and included in the sample.

Seat of the municipal court	Total number of compensation claims	Number of analysed claims	Percentage of analysed claims in the total number of compensation claims
Prishtinë/Priština	3234	50	1.5%
Pejë/Peć	2741	50	1.8%
Ferizaj/Uroševac	2254	50	2.2%
Prizren	2002	50	2.5%
Istog/Istok	1764	50	2.8%
Klinë/Klina	920	50	5.4%

4. Statistical analysis

4.1. Number of the compensation claims

As explained in the previous chapter, the total number of lawsuits for compensation of damages inflicted on properties in the aftermath of 1999 conflict that is contained in the archive was determined by analysing all the lawsuits that were found therein. The researcher has firstly examined the content of the archive and established its general features, which can be presented as follows:

- The total number of folders contained in the archive: 278
- The total number of lawsuits as indicated on the folders: 19067
- The total number of lawsuits missing from the folders: 736
- The total number of lawsuits other than the compensation claims lawsuits: 422
- The total number of the compensation claims lawsuits: 17 912

The number of compensation claims lawsuits was calculated in the following way: the sum of the total number of lawsuits missing from the folders (736) and of the total number of lawsuits other than the compensation claim lawsuits (422) was subtracted from total number of the lawsuits as indicated on the folders (19067).

4.2. Court endorsement stamp, date of lawsuit's receipt and the court case file number

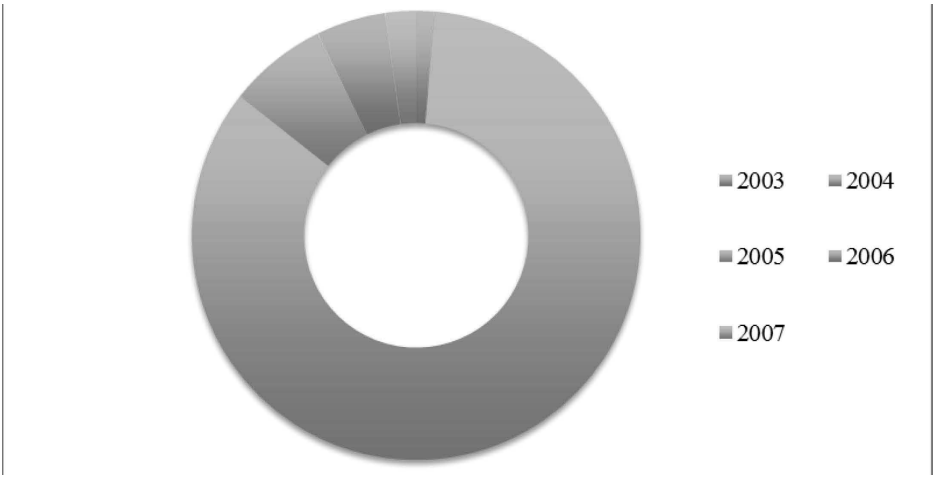
The first to be analysed was the court endorsement stamp and its elements, *i.e.* the date when lawsuit was received by the court and the court case file number. The statistical analysis of the sample was firstly directed at establishing the number of lawsuits which do/do not have a court endorsement stamp. Then, the endorsement stamp imprints were analysed in order to determine frequency of the lawsuits with the indicated receipt date. The last step undertaken with regard to the court endorsement stamp was to find out the number of lawsuits to which the courts have assigned the court case file number upon their receipt.

The results of the analysis are as follows:

- Almost all analysed lawsuits have the endorsement stamp imprints (98.3%). The low quality of the copies of original lawsuits could explain the figure of 1.6 % of the copies without the endorsement stamp imprints.
- Almost all endorsement stamp imprints have the date of receipt (98.5%).
- The analysed lawsuits as a rule do not have the court case file number (94.2%). An exception to this are the lawsuits registered before the Municipal Courts in Skenderaj/Srbica and in Pristina. The data show that the Municipal Court in Skenderaj/Srbica received a small number of the compensation claims (122 claims in total) and that 27 out of 30 lawsuits registered before this court and included in the sample contain a court case file number. Concerning the lawsuits with the court case file number that were submitted before Pristina's Municipal Court, they represent a tiny portion of the total number of lawsuits registered before this court and included in the sample (17 out of 50 lawsuits).

4.3. Year of submission

The year of submission of the analysed lawsuits was determined on the basis of the date indicated in the court endorsement stamp. As **Graph 1** shows, the greatest number of claims reached the courts in 2004 (84.1%), certain number of them in 2005 (7.1%) and a tiny percentage was filled in 2003, 2007 and 2008 successively (in total 3.7%).



4.4. Basic characteristics of the plaintiff

This part of the analysis examines whether the plaintiff was a natural or legal person and where was his/her residence at the moment of the submission of the lawsuit. The data on the domicile of the plaintiff were then used as an indicator of the plaintiff's status *i.e.* whether the plaintiff was an internally displaced person (IDP) or the so-called "internally-internally displaced person" (IIDP)[30] at the time when the lawsuit was submitted. Namely, when the plaintiff's *temporary address* was in Serbia proper or in Kosovo that was taken as an indicator that he/she had an IDP or IIDP status, respectively. It should be noted that due to the limited resources available for the research, this data was taken only for one plaintiff per lawsuit,[31] although in many cases more than one plaintiff lodged the lawsuit. The results obtained in this way are as follows:

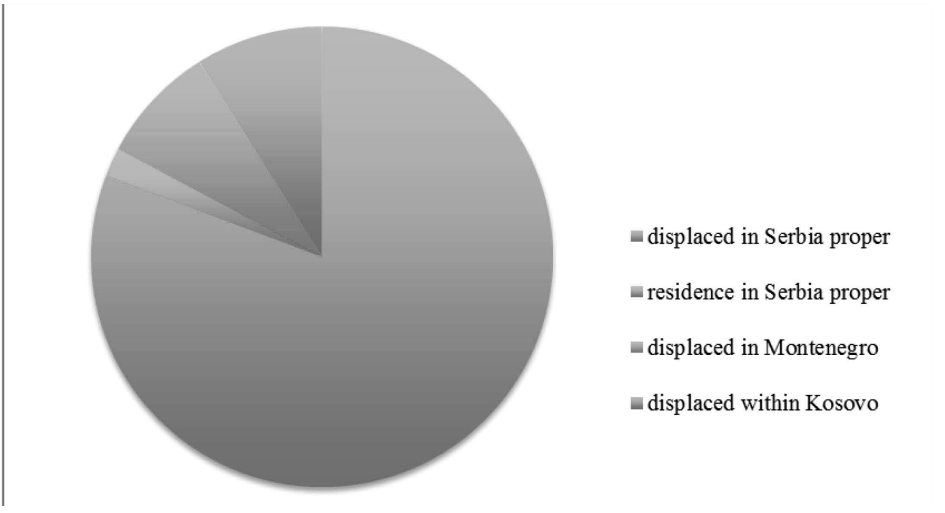
- All plaintiffs in the analysed lawsuits were natural persons;
- The greatest majority of plaintiffs had temporary residence in Serbia proper at the time of the lawsuit's submission (78.8%), which was taken as an indicator that 78.8% of plaintiffs were internally displaced persons (IDPs);
- In total 8.7% of plaintiffs were categorized as IIDPs because they provided only a temporary address in Kosovo that was different from

[30] Internally-internally displaced persons are persons who were forced to leave their homes in 1999 and 2004, but remained displaced within the boundaries of Kosovo. According to the last UNHCR assessment, in 2013 there were approximately 18,000 internally-internally displaced persons (IIDPs) in Kosovo (UNHCR, 2013 UNHCR Country Operations Profile – Serbia (and Kosovo: SC Res. 1244)), *http://www.unhcr.org/pages/49e48d9f6.html*, 19.11.2013.

[31] More specifically, the data were taken for the first plaintiff indicated in the lawsuit.

their pre-conflict address;
- Certain portion of plaintiffs (8.1%) was displaced in Montenegro at the time of the submission of the compensation claim.[32]
- Only one plaintiff had temporary residence abroad and no plaintiff from the analysed lawsuits was permanently settled abroad.

Graph 2 shows which portion of plaintiffs had residence in Serbia proper, Kosovo or Montenegro, respectively, and how many of them, in comparison to the total number of plaintiffs from the sample, could be considered to belong to the category of displaced persons.



4.5. Basic characteristics of defendant(s)

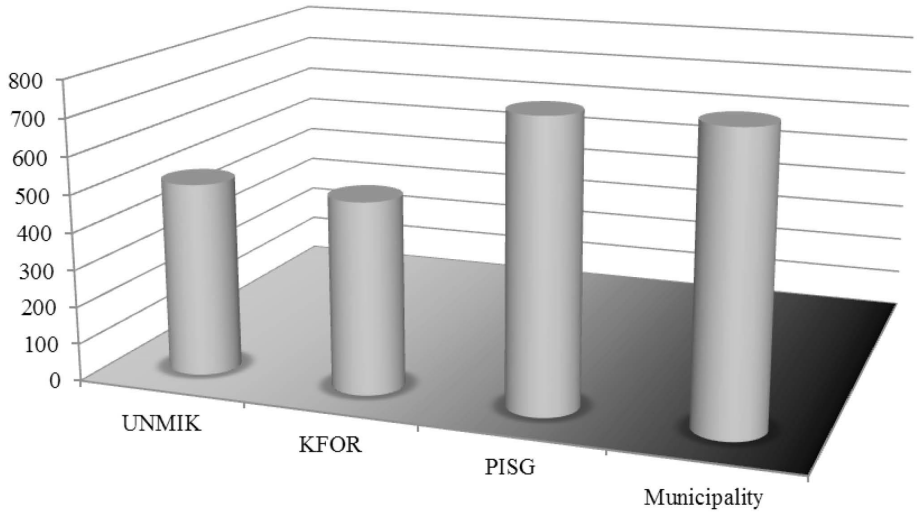
One of the distinctive features of the claims under consideration is that the plaintiffs demanded compensation from the international and/or local institutions established after the conflict. The goal of the research was to determine who exactly were the defendant(s) and how frequently these different institutions were named as defendants in the analysed lawsuits.

The plaintiffs were requesting compensation for damages primarily from the local institutions. Namely, in almost all analysed cases the plaintiffs sued the municipalities (99.86%) and the central level institutions, referred to as "the Kosovo Government" or as "the Provisional Institutions of Self-Governance" (99%). UNMIK and KFOR were defendants in 67.1% and 66.3% of analysed lawsuits, respectively. In an insignificant number of cases the claim was lodged against identified

[32] The State Union of Serbia and Montenegro came to an end in 2006, after the referendum on independence held in Montenegro on 21 May 2006.

natural persons (1.3%) and the Housing and Property Directorate (HPD), but even in these lawsuits the main defendants were always the executive authorities referred to above.

Graph 3 presents the number of lawsuits grouped according to the entitv that was in the role of defendant.



4.6. Legal basis of the compensation claims

The analysis shows that plaintiffs based their claims on several different legal acts. Certain of these legal acts served to establish the responsibility of the defendant(s), while others were used to invoke direct applicability of the European Convention on Human Rights (ECHR). The following figures illustrate how plaintiffs combined different normative frameworks applicable at the time in Kosovo:

- In total, 94% of the complainants referred to the European Convention on Human Rights Article 1, Protocol 1, as a legal foundation of their claims.
- Almost all complainants (98.8%) based their claims on the principle of objective responsibility of public authorities, as provided in Section 180(1) of the Civil Obligations Act from 1978 (Zakon o obligacionim odnosima).[33]
- More than half of the plaintiffs (403 lawsuits) invoked the provisions of UNMIK Regulation No. 1999/24.[34]

[33] The law was applicable in Kosovo at the time of the submission of the lawsuits by virtue of UNMIK Regulation No. 1999/24 On the Law Applicable in Kosovo, of 12 December 1999.
[34] UNMIK Regulation No. 1999/24 On the Law Applicable in Kosovo, of 12 December 1999.

- UN Security Council Resolution 1244[35] was cited in 391 lawsuits.
- In 386 lawsuits the plaintiffs invoked the Military Technical Agreement between KFOR and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia, known as the "Kumanovo Agreement".[36]
- A significant number of plaintiffs (38,3%) also referred to the Constitutional Framework for the Provisional Self-Governance in Kosovo.[37]

4.7. Court fees waiver

As observed in practice, in certain number of cases the courts asked plaintiffs to pay court fees after rejecting their claims.[38] This observation led the researcher to the question of whether the plaintiffs had asked the court to submit their lawsuit *in forma pauperis*. The results of the analysis show that in 97% of the lawsuits the plaintiffs invoked the right to be exempted from the payment of court fees *i.e.* that only a tiny minority of analysed lawsuits (3%) did not contain a court fee waiver.

4.8. Evidence

The case-files included in the sample were analysed in its entirety in order to determine whether the plaintiffs had submitted the evidence together with the lawsuit. An important objective of this part of the research was also to learn what were the main types of evidence submitted with the initial pleadings.

The result of the analysis shows that 676 compensation claims (87.9% of the sample) contained at least one piece of evidence, *i.e.* that in only 12.1% of the analysed cases no evidence was found.

The total number of evidence items attached to the lawsuits was not determined given that the main objective of the research was to identify which percentage of the lawsuits contained the evidence and

[35] UN Security Council Resolution 1244 (1999) [on the deployment of international civil and security presences in Kosovo], 10 June 1999, S/RES/1244 (1999).

[36] The Agreement was concluded on 9 June 1999 in Kumanovo (Macedonia).

[37] UNMIK Regulation No. 2001/9 On Constitutional Framework for the Provisional Self-Governance in Kosovo, of 15 May 2001.

[38] Information based on the observations of the lawyers engaged at the EU-funded Legal Aid Project "Further support to refugees and IDPs in Serbia" (EuropeAid/129208/C/SER/RS) (records of interviews on file with author). This observation was subsequently upheld by the research on the judicial proceedings in the compensation cases, the results of which were presented and analysed in Milica V. Matijević, "The Judicial Proceedings on Compensation Claims Arising from the Widespread Destruction of Residential Property in the Aftermath of the Kosovo Conflict", *Strani pravni život*, 3/2014, Institute of Comparative Law, 187-206.

which types of evidence was used. Namely, for each compensation claim only one piece of evidence of the same type was analysed. For instance, if a lawsuit contained copies of five different possession lists for five different immovable properties, only one copy of a possession list was included in the total number of analysed evidence. In this way the research identified 2199 pieces of different types of evidence attached to 769 analysed compensation claims. This signifies that there was in average 3.25 *different* pieces of evidence per lawsuit. In reality, the number of items intended to serve as evidence is several times higher since many lawsuits contained more than one piece of evidence of the same type that were not included in the analysis.

The types of evidence used by the plaintiffs could be classified according to the types of claims the given peace of evidence was intended to support. Roughly speaking, the plaintiffs used evidence in order to substantiate two different types of claims: a) the compensation claim itself (*e.g.* copies of possession lists) or b) the court fees waver (*e.g.* copies of the Red Cross certificates). The copies of possession lists were the most typical type of evidence from the first group, while the copies of IDP and ID cards were the most usual types of evidence used by the plaintiffs to support the court fee wavers.

4.9. Signature and contact details

The last part of the research was concerned with the issue of the authenticity of the analysed compensation claims lawsuits. Its goal was to determine the number of lawsuits signed by the plaintiffs in comparison to the number of those signed by the representatives of the plaintiffs. Another question the researcher looked into is whether the plaintiff or his/her representative provided his/her contact details.

Although many of the analysed lawsuits exhibit features which indicate that they were written through the use of templates the results of the analysis in fact demonstrate that they are authentic documents. Namely, it was found that 95.5% of the analysed lawsuits were signed by the plaintiff and that 96.6% of them contained contact details of either plaintiff or of his/her representative.

5. Conclusion

The compensation claims analysed in this paper epitomize the lingering issue of post-conflict property restitution in Kosovo. The initiated judicial proceedings were stayed for several years. It is unknown how many of these cases have been concluded so far but the claims that

were processed by the courts were by rule rejected. Only a tiny number of reconstruction projects undertaken in Kosovo was open to the members of minority communities. Finally, no mechanism for the monetary compensation of the damages suffered by the owners of the destroyed property was ever developed.

The paper shows that at least 17912 compensation claims were submitted before the courts in Kosovo in relation to the damages sustained by Serbs and members of other minority communities during the wave of violence that took place after the conflict. The analysis of their basic elements points out that these claims were the result of genuine attempt of the property owners to obtain redress.

The author believes that better understanding of the way the justice system responded to the compensation claims is necessary for a comprehensive evaluation of what was done and what remains to be done in the sphere of post-conflict property restitution in Kosovo.

Mr Milica V. Matijević
Istraživač saradnik
Institut za uporedno pravo, Beograd

O OSNOVNIM KARAKTERISTIKAMA TUŽBI ZA NAKNADU ŠTETE NASTALE USLED MASOVNOG UNIŠTAVANjA STAMBENE IMOVINE PO OKONČANjU ORUŽANIH SUKOBA NA KOSOVU I METOHIJI

Rezime

Nakon potpisivanja Rezolucije 1244 Saveta bezbednosti Ujedinjenih nacija i povlačenja srpske vojske, na Kosovu i Metohiji dolazi do proterivanja Srba i pripadnika drugih manjinskih zajednica, te do masovnog uništavanja i pljačkanja njihove imovine. Uvidevši da je malo verovatno da će njihove kuće biti obnovljene ili da će šteta koju su pretrpeli biti nadoknađena, tokom 2004. i 2005. godine vlasnici porušenih nepokretnosti se u velikom broju obraćaju lokalnim sudovima. Našavši se u ulozi tužioca ova, mahom interno raseljena lica, naknadu štete traže od UNMIK-a, KFOR-a i lokalnih institucija uspostavljenih nakon juna 1999. godine. Malo se toga zna o ovim tužbenim

zahtevima i njima iniciranim sudskim postupcima. Ono što je izvesno je da su postupci u nekoliko navrata obustavljani na zahtev izvršnih vlasti, te da su poslednjih godina mnoge tužbe odbačene po osnovu nedostatka pasivne legitimacije tuženih. Autorka nastoji da popuni ovu prazninu predstavljajući statističke podatke prikupljene sa ciljem da se utvrdi brojnost tužbi za naknadu štete nastale nakon sukoba, kao i njihove osnovne karakteristike.

Ključne reči: tužbe za naknadu štete, materijalna šteta, restitucija, Kosovo, UNMIK.

Katica Tomić, LL.M.[1]

Scientific review paper
UDC: 347.441.62:368

THE PRINCIPLE OF GOOD FAITH IN EUROPEAN AND NATIONAL INSURANCE LAW

Abstract

In recent years, insurance markets have become more dynamic due to deregulation of insurance industry, globalization of insurance institutions, increased competition, technological progress, changing customer behavior and regulatory activity, which have greatly intensified in recent years in response to the global financial crisis. In the wake of the global financial crisis, additional measures aimed at enhancing consumer protection were passed in Europe. These include the Insurance Distribution Directive (IDD) and the Markets in Financial Instruments Directive (MiFID II). The IDD contains numerous innovations compared with the Insurance Mediation Directive (IMD Directive 2002/92/EC), including a new conduct requirement for the insurance distributors to „always act honestly, fairly and professionally in accordance with the best interests of the customer". The main concept behind this rule is that an insured shall only be able to make right decision when he is clearly informed on services offered (and their risks) and distributors can only provide services to clients in accordance with clients' best interests once they became fully familiar with a kind of a customer that they are dealing with. Most of the EU Member States have a civil law system, with the general clauses of fairness and good faith. EU Member States shall implement the IDD into national law, therefore it is arguable that they should decide whether these standards are mere synonyms of the existing general clauses, or these standards are different from those clauses.

Keywords: *Insurance Distribution Directive, good faith, utmost good faith, Civil Code, Insurance Contract Act*

[1] Rechtsanwälte BVM, AWA, Vienna; PhD candidate at the Faculty of Law, University of Vienna, Austria and at the Faculty od Law Sciences, University "Apeiron" Banja Luka, Bosnia and Herzegovina; mail: katicatomic123@gmail.com.

1. Introduction

The Insurance distribution directive (IDD)[2] entered into force on February 22, 2016 and all Members States have to transpose it into national laws by February 2018. The IDD is a minimum harmonisation Directive and it is designed to improve EU regulation in the insurance market by ensuring a level playing field for all participants involved in the sale of insurance products. It aims to address the inconsistent implementation of the Insurance Mediation Directive (IMD)[3] across EU Member States and to challenge the increased complexity of the insurance market.

The financial crisis clearly showed that consumer protection in some financial markets was highly deficient in the run-up to financial crisis of 2007/2008. Improved protection on consumers in financial markets is a key preoccupation among policy-makers and IDD is a step towards an increased level of consumer protection and market integration in relation to Directive 2002/92/EC. The new directive, like the Directive 2002/92/EC, is a minimum harmonisation directive, so Member States can adopt stricter provisions if they wish. Therefore, it will not lead to the removal of rules with restrictive requirements in the area of information provision already in place in EU Member States.

Under the IDD, there are two general principles: distributers must always act honestly, fairly and professionally in accordance with the best interest of customers and all information provided by distributers must be fair, clear and not misleading. The IDD aims to harmonize the legislations of the Member States by requiring that the behavior of distributors complies with legal standards of honesty, fairness and professionalism in accordance with the best interest of customers.[4]

This requirement contain IDD and Directive on the Market in Financial Instruments (MiFID II)[5], and it imposes a high standard upon all distributors (including direct sellers and those distributing to professional customers) to consider the interests of customers in their business. MiFID II requires benefits to enhance the quality of the service to the client (and not against the criteria to act honestly, fairly, professionally and in the

[2] Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (recast), OJ L 26, 2.2.2016, p. 19–59 – IDD.

[3] Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation, OJ L 009, 15.1.2003, p. 3 - Directive 2002/92/EC.

[4] Article 17 IDD „always act honestly, fairly and professionally in accordance with the best interests of their customers".

[5] Article 24 Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, OJ L 173, 12.6.2014, p. 349–496 - MiFID. MiFID II and delegated Regulation is available at *http://ec.europa.eu/finance/securities/isd/mifid2/index_en.htm*.

best interests of the client),[6]IDD allows them, if there is no detrimental impact on the quality of the service and it is not against the criteria, to act honestly, fairly, professionally and in accordance with the best interests of its customers.

This article focuses on a new „general principle" on insurance distributors „to always act honestly, fairly and professionally" in accordance with the best interests of their customers. It's not clear how or if the disclosure of clear, meaningful and relevant information at contract level will impact consumer protection in Europe but it does raise a questions: Are the new principles in financial services related to the old one „ good faith" , or they are totally new? How does it apply to a broker when acting as agent of the insurer? Moreover, does the new rule require distributors to act in the best interests of customers separately from acting honestly, fairly and professionally or if (as of course they should) they act honestly, fairly and professionally, is that in itself in accordance with customers' best interests?

In this paper the author elaborates the lawful regulation of the principle on insurance distributors „to always act honestly, fairly and professionally" and the theory and current praxis of well-known principle of "good faith", which are based both on demandings and practical obedience of the principle. The author especially elaborates contents of the principle „good faith", emphasizes the legal nature and exposes the new Insurance distribution directive provisions on the principle and compares the principle with a new IDD general principle „to always act honestly, fairly and professionally" in accordance with the best interests of their customers.

2. Good faith in theory

Good faith is a key concept in civil law systems and requires parties to enter into relationships 'honestly and fairly' and be guided by truthful motives and purposes. Most civil codes have one or more general good faith provisions.[7] The principle of good faith played a major role in late Roman law,[8] medieval law and the 19th century, period of the first codifications.[9]

[6] Aricle 19 (i) MiFID.

[7] Art. 1134, § 3 and 1135 of the Belgian Civil Code; Art. 113 of the Brazilian Civil Code; Art. 1134 of the French Civil Code; Sec. 242 German Civil Code; Act V of 2013 on the Hungarian Civil Code (Section 1:3 of the Hungarian Civil Code sets out the principle of good faith and fair dealing); art. 1175 of the Italian Civil Code; Art. 3:11 of the Dutch Civil Code.

[8] M.J. Schermaier, „Bona fides in Roman contract law", in: *Good Faith in European Contract Law* (eds. R. Zimmermann, S. Whittaker), Cambridge University Press, Cambridge 2000, 63.

[9] B. Fauvarque-Cosson, D. Mazeaud, *European Contract Law: Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules*, Munich 2008, 151.

The concept of good faith has been a subject of continuing controversy since it was derived from the Roman legal equivalent "*bonas fides*". Academics' views on and the legal approach of the idea of good faith may often vary across the cultural divides and legal traditions which has caused some uncertainty about the nature of the concept itself and the consequent unpredictability of the outcome of its application.

Good faith is used in two distinct senses and most legal systems make a difference between subjective good faith[10] and objective good faith.[11] Subjective good faith means that a person is subjectively acting to the best of his knowledge, or according to what he should have known. It is of relevance particularly to the law of property (*bona fide acquisition*)[12] rather than to the law of obligations.

Objective good faith means an objective standard by which the behavior of the parties to an obligation is judge. It is usually regarded as a norm for the conduct of contracting parties, acting in accordance with or contrary to good faith. However, this two are not completely separate doctrines, as subjective good faith might have an impact of what objective good faith requires of a party. Moreover, an external, objective standard of behaviour offers a practical measure, but this stands in relation with understandings of good faith as a duty of morality which should be considered subjectively.[13] The contents of good faith may be coloured more subjectively, as in a traditional French view reducing good faith to the absence of bad faith in a subjective sense or may be coloured more objectively as in art. 1175 of the Italian Civil Code.[14]

Objective good faith is usually considered as a normative concept and the highest norm of contract law, or of the law of obligations or even of all private law. It can supplement a contract (where no express contractual provision exists and no statutory provision or custom gives guidance) or derogate from a contractual provision. This means that under specific circumstances an express contractual or even mandatory statutory provision cannot be relied upon. Good faith is often perceived as being the method used to moralize contractual relationships and to be in good faith is to behave loyally, sincerely, honestly; to keep one's word; to keep one's promise without

[10] On subjective good faith, see: S. Waddams, *Principle and Policy in Contract Law: Competing or Complementary Concepts?*, Cambridge 2011, 215.

[11] A. M. Forte, *Good Faith in Contract and Property Law*, Oxford 1990, 199.

[12] E.g. protection of good faith acquirers of movables

[13] C. Willett, *Fairness in Consumer Contracts: The Case of Unfair Terms*, Ashgate, Aldershot, Hants 2007, 2.

[14] Art. 1175 of the Italian Civil Code "*Il debitore e il creditore devono comportarsi secondo le regole della correttezza*" The debtor and the creditor must behave following the rules of honesty. "*Correttezza*" indicates the honesty that should preside over business relationship.

taking unfair advantage of others or holding others to an impossible standard**.** Good faith is required in a wide range of situations, including contracts and business dealings, business law, during mediation, arbitration or settlement negotiations in a personal injury or similar tort case.

Traditionally, three are three different meanings of the term "good faith": 1) good faith is "a criteria of interpretation" which means to interpret a legal text, especially contract text , in accordance with good faith is to interpret it according to its real spirit, and, in case of contract, according to what is acceptable for the parties, and not to interpret it strictly; 2. good faith is often said to be a moral standard itself (a legal-ethical principle)[15]; 3) good faith is always presumed to exist.[16] The theoretical standing of good faith may seem quite unclear since the terminology used by legal authors is far from unitary. Good faith is said to be a norm,[17] a principle,[18] a rule,[19] a maxim,[20] a duty,[21] a rule or standard for conduct,[22] a source of unwritten law,[23] a general clause.[24]

The ongoing debate on the notion of good faith in contract law has typically three dimensions: substantive dimension of justification of good faith duties in terms of (e.g. contractual ethics); a formal dimension

---

[15] The Greek philosopher, Aristotle observed two thousand years ago that "if good faith has been taken away, all intercourse among men ceases to exist". Aristotle's statement emphasises the requirement of society upon its members to act in good faith not just with regard to commercial transactions, but also in any other daily intercourse. See: W. Tetley, „Good Faith in Contract: Particularly in the Contracts of Arbitration and Chartering", *Journal of Maritime Law & Commerce*, Vol. 35, 2004, 568.

[16] For example, French Civile Code provides that the good faith is always presumed and that the person who who alleges bad faith must prove it. A similar principle can be found in several other civil law jurisditions, such as Germany and Switzerland. In Austrian law, the principle of good faith and fair dealing is an ethical rule that is recognised as generally applicable (see OGH 29.04.1965 2 Ob 75/65) which is derived from the Imperial declaration in the introduction of the general Civil Code (*Allgemeines bürgerliches Gesetzbuch*-ABGB) of 1thJune 1811, which recognises as the basis of civil law (see OGH 07.10.1974 1 Ob 158/74) the „general principles of justice" expressly mentioned by the Code as a including „good faith", see § 863 and 914 ABGB.

[17] See, e.g., Karl Larenz, *Lehrbuch des Schuldrechts*, *Allgemeiner Teil* , Vol. I, München 1987[14], 129.

[18] See, e.g., A. S. Hartkamp, *Verbintenissenrecht* II (in: Asser series), Nos. 300, 301, 304; D. Medicus, S. Lorenz, *Schuldrecht I Allgemeiner Teil*, München 2008[18], No. 139 („*ein den einzelnen Rechtsvorschriften übergeordnetes Prinzip*").

[19] See, e.g., A. Menezes-Cordeiro, „Rapport portugais", *Travaux de l'association Henri Capitant, Tome XLIII, anne´e 1992. Journe´es louisianaises de Baton-Rouge et La Nouvelle Orle´ans, 'La bonne foi'*, Paris 1994, 338 (règle).

[20] See J. Carbonnier, *Droit Civil, vol. IV Les Obligations,* Paris 2000[22], No. 113 (*maxime*)

[21] See P. Malaurie, L. Aynès, *Cours de droit civil: Les obligations*, Paris 1999[10], No. 622 (devoir).

[22] See C. Massimo Bianca, *Il contratto*, No. 253 (*regola di condotta*).

[23] See A.S. Hartkamp, *Verbintenissenrecht II* (in: Asser series), Wolters Kluwer, No. 305.

[24] See, e.g., K. Zweigert, H. Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiet des Privatrechts*, Tübingen, 1996[3], 149 (*Generalklausel*).

concerned with its structure as a vague standard; an institutional competence dimension raising the question of judicial freedom and constraint in adjudication based on open standards such as good faith. [25]

It is generally agreed that a general good faith clause does not contain a rule, at least not one similar to most other rules in the code. Also, good faith clause is not susceptive to subsumption since neither the facts to which it applies nor the legal effect that it stipulates can be established *a priori*. Good faith is therefore usually said to be an open norm (but still a norm). The content of the norm cannot be established in an abstract way but it depends on the circumstances of the case in which it must be applied, and which must be established through concretisation.[26]

In positive law there still is a substantive dimension in good faith, despite a very broad one (good faith as a very open norm, but still a norm), a substantive dimension negatively limited by the other two dimensions. In positive contract law, a solution will be seen as an application of the good faith principle, if it positively conforms to the open norm (substantive dimension) and does not follow already from another firmly established norm (formal and/or institutional dimension). Once a more specific norm is firmly established, good faith is no longer necessary to justify that rule, but this does not mean that the content of the open norm of good faith can ever be exhausted into more specific norms.

Classical definition of good faith in contract law refers to the need to take into account the legitimate interests of the other party. The court determines what good faith requires in the circumstances of the specific case and the judge has to determine the requirements of good faith in such an objective way as possible.[27] In the Netherlands the principle of good faith has been provided for in article 3:11 of the Dutch Civil Code (DCC) and entails that both parties may rely on the other parties' good faith. This principle is stated in article 3:12, 6:2 and 6:248 DCC and can also be found in case law. For instance, a term of an insurance agreement can be disregarded by the court if this term is, under the given circumstances, unacceptably contrary to the standards of reasonableness and fairness.[28] Stricter rule applies to general provisions (i.e. insurer's standard terms) and such provisions are voidable, if these are unreasonably inconvenient

[25] M. Auer, „Good Faith: A Semiotic Approach", *European Review of Private Law*, 2/2002, 280.
[26] See. *The Principles of European Contract Law and Dutch Law: A Commentary* (eds. D. Busch, E. Hondius, H. J. Van Kooten, W. M. Schelhaas, H. N. Schrama), Kluwer Law International, The Hague-London-New York 2002, 490; M.W. Hesselink, *The New European Private Law- Essays on the Future of Private Law in Europe*, Kluwer Law International, The Hague-London-New York 2002, 215.
[27] K. Larenz, *Lehrbuch des Schuldrechts. Bd. 1. Allgemeiner Teil*, C.H.Beck Verlag 1957, 126ff.
[28] Article 6:248(2) DCC.

for the insured.[29] Both statutory provisions can be used to remedy a breach of the duty of utmost good faith.

In France, article 1134 of the French Civil Code provides that all contracts "must be performed in good faith" and the obligations of the insurer and the insured are mainly set out in the French Insurance Code and the French Civil Code, as interpreted by the courts. In Belgium, the duty of good faith is one of the basic principles and It is provided for in articles 1134, § 3 and 1135 of the Belgian Civil Code, which is basically the same as the French Civil Code (with no difference between "good faith" and "utmost good faith".) In Hungary, section 1:3 of the Hungarian Civil Code sets out the principle of good faith and fair dealing. The parties to a contract (including an insurance contract) and third parties (e.g. beneficiaries) that are linked to a contract are obliged to observe the above principle pre-contractually and post-contractually throughout the existence of the legal relationship. According to the Hungarian Civil Code, the requirement of good faith and fair dealing is considered as breached where a party's exercise of rights is contradictory to his previous actions which the other party had reason to rely on.

3. Insurance distribution directive

In recent years, the European Union has enacted many new insurance regulations aimed at enhancing consumer protection. These include the Insurance Distribution Directive and the Markets in Financial Instruments Directive (MiFID II).

The IDD came into force on 23 February 2016 and must be transposed into the national laws of the EU Member States by 23 February 2018. The IDD have entailed a considerable number of additional obligations as regards documentation and the provision of information and applies to a wider regulation of insurance distributors, i.e. to any person carrying on the activity of „distributing insurance".[30] Notably, it governs the activity of distribution whether carried out directly by an insurer or through an intermediary.

The IDD recognises and applies its rules to three types of distributors, insurance intermediaries, i.e. persons that pursue the activity of insurance distribution for remuneration and who are not ancillary insurance intermediaries; ancillary insurance intermediaries, i.e. persons that pursue the activity of insurance distribution for remuneration but whose principal professional activity is not insurance distribution and

[29] Article 6:233(a) DCC.

[30] The new definition of 'insurance distribution' and 'insurance distributor' appears to encompass a larger number of firms than before.

who only distribute insurance products that are complementary to their goods or services; insurance undertakings.[31]

In the same way as the Markets in Financial Instruments Directive II (MiFID II), which regulates the purchase of investment products, the IDD is also intended to create standardised conditions in the European Union. However, while MiFID II aims at a maximum harmonisation of national regulations, the IDD is designed as a minimum harmonisation directive. That means that Member States have room to manoeuvre in its implementation. The IDD contains less strict provisions than MiFID II, particularly about commissions and the target group. However, Member States can introduce more rigid provisions or decide to make the advisory business subject to an authorisation requirement.

New Directive contains numerous new provisions, including: extending the scope to cover all sales of insurance products; identifying, managing and mitigating conflicts of interest; strengthening administrative sanctions; enhancing the suitability and objectiveness of insurance advice; ensuring that sellers' professional qualifications match the complexity of the products they sell; clarifying the procedure for cross-border market entry.

Article 17(1) of the IDD provides that "insurance distributors [must] always act honestly, fairly and professionally in accordance with the best interests of their customers". It is not clear how this new obligation will fit with the insurance market and what does „act with „fairness" mean?

The „fairness" is the objective element. This objective element is combined with the notion of 'honesty', which is subjective and objective element. The test in determining whether the duty has been breached is an objective test based on subjective facts. In other words, would an objective person (a reasonable person), knowing what the insurer actually knows, act the same way? According to linguistic interpretations it means that distributors honesty, fairness, and professionalism are valued according to best interests of customers, and not according to the objective criteria. Consequently, it could be also interpreted that in any particular case, honesty, fairness and professionalism of distributors have to be valued according to the interest of policyholders.

However, at first glance, it appears straightforward for an insurance broker acting (in a traditional sense) honestly, fairly and professionally in accordance with the best interests of their client, the policyholder. But how does this apply to insurers, where the policyholder is their contractual counterparty?

The exact scope of the Article 17 (1) requirement is unclear and goes beyond existing principal of good faith, which includes the requirement for

[31] This is a key change from IMD which only covered intermediary sales.

both parties to the contract to disclose all material facts and act honestly towards each other without any underhanded behaviour. Interpreted strictly, this could have a potentially far reaching effect in insurance market, so it will be interesting to see how this requirement is implemented in the EU Member States.

4. Good faith in insurance contracts

The principle of utmost good faith, expressed by the Latin maxim *uberrima fidei*, is one of the most important doctrines of insurance law and highest standard of principle good faith. Traditionally this principle requires on both the applicant for insurance and the insurer a duty of utmost good faith in their dealings with each other leading to the issue of a policy.[32] In modern insurance, this principle is used to refer to the insured's duty to disclose facts which are material to the risk and which enable the insurer to form a rational decision whether to accept the risk and, if so, at what premium.

Although this doctrine originated from English insurance law,[33] it is regarded as a fundamental principle which governs insurance contracts. However, the doctrine does not have the same meaning, nor its application is the same way in each legal system in which it has been adopted. Additionally, in some jurisdictions, the principle of utmost good faith is not recognized. For example, the insurance law of some civil law countries refers instead to the civil law concept of "good faith".[34]

The doctrine of utmost good faith requires that the insured act in good faith to disclose relevant information to the insurer when applying for insurance.[35] Originally, the common law duty of utmost good faith applied only at insured's pre-contractual duty.[36] Today, in many jurisdictions that have adopted the principle of utmost good faith, the application of the doctrine has been extended by the requirement that the insured must make to the insurer a fair presentation of the risk and that implies that he either discloses

[32] The principle of utmost good faith makes the application for insurance easier because most insurance companies do not check the facts before they issue the policy.

[33] This doctrine was originated from the case of Lord Mansfield C.J. in *Carter v. Boehm* ((1766) 3 Burr 1905) and his formulation of the disclosure duty is partially codified in the Marine Insurance Act 1906.

[34] See e.g. article 1134 of the French Civil Code; section 1:3 of the Hungarian Civil Code; section 7.1, 1258 Spanish Civil Code; article 2 and 3 of the Turkish Civil Code.

[35] The same provision contains Art 18. IDD. Before the conclusion of the contract, consumers will be provided with clear information about the professional status of the person selling the insurance product and about the nature of remuneration which he will receive. This does not apply for large risks and for reinsurance distribution activities.

[36] G. Blackwood, „The pre-contractual duty of (utmost) good faith the past and the future", *Lloyd's maritime and commercial law quarterly*, 2013, 322.

every material circumstances that he knows or ought to know which would influence the judgement of the insurer in deciding to underwrite the risk or provides information sufficient to put a prudent insurer on notice to enquire further into the cover proposed.

Also, in some of jurisdictions, the scope of this doctrine has been expanded to the exercise of contractual rights and the processing of claims.[37] The duty of disclosure forms part of the principle of utmost good faith and thus, is almost identical, whereas in other jurisdictions it is a separate duty imposed on the insured by statute. The ground for the strong emphasis of the principle of utmost good faith within the insurance relationship is that either party is dependent on support of the other party because of the unequal bargaining position of parties.

The insured is often regarded as being the weaker party[38] and less experienced in legal matters than the other party to the contract and the insurer has superior knowledge of the contract's content and actuarial practice, business, vast expertise. It is not always a case than an insured will be in a weaker negotiating position than the insurer, especially where the insured is a large commercial corporation.

In the following chapter we will review the good faith obligations in insurance contracts in Germany and United Kingdom.

4.1. The Principle of Utmost Good Faith in German Insurance contract Law

In Germany the doctrine of *Treu und Glauben* (literally fidelity and faith) is applicable in insurance contract law and it is generally recognized that the insurance relationship is governed to a special degree by such principle.[39] The principle of utmost good faith apply to all types of insurance contracts (life insurance, general insurance, reinsurance etc.) and particularly on insurance contracts with consumers. Both, the insurer and the insured are subject to the principle of utmost good faith (also an aggrieved party in some respect). The principle of utmost good faith is a constant duty to both insurer and insured throughout the contractual relationship[40] and irrespective of whether or not an actual insurance contract is concluded.

[37] Section 22 of the Danish Insurance Contracts Act.

[38] A reference to a „weaker party" in the EU private international law rules in civil and commercial matters usually relates to consumers, employees and insurance policy holders or other beneficiaries under insurance contracts.

[39] H. Heiss, *Treu und Glauben im Versicherungsvertragsrecht: Eine rechtsvergleichende Untersuchung deutscher und osterreichischer hochstrichterlicher Judikatur*, Wien 1989, 20ff; R. Fischer, „Treu und Glauben im Versicherungsrecht", *Versicherungsrecht – VersR Zeitschrift für Versicherungsrecht, Haftungs und Schadensrecht*, 1965, 197ff.

[40] Insurer's duty to inform and to advise and the insured's duty to disclose.

The principle of good faith is provided in Sec. 242 German Civil Code (*Bürgerliches Gesetzbuch* – BGB).[41] The insured's duty of disclosure which is contained in Sec. 19 German Insurance Contract Act (*Versicherungsvertragsgesetz* – VVG)[42] is the product of the principle of utmost good faith.[43] Sec. 19 VVG provides a detailed set of rules with regard to the insured's duty of disclosure[44] and the legal consequences following a violation of the disclosure.[45]

Where the policyholder deliberately (*vorsätzlich*) or with gross negligence (*grob fahrlässig*) has made incorrect statements, the insurer may withdraw (*zurücktreten*) from the contract.[46] If the policyholder acted without fault or was only guilty of simple negligence in violating these duties, the insurer may terminate (*kündigen*) the contract with one month's notice.[47]

In the event the insurer withdraws from the contract after the occurrence of the insured event, the insurer shall not be obligated to effect payment, unless the breach of the duty of disclosure refers to a circumstance which is neither responsible for the occurrence nor for the establishment of

[41] § 242 BGB „*Der Schuldner ist verpflichtet, die Leistung so zu bewirken, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern*." (An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration).

[42] German insurance contract act (*Versicherungsvertragsgesetz* – VVG 2008) entered into force on 1 January 2008 (for policies concluded prior to that date it took effect as of 1 January 2009).

[43] H.Honsell, *Berliner Kommentar zum Versicherungsvertragsgesetz: Kommentar zum deutschen zum deutschen und österreichischen VVG*, Springer, Berlin-Heidelberg 1998, 2194.

[44] Sect. 19 para. 1 VVG 2008. Pursuant to this rule, the insured shall disclose to the insurer before making his contractual acceptance the risk factors known to him which are relevant to the insurer's decision to conclude the contract with the agreed content and which the insurer has requested in writing. If, after receiving the policyholder's contractual acceptance and before accepting the contract, the insurer asks such questions as are referred to in the first sentence, the policyholder shall also be under the duty of disclosure as regards these questions. If the contract is concluded by a person representing the policyholder, both the representative's knowledge and fraudulent conduct as well as the insured's knowledge and fraudulent conduct shall be taken into account in the application of the above. The insured may only invoke the duty of disclosure not having been breached intentionally or with gross negligence if neither the representative nor the insured has incurred responsibility for intent or gross negligence.

[45] Sec. 16 Austrian Insurance Contract Act (*Versicherungsvertragsgesetz* – VersVG), pre-contractual disclosure concerns every fact of importance for the decision of the insurer to take a risk and If violated the right to rescind the contract; if insurer rescinds it will be free from paying insurance money for insured events which were caused by the circumstance which was not disclosed or misrepresented; Pursuant to art. 931 of the Civil Obligations Act of the Republic of Croatia, on the conclusion of the contract, the policyholder shall report to the insurer all the circumstances that are material for assessing the risk, of which he is aware or of which he should have been aware; Sec. 82-84 Serbian insurance Act, provide the minimum content of the information that an insurer is required to make available prior to the conclusion of the contract to a policyholder.

[46] Sect. 19 para. 2, 3 VVG 2008.

[47] Sect. 19 para. 2 VVG 2008.

the occurrence of the insured event nor for the establishment or the extent of the insurer's liability. If the policyholder has fraudulently breached the duty of disclosure, the insurer is not obliged pay.

The insurer's right of withdrawal or termination, however, is excluded, if, having known of the undisclosed circumstances, he would have concluded the contract, albeit on different terms and conditions (unless the policyholder acted deliberately). In that case the insurer is entitled to modify the policy accordingly. The policyholder must generally provide notice of only those circumstances about which the insurer has queried in text form prior to the conclusion of the contract. The remedies for a breach of the duty of utmost good faith are not provided for in statutory rules.

The duty of utmost good faith applies at the pre-contractual and post-contractual stage. Sec. 19 VVG is primarily applicable but also the principle of utmost good faith applies during the pre-contractual stage.[48] Additionally, Sec. 23 VVG contains rules regarding the aggravation of risk which also constitute the written consequence of the principle of utmost good faith.[49] Sections 6 and 7 VVG prescribe the pre-contractual duty of utmost good faith for the insurer to inform and to advise. In addition, the principle of utmost good faith obliges the insurer to clarify any ambiguities.

As a general rule, under the VVG 2008 the insurer is required to give advice to the policyholder before the conclusion of an insurance contract and this advice must be documented.[50] The information must be provided in a clear and comprehensible manner.[51] Should there be a reason to do so advice must be provided during the term of the policy as well.[52]

The basic remedies for breach of the duty to disclose include the following: insurer's right to withdraw from the contract (if the breach

[48] The principle of utmost good faith nevertheless still is applicable where positive rules do not exist.

[49] Pursuant to this rules,, the insured is obliged to adjust objectively incorrect information if apparent to him and to give voluntary disclosure truthfully.

[50] Sect. 6 para. 1 VVG 2008. The insurer, unlike a broker (*Versicherungsmakler*) owes reasonable advice to the policyholder. In determining the reasonableness of the advice, it is generally accepted that all relevant information of the case including the demands and needs of the policyholder, the nature and complexity of the envisaged insurance contract and the amount of the premium to be paid.

[51] Sect. 6 para. 2 VVG 2008.

[52] Sect. 6 para. 4 VVG 2008. For example, if the policyholder wishes to terminate a life insurance contract, the insurer must inform him about the option to continue the policy without premium payments. The documentation requirement is intended to facilitate the production of evidence for the policyholder (if he claims for damages for inappropriate advice). Policyholders may waive their right to receive advice and/or documentation by issuing a separate written declaration to this effect and such waiver is only valid if the insurer refers in the same document to the disadvantageous effects of the waiver. In this way, policyholders are protected from hasty waivers. More details: W. Rüffer, D. Halbach, P. Schimikowski, *Versicherungsvertragsgesetz: VVG- Handkommentar*, 2008^2, § 6 VVG note 31.

was grossly negligent or intentional), the right to terminate the contract by giving one month's notice (if the breach was not intentional or grossly negligent), and the right to increase the premium (if the insurance contract would have been concluded irrespective of the misstated or omitted information but on different conditions, even if the breach was grossly negligent). However, the remedies for a breach of the duty of utmost good faith are not provided for in statutory rules.

The German regulator (*Bundesanstalt für Finanzdienstleistungsaufsicht* – BaFin)[53] in case of violation of the interests (constant breach by the insurer of its duty of utmost good faith in the form it has been adopted in statutory provisions) will demand from the insurer to remedy such inadequacy and has the authority to issue any order *vis-à-vis* the insurer (or/and insurer's management) which is necessary to remedy the situation.

4.2. The Principle of Good Faith in United Kingdom insurance contract law

The UK insurance and business market has changed significantly during the last 100 years since the Marine Insurance Act 1906 received Royal Assent. Marine Insurance Act 1906 was the leading statute relating to commercial insurance, which, despite its name, also applied to non-marine insurance and reinsurance. Although that Act has served the marine industry well and has stood the test of time, after substantial review, the Law Commission concluded that the current law was out of step with twenty-first century commercial practice.

The Insurance Act 2015 received Royal Assent on 12 February 2015 and came in force on 12 August 2016 and is designed to provide a more up to date framework for commercial insurance in England and Wales, with a focus on transparency and confidence over the rules that govern contracts between commercial policyholders and insurers.[54] However,

[53] Post-Contractual duty of the principle of utmost good faith for insurer: obligation to pay the premium certain obligations regarding the adjustment of the information imbalance between the insurer and the insured/beneficiary as is the case in connection with the aggravation of risk (art. 28 et seqq. ICA), the occurrence of an insured event (art. 38 ICA) or the justification of the insurance claims made under the contract (art. 39 ICA). There is no specific duty at a post-contractual stage for the insurer. However, when insurer is dealing with a claim, he is bound by the general principle of good faith pursuant to art. 2 of the Swiss Civil Code.

[54] The exceptions are the provisions which relate to the amendment of the Third Parties (Rights against Insurers) Act 2010 and the provisions relating to late payment of insurance claims. These provisions were not originally included in the Act but have since been inserted by Part 5 of the Enterprise Act 2016. The 2010 Act came into force on 1 August 2016 and the provisions relating to late payment will come into force on 4 May 2017. The 18 month delay between royal assent and commencement is designed to provide all stakeholders with the opportunity to prepare for the changes to the law and to amend their current practice as necessary.

Insurance Act 2015 will not apply retrospectively to English contracts of insurance entered into prior to 12 August 2016.

The 2015 Insurance Act applies to all commercial contracts of insurance and variations to existing contracts of insurance and represents the biggest reform to insurance contract law in UK for more than a century. Insurance contracts under English law are traditionaly considered contracts of „utmost good faith".[55] English insurance contract law derives from the common law and was partially codified under the Marine Insurance Act 1906. As already mentioned, the principle of utmost good faith first arose through common law in the mid eighteenth century (as expressed by Lord Mansfield in *Carter v Boehm*)and is partially codified through sections 17-20 of the Marine Insurance Act 1906.

The general underlying principle that insurance contracts are based upon utmost good faith remains in the 2015 Insurance Act. However, the Act alters the law in relation to pre-contractual disclosure, creating a new duty of fair presentation of risk.[56] It requires the insured to make to the insurer, a "fair representation of the risk" before the contract is entered into.

This duty is made up of following elements. The insured is required to disclose "every material circumstance"[57] which they "know or ought to know".[58] This replaces the disclosure duty in the Marine Insurance Act 1906. If the insurer is not strictly satisfied, there will be no breach if the insured gives enough information to put a prudent insurer on notice that it should make further enquiries which would reveal material circumstances which the insured know or ought to know. This clause creates a duty not to make misrepresentations. This means where a material representation concerns a matter of fact it must be "substantially correct" and where it concerns a matter of expectation or belief it must be made "in good faith".[59]

The duty of fair presentation under the 2015 Insurance Act and prohibition of "basis of contract" clauses only apply to non-consumer insurance contracts because the duty of fair presentation and prohibition of basis of contract clauses already applies to consumer insurance contracts under the Consumer Insurance (Disclosure and Representations Act 2012). The application of the 2015 Act to consumer insurance contracts is mandatory and cannot be contracted out.

[55] In English law, good faith has been outlined as not simply meaning that the parties should not deceive each other, a principle which any legal system must recognize and its effect is perhaps most suitably conveyed by such metaphorical language phrase s as "playing fair", "coming clean" or "putting one's cards face upwards on the table".

[56] Chapter 4, part 2 The 2015 Insurance Act.

[57] Whether a circumstance is material is defined whether it would influence the judgment of a prudent underwriter in determining whether to take the risk and on what terms.

[58] What an insured "ought to know" will be assessed objectively i.e. what should reasonably be revealed by a reasonable search of information available to the policyholder.

[59] Chapter. 4. part 3, The 2015 Insurance Act.

Duty of utmost good faith, including the duty of disclosure, applies to all types of insurance contracts.[60] This, however, does not necessarily mean that the scope and application of the duty are identical in every type of insurance.[61] The duty will depend upon the circumstances of each case. The Principle of Utmost Good Faith is mutual and apply to both the insured and the insurer at the pre-contractual stage. However, in practice, the duty is significantly more oppressive for the insured than for the insurer. This is because the information relevant to the assessment of a risk has most commonly been in the knowledge of the insured. Furthermore, matters involving the insurer's duty of disclosure are rarely litigated because the remedy available to the insured for non-disclosure, avoidance of the insurance contract, is rarely of benefit to the insured.

The remedy for a pre-contractual breach of the duty of utmost good faith (duty of fair presentation) is set out in Schedule 1 of the 2015 Insurance Act and entitles the insurer If the breach of the duty of fair presentation is deliberate or reckless to avoid the contract and refuse all claims and need not return any of the premiums paid.[62] If the breach is neither deliberate nor reckless and the insurer would not have entered into the contract if aware of all of the information then the insurer may avoid the contract and repay all premiums paid. If the breach is neither deliberate nor reckless and the insurer would have entered into the contract but on different terms then the payment may be reduced in proportion to the difference between the premiums paid and the premiums that would have been payable.

In terms of an insurer's remedy for breach of the duty of fair presentation, the new Act provides for a range of remedies which are intended to be more flexible and proportionate. But, generally speaking under the new framework, where the insurer would have written the policy on different terms and had a fair presentation of the risk been provided, a claim on the policy will be assessed applying those different terms. This is likely to introduce some uncertainty, and potentially disputes, at least until there is clear guidance from the Courts as to how these principles under the Act are to be applied in practice.

At present insurers often rely on so called "basis of contract" clauses as a means of converting pre-contractual statements and information supplied to insurers into warranties. The use of "basis of contract" clauses has been the subject of much criticism, because of their potentially strict consequences. The 2015 Insurance Act now abolishes the use of "basis of contract" clauses in non-consumer insurance as they were abolished

[60] *Godfrey v Britannic. Assurance co* [1963] 2 Lloyds Rep 5151.
[61] *London Assurance v Mansel* (1879) 11 Ch. D. 363.
[62] The requirement that the insured's failure to disclose information was "deliberate or reckless" could be very difficult for insurers to prove.

in consumer insurance by the Consumer Insurance (Disclosure and Representations) Act 2012.

Under past law, a breach of warranty discharges the insurer from all liability under the insurance contract, even if the breach is trivial and has no connection with the insured's loss. This is repealed by the new Act a breach of warranty will not automatically take the insurer off risk. Instead warranties will be of suspensive effect such that an insurer can only rely on a warranty throughout the time the insured is in breach. Insurers will come back on risk if the breach is subsequently remedied (where the breach is capable of being remedied).The Act also provides that insurers cannot rely on a breach of warranty or other terms which are not relevant to the actual loss. Where a loss occurs, and a policy term has not been complied with, insurers will be prevented from relying on the non-compliance to exclude, limit or discharge their liability under the policy if the insured can show that non-compliance with the term did not increase the risk of loss which actually occurred.[63]

Pursuant to 2015 Insurance Act, contracting out, clause 15 makes it clear that in consumer insurance contracts, insurers are prevented from contracting out of any of the provisions in the act to the detriment of the consumer. A policy term that puts the consumer in a worse position than under the Act will be rendered void. At present insurers often rely on so called "basis of contract" clauses as a means of converting pre-contractual statements and information supplied to insurers into warranties. The use of "basis of contract" clauses has been the subject of much criticism, because of their potentially strict consequences. The Act now abolishes the use of "basis of contract" clauses which is a welcome development for policyholders.

As outlined above, the IDD is not 'directly applicable' which means that it must be implemented into domestic law by each EU Member State and the deadline for domestic implementation is 22 February 2018. If the UK leaves the EU, it would of course no longer be required to implement EU directives after it ceases to be an EU member state. However, after Brexit[64], the UK is unlikely to leave the EU until after 22 February 2018, meaning that it would in theory still be under an obligation to implement the IDD into UK law. Assuming that the IDD is implemented into UK law, anyone involved in selling insurance products should take note of the new IDD and its principle.

[63] Chapter 4, part 3. art 10 The 2015 Insurance Act.

[64] Brexit is an abbreviation for „British exit" which refers to the 23 June, 2016, referendum whereby British citizens voted to exit the European Union.

5. Conclusion

Most civil law jurisdictions recognize and enforce a general duty of good faith as one of the basic principles governing the whole life of a contract. In spite of this far reaching acceptance of good faith in the area of substantive law, over the years the duty of good faith has been subject to attack and criticisms on various grounds. One frequent accusation is that the good faith doctrine is ambiguous in nature since there is no definitive answer as to the exact nature of the principle of good faith. Furthermore, notion of fairness is often very difficult to define, great ambiguity follow when trying to assess whether good faith has been employed or not. The principle of good faith does not itself serve as a basis for rights and duties. It is not a free-standing rule, but rather a standard that underpins and is manifested in more specific legal doctrines. The organizing principle of good faith is a rule or doctrine in general statutory provisions on good faith in civil law legal systems. It is generally accepted that the good faith standard requires subjective honesty from the contracting parties. Provided that parties deal with each other honestly and fairly, however, the good faith doctrine will be assumed to have been executed, yet this is rather difficult to achieve in insurance contracts since the parties are often unaware of their exact rights and duties.

The insurance market has changed considerably in the present time and this classical assertion of insurance law has recently been questioned due to all the technological advancements. Therefore, since it cannot keep pace with modern commercial practice, a classical approach of the doctrine good faith remains at the center of attention and facing further calls for reform in order to cope with the developments in commercial transactions. Based on the solutions inspired by the principle of good faith, new rules and institutions started to emerge, and MiFid and IDD principles are clear proof of that. The IDD introduced two general principles, providing that insurance distributors must "always act honestly, fairly and professionally in accordance with the best interests of customers"; and that all information must be "fair, clear and not misleading". The disclosure of clear, meaningful and relevant information at contract level will help consumers to make informed decisions when purchasing insurance products. Accepting a general principle "to always act honestly, fairly and professionally" does not necessarily mean that parties to insurance contracts will be subject to new or more extensive "good faith" duties. The general organizing principle will not impose a pre-fabricated set of specific legal duties that need to be observed by the parties. Rather, it requires the parties in general terms to perform their contractual duties honestly, fairly and professionally in accordance with

the best interests of customers. As the IDD is a minimum harmonisation Directive, Members States may elect to implement additional measures at national level, if they deem this necessary for the purposes of consumer protection. However, this may lead to unnecessary administrative burden and would have a negative effect on the Single Market. The implementation of the IDD might not change the regulatory landscape in insurance distribution in many Member States because a number of the regulatory requirements that are now being introduced by the IDD are already in place. Bearing in mind the above-mentioned, this leaves some space for a doubt as to what level of harmonisation the IDD will achieve in practice.

Mr Katica Tomić
doktorand Pravnog fakulteta Univerziteta u Beču i
Fakulteta pravnih nauka Univerziteta "Apeiron", Banja Luka

NAČELO DOBRE VJERE U EVROPSKOM I NACIONALNOM ZAKONU O OSIGURANJU

Rezime

U posljednjih nekoliko godina tržišta osiguranja postala su dinamičnija zbog deregulacije tržišta osiguranja, globalizacije osiguravajućih ustanova, povećane tržišne konkurencije, tehnološkog napretka, promjena u ponašanju kupaca kao i aktivnost regulatora , a što se povećalo posljednjih nekoliko godina kao posljedica svjetske financijske krize. U svjetlu svjetske financijske krize, usvojene su dodatne mjere usmjerene na jačanje zaštite potrošača u Europi. To uključuje Direktivu o distribuciji za osiguranje (IDD) i Direktivu o tržištu financijskih instrumenata (MiFID II). IDD sadrži brojne nove odredbe u odnosu na Direktivu o posredovanju u osiguranju (IMD Direktiva 2002/92 / EZ), uključujući i novi princip ponašanja za distributere osiguranja da „uvijek djeluju pošteno, pravedno i profesionalno u skladu s najboljim interesima svojih potrošača". Glavni koncept ovog pravila je da će osiguranik samo biti u mogućnosti donijeti pravu odluku kada je jasno obavješten o uslugama koje se nude (i rizicima), a distributeri mogu pružati usluge u

skladu s najboljim interesima klijenta samo u slučaju ako su u potpunosti upoznati sa vrstom kupaca i njihovim interesima. Većina država članica EU ima pravni sistem civilnog prava , s općom klauzulom o pravičnosti i dobroj vjeri. Države članice Evropske unije moraju implementirati IDD u nacionalna zakonodavstva, stoga je sporno da one same odluče da li je princip ponašanja koje određuje IDD sličan sa postojećim općim odredbama iz nacionalno zakonodavstva, ili je različiti od tih odredbi.

Ključne riječi: Direktiva o distribuciji osiguranja, dobra vjera, krajnje dobra vjera, Građanski zakonik, Zakon o ugovoru o osiguranju.

Ksenija Vlašković, Ph. D.[1]

Scientific review paper
UDC: 347.772

THE USE OF A MARK IDENTICAL OF SIMILAR TO WELL KNOWN TRADEMARK WITH AND WITHOUT "DUE CAUSE"

Abstract

Protection of trade mark is available for any sign which is capable of distinguishing the goods and services of one enterprise from others. These signs include, inter alia, words, personal names, letters and numerals, figurative signs, colors and color combinations, three dimensional shapes, including the shape of goods or their packaging. They are essential in market economies, fostering market transparency, permitting their owners to create a direct link with consumers, allowing consumers to identify and memorize the products and services they prefer, thus contributing to a system of fair and undistorted competition. However, with the growth of globalization, e-commerce consumers and advertising, reputation and distinctiveness of trade marks are particularly vulnerable to attack by those who wish to take advantage of them, for profits and enhance their financial gain (using a sign, identical or similar, to an earlier trade mark). The damage and exploitation of distinctiveness as well as the damage and the exploitation of the reputation of the well-known trademark can be discussed only in the event when there are no specific "due causes" coming from the side of a potential infringer. This means that the lack of "due cause" is the requirement for the protection of well-known trademarks.

In this paper, we analyzed the BGH and the ECJ judgments whose subject was to determine the existence of "due causes". Since this reason can be based on the regulations of trademark rights, but also on the basis of more general rules of legal order, such as constitutional provisions protecting freedom of thought, freedom of artistic creativity, as well as the communitarian regulations on freedom of transport and services in the single market, establishing a valid reason is based on all the circumstances of specific cases, which is why judicial decisions often come to opposite conclusion. "Due cause" limits the scope of protection of well known trademark. In

[1] Associate at Rectorate, University of Kragujevac, mail: ksenija@kg.ac.rs

terms of peacock sting, the limit should be reduced to the suitable measure, mainly in the sense that new competitors, with the use of additional features, must be distinguished from the already well known trademark.

Keywords: *using in good faith, coordination of interests, freedom of expression, commercial use, imitation products.*

1. Introduction

Doing business in good faith in the unique market is based on the principle of striking a balance between the interests of the trade mark proprietor and those of the proprietor's competitors, consumers and a social community as a whole. One of the most common ways of disrupting the balance established in such a manner is the use of a sign in bad faith without "due cause".[2] In other words, infringing acts occur only if they are done in bad faith. By default, bad faith is always assumed while confirming the facts related to damaging or exploiting someone else's trade mark. When acting in bad faith, which is a condition for the protection of well-known trade marks, one can refer to the unity of trade marks rights and the rights of their competitors.[3] The facts related to the sign being used in bad faith are confirmed based on the overall evaluation defined in the area of competition law.[4]

The fact that there is no due cause is recognized as an independent condition for the protection of well known trademarks, to which a slight meaning can be attributed in practice, considering the "fact that in majority of the cases infringing acts are performed without due cause".[5] It means that only in specific cases can protection of well known trademarks be restricted due to the existance of "due cause" which may be based, for instance, on the consitutional provisions on freedom of expression,

[2] Article 5 (2) First Council Directive 89/104/EEC to approximate the laws of the Member States relating to trade marks contains provision, which read as follows: " Any Member State may also provide that the proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade any sign which is identical with, or similar to, the trade mark in relation to goods or services which are not similar to those for which the trade mark is registered, where the latter has a reputation in the Member State and where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark." First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks, *Official Journal L 040, 11/02/1989***,** 0001 - 0007.

[3] A. Baumbach, W. Hefermehl, *Warenzeichengesetz,* Münche 1985[12], 439.

[4] M. Harald, „Die Rufausnutzung als Unlauterkeitstatbestand in den neueren Rechtspechung des BGH - der wettbewerbsrechtlich verankerte Schutz „bekannter" und „exklusiver" Marken ein gangbarer Weg?", *Gewerblicher Rechtsschutz und Urheberrecht* 9/1986, 836. Also see: A. Winkhaus, *Der Begriff der Zeichenähnlichkeit beim Sonderschutz bekannter Marken,* Peter Lang GmbH, Frankfurt am Main 2010, 30.

[5] K. H. Fezer, *Markenrecht,* München 2001[3], 428.

freedom in artistic creativity or free movement of goods and services in the unique market.[6] This paper, from the legal point of view, represents the opinion of the German Federal Supreme Court and European Court of Justice on the matter of distinguishing the aforementioned forms of the use of signs in context the concept of „due cause".

2. Due cause in decisions of the German Federal Supreme Court of Justice

What was being resolved in the German Federal Supreme Court's decision "POST/Die Neue Post" – was the claim submitted by Deutsche Post AG, as the proprietor of a trade mark POST registered for postal services related to the delivery of goods, letters and parcels. Namely, the abovementioned company was the proprietor of a majority of the trade marks containing the word POST, complete with a trade mark represented using pictures, graphics or images due to which a post horn is being reproduced in black in the background with the specific nuance of yellow. The defendant is an enterprise providing the same services and doing business as *Die Neue Post*.[7]

According to Article 6 of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade mark**s** (hereinafter: Directive 89/104/EEC),[8] the trade mark shall not entitle the proprietor to prohibit a third party from using, in the course of trade, any sign which is identical with, or similar to, the trade mark in relation to goods or services or the characteristics of the services which are not similar to those for which the trade mark is registered, provided he

[6] Judgment of the General Court (Sixth Chamber), 27. 9. 2012, T-373/09 - *El Corte Inglés v OHMI - Pucci International (Emidio Tucci)*, Application for Community figurative mark Emidio Tucci, Earlier Community figurative and national word and figurative mark EMILIO PUCCI, Unfair advantage taken of the distinctive character or the repute of the earlier mark.

[7] The German Federal Supreme Court's decision, *POST v. Die Neue Post* - I ZR 169/05, made on June 5, 2008, *Gewerblicher Rechtsschutz und Urheberrecht* 9/2008, 798.

[8] The trade mark shall not entitle the proprietor to prohibit a third party from using, in the course of trade, his own name or address; indications concerning the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of the service, or other characteristics of goods or services; the trade mark where it is necessary to indicate the intended purpose of a product or service, in particular as accessories or spare parts; provided he uses them in accordance with honest practices in industrial or commercial matters. Also, the trade mark shall not entitle the proprietor to prohibit a third party from using, in the course of trade, an earlier right which only applies in a particular locality if that right is recognized by the laws of the Member State in question and within the limits of the territory in which it is recognized. Article 6, First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks, *Official Journal L 040,* 11/02/1989, 0001 - 0007.

uses them in accordance with honest practices in industrial or commercial matters. Accordingly, the German Federal Supreme Court denied the defendant's claim providing the following explanation: "(...) due to honest practices in industrial or commercial matters third parties are obliged not to act in a disloyal manner against the rightful interests of the trade mark proprietor. The risk of its replacement in terms of the trade mark rights does not automatically mean that there will be an infringement regarding the honest practices in industrial or commercial matters. Otherwise, Article 6 of Directive 89/104/EEC would not make any sense."[9]

Therefore, in the concrete case one cannot claim that there is an infringement regarding the honest practices in industrial or commercial matters, for the court precedent of the defendant was German federal post office, that is, the enterprise holding a monopoly of the market, having the exclusive right to perform the abovementioned services in Germany.[10] Additionally, in the 1990s the postal services market was partly opened for private enterprises in whose special interest was to use the term POST for the purpose of designating their services. However, private enterprises were not entitled to use this particular term, and the only remaining possibility was only to use the signs of a fantastic character.[11]

By placing an emphasis on the fact that the concrete aim of Article 6 of the Directive 89/104/EEC is to reconcile the fundamental interests of trade-mark protection with those of free movement of goods and services, the German Federal Supreme Court indicates that there is an evident need to provide competitors, occuring later on the previously monopolized market, with a possibility to use another descriptive term, even in the case that it could induce the risk of its replacement with the already known trade mark containing a word. In such cases, reconciling interests of competitors consequently leads to limitations on the scope of trademark protection. However, limitations on the scope of trademark protection have to be reduced to appropriate degree – which means that new competitors have to be distinguished in relation to the previously used trademark.[12] At the same time, they must not increase the risk of its replacement during the movement of goods by relying on other signs used by the trademark holder such as the black post horn or the background with the specific nuance of yellow in this particular case.

---

[9] The German Federal Supreme Court's decision, *POST v. Die Neue Post* - I ZR 169/05, 799.
[10] *Ibid.,* 780.
[11] U. Sternberg, „Anmerkung zum Urteil des BGH made on June 5, 2008 - Az. I ZR 108/05 and I ZR 169/05 (Post)", *MarkenR* 7/2008, 364.
[12] The same viewpoint is confirmed in the German Federal Court's decision I ZR 44/07 - OFFROAD, made on December 2, 2009*, Gewerblicher Rechtsschutz und Urheberrecht* 7/2010, 646.

The German Federal Supreme Court overruled the defendant's claim, that is the claim of the POST trademark proprietor, on the grounds of specific protection of well-known registered trademarks – with the explanation that the abovementioned protection is provided only in the case of the defendant's use of the sign at issue in bad faith, without having due cause. However, the previous presentation makes it clear that the defendant has used a well-known trademark with due cause and that it is not done in a manner contrary to honest practices in industrial or commercial matters.[13]

The German Federal Supreme Court contemplated the issue of the use of a trade name and well-known trademark in bad faith in the decision *TÜV II*. The defendant in the case of the dispute at issue is the TÜV Süd Aktiengesellschaft Company, established in the year of 1995 and created from the merger of several technical inspection agencies. It is the proprietor of a trademark containing a word TÜV, complete with a combined trademark containing a word and image TÜV SÜD. Trademarks are registered for the purpose of providing engineering, examination, research, testing and monitoring services in the field of technology, particularly from the aspect of safety. The plaintiff does business using the D. A. GmbH. sign, offering services in the areas of the health protect ion at work, health and safety at work, hazardous materials, contaminated locations and environmental protection, technical monitoring of equipment, fire protection, explosion protection, design and construction of architectural objects, engineering and quality management. The plaintiff offered the abovementioned services on the Internet, using the following signs: Privater TÜV, Erster privater TÜV and TÜV - Dienstleistungen. The plaintiff disputed the use of the aforementioned signs because of their containing the word TÜV, which was identical with the defendant's trade name and trademark, placing an emphasis on the fact that it was a well-known trademark highly reputed in the field of monitoring, evaluation of technical systems complete with certificate issuance for the aforementioned services. Contrary to the given statement, the plaintiff claimed that the TÜV sign had become a synonyme for technical performance monitoring and certificate issuance, for instance, during the control inspection of motor vehicles. Additionally, the plaintiff claimed that it was the reason of the justified use of the aforementioned sign as a generic name while advertising the services via the Internet.[14]

[13] The same reasoning upon which a court ruling was based is given in the decision of the Court of Appeals of Hamburg 3 U 10/05: Bedeutung des Monopoleinwands bei einer Benutzungsmarke OP OSTSEE - POST, made on April 4, 2006, *Gewerblicher Rechtsschutz und Urheberrecht - RR* 5/2007, 149.

[14] The German Federal Supreme Court's decision, I ZR 108/09 TÜV II, made on August 17, 2011, *Gewerblicher Rechtsschutz und Urheberrecht* 11/2011, 1043.

The German Federal Supreme Court believed that exploitation of distinctive power or reputation of TÜV and TÜV SÜD trademarks was done in bad faith and that it was done without due cause whereas its final decision was based on the overall evaluation of interests. Taking into account that the use of the aforementioned sign, which is identical with, or similar to, a well-known trade mark previously registered for similar or identical goods or services for the purpose of exploitation of distinctive power or reputation, by default, always means that there is some form of bad faith, the court emphasizes that "(...) due cause cannot be considered in respect of the fact that the disputed sign cannot be replaced by the well-known trademark, for the protection against the potential risk of signs replacement is inherent to each trademark, in particular to well-known trademarks enjoying extended protection as well."[15] In addition, the use of the D. A. GmbH sign – used by the plaintiff while doing business for more than 30 years – cannot justify the use of the TÜV sign for a description of services provided by the defendant, that is, the plaintiff has no legitimate interest in such use. The TÜV word has no specific meaning and the fact that it is well-known is neither based on its previous use nor its monopolistic character as in the case of the POST trademark noted above. In other words, the plaintiff did not choose an originally descriptive sign. Therefore, the plaintiff is not obliged to be affected by the limitations related to the scope of trademark protection.[16]

The case *Marlboro/Mordoro* was being resolved upon the request of the plaintiff who was selling Malboro cigarettes after having advertised the aforementioned cigarettes for years using images portraying the life of a cowboy and advertising slogans as well. The plaintiff announced the award competition for self-promotional purposes, at the same time advertising it by using a coloured placate with the following words written on it: "Great Marlboro - Poker!"[17]. There was an image of a cowboy reproduced on the poster. The cowboy presented in the picture was holding a pack of cards in one hand and a cigarette in another hand. In addition, a substantial part of the given poster contained some words signifying three prizes. This placate was replaced by a medical practitioner via the photo montage. The

[15] O. Teplitzky, „Der Streitgegenstand der schutz- und lauterkeitsrechtlichen Unterlassungsklage vor und nach den TÜV - Entscheidungen des BGH", *Gewerblicher Rechtsschutz und Urheberrecht* 12/2011, 1091.

[16] See the decisions of the German Federal Court: I ZR 149/96 - BIG PACK, para 27, made on January 14, 1999, *Gewerblicher Rechtsschutz und Urheberrecht* 11/ 1999, 994 and I ZR 211/98 - Tagesschau, made on March 1, 2001, para 56 and 67, *Gewerblicher Rechtsschutz und Urheberrecht* 10-11/2001, 1050 and I ZR 279/02 - Telefonische Gewinnauskunft, made on June 9, 2005, para 32 and 47, *Gewerblicher Rechtsschutz und Urheberrecht* 12/2005, 1064.

[17] In the German language: "Großes Marlboro - Poker!"

advertising title was replaced by the following words: "A big Mordoro – Poker!"[18] while the first, second and third award had already been written. The aforementioned awards signified the most common diseases caused by smoking cigarettes, while the awards (complete with the advertising slogan) stated by the plaintiff had been deleted.[19]

The plaintiff believed that the trademark at issue was subjected to mockery in this manner, which consequently led to its discrimination and underestimation. Therefore, the plaintiff stood against the alienated review of the reputation and dilution of the commercial value or "selling power" of the trademark at issue.[20]

The German Federal Supreme Court confirmed the standpoint that the defendant was able to refer to the constitutional right to freedom of expression,[21] because a dispute in respect of any matter of the health risks of smoking was in the public interest. Namely, the tobacco industry had to tolerate all the activities the purpose of which was to point out such hazards, even in the case when negative effects of smoking were believed to be overly accentuated and presented from one point of view, causing a steady decline in tobacco products sales. However, it still did not mean that the defendant could initiate an anti-smoking advertising campaign in public, without taking into account the plaintiff's interests. Namely, under no circumstances was the defendant allowed to focus the criticism on the plaintiff in such a manner so that the latter was discriminated in public, nor was the defendant allowed to use his/her criticism, which was primarily directed against cigarette smoking, as a basis for personification of the plaintif's enterprise for the purposes of exploitation of fame and advertising power incorporated in the plaintiff's trademark.

According to the German Federal Supreme Court, the defendant's criticism did not give the plaintiff cause for feeling discriminated nor underestimated. Namely, from the aspect of an observer, the content of the criticism noted above did not refer to the trademark on packaging for Marlboro cigarettes. On the contrary, it was directed against the tobacco consumption in general. It was true that criticism relied on the advertising effects of Marlboro cigarettes, which were related to the notions of freedom, manhood and adventure particularly with younger smokers. By means of satirical conversion of the suggested notions into the notions

[18] In the German language: "Großes Mordoro - Poker!"

[19] The German Federal Supreme Court's decision Marlboro/Mordoro - VI ZR 246/82, made on 17. 4. 1984, *Gewerblicher Rechtsschutz und Urheberrecht* 9/1984, 684.

[20] K. Vlašković, „Nova koncepcija zaštite od opasnosti razvodnjavanja žiga", *Pravo i privreda* 7 – 9/ 2014, 104.

[21] See: K. Vlašković, „Sloboda izražavanja mišljenja i sloboda umetničkog stvaralaštva kao ograničenje delovanja poznatog žiga u nemačkom pravu", *Pravni život* 11/2015*,* 541.

related to the health risks of smoking, a consumer was redirected from the Marlboro trademark to the fantastic Mordoro trademark. The defendant's intention was clear – to unmask the advertising power of the Marlboro trademark exclusively as the representative type of all cigarettes, so that criticism could not be mistaken for the one directed against the plaintiff as the producer of Marlboro cigarettes. By acting in such a manner the defendant'scriticism did not place an emphasis on the Marlboro trademark. In addition, by all means it was possible that smokers consuming the Marlboro cigarettes were reminded of its' trademark and health risks of smoking in a much more stronger manner – based on the connection between a consumer's mind and the attached commodity – as opposed to smokers consuming other cigarette brands. However, it had to be primarily attributed to a specific advertising effect of the trademark at issue. A cigarette producer, advertising his/her products in such a manner, had to tolerate a much more serious criticism directed by his/her opponents of smoking actively engaged in the campaign of such a kind, so that one could not speak about any kind of discrimination. Namely, the point was not that the defendant was supposed to criticize any kind of a 'criminal action' on the part of the plaintiff. Instead, the defendant was supposed to point out health risks of smoking, although he/she was doing the same in a drastic form. The further aim of the defendant relating to health itself was to point out risks of cigarette advertising which was considered as a completely adequate application of a so-called anti-advertising method. A common reason based on which protection in case of risks of its replacement was provided was not applicable in case of the anti-advertisement. Any kind of infliction of damage upon the plaintiff could result from the plaintiff's sign being burdened by the reverse effect of an anti-advertisment. However, it was the burden itself that was the means by which criticism was expressed and directed at the plaintiff's advertising methods. The intensity of the reverse effects of an anti-advertisment was based on the degree of fame of the Marlboro trademark and its advertising effects as well.[22]

However, the same court took the very opposite standpoint in the decision *Markenverunglimpfung I*, which demonstrates that in the concrete case there is a very delicate line between the unauthorized use of a trademark causing trademark infringement and the use of a trademark in case that there is a justifying reson in terms of the freedom of expression or art criticism. In the aforementioned dispute, the plaintiff was a producer of chocolate and related products who achieved particular success with

[22] W. Sakulin, *Trademark protection and freedom of expression: an inquiry into the conflict between trademark rights and freedom of expression under European, German and Dutch law*, Kluwer Law International, Rotterdam 2011, 179.

the production of ribbed molded chocolate bars, marketed under the MARS trademark designation.[23] Additionally, the plaintiff registered the following slogan as a trademark: "MARS macht mobil bei Arbeit, Sport und Spiel".[24] The plaintiff was producing and offering for sale some articles made with humorous intent as well, such as a preservative condom individually packed in a box similar to the one used for packing promotional matches, with the picture of MARS ribbed molded chocolate bar presented on the front side of the packaging itself whereas the words "macht mobil"[25] were printed beneath the aforementioned picture. The continuation of the phrase given was evident when opening the box. Being placed on its interior side, the following words were written: "bei Sex, Sport und Spiel."[26] The visual image matched the image of a simple box of matches, commonly used as a promotional gift with the company's logo or trademark printed on it.

The German Federal Supreme Court found that the plaintiff's allegation that in this particular case it was all about the freedom of expression and satirical thoughts was not grounded. In the concrete case the matter of a decision did not depend on the defendant's opinion of the plaintiff, the products at issue or advertising methods used nor did it depend on the manners of expression of such an opinion, but it was strictly related to the commercial use of someone else's reputable trade mark for the purpose of marketing his/her own product, marked with a notable low rate of sale prior to the use of the trade mark at issue. By using the sign in such a manner the plaintiff exclusively increased the sale of the products whereas the aim was not to have a satirical dispute on the reputation or advertising methods of the plaintiff.[27]

In the decision of the German Federal Supreme Court *OTTO CAP*, a meaning of the term of due cause was being considered among other terms. The standpoint of the Court referred to the fact that a circumstance of the intervener having the Otto International Inc company in the

[23] The German Federal Court's decision, Markenverunglimpfung I – I ZR 79/92, made on 10 February 1994, *Gewerblicher Rechtsschutz und Urheberrecht* 11/1994, 808.

[24] A translation of this advertising slogan is the following: "Mars enables you to feel mobile at work, in sports and games."

[25] Translation: "enables you to feel mobile."

[26] Translation: "for sex, sport and games."

[27] The following decisions are similar to the ones given above: Bumms mal wieder - VI ZR 102/85, made on 3 June 1986, *Gewerblicher Rechtsschutz und Urheberrecht* 10/1985, 759; Markenverunglimpfung II - I ZR 130/92, made on 19 October 1994, *Gewerblicher Rechtsschutz und Urheberrecht* 1/1995, 57.

USA could not be considered as due cause.[28] The Court of Appeal did not confirm that the intervener's company was protected in Germany, and without such a protection one could not claim that there was due cause for the exploitation of distinctive selling power of the plaintiff's trademark. The exploitation of the distinctive selling power of the plaintiff's trademark, without using of a sign in bad faith and without due cause, was not conditioned by the subjective element. Therefore, it was not necessary for the plaintiff to use the sign in order to exploit the distinctive selling power of a well-known trademark.[29]

3. Due cause in decisions of the European Court of Justice

The national courts of the Member States have frequently referred to the European Court of Justice with the question of whether specific factors were sufficient in order to confirm or deny the existance of the use of a sign in bad faith. In that context, the Advocate General, Sharpston emphasizes the following: "Bad faith is no doubt easier to recognise than to define. It is a concept with which not merely lawyers but philosophers and theologians have grappled without quite achieving mastery. It is likely, indeed, that bad faith cannot be defined at all in the sense of determining its precise limits."[30] Accordingly, only a few specific viewpoints on this matter, presented in the decisions of the European Court of Justice, will be given at this point.

One of forms of bad faith is related to offering a mere imitation of the goods or services of the proprietor of the well-known trade mark. Namely, in the *Interflora* decision, the European Court of Justice has emphasized that it cannot be disputed that a competitor thereby takes unfair advantage of the distinctive character or repute of the trade mark (free-riding) whereas an Internet user purchases the goods of a competitor after seeing the competitor's advertisement, instead of the goods or services of the proprietor of a trademark that he/she has initially searched for. In addition, it is important to emphasize that the competitor does not pay the proprietor of the trade mark any compensation in respect of that use.[31]

The second, even more obvious form of taking unfair advantage of a sign was the subject matter of the dispute *Portakabin BV vs.*

[28] The German Federal Court's decision, I ZR 49/12: Unlautere Ausnutzung der Unterscheidungskraft einer bekannten Marke - OTTO CAP, made on 31.10.2013, *Gewerblicher Rechtsschutz und Urheberrecht* 4/2014, 378.

[29] *Ibid.,* 379.

[30] The opinion of the Advocate General, Sharpston, delived in the case C-529/07, made on 12 March 2009, *curia.europa.eu/juris/liste.jsf?num=C-529/07,* last visited 8 July 2014.

[31] See: K. Vlašković, „Zaštita poznatih žigova po direktivi broj 89/104/EEZ", *Anali Pravnog fakulteta u Beogradu* 1/2013, 277.

Primakabin in front of the Supreme Court in Amsterdam, and later in front of the European Court of Justice as well. Namely, the Portokabin BV Ltd was the proprietor of the Benelux trade mark PORTAKABIN, registered in respect of goods in Classes 6 (metal buildings, parts and building materials) and 19 (non-metal buildings, parts and building materials). Primakabin was selling and leasing new and second-hand mobile buildings. Primakabin was also engaged in selling and leasing used units, including those manufactured by Portakabin BV. The dispute arose after Primakabin chose the keywords "portakabin", "portacabin", "portokabin" and "portocabin" for the "AdWords" referencing service.[32] The aforementioned legal proceeding was brought before the Supreme Court of Amsterdam which emphasized that without the consent of the proprietor of the trademark the reseller cannot be prohibited from using the trade mark in the context of advertising for its resale activities, including the sale of the second-hand goods while using the keywords which were identical or similar to the proprietor's well-known trade mark, unless if there is a legitimate reason for such a use. The same court defines the concept of a "legitimate reason" on the part of the proprietor of that trade mark by providing an example of an advertiser who has removed reference to that trade mark from the goods, manufactured and placed on the market by that proprietor, and replaced it with a label bearing the reseller's name, thereby concealing the trade mark. [33]

The European Court of Justice in its preliminary decision confirmed that an internet search engine provider is responsible for allowing the Primakabin company to seriously damage the image (by using that mark to advertise to the public its resale activities which include the sale of second-hand goods under that mark), which the proprietor Portokabin BV has succeeded in creating for its well-known trademark. By contrast, "(...) where the advertisement displayed on the internet on the basis of a keyword corresponding to a trademark with a reputation puts forward – without offering a mere imitation of the goods or services of the proprietor of that trademark, without causing dilution or tarnishment and without, moreover, adversely affecting the functions of the trademark concerned –

[32] Case C-558/08 *Portakabin Ltd and Portakabin BV. v. Primakabin BV*. (Reference for a preliminary ruling from the Hoge Raad der Nederlanden). *curia.europa.eu/juris/liste.jsf?num=C-558/08,* last visited 11 July 2014. In assessing whether or not such a legitimate reason exists, the ECJ provides the following guidelines: (1)The national court cannot find that the ad gives the impression that the reseller and the trademark owner are economically linked, or that the ad is seriously detrimental to the reputation of that mark, merely on the basis that an advertiser uses another person's trademark with additional wording indicating that the goods in question are being resold, such as "used" or "second-hand".

[33] D. Breuer, Leitfaden Markenschutz in Google-AdWords-Marken als Keywords, Markenrecht und Markenschutz in der Praxis, 2010, *www.markenmagazin.de*, last visited 16 April 2014.

an alternative to the goods or services of the proprietor of the trademark with a reputation, it must be concluded that such use falls, as a rule, within the ambit of fair competition in the sector for the goods or services concerned and is thus not without due cause." [34]

In the *Red Bull/Bulldog* decision, the European Court of Justice defined for the first time the term due cause.[35] In the present dispute, the plaintiff is the Red Bull company. Red Bull is the proprietor of the word/figurative mark Red Bull Krating-Daeng, which was registered on 11 July 1983 for Class 32 (non-alcoholic drinks) in the Benelux countries. This undertaking's best known product is the energy drink of the same name. The subject matter of the lawsuit filed against the Leidseplein Beheer BV company and its owner Mr De Vries was related to the registration of the Bulldog mark. (Long) before Red Bull filed its trade mark in 1983, Mr de Vries was using this sign for "hotel, restaurant and café services involving the sale of drinks" and for various merchandising activities, namely, according to information provided by him, since 1975 inter alia for so-called "Coffeeshops", but also for cafés, a hotel, a bicycle-hire business, a chain of stores and, since 1997, for an energy drink. Only a few days after the registration of the plaintiff's trademark, or to be more exact: on 14 July 1983 Mr de Vries registered the word/figurative mark The Bulldog also for Class 32 (non-alcoholic drinks). The plaintiff disputed the aforementioned registration, stating that the use of the Bulldog sign for the non-alcoholic energy drink had lead to the infringement of the well-known trademark of his/her own, taking into account one part of the nominal phrase Bulldog – Bull.

The Supreme Court of the Netherlands postponed its decision on the relevant ground of Mr de Vries' appeal in order first to ask the European Court of Justice whether there can also be due cause, within the meaning of Article 5(2) of the Directive 89/104/EEC, in the case where the sign that is identical or similar to the trade mark with a reputation was already being used in good faith by the third party or parties before that trade mark was filed.[36]

In its preliminary decision, the European Court of Justice initially confirms that the concept of 'due cause' is not defined within the meaning of the Directive 89/104/EEC. Thefore, when interpreting the decision the systematic approach complete with the objective of the regulations have

[34] K. Vlašković, „Oblici odgovonosti za upotrebu poznatih žigova kao ključnih reči u on-line uslugama", in *Zbornik referata sa Međunarodnog naučnog skupa „Uslužni poslovi" održanog 9. maja 2014. na Pravnom fakultetu u Kragujevcu* (ed. M. Mićović), Kragujevac 2014, 546.

[35] The decision of the European Court of Justice C 65/12 – Leidseplein Beheer u. De Vries/Red Bull (Red Bull/Bulldog), Begriff des rechtfertigenden Grundes, from 6. 2. 2014, *Gewerblicher Rechtsschutz und Urheberrecht Int* 3/2014, 248.

[36] *Ibid.,* 250.

to be taken into account. First of all, one has to take into account the circumstances of the proprietor being guaranteed the exclusive rights by means of the registered trade mark. However, the restrictions when exercising this particular right, which the proprietor of that mark is recognised as having, are being constituted at the same time. It means that the concept of "due cause" is intended to strike a balance between the interests in question by taking account, in the specific context of Article 5(2) of Directive 89/104/ECC, of the interests of the proprietor in terms of maintaining the basic functions of the trade mark complete with the interests of other participants involved in the sales of goods or services who demonstrate the freedom when using the marks in order to label the sign similar to the well-known mark. The interests of third parties using that sign which is similar to the well-known trade mark have taken into account the specific context of Article 5(2) of Directive 89/104/ECC, so that the user of an earlier sign can refer to any "due cause". It follows that the concept of "due cause" may not only include objectively overriding reasons but may also relate to the subjective interests of a third party using a sign which is identical or similar to the mark with a reputation in order to strike a balance between the interests in question.[37] In so doing, the claim by a third party that there is due cause for using a sign which is similar to a mark with a reputation cannot lead to the recognition, for the benefit of that third party, of the rights connected with a registered mark, but rather obliges the proprietor of the mark with a reputation to tolerate the use of the similar sign.[38] In the present case, it is not disputed that Mr De Vries uses The Bulldog sign for the goods or services which are not identical or similar to the goods or services for which the Red Bull trade mark is registered. The Bulldog was used for energy drinks before the mark Red Bull Krating-Daeng acquired its reputation. The Court emphasizes that there are two circumstances relevant for giving an answer to the question of whether the use of a similar sign, occuring prior to the registration of the trade mark with a reputation, can be considered as due cause within the meaning of Article 5(2) of the Directive 89/104/EEC. The first one refers to the examination due to which it is measured up to which extent the disputed sign has imposed itself within the sale of the goods or services and what kind of its reputation follows the sign in the valid sale circles. The second one is related to an evaluation by means of which the intention of that sign user is being detected. The following factors have to be taken into account when qualifiying the use of a sign similar to the well-known trademark as ,the use in good faith: a)

[37] L. Bently, B. Sherman, *Intellectual Property-Law express,* Oxford 2014, 1011.
[38] *Ibid.,* 1014.

the degree of distinctive character of the mark and its reputation; b) the degree of similarity between the mark with earlier priority and the later well-known mark; c) the nature and degree of proximity of the goods or services concerned and marked with the opposite signs; d) date of first use of the sign for the goods or services identical with those for which the well-known trade mark is registered.

In the case that before the registration of the well-known trademark the sign has been used for the goods and services that can be associated with the goods for which the well-known trademark is registered, the use of this sign, in particular, for the aforementioned products as well can therefore be perceived, not as an attempt to take advantage of the repute of the mark Red Bull, but rather as a genuine extension of the range of goods and services offered by Mr de Vries, the ones displaying a sign which has already gained their own reputation in the valid turnover social circles. In the specific case, Mr de Vries used the sign The Bulldog in relation to hotel, restaurant and café goods and services which include the sale of drinks. The sale of energy drinks contained in packaging which displays that sign may therefore be perceived, not as an attempt to take advantage of the repute of the mark Red Bull, but rather as a genuine extension of the range of goods and services offered by Mr de Vries. This standpoint is substantiated with the fact that the sign The Bulldog was already used in relation to energy drinks even before the mark Red Bull had acquired its reputation. Taking the aforementioned analysis into consideration, the European Court of Justice believed that due cause was constituted if that third party was already using the sign (that was identical to the trademark) in good faith for other goods or services before the trade mark with a reputation was registered or gained a reputation.[39] The opinion given in front of the European Court of Justice by Juliane Kokott, the German Advocate General, is of a particular importance for the question at issue. She emphasizes the following: "The essential characteristic of taking unfair advantage is, however, that a third party attempts, through the use of a sign similar to a trade mark with a reputation, to ride on the coat-tails of that mark in order to benefit from its power of attraction, its reputation and its prestige accruing to the sign in the industrial turnover of goods, and to exploit, without paying any financial compensation and without being required to make efforts of his own in that regard, the marketing effort expended by the proprietor of the mark in order to create and maintain the mark's image." [40] However, in the present case

[39] A. Kur, „Convergence After All? A Comparative View on the U.S. and EU Trademark Systems in the Light of the 'Trade Mark Study'", *Journal of Intellectual Property Law* 2/2012, 523.

[40] The opinion of the Advocate General Kokott, delived on 21 March 2013, in the case C-65/12 – *Leidseplein Beheer BV/H.J.M. de Vries*, Article 45, *http://curia.europa.eu/juris/liste.jsf?num=C-65/12*, last visited 11 July 2014.

the possibility that Mr de Vries may have begun to market energy drinks only after Red Bull had enjoyed great success with this product also does not negate his legitimate interest in employing a previously used sign. The purpose of trade mark law is not to prevent particular undertakings from participating in competition on particular markets. Rather, such competition within the internal market is considered desirable, as the Interflora judgment shows. Within the framework of this competition, undertakings should in principle also be entitled – subject to any likelihood of confusion – to use the sign under which they are known on the market.

4. Conclusion

The damage and the exploitation of distinctiveness, as well as the damage and the exploitation of the reputation of the well-known trademark, can be discussed only in the case when the potential infringer does not have a specific "due cause". In other words, the nonexistence of the "due cause" is a self-sufficient condition for the protection of the well-known trademarks. The primary rule is that the damage without a "due cause" will more likely occur in the case of specific distinctive power and the reputation of a trademark.

The determination of the trademark usage without "due cause" is presupposed by the overall evaluation of the market circumstances. It is possible that, when taking into consideration more common norms of legal order, there is a "due cause", which can be based on constitutional regulations for the protection of the freedom of speech, freedom of artistic expression, or the freedom of traffic and services on a single market.

BGH practice stresses that the circumstance when a disputed mark is not replaceable with a well-known trademark cannot be considered as a "due cause", because the protection from the replacement danger belongs to every trademark, especially to well-known trademarks, which also enjoy extended protection. The same court considers that a "due cause" limits the scope of protection of a well-known trademark in order to harmonize the interests of competitors. In terms of trademark rights, the limiting of protection scope should be reduced to a suitable extent, by distinguishing new competitors from the well-known trademark with the usage of additional characteristics. At the same time, they cannot increase the danger of replacement in traffic by leaning on other marks used by the holder of a well-known trademark.

ECJ practice considers two circumstances as essential for answering the question whether the usage of a similar mark, which preceded the registration of a well-known trademark, is a justified reason in terms of article 5 (2) of the Directive 89/104/EEC. The first circumstance relates

to the examination to which extent the disputed mark established itself in traffic and what is its reputation in authoritative traffic circles. The other relates to the examination of what is the intention of the mark user. In order to qualify the usage of a mark similar to a well-known trademark as usage in good faith, the following factors need to be taken into consideration: the level of distinctiveness and the reputation of a well-known trademark; the level of similarity between a younger mark and a well-known trademark; the nature, the type and mutual competition relation between the compared products and services labeled by the opposing marks; the timeline in which the mark was used for the first time for the products which are identical to those for which a well-known trademark was registered.

Dr Ksenija Vlašković,
saradnik Rektorata, Univerzitet u Kagujevcu

UPOTREBA OZNAKE IDENTIČNE ILI SLIČNE POZNATOM ŽIGU SA I BEZ OPRAVDAVAJUĆEG RAZLOGA

Rezime

Zaštita žigom je dostupna za znak koji je u stanju da razlikuje proizvode i usluge jednog preduzeća od drugog. Ovi znaci uključuju, između ostalog, reči, lična imena, slova i brojeve, figurativne znakova, boje i kombinacije boja, trodimenzionalne oblike, uključujući i oblik proizvoda ili njihove ambalaže. Oni su od suštinskog značaja u tržišnim ekonomijama, jer podstiču transparentnost tržišta, dozvoljavajući njihovim vlasnicima da stvore direktnu vezu sa potrošačima, ali i omogućavaju korisnicima da identifikuju proizvode i usluge koje žele, čime se doprinosi sistemu lojalne konkurencije. Međutim, sa porastom globalizacije, komercijalizacije i oglašavanja, ugled i distinktivnost žigova su posebno izloženi napadima od strane onih koji žele da ih iskoriste, za profit i povećanje svoje finansijske dobiti (koristeći znak, identični ili sličnan ranijoj oznaci). O oštećenju i iskorišćavanju distinktivne moći, kao i o oštećenju i iskorišćavanju ugleda poznatog žiga može se govoriti samo u slučaju da na strani potecijalnog povredioca ne postoji određeni opravdavajući razlog. To znači da je nepostojanje opravdavajućeg razloga samostalni uslov za zaštitu poznatih žigova.

U ovom radu, analizirane su presude BGH i ECJ čiji je predmet utvrđivanje postojanja opravdavajućeg razloga. S obzirom da se ovaj razlog može zasnivati na propisima prava žiga, ali i na osnovu opštijih normi pravnog poretka, kao što su ustavne odredbe kojima se štiti sloboda mišljenja, sloboda umetničkog stvaralaštva, kao i na komunitarnim propisima o slobodi prometa i usluga na jedinstvenom tržištu, utvrđivanje opravdanog razloga zasniva se na svim okolnostima konkretnih slučajeva, pa se u sudskim odlukama često dolazi do suprotnih zaključaka. Opravdavajućim razlogom se ograničava obim zaštite poznatog žiga. U smislu prava žiga, ograničenje se mora svesti na primerenu meru, najčešće u smislu da se novi konkurenti, upotrebom dodatnih obeležja, moraju razgraničiti u odnosu na već poznati žig.

Ključne reči: upotreba u dobroj veri, usklađivanje interesa, sloboda izražavanja, komercijalno korišćenje, podražavanje proizvoda.

Sanda Ćorac, LL.M.[1]

Scientific review paper
UDC: 341.231.14:341.24

INTERNATIONAL HUMAN RIGHTS GUARANTEES WITH SPECIAL REFERENCE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Abstract

In the twenty-first century, one of the main issues is the question of respect for human rights. Human rights are the basis of modern society and also the matter of ongoing reflection and an inexhaustible subject. The paper analyzes the development of international guarantees of human rights, with a special emphasis on the European Convention on Human Rights and the catalog of guaranteed rights.

Keywords: *Human Rights, International guarantees of Human Rights, European Convention on Human Rights*

1. The concept of human rights

On the concept and content of human rights has been written a lot, so we can freely ask whether we can say something new. However, despite this, human rights and their protection are still discussed and wrote about with undiminished intensity.

Without a doubt, the subject of human rights is one of the biggest legal and socio-political ideas in history and probably the prominent legal and socio-political "invention" and, practically, a novelty of modern.[2] Thereby, human rights are not only proclamations but also a normative revived through a series of international documents and mechanisms through which human rights are transformed into reality. However, international documents do not provide a definition of human rights, i.e. they do not define them conceptually. Even in the legal literature on this concept, we cannot find a universal definition. In the absence of a unified position on what does the term "human rights" mean, legal theorists are trying to fill the void.

[1] PhD student, Faculty of Law, University of Kragujevac, mail: sanda_bdt@yahoo.com

[2] J.Hasanbegović, "Kultura i/ili ideologija ljudskih prava – retorika i realnost", *Anali Pravnog fakulteta u Beogradu* 4/09, 82.

Some authors are defining human rights as inherent rights of every human being.[3] They also denote a set of basic human rights, i.e. rights that human beings do not need to obtain, but have them on the basis of their very existence, independently of their native country or where they live or whether they have a citizenship or not or are refugees.[4] They are understood as a set of standards that are based on the principles and standards of the international law, including the law of each state.[5] There are authors who define human rights as a set of principles and standards common to all people that belong to individuals and/or groups, regardless of their gender, race, religion, nationality, political affiliation or origin; those rights are universal, regardless of the disputes that are related to them.[6] Also, human rights are defined as the basic and the greatest value of modern society and the modern, democratic system.[7] However, a number of legal authors are setting the question whether the concept of human rights, in general, can be defined in the usual way, which means a number of things that would more or less represent a synonym of the term or the enumeration of its essential characteristic.[8] The previous is probably the reason why some authors do not define human rights.[9]

The concept of human rights has evolved from the concept of "rights of man" which precedes it in time and what is more important: from the idea of natural right.[10] The concept of natural rights was shaped during the seventeenth and eighteenth century on the foundations of the idea of Thomas Hobbes. These ideas were then expanded by

[3] V.Dimitrijević *et al.*, *Međunarodno pravo ljudskih prava*, Beograd 2006., 36.

[4] V.Ibler, *Rječnik međunarodnog javnog prava*, Zagreb 1987., 236.

[5] In a similar way the human rights are defined by S.Avramov, M.Kreća, *Međunarodno javno pravo*, Beograd 2007., 297.

[6] M.Sahadžić, "Međunarodno pravo ljudskih prava: zaštita pojedinaca i skupina", Aktuelnost i značaj ljudskih prava i sloboda, *Zbornik radova Pravnog fakulteta Univerziteta u Istočnom Sarajevu* 2011., 246.

[7] M.Novaković, "Odnos države prema ljudskim pravima kroz neposrednu primenu međunarodnih konvencija", *Basic concepts of public international law – Monism & Dualism*, Beograd 2013., 220.

[8] J.Griffin, *On Human Rights*, Oxford UniversityPress, 2011., 18.

[9] See for example I.Brownlie, *Principles of International Public Law*, Oxford University Press 2003. and M.N.Shaw, *International Law*, Cambridge University Press 2008. About how the notion of "human rights" fraught with a number of "controversial" moments, which is why it is not surprising that there is not just one concept, school, definition and vision when this term is concerned, see more at P.G.Laurenne, *The Evolution of International Human Rights*, Philadelphia 2011., 2, referred to G.Graovac, "Geneza i važnost prava na osobnu slobodu", *Zagrebačka pravna revija* 2/2013, 238.

[10] A.Jurić, "Specifičnosti shvaćanja prava na nepovredivost doma u praksi Evropskog suda za ljudska prava", *Aktualnosti građanskog i trgovačkog zakonodavstva i pravne prakse* br.10, Mostar 2012., 363.

John Locke, who is considered to be a "father of human rights". In his expose on the natural rights John Locke starts from the idea that they are present in human society since the earliest days of its existence and that people are free and equal, proving that they have a natural right to life, liberty, and property.[11] According to the concept of natural rights, people have certain rights simply because they are humans. These rights cannot be waived because they are a natural gift and as such innate to every human being. Thus, the idea of human rights remains the idea of the right that is natural, inasmuch as it is conceived as a moral authority which human beings have as a natural capacity, not because of any particular agreement they entered into or any system of law under whose jurisdiction they fall.[12]

The doctrine of human rights is formed through the idea that each person is subject to a global (general) interest.[13] In this doctrine dominates the principle of equality, which emphasizes that human rights belong to all human beings, without distinction, for they are based on the values inherent in every person and on the innate human dignity and equality.

The concept of human rights can be analyzed through characteristics that these rights have, although there is not any unified position about them. The following characteristics can be identified in the literature: universality, the moral validity, fundamental importance, priority and abstractions;[14] then, that they are original, universal and inalienable;[15] they are universal, indivisible, interdependent and interrelated;[16] or universal - human rights belong to all people equally, they are inalienable - inseparable from the individual (are not and cannot be a matter of merit, awards or election, cannot be sold, given away or taken away), irreversible – they cannot be revoked by the government (or anyone else), indivisible – they are of the same nature and mutually dependent.[17] However, it appears that none of the

[11] N.Deretić, "Uporedna analiza: Prava čoveka u rimskoj državi i savremena ljudska prava", *Zbornik radova Pravnog fakulteta u Novom Sadu* 3/2011, 487.

[12] D.Boučer, "Prelaz od prirodnih prava do kulture ljudskih prava", *Ljudska prava – preispitivanje ideje* (ed. Đ. Pavićević), Beograd 2011., 147.

[13] C.Beitz, *The idea of Human rights*, Oxford University Press, 2009., 1.

[14] R.Aleksi, "Institucionalizacija ljudskih prava u demokratskoj ustavnoj državi", *Ljudska prava– preispitivanje ideje* (ed. Đ.Pavićević), Beograd 2011., 201.

[15] M.Paunović, B.Krivokapić, I.Krstić, *Međunarodna ljudska prava*, Beograd 2013., 22.

[16] J.W.Nickel, "Rethinking Indivisibility: Towards A Theory of Supporting Relations Between Human Rights", *Human Rights Quarterly* 4/2008, 985, referred to M.Jovanović, I.Krstić, "Ljudska prava u XXI veku: između krize i novog početka", *Anali Pravnog fakulteta u Beogradu* 4/2009, 11.

[17] M.Rudić, *Ljudska prava – priručnik za nastavnike,* Beogradski centar za ljudska prava, 2001., 7,*http://chris-network.org/wp-content/uploads/2013/01/Ljudska-prava-Priru%C4%8Dnik-za-nastavnike.pdf,* 15.05.2016.

listed characteristics is inaccurate, and each, but only partially explains the concept of human rights.

In theory, there is no agreement neither about the division of human rights. Namely, the traditional division is on basic and special rights; positive and negative; actionable and non-actionable; civil, political, economic, social and cultural; individual and collective rights. In addition to these partitions, common is also a classification on the different "generations" of human rights.[18] Classifying human rights in "generations", the phrase "triad of human rights" was created which is still in use, and includes the totality of human, civil and political rights. However, the classification in the "generations" basically just shows historical trends and their development path, that is the course of their recognition, but it does not mean favoring certain rights. The rights of the first generation are personal rights, historically oldest, and they were first formulated during the eighteenth century. The rights of the second generation are linked to the efforts of workers and other socially vulnerable groups to provide suitable economic, labor, social and cultural environment.[19] Therefore, this generation of rights forms economic, social and cultural rights. Third generation of human rights represents collective rights or rights of solidarity, which include the right to peace, to development, to a clean and healthy environment. Regardless of the "generation" to which the rights belong to, all human rights are equal concerning legal obligation and the strength and function as a single unit, but if they are violated as a whole or partially, it withdraws contempt of rights in general.

2. International human rights guarantees

The concept of human rights as we know it today has its historical roots. In fact, the idea of human rights has its origins in the ancient period, continued in early Christian period and in the feudal period in the middle ages.[20] England had a leading role in the formal development of human rights, where the historical development of these rights played out through several key stages. The Great Charter of Freedoms (Magna Charta Libertatum) was first adopted in 1215. Then, in 1628, the Petition

[18] The creator of the categorization of human rights into "generations" is Karl Vasak and it was created at the end of the seventies years of last century, see K.Vasak, "Human Rights: A Thirty-Year Struggle: the Sustained Efforts to give Force of law to the Universal Declaration of Human Rights", *UNESCO Courier*, Paris 1977., 29.

[19] S.Gajin, *Ljudska prava – pravno sistemski okvir*, Beograd 2012., 137, *http://www.nvo.org.rs/fileadmin/user_upload/Sasa_Gajin_-_Ljudska_prava__E_izdanje_.pdf*, 15.05.2016.

[20] M.Nastić, *Ustavnopravni osnov primene Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda u postupku pred nacionalnim ustavnim sudovima*, doktorska disertacija, Niš 2012., 4.

of Rights proclaimed the inviolability of citizens and in the 1679 Habeas Corpus Act was adopted: the law that declares the rights and freedoms of the subjects and determines the legacy of the crown (which is considered the most important document on human rights in Anglo-Saxon law). The beginning of a modern legal history of England is linked to the Bill of Rights (1689) which supplements the Habeas Corpus Act, where were shaped the achievements of the English bourgeois revolution. The rights guaranteed in these documents, were applied in the 13 English colonies in North America. Liberation of North American colonies from English jurisdiction and the establishment of statehood were marked with USA Declaration of Independence in 1776.[21] The USA is based on this document. On the European continent, human rights as the greatest achievement of mankind are most closely related to the French Revolution and the Declaration of the Rights of a Man and a Citizen (*La Déclaration des Drits de l'homme et du citoyen*) from 1789. This declaration proclaims liberty, equality and brotherhood (*liberté, égalité, fraternité*) and is considered to be the foundation of modern democracy and modern state. After the adoption of the American and the French Declaration, human rights receive an individualistic character.

The development of the idea of rights and freedoms of a human being initiate activities for the protection of human rights at an international level. International protection of human rights represents the chapter of legal history, which began to develop at a late stage in the history of mankind.[22] The period after the Second World War marks a milestone in the internationalization of the problem of protection of human rights and they appear as a response to the horrors of war and tyranny of individuals. Until then, human rights were not part of international law, nor are there as an internationally accepted term, but fell within the domestic jurisdiction of any state. Exactly in this period, the thing which was the exclusive responsibility of sovereign states has become the subject of international protection and control.[23] However, regardless that the international editing of human rights means that states no longer has exclusive jurisdiction, they still maintained a wide range of rights and responsibilities in this area, in general.[24]

For the modern concept of human rights of particular importance is the adoption of a number of universal and regional documents. First,

[21] N.Deretić, 487.

[22] C.Tomuschat, *Human Rights between Idealism and Realism*, Oxford UniversityPress 2003., 7.

[23] A.Mowbray, "The Creativity of the European Court of Human Rights", *Human Rights Law Review* 5 (1), 2005., 56-59.

[24] M.Milojević, "Evropska konvencija o ljudskim pravima i dužnosti država i Evropska konvencija i unutrašnje pravo", *Revija za evropsko pravo*, 2-3, Kragujevac 2008., 8.

The Charter of the United Nations (1945) was signed in San Francisco, which in its preamble states that the people who founded this organization determined to confirm their faith in fundamental human rights, in the dignity and worth of the human person. Then the United Nations General Assembly adopted the Universal Declaration of Human Rights,[25] which represents the codification of rights so far recorded only by charters and declarations of nations. In the preamble of the Universal Declaration, governments are obliged to introduce progressive measures, national and international, to secure their universal and effective recognition and observance of human rights contained in it. This document is the first step on the level of international law that limits the actions of states and puts a pressure on them to accept obligations toward their own citizens with mutual respect of rights and obligations. Announcement of the Universal Declaration is seen as the beginning of the tectonic shifts on the global level, the shift to democratic equality that leaves little space for imperial and racial ideals that have lasted for centuries.[26] At the same time, it is an appeal to humanity to respect the fundamental rights and freedoms, the ideal to which the signatory countries have striven, and not the legal regulation that is compelling for the country and due to possible non-compliance the country could be penalized.[27] Although not legally binding, the Universal Declaration has strongly influenced the countries to make efforts in the recognition of human, civil, economic and social rights, with the principle that these rights are part of the "basic freedom, justice and peace in the world".[28] From 1948 until today the Universal Declaration is the basis of a number of national and international laws and agreements, as well as the cause of numerous regional, national and supranational institutions dealing with the protection and promotion of human rights.[29] Thus, two international covenants which guarantee human rights are adopted in 1966,

[25] Universal Declaration of Human Right, United Nations, 1948, G.A. res. 217A (III), U.N. Doc A/810.

[26] E.Blumenson, "Four Challenges Confronting a Moral Conception of Universal Human Rights", *The George Washington International Law Review* 47/2015, 328, *http://ssrn.com/abstract=2394917,* 20.05.2016.

[27] LJ.Mijović, "Uticaj odluka Evropskog suda za ljudska prava na pravne sisteme država članica Vijeća Evrope s posebnim osvrtom na Bosnu i Hercegovinu", *Godišnjak Pravnog fakulteta u Banja Luci* 2012., 233.

[28] Namely, as international experience has repeatedly shown, it cannot be trusted to the states that they will respect and protect human dignity inherent to all those who are under their jurisdiction. Therefore, United Nations are trying to establish a universal set of standards which, according to the preamble of the Universal Declaration of Human Rights, represent a "common standard of achievement for all peoples and all nations". A.A.An-Naim, "Univerzalnost ljudskih prava: rešavanje paradoksa u cilju unapređivanja prakse", *Anali Pravnog fakulteta u Beogradu* 4/2009, 39.

[29] E.Korljan, *Evropska konvencija o ljudskim pravima i pravo na život*, doktorska disertacija, Beograd 2012., 55.

but also paved the way for the expansion of the catalog of human rights. These are the International Covenant on Economic, Social and Cultural Rights[30] and the International Covenant on Civil and Political Rights,[31] which were revised by two optional protocols from 1989 and 1996. In addition to further elaborate on the rights guaranteed in the Universal Declaration, these international documents are legally binding.

3. The European Convention on Human Rights

Defining human rights within the United Nations has prompted regional organizations to adopt their own mechanisms for the establishment of human rights and their protection. For European countries, the idea of establishing a uniform protection of human rights and fundamental freedoms legally is shaped by adopting the European Convention on Human Rights (hereinafter "the Convention")[32]. Its adoption represents an effort to make the goals established in the Universal Declaration obtain a binding legal force. In this way are eliminated shortcomings in the protection of human rights that arose from the non-binding character of the Universal Declaration.

Given the fact that it is prepared and adopted after the Second World War, the adoption of the Convention could be said is a kind of reaction to the dramatic experience of Nazism and fascism, and the massive human rights violations. Violation of human rights by the influential leaders of the time led to the tragic consequences. Therefore, the Convention constitutes a legal expression of the political will of European countries, which aims to prevent the emergence of new non-democratic regimes, but also intends to consolidate peace and ensure the unity of the continent by establishing uniform protection of individual human rights and political freedoms in Europe.[33]

As a legal act of the Council of Europe, the Convention was adopted in 1950 in Rome. The adoption and implementation of the Convention is considered as the most important step in the development of law in

---

[30] *International Covenant on Economic, Social and Cultural Rights*, United Nations, 1966, 999 UNTS 3.

[31] *International Covenant on Civil and Political Rights*, United Nations, 1966, 999 UNTS 71.

[32] As a legal act of the Council of Europe, the Convention was adopted in 1950 in Rome. The original version of the European Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up in English and French (*Convention Europeenne des Droits de l'Homme*). It also applies in the Republic of Serbia (Zakon o ratifikaciji Evropske konvencije o zaštiti ljudskih prava i osnovnih sloboda, "*Službeni list Srbije i Crne Gore-Međunarodni ugovori*", br. 9/2003, 5/2005).

[33] J.Omejec, *Konvencija za zaštitu ljudskih prava i temeljnih sloboda u praksi Europskog suda za ljudska prava (Strasbourški acquis),* Zagreb 2013., 13.

European history and the crowning achievement of the Council of Europe in a part of a legal theory.[34] It is indicated as an essential part of the common European heritage, exceptional testimony to a European ethical and legal culture.[35] The former President of the European Court of Human Rights (Rolv Ryssdal) described the Convention as "the basic law of Europe".[36] About the Convention`s character speaks the statement that all documents of the European human rights law containing further elaboration of specific guarantees of human rights or the human rights of certain groups, as a rule, but in their preambles, refer to the Convention, recognizing her so Lex general and Lex superior in the European system of human rights. Over the years since its adoption, the Convention has become the strongest and most coherent system of human rights protection in the international community.[37]

The purpose of the adoption of the Convention is to guarantee the corps of rights and then the establishment of mechanisms for their protection on the European continent. It is conceived as "early warning system" that should prevent the country falling into totalitarianism and acts as a sort of "life jackets", which should cover the violations of human rights that are out of control of national courts.[38]

Acceding countries undertake to respect its provisions, given that this international instrument has the form of a contract.[39] At the same time, the Convention does not specify the manner in which each party shall ensure respect for the rights guaranteed. This is the domain of each country individually. By ratifying the Convention, each country undertakes to practically ensure every person within its jurisdiction their guaranteed rights.[40] In doing so, it is necessary to point out that

[34] M.O'Boyle, "On Reforming the Operation of the European Court of Human Rights", *European Human Rights Law Review* (1) 2008., 268.

[35] L.Wildhaber, *Annual Report 2004 of the European Court of Human Rights, Council of Europe*, Strasbourg 2005, 33, *http://www.echr:coe.int/Documents/Annual_report_2004_ENG.pdf,* 23.05.2016.

[36] F.Lič, *Obraćanje Evropskom sudu za ljudska prava*, Knjiga 1, Beograd 2005., 5.

[37] M.Paunović, *Jurisprudencija Evropskog suda za ljudska prava*, Beograd 1993., 9.

[38] M.Nastić, 30.

[39] Contractual form is deliberately chosen, as well as in many other international organizations that have accepted the former way of creating legal rules, so that rules of behavior would not be automatically imposed to the members of the organization; These rules apply only to states that explicitly accept them, which is best achieved through a contract which is (at least theoretically) free to accept. M.Milojević, 7.

[40] Although the Convention states accept certain duties they have retained considerable freedom in the legal regulation of the conditions for the enjoyment of rights and freedoms, including the considerable powers of the introduction of restrictions in the general public interest and the right to put the reserves on certain provisions of the Convention and the Protocol in the event of their disagreement with the law. *Ibid.*

the guaranteed are only those rights that are considered essential for the integration of European democracy, which was possible to formulate in a unique way and, more importantly, for which an agreement was reached on international control over their implementation.[41] Therefore, the catalog of guaranteed rights is not comprehensive. It represents the minimum (lower limit) rights that the contracting states must respect, provided that they can extend and complement other rights.

4. Review of the content of the rights guaranteed by the European Convention on Human Rights

The provisions of the Convention which make up a catalog of Convention`s rights are formulated in an abstract way in the spirit of the Euro-continental legal system. How the Convention`s rights are not defined or notionally determined in a unique way, it is believed, in theory, that they contain principles rather than pre-care legislation.[42]

The Convention consists of a Preamble, the basic text, and the 14 Protocols.[43]

The Preamble stressed that countries by adopting the Convention are taking the first steps towards common human rights stated in the Universal Declaration, with the aim of achieving greater unity between contracting states. One way to achieve this goal is the preservation and development of basic human rights. Therefore, it could be said that the Preamble speaks not only about "protecting" but also the "development of fundamental rights and freedoms", indicating in this way that the subject is not static and defensive, but more dynamic and offensive.[44] This dynamism is the achievement of an evolutionary process with a tendency to increasingly restrict the sovereignty of states and accelerate the harmonization of law.[45] In addition, it is

[41] M.Nastić, 32.

[42] Judge Jean-Paul Costa said that "numerous provisions of the Convention drawn up to include the principle". J.P.Costa, "The Evolution and Current Challenges of the European Court of Human Rights", *Regent Journal of Law & Public Policy*, Washington & Lee Law School 1(1) 2009, 28, referred to J.Omejec, 857.

[43] The main text of the Convention consists of three parts. Part I contains a catalog of guaranteed rights (2-18); Part II regulates the organization, powers and jurisdiction of the European Court of Human Rights (19-51); Part III contains other provisions governing jurisdiction and procedural issues relating to the signing, ratifying, the interpretation of the Convention and its implementation (52-59). The text of the Convention is available at *http://www.coe.org.rs/REPOSITORY/163_ekljp_-_tekst_konvencije.pdf,* 30.05.2016.

[44] Z.Ponjavić, "Evropska konvencija za zaštitu ljudskih prava i pravo na poštovanje porodičnog života", *Pravni život* 9/2003*,* 824.

[45] *Ibid*.

necessary to emphasize the dominant character of the rule of law in the Preamble, which is, together with a guarantee of fundamental rights and freedoms, a prerequisite for the construction and preservation of a democratic society.[46]

In the main text of the Convention, the Article 1 defines the obligation to respect human rights or the obligations of states to guarantee the rights and freedoms defined in Section I of the Convention to anyone who falls under their jurisdiction.[47]

The rights guaranteed by the Convention can be grouped according to dominant characteristics and here they are not described in the order specified in the Convention. First, there are rights which are absolutely protected and are not subject to any restriction. This is the right to life, which can certainly be described as the most elementary right and out of which the Convention starts in establishment and protection of the rights. It has a special status and provides the basis and meaning of other values that human being has.[48] The Convention does not guarantee the unconditional protection of life, nor its specific qualities, but only the obligation of the State that the human life as such is protected. At the same time, it is not considered unlawful deprivation of life that which results from the use of force which is absolutely necessary for the defense of any person from unlawful violence, execution during a lawful arrest or in a case of preventing the escape of a person lawfully detained or regarding legal measures taken to suppress a riot or insurrection. In the group of the absolutely protected rights is the right which prohibits torture, inhuman or degrading treatment or punishment, guaranteed by the Article 3 of the Convention.[49] This Article provides protection of the moral and physical integrity of human beings and any form of abuse constitutes a "flagrant negation of humanity".[50] The enjoyment of this right can't

[46] A.Jakšić, *Evropska konvencija o ljudskim pravima – komentar*, Beograd 2006., 49.

[47] The first article of the Convention defined in this way, interpreted in the literature as a rather imprecise. The first reason is the fact that Part I includes articles 15-18 which do not guarantee the rights and the other reason is that the rights guaranteed in the Protocols are not included. Ch.Grabenwarter, *European Convention on Human Rights (Commentary)*, München 2014., 2.

[48] Convention in Article 2/1 provides that everyone's right to life shall be protected by law and no one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

[49] Torture constitutes inhuman treatment causing very serious and cruel physical or mental suffering. Inhuman treatment involves causing severe physical or mental suffering. Degrading treatment or punishment of abuse that denigrates a person, diminishes her dignity, causing a feeling of fear and mental suffering able to break the morale of a person, referred to O.Račić, B.Milinović, M.Paunović, *Ljudska prava*, Beograd 1998., 90.

[50] M.Paunović, (1993), 52.

be limited by reference to some special circumstances (e.g. emergency situation, state or war).[51] However, in order to speak about the violation of this right it is necessary that the violation is of much greater intensity than usual, or to reach the minimal level of severity. Prohibition of slavery or servitude is guaranteed by Article 4 of the Convention, it is also one of the absolutely protected rights and it can't be reversed in any situation and under any circumstances. The autonomy of the will on the basis that a person consented to slavery and thereby denied these guarantees is not permitted, because it is contrary to *jus cogens* in international law. The second paragraph of Article 4 prohibits the performance of forced or compulsory labor, while the third paragraph is provided for situations that can't be subsumed under the term "forced or compulsory labor" and they are: a) work required to be done in the ordinary course of the imposed detention according to the provisions of Article 5 of this Convention or during conditional release from such detention; b) service of a military character or in case of conscientious objectors, in countries where they are recognized, service exacted instead of compulsory military service; c) service exacted in case of an emergency or calamity threatening the life or well-being of the community; d) work or service which forms part of normal civic obligations.

The second group consists of Convention`s rights that suffer certain limitations. Previously, it is needed to note a very useful classification of these restrictions set in theory. Specifically, it is stated that the states contractors of all international instruments that guarantee basic rights are entitled in the precisely defined situations to subject these rights to certain restrictions and even some of them put out of the force for a while.[52] Depending on the type and character of individual rights it is possible to talk about three types of such restrictions: repeal (derogations) of individual human rights, then there are the so-called inherent (built-in) limits of certain categories of human rights and at the end, the state has available optional restrictions that it can, but need

[51] The Council of Europe in order to protect this right went a step further by adoptioning the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (it also applies in the Republic of Serbia: Zakon o ratifikaciji Konvencije o sprečavanju mučenja i nečovečnih ili ponižavajućih postupaka i kažnjavanja, izmenjene i dopunjene Protokolom 1 i Protokolom 2 uz Konvenciju, "*Službeni list SCG - Međunarodni ugovori*", br. 9/2003 od 26.12.2003.). The importance of this Convention, among other things, is that it establishes a European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. This special mechanism is composed of experts from different fields and does not consider individual complaints, nor treats them, but monitoring compliance and implementation of the commitments by States Partie.

[52] M.Paunović, *Osnovi ljudskih prava – izvornik i pojmovnik*, Beograd 2002., 60.

not introduce relying on so-called restrictive clauses that accompany some of the protected rights.[53]

First, the derogations as a limitation provided by the Convention in Article 15 is bind to some extraordinary circumstances. In this sense, the Article also provides that in time of a war or other public emergency threatening the life of the nation any country may take measures derogating from its obligations under this Convention. In addition, the variation in time of emergency can only be to the extent strictly that the situation requires, in addition to the fulfillment of two conditions: that such measures must comply with the obligations of country which it has under international law and under the condition that the competent authority (the Secretary General of the Council of Europe) is informed about it.

Another type of so-called inherent (embedded) limitation of the Convention`s rights implies that these rights are limited in the formulation, i.e. permanent. These limits are defined by precise enumeration of exceptions when a specific right can't be used or when it is not invoked.[54] An example of this type of restriction of the right is evident in Article 5 of the Convention. This right primarily protects the individual against arbitrary arrest and detention and states that everyone has the right to liberty and security of a person and that no one can be deprived of liberty except in clearly specified cases and in accordance with the procedure prescribed by law. The same position is determined by the permitted grounds of deprivation of liberty, a crawling list of exceptions to the general rule. Therefore, Article 5 creates an obligation that any arrest or detention shall be in accordance with the law (procedural and substantive) and is *de facto* carried out by the Convention`s following circumstances. It also means that each country has the discretion to create a new kind of justification for detention or arrest, but must act within the framework established by the Convention.[55]

A special type of permitted limit is optional restrictions, or authorizations that country on various grounds, in the general public interest, can limit the implementation of individual rights.[56] In Articles 8-11 of the Convention are grouped the rights which include this type of restrictions concerning the mental and moral integrity of persons.

The Convention, in Article 8 protects the right for private and family life, home and correspondence. This protects the private sphere of the

[53] M.Paunović (2002), 60.
[54] *Ibid.*
[55] M.Nastić, 33.
[56] M.Paunović, B. Krivokapić, I. Krstić, 69.

individual, the right of human being to live as he/she wants, protected from the public and to some extent also includes the right to establish and cultivate relationships with other human beings, especially in the emotional sphere, to develop its own personality.[57] Freedom of thought, conscience, and religion is guaranteed by Article 9. This right includes freedom to change a religion or a belief, freedom of the individual to personally or in the community, publicly or privately, manifests his/hers religion or belief by preaching, practice and observance.[58] Freedom of expression is guaranteed by Article 10 of the Convention.[59] The right to freedom of expression, in various forms and ways, is not only one of the cornerstones of democracy, but also a prerequisite for the implementation of many other rights and freedoms set forth in the Convention. This right includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. Article 11 concerns the freedom of assembly and association with others, including the right to form and join trade unions for the protection of interests. Institutes of free assembly and association are very close and therefore are regulated by the same article.[60] In the case of public meetings is necessary to obtain the permission of the state, which is, in this case, obliged to protect its participants. In this respect, it is emphasized that this Article implies various positive obligations of the state, especially in the legislation.

Nomotechnics in the formation of these articles is identical and each of them has two positions: the first recognizes the right or freedom and is always in the same form, "everyone has the right". The text of these standards, therefore, does not define who are the persons that can seek protection guaranteed by law. It is clear therefore that no one has primacy in search of protection. The term "any" means that all citizens who are under the jurisdiction of a state party may seek the protection of the rights guaranteed. In addition to nationals, protection may be requested by other persons (e.g. foreigners or stateless) in a

[57] A.Drzemczewski, *The right to respect for private and family, home and correspodence*, Human right files No.7, Strasbourg 1984., 7-8.

[58] The right to freedom of thought, conscience and religion is often referred as one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned (*Case of Kokkinakis v. Greece*, No. 14307/88 од 25. маја 1993., §31).

[59] Unlike Article 9 which guarantees the free and undisturbed internal, philosophical and psychological life of the individual, Article 10 guarantees so-called *forum externum*, or the freedom of communication. А. Јакшић, 292.

[60] Freedom of assembly is considered to be less formal than the freedom of association and includes all types of public and private meetings, public walks and demonstrations, except where there is an intention to use force.

condition that they are within the jurisdiction of a state party. These individuals in the legal theory are referred to as beneficiaries. The term "beneficiary" refers to a fundamental expectation of those to which human rights belong and this is a benefit, expected from the exercise, or exercise of rights.[61]

Second paragraph of the Article 8-11 foresees exception clause and lays down certain restrictions. These are the conditions that can legally be used by the public authorities of the state party in respect to the implementation or enjoyment of the rights recognized in these articles, or in one word: their realization. The key is that this kind of restriction allows the state the option to decide only on the scope of this realization. In this sense, it stipulates that in its implementation the public authority will not interfere, unless it is in accordance with the law and necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health and morals or for the protection of the rights and freedoms of others.

Furthermore, when talking about the content of the rights guaranteed by the Convention, it should be noted that Article 12 guarantees the right to marry and found a family. This article is most closely associated with Article 8 and it actually, protects traditional marriage between persons of opposite biological sex. Men and women of appropriate age have the right to marry and found a family in accordance with the national laws governing the execution of this right. Thus, this article refers to national law accepting the possible differences between the legal systems of the contracting states.[62]

A right that is essential for the functioning of any democratic society is guaranteed by Article 6. It is a fair trial, which represents "the embodiment of the rule of law", without which there is no respect for other human rights.[63] The rights under this section relate to the basic principles on which civil and criminal court proceedings should be based. Additionally, it contains guarantees of equality and above all the right to access to court without any discrimination and equal

[61] S.Gajin, 137.

[62] In recognition of the rights of citizens to marry national laws are invited to regulate the form of marriage and the ability of people to marry (minimum age) and certain bans or interference (eg. kinship etc.). Freedom of the state in determining the prerequisites for marriage is limited to the extent that the prescribed standards must not be arbitrary, nor such as to deprive the garanted right of its content or the meaning of provisions of the convention. M. Alinčić, "Zaštita prava na sklapanje braka i osnivanje obitelji u europskim dokumentima o ljudskim pravima i u nacionalnim zakonodavstvima", *Godišnjak Akademije pravnih znanosti Hrvatske* 1/2013, 25.

[63] M.Paunović, B. Krivokapić, I. Krstić, 167.

treatment in the process. It is understood that the court must be drawn up to allow the adoption of a fair judgment, and in addition, must necessarily be based on law.[64] This Article names the presumption of innocence as one of the most important guarantees of a fair trial in criminal proceedings. In addition, there will also be a public trial and a trial within a reasonable time.[65] In paragraph 3 of this Article, the accused in criminal proceedings are guaranteed by the notice of the nature and cause of the charge, the possibility of preparing a defense, the right to counsel, the right to examine witnesses and the right to free assistance of an interpreter.

The provision of Article 7 contains a basic principle of criminal law *nullum crimen sine lege, nulla poene sine lege.* It is necessary, therefore, that some form of behavior is prescribed by law as forbidden so that each person knew that something constitutes an illegal form of behavior and be responsible for the possible violation of the prohibitions. From that continues to derive two principles: first, that this article prohibits the retroactive application of criminal law, while the second principle requires the availability and sufficient specificity of criminal law. However, this rule knows exceptions, which refers to the fact that this may prejudice the trial and punishment of any person for any act or omission which at the time of execution was criminal according to generally accepted principles of law.

The rights guaranteed by Article 13[66] and Article 14[67] are not independent and the reference to their violation is conditioned by the reference to the violation of another convention`s rights, including the rights contained in the Protocols. Although not identified as an independent rights in the judicial practice the right to an effective remedy (Article 13)

[64] D.Popović, *Evropsko pravo ljudskih prava,* Beograd 2012., 251.

[65] In addition, the wording of this provision does not prescribe the duration or length of the proceedings before the national court, on the basis of which it could be assess that a reasonable period is not exceeded.

[66] Article 13 of the Convention guarantees the right to an effective remedy. It states that everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity. The essence of this article is that individuals have the ability to obtain satisfaction on a national level before the proceedings before the court.

[67] The guarantees laid down in Article 14 are prohibiting discrimination. The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. The person is discriminated, unless under the illegal basis, is treated differently from others in a similar situation if there is no reasonable or objective justification for differential treatment. In contrast, positive discrimination is not automatically prohibited under article 14 and it will depend on the justification for the difference in treatment in each case.

and the right to non-discrimination (Article 14) recognized the autonomous character. The autonomy means that the application of these provisions does not necessarily presuppose that was previously committed another violation of substantive Convention rights.[68]

6. Conclusion

Proclamation and protection of human rights represent the highest value of the modern world. Human rights become a global brand that strives to universal human values. The idea of affirmation of human rights strengthens over the world, especially in Europe. For European countries, the idea of establishing a uniform protection of human rights and fundamental freedoms, the rule is shaped by adopting the European Convention on Human Rights. Its adoption is a cornerstone of modern understanding of human rights and a new approach to their protection in the territory covered by the members of the Council of Europe.

Sanda Ćorac, master prava
doktorand Pravnog fakulteta Univerziteta u Kragujevcu

MEĐUNARODNE GARANTIJE LJUDSKIH PRAVA SA POSEBNIM OSVRTOM NA EVROPSKU KONVENCIJU O LJUDSKIM PRAVIMA

Rezime

U dvadesetprvom veku jedno od osnovnih pitanja jeste pitanje poštovanja ljudskih prava. Ljudska prava su osnova savremenog društva, pa su ujedno i predmet neprestanog promišljanja i neiscrpna tema. U radu se analizira razvoj međunarodnih garantija ljudskih prava, a poseban akcenat je stavljen na Evropsku konvenciju o ljudskim pravima i katalog prava koje garantuje.

Ključne reči: ljudska prava, međunarodne garantije ljudskih prava, Evropska konvencija o ljudskim pravima

[68] M.Nastić, 36.

INSTRUCTIONS FOR AUTHORS
FOREIGN LEGAL LIFE

(Institute of Comparative Law, Belgrade)

Foreign Legal Life, published by Institute of comparative law in Belgrade, is a peer-reviewed journal that focuses on the theoretical and practical aspect of foreign legal systems. The journal publishes scientific articles, case law comments, book reviews. The journal is published quarterly – three editions in Serbian (with abstracts in English) and one in English.

Papers should be submitted in electronic form to **redakcijaspz@gmail.com** or **institute@icl.org.rs**, or in person, on a CD, to the address **Institut za uporedno pravo, Terazije 41, Beograd**. Along with the paper, the authors should submit their personal information and statement that the article or any of its parts was not previously published. Submitted papers will not be returned.

Papers that do not comply with the stated criteria in respect of subject, structure and reference style shall not be reviewed. If the paper conforms to the standards of Foreign Legal Life, it is sent to anonymous peer review. All submitted articles will be evaluated by two reviewers who are acclaimed experts in the area. After the review, papers shall be sent to the authors for corrections. The author should send corrected version of the paper **no later than five days** after the receipt of the review. If the reviewers determine that the paper contains numerous irregularities in respect of the content of the paper, structure, references, or other irregularities, the Editorial board shall not publish the paper even though the reviewers didn't suggest the refusal. Editorial board makes the final decision as to the publication of the papers. The Board can reject the publication of the article even though it received positive reviews. Reasons can be that there are numerous articles that received positive reviews that cannot all be published, irregularities in the paper that the reviewers didn't determine, determining that the article or some of its parts were previously published, or the other reasons the Editorial board determines.

By submitting the articles, the authors accept the publication of the articles on the website of the journal. Foreign Legal Life reserves all the other rights unless something else was agreed with the author.

STANDARDS OF FORMATING
Scientific articles

1. Articles should be written in Microsoft Word (.doc or .docx format), in Latin script, font **Times New Roman**, size **12 pt** with 1.5 spacing.
2. Articles should not exceed 28,800 characters in length (approximately 16 pages long, with 28 lines per page and 66 characters in line). Exceptionally the Editorial board can approve the publication of longer articles.
3. References are quoted in the footnotes (font size **10 pt**).
4. The name of the author should be written in the top left corner of the paper. The remaining data such as the title, affiliation and e-mail are placed in the footnote.
5. The title should be centred, written in capital letters, font size 14 and should not exceed 10-12 words.
6. An abstract of the article is placed two lines below the title and should not exceed 1000 characters without spacing. Font size should be **11 pt** and writing in Italic. Keywords should be written under the abstract.
7. Subheadings should be centred on pages (font size **12 pt**), in bold and should be numbered. If there are second, third etc. level subheadings they should also be numbered (for example, 1.1., 1.1.1. etc.). Introductory and concluding remarks should also be numbered.
8. Abstracts in Serbian should be written at the end of the article. Text should be written in current and should not exceed 1 500 characters without spacing. Above the article should be placed the name of the author and information on the title and affiliation of the author.
9. Entire article shall be proofread.

Other contributions

Comments of judicial decisions should not exceed 15 000 characters. Conference papers, book reviews etc. should not exceed 7 000 characters. These types of contributions don't have abstract.

REFERENCE STYLE

1. Books: first letter of the author's name (with a period after it), author's last name, title of the publication written in italics, place of publication in roman, year of publishing. If the page number is specified, it should be written without any supplements such as p., pp., f., dd. or others. The publisher's location should not be followed by a comma. If the publisher is stated, it should be written before the location.

Example: J.Ćirić, *Objektivna odgovornost u krivičnom pravu*, Institut za uporedno pravo, Beograd 2008., 45.

- If a book has more than one edition, the number of the edition can be stated in superscript (for example: 2008[3]).

Example: P. Wood, *Principles of international insolvency*, Sweet &Maxwell, London 2007[2].

- Reference to a footnote should be abbreviated and numbered after the page number.

Example: J.Ćirić, *Objektivna odgovornost u krivičnom pravu*, Institut za uporedno pravo, Beograd 2008., 45 fn. 83.

2. Articles: first letter of the author's name (with a period after it), author's last name, title of the article in roman with quotation marks, name of the journal in italics, volume and year of publication, page number (same rule as in the book citation). If the name of a journal is longer than usual, an abbreviation should be offered in brackets when it is first mentioned and used later on.

Example: J.Ćirić, „Borba protiv droge putem dekriminalizacije –slučaj Portugalije", *Strani pravni život* 2/2012, 310.

P. Davies, "Directors' creditor-regarding duties in respect of trading decisions taken in the vicinity of insolvency", *European Business Organization Law Review* (EBOR) 1/2006, 303.

- Articles published in a collection of papers should be cited in the following manner:

J. Sarra, „Widening the Insolvency Lens: The Treatment of Employee Claims", in: *International Insolvency Law: Themes and Perspectives* (ed. Paul Omar), London 2007, 295.

3. If there is more than one author of a book or article (up to three), their names should be separated by commas.

Example: D. Prlja, A. Diligenski, Z. Ivanović, *Internet pravo*, Beograd 2012.

If there are more than three authors, only the first name should be cited, followed by abbreviation *et alia* (*et al*.) in italics.

Example: Jovan Ćirić *et al.*

4. If the article quotes only one paper of the author, repeated citations of that author should include only the first letter of his/her name, last name and the number of the page (no *op. cit.* etc.)

Example: J. Ćirić, 310.

If two or more publications of the same author are cited, the first time all the information on the publication should be provided, and in the latter citations after the name of the author the year of publication should be provided in brackets. If two or more publications of the same author published in the same year are cited, they should be distinguished by adding a,b,c, etc. after the year:

Example: J. Ćirić, (2012a), 310.

5. If several pages are cited from a text and they are specified, they should be separated by a dash, followed by a period. If more than one page is cited from a text, but they are not specifically stated, after the number which notes the first page "etc." is added with a period at the end.

Example: J. Ćirić, 310–316.

Example: J. Ćirić, 310 etc.

6. If the same page of the same source was cited in the previous footnote, the abbreviation for *Ibidem* should be used, in italics, followed by a period (without quoting the name of the author).

Example: *Ibid*.

If the same source (but not the same page) was cited in the previous footnote, the abbreviation for *Ibidem* should be used, in italics, followed by the page number and a period.

Example: *Ibid*., 69.

7. Statutes and other regulations are cited with a complete title in roman, followed by the name of the official publication (e.g. official gazette) in italics, and then the number (volume) and year of publication in roman. In case of repeated citations, an acronym should be provided on the first mention of a given statute or other regulation.

Example: Zakon o privrednim društvima – ZPD, *Službeni glasnik RS*, br. 125/04.

7.1. If the statute has been changed and supplemented, numbers and years should be given in a successive order of publishing changes and additions.

Example: Zakon o obligacionim odnosima –ZOO, *Službeni list SFRJ*, br. 29/78 39/85, 45/89 - odluka USJ i 57/89, *Službeni list SRJ*, br. 31/93 i *Službeni list SCG*, br. 1/2003 - Ustavna povelja)

8. Articles of the statutes and regulations should be cited as follows:

Example: Article 5 (1) (3); Article 4–12.

9. Citation of court decisions should contain the most complete information possible (category and number of decision, date of decision, the publication in which it was published).

10. Latin and other foreign words, Internet addresses etc. should be written in italics.

11. Citation of the websites should contain the title of the text, address of the page and the date of access.

Example: Hodson David, EU approves European divorce enhanced co-operation, *www.davidhodson.com/assets/documents/enhancedcoop.pdf*, last visited 14 April 2011.