INSTITUT ZA UPOREDNO PRAVO

INSTITUTE OF COMPARATIVE LAW

ISSN 0039 2138 **UDK 34**

FOREIGN LEGAL LIFE

STRANI PRAVNI ŽIVOT

4/2015

Beograd, 2015.

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tel. + 381 11 32 33 213

Print
Štampa

GORAGRAF

Circulation
Tiraž
300 copies - primeraka

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Original scientific paper

UDK: 341.985(470+571)

CLAUSE ON PUBLIC ORDER AS A GROUND FOR REFUSAL OF RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN RUSSIA

Abstract

The article analyzes judicial enforcement experience, legislation and Russian doctrines as to refusing to recognize and execute foreign arbitration awards as this contradicts public order. A division is made between the categories of domestic public order and international public order. The major methods applied in the paper are comparative analysis and comparative law. The article touches upon the problems of material public order. A conclusion has been made that defining this category poses a serious problem. In comparison, the category of procedural public order is easier to define. Judicial practice does not give a definition of material public order but the underlying principle is that the system of principles and values embodying a national public order cannot be recognized even in international cases. Russian legislation does not operate the concept of international public order, but the analysis of legal norms allows making a conclusion that when recognizing and enforcing foreign arbitration awards, not a public order of the Russian Federation is meant but public order taking into account international obligations of the RF and the character of relations containing a foreign element. The research has allowed making the following conclusions. Russian legislation regulating the issues of recognizing and enforcing foreign arbitration awards needs to include the concept of international public order understood as fundamental legal principles of mandatory nature, universal character, special public significance and being the basis for economic, political, legal system of the RF considering its international obligations and the character of relations related to foreign enforcement.

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Keywords: *foreign arbitration awards, recognizing and executing, refusal, contradiction, material public order, international public order, domestic public order, Russia, case practice, judicial enforcement experience.*

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The main international instrument in the field of commercial arbitration is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 July 1958 (hereinafter - the New York Convention). 149 countries ratified the Convention, including Russia. The New York Convention should be applied in all Member States in deciding on the Recognition and Enforcement of Foreign Arbitral Awards. At the same time, art. VII § 1 of the New York Convention provides that an interested party has the right to benefit from the provisions of the national legislation of the country where the recognition and enforcement of an arbitral award.

The New York Convention in the art. V §2 (b) does not specify on the domestic or international public order. However, the developers of the Convention sought to provide the most favorable regime of Foreign Arbitral Awards, and proceeded from the narrow conception of public order. Commentators of the Convention clearly indicate that the text implies the international public order: "Although in the art. V §2 (b) is not explicitly indicated, no one will deny that, along with the public order of the country of execution can be understood here as the international public order "[2]. This concept was accepted in the jurisprudence of the participating countries in an applying the provisions of the Convention. The literature indicates that the entire judicial practice relating to the use of the art. V §2 (b), either explicitly or hidden, but always made a distinction between domestic and international public order[3]. The point of view is expressed that the difference between domestic public order and the international public order justified is such a recognized principle of international arbitration as the finality of international arbitral award[4].

The art. V §2 (b) of the New York Convention unequivocally establishes the application of lex fori to issues of public order. The mechanism of public order is applicable on the initiative of a court, and not on the initiative of persons involved in the case (without prejudice for the interested party the right to appeal to the public order). The court must

[2] P. Fouchard, E.Gaillard , B.Goldman *Traité de l'arbitrage commercial international* // Litec. 1996. N 1710., 1012.

[3] S.V. Krokhalev *Category of international public order in international civil procedure. M.,* 2010 // RRS (Reference Retrieval System) Consultant Plus; A.J.Van den Berg The New York Arbitration Convention of 1958. Towards a Uniform Judicial Interpretation. Deventer, 1981.

[4] A.J.Van den Berg Refusal of Enforcement under the New-York Convention 1958 // ICC Bulletin. 1999., 86.

give an interpretation of the concept of "public order." The provisions of the art. V §2 (b) limit the ability of foreign arbitral awards at the behest of the State whose court considers the question about the performance of such design: persons involved in the dispute (including referees) can not affect this will; they can only take note the law of the Forum State and take them into account when formulating their position[5].

In Russia there is a dualism of civil process, and therefore the order of the application for recognition and enforcement of a foreign arbitral award is governed by the rules of Chapter 31 (art. 241-246) of Arbitration Procedural Code of the Russian Federation (hereinafter – APC RF) and the provisions of Chapter 45 (art. 409-417) of the Civil Procedure Code of the Russian Federation (hereinafter – CPC RF). Thus, there are two procedural forms of recognition and enforcement of foreign arbitral awards – under the state arbitrazh[6] proceeding and civil proceeding, and in some cases these procedural forms have significant differences.

Competence of state arbitrazh courts or courts of general jurisdiction depends on the character of the dispute. State arbitrazh has jurisdiction if the decision was made on the dispute related to business and other economic activities. In other cases, the general court has jurisdiction. An international commercial arbitration decision, adopted on the consideration of an international commercial dispute, subjects to recognition and enforcement of Russian state arbitrazh [7]. If a foreign arbitration shall decide the dispute related to the family, inheritance, labor, copyright, the decision recognized and enforced by a court of general jurisdiction[8].

In Russia, there is the system of the exequatur. A foreign arbitral award is executed enforce without any transformation in court decision according to the rules of enforcement proceedings, applicable at the time of execution, on the basis of the competent state court an enforcement order [9].

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[5] B.R.Karabelnikov *Performance and contesting the decisions of international commercial arbitration. Comment to the New York Convention of 1958 and chapters 30 and 31 APC RF 2002. 3rd ed., Rev. and add. M.: Statute, 2008* // RRS Consultant Plus.

[6] In Russia, the term "arbitration, arbitrage" is used in two fundamentally different semantics. The term "arbitration" at the same time represents the state court of special jurisdiction (on disputes related to business (commercial) and other economic activities – f.e. Federal Arbitration Court of the Moscow District) and non-state, the arbitral tribunal (f.e. International Commercial Arbitration Court of the Russian Federation). Official normative acts regulating activities of the state commercial courts use the term "arbitration". Russian legal practice (but not judicial practice!) and Russian doctrine use in writing, the term **"arbitrazh", "**state arbitrazh" to refer to the state commercial courts in order to distinguish between the arbitral tribunals and state commercial courts. Arbitral tribunals (and international commercial arbitration) in the Russian legal literature are designated by the term "arbitration".

[7] N.Y.Erpyleva, Private international law: the textbook. M., 2011.

[8] See, eg.: Decision of the Moscow City Court on 6 April 2011 in the case N 3m-11/3-2011 // RRS Consultant Plus.

[9] See:S.A. Kurochkin, Recognition and enforcement of arbitral awards and international commercial arbitration / / Law. 2008. N 7., 189.

Foreign arbitral awards entered into force shall be recognized and enforced in Russia if their recognition and enforcement is provided for an international treaty and a federal law. A petition for recognition and enforcement may be based on reciprocity or international comity. Possibility of recognition and enforcement of foreign arbitral awards on the basis of reciprocity or comity is not directly attached in the Russian legislation, but follows from its provisions, and confirmed by the jurisprudence[10].

In the Russian civil procedural law and arbitrazh procedural law the New York Convention provisions are implemented, establishing the grounds for refusing recognition and enforcement of foreign arbitral awards. The provision of the art. V §2 (b) of the New York Convention, according to which the state has the right to refuse recognition and enforcement of foreign arbitral award, if such performance is contrary to the public order of this state, is enshrined in art. 417 CPC RF and art. 244 APC RF[11].

Russian procedural law does not operate on the concept of "international public order", on the contrary, in all legislation there is explicitly stated - **"public order of the Russian Federation."** However, the Russian doctrine states that public order as an object of protection clause has two types. The first applies only to internal relations, the second must be observed in the application of foreign law, recognition and enforcement of foreign judgments and arbitral awards[12]. The concept of "international public order" is used in the Russian judicial acts[13]. It

[10] See, eg.: Ordinance of the Federal Arbitration Court of the Moscow District. April 19, 2012 N A40-119397/11-63-950 : «Under P. 4 Art. 15 of the Constitution of the Russian Federation recognized principles and norms of international law are an integral part of the legal system of the Russian Federation. These recognized principles of international law include the principles of reciprocity and comity. The principle of international comity requires States to relate to foreign legal order with courtesy and politeness... Even in the absence of a treaty between the Russian Federation and the State on the recognition and enforcement of the judgment is claimed in a Russian court, this foreign judgment is enforceable under the principles of reciprocity and international comity… Due to the fact that ... English law provides for the recognition and enforcement of decisions of Russian courts and also due to the fact that the decisions of Russian courts recognized and enforced by the courts of the United Kingdom, court correctly concluded that the injunctions in any case shall be recognized and enforced in the territory of the Russian Federation on the basis of reciprocity and comity » // RRS Consultant Plus.

[11] See, eg.: Art. 417 CPC RF " Refusal of Acknowledgment and Execution of Foreign Arbitral Awards (Judgments made by Foreign Arbitration)": 1. The acknowledgment and execution of foreign arbitral award may be rejected of on the following grounds: … 2) if court establishes a dispute not to be subject to arbitration according to federal law, or acknowledgment and execution of this foreign arbitral award to contradict public order in the Russian Federation.

[12] Y.G.Morozova, *Clause on public order: theoretical foundations and practical application in Russia / / Arbitration practice*. 2001. № 06 (06).

[13] For example, "... The fundamental principles of independence and impartiality of arbitrators in disputes are the basis of procedural *international public order* and are therefore subject to the unconditional defense. " See: Information Letter of the Presidium of the Supreme Arbitration Court of the Russian Federation «Review of practice by arbitration courts of cases on the application of the public order as grounds for refusing recognition and enforcement of foreign judgments and arbitral awards ". 26 February 2013 N 156 // RRS Consultant Plus.

seems that the design terminology, fixed in art. 417 CPC RF and Art. 244 APC RF, implies precisely the international public order in the sense that it is possible to talk about the "public order" only when the legal disputes associated with foreign law.

Chapter 30 APC RF (Art. 230-240) regulates the procedure for challenging the decisions of arbitration courts and issue writs for the enforcement of arbitral awards. The scope of chapter 30 RF APC is the arbitral awards and international commercial arbitral awards rendered in the territory of the Russian Federation, namely Russian, not foreign arbitral awards. The challenging and enforcement of the decisions of international commercial arbitration in ch. 30 APC RF are not related to the place of their education or finding of arbitration, there are connected with a place of this decision (the territory of Russia). The arbitration institute itself can be formed, to hold a hearing or have a permanent location in Stockholm, London or Paris[14].

The state arbitrazh court overturns the decision of the arbitral tribunal or refuse to issue a writ of execution for its enforcement, if such decision violates the fundamental principles of Russian law (par. 2 part 3 art. 233, par. 2 part 3 art. 239 APC RF). Almost identical formulations enshrined in par. 2 part 3 art. 421 and par. 2 part 2 art. 426 CPC RF[15]. It must be emphasized that, according to those standards CCP RF and APC RF the decision of the arbitral tribunal shall be canceled or not executed, if the decision itself violates such principles (and not its execution, as it is in the relation to foreign arbitral awards!). From this we can conclude that the grounds for refusal of enforcement of foreign arbitral awards relating to public order, must be interpreted more narrowly than the grounds for refusal to enforce international arbitral awards made in the territory of the Russian Federation[16].

Fundamental principles of Russian law are the estimated category sufficiently elastic as there is not any (and can not) its regulatory definition[17]. In practice of the state arbitrazh courts the fundamental principles of Russian law are defined as its fundamental, basic principles, which have the versatility, higher mandatory and special universal significance[18].

In Russian doctrine emphasizes that the category of "fundamental principles of Russian law" in the practice of state arbitrazh courts is understood narrowly and is not identified with mandatory national law.

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[14] See: Commentary on the Arbitration Procedural Code of the Russian Federation (Article by article). 3rd ed., Rev. and add. / Ed. prof. V.V. Yarkov. M., 2011 // RRS Consultant Plus.

[15] See: art. 421 CPC RF "Grounds to Reverse the Arbitral Award": 3.Court shall also reverse an arbitral award, if established the following:…2) the arbitral award violates fundamental principles of Russian law.

[16] B.R.Karabelnikov, *Performance and contesting the decisions of international commercial arbitration.*

[17] See: Commentary on the Code of Arbitration Procedure of the Russian Federation.

[18] Ordinance of the Federal Arbitration Court of the North-West District. January 16, 2003 N A66-8050/02 // RRS Consultant Plus.

Narrow concept of the understanding of this category as "leitmotif runs in decisions passed by the courts"[19]. Judicial acts indicate that the "fundamental principles of Russian law" are "not private legal norms governing the rights and obligations of participants in economic activity in a particular case, there are the general principles of economic and business activities such as equality of participants, freedom of contract, civil stability and the main economic traditions, reflected not only in the civil legislation of the Russian Federation, but at first and foremost in the Constitution of the Russian Federation "[20].

Fundamental principles of Russian law can be defined as domestic public order, is not applied to foreign arbitral awards and is applied exclusively to Russian arbitral awards. Although the concept of "fundamental principles of Russian law" (internal public order) and "public order" (applied for on PIL / ICP) in the Russian judicial practice is virtually identical[21], terminology legislator distinguishs between these concepts. About public order is only mentioned in the norms governing international civil procedure and international commercial arbitration. At trial of Russian domestic disputes unrelated to the foreign law, the category of "public order" is not applicable.

It seems that the part 2 art. 244 APC RF is a "shifting of" to legal category of "international public order." Arbitrazh court refuses in the recognition and enforcement of a foreign arbitral award on the grounds provided in par. 7 part 1 art. 244, if other is not stipulated by an international treaty of the Russian Federation. This rule confirms that the definition of public order (and even the absence of such ground for refusal) may take place at the international (bilateral or regional) level, namely "the public order of the Russian Federation" is defined with regard to its international obligations. The norm of relevant international treaty will have precedence over the provisions of the Russian legislation.

Unfortunately, the design of the public order in the Code of

[19] S.V.Krokhalev, *Category of international public order in international civil procedure.*

[20] Ordinance of the Federal Arbitration Court of the Moscow District. July 21, 2004 N КГ-А40/5789-04; Ordinance of the Federal Arbitration Court of the Moscow District. July 26, 2004 N КГ-А40/5907-04 // RRS Consultant Plus.

[21] For example: Ordinance of the Federal Arbitration Court of the Moscow District. April 3, 2003 N КГ-А40/1672: "... The decision of the arbitral tribunal can be recognized as a violation of fundamental principles of Russian law (a contrary to the public order of the Russian Federation) if as a result of its implementation will be made or action expressly prohibited by law, or prejudicial to the sovereignty or security of the state, affecting the interests of large social groups, incompatible with the principles of construction of economic, political and legal system, affecting the constitutional rights and freedoms of citizens, as well as contrary to the fundamental principles of civil law, such as the equality of participants, the inviolability of property, freedom of contract " // RRS Consultant Plus; Decision of the Supreme Arbitration Court, 26.07.2012 N BAC-6580/12 case N A40-119397/11-63-950: "... The public order of the Russian Federation, under which it should be understood a set of components such fundamental principles of law, that is, its basic principles, which have the versatility, higher mandatory and special universal significance"// RRS Consultant Plus.

Civil Procedure Code contains sufficient serious contradictions. In art. 417, which is a special rule that establishes the grounds for the refusal to recognition and enforcement of foreign arbitral awards, is used only the concept of "public order." Art. 412 formulates the similar base much wider - the refusal to enforcement of a foreign judgment is allowed if its execution may impair the sovereignty of the Russian Federation or threatens the security of the Russian Federation, or is contrary to public order of the Russian Federation[22]. This norm is common - in accordance with the rules of art. 416 CPC RF the §. 5 part 1 art. 412 applies to foreign judgments and foreign arbitral awards (judgments made by arbitrations)[23].

In Russian literature is noted that the grounds for the refusal in the enforcement of foreign decisions stated in § 1 part 5 art. 412 are the most difficult to disclosure of their content and application in practice. § 1 part 5 art. 412 identifies three provisions prohibiting execution imperative: the possibility of injury to the sovereignty of the Russian Federation, Russian Federation security threat, contrary to the public order of the Russian Federation. And there are not referring the procedural errors, there are mainly the substantive aspects of the act of a foreign court[24]. Naturally, the question arises: in what cases the court refusing enforcement of a foreign arbitral award because it is contrary to public order, should refer to the article. 412, and in which - to the art. 417? Apparently, in relation to foreign arbitral awards should always be guided by art. 417, but "the concept of " public order " should be interpreted broadly including the threat of damage to the sovereignty or security of the State, as provided by § 5 part 1 art. 412 CPC RF"[25]. At the same time, the acts of the higher courts and Russian scientists[26] point to the inadmissibility of a broad interpretation of public order, especially in the enforcement of foreign arbitral awards. Conversely the refusal of execution on this ground can take place only in exceptional cases. For this reason the approach of Russian legislator seems at least strange, and the provisions of art. 412 require a new version.

The definition of public order has by virtue of its nature some uncertainty (and even indeterminacy) because it is impossible to predict

[22] See: art. 412 CPC RF "Refusal of Compulsory Execution of Foreign Court's Judgment": 1.Refusal of compulsory execution of the judgment made by foreign court shall be allowed if:… 5) execution of the judgment may cause the damage to sovereignty of the Russian Federation or is threatening to security of the Russian Federation or conflicting with public order in the Russian Federation.

[23] See, eg.: Decision of the Moscow City Court. April 6, 2011 N 3м-11/3-2011 // RRS Consultant Plus.

[24] See: Commentary to the Civil Procedure Code of the Russian Federation / ed. V.M. Zhuykov, M.K. Treushnikov, 2007 // RRS Consultant Plus.

[25] See: Commentary to the Civil Procedure Code of the Russian Federation.

[26] See: S.V.Krokhalev, *Category of international public order in international civil procedure.*

all potential conflicts[27]. In this connection the determination of public order is an almost impossible task, but it is possible to identify some general principles. The fundamental principles of law and order of the court issuing the exequatur, which are usually divided into substantive and procedural public order, only relate to public order in the context of recognition and enforcement of foreign arbitral awards [28].

Tendency to concretization of the public order and the existence of the procedural and substantive public order takes place in Russia[29]. Clause extends to the decisions of international arbitral award rendered in violation of fundamental procedural principles of good faith, fairness and adversarial (the incompatibility of arbitral awards with the constitutional guarantees of judicial protection - part 1 art. 46 Constitution RF). In this an application for clause about violation of public order requires the presentation of undisputed evidence of impaired of fundamental procedural rights party's losing arbitration[30].

The general concept of substantive public order originally formed in conflicts of laws - in private international law, and then it spread to the sphere of international civil process. The doctrine states that a definition of "material public order" is of particular complexity[31].

The Russian judicial practice also states that "in accordance with Article 1193 of the Civil Code of the Russian Federation under the public order is going to understand the foundations of law and order of the Russian Federation, which primarily include the fundamental principles of Russian law, such as the principle of the independence and impartiality of the court , the principle of legality of the decision"[32]. It should be noted that these formulations include into the definition of public order using in PIL / ICP, the fundamental principles of Russian law, that is, and domestic public order. As a result, a literal interpretation of such judicial acts may cause to the conclusion that public order for the purposes of PIL / ICP fully, without any limitations includes internal public order. Moreover,

[27] See: E.Kurzinski-Singer, V.L.Davydenko, Substantive ordre public in the Russian judicial practice in cases of recognition and enforcement or canceling of decisions of international commercial arbitration / / Law. 2009. September / /*http://www.iurisprudentia.ru/alternative/files/Ordre_public.pdf;* L.A.Luntz, *The course of private international law:* in 3 v. Moscow, 2002. 271; B.R.Karabelnikov, *The problem of public order in enforcement of decisions of international commercial arbitration / / Journal of Russian law.* 2001. N 8. 103.

[28] O.Sandrock, Gewöhnliche Fehler in Schiedsprüchen: Wann Können sie zur Aufhebung des Schiedsspruchs führen? // Betriebsberater. 2001. N 43., 2175; B.R.Karabelnikov, *The problem of public order in enforcement of decisions of international commercial arbitration.*

[29] Y.G. Bogatina, Clause on public order in private international law: theoretical problems and modern practice. M.: Statute, 2010 / / RRS Consultant Plus.

[30] B.R. Karabelnikov, *Performance and contesting the decisions of international commercial arbitration.*

[31] E.Kurzinski-Singer, V.L.Davydenko, Substantive ordre public in the Russian judicial practice in cases of recognition and enforcement or canceling of decisions of international commercial arbitration.

[32] Ordinance of the Federal Arbitration Court of the Moscow District. May 17, 2012 N **А**41-21119/11 // RRS Consultant Plus.

it seems that public order is a broader category than the "fundamental principles of Russian law." Moreover, in practice, very often there are situations where a party contesting recognition and enforcement of foreign arbitral award, claims that the arbitral award at the same time contradicts the fundamental principles of Russian law and public order[33].

Practice of Russian state courts (both arbitrazh and general jurisdiction) on the application of the concept of "public order" after the entry into force of the acts interdisciplinary codification Russian PIL / ICP (Civil Code, CPC RF and APC RF) is very inconsistency and unpredictability. The Russian legislator did not want (or could not) to determine the content of public order by the specific regulations, the use of which would not confronted with disputes and uncertainties[34]. In the legislation the content of the term "public order" is not disclosed. Already during the adoption stage of modern Russian regulation in PIL / ICP (2002) Russian experts expressed their serious concerns that the vague and undefined concepts of "public order", "the fundamental principles of Russian law," "the basics of the law" will result in their extended treatment and unnecessarily frequent use. The worst expectations which had the specialists in 2002, fully are justified, and Russian courts have taken a lot of acts in which these concepts are unjustifiably broad interpretation[35].

Reference to public order remains one of the most popular arguments for the party losing arbitration. Often, the party seeks to convince the Russian court that the reasoning about abstract concepts such as "the principle of legality" and "fundamental principles of law", is compelling enough to justify a revision of the award being in the process of its contesting or enforcement[36]. However, in recent years courts have gradually cease to take into consideration such "abstract" arguments of the losing party. In judicial acts is emphasized that the violation of public order should be a violation of specific fundamental principles of law and have legal consequences for the applicant in the form of infringement of his rights and legitimate interests[37]. The applicant shall indicate which specific fundamental principles of Russian law the recognition and enforcement of a controversial decision contradicts [38]. If any interested party has not provided evidence to support reasonable grounds for

[33] See: Ordinance of the Federal Arbitration Court of the Central District. October 17, 2012 N A35-3974/2012 // RRS Consultant Plus.
[34] B.R. Karabelnikov, *Performance and contesting the decisions of international commercial arbitration.*
[35] *Ibid.*
[36] *Ibid.*
[37] Ordinance of the Federal Arbitration Court of the West-Siberian District. September 24, 2012 r. N A45-19171/2012 // RRS Consultant Plus.
[38] Ordinance of the Federal Arbitration Court of the Moscow District. July 23, 2012 N **A**40-14982/12-68-133 // RRS Consultant Plus.

refusing recognition and enforcement of an arbitral award, the decision is subject to recognition and enforcement[39].

In addition, the court practice emphasizes that the concept of *"public order of the Russian Federation"* does not coincide with content of national legislation of Russia. As Russian law allows the application of foreign legal norms, the presence of a fundamental distinction between the Russian law and the law of another state by itself can not be the basis for the application of the public order. Such application of this clause would mean a principal refusal of the possibility to application in Russian foreign law[40]. It should also be noted that in the Civil Code, and in the practice of Russian courts there is constantly emphasized the *extraordinary* nature of the application of the public order[41] , the possibility of its application only in *individual exceptional cases*, only if the implication's effects of foreign norms manifestly contrary to the public order[42]. Despite the lack of uniformity in judicial practice, the Russian doctrine notes that the distinction of domestic and international public order begin to take root in the Russian legal system[43]. In this in the sphere of PIL / ICP public order acts more gently. It establishes the rights and obligations arising out of foreign acts more "preferential regime", involving a legal compromise for the sake ensuring freedom of international commercial trade[44].

In addition, it must be emphasized that under Federal law from 30.09.2013 № 260-FZ "On Amendments to the third part of the Civil Code of the Russian Federation",[45] the wording of art. 1193 Civil Code has undergone serious change of meaning. The current edition of the Civil Code of the Russian Federation stipulates that foreign law does not apply if the consequences of its use contrary to the public order of the Russian Federation *with regard to the nature of relations, complicated by a foreign*

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[39] Ordinance of the Federal Arbitration Court of the Moscow District. November 23, 2012 N **А**40-66856/12-25-303 // RRS Consultant Plus.

[40] Ordinance of the Federal Arbitration Court of the North-Western District. December 28, 2009 N А21-802/2009 // RRS Consultant Plus.

[41] Information Letter of the Presidium of the Supreme Arbitration Court of the Russian Federation «Review of practice by arbitration courts of cases on the application of the public order as grounds for refusing recognition and enforcement of foreign judgments and arbitral awards ".

[42] f.ex.: Ordinance of the Federal Arbitration Court of the North-Western District. March 18, 2010 N A56-82470/2009: "In applying **§** 7 part 1 art. 244 APC RF should be borne in mind that the clause on a public order is possible only in those individual cases where the application of foreign law could give rise to a result that is not valid in terms of the Russian sense of justice" // RRS Consultant Plus.

[43] S.V. Krokhalev, *Category of international public order in international civil procedure.*

[44] Y.G. Morozova, *Clause on public order: theoretical foundations and practical application in Russia*.

[45] Federal Law of 30.09.2013 N 260-FZ "On Amendments to the third part of the Civil Code in the Russian Federation" / / RRS Consultant Plus.

element[46]. Obligation of the court to consider when applying of the public order nature of the relationship, complicated by a foreign element, was previously missing in Russian PIL. This change was made in the new edition of the Civil Code in accordance with the Concept of development of civil legislation in the Russian Federation [47], in which, in particular, it was noted that the legislation and jurisprudence of many foreign countries makes a distinction between domestic and international public order. In this connection the formulation of art. 1193 needs to be clarified in terms of its application specifically to relations with a foreign element[48].

Changes of the text of art. 1193 Civil Code are aimed at improving its provisions from the point of view of legal technique, in order to promote their correct application by the courts[49]. Currently, a foreign element in the civil relations is an additional criterion for deciding on the application of foreign law, the consequences of which may be contrary to the public order of the Russian Federation. It may lead to expansion of the limits of discretion of the court in deciding on the admissibility of the application of foreign law[50].

It seems that the best solution would be a direct fixation in the text of the law the term "international public order." This may combine to achieve greater certainty in the application of clause, would allow more accurately to differentiate concepts "international public order" and "internal public order." At the moment essentially in the Russian legislation there are a few concepts - the fundamental principles of Russian law ("domestic public order"), the public order of the Russian Federation with regard to the nature of the relationship, complicated by a foreign element (obviously, this is the "international public order"), and the public order of the Russian Federation (as it is understood in the APC RF and the CPC RF). At the same time, none of these concepts has any certain content.

[46] See: § 1 art. 1193 Civil Code RF: «A norm of a foreign law subject to application in keeping with the rules of the present section shall not be applicable in exceptional cases when the consequences of its application would have obviously been in conflict with the fundamentals of law and order (public order) of the Russian Federation taking into account the nature of the relationship, complicated by a foreign element "(in red. Federal Law 30.09.2013 N 260-ФЗ).

[47] The Concept of development of civil legislation in the Russian Federation (approved by the decision of the Presidential Council for the codification and improvement of civil law 07.10.2009) // RRS Consultant Plus.

[48] See: p. 2.2 ch. VIII Concept of development of civil legislation in the Russian Federation: "It is desirable to clarify some of the provisions of Article 1193 of the Civil Code ("Public Order Clause") in order to better define the conditions under which may be refused in the application of foreign law. The national legislation and jurisprudence of some foreign countries makes a distinction between domestic and international public order applicable to purely internal relations and public order, used to regulate relations complicated by foreign element. While maintaining the overall flexibility of the protective mechanism of the public order it is appropriate to provide appropriate clarification in Article 1193, stating that its application shall be based on complex relations a foreign element. "

[49] Explanatory note to the draft Federal Law "On Amendments to the first, second, third and fourth of the Civil Code of the Russian Federation, as well as to certain legislative acts of the Russian Federation" / / RRS Consultant Plus.

[50] Projected changes of the third part of the Civil Code of the Russian Federation / / RRS Consultant Plus.

As far as one can imagine the developers of the Concept and the new edition of Civil Code came from the concept of "flexible" nature of the public order, and as a priority preferred to keep the overall flexibility of the protective mechanism of the public order. It seems, however, that in this case the flexibility causes serious damage to the principle of certainty of law and could again result in broad interpretation and overly frequent use of this protective mechanism.

Acts of the Supreme Arbitration Court[51] correct practice of the lower courts. In the Information Letter from February 26, 2013 № 156 the Presidium of the Supreme Arbitration Court emphasized that under the public order for the application of art. V §2 (b) of the New York Convention and § 1 part 7 art. 244 APC RF (in fact, under international public order) are understood fundamental legal basis (principles), which have the highest imperativity, universality, social and special public importance, are the basis of development of the economic, political and legal system[52]. In general, it can be argued that in the Russian judicial practice the approach has formed that the reference to the violation of public order may lead to a refusal of recognition and enforcement of foreign arbitral awards only as ultima ratio, that is, if there are violated fundamental norms, rules-principles of the Russian law[53]. If a foreign court unreasonably and incorrectly applied the separate rules of law, it can not be considered as a violation of the public order of the Russian Federation[54]. However, neither the judicial practice, neither the legislator nor the doctrine can not give a definite answer to the question, what provisions of Russian law must be assessed as rules-principles.

In Russian judicial acts there is emphasized that the violation of public order can take place only in the case on application of foreign legal norm which contradicts the fundamental principles of the Russian law. Application of international commercial arbitration the rules of the national (Russian) law excludes the possibility to reference to the

[51] In the autumn of 2013 Supreme Arbitration Court RF has been eradicated; its functions were transferred to the Supreme Court of the Russian Federation.

[52] See: Information Letter of the Presidium of the Supreme Arbitration Court of the Russian Federation «Review of practice by arbitration courts of cases on the application of the public order as grounds for refusing recognition and enforcement of foreign judgments and arbitral awards ". 26 February 2013 N 156.

[53] E.Kurzinski-Singer, V.L.Davydenko, Substantive ordre public in the Russian judicial practice in cases of recognition and enforcement or canceling of decisions of international commercial arbitration.

[54] Decision of the Supreme Arbitration Court RF. 06.12.2007 N 13452/07 case N A40-694/07-68-7; Ordinance of the Federal Arbitration Court of the Moscow District. 14.02.2006 N A40-51576/05- 60-397 / / RRS Consultant Plus.

violation of public order of the Russian Federation[55].

However, for many Russian judges (especially in remote Russian regions) is still a "the seditious" the idea that the relations with the participation of Russian companies can be regulated by foreign substantive law[56]. Indicative in this respect the Ordinance of the Federal Arbitration Court of the Volga-Vyatka District from May 25, 2006 is, in which the court refused on enforcement of a foreign arbitral award with the following formulation: "The decision of a foreign state contradicts the public order of the Russian Federation, because the rules of Russian law have not been applied "[57].

Fortunately, this practice is quite rare and mostly only in the courts of the first instance. As a rule, higher courts cancel these decisions. In addition, the jurisprudence in full compliance with Art. 1193 Civil Code declares that "the refusal to recognize the decision taken on the basis of foreign law may not only be due to difference of legal, political or economic system of the respective foreign state from the legal, political or economic system of the Russian Federation"[58]. If the arbitral award decided on the basis of Russian law, the violation of public order can only be non-compliance with the fundamental principles of Russian procedural law, violation of the procedural rights the respondent [59].

Russian doctrine also notes that a violation of public order can not be referenced when the substantive law applied to the transaction is the law of the State in which recognition and enforcement of a foreign judgment are requested. This is connected with the legal nature of the public order designed to eliminate the possibility of the application of foreign law, and not law of the country in which the court regarded the question of recognition and enforcement of international arbitral award[60]. This provision could be argued as a universally recognized presumption.

It should be added that the recognition and enforcement of a foreign arbitral award can not be contrary to public order of the Russian Federation on the sole ground that in the Russian law, there are no rules,

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[55] Ordinance of the Federal Arbitration Court of the Moscow District. November 18, 2002 N КГ-А40/7628-02: "According ZAO " Pricewaterhouse Coopers Audit " the violation of public order by the arbitral tribunal is expressed in the violation of legal principles enshrined in § 2 art. 1, § 1 art. 9, § 3 arti. 10, articles 309 and 328 of the Civil Code RF. Arguments of the complaint is not based on law. From the meaning of art. 1193 of the Civil Code RF the violation of public order can take place only in the case on application of foreign legal norm which contradicts the fundamental principles of the Russian law "/ / RRS Consultant Plus.

[56] B.R. Karabelnikov, *Performance and contesting the decisions of international commercial arbitration.*

[57] Ordinance of the Federal Arbitration Court of the Volga-Vyatka District. May 25, 2006 N A82-10555/2005-2-2 // RRS Consultant Plus.

[58] Ordinance of the Federal Arbitration Court of the Central District. March 19, 2009 N Ф10-770/09 // RRS Consultant Plus.

[59] Decision of the Supreme Arbitration Court on December 6, 2007 N 13452/07 // RRS Consultant Plus.

[60] B.R. Karabelnikov, *Performance and contesting the decisions of international commercial arbitration.*

analogous standards for the applicable foreign law. Only the lack of a complete analog of some legal institution in the Russian legislation, if such institution generally follows the basic rule of law of the Russian Federation, can not be grounds for the application of the public order[61].

Before entry into force of the interbranch codification of Russian PIL / ICP (2002-2003) in the Russian jurisprudence the cases of the revision of foreign arbitral award on the merits met [62]. Perhaps it was, in particular, associated with the interpretation of the public order in the Decision of the Supreme Court RF on 25.09.1998, the case N 5-G98-60[63]. In the Decision was noted that the court considering petition for setting aside an award, is not entitled to revise on the merits the conclusions of international commercial arbitration, except for cases of violation of public order of the Russian Federation. Thus, on the one hand the Decision established the principle of the impossibility of revision of the conclusions of the arbitration, on the other hand, it pointed to the clause on public order as a permissible exception [64].

Since 2002 in the Russian judicial and arbitration practice a uniform approach established – a verification of international commercial arbitral award on conformity of public order does not mean in any way that it is permissible to its revision on the merits[65]. In the Information Letter of the Presidium of the Supreme Arbitration Court of the Russian Federation № 156 is directly emphasized that when assessing the consequences of foreign arbitral awards in terms of its compliance with public order of the Russian Federation a state court is not empowered to revise this decision on the merits[66].

The revision's prohibition of foreign arbitral award on the merits is one of the few issues on which the Russian judicial practice, in general, shows unanimity. This approach can be considered one of the basic

[61] Information Letter of the Presidium of the Supreme Arbitration Court of the Russian Federation «Review of practice by arbitration courts of cases on the application of the public order as grounds for refusing recognition and enforcement of foreign judgments and arbitral awards ". 26 February 2013 N 156.

[62] See f.e.: Decision of Judicial Collegium for Civil Cases of the Supreme Court RF on August 23, 2002 N 5-Г02-98 // http://www.referent.ru/7/54941

[63] Decision of Judicial Collegium for Civil Cases of the Supreme Court RF on 25.09.1998 N 5-Г98-60 // *http://sudbiblioteka.ru/vs/text_big1/verhsud_big_2144.htm*., 10.10.2014. This Decision has been canceled by Ordinance of the Presidium of the Supreme Court on December 2, 1998 N 161pv-98.

[64] R.A. Traspov, *International commercial arbitration: the concept and criteria for the application of the public order* // RRS Consultant Plus.

[65] See f.e.: Decision of the Supreme Court of the Russian Federation on 04.03.2002 N 34-**Г**02-2; Ordinance of the Presidium of the Supreme Court of the Russian Federation on 12.09.2006 N 4485/06; Decision of the Supreme Arbitration Court on 07.02.2008 N 575/08 case N ***А***06-6957-2/2006; Ordinance of the Federal Arbitration Court of the Moscow District. 14.02.2006 N ***КГ-А***40/247-06; Ordinance of the Federal Arbitration Court of the North-West District September 18, 2009 N **А**21-802/2009 // RRS Consultant Plus.

[66] Information Letter of the Presidium of the Supreme Arbitration Court of the Russian Federation «Review of practice by arbitration courts of cases on the application of the public order as grounds for refusing recognition and enforcement of foreign judgments and arbitral awards ". 26 February 2013 N 156.

postulates and the basic principles of Russian legislation and the Russian judicial practice. At the same time it should be noted that in the Code of Civil Procedure of the Russian Federation, this principle is not directly attached. However, the absence of such an indication is not a sign on the right of courts of general jurisdiction to revise foreign decisions on the merits. The competent court considering the question of recognition and enforcement of foreign arbitral award, it is not entitled to revise it on the merits in terms of the correct application of the substantive law, of the definition of the subject of proof and assessment of evidence[67].

The prohibition of revision of international commercial arbitral award on the merits is an accepted norm of international civil proceeding. At the same time the principle of impossibility of revision of the arbitral award on the merits should not prevent the implementation of the principle of protection of public order [68]. But due to the prohibition of revision a judge deciding the question of exequatur, deprived of authority to assess the validity of a foreign judgment in matters of fact and law. At check violation of material public order the judge can not doubt either the facts established by a foreign court nor untertaken by him legally qualified contentious relations [69]. But the prohibition of revision should not be considered as blocking any controlling powers of the judge. In this regard, one of the most complex of issues is the amount of control exercised by a state court, because the judge is obliged to ensure effective control, but he does not prevent revision of the decision on the merits.

Russian doctrine suggests the following model of reasoning. Judge relies on the factual circumstances investigated of the foreign arbitration (without interpreting them differently) and the circumstances, the "external" with respect to the decision (which did not found their reflection in the text), but he is unable to verify the correctness of the legal qualification of the relationship by foreign arbiter. In this situation, the judge is obliged to check at first, if not contradict the public order recognition and enforcement of the resolution part of a foreign judgment based on the circumstances. In most cases, the courts confirmed the impossibility of verification of the correct application of the law by the arbiters [70].

In Russian doctrine one accord is noted that the violation of public order can not be referenced if the party opposing enforcement of international arbitral award, considers that the arbiters erred in the application of substantive law or applied an incorrect law. The court

[67] Commentary to the Civil Procedure Code of the Russian Federation / под общ. ред. В.И. Нечаева. М., 2008 // RRS Consultant Plus; *S.V.*Krokhalev, *Category of international public order in international civil procedure.*

[68] Y.G.Bogatina, Clause on public order in private international law: theoretical problems and modern practice.

[69] S.V. Krokhalev, *Category of international public order in international civil procedure.*

[70] Commentary on the Code of Arbitration Procedure of the Russian Federation (Article by article).

considering the issue of recognition and enforcement of a foreign judgment is not entitled to examine such arguments, since it would attempt to revise the arbitral award on the merits[71]. In judicial practice is also emphasized that the subject of assessment is to verify of conformity to the public order of the decisions of international commercial arbitration, and not the correct application of the substantive law[72].

If we use the definition of public order, which the Presidium of the Supreme Arbitration Court of the Russian Federation proposed[73], we can safely assume that the conflict rules may not enter into the category of either domestic or international public order. Conflict rules have neither higher imperativity or a particular social and public significance; we can not say that they are the basis of development of the economic, political and legal system. Unlikely choice of the applicable substantive law, which does not coincide with the requirements of Russian conflict rules can cause damage to the sovereignty or security of the state, affects the interests of large social groups, violates constitutional rights and freedoms of private persons. In this regard, the application of a foreign law decision, incompetent in accordance with Russian conflicts rules, can not entail a refusal of recognition and enforcement of this decision by reason that it is contrary to the public order of the Russian Federation. Indirectly, this conclusion is confirmed by the jurisprudence [74].

At the end of the present study we can suggest the following conclusions.

The Russian legislation governing the recognition and enforcement of foreign arbitral awards, in fact distinguishes the concepts of "domestic" and " international" public order, although in a some terminology, which could lead to a violation the principle of certainty of law. Despite this, the Russian judicial practice in general shows a more "narrow" approach to the definition of public order at the recognition and enforcement of foreign

[71] See f.e.: B.R.Karabelnikov, *Performance and contesting the decisions of international commercial arbitration.*

[72] Ordinance of the Federal Arbitration Court of the Moscow District. September 29, 2004 N КГ-А40/7948-04 // RRS Consultant Plus.

[73] "Under the public order for the application of these rules should be understood as the fundamental legal beginnings (principles), which have the highest imperativity, universality, social and special public importance, are the basis of development of the economic, political and legal system. These principles, in particular, include a ban to act expressly prohibited by peremptory rules of legislation of the Russian Federation (art. 1192 Civil Code), if these actions are detrimental to the sovereignty or security of the state, affect the interests of large social groups, constitutional rights and freedoms of private persons ". See: Information Letter of the Presidium of the Supreme Arbitration Court of the Russian Federation «Review of practice by arbitration courts of cases on the application of the public order as grounds for refusing recognition and enforcement of foreign judgments and arbitral awards ". 26 February 2013 N 156.

[74] "... In itself incorrect application of law by the arbitral tribunal [not only material. - I. G.-P.] does not indicate a violation of public order of the Russian Federation. " See: Ordinance of the Federal Arbitration Court of the Moscow District. April 15, 2004 N КГ-А40/2498-04 // RRS Consultant Plus.

decisions. It is necessary to fix directly in the legislation the concept of "international public policy", under which it is proposed to understand the fundamental principles of law, having the highest imperativity, versatility, special social significance and forming the basis of economic, political and legal system in accordance with international obligations of the Russian Federation and the nature of relations connected with foreign legal order.

In addition, in recent years in the Russian judicial practice (especially in the first instance) there are cases where judges include in the concept of public order absolutely illegal and indefinite categories. In particular, there are several decisions of the Federal Arbitration Court of the North-West District, defining public policy as follows: "Fundamentals of law order of the Russian Federation include, among foundations of morality, *the main religious postulates [Emphasis added. - I.G.-P.],* the main economic and cultural traditions that have shaped the Russian civil society and the fundamental principles of Russian law "[75]. This formulation is not only inadmissible broadly, but it is rather unconstitutional because it directly violates the provisions of Art. 14 of the Russian Constitution which clearly establishes the secular nature of the Russian state and the principle of separation of church and state[76]. It is difficult to imagine that such formulation can take place in the judicial practice in civilized, democratic, legal state. However, one should emphasize that the referred formulation of public order is fortunately limited in its importance since it is found only in acts of one Russian state arbitrazh court – in acts of the Federal Arbitration Court of the North-West District.

For some unknown reason, the formulation proposed by in the decision FAS North-West District (№ A21-802/2009), fixed in the commentary to art. 1193 Civil Code proposed in Reference-Retrieval System "Consultant Plus": "The foundations of law order (public order) include, for example, the foundations of the social structure of the Russian state, the foundations of morality, *the main religious tenets [Emphasis added. - I.G.-P.]*, the main economic and cultural traditions that have formed the Russian civil society, as well as the fundamental principles of Russian law, including the basic principles of civil law. It follows from available in the judicial practice conclusions"[77]. It is a pity that such an

[75] Ordinance of the Federal Arbitration Court of the North-West District on September 18. 2009 case N A21-802/2009; Ordinance of the Federal Arbitration Court of the North-West District on March 6. 2012 case N A56-49603/2011 // RRS Consultant Plus.

[76] Article 14 of the Constitution of the Russian Federation (1993): "1. The Russian Federation is a secular state. No religion may be established as a state or obligatory. 2 Religious associations shall be separated from the state and equal before the law. "

[77] ConsultantPlus: Legal News. Special issue "Commentary to the draft amendments of the Civil Code of the Russian Federation"// *RRS Consultant Plus.*

unconstitutional definition of public order taken by such an authoritative legal information resources available huge number of users and is the most popular. This formulation is misleading many Russian lawyers and judges, especially beginners.

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KLAUZULA JAVNOG PORETKA KAO RAZLOG ZA ODBIJANJE PRIZNANJA I IZVRŠENJA STRANIH ARBITRAŽNIH ODLUKA U RUSIJI

Rezime

U članku se analiziraju iskustva u sudskom izvršenju, zakonodavstvo i doktrina u Rusiji u oblasti odbijanja priznanja i izvršenja stranih arbitražnih odluka u slučaju njihovog protivljenja javnom poretku. U radu se pravila razlika između domaćeg i međunarodnog javnog poretka. Glavni metodi koji se primenjuju u članku odnose se na analizu uporednog prava. U članku se razmatraju i problem vezani za materijalni javni poredak. Definicija ovog problema predstavlja ozbiljan problem. Sa druge strane, kategoriju procesnog javnog poretka je lakše definisati. Sudska praksa ne daje definiciju materijalnog javnog poretka, ali se može reći da system principa i vrednosti koje sadrži nacionalni javni poredak nije prepoznat ni u međunarodnim slučajevima. U ruskom zakonodavstvu se neprimenjuje concept međunarodnog javnog poretka, ali analiza zakonskih normi omogućava donošenje zaključka da kad se radi o priznanju i izvršenju stranih arbitražnih odluka, i kad se posmatra javni poredak Ruske Federacije, uzimaju se u obzir međunarodne obaveze Ruske Federacije i karakter odnosa koji sadrži element inostranosti. Istraživanje je dovelo do sledećih zaključaka. Rusko zakonodavstvo u regulisanju oblasti priznanja i izvršenja stranih arbitražnih odluka treba da obuhvati koncept međunarodnog javnog poretka kao osnovni pravni princip obaveznog i univerzalnog karaktera, posebnog javnog značaja, kao osnov ekonomskog, političkog i pravnog sistema Ruske Federacije, obzirom na njene međunarodne obaveze i karakter odnosa u okviru njih.

Ključne reči: strana arbitražna odluka, priznanje i izvršenje, odbijanje, kontradikcija, materijalni javni poredak, međunarodni javni poredak, domaći javni poredak, Rusija, praksa, iskustvo u sudskom izvršenju.

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Original scientific paper

UDK: 347.426.4

FEAR AS A FORM OF NON-PECUNIARY DAMAGE

Abstract

The authors analyzed comparative legislation in the area of tort law. The paper referred different legislative solutions in legislations regarding prescribing fear as an independent form of non-pecuniary damage. They found that a small number of legislations in which fear determine as a special form of non-pecuniary damage. Such solutions have been adopted in legislations in states originating through secession from The Socialist Federal Republic of Yugoslavia (SFRY) in which have also taken over that Yugoslav Law of Obligations incorporating it into their own legislation: Slovenia, Bosnia and Herzegovina, Croatia, Macedonia, Serbia, Montenegro. In other european countries fear is not determined as a separate form of non-pecuniary damage, but the compensation for experienced fear, within mental suffering, is awarded by court's decisions.

Keywords: *civil wrong, non-pecuniary damage, fair, mental pain, personal rights, compensation*

1. Introduction

The tort law in European legal systems should protect both the economic interest and non-material fundamental values, which should have priority in the hierarchy of protected legal goods. Such differences causes a "splitting" of the concept of damage to material (pecuniary), which included economic losses, and non-material (non-pecuniary), which is expressed as the harm on the rights of personality. Despite the consensus on the protection of fundamental human rights and freedoms (also the fundamental rights of personality), noticeable are large differences between the national legislatives relating to legally

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recognized for of non-pecuniary damage. Also in Principles of European Tort Law and Draft Common Frame of Reference damage requires injury, so a legally protected interest[3].

Whereas the pain is primarily bodily sensation (and then vegetative or mental), the fear is a mental sensation and consequnce of a danger which a person facing it was exposed to. Fear is a responsive feeling always accompanied by changes in vegetative functions, facial reactions in motor coordination. Thus, one of the key differences between pain and fear is the fact that pain is always caused by a bodily injury, whereas fear can be the result of a bodily injury, but does not have to be. Fear will always appear when a men is faced with certain crisis situations either for himself or for his family or friends. Fear and pain can appear simultaneously, although it is also possible for fear to occur independently of mental or psysical pain, for example, when somebody is involved in a traffic accident, but escapes bodily injury. It is therefore important that anyone has a right to indemnity only for fear of suffering a life threatening or not.

The number of legislation which determine fear as a special form of non-pecuniary dammage is insignificant. These are mostly states originating through secession from The Socialist Federal Republic of Yugoslavia (SFRY) which have also taken over that Yugoslav Law of Obligations incorporating it into their own legislation: Slovenia, Bosnia and Herzegovina, Croatia, Macedonia, Serbia, Montenegro. In other european countries fear is not determined as a separate form of non-pecuniary damage, but the compensation for experienced fear, within mental suffering, is awarded by court's decisions. This paper analyzes such different comparative solutions.

2. Legislation in which fear is not a special form of non-pecuniary damage

The Italian law does not recognize definition of non-pecuniary damage, but in the 19th century in the theory was made the difference between moral and economic damagge. When a claimant's assest were reduced as a result of a criminal act, he was awarded economic damages and also, when that criminal act caused pains, was awarded so called moral damages. The Article 2043 of the Civil Code[4], enacted in 1941, stipulates that whenever a person causes damage deliberately or through

[3] H. Rogers in: European Group on Tort Law (ed.), *Principles of European Tort Law – Text and Commentary*, Springer, Vienna-New York, 2005, 15.

[4] *Regio Decreto* from 16 March 1942, n. 262, with amendments ended L. from August 6, 2015, no. 132, available on *http://www.altalex.com/documents/codici-altalex/2015/01/02/codice-civile,* 12. 11. 2015.

negligence, he is obliged to compensate for it. This obligation refers both to compensation of pecuniary and non-pecuniary damage. Since the Italian law has not defined the non-pecuniary damage, the legal theory and judical practice have adopted negative definition[5]. Therefore moral, non-pecuniary damage is the one which does not harm property interest. The Constitutional court has confirmed the negative theory and thus non-pecuniary damage refers to every damage whis is, in negative sense, reflected on property typical for the economic interest of the claimant, that is, the damage which cannot be economically evaluated because it involves health impairment adn/or psysical and mental suffering. With the ruling from 1986, the Constitutional court introduces the notion „biological damage" *(danno biologico)*, which belongs neither to the property damage group not to the moral damage group. A biological damage is caused by infringement of the right to life and health and grounds for this damage are found in the Article 42 of the Constitution of the Italian Republic. Fear is not accepted as a separate legal category of non-materal damage and there is no special indemnity for experienced fear. It is, however, included in mental sufferings. However, during 1990s, the judical practice has seen cases of recognizing rights to pecuniary compensation for experienced fear, since this kind of damage could not have been classified under already established forms of damage. Thus, on April 15, 1994, the Higher Court in Milan awarded pecuniary compensation to a claimant who was staying in the area under ecological hazard, although he did not suffer biological damage[6]. The decision was explained by the fact that the claimant suffered moral damage with reflected through fear, since he had to undergo medical treatment in order to establish whether his health was impaired by poisonous substances. According to the Cassation Court decisions number 8827, 8828 from 2003 and by the decision of the Constitutional Court number 233 from 2003, the notion existential damage (*danno egzistenziale*) is introduced. It is a pecuniary compensation for non-property damage caused by the infringement of personality rights which are protected by the Constitution. In essence, this indemnity coincides with moral and biological damage and therefore is awarded by courts only in cases of really serious infringements of personality rights guaranteed by the Constitution.

[5] N. Coggiola, B. Gardella Tedeschi, M. Graziadei, „Italy" in: B. Winiger, H. Koziol, B.A. Koch, R. Zimmermann (eds.), *Digest of European Tort Law*, vol 2, *Essential Cases on Damage*, Walter de Gruyter GmbH, Berlin 2011, 29-30.

[6] B. Markesinis, M. Coester, G. Alpa, A. Ullstein, *Compensation for Personal Injury in English, German and Italian Law*, Series: Cambridge Studies in International and Comparative Law, March 2005, No 40, 84-96, available on: h*ttp://assets.cambridge.org/97805218/46134/frontmatter/9780521846134_frontmatter.pdf,* 12. 11. 2015.

The French Civil Code[7] (*Code civil*) from 1804 introduces money idemnity for non-pecuniary damage as a protection of personal rights of citizens. Althoug the Code does not explicitly regulate the right to pecuniary compensation due to infringement of personality rights, trought Article 1382, the judical practice approved both pecuniary and non-pecuniary damage[8]. Namely, this provision regulated that the person responsible for causing damage has to compensate for it. As technology developed, the number of personal rights which were protected by judicial decisions decreased. As a result, in 2005 the Cassation Court ordered that a taskforce should be established with the aim of determining coherent sub-types of non-pecuniary damage which would make distinguishing from property damage easier. Non-pecuniary damage differs from property damage in adverse consequnces. The consequence of non-pecuniary damage is „every limitation of activities or restriction of participation in social life of a claimant's of his surrounding due to the lack of and important, permanent or definite, one or more physical, sensational, mental, cognitive or psychical functions...“[9]. The French traditionaly distinquish between damage (fr. *domage*) and *préjudice* (legal term describing the consequence of the harm). Pain and suffering (also caused by fear) the so-called non-pecuniary damage (*préjudice extrapatrimoniaux*)[10].

In Anglo-American law non-pecuniary damages has been known for quite a while. The main source of American tort law is common law, but the statutory law is seeing an upward trend. The damage liability is related solely to subjective measures and is estimated in accordance whith rules of the law of negligence, since the claimant has to prove the tortfeasor's guilt, that is, negligence conduct. All states recognized right to non-pecuniary damages, more precisely – indemnity for non-pecuniary loss, e.c. for mental pain and suffering, loss of amenities, psysical incoveniance and discomfort, social discredit, mental distress, loss of society of relatives et cetera[11]. The fear is one of the forms of mental suffering. The fear is known to American law as a possible form of emotional harm. The existence the kind of emotional harm is not seriously in doubt, e.c. reaction of passengers on the Boeing 787s that have had to

[7] Consolidated version from October 17, 2015, available on *http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070721*, 12. 11. 2015.
[8] J-S. Borghetti, „France“ in: B. Winiger, H. Koziol, B.A. Koch, R. Zimmermann (eds.), 25.
[9] V.G.D., „La nomenclature des prejudices corporels“, *La jurisprudence automobile*, L'Argus de l'Assurance, no 774 dated 2006, 262.
[10] O. Moréteau, „Basic Questions of Tort Law from a French Perspective", in: H. Koziol (ed.), *Basic Questions of Tort Law from a Comparative Perspective,* Jan Sramek Verlag, Wien 2015, 37.
[11] K. Oliphant, „Basic Questions of Tort Law from the Perspective of England and Commonwealth, in: H. Koziol (ed.), 2015, 389.

do an emergency landing because of a variety of in-flight problems[12]. The judical practice has accepted this rule and has always acknowledged the right to damages for mental pain and suffering which are caused by bodily injuriy or which appear as side-effects of a bodily injury. The following indemnities shall be granted and evaluated in line with provisions of the Law of Negligence: experienced fear which occurred during the adverse event, fear expressed as a worry, anxiety caused by possible consequences resulting from a bodily injury, fear caused by possible development of cancer due to radiation exposure.

Examples of Austrian and German legislation show that compensation for the infliction of physical pain is historically the oldest form of compensation for non-pecuniary damage[13]. The German Civil Law[14] (*Bürgerlichen Gesetztsbuch* – BGB) does not provide the definition of damage in general and consequently there is no definition of non-pecuniary damage, although it recognizes this damage, since the paragraph 253 states that pecuniary compensation of non-pecuniary damage is allowed in cases prescribed by law. The claimant, according to the paragraph 847 may claim a fair pecuniary compensation in case of bodily injures, health impairments, restriction of freedom. A woman may claim compensation if she was a victim of an immoral crime, or was in vicious or appalling manner or by trust abuse coerced into sexual intercourse. According to the broadest interpretation of the provision of paragraph 847 (prior to the reform law in 2002) it is possible to understand fear as a form of mental pain and suffering with granted pecuniary compensation, provided that it is a consequnce of bodily injury or health impairment. Non-pecuniary damages for fear cannot be found in BGB, but pecuniary compensation may be classified under compensation for impaired health, which legally recognized category of non-pecuniary damage. Damages for pain and suffering *(Schmerzensgeld)* is a general term for non-pecuniary damages. A pecuniary compensation is awarded to be payable as a lump sum, and may be awarded as pecuniary sum payable in installments. Damage for pain and suffering is determined according to the equity principle taking into account all case circumstances such as: permanent consequences, scars, duration of medical treatment, danger to life and similar. According to the position of the judical practice, the indemnity is not awarded for minor bodily injuries. Similar solution exists also in Austrian Civil Law, but under § 1325 ABGB compensation for non-pecuniary damage in the

[12] M. D. Green, W. J. Cardi, „Basic Questions of Tort Law from the Perspective of the USA", in: H. Koziol (ed.), 2015, 460.
[13] H. Koziol, *Basic Questions of Tort Law from a Germanic Perspective*, Jan Sramek Verlag, Wien 2012, 115.
[14] Civil Code in the version promulgated on 2 January 2002 (Federal Law Gazette [*Bundesgesetzblatt*] I page 42, 2909; 2003 I page 738, last amended by Article 4 para. 5 of the Act of 1 October 2013 (Federal Law Gazette I page 3719), available on *http://www.buergerliches-gesetzbuch.info/*, 12. 11. 2015.

form of pain and suffering damages is owed for injury to bodily integrity even in the case of slight negligence and such claims are also provided for in all non-fault-based strict liability constellations while other non-pecuniary harm only leads to compensation claims in the case of serious fault on behalf of the injuring party (§ 1324 ABGB)[15].

3. Legislation in which the fear is a special form of non-pecuniary damage

Legislations Slovenia, Croatia, Macedonia, Montenegro, Bosnia and Herzegovina and Serbia are an interesting examples those which recognize compensation for the fear as a special form of non-pecuniary damage. This is due to the earlier common legal heritage. All these laws are "inherited" in the obligations law defines damage (pecuniary and non-pecuniary) and stipulate the legally recognized forms of non-pecuniary damage. At the same time, all these laws show significant similarity to the German subtype of continental legal system.

The Yugoslav Law of Obligations enacted in 1978 is still in force in the Republic of Serbia[16]. In subsection 7 (Art. 185-207) The Law of Obligations guarantees compensation both pecuniary damage (as simple damage or lost profit), and indemnity for the person who suffering damage for violation the personal rights to freedom, life, body, honor, reputation et cetera. But, pecuniary compensation can be awarded only for so-called legally recognized non-pecuniary damages - suffered psychical pain, mental pain, fear and mental anguish caused by a sexual offence (Art. 200-203). Article 200 paragraph 1 provides so-called legally recognized non-pecuniary damages: "for physical pains suffered, 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 fear suffered, the court shall, after finding that the circumstances of the case and particularly the intensity of pains and fear, and their duration, provide a corresponding ground thereof – award equitable damages, independently of redressing the property damage, even if the latter is not awarded". In Art. 200 paragraph 2 are defined criteria for determining fair pecuniary compensation for non-pecuniary damages: "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

[15] H. Koziol (2012), 115.

[16] Federal Law Gazette [*Službeni list SFRJ*], br. 29/78, 39/85, 45/89, 57/89, Federal Law Gazette [*Službeni list SRJ*], no. 31/93, Federal Law Gazette [*Službeni list SCG*], no. 1/2003, available in English (translated by Đ. Krstić), with introduction by I. Janković, on *http://www.mpravde.gov.rs/files/The%20 Law%20of%20Contract%20and%20Torts_180411.pdf,* 15. 11. 2015.

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". In the case of death or serious disability of a person, the court may awarded indemnity under Article 201 to the family members and relatives who suffer their mental anguishes.

As in Serbia, in Bosnia and Herzegovina is also the former Yugoslav law adopted as regulations at federative level and in entities the Federation of Bosnia and Herzegovina and Republic of Srpska[17]. Thus, fear is recognized as one of the forms of legally recognized non-pecuniary damage.

Indemnity for fear as non-pecuniary damages is very similar regulated in other analyzed jurisdictions even after the adoption of new legislation.

The Republic of Slovenia passed the Code of Obligations[18] in 2001. Key concepts of former Yugoslav Law of Obligations were incorporated into the Slovenian Code. Article 132 defines non-pecuniary damage - suffered psychical pain, mental pain and fear and tarnishing reputation to the legal entity. Thus, the Code of Obligation regulates non-pecuniary damages almost identically to provision of Article 199-200 of the former Yugoslav Law of Obligations.

The Republic of Croatia also passed the Law of Obligations[19] in 2005. The damage is defined in Article 1046. as causing pecuniary damage (simple damage or lost profit) and violation of personal rights (non-pecuniary damage). The Croatian Law does not prescribe types of non-pecuniary damages, but in Article 1100, Paragraph 1 regulates that in case "…of violation of personality rights, the court shall, should the severity of injury and circumstances of the case justify that, award a fair pecuniary compensation …". In Paragraph 2 are listed the same criteria for award equitable damage as well as in the Art. 200 par. 2 the Yugoslav Law of Obligations.

In the Republic of Macedonia is in force the Law on Obligations[20], which, similar to Croatian, adopts the concept of non-pecuniary damages for all violation of personal rights (in Article 9-a provided protection of personal rights in Law of Obligations Republic of Macedonia). Indemnity for non-pecuniary damage is moral satisfaction or material satisfaction (Article 187-a). In the Article 189 paragraph 2 are listed the same criteria for award

[17] Federal Law Gazette [*Službeni list SFRJ*], no. 29/78, 39/85, 45/89, 57/89, Federal Law Gazette [*Službeni list Republike Bosne i Hercegovine]*, no.2/92, 13/93, 13/94, Official Journal of Republic of Srpska [*Službeni glasnik Republike Srpske*], no. 17/93, 3/96, 74/04, Official Gazete of Federation of Bosnia and Herzegovina [*Službene novine Federacije BiH*], no. 29/03, 42/11.

[18] Official Gazette of Republic of Slovenia [*Uradni list RS*], no. 83/01 on October 25, 2001, effective as of 2002.

[19] Official Journal of Republic of Croatia [*Narodne novine RH*], no 35/2005 on March 17 2005 with amendments in no. 41/08 on April 9, 2008.

[20] Official Journal of Republic of Republic of Macedonia [Службен весник на Република Македонија] no. 18/2001, 121/2001 –Constitutional Court decision, 4/2002, 59/2002 – Constitutional Court decision, 5/2003, 84/2008, 81/2009, 161/2009).

equitable non-material damages (intensity and duration of psychical paints, mental suffering and fear, in accordance with purpose of compensation), similar to Article 200 paragraph 2 Yugoslav Law of Obligations).

The Law of Obligations[21] in the Republic Montenegro in Article 207 prescribe redressing non-pecuniary damage pecuniary compensation. In Article 207 solutions are taken from Article 200 Yugoslav Law of Obligations.

4. Indemnity for suffered fear in Serbian court practice

An interesting definition of experienced fear as a legal basis for pecuniary compensation for non-pecuniary damage is found in the following decision of the Serbian Supreme Court: "As from the medical viewpoint, the fear is a psychic personality disorder, which can be more or less serious. It can, primarily, be the fear for life, which appears when a person is facing death, but the fear may dead to depression, neurotic conditions, traumatic shocks or permanent mental disorder with possible serious consequences. That kind of fear represents an violation of health and bodily integrity of a man so it is a form of non-pecuniary damage for which, pursuant to Article 200 of the Law of Obligations, a person suffering from these kinds of injuries is entitled to damages in the form of a fair pecuniary compensation, whose amount depends on intensity and duration of fear".[22]

At some point in previous court practice a distinction was drown between a primary fear (which arises in the immediate expectation of an event) and secondary (which arises after the averse event as result of fear for one's own destiny). However, this division does not have any practical meaning, since both fears represent the basis for awarding amount of money, and the justification and amount of such a demand evaluated according to circumstances of the actual case. According to the Article 200 Law of Obligations Republic of Serbia, compensation for experienced fear awarded when intensity of fear and its duration, justify that. Thus, the fear does not have to cause more permanent consequences in the emotional sphere of the claimant's personality.

Such viewpoint is more realistic since it is objectively closer to reality, primarily due to the fact that permanent consequences of fear (psychical disturbances) rarely appear, and when they do appear it is with people who suffer from psychosomatic illnesses. Consequences of fear, which are defined as a late fear, arise during recollection of the

[21] Official Gazette of Republic of Montenegro [*Službeni list Republike Crne Gore*], no. 47/08 on August 7, 2008.

[22] From decision by the Supreme Court of Serbia, Rev. 409/85 (Z. Petrović, N. Mrvić Petrović, *Damage Compensation for Bodily Injuries and Health Impairment,* German Organization for Technical Cooperation (GTZ), Beograd 2008, 202.

event and last form a few months to one year. The fear in the same or similar situations may last from one to two years[23]. One thing is certain, though. Nowadays, there are many therapeutic methods, treatments and procedures which can, with most people, quickly and completely eliminate fear and phenomena which are based on fear[24]. Hardly could we speak about permanent consequences of fear (apart from people who suffer from psychosomatic illnesses).

According to the conclusion adopted in former SFRY at the conference of civil and civil-economic division of Federal Court, republic supreme courts and the Military Supreme Court held on 15 and 16 October 1986 it is prescribed that: "a fair pecuniary compensation may be awarded for prolonged and intense fear. If the intensive fear lasted for a short period of time, the compensation may be awarded provided that mental balance of a claimant was disturbed"[25]. This attitude is still respected in the court practice in all republics of the former SFRY.

Compensation may be obtained by a person who is experiencing fear caused by a danger he himself is facing and not in case when the fear is caused by concern for another person, not even for a close relative. A distinction (approved by the Law of Obligations as well) according to the source of fear should be drawn at this point: there is fear of one's own source and fear of an external source, depending on whether we deal with a direct or indirect claimant. Accordingly, a mother, which suffer intensive fear for destiny of her child if it encounters a dangerous situation, is not entitled to compensation just of experiencing fear – it is not legally recognized damage (the conclusion at the courts conference from 15 and 16 October 1986)[26]. This viewpoint explained by the fact that Article 200 of the Law of Obligations regulates exclusively damage of one's own source i.e. physical pains and fears of the initial victim. In addition, Article 201 regulates the damage of indirect claimants. The Law of Obligations states only two cases in which legally recognized damage is of an external source: mental suffering caused by death, that is, severe disability of a close person. Article 201 does not mention fear and consequently the damage of indirect claimants is not legally recognized non-pecuniary damage.

The courts makes a decision on compensation for fear after the expert has submitted his report and opinion. It is common in court practice that the fear qualified by intensity as fear of weak, medium and strong

[23] L. Koman-Perenić, "Oblici, obim i visina neimovinske štete", *Sudska praksa* 2/1983, 79.
[24] J. Zdravković, *Strahovi i seksualnost –smetnje i terapija*, Nolit, Belgrade 1985, 245.
[25] Cases from court practice (contribution conference proceedings *Prouzrokovanje štete*, II, Perimeks, Budva 1999, 197.
[26] *Ibid*.

intensity. The expert is required to give explicit opinion on intensity and duration of fear. Having considered everything stated in the presentation of evidence, the court shall award the compensation only if it is justified by case circumstances, intensity and duration of fear. However, a stronger intensity of fear, but short lasting and without consequences, is not sufficient legal reason for awarding compensation.

If the injured receiving treatment in hospital, the fear experienced in hospital should be take into account if he was exposed to unpleasant and aggressive treatment methods, especially if the injured child, which will still feels uneasy about medical staff because it reminds him on unpleasantness he experienced during the course of treatment.

Pecuniary compensation for fear is awarded pursuant to the Article 232 of the Civil Procedure Law[27] which means at one's own discretion. However, that discretion is limited by the obligation of the court to take into account all circumstances causing damage and other conditions stipulated by Article 200 Paragraph 2 of the Law of Obligations. This kind of compensation is in the court practice always awarded as a lump sum.

5. Conclusion

In comparative law is rare that the fear is independent form of non-pecuniary damage, more often it subsumed under suffered mental pain or distress. As an independent form of non-pecuniary damage fear be provided in the legislation of Bosnia and Herzegovina, Croatia, Serbia, Slovenia, Macedonia and Montenegro. This is as result of the common legal heritage. However, pecuniary compensation for fear, as primarily emotional disorder, be awarded only if the fear was intense and/or long so that it is left on the consequences on the claimant's psyche, and it be determined on the basis of the circumstances of the case. Thus, former Yugoslav Law of Obligations, because the quality, is still in force in Bosnia and Herzegovina and Serbia, and also "lives" in new legislations in Croatia, Slovenia, Macedonia and Montenegro.

[27] Official Journal of Republic of Serbia [*Službeni glasnik RS*], no. 72/2011, 49/2013 – Constitutinal Court decision, 74/2013 – Constitutional Court decision and no. 55/2014.

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STRAH KAO OBLIK NEMATERIJALNE ŠTETE

Rezime

Autori su analizirali uporednopravnu regulativu iz oblasti odštetnog prava. U članku daju pregled različitih zakonskih rešenja vezano za propisavanje straha kao samostalnog vida neimovinske štete. Kostatuju da je mali broj zakonodavstava u kojima je strah određen kao naročita vrsta neimovinske štete. Takva rešenja su prihvaćena u zakonodavstvima država nastalih izdvajanjem iz Socijalističke Federativne Republike Jugoslavije (Slovenija, Hrvatska, Bosna i Hercegovina, Makedonija, Srbija, Crna Gora), u kojima su preuzete odredbe nekadašnjeg jugoslovenskog Zakona o obligacionim odnosima. U pravima drugih evropskih država (na primer, Francuskoj, Italiji, Nemačkoj, Austriji, Velikoj Britaniji), kao i u Sjedinjenim Američkim Država strah nije propisan kao izdvojeni oblik neimovinske štete, nego se tretira u sklopu pretrpljenih duševnih bolova i patnji za koje oštećeni može dobiti naknadu u sudskom postupku.

Ključne reči: građanskopravni delikt, neimovinska šteta, strah, duševni bolovi, prava ličnosti, naknada štete

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Original scientific paper

UDK: 005.21:334.724

CORPORATE GOVERNANCE IN STATE - OWNED ENTERPRISES – RELEVANT EUROPEAN STANDARDS

Abstract

Corporate governance standards are confirmed in corporate world, slightly modified applied in state-owned entities in developed European countries (OECD countries). Corporate scandals, among other issues, have led to introduction of corporate governance standards in capital market companies. Numerous abuses and inefficiencies in public enterprises management and other state-owned entities have urged for application of adequate principles as a guarantee of a higher level of accountability and efficiency. New rules for establishment of structures and processes in open joint-stock companies primarily aims at provision of long-term stockholders' interests (investors), as well as other company related stakeholders. This paper is focused on the analysis of those international standards and good governance practices for that kind of enterprise and possibilities for applying rules providing for transparency, independence and accountability, professionalism and efficiency, as well as a conflict of interests resolution in our legal system.

***Key words**: corporate governance, state owned enterprises*

1. Importance of state – owned enterprises

Contrary to profit-oriented private enterprises, public enterprises follow an additional, public duty. i.e. general public interest to be performed and protected in an optimal way. Public good must be cheap and yet be produced at an adequate quality - corresponding to strategic objectives of the enterprise. This balancing act is often associated with implementation difficulties.

Private owned enterprises are the skeleton of market economy. However, the state should no way be neglected as a participant in economic

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life, but on the contrary. Looking from the state side and widest social interest viewpoint, such an entity requires special attention, whether it appears as a public enterprise founder or investor in a company.

This implies that a state-owned enterprise, or with a large stake of the state ownership in the market is *sui generis* entity in economy of any country. Introduction of corporate governance structures and processes in any of those enterprises poses a special problem and challenge. OECD countries experiences and existing standards are definitely precious for Serbia when trying to deal with the issue. Example of a good approach can be seen in India where state owned enterprises in manufacturing sector have dubled its rate of profitability during the last decade[3].

A huge importance of enterprises with a high percentage of state ownership, which are as a rule to be found in energy sector, infrastructure and telecommunication in all economies around the world, underlines the need of management grounded on principles of efficiency, transparency and accountability. Interest to establish (or fail to) such a system comprises a wide range of entities (at national and international levels). It is an extremely challenging task to try and make these enterprises successful in their businesses, and at the same time keep equal legal position as other participants in the market have, and , at the same time, expose them to the market mechanisms effects (free competition, solvency, take over).

Excessive political interference is a key obstacle (including a direct lobbying by numerous groups), leading to politicisation and lack of professionalism in management, hence consequently to inefficiency and unaccountability. A way out of this currently unfavourable situation lies in application of corporate governance standards taking all specific characteristics of these entities into consideration. OECD Guidelines on Corporate Governance of State-Owned Enterprises 2005[4] provide important directions for resolving a number of above mentioned problem related issues. Those standards are the supplement to 'OECD Principles of Corporate Governance 2004'[5]. Results, nonetheless, depend on synergy of a number of factors that should contribute to establishment of a new corporate culture in state-owned enterprises (this primarily refers to enterprises where the state has a significant stake in or even more than that). Academic institutions, NGO sector, corporate sector and state bodies need to act as one aiming at overall economic interest.

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[3] A.S.Khanna, „State Owned Enterprises in India: Restructuring and Growth", *The Copenhagen Journal of Asian Studies* 30 (20) 2012., 26.

[4] OECD Guidelines on Corporate Governance of State-Owned Enterprises 2005 OECD, available in November 25, 2014*, http://www.oecd.org/daf/ca/41814777.pdf*

[5] OECD Principles of Corporate Governance available in November 25, 2014 at: *http://www.oecd.org/daf/ca/corporategovernanceprinciples/34625094.pdf*

2. Relevant issues of state ownership

There is a significant competitive advantage of public enterprises over private enterprises. Many opportunities for crosssubsidization exist in public enterprises, because the surplus of profitable and often monopolized business units can be re-routed to loss-generating. Public enterprises have advantages in raising capital due to the reduced bankruptcy risk, which results from protective coverage guaranteed by the state and conveys a rating advantage. Furthermore, public enterprises can often make use of an information advantage over their private competitors, which stems from close connections to political leaders[6].

Public enterprises, as entities in the market one always first thinks of when talking about state ownership in business entities, have been of huge importance in Serbia. These enterprises employ a great number of people, performing activities of public importance, bear big potential when it comes to its share in the GDP and have a significant impact on the market game. In Germany in banking sector state ownership is extremely important[7]. However, it has to be underlined that other business entities have been equally important. State investments become even more relevant at crisis when it aims at saving certain companies - 'too big to fail'. Nationalisation mechanism is to be activated then (state capital subsidy), contrary to equally relevant process of privatisation (topical sale to a strategic partner here).

The public has undoubtedly had a negative attitude towards public enterprises and the states as a commercial entity. They have been a synonym of inefficiency, political interference and unprofessional management. Public believes their management boards are designed to be home to party cadres. Transparency Serbia (NGO) survey at a sample of 25 enterprises shows that this view is well grounded in a large number of cases.

State bodies entrusted to manage the state property act as state property owner agent, its representative, a person working on behalf and for the principal[8]. Principal is an owner of the state property, composed of citizens of the respective state. Owner in corporate governance system always has her/her clearly defined goal. He/she has policy in place and resources to implement it. Owner's primary goal is to maintain and enlarge ownership in the long run. He/she cannot do it on his/her own,

[6] T.Lenk, O.Rottmann, F.F.Woitek, *Public Corporate Governance in Public Enterprises – Transparency in the Face of Divergent Positions of Interest*, Faculty of Economics and Business Administration, University of Leipzig, 2009, 6.

[7] J.A.Kregel, „Corporate Governance of Banks: Germany", *BNL Quarterly Review*, Special Issue, March 1997., 78.

[8] Law on Public Enterprises of Serbia-*Official Journal of Serbia*, No. 119/2012, 116/2013 – authentic legal interpretation

since people are needed with special skills and experiences; the owner is forced to hire such cadre, i.e. professionals.

Should we translate this principle into the state enterprises language, it is logical that their property is managed by professionals, and not political party members. This implies that depolitisation and professionalization are the first prerequisite. In the same time it is important to understand that state and state owned subject have interests of their own[9]. Should we make a step further in the analysis, we will be able to see that even professionals, despite being well-educated, experienced and capable of protecting interests of an enterprise and state ownership in it as a rule, may have a destructive impact on the state interest. This is a problem, theoretically known as „principal-agent problem", stemming from potential for conflict of interest between owner and manager. The citizen as a customer of public services still expects high quality for an adequate price. Following the postulate of maximizing welfare, the citizen thus endows the politician with a mandate to fulfill this public intent. This multilevel "principal agent problem", is therefore based not only on conflicts of interest but also on information asymmetries. The uniqueness of public enterprises stems mainly from their relationship to the reference systems of market and politics, i.e. the business focus has to be fixed a priori. This describes the framework for these enterprises to be profitable or to follow the postulate of providing SGI. Since public enterprises sometimes have to decide between public duty and the financial result, the main goal of the public enterprise needs to be clarified precisely.

Instruments ensuring motivation of these people to work in interest of those who appointed them have been extremely important in such a situation, providing adequate supervision and disciplinary measures. Such a situation underlines importance of transparent appointment of managers (necessity of a public advertisement) and motivation mechanisms that would help he/she should become efficient and loyal. Supervision of their work is an important step as well, i.e. appointment of supervisory board members and their responsibilities.

Merging business transactions control of all state owned entities is especially important for the overall success. Having this in mind, it is necessary to appoint a body-entity that would be in charge of monitoring business transactions and results of state owned enterprises. This entity would have to act in line with the policy passed by the Government and ratified by the Parliament, being directly accountable to the Parliaments itself.

[9] C.Rentsch, M.Finger, „Yes, No, Maybe: The Ambiguous Relationsips Between State-Owned Enterprises and States", Working Paper n. 2014-05. *Milan European Economy Workshops*, 1.

3. Corporate governance standards

Corporate governance is a system improving business efficiency and brings about a higher level of trust of investment public. It, by the definition, should provide for operational efficiency and access to external financing[10]. Better efficiency is to be achieved through clearly defined policies, set objectives and professional governance.

Corporate governance rules have been largely incorporated in our legal system, pertaining to the corporate sector, public enterprises in the first place (open joint-stock companies). Changes have been triggered by OECD activities and passing the Principles of Corporate Governance. Numerous items of the standards are to be found in the Company Law of Serbia, Serbian Law on capital market, Serbian Law on Takeovers of Joint Stock Companies and other general and special laws (e.g. Law on banks), Corporate governance Code of the Serbian Chamber of Commerce, Belgrade stock exchange Code, etc.

Public enterprises and other entities owned by the state fail to follow this path despite the fact that OECD has passed special Corporate governance guidelines for state owned enterprises, annexed to previously adopted standards and adjusted to specific characteristics of this type of enterprises.

Guidelines comprise a number of important issues. They start from the observation that good and solid legal and regulatory framework is a base for building a different approach aiming at establishment of modern corporate governance in state-owned enterprises, or in those the state has larger share. Such a framework should help free market game and prevent disturbances and destructive actions of some factors, in particular confusion of economic functions with other state run functions (e.g. social). Should we wish to have a state owned enterprise in the market, it is logical to expect it to meet its commitments and be exposed to mechanisms the market applies to discipline the unsuccessful ones. Need to provide for equality among entities in the market requires in the first place an even access to banks and other sources of external financing. Specific characteristics of public enterprises impose the need for transparency as an extremely important one, meaning that every public service commitments should be made public.

One of more significant issues within the corporate governance system is a way to turn the owner, 'lazybones king', into an active keeper of self-interest. Concretely speaking, this implies that the state, as an owner of a share in any entity has to use its full governing capacity it has as an

[10] International Financial Corporation, *Korporativno upravljanje*, Beograd. 2011, 6.

owner. This is underpinned by adequate ownership policy incorporating goals and resting on pillars such as information, transparency and accountability.

Interference of controlling owner in a company's management is one of identified issues with corporate governance in Serbia and corporate sector. This undoubtedly does harm to the company's efficiency and has other negative repercussions (harmful for minor shareholders). Once we translate this issue into state owned enterprises related problems, we face with administrative boards independence issue. It is thus essential one should ensure a good quality personnel, adequately divide competencies and make responsibilities precise, provide adequate resources, motivation mechanisms and independence in boards daily businesses. Independence should not exclude supervision. Supervision of all state owned business entities should be differentiated from interference in running the company.

The state should protect its own interests of a stakeholder, aiming at drawing other investors as well. However, it should adequately show respect for interest of all those who invested any resources (smaller stakeholders), or are related in any other interest or risk with this very enterprise. This is a main principle. Corporate governance standards are based upon, pertaining to protection of all stakeholders right and their equality, as well as all stakeholders rights protection. This approach rests on a high level transparency in business transactions, easy and timely access to information, and adequate reporting. Synergy between internal and external audit is definitely the base for setting up such a regime.

OECD guidelines for corporate governance in state owned enterprises stipulate the need for communicating company's objectives with the general public and ways of their realisation; financial assistance by any foreign country, transaction with related persons, all relevant risks for the company's success, as well as ownership structure and electoral ballots distribution. Having said this, one may easily spot the complexity of the issue[11] and the reason the assessment from the first part was based upon: introduction of corporate governance standards in state owned enterprises is a huge challenge.

4. Concluding remarks

The balance between political influence, the management's executive power and economic success forms the pillars in the discussion about purposeful governance of public enterprises[12]. Corporate Governance standards for the public sector generate positive effects through

[11] A.K.Kim, R.J.Nofsinger, *Corporate Governance*, Pearson Prentice Hall, New Jersey. 2007, 37.
[12] T.Lenk, O.Rottmann, F.F.Woitek, 5.

increasing transparency and comprehensive reporting. Implementation of governance regulations for state/owned i.e. public enterprises is only possible, if all parties take part on all levels in this improvement. The question is to what extent the citizen has the opportunity to follow the procedure of public production of goods and services, especially in the light of diverging interests and the high number of participants in the decision-making process in the public sector. Public enterprises have been an obvious example of how the state behaves as an owner of a business entity. Should we start from the fact that a country is seriously indebted, poorly positioned for investments, with a chronic deposit, its capacity to manage its property efficiently has been logically questioned. As the country's property is actually property of all its citizens, managing any role the state has had with any business entity is of the widest social importance.

Positive effects of corporate governance standards in state - owned companies are the following:

- Increased flexibility and adaptability for future developments,
- Greater executive power because of more operational freedom,
- Extended applications to approaches regulated by law,
- Supporting orientation, capacities for communication and organization,
- Reduction of task duplication by a transferable fundamental framework,
- Functions of regulatory policy.

Application of the corporate governance standards is essential for reaching those objectives. New structures and processes within this type of business entities should make them more independent and free them from the burden of serving to other interests, as is the case now, as well as to make their boards more efficient, depoliticized, professional and accountable.

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KORPORATIVNO UPRAVLJANJE U JAVNIM PREDUZEĆIMA -RELEVANTNI EVROPSKI STANDARDI

Rezime

Standardi korporativnog upravljanja su potvrdjeni u korporativnom svetu, malo izmenjeni su primenjeni u kompanijama u državnom vlasništvu u razvijenim evropskim zemljama (zemljama OECD). Korporativni skandali su, uz druge faktore, bili podsticaj uvođenju standarda korporativnog upravljanja u kompanije koje se nalaze na tržištu kapitala. Nova pravila su bila osnov izgradnje struktura i procesa u javnim preduzećima sa primarnim ciljem da dugoročno obezbede interese akcionara i drugih nosilaca rizika. Brojne zloupotrebe i neefikasnosti upravljanja javnim preduzećima i drugim subjektima sa državnim vlasništvom uslovili su nužnost uvođenja adekvatnih standarda koji bi trebalo da garantuju viši nivo odgovornosti i uspešnosti.

Ovaj rad usmeren je ka analizi međunarodnih standarda i dobroj praksi upravljanja tom vrstom preduzeća i mogućnostima njihove primene u našem pravnom i privrednom životu, u smislu obezbeđenja transparentnosti, nezavisnosti i odgovornosti, profesionalizma, efikasnosti, brižljivosti, kao i uspešnog rešavanja situacija konflikta interesa.

Ključne reči: korporativno upravljanje, preduzeća u državnom vlasništvu

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UDK: 341.9:347.44

APPLICATION OF THE THEORY OF *PROPER LAW* TO CONTRACTUAL RELATIONS WITH THE FOREIGN ELEMENT

Abstract

The theory of proper law is a product of the Anglo-Saxon doctrine of the 18th and 19th centuries and is applied, among other things, to determining the applicable law in contractual relations with the foreign element when the party autonomy is absent. This theory is grounded not only in the close connection between contracts and a particular country, but also in the intention of the parties which must be included in the elements of the contractual relations. This theory cannot be defined without the aforesaid elements. The article analyses the relation of the theory of proper law to other theories applied to cases when the parties have not chosen the applicable law, such as the center of gravity theory and the theory of characteristic obligation. In this regard, we shall analyse provisions of the most important sources of EU law in this area, such as the Rome Convention and Regulation 593/2008, and examine legal provisions of individual states outside the EU related to this area. The author concludes that the theory of proper law provides the most leeway for choosing the applicable law compared to the other theories.

Keywords: *contract, applicable law, proper law, center of gravity, characteristic obligation.*

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When discussing contractual relations with the foreign element, we primarily have in mind the party autonomy. The guiding principle in deciding on the applicable law in this area is the party autonomy and to the contracting parties it means the right exercised in a mutual agreement, which regulates the rights and obligations arising from their contractual relations. We can say that the party autonomy is a choice-of-law rule both

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for the contracting parties and the competent authorities, i.e. courts of law which decide on any matters of dispute[2].

On the other hand, we pose the question of how to decide on the applicable law if the parties do not make a choice of the applicable law, i.e. if the party autonomy principle is not applied. There are different theories that, more or less adequately, define the rules to be applied to this situation. One such theory is the theory of *proper law* which, put simply, can be defined as the right of the country with which a contractual relations is the most closely connected[3]. However, this theory can be defined in other ways as well, as we will see further below.

Yet, the application of the theory of *proper law* to contractual relations with the foreign element gives rise to many doubts, not only with regard to defining the theory, but also in terms of its relation to the party autonomy, and to other theories defining the rules which apply to cases when the parties have not made their choice of the applicable law. In other words, if the theory of *proper law* is related to other theories in this area, such as the center of gravity theory and the characteristic obligation theory. In that regard, the question is asked if the theory of *proper law* only accounts for the closer connection of a particular contract with a particular legal system, or if it also provides a basis for defining the tacit will of the parties, and if it also enables the decision on the law to be made by a court, with regard to hypothetical party autonomy.

The question of application of the theory of *proper law* to contractual relations with the foreign element is posed for two main reasons. The first is purely theoretical, regarding the impact of a theory deriving from the Anglo-Saxon doctrine on the formulation of rules applied when the party autonomy is absent, while the second reason relates to different solutions which can be found both in international sources and national legislations. As regards national legislations, we take into account the contents of the new Act on the Private International Law of Serbia (hereinafter: APILS)[4] which has not been passed yet, which includes solutions partly different from the Act on the Resolution of the Conflict of Laws with Regulations of Other Countries (hereinafter: ARCL)[5] which is still in force. We will also consider the definitions of the theory of *proper law* in two acts of the EU, as well as in individual laws of states which are not members of EU.

[2] M. Pak, *Međunarodno privatno pravo*, Beograd 1989., 798

[3] F.A.Mann, „The proper law in the conflict of laws", *The International and Comparative Law Quarterly*, vol. 36, No. 3 (July, 1987), 445

[4] Draft of Act on the Private International Law of Serbia (Nacrt Zakona o Međunarodnom privatnom pravu) final version, website of Ministry of Justice of Republic of Serbia, *http://www.mpravde.gov.rs/sekcija/53/radne-verzije-propisa.php*, 16.11.2015.

[5] Act on the Resolution of the Conflict of Laws with Regulations of Other Countries (Zakon o rešavanju sukoba zakona sa propisima drugih zemalja) - *Sl.list SFRJ* br. 43/82, 72/82, *Sl.list SRJ* br. 46/96

1. The theory of *proper law* in general

As far back as the 19th century, English courts used to apply applicable law according to the theory of *proper law*. This theory was associated with contracts for the first time in 1925 by Westlake, who stated that the law that the contractual relations is the most "truly" connected with should be applied[6]. The theory of *proper law* includes three elements in determining the applicable law: - the explicit intention of the parties; - the assumed intention of the parties; and – the closest connection principle[7]. However, in defining the *proper law of the contract* theory, Westlake included only the third element. What was problematic was the fact based on which the applicable law was to be established, when there was no explicit choice of law by the parties. The decision lied between the assumed intention of the parties and the closest connection principle. However, there is no clear boundary between the hypothetical party autonomy and the closest connection principle, as demonstrated by earlier English court practice[8]. English professor Cheshire advocated the adoption of the objective concept in deciding on the applicable law. Cheshire drew on the center of gravity theory, by means of which he explained that connections of a contractual relations with a potentially applicable law can be multiple and varied, and that the center of gravity defines the concentration of those connections in a contract. However, the assumed intention of the parties which is a significant indicator in deciding on the applicable law must also be taken into account, but it must also be linked to the relation localization factor in the particular contract[9].

Nowadays, a great majority of countries apply the principle of the closest association of a contract with a particular law, in case the parties do not decide on the applicable law. The theory of *proper law* comprises this principle, along with other elements, as we have indicated above. An exact definition of this theory could be that it refers to the law according to which the contract was drawn up, i.e. that it is most closely connected with. Graveson thinks that this theory represents the application of the right of free choice of the law applicable to regulating the rights and obligations under a contract. Each contract must have its *proper law*, even in the absence of an explicit clause of choice[10].

In other words, the theory of *proper law* implies that, in cases when a governing law is applied to a contract, the court applies the law

[6] J.Belović, *Korektivna funkcija principa najbliže veze*, doctoral thesis, Faculty of Law of University of Belgrade, 2012., 18
[7] J.Belović, 121
[8] *Ibid.*
[9] J.Belović, 122
[10] M. Ročkomanović, *Međunarodno privatno pravo*, Niš 1995., 265

which is at the moment the most closely connected with it. In doing so, it must also take into account the rules characteristic of the contract in question, such as *lex loci contractus*, *lex loci solutionis*, and other rules that apply to this subject, in view of the fact that the application of the applicable law also depends on the intentions of the parties, along with other facts, when the party autonomy is absent[11]. The criteria for defining this relationship are numerous. According to this theory, priority is given to the law of the contracting party which is more obliged to abide by certain norms while performing its obligations, the party which performs an active role, essential for the contract, whose contractual obligations are more complex[12]. However, we should allow for the possibility that this method is not easily applied to some contracts, when deciding on the applicable law[13]. It follows from the aforesaid that this theory is related to the characteristic obligation theory.

On the other hand, the theory of *proper law* can be considered from two perspectives, related to the parties and their will. It can be observed both subjectively and objectively[14]. From the subjective standpoint, the parties had the intention of deciding on the applicable law, which is closely connected with the contract, and it is exactly the law that they have agreed on. Conversely, looked upon from the objective perspective, the contract is more closely connected with some other law, depending on any number of circumstances[15]. This theory points out that many facts within the contract suggest the application of a particular law, which is most closely connected with the contract[16]. The governing law of a country can determine both the form and language of the contract, which can in turn serve as indicators for a particular law to be applied[17].

In England the theory of *proper law* has almost entirely been replaced by regulations of EU law, i.e. the Rome Convention, but it is still influential in many countries, especially those which abide by *common law* systems[18]. The question is whether the application of foreign rules

[11] J.G. Castel, *Conflict of laws – contract – proper law - foreign exchange control regulations*, The Canadian Bar Review, 1962., 108, fn.10

[12] V.Čolović, „Specifičnosti određivanja merodavnog prava u ugovornim odnosima sa elementom inostranosti", *Yearbook of Faculty of Law Sciences* no.1 *(Godišnjak Fakulteta pravnih nauka)*, University „Apeiron", Banja Luka 2011., 74

[13] A.J.E. Jaffey, »Engleska "proper law" doktrina i konvencija EEZ" (The English Proper Law Doctrine and the EEC Convention), *International and Comparative Law Quarterly*, 1984; 33:531-537, taken from: *Strani pravni život* no. 128-129/85

[14] V.Čolović (2011.), 74

[15] J.G. Castel, 113

[16] G.C. Cheshire, *Private International Law*, Oxford 1961., 213

[17] G.C. Cheshire, 215

[18] M.Bagheri, „Conflict of Laws, Economic Regulations and Corrective/Distributive Justice", *Journal of International Law*, Vol. 28, Iss. 1 [2014], Art. 5, University of Pennsylvania Journal of International Economic Law (14th Judicial Conference of the United States Court of International), 2014., 125

could be allowed, when the parties are free to choose their law, if the law of the foreign country in question is more closely related to the content of the contract[19]. The law application principle according to the theory of *proper law* is not absolute. We could say that the theory of *proper law* is unitary in nature, as regards the relation of this theory to legal rules and corrections to the application of laws, in case the public order is disrupted[20]. When speaking of the conflict of laws in civil law relations with the foreign element, we also speak of the institute of corrective justice. Corrective justice refers to the physical connection between the place where the contract is signed and the place of its performance and the applicable law. But this institute cannot always support the assumption that the law of those places can govern the contract in question. The will of the parties is also important, as well as the application of the closest connection principle which, in fact, expresses the corrective justice that must be carried out between the contracting parties. This could call for the application of *lex mercatoria*[21].

As we have stated above, there are different criteria governing the establishment of applicable law according to the theory of *proper law*. Even in cases when a number of elements within the contract point in the direction of the legal system of a particular country, this does not mean that the law of that country shall be applicable. Namely, in one specific case of a claim for industrial injury compensation, the applicable law was determined based on the contract, while the law governing the employer's tortious liability was not applied. In other words, the facts that the claimant is resident in England, that the contract was executed in England, in the English language, and that the employer's parent company was in the USA, do not provide sufficient grounds for the conclusion that the law governing the contract is either the English law or the law of the State of Texas in the US[22].

2. The relationship between the theory of *proper law* and other principles governing the choice of law applicable to contractual relations

We will now try to define the relationship between the theory of *proper law* and other principles (theories) in this area. This also includes the party autonomy. Namely, we have seen that this theory comprises the

[19] M. Bagheri, 128-129
[20] M. Bagheri, 129-130
[21] M. Bagheri, 130
[22] „Pravo koje se primenjuje na ugovor", *Journal du droit international* 1973., 2:441-445, taken from: *Strani pravni život* no. 86/74

element relating to the assumed intentions of the parties. On the other hand, the party autonomy proponents hold that the contracting parties can adopt the law to be applied with absolute freedom of choice, and that law does not, in their view, have to be in any way related to the elements of the legal transaction in a particular contractual relations. This means that the parties do not have to abide by any particular law. This opinion, termed the "contract without the law" theory, is not accepted, especially in the legislations of France and Germany, which stipulate that every contract must be governed by the law of a particular country. In other words, in order to establish whether an international or domestic contract is in question, the court is always obligated to examine the so-called "objective localization of the contract". To determine the "objective localization of the contract" means to establish objective connections of the contract with particular countries. In line with the aforesaid opinion, allowing the parties to choose a law totally unrelated to the contract would amount to acknowledging that the parties can rule out the laws of all the countries that their contract is connected with. For this to be avoided, it must be accepted that the parties are not free to adopt just any law. They are free only in making choice from among those laws that are connected with their contract[23]. The theory of *proper law* includes the assumed intention of the parties which is determined based on the content of the contract. Further below we will see that similar rules also exist in regulations from the legal sources of the EU and individual states.

As regards the relationship of the theory of *proper law* with the center of gravity theory, they display certain similarities. Namely, the center of gravity theory promotes the choice-of-law rule according to which, with regard to contracts with the foreign element, the applicable law is determined taking into account legal connections of that contract which "gravitate" towards a particular country. Those specific connections or a combination of circumstances are also termed "close connection", "specific circumstances", etc[24]. Every contract contains one specific fact which is essential for its functioning. What fact it is depends on the type and subject of the contract. Such a fact can be found in every contract and it should be given the status of the relevant fact in the choice-of-law rule[25]. This fact shall be established according to the law of the country where the question is raised, which means according to *lex fori*[26]. There are, most often, two correlative obligations in a contract. In terms of space, those obligations do

[23] H. Batiffol, „Uloga volje u MPP", *Archives de philosophie du droi*t 1957., 71-85, taken from: *Strani pravni život* br. 33/61
[24] M. Pak, *Međunarodno privatno pravo*, Beograd 2000., 444
[25] *Ibid.*
[26] L. Raape, *Internationales Privatrecht*, Berlin und Frankfurt a. M. 1955., 449

not have to be performed in the same territory and in that case one point of connection could point towards the application of two laws[27].

If there is no so-called "close connection" between the elements of a contract and the law of a particular country, the problem of determining the applicable law becomes even greater. Then, practically speaking, we have to resort to some other rules that should be defined in advance for any kind of contractual relations. This is possible by using the theory of characteristic obligation, which defines the basic rule for establishing the applicable law based on the place of residence (seat or abode) of the main obligation debtor. Characteristic obligation as the point of connection, in advance, determines whose obligation in a contract is more important, so as to serve as basis in deciding on the applicable law. This characteristic obligation or action objectivizes a contract, in which the party autonomy is not applied, or it is impossible to determine the "closest connection". Characteristic obligation can be expressed in the transfer of property of objects, in the obligation of services etc. Those prestations or obligations must have priority over payment of the other party[28]. If that characteristic obligation is the basis of the contractual relation, decision-making on the relative importance of one or another obligation must follow. In other words, it must be established whose prestation, or obligation is more important[29]. The characteristic obligation theory has become predominant in recent legislation. A great majority of countries have adopted this principle. Those countries include countries originating from the former SFR Yugoslavia, then Austria, the Czech Republic, Poland, Hungary, Switzerland, etc. On the other hand, some countries recognize the principle according to which the applicable law is determined based on the place of signing the contract. Similarly, many Latin American countries have adopted the place of contract execution as the governing principle in this area[30]. It should be noted that no rule for deciding on the applicable law following the characteristic obligation theory is absolute. All the rules are refutable assumptions. Even the *lex rei sitae* as the place where a property is situated constitutes a refutable assumption.

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The original meaning of the term *proper law* is the correct law, the law that can be applied. This meaning should be the starting point in analysing this theory. It indicates that the law applied is the one most closely

[27] E. Muminović, *Osnovi Međunarodnog privatnog prava*, Sarajevo 1997., 175
[28] M. Pak (2000.), 445
[29] M. Pak (1989.), 806
[30] M. Ročkomanović, 266

connected with the contract, while the content of the contract represents the will of the parties, even in the case of adhesion contracts, given that the execution of those contracts also requires the will of the parties. We could say that the theory of *proper law* expresses both the will of the parties, and the close connection of the contract with the law of a country. On the other hand, the center of gravity theory only takes account of the content of the contract, i.e. its elements that "point towards" the law of a particular country. Finally, the characteristic obligation theory defines, in advance, the elements of a contract that will be relevant in deciding on the applicable law, although those elements are not necessarily in any way related either to the content of the contract, or the will of the contracting parties. The fact remains that incorporating this theory within the law has facilitated the work of courts, but it has also marked a departure from the essential rule – the party autonomy and the principle of applying the law best suited to the contractual relation in question.

3. The theory of *proper law* in EU law sources

3.1. The Rome Convention and the theory of *proper law*

We shall analyse the application of the theory of *proper law* in the sources of EU law through the clauses of the two most important acts passed in EU law with regard to this area. First of all, it is the Rome Convention on the Law Applicable to Contractual Obligations, passed within the EEC (hereinafter: the Rome Convention)[31], which has greatly influenced many national legislations. Pursuant to the Rome Convention clauses, the parties are granted full autonomy of the will in deciding on the applicable law, which means that they can choose the law governing the entire contract, or any of its parts[32]. In the absence of choice of law by the parties, a contractual relation will be most closely connected with the country in which the contracting party which is to execute a characteristic obligation has, at the time of signing the contract, its regular residence or seat. If the party performs a business activity, the contractual relation will be most closely connected with the country of the principal place of business. Finally, if the characteristic obligation is to be carried out in some other location, and not the place of business, the closest connection will be with the country where the obligation is to be carried out, i.e. the law following the *lex loci actus* will be applied. If the main obligation of

[31] Adopted 19.06.1980., entry into force of the seventh ratification 01.04.1991., Rome Convention on the law applicable to contractual obligations, *OJ* C027/26.01.1998.
[32] Art. 3.1 Rome Convention

a contract cannot be determined, this rule will not be applied[33].

If the contract relates to real estate, according to the Rome Convention the contract will be most closely connected with the country where the real estate is located[34]. This means that the law pursuant to *lex rei sitae* will not be exclusively applied[35]. The Rome Convention has left some leeway for regulating these contracts in a different way, i.e. if one such contract is "closer" to a country other than the country where the real estate is located, the "closer" country principle shall be applied.

The Rome Convention was founded on the characteristic obligation principle, disregarding other elements of a contract which could possibly point to "closeness" of the contract with any other law. On the other hand, in determining the governing law of contracts related to real estate, the Rome Convention allowed for the possibility of choice of some other law, should the particular contractual relation not be closely connected with the *lex rei sitae*. In this way, individual elements of the theory of *proper law* came to be accepted.

The Rome Convention stipulates that it is possible to regulate a contractual relation by means of more than one governing law. Namely, if any part of a contract can be set apart and if it is "most closely connected" with any other legal system, it is possible to decide on another law applicable to this part of the contract. If the contract can still exist in this way, there will be no obstacles to the aforesaid[36].

3.2. Regulation 593/2008 and the theory of *proper law*

The Rome Convention was replaced by the Regulation of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I) No. 593/2008 of 17 June 2008 (hereinafter: Regulation 593/2008)[37]. Regulation 593/2008 also gives priority to the party autonomy, but lays down rules to be applied in its absence[38]. If the rule for a contract is not laid down, or if the contract can be governed by various elements indicated in this provision, the applicable law shall be determined according to the habitual residence of the debtor owing the characteristic obligation. However, Regulation 593/2008 also takes into account situations when a

[33] Art. 4.2, Rome Convention
[34] Art. 4.3, Rome Convention
[35] K. Sajko, *Međunarodno privatno pravo*, Zagreb 2005., 387-388
[36] Some authors are of the opinion that this will disturb the balance of the contract. See M. Dika, G.Knežević, S. Stojanović, *Komentar Zakona o Međunarodnom privatnom i procesnom pravu*, Beograd 1991., 75
[37] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) - *Official Journal of the European Communities* L 177, 04.07.2008., 6-16
[38] V.Čolović, *Međunarodno privatno pravo*, Banja Luka 2012., 208

contract is more closely associated with a country other than the one where the fact relating to characteristic obligation is situated[39]. In those cases the law shall be the law of the country that the contract is most closely associated with. Moreover, if the law cannot be chosen according to the aforesaid rules, the law of the country that the contract is most closely connected with shall be applied[40]. We can see that Regulation 593/2008 gives priority to the "closer connection" of a contract over characteristic obligation. As a result, the theory of *proper law* is being increasingly applied. In particular, Regulation 593/2008 lays down the rules governing the law applicable to contracts on the carriage of goods[41], consumer contracts[42], insurance contracts[43] and individual employment contracts[44]. We shall see that some legislations are particularly concerned with these contracts. We will not go into analysing these rules, but will only point out that some of them are determined by the application of the characteristic obligation theory, while some rules limit the party autonomy, allowing the parties to choose from among the applicable laws related to rules predefined by Regulation 593/2008.

4. The theory of *proper law* in some national legislations

We shall analyse the application of the theory of *proper law* within provisions of several laws in this area. As the governing principle, these laws primarily recognise the party autonomy, and if the law is not decided on following that principle, they lay down rules to connect a particular contractual relationship with the country most closely associated with it. Some national legislations define the rules of the characteristic obligation theory more broadly or narrowly, as the case may be. Similarly, some national legislations define specific rules for particular contract types, as do the Rome Convention and Regulation 593/2008. Nevertheless, the common feature of all those laws is regulating the close connection of the contractual relation with the law of a particular country. In view of the above analysis of provisions from EU law sources governing this area, we shall focus on the laws of some countries outside the EU.

4.1. Serbia

According to the ARCL, in the absence of the party autonomy, the applicable law is determined, according to the characteristic obligation

[39] *Ibid.*
[40] Art. 4 Regulation 593/2008
[41] Art. 5 Regulation 593/2008
[42] Art. 6 Regulation 593/2008
[43] Art. 7 Regulation 593/2008
[44] Art. 8 Regulation 593/2008

theory, based on the habitual residence of the debtor owing the characteristic obligation at the time of receipt of the offer (the signing of the contract). In article 20, the ARCL specifies solutions for a large majority of contracts, i.e. lays down the facts according to which the applicable law is to be chosen. Nevertheless, it must be noted, first of all, that the ARCL has adopted the party autonomy principle and that in article 19 it stipulates that contractual relation shall be primarily governed by the will of the contracting parties. The ARCL has defined the aforesaid rules as absolute, which means that the law of any other country shall not be applied if the contractual relation is more "strongly", or closely associated with that country. However, provision of article 20 stipulates that the law shall be applied pursuant to the rules of the characteristic obligation theory, if the law has not been chosen following the party autonomy principle, i.e. if the circumstances of the case do not point towards the application of any other law. It is possible that the quoted part of the provision refers to the application of the theory of *proper law*, but the legislator does not explicitly state what constitutes specific circumstances relating to a case.

The APILS bill stipulates slightly different rules for deciding on the applicable law compared to the ARCL. Namely, the APILS does not depart from the basic principles governing this matter, that the ARCL is also based on, but it should be noted that the latter law provides more leeway for the "closer connection" theory, and in turn the theory of *proper law* compared to the characteristic obligation theory. The APILS bill primarily stipulates that the choice of applicable law must be explicit or must indisputably result from contract provisions or the circumstances of the case[45]. If, at the moment when the choice of applicable law is made, all the other element of the contract are associated with a country whose law has not been chosen, the choice of the applicable law shall not affect the implementation of the provisions that, pursuant to the law of that other country, cannot be departed from in line with the contract[46]. The APILS also stipulates rules defined by the characteristic obligation theory, while also raising the number of contract types to be governed by those principles, in the absence of the party autonomy. If all the circumstances of the case indicate that the contract is obviously much more closely connected a the country not mentioned in the rules defined by the characteristic obligation theory, the law of that other country shall be applied, except in the case of compulsory insurance contracts[47]. If the applicable law cannot be determined according to the aforesaid, the law applicable to the contract shall be that of the country that the contract is considerable

[45] Art.145, par. 2 APILS
[46] Art. 145, par. 6 APILS
[47] Art. 146, par. 3 APILS

more closely associated with[48]. The APILS stipulates, specifically, the rules for determining the applicable law for contracts on the carriage of goods, contracts on the carriage of passengers, consumer contracts and individual employment contracts, as do the aforesaid sources within the EU.

4.2. USA

The Second Restatement of the Conflict of Laws of the USA (hereinafter: Restatement)[49] also regulates the choice of applicable law for the validity of contracts and the rights arising from contracts[50]. The party autonomy comes first. In other words, the law of the country that the parties have chosen to regulate their contractual rights and obligations is applied if the particular issue is such that it can be resolved by an explicit provision of the contract relating to that issue. The law chosen according to the principle of party autonomy will also applied to cases when the issue in question is such that the parties cannot resolve it by means of an explicit provision of the contract relating to that issue, unless: the chosen country is in no significant connection with the parties or the contract, and there are no other reasonable grounds for applying the law that the parties have chosen, and if the application of the chosen law would be in conflict with the public order of the country having considerably more interest than the chosen country in resolving the matter in question, which would in turn be the country whose law would be governing had the parties actually not decided on the law to be applied[51]. With regard to the rights and obligations of the parties concerning any issue from the contract, the applicable law shall be that of the country which is most closely associated with the contract and the parties with reference to that issue. If the parties have not made their choice of law, in deciding on the applicable law for regulating an issue the following linking points should be considered: the place of signing; the place of negotiations before signing the contract; the place of execution; the place where the subject of the contract is situated; residence, place of abode, citizenship, place of registration, place of the parties' business[52]. We can say that elements of the theory of *proper law* are also present in regulating the application of law by means of the party autonomy, i.e. by restricting the application of this principle. The law of the country with more interest is associated with both the content of the contract and the parties. In this way the closer connection of a contract is defined, which is contrary to the intention of the parties.

[48] Art. 146, par. 4 APILS
[49] Restatement II of Conflict of Laws, 1969., M.Živković, *Međunarodno privatno pravo*, nacionalne kodifikacije, knjiga prva, (national codifications, first book) Beograd 1996
[50] Art. 186 of Restatement
[51] Art. 187 of Restatement
[52] Art. 188 of Restatement

4.3. Switzerland

The Swiss Federal Act on International Private Law of 1987 (hereinafter: SIPL)[53] stipulates as the principal rule the free choice of law following the party autonomy principle, so that the choice of law must be explicit, or must credibly result from provisions of the contract or circumstances related to it[54]. Had the parties not applied the party autonomy principle in deciding on the applicable law, the law of the country that the contract is most closely associated with shall be applied. It is assumed that the closest connection is with the country in which the party to carry out the characteristic obligation has its habitual residence or, if a party to the contract is a person professionally dealing with trade or any other activity, the law shall be determined according to their principal place of business. The SIPL specifically defines characteristic performance with regard to particular contracts[55]. The SIPL specifically lays down the rules for contracts on the sale of movable property, contracts regarding the sale of real estate, consumer contracts and employment contracts. With reference to contracts on real estate, the principal rule is the *lex rei sitae*, while the parties are free to choose the law[56]. As regards consumer contracts, the party autonomy is limited[57], while the choice of law is limited in employment contracts[58]. When speaking of the application of the theory of *proper law* in the aforesaid provision, we imply that the choice of law must clearly result from provisions of the contract, i.e. the content of the contract. As regards the circumstances, the court has to assess them in each particular case which in turn demonstrates the application of this theory since it is the assumed intention of the parties that the court will take into account as the basic element in deciding on the applicable law.

4.4. The Russian Federation

The Civil Code of the Russian Federation (hereinafter: CCRF)[59] regulates the choice of applicable law in contractual relations by stipulating

[53] Swiss Federal Act on Private International Law of 18 December 1987 as amended until 1st July 2014, *http://www.andreasbucher-law.ch/images/stories/pil_act_1987_as_amended_until_1_7_2014.pdf,* 20.11.2015.
[54] Art. 116, par. 1 and 2 SIPL
[55] Art. 117 SIPL
[56] Art. 119, par. 1 and 2 SIPL
[57] Art. 120 SIPL
[58] Art. 121 SIPL
[59] The Civil Code of the Russian Federation, with the Additions and Amendments 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, *http://www.russian-civil-code.com/PartIII/SectionVI/,* 20.11.2015

the party autonomy as the governing principle. The applicable law chosen by the parties must not infringe the rights of third parties. The parties can agree on one law applicable to the whole contract, or on several laws applicable to specific parts of the contract. If it follows from circumstances of the case or the content of the contract that the contractual relation is associated with the legal system of another country, the choice made by the parties shall not affect the implementation of the country's imperative rules to the contractual relationship[60]. If the parties have not decided on the applicable law, the right to be applied shall be that of the country with which the contract is most closely connected. The CCRF defines the theory of characteristic obligation, specifying that the law of the habitual residence of the debtor owing the principal obligation shall be applied, unless the circumstances of the case, the content of the contract or the law dictate otherwise. If the contract comprises features of different contract types, the law to be applied shall be the one that the contract as a whole is most closely associated with[61]. If the parties fail to reach an agreement, and the contract is connected with real estate, the law following the closest connection shall be applied. This is the law of the place where the real estate is situated, unless the circumstances of the case, the content of the contract or the law indicate otherwise. On the other hand, if the contract is concerned with real estate located in the Russian Federation, and the legislator specifies all the categories included in the concept of real estate, the law of the Russian Federation shall be applied. The CCRF stipulates that a connection must exist between a contract and the law of a particular country. This part of the provision illustrates the application of elements of the theory of *proper law*. The situation is similar with regard to real estate, except that in this case the application of this theory is rather limited, if the real estate is located in the Russian Federation.

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* *

The provisions mentioned above demonstrate that legislators have principally opted for the application of "firmer" rules in deciding on the applicable law when the party autonomy is absent. The fact of restricting the party autonomy is associated with determining the real content of a contract and all the negative aspects of regulating a contractual relation by the law of a country not related to it. The theory of *proper law* enables that, but it also defines connexity, or the "close connection" discussed above.

[60] Art. 1210 CCRF
[61] Art. 1211, par. 1, 2 and 5 CCRF

5. Conclusion

The objective of the theory of *proper law* is to enable the choice of the applicable law best suited to the content of the contractual relation and the party autonomy. Besides, it is understood that the party autonomy must derive from the content of the contract. The essential definition of the theory of *proper law* refers both to the will of the parties and the "close connection" of the contract with a particular country. On the other hand, the center of gravity theory and the theory of characteristic obligation do not leave much leeway for deciding on the law most suited to the nature of the contractual relations and the party autonomy. The center of gravity theory specifies which country a contractual relation is the closest to, according to the facts stated in the contract. The theory of characteristic obligation defines in advance the rules that the choice of applicable law shall be governed by. Both the center of gravity and characteristic obligation theories include some elements of the theory of *proper law*, regarding the "close connection" of a contract with a particular country.

In view of the aforesaid, the theory of *proper law* provides a basis for determining the applicable law in the absence of the party autonomy. However, even if the party autonomy is applied to choosing the law, the theory of *proper law* limits its application, if the contract is "closer" to a country other than the one whose law has been chosen. This results in the application of the only law truly applicable to a contractual relation, which is in fact the main objective of the theory of *proper law*.

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PRIMENA TEORIJA *PROPER LAW* KOD UGOVORNIH ODNOSA SA ELEMENTOM INOSTRANOSTI

Rezime

Teorija *proper law* je proizvod anglosaksonske doktrine XVIII i XIX veka i primenjuje se, između ostalog, kod određivanja merodavnog prava u ugovornim odnosima sa elementom inostranosti u odsustvu autonomije volje. Osnov ove teorije nije samo u bliskoj vezi ugovora sa nekom

zemljom, već i u nameri stranaka koja mora biti sadržana u elementima ugovornog odnosa. Ne može se definisati ova teorija bez navedenih elemenata. U radu se analizira kakav je odnos teorije *proper law* i drugih teorija koje se primenjuju u slučaju kada stranke nisu izabrale merodavno pravo, kao što su teorija centra gravitacije i teorija karakteristične prestacije. U vezi sa tim, analiziraju se odredbe najvažnijih izvora prava EU u ovoj oblasti, kao što su Rimska konvencija i Uredba 593/2008, a posvećuje se pažnja odredbama zakona pojedinih zemalja van EU u ovoj oblasti. Autor zaključuje da teorija *proper law* ostavlja najviše prostora za određivanje merodavnog prava u odnosu na ostale teorije.

Ključne reči: ugovor, merodavno pravo, *proper law*, centar gravitacije, karakteristična prestacija.

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UDK: 341.217.02(4-672EU)

NEW EU ENLARGMENT STRATEGY AND COUNTRY PROGRESS REPORTS – A MOTOR FOR CHANGE ?

Abstract

In November 2015, the European Commission has adopted the new Enlargement Strategy and a new methodology in reporting on the progress countries have made in the EU accession process. The novelties in the strategy and the reporting methodology are aimed to increase transparency and facilitate greater scrutiny of reforms by all stakeholders, including civil society. What does the new approach imply and what changes can we except it to induce in the behaviour and actions of the legislator and the civil society in the accession countries?

Keywords: *European Union, accession process, enlargement, reforms*

1. EU Conditionality Policy

With the introduction of the Copenhagen criteria for EU membership[2], the EU has moved the policy of conditionality to the centre of the EU enlargement process. [3] The annual reporting on the progress of every country in the process has been an important element of that policy. The accession of the 10 Central and East European Countries to the EU in 2004 was acknowledged as a success and a good example of the transformative power of the EU.[4] However, the accessions of Bulgaria and Romania have shown some deficiencies in the conditionality policy, since both countries have still had to demonstrate that the rule of law

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[2] Conclusions of the presidency, Copenhagen European council. For more information, see *http://www.consilium.europa. eu/ueDocs/cms_Data/docs/pressData/en/ec/72921.pdf*

[3] Z.Nechev et al, Embedding rule of law in the enlargement process—a case for EU political conditionality in the accession of the Western Balkan Countries, 2013. *www.kas.de/wf/doc/kas_36352-1522-1-30.pdf*. Also see F.Schimmelfennig and U.Sedelmeier. "Governance by conditionality: EU rule transfer to the candidate countries of Central and Eastern Europe" *Journal of European public policy* 11.4 (2004): 661-679.

[4] *Ibid*. For a detailed analysis in Serbian language see. A. Cavoski et el. Pristupanje Državne zajednice Srbija i Crna Gora Evropskoj uniji – iskustva deset novoprimljenih država, Beograd, Institut za uporedno pravo, 2005.

was fully observed in their domestic systems. In order to mitigate these deficiencies, EU had developed the Cooperation and Verification Mechanism – a monitoring process requiring prompt policy response from the government – in order to identify and address shortcomings in problem areas. [5] Drawing on that experience and also the experience of Croatia's EU accession process, the European Commission proposed a "new approach" to the accession process in October 2011, which rests on the principle that issues related to judiciary and fundamental rights should be dealt with early on in the accession process.[6] As Fagan and Sircar duly note,[7] through this new approach the EU sought to avoid the requirement of a post-accession mechanism for monitoring and safeguarding reforms in the justice and home affairs sectors in the Western Balkan countries.

The EU accession process in the countries of the Western Balkans has to a certain extent benefited from this new approach. Possibly the most important positive change of the approach was the setting of benchmarks – opening, interim and closing benchmarks – particularly in areas where there are no clear EU standards and the target to be met by the accession countries was somewhat elusive, such as the Judiciary and Fundamental Rights. Also, the political impact of the EU progress reports to internal country's policy must not be disregarded – perhaps the most prominent example of the significance of the EU reporting is the manner in which the EU approach to the process in which decisions on judicial non-appointments in Serbia were reviewed was reflected in government policy, rhetoric and the final outcome of the process – a more lenient EU assessment was used by the Government to justify this contentious reform, while a more critical view led the Government to somewhat re-examine its approach and policy.[8]

In November 2015, the European Commission has taken an additional step forward and introduced a new approach to the accession strategy and the progress reporting methodology. What are the novelties

[5] M.A.Vachudova, A.Spenzharoda, The EU's cooperation and verification mechanism: fighting corruption in Bulgaria and Romania after EU accession. Swedish Institute for European Policy Studies 1., 2012, *www.sieps.se/sites/default/files/2012_1epa%20EN_A4.pdf*, 2.

[6] European Commission 'Enlargement Strategy and Main Challenges 2011-2012', COM(2011) 666 final.

[7] A.Fagan, I.Sircar, *Judicial Independence in the Western Balkans: Is the EU's 'New Approach' Changing Judicial Practices?* No. 11, June 2015*, http://www.maxcap-project.eu/system/files/maxcap_wp_11.pdf*, 9, access November 13, 20015

[8] Namely, in its progress report for 2011 the EU gave an understated and, furthermore, positive assessment of this process. Months later, following the questions of a EU Parliament member over leaked negative reports on the process and the recommendations of the Ombudsman on the issue, the EU had considerably changed its position and put the entire process under closer and more objective scrutiny. This has supported the change in the public perception of the process and induced additional public pressure for the deficiencies in the process to be addressed – including the final decision of the Constitutional Court which had annulled the entire problematic process. For more details see. V.Rakic - Vodinelic, A.Knezevic Bojovic, M.Reljanovic, *Judicial Reform in Serbia 2008 – 2012*, Belgrade, CUPS, 2012

and can they be expected to drive the change in the accession countries, and specifically, in Serbia?

2. The New Enlargement Strategy

The new EU Enlargement Strategy[9] sets out the medium-term enlargement policy strategy of the European Commission. As a change from the previous years, when a strategy paper was adopted each year, this Strategy shall cover the period of the mandate of the Commission – therefore, it will be the overarching enlargement policy document until late 2019. The reasons for this are twofold – first, as in any other strategic approach, medium-term planning allows for the setting of more ambitious objectives and sufficient time for their realization. Secondly, the Commission has assessed that "while there has been important progress by many countries in many areas over the past year, the challenges faced by these countries are such that none will be ready to join the EU during the mandate of the current Commission, which will expire towards the end of 2019."[10] This assessment does not come as a surprise – when the Commission was being formed in late 2014, the enlargement portfolio was not planned[11] and the neighbouring policy portfolio was subsequently amended to include "enlargement negotiations"; moreover, the current president of the European Commission, Jean-Claude Juncker, had announced in a speech leading up to his confirmation vote that there would be no new enlargement for the next five years.[12]

In the 2015 Strategy, the Commission has further assessed that all the countries covered by the current enlargement package – the Western Balkan countries and Turkey – face major challenges with respect to the rule of law, or, more specifically, that "judicial systems are not sufficiently independent, efficient or accountable. Serious efforts are still needed to tackle organised crime and corruption".[13]

It was therefore logical that the new strategy will reaffirm the "fundamentals first" approach, first launched in 2011, as described above. Namely, the rule of law, fundamental rights, the strengthening of democratic institutions, including public administration reform, as well as economic development and competitiveness remain key priorities of the EU's enlargement

[9] Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions – EU Enlargement Strategy, COM(2015) 611 final, hereinafter: 2015 Enlargement Strategy

[10] *Ibid*, 2.

[11] *http://www.balkaninsight.com/en/blog/enlargement-delayed-a-new-commission-without-an-enlargement-commissioner,* access November 13, 2015.

[12] *http://www.eubusiness.com/news-eu/politics-juncker.x29*, access November 13, 2015.

[13] 2015 Enlargement Strategy, 2.

policy in the 2015-2019 period. The focus on these issues is reflected in the specific areas subject to strengthened reporting in the EU country progress reports, which is the second important novelty that will be discussed in more detail further in the text. The Commission has also underlined that the listed fundamentals are both indivisible and mutually reinforcing, and that is imperative that the enlargement process facilitates their synergies.

Another issues that remain in the focus of the strategy are regional cooperation and inclusive accession dialogue – the Commission has emphasised that the civil society must be given a more prominent role in the reform process. In fact, the new reporting methodology may well be understood as a tool for increasing the transparency of the progress reporting, but also as a clear and value-based mechanism for tracking progress, which can be used both the European Union, in line with is re-affirmed conditionality policy, and by the countries' civil sector and citizens, to affect policy formulation and implementation at the national level.

The Commission has also announced in the 2015 Strategy that it will improve the information gathering. Namely, in order to gain a deeper understanding of reform challenges for all countries, the Commission will resort to a more systematic use of existing mechanisms, such as TAIEX, and also through more frequent and better targeted peer review missions. [14] The peer review missions have proven to be a valuable source of information on not just legislation, but also practice and problems in implementation. For example, relevant peer review missions in the field of judiciary, which will remain in the focus of the accession process, have enabled the EU to observe the working conditions of the judiciary, include a wider array of stakeholders (particularly non-state actors), and not limit the missions to capitals or major urban centres.[15] Also, the full inclusion of the civil sector in the planned reforms "to anchor reforms across society"[16] will be supported in the implementation of the 2015 enlargement Strategy. [17]

3. The New Approach to Annual Country Reports

As a part of the new enlargement package, the Commission has further strengthened the assessments in its annual country reports. As of this year, more emphasis is put on the state of play in the countries, so that it is clear to what extent they are prepared for the challenges of membership, and, additionally, the progress made over the past year is

[14] 2015 Enlargement Strategy, 32
[15] A.Fagan, I.Sircar, 32.
[16] 2015 Enlargement Strategy, 2
[17] One such mechanism which is particularly effective in Serbia is the National Convention on the European Union in Serbia. See more on National Conventions in A.Knezevic Bojovic, "Ucesce civilnog sektora u procesu pridruzivanja Evropskoj uniji i praksa Nacionalnog konventa o EU", *Strani pravni zivot* 2/2015, 131 – 144.

also assessed in a clearer manner. This pilot effort is applied to a selected group of areas, the importance of which was underscored in the Strategy:

- rule of law and fundamental rights – judiciary, fight against corruption, fight against organised crime, freedom of expression
- economic development
- public administration reform
- three specific chapters of the *acquis* – public procurement, statistics and financial control.

In these areas, one assessment is provided for the state of play, using the following five-tier descriptive scale:

Early stage – Some level of preparation - Moderately prepared - Good level of preparation - Well advanced.

The second assessment is provided for the level of progress, again, using a following five-tier scale:

Backsliding – No progress – Some progress – Good progress – Very good progress.

The assessments are made using a careful and detailed situation analysis, which is included in the Enlargement strategy as its Annex 2. For instance, the assessment of the functioning of the judiciary includes an analysis of the following issues:

- strategic framework and budget
- management of the judiciary
- independence
- accountability
- professionalism and competence
- quality of justice
- efficiency.

Similar sub-criteria and checklists are formed for the majority of the other pilot areas. However, the relevant sub-criteria with regards to the economic accession criteria are not as easy to set – as the Commission admits, there is no simple checklist to assess compliance. The fulfilment of economic criteria requires profound and lasting structural reforms, which is why the importance of a sustained track record of implementation is of particular importance in this area. This means that in the area of economic criteria the regime remains negatively defined, as the case was in the accession process so far, without directly addressing the main

development criteria.[18]

The new reporting should increase the reporting transparency and facilitate both the state officials and the other stakeholders to understand the challenges that lay ahead and to steer the internal reform policy. However, it still remains to be seen whether this novel approach to what essentially remains the EU conditionality approach will yield more substantial results than the case was so far. It is likely that one of the main deficiencies of the conditionality approach in general – the fact that domestic context was under-played as an intervening variable[19] - could, to an extent, be mitigated through the increased transparency of the reporting and a more inclusive process. Evidence from the past years has shown that countries in the Western Balkans are competitive and responsive when it comes to external assessments of their performance and reforms, particularly in the economic sphere. For instance, Serbian government has formed a working group the objective of which is to increase Serbia's ranking on the Doing Business List.[20] This working group has spearheaded reforms in legislation and practice that have resulted in the improved ranking of Serbia on this list,[21] which is perceived by the government as a major accomplishment in business enabling reforms.[22] Similar reformatory efforts were taken in Macedonia in the past years.[23] On the other hand, similar efforts at assessing government performance in various reform areas, which are closely linked to the EU accession process, introduced by the local civil society, have seldom had a similar effect. [24] This means that the introduction of the five-tier scale for assessing both the state of play and the progress accomplished so far, by a strong political actor such as the European Commission, can reasonably be expected to induce more focused and targeted reforms in all Western Balkan countries and also, that relevant policy dialogues can become more structured and ultimately, more effective.

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[18] L.Bruszt, J.Langbein, "Anticipatory integration and orchestration: The evolving EU governance of economic and regulatory integration during the Eastern enlargement", Paper prepared for the APSA Annual Meeting, Washington, August 28--31, 2014, 12, available at *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2451961,* November 16, 2015

[19] A.Fagan, I.Sircar, 8.

[20] Decision of the Government of Serbia No. 02-16383/2014 of December 20, 2014. The working group is headed by the deputy prime minister and minister of construction, transport and infrastructure, and also includes the minister of finance, independent experts, representatives of the civil society and representatives of local self-government.

[21] *http://www.doingbusiness.org/data/exploreeconomies/serbia/,* accessed on November 16, 2015

22 Vucic: Serbia climbs 32 positions in WB rankings, *http://www.tanjug.rs/full-view_en.aspx?izb=209983,* accessed on November 16, 2015

[23] *http://www.worldbank.org/en/news/press-release/2014/10/29/fyr-macedonia-once-again-among-region-highest-performers,* accessed on November 16, 2015

[24] See for example the efforts aimed at formulating a neutral indicator assessing the quality of regulatory environment in Serbia launched by a Serbian NGO *http://www.naled-serbia.org/en/page/138/Regulatory-Index-of-Serbia,* accessed on November 15, 2015

In order to assess the possibility of the new reporting system to drive changes in the sector which remains in the focus of the accession process – the functioning of the judiciary – this paper will analyse is more detail the way in which the new methodology is used in the Serbia progress report in 2015.

4. How the new approach works in practice - The Functioning of the Judiciary in the 2015 Serbia Report

When it comes to the functioning of the judiciary, this year's Serbia Progress Report[25] assessed that the Serbia's judicial system has some level of preparation, which means that, if expressed numerically, the functioning of the Serbian judicial system would obtain a score of 2 on a 1-5 scale, where 5 is the best result. The assessment provided in section dedicated to the Political criteria is reiterated in the section dealing with Chapter 23, Judiciary and Fundamental Rights, in more detail. The progress level in the past year has been assessed "some progress", which means that, if expressed numerically, it would obtain a score of 3 on a 1-5 scale.

The main assessment is that judicial independence is not assured in practice and that there is scope for political interference with the recruitment and appointment of judges and prosecutors. Interestingly, the 2014 progress report has underscored the same - "the constitutional and legislative framework still leaves room for undue political influence affecting the independence of the judiciary, particularly in relation to the career of magistrates".[26] Even though the Commission has acknowledged the fact that steps have been taken to reduce the backlog of cases, it has also correctly assessed that it remains significant.[27]

The European Commission therefore recommends that the following specific steps be taken:

- establish and implement a fair and transparent merit-based recruitment system and career management to better guarantee the operational independence of the justice system;
- adopt a new law on free legal aid and enable smooth implementation in cooperation with main stakeholders;
- reduce the case backlog and harmonise case law.

[25] Serbia 2015 Report, SWD(2015) 211 final

[26] Serbia 2014 Progress Report, SWD(2014) 302 final, 41

[27] The total backlog of unresolved cases in Serbia on December 31, 2014 amounted to 2.300.252, out of which 1.797.155 are old cases that remain unresolved, as documented in the Supreme Court of Cassation (SCC) Analysis of the Work of Courts in 2014. The analysis is available at *http://www.vk.sud.rs/sites/default/files/attachments/ANALIZA%20rada%20sudova%20za%202014%20%20KONA%C4%8CNI_0.pdf,* accessed on November 16, 2015.

These recommendations are fully in line with the planned reformatory agenda of the Serbian government in this field – both the relevant National Judicial Reform Strategy and the action plan for its implementation[28] and the Chapter 23 Action Plan. Also, unlike the recommendation in the previous year, the Commission clearly no longer demands that constitutional changes be made – it rather focuses on the results that are reasonably attainable until the next report.

However, experience in the implementation of reform has shown that practical problems are likely to occur in practice and that true reforms require not only formal changes to the Constitution, as advised in the 2014 Progress Report, but, more importantly, in building a sound system were both judicial independence and the checks and balances system are in place and fully functional. Independent assessments of Serbia's progress in this area are still not available, but it is safe to assume that the expert public is more likely to agree with the assessment of the state of play than on the assessment of progress given by the Commission in the 2015 Progress report, particularly given that the main challenges remain constant, and unresolved, over the years. On the other hand, the specific recommendations included in the Progress report may provide additional leverage, particularly for the civil sector, to demand that the legislative drafting process, particularly the one related to free legal aid, be as inclusive as possible, and also to advocate for effective and practical solutions in the entire judicial reform process. This will, hopefully, prevent the judicial reform from being a mere box-ticking exercise. The Commission's rather optimistic assessment of the progress made in the sector over the past year should therefore be understood, as times before, as a recognition of the efforts of the competent state authorities, mostly the Ministry of Justice, in setting the reform agenda for the future, than of the actual results achieved – this is clearly seen from the relatively low assessment of the current state of play. However, there is hope that the competent authorities will strive to maintain or improve the assessment of the progress accomplished over the years.

5. How were the countries assessed – a cross comparison

As explained above, the European Commission has decided to use a five-tier descriptive scale in pilot areas observed and assessed within the accession process.

[28] National Judicial Reform Strategy for the 2013-208 period, RS Official Gazette No. 57/13); National Judicial Reform Strategy for the 2013-208 Period Implementation Action Plan, RS Official Gazette No. 71/13 and 55/14 and the Third Draft of the Action Plan for Chapter 23, available at *http://www.mpravde.gov.rs/tekst/9664/treci-nacrt-posle-tehnickog-usaglasavanja-sa-komentarima-evropske-komisije.php*, access November 16, 2015.

However, if the scale was translated into a numerical one, a more simplistic yet easily understandable scale could be provided and used to cross-compare country's performances in specific areas. Fully aware of the fact that such an assessment would not only be more simplistic, but also would not duly acknowledge the interior contexts of all the countries covered by the 2015 Enlargement Strategy, the author hereby provides an outlook on the numerical assessment of the state of play and progress in the pilot areas, as provided in relevant country reports.

The scales are translated in numerical values in the following manner, where 1 is the lowest and 5 is the highest score:

State of play descriptive value	State of play numerical value
Early stage	1
Some level of preparation	2
Moderately prepared	3
Good level of preparation	4
Well advanced	5

Level of progress descriptive value	State of play numerical value
Backsliding	1
No progress	2
Some progress	3
Good progress	4
Very good progress	5

Country/ Field	Serbia	Montenegro	Former Yugoslav Republic of Macedonia	Bosnia and Herzegovina	Albania	Kosovo*	Turkey
Judiciary	2/3	3/3	2/1	2/3	1/3	1/3	2/2
Fight against corruption	2/3	2/3	2/2	2/3	2/3	1/3	2/2
Fight against organised crime	2/3	2/3	2/2	2/3	3/3	1/3	2/3
Freedom of expression	2/2	2/2	2/1	2/1	3/3	2/2	2/1
Existence of a functional market economy	3/3	3/3	4/2	1/3	3/3	1/3	5/2
Capacity to cope with competitive pressure and market forces within the Union	3/3	3/3	3/3	1/3	3/3	1/2	4/3
Public administration reform	3/4	3/3	3/3	1/2	3/4	3/4	3/3
Public procurement	3/4	3/3	3/3	2/4	2/3	1/3	3/3
Statistics	3/4	2/3	3/3	1/3	2/3	1/3	3/3
Financial control	3/4	3/4	3/3	1/3	3/3	1/4	4/3

State of play/progress level per country

The table clearly shows that all countries still have to undergo substantial and comprehensive reforms in the sphere of the judiciary, and that freedom of expression freedoms is also an issue of concern in most countries. As expected, Turkey is most advanced in the domain of economic criteria, whilst the assessments of the state of play and progress in other areas remain relatively uniform across countries, and that the initial statement – that no enlargement should be expected before 2020 – is not based only on the political assessment of the EU's absorption capacity, but is also supported by facts.

6. Will the New Methodology Gear Reforms?

The accession experience so far has shown that the EU conditionality policy has had a considerable effect on the reforms of the countries acceding to the European Union, while at the same time some drawbacks were notable in the field of judiciary and fundamental rights, and inequalities with regards to economic development remain visible between the "old" and the "new" member states. It is evident that the entire process is a learning exercise both for the European Union and for the countries wishing to join it. In the current enlargement package, the European Union has left less room for ambiguity when it comes to the assessment of the accomplishments of the member states in attaining the relevant EU standards and has put additional emphasis on the specific measures that countries need to take in the forthcoming period. Coupled with the new reporting approach, which, for the first time, provides a clear scale for assessing both the state of play and the progress achieved in a number of pilot areas, both the competent country authorities and its citizens have been provided with a transparent mechanism for tracking the progress of reforms. It is unlikely that the new "scoreboard" will result in specialized task forces being formed to advance the country's scoring, as the case was with Serbia and the Doing Business list; however, the governments may well take a more proactive approach in showing visible and viable traction, both in terms of legislation and practice, in the pilot fields, particularly in cases where progress has not been favourably assessed. Given the significance that the EU conditionality policy has in what are otherwise purely internal policy advocacy initiatives, the new reporting methodology can reasonably be expected to gear reforms in pilot areas, through a combination of external and internal policy reform efforts. Relevant country reports for 2016 will show whether the governments and citizens of the seven countries have seized this opportunity.

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NOVA STRATEGIJA PROŠIRENJA EVROPSKE UNIJE I IZVEŠTAJI O NAPRETKU POJEDINAČNIH DRŽAVA – MOGU LI BITI POKRETAČI PROMENA?

Rezime

U novembru 2015. godine, Evropska komisija je usvojila novu strategiju proširenja i novu metodologiju u izradi izveštaja o napretku pojedinačnih država. Novine koje donose strategija i izveštaji o napretku imaju za cilj da povećaju transparentost ovog procesa i istovremeno svim ključnim akterima, a naročito predstavnicima nevladinog sektora, olakšaju vršenje nadzora nad reformskim procesima. Šta ovaj novi pristup podrazumeva i kakve bi se promene mogle očekivati u ponašanju i aktivnostima zakonodavaca i nevladinog sektora u državama koje pristupaju Evropskoj uniji?

Ključne reči: Evropska unija, process pristupanja, proširenje, reforme.

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UDK: 341.948

IS THE APPLICATION OF FOREIGN LAW AN IMPERATIVE? -PRINCIPLE OF PUBLIC POLICY IN NATIONAL LAWS AND INTERNATIONAL CONVENTIONS -

Abstract

Choice of law rules are of an imperative nature and their application is not dependant on the will of the parties. To that extent, we will apply national choice of law rules and even the foreign law to which they refer, even when parties prefer that their matter is resolved according to the national law. However, in particular situations, we will refuse to apply the applicable foreign law despite the reference of the choice of law rules of the forum, because the result of such application would not correspond to the principles of domestic legal system. For such purposes, we use the principle of public policy and by using its protective function, our application of the choice of law rules has corrective effects, whereas we do not apply foreign law, regardless of the fact that such law, according to the will of the legislator, is very closely connected to a particular case. Thus, if the results of foreign law application are incompatible with fundamental values of the national legal system, we must deviate from standard application of the choice of law rules and in a particular matter, find an alternative solution.

Key words*: foreign law application, public policy, deviation from standard application of choice of law rules.*

1. Introduction

In comparative law, public policy is usually defined as an institute which protects fundamental values of the national legal system, particular fundamental principles and vital interests[2] on which the national law is based. These fundamental values of the national legal system are contained in the fundamental principles as the underlying concept of the national legal system, but they can also be found in particular regulations

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[2] M. Wolff, *Private International Law*, Oxford 1950., 182.

which are a normative expression of these principles or bear their own significance.[3] Thus, when we speak about the content of public policy, we speak about particular legal principles and norms and we give precedence to their protection over standard application of the choice of law rules. The position of national law in relation to foreign law can be viewed in relation to the extent to which public policy is applied to eliminate the application of the letter.[4]

The principles we protect through the public policy provision are those which represent the epitomy of universal justice, that is, those which attain and protect internationally recognised values. By protecting these principles we prevent the effects, which are incompatible with the notion of the national state, from penetrating into the domestic territory. To that extent, we must not allow the application of foreign law which would negate the prohibition of slavery, prohibition of religious or racial discrimination, or prohibition of sex discrimination.

In addition to the aforementioned, the content of public policy is also comprised of the principles protecting political and social foundations of the national state. In this way, protected are particular forms of ownership, principle of monogamy, nullity of marriage, equality of spouses, equality between children of the marriage, children born out of wedlock and adopted children. Through these principles, the state points out the fundamental values which must be protected and they are incorporated in constitutions, that is, in particular legal texts.

In addition, public policy undoubtedly includes appropriate legal norms. Thus, for example, several provisions of Montenegrin Family Law[5] can be considered Montenegrin public policy. According to this Law, determining of paternity for the child conceived by means of artificial insemination of the mother is not allowed.[6] Additionally, this Law does not allow contesting of paternity after death of a child.[7] Thus, the content of these and so many other norms is such that it represents public policy and because of their aim, foreign law should not be applied because it produces the effects which are contrary to these regulations.

From the perspective of comparative law, it can be seen that numerous national legislations contain the public policy provision, and the same applies to international conventions. What they more or less have in common is that this doctrine is defined in general terms, whereas

[3] M. Živković, M. Stanivuković, *Private International Law, General Part*, Beograd, 2006., 309.
[4] N. Enonchong, Public Policy in the Conflict of Laws: A Chinese Wall Around Little England?", *International and Comparative Law Quarterly*, vol. 45, 1996., 634.
[5] Family Law of Monenegro, *Official Gazette of Monenegro*, no. 1/2007.
[6] Art. 112 of the Family Law.
[7] Art. 119 of the Family Law.

its content is left to the applying bodies.[8] Their task, in this particular case, is to fill the general definition with precise and clear content.[9] Thus, this is some kind of a blanket norm,[10] and the judge's task is to fill its content in each particular case.[11] In other words, it is a generalised clause which must be filled with values.[12]

2. Public policy in national laws – overview from the perspective of comparative law

In principle, the norm of international private law which defines the public policy calls attention to the rule of conduct in the situation when the norms of applicable foreign law, which should be implemented, offend national public policy principles. To that extent, Japanese Act on private international law prescribes:

> "Where a case should be governed by a foreign law but application of those provisions would contravene public policy, those provisions shall not apply. "[13]

The Law Decree on International Private Law of Hungary contains similar provision which stipulates that foreign law, which contravenes Hungarian public policy, shall not be applied.[14]

All these provisions are rather general and speak about non-application of foreign law if it is contrary to the domestic public policy. However, there are examples of national legislations which speak about non-application of foreign law if its effects are contrary to public policy. This provision is contained, among others, in the laws on private international law of Germany, Switzerland, and Poland. Thus, German legislator stipulates:

> „A provision of the law of another country shall not be applied where its application would lead to a result which is manifestly incompatible with the fundamental principles of German law. "[15]

[8] K. Sajko, *Private International Law,* Zagreb, 2009., 257.
[9] D. Klasiček, „Autonomija u međunarodnom privatnom pravu – novije tendencije", *Book of Abstracts of the Faculty of Law in Zagreb*, 56 (2-3), 2006., 696.
[10] M. Ročkomanović, *Javni poredak u međunarodnom privatnom pravu*, Niš, 1988., 14.
[11] A. Braucher, „Swastikas and Hit Lists: A Study of Public Policy Exception to the Draft Hague Convention on Jurisdiction and Enforcement of Foreign Judgments", 5 *Gonzaga Journal of International Law*, 2001-2002., 13.
[12] R. Lange, „The European Public Order, Constitutional Principles and Fundamental Rights", *Erasmus Law Review*, volume 1, issue 1, 2007., 4.
[13] Art. 42 of the Japanese Act.
[14] Law Decree on International Private Law of Hungary, § 7 pp. 1.
[15] Art. 6 of German Law.

Swiss law stipulates deviation from the standard application of the choice of law rule in the situation which, by its results, threatens its public policy, as follows:

> „The application of provisions of foreign law is excluded if such application leads to a result that is incompatible with Swiss public policy. "[16]

Austrian rule is, in its content, identical to German, and is only differently phrased:

> „A provision of foreign law shall not be applied where its application would lead to a result irreconcilable with the basic tenets of the Austrian legal order. "[17]

Such was the case with the former rule on public policy contained in the Yugoslav Law on Resolving Conflict of Laws with Regulations of Other Countries. This Law did not expressly speak about public policy. Instead it referred to the „fundamentals of the social system"[18], as follows:

> „The law of a foreign country shall not apply if its effects would be contrary to the fundamentals of the social system established by the Constitution of the Federal Republic of Yugoslavia."[19]

Quite similar to previous wording is the norm of a positive Montenegrin International Private Law Act which connects non-application of foreign law with the effects which are „manifestly contrary"to the public order of Montenegro.[20]

Among this second group of countries, which view the opposition to the public policy through the effects of a foreign norm, there is a prevailing opinion that foreign norm will not be eliminated if it is materially different but only if its application leads to the result which is incompatible with the main principles of domestic legal system. Certainly,

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[16] Art. 17 of Swiss Law.
[17] § 6 of the Austrian Law.
[18] On the criticism of terminology see V. Čolović, „Deviation of the Regular Application of the Choice of Law Rules („Correction" of the choice of law rules) – Need for Different Attitude", *Strani pravni život,* 3/2009., 39, 40.
[19] Law on Resolving Conflict of Laws with Regulations of Other Countries, *Official Gazette of SFRY,* 43/ 1982, 72/1982, čl. 4.
[20] International Private Law Act of Montenegro, *Official Gazette of Montenegro,* no. 1/14, 6/14, 11/14, 14/14, Art. 9.

this would be determined *in concreto*.[21] Therefore, the attention should not be focused on the text of a foreign law norm and the way it is styled and phrased but on its effects, that is, the result which it would produce in the domestic legal system. This is explicitly stated in the Belgian Code on Private International Law where it is prescribed that the application of a provision of the foreign law is refused in so far as it would lead to a result that would be manifestly incompatible with Belgian public policy. It is further stipulated that this incompatibility is determined by giving special consideration to the degree to which the situation is connected with the Belgian legal order and to the significance of the consequences produced by the application of the foreign law.[22]

In theory, comparisons of the method and manner of public policy application were made, and there are opinions that this institute is applied more in France[23] and Germany than, for example, in England.[24] However, one should not jump into conclusions and understand that English law is the law which more strongly seeks international cooperation and fulfilment of internationalist tasks than that of France and Germany. It seems that the answer lies in different ways in which choice of law rules are constructed because in England they are „forum-oriented" and lead, in many cases, to the application of the national law, whereas in France and Germany, foreign instead of national law would govern.[25] Thus, there is no need to activate public policy clause.[26]

Public policy content is of a changeable character and its structure differs depending on the country. Therefore, it is not only impossible to speak about public policy content in connection with several countries and in the long run, but it is also impossible to speak about the content of only one public policy for a longer period of time.[27] The essence of public policy can be determined only with very precise coordinates of space and time since its norms are characterised by relativity and changeability and, accordingly, what is today contrary to public policy does not necessarily have to be so tomorrow. Depending on the change in the content of domestic public policy it will be judged whether foreign law is contrary to public policy or not. In any case, the judge will pay attention to public policy only when it

[21] B. Bordaš, T. Varadi, G. Knežević, V. Pavić, *Međunarodno privatno pravo*, Beograd, 2007., 158.
[22] Code on Private International Law of Belgium 2004 Art. 21.
[23] On the application of public policy in France see M. Ročkomanović, „Ordre public u međunarodnom privatnom pravu Francuske", *Annals of the Faculty of Law in Belgrade,* 3-4, 1994., 322-338.
[24] N. Enonchong, 636, 637.
[25] Some argue the opposite, that there are also situations where French and German norms are forum-oriented and that no simple conclusion can be drawn focusing only on English law.
[26] N. Enonchong, 637.
[27] B. Blagojević, *Međunarodno privatno pravo,* Beograd, 1950., 148.

is subject to the decision,[28] which is called the topicality principle of public policy.[29] International doctrine also agrees with this interpretation of public policy content i.e. at the moment when the matter is under consideration,[30] which means that the fact that public policy content is time-dependant is not prejudiced.[31] Otherwise, if public policy was to include those norms which are no longer its integral part, despite the fact that they used to be, this could lead to the situation in which two contradictory public policies are applicable on the same territory,[32] and that is absolutely unacceptable.

3. Public policy in international conventions

In the case of international treaties, we will differentiate between those bilateral and multilateral. Bilateral agreements almost never stipulate public policy clause.[33] This is because prevailing opinion is that there is no room for invoking public policy, that is, refusing to apply the solutions found in the implementation of international convention, because such action would mean a unilateral amendment to the content of an international treaty, which would be contrary to its purpose.[34] Essentially, bilateral conventions standardise the choice-of-law technique of the two countries and they are created with the aim to address the law of one or the other contracting state. This precludes the possibility to declare the applicable law, so determined, as contrary to the public policy of the state i.e. one of the contracting states which choice of law rules are being premised upon.[35] In addition, if we take into account the fact that after the ratification, the norms of an international treaty become an integral part of the domestic law of the contracting state, the refusal of their application would actually mean that our own law is negated.[36]

The conventions drafted under the auspices of the Hague Conference on Private International Law are somewhat different. They mostly contain the provision which stipulates that the application of the applicable substantive law may be refused if it is manifestly contrary to the public policy. Such norm is contained in the Hague Convention on the

[28] B. Bordaš, T. Varadi, G. Knežević, V. Pavić, 160.
[29] M. Živković, M. Stanivuković, 312.
[30] J. Maury, *L'eviction de la loi normalement compétente: l'ordre public et la fraude à la* loi, Valladolid 1952., 122; C. Gavalda, *Les conflits dans le temps en droit international privé*, Paris 1955., 224; M. De Angulo Rodriguez, „Du moment auqueil il faut se placer pour apprécier l'ordre public international", *Revue critique*, 1972., 369.
[31] M. Ročkomanović, (1994), 328.
[32] Ch. Knapp, *La notion de l'ordre public dans les conflits de lois*, Neushatel 1933., 175.
[33] K. Sajko, 260.
[34] B. Blagojević, 156.
[35] K. Sajko, 260.
[36] Position of *Batiffol* in relation to M. Ročkomanović, (1988), 52.

Conflict of Laws Relating to the Form of Testamentary Provisions,[37] the Hague Convention on the Law Applicable to Road Traffic Accidents,[38] the Convention on the Law Applicable to Product Liability.[39]

Within the European Union, the Rome Convention on the Law Applicable to Contractual Obligations also stipulates the public policy clause.[40] Today, it is replaced with the Regulation of the European Parliament and of the Council on the Law Applicable to Contractual Obligations, which also stipulates that the application of a provision of the law of any country may be refused only if such application is manifestly incompatible with the public policy of the forum.[41] Public policy in the context of the Regulation certainly has to be interpreted in accordance with its content. Therefore, there is no room for extensive interpretation of public policy. In addition, since the subject of protection is the public policy of the forum state, this means that the application of the applicable law results will be upon the state which is to apply this applicable law, irrespective of the fact that the subjects of civil-legal relationships may be connected to more states.[42]

In the field of the European Union we can speak about a so-called European public policy which protects fundamental rights of the Union.[43] Thus, the European Convention for the Protection of Human Rights and Fundamental Freedoms stipulates that human rights in the convention field of application represent public policy of contracting states and applicable foreign law will not be applied if it is contrary to the provisions of the Convention.[44] The Treaty on European Union stipulates that fundamental rights, as guaranteed by this Convention, and as they result from the constitutional traditions common to the Member States, will constitute general principles of the Union's Law. The impact of this Convention was also important in the field of harmonisation of the laws of contracting states with the provisions it contains and thus, the provision of the Belgian Civil Code, according to which maternal affiliation of a child born out-of-wedlock and mother seemed to be dependent on the recognition of maternity is to be considered contrary to the European Convention and may no longer be applied.[45]

[37] Hague Convention on the Conflict of Laws Relating to the Form of Testamentary Provisions, Art. 7.
[38] Hague convention on the Law Applicable to Road Traffic Accidents, Art. 10.
[39] Convention on the Law Applicable to Products Liability, Art. 10.
[40] Rome Convention on the Law Applicable to Contractual Obligations, Art. 16.
[41] See Art. 21 of this Regulation.
[42] V. Čolović, 42.
[43] K. Sajko, 268.
[44] *Ibid.,* 267.
[45] *Ibid.*

4. An alternative to foreign law

After we have concluded that in accordance with the choice of law rule of the forum the foreign law is applicable and when we have seen that the result of its application would potentially pose a threat to the national legal system, we should see what are the effects of the institute of public policy and how to deviate from the standard application of the choice of law rule.

The general effect of the public policy institute may be seen as the refusal to apply foreign law to which a national choice of law rule refers and as the application of another law to a particular case.[46] Failure to apply foreign law is qualified as negative effect, whereas the application of another law instead of the foreign law which is contrary to the public policy would be considered a positive effect.[47]

The central characteristic and basis of the existence of this institute is its negative effect i.e. power not to apply foreign law if the result of such application would be completely unacceptable for the national state. Negative effect contains very explicit power to shift the choice of law rule i.e. to deviate from its standard application. Sometimes this negative effect will be the only effect, that is, the circumstances of the case may be such that it is just sufficient to eliminate the application of the foreign law, without the need to find a new solution.[48] This is when we do not give any effect to the situations which occurred by the application of the foreign law, when we do not recognize such situations, or when we do not allow the situation to be established in the national state.[49] This would be the case in which we did not recognize and apply foreign discriminatory regulations which deprive the citizens of the national state of their property or, in another case, when we refuse to solemnise marriage in the situation when a person originates from the country which allows polygamy and already has one marriage solemnized.[50] In such situations, general effects of public policy doctrine are shown in their negative dimension because the national judge eliminates the application of foreign law only by not recognising legal situation based abroad, that is, by refusing to establish legal situation in the national state. Yet, positive dimension is missing, because this is not required by the circumstances of the case.

However, after deviating from the standard application of the choice of law rule i.e. the negative effect of public policy institute, the need will often arise to exercise its positive effects, that is, to find an

[46] M. Živković, M. Stanivuković, 316.
[47] C. David, „La loi étrangère devant le juge du fond“, *Bibliothèque de droit international privé*, vol. 3, Paris 1965, 84, 85.
[48] M. Živković, M. Stanivuković, 317.
[49] K. Sajko, 265.
[50] *Ibid*. 265, 266.

alternative law according to which a particular matter will be resolved. Foreign law, which is contrary to the national public policy, must be substituted and thus, the main dilemma is which law will be given the role of a substitute. Most common point of view is that foreign law is to be replaced by the national law,[51] despite the fact that provisions expressly prescribing this are rarely seen in legislations. Such exception can be seen in the Austrian law, where the legislator prescribes the following:

> „In place of foreign law, if necessary, the corresponding provision of Austrian law shall apply. "[52]

Similar provision is contained in the Hungarian Law Decree on International Private Law, which explicitly regulates the application of Hungarian law in place of foreign law:

> „In place of foreign law, which shall not be applied, Hungarian law shall apply. "[53]

These are most common actions in practice, regardless of whether there is an express legal wording or not. If in Montenegro an issue is raised as to the determination of the applicable law for the solemnization of marriage, and if according to domestic choice of law rule the judge establishes the applicability of the law which prescribes the prohibition of marriage solemnization due to religious differences, in such case not only will we refuse to apply such foreign law expressing the negative effects of public policy institute but we will apply its positive dimension by applying *lex fori* to the solemnization of marriage and thus protecting public policy from the result which would threaten the fundamental principles it is based on.

Despite the fact that the most accepted concept is the one according to which general positive effects of public policy institute are achieved by the application of national in place of foreign law, there are also other solutions. Thus, stipulated are the application of the corresponding provisions of applicable foreign law, provided that they are not contrary to the public policy of the national state; the combination between the norms of national and foreign law; or even the application of another law pointed out by other connecting points which are possibly contained in the choice of law rule.[54] Such solutions are prescribed by Portuguese

[51] A. Bucher, „L'ordre public et le but social des lois en droit international privé", *Recueil des Cours,* Academie de driot international da la Haye*,* II, 1993., 30-34.
[52] Art. 6 of Austrian Law.
[53] Hungarian Law Decree on International Private Law, § 7 par.3.
[54] M. Živković, M. Stanivuković, 317.

Civil Code[55] which stipulates the application of those norms which are most adjusted to the applicable foreign legislation or subsidiary norms of Portuguese national law, or Italian Private International Law Act which, in the event when it is not possible to apply foreign law due to its incompatibility with public policy, prescribes the application of the law pointed out by other connecting criteria which may be stipulated for the same normative hypothesis. If these additional connecting points do not exist, Italian law will apply.[56]

If the application of national law in place of applicable foreign law is made unambiguous, the dilemma remains whether we will fully replace foreign law or opt for its replacement only in the part of the norms which are contrary to public policy. To that extent, there are opinions which favour the differential application of foreign law which excludes only those provisions that are contrary to the public policy and that apply national provisions instead, and to all other matters they apply otherwise applicable foreign law.[57] However, this solution would be much more complicated for the court which would have to apply more laws to the same relationship and this would be more complex and time-consuming than the solution according to which applicable foreign law would be fully replaced by the national law.

5. Conclusion

Legislation and international conventions, as well as practice, share the same position that public policy must be protected. To that extent, public policy clause, that is, the institute of public policy, serves as an exceptionally suitable correction which provides the possibility not to apply the applicable law, despite the fact that the very choice of law rule makes it applicable, because its effect is contrary to the fundamental values of the national law.[58]

When national judge concludes that foreign law, that is, the result of its application is incompatible with the public policy of the forum, public policy clause has powers to refuse its application. In addition, it is important to note that such negative function of public policy is not aimed against the content of foreign law so determined, but against its application in that particular case.[59]

In the context of determining the applicable law, states widely

[55] See Art. 22 par. 2 of Portuguese Civil Code 1966
[56] Private International Law Act of Italy, Art. 16.
[57] M. Ročkomanović, (1994), 326, 327.
[58] N. Enonchong, 635.
[59] K. Sajko, 264.

accept reference to the choice of law instead of substantial reference according to which, when we apply foreign law referred to by the national choice of law rule, we also apply the choice of law rules of such foreign law. Thus, public policy represents the protection of national law not only from the foreign substantial law but from the foreign conflict of laws if such law is unacceptable for the forum state and thus, in case of application of the institute of *renvoi*, this law will not be applied.[60]

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DA LI JE PRIMJENA STRANOG PRAVA IMPERATIV? - USTANOVA JAVNOG PORETKA U NACIONALNIM ZAKONIMA I MEĐUNARODNIM KONVENCIJAMA-

Rezime

Kolizione norme su imperativne prirode i njihova primjena ne zavisi od volje stranaka. U tom smislu, primijenićemo domaću kolizionu normu pa i strano pravo na koje ona ukazuje, čak i ako bi stranke željele da se njihovo pitanje razriješi po domaćem pravu. Međutim, postoje i situacije kada ćemo, uprkos pravu na koje ukazuje koliziona norma foruma, odbiti da primijenimo strano mjerodavno pravo, zato što rezultati takve primjene ne bi odgovarali nazorima domaćeg pravnog poretka. U tu svrhu se služimo institutom javnog poretka, čija zaštitna funkcija omogućava da korektivno djelujemo na primjenu kolizione norme i da ne primijenimo strano pravo, bez obzira što je ono, shodno volji zakonodavca, najbliže povezano sa konkretnim slučajem. Dakle, ukoliko su rezultati primjene stranog prava nespojivi sa osnovnim vrijednostima domaćeg pravnog sistema, moramo odstupiti od redovne primjene kolizione norme i naći alternativno rješenje za konkretno pitanje.

Ključne riječi: primjena stranog prava, javni poredak, odstupanje od redovne primjene kolizionih normi.

[60] K. Sajko, 261.

Jelena Vukadinović, LL.M[1] **Original scientific paper**

UDK: 341.24(4-672EU)

STABILIZATION AND ASSOCIATION AGREEMENT AS A SPECIAL INSTRUMENT OF EU FOREIGN POLICY

Abstract

This paper, from the legal point of view, represents the opinion that Stabilization and Association Agreements are "relatively new" instruments in the sense of their creation and duration, but they are by their nature and their content just a modified version of association agreements which had been concluded by the European Community since 1960, especially in regard to so called "Europa agreements", concluded from 1990 to 1996. From the political point of view, the paper represents the opinion that the foreign policy of the EU after the Treaty of Lisbon is based on the principles and instruments thorough which the EEC and EC had established external relations in earlier period. What distinguishes SAA contracts from traditional international agreements is their relation to community law and legal status in EU law, as well as in the law of associated state.

In this sense, paper is divided into three parts. The first part describes the political framework which preceded and which launched the Stabilization and Association process. The second part describes the process of stabilization and association through analyses of process of association as framework for stabilization and association agreement. The third part of this paper provides a legal status of the SAA in legal order of the country of association.

***Keywords**: Stabilization and Association agreement, EU law, association country, association agreement, European Union.*

1. Political framework of the Stabilization and Association processs

Stabilization and Association agreements represent a new category of legal and political instruments through which the European Union conducts a policy of external relations towards the countries of the Western Balkans. From a legal point of view, in this paper is represented

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the opinion that Stabilization and Association Agreements are "relatively new" instruments in the sense of their creation and their duration, but they are by their nature and their content just a modified version of association agreements which had been concluded by the European Community since 1960, especially in comparison with the so called European Agreements. Their modification is a result of the intention of the European Union to encourage (newly) associating countries not only to accept the *acquis communautaire*, and in that way meets the requirements for filling accession applications, but also, before that, to make changes in their political, legal and social systems, which are necessary for the essential acceptance and implementation of the acquis. From the political point of view, this paper represents the opinion that the foreign policy of the EU after the Treaty of Lisbon is based on the principles characterized by graduality, differentiation and flexibility.

1.1. Background of EU external relations

External Relations which the EEC until the entry into force of the Treaty of Maastricht[2], in 1993, had established with third countries and international organizations, mainly have been in the function of internal achievements, and partially in the function of external economic objectives. According to these reasons, until the entry into force of the Treaty of Maastricht, external relations of the EEC, which involved external economic and external political relations[3], have been reduced mainly to the establishment of economic relations. In the beginning, the main content of these relations were limited on commercial relations established within the common commercial policy of the EEC. Later on, the EEC enriched this with the policy of cooperation and assistance towards third countries[4] , which are instrumentalised through agreements on cooperation and association signed by the EEC and third countries. Only the European Union, established by the Treaty of Maastricht, got the task to determine the content and tools for managing the common foreign policy in order "to assert its identity on the international scene".

In accordance to the Liosbon Treaty, the EU has ceased as legal entity and After the entry into force of the Treaty of Lisbon and the European Community ceased as legal entity, the mentioned powers have been transferred to the European Union and regulated by the fifth part of

[2] Treaty on European Union, signed at Maastricht on 7 Febraury 1992, *Official Journal of the European Communities, C 191, of 29 July 1992*, 1.

[3] See. B. Weidel, "Regulation or Common Position? The Impact of the Pillar Construction on the European Union's External Policy", in: S. Griller and B. Weidel (eds*), External Economic Relations and Foreign Policy in the European Union*, Springer 2002, 17.

[4] N. Moussis, *Access to European Union Law, Economics, Policies*, European Study Service 1999, 532

the TFEU called "External actions of the Union"(Articles 205 to 222).

As the most powerful instrument of policy of cooperation of the EU for dealing with the candidate and potential candidate in theory states conditionality.[5] Conditional policy for countries of Western Balkans was introduced by the European Commission in 1996. On 29 April 1997, following the Commission's report, the EU General Affairs Council adopted a Regional Approach introducing political and economic conditionality for the development of relations with countries in the region. That approach was further developed in June 1999, following the Commission's proposal of 26 May for the creation of Stabilization an Association Process (SAP) for the countries of South-Eastern Europe. The main conditions to be complied with by those countries were specified as compliance with democratic principles, human rights and rule of law, respect for and protection of minorities, market economy reforms, regional cooperation and compliance with obligations under international peace agreements.

Although the EC wished to develop a coherent foreign economic policy, it recognized that special circumstances for particular regions or countries needs for different speeds and timetables, or differentiation in progress and the conditionality to be applied. It is why differentiation is "accompanied by the logic of gradualism tied to partners' own willingness to precede with reform."[6]

Differentiation of external economic and political relations established by the European Community and accepted by the European Union is reflected in the use of different types of autonomous and conventional measures which have been undertaken toward some nonmember states or in relation with international organizations. In particular, external relations differentiation is expressed through the "offer" of different types of agreements to third countries or groups of countries from free trade agreements and association agreements, or through the possibility of using different autonomous measures: from the incentives to sanctions. Using different instruments for different countries, the Community actually led diverse and differentiated policies towards them. Regarding geopolitical sub region labeled as the Western Balkans, which includes Croatia, Bosnia and Herzegovina, Serbia, Montenegro, the European Union leads a policy of stabilization and association.

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[5] O. Anastasakis & D. Bechev, EU Conditionality in South East Europe: Bringing Commitment to the Process, South East European Programme, St Antony's College, University of Oxford, April 2003, 3, 5. available on *http://www.emins.org/sr/aktivnosti/ konferencije/solun/pdf/ ostala/conditio.pdf*

[6] S. Kahraman, *The European Neighbourhood Policy: The European Union's new Engagement Towards Wider Europe*, Perceptions, Winter 2005, 18

1.2. History of enlargement

The European Community started paying special attention to the enlargement policy for the first time after the fall of the Berlin Wall and the collapse of the so called Eastern Bloc. For the countries that emerged after these changes, or have changed their integration background, the newly established European Union has developed a special process of joining, rich by variety of economic stimulation funds, which the associated country could use to meet the criteria for membership. They were institutionalized in the so-called "European agreements", which are by their nature constituting legal contractual relations accompanied by the creation of special bodies and not including the associated countries in the work of the existing main bodies of the international organization. The associated country was not institutionally included in the European Union, nor is it included in the work of its main bodies. When the Central and South East Europe countries finally became EU member (ili joined the EU), the European agreements were replaced by the Stabilization and Association Agreement. Stabilization agreements are designed as a legal-political platform for the accession of the Western Balkans countries

The Stabilization and Association Process represents a legal and political framework for gradual establishment of partnership between third countries and the European Union, which was initially based on a combination of trade concessions (Autonomous Trade Measures - ATM), economic and financial assistance and contractual relationships through Stabilization and Association Agreement (SAA). On that way, for the first time, countries of the Western Balkans were granted status of "potential candidate" for EU membership.[7]

2. The process of Stabilization and Association

The process of stabilization and association is characterized by two processes that are partially happening at the same time and partly following one another in the country which intends to conclude the SAA. The aim of both processes is, on one hand, to stabilize the social, legal, economic and political situation in the Western Balkans and after that, to enable the Western Balkans countries to conclude SAA and to prepare them for rights and obligations arising from the special and privileged relations with the EU. Measures and actions that the third country in the period before concluding SAA undertakes to stabilization is mainly based on its internal legal and political documents, whose contents, instruments and dynamic

[7] See S. Rodin, "Requirements of EU Membership and Legal Reform in Croatia", *Politička misao*, Vol. XXXVIII (2001) No 5, 88.

determines the degree of political willingness to establish proper relations with the EU. Although the process of internal transition in chronological terms precedes association, this process takes place after the conclusion of the SAA and prolongs in parallel with the process of association.

2.1. Process of association as framework for process of stabilization and association

The concept of association itself is not defined in EU founding treaties.[8] In international relations under the term association can be understood an association of a state to international organizations through a special form of relationship that is established by international agreements.[9] In legal sense process of association is based and framed in the relevant agreement that creates mutual rights and obligations of both contracting parties. Rights and obligations of the associated third state are partially consistent with right and obligations existing in other kinds of international cooperation and international cooperation forms that lead to the memberships. However, in comparison with them, these are wider than traditional forms of trade and narrower compared to the agreements on EU accession. Reasons for entering in this kind of closer international relations should be primarily sought in willingness of countries to establish enhanced links with some organizations[10] in order to participate in they work. In case of association to EU, it means rights associated country to participate in a Union system,[11] but not the general right to take decisions. According to founding treaty, association means special long term relationship between the EU and third countries, which are characterized by "mutual rights and obligations, joint actions and special procedures." [12]

Same elements characterized also stabilization and association agreements. In terms of durability, association agreements as well as SAA are generally concluded for an indefinite time and in comparison with trade agreements they are more permanent and have a long-established character of relations between the Union and third countries. On the other hand, the SAA creates special or privileged relationship between associated countries and the EU. This is reflected through "the nature of the links established and the fact that they often span across a range of the Community's

[8] P. Eeckhout, *External Relations of the European Union, Legal and Constitutional Foundations*, OUP 2005, 103.
[9] T. Miščević, *Pridruživanje Evropskoj uniji (Association to the European Union),* Beograd 2009, 24.
[10] *Ibid.*, 26.
[11] See Case 12/86 *Demirel v Stadt Schwabish Gmund* [1987] ECR I-3719.
[12] Art. 217. TFEU. (previously Art. 310 EC Treaty)

activities."[13] Although association agreements and SAAs do not provide either full or partial membership, their special nature is reflected in the fact that they are supposed to prepare the associated countries to meet the requirements for later accession to the Union, and to establish very close relations for institutional cooperation. In economic terms, these agreements can establish a free trade area, a customs union or to provide the associating country preferential system. In that sense it can be concluded that mutual rights and obligations does not have to involve equalent and equal rights and obligations of the contracting parts. Finally, the economic nature of the SAAs is not exhausted only by provisions on trade relations between the third countries and the EU but cover social, cultural and technical cooperation. It is why the notion of "common action" does not include only common activities but also involvement of the associating country in the achievement of goals and tasks of the Union.

2.2. SAA as a kind of Association Agreements

Regarding the level of established rights and obligations of the EU with third countries and international organizations, the practice shows the existence of different types of institutional relations which, according to the content of the agreement and purpose, can be grouped into different categories.[14]

Stabilization and Association Agreements serve as a "waiting room" or preparatory phase before accession to the EU. The associated countries can count on the full membership after a transitional period when they have sufficiently harmonized their economic, political and legal system with *acquis communautaire*. SAA fall also under this category of association agreement because is giving the associating country the status of a potential candidate for accession in the EU, which after the implementation of the agreement and meeting other requirements may apply for membership in the EU. By signing the SAA the state is getting the status of a potential candidate for EU membership,[15] but it does not guarantee admission of that country in the European Union. The EU just opens this possibility.[16]

[13] I. Macleod, I. D. Hendry and S. Hyett, *The External Relations of the European Communities*, Oxford 1996, 368.
[14] *Ibid.,* 372
[15] See preamble of the SAA signed with Serbia, para. 3.
[16] See more: N. Misita, *Osnovi prava Evropske unije (Foundations of EU Law*), Sarajevo 2007, 447- 455

3. Legal status of SAA

3.1. Legal status of the SAA in internal legal order of the Republic of Serbia

From the international law point of view, the agreements on stabilization and association fall within the category of international agreements due to contracting parties, manner of conclusion and entry into force. However, they are different from traditional international agreements in the way in which they create legal effect on the contracting parties, or, by their status, which is recognized in the EU law and in domestic law of the associated country. The legal nature of the SAA has never been discussed by the ECJ, but only on the association agreements.

Concerning the status of the SAA in EU law, neither the Court of Justice nor legal theory declared precisely on the SAA as some sort of a special kind of agreement, but they did so only within the framework of SA analysis. According to case law of ECJ, SA exemplifies a sort of a mixed agreement and forms an integral part of the Community law.[17] In a third country, approved SAA forms part of internal law and binds the associated country, as the other contracting party, but the legal status depends upon domestic constitutional solutions. In general sense, in associated country the SAA has legal status of international contract (convention or agreement) whose relation toward other sources of internal law is determined by the Constitutional law. According to Art. 16(2) of Serbian's Constitution "Generally accepted rules of international law and ratified international treaties shall be an integral part of the legal system in the Republic of Serbia and applied directly." In domestic legal theory there are some doubts concerning the meaning "applied directly." [18] Is that phrase used in meaning which has in EU law in sense that differs from direct effect, or it means both.[19]

However, this interpretation may encounter obstacles in the application before the Serbian courts in cases of alleged existence of unconstitutionality of specific provisions of the Agreement, or SAA as a whole. Solutions which have been adopted in Serbian constitution in this regard are very strict and less encouraged. So, Art. 16(3) provides that "Ratified international treaties must

[17] See Case 181/73 Haegemann [1974] ECR 449, para.5; Case C - 162/96 Racke GmbH & Co v Hauptzollamt Mainz [1998] ECR I-3655, para. 46. But, R. Leal-Arcas, cites that the ECJ has never explained why an international agreement forms an integral part of EC law because that agreement has been concluded by the EC. R. Leal-Arcas, The European Court of Justice and the EC External Trade Relations: A Legal Analysis of the Court's Problems with Regard to International Agreements, Nordic Journal of International Law 72: 215–251, 2003, 237.

[18] R. Vukadinović, *Uvod u institucije i pravo Evropske unije*, Kragujevac 2014, 477 .

[19] See more about direct effect: R. Vukadinovic, 141.

be in accordance with the Constitution," while Art. 167(1), (1 and 2) of the Constitution authorizes the Constitutional court to decide on compliance of laws and other general acts with the Constitution, generally accepted rules of the international law and ratified international treaties, and "compliance of ratified international treaties with the Constitution." The mentioned provisions of the Constitution on "constitutionality" of SAA, read in conjunction with provision of Art. 4(1) of the Constitution by which unique legal system is guaranteed, can seriously jeopardize direct application and direct effect of SAA in internal legal system of Serbia. Problems in application can be caused by the articles of SAA which concern direct application of the EU law. For example, article 73(3) SAA provides "Any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the competition rules applicable in the Community, in particular from Articles 81, 82, 86 and 87 of the EC Treaty and interpretative instruments adopted by the Community institutions."[20] Taking that into consideration this and similar articles of SAA, the associated states took direct responsibility to apply not only to European Community rules on market competition, but also to the "interpretative instruments adopted by the Community institutions", the constitutionally proclaimed principle of unity of the legal system of Serbia is brought into question. In order to solve this and similar questions practice of the courts of other associated states can be used, since they faced with similar problems.[21]

The question about legal character of decisions passed by the Stabilization and Association Council is very interesting as well. According to Article 121. SAA with Serbia "The Stabilization and Association Council shall, for the purpose of attaining the objectives of this Agreement, have the power to make decisions within the scope of this Agreement in the cases provided for therein. The decisions taken shall be binding on the Parties, which shall take the measures necessary to implement taken decisions. The Stabilization and Association Council may also make appropriate recommendations. It shall draw up its decisions and recommendations by agreement between the Parties." Courts in Serbia have not declared on this matter, while as far as EU law is concerned the decisions of the Council for Stabilization and Association have been granted with the immediate effect. The ECJ held in Greece v. Commission[22] that decisions issued by the Association Council form an integral part of EC law from the moment of their entry into force. They do not necessarily require implementing measures and can make direct effect. So, in Sevince case, the Court accepted that the provisions of the Association Council decisions No. 2/76 of 1976 and No. 1/80 of 1980

[20] After Treaty of Lisbon, these articles are 101, 102, 105 and 107 TFEU

[21] For example, the Polish Constitutional Court justified the readiness (or obligation) of domestic courts to interpret national law in accordance with European community law, by the need to respect the assumed obligations from the SAA

[22] Case 30/88 Greece v. Commission, [1989]ECR 3711, para. 12.

concerning the conditions of employment were directly effective in Community countries [23]. In legal theory different viewpoints have been taken in respect to this issue. Therefore, one side[24] holds that association treaties create no supranational legal order and remain in the realm of traditional international law. According to this position acts of institutions established under Association treaties, i.e. decisions of an Association Council, do not have, as such, validity in Community law or in legal orders of Member States, but require an act of transformation by secondary Community legislation for the association agreements not to create any supranational legal order and remain in the domain of classic international law. This opinion is followed by a claim that the European Union is a creation of the international law, and in adherence to that, its country members remain "Herren von Vertraege". Due to those reasons, institutions based on the association agreement, alongside decision of the Council for Stabilization and Association as such have no legal effect in the legal order of the EU, or in the legal order of country members, but they need to be incorporated via secondary legislation.[25]

3.2. Legal status of the SAA in EU law

One could speak of the legal status of the SAA in EU law indirectly, by assuming that the SAA is a special sort of SA and that it shares its characteristics. In judicial practice of the EU, the SAs are qualified as a kind of mixed agreements that form an integral part of community law[26] and are binding to the EU and Member States.[27] In Demirel case[28] ECJ held: that "an agreement concluded by the Council under Articles 228 and 238 of

[23] Case C-192/89, S. Z. Sevince v. Staatssecretaris van Justitie, [1990] ECR I-3461; Case C-237/91, Kazim Kus v Landeshauptstadt Wiesbaden, [1992] ECR -6781; Case C-355/93, Hayryes Eroglu v Land Baden/ Wuertemberg, [1994] ECR 5113, C-98/96 Kasim Ertanir v Land Hessen, [1997] ECR I- 5179, Case C-262/96 Sema Sürül v Bundesanstalt für Arbeit [1999] ECR I-2685.

[24] A. Bleckmann, *Europarecht*, Carl Heymanns Verlag, Köln 1997, 502

[25] A. Bleckmann, 503

[26] See case 181/73, Haegeman [1974] ECR 449, paras. 3 and 4; case 12/86, Demirel [1987] ECR 3719, para. 7.

[27] See case 104/87, Hauptzollmt Mainz v Kupferberg & Cie Kg [1982] ECR 3641, paras. 2 and 4.

[28] The Demirel ruling concemed a Turkish woman whose husband had been working in Germany since 1979. She wanted to join her husband in 1984 for the purpose of family unification, but was only granted a visitor's visa. This was justified on grounds that in the Lander of Baden- Württemberg where Mr. Demirel had been employed, the amount of time that a foreign worker was required to have spent before joining his/ her family had been raised in 1982 from three to eight years. As a result of this new legislation, Mrs. Demirel was issued with an expulsion order in 1985 on the expiration of her visa. However she challenged the order by appealing to an Administrative Court in Stutgart on grounds, that the new restrictive legislation contravened the terms of the Association Agreement between Turkey and the EC. For its part, the Administrative Court referred the case to the ECJ for a preliminary ruling. The Court first established, in the light of judicial precedents, that it had the necessary authorization to interpret the provisions in question, since the Association Agreement was part of Community law. Should the Court role that the relevant provisions of the Association Agreement were directly effective, they would lake precedence over inconsistent national laws of Member States. They could then be invoked by Turkish migrant workers. However the Court denied the direct effect of the free movement provisions in the Turkey-EC Association Agreement. In the Court's view, Article 12 of the Ankara Agreement and Article 36 of the Additional Protocol were in the nature of a 'plan of action' and were not sufficiently precise and unconditional! to be directly effective

the Treaty is, as far as the Community is concerned, an act of one of the institutions of the Community within the meaning of Article 177 (1)(b), and, as from its entry into force, the provisions of such an agreement form an integral part of the Community's legal system..." [29] The binding character of the SA, ECJ explained as follows: "...Since the agreement in question is an association agreement creating special, privileged links with a non-member country which in case at least to a certain extent, take part in the Community's system, Article 238 must necessarily empower the Community to guarantee commitments towards non-member countries in all the fields covered by the Treaty..."[30] In legal theory, based on the jurisprudence of the ECJ an opinion became crystallized, according to which regardless of the fact that in the interpretation of the association agreement and primary sources of EC/EU law there are some differences,[31] it is without doubt that SAA are binding on the Community and the Member States and form an integral part of EU law. In the hierarchy of sources, "they rank below primary sources and general principles of Union law but above secondary sources."[32]

3.2.1. Direct effect

The Court of justice declared on the impact of classic agreements on association in several cases. Even though in the first case launched based on the association agreement, the Court refused the request for direct implementation of certain provisions as provided by the Association Agreement between the EU and Turkey. In the same judgment the Court took a stand according to which: "provision in an agreement concluded by the Community with non-member countries must be regarded as being directly applicable when, regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.."[33] Therefore, in Kupferberg case[34] the Court of Justice held that Art 21 of the EEC Portugal Association Agreement was directly enforceable in the national courts, and "neither the nature nor the structure of the Agreement between the EEC and Portuguese Republic may prevent a trader from relying on one of its provisions before a court in the Community..."[35] as well as, "the mere

[29] Para. 7 referring to the decision in case 181/73, Haegeman, ECR (1974) 449.
[30] Para. 9. of Demirel judgment.
[31] See para. 20 of judgment in case 270/80 Polydor Records and RSO Records Inc v Harlequin Records Shops Ltd and Simons Records Ltd [1982] ECR 329.
[32] A. Kaczorowska, *European Union Law*, Taylor & Francis, 2008, 205, 226.
[33] Demirel, para. 14.
[34] Case 104/87, Kupferberg [1982] ECR 3641
[35] *Ibid.,* para. 3.

fact that an agreement concluded by Community has established special institutional framework for consultations and negotiations between the contracting parties in relation to the implementation of the Agreement is not in itself sufficient to exclude all judicial application." [36]

The principle of the direct enforcement of such agreements has enabled the nationals of the states which are parties to such agreements to enforce the provisions against Member States of the Community.[37]

Even the provisions which cannot be directly applied can be subjected to Court consideration, if the country member undertakes an action contrary to those provisions. In such cases, the illegal action of the member state represents a foundation for launching procedure and it falls within the competence of the Court to determine breach of obligations that stem from the international contract. Thus the provisions which are not directly implemented are practically recognized their direct effect. In regard to SAA, such agreements the Court can interpret *ex ante*, in a proceeding upon their signing, or *ex post* upon its entrance into effect, based on the decision making process in previous matters. In such a case, the court of any country, faced with the interpretation issue of accession can launch procedure before the European Court, whose decision is binding"[38]

3.2.2. Interpretation of the SA

The practice of the EU Court on interpretation of association agreements as special category of mixed agreements is comprehensive and abundant. It follows the basic guidelines from the Demirel case. The EU Court first examines whether a certain provisions from the SA has direct effect, which is determined by interpreting the respective provisions. Thereby, the Court takes the assumption that the provisions of the SA have direct effect, from which it can depart, if proven that some provisions from the SA due to its nature cannot provide such effect. The cases which can serve as examples here are Kondova[39]and Gloszczuk[40] cases. In Kondova case, the EU Court examined the direct applicability of provisions on prohibition of discrimination from the SA with Bulgaria. The Court concluded that these provisions are directly applicable, but that, nevertheless, are not violated in the concrete case, thus leaving the

[36] *Ibid.,* para. 5.

[37] In Onem v Kziber case C-18/90 [1991] ECR I-199, the Court of Justice held that parts of the EEC–Morocco Cooperation Agreement are directly enforceable. See also, case C-58/93, Yousfi v Belgium [1994] ECR I-625, also, in C-13/00 Commission of the European Communities v. Ireland, [2002] ECR I-2943.

[38] See S. Rodin, *Sporazum o stabilizaciji i pridruživanju u pravnom poretku Europske zajednice i Republike Hrvatske*, Zbornik Pravnog fakulteta u Zagrebu, No. 3 and 4/2003, 593.

[39] The Queen and Secretary of State for the Home Department v Kondova [2001] ECR I-6557.

[40] The Queen and Secretary of State for the Home Department v W. Gloszczuk et E. Gloszczuk [2001] I- 6369.

prosecutor without the legal protection as provided by the SA. In the Gloszczuk case the EU Court also concluded that the provisions on the freedom of establishment as provisioned the SAA with Poland is directly applicable. As in Kondova case, the EU Court concluded that these provisions have not been breached in relation to the prosecutor. Certain authors interpret this as a political stand of the Court by which the court refuses to take over the role of an active player in the enlargement process of the EU, because effectively it denies the protection SAs provide.[41]

In that sense it is necessary to understand the contracting sides are obliged to provide physical and legal entities from the other contracting party with free access to court and administration bodies with the aim of protecting their personal and property rights. However, these guarantees do not include the right of Serbian courts to address the EU Court for interpretation purposes of the SAA in decision making process on previously mentioned matter.

4. Conclusion

The Stabilization and Association Agreement is the first step in the long path toward attaining the fully fledged membership in the European Union. With this Agreement, along with the Interim Trade Agreement, a new legal and institutional framework is being established in relations between the EU and the Republic of Serbia. The Agreement regulates relations between the Republic of Serbia and the other party, the contractor in the European Union. Even if the EU Council has postponed entrance into force of these agreements and process of opening chapters of SAA for negotiation doing slowly, faith in european future still exist.

[41] J. McMahon, A. Pedain, "With or Without Me: the ECJ Adopts a Pose of Studied Neutrality Towards EU Enlargement", *International and Comparative Law Quarterly*, tom 51, 2002, 981-989.

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SPORAZUM O STABILIZACIJI I PRIDRUŽIVANJU KAO POSEBAN INSTRUMENT SPOLJNE POLITIKE EU

Rezime

Sporazumi o stabilizaciji i pridruživanju u pravnom smislu predstavljaju "relativno nove" instrumente vodjenja spoljne politike EU. U pogledu nastanka i trajanja, kao i po pravnoj prirodi i sadržini sporazumi o stabilizaciji i pridruživanju predstavljaju samo modifikovanu verziju sporazuma koje je Evropska zajednica zaključivala sa pridruženim državama počev od 1960. godine, a posebno u odnosu na tzv. "Evropske sporazume", koje je EZ zaključivala između 1990. i 1996. godine sa državama centralne Evrope. U političkom smislu, u radu je zauzet stav da EU nakon stupanja na snagu Sporazuma iz Lisabona vodi spoljnu politiku na principima i instrumentima koje je u ranijem vremenu koristila EEZ i EZ. Međutim, ono što razlikuje sporazume o stabilizaciji i pridruživanju od tradicionalnih međunarodnih sporazuma jeste njihovo hijerarhijsko mesto u pravnom poretku pridružene države.

U tom smislu, rad je podeljen u tri dela. U prvom delu se daje prikaz političkog okvira koji prethodi procesu stabilizacije i pridruživanja. Drugi deo opisuje proces stabilizacije i pridruživanja kroz analizu procesa pridruživanja kao pravnog okvira za uspostavljanje procesa stabilizacije i pridruživanja. Treći deo rada je posvećen mestu SSP-a u pravnom poretku pridružene države.

Ključne reči: sporazum o stabilizaciji i pridruživanju, pravo EU, sporazum o pridruživanju, pridružena država, Evropska unija.

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Original scientific paper

UDK: 347.214.2(497.115)

THE CONSOLIDATION OF CADASTRE RECORDS IN KOSOVO* AND PROPERTY RIGHTS OF INTERNALLY DISPLACED PERSONS[2]

Abstract

The implementation of the Cadastral Records Agreement, signed on 2 September 2011 by Serbia and Kosovo, requires a legal framework that would regulate the process of comparison of cadastral records. The step in this direction was the adoption by the Government of Kosovo of a Draft Law on Kosovo Property Comparison and Verification Agency, the last version of which is pending before the Assembly of Kosovo. By analysing this draft law, the author investigated in which way the process of consolidation of the cadastral records as laid down in its provisions might affect the enjoyment of the right to property. The paper looked in particular at the extent to which the rules on resolving the mismatch between the cadastre records and on adjudication of conflicting property claims are reflecting the special needs of internally displaced persons (IDPs) when it comes to the protection of their property rights. The results of the analysis show that its provisions could lead to the violations of Article 6 para. 1 and Article 1 of the Protocol 1 of the European Convention on Human Rights, in particular in cases involving the property rights of IDPs. The analysis also indicates that many of the identified shortcomings of the Draft Law might spring from the fact that the rules on comparison of cadastral plans and adjudication of conflicting claims have been modelled after those regulating the work of the Kosovo Property Agency.

Key words: *Cadastral Records Agreement, Draft Law on Kosovo Property Comparison and Verification Agency, right to property, internally displaced persons*

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* This designation is without prejudice to positions on status and it is in line with the UN Security Council Resolution 1244/99 and the International Court of Justice Advisory Opinion on the declaration of independence of Kosovo.

[2] The paper is based on the insights about the obstacles the internally displaced persons from Kosovo face in the enjoyment of their property rights in the place of displacement, which have been gained by the author during the research conducted within the Project "Support to the Implementation of the Strategies for IDPs, Refugees and Returnees – Legal Aid" (EuropeAid/131328/C/SER/RS).

1. Introduction

After the 2008 unilateral declaration of independence a complete stalemate in communication took over the relationship between the Serbian Government and the authorities in Kosovo. The turning point occurred two years later when, following the International Court of Justice Advisory Opinion on Kosovo's declaration of independence, the Government of Serbia together with 27 EU member states tabled a resolution before the UN General Assembly, which called for an EU-facilitated dialogue between Belgrade and Pristina.[3]

Following this, the so-called "technical dialog" started in 2011 as a series of meetings aimed at resolving technical matters of mutual interest.[4] One of the important issues settled through the "technical dialog" was the question of cadastral records dislocated to Serbia proper during the conflict and their merging with the newly created cadastre in Kosovo. The Cadastral Records Agreement was concluded on 2 September 2011[5] with the aim "to protect the rights of people with the legitimate claims to property"[6] through the creation of reliable property records in Kosovo. To achieve this goal the parties agreed that the copies of cadastral books kept in Serbia proper would be handed over to Kosovo authorities and compared with the "reconstructed Kosovo cadastre".[7] Another important element of the Agreement was the provision stipulating that all discrepancies between the old and post-1999 cadastral records are to be resolved by a two-tier adjudication mechanism.

The implementation of the Cadastral Records Agreement implied, as a first step, the digitalization of around 12.000.000 pages of analogue cadastral records managed by the Republic Geodetic Authority of Serbia[8]

[3] UN Resolution A/RES/64/298 of 9 Sep 2010. A detailed analysis of the re-opening of the negotiations between Serbia and Kosovo after the pronouncement of the ICJ Advisory Opinion on Kosovo declaration of independence can be found in T. Papic, "The Political Aftermath of the ICJ's Kosovo Opinion", in: M. Milanovic, M. Wood (eds.), *The Law and Politics of the Kosovo Advisory Opinion*, Oxford University Press, 2015, 240 – 268.

[4] Texts of the agreements are available at: *http://www.helsinki.org.rs/doc/all%20agreed%20conclusions%20%282011-2012%29.pdf* , October 24, 2015).

[5] European Union Press Statement, "EU facilitated dialogue: Agreement on Customs Stamps and Cadastre" (2 September 2011), accessible at: *http://europa.eu/rapid/press-release_PRES-11-294_en.htm*, October 24, 2015.

[6] Point 1 of the Cadastral Records Agreement of 2 September 2011.

[7] Point 4 of the Cadastral Records Agreement of 2 September 2011.

[8] Government of Kosovo, "State of Play in Implementation of the Brussels Agreement" (Report submitted to the European Union/European External Action Service by the Government of Kosovo), (16 January 2014), 29, at:
http://www.kryeministriks.net/repository/docs/Kosovo_Report_on_implementation_state_of_play_of_the_Brussels_Agreements_160114-signed.pdf, March 11, 2015. See also Minutes of the Human Rights International Contact Group Meeting on Property Issues held on 12 February 2015 in Pristina (statement of Xhevat Azemi, representative of USAID).

and their transfer to Kosovo.[9]

Another segment of the implementation strategy is the creation of legal and institutional setup for the process of comparison of cadastral records and adjudication of any conflicting claims that could arise in this way. To this end already in 2011 the Government of Kosovo adopted the first draft of the Law on Kosovo Property Comparison and Verification Agency.[10]

It is this aspect of the implementation of the Cadastral Records Agreement that the paper investigates. By analysing the substantive provisions of the Draft Law on Kosovo Property Comparison and Verification Agency (further "Draft Law"),[11] the author tries to examine the effects that the process of consolidation of the cadastre records might have on the enjoyment of property rights in Kosovo. The analysis is in particular focused at investigating to what extent the process of adjudication of conflicting property claims took into account the special needs of the internally displaced persons (IDPs) when it comes to the protection of their property rights in the place of displacement.

The structure of the paper evolves around those provisions of the Draft law that could have the most far-reaching consequences on the enjoyment of the property rights in Kosovo *vis-à-vis* the requirements laid down in Article 6 para. 1 and Article 1 of the Protocol 1 of the European Convention on Human Rights.

[9] At the beginning of 2014 the first batch of digitalized copies was handed over to the authorities in Pristina through the EU Special Representative in Kosovo (See: Minutes from the UN Security Council session held on 10 February 2014 (S/PV.7108), 4). According to BIRN, by February 2015 the Serbian side completed digitalization of cadastral records for one third of cadastre zones existing in Kosovo (See: BIRN Kosovo, "Big Deal Lost in Stagnation: Report No. 2, April 2015, 41). However, the further transfer of the digitalized copies of the cadastral records has been under question mark since 30 January 2014, when the Constitutional Court of Serbia ruled that the "Decree on Special Modalities of Processing of Data Contained in the Land Cadastral Records for the Autonomous Province of Kosovo and Metohija" is not in accordance with the Serbian Constitution and its laws (Conclusion of the Constitutional Court of Serbia No. IUo–247/2013 of 10 December 2014, *Official Gazette of the Republic of Serbia* No. 13/15 of 2 February 2015).

[10] The first version of the Draft Law was approved by a Government Decision no. 01/100 of 11 December 2012. See: Government of Kosovo, "State of Play in Implementation of the Brussels Agreement", 29. The first text of the Draft Law passed the first reading in the Assembly of Kosovo on 14 March 2013 but was withdrawn from the parliamentary procedure after the second reading that took place several months after. The second version of the Draft Law was completed at the end of 2013 and the first reading in the Kosovo Assembly took place on 26 February 2014 ((see Kosovo Assembly meetings calendar at *http://www.kuvendikosoves.org/?cid=2,159,5426,* April 5, 2015)). However, this version was also withdrawn and on 5th February 2015 the Government of Kosovo has adopted the third version of the Draft Law, which is still pending before the Assembly of Kosovo.

[11] The analysed version of the Draft Law was approved at 12th meeting of the Government of Kosovo by Decision no. 01/12 dt. of 5 February 2015. Its text is accessible at *http://www.kuvendikosoves.org/?cid=2,194,900*, October 24, 2015.

2. The process of adjudication of conflicting property related claims

On the basis of point 4 of the Cadastral Records Agreement, which envisions creation of an adjudication mechanism,[12] the Draft Law lays down rules for adjudication of disputes identified in the process of comparison of cadastral records. According to its section IV, the first instance of the adjudication mechanism, the Property Verification and Adjudication Commission (further "PVAC"), is in many respects modelled after the Kosovo Property Claims Commission.[13] The PVAC should examine the old and new cadastre records when the Executive Secretariat of the Agency determines there is a mismatch or a gap, decide which one of them is accurate and adjudicate property disputes that have arisen during the process of comparison.

An analysis of Article 14, para. 3 shows that the PVAC has three possible ways to resolve the cases of discrepancy between the old and new cadastral records:

a) to confirm the accuracy of data contained in the pre-1999 cadastral records;
b) to confirm the accuracy of data contained in the post-1999 cadastral records;
c) to "determine the legal entry that should be registered in the Cadastral records in Kosovo" if it found that none of the two cadastral records are accurate.

In other words, the PVAC is supposed to resolve all the discrepancies between the cadastral records or between the cadastral records and the claims of third parties that would be identified in the process of comparison.

This signifies that the PVAC would have to decide on the discrepancy even if the data contained in the cadastral records and/or in a third party claim(s) were not corroborated by the documents that could normally serve as legal ground for the registration of a property right in the immovable property registry. Theoretically, the PVAC would have a duty to decide who has the ownership right over disputed property, even if none of the parties to the proceedings possessed a valid title, such

[12] Point 4 of the Cadastral Records Agreement stipulated that when there is discrepancy between the old and new cadastral records, "[an] adjudication mechanism will make a final determination as to which cadastral record is correct".

[13] The Kosovo Property Claims Commission (KPCC) is a quasi-judicial decision-making body within the Kosovo Property Agency (KPA) established pursuant to UNMIK Regulations No. 2006/10 On the Resolution of Claims Relating to Private Immoveable Property, including Agricultural and Commercial Property of 4 March 2006 (as amended). Its mandate was to resolve conflict-related property claims with respect to private immoveable property involving circumstances directly related to or resulting from the armed conflict that occurred between 27 February 1998 and 20 June 1999.

as contract of sale, an inheritance decision or a court judgment – the documents on the basis of which, according to the applicable law, the cadastral authorities in Kosovo can register the right of ownership of a natural person.[14] This leads to the conclusion that the PVAC decisions would in some instances be constitutive in nature and that the PVAC is supposed to take on the tasks normally carried by the courts.[15]

Another problem arises from the fact that, according to Article 14, para. 1, the PVAC should reach these decisions by applying the Law on Administrative Procedures.[16] The question is how could the individual administrative act, as defined in Article 2 of the Law on Administrative Procedure, serve as legal ground for registration in the cadastral books/ immovable property registry of the right to property of a natural person? Needless to say, the adjudication of claims over immovable property of private parties goes beyond the scope of the administrative law, the role of which is to govern the interaction between the public agencies and the citizens on administrative matters.

As shown above, in cases of a mismatch between the cadastral records the PVAC decides on the property rights of parties to the proceedings whose rights are registered in one of the cadastres by either confirming their property title or revoking it. This conclusion flows from the fact that the registration in the immovable property rights register is *conditio sine qua non* of the right of ownership of immovable property in Kosovo.[17] Although Article 1 of the Protocol 1 to the European Convention on Human Rights (further "ECHR"), does not lay down in an explicit manner the procedural requirements of the right to property, the European Court of Human Rights has held in its case law that the fair trial requirements apply whenever the civil rights and obligations of private persons are at stake.[18] According to the text of Article 6 of the ECHR, the determination of individual civil rights and obligations shall be conducted in a fair and "public hearing". The right to a public hearing generally includes a right to **a**n oral hearing and as such is an essential feature of the right to fair trial.[19] As the Court stated in *Axen v. the Federal Republic of Germany*:

[14] See Chapter III of the Law on Property and Other Real Rights No. 03/L-154, of 25 June 2009.
[15] Declarative decisions establish existence of a fact to which the law attaches specific consequences, while constitutive decisions create rights or obligations. In: R. Seerden, F. A. M. Stroink (eds.), *Administrative Law of the European Union, Its Member States and the United States: A Comparative Analysis*, 2002, 157.
[16] Law on Administrative Procedure No. 02/L-28 of 22 July 2005.
[17] Articles 36, para. 1 and 287, para. 1 of the Law on Property and Other Real Rights.
[18] *Ringeisen v. Austria,* 16 July 1971, para. 94.
[19] *Axen v. the Federal Republic of Germany*, 8 December 1983, para. 28.

> "The public character of proceedings before the judicial bodies referred to in Article 6 (1) protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts, superior and inferior, can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 (1), namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention."[20]

As it flows from the provisions of the Draft Law, the proceedings before the PVAC are not supposed to be public. According to Article 14, para. 3, the PVAC should reach its decisions on the basis of the "evidence submitted in the case file, the reply or replies from the parties or other interested persons and a recommendation provided by the Secretariat". The further analysis indicates that this provision might be seen as contrary to the ECHR and the Constitution of Kosovo.[21] Namely, while it is true that the European Court of Human Rights has held that public hearing before the appellate body, under certain circumstances, might remedy this shortcoming of the first instance proceedings, this can be of no avail in the cases decided by the PVAC. Article 15, para. 10 of the Draft Law clearly stipulates that the oral hearings before the Supreme Court of Kosovo are to be an exception to the general rule that the appellate procedure is to be conducted on the basis of the written submissions of the parties.

3. Notification procedures

By deciding which of the parties with the conflicting claims should be registered in the cadastral records, the PVAC in effect decides about property rights and hence its decisions need to satisfy the requirements contained in the right to fair trial, as guaranteed in Article 6(1) of the ECHR.[22] The analysis, however, shows that the Draft Law does not seem to provide the necessary guarantees that the proceedings before the PVAC would fulfil another two basic requirements of the right to fair trial – to be adversarial and to comply with the principle of equality of arms.

Namely, the drafter failed to lay down the safeguards for the participation in the proceedings of the persons who are registered in

[20] *Ibidem*, para. 25.
[21] Article 31, para. 2 of the Constitution of Kosovo.
[22] The European Court of Human Rights has held in its case law that Article 6 is applicable under its civil head also with respect to the registration by the authorities of ownership of property, as this is decisive for the effective exercise of ownership rights (see *Buj v. Croatia*, 1 June 2006).

the cadastral records or of other persons with the legal interest. In that sense much can be learned from an analysis of its provisions regulating the process of notification of the parties. The Draft Law contains only a general rule that when there is a discrepancy between the pre-1999 and the new cadastral records, the Secretariat should "make every effort to contact the person named or their heirs and family household members of the person named on the documentation".[23] An idea about the means to be used for the purpose of the notification of the persons with legal interest can be gained from Article 13, para. 5, which says that "[the] methodology to notify such interested parties may include physical notification of the property or an announcement in an official publication of the Secretariat". This is very much alike to the methods of notification used by the Kosovo Property Agency, yet the important difference is that the later proceedings were initiated by the interested parties, while the proceedings before the KPVCA are to be initiated *ex officio*.

While analysing the issue of notification, one should also look at the Law on Administrative Procedure, which is to govern the proceedings before the Executive Secretariat and the PVAC. In its Article 37, para. 1 this law sets a general rule that when the administrative proceedings are initiated by a public administration body, a notice of initiation of action should be sent to interested parties "if they are identifiable". In para. 3 of the same article, the law lays down an exception to that rule by stipulating that "[t]he public administration body shall not communicate with interested parties […] if in the conditions of extraordinary situation, the communication may undermine the effectiveness of the administrative proceeding."

The analysed provisions show that the drafter did not thoroughly reflect on the difficulties that stand in the way of an effective identification and communication with the persons named in the cadastral records and their heirs.[24] These difficulties are particularly numerous and complex when it comes to IDPs. Great many of them still live in privately rented accommodation and due to the lack of subsistence means often change place of residence. There is no functional postal service between Kosovo and the Serbia proper. Not less importantly, many of the potential claimants will certainly not have financial means or the knowledge to follow the daily newspapers, regularly visit the web page of the Agency or in other way follow the official publications of the Agency.[25] Another question

[23] Article 13, para. 4 of the Draft Law.

[24] A more detailed account of the problems related to the land register in Kosovo can be found in: M. Salamun at al., "Private Properties Issues following the Regional Conflict in Bosnia and Herzegovina", Croatia and Kosovo (Study requested by the European Parliament's Committee on Petitions), 2010, 115 - 116.

[25] As set in Article 13, para. 5 of the Draft Law.

to be asked is in which way would the Agency use the mass means of communication for the purpose of notification given the limitations laid down in the Law on the Protection of Personal Data.[26] When it comes to the physical notification on the property, this method goes against the interests of many displaced property owners whose immovable property is still illegally occupied or who are not using it due to their displacement, no matter to which community they belong.

All in all, one need not be very knowledgeable of the life in displacement, as well of the shortcomings of the Kosovo cadastral records both before and in particular after the 1999 conflict, to understand that the process of communication with the interested parties will be logistically, financially and time-wise a very demanding endeavour. In the light of it, the Agency might easily opt for the less strict interpretation of the "make every effort" standard for the notification of parties, or at best to use only indirect means of notification such as web site, physical notification on the property, or daily newspapers. This would, however, be detrimental to the fairness of the proceedings before the Agency and IDPs would most likely bear the greatest burden of such unfairness.

4. Collection and use of evidence in the process of comparison, verification and adjudication

Another danger for individual property rights ensuing from the Draft Law comes from its provisions regulating the use of evidence to be acquired *ex officio* by the Executive Secretariat in the process of comparison and verification of cadastre records and, subsequently, in the process of adjudication. According to Article 13, para. 4 the Secretariat should collect evidence from a wide panoply of sources:

> "In cases where a gap or discrepancy is found between the pre 1999 cadastral records and the cadastral records obtained from the Kosovo Cadastral Agency and the Municipal Cadastral Office the Secretariat shall undertake a full comparison of the documentation against all available public archives and shall in addition make every effort to contact the person named or their heirs and family household members of the person named on the documentation and any institution in Kosovo which may hold information on the property in question in order to request evidence so as to be able to determine how the discrepancy came to be."

[26] Article 5 of the Law on Protection of Personal Data No. 03/L – 172, of 29 April 2010.

The evidence collected in this way is also to be used by the PVAC in the phase of adjudication of conflicting property claims arising for the mismatch between the cadastral records:

> "The Commission shall determine**, based on the evidence submitted in the case file, the reply or replies from the parties or other interested persons and a recommendation provided by the Secretariat** which cadastral record is legal, […] and in cases where neither of the cadastral records are determined to be correct, the Commission shall determine the legal entry that should be registered in the Cadastre records in Kosovo. In making its decision the Commission should **note the final and binding nature of the decisions of the authorized court and administrative institutions** (emphasis added)."[27]

There are several problems arising in relation to these provisions. The first one lays in the fact that the Draft Law does not set exact rules on the sources and classification of different types of evidence to be used in the proceedings. Under normal circumstances, this would not be an issue *per se* since the administrative and judicial bodies usually have a discretionary power in deciding which evidence is reliable and conclusive for the matter before them. Yet, in the light of the fact that the PVAC is modelled after the Kosovo Property Claims Commission *i.e.* set to be a mass claims resolution body, it could be expected that its decisions will be summary in nature and written through the use of a template. In other words, the danger is that the decisions of the PVAC would not contain rationale that would provide the parties with enough detailed account of the way in which the PVAC was weighing evidence in their case.[28] This is in particular worrisome given that the PVAC proceedings are initiated by the Agency and not by the interested parties, who could otherwise have a proactive role in providing the evidence, and that the proceedings are not public. Another danger arises from the lack of rules that would regulate types of public archives from which the evidence is to be collected. Since the Draft Law does not determine which public archives should be obligatorily consulted, the question is whether the Agency would in each case act in the same way and collect the evidence with the same vigilance. Such a wide discretionary power of the Secretariat combined with the lack of guarantees that the persons with a legal interest would be timely informed about the proceedings, could lead to the violation of the right to property and the right to fair trial as guaranteed in the jurisprudence of the European Court of Human Rights.

[27] Article 14, para. 3 of the Draft Law.

[28] Although this would be contrary to Articles 85 and 86 of the Law on Administrative Proceedings.

4.1. Fiscal cadastre

Another equally worrying aspect of these provisions springs to mind when they are interpreted in the light of other property-related laws. Due to a great number of illegally occupied immovable properties, there is a whole set of laws that give special consideration to this particular feature of Kosovo. For instance, the Kosovo Law on Property Tax is unique for its Article 5 that establishes liability of the illegal occupants for the payment of immovable property tax.[29] On the basis of its provisions the tax authorities have been registering in the tax database illegal occupants as persons liable for the payment of the tax without making a clear distinction between them and the rightful owners. Furthermore, the tax authorities' decisions on the annual tax (tax bills) by default refer only to the illegal occupant's name without specifying that he/she is not the property owner.[30] Yet, the tax database could be subsumed under the generic notion of "public archives" referred to in Article 13, para. 4 and used by the Secretariat in the process of comparison and verification although it does not contain evidence reliable enough for this purpose.

4.2. Access to the Kosovo cadastre

One more obstacle ensuing from the tax laws are provisions on the termination of municipal services such as cadastre for the properties for which the immovable property tax was not paid. According to the relevant bylaw, the extracts from the immovable property rights register or cadastre plans are not to be issued for the immovable property over which there is an outstanding tax debt.[31] Needless to say this has been a great obstacle to the effective judicial protection against illegal occupations. When it comes to the Draft Law this could also be another hurdle to a participation of the property owners whose property is illegally occupied, since they would have no possibility to learn in time whether there is a discrepancy between the cadastral records.

These provisions read in conjunction with the Draft Law raise concern that lawful owners could be prevented to prove their ownership because of the accrued tax debt, while illegal occupants could try to "legalise" their position by presenting the data from the fiscal cadastre and tax bills with their name on it.

[29] Law on Taxes on Immovable Property No. 03/L –204 of 07 October 2010.
[30] More on this in: Legal Aid Project, "Taxation of Immovable Property of Internally Displaced Persons in Kosovo" (Report), August 2012, at: *http://www.pravnapomoc.org/web/analysis_of_gaps_5.pdf*, April 6, 2015.
[31] Article 3 of the Administrative Instruction No. 07/2011 on Orders to Ban Offering Municipal Services Aiming Enforced Payment or Property Taxes.

4.3. Public utility bills

Similar effects could also ensue from the provisions regulating payment of unsettled public utility services in the period of UNMIK administration of Kosovo. Due to widespread illegal occupation of immovable properties of IDPs, UNMIK had rightly laid down the rule that such property owners shall be granted relief from the debts for public utility services and had authorized the public utility providers to charge the debts from the illegal occupant.[32] No doubt such rules affected the validity of data contained in the archives of public companies and therefore their usefulness, as a source of evidence, is questionable.[33]

The question is whether the Executive Secretariat and the PVAC will be enough aware of these complex interactions between different property related laws and the way in which they have affected the records of the public institutions in Kosovo that are supposed to serve as a source of documentary evidence in the process of comparison, verification and adjudication. Needless to say, the internally displaced persons who are, due to their specific position, predominantly victims of the widespread illegal occupation, might be the most affected by an indiscriminate and incautious use of these public archives.

5. Legal remedies against the PVAC decisions

In accordance with the Agreement on Cadastral Records, the Draft Law stipulates that the appellate proceedings before the Supreme Court of Kosovo are to be a legal remedy against the PVAC decisions.[34] As different from the proceedings before the PVAC, the appellate proceedings are to be regulated by the Law on Contested Procedure.[35] The Supreme Court of Kosovo is supposed to render its decisions primarily on the basis of the facts presented in the proceedings before the PVAC.[36] The unsatisfied party may initiate the appellate proceedings on the following grounds:

> "[…] 3.1. The decision involves a fundamental error or serious misapplication of the applicable material or procedural law; or

[32] UNMIK Administrative Directive No. 2008/5 of 5 May 2008.
[33] In the proceedings before the Kosovo Property Claims Commission (KPCC) and its predecessor, the Housing and Property Claims Commission (HPCC), public utility bills were often used as a subsidiary proof of the right to use property, bit this was limited to the public utility services provided before the conflict.
[34] Article 15, para. 1 of the Draft Law.
[35] Law on Contested Procedure No. 03/L-006 of 30 June 2008.
[36] Article 15 para. 11 of the Draft Law.

3.2. The decision rests upon an erroneous or incomplete determination of the facts. […]."[37]

The first question that arises from the analysis of the cited provisions is in which way would the Supreme Court conduct the review of the decisions of the PVAC given that the later brings its decisions in administrative proceedings while the Supreme Court applies the rules of civil proceedings. According to the Draft Law, the task of the highest court is, among else, to examine the way in which the PVAC has applied material or procedural law. Given that the PVAC is applying the administrative law, the question is how could the Supreme Court review the proceedings before the PVAC by applying the Law on Contested Proceedings.

The second question is whether the proceedings before the Supreme Court can be seen at all as the appellate proceedings? As it was elaborated above, the PVAC proceedings in several respects do not fulfil the standards of fair hearings in the sense of Article 6 of the ECHR. The PVAC is to decide about the civil rights in administrative proceedings initiated *ex officio*, without holding public hearings and without the necessary guarantees that the persons with legal interest would have the opportunity to participate in the proceedings. On the other hand, the proceedings before the Supreme Court of Kosovo are envisioned to be *sensu stricto* appellate judicial proceedings. Hence, they are limited in scope and the review is confined to facts and evidence used in the proceedings before the PVAC.[38]

6. Execution of the PVAC decisions

The Draft Law repeats the provisions on remedies provided in the legal framework regulating the execution of decisions of the Kosovo Property Claims Commission despite the fact many of them have proven to be completely or partly ineffective in practice. For instance, one of the remedies among those enlisted in Article 18 is "seizure and demolition of unlawful structures", although the Kosovo Property Claims Commission has never used this type of remedy due to variety of obstacles, including lack of budgetary resources.

This is well illustrated in the decision of the Constitutional Court of Kosovo of 16 April 2014.[39] The applicant, a Kosovo Serb IDP, owner of a parcel of land in Pristina municipality that was illegally occupied since 1999, in 2005 had submitted a claim to the KPA. In June 2011, the Kosovo Property Claims Commission (KPCC) found that the applicant

[37] Article 15, para. 3 of the Draft Law.
[38] The new facts and material evidence can be invoked only in the exceptional circumstances. *Ibid.*
[39] Judgment of the Constitutional Court of Kosovo in case no. K1187/13 of 16 April 2014.

is the lawful property right holder and ordered to the illegal occupant to vacate the property within 30 days under the threat of forced eviction. The KPCC decision was confirmed by the Special Chamber of the Supreme Court on KPA related matters in 2012. After several attempts of the applicant to initiate enforcement of the final decisions, in 2013 the KPA informed her that since the illegal occupant has erected buildings on the property, there could be no *restitutio in integrum* because the KPA could not conduct demolition of property and that she can be only offered a mediation "between [her] and the *user of the property*, with a view of finding an amicable solution on the use of [her] property (emphasis added)".[40] The applicant then pleaded to the Constitutional Court for the non-execution of the KPCC decision. In the proceedings before the Constitutional Court the KPA, as the opposing party, stated the following:

> "[…] the KPA failed to execute the KPCC decision, due to construction of the new structures in that property […]. The obstacles appeared because, to deliver the possession of the immovable property to the legitimate owner, the KPA needed additional funds to demolish the constructed houses. Apart from the demolition of the structures, the KPA, under the law, has in disposal other legal remedies, such as the remedy of mediation. The KPA, due to the lack of funds, could not execute the decision, since the budget has already been approved and for this reason, the KPA on 21 October 2013, requested from the Ministry of Finance the approval of the additional budget for 2014, which would ensure the KPA progress with its mandate, but although our requests were reasoned, the Ministry of Finance did not approve the request for additional budget. On 5 June 2013, in order to execute the KPCC decision, the KPA contacted [the applicant] and notified her of the circumstances of the case and requested from her to accept the remedy of mediation, in order that the issue of the immovable property is solved by agreement and in a friendly manner."[41]

Here is worth repeating that the "seizure and demolition of unlawful structured" has been prescribed as remedy for the execution of KPCC decisions since 2006.[42] Yet, in executing the decisions of the KPCC, the KPA has never used seizure, demolition and auction nor the Kosovo Government ever approved financial resources necessary for the application of these remedies. No surprise, this case has not been finalized until the present day although the Constitutional Court of Kosovo unanimously ruled that:

[40] *Ibid.*, para. 26.
[41] *Ibid.*, para. 37.
[42] Article 16 of UNMIK Regulation No. 2006/50 of 16 October 2006.

> "[…] the non-execution of the KPCC Decision by the KPA and the failure of competent authorities of the Republic of Kosovo to ensure efficient mechanisms for execution of final decisions are in contradiction with the principle of the Rule of Law and constitute violation of the fundamental human rights guaranteed by the Constitution."[43]

When it comes to the eviction, which has been the principal remedy in the cases of illegal occupations and is also enlisted among the means of execution of decisions of the Kosovo Property Comparison and Verification Agency, the available statistics show that its efficiency is doubtful due to shortcomings in its application.[44] Numerous reports have tackled this issue yet the drafter only repeats the provisions of the KPA related laws without any noticeable attempt to ensure its greater efficiency.[45]

7. Financial and regulatory impact assessment

A cursory glance at the competencies of the Kosovo Property Comparison and Verification Agency leads to the conclusion that the completion of its tasks would be an extremely costly undertaking. In that sense a parallel could be made with the work of its predecessor, the Kosovo Property Agency, the work of which was in many respects ineffective due to budgetary limitations, in spite of the fact that numerous international donors supported its work.[46]

Due to the lack of transparency in the process of its drafting, it is not clear whether the Draft Law was complemented by the financial and regulatory impact assessment documents *i.e.* whether the Kosovo Government has a clear overview of the costs it implies and its potential effects on the regulatory system in Kosovo. Not only it is very important to see how much budgetary means have to be secured for an effective realization of the mandate of the Kosovo Property Comparison and Verification

[43] Judgment of the Constitutional Court of Kosovo in case no. K1187/13 of 16 April 2014, para. 79.
[44] The widespread instances of re-occupation, looting and destruction of the real property given back to the rightful owners too often nullify the effects of the provided remedies. See, for instance, Kosovo Property Agency Annual Report for 2011, according to which "in many cases the number of re-occupations and evictions has exceeded ten on the same person and property". In: Kosovo Property Agency, "Annual Report for 2011", 25, available at: *http://www.kpaonline.org/PDFs/AR2011.pdf* , October, 25 2015.
[45] See, for instance, OSCE Mission in Kosovo, "Challenges in the Resolution of Conflict-Related Property Claims in Kosovo" (Report), 2011. See also: OSCE Mission in Kosovo, "Review of illegal re-occupation cases in Kosovo" (Report), 2015.
[46] Apart from the problems with the repossession of land on which buildings were illegally constructed, the Kosovo Property Agency has also been continuously failing to fulfill its mandate *vis-à-vis* the restitution of occupancy rights to socially owned apartments lost as a result of discrimination because of the budgetary limitations.

Agency but also it is important to understand in which way the Draft Law would affect the related laws and *vice versa*. Important consideration in the later sense should be given, for instance, to its relationship with the Law for Treatment of Constructions Without Permit, which contains no single safeguard that the legalization would not be allowed where the building was constructed on an illegally occupied land.[47]

8. Conclusion

The signing of the Cadastral Records Agreement on 2 September 2011 created an obligation on the Government of Kosovo to prepare the legal and institutional framework necessary for its implementation. Three years after the initial text has seen the light of the day the last version of the Draft Law on Kosovo Property Comparison and Verification Agency is now pending before the Assembly of Kosovo. The analysis undertaken in the paper shows that the application of the Draft Law could lead to the violations of Article 6 para. 1 and Article 1 of the Protocol 1 of the European Convention on Human Rights. This might be in particular true when it comes to the property rights of IDPs whose vulnerability to a various types of unlawful activities, that usually characterise the post-conflict settings such as Kosovo, warrants special attention. The analysis also shows that many of the identified shortcomings of the Draft Law spring from the fact that the institutional solution for the consolidation of the cadastre records has been sought in extending the mandate of the Kosovo Property Agency. If that had made some sense in 2011 when the first text of the Draft Law was written, it made little sense now, four years later, when the Kosovo Property Agency has practically completed its mandate.[48] Moreover, given its mixed record in securing the effective protection of the property rights of IDPs it becomes hard to understand why the approach of the drafter was the one of copying the provisions of the KPA-related laws without considering how to avoid the well-documented obstacles the KPA faced in its work.

[47] Law for Treatment of Constructions Without Permit No. 04/L-188 of 26 December 2013.

[48] According to the information available at the web site of the Kosovo Property Agency, on 16 December 2014, the Kosovo Property Claims Commission (KPCC) held its last session and decided about the last 194 claims. See at *http://www.kpaonline.org/detailRelPrint.asp?ID=81*, October 24 2015.

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ПРОЦЕС КОНСОЛИДАЦИЈЕ КАТАСТАРСКИХ КЊИГА НА КОСОВУ И МЕТОХИЈИ И ПИТАЊЕ ЗАШТИТЕ ВЛАСНИЧКИХ ПРАВА РАСЕЉЕНИХ ЛИЦА

Резиме

Процес „Дијалога између Београда и Приштине" покренут је на основу Резолуције Генералне скупштине Уједињених нација A/RES/64/298 од 9. септембра 2010. године. Током дијалога о техничким питањима, који је вођен уз посредовање Европске Уније, утаначен је 2011. године и садржај Споразума о катастру. Његовим закључивањем Влада у Приштини преузела је на себе обавезу да обезбеди законодавни и правни оквир неопходан за спровођење поступка упоређивања катастарских књига које води Геодетски завод Србије и оних које су успостављене на Косову и Метохији након доласка Мисије Уједињених нација (УНМИК-а). Косовска Влада* је с тим циљем већ крајем 2011. године усвојила Нацрт Закона о Косовској агенцији за упоређивање и верификацију имовине, чија се последња верзија од фербуара 2015. налази пред Скупштином Косова. Циљ чланка је да се кроз анализу овог Нацрта Закона утврди какав би утицај поступак упоређивања катастарских књига и одлучивања о супротстављеним имовинским захтевима могао да има на остваривање имовинских права на Косову и Метохији. Ауторка се у том погледу посебно бавила питањем у којој мери анализиране одредбе одражавају посебан положај расељених лица када је у питању заштита њихових имовинских права у месту расељења. Резултати анализе указују на то да би спровођење поступка консолидације катастарских књига на начин на који је то предвиђено Нацртом Закона о Косовској агенцији за упоређивање и верификацију имовине могло довести до кршења члана 6, става 1 и члана 1 Протокола 1 уз Европску конвенцију о људским правима и основним слободама, посебно у случајевима који се тичу имовинска права расељених лица. У чланку је наговештено и то да многе од

* Овај назив не прејудицира ставове о статусу и у складу је са Резолуцијом СБ УН 1244/99 и мишљењем Међународног суда правде о проглашењу независности Косова и Метохије.

уочених слабости Нацрта Закона произилазе из тога што су поступци упоређивања катастарских података и решавања о супротстављеним имовинским захтевима уређени по узору на поступке спровођене пред Косовском агенцијом за имовину.

Кључне речи: Споразум о катастру, Нацрт Закона о Косовској агенцији за упоређивање и верификацију имовине, право на неометано уживање имовине, интерно расељена лица

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Original scientific paper

UDK: 349.44(4-191.2)

REVITALIZATION OF MILITARY BROWNFIELDS IN EASTERN AND CENTRAL EUROPE

Abstract

Economic and political changes occurred in Eastern and Central Europe after the Cold War have left behind many buildings, so called brownfields, that are nowadays abandoned, out of order and often with unresolved property issues. Certain amounts of these facilities belonged to military and were used by Soviet army and national military units back in the past. After political and economical changes, some of these locations were transferred to local communities, while the others nowadays belong to the state or are in private property.

The awareness that these brownfields represent serious ecological and urban issue has raised considerably in the last several years. These problems can partially be resolved by their revitalization, which would make them usable again. Certain countries of Eastern and Central Europe have realized the significance of revitalization and managed in reusing the old buildings for purposes different from their previous one.

Experiences gained in the process of revitalization of military brownfields in the Czech Republic, Hungary and Slovenia are presented in the Paper. The possibility of donating the property to local communities for free is special emphasized. The conclusion is dedicated to alternative solutions in the process of revitalization of military brownfields in case when local community does not dispose of enough funding.

Key words**:** *revitalization, military brownfields, local community, donating, public-private partnership.*

1. Introduction

In Post Cold War era, countries of Eastern and Central Europe underwent serious political and economical changes. Ex-socialist countries` transition to market economy, decline of industrial production, withdrawal

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of Soviet military troupes left behind the great number of different brownfield locations, which today represent derelict, neglected and rusty buildings.[2]

At the moment as those objects were being built, ``non existence of market of capital and immobility led to the fact that public companies did not take care and consider the value of land and money…``.[3] We are talking about whole industrial complexes, military barracks and other buildings, that do not have any kind of function nowadays. Furthermore, geopolitical changes and NATO membership of certain countries were other key factors that caused gradual demilitarization of these countries, which also left behind tremendous number of derelict military brownfields.[4] Some of those locations are in the property of local authorities on whose territory they are located, the others are owned by the State, while certain percentage are private property. Besides, one of the most important economical processes, that also contributed to the massive ``production`` of brownfields should not be neglected. It is the process of globalization, with all its consequences on economical and demographical world map.[5]

For a long time neither have these locations come to fore nor have they been considered as an ecological or urban problem. More precisely, this was till the beginning of the process of privatization, when it came clear that foreign investors are not particularly interested in buying these real estates. Because of that, brownfields today represent ``scars on the faces of cities, that not only reduce land`s value, but also are the sever obstacle for the future local development``.[6]

Revitalization process of these buildings began several decades ago in order to use their full potential for some other purpose, a bit or completely different from the previous one. Even though foreign investors have not shown great interest in these projects at the beginning, which was mainly caused by numerous joined risks, as the time passed by all the

[2] According to available data, in 11 EU country members, brownfields occupy the total square of more than 11miliona ha. Number of brownfields reused in the whole world amounts around 8 000. For more details, *http://www.cabernet.org.uk/resourcefs/427.pdf,* 01.09.2015.

[3] J.Jackson, Y.Garb, ''Faciliating Brownfield Redevelopment in Central Europe: Overview and Proposals", Institute for Transportation and Development Policy 2001, 3., available on *http://www.researchgate.net/publication/228455453_Facilitating_brownfield_redevelopment_in_Central_Europe_overview_and_proposals,* 02.09.2015.

[4] See more J.Altman, W.Liebert, W.G.Neuneck, J.Scheffran, ''Dual Use and Conversion of Military Related R&D in Germany", *Conversion of Military R&D* (ur. J.Reppy, J.Rotblat *et al*.), Palgrave Macmillan, London-New York 1998, 163-182.

[5] J. Keller, ''Koncept postindustriální společnosti a jeho slabiny", *Sociológia*, 4/2011, 3, according to J.Hercik, Z.Szczyrba, ''Post-military areas as Space for Business Opportunities and Innovation", *Prace Komisji Geografii Przemyslu* 19/2012, 143.

[6] Cabernet, Brownfield Definition, University Nottingham, Nottingham 2005, available on *http://www.cabernet.org.uk/index.asp?c=1134,* 09.06.2015.

brownfields` advantages came to light gradually. Two main advantages may be are already developed und built infrastructure of these buildings and their great locations. More and more brownfield revitalization processes have been started lately, which is also owned to the fact that the interest in greenfields has been decreasing due to their high prices.[7]

Without any further discussion, the squalor of previous industrial and military facilities represents serious threat to environment. Considering this problem, one must notice that brownfield revitalization, despite high costs, can be a remarkable basis for ecological hazards` elimination. Furthermore, since the revitalization represent the possibility for opening of new workplaces, reuse of brownfields can have a positive influence on economical situation in areas where the unemployment percentage is high. Taking into account all the barriers and costs one military brownfield process has to face it became obvious that it demands a thorough cooperation among several participants. In post socialist countries ``most of the investors are companies with foreign capital and shares, whose key factors are profit and quick turnover``[8], while in countries with developed market economy, brownfield revitalization is mostly accomplished through public-private partnerships.[9]

Research in this Paper has set as its aim the presentation of military brownfield revitalization in certain countries of Eastern and Central Europe. What is particularly emphasized in this Paper is the cooperation between public and private sector and the forms this cooperation took in given country. It is worth mentioning that in many countries the first step in revitalization process was transfer of property on military brownfields free of charges to local and territorial authorities. For that reason the author decided to explain in more detail comparative experiences on this subject, while pointing out its positive side effects on the revitalization process. Considering this topic`s actuality in Serbia and similarities within financial and political situation with described countries, the author assumes that it would be useful for expert public to get acquainted with comparative experiences and legislation of other countries, that have already undergone the same process, in order to eventually prevent and avoid some of the difficulties that occur on the pathway of revitalization. As usual, comparative analyze can be used as a pattern in the improvement of existing legislation. Namely, the Government of the Republic of

[7] *http://www.wiley.com.au/wp-content/uploads/Tool_-_Brownfield_vs_Greenfield.pdf,* 01.09.2015.
[8] B.Frantal, J.Kunc *et al.*, ''Location Matters! Exploring Brownfields Regeneration in a Spatial Context (a case study of the South Moravian Region, Czech Republic), *Moravian Geographical Reports*, 2/2013, 6.
[9] A.Kalberer, S.F.Klever, T.Lepke, ''The Future Lies on Brownfields'', 17., available on *http://www.umweltbundesamt.de/sites/default/files/medien/publikation/long/3051.pdf,* 10.06.2015.

Serbia adopted two document dedicated to the sale of military property.[10] However, practice has shown that a very small amount of military brownfields have been sold in accordance with documents, so a question can be raised, if it is necessary to make some changes of the legislation in order to instigate military brownfield revitalization. Exactly for this purpose coming article can be used.

2. Demilitarization of Eastern and Central Europe

When discussing brownfields and their revitalization, the focus is mainly on brownfields that occurred after the process of deindustrialization, while completely neglecting the consequences of demilitarization and tremendous number of military facilities left behind. Even though demilitarization and deindustrialization have a lot in common, the main difference between these two is political motives for abandoning military facilities unlike economical ones that are important in caseof industrial facilities.

Two phases of demilitarization can be perceived on the territory of Eastern and Central Europe: the first one, in the period from 1898 till 1995, and the second one, starting in the midnineties.[11] The first phase refers to withdrawal of Soviet military troupes from Eastern Germany, Czech Republic, Poland, Baltic States and Hungary. Starting from the eighties until 1995 around 500 000 Soviet soldiers withdrew from above mentioned countries. Till the end of nineties this number reached 1 000 000 soldiers.[12] Today this region has 2,6 million less soldiers than back in the nineties,[13] since the gradual demobilization of military unites took place.

In countries of Eastern Europe situation was a bit different because Soviet Army was not present there, except in Bulgaria, so the first phase of conversion based on demobilization of paramilitary units, while national armies continued to exist and function with many units.

The second phase lasted from the midnineties and in a decade afterwards. Main characteristic of this phase is a reduction of amount of members of national armies. Besides professional army started developing and suppressing the existing one. ``Not only that these processes represent

[10] These documents are`` Master plan`` on the sale of property and ``Information on real estates on the territory of Republic of Serbia``.

[11] Bonn International Center for Conversion, Base Coversion in Central and Eastern Europe 1989-2003, available on *https://www.bicc.de/uploads/tx_bicctools/paper30.pdf,* 11.06.2015.

[12] G.Ignatavičius, ''Environmental Risk Prevention and Environment Management in Lithuanian Military Lands", *Comparative Risk Assessment and Environmental Decision Making* (ur. I.Linkov, A.B.Ramadan), Netherland 2004, 403.

[13] A.Heinemann-Grueder, ''Becoming an Ex-military Man: Demobilization and Reintegration of Military Professionals in Eastern Europe", Bonn International Center for Conversion, 2002, 4., available on *https://www.bicc.de/uploads/tx_bicctools/brief26.pdf,* 02.09.2015.

international current, they are also caused by budget restrictions and aspiration of most of the countries to become EU and NATO members``.[14]

Consequences of dereliction of military facilities can easily be seen because empty buildings are left behind. But these are not the only after effects. Namely, economical effects of the demilitarization can also be noticed, because maintaining of these facilities requests great amount of money, which were not available for national Ministries of Defense. Based on this conclusion, Ministries made up their mind to start selling military facilities. Economical effects of closing military bases can most easily be noticed in some western countries because many jobs were lost[15], while the same effects did not have a large impact on economical situation in countries of Eastern Europe. Explanation can be found in the fact that military bases in Central and Eastern Europe were mainly independent because they owned own cattle and households. Besides, withdrawal of Soviet army from Western countries had direct impact on economy, well-exemplified in ``reduction of number of employed civilians, attenuation of purchasing power in the region, as well as the decrease of tax incomes collected by local authorities``.[16]

Listed economical, ecological and urban negative consequences of demilitarization were an additional motive for national authorities to get involved in the process of revitalization of military brownfields. One of the first missions to be undertaken, in order to start the process of revitalization, was defining of brownfields or making changes in the existing definitions, because it came clear that available legislation did not give appropriate legal foundations for reuse of abandoned facilities.[17] Especially because there was a trend in legal acts to define brownfields as buildings and city parts.[18] Widening of the notion brownfield was required in order to cover rural areas as well as other objects used for military, industrial, agricultural and other purposes.

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[14] Bonn International Center for Conversion, Base Coversion in Central and Eastern Europe 1989-2003, 7.

[15] As an example can serve the closing of air military base in Colorado that caused 2000 civilians lose their jobs, B.Hallenbeck, ''Role Models: How Former Milittary Bases are Effectively Addressing Enviromnental Liability to Take Advantageof Real Estate Opportunities'', available on *http://xlgroup.com/insurance/insurance-resources/insurance-articles/role-models-how-former-military-bases-are-effectively-addressing-environmental-liability-to-take-advantage-of-real-estate-opportunities,* 09.06.2015.Also, withdrawal of American army caused 14000 Philippines lose their jobs.

[16] Bonn International Center for Conversion, 7.

[17] C.Bartsch, E.Collation, *Brownfields: Cleaning and Reusing Contaminated Properties*, Westport 1997, according to M. N. Lurie, M.Mappen, *Encyclopedia of New Yersey*, Rutgers University Press 2004, 103.

[18] See more, C.M. Hanley, ''Developing Brownfields– An Overview'', *Journal of Urban Technology* 2/1995, 5.

3. Definition of Brownfields

After certain period of time notion of brownfield underwent certain changes, and today there are different approaches in defining brownfields, depending on what is considered to be the main feature in the given country and its legal system.

In Scandinavia, Germany and USA brownfields are connected to contaminated areas. In Eastern Europe the importance of derelict areas as main feature of brownfields is especially emphasized. It is considered that these areas can be reused, after the fulfillment of certain requirements.[19] Different approaches in defining brownfields led to different national strategies dedicated to brownfield revitalization and to different priorities in this process. In order to avoid misunderstanding about what is considered to be brownfield and in order to simplify collecting of precise data on brownfields, it is necessary to define brownfield in such a manner that the given definition indicates multidisciplinary approach to this issue and numerous participants that have to take part in this complex process.

In literature definition given by Alker *(Alker*) is often used, according to which ``*brownfiled is any location or facility previously used or developed and which is not completely in use at the given moment, even though it could be partly be reused. Also, brownfield can be derelict or contaminated. So, brownfield is not available for current and direct use without certain interventions*``.[20]

In Central and Eastern Europe the notion of brownfield appears for the first time after the fall of socialist regime.[21] Defining brownfield went through several stages: at the beginning focus was on the issue ecological contamination[22], while today there is aspiration to cover as many as possible location with one definition of brownfield. Only way to accomplish this is to define it in a general manner. Czech laws do not use the term braunfield, but it is mentioned indirectly, by taking into consideration land on which it has been built in the past. [23] In National Strategy for brownfield revitalization, brownfield is defined as `` *Property*

[19] For different approaches in defining brownfields, see more *http://www.cabernet.org.uk/?c=1316,* 01.09.2015.

[20] Alker, S. Joy *et al*., ''The Definition of Brownfields", *Journal of Environmental Planning and Management* 1/2000, 49.

[21] B.Frantal, P.Klusacek, J.Kunc, S.Martinat, ''Report on Results of Survey on Brownfield Regeneration and Statistical Analysis", 7. Text available on *http://www.timbre-project.eu/tl_files/timbre/Intern/4%20Work%20Packages/WP8/Deliverables/timbre_265364_D3.1_V3.pdf,* 09.06.2015. P.Marcuse, M.van Kempen, *Globalizing Cities: A new spatial order?*, London 2000, 336.

[22] M.Havrlant, *Evaluation of Ecological burdens*, Ostrava 1998, according to B. Duži, J. Jakubinsky, ''Brownfield Dilemmas in the Transformation of Post- Communist Cities: A Case Study of Ostrava, Czech Republic", *Journal of Studies and Research in Human Geography* 7.2/2013, 56.

[23] See Zakon 183/2006 Sb. o uzemnim planovani a stavebnim radu.

(land, building, area) which is insufficiently used, or even derelict or may be contaminated. It occurs as a consequence of industrial, agricultural, military or residential activity. It is not possible to reuse this property without its regeneration``.[24] On the other side, an example of Germany can serve as an opposite example, since German legislation does not contain one legal binding definition of brownfields and because of that legislator`s attention is brought to safety precautions that have to be undertaken in order to avoid land`s contamination. [25] In Slovenian legislation different examples of locations that can be considered for brownfields are given *exempli causa* (railway stations, military and industrial facilities, mines, cultural monuments etc). [26]

Recent example of Hungary has shown how it is important to define brownfield in an appropriate manner, so that vast number of potential locations can be considered as brownfields one day. Hungarian legal acts dedicated to urban and regional development apply rather narrow interpretation of brownfield, which includes only urban areas used for industrial and mining purposes, while leaving military brownfields outside its range.[27] Absence of definition vast enough left Hungary short of EU funding intended for brownfield revitalization.[28] European Union developed many brownfield support programs[29], but the pure fact that Hungary did not perceive military facilities excluded Germany from applying for EU funding.[30]

4. Revitalization of Military Brownfields in Hungary

Demilitarization in Hungary left behind more than 2000 military objects and very small percentage of these became property of local

[24] Definition taken from National strategy on brownfield revitalization.
[25] Paragraph 2 Bundesbidenschutzgesetz (BbodSchG, *BGBI*. I S 502),
[26] Odlok o Strategiji prostorskega razvoja Slovenije, *OJ RS B*, br. 76/04.
[27] K.Kadar, ,,The Rehablitation of former Soviet military sites in Hungary", *Hungarian Geographical Bulletin* 63 (4)/2014, 438.
[28] Most important documents on EU level considering brownfields are *European Spatial Development Perspectives* from 1999, that points out basic principles and instructions in reconstructing and reuse of facilities, that should be implemented into national legislation. Text available on: *http://ec.europa.eu/regional_policy/sources/docoffic/official/reports/pdf/sum_en.pdf,* 08.06.2015. Some of the EU programs dedicated to this issue are: 1)programs for candidate countries, *http://europa.eu.int/comm/enlargement/index.htm*, 2) CARDS program for non candidate countries from Eastern Europe,*http://europa.eu.int/comm/europeaid/projects/cards/inde x_en.htm,* 3) TACIS programs for countries appeared after the Soviet Union dissolution*, europa.eu.int/comm/europeaid/projects/tacis/inde x_en.htm.* Also, there is a special program dedicated to conversion of military facilities to civilones, KONVER II.
[29] See more, U. Ferber, D.Grimski, K.Millar, P. Nathanail*, Suistanble Brownfield Regeneration: CABERNET Network Report*, Nottingham 2006, 132.
[30] *http://www.timbreproject.eu/tl_files/timbre/Intern/4%20Work%20Packages/WP8/Deliverables/timbre_265364_D3.1_V3.pdf,* 09.06.2015.

authorities. Some of these facilities are given to local or regional agencies or to Ministry of defense to govern and control them. [31] In accordance with Government`s approval Public Property Management Hungary Kft. became responsible for ``revival`` of derelict military facilities.

One of the options for reuse of brownfields was their sale either to private persons or to local authorities, who had pre-emptive rights. In case Soviet army was the one who built one military building, this could be disposed only in accordance with an international contract.[32] One of the means that was meant to facilitate the process of military brownfield revitalization was a transfer of these facilities for free, in the first place to local authorities. However, two obstacles were to be found on this ``road``: first of all, local authorities were not aware of the fact that there are many military objects on their own territory, so they could not show their interest in these; and second, budgetary restrictions relating to number of real estates in state property that could be transferred for free in one year. In the end, Hungarian Army took nearly around 5% of Soviet facilities, while the rest ended up in the hands of private persons, who mostly used these buildings for converting them into apartments. Slight percentage of local authorities had any kind of interest in military facilities on their territory and perceived as one of the priorities in their development strategies.[33]

It should not be left out of the sight that undeveloped practice of transfer of military brownfields to local authorities for free considerably contributed to disengagement of local authorities in the revitalization process, because they were expected to give great sums of money to buy military facilities, even though their budgets did not have enough money at disposal.

5. Revitalization of Military Brownfields in Czech Republic

After the Second World War ended and while the preparation for the Cold War took place, the number of military forces, both Soviet and national ones, were constantly rising in Czechoslovakia. However, the downfall of the political regime and introduction of democracy, caused at the same time certain changes in military doctrine in the sense of demilitarization and democratization of Czechoslovakian army that was

[31] *FATE, Assessment of Military Brownfields, Zala County*, 5.

[32] Some of th legal acts referring to revitalization of military brownfields in Hungary are: Act on local authorities LXV/1990, Act on public funding XXXVIII/1992, Act on public property CVI/2007. Laws available in English can be found on *http://www.lexadin.nl/wlg/legis/nofr/eur/lxwehun.htm*, 08.06.2015.

[33] An example of successful revitalization in Hungary: *http://fate.progetti.informest.it/index.php?option=com_content&view=article&id=102&Itemid=79,* 08.06.2015.

``no longer offensive but defensive one``.[34] Demilitarization process started in the midnineties as the Soviet military units started to withdraw from the territory of Czechoslovakia. More than 70 000 Soviet soldiers were allocated to 80 locations on the whole territory of the country.[35] In 2005 Czech Army became professional.

According to National Strategy for brownfield revitalization and *CzechInvesta* documentation, Czech Army itself left 128 garrisons and dozens of individual facilities. At one point it was estimated that there were more than 150 military brownfields with a total square of more than 2000 ha.[36] Military brownfield is a rather heterogeneous notion, that includes all different kinds of military facilities in different sizes, locations (some of them in city center, others outside it). Also their previous functions vary one from another, what defines the possibilities and feasibility of the potential revitalization of one military brownfield. What often happens in military brownfield revitalization is that public sector is overwhelmed by the private one. Municipalities and other forms of local communities should not give up on their role in this process, even when they consider that private persons would do a better job because they have money in their hands. Therefore the process of revitalization in Czech Republic was conducted through cooperation of public and private sector, especially in the form of public-private partnership.[37]

Main legal acts in Czech Republic dedicated to free transfer of military property to local authority, as one of the most common form of disposal of military brownfields, is Act on transfer of some surplus military property and assets, administrated by the Ministry of Interior, from the Ownership of the Czech Republic to the ownership of territorial authorities.[38]Apart from territorial authorities, military brownfields were also transferred to other public entities, that changed their purpose in a manner that some of them became prisons, while the others are now used as offices. [39] Only in case if neither public entities nor local authorities showed interest in one military facility is that Act on Property of the

[34] J.Hercik, O.Sery, V.Toušek, ''Post-Military Areas in the Czech Republicand their Revitalization-Examples of the Towns of Hodonin and Uherske Hradište", *Acta Universitatis Palackianae Otomucensis-Geographica* .3/2011, 108.

[35] J.Hercik, Z.Szczyrba, 144.

[36] CzechInvest, Národní strategie regenerace brownfieldů 2008, *http://www.czechinvest.org/data/f les/nsb-595.pdf*, 10.06.2015.

[37] See, C.A.De Sousa, L.M.Westphal, ''Assessing the Effect of Publicly Assissted Brownfield Redevelopment on Surronding Property Values", *Economic Development Quarterly* 2/ 2009, 95-110.

[38] Act on transfer of some surplus military property and assets, administrated by the Ministry of Interior, from the Ownership of the Czech Republic to the ownership of territorial authorities, no 174/2003.

[39] On potential future use of military brownfields see, J.Herick, P.Šimaček, Z.Szczzrba, I.Smolova, ''Military Brownfields in the Czech Republic and the Potential for their Revitalisation, Focused on the their Residential Potential", *Quaestiones Geographicae* 2/2014, 130.

Czech Republic and its Representation in legal relation allows sale of that facility to private investors.[40] Apart from direct purchase from Ministry of defense, private investors can also buy immobile property from territorial authority. Afterwards, bought immobility can be used as a location for building apartments. If the contract foresees that some of the built apartments remain in the hands of territorial authority, then these apartments are meant for special groups of citizens (the Youngs, unemployed etc.).

All abounded military facilities became the property of Czechoslovakian Army and later of Czech Army. After getting the ownership of a facility Army would, first of all, clean the facility in order to prepare it for the selling to private persons or territorial authority. The most common manner of transfer was a free transfer to local authority.[41] As examples of good practice of military brownfield revitalization in Czech Republic one can use cities of Hodonin and Uherske Gradiste. On the territory of these two cities many military barracks could be found and a great deal of them was transferred to local authorities for free.

Further development of brownfield revitalization differenced from city to city, depending on whether the city sold military barracks to private investors or not, and what was the new function and purpose of the previous military facility.

Hodonin had enough time to do the preparation for taking over the military facilities because the city was previously and in advance informed on the planned abandoning of military facilities. City administration divided these facilities in several groups in accordance with their possible future use. Some of them were meant to be used as residential ones, others as commercial, educational ones and those for recreation. City of Hodonin gave certain donations for mending technical infrastructure of objects in order to make them more attractive. Funding for these investments came partly from the City budget and partly from the State. Within the period of 18 months buildings were sold or rented, with an average payment period of 5 years. Mostly military facilities were being used as the commercial ones, in the sense of factories, shops. One building was turned into restaurant; horse stables and other sport facilities were also built, one private college rented parts of previous barracks for its needs. As before mentioned, certain percentage of military brownfields was planned to be changed into apartments or apartments were to be built on barracks` land.[42]

[40] Act on Property of the Czech Republic and its Representation in legal relation allows sale of that facility to private investors, no 219/2000.
[41] J.Hercik, O.Sery, V.Toušek, 108.
[42] For the whole process of revitalization see, J. Hercik, O.Sery, V. Toušek, 110-112.

The City of Uherske Gradiste is even more connected to military, for the construction of military facilities started back in 1918.[43] The principle of handling previous military barracks was rather much the same as in the city of Hodonin. Namely, most of the building were transferred for free to territorial authorities. Military did a bit of tiding of its facilities, most of which were left in bad condition, both from inside and outside. The same pattern of dividing facilities in different categories as in Hodonin was applied in Uherske Gardiste.[44]

What is common for both cities is that the great part of the revitalization was conducted through cooperation of public and private sector: in Hodonin, the City invested in reparation and providing technical infrastructure and then sold the objects to local private companies, while holding a small share in its property; on the other hand, Uherske Hradiste initially organized obtaining of infrastructure in cooperation with private sector and in the end most of the buildings ended up as property of territorial authorities used as residential and educational facilities, what was the main aim of revitalization in this city.[45] Keeping most of the facilities in the property of local authorities made it possible that the City receives significant sums of money from the EU funds for this purpose.[46]

6. Revitalization of Military Brownfields in Slovenia

In Slovenia there is also a legal option for free transfer of military facilities to territorial authorities. What is necessary to be done is that local and regional agencies for development are determined as the users of these facilities.[47] Whether the local authority is interested in a military brownfield, its duty is to prepare a project describing the manner of adaptation of the object, presenting its future use as well as financial plan for the predicted activities. Main conditions that one local community initiative has to fulfill are: the existence of public interest, opening new or maintaining the existing workplaces. If Government Office for local authority and regional politic assesses finds that the submitted project fulfills all the necessary conditions, procedure of approving the availability

[43] J.Čoupek, J.Šnajdr, O.Paule, *Military forces in Uherske Hradište*, according to J.Hercik, O.Sery, V.Toušek, 114

[44] Around 150 residential units were built

[45] Several projects were dedicated to reuse of military brownfields for educational purpose (Regional Training Centre, Lifelong Learning Centre...).

[46] About 28% of funds necessary for revitalization came from the EU and because of that the city itself had to giv less funds, while on the other hand Hodonin received only 3% from the EU, M. Špačkova, *Barracks in Uherske Hradište and in Hodonin and their Transformation: a comparative study*, Masaryk University, Brno 2011, according to Hercik, Z.Szczyrba, 146.

[47] Zakon o spodbujanju skladnega regionalnega razvoja, *Uradni list RS*, št.93/2005, Uredba o neposrednih plačilih v kmetijstvu, *Uradni list RS,* št. 113/2009.

of military facility enforced by the Ministry of defense can be continued. Local authority that does not conduct the projects in accordance with the submitted documentation is obliged to transfer military brownfield back to the Ministry of defense.[48] Similar legal possibility for free transfer of military brownfields can be also found in Croatia.[49]

7. Conclusion

Brownfields and their revitalization represent an important issue for the local development and also an opportunity for appealing foreign direct investments, with all its positive consequences on ecology, urbanism, protection and sparing of greenfields. Revitalization of abandoned military facilities can significantly contribute to local economical development because ``it can lead to opening new workplaces, collecting more incomes and use tax incomes for other purpose instead on military``.[50] Establishing the process of revitalization demands dealing with unresolved property issues, cleaning contaminated areas. These and similar activities demand huge engagement of local authorities. It occurs frequently that local administration does not dispose of such capacities. But one should also keep in mind that ``Unlike many other urban problems, the issue of brownfields is not mostly followed by conflicts because its resolving makes it possible for both sides to achieve their goals, without threatening the interests of the opposite side. Regeneration of urban land is a win-win situation, which benefits both to private and public sector``.[51]

It is up to local authorities to decide, whether they want to purchase military brownfields or to support its revitalization in some other manner. Anyway, obtaining property gives the possibility to local authorities to govern the process of reuse of military brownfields. If the possibility of free transfer does not exist, making an agreement on price between Ministry of defense and local authorities can turn out to be an aggravating circumstance that hinders further procedure of renewing one location.

This all stands as a rule only in a case that local authority owns enough funding to buy one military brownfield. If financial circumstances do not allow the purchase, what an alternative is that local authority

[48] For more details on transfer of brownfields see *FATE, Position Paper , Process to Acquire Military Brownfields*, 7.

[49] See more *Kome propadaju bivše vojne nekretnine? Iskustva prenamjene u Hrvatskoj*, (ur. K.Kardov, I.Tabak), Zagreb 2014.

[50] K.N.Hansen, *The Greening of Pentagon Brownfields: Using Environmental Discourse to Redevolop Former Military Bases*, London 2004, 50.

[51] Y.Garb, J.Jackson, "Central Europe's Brownfields: Catalysing a Planning Response in the Czech Republic", *Spatial Planning and Urban Development in the new EU Member States, From Adjustment to Reinvention* (ur. U. Altrock, S. Guntner *et al*.), Hampshire 2006, 276.

launches the brownfield revitalization in cooperation with Government in such a manner that Government remains the owner of the immobility, while the local authority takes the first steps in development and brownfield preparation that would be financed by the Government in the certain percentage. The amount of money given by the Government cannot be higher than netto price achieved when the facility is later sold. This way local authority is set free from assignment of high financial costs, while on the other side receiving certain amounts of money when selling a brownfield.[52] According to Bonn International Conversion Center study, revitalization of military brownfields due to their political significance should not be exclusively governed by local authorities. One of the Government incentive should be transfer of brownfields to local authorities for prices that are lower than those forms on the market. Besides, Government should provide local authorities with assistance when opening new workplaces. The problem of insufficient funds can be resolved by establishing public-private partnership. Foundation of one local or private agency specialized in brownfield revitalization its funding and further development is also one of the options available for local authorities. The Agency established this way can make profit on its own and then use it for the revitalization purpose.[53] Afterwards the agency can lease revitalized brownfields, which can then be subleased. The user of brownfield should be provided with tax relieves. User`s obligation could be not to maintain the facility, but to lease it for a certain period of time.[54]

Legal acts of Republic of Serbia dedicated to this subject foresee as an option selling of military mobile and immobile property on a reduced price. However, time and practice have shown that local authorities in Serbia do not possess enough funds in their budgets usable for this purpose, which makes the situation in Serbia quite similar to the situation in Hungary, Czech Republic and Slovenia. These countries are just some of the examples of good practice and they are given in this Paper with a hope that they can contribute to improvement of legal solutions in the Republic of Serbia. One cannot object to the statement that each brownfield is specific and determined by individual circumstances differing from one case to another, but certain patterns on this matter are defined. Acting in accordance with given patterns can lead to successful revitalization and they should be perceived as guidelines when the circumstances allow it.

[52] This method of revitalization can be spotted in German practice. See more *Bonn International Centre for Conversion*, 13.
[53] *Ibid*, 12.
[54] *Ibid*, 16.

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REVITALIZACIJA VOJNIH BRAUNFILDA U ZEMLJAMA ISTOČNE EVROPE

Rezime

Ekonomske i političke promene koje su preživele zemlje istočne i centralne Evrope po okončanju Hladnog rata, ostavile su iza sebe velikih broj objekata, tzv. braunfilde, koji su danas napušteni, van funkcije i često bez rešenog pravnog statusa. Određeni broj ovih objekata predstavljaju vojni objeki, korišćeni od strane sovjetske i nacionalne vojske. Po povlačenju sovjetskih trupa, počeo je i proces demilitarizacije u ovim zemljama. Neke od tih lokacija prešle su danas u vlasništvo lokalnih samouprava, neke su ostale u rukama države, dok je nekolicina prešla u privatnu svojinu.

Poslednjih godina počela je jačati svest da ovi objekti predstavljaju ozbiljan ekološki i urbanistički problem, koji se delimično može regulisati revitalizacijom ovih objekata i njihovim ponovnim stavljanjem u upotrebu, sa drugačijom svrhom od one koju su prvobitno imali. Određene zemlje istočne i centralne Evrope su shvatile značaj procesa revitalizacije, koji su uspešno sprovele i omogućile da se nekadašenji vojni objekti ponovo koriste u neke druge svrhe.

U radu su predstavljena iskustva Češke, Mađarske i Slovenije u procesu revitalizacije vojnih braunfilda. Poseban akcenat je stavljen na mogućnosti lokalne samouprave da učestvuje u ovom procesu kupovinom vojnih braunfilda, uz ukazivanje na probleme sa kojima su susrele na tom putu. Zaključak rada posvećen je alternativnim rešenjima za revitalizaciju braunfilda u slučaju da lokalne samouprave na čijoj teritoriji se nalaze vojni objekti ne raspolažu dovoljnim finansijskim sredstvima za kupovinu objekata.

Ključne reči: revitalizacija, vojni braunfildi, lokalna samouprava, besplatno ustupanje, javno-privatno partnerstvo.

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UDK: 339.727.22:341.63

A PROPOSAL FOR A NEW NORMATIVE APPROACH TO INVESTMENT ARBITRATION AND THE NATIONAL RULE OF LAW

Abstract

Transnational visions of how rule of law and good governance should look like on the national plane are a development of last couple of decades. This article argues that international investment arbitration has been in effect utilized as a tool for promoting such visions, despite their controversial practical record so far. In order to capitalize on the potential that investment arbitration does possess, the proposal is made for a normative turn that would encompass focusing on promoting rule of national law as opposed to the rule of investment law.

Keywords: *international investment law, international investment arbitration, rule of law*

1. Introduction

As has been increasingly argued in doctrine, the exercise conducted by the international investment tribunals in a predominant number of instances is akin to a judicial review of host State behaviour. However, the benchmarks used for this review are often the result of questionably creative (at best) interpretation of international law, a system of law which was in essence never geared towards providing rules for such a delicate exercise outside of the relatively crude and uncertain category of international minimum standard of treatment.

While with the overall context taken into account, one could expect far more restraint and 'judicial modesty' from investment arbitrators, practice did not show this to be the case. Interpretation of BITs as largely insulated from the broader framework of host State legal obligations entrenches the expectations from these States to essentially uphold, if necessary, the rule of investment law over rule of law in the domestic

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context - something particularly contentious with the regime origin in mind.

Imposition of new, interpretation-created rules largely resembles imposing a unified, globalized vision of good governance and rule of law on a very disparate set of States. Similar exercises have been criticised in other contexts (UN, WB) as both misguided and eventually unsuccessful. There is no particular reason why one-size-fits-all approach would fare any better in the sphere of investment protection. Efforts are thus be put in a different direction to the one primarily seeking elusive *jurisprudence constante* on substantive issues.

In order to propose a basis for a different course of action, this article will first explain the controversies surrounding the promotion of the rule of law on an international/transnational plane, (part 2) before delving into an elaboration of a normative turn that is more in line with the investment law origins and potentials in part 3. Finally, key concepts of such a turn - reasonable fulfillment of obligations, deference, the need for additional guidance, the crucial role of argumentative weight (as well as a cautionary caveat) are described in part 4.

2. A different view of rule of law and good governance - equality of State visions

Promotion of the rule of law and good governance among developing countries has become one of the primary goals of numerous international organizations. The extent of this phenomenon lead authors to express that '[...] the concept of good governance has moved to the centre of international aid and poverty reduction policies.'[2] Not surprisingly, there has been a corresponding increase in academic interest in the topic.[3]

Importantly, the origin of the good governance concept coincides with the Washington Consensus and the IIA boom of the 1990's.[4] Not unexpectedly, the IIAs and promotion of 'good governance' thus exhibit a strong link. According to Dolzer and Schreuer, investment treaties provide for external constraints and disciplines which foster and reinforce values *similar to the principles of good governance* with its emphasis on domestic institutions and policies.[5]

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[2] R.Dolzer, C. Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012,) 25.

[3] A.D Mitchell, E.Sheargold, T.Voon, "Good Governance Obligations in International Economic Law: A Comparative Analysis of Trade and Investment" (2015) *16 Journal of World Investment and Trade (forthcoming)*, available at: *http://ssrn.com/abstract=2616566*, 2.

[4] R.Dolzer, C. Schreuer (n 1) 25; W.M.Reisman, RD Sloane, "Indirect Expropriation and its Valuation in the BIT Generation" (2004) 74 BYBIL 115, 117.

[5] R.Dolzer, C. Schreuer (n 1) 25 (emphasis added).

The idea has found reputable proponents in the IIL sphere. In an oft-cited separate opinion in *International Thunderbird Gaming*, late Thomas Wälde expressed the view that '[a]buse of governmental powers is not an issue in commercial arbitration, but it is at the core of the *good-governance standards embodied in investment protection treaties*.'[6] In the very same opinion, Wälde advocates an award that would have a 'good-governance signal' as it ultimate goal, essentially a guidance for Mexico to observe in the future.[7] Another analysis concludes that standards emerging from investment jurisprudence are 'not as different from standards that contemporary administrative law has been trying to enforce in the last quarter of century in the domestic sphere'[8] and yet another sees BITs as consciously approximating the legal, administrative and regulatory framework in capital-importing states.[9] There is, thus, a considerable degree of trust that is put into IIA provisions as good governance enhancers.

It is, however, important to assess what is actually embodied in IIAs in terms of prescribing good governance.

The first, and rather often voiced objection, relates to the vagueness of most common substantive standards found in IIAs. There is no need to reiterate the point in too much detail - it is highly questionable how the formulations of such high levels of abstraction found especially in older IIAs (but not quite eradicated in newer ones)[10] can serve as meaningful practical guidance to host States.[11] These standards do not go beyond the level of higher order principles, appealingly formulated but of dubious practical value. Regarding the conclusion of IIAs, no State would have a principled reason to object to treating foreign investors (or pretty much anyone else for that matter) fairly, equitably, without discrimination or arbitrariness. Yet, the question of what this actually means in practice nevertheless remains. The existing body of jurisprudence has failed to clarify this, particularly regarding the FET standard.[12]

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[6] International Thunderbird Gaming Corporation v. The United Mexican States (Separate Opinion of Thomas Wälde of 1 December 2005), *http://www.italaw.com/sites/default/files/case-documents/ita0432.pdf,* accessed 14 August 2015, 13 (emphasis added).

7 International Thunderbird Gaming - Separate Opinion (n 5), 125.

[8] H.P.Loose, "Administrative law and international law: the encounter of an odd couple" in P.H.F.Bekker, R. Dolzer, M.Waibel (eds), *Making Transnational Law Work in the Global Economy - Essays in Honour of Detlev Vagts* (CUP 2010) 404-405.

[9] W.M.Reisman, RD Sloane (n 3) 118.

[10] A.D Mitchell, E.Sheargold, T.Voon, (n 2) 5-7.

[11] See also S.Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (Hart 2012) 147.

[12] A.D Mitchell, E.Sheargold, T.Voon, (n 2) 19.

It is commonly argued that this situation was planned, and that essentially it could hardly have been avoided.[13] The indeterminacy of these standards is, the narrative proceeds, supplemented by their fleshing out in arbitral practice, accompanied by periodic enhancements of IIAs being concluded. The legitimacy issues caused by this incremental development through a self-generating are considerable, but will not be revisited here. However, further implications stemming from this view that are relevant for the suggested normative turn will be elaborated upon.

What seems to be an often unspoken assumption behind the view of IIL as a rule of law generator is that there is some uniform standard of good governance and rule of law that is to be equally applied to all States participating in the IIL. The underlying core premise is rather similar to the idea that good governance can be 'introduced' to developing countries from the outside as a 'finished product' or simple transplant. However, increasing literature as well show the numerous failings of the idea that idea of the 'rule of law' and/or 'good governance' can be transplanted without due regard to the national context or provide the expected developmental outcomes.[14]

Stephen Humphreys in his thorough analysis concludes that the transnationally imposed rule of law policy actually facilitated resource transfers, minimisation of labour costs and reduction of tax revenues, contributing to precariousness of host States instead of eliminating it.[15] What is constructed in such endeavours is a vision of law and its institutions without regard to historical, local, cultural or social peculiarities - an 'easy universalism' that overlooks cultural specificity or historical cause.[16] It is a centralised, gloabalised policy that assumes its own unproblematic transplantation that does not, however, materialise in practice.[17]

However, a further layer of contentiousness is added if the IIL regime is seen as one of the defining sources of uniform principles of good governance and rule of law. Even if one could perhaps accept, for discussion sake, that uniformity of these is possible, saying that IIL is to be its source raises new problems. ISDS has been in many ways rightfully described as problematic regarding, *inter alia*, the underlying ideas about

[13] See, for example, A.Van Aaken, "International Investment Law between Commitment and Flexibility: A Contract Theory Analysis" (2009) 12 *J.Int'l Econ.L.* 507.
[14] See, for example, the summary at L.Earle, Z.Scott, *Assessing the Evidence of the Impact of Governance on Development Outcomes and Poverty Reduction: Issues Paper* (University of Birmingham 2010) 4-5.
[15] S.Humphreys, *Theatre of the Rule of Law: Transnational Legal Intervention in Theory and Practice* (CUP 2010), 219.
[16] Humphreys (n 14) 220-221. See also T.Carothers, *Aiding Democracy Abroad: The Learning Curve* (Carnegie Endowment for International Peace 1999).
[17] S.Humphreys (n 14) 223.

the rule of law displayed in the jurisprudence.[18]These deficiencies have been attributed to the insufficient understanding of ISDS as a public order control and accountability mechanism by arbitrators and counsel alike.[19]

While there has not been much empirical investigation into the effect of IIL on the quality of the rule of law, what does exist does not seem particularly positive in this regard. According to the analysis by Ginsburg, IIAs actually have a minor *negative* effect on the rule of law in developing States. This is primarily because, at least in some circumstances, the avoidance of domestic judicial institutions removes the incentive on their side to improve.[20] Bearing in mind the dearth of empirical research, Bonnitcha sets out reasonable tentative hypotheses regarding the relationship between the IIA provision interpretations and the improvement of domestic legal systems.[21] To summarize, interpretations that impose liability when a measure does not comply with the requirements of the rule of law but do not impose liability when a measure does meet the requirements of the rule of law are more likely to create an incentive structure that encourages respect for the rule of law in host States.[22]

While the hypotheses can be supported as reasonable, the question remains what are the requirements of the rule of law that need to be met? Which *law*? Who gets to prescribe these requirements? One potential answer is, again, that requirements are in the IIAs themselves. In that vein, some authors conclude that the pressure is put on the executive and legislature to conform administrative practice and legislative acts to IIA provisions.[23]

It is highly contentious to use these provisions or their interpretations as reliable guidelines from both practical and legitimacy viewpoints. They are certainly insufficient as exclusive benchmarks to look up to. Essentially, the quest for rule of law and good governance benchmarks is put in hands of investment arbitrators that can and often do utilize the vagueness of substantive standards to promote particular visions of host State behaviour. These then can become entrenched through the widespread (albeit not formally recognized) use of investment awards as 'precedents'. That is how, eventually, global

[18] S.W Schill, "The Sixth Path: Reforming Investment Law from Within" (2014) 11 *Transnational Dispute Managemen*t, 11 (hereinafter 'The Sixth Path').
[19] Schill 'Sixth Path' (n 17) 11.
[20] T.Ginsburg, "International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance" (2005) 25 *International Review of Law and Economics* 107, 113 and 121. Similar concerns regarding rule of law transplants regard the subversion of the domestic legislative process, and its replacement with the elite agreement at transnational level. See S.Humphreys (n 14) 224.
[21] J.Bonnitcha, "Outline of a normative framework for evaluating interpretations of investment treaty protections" in C.Brown, K.Miles (eds), *Evolution in International Investment Law and Arbitration* (CUP 2012).
[22] J.Bonnitcha (n 20) 457.
[23] A.Kulick, *Global Public Interest in International Investment Law* (CUP 2012) 126-127.

uniform good governance standards can in practice become visions of a relatively small and rather homogenous group. The system of ISDS as it exists now makes this both possible and legal.

This possibility comes under vehement attack from certain commentators. For Sornarajah, ensuring good governance through IIAs very much resembles old 'civilizing' arguments of colonial times, with the use of the doctrine of the rule of law as perhaps the oldest of the justifications advanced for the absolute protection of foreign investment.[24] The newer version is couched as 'stability of rules in business' but nevertheless is a perversion of the original concept of the rule of law that was meant to protect the powerless mass of humanity against tyrants.[25] David Schneiderman warns that while a rules-based investment system might be a laudable objective, the risk exists to privilege market over all else, thus perilously subduing the 'rule of law' to the interests of a privileged few.[26] The established transnational investment regimes thus 'pins' the States down, freezes politics and cabins alternative futures.[27] Similarly to Sornarajah, he is of the opinion that the revival of rule of law rhetoric in contemporary times signals the revival of classical legal thought, now in the guise of neoliberalism.[28]

While one can certainly disagree with harshness of such qualifications, or agree with them partially,[29] the underlying problem remains. Imposing a particular worldview as universal is bound to encounter resistance. And if the IIAs are recognized as problematic in that regard, it becomes necessary to look beyond them in ISDS. There does not seem to be much that can be said against the sovereign right of a State to choose a particular vision of good governance, one that theoretically and practically does not need to completely coincide with the vision that IIAs allegedly embody, and yet does not necessarily infringe fairness, equitableness, non-discrimination or non-arbitrariness. Simply put, there is nothing that makes 'one right way' necessary in this context. There is no need to make Xiaoping's proverbial cat exclusively black or exclusively white.

3. A normative turn

The principled allowance for every State to make its own choice comes clearly through a number of international instruments. Article 1

[24] M.Sornarajah, "The Case Against a Regime on International Investment Law" in L.E. Trakman and N.W. Ranieri (eds), *Regionalism in International Investment Law* (OUP 2013) 488-489.
[25] M.Sornarajah, 492.
[26] D.Schneiderman, "Investment Rules and the New Constitutionalism" (2000) 25 *Law & Social Inquiry* 521, 523.
[27] D.Schneiderman, 523.
[28] D.Schneiderman, 529.
[29] See S.Humphreys (n 14) 223.

of the Charter of Economic Rights and Duties of States unequivocally confirms the sovereign and inalienable right of every State to choose its own economic, political, social and cultural system.[30] The UN General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States contains the same right.[31] The general position is well summarized by Reisman:

A basic postulate of public international law is that every territorial community may organize itself as a State and, within certain basic limits prescribed by international law, organize its social and economic affairs in ways consistent with its own national values.[32]

Legislative expression of variations in the law of different states that result from this value differences are thus internationally lawful and entitled to respect.[33] It should be noted that this also resonates well with the view of many economists, notably Dani Rodrik, that each country should be able to build its own path into development.[34]

That being said, national idiosyncrasy regarding rule of law should not be overemphasized. Particular national vision of good governance cannot, of course, be seen as a *carte blanche* to impose unhindered *fiat* of the State under the guise of some national specificity. Such approach almost instinctively seems not only lopsided against foreign investors, but also equally damaging to the long-term interests of the host State.

After all, it is hardly debatable that basic precepts of rule of law and at least some precepts of what constitutes good governance can be agreed upon, even if in relatively broad strokes.[35] There simply does not exist 190 or more truly unique ways to provide good administration.[36]

However, the fact is that each of the existing national ways is couched in an intermingled web of legal, political and cultural traditions, international obligations, political and policy priorities and particular administrative capacities. An approach to assessing host State behaviour towards foreign investor that disregards this, and does not recognize that there should be a 'zone of legality' of State behaviour as opposed to 'one right way' arguably both endangers long-term sustainability of ISDS and, importantly, fails to utilize the full potential of the system in promoting

[30] G.A. Res. 3281 (XXIX), U.N. Doc. A/RES/3281 (1974).
[31] G.A. Res. 2625, U.N. Doc. A/8028 (1970).
[32] W M.Reisman, "The Regime for Lacunae in the ICSID Choice of Law Provision and the Question of Its Threshold" (2000) *15 ICSID Review* 362, 366.
[33] W M.Reisman, 367.
[34] D.Rodrik, "Growth Strategies" in P.Aghion, S.N.Durlauf (eds), *Handbook of Economic Growth* (Elsevier 2005).
[35] See, for example, the United Nations position at *http://www.un.org/en/globalissues/governance/,* November 7, 2015.
[36] For what is at least formally a shared view of the EU and a number of African states, see Articles 9(3) and 9(4) of the Cotonou Agreement.

and securing rule of law in host States. As Montt notes, '[...]BITs require from states the creation, implementation and proper management of functional domestic regulatory systems. They can therefore act as rule-of-law-enhancers, a desirable outcome.'[37] As a matter of fact, this rule of law enhancement is sometimes seen as the key legitimacy-inducing justification and virtue of the ISDS in general.[38]

There is thus a good reason to normatively expand the horizons of ISDS beyond the relatively narrow drive to contribute to FDI increase. The IIA preambles have consistently been used to identify the object and purpose of these agreements.[39] While they have been controversially used to focus solely on investor protection and investor-favourable interpretations,[40] there is definitely a scope for a more holistic view.

As recently argued by Kleinheisterkamp, the object and purpose of BITs cannot be simplistically reduced to enhanced protection of foreign investments only.[41] The *telos* of IIAs remains the increase of social welfare in general, with privileges granted to foreign investors remaining merely one of the tools in that regard and not becoming the end in itself.[42] The ultimate goal should remain the establishment of an essentially fair investment environment that recognizes the legitimate sphere of operation of the host State apart and beyond the rights of foreign investor.[43]

Goals of IIAs can and should be interpreted more broadly as not only allowing, but encouraging holistic and comprehensive promotion of the (national, as opposed to rather elusive 'transnational') rule of law and good governance in State parties. As both older[44] and more recent[45] studies tend to show, it is the rule of law that is actually the most appealing factor to foreign investors (considerably more than just concluding BITs) and it is submitted that the most reliable way to secure it is to promote it under

[37] Mont (n 10) 76.
[38] Schill 'Sixth Path' (n 17) 9.
[39] R.Dolzer, C. Schreuer, (n 1) 29.
[40] See, for example, SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6 (Decision on Objections to Jurisdiction of 29 September 2004)116 and Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11 (Award of 12 October 2005) 52. See also R.Dolzer, C. Schreuer, (n 1) 190-191.
[41] J.Kleinheisterkamp, "Investment Treaty Law and the Fear for Sovereignty: Transnational Challenges and Solutions"' (2015) 78 *MLR* 793, 807.
[42] J.Kleinheisterkamp (n 40) 811. This is also of broader relevance for stemming the general trend of deployment of the rule of law internationally which is characterized by privileging market solutions over other possible articulations of the public good. See S.Humphreys (n 14) 225.
[43] J.Kleinheisterkamp (n 40) 811; See also C.McLachlan, L.Shore, M.Weiniger, *International Investment Arbitration: Substantive Principles* (OUP 2007) 21.
[44] S.W Schill, "Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law" in S.W. Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 176.
[45] British Institute of International and Comparative Law/Hogan Lovells, *Risk and Return: Foreign Direct Investment and the Rule of Law* (BIICL 2015) 56.

the terms that the host State chose for itself and not through a process of top-down imposition.

Such a nationally oriented approach adds further legitimizing strength to capacious powers held by investment tribunals as it can directly benefit domestic citizens and business entities as well, and in particular avoid creation of foreign investment protection 'bubbles'. Investment tribunals have the powers and enforcement mechanisms that many other international legal regimes cannot match, and deal with business operations that have been described as 'the most important international transactions of the modern world'.[46] Tribunals thus have the power and leverage to make States take careful attention of their 'good governance signals' and enhance their rule of law accordingly. But wielding of this power should conform to a set of different principles than often encountered in current practice.

Bearing in mind exceptions that will be discussed further below, the argument submitted is that host States largely have in place legal frameworks that, if completely and thoroughly obeyed, would provide for the level of good governance and rule of law that no investor (or citizen, for that matter) would find nearly sufficient as to warrant international liability of the State. The 'law on the books', *if approached as a whole*, is generally not the problematic issue. Its application in practice can be, and relatively often is.

But this does not warrant imposition of new, particularistic law of protection of foreign investors that is often created in a process that is suspiciously similar to pulling rules out of thin air. Such processes run a high risk of breeding resentment and resistance in host State, squandering an excellent available mechanism for promotion of the rule of law and eventually damaging the long-term interests of foreign investors. States can and should be forced (where justified) to obey the rules that they chose for themselves, and to make their 'law in books' a properly applied law in practice. A proposed way to achieve this will be the topic of the remainder of this article.

4. The key guiding principles and a caveat

4.1. Reasonable fulfillment of obligations

Generally speaking, and subject to certain exceptions (primarily individual representations and assurances given to particular investors), the first guiding normative principle should be that IIA provisions and

[46] F.O.Vicuña, "Of Contracts and Treaties in the Global Market"(2004) 8 *Max Planck UNYB* 341, 348.

their interpretations should not demand more from a host State than to reasonably secure for foreign investors a legal and administrative surrounding that does not (in its content and operation) contravene its own national and international legal obligations *assessed in their entirety*. More succinctly, while one can extrapolate from IIAs a demand for a sufficiently proper functioning of the existing national legal system (within reasonable, adequately assessed bounds), there should be no demand for a perfect functioning of a hypothetical perfect national legal system. This is all the more relevant if the definition of this perfection is to be found in the risky and changing eye of the arbitral beholder.

The key right that foreign investors do have is the possibility to use the powerful mechanism of ISDS to make sure that State will uphold its own legal framework. This can be supplemented by a number of substantive international law rules and principles that can with certainty be established in this subject matter, and that are applicable through the provisions on applicable law specifically, and international character of ISDS and IIAs more broadly. But there is little to no justification for using the label of 'international law' as to fill IIA provisions with content that results in foreign investors essentially being granted the right to their own parallel legal system in a host State.

The norms found in IIAs, despite different efforts to establish their independent, homogenous substantive content, are still in essence devoid of clear prescriptions. They are, it is submitted, more aptly observed as a form of meta-norms, the gates through which it is possible to invoke a whole array of principles and rules appropriate to the particular legal situation at hand. Instituting a sufficiently rigorous manner for this invocation lies at the core of the proposed approach.

These efforts, it should be clear, are not completely novel. They draw upon existing contributions in literature aimed in this direction. Perhaps most prominently, Stephan Schill has called for a new methodology for 'normative grounding' of substantive standards of international law.[47] Decision-making of investment arbitrators should be adapted to respond to legitimacy debates and the expectations of all stakeholders. In the light of unlikely wholesale institutional reform and a large number of 'old generation' BITs this adaptation seems as a necessary complement, if not an outright alternative.[48] The proposals set out are further contribution in an attempt to concretize the content of this new 'normative grounding'.

Structuring the way in which broad IIA standards are used to fully assess the fulfillment of the rule of law in each case opens the path for enhancing the dialogue between investment tribunals themselves, as well as

[47] Schill 'Sixth Path' (n 17) 3.
[48] Schill 'Sixth Path' (n 17) 4.

tribunals and host States, on different and more productive grounds. Instead of insisting on and hoping for clarification of substantive norms, the dialogue is to focus on refining the method of securing and promoting the national rule of law as the true FDI attraction point. The goal can and should be the promotion of the rule of *law* and not the rule of *investment law*.

4.2. Deference

Secondly, and as a corollary, the investment tribunals should demonstrate the higher level of awareness about their position and realize the necessity of a considerable (but not limitless) deference towards the actions of a host State. This view draws heavily upon the (comparatively common) use of deference employed by courts and tribunals when engaging in judicial review of acts of other organs, in particular when a degree of discretion is involved. Especially in the issues of judicial review (or similar processes) beyond the state, the sensitivity to the question of what level within multilevel governance is most suitable for making a particular decision assumes critical importance.[49]

A good parallel in that regard can again be taken with the WTO dispute settlement. In face of considerable criticism that it should not become a mechanism for global entrenchment of a single form of state-market relations and allowed levels of regulatory interventions,[50] the WTO Appellate Body took on itself to create a new approach to reviewing domestic regulation. The aim was to avoid the intrusiveness of the neoliberal-era jurisprudence and leave the legitimate 'political' sphere intact in States.[51] While Andrew Lang expresses reasonable skepticism that preserving national 'autonomy' is possible when States are already heavily constrained by other forms of international economic law, the appealing aspects of a new approach remain worthy of attention. The modesty, cautiousness and working from a position of profound awareness of the limited present legitimacy of WTO among public constituencies should enjoy principled support.[52] As summarized by Howse and Nicolaidis, 'there needs to be prima facie recognition of outcomes from more democratically legitimate political and regulatory institutions'.[53]

The parallels should not end there. Other transnational regimes with unquestionably stronger institutional background (such as the EU or ECtHR) are often very reticent when it comes to imposing the

[49] A.von Staden, "The democratic legitimacy of judicial review beyond the state: Normative subsidiarity and judicial standards of review" (2012) 10 I-CON 1023, 1034.
[50] A.Lang, *World Trade Law after Neoliberalism: Reimagining the Global Economic Order* (OUP 2011) 343.
[51] A.Lang (n 49) 316.
[52] A.Lang (n 49) 344-46.
[53] As referenced in Montt (n 10) 347.

requirement of introducing new procedures into national law through judicial activism. The definite new trend in the CJEU jurisprudence of review is the adoption of so called 'process review' aimed at assessing if existing procedures were followed, as opposed to suggesting new ones.[54] Taking the example of ECtHR, relatively recent developments such as the 2012 Brighton declaration of all member states clearly reinforced the need for a margin of appreciation and the use of ECHR as a last resort after careful analysis of national laws and procedures.[55] Even for an institution with definite strong standing such as ICJ, it has been said that so much still 'depends almost entirely upon moral suasion-the exercise of even the most responsible and restrained judicial discretion requires a very delicate touch'.[56]

This is not to say that deferential approaches are uncritically accepted. As recently argued by Eirik Bjorge, in the context of recent ICJ jurisprudence, '[t]o international law [...] the slightly tired idea of the margin of appreciation is decidedly old hat. International law has been there, it has done that.'[57] Briefly, the main concern exhibited is that the granting of a margin of appreciation to one state may effectively give to that state a free rein vis-à-vis another state, thus undermining other State sovereignty.[58] However, while such an approach can be understood and supported in the context of inter-state relations, it does not bear direct relevance to the unique context of investor-State relations. It can only perhaps illustrate the level to which IIL adds to fragmentation of general international law and exhibits the needs for different reasoning.

As aptly formulated by Sureda:

Restraint would seem the wiser choice for *ad hoc* tribunals of limited jurisdiction. Avoidance of unnecessary pronouncements on contentious issues would help reduce the perception of a ruptured international investment legal regime and the resulting uncertainty. An international adjudicator deals with a dispute with the objective of contributing to the pacification and normalization of relations between the parties; its decision should not be counterproductive and exacerbate the differences.[59]

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[54] D.Chalmers, G. Davies, G.Monti, *European Union Law: Text and Materials* (3rd edn, CUP 2014) 922-925. See also K. Lenaerts, "The European Court of Justice and Process-Oriented Review" (2012) 31 Yearbook of European Law 3, 3-4 and, for example, the judgment in *Unibet* (C-432/05) as a good example to what lengths the Court is ready to go to accommodate existing national procedures as compliant with the Treaties.

[55] The Declaration is available at http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf.

[56] C.A. Ford, "Judicial Discretion in International Jurisprudence: Article 38(1)(C) and "General Principles of Law""(1994) 5 *Duke Journal of Comparative & International Law* 35, 79-80.

[57] E.Bjorge, "Been There, Done That: The Margin of Appreciation and International Law" (2015) 4 *CJICL* 181, 181.

[58] E.Bjorge (n 56) 190.

[59] A.R. Sureda, *Investment Treaty Arbitration: Judging under Uncertainty* (CUP 2012) 19.

And yet, empirical research tends to confirm that investment tribunals show little if any restraint when assessing host State behaviour.[60] The starting presumptions should not be that a strict or *de novo* review should be conducted in every case.[61] If nothing else, a degree of mutual trust and comity should be presumed to exist among the parties to the IIA. There are indications that this idea is slowly gaining ground in practice and doctrine, yet a uniform approach that would be desirable still seems far off. The guiding light in search for it should be deference and respect towards governments, or what has been called a 'jurisprudence of modesty'.[62]

4.3. The need for additional guidance

Thirdly, it should be recognized that assessing a complete legal framework and maintaining an attitude of deference cannot on provide all the answers. The rules and/or principles can conflict, or simply strive toward different goals. Relevant provisions can leave ample discretion to a national decision-maker, the exercise of which still needs to be examined by the tribunal with some boundaries in mind lest the *fiat* of the State be reinstated as supreme. Different values and priorities still might need to be ranked, even if deference is in place.

It has been correctly observed, in a different but equally relevant context, that '[t]o ban non-liquet [...] was to institutionalize the need for judicial discretion'. [63] Yet, the legal reasoning in situations of ample discretion needs to be supplemented by additional and innovative tools. Normatively, it is exactly in situations like this that the 'know it when I see it' approach to the existence of an IIA breach, sometimes even celebrated in awards,[64] is most harmful to the legitimacy of the ISDS decisions. Likewise, it is exactly then that an excellent opportunity is lost to persuasively identify, explain, and potentially suggest remedy to deficiencies in national good governance and the rule of law.

The proposal put forward is to utilize two distinct categories of such tools, which provide grounds for further research. One is the recourse to what shall be further called *corrective factors* - an instructive list of

[60] See in general G.Van Harten, *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration* (OUP 2013).

[61] See also for support and discussion Y.Shany, "Toward a General Margin of Appreciation Doctrine in International Law?" (2005) 16 *EJIL* 907, 909-910.

[62] See Montt (n 10) 22. See also N.Mahmood, "Democratizing Investment Laws: Ensuring 'Minimum Standards' for Host States"(2013) 14 *Journal of World Investment and Trade* 79, 103.

[63] C.A. Ford (n 55) 60.

[64] See B.Kingsbury and S.W Schill, "Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest - the Concept of Proportionality" in S.W. Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 77-78.

factors/questions that can contribute to reaching a normatively more acceptable outcome in situations where a decision can go either way.

The second is the recourse to *comparative standards* - examples of comparative law and policy in situations comparable to the one at hand. It is this recourse that can further ground the deliberations and decision of the tribunal in terms of normative acceptability and away from vagaries of subjectivity. It is also the power of potentially consistent comparative *opinio* on a particular issue that can effectively contribute to the enhancement of national law and policy, a process for which the investment award can serve as a conduit. Conversely, the analysis of the comparative landscape can indicate that a particular State behaviour is within the bounds of an established 'zone of legality', which can be a determining factor in evaluating the existence of a breach.

4.4. The crucial role of argumentative weight

Finally, what the application of these principles is meant to ultimately achieve is the existence of a strong *argumentative weight* of a particular investment tribunal award. Argumentative weight is aimed at enhancing the acceptability of the decision to both the investor and the host State, and thereby contributing to the elimination of the de-legitimizing image of ISDS as a biased, subjectivity-driven method of dispute resolution.

It is worth explaining the use of the term argumentative (or persuasive) *weight*. It is chosen over perhaps more common 'authority' as to signify the character of many investment awards which have considerable *legal* (especially bearing in mind the ICSID regime of enforcement and annulment), *political* (the possibility to cause inter-state friction) and *economic* weight (as they can sometimes amount to large parts of national budgets. The *argumentative* weight needs to serve as a counterweight of sorts - if the award is to enjoy such power, its reasoning and approach must be of such strength to truly justify it.

In the light of relative absence of legal obligations on the type, amount and persuasiveness of reasoning in investment awards (apart from a most general requirement for them to be reasoned),[65] a normative obligation should be put in place for extensive and rigorous reasoning and justification of adopted solutions within, again, the context of the complete legal framework. Such reasoning, arguably, plays an immensely important role in securing a truly acceptable outcome for both parties.

[65] Most importantly in ICSID Convention, Art. 48 (3), but other relevant arbitration rules have a similar (and similarly cursory) requirement. See also, for example, UNCITRAL Arbitration Rules 2010, Art. 34 (3), SCC Rules 2010, Art. 36 (1) and ICC Rules 2012, Art. 31 (2).

In a nutshell, it should elucidate to either or both of the parties what, where and when went wrong - for the losing host State what was its failing to respect its own complete legal framework and for the losing investor what were its own shortcomings in terms of, e.g., its lacking due diligence or failure to conform to national law. Concentrating again on the host State, this analysis can actually meaningfully contribute to improvement of its overall legal, business and administrative environment. Concrete engagement with a host State's legal framework and rigorous argumentation on what principles/rules were breached and why was this the case to an extent sufficient extent to engage responsibility can have true persuasive and instructive value for a particular State in avoiding such occurrences in the future.

Emphasis on argumentative weight is meant to break the often-observed circle of awards referring to previous awards up to a progenitor in which a rule was developed out of 'common sense' or simple arbitral creativity. The importance of persuasiveness and reasoning is well captured by Sureda in the context of IIAs and their standards. As he observes, '[t]he choice of the standard with the largest measure of discretion implies a proportionate effort to justify it, if the exercise of the discretion is to remain legitimate.'[66]Arbitrators as legal decision-makers must retain awareness of their role, the existence of their discretion and the need to formulate a purpose behind a legal norm created through judicial discretion.[67]Arguably, the duty of awareness and provision of justification cannot rest exclusively or even largely on reliance on quasi-precedents or essayistic reasoning adopted in numerous awards.

Regarding the weakness of persuasion that can come from IIL 'precedents' a clear and astute analysis is offered by Orakhelashvili.[68] According to him:

In a legal order whose rules are created by inter-state agreement, judicial law-making and precedential force of awards is conceptually impossible.[...] The reference to previous decisions confers to them the conclusive relevance and legitimacy that is not inferable from any source of international law and goes against the absence of precedent in the international legal system. Such reference in particular involves the argument that the relevant interpretative argument is correct because the particular judicial decision suggest it; it involves no substantive explanation as to the merits of that interpretative argument, nor addresses the need of ascertaining as to whether this is exactly what the parties have

[66] A.R. Sureda (n 58) 140.
[67] A. Barak, *Judicial Discretion* (Yale University Press 1989) 146-147. See also Ford (n 55) 53.
[68] A.Orakhelashvili, "Principles of Treaty Interpretation in the NAFTA Arbitral Award on Canadian Cattlemen" (2009) 26 *Journal of International Arbitration*, 159.

intended.[...] Consequently, the use in the award of previous decisions as an interpretative factor has no conceptual and legal justification [...]. [69]

Hope in the strength of reasoning in IIL awards is also often frustrated. Based on empirical research conducted by Tony Cole, tribunals generally adopt more norm-generating than persuasiveness oriented approach, with low citation rates and tribunals usually expressing and opinion without providing supporting citation to authoritative instruments.[70] The predominant citations remain reserved for ILC writings and a small number of academic texts (with Christoph Schreuer's ICSID Convention commentary as absolutely dominant).[71]

Even more worryingly, awards often include extended passages of analytic discussion, but this discussion is rarely supported by more than an occasional citation of a non-State-generated writing. It is common for multiple pages of discussion to be offered without the tribunal ever considering even a single argument advanced in an academic or institutional writing.[72] Cole's conclusion on the issue is sound and worthy of support - award must be drafted so to explain clearly and compellingly why the tribunal reached the conclusions that it did, showing the necessary research to reach an informed decision on the law and defensible reasons for adopting the understandings of the law upon which they have relied.[73]

The direct relevance of acceptability of decisions for long term legitimacy and stability is confirmed yet again by a recourse to comparable transnational regimes. An excellent insight regarding ECtHR is offered by Carozza.[74] For a long period the ECtHR had to seek its legitimacy through the acceptance of its judgments in internal legal orders of States.[75] Seeking to ground its decisions in the actual practice of Member States helped it establish and maintain political legitimacy and ensure the viability of the system, in face of risks that States could abandon the system in protest over Court's intrusion into national 'political morality'.[76] More recently, similar arguments have been raised regarding the need of the CJEU to show due deference to decisions of national courts in questions of identifying national identity in accordance with Art 4(2) of the Lisbon Treaty. According to von Bogdandy and Schill,

[69] A.Orakhelashvili (n 67) 168-169.
[70] T.Cole, *The Structure of Investment Arbitration* (Routledge 2013) 52.
[71] T.Cole (n 69) 52-53.
[72] T.Cole (n 69) 59.
[73] T.Cole (n 69) 61.
[74] P.G Carozza, "Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights" (1998) 73 *Notre Dame Law Review* 1217.
[75] P.G.Carozza (n 73) 1227-1228.
[76] P.G.Carozza (n 73) 1227-1228.

If the ECJ does not adopt the position expressed by the domestic constitutional court, it will itself need to *provide convincing reasons to the European public at large* why the duty to respect national identity, contrary to the position of a domestic constitutional court, does not allow the Member State in question to derogate from its obligation to implement EU law.[77]

If the ISDS is to achieve its full potential as a rule-of-law enhancer and long-term FDI magnet at the national level, the persuasiveness of awards needs to be oriented towards the parties in a particular dispute and not with one eye looking at the next case or appointment. Arguably, what needs to be found convincing for the next case is the rigour and thoroughness with which the tribunal applied the proposed normative approach, and not the invention of a new substantive rule under the aegis of IIA standards.

4.5. A caveat

It seems highly unlikely that a degree of uncertainty, the element of subjectivity or arbitrators' own imprint can be eliminated from ISDS,[78] as it can hardly be eliminated from other forms of dispute settlement. Even a relatively stringent following of the proposed approach in many instances may leave room for a degree of discretion that remains in place even if corrective factors and comparative insights are taken into account. So does the possibility of decisions that can be labeled as controversial or even as 'egregious failures'.[79] Dispute settlers as ideally objective, impassionate and omniscient *bouches de la loi* will remain an unattainable ideal.

But this does not prevent striving towards a model that brings in clarity of approach, rigorousness of analysis and tends to adequately limit (but not eliminate) the relevance of the human factor. The disproportionate importance of the tribunal composition is something that has been noted in the context of the ISDS. It is exactly the situation that decisions can be accurately estimated in advance based on the arbitrators, that is arguably pernicious to the ISDS foundations and that can and should be tackled.[80]

A new normative approach, or to be more exact its wider acceptance, can provide a common ground on which a level of arbitrator-

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[77] A.von Bogdandy, S.W. Schill, "Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty"(2011) 48 *CMLR* 1417, 1451 (emphasis added).

[78] See Schill 'Sixth Path' (n 17) 4-5 ('[...]no matter how precise applicable standards are drafted, the adjudicatory process as such necessarily involves a considerable degree of discretion. [...]Refining substantive treaty standards, in other words, will only go so far in reducing arbitrator discretion; it can never exclude it completely.')

[79] F.Ortino, "Legal Reasoning of International Investment Tribunals: A Typology of Egregious Failures" (2012) 3 *J. Int. Disp.Settlement* , 31.

[80] As Shultz aptly points out, any system heavily based on human factor fails as a rule of law. See T.Schultz, *Transnational Legality: Stateless Law and International Arbitration* (OUP 2014), 175.

neutral consistency can be built. The aim should always remain to avoid sacrificing the uniqueness of individual disputes on the altar of elusive substantive consistency of decisions.

5. Conclusion

Both in order to strengthen the legitimacy foundations of IIL and properly fulfill their legal mandate, ISDS tribunals should utilize their power and discretion to become a tool for promoting the rule of law and good governance at the national level. This should be done, to the extent possible, in accordance with the host State's own vision of these concepts as opposed to elusive and controversial 'transnational' benchmarks in this field.

But, equally crucially, fuller engagement with domestic law and domestic rule of law in the Fullerian sense is not only legally mandated but is also normatively warranted to provide a source of legitimization for the broad powers investment tribunals exercise. The sheer potential of ISDS awards to cripple national budgets with a single decision cannot be justified by recourse to (empirically largely unproven) contribution to attracting foreign direct investment flows. If anything, it is the very existence and cultivation of rule of law that has been empirically proven to be a magnet for attracting investment. Mere conclusion of BITs has yet to clearly show such effect.

Such a normative approach can provide a form of counter-weight to concerns arising out of the peculiar and arguably controversial way in which IIL became a form of a transnational governance mechanism, as well as from its increasing norm generation. It this way, it can also both draw on experiences from other existing and emerging transnational regimes, and become a source of inspiration for them.

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PREDLOG NOVOG NORMATIVNOG PRISTUPA INVESTICIONOJ ARBITRAŽI I NACIONALNOJ VLADAVINI PRAVA

Rezime

Transnacionalne vizije o tome kako bi vladavina prava i dobro upravljanje trebalo da izgledaju na nacionalnom nivou su proizvod poslednjih nekoliko decenija. U ovom radu se iznosi teza da je međunarodna investiciona arbitraža efektivno korišćena kao jedno od oruđa za promovisanje takvih vizija, uprkos njihovim dosadašnjim kontroverznim praktičnim rezultatima. Kako bi se iskoristili objektivno postojeći potencijali investicione arbitaže, u radu se predlaže normativni zaokret koji bi obuhvatao usredsređivanje na prmovisanje vladavine nacionalnog prava, a ne vladavine investicionog prava.

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

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Original scientific paper

UDK: 341.231.14
341.645(4)

IS IT PERMITTED TO STRIKE A BALANCE BETWEEN THE INTERESTS OF NATIONAL SECURITY OF A STATE AND THE RULE OF NON-REFOULEMENT IN THE CONTEXT OF ARTICLE 3 OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS?

Abstract

This study will explore the development and challenges facing the principle of non-return to torture and inhuman and degrading treatment (principle of non refoulement) in the current security sensitive climate. Special attention will be put on the attempts by states to overcome the Article 3 of the European Convention on Human Rights barriers to removal of terrorist suspects. This includes looking at the challenge to the absolute nature of prohibition of torture and inhuman and degrading treatment and punishment by some states' efforts to introduce a balancing test and the negotiation and use of diplomatic assurances.

Key words: *human rights, protection, prohibition of torture and inhuman and degrading treatment and punishment, European Court for Human Rights, principle of non refoulement, national security.*

1. Introduction

This study will explore the development and challenges facing the principle of non-return to torture and inhuman and degrading treatment in the current security sensitive climate. In particular, attention will be paid to the attempts by states to overcome the Article 3 of the European Convention on Human Rights ("ECHR") barriers to removal of terrorist suspects. This will include looking at the challenge to the absolute nature of Article 3 by some states' efforts to introduce a balancing test and the negotiation and use of diplomatic assurances.

States must engage in a difficult balancing act when faced with the terrorist threats and their obligations in human rights law as they must

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work within the confines of such law whilst also protecting their national security and public safety. However, this difficult balancing act between core rights is increasingly resulting in European states feeling constrained by human rights law and hence seeking to mould and develop that law in a way that accords with their domestic concerns. The extent to which this is permissible and justifiable within the human rights law regime and whether or not the regime can survive such challenges will be the focus of this study.

2. Article 3 ECHR

2.1. Absolute and Unqualified Nature of Article 3 and its Scope

Article 3 of the ECHR provides that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." Article 3 was modeled on Article 5 of the Universal Declaration of Human Rights ("UDHR"), except that the reference to 'cruel' treatment and punishment was omitted, due to its wide and subjective interpretation.[2] This brief but powerful provision has been gradually interpreted by the European Court of Human Rights ("Court" or "ECtHR"), enlarging the areas to which Article 3 should apply, but also broadening the contents of the prohibition. Its huge case law represents a treasure trove of interpretation and explanation of its terms.[3]

Only a limited number of human rights, such as right to life, prohibition of torture or slavery and forced labour are considered absolute and unlimited. Because the prohibition of torture is so fundamental, it permits no qualifications or exceptions whatsoever. Article 15 of the ECHR provides for some derogations in time of war or public emergency. However, prohibition of torture cannot be derogated under any circumstances.[4] Person's personal integrity and dignity is absolutely protected, even more than life. There is a consensus that prohibition of torture and ill-treatment today has status of a peremptory norm of international law, or *jus cogens*, as the highest form of customary international law.

The absolute nature of the prohibition is also clearly expressed in Article 2.2 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment ("CAT"): "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal

[2] O. Z. Bekerman, "Torture – The Absolute Prohibition of a Relative Term: Does Everyone Know What is in Room 101?", (2005) 53 *Am. J. Comp. L.* 743, 6

[3] A. Cassese, "Prohibition of Torture and Inhuman or Degrading Treatment or Punishment", in R. MacDonald et al. (eds.), *The European System for the Protection of Human Rights* (Kluwer Academic Publishers) (1993), 225-261, 228

[4] C. Ovey, R.C.A. White, *Jacobs and White, The European Convention on Human Rights* (Oxford: Oxford University Press) (4th ed., 2006), 74

political instability or any other public emergency, may be invoked as a justification of torture."[5]

The prohibition against torture and other forms of ill-treatment extends beyond forbidding torture by the state itself; it precludes states from deporting individuals, or allowing their extradition to states where they would face a real risk of torture and other ill-treatment upon removal.[6] To that extent, Article 3 has a certain extra-territorial application.[7] It cannot be irrelevant how removed individuals will be treated in the receiving state.[8]

2.2. Principle of *Non-refoulement* and its Extension (in the sense of non-removal to face certain treatment) to Article 3

The idea that an international human rights treaty should protect certain individuals from the consequences that they may face on being returned to their country of origin by a third state was enshrined in the 1951 Convention Relating to the Status of Refugees ("Refugee Convention") in respect of refugees and asylum seekers. This Convention codified principle of *non-refoulement* of those who met the definition. This principle, as set out in Article 33(1), provides that no refugee or asylum seeker should be returned to territories where he or she is likely to face persecution on account of race, religion, nationality, membership of a particular social group, or political opinion.

The prohibition against *refoulement* in international refugee law regime is not absolute and exceptions are allowed in narrow circumstances, even if a person has a well-founded fear of persecution on one of the five enumerated grounds. The *non-refoulement* obligation in Article 33(1) of the Refugee Convention is limited by Article 33(2) such that *refoulement* is permitted if there are reasonable grounds for regarding a refugee as a danger to the security of the country in which he or she is, or who, having been convicted by a final judgment of a particular serious crime, constitutes a danger to the community in that country. Also, this principle is not available irrespective of conduct. Individuals who commit certain crimes or acts can be excluded from the protection of the Refugee

[5] *See* e.g., HRC General Comment No. 20, Prohibition of torture or cruel, inhuman or degrading treatment or punishment (article 7), 10 March 1992

[6] E. Metcalfe, "Torture and the boundaries of English law", (2005) 2(2) *Justice Journal*, 79-89, 80

[7] P. Leach, *Taking a case to the European Court of Human Rights* (Oxford: Oxford University Press) (2nd ed., 2005)

[8] T. Vogler, "The scope of extradition in the light of the European Convention on Human Rights" in F. Matscher and H. Petzold (eds.), *Protecting Human Rights: The European Dimension, Studies in honour of Gerard J. Wiarda* (Koln: Heymanns) (1988), 663-671, 664

Convention under the provisions in Article 1F.[9]

Although Article 3 of the ECHR does not contain an explicit prohibition against *refoulement*, the Strasbourg bodies have interpreted Article 3 to encompass this prohibition, based on what it expressly identifies as a set of shared norms: the "common heritage of political traditions, ideals, freedom and the rule of law" of the states parties to the ECHR.[10] All types of removal, from formal processes of extradition, expulsion or deportation, as well as administrative schemes and 'extra-legal transfers' have to comply with this absolute prohibition.[11] The Strasbourg bodies' case law in this area is of special kind, because the issue in these cases is not a violation of the Convention that has taken place, but a hypothetical violation which would take place if the state concerned proceeded with removal of individuals. In addition, although the real violator would be the receiving state, the sending state is also in breach of the Convention.[12]

3. The Scope of Article 3 in Removal Cases

3.1. Development of Case Law

The starting point in considering the impact of Article 3 on removal cases is the case of **Soering v United Kingdom**,[13] a case in which the applicant resisted extradition to the United States ("US") to stand trial in Virginia on the ground, *inter alia*, that if convicted there of murder he might be sentenced to death and endure 'death row phenomenon', i.e. awaiting for the execution for extended periods of time, in special prison department for years, sometimes even for decades, because the death penalty is being postponed for various reasons including the exhaustion of various legal remedies. The Court has unanimously found that it is contrary to the prohibition in Article 3 to allow extradition of a person who is facing a real risk of subjection to inhuman or degrading treatment and punishment.

It is also notable that the Court referred to other international human rights conventions and in particular the CAT which, by Article 3, provides that no state party shall expel, return (*"refouler"*) or extradite a

[9] The Convention shall not be applicable to a person if: a) he has committed a crime against peace, a war crime, or a crime against humanity; b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; c) he has been guilty of acts contrary to the purposes of the United Nations.

[10] *Soering v United Kingdom*, Judgment of 7 July 1989, Series A, No. 161; (1989), 11 EHRR 439, para. 88

[11] L. Arbour, UN High Commissioner for Human Rights, Address at Chatham House and the British Institute of International and Comparative Law, 15 February 2006

[12] H. Danelius, "Protection Against Torture in Europe and the World", in R. MacDonald et al. (eds.), *op.cit., supra,* n. 2, 263-275, 270

[13] *Soering v United Kingdom*, Judgment of 7 July 1989, Series A, No. 161; (1989), 11 EHRR 439

person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture and that for the purposes of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including the existence in the state concerned of a consistent pattern of gross, flagrant and mass violations of human rights.

Article 3 ECHR is concerned with ill-treatment of a broader nature than simply torture as defined in CAT. Nonetheless, the ECtHR was seeking to achieve comparable protection under Article 3 ECHR in extradition cases, so it uses the language of CAT ('were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture') in formulating its prohibition against surrender to the possibility of torture.[14] It then extends it to a 'real risk' of inhuman treatment or degrading treatment. There can be no difference between 'real risk' and 'in danger'. They are two ways of expressing the same degree of risk.

Paragraph 89 of the Court's judgment referred to the well-known mantra of the 'fair balance' between the interests of the community and those of the individual. This was for the first time that the Court made a hint that there may be a balancing test in relation to removal cases. It referred to the need to have effective extradition arrangements, to avoid the creation of safe heavens and suggested that these factors would weigh in the determination of whether prospective ill-treatment was, or was not, inhuman or degrading for the purposes of this type of case. This reference to the fair balance appears to have been a particular manifestation of the general principle identified in paragraph 100 of the judgment, which must be applied when searching for the minimum threshold necessary to breach Article 3. Paragraph 100 of the judgment is important because it contains the well-established reference to the assessment of the minimum level of severity being relative. There, the Court expressed that ill-treatment, in order to fall within the scope of Article 3, must attain a minimum level of severity. The assessment of this minimum is relative, it depends on all the circumstances of the case, such as the nature and context of the treatment or punishment, the manner and method of its execution, its duration, physical or mental effects and, in some instances, the sex, age and state of health of the victim.[15]

The principle established in *Soering* was soon extended from extradition to removal cases. This is shown in cases of **Cruz Varas v**

[14] Para. 88 of the judgment
[15] Para. 100 of the judgment

Sweden[16] and **Vilvarajah v United Kingdom**.[17] Neither had a national security or other feature which called for any potential balancing exercise. Both cases applied the test established in *Soering*, but the Court concluded that ill-treatment must attain a minimum level of severity in order to fall within the scope of Article 3, and the evidence must show that there were substantial grounds for believing that the particular applicant was at real risk of being subjected to ill-treatment if returned to the State where the conflict was occurring. Accordingly, mere membership of a particular minority group is not in itself enough to fall into the scope of the *Soering* principle.[18]

It can be seen that there is no reference to the concept of a balance, as appeared in *Soering*. Instead, when discussing the minimum level of severity required to trigger an Article 3 complaint, the Court talked of the assessment being 'relative', as the Court had done in paragraph 100 in *Soering*. The same formulation appeared in the Commission decision in **Dehwari v Netherlands,**[19] paragraph 72, and in **Hilal v United Kingdom**[20], paragraph 47.

3.2. Absolute Right in Respect of Return - The Principle in Chahal v United Kingdom

Chahal v United Kingdom[21] was a case in which the Court had to confront an argument that the threat posed to national security by the applicant, Mr Chahal, should be balanced against the risks he would face on return to India. The Court noted that the British Government sought to rely upon the 'fair balance' observations in *Soering* and also that the Commission delegate (Nicholas Bratza) argued that while the Article 3 guarantees were absolute in nature, those passages in *Soering* should be taken to suggest that doubts about the likelihood of ill-treatment should be resolved in favour of the State, rather than the individual. The British Government argued that Article 3 prohibition was not absolute in cases of removal, and that the assessment should take into consideration other factors, such as the threat that the individual is posing to the domestic national security. There should be an implied limitation of the right. The danger which the individual posed to the domestic national security of the country in question should at least be allowed to be weighed in the

[16] *Cruz Varas and others v Sweden*, Judgment of 20 March 1991, Series A, No. 201; (1992) 14 EHRR 1
[17] *Vilvarajah and others v United Kingdom*, Judgment of 30 October 1991, Series A, No. 215; (1992) 14 EHRR 248
[18] A. Mowbray, *Cases and Materials on the European Convention on Human Rights* (Oxford: Oxford University Press) (2004), 123
[19] *Dehwari v Netherlands*, (App. 37014/97), Judgment of 27 April 2000; (2000) 29 EHRR CD 7
[20] *Hilal v United Kingdom*, (App. 45276/99), Judgment of 6 March 2001; (2001) 33 EHRR 31
[21] *Chahal v United Kingdom*, (App. 22414/93), Judgment of 15 November 1996; (1997) 23 EHRR 413

balance, similarly to the Refugee Convention.[22]

The Court then set out the core of its reasoning, stating that the prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases and that the state party should safeguard an individual facing a real risk of being subjected to treatment contrary to Article 3 if removed to another state. The Court was unequivocal in its conclusion that the activities of the individual concerned, despite of being undesirable or dangerous, were immaterial. Also, the Court rejected the argument of the United Kingdom ("UK") based on Article 32 and 33 of the Refugee Convention to the effect that it would be wrong to use Article 3 ECHR to emasculate provisions in the Refugee Convention since they deprive individuals seriously believed to be involved in terrorism of its protection. Therefore, the protection provided by Article 3 is wider than that provided by the Refugee Convention.[23]

However, the Court, sitting as a Grand Chamber, was far from unanimous. The finding of a violation of Article 3 was by a majority of 12 to 7. In addition to concluding that Mr Chahal had not substantiated the risk of Article 3 ill-treatment, the dissenting judges held that the state "may legitimately strike a fair balance between, on the one hand, the nature of the threat to its national security interests if the person concerned were to remain and, on the other, the extent of the potential risk of ill-treatment of that person in the State of destination. Where, on the evidence, there exists a substantial doubt as to the likelihood that ill-treatment in the latter state would indeed eventuate, the threat to national security may weigh heavily in the balance. Correspondingly, the greater the risk of ill-treatment, the less weight should be accorded to the security threat."[24]

The judgment in the *Chahal* case is of utmost importance. Firstly, the Court had reaffirmed the absolute and fundamental character of the prohibition of torture and rejected the argument advanced by the British Government that there should be an implied limitation to Article 3 allowing application of the balancing test.[25] Secondly, the judgment confirms that those facing expulsion must have access to a remedy which secures independent scrutiny of the alleged risk of ill-treatment upon return to the receiving country. Finally, it highlights the deficiencies of the Refugee Convention which provides protection only to persons recognised as refugees under the 1951 Refugee Convention and to asylum seekers who are awaiting a decision on their refugee status whereas the

[22] C. J. Harvey, "Expulsion, National Security and The European Convention", Case Comment, *E. L. Rev.* 1997, 22 (6), 626-633
[23] Paras. 80, 81 and 82 of the *Chahal* judgment.
[24] Joint Partly Dissenting Opinion of Judges Golcuklu, Matscher, Freeland, Baka, Gotchev, Bonnici and Levits
[25] C. J. Harvey, *loc. cit., supra*, n. 22

Strasbourg bodies' case law protects anyone, even illegal entrants, whatever their activities or personal conduct,[26] who risk ill-treatment if removed to another country.[27] While the rule of *non-refoulement* in Article 33 is viewed as a cornerstone of modern refugee law, it is seriously flawed because it permits limitations on national security grounds. This is why Article 3 of the ECHR, although not explicitly prohibiting *refoulement,* has often been referred to as a complementary "safety-net" mechanism of protection.[28]

Only a month after *Chahal*, in **Ahmed v Austria**,[29] the Court recited the conclusions of the majority in *Chahal* on the question whether the conduct of the applicant was a relevant factor as settled law. And so it has remained.

3.3. Conclusions on the Strasbourg Jurisprudence

The line of authority stretching from *Soering* establishes unequivocally that Article 3 of the ECHR may effectively prevent the expulsion of an alien. The apparent flicker of recognition in paragraph 89 of *Soering* that a general balancing exercise may be required in such cases was extinguished in *Chahal* by the majority of the Grand Chamber and has never been revived. Despite the conclusion in that case being by majority, it represents settled Strasbourg jurisprudence. That is important for two reasons. First, it is unimaginable that anything other than a decision of the Grand Chamber could upset the earlier conclusion that the personal behaviour of an applicant should be ignored when deciding whether Article 3 should prevent an expulsion. Secondly, the UK courts, whilst not bound by the ECtHR *strict sensu* will follow clear and constant jurisprudence from Strasbourg in the absence of some special circumstances.

3.4. The Canadian Approach

In **Suresh v Canada**,[30] the Supreme Court considered the position of a Sri Lankan national who argued that he faced the risk of torture if he were returned there from Canada. The context of the argument was the Canadian Charter of Rights and Freedoms. The Court reviewed the international law position, however, it concludes that "we leave open the

[26] H. Lambert, "Protection Against *Refoulement* from Europe: Human Rights Law Comes to the Rescue" (1999) 48 *Int'l & Comp. L. Q.* 515, 516

[27] H. Danelius, *op. cit., supra*, n. 11, 270

[28] E. Feller, Director of the Department of International Protection, UNHCR, Speech at the Second Colloquy on the European Convention on Human Rights and the Protection of Refugees, Asylum-Seekers and Displaced Persons, Strasbourg, 19-20 May 2000

[29] *Ahmed v Austria* (App. 25964/94), Judgment of 17 December 1996; (1997) 24 EHRR 278

[30] Manickavasagam Suresh v Minister of Citizenship and Immigration and the Attorney General of Canada (*Suresh v Canada*), 2002, SCC 1, File No. 27790, 11 January 2002

possibility that in an exceptional case such deportation might be justified either in the balancing approach under s. 7 or 1 of the Charter."[31]

Whilst the balancing approach survives (only) in Canada it springs from a consistent line of authority interpreting the material sections of the Charter as importing a balance. Therefore, the Court adopted a balancing approach, where the risk of torture must be balanced against the threat to national security of Canada, thereby leaving the door open to deportation in exceptional circumstances even when the deportee faces a high risk of torture.[32] The implication is that the higher the risk to national security of Canada, the more likely that deportation will be justifiable, even if it is likely that the acts of torture would be inflicted.[33] This decision may have important implications for the way convention refugees and asylum seekers are treated in Canada, but it also may have a far-reaching impact in other refugee-receiving countries in post 11 September world order.[34]

In May 2005, the Committee against Torture, in its concluding observations on the report of Canada, expressed its concern at 'the failure of the Supreme Court of Canada, in *Suresh v Minister of Citizenship and Immigration*, to recognise at the level of domestic law the absolute nature of the prohibition of Article 3 of the Convention, which is not subject to any exception whatsoever.'[35]

4. Introduction of Balancing Act

4.1. Intervention in the *Ramzy* Case

Following the terrorist attacks in New York and Washington on 11 September 2001, in Madrid on 11 March 2004, and in London on 7 July 2005, the British Government has called into question the absoluteness of the prohibition of torture. In October 2005, the Government made known that it would intervene, along with the Governments of Italy, Lithuania, Portugal and Slovakia, in the case of **Ramzy v The Netherlands**[36] before the ECtHR. This case concerned the proposed removal of the applicant, suspected of involvement with an Islamic extremist group in the Netherlands, from this country to Algeria. He claimed that he would be exposed to torture and ill-treatment in the hands of Algerian authorities.

In the *Ramzy* case, the British Government was seeking to reverse

[31] Para. 129 of the judgment
[32] O. C. Okafor and P. L. Okoronkwo, "Re-configuring Non-refoulement? The Suresh Decision, 'Security Relativism', and the International Human Rights Imperative" (2003) 15 *Int'l J. Refugee L.* 1, 46
[33] *Ibid.*
[34] *Ibid.*, 32
[35] CAT/C/CR/34/CAN, para. 4(a)
[36] *Ramzy v The Netherlands* (App. 25424/05)

or limit the principle established in *Chahal*, consistently followed by the European Court and other human rights bodies, such as the HRC and CAT Committee for almost the whole decade. The view of the Government was that, in light of fight against terrorism, the approach to national security has changed significantly since 1997 when the case was decided. Therefore, the *Chahal* case should be reopened and the position taken by the minority in the case upheld.[37] Therefore, a State, when deciding whether to remove an individual, should be able to struck a balance in those cases when the risk of being exposed to torture or other ill-treatment is quite low, and the risk of threat to national security of the state is quite high. Conversely, the greater the risk of ill-treatment, the less weight should be given to the threat to the national security. Where, on the evidence, there is a "substantial doubt" as to whether the person would indeed be subjected to torture or ill-treatment upon removal, the threat to security could be sufficient to justify removal.[38] Therefore, according to this view, the absolute prohibition on torture may in some circumstances be overruled by national security considerations. The absolute right becomes qualified.

This intervention emphasised that the Convention recognises the need for balance, which may in extraordinary times necessitate derogations from the practices in times of peace and tranquility and that the position of the British government is not to exclude those who face deportation of Article 3 protection but to protect the rights of those whose lives are threatened by a suspected terrorist.[39]

4.2. Protection of Victims of Terrorism

The very first principle in the Guidelines of the Council of Europe ("CoE") Committee of Ministers on human rights and the fight against terrorism is 'states' obligation to protect everyone against terrorism'. Therefore, states are under the obligation to take the measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts, especially the right to life. This positive obligation fully justifies states' fight against terrorism in accordance with the present Guidelines.[40]

Furthermore, consideration should be given to the rights of the victims of terrorism which enables states to claim that, when taking measures against

[37] Joint Partly Dissenting Opinion, *loc. cit., supra*, n. 23

[38] Nineteenth Report of Session 2005-06, The Joint Committee on Human Rights, *The UN Convention Against Torture (UNCAT),* Order 2006, para. 20

[39] Attorney General Lord Goldsmith, Speech to the Council of Bars and Law Societies in Europe, 19 November 2005

[40] Principle I, *Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism*, adopted by the Committee of Ministers on 11 July 2002 at the 804th meeting of the Ministers' Deputies

terrorists, they are acting to protect the human rights of these victims. Counter-terrorism policies and operations are then assessed, not by considering the impact on the human rights of people against the interest of preserving public order or fighting crime but in balancing the rights of terrorist suspects against the rights of the victims of terrorist action.[41]

4.3. Positive Obligations

The ECHR sees member states as solely responsible for the protection of human rights of those within their jurisdiction. The Court has distinguished a number of positive obligations on states. The right to life protected in Article 2 ECHR requires states not only to refrain from the intentional and unlawful taking of life, but also to take steps to safeguard the lives of those within its jurisdiction.[42] The Court has interpreted the Convention that there may be a positive obligation on the state to provide individuals with suitable protection against immediate threat to their lives from third parties, where the threat was known to the security forces and it would have been reasonable for positive steps to have been taken to protect an individual from the danger.[43] Such duty implies 'a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual',[44] if that is 'in a way which does not impose an impossible or disproportionate burden on the authorities'.[45] The leading authority, the case of *Osman*, suggests that the duty is a narrow one, leaving a wide margin of appreciation to the State about the deployment of its protective force.[46]

Therefore, the Government is bound by a positive obligation to protect its own citizens from violations of Article 2 and 3, therefore making the ECHR guarantees of practical value.[47]

In UK there is a problem of bringing suspected terrorists to trial where the evidence against them would be inadmissible because the Government did not want to reveal its source in the intelligence-gathering processes or because it was hearsay information.[48] Where such suspects were foreign nationals, it would have ordinarily been possible to deport

[41] C. Warbrick, "The European Response to Terrorism in an Age of Human Rights" (2004) 15 *EJIL* 5, 994
[42] *Osman v United Kingdom (App. 23452/94), Judgment of 28 October 1998; (1998) 29 EHRR 245*, para. 115 of the judgment
[43] A.Mowbray *The development of positive obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Hart) (2004), 15
[44] *Osman v United Kingdom, loc. cit., supra,* n. 41, para. 115 of the judgment
[45] *Ibid.*, para. 116 of the judgment
[46] *Ibid*, paras. 115-116
[47] A. Mowbray*, op. cit., supra*, n. 42, 17
[48] C. Warbrick, *loc. cit., supra*, n. 40, 1007

them to their national state. However, a barrier to their removal could arise in light of the principle established in *Chahal*. So the Government was faced with the prospect that non-UK nationals whom it suspected of being involved in activities seriously detrimental to the UK's national security, and who could harm its citizens, could not be prosecuted in the UK nor removed to another state, nor could they be detained under the existing law, either as criminal suspects or as persons awaiting deportation.[49] In order to deal with these cases, the legislation proposed a power of detention, which would require the submission of a notice of derogation to make it compatible with the ICCPR and the ECHR. The English Court has held that detention for deportation is unlawful.[50] This is the reason why the Government argued that not being allowed to remove these persons amounts to a breach of its positive obligations to protect its own citizens and that the balancing test should be introduced in Article 3 because there are different competing obligations under the ECHR. The use of such a test would allow the Government to balance the risk to people in the UK to the risk to the foreign national. Only if the foreign national would face a real risk if removed, while he poses only a limited risk to the domestic national security, the balance would be in favour of him remaining in the country.

4.4. National Security

Another problem is that the notion of 'national security' is a widely defined, subjective concept in the UK case law, where the government has the main role in the assessment of any threat.[51] Because of the excessive secrecy attached to national security, it is usually impossible for members of public to know whether the government is talking about direct or indirect threats to national security. The threat may not be a direct threat to the UK, but a threat to another countries' national security. If there is no direct threat to people in the UK, then do they need Article 2 right protecting by a policy of removing dangerous individuals pursuant to a balancing test? The key weakness in the above argument is that there may not be a direct risk to the UK citizens in order for deportation on national security grounds to be relied on.

In the **Secretary of State for the Home Department v Rehman**[52] the House of Lords delivered an important decision on the issue of national

[49] *Ibid.*, p. 1008
[50] *Ibid.*, p. 1008
[51] ILPA Submission to the Secretary of State on Exclusion or Deportation from the UK on Non-Conductive Grounds: Consultation Document, para. 4, at *C:\Documents and Settings\user\My Documents\Dissertation ILPA Laeken summit.htm*
[52] *Secretary of State for the Home Department v Rehman* [2001] UKHL 47; [2003] 1 A.C. 153 (HL)

security. Mr. Rehman, a Pakistani national, was subject to deportation on order of the Home Secretary on the ground that he was considered to be a danger to national security. He appealed to the Special Immigration Appeals Commission, established by Act of Parliament in 1997 with the aim to bring the UK law into conformity with the ECHR following the Court's judgment in the *Chahal* case, which upheld his appeal.[53]

The Commission had ruled that national security could be a valid ground for deportation only if it could be shown that the deportee had taken part in "violent activity which is targeted at the UK, its system of government and its people".[54] The government argued that this was too narrow to define national security as to include only threats targeted in the country. Government argued that national security could be threatened by action targeted at some other jurisdiction, even if no British subjects were directly involved, which was accepted by both the Court of Appeal and the House of Lords.[55]

Although judges in *Rehman* avoided to give a clear definition of the notion of national security, they did make clear that indirect threats to British national security, manifested in the promotion of terrorism abroad, were included in the definition.[56] They made it clear that the promotion of terrorism against any state, although not a direct threat to the UK, is capable of indirectly affecting the UK's national security, because of the mutual interdependence of the countries, especially in the light of joint combat against terrorism,[57] since security of one country is dependent upon the security of others,[58] and therefore any conduct which could have an adverse effect on the UK's relationship with a friendly state, could threaten the UK's national security.[59] Consequently, planning of terrorist acts abroad could be basis for the deportation.

4.5. An Alternative Solution

An alternative solution to removing alleged terrorist suspects to their countries of origin where they will face ill-treatment is their prosecution in the sending state.[60] However, there is a problem that the sending state cannot prosecute those suspects because the government, for

[53] A. Tomkins, "Defining and Delimiting National Security", Case Comment (2002) *L. Q. Rev.*, 1
[54] *Ibid*.
[55] *Ibid*.
[56] ILPA, *loc. cit., supra*, n. 50, para. 5
[57] *Secretary of State for the Home Department v Rehman*, *loc. cit., supra, n.* 51, Lord Slynn, para. 16
[58] *Ibid.*, Lord Slynn, para. 28
[59] ILPA, *loc. cit., supra*, n. 50, para. 5
[60] R. Bruin and K. Wouters, "Terrorism and the Non-derogability of Non-refoulement" (2003) 15 *Int'l J. Refugee L.* 5, p. 13

example, does not want to reveal its source in the intelligence-gathering processes or because it was hearsay information.[61] The solution may be in the establishment of special tribunals or commissions. Also, prosecution may require specific safety precautions, and the terror suspects would have to be kept in high security detentions pending trial. The obstacles towards prosecution of terror suspects in a sending state were apparent in the *Ramzy* case, where Mr Ramzy was acquitted by the court in the Netherlands because the intelligence reports relied on by the prosecution could not be used in evidence due to their secrecy, and the defence had not been given the chance to verify the information in the reports in an effective manner. In special courts or commissions, evidence obtained by intelligence would be accessible and trial would be possible.[62]

4.6. Conclusions on the Absolute Nature of Article 3

There is little prospect of persuading the Grand Chamber to revisit the principle established in its *Chahal* judgment. It does not seem to be realistic to persuade the Court that the fight against terrorism should lead to a weakening of human rights protection. The United Nations resolutions encouraging cooperation in the international fight against terrorism will not assist the argument, because they are all crafted in the environment of international human rights law.

5. The Use of Diplomatic Assurances

5.1. Defining Diplomatic Assurances

Although fully aware of their obligation not to return individuals to face mistreatment, states have increasingly been seeking to obtain diplomatic assurances to facilitate and legitimize the removal of non-nationals to third countries with dubious human rights records.[63] Diplomatic assurances are formal promises from the government of the receiving country that the removed person will not be subjected to illegal treatment upon removal. In the past, such assurances were used primarily as a migration control tool.[64] Today they serve as a way to

[61] C. Warbrick, *loc. cit., supra*, n. 40, 1007

[62] S. Isman, *Diplomatic Assurances-Safeguard against Torture or Undermining the Prohibition of Refoulement*? (2005) Master Thesis, University of Lund, 7, at <*http://www.jur.lu.se/Internet/Biblioteket/Examensarbeten.nsf/0/7ED944C141D6583DC1257114006C4721/$File/exam.pdf?OpenElement*>

[63] G. Noll, "Diplomatic Assurances and the Silence of Human Rights Law", 1, at <*http://www.jur.lu.se/Internet/forskare/Noll.nsf/43e828219552baccc12568cd0028a0b9/d328a8315ca45ac0c12571130069d164/$FILE/NollDiplomaticAssurances2006.pdf*>

[64] *Ibid*.

extradite or deport terror suspects who are considered to be a threat to national security, in the context of asylum law, but also in the context of extraordinary rendition.[65]

5.2. Differences between Assurances

Governments have been resorting to diplomatic assurances to provide for safeguards of individuals against death penalty, unfair trial, and the risk of torture and other forms of ill-treatment.

Diplomatic assurances in the context of death penalty should be distinguished from those in context of torture and ill-treatment because the former are not generally prohibited in international human rights law, they serve merely to acknowledge the different legal approaches of two states, as a tool that allows an exception to one state's laws and policies as an adjustment to the concerns of another state. The latter are absolutely prohibited in regional and international human rights instruments and customary international law as an unacceptable, criminal behaviour. Furthermore, whereas death penalty is openly practiced by those states under the authority of their national legislations, torture is always performed clandestinely, in secret, breaching both international and domestic law and represents an illegal process *per se*.[66] Finally, execution of death penalty is easier to monitor, whereas torture is always performed far from the eyes of public, making it unavailable to be put under the scrutiny.[67] Further, in the context of a fair trial these assurances are easier to monitor, and the harm in case of breach can be rectified.[68]

Diplomatic assurances may be formulated as individual or collective.[69] Individual assurances are sought for a specified individual or individuals. They were issued in the case of *Soering*, in order to enable the extradition of Mr Soering to the USA by guaranteeing that the death penalty will not to be imposed upon trial. Also, the Government of India issued individual assurance for *Chahal*, promising that this Sikh activist would not be subjected to torture and ill-treatment upon his removal to India.

Collective assurances are usually formulated as a specific clause in readmission agreements, usually referring to a group of persons. Following London underground attacks in July 2005, a Memorandum of Understanding was concluded with Jordan in order to seek the return of terror suspects, applying to any citizen of the receiving State specified

[65] S. Isman, *loc. cit., supra*, n. 61, 23
[66] Nineteenth Report of Session 2005-06, *loc. cit., supra*, n. 37, para. 121
[67] *Suresh v Canada*, para.124
[68] S. Isman, *loc. cit., supra*, n. 61, 6
[69] *Ibid*., p. 24

prior to removal. Two countries have undertaken to comply with their human rights obligations regarding any person returned to the receiving state under that arrangement.[70]

5.3. International Law and Jurisprudence Regulating Diplomatic Assurances

International law does not preclude states from concluding agreements with the receiving state to eliminate the risk of torture and ill-treatment. None of the treaties containing prohibition of torture neither envisions nor prohibits their use.[71]

In Europe, the only explicit provisions regulating the use of diplomatic assurances are in Article 11 of the European Convention on Extradition and in Article 4 of the Protocol amending the European Convention on the Suppression of Terrorism, as well as in Article 5 of the European Arrest Warrant, guaranteeing that the person to be surrendered will have an opportunity to apply for a retrial of the case in which the decision was rendered *in absentia*.[72]

The ECtHR has established in *Soering* the standard that diplomatic assurances are not an adequate safeguard for removal to states where torture is "endemic" or a "recalcitrant and enduring problem".[73] In *Chahal*, the ECtHR rejected the UK's reliance on assurances issued by the Government of India that Mr Chahal would not be subjected to torture or other forms of ill-treatment at the hands of Indian authorities as an inadequate guarantee of safety, but the Court's reasoning did not go so far as to rule out any reliance of diplomatic assurances, but rather in light of the particular situation prevailing in India at the time.[74] In *Mamatkulov* case, the Court did not elaborate the issue of the legality of the assurances, but in a joint dissenting opinion, three dissenters concluded that a diplomatic assurance, even if given in good faith, that an individual will not be subjected to ill-treatment, is not in itself a sufficient safeguard where there are doubts as to its effective implementation.[75] The strength of the assurance must in every case be assessed in light of the situation prevailing in that State at the material time.

[70] *Ibid.*, p. 26

[71] *Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions" ("Torture by Proxy")* The Committee on International Human Rights of the Association of the Bar of the City of New York and The Center for Human Rights and Global Justice, New York University School of Law (2004), 84

[72] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States

[73] *Soering v United Kingdom*, paras. 104-105

[74] *Chahal v United Kingdom*, paras. 37, 89, 104-105

[75] *Mamatkulov and Askarov v Turkey*, (App. 46827/99 and 46951/99), Judgment of 4 February 2005 14 BHRC 149 and (Grand Chamber) 4 February 2005, Joint Partly Dissenting Opinion of Judges Bratza, Bonello and Hedigan, para. 10

As it was concluded by the Joint Committee on Human Rights, the practice of resorting to diplomatic assurances is not completely ruled out, in principle such assurances are capable of satisfying that the state's obligation not to remove a person to a country where there is a real risk of torture and other forms of ill-treatment.[76] However, these practices should be under close scrutiny, and ultimately it would be one of the factors that the courts should weight when assessing the risk of torture in the context of individual circumstances of each particular case.[77] The courts should take into consideration the situation in the state to which the removal is proposed, circumstances regarding the person that is to be removed and the nature of the protection offered by assurances.[78]

The British Government concluded Memoranda of Understanding with a number of countries to enable returning of foreign nationals, Islamic fundamentalists, presently in the UK, to their countries of origin, where they would face torture upon return.[79] None of the memoranda contains explicit provision concerning torture, but that removed individuals will be "afforded adequate accommodation, nourishment, and medical treatment, and will be treated in a humane and proper manner, in accordance with internationally accepted standards."[80] Each of the memoranda provides for prompt and regular private visits from representatives of an independent body nominated jointly by both states. None of the memoranda provides for independent medical personnel, or whether the medical examination will take place in private without the presence of representatives of detaining authorities, or whether or to whom will submit reports. Monitoring body is not specified in none of the memoranda.

Human rights community generally has a negative attitude towards diplomatic assurances since their inherent weakness is that they are sought only from those states where it is assessed that removed persons would otherwise be likely to be subjected to ill-treatment, given the systematic and endemic use of torture in those states.[81] In addition, the governments that give assurances are not in a position to provide an effective guarantee against their use, because of the lack of control over regional or local authorities.[82] This was, for instance, the case in *Chahal*, where the Court found that assurances given by the Indian government would not be an adequate safeguard because there was insufficient state control of individual

[76] Nineteenth Report of Session 2005-06, *loc. cit., supra*, n. 37, para. 126
[77] *Ibid.*
[78] *Ibid.*, para. 127
[79] M. Nowak, "Challenges to the Absolute Nature of the Prohibition of Torture and Ill-Treatment!, (2005) 23 *N.Q.H.R.* 4, p. 676, 687
[80] Nineteenth Report of Session 2005-06, *loc. cit., supra*, n. 37, para. 105
[81] M. Nowak, *loc. cit., supra*, n. 78, 685
[82] Nineteenth Report of Session 2005-06, *loc. cit., supra*, n. 37, para. 113

officers on the ground to ensure the applicant's safety.[83]

Another argument advanced by human rights community against the use of diplomatic assurances is that the fact that torture is always practiced clandestinely and the perpetrators are generally expert at keeping abuses from being detected, and that the victims are often reluctant to talk about the suffering due to the fear of retaliation is a factor that disables functioning of the post-return monitoring mechanism. In addition, sending state usually has no motivation to determine that torture has actually been used because doing so would amount to an admission that it has breached its obligation not to torture.[84]

The former Special Rapporteur on torture has expressed that diplomatic assurances should not be ruled out a priori in all situations.[85] However, such assurances should contain unequivocal guarantee that the individual will not be subjected to torture or any other form of ill-treatment, and that a monitoring mechanism should be put into place.[86] In the case of *Suresh*, the Canadian Supreme Court offered guidelines for the assessment of the adequacy of diplomatic assurances. This assessment should be consisted of an evaluation of the human rights record of the government offering assurances, the government's record of complying with given assurances, and the capacity of the government to fulfill the assurances, in particular where there is doubt about the government's ability to control its security forces.[87]

5.4. Conclusions on Diplomatic Assurances

European and other states, seeking to remove terrorist suspects, accept that they cannot remove them in contravention of Article 3 so they are trying to eliminate the risk of torture by resorting to diplomatic assurances. Reliance on diplomatic assurances creates a loophole in the obligation of non-removal of individuals to face torture, and in the final analysis erodes the prohibition of torture and other ill-treatment.

Diplomatic assurances are often seen as 'a formal aberration', as a mere iteration of already existing human rights obligations, adding no further substance to it.[88] This brings a conflict of universal and multilateral human rights treaty law with the bilateral obligation that emanates from

[83] *Ibid*., para. 114
[84] Association for the Prevention of Torture *("APT")*, at <http://www.apt.ch/call_for_action.shtml>
[85] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mr T.van Boven, para. 30, at *<http://www.ohchr.org/english/bodies/chr/docs/ga59/324.doc>*
[86] *Ibid.,* para. 40
[87] *Suresh v Canada*, para. 125
[88] G. Noll, *loc. cit., supra*, n. 62, 2

the diplomatic assurance.[89]

States are already parties to binding multilateral treaties of international or regional character prohibiting torture, and other ill-treatment and *refoulement* to such practices.[90] Diplomatic assurances are ad hoc arrangements, agreed outside the currently existing treaty regime on torture, creating individual bilateral agreements among states merely undermining the universal treaty regime as they encourage other states to start concluding their own separate agreements outside the regime system thus weakening it. They thus create a two-class system amongst those removed, with the intent to provide special bilateral protection and monitoring for a selected few while ignoring many others in the same situation, thereby condoning torture and other forms of ill-treatment by acknowledging that these practices exist in the receiving State,[91] or producing "an island of legality, in a sea of illegality".[92] Negotiation of individual assurances implies weakening of the absolute prohibition against torture, suggesting that the fact that the assurance is needed in an individual case implies that a state practices torture systematically.[93]

Therefore, practice of diplomatic assurances may undermine the multilateralism, well-established universal legal prohibition not to remove anybody if there is serious risk of torture or ill-treatment in the receiving state. Thus, it represents a step backward in international human rights protection.[94] However, this is conspicuously not an obstacle for the state to continue concluding diplomatic assurances. If states continue to rely on this practice when removing individuals to countries with dubious human rights records, more and more states will copy the practice. In the final analysis, this may affect the content of international human rights law.

6. Conclusion

Acts of international terrorism pose a genuine threat to the safety and well being of all people, and the governments are entitled, indeed required, to meet the threat. However, circumventing international human rights legal instruments will not eliminate the threat. Provisions of international human rights law were enacted to meet the needs of governments in time of both peace and emergency. Although virtually every state continues ritualistically to condemn all torture, their attempts

[89] *Ibid.*
[90] L. Arbour, *loc. cit., supra*, n. 10
[91] *Ibid.*
[92] Interview of Julia Hall, Counsel and Senior Researcher, Europe and Central Asia Division, Human Rights Watch, June 14, 2004, Notes on file with the ABCNY International Human Rights Committee
[93] Nineteenth Report of Session 2005-06, *loc. cit., supra*, n. 37, para. 123
[94] *Ibid.,* para. 124

to circumvent the Article 3 obstacles show that the real conviction is not always behind the strong language. States seem to be more and more determined to eradicate all forms of terrorism. However, this brings the risk that they will try to sacrifice their commitments to ideals of fundamental justice. The prohibition of torture is an important and fundamental principle, but when circumstances become extreme, it is not the only value in play. Its absolute nature rejects the legitimacy of any form of balancing. The balancing act is difficult to apply in practice and it is subject to inherent biases that would eventually lead in more torture. Any form of condoning torture erodes this most basic principle of international law and human rights. Once allowed only under limited conditions, it cannot be kept under control. In other words, Pandora's Box is open.

Within the European human rights protection system, states have become accustomed to external legal scrutiny, which has enabled the Court to extend its jurisprudence in context of Article 3 both in depth and breadth. This is an indication that a step backwards from the high moral ground established by the Court in a security sensitive world is highly unlikely, at least viewed in the short term. However, the Court has repeatedly emphasised in its work that the Convention is a living instrument that must be interpreted in the light of present-day conditions. It remains to be seen whether the long and complex fight against terrorism will have a detrimental effect on the level of protection currently afforded under Article 3 in the longer term.

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DA LI JE DOZVOLJENO USPOSTAVLJANJE BALANSA IZMEĐU INTERESA NACIONALNE BEZBEDNOSTI JEDNE ZEMLJE I PRAVILA *NON-REFOULEMENT* U KONTEKSTU ODREDBE ČLANA 3 EVROPSKE KONVENCIJE ZA ZAŠTITU LJUDSKIH PRAVA I OSNOVNIH SLOBODA?

Rezime

Ovaj rad se bavi razvojem i izazovima kojima je izložen princip nevraćanja lica u zemlju u kojoj postoji opasnost da će biti izloženo mučenju ili nečovečnom ili ponižavajućem postupanju ili kažnjavanju (princip *non refoulement*) u trenutnoj bezbednosno senzitivnoj klimi. Posebna pažnja će biti posvećena skorašnjim i aktuelnim nastojanjima država da prevaziđu prepreku koju odredba člana 3. Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda postavlja u vezi sa uklanjanjem osumnjičenih terorista. Ovo uključuje i razmatranje izazova koji se postavljaju apsolutnoj prirodi zabrane mučenja i nečovečnog ili ponižavajućeg postupanja ili kažnjavanja u vidu nastojanja da se uvede test balansa tj. obaveze razmatranja svih relevantnih faktora prilikom primene ovog člana, kao i pregovaranje i upotrebu diplomatskih garancija.

Ključne reči: ljudska prava, zaštita, zabrana mučenja i nečovečnog ili ponižavajućeg postupanja ili kažnjavanja, Evropski sud za ljudska prava, princip *non refoulement*, nacionalna bezbednost.

Marina Matić Bošković, LLM[1] **Scientific review paper**

UDK: 340.134(478)

REFORM OF JUSTICE SECTOR IN MOLDOVA – HOW MUCH THEY CAN LEARN FROM SERBIAN EXPERIENCE

Abstract

The author strives to present situation in justice sector in Moldova and efforts of the authorities to implement Justice Sector Reform Strategy. The first wave of reforms related to the legislative amendments and institutional setup are mostly implemented. The Supreme Council of Magistracy is established and should absorb its competences related to the administration of justice system, budget independence, performance evaluation of judges, disciplinary procedure against judges, election and promotion, etc. However Moldova is facing with the challenge of application of newly established framework in practice. Additional challenge for Moldova presents lack of clear path toward European integration. Having that in mind, author referred to the experience from Serbia in the judicial reform process, challenges in establishment of balance between independence and accountability of judiciary, optimization of court network and efficiency of court system. Serbian experience could be useful for Moldova and assist decision makers in avoiding mistakes.

***Key words**: justice sector reform, judicial independence, judicial councils, court network, efficiency of justice system, Eastern Partnership.*

1. Introduction

Moldova is part of Eastern Partnership as a joint initiative of the EU and six eastern European partner countries (Armenia, Azerbaijan, Belarus, Georgia and Ukraine) that aims to bring these countries closer to the EU. On 27 June 2014, Moldova and the EU signed the Association Agreement, including a Deep and Comprehensive Free Trade Area.

The Association Agreements offer advanced integration with the EU and provide a blueprint for partner countries to develop good

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governance, improve justice and strengthen the rule of law, while offering possibilities for integration ranging from political association and enhanced cooperation in foreign and security policy to close economic integration through a deep and comprehensive free trade area.

Cooperation on justice, freedom and security is a key area of the Eastern Partnership. The reform of the judiciary is priority in a number of eastern partner countries and ongoing reforms are intended to ensure the independence and efficiency of the justice system and to contribute to preventing and combating corruption.

The Moldovan judiciary has been shaped by a difficult history, developing from a Soviet tradition in which the judiciary was subordinated to the executive. Following independence in 1991, and the adoption of a new Constitution in 1994, Moldova undertook a program of judicial reform, with a series of new laws governing the judiciary and the court system enacted between 1994 and 1996. During this period, Moldova joined the Council of Europe and became party to the European Convention on Human Rights,[2] as well as a number of the principal UN human rights treaties.[3]

Since 2009, two successive coalition governments have each made reform of the justice system one of their highest priorities. The Strategy, developed through consultative working group, was adopted by Parliament in November 2011 and entered into force in January 2012. An Action Plan for its implementation through to 2016 was adopted by the Parliament in February 2012 and published in June 2012. The Justice Sector Reform Strategy for 2012-2016 includes proposals for reform of the judiciary, prosecution service and police, as well as reform of the Criminal Procedure Code, and measures to ensure access to justice. An ambitious program of legislative reform of the judiciary has been undertaken in 2012.

[2] Moldova joined the Council of Europe on 13 July 1995 and ratified the European Convention on Human Rights on 12 September 1997.

[3] Moldova acceded to the International Covenant on Economic Social and Cultural Rights (in 1993); the International Covenant on Civil and Political Rights (in 1993); the International Convention on the Elimination of All Forms of Racial Discrimination (in 1993); the Convention on the Rights of the Child (in 1993); the Convention on the Elimination of All Forms of Discrimination against Women (in 1994); and the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (in 1995). More recently, Moldova has ratified the first and second Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2004); the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2007); ratified the first Optional Protocol to the ICCPR (2008) and acceded to the Second Optional Protocol to the ICCPR on the Abolition of the Death Penalty (2006); acceded to the Optional Protocol to the Convention on the Elimination of Discrimination Against Women (2006); ratified the Optional Protocol to the Convention Against Torture (2006) and the Convention on the Rights of Persons with Disabilities (2010); and signed the International Convention for the Protection of All Persons from Enforced Disappearances.

2. Justice sector in Moldova according to international reports

Although the constitution provides for an independent judiciary, judicial and law enforcement officials have a reputation for politicization and corruption, as assessed by several sources, including Freedom in the World 2014,[4] the Human Rights Report 2013[5] and Implementation of the European Neighbourhood Policy in the Republic of Moldova Progress in 2014[6]. This perception is supported by the Global Corruption Barometer 2013, which reports that more than three-quarters (80%) of surveyed citizens perceive the judiciary to be corrupt and one third (34%) reporting paying a bribe to judiciary, placing it among the most corrupt institutions included in the Moldova survey[7].

According to the Global Competitiveness Report 2014-2015[8], companies in Moldova do not perceive the legal framework for settling disputes or for challenging regulations to be sufficiently efficient. In addition, the Investment Climate Statement 2015[9] reports that the judiciary is considered have low level of efficiency and citizen trust.

According to the WB Doing Business 2015[10] the Moldova stands at 42 in the ranking of 189 economies on the ease of enforcing contracts. On average the enforcement of contract takes 567 days, costs 28.6% of the value of the claim and requires 31 procedures.

The Global Competitiveness Report 2014-2015[11]: Business executives give the independence of the judiciary from influences of members of government, citizens or company a score of 2 on a 7-point scale (1 being 'heavily influenced' and 7 'entirely independent').

When the performance of the justice sector is discussed as well as perception of corruption it is necessary to assess available resources within the system. According to the CEPEJ data from 2014[12] Moldova has the twice lower number of judges per 100.000 inhabitants than the European median.[13] The level of remuneration of judges in Moldova is below[14] the available European benchmarks (2.1 - 3.9 x the average

[4] *https://freedomhouse.org/report/freedom-world/2014/moldova,* November 11, 2015.
[5] *http://www.state.gov/j/drl/rls/hrrpt/2013humanrightsreport/index.htm?year=2013&dlid=220247%20-%20wrapper#wrapper,* November 10, 2015.
[6] *http://eeas.europa.eu/enp/pdf/2015/repulic-of-moldova-enp-report-2015_en.pdf*
[7] *http://www.transparency.org/gcb2013/country/?country=moldova,* November 9, 2015.
[8] *http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2014-15.pdf*
[9] *http://www.state.gov/documents/organization/241877.pdf*
[10] *http://www.doingbusiness.org/~/media/GIAWB/Doing%20Business/Documents/Profiles/Country/ALB.pdf*
[11] *http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2014-15.pdf*
[12] *http://www.coe.int/t/dghl/cooperation/cepej/cooperation/Eastern_partnership/ENG_Efficient%20Judicial%20Systems%202014%20FINAL.pdf*
[13] In Moldova there are 12.6 judges per 100.000 inhabitants in comparison to 21.3 as European median.
[14] It is from 1.5-2.2.

gross national salary). Moldova has between 1 and 2 courts per 100.000 inhabitants, what is in line with the European median.

3. Moldova Justice Sector Reform Strategy 2012-2016

The Justice Sector Reform Strategy is comprehensive document, covering not only justice sector but also anti-corruption, human rights and penitentiary system. Both the Strategy and Action Plan address justice sector reform in the context of seven key pillars:

I. The judiciary;
II. Criminal justice;
III. Access to justice and enforcement of courts' decisions;
IV. Integrity of the players in the justice system;
V. The role of justice in economic development;
VI. Observance of human rights in the field of justice; and
VII. Well-coordinated, managed, and responsible justice system.

Under these headings key elements relate to the inefficiency of the system to deliver impartial, accountable, and transparent justice for all, bound by inadequacies in procedural codes, the weakness of self-regulation or administration by the various professional bodies, and widespread corruption or system manipulation. The situation is compounded by politicisation of the system and reform impeded by competing objectives of the legislative, executive and judicial branches of Government, each of which controls a part of the system, and by the unstable political environment. The result is an astonishingly low level of trust in the justice system by the population, calculated recently at less than 2% for the judiciary[15].

Draft strategy was assessed by Council of Europe experts as „an ambitious plan to strengthen the rule of law and observance of human rights in Republic of Moldova".[16]

In May 2011 the President of Moldova set up a National Council for Law Enforcement Bodies Reform, which includes high level public officials from all law institutions of Moldova, and representatives of scientific and civil society. The Council is to supervise coordination between these various agencies to achieve consensus on the nature of the reforms and the manner and timetable of their implementation. Overall responsibility for implementation of the Strategy rests with the Ministry

[15] Institute for Public Policies of Moldova surveys, *http://www.justice.gov.md/file/proiectul_strategiei/SJSR_Gov_Version_En_DemSp_Translation_05%2009_.pdf*

[16] *http://www.coe.md/images/stories/Articles/JP-Dem/demsp_expertise_on_jsr_strategy_2011-2015_by_t.tomashvili_en.pdf*

of Justice, but actual reform will be dependent upon the actions by several institutions, many of which are not accountable to Government.

The Strategy envisaged introduction of optimization of judicial map, performance evaluation of judges, disciplinary responsibility for judges, criteria for election and promotion, transfer of administration of justice competences to the Superior Council of Magistracy, introduction of random allocation of cases, introduction of court managers and judges assistants, uniformity of court practice, improvement of reasoning, etc. It is also envisaged in the Strategy to establish an integrated case management system, compatible across the judicial process that will enable performance based monitoring and evaluation.

However after 3 years of implementation of the Strategy Moldova is facing with challenges to accomplish defined activities and goals.

3.1. Challenges

3.1.1. Independence vs. Accountability

Many of the legislative changes raised difficult issues of the challenges of upholding judicial independence while ensuring accountability. There was uncertainty among members of the judicial and legal communities as to how this complex package of legislation would work in practice, in part because regulations providing for the detail of several new procedures and standards had yet to be developed.

Performance evaluation of judges is a new system that was introduced in 2012 to help raise the professionalism of judges.

The judges' performance evaluation system was introduced by Law no. 154 of July 5, 2012 on the selection, performance evaluation and career of judges, in force from December 14, 2012. In 2013 the Superior Council of Magistracy (SCM) adopted the Regulation on the organization of activity of the Judges' Performance Evaluation Board6 and the Regulation on the criteria, indicators and procedure of evaluation of judges' performance. The performance evaluation of judges aims at determining the level of judges' professional knowledge and skills, as well as the ability to apply the required theoretical knowledge and skills in the practice of the profession of judge, at determining the weaknesses and strengths of judges' work, at stimulating the tendency to upgrade professional skills and at increasing the efficiency of judges' activity at the individual and court level.

The Judges' Performance Evaluation Board was established as a collegial body with sporadic activity, and not as a permanent body, or at least in such a way that some of its members would work on a permanent

basis. The membership of the Evaluation Board is not remunerated. The members of the Board who are civil society representatives receive for each attended meeting an allowance equivalent to one twentieth (1/20) of the salary of a judge of the Supreme Court of Justice. The members of the Evaluation Board who are judges remain in their position of judge and do not receive remuneration for their work in the Board, but only benefit from a reduction of the workload for the judge's position. Initially, it was decided that the judges, members of the Evaluation Board, would be assigned cases in the amount of 75% of the workload of an ordinary judge, and subsequently the workload was reduced to 50% to allow the members of the Evaluation Board who are judges to cope with the workload as members of the Board. The activity of the Evaluation Board is ensured by SCM Secretariat's assistance. During 2013 and the first half of 2014 the secretarial activity for the Evaluation Board was performed by one person.

The Board started its activity in March 2013. Pursuant to the law, it is to evaluate all judges within two years from the entry into force of Law no. 154 that is until December 14, 2014.

The heavy workload, especially caused by the overly narrow two-year term provided by Law no.154 for the first cycle of ordinary assessment of all judges, negatively influences the performance of the Evaluation Board itself. The analysis conducted by the OSCE/ODIHR in 2014 on the system of performance evaluation of judges concludes that the activity of the Board is to be improved as regards the justification of its decisions, which are usually briefly justified and do not explain the way the score and the rating for each judge is estimated, thus creating the impression of a subjective and sometimes inconsistent system. In particular, it is recommended to specify the reasons for granting a particular rating in every decision of the Board and indicate specific recommendations to improve the performance of the evaluated judge, which the latter could actually use. As long as the decisions of the Evaluation Board will contain no specific recommendations for the judge and no justification for the granted rating, there is a risk that the assessment process will turn into a formal mathematical exercise, with no value for the judges' activity. It is also advisable to improve the way interviews with evaluated judges are organized. So far, the interviews organized by the Board were quite brief, lasting between 15-30 minutes, more formal than focused on the essence of evaluation. The Evaluation Board should use the interview to clarify especially the qualitative indicators of assessment, as well as the quantitative indicators which are not sufficiently clear, for instance, the percentage of judgments quashed for reasons not imputable to judges. The OSCE analysis also concluded that the performance evaluation system is not clear enough for judges and recommended to the Evaluation Board

to develop guidelines on the application of the Regulation on the criteria, indicators and procedure of evaluation of judges' performance.

Following the 2012 legislative amendments, SCM has introduced clear criteria for the evaluation of the activity of judges and selection of candidates who wish to become judges or judges who want to be promoted. However, SCM does not feel obliged to follow the score awarded by the Selection Board. In several decisions, SCM did not indicate the reason or criteria that served as the basis for the appointment or promotion of judges, despite the fact that other candidates were proposed for appointment or promotion than candidates who accumulated the highest score. Such practice erodes the trust of judges in the SCM.

At the level of legal framework, the judges' performance evaluation system has also some shortcomings.[17] A new law on the disciplinary liability of judges was adopted recently[18]. The law includes a series of positive innovations, as well as some issues that may create difficulties in the implementation process. The European Commission for Democracy through Law (Venice Commission) provided the opinion on draft law.[19]

The law grants limited competences to Judicial Inspection, which could negatively affect the quality of checks as well. The procedure of examining a disciplinary case by the Disciplinary Board involves problems concerning impartiality of its members, due to the fact that the disciplinary case is presented, pursuant to the law, by one of the members of the Disciplinary Board, reporter on the case. In the current regulation it appears that the member of the Disciplinary Board is both prosecutor and judge, which is contrary to the right to a fair trial. The judges' access to justice on disciplinary cases may raise signs of incompatibility with Art. 6 of the ECHR.

Self-governance of the judiciary is essential in ensuring its independence. The Superior Council of Magistracy is the main governing

[17] We want to emphasize the matter from the law concerning the possibility for the SCM to initiate the dismissal process, as a result of judge's failing the performance evaluation. Dismissal of a judge should not be possible after the judge's first performance evaluation failure. The judge should be given at least one chance to improve his activity. The provision regarding the possibility of dismissal only after failing two extraordinary assessments, following the failure of an ordinary evaluation, is consistent with international standards on judge's independence, whereas the dismissal after the first failure is not. Thus, Art.23 of Law no.154 is to be amended, to bring it in line with international standards. Similar recommendations have been made by the OSCE/ODIHR. See the Opinion on Law of the Republic of Moldova on the selection, performance evaluation and career of judges, drafted by OSCE Office for Democratic Institutions and Human Rights (ODIHR), June 13, 2014, available at *http://www.osce.org/ro/odihr/120210?download=true,* November 6, 2015.

[18] Law no.178 of July 25, 2014 on the disciplinary liability of judges .

[19] The joint opinion of the Venice Commission and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) no. 755/2014 was published on March 24, 2014. On July 21, 2014 the Government adopted Decision no.610 on assuming the responsibility for the draft law on disciplinary liability of judges. The President promulgated the law on August 11, 2014. Law no. 178 of July 25, 2014 was published in the Official Gazette on August 15, 2014 and will enter into force on January 1, 2015.

body of the judiciary, with responsibility for judicial appointments, evaluation of judicial performance, promotions, inspection and disciplinary matters. The composition of the SCM was also changed by the 2012 amendments, to ensure a majority of judges in its membership.

Budgetary competences were divided among the Ministry of Justice, which coordinates the budgetary preparation process through its Department of Judicial Administration (DJA); the SCM, which examines, confirms and proposes a draft budget of the courts; and the Parliament. Article 22 of the Law on the Organisation of the Judiciary provides that financial resources for the courts must be approved by the Parliament, on the proposal of the SCM, and included in the state budget. Until 2013, draft budgets of district courts were elaborated by the chairpersons of courts and sent to the Department of Judicial Administration of the Ministry of Justice (DJA), the fact that dissatisfied SCM. Since 2014, DJA is no longer involved in the management of court budgets, and this task has been totally taken over by the SCM.

The SCM has until now been perceived as a relatively weak institution, partly because it has lacked staff and resources. However it is approved to significantly increase staff of the SCM Secretariat which should help to improve performances of the SCM.

3.1.2. Optimization of judicial network

The courts with a small number of judges are expensive to be maintained and do not provide an appropriate environment for judges' professional growth. Out of 44 courts from the Republic of Moldova, 29 courts have less than seven judges. The workload of judges from different courts varies several times. For example, in 2012, the annual number of cases per judge ranged between 24 and 1,145.[20]

The modification of the judicial map appears among the objectives of Moldovan Government since 2009. In 2011 the Parliament and the Government have taken several steps in this regard, but for now these measures were not been implemented.

The Legal Resources Centre from Moldova (LRCM) in collaboration with Supreme Council of Magistracy and the Ministry of Justice prepared the Study on optimization of the judicial map in the Republic Moldova. The study does not recommend to reduce or increase the judge's positions, but to reallocate the existing 504 positions. It recommends to rethink the judicial map by merging and abolishing several courts and courts of appeal, to enhance the quality of the delivery

[20] Legal Resource Centre from Moldova, Achievements and faults in reforming the justice sector of the Republic of Moldova: 2012 - July 2014 *http://crjm.org/en/category/publications/justitie/,* November 9, 2015.

of justice and administer efficiently public funds.

It seems that the Government has not decided yet how it will optimize the judicial map. However, in the summer of 2014 it has initiated the abolishment of a court of appeal. By Law no.177 of July 25, 2014, adopted following the assumption of responsibility by the Government, the Bender Court of Appeal was abolished and the localities placed under its jurisdiction were transferred into the jurisdiction of the Chisinau Court of Appeal. The information note to the draft law states as the main argument the low workload of this court in comparison to other courts of appeal. Even though formally the main reason invoked was the low workload, other reasons related to the judges from the Bender Court of Appeal were also discussed behind the scenes. Even if the abolishment of the Bender Court of Appeal is justified in terms of the workload, the law regarding its abolishment has a number of shortcomings. The law provides for the transfer of localities from the jurisdiction of the Bender Court of Appeal into the jurisdiction of the Chisinau Court of Appeal, but doesn't stipulate the transfer of judges and court staff of the abolished court to the Chisinau Court of Appeal, leaving the process to the discretion of the SCM. This omission may create the impression that, in fact, the abolishment of the Bender Court of Appeal aims at excluding the judges of this court from the system, and not at increasing the efficiency of the judicial map. Another problematic issue is related to the moment of termination of activity of the Bender Court of Appeal, which pursuant to the law is the date of publication of the law. The cessation of activity of a court is an extremely complex process which cannot be completed in an instant or a day without major problems. The sudden transfer of case files will require the re-examination of cases from the very beginning in the Chisinau Court of Appeal. On the other hand, it will introduce a state of uncertainty and chaos among the parties involved in these cases, inconveniences which can only reduce the popularity of the justice sector reform and the trust in judges and politicians.

3.1.3. Efficiency of court system

By Law no. 153 of July 5, 2012, the competences of the SCM were strengthened in terms of administration of the judicial system. One of major changes is that the SCM was granted the competence to determine the number of judges per court. Until 2013, the number of judges was established in the Annex to Law no. 514 of July 6, 1995 on judicial organization.

In order to execute Art.21 para.(4) of Law no. 514 on judicial organization, the SCM has developed and approved the Regulation on the

criteria for determining the number of judges in courts[21], among which are: the workload per judge for the last three years; the annual average workload per judge in the country; the complexity of cases; the number of judges per capita; the number of inhabitants per court district; the number of cases specific to the respective court and district etc. Thus, by its Decision no.307/12 of April 2, 2013, the SCM ruled to redistribute the number of judges.

With regard to judges' workload, the SCM adopted several decisions by which the Integrated Case Management System (ICMS) was changed and set a reduced workload for the number of cases registered in courts.[22]

A number of significant changes were introduced in the courts administration system by Law no. 153 on amending and supplementing certain legislative acts of July 5, 2012, in force from August 31, 2012.

The introduction of positions of judicial assistants and heads of court secretariats is useful for the judicial system, as it should help to relieve judges and to better administer courts. However, achieving these objectives in practice could be problematic due to the manner in which the positions of judicial assistant and head of court secretariat are regulated.

Efficiency is also increased through the revision of the appeal system and distribution of competences between courts along the horizontal axis, as well as simplify and unify the system of remedy. Until 2012, the appeal system in Moldova was quite complicated. It included many exceptions under which certain criminal and civil cases were examined on their merits by the courts of appeal. As a result, the work of the courts of appeal was stalled. According to amendments introduced in the Civil Procedure Code and Criminal Procedure Code in 2012, all cases are examined on their merits by the district courts. However, instead of narrowing the competence of the SCJ in civil cases, the 2012 legislative amendments have expanded its competence.

4. Relevant Serbian experience

Listed challenges of Moldova authorities in reforming of justice sector are similar to challenges that other countries in transition are facing with. Moreover, many of the problems of the judiciary that persist in Moldova are derived from the past and are similar to those in other

[21] The Regulation on the criteria for determining the number of judges in courts, approved by the SCM Decision no.175/7 of February 26, 2013. The Regulation on the criteria and procedure of transfer of judges in case of redistribution of judges' positions, reorganization or abolishment of courts was approved by the CSM Decision no. 644/31 of October 16, 2012.

[22] a) court presidents - 50% , b) court vice-presidents - 75%, c) presidents of courts and courts of appeal from municipalities of Chisinau and Balti - 25%, d) judges who are members of the Judges' Performance Evaluation Board to an extent of up to 50%, e) judges who are members of the Disciplinary Board, Board for Selection and Career of Judges and of the Evaluation Board -75%.

countries of the former Soviet Union or that countries in Eastern Europe had few decades ago.

Judicial independence is one of the utmost goals of the justice reform efforts in transitional countries.[23] As a solution for achieving judicial independence in Central and Eastern Europe institutional reforms were recommended and establishment of judicial council model. The Judicial council model was recognized as tool for enhancing judicial independence and protection of judiciary from political influence.

However the promoted model of court administration and guarantee of independence has not lived up to that promise and did not deliver the values it was expected to. Moreover, in number of countries, including Serbia, the situation has been made worse following the establishment of a judicial council. The new institution has slowed down reform activities in Serbia.

Members of judiciary have presumption that the more senior members of the profession have more experience and they should thus be better administrators. The institutional design of the judicial councils is such as to bring the more senior members of the judiciary to the fore; either directly, making some senior judges *ex lege* members of the JC (chief justice, presidents of other supreme court etc.), or indirectly, by election. However, in transitional societies there always is an inherent discrepancy between experience and values. Those with experience will typically adhere to the old system and other values.

Having that in mind Councils in Serbia implemented controversial re-election of all judges and prosecutors and violated all principles of fair trial. In parallel they were not able to plan and absorb other competences related to the administration of justice: assessment of the workload per court, equal distribution of case, legislative activities, preparation of judiciary for other reform activities like introduction of prosecutorial investigation, etc.

Judiciary in Moldova should learn from Serbian experience and include mechanism to ensure that the best representatives of profession should be selected to the Councils.

Related to the optimisation of judicial network Moldova authorities and judiciary should be careful in decision making process and should conduct proper assessment. Serbia significantly change its judicial network during last five years – in 2010 Serbia decrease number of basic courts from 138 to 34 which is considerable reduction; and in 2014

[23] The United Nations created the office of Special Rapporteur on the Independence of Judges and Lawyers in 1994. The Council of Europe has been pushing for judicial independence and judicial reform throughout the Continent. The European Union included judicial independence among its core requirements for the accession countries. Both organisations, the European Union as well as the Council of Europe, then jointly encouraged legal and judicial reforms in Central and Eastern Europe (hereinafter the CEE).

increase number of basic court from 24 to 66. Changing of court network requires a lot of preparation and work, moving of cases, allocation of judges and judicial staff, moving of furniture, equipment, network, etc. Both changes of network were justified with need for equal distribution of workload, better organization of work, better efficiency and decreasing of costs. However those goals were not achieved.

In relation to the efficiency of court system the Moldova authorities should not forget need for quality of justice system. As early as in 1994, the Council of Europe stressed the importance of the efficiency of judges. In fact, speeding up judicial procedures and reducing workloads became a one of indicators in the EU Accession Reports. Eventually, the quality of justice was added as a separate value.[24]

Serbia introduced several case management system and expectations were high. However, introduction of e-justices and sophisticated case management system influence on the decrease of burden in the judicial administration, though it will not increase disposition time, clearance rate, cost efficiency and productivity.

The most important lessons learned in Serbia is that any reform activity in justice sector would require strong leadership and ownership over the reform process by Ministry of Justice and Judiciary (Supreme Court of Cassation and High Judicial Council) as well as good coordination mechanism supported by expert body and provided funds for financing.

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REFORMA PRAVOSUĐA U MOLDAVIJI – KOLIKO MOGU NAUČITI IZ ISKUSTVA SRBIJE

Rezime

Autor nastoji da predstavi situaciju u pravosudnom sektoru u Moldaviji i napore institucija da sprovedu Strategiju reforme pravosuđa. Prva grupa mera koja se odnosi se na izmene zakona i uspostavljanje institucija u većem delu je sprovedena. Vrhovni savet sudstva je osnovan

[24] See ENCJ, Councils for the Judiciary Report 2010-2011, para. 1.7; CCJE, Opinion no.10 (2007), para. 10.

i trebalo bi da u punoj meri primenjuje nadležnosti koje se odnose na upravljanje pravosudnim sistemom, budžetsku nezavisnost, vrednovanje rada sudija, disciplinski postupak, izbor i napredovanje, itd. Međutim, Moldavija se suočava sa izazovima u primeni sprovdenih reformi. Dodatni izazov za Moldaviju predstavlja nedostatak jasne odluke da evropske integraciju predstavljaju put države. Imajući na umu navedene izazove, autor se osvrće na iskustva iz reforme pravosuđa u Srbiji, izazove u uspostavljanju ravnoteže između nezavisnosti i odgovornosti pravosuđa, racionalizacije sudske mreže i efikasnosti sudskog sistema. Iskustva Srbije mogu biti korisna Modlaviji i pomoći donosiocima odluka da ne ponove greške drugih država.

Ključne reči: reforma pravosuđa, nezavisnost pravosuđa, pravosudni saveti, sudska mreža, efiksanost pravosudnog sistema, Istočno partnerstvo.

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Scientific review paper

UDK: 347.78(4-672EU)

TECHNOLOGY IN THE SERVICE OF LAW – EXAMPLE OF TECHNOLOGICAL PROTECTION MEASURES IN THE EUROPEAN UNION'S COPYRIGHT LAW

Abstract

In the information society, examples of copyright violation by the unlawful use of technology are so numerous, that in some European countries piracy issues and the concept of free software have become an integral part of official programs of certain political parties taking part in elections. The objective of this paper is just the opposite: to demonstrate that technology can also be in the service of law, especially since the development of the European Union law greatly accentuated – mainly because of the freedoms of movement in the Internal Market – the need for a European response to the challenges of copyright protection. The most important act the EU adopted in this field is the Directive 2001/29/EC of the European Parliament and of the Council on the harmonization of certain aspects of copyright and related rights in the information society, while the national legislation in the Member States, as well as the legal doctrine, often have divergent approaches. Based on a jurisprudential analysis and focused literature review, this paper examines the strengths and weaknesses of the EU law harmonization related to the technological protection measures.

Keywords: *copyright law, technological protection measures, information society, law harmonization, European Union*

1. Introduction

Of all the international conventions adopted with the objective to ensure the protection of various "property rights" in the broadest sense, the one concerning copyright exists already for a remarkably long time.[2] Accordingly, the *terminus technicus* "copyright and neighboring rights"

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[2] The Berne Convention for the Protection of Literary and Artistic Works was signed on September 9, 1886.

was introduced to designate prerogatives originally named "author's rights in literary and artistic works" (copyright) and certain other rights that might arise due to the existence of these works (neighboring rights). However, there is no doubt that the Berne Convention for the Protection of Literary and Artistic Works (1886) was a remarkable success, so much so that its dispositions were reiterated in the Universal Declaration of Human Rights,[3] the fact that proves the undeniable importance attributed to copyright: its protection has become a part of the corpus of fundamental human rights. Furthermore, the UNESCO (by its Universal Copyright Convention) as well as the World Trade Organization (through the Agreement on Trade-Related Aspects of Intellectual Property Rights) have contributed significantly to the internationalization of copyright protection. In 1996, under the auspices of the World Intellectual Property Organization (WIPO), an UN agency specialized in the protection and promotion of intellectual property, two important treaties were adopted: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, both recognizing the importance and the relevance of the application of copyright in the digital environment, even before the substantial development of the Internet. The category of "literary and artistic works" evoked by the above-mentioned treaties also includes music, movies and computer programs, thus extending their scope and making these international conventions the reference starting point for the future expansion of a copyright protection system adapted to the digital environment. Consequently, headroom for further development of digital rights management (DRM) measures was unquestionably guaranteed of the international level. Nevertheless, numerous legal and technological obstacles remained untackled, leaving marge for different states and organizations to consider the transnational nature of the problem and, eventually, to adopt some harmonized legal solutions.

Numerous international legal instruments in the field of copyright protection have met various political or purely theoretical obstacles, reflecting divergent interests that were difficult to reconcile. One of the examples to illustrate these divergences is the fact that the United States – the country with a tradition of copyright protection[4] that is, in many of its points, different from what is known as the "continental system" – acceded

[3] Art. 27, para. 2 of the Universal Declaration of Human Rights states that "everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author".

[4] Concerning the differences between the two systems of the legal protection of copyright and their impact on the effectiveness of DRM measures, see E. Dirrig, "Limites tenant à la nature des directives et cohérence de l'ordre juridique communautaire: un nœud gordien?", commentaire de l'arrêt de la CJCE du 3 mars 2005 Procédure pénale c/ Silvio Berlusconi (aff. jt. C-387/02, C-391/02, C-403/02), *Revue trimestrielle de droit européen* 4-2005, 921-957.

to the Berne Convention not earlier than in 1989, more than a century after its signature. Furthermore, the technical development of methods enabling the multiplication of data carriers containing material under copyright presented a growing challenge to the legitimate intention of offering the authors a protection of much broader scope. Simultaneously, the unprecedented expansion of the means of online communication[5] of material under copyright which, by definition, knows no state borders, has necessarily imposed a radically international perspective to technical and legal efforts to assure the protection of human creativity.[6] In other words, the digital rights protection system must be developed as rapidly as the technology enabling the communication of the material protected by such rights. Metaphorically, in this case technology is both the pyromaniac and the firefighter and, consequently, technology should be used to strengthen what was, at least potentially, weakened by it. The challenge is significant, because national legal systems have often been unable to offer solutions for such a radically international situation. Given the specificity of the European Union (EU) as a *sui generis* international organization, this paper intends to analyze its legal response to the challenge of copyright protection in the context of digital technologies, through the critical examination of the notion of technological measures for copyright protection (Chapter 2) and of the impact of the European harmonization in this field (Chapter 3). Therefore, the focus will be on the Directive 2001/29/EC of the European Parliament and of the Council on the harmonization of certain aspects of copyright and related rights in the information society.[7] It is worth mentioning that the European Commission also adopted a Communication on Copyright in the Knowledge Economy;[8] however, its scope, importance and legally binding character largely prevail in favor of the dedication to the Directive.

2. Technological measures and copyright protection: the search for a common concept

Technological measures that can be applied to protect legitimately acquired copyright or a related right are so numerous that each definition that claims to be exhaustive is doomed to failure. On the other hand, a general binary typology of digital rights management measures can be

[5] See also R. Gavison, *Privacy and the Limits of Law*, Harvard University Press, 1999, 327.
[6] See also M. Vivant, A. Maffre-Baugé, *Internet et propriété intellectuelle: le droit, l'information et les réseaux*, Institut français des relations internationales, Paris 2002, 51-58.
[7] *Official Journal of the European Communities* of 22 June 2001, L 167, 10-19, hereinafter referred to as Directive.
[8] Communication of the Commission of 19 October 2009, COM (2009) 532 final, *http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/20091019_532_en.pdf,* 21.06.2015.

set up, given that "typically, a DRM system protects copyright by either encrypting information so that only authorized users can access it or marking the information with a digital watermark (or similar method) in a way that the content cannot be freely distributed, copied, shifted, printed, modified etc."[9] Moreover, the situation is further complicated by the fact that the real issue is the "legal protection of technological protection measures"[10], a circumstance that made commentators analyze the scope and the meaning of the term "legal"[11] leaving little room for the question of a greater importance: what is the purpose of this legal protection? Without being exceptionally meticulous, one can spot two "layers" of protection: the works or other subject-matter are protected by technical measures which, themselves, benefit from a legal protection against circumvention. This seemingly tautological concept has its legal and practical reasons, given that between the two legal entities (works as object of the protection, on the one hand, and legal protection against circumvention, on the other), there is an entity of technological nature. The functioning of the whole – which is, logically, quite acceptable – largely depends on the technological measures, the central element that serves as an intermediary. In other words, the success of the legal instruments intended to assure the copyright protection in the information society crucially depends on the good understanding and proper application of the technological component and therefore its proper insertion into a complex. Moreover, the nature of legal protection is closely linked to the concrete type of technological measure.

Some technological protection measures have been developed and designed to fully meet the needs of associating a work to an author, others are related to private copying, remuneration schemes or, more generally, terms of use and safe digital transmission. In the same vein, some of those measures are specifically designed to respond to digital network threats against the circumvention of works, while others can be applied independently of the way of distribution, in order to restrict acts not authorized by the rightholders of any copyright. In any case, the development of technological measures is very rapid and highly unpredictable, given that "digital network technology expedites the reproduction, distribution

[9] G. Mazziotti, *EU Digital Copyright Law and the End-User*, Springer-Verlag, Berlin Heidelberg 2008, 315.
[10] M. Herubel, F. Tarrier, *Mesures techniques de protection des œuvres et DRMS –première partie: un état des lieux, janvier 2003,* Rapport n° 2003-02-(I) du Ministère français de culture et de communication, étude établie par Philippe Chantepie, Chargé de mission à l'Inspection Générale de l'Administration des Affaires Culturelles, 47.
[11] One of the important questions is whether it is sufficient to confine to the criminal measures. It seems that the negative response, prompted by the position of the Committee on Crime in Cyberspace of the Council of Europe (CCCCoE), has not any chance of winning; see the CCCCoE's Explanatory Report to the Convention on Cybercrime *http://conventions.coe.int/Treaty/EN/Reports/Html/185.htm*, 22.06.2015.

and making available of works by public users".[12] Consequently, the legal protection of technological measures that "applies without prejudice to public policy"[13] ought to be defined in the broadest possible way, simply because the speed of technological development exceeds the relatively slow legislative process in the EU. The definition given by Article 6, paragraph 3 of the Directive is, therefore, incomplete and general, but also widely applicable and reasonably adaptable:

"*For the purposes of this Directive, the expression 'technological measures' means any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorized by the rightholder of any copyright or any right related to copyright as provided for by law.*"

This definition intends to introduce a common harmonized EU approach aiming to respond to newly emerging forms of exploitation of works. In order to better seize its strengths and weaknesses, more attention should be paid to the following two elements: the legal nature of the enumeration of tools considered as technological measures and the compatibility of this definition with both concepts of interoperability and ideology of free software.

The European legislator, most probably in order to facilitate the reception of the definition of technological measures in the Member States' national legal systems, has elegantly avoided the trap of an eventual *numerous clausus* definition, given that those measures can consist of *"any technology, device or component"* (Article 6, paragraph 3). On the other hand, one of the draft versions of the French law transposing the Directive,[14] by the commendable desire of precision, introduced a confusing list of tools that could have included *"any technology, product, system, device, component, service or method"*.[15] Even if this enumeration is only indicative, it does not contribute to the

[12] J.J. Hua, *Toward a More Balanced Approach: Rethinking and Readjusting Copyright Systems in the Digital Network Era*, Springer-Verlag, Berlin Heidelberg 2014, 61.

[13] Recital 51 of the Directive.

[14] According to Art. 288, para. 3 of the Treaty on the Functioning of the European Union, "a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods". Therefore, in this case the French legislator was entitled to give a more detailed definition of technological measure, as far the result defined by the Directive is fully taken into consideration.

[15] T. Maillard, *La réception des mesures techniques de protection des œuvres en droit français: Commentaire du projet de loi relatif au droit d'auteur et aux droits voisins dans la société de l'information*, Légipresse 2004, n°208, II, 8-15.

effectiveness of the technological measures, simply because the crucial part of the definition given by the Directive is related to the purpose of those measures *"designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorized by the rightholder of any copyright or any right related to copyright"*. Therefore, as long as a measure aims to prevent the circumvention, it can legitimately be considered as a technological measure under the EU law, regardless of the level of precision of the national legislator concerning the indicative list of measures.

In the process of the transposition of the Directive, in some Member States the proponents of free software have suggested certain adjustments which might be considered as legitimate concerning the system interoperability requirements; namely, the proposition included the following provision: *"a protocol, format, encryption or scrambling method, cannot be, as such, considered as a technical measure within the meaning of this law"*.[16] However, this provision, due to its limitative character and technical inventory of measures, can be abused in order to legitimize the eventual circumventions; moreover, its technicality makes is less adaptable to the rapid development of the digital environment. Finally, this proposition illustrates well the fact that every exhaustive – or even excessively detailed – definition of tools/methods considered (or not) as a technological measure may run against the legitimate interests of the copyright holders, but also bring some significant differences in intellectual property protection in different Member States and, consequently, hinder the free movement of goods or services within the EU.

3. Copyright protection measures and the information society: the limitations of a harmonized response

The unprecedentedly rapid expansion of information and communication technologies (ICT) over the last two decades has deeply influenced the very concept of intellectual property protection, and, more specifically, copyright protection, given that the "technological development has multiplied and diversified the vectors for creation, production and exploitation"[17] of copyright works. In this context, the emerging "information society" is a new, complex reality, and it was necessary to adapt the legislative solutions on the national, the European and the international level to the challenges it poses. Within the European Union, it was the Lisbon European Council held in March 2000 that officially started the process of transition to a "competitive, dynamic and knowledge-based

[16] *Ibid.*
[17] Recital 5 of the Directive.

economy".[18] At the same time, longstanding legal concepts, especially that of the property, had to undergo a profound change, similar to the transformation that occurred when – starting from the Paris Convention for the Protection of Industrial Property – non-material, intangible rights were recognized as property-rights. From the sociological and legal point of view, the possibility of giving substantially the same legal protection to material and intangible forms of property was a small revolution[19] in itself and an enormous breakthrough on the international level, especially for the late 19th century, when both the Berne[20] and the Paris Conventions were adopted. It seems, however, that the revolution happening these days is even more profound, with the current development of digital network technology which has imposed a new set of legal, economic, sociological, political and even philosophical questions.

The radical simplification of the forms of distribution of pirated or counterfeited works somewhat compromised the sacrosanct act of intellectual creation, "giving the impression that the value of author's rights had disappeared in the digital environment".[21] Moreover, the phenomenon of the information society accentuated the confrontation of the competing interests of producers and users, a conflict that often takes the form of a clash between two irreconcilable socio-political conceptions. This confrontation can be illustrated by the juxtaposition of recitals 10 and 14 of the Directive:

> *"If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work […] Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment."*

However, at the same time it is necessary to

> *"promote learning and culture by protecting works and other subject-matter while permitting exceptions or limitations in the public interest for the purpose of education and teaching."*

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[18] Lisbon European Council Presidency Conclusions, points 8-11, *http://www.europarl.europa.eu/summits/lis1_en.htm,* 29.06.2015.

[19] The recital 9 *in fine* of the Directive corroborates this assessment, claiming that the "intellectual property has therefore been recognized as an integral part of property".

[20] See also the introduction.

[21] J-B. Soufron, *Les limites de la protection technique des données numériques – la directive 2001/29/CE du Parlement Européen et du Conseil du 22 mai 2001 sur l'harmonisation de certains aspects du droit d'auteur dans la société de l'information,* University of Strasbourg 2002, 1.

As this example shows, technological measures for copyright protection in the information society should simultaneously reward authors and producers, but also allow free access for some, vaguely defined, categories of users. The balance between those two sets of interests is very difficult to find, and the Directive 2001/29/EC was the European Union's answer. However, as a form of *sui generis* political organization governed by the principles of specialty and subsidiarity and whose legislative efforts are marked by a pragmatic and economy-based oriented approach, the EU could not handle all the issues of copyright protection, especially by means of a directive. There is also the issue of the Union's legislative competence in this field, which was found in the establishment of "an internal market for new products and services" (Article 14 of the TEEC[22] and recitals 1 and 2 of the Directive), while the "harmonization will help to implement the four freedoms of the internal market and relates to compliance with the fundamental principles of law and especially of property" (Article 95 of the TEEC and recital 3 of the Directive). Despite its fairly general nature, the Directive 2001/29/EC truly represents an important breakthrough, "the most important measure ever to be adopted by Europe in the copyright field",[23] an act that "brings European copyright rules into the digital age".[24] There is no doubt that the adoption of this piece of EU legislation was a big step for the harmonization of Member States' national legal systems. However, a more detailed analysis of the Directive's provisions will show some considerable limitations of this harmonization.

Apart from Chapters I (Objective and scope) and IV (Common provisions) of the Directive, which are general in nature, the rest of its provisions could be grouped in two blocks: the first, which defines the prerogatives of the rightholders and certain exceptions in favor of the users, and the second, which concerns the protection of technological measures and rights-management information. In order to describe some crucial characteristics of the EU's harmonized response to copyright protection measures in the information society, the focus will now be on the critical analysis of Article 6 of the Directive, excluding, of course, the question of the definition of technological measures (Article 6, paragraph 3) already analyzed in the previous chapter of this paper.

Article 6, paragraph 2 of the Directive is a good example of an exhaustive harmonization; given the precision of its provisions, while transposing them, national legislators were indirectly obliged to adopt

[22] Consolidated version of the Treaty Establishing the European Community, *Official Journal of the European Communities* C 325, 33-184.
[23] European Commission, Press Release Database, http://europa.eu/rapid/press-release_IP-01-528_en.htm, 09.07.2015.
[24] *Ibid*.

effective and detailed implementation measures. Consequently, Member States are compelled to "provide adequate legal protection against the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services"[25] which circumvent or could contribute to the circumvention of technological measures for copyright protection. In a context characterized by rapid technological development, an exhaustive list of malicious actions against which legal protection should be provided, combined with a high precision in defining potential risks related to circumvention, carries a risk of making these provisions of the Directive obsolete and inapplicable. Without going into the numerous legal and technical details, it seems that the crucial intention of the European legislator is to eliminate those "devices, products or components" that have as their unique or principal purpose to enable or to facilitate the circumvention of technological measures considered as effective. However, this intention clearly reveals one of the standpoints of this paper: the extent to which it is difficult to achieve harmony (or at least to assure coexistence) between law and technology. Two concrete examples can be given: 1) how we will know if a technology is mainly designed for the purpose of facilitating the circumvention of a certain technological measure? And what if it is designed to achieve a perfectly legitimate goal, but its usage can allow certain manipulations? 2) What to do with technology that is conceived exclusively for legitimate purposes, but some of its elements could be used to facilitate the circumvention of a certain technological measure? The fact that judges from 28 largely different legal systems will be expected to provide answers to these questions may cause serious concern. It is unnecessary to emphasize the importance of the preliminary rulings of the Court of Justice of the European Union (CJEU) concerning the interpretation of Article 6, paragraph 2 of the Directive. Unfortunately, until the end of June 2015, the CJEU mentioned Article 6, paragraph 2 in only one of its judgements (*Nintendo Co. Ltd and Others*),[26] emphasizing that "legal protection against acts not authorized by the rightholder of any copyright must respect the principle of proportionality, in accordance with Article 6(2) of Directive 2001/29, interpreted in the light of recital 48 thereof, and should not prohibit devices or activities which have a commercially significant purpose or use other than to circumvent the technical protection".[27] This judgement is of great importance, but it still does not fully answer to the questions

[25] Art. 6, para. 2 of the Directive.

[26] Judgement of the CJEU of 23 January 2014 in case C-355/12 *Nintendo Co. Ltd and Others v PC Box Srl and 9Net Srl*. The case C-458/13 *Andreas Grund v Nintendo Co. Ltd. and Nintendo of America Inc*. was removed from the register of the Court by the Order of the President of the Court of 7 May 2014.

[27] Judgement of the CJEU of 23 January 2014 in case C-355/12 *Nintendo Co. Ltd and Others v PC Box Srl and 9Net Srl*, para. 30.

mentioned above. Moreover, the Court itself recognized that "the concept of 'effective technological measures' is defined broadly"[28] but does not offer more details regarding the nature of the circumvention.

The relatively terse wording of Article 6, paragraph 1 has fortunately avoided the enumeration, even indicative, of the possible forms of circumvention of technological measures, but it implicitly refers to paragraph 3 *in fine*, requiring the effectiveness of those measures. Furthermore, it is necessary that the circumvention is carried out by the person "in the knowledge, or with reasonable grounds to know"[29] that the technological measure has the protection objective. In spite of the broad definition of the concept of effectiveness, it remains highly dependent on technological development and its adaptation to the needs of copyright protection. As regards the requirement related to the awareness of the measure's objective, although perfectly understandable, it may cause interpretation problems for national courts. Moreover, this provision, as many others, does not contain any additional specification related to digital networks, leaving once again some room for divergent interpretations by the Member States' judicial authorities.[30] In its judgement of 5 March 2015 in case *Copydan Båndkopi v Nokia Danmark A/S* (C-463/12), the CJEU only stated that "the implementation of technological measures under Article 6 of Directive 2001/29/EC for devices used to reproduce protected works, such as DVDs, CDs, MP3 players and computers, can have no effect on the fair compensation payable in respect of reproductions made for private use by means of such devices".[31] Fighting piracy and assuring effective copyright protection in the information society will certainly necessitate much closer cooperation between the Member States, as well as further efforts in the harmonization of legislation.

4. Conclusion

No exhaustive law harmonization, on the international or the European Union level, of all provisions related to copyright in the information society and, more specifically, technological protection measures is either necessary or desirable. Within the EU, different legal traditions in Member States can be respected and maintained, but only

[28] *Ibid.*, para. 27.
[29] Art. 6, par. 1 of the Directive.
[30] Recital 59 of the Directive states that "in the digital environment, in particular, the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such intermediaries are best placed to bring such infringing activities to an end." However, in the further text there are no specific provisions related to the digital environment.
[31] Judgement of the CJEU of 5 March 2015 in case C-463/12 *Copydan Båndkopi v Nokia Danmark A/S*, para. 76.

as long as they do not hinder the functioning of the Internal Market. The means of online communication of material under copyright can make it accessible worldwide (and, consequently, in all the Member States), while the free circulation of goods and services within the EU necessitates legislative consistency and a harmonized legal framework on copyright and related rights. On the other hand, the dynamic technological development also requires an adaptable legal protection of technological measures. Therefore, increased legal certainty and rigorous system for the protection of copyright often does not fully rhyme with adaptability imposed by technology. Similarly, the legitimate intention of the European legislation to take into account the competing interests of both producers and users is ethically sensitive and demands an equilibristic approach. The Directive 2001/29/EC was a significant step in harmonizing copyright protection within the EU. However, the digital age and the creativity of counterfeiters and pirates will permanently demand additional legislative and jurisprudential efforts of both EU and national institutions.

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ТЕХНОЛОГИЈА У СЛУЖБИ ПРАВА – ПРИМЕР ТЕХНИЧКИХ МЕРА ЗАШТИТЕ АУТОРСКИХ ПРАВА У ЕВРОПСКОЈ УНИЈИ

Резиме

У савременом информационом друштву, бројни су примери кршења ауторских права уз помоћ различитих технолошких средстава. Ова појава је раширена у тој мери да у појединим европским државама пиратерија и тзв. концепт „слободног софтвера“ фигуришу у програмима неких политичких партија које учествују на изборима. Међутим, циљ овог рада је управо обратан: намера је да се покаже да технологија такође може бити у служби права, тим пре имајући у виду да је стварање Европске (заједнице) уније, *sui generis* међународне организације, пре свега због постојања различитих видова слободе кретања на заједничком/унутрашњем тржишту,

додатно појачало потребу изналажења заједничког европског концепта заштите ауторских права. Најбитнији акт усвојен у овој области је Директива 2001/29 Европског парламента и Савета о усклађивању одређених аспеката ауторских и сродних права у информационом друштву. Намера овог чланка је да представи и анализира предности и слабости система заштите ауторских права путем техничких мера предвиђених у овом акту.

Кључне речи: право и технологија, ауторско право, информационо друштво, техничке мере заштите, Европска унија

Katica Tomić, LLM[1] **Scientific review paper**

UDK: 341.63:347.73

SETTLEMENT OF DISPUTES IN THE BANKING AND FINANCIAL SECTOR

Abstract

For a long time arbitration has played a rather limited role in banking and finance sector and it has been a preference for resolving arbitration and finance disputes in state courts of important financial centers, such as New York or London. The global economy has experienced extreme stresses in recent years, beginning with the banking crisis of 2007 and the global recession that followed. While financial institutions have in the past relied primarily on litigation to enforce contracts, they are increasingly turning to international arbitration. Today, the traditional reluctance towards arbitration is less prevalent and an alternative means of dispute resolution through arbitration is increasingly gaining importance in banking and finance sector.

***Key words**: B2B disputes, ICC, Vienna Rules, New York Convention*

1. Introduction

Litigation has traditionally been the forum of choice for dispute resolution in international finance and banking sector. When parties find themselves in disputes in respect of the investments and contracts that constitute financial trading, there is often a lot at stake, the amount of money at risk is staggering and the interests of many can be affected. The issues contested in these disputes can be complex and financial market disputes that get litigated or arbitrated are rarely "one-shot money disputes" involving straightforward payment claims.

These days finance and banking market are dealing with sometimes multi-party, often multi-contract disputes, involving complex-structured financial products implicating a number of legal relationship that interact

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in complicated ways.[2] Furthermore, because of standardization of documentation, causal sequence for third-party contracts and relationships of any precedents created can be considerable.

The recession and financial crises in the 2000s challenged banks and their litigation culture significantly. Before the crisis, well-run banks will normally be in possession of collateral security before money is made available to lenders or other customers and also the interest rates were appropriate and well above inflation so there was invariably no urgency in resolving disputes quickly and were settled out of court. For that reason, all major banking law academics and practitioners would not consider arbitration, except under exceptional circumstances, clauses in banking or finance contract.

As financial transactions and markets have become more complex and under the current economic consequences as a result of the financial crisis, the number of complex product disputes has also been growing and the choice of the right dispute-resolution mechanism therefore becomes more important for banks and financial institutions.

2. The modern role of arbitration in banking and finance

For many years, banking practitioners have shown aversion towards arbitration and key contracts had historically assumed dispute settlement by domestic courts in the leading financial centers – primarily by London or New York courts. For instance, the ISDA Master Agreement[3] which governs the vast majority of over the country derivatives transactions provides for the exclusive jurisdiction of the state courts of England or New York, depending on whether the parties have stated that English law or New York law is applicable.

Given that both the English and New York courts have extensive experience of effectively and efficiently resolving derivatives disputes,[4] part of the particular interest in New York and English courts (and a

[2] The financial disputes are never as simply as they have been characterised by banking practitioners. When we deeper analysed "simple" financial disputes, a complex legal issues may be raised in a dispute arising out of a loan agreement by a respondent-borrower, such as the compatibility of the grounds for termination embodied in the representations and warranties or covenants with the applicable substantive law.

[3] The ISDA Master Agreement is a master agreement form which can govern multiple derivatives transactions. It is a single agreement consisting of three different components: 1) a printed form of standard provisions; 2) a schedule to the agreement, in which certain variables and elections made by the parties, together with any additional, bilaterally agreed provisions, are set out; c) confirmations relating to individual transactions, where the economic terms of the transactions are set out. The ISDA Master Agreement is widely used as an industry standard and receives considerable attention in all leading treaties on law and practice in the derivatives markets.

[4] Disputes arising out of standard Master Agreements, such as the one used by the International Swaps and Derivatives Association (ISDA), the Master Agreements of the London-based Loan Market Association (LMA) and the New York-based Loan Syndications and Trading Association (LSTA) were also exclusively settled by state courts in London or New York.

limited choice between New York and English Law as the governing law of contract) was assumption that, such uniformity by limiting the parties´ choice in this way, there was increasing probability that industry standard contracts like the ISDA Master Agreement, would represent a comprehensive, uniform and legally enforceable master agreement which will reflect the collective experience of the derivatives industry.[5]

Today, the expending and evolving nature of key element of the financial markets, the widening participation of a range of market players differently situated, and the growing complexity of structured financial products and relevant issues have increase demand to have recourse to arbitration.

3. Advantages of the arbitration process in banking and financial sector

The long list of reasons why arbitration has no place in international banking and financial transactions is constantly repeated by academics and banking practitioners. Those characteristics of arbitration which are usually considered to speak in favor of this dispute-resolution process but often cited as disadvantages of arbitration in this specific industry sector, may vary from party to party and even from transaction to transaction. As explained below, the disadvantages can often be mitigated by the inclusion of additional provisions in the arbitration clause. The remaining chapters will be described the most important reasons why banks and other financial institutions should consider dispute resolution through arbitration.

3.1. Key reasons to choose arbitration

Financial market disputes reflect the realities of financial markets. As financial markets becomes increasingly complex, so do disputes. Because the landscape of international banking and finance has changed, there has also been an evolution in the nature of the issues that come to court in financial market disputes, particularly those arising from trading in complex financial products. Typically, financial disputes involve direct payment claims thus involving simple legal questions and for such disputes, dispute resolution by existing state courts is considered to be better, swifter and simpler by far.

As financial transactions and markets have become more complex, so have the disputes and parties have been bringing to court disputes

[5] The results from leading courts have not been in all cases consistent and significant example of this inconsistency is the differing conclusions of the London and New York courts as to the enforceability of a key provision, Section 2(a) (iii), of the ISDA Master Agreement, the former upholding its enforceability in *Lomas v Firth Rixson*, whilst the latter held that, on the facts of the case, it was unenforceable or at least of limited enforceability in *Metavante.*

involving highly technical issues that comprise specialist knowledge which demands framework in market practice, custom, and usage. It would seem undesirable to expect that the parties in such a situation to seek resolution of the issue in a court of general jurisdiction either a local court where the judges might lack relevant experience in the field of national and international banking and capital market law or especially if it would require sending the parties to a court far away, with logistical and linguistic obstacles, prohibitive expense, and lacking in jurisdiction such that it could render equitable decisions These are situations where an expedited arbitration or mediation[6] might be preferable method of dispute resolution.

The survey in 2013 by the Queen Mary University of London (QMUL) School of International Arbitration and PwC survey on industry perspectives in relation to arbitration confirms that arbitration is more popular in some industry sectors than others, most notably in the Energy and Construction sectors with 84% and 78% of the industry respondents supporting arbitration respectively. According to this 2013 survey, the percentage for banking and finance is quite significant at 69% with less than one quarter of general counsel in banking and finance declaring arbitration to be their most preferred option.[7] According to 2015 survey, 90% of respondents indicated that international arbitration is their preferred dispute resolution mechanism, either as a stand-alone method (56%) or together with other forms of ADR (34%) and the five most preferred and widely used arbitration seats are London, Paris, Hong Kong, Singapore and Geneva.[8]

Given this clear preference of the commercial sector for arbitration as well as a fundamentally changed and more contentious market environment caused by the worldwide financial crisis, advocates for dispute settlement of financial disputes by arbitration point to variety of benefits of arbitration for the resolution of their b2b disputes. That includes measure of procedural flexibility that allows conformity with particular financial market conventions and can meet a need for expedited procedures or confidentiality, avoiding specific legal systems/national courts, selection of arbitrators, neutrality and privacy, ensuring that any decision, judgment, or an award will be upheld in the relevant jurisdiction.

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[6] Mediation differs from arbitration insofar as it generally does not lead to a final and binding decision on the parties. It is focused on enabling parties to reach a settlement through the help of a third party, which will enable them to continue to fulfil their duties under their original contract and thereby maintain ongoing commercial relations. See the 2013 *ISDA Arbitration Guide*, 1

[7] Corporate choices in International Arbitration Industry perspectives, 2013 International Arbitration Survey (Queen Mary College, London) and Pricewaterhouse Coopers (2013), 4

[8] *http://www.arbitration.qmul.ac.uk/,* November 10, 2015

3.2. Scope of Application of the Provisions on Expedited Procedure

Some institutional rules allow arbitration provisions on the accelerated procedure, typically where the amount in dispute is below a certain threshold value, in cases of urgency, or where the parties agree to shorten the timelines. Arbitration provisions on the accelerated procedure is the argument that arbitration does not allow for the speed of decision-making that is required to resolve financial disputes.

Since arbitral proceedings, in legally and/or factually complex cases can take as long as state court proceedings, the duration of proceedings is increasingly cited as a disadvantage of arbitration.[9] All practitioners know that arbitrator selection can be a very expensive and time-consuming endeavor. The selection of the arbitrator is critically important and a decision that can have potentially devastating results to a client. When the solo arbitrator expands to a panel of a three-member arbitral tribunal, the selection and anguish processes increase geometrically.

Hereafter, if a respondent does not participate in the proceedings, the arbitral tribunal may not render a summary judgment and in that case the arbitral tribunal must continue the proceedings without argue such failure (to communicate his statement of advocacy within the set time-limit) in itself as an admission of the claimant's allegations[10]. Even if the respondent is in default, the arbitral tribunal must evaluate the dispute on the basis of the legal arguments and documents submitted by the claimant before rendering an award.

Several important international arbitration institutions offer specific rules for fast track arbitration. The increase in number of arbitral institutions creating such special rules for expedited proceedings demonstrates the "need for speed" in arbitral proceedings.[11]

The most well-known fast track arbitration cases to date were conducted under the rules published by the International Chamber of Commerce (ICC). Although Art 32 of the ICC Rules generally provides for expedited procedures by granting the parties the opportunity to shorten various time limits set out in these rules, the ICC Rules do not contain further detailed regulations in this regard.

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[9] 0 Cf Survey "International Arbitration: Corporate Attitudes and Practices 2006", supra n 9, 7: "A related concern is the time the arbitration process takes from filing to award, which was the second most commonly expressed concern"; see also Survey "International Arbitration: Corporate Attitudes and Practices 2008", supra n 3, 7, stating that 17% of the interviewees indicated their desire "to avoid excessive delay" as the major reason to settle a dispute during arbitration.

[10] Art 25(b) UNCITRAL Model Law; cf Art 28(2) UNCITRAL Arbitration Rules.

[11] For more institutions that have adopted specific rules, see R. Fiebinger, C. Gregorich, "Arbitration on Acid", *Austrian Arbitration Yearbook* 2008, Klausegger, Klein, Kremslehner, Petsche, Pitkowitz, Power, Welser & Zeiler eds,2008, 237

The German Institution of Arbitration (DIS) has adopted the Supplementary Rules for Expedited Proceedings (DIS-SREP).[12] These new Rules supplement the standard DIS Arbitration Rules. The DIS Arbitration Rules state that the arbitral tribunal must conduct the proceedings expeditiously. The DIS-SREP provide for: dispute resolution by a sole arbitrator as a rule; a limit on the number of briefs exchanged; and proceedings to be concluded within six months.

Vienna rules contain more elaborate section on expediting proceedings and the provisions on expedited proceedings constitute an important amendment to Vienna Rules 2013 compared to the Vienna Rules 2006.[13] The expedited procedure pursuant to Art 45 is not simplified procedure[14] and the parties' right to be heard must be observed to the same extent as in "normal" arbitration proceedings. An arbitral award rendered in expedited proceedings must be reasoned with the same due care as an arbitral award that is rendered in non- expedited proceedings. The purpose of the provisions on expedited procedure is to minimize the duration of the proceedings without reducing the quality of the decision of an arbitral tribunal.

Pursuant to Art 45(1), the provisions on expedited proceedings only apply if they have been agreed by the parties ("opt-in" model). Vienna Rules deliberately do not contain a monetary limit below which the conduct of expedited proceedings is automatic in adversely to the other arbitration rules. Expedited proceedings put higher constraints on the parties and arbitral tribunal and the "opt-model" was chosen because the parties should be free to decide whether a dispute is suitable for expedited proceedings or not. A high amount in dispute does not automatically mean that the proceedings will be more complex, on the contrary, even proceedings with a low amount in dispute may be complex and therefore be considered by the parties to be inapt for an expedited procedure. The agreement on expedited procedure may be concluded at the same time as the arbitration agreement is concluded and the model arbitration clause recommended by the VIAC (Vienna International Arbitral Centre) contains a model clause for an agreement on expedited proceedings.

Since at the time of the conclusion of the agreement the possibility or need for expedited proceedings is often not yet predictable, banks and other financial institutions are advised to adapt the arbitration agreement

[12] The Rules are available at *http:// www.dis-arb.de,* November 11, 2015.; see for a commentary on the DIS Rules K Böckstiegel, S Kröll and P Nacimiento (eds), Arbitration in Germany, The Model Law in Practice ,The Hague, Verlag Recht und Wirtschaft, 2007, 655ff

[13] The Rules are available at *http://www.viac.eu/en/,* November 11, 2015

[14] Cf.by contrast DIS – Supplementary Rules for Expedited Proceedings (2008), Section 7; „Rules for expedited arbitrations" SCC Rules (The Arbitration Institute of the Stockholm Chamber of Commerce) and the Swiss Rules of Arbitration (2012), Art 42; which allow that the reasons upon which the award is based are stated in a summary form.

by including a right of choice. Under such a clause, a claimant bank could choose, after the dispute has arisen, to pursue its claim in "standard" or in "expedited" arbitration proceedings, both being administered by the same arbitral institution.

Clearly, fast track procedures must be welcomed by both parties as well as the arbitral tribunal, and must be duly supported by the institution which provides the framework for the proceedings, or else they will not be a success. Care should be taken, however, to ensure that all parties are able to present their case, and to avoid unrealistic or inflexible deadlines: if a deadline for rendering an award cannot be extended and is missed, any subsequent award may be vulnerable to challenge.

3.3. The arbitral tribunal's jurisdiction

It is often suggested that arbitration is not convenient for financial disputes because the final decision on the merits is often delayed by preliminary disputes on the jurisdiction of the arbitral tribunal. Awards rendered without jurisdiction have no legitimacy. The absence of jurisdiction is one of the few recognized reasons for a court to set aside or refuse recognition and enforcement of an award.

The tribunal´s jurisdiction depends on the existence of a valid arbitration agreement between the parties that covers in scope the arbitrable dispute before them. It is generally in the interest of the parties and the arbitral tribunal to establish as quickly as possible if the disputes at bar has been properly referred to arbitration. This is a matter of procedural efficiency. Most arbitration rules, encouraged by the vast majority of modern arbitration laws and international instruments, require the respondent to raise any objection as to jurisdiction at the first opportunity in the arbitration proceedings, or else be barred from raising it at all.

It is commonly the case in international commercial practice that little, if any, attention is paid to the drafting of the dispute resolution clause. Typically, these clauses, together with the choice of law provision, are located at the end of the lengthy contract document. Consequently, a poorly drafted "ad hoc" arbitration clause, inserted into the contract at the very last moment of the contract negotiations, when the managers want to close the transactions and commemorate their deal, instead of having to think about potential future disputes between their companies. Often contract drafters have little or no experience in arbitration or they don't include model clause of a leading arbitral institution into their contract. This poses serious problems if a dispute arises between parties but this problem does not stem from an inherent disadvantage of arbitration but rather from the parties' negligent at the drafting stage.

Parties in international contract negotiation should always pay close attention to careful drafting of the dispute resolution clause and using a standard "boilerplate" model clauses of recognized arbitration institutions which serves as an important means of conflict avoidance and they save money and time by providing the required legal certainty with respect to potential disputes about the tribunal's jurisdiction that may arise during the arbitration.

3.4. Arbitrators are required to render decisions in an "independent" or "impartial" manner which offers neutrality in the adjudicative process

The possibility of selecting suitable arbitrators for hearing the parties' case is an advantage not limited to finance and banking disputes. However, next to ensuring (or at least balancing) the deciding forum's independence and impartiality, the free selection of arbitrators adds yet another benefit which makes arbitration the most desirable method of resolving finance and banking disputes at the litigious stage.

Provided that the selection of arbitrators is performed diligently and with due consideration of the individual case, the panel thusly selected may be expected to not only successfully take on the legal challenges of adjudicating disputes of international nature, but to also dispose of the much-needed thorough expert knowledge of the financial background underlying the subject matter.

The UNCITRAL Model Law on International Commercial Arbitration and many national arbitration laws require arbitrators to have a natural tendency to take into account the underlying economic interests of the parties as well as the usages, customs and business practices of the relevant commercial or industrial sector This is one of the crucial advantages of arbitration *vis-à-vis* state proceedings before domestic courts. [15]

3.5. Procedural Flexibility and Party Autonomy

Party autonomy is the fundamental principle of the arbitration which allows the parties to determine all the essential elements of the arbitration and to design the proceedings in advance in accordance with their needs for special experience of the arbitrators, applicable laws, speed and efficiency.

It is often argued that its procedural flexibility and potential disadvantages in many cases is intentional gap[16] in the rules that may lead to

[15] S Kröll, *Schiedsverfahren bei Finanzgeschäften – Mehr Chancen als Risiken, Zeitschrift für bankrecht und bankwirtschaft* (ZBB), 1999

[16] This is particularly so when the parties come from different legal backgrounds and cultures or when one or both of the parties are inexperienced in international arbitration.

an unacceptable degree of legal uncertainty in a financial and capital market transactions, allowing parties many possibilities to delay the proceedings.[17]

Several sets of rules currently exist which reflect globally recognized "best practice standards" and this rules can be incorporated by the parties into their procedural agreements or can be used by arbitral tribunals as guidelines for the exercise of their procedural discretion. The basic are the IBA Rules on the Taking of Evidence in International Commercial Arbitration (the "IBA Rules of Evidence"). These IBA Rules contain procedures initially developed in different legal systems and in international arbitration processes. They are a blend of different legal traditions and are intended to govern the taking of evidence in an efficient and economical manner. Parties and arbitral tribunals may adopt the IBA Rules in whole or in part at the time of drafting the arbitration clause in a contract or once arbitration commences or they may use them as guidelines but the Rules do not provide a complete framework for the conduct of international arbitration and the parties must still select another set of rules, institutional or ad hoc, to govern their proceedings.

In October 2014 the IBA Council adopted new guidelines on Conflicts of Interest in International Arbitration. While they are not binding, the Guidelines are intended as an expression of best practices in international arbitration and offer a set of standards seeking to enhance legal certainty and preserve the integrity, transparency and fairness of arbitral proceedings. Arbitral institutions and courts refer to the Guidelines in deciding challenges of arbitrators.

International arbitrators should be impartial, independent, competent, diligent and discreet and IBA Rules of Ethics for International Arbitrators seek to establish the manner in which these abstract qualities may be assessed in practice. They reflect internationally acceptable guidelines developed by practicing lawyers from all continents and they will attain their objectives only if they are applied in good faith.[18]

The Chartered Institute of Arbitrators (London) has developed guidelines for interviewing arbitrators which contains rules for the conduct of interviews with potential arbitrator. [19] The UNCITRAL Notes on Organizing Arbitral Proceedings[20] contain checklists and guidelines for the organization of international arbitration proceedings.

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[17] P Wood, *International Loans, Bonds and Securities Regulatio*n, London, Sweet & Maxwell, 1995, margin no 5-60

[18] The rules cannot be directly binding either on arbitrators, or on the parties themselves, unless they are adopted by agreement.

[19] Practice Guideline 16: The Interviewing of Prospective Arbitrators, The Chartered Institute of Arbitrators, 2008.

[20] UNCITRAL Notes on Organizing Arbitral Proceedings 2012 (No legal requirement binding on the arbitrators or the parties is imposed by the Notes)

3.6. The decision of the arbitrator is binding

In a court proceeding, when a judgment is entered against the weight of the evidence, or an error in law is made, an appeal can be had and, if well taken, a new trial order. Similarly, excessive judgments can be reduced. In arbitrations, however, the revision of arbitral awards remains an exceptional remedy which is only available to the parties in extreme circumstances (only a violation of essential principles of arbitral due process, such as the parties' fundamental right to be heard, or of public policy can lead to the annulment of an arbitral award).

The finality of arbitral decision promotes a speedy clarification of the legal issues at stake and resolution of the conflict between the parties and it is consider to be one argument in favor of arbitration which also applies to the financial and capital market sector.

One argument in favor of state court jurisdiction remains: in those rare instances in which banks and other financial institutions take a legal issue to court, they wish to have it determined definitively, if necessary by the highest court, and with effect for the entire sector. On a national level this makes sense for disputes which banks have with their private customers (b2c disputes), in particular if the dispute concerns the interpretation and validity of certain clauses of the standard terms and conditions used by all banks in that country.

However, arbitral awards which have the same effect between parties as state court judgments, may serve as precedents.[21] This is also true for the international banking and financial sector.

The arbitral precedent is a necessity for certain types of disputes because a dispute settlement process that produces unpredictable results will lose the confidence of the users in the long term and defeat its own purpose. The credibility of the entire dispute resolution system depends on consistency and this presupposes that arbitral awards are published in a specific collection.

In view of the model contracts used on a world-wide level by the Loan Market Association (LMA) or the International Swaps and Derivatives Association (ISDA) there is a strong need for uniform decision-making and publication of such decisions. The Uniform Customs and Practice for Documentary Credits (UCP) is a set of rules on the issuance and use of letters of credit. The UCP is utilized by bankers and commercial parties. This practice has been standardized by the ICC (International Chamber of Commerce).

[21] G K Kohler, "Arbitral Precedent: Dream, Necessity or Excuse?" The 2006 Freshfields Lecture, Arbitration International, Vol. 23, No. 3, LCIA 2007.

3.7. Multi-Party and Multi-Contract Arbitration

Not every transaction or contract is executed by two counter-parties. Often there may be one contract but more than two parties ("multi-party"), or a number of contracts possibly involving different parties ("multi-contract").[22] This is typical for joint venture agreements; arbitration clauses contained in articles of association;[23]distribution agreements; construction projects;[24]and many other forms of commercial contracts. As particular form of multiparty –arbitrations, commercial arrangements also give rise to multi-contract arbitration between two or more parties, who have entered into a number of different contracts all providing for arbitration.

The banking and finance sector often question if it is possible to conduct arbitrations in a multiparty context. There is a lot to be said in favor of establishing one tribunal instead of several different ones to settle disputes. First, a single tribunal would gain full knowledge of relevant facts and circumstances of the parties' dispute. Second, to consolidate multiple disputes in one arbitration will often save the parties a significant amount of time and other resources. Third, resolving multi-party disputes in a single forum resolves the risk that different tribunals reach inconsistent or contradictory conclusions with the regard to the same matter.[25]

However, multi-party (and multi-contract) proceedings raise some difficult issues. First, the arbitration agreement must be valid and applicable in scope to all parties to the disputes.[26]Second, all the parties must have been given proper notice of arbitration and have had an equal opportunity to present their cases[27]and finally, all parties must have an equal opportunity to participate in the constitution of the tribunal.[28]

If arbitration is to function as a real alternative for litigation in multi-party and multi-contract situations, it is imperative that the applicable laws and rules provide more satisfactory procedural solutions for issues arising in these contexts. Most institutional arbitration rules nowadays contain provisions which allow an arbitral tribunal to be constituted even if the side

[22] An example being the chain of contracts required to finance and build a project
[23] J Lew, L.Mistelis, S.Kröl, *Comparative International Arbitration*, The Hague, Kluwer Law International, 2003, para.16-7.
[24] Ch. C Bühring-Uhle, *Arbitration and Mediation in International Business*, Second Revised Edition, Arbitration and Mediation in International Business, Kluwer Law International, 1996, p.65
[25] P. Level, Joinder of Proceedings, "Intervention of Third Parties and Additional Claims and Counterclaims", *ICC Bulletin*, Vol.7, No.2, 1996, 27 et seq.
[26] See Art. V (1)(a) NY Convention, Annex 11
[27] See Art. V (1)(b) NY Convention, Annex 11
[28] See Art. V (1)(d) NY Convention, Annex 11

consisting of more than one party fails to agree on an arbitrator. Securing an effective multiparty proceeding depends on the careful harmonization of the arbitration clauses contained in different but interlinked contracts. This can be done, for example, by including an appropriate arbitration clause in a multiparty contract such as the "terms of agreement" or by forming a single contractual network consisting of various construction and finance agreements for the purpose of project financing.

3.8. Arbitration is confidential

One of the major factors that encourage parties to choose arbitration over litigation for the resolution of disputes is the perceived confidential nature of arbitration proceedings. Confidentiality is core issue in international arbitration law[29]and together with the worldwide enforcement system for foreign arbitral awards established by the New York Convention of 1958, have always been a major reason for parties to agree to arbitration. The concepts of privacy and confidentiality in arbitration are important and interrelated features of international commercial arbitration. Privacy involves arbitration proceedings being private to the disputing parties and to the tribunal and the privacy of arbitration proceedings is concerned with the obligation not to disclose information relating to the content of the arbitration.

Banking practitioners argue that the confidentiality of arbitral proceedings deducts banks of the option of straining additional pressure on defaulting debtors based on unpleasant publicity. It is rarely the case that a banks image may be damaged because of its involvement in a dispute (nowadays, more and more a physiological – rather than pathological – event of any complex business relation). Confidentiality is an important feature and a major advantage of international commercial arbitration, and also it can be advantage for banks and financial institutions.

3.9. Arbitration and State Courts

Arbitration is based on an agreement between the parties and therefore banking practitioners very often criticize the exclusive competence of arbitral tribunals. *De facto,* banks like to keep their dispute-resolution options open and they often agree cumulatively that actions can be brought before courts at the seat of the debtor, the place of contract performance or at other places where the debtor has assets which serves to prevent the debtor, after the arbitration, from misusing the ensuing enforcement proceeding before the state court to cause additional delays.

[29] See Art. 52(a) WIPO (World Intellectual Property Organization)

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, has proven to be "the cornerstone of the international arbitration system"[30] and one of the most successful instruments of international uniform law and essential advantages of arbitration. The New York Convention creates a uniform international framework, which enables parties to international commercial arbitration agreements to enforce foreign arbitral awards with relative ease. Although the prevailing party has to rely too on the courts in the country of the respondent, the procedure for recognition and enforcement is uniform and enables parties to international commercial arbitration agreements to enforce foreign arbitral awards with relative ease.

Enforcement of a foreign award can be refused only in the limited circumstances listed in Article V, which go mainly to procedural defects rather than the substance of the decision. It is particularly due to this possibility of world-wide enforcement that arbitration clauses as primary mechanism of dispute resolution have been included for many years in the loan agreements of international banks such as the World Bank or the European Bank for Reconstruction and Development.

4. Choice of an Adequate Arbitral Institution

A fundamental part of arbitration is the selection of an arbitrators with relevant expert knowledge, as evident as in the field of national and international banking and capital market law. Arbitrators from banking and financial sector have the advantage that they avoid the ramp-up costs required to learn the subject matter of the dispute, and may be better able to understand the parties' positions.

Furthermore, in complex technical and legal issues of capital market transactions (e.g. whether an email is an electronic message for the purpose of satisfying a contractual notice provision;[31] whether the market expectation is that quotations or replacement trade will be provided on a firm or indicative basis;[32] whether and to what extent a party may finally determine default interest consistent with relevant market practice etc.) the relevant expert knowledge of arbitrators selected specifically for this reason is on average higher than that of state court judges. This provides comfort to banks and financial institutions as one of concerns about arbitration was the shortage of finance and banking experts who could also manage a complex financial dispute as arbitrators.

International practice shows a strong tendency towards institutional

[30] Renaud Sorieul, Director UNCITRAL Secretariat
[31] *Greenelose Ltd v National Westminster Bank Plc* (2014) EWHC 1156 (English High Court).
[32] *Goldman Sachs International v Videocon Global Ltd* (2013) EWHC 2843 (Comm) (English High Court)

arbitration and some arbitral institutions with a general mandate for dispute resolution have issued special rules for disputes in the banking and finance sector. Also, there are specialized institutions with an exclusive mandate for dispute resolution in the banking and finance sector.

Some arbitral institutions such as the American Arbitration Association (AAA)[33], and the China International Economic and Trade Arbitration Commission (CIETAC) [34]have issued special rules for arbitration in the banking and finance sector. The European Centre for Financial Dispute Resolution ("EuroArbitration") offers specialized arbitration rules for financial b2b disputes[35], The P.R.I.M.E. Finance Arbitration Rules are based on the UNCITRAL Arbitration rules (as revised in 2010)[36] with an exclusive mandate for the settlement of disputes in the financial and banking sector.[37] The P.R.I.M.E. Finance foundation (Panel of Recognized International Market Experts in Finance includes internationally renowned experts in the field of both finance as well as dispute resolution.) was established with the aim of facilitating dispute settlement, reducing legal uncertainty and fostering stability in the global financial markets. All these rules are used only infrequently by banks and other financial institutions.

5. Conclusion

While the developing trends in international arbitration may not be looked upon by everyone with favor, arbitration is, and will continue to be, the method of choice for obtaining a final resolution of international disputes. For many decades, finance and banking sectors have shown a marked lack of faith in arbitration and had no incentive or particular advantage to utilize private and quicker dispute resolution methods, such as mediation and arbitration.

[33] AAA offers special rules and drafting guides to address banking disputes, especially those involving secured transactions, which are mediated and arbitrated within the context of judicial protections. Other complex financial issues may be resolved by using AAA's Commercial Rules and selecting a neutral from AAA's Commercial Finance Panel of arbitrators and mediators with specialized subject-matter expertise.

[34] According to the CIETAC Financial Disputes Arbitration Rules, unless otherwise agreed by the parties, the arbitral tribunal shall render an arbitral award within 45 working days from the date on which the arbitral tribunal is constituted. At the request of the arbitral tribunal, the Secretary-General of the CIETAC may extend the time period as needed. However, the extension may not exceed 20 working days. The arbitration fee charged for cases applying the Financial Disputes Arbitration Rules is much lower than that in other arbitration cases before the CIETAC

[35] See A. Hirsch, Presentation of Euroarbitration, in European Centre for Financial Dispute Resolution, in 55 ASA Special Series No. 20, 2003.

[36] The P.R.I.M.E. Finance Rules provide for an arbitration institute that will administer the arbitral proceedings, whereas UNCITRAL Rules have been written for *ad hoc* arbitration.

[37] The P.R.I.M.E. Finance dispute resolution services and its Arbitration and Mediation Rules were launched at the opening conference of P.R.I.M.E. Finance in the Peace Palace in The Hague on 16 January 2012.

Geographical expansion of the financial sector, complex markets and financial transactions, product expansion, and an expansion of the universe of market participants on both the buy side and market-making side of the business has resulted a sea-change in thinking towards more flexible and fine-tuned dispute settlement solutions within the finance and banking sectors. Today, a considerable percentage of the cases administered by some arbitral institutions involves international banking and finance disputes.

For an industry that has had in the past aversion towards arbitration and other methods of alternative dispute resolution, it is considerable that 69 percent of financial services sector respondents in a survey held by the Queen Mary College, University of London and Price Waterhouse Coopers, expressed their support for arbitration as an effective dispute resolution process. This change in attitude is reflected in the publication of the 2013 ISDA Arbitration Guide containing model arbitration clauses, as well as the establishment of P.R.I.M.E. Finance which provide a dispute settlement mechanism for disputes relating to financial products, in particular complex financial products such as derivatives.

For finance and banking disputes, the advantages of arbitration today access to the legal and financial market expertise of highly qualified arbitrators selected by the parties; confidentiality of the arbitral procedure; worldwide enforceability of arbitral awards under the 1958 New York Convention; the rules for expedited proceedings ("fast track rules") as well as other advantages of arbitration in finance.

Considering this, the success of arbitration in banking and finance sector will depend in part on whether parties make reasonable progress in drafting feasible arbitration agreements, choosing the right arbitral institutions and arbitrators who are already versed in complex financial transactions (so that the parties only need to explain the facts and can rest assured that the arbitrators understood what was presented) and competitiveness of state courts.

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RJEŠAVANJE SPOROVA U BANKARSKOM I FINANSIJSKOM SEKTORU

Rezime

Dugo vremena arbitraža je imala vrlo ograničenu ulogu u bankarskom i financijskom sektoru, a prednost za rješavanje arbitražnih i financijskih sporova se davala državnim sudovima važnih financijskih centara kao što su New York ili London. Fnancijska kriza koja je poprimila globalne razmjere u posljednjih nekoliko godina, počevši od bankarske krize 2007. godine i globalne recesije koja je uslijedila, uzdrmala je svjetsku ekonomiju. Većina financijskog sektora koji su se u u prošlosti oslanjali na parničenje za provedbu ugovora, sve više se okreću prema međunarodnoj arbitraži. Danas tradicionalna nesklonost prema arbitraži je manje rasprostranjena, a arbitraža , kao alternativni način rješavanja sporova, prihvaćena u gotovo svim zemljama svijeta i njezina se primjena sve više širi u bankarskom i financijskom sektoru.

Ključne riječi: B2B sporovi, ICC, Bečka pravila, Njujorška konvencija.

Vladimir Šebek,Ph.D.[1] **Scientific review paper**

UDK: 343.98(4-672EU)

THE ROAD TOWARDS A EUROPEAN CRIMINAL INTELLIGENCE MODEL - ECIM

Abstract

Great challenges brought about by difficult economic and financial conditions, on one hand, and the trend of growth, sophistication and globalization of organized crime, on the other hand, equally affect Member States of the European Union, as well as other European countries; thus, the creation of the European space of safety and justice is needed more than ever. This can be achieved through mutual cooperation and consolidation of cross-border police cooperation based on the development of national police forces, integration of already established EU framework and instruments in the area of justice and home affairs and strengthening of information exchange between police organizations, with the aim of implementing the European Criminal Intelligence Model. Therefore, the purpose of this paper is to analise the circumstances in terms of adoption, development and implementation of the European Criminal Intelligence Model- ECIM as part of the European Union Internal Security Strategy. If we add to that the fact that one of the priority tasks of our country, in line with harmonization with EU regulations, is the requirement for compliance with the European Criminal Intelligence Model, then this paper, from the aspect of its contribution, gains in importance. The contribution of this paper in this domain should be evaluated in light of the current absence of a strategy and clear path towards implementation of such method of police work despite European (and world) actuality.

Key words*:The European Criminal Intelligence Model – ECIM; Criminal Intelligence; Europol; SOCTA; Intelligence-Led Policing.*

1. Introduction

EU security policy has acquired a multidimensional character in the past decade, due to new forms of emerging threats and challenges as

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well as varied types of response. The levels of EU security policy differed in many respects, subject to issues, areas, methods, tools and policies applied to cope with detected or identified problems. Approaches worked out for the effective operation in particular fields of security were aiming to tackle any single issue in a specific manner, giving thus opportunity for EU institutions and agencies to intervene in political, economic, diplomatic, or even military way. Before 9/11, however, EU justice and home affairs cooperation, despite its reinforcement as a result of the 1999 Amsterdam reform of EU treaty law, was relatively loose and dependent on Member States' particular interests or national determinants.

The events of 9/11 highlighted the critical importance of intelligence for effective prevention and combating of terrorism and transnational crime. However, it did not have any special impact on the capabilities of EU legal and institutional arrangements to establish a genuine Intelligence-Led Policing model. Some attempts at intensifying and enlarging the scope of intelligence cooperation at EU level, due to the lack of unanimity and the deficit of trust among the Member States, did not yield the expected results.[2]

This picture altered in the immediate aftermaths of the 11 March 2004 terrorist attack in Madrid. The EU's institutions placed particular emphasis on the exchange of information and intelligence between law enforcement authorities of the Member States and called for the improvement of mechanisms for cooperation and the promotion of effective systematic collaboration between police, security and intelligence services. The European Council in the Hague Programme of November 2004 set the goal of „setting up and implementing a methodology for intelligence-led law enforcement at EU level".[3] A British proposal submitted to Interior Ministers gathered at an informal meeting in September 2005 contained what may have been considered the "missing link" in the creation of a potential EU intelligence tradecraft.[4] A consultation paper delivered by the UK Home Office introduced the idea of a European Criminal Intelligence Model (ECIM) based on the principles of Intelligence-Led Policing and evidently inspired by the UK's National Intelligence Model.[5] The ECIM was marked by a „shift from reactive policing to a problem solving approach, based on analysis, by developing action plans (focused on crime prevention as well as on repressive action) and involving multiple actors

[2] O. Bures, „EU Counterterrorism Policy: A Paper Tiger?", *Terrorism and Political Violence* 18/2006, 62-63.
[3] European Council, 'The Hague Programme: Strengthening Freedom, Security and Justice in the European Union', *Official Journal of the European Union* C 53, 3 March 2004, 9.
[4] A. Gruszczak, "Intelligence tradecraft and the pre-crime approach to EU internal security governance", Paper to the UACES 43rd Annual Conference, Leeds, 2-4 September 2013, 13.
[5] UK Presidency, „A European Criminal Intelligence Model", paper issued by the 2005 UK Presidency of the EU, 2005, 1.

(both private and public partners)".[6]

Europol was pointed as the central EU capability to receive, store and analyse this collected information and to support operational activities of the Member States based on Europol's earlier strategic assessments. Europol was also tasked to lead the further development of the ECIM.

The aim of this paper is, first, to present through a comparative analysisthe development of the European legal framework, institutions and instruments for the establishment of the European Criminal Intelligence Modelas part of the EU Internal Security Strategy. In the second part of the paper, the focus will be on revealing the European Criminal Intelligence Model and analysis of Europol as a central institution in the development of the ECIM, as well as on the presentation of the key document SOCTA (Serious and Organised Crime Threat Assessment) as a basis for a strategic approach to the ECIM in identifying of priorities and instructions for work.

2. European framework, institutions and instruments

At the European Union political level, the first efforts towards an integrated approach to police or criminal intelligence were made through the adoption of the Hague Programme and the Stockholm Programme but, more significantly, through the changes of the EU treaties brought by the Lisbon Treaty.The Hague and Stockholm Programmes identified the need for the consolidation of the cross-border police cooperation through different instruments for which the common thread is the exchange of various types of police information in the EU, whereas the Lisbon Treaty provides the EU with modern institutions and optimised working methods to address, among other issues, the security of the EU citizens.

The 2004 Hague programme[7] requested the Member States as well as the European responsible institutions to adopt innovative approaches to cross-border exchange of law-enforcement information with the view to creating a space of freedom, security and justice. The programme postulates the principle of availability of police information throughout the European Union and establishes a set of key conditions which should be strictly observed:

- the exchange may only take place in order that legal tasks may be performed;

[6] Council of the EU, Result of the "Harmony" project - "A generic European Crime Intelligence Model - Bringing together the existing instruments and strengthening Europol's central role", doc. 14851/10, Brussels, 25 October 2010, 8.

[7] Council of the European Union, *The Hague Programme: Strengthening Freedom, Security and Justice in the European Union*, General Secretariat, Brussels, 13 December 2004, 16054/04.

- the integrity of the data to be exchanged must be guaranteed;
- the need to protect sources of information and to secure the confidentiality of the data at all stages of the exchange, and subsequently;
- common standards for data access and common technical standards must be applied;
- supervision of respect for data protection, and appropriate control prior to and after the exchange must be ensured;
- individuals must be protected from abuse of data and have the right to seek correction of incorrect data.[8]

The 2009 Lisbon Treaty defines and implements a common security policy for the EU. It also establishes the shared competences between the Union and the Member States in the area of freedom, security and justice among other areas. The treaty also empowers the European Parliament and the Council to establish measures concerning:

- the collection, storage, processing, analysis and exchange of relevant information;
- support for the training of staff, and cooperation on the exchange of staff, on equipment and on research into crime-detection;
- common investigative techniques in relation to the detection of serious forms of organised crime.[9]

The Lisbon Treaty also provides for the creation of a new body, the Standing Comitee on Operational Cooperation and Internal Security (COSI). COSI was created with the view to facilitating, promoting and strengthening the coordination of EU States' operational actions in the area of internal security. It consists of high-level officials from EU States' ministries of the interior and of Commission representatives. However, other relevant bodies may be invited to attend COSI's meetings as observers.[10]

The Stockholm programme[11] adopted by the European Council in 2010 looks upon the idea of developing, over a period of 5 years, the specific framework with the view to creating an area of freedom, security and justice in the European Union. The aspects concerning the management of police information are contained in Chapter 4 of

[8] Official Journal of the European Union, "The Hague Programme: Ten priorities for the next five years The Partnership for European renewal in the field of Freedom, Security and Justice", 2005.
[9] Official Journal of the European Union – "The Lisbon Treaty" (Chapter 5 - Police Cooperation), C 306/2007, 67. *http://europa.eu/lisbon_treaty/full_text/index_en.htm,* November 9th 2015.
[10] European Commission, Home Affairs Section, http://ec.europa.eu/dgs/home-affairs/ , November 9th 2015.
[11] Council of the EU, *The Stockholm Programme – An open and secure Europe serving and protecting the citizen*, Brussels, 17024/09, 2 December 2009.

the Programme which deals with the Internal Security of the European Union. Indicative of the importance of criminal intelligence within the Programme is the fact that one of the pivotal principles around which the EU internal security strategy should be developed is that of a proactive and intelligence-led approach as well as afurther improvement of their information exchange.

The Stockholm programme acknowledges a wide choice of toolbox for collecting, processing and sharing of information between national authorities and other European players and upholds the principle of availability as established by the Hague Programme.

A step forward in improvement and creation of the European security model was made on 25 and 26 March 2010,when the European Union Internal Security Strategy was adopted, by which citizens' needs were aligned with the challenges of the XXI century, with the following fundamental goals: protecting rights and freedoms; improving cooperation and solidarity between Member States; addressing the causesof insecurity and not just the effects; prioritising prevention and anticipation; involving all sectors with a role to play in public protection (political, economic, social, etc.); communicating security policies to the citizens; and, finally, recognising the interdependence between internal and external security in establishing a „global security" approach with third countries.[12]

3. European Criminal Intelligence Model – *ECIM*

The Hague Programme: strengthening freedom, security and justice in the European Union, introduced the basic principles of Criminal Intelligence activity which represent the ground for the establishment of the European Criminal Intelligence Model based on the principles of Intelligence-Led Policing – ILP. In this respect, the Council of the European Union invited EU Member States to allow Europol to take a key position, i.e. a role in the fight against organized crime and terrorism, by establishing a legal basis for mandatory submission of Intelligence and information by EU Member States to Europol, as well as a mutual exchange of information.

Agreement on the establishment of the European Criminal Intelligence Model– ECIM was reached at the meeting of the European Ministers of Home Affairs in 2005.[13] It sets up a new strategy for information sharing among Law enforcement agencies of Member States and Europol.

[12] Internal Security Strategy for the European Union: Towards a European Security Model, Luxembourg, Publications Office of the European Union, 2010, 8–9.

[13] Annex-A European Criminal Intelligence Model, Justice and Home Affairs Informal, 8-9 September 2005. *www.eu2005.gov.uk*

In 2005, the UK Home Office published, under the UK Presidency of the European Union, a consultation paper[14] which firstly introduced the idea of a European Criminal Intelligence Modelbased on the aforementioned principles of intelligence-led policing. In this context the UK Presidency advanced the idea of a European Criminal Intelligence Model which would deliver benefits in particular by:

- improving common knowledge of serious and organised crime through a more effective collection, exchange, and analysis of information; increasing the effectiveness of Europol and other EU bodies;
- achieving better operational results in the highest priority areas; achieving greater accountability to Ministers in delivering action against Council priorities;
- and allowing all Member States and relevant EU institutions to observe a common methodology for tackling serious and organised crime in the EU.

In this way, the ECIM was assigned a role to secure a more efficient decrease of serious (severe) forms of crime in the field of European security, depending on the level of threat or vulnerability. It is achieved through the Criminal Intelligence Process whose aim is to identify criminal threats on the basis on Intelligence submitted to Europol, considering the fact that this institution is a central point for reception, storage and analysis of the collected informations. In accordance with the conclusions of the Hague programme, in 2006 Europol replaced a standard Annual Crime Report with the OCTA – European Union's Organised Crime Threat Assessment. The Council determined annual priorities and work directions on the basis of the assessment made. Europol's OCTA became a key element of the model of a proactive crime confronting. In order to improve the quality of OCTA documents, the European Criminal Intelligence Model was intensively developed. In this respect, Member States have put efforts to improve the quality of informations for law enforcement with the assistance of Europol. The document OCTA was developed during 2006, 2007, 2008, 2009 and 2011.

The OCTA representsan annual *strategic document* developed on the basis of information and Intelligence provided to Europol by Member

[14] Home Office – "A European Criminal Intelligence Model", Justice and Home Affairs Informal, Newcastle Gateshead, 8-9 September, 2005. If we are to draw a parallel between the European Criminal Intelligence Model and the UK National Intelligence Model, we would undoubtedly notice that the two models are identical. In fact, the only straight forward difference between the two models is their range (national and European level), as the UK paper explains how the European Criminal Intelligence Model would work by using the same intelligence management cycle of turning knowledge into effective action. Also:UK House of Lords European Union Committee, "Europol: Coordinating the Fight against Serious and Organised Crime", 29th Report of Session 2007-2008, HL Paper 183, 2008, 26.

States. Apart from that, the OCTA also relies on the information received from the states outside the EU as well as from the international law enforcement organisations (such as INTERPOL). Its goal is to manage priorities of Member States through the Police Chief Task Force (PCTF/ COSPOL), by direct dissemination of the assesment document to the law enforcement agencies at national level.

On a practical level, the aim of OCTA is to guide police operations, performed by Member States, by relevant Intelligence which will secure the use of relevant resources of the law enforcement agencies in confronting expected threat.[15] This methodis firmly in line with the decision of the Hague programme that activities directed towards fighting organized crime should be conducted more proactively than reactively. In this way, common knowledge about criminal activities and threats increases, identifying the most dangerous criminals and criminal organisations, that is, determining priority fields in order to reduce the area of organized international crime occurrence.

Strategic reports (analysis) OCTA can be:

- A **threat assessment:** contains the analysis and evaluation of the character, scope and impact of criminality (for example, the impact of money laundering on the EU; the impact of South American drug cartels on the EU).
- A **risk assessment:** identifies and examines vulnerable areas of society thatare, or could be, criminally exploited; this type of report offers recommendations on potential counter measures.
- A **general situation report:** describes current crime situations in general or specific areas (for example, drug situation in the EU; the amount of money laundered in the EU; the situation on terrorism in the EU).[16]

Although it was planned that Member States and their police organisations gradually completely adopt ECIM, there was a wide agreement from the start that this model had helped in harmonizing police practice throughout EU, as well as in introducing "modern" Intelligence-Led Policing and strategic planning.[17] There are also statements of the representatives of the Serious and Organised Crime Organisation (SOCA) testifying on the ECIM support:"*The ECIM model is ushering in a new phase in the development of Europol, establishing the agency as a central*

[15] Europol, „Europol Information Managament – Products and Service", File No. 2510-271, 14. (Europol, *Europol Information Managament*)

[16] Europol – Directorate General Internal Policies, "Development of the Organised Crime Threat Assessment (OKTA) and Internal Security Architecture: Study", Doc. No. PE 410.682, Brussels, 2009, 18.

[17] UK House of Lords European Union Committee, "Europol: Coordinating the Fight against Serious and Organised Crime", 29th Report of Session 2007-2008, HL Paper 183, 2008, 28.

intelligence base in the EU supporting a range of subregional initiatives around the EU. This approach is exactly in line with our aspirations for the organization".[18]

EU Member States tested the new way of work for the first time in 2006. The first threat assessment, made by Europol, set up four regional priorities in fighting organized crime in Europe. Those priorities are:

- The south-eastern region of the EU, with a focus on Turkish and Albanian OC groups;
- The south-western region of the EU, with a focus on certain African OCgroups;
- The north-eastern region of the EU, focusing on the Baltic States and theinfluence of Russian speaking OC;
- The Atlantic region, revolving mainly around the pivotal transnational role of Dutch, British and Belgian criminal organisations.[19]

During Belgian Presidency of the Council of the European Union in 2009, Harmonization Project was launched, that is, the project of integration of EU instruments, including the OCTA, in a higher-level, more consistent and effective approach, within which a new policy cycle in fighting serious and transnational criminal was adopted for the period of 2013–2017. The operational basis of the new cycle in future concrete operational plans was the SOCTA (Serious and Organised Crime Threat Assessment).[20]

In the interim period (2010-2013), prior to the full policy cycle of 2013-2017, an initial, reduced cycle was initiated. The 2011 OCTA (Organised Crime Threat Assessment) provided the basis on which the Council agreed eight priorities for 2011-2013. These were translated into strategic goals, and eight EMPACT projects were launched to coordinatethe ongoing action by Member States and EU organizationsagainst the identified threats. The eight EMPACT projects decided upon in 2011 were: West Africa, Western Balkans, Facilitated illegal immigration, Synthetic drugs, Smugglingin shipping containers, Trafficking in human beings, Mobile (Itinerant) Organised Crime Groups and Cybercrime.[21][22]

The SOCTA uses the definition of international organized crime provided by the Framework Decision on organized crime of 24 October

[18] Europol , OCTA EU Organised Crime Threat Assessment, 2006, 24.
[19] *Ibid*., 24.
[20] Council of the EU, "Council conclusions on the creation and implementation of a EU policy cycle for organised and serious international crime", Brussels, 8 and 9 November 2010.
[21] European Police Office, *EU Serious and Organised Crime Threat Assessment*, 2013, 9. (SOKTA 2013).
[22] More about SOKTA: (SOKTA 2013).

2008.[23] This Framework Decision defines a criminal organisation as "*a structured association, established over a period of time, of more than two persons acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, to obtain, directly or indirectly, a financial or other material benefit*".

The SOCTA is a strategic report. It identifies and assesses threats, analyses vulnerabilities and opportunities for crime and includes findings specific to regions and Member States.

The aim of the SOCTA is to:

- analyse the character or threatening features of organized crime groups (OCGs);
- analyse the threatening features of serious and organized crime areas of activity (SOC areas);
- analyse threatening aspects of OCG and SOC areas by region;
- define the most threatening OCGs, criminal areas and their regional dimension.[24]

The development of serious and organized crime threat assessments is, therefore, beneficial for a number of related reasons as they:

- Enable the government to more effectively protect the state and its people from the effects of serious and organized crime;
- Institutionalize procedures in which information on serious and organized crime can be more systematically collected, assessed and published;
- Are a crucial government and organizational policy making and management tool to identify priorities and guide decisions as to the allocation of resources;
- Will identify effective actions in terms of better prevention, intervention and partnerships;
- Are excellent monitoring tools when produced regularly;
- Provide a foundation on which other information and intelligence tools (for example the requirements for future criminal intelligence collection) can be built; and,
- Make an important contribution to a higher degree of transparency and provide a forum to involve relevant stakeholders (such as, for

[23] Council of the EU, Council Framework Decision, 2008/841/JHA of 24 October 2008 on the fight against organised crime, OJL 300, 11. 11. 2008, 42.
[24] SOKTA 2013, 42.

example, business groups and community leaders) in debates as to how serious and organized crime can be effectively countered;
- Provide a mechanism for promoting collaboration and cooperation across arange of public and private sector organization stakeholders.[25]

The policy cycle will last for four years and it consists of four key steps:

1. **Step 1: SOCTA** – the Serious and Organised Crime Threat Assessment, developed by Europol delivers a set of recommendations based on an in-depth analysis of the major crime threats facing the EU.
2. **Step 2: Policy-setting and decision making**- The Council of Justice and Home Affairs Ministers uses the recommendations of the SOCTA to define its priorities for the next four years. **MASP** - Multi-Annual Strategic Action Plans will be developed from the priorities in order to define the strategic goals for combating each priority threat (2013). These projects will set out yearly operational action plans (**OAPs**) to combat the priority threats. The first plans will be developed during 2013 to become operational in 2014.
3. **Step 3: Implementation and monitoring** of annual OAP's on the basis of the MASPs using the framework of **EMPACT** (European Multidisciplinary Platform against Criminal Threats). COSI invites the relevant MS and EU agencies to integrate the actions developed in the OAPs into their planning and strategy.
4. **Step 4: Review and assessment** – the effectiveness of the OAPs and their impact on the priority threat will be reviewed. In the meantime, Europol continuously engages in horizon scanning to identify new threats and trends. In 2015, an interim threat assessment (SOCTA) will be prepared by Europol to evaluate, monitor and adjust (if required) the effort in tackling the priority threats.[26]

3.1. Europol's Information Management Process

Exchange of information, especially information improved by appropriate analysis and unification, represents the main activity of Europol. This method of work provides support to police efforts and represents a fundamental work tool in criminal investigations and

[25] United Nations Office on Drugs and Crime, *Guidance on the use and preparation of serious and organized crime threat assessments – The SOCTA Handbook*, Vienna, 2010, 6.
[26] SOCTA 2013, 9.

tendencies in fighting organized crime.

Information management is a process based on raw information, which can beabout a crime, perpetrator, suspected person, etc. Information management'sobjective is the enhancement of the basic information which provides additional knowledge about the activities of criminals. The result focused on is "*information designed for action*".[27]

Europol – ECIM process can be presented as activities (cycle) in six steps: 1) *Collection*; 2) *Collation*; 3) *Evaluation*; 4) *Analysis*; 5) *Dissemination*; and 6) *Re-evaluation.*

Crucial to the function of this model is the safety of information distributed to Europol, therefore it is necessary to properly evaluate and label codes for transmission to Europol. Also, products distributed from Europol to Member States will, accordingly, be labeled using security codes and codes for information handling.

Evaluation codes are based on the *4x4 system* used in the Member States toestablish the authenticity and accuracy of the supplied information. Evaluation codes consist of source codes and information codes.

3.2. Data Protection and Confidentiality

The purpose of data protection is to afford protection to the individual about whom data are processed. This is typically achieved through a combination of rights for the data subject and conditions for those who process data. Data protection within Europol is about creating a framework for Europol's information handling that appropriately takes care of the interests of the individual on whom law enforcement data are processed.

The level of protection of Europol information is a standardised format that indicates the protection measures that need to be applied to this information.

Three types of information can be identified:[28]

1. **(Europol) public information:** information which is marked or is clearly recognisable as being public information. The decision to allocate the public status to information can only be taken by head of unit or department within Europol, or a person under his authority, where the information originates;
2. **Europol BPL information:** Basic Protection Level information (BPL);
3. **Europol classified information:** information subject to a special

[27] Europol, *Europol Information Managament*, 7.
[28] Europol, *Europol Information Managament*, 8.

security regime and marked with one of the classification levels:

- **Europol Restricted:** This level is applicable to information and material the unauthorized disclosure of which could be disadvantageous to the interests of Europol or of one or more Member States.
- **Europol Confidential:** This level is applicable to information and material the unauthorized disclosure of which could harm the essential interests of Europol or of one or more Member States.
- **Europol Secret:** This level is applicable only to information and material the unauthorised disclosure of which could seriously harm the essential interests of Europol or of one or more Member States.
- **Europol Top Secret:** This level is applicable only to information and material the unauthorised disclosure of which could cause exceptionally grave prejudice to the essential interests of Europol or of one or more Member States.

4. Conclusion

The Treaty on European Union, apart from clear goals of promoting economic and social progress, envisages the implementation of the common foreign and security policy as well as the development of close cooperation on justice and home affairs. The latter goal implies a high level of political engagement among EU Member States and real efforts to develop a coherent approach. Such efforts are certainly necessary, considering the overall widening of criminal environment and facing new threats. Political focus directed only to solving financial issues seems insufficient and serious efforts are needed to establish new mechanisms of EU such as the strategic approach envisaged by the European Criminal Intelligence Model.

In the light of these considerations we believe that a functional European Criminal Intelligence Model would only be possible if the Member States law enforcement agencies would strengthen their efforts towards a full adoption and implementation of the concept of "Intelligence-Led Policing" which would also involve an organizational realignment by moving their focus from the investigative/reactive activitiestowards a preventive/information-based approach. At the EU level, the ECIM should be based on a common legal framework as regards the management of intelligence with unique procedures for collecting, evaluating, storing, analysing and disseminating intelligence which would also include the education/training dimension.

In the context of the orientation of Serbia towards integration into the European Union, and hence into the subsystem of the European Criminal Intelligence Model, it is neccesary to carry out reforms of both

public administration and police in order to to align with EU standards and models. Experiences of prosperous European countries, as well as the basis of the European Security Model presented in this paper, seem to be a reference base for the police reform and path towards the European Criminal Intelligence Model.

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ПУТ КА ЕВРОПСКОМ КРИМИНАЛИСТИЧКО-ОБАВЕШТАЈНОМ МОДЕЛУ

Резиме

Велики изазови које са собом доносе тешки економски и финансијски услови, а са друге стране тренд раста, софистицираности и глобализације организованог криминала, једнако утичу на државе чланице Европске уније, као и остале европске земље, те је стварање европског простора безбедности и правде потребније више него икада. Ово се може постићи кроз међусобну сарадњу и консолидацију прекограничне полицијске сарадње засноване на развоју националних полиција, интеграцију већ успостављеног оквира и инструмената Европске уније у области правосуђа и унутрашњих послова_ и јачање размене информација полицијских организација, а све у циљу имплементације Европског криминалистичко-обавештајног модела. Стога, овај рад има за циљ да анализира стање у погледу усвајања, развоја и имплементације Европског криминалистичко-обавештајног модела ECIM као дела Стратегије Европске уније за унутрашњу безбедност. Ако се овоме дода чињеница да је један од приоритетних задатака наше државе, у склопу усаглашавања са прописима Европске уније, управо захтев за усаглашавње са Европским криминалистичко-обавештајним моделом, онда овај рад, посматрано са аспекта њеног доприноса, добија још више на значају. Допринос рада у овом домену нарочито треба ценити у светлу актуелног одсуства стратегије и јасног курса у спровођењу и имплементацији оваквог полицијског рада упркос европској (али и светској) актуелности.

Кључне речи: *Европски криминалистичко-обавештајни модел (*ECIM); криминалистико-обавештајна делатност; Европол; SOCTA; *полицијски рад вођен криминалистичко-обавештајним информацијама;*

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Scientific review paper

UDK: 342.721

PREVENTING TERRORISM OR ELIMINATING PRIVACY? RETHINKING MASS SURVEILLANCE AFTER SNOWDEN REVELATIONS

Abstract

After Edward Snowden's leaks revealed to the public in June 2013, mass surveillance programs still exist. Considering that these practises restrain the right to privacy, there is a need to rethink the very concept of mass surveillance. The aim of this paper is to analyse this concept, sum up the problems related to its logic and methods, and question its legitimacy. Critical approach to the concept of mass surveillance is necessary on order to create the basis for resolving current issues related to it.

My research shows that there are reasons to question legitimacy of mass surveillance as it not only breaches the right to privacy but also ignores the presumption of innocence and there is possibly a substantial lack of oversight by the independent bodies which is necessary to make these practices democratic. Moreover, given that mass surveillance programs were introduced to fight terrorism and crime, it should be assessed how efficient they really are and whether they are worth having considering their drawbacks and potential dangers for the society.

***Key words**: mass surveillance, terrorism, Snowden, privacy.*

1. Introduction

Information revealed by the former US National Security Agency employee Edward Snowden and published by The Guardian, The New York Times and other media in June 2013 confirmed the existence of surveillance programs conducted by intelligence services such as the US National Security Agency (NSA) and British Government Communications Headqarters (GCHQ). Even though the news about the existence of systems which are monitoring private communications isn't completely new, and the general public was aware of a global system for the interception of

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private and commercial communication ECHELON since 2001, what made Snowden's revelations shocking was the scale of this surveillance, but also the undemocratic way it was introduced and conducted under secret authorisation[2]. It was revealed that the intelligence agencies had been holding whole populations under surveillance and that targets were not just those suspicious of committing crimes and terrorism acts, but also ordinary citizens as well as political leaders, UN officials and companies.

One of the key questions that arose immediately after Snowden's revelations was the one related to the right to privacy. Due to the development of technology, ubiquitous computing and contemporary surveillance methods, privacy has become a critical topic in the field of politics and law, but one of the main problems seems to be lack of definition of the notion itself and the absence of a clear approach in dealing with privacy related issues. Many theoreticians claim that it is a social construct and therefore its meaning depends on the specific historical and cultural context, however, it also seems that there is some kind of consent that it is something valuable all human beings feel the need for and are entitled to[3]. After Snowden's leaks, it became apparent that we should rethink the concept of privacy and find some kind of a method of balancing it with conflicting interests. Most importantly, we need to establish some kind of attitude towards the right to privacy versus mass surveillance in order to provide adequate solutions in the sphere of law.

Another key issue that needs to be addressed in relation to mass surveillance is its benefits for fighting terrorism and crime. As Snowden's leaks suggest, it is highly likely that benefits of mass surveillance are simply not worth it. Calculating costs and benefits of surveillance is crucial for determining the attitude that should be taken towards both privacy and surveillance.

Even though it was bureaucratic surveillance developed in previous centuries that led to its modern day practises, with digital technology surveillance reaches mass scale level and possibly covers almost the entire electronic communication of everyone in the world. Since technology inevitably changes the way we communicate and live, it also changes surveillance practises and thereby our very perception and expectation of privacy. If we accept that it is a social construct, we should also accept that we need to build its new meaning, considering the new circumstances. There seem to be two opposing arguments which summarise today's views on privacy and surveillance. The first one says that there is "nothing to hide" and it prioritises security, while the other one claims that privacy is "lost"

[2] D. Wright, R. Kreissl. *European Responses to the Snowden Revelations: A Discussion Paper*. IRISS, European Commission 2013., 6.
[3] C. Bennett. *The Privacy Advocates*. MIT Press, Cambridge Massachusetts 2008., 2

and that we should somehow reclaim it[4]. These is also a medium approach which focuses on finding a balance between the two opposites, admitting that control is a necessity, but only if conducted in a democratic way with respect for privacy rights.

However, after Edward Snowden's revelations it is also important to rethink surveillance as a means of control and question legitimacy of mass surveillance in particular. Considering constant breaches of the right to privacy and restraining liberties, it is crucial to critically approach this issue. This aim of this paper is to sum up potential problems related to mass surveillance and question its legitimacy, especially regarding its efficiency in preventing criminal activities as well as adequate surveillance oversight.

2. The Origins of Mass Surveillance

As Dandeker writes, surveillance practices existed in all societies simply because they are "features of all social relationships", and he stresses out that the key change that brought about the contemporary model of surveillance occurred when personal and patronage forms of indirect control were replaced by bureaucratic systems of administrative power.[5] He defines surveillance as collection and storage of information about people or objects and the supervision of the activities of people or objects, but also stresses out that it is often used as an administrative means of reproducing a social system of rule.[6]

And it is indeed hard to imagine modern nation states functioning without mass surveillance which have to regulate their internal and external peace with military and police. The ultimate purpose of governmental surveillance has always been maintaining peace or preventing and sanctioning rule breakers. Moreover, the same principle was applied to other institutions including schools, hospices and modern business companies. Due to large numbers of individuals, the only way to make sure everyone obeys the rules was to introduce surveillance systems. Surveillance was the survival strategy of the modern nation state as it would easily collapse without various systems of bureaucratic control[7]. In that sense it can be said that there is nothing wrong with mass surveillance as it is simply an instrument or organising the society. As long as the surveillance is localised, justified and just, it is not a practice that necessarily has to be seen as a threat.

[4] D. Solove. *Nothing to Hide: The False Tradeoff between Privacy and Security*. Yale University Press, New Haven and London 2011

[5] C. Dandeker. *Surveillance, Power and Modernity: Bureaucracy and Discipline from 1700 to the Present Day*. Cambridge: Polity Press 1994., 193-194

[6] *Ibid*. 37-38.

[7] *Ibid*.194

Foucault defined modern societies as 'disciplinary societies'[8]. Its surveillance mechanism was inspired by Bentham's 'panopticon' prison based on the principle of the invisible watcher who watches the prisoners without being seen in order to control or discipline their behaviour by creating an optical illusion that they are being watched at all times. He connects the notion of surveillance to that of power and acknowledges that the key feature of modernity is breaking up the singular governmental centre of power into separate units or centres of power. In this sense all these centres such as schools, factories, medical institutions and prisons are exercising disciplinary power thereby controlling the private lives of the citizens.

While societies of the age of modernity operated with visual and mechanical technology to conduct surveillance practices and the control was limited to specific physical places where surveillance was practised, today's digital technology makes the surveillance ubiquitous. Deleuze described postmodern societies as "societies of control" as opposed to Foucault's disciplinary societies.[9] He stresses out that technology does not determine social forms but rather expresses them: "the old societies of sovereignty made use of simple machines – levers, pulleys, clocks; but the recent disciplinary societies equipped themselves with machines involving energy with the passive danger of entropy and the active danger of sabotage; the societies of control operate with machines of a third type, computers, whose passive danger is jamming"[10].

By calling the new type of societies which emerge with ubiquitous computing, Deleuze anticipated consequences of both new forms of production and new surveillance practices followed by it. In this short article which was published in 1990 he gave a brief prediction of the future of the capitalism and it seems apparent that the societies of control as he defines them should be directly developed from the disciplinary societies and their modes of production and surveillance. He claims that Kafka's *Trial* is positioned at "the pivotal point between two types of social formations, and described the most fearsome of juridical forms"[11] which clearly shows that he sees modern methods of control stemming from bureaucratic surveillance.

While many see technology as the main cause of the spread of surveillance and elimination of privacy in contemporary societies, Deleuze along with many other theoreticians points out that it is not technology that brought about surveillance, but rather social systems developed and used technologies in such a way to design certain systems

[8] M.Foucault, *Discipline and Punish: The Birth of Prison*. New York: Vintage Books 1995., 205
[9] G. Deleuze. "Postscript on the Societies of Control", *October, Vol. 59*, 1992., 3-7
[10] *Ibid*. 6
[11] *Ibid*. 5

of control. It is very common nowadays to associate surveillance with technology, but it is simply not seeing the bigger picture, as the story about surveillance begins long before computers were invented.[12] It was in fact control that motivated creation of computers which are enabling information collection and processing and the development of these technologies started back in the 19th century with the invention of tabulating machines by Herman Hollerith and others.[13] After World War I, these machines were used not only by governmental institutions, but also for businesses (for example, IBM punch card machines were used to organise and control enterprises)[14].

It was during 1960's and 1970's when the discourse of contemporary surveillance stared to emerge along with creation of databases of both governmental institutions and business companies which wanted to collect data on consumers.[15] This means that the surveillance system we now live in and which we became more aware after Edward Snowden's revelations in 2013, was actually conceived and structured long before, and it is new technologies that took it to the new level in terms of quantity of collected information.

3. What is wrong with Mass Surveillance?

It can be argued that the underlying principle of surveillance remained the same even though technology radically changed the way it operates. It seems that the key difference between monitoring practices in earlier centuries and today is the scale of surveillance. The capacities of collecting information on people has dramatically increased and in Edward Snowden's words the problem with NSA databases is the "omniscient, automatic, mass surveillance" of everyone, regardless of whether they are suspected of any wrongdoing.[16] Bulk collection of private correspondence, interception of telephone calls and storage of various personal data in huge databases not only violates the right to privacy as a fundamental right, but also doesn't recognise the presumption of innocence by treating ordinary people as potential suspects.

Human rights are considered as pillars of democracy which is why they should not be violated unless there is a good reason. The purpose of mass surveillance projects imposed by the NSA is fighting terrorism and

[12] D. Barnard-Wills. *Surveillance and Identity: Discourse, Subjectivity and the State*. Farnham: Ashgate 2012., 12
[13] D. Wright *et al*. *Surveillance, Fighting Crime and Violence*, IRISS, European Commission 2013., 28
[14] *Ibid*. 29
[15] *Ibid*. 30
[16] Ted Talks, *Edward Snowden: Here is How We Take Back the Internet*, *http://www.ted.com/talks/edward_snowden_here_s_how_we_take_back_the_internet*, 03.05.2015.

security was put forward as the core value in every society which should be considered as more important than privacy. However, the question which arises in the light of Snowden's revelations is this: is it really necessary to trade all privacy for security?

The so called "trade-off paradigm" has been extensively debated in the domain of legal theory, and in 2010 the European Commission questions the trade-off model between privacy and security through the PRISMS Project. The objectives of the project were to determine whether people actually evaluate the introduction of security technologies in terms of a trade-off and what are the main factors that affect public assessment of the security and privacy implications of given security technology. The survey was conducted in 27 EU countries with target population being general population aged 18+ and included 27,195 interviews. The results of this survey had shown that European citizens consider privacy as an important value (both online and offline), that people feel more data about them is collected and that they less accept disclosure of personal data compared to previous surveys. The general conclusion was that "there is no significant relationship between citizens' general attitudes towards 'privacy' and 'security'".[17]

The PRISMS Project clearly shows that the trade-off paradigm is not the only way to understand the problem of surveillance. The debate on privacy does not end with a simple question of whether people are ready to exchange their individual privacy for the benefit of security of the society as a whole. The results of this survey point towards a view that the two issues should be tackled separately since the general public in the EU values both privacy and security. In this sense, mass surveillance that wipes out individual privacy is deeply disturbing.

However, one of the crucial problems related to the NSA surveillance programs is the fact that their legality is based on "decisions made by secret judges in secret courts and secret interpretations of law"[18] He refers to the Foreign Intelligence Surveillance Court (FISC) which "operates in complete secrecy"[19]. The Guardian journalist Glenn Greenwald's questioning of the transparency of this court was based on the analysis of NSA documents provided by Edward Snowden. He claimed that "those documents demonstrate that this entire process is a fig leaf, 'oversight' in name only" and that this court "offers no safeguards"[20]

[17] M. Friedwald, "Key results from the PRISMS survey", *PRISMS Project*, *http://prismsproject.eu/wp-content/uploads/2014/11/Friedewald_PRISMS@FinalConference.pdf* , 03.05.2015.
[18] TED Talks, *Edward Snowden: Here is How We Take Back the Internet*, *http://www.ted.com/talks/edward_snowden_here_s_how_we_take_back_the_internet*, 03.05.2015.
[19] G. Greenwald, "Fisa court oversight": a look inside a secret and empty process", *The Guardian, http://www.theguardian.com/commentisfree/2013/jun/19/fisa-court-oversight-process-secrecy*, 03.05.2015.
[20] *Ibid*.

The documents show that the NSA does not in fact need to inform the court on whose calls and emails they intend to intercept in order to obtain approval from the FISC. In this way Surveillance programs can listen to great many different calls and read great many emails without any requirement of a warrant, as limitations are applied only to surveillance of US citizens and communications that occur within USA borders[21]. "The decisions about who has their emails and telephone calls intercepted by the NSA is made by the NSA itself, not by the Fisa court, except where the NSA itself concludes the person is a US citizen and/or the communication is exclusively domestic. But even in such cases, the NSA often ends up intercepting those communications of Americans without individualized warrants, and all of this is left to the discretion of the NSA analysts with no real judicial oversight".

In their discussion paper published as a part of European Commission's IRISS program, Wright and Kreissl call the FISC a "toothless" court which "provides a prima facie legal basis for many NSA actions, but they hollow out the idea of rule of law by doing so"[22] The Increasing Resilience In Surveillance Societies (IRISS) project was initiated by the European Commission after the Snowden revelations with the aim to investigate and analyse surveillance and its impact on human rights, as well as to provide ideas for enhancing social, economic and institutional resilience in Europe.

If there is no independent judicial instance that ensures transparency and accountability of the surveillance practices, governments and intelligence services have virtually limitless power to monitor citizens. This type of unrestrained control cannot be called democratic and was always associated with autocratic regimes throughout history. The fact that mass surveillance programs were introduced secretly, without public awareness and consent illustrates just how severely this type of control undermines basic principles of democracy.

Worryingly, this type of control essentially targets everyone and not just those suspected of committing crimes, planning terrorist attacks or being involved with extremists. Data provided by Edward Snowden confirm fears that many innocent citizens were targeted for all sorts of reasons other than preventing terrorist attacks and crime. [23] One of the worst consequences of mass surveillance programs is their abuse. As Stephen Walt, Harvard professor of international affairs stated: "Once a secret surveillance system exists, it is only a matter of time before

[21] *Ibid*.
[22] D. Wright and R. Kreissl. *European Responses to Snowden Revelations: a Discussion Paper.* IRISS, European Commission 2013.,14
[23] *Ibid*.

someone abuses it for selfish ends"[24]. This is why oversight of these programs is essential in every democratic state.

After Edward Snowden revealed NSA documents that prove the existence of mass surveillance projects such as NSA's PRISM and GCQH's TEMPORA, it was also discovered that leaders of Germany, Italy, Spain and other allies were targets of surveillance programs, it became apparent that it was not used solely for the purpose of fighting terrorists. It was also learnt that much of the NSA surveillance was focused on oil companies which also clearly signalises abuse of these practises.[25]

While rarely anybody would argue that all forms of surveillance are harmful, key criticisms of mass surveillance practises revolve around the argument of "failure of oversight". Wright and Kreissl underlined this problem and pointed out that surveillance should be controlled and targeted to battle terrorism.[26] Consequently, it is not surveillance *per se* that poses a threat to democracy, but the lack of control of surveillance practises as well as bulk collection of data on individuals who are not suspects. Wright and Kreissl propose that "there should be no mass surveillance unless any particular system can be justified, starting with a privacy impact assessment, review by a regulatory authority and parliamentary oversight committee" and add that this oversight committee should be led by a member of opposition.[27] Additionally, they say that governments should conduct regular opinion surveys to find out what the public thinks about the extent of surveillance and to produce independent annual reports on the state of privacy and surveillance along with recommendations on how to provide better protection of privacy.[28]

Furthermore, the problems with surveillance and control over individual privacy does not end with monitoring electronic communication. The very last bastion of privacy should be inside of the mind to which only individuals should have exclusive access. However, Defence Advanced Research Projects Agency (DARPA) works on projects of mind control for military purposes.[29] Even though these projects are still on experimental level, there is a strong indication that the neuroscience can contribute to inventing mechanisms for invading the innermost area of privacy – the inside of the

[24] S. Walt, "Snowden deserves an immediate presidential pardon", *Financial Times, http://www.ft.com/cms/s/0/0ccf2d14-e7c1-11e2-babb-00144feabdc0.html#axzz3YzuAMGSb* , 03.05.2015.
[25] G. Greenwald. *No Place to Hide: Edward Snowden, the NSA and the Surveillance State*. London: Penguin 2013., 151
[26] D. Wright and R. Kreissl. *European Responses to Snowden Revelations: a Discussion Paper.* IRISS, European Commission 2013., 43
[27] *Ibid*. 43
[28] *Ibid*. 43
[29] E. D. Cohen. *Mass Surveillance and State Control: The Total Information Awareness Project*. Palgrave Macmillan 2010., 16-17

human brain. With possibilities of these practises arises the fear of realisation of the most disturbing Orwellian prediction – the "thought police". The world sleepwalked into mass surveillance of electronic data and unless there is a substantial change in the way surveillance practices are conducted, privacy might be eliminated altogether, followed by all freedoms.

4. Questionable Success of Mass Surveillance in Fighting Terrorism and Crime

The reasoning behind programs for mass surveillance is that these systems will provide new, more efficient form of policing which will enable more crime prevention. Anti-terrorism legislations such as USA Patriot Act and other legal regulations of different countries around the world that concern intelligence and national security legalised many forms of surveillance in order to protect security and battle terrorism, but the key question is how useful these systems are for prevention of terrorist attacks and crime in general.

If governmental surveillance isn't itself being controlled in any way, as it was shown in the previous chapter, then it is clear that it is hard to measure the impact of surveillance on crime prevention. This is one of the key conclusions stated in the IRISS on surveillance, fighting crime and violence.[30] Moreover, Edward Snowden stated that, according to his knowledge and experience during his contract with the NSA, mass surveillance "hasn't stopped a single terrorist attack".[31] He also said that terrorism was used as a "cover for action" and that in his personal opinion these surveillance programs do not have any value. Since 2001, the everyday presence of digital surveillance has become normalised through the so called "trade-off paradigm" as the whole word was frightened by acts of terrorism. People were promised to get more security in exchange for some of their privacy.

However, the concept of increasing surveillance for the sake of safety isn't exclusively related to terrorism and issues of national security, but also individual safety. Twentieth century introduces concepts of 'defensible spaces' and 'gated communities' which illustrates modes of surveillance that are not practised by governments or corporations, but in fact by citizens themselves. As Setha M. Low writes, "At the turn of the twentieth century, secured and gated communities in the United States were built to protect family estates and wealthy citizens […] gates then spread to resorts and country club developments, and finally to middle-

[30] D. Wright *et al*. *Surveillance, fighting crime and violence*. IRISS, European Commission 2013., 11
[31] TED Talks, *Edward Snowden: Here is How We Take Back the Internet*, *http://www.ted.com/talks/edward_snowden_here_s_how_we_take_back_the_internet*, 03.05.2015.

class suburban developments".[32] Her anthropological research revealed that it was the urban fear of the "other" that led to this trend of hiding behind gates and introducing surveillance mechanisms in and around the private property to ensure protection against criminals who were normally referred to as members of other races or lower classes.[33]

On the other hand, the architect Oscar Newman introduced the concept of 'defensible space' in order to create a new criminological sub-discipline called "Crime Prevention Through Environmental Design" (CPTED). He proposes the idea of creating spatial units which rely on "self-help rather than on government intervention, and […] it depends on resident involvement to reduce crime and remove the presence of criminals".[34]

However, the idea of preventing crime by the means of video surveillance has led to the development of CCTV surveillance system which was first established in the UK and then copied around the world. Video surveillance as we know it today consists of both security cameras in public spaces operated by the police and those installed in private properties including shops and residential buildings. Named 'the most surveilled country in the world'[35], the UK has an extremely high level of video surveillance, but as William Webster claims, the "use of CCTV has evolved from being associated with combating crime to systems designed to reduce the fear of crime, deter anti-social and undesirable behaviour, and encourage community safety".[36] It can therefore be said that it is now commonly accepted that the role of video surveillance is not simply prevention of crime but also controlling behaviour. Similarity with Bentham's prison guard is obvious.

Since it isn't possible to have constant live surveillance and have everyone monitored at all times, the possibility of recording and storing video files is useful for identifying and tracking criminals after the crime has occurred, as well as providing sufficient evidence for the prosecution.

Other key surveillance areas aimed at fighting crime and terrorism include DNA samples, biometrics, x-ray security screenings etc. Information collected from mobile phone service providers are also used by the police and secret services to fight terrorism and other forms of crime. However, the major problem with all these surveillance practises seems to be a lack of

[32] S. M. Low. „The Edge and the Center: Gated Communities and the Discourse of Urban Fear", S. M. Low and D. L. Zuniga eds. *The Anthropology of Space and Place*. Malden, Oxford, Carlton: Blackwell Publishing 2007., 388

[33] Ibid. 389

[34] O. Newman. *Defensible Spaces*. Department of Housing and Urban Development and Research 1996., 9

[35] D. Barnard-Willis. *Surveillance and Identity: Discourse, Subjectivity and the State*. Farnham: Ashgate 2012., 18

[36] W. Webster, "CCTV Policy in the UK: Reconsidering the Evidence Base", *Surveillance & Society, Vol. 6, Issue 1*, 2009.

oversight. In other words, there is no one to watch the watchers.

Using surveillance technologies often leads to breaches of the right to privacy and often doesn't acknowledge the presumption of innocence which is an important legal safeguard.[37] This is precisely why it is important to establish some kind of independent monitoring system and constantly analyse the impact of surveillance technologies on preventing crime.

With its IRISS project initiated after Snowden's revelations, the European Commission made a bold statement that there is a need for the increase of resilience on existing surveillance practises and their researches show that there is an "insufficient an incomplete knowledge and consideration of the social and economic costs of surveillance".[38] The question seems to be: is mass surveillance really worth it, or is it just a means of control that eliminates privacy without achieving other important benefits for the society? Costs and benefits should clearly be re-evaluated.

It should also be established whether a more targeted surveillance that focuses on crime prevention and detection should replace mass surveillance and bulk collection and storage of private information of ordinary citizens. According to the so called "trade-off" paradigm, citizens should exchange their individual freedom for security which is considered to be greater benefit for both individuals and the society as a whole. But while this sounds as a very reasonable argumentation most people would agree with, Snowden's revelations on surveillance practices done by the NSA and GCHQ imply that there is a need to question this reasoning.

Perhaps there is no need for a trade-off and citizens can enjoy both their human right to privacy and have security. This is merely a hypothesis based on some researches and hints dropped by Edward Snowden himself, but it could be proven wrong or right with a research that would weigh the impact of mass surveillance on preventing terrorism and crime, and assess whether it is worth it at all or not.

The very existence of these programs that enable surveillance on such a mass scale without proper oversight is worrying because it opens up endless possibilities for abuse. Unlocking channels of communication and disabling encryption potentially makes these channels and databases vulnerable and leaves personal information of citizens more exposed to criminals. In this sense surveillance systems can perhaps cause more criminal activities instead of actually preventing them which would make societies even less safe, while at the same time depriving individuals from privacy.

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[37] D. Wright *et al .Surveillance, fighting crime and violence*. IRISS, European Commission 2013., 12
[38] *Ibid*. 14

5. Conclusion

Surveillance not a modern day phaenomenon, but rather a type of practice that was exercised throughout history in very different communities. However, contemporary mass surveillance is a new thing that emerged with rapid development of digital technology. Even though new technologies facilitate electronic surveillance on such a mass scale, it is not technology itself that caused. Surveillance as we know it today stems from bureaucratic systems established in modernity and the principle which existed a century ago remains exactly the same, while it is simply the technology that speeds up the process and allows collecting more data.

But while it seems obvious that there is nothing wrong with surveillance *per se*, there are certain problems with both the logic and the method of conducting mass surveillance. As it applies to both suspects and innocent citizens, it breaches the right to privacy and ignores presumption of innocence. Moreover, as some researches have shown, that there is a reason to question the impact of mass surveillance programs and collecting bulk data on prevention of terrorism and crime which is supposed to be the only reason why such programs were established in the first place.

Another big problem with mass surveillance is the lack of control of these practices by independent instances. These should be courts such as FISC in USA, but, as this paper and many other documents show, there is a strong doubt that these courts are actually not independent and that they are not a much needed safeguard against unlawful surveillance of innocent individuals. This issue leads to questioning the legitimacy of mass surveillance due to the lack of oversight. Unless surveillance practises are monitored and regulated by the independent body, these practices are simply not democratic. Furthermore, the fact that very little has changed in the legal system to stop such surveillance practises almost two years since Edward Snowden's first leak shows how powerful and undemocratic this system already is.

The consequences of such undemocratic practices are also worth considering. Allowing uncontrolled mass scale surveillance may potentially lead to even more severe forms of control than simply recording and storing electronic data. Considering the nature of developments in the field of neuroscience conducted by institutions such as DARPA, mind control isn't a science fiction any more, but quite possibly a realistic fear. Control practices could potentially evolve into losing even more freedom and wiping out all spheres of privacy, including the privacy of mind.

Finally, "nothing to hide" argument which is based on a belief that innocent people have nothing to hide and therefore should not be opposed to losing their privacy should be questioned as well. The very concept of human

rights is constructed on the belief that all humans need them and that they are somehow inherent to the human nature. In the words of Edward Snowden, "you need your rights because you never know when you are going to need them".[39]

It is for all these reasons that the concept of mass surveillance should be critically approached rather than just accepted and that steps should be taken to assess its potential dangers as well as benefits.

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SPREČAVANJE TERORIZMA ILI ELIMINACIJA PRIVATNOSTI? KRITIČKO PREISPITIVANJE MASOVNOG NADZORA NAKON OKTKRIĆA EDVARDA SNOUDENA

Rezime

Nakon otkrića Edvarda Snoudena juna 2013 godine, programi za masovni nadzor i dalje postoje. S obzirom na činjenicu da ove prakse ograničavaju pravo na privatnost, postoji potreba da se sam koncept masovnog nadzora kritički promisli. Cilj ovog rada je da analizira ovaj koncept, sumira probleme vezane za njegovu logiku i metode nadzora, kao i da preispita njegovu legitimnost. Kritički pristup fenomenu masovnog nadzora je neophodan kako bi se stvorila baza za rešavanje aktuelnih problema vezanih za ove prakse.

Ovo istraživanje pokazuje da postoje razlozi da se preispita legitimnost masovnog nadzora, i to ne samo zato što on krši pravo na privatnost, već i zato što ignoriše predpostavku nevinosti i veoma je verovatno da ne postoji adekvatna kontola od strane nezavisnih tela nad samim sistemima masovnog nadzora koja bi ga učinila demokratskim. Štaviše, kako je masovni nadzor uveden u cilju borbe protiv terorizma i kriminala, potrebno je proceniti koliko je on u tome efikasan i da li se uopšte isplati, s obzirom na manjkavosti i potencijalne opasnosti po društvo koje on sa sobom nosi.

Ključne reči: masovni nadzor, terorizam, Snouden, privatnost.

[39] TED Talks, *Edward Snowden: Here is How We Take Back the Internet*, *http://www.ted.com/talks/edward_snowden_here_s_how_we_take_back_the_internet*, 03.05.2015.

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Scientific review paper

UDK: 343.126:331.101.21

COMMENCEMENT OF CRIMINAL PROCEDURE AND ITS INFLUENCE ON EMPLOYMENT CONTRACT

Abstract

Commencement of a prosecution might cause some consequences for an employee regarding the employment contract, which raises several issues. First of all, if there is a reasonable doubt that one has committed a crime at work place or work-related crime, without being sentenced, an employer has no legal right to rescind the employment contract. That is the newest provision of novel of Labour Law. Before that, there were disagreements about whether the fact that criminal charges were submitted and the prosecution started were enough to rescind the employment contract. In the light of changes, there are serious doubts that the previous provision has jeopardised the presumption of innocence. On the other hand, ordered custody or any other violation of duty is followed by removal from work up to three months. The Labour Law also prescribes special removal for those defendants who are prosecuted for the crimes committed at work or work-related crimes until the ending of the case. Having in mind that the average duration of prosecution in Serbia takes up to several years, it is possible for an employee to suffer damages even though he/she has not been sentenced yet. The Labour Law also does not specify if an employee has the right to wage compensation in this particular case, which can jeopardize not only the employee, but also of his family.

***Key words**: criminal case, employment contract, employee, presumption of innocence, custody, starting a criminal case, termination of employment.*

1. Introductory remarks

Employment contract is a voluntary relation between employer and employee, which regulates their duties and rights. Employee obligates to follow all the legal instruction from employer and to perform tasks

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in order to get wage. These characteristics of employment contract are noticeable in most of the definitions given by authors.[2] It is not an easy task to harmonize the interests of employer and employee. On the one hand, there is interest for employer to use knowledge of employee, his experience and skills in order to obtain profit. On the other hand, there is an employee trying to take advantageof the more of his employment place, not only to obtain better salary, but also to learn more and get new experience. The balance cannot be easily found. Writing about dismissal, we cannot avoid the discipline duties and some other measures which can be legally imposed by employer. An employee must respect rules of behaviour, written in employment's act. The fact that the prosecution has started effects the position of the employee and can result in dismissal or removal from work.

In practice, there were concerns regarding the interpretation of Labour Law, whenever the employer is in position to dismiss the employee from work. Doubts were concerning the question in which stage of the prosecution can there be legal dismissal. Is it the time when the charges are put, or we should wait for the indictment to be written or sentence to be brought? The newest novel of Labour Law brings no doubts, but there are some new questions to be answered.

2. The novel of Labour Law – new normative principles

In July 2014 was enacted the latest novel of Labour Law that regulates the consequences of committing crime at work or work-related crime by employee. The reasons for the changes are justified differently - from those who state that it is related with the European integration process of our country to those who think that this act brings better work standards for employees, and those who think the opposite - that this is the way to increase the power of the employer.

2.1. Duration of dismissal

Dismissal is a specific measure that can be seen as temporary solution until employer decides about employee's responsibility or as a disciplinary measure, without wage compensation.[3] According to Labour Law, dismissal can last until the judgment becomes final if there is a crime at work or work-related crime. Trying to understand this provision, it seems that it was brought to save interests of employer more than of employee. While proving his innocence, the employee will stay out

[2] P. Jovanović, *Radno pravo*, Beograd 2003., 153.
[3] N. Tintić, *Radno i socijalno pravo.Knjiga prva : Radni odnosi (II)*, Zagreb 1972., 604.

of the work environment and the provision of the Labour Law is not precise about the question whether the employee has the right to wage compensation. The duration of persecution process in Serbia can last several years and dismissal will increase the work isolation of employee and certainly complicate his resocialization.

There are two types of dismissal - obligatory and voluntary. The distinction is made by the fact that in the first case the employer has to dismiss the employee without the possibility to decide and in the other case it is legally given the opportunity for employer to decide. There is a place for voluntary dismissal when there is a prosecution started against the employee for crime at work or work-related crime.[4] In the same article of Labour Law other reasons for voluntary dismissal are stipulated, such as violation of obligation that causes loss of greater value that is determined by the general act of employer. Other reason is specific and extended because it treats the violation of obligation that kind that there is no reasonable way to keep that employee to continue his work at the work place. The maximum duration of dismissal is determined by the Labour Law and it is limited up to three months. After that period, the employer must either terminate the employment act or give back the employee the possibility to work.

It could be put as a question why is there deadline of three months? Is there a need for it to be longer? According to the duration of the custody before the persecution of six months maximum, it is unknown the position of the employee during the time.[5]

There are some particularities of this institute in Montenegrin law, that proscribes the same reasons for dismissal as Serbian law, but it is extended by the provision that prescribes the sanction for the employee who is caught committing violation of the obligation.[6] The provision goes by prescribing a new reason for dismissal – started prosecution for crime related to corruption.

Labour Law in Croatia has no provisions about the dismissal, neither the Bosnian legal act.

3. Consequences of ordered custody

Ordered custody implies obligatory dismissal for employee. Practically, the employer has no freedom to take another action or decision. The employee must be removed from work from the first day that custody has started. It is important to recall the provision that provides/

[4] Act on Labour, *Official Gazette of Serbia*, no. 24/2005, 61/2005, 54/2009, 32/2013, 75/2014, art.165.
[5] M. Škulić, *Krivično procesno pravo*, Beograd 2013., 156.
[6] Act on Labour of Montenegro, *Official Gazette of Montenegro*, no. 49/2014, art. 130.

stipulates wage compensation for the employee but there is a difference when employee raises a family. In that case the wage compensation is increased up to 1/3 of the salary that he/she earned compared to the wage compensation of ¼ that is provided for those employees that does not support the family. The consequences of the ordered custody maintain factual disability for worker to be at his work place and to do tasks. If it continues, it could jeopardise the employer's production process.[7] Ordered custody does not always mean the reason for termination of contract by law and it could not be understood as unjustified absents from work by the employee. In those cases comes the dismissal. But there is a considerable number of employers who are not informed of ordered custody which brings us to the determination of employment contract after five days because of the unexcused absence of employee. The Supreme Court of Serbia passed a ruling that stands for the fact that custody can be ordered only by state authority and employee has no influence on that decision. In accordance with that, employee's absence during the custody cannot be seen as unjustified absence. Therefore, the state authority that ordered custody is the one to inform the employer of the ordered custody and employee must not suffer any consequences if there is the omission of the authority.[8] Speaking of which, that provision is maintained in Montenegrin labour law and provides the obligation for the authority that ordered custody to inform the employer of that fact within three days.

The duration of custody is in direct casual connection with whether the employee is going to be dismissed from work or if there is a fact of determination of employment contract. If the employee must be absent from work more than six months there is determination of employment contract by force of law.

4. Consequences of employee's absence due to serving a prison sentence, security measures and corrective measures

Employment contract must be terminated by force of law if the absence of employee during the prison sentence is going to be longer than six months and relevant moment is the day of entry to the prison/the day of incarceration.[9] Social justification for this kind of provision is the need for protection not only for the workplace but for the other workers.[10] It is important to underline that there will not be termination of employment

[7] I. Crnić, *Otkaz ugovora o radu*, Zagreb 2013., 82.
[8] The judgment of the Supreme Court of Serbia, Rev. 2830/93 from August 24, 1993., available on: *www.iio.org.rs*, 31. 05. 2014.
[9] B. Lubarda, *Radno pravo – rasprava o dostojanstvu na radu i socijalnom dijalogu*, Beograd 2013, 729.
[10] R. Kukavica, *Pravne posledice krivične osude*, doctoral thesis (unpublished), Faculty of Law, University of Belgrade, 1965., 218.

contract if the employee is sentenced to prison for more than six months, but he/she will not be absent the whole time because he/she spent some time in custody. The reasons are given in statute of criminal law that proscribes that every deprivation of liberty related to the crime must be calculated in sentence of imprisonment. This question was disputable until the Supreme Court of Serbia ruled that the relevant moment is the day when employee enters into a imprisonment and six months of absence should be counted from that moment.[11] The ruling specifies: „When the absence is longer continuously than six months, the employment contract must be terminated regardless the fact that employee is serving two sentences that individually do not last longer than six months.“[12]

On the other hand, the question of suspended sentence is interesting because it does not bring any effects on employment contract until it has been revoked by court.[13]

Security measures can also bring to the termination of the employment contract. The Labour Law proscribes that duration of prison sentence, security measures and corrective measures up to six months leads to suspension of employment. On the other hand, if employee must be absent longer than six months because of the upkeep of the security measures, the termination of the contract is unavoidable. It is helpful to notice that in cases of security measures the employee's contract is determined by the day the decision becomes final. Therefore, the institutionalization of the employee will not bring to the termination of the contract until the decision that employee is sentenced to security measure becomes final. The same rule is applicable concerning corrective measures.[14]

Corrective measure is the name for specific security measures that are applied to minors, with the same purpose as security measure.

Ban of performing certain activities is one of the most important security measures, related with performing of work by the employee. It is ban that implies prohibition of performing certain calls, duties or activities that are related to disposal of assets, menagment or carring other's assets.[15] This ban is conditioned by inability of employer to enable for employee other assignments. There are some alternatives conditions: employee must be the one who abused his work place, performing his duties or there is a threat that crime will be repeated. One of the authors stands for that one of the conditions must be obligatory and that refers to the threat of repeating the crime by performing duties and the other

[11] S. Andrejević, ''Praksa Vrhovnog suda Srbije u sporovima iz radnih odnosa", *Radno i socijalno pravo* 1/2008, 137.
[12] *Ibid.*
[13] A. Baltić, M. Despotović, *Osnovi radnog prava Jugoslavije*, Beograd 1974., 295.
[14] Z. Stojanović*, Krivično pravo-opšti deo*, Beograd 2011., 201.
[15] Z. Stojanović, *Komentar Krivičnog zakona SRJ*, Beograd 2003., 307.

can be voluntary.[16] This is justified by the fact that all the crimes that do not involve abuse would be excluded. Judge in his decision specifies duties, activities, calls that are covered by the ban. The main reason to sentence employee to this ban is danger of repeating the crime at work environment and duration of the ban is limited up to ten years. It is certain that legislator recognized the importance of this measure, demerged it and prescribed different conditions. Maybe this ban is seen as mode to prevent the recidivism in work environment.

5. Determination of employment contract due to crime at work or work-related

The latest Labour Law brings new, changed provision that implies the right of employer to terminate employment contract of an employee when the final sentence for crime at work or work-related crime is passed. This provision is needed in Serbian law because the previous one that implied that employer can terminate employment act if employee commits crime at work or work-related crime, was seemingly clear. The question is – is the employer allowed to qualify actions of employee as crime without final sentence? In theory and in practice, there hasn't been plain explanation. Ministry of Labour and Social Affairs stands for the possibility/on the ground that for employer to terminate employment act when there are criminal charges put against the employee or there is request for investigation.[17] Some authors have the same opinion but with different explanation. The Supreme Court of Serbia passed a significant ruling, stating that only the final sentence may be the reason for termination of employment contract for work-related crime committed by worker.[18]

Two opinions are opposed we can not stand for one of them without an explanation. If we stand for the opinion/take the standpoint of Supreme Court of Serbia, there is a possibility that employee stays in work environment with criminal act until final sentence is passed. If support the stance of Ministry, it might jeopardise the presumption of innocence if employer has done wrong qualification of employee's act and terminated the employment contract.

Some of the authors argue that this provision must be interpreted together with provisions of suspension. As said, the duration of suspension is limited up to three months and in Serbia is not likely for criminal process to be ended in this time. So, the reason for termination must be

[16] *Ibid., 119.*
[17] P. Trifunović, ''Krivično delo kao otkazni razlog'', *Pravni informer* 2/2008, 60.
[18] The judgment of the Supreme Court of Serbia, Rev.II 1758/05 of 08. 11. 2006., *Ibid.,* 63.

related to the time the crime has been committed.[19] Some authors do not support the opinion of Supreme Court that reason for determination should be followed by final sentence, referring to those crimes, which are not prosecuted by public attorney. Waiting for the victim to start a prosecution may be in vain if he doesn't decide to do so and the provision applies to all crimes.[20]

The opinion of Supreme Court of Serbia is different and underlines that we cannot stand only for execution of crime without final sentence. Putting charges or request for investigation does not mean that there is a crime at work or work-related crime committed.

Even though the opinion of Ministry is not source of law, nor is the opinion of Supreme Court of Serbia, we chose the attitude of court. The opinion of Supreme Court is not formally the source of law but in practice has the significance for harmonization of practices. The act of crime is just one of the elements needed for existence of crime. At the moment of putting charges there is only one element, which is not enough to qualify someone's act as crime. But the stronger reason for deferring the opinion of Supreme Court is the presumption of innocence. The presupmtion of innocence is the main right according to European Convention on Human rights, which was ratified by Serbian legislatior.[21] Even though this right if referring to accused, it can be expended to employees in labour disputes, which is confirmed by the practice of European Court of Human Rights.[22] The Constitution of the Republic of Serbia provides the same principle: one is presumed innocent until his guilt is proved by final sentence by court.[23] It is the crucial principle in every prosecution. Qualification of employee's action a crime at work or work-related crime by employer without a final sentence could jeopardise the presumption of innocence.[24] One life event can be differently qualified from criminal or labour point of view and in order to keep legal security it is important to do the qualification only by court.

There is also a doubt if the civil court can qualify employee's action as crime at work or work-related crime during the desicion of preliminary issue, as right or legal relationship that is important to be solved in order to pass a ruling. One of the authors does not support the possibility for civil court to decide for preliminary issue and suggests that courts stop the procedure and wait for the decision of criminal court.[25]

[19] Z.Ivošević, M.Ivošević, *Komentar Zakona o radu*, Beograd 2007, 368.
[20] *Ibid.*
[21] European Convention on Human Rights - *Official Gazette of Serbia*, no.9/2013, 5/2005 и 7/2005), art. 6.
[22] P. Trifunović, 63.
[23] Constitution of the Republic Serbia - *Official Gazette of Serbia*, no. 48/94 и 11/98, art. 34.
[24] P. Trifunović, 63.
[25] R. Keča, *Gradjansko procesno pravo – Priručnik za pravosudni ispit*, Beograd 2010., 72.

Other authors think that there is no equality between the crime and the act of crime.[26] In complience to that, there is no preliminary issue and there is no need for stopping the procedure. There is only a need to determine if there is a final sentence. After all the above/considering everything above mentioned, we should maintain the Supreme Court's judgments, as the following provision in Labour Law.

This opinion is shared. One of the authors stands that the presumption of innocence must be respected either by employer as by employee. By starting a prosecution we cannot ignore the presumption of innocence. There is only a reasonable doubt that one has committed a crime when the charges are put and that does not mean that one is going to be accused.[27] Only the court must be called to give the final word about the innocence of an employee, not employer[28].

It is interesting to notice that Montenigrin law does not have this dismissal reason, and committing crime at work and work- related crime can only be the reason for suspension from work.[29]

Provision in Bosnia is unique because the employer can dismiss employee „if employee has been found guilty for a crime and sentenced to prison at least for three months.“[30]

Croatian law does not provide the possibility for employer to terminate employee contract because of the crime at work or work-related crime and only the facts such as technological surplus, work disability and violation of labour obligation can cause the termination.[31] But it is also interesting to point out the provision of the extraordinary termination when there is the fact of „particulary serious violation'' by employee“ while the employment cannot be continued.

6. Concluding remarks

Even though the criminal law distinguishes to labour law, there are situations when they areinterconnected. As the fact the decisions passed in criminal procedures effects employment, there is a need to harmonize their regulation. In that way, the latest novel of Labour Law can be considered as a step forward. The important change surely presents one that provides that only the final sentence can be the reason for termination of contract. In comparison with the earlier provisions,

[26] P. Trifunović, 63.
[27] B. Šunderić, ''Kažnjavanje pre osude'', *Radno i socijalno pravo* 1-6/2004, 42.
[28] *Ibid.*
[29] Act on Labour of Montenegro, *Official Gazette of Montenegro*, no.49/2008, 26/2009, 59/2011, 66/2012, art.143
[30] Act on Labour of Bosnia, *Official Gazette of Bosnia*, no.43/99, 32/00, 29/03), art.86
[31] Act on Labour of Croatia *Official Gazette of Croatia*, no.149/09, 61/11, art. 107

this one is considered clear and precise and takes into consideration the presumption of innocence. Employment contract cannot be rescinded without affirming all the elements for his responsibility, which is the way of protection for employee as a subordinated party of the contract.

As stated, starting a prosecution can result by some consequences to employment. The legislature shows special concern by the possibility for employee to repeat an offence in work environment and security measure has the aim to prevent worker from taking some actions, duties or call. If employee must be absent longer than six months because of imprisonment, security measures or corrective measures, it will represent a reason for termination of employment contract. The connexion of criminal and labour law is not negligible and in order for legal system to function properly, some institutes must be compatible.

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ПОСЛЕДИЦЕ ПОКРЕТАЊА КРИВИЧНОГ ПОСТУПКА НА РАДНИ ОДНОС ЗАПОСЛЕНОГ

Резиме

Извршено кривично дело на раду и у вези са радом може узроковати удаљење са рада, али и отказ од стране послодавца. У складу са изменама Закона о раду од јула 2014. године, једино правносажна пресуда суда донета у кривичном поступку може бити основ престанка радног односа. У овом раду пошли смо од хипотезе да нова одредба, у односу на претходну којом је било предвиђено да послодавац може отказати уговор о раду запосленом, ако изврши кривично дело на раду или у вези са радом, отклања недоумице које су, с тим у вези, постојале у пракси и штити запосленог, као економски слабију и правно подређену страну у радном односу. Новина коју Закон доноси је и та да удаљење запосленог са рада може трајати до правноснажног окончања поступка када је кривично дело на раду или у вези са радом посреди, због чега је у раду размотрен и домашај овог решења, посебно у светлу стварања услова за

делотворну примену претпоставке невиности. Изрицање притвора, мере безбедности, заштитне мере, васпитне мере и казне затвора, такође, може утицати на радни однос. Како се поља кривичног и радног права често додирују, настојаћемо да, користећи нормативни метод и друге методе правних и друштвених наука, укажемо на добре и лоше стране нових одредби Закона о раду, али и да укажемо на празнине које би, зарад остваривања правде и правне сигурности, морале бити попуњене.

Кључне речи: кривични поступак, радни однос, претпоставка невиности, притвор, започињање кривичног гоњења, одсуство са рада због издржавања кривичне санкције, престанак радног односа.