

**INSTITUT ZA UPOREDNO PRAVO
INSTITUTE OF COMPARATIVE LAW**

**ISSN 0039 2138
ISSN (Online) 2620-1127**

UDC 34

**STRANI PRAVNI ŽIVOT
FOREIGN LEGAL LIFE**

**4/2018
Belgrade, 2018.**

Publisher/Izdavač

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GORAGRAF

Circulation/Tiraž

200 copies/200 primeraka

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BEHAVIORAL APPROACH TO UNFAIR TERMS AND CONDITIONS IN EU CONSUMER LAW

Abstract

Rational choice theory is still at the hearth of EU consumer law. In this paper I consider how this theory reflects on the unfair terms control mechanism set by the Unfair Contract Terms Directive. I identify most pressing problems in the field of unfair contract terms using the findings of behavioral psychology and behavioral economics. In search for possible solutions to these problems I will consult the relevant literature. Therefore, method I use here is a theoretical application of the behavioral findings. In conclusion I will assess which solutions are feasible and most desirable in a short term period, and which are the most effective but demand certain investments and time to become fully functional. Finally, I will conclude that behavioral approach to the issue of unfair contract terms and conditions is an important addition to the policing of unfair terms and conditions which could lead to the raise of overall quality of terms and conditions which is a significant step beyond the control of unfairness.

Keywords: *consumer law, unfair contract terms, behavioral approach.*

1. Introduction

The corner stone of EU consumer law are information duties.¹ For example, the Consumer Rights Directive prescribes that the traders must disclose twenty different information to a consumer before concluding a distance or an off premises contract.² Such an approach goes hand in hand with the assumption that consumers are perfectly rational, and that the only problem they face on the market is the information asymmetry, which

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¹ H. A. Luth, *Behavioral Economics in Consumer Policy: The Economic Analysis of Standard Terms in Consumer Contracts Revisited* (PhD thesis), Erasmus University Rotterdam, Rotterdam 2010, 214, <https://repub.eur.nl/pub/19572/Proefschrift-Hanneke-A.-Luth.pdf>, last visited November 14, 2018.

² See Directive 2011/83/EU, OJL 304/64, Article 6.

can be remedied by the mandatory pre-contractual duties to inform.³ This assumption is a fruit of rational choice theory, which assumes that human beings are, when provided with sufficient information, capable of rationally choosing among many options the one that is maximizing their welfare.⁴

However, the reality and the research in behavioral psychology prove the opposite. First, while we may lack information, we also lack attention.⁵ We have innate limits as to the amount of information we are able to process at a time.⁶ I would add that we also lack time to make the best of the information we gather since we all have to perform many tasks every day. Therefore, even when provided with comprehensive information consumers may fail to make the right decision because of the information overload.⁷ Furthermore, we are not as rational as one may think. Human beings are susceptible to the influence of emotion, and motivation when making decisions.⁸ And make no mistake: even experts are prone to various biases.⁹ As Anne-Lise Sibony simply puts it: “Behavioral studies show that we are all “idiots”...”¹⁰ For all the above stated reasons human behavior deviates from the behavioral pattern expected from a rational welfare-maximizing person, and it does so regularly and predictably.¹¹ Confronted with too many choices they have to make within a little time and burdened by innate cognitive limitations, people rely on “cognitive rules of thumb, known as heuristics” which lead to incorrect evaluations and judgments.¹² For example, people often choose the instant gratification even if in the end that leads to higher costs than had they made a different decision.¹³ Another example is egocentric bias which results in over-optimism making people

³ A-L. Sibony, “Can EU Consumer Law Benefit from Behavioural Insights? An Analysis of the Unfair Practices Directive”, *European Review of Private Law* 6/2014, 901-903.

⁴ K. Mathis, A. D. Steffen, “From Rational Choice to Behavioral Economics: Theoretical Foundations, Empirical Findings and Legal Implications”, in: *European Perspectives on Behavioral Law and Economics* (ed. Klaus Mathis), Cham 2015, 31.

⁵ A-L. Sibony, 903.

⁶ See e.g. G. A. Miller, “The Magical Number Seven, Plus or Minus Two: Some Limits on Our Capacity to Process Information”, *The Psychological Review* 2/1956.

⁷ M. G. Faure, H. A. Luth, “Behavioural Economics in Unfair Contract Terms Cautions and Considerations”, *Journal of Consumer Policy* 3/2011, 344.

⁸ A. Tor, “The Methodology of the Behavioral Analysis of Law”, *Hatifa Law Review* 4/2008, https://scholarship.law.nd.edu/law_faculty_scholarship/836, last visited September 26, 2018, 242.

⁹ “Research also shows that financial professionals give better ratings to investments with aesthetically pleasing annual reports than to those with less attractive reports that contain exactly the same data.” see R.H. Thaler, W. Tucker, “Smarter Information, Smarter Consumers”, *Harvard Business Review* 1/2013, <https://hbr.org/2013/01/smarter-information-smarter-consumers>, last visited November 22, 2018.

¹⁰ A-L. Sibony, 905.

¹¹ A. Tor, 242-243.

¹² K. Mathis, A. D. Steffen, 37.

¹³ A-L. Sibony, 907 fn. 19.

to overestimate the likelihood of positive outcomes, and underestimate the probability of negative outcomes.¹⁴ Also providing too much information and too many choices makes impossible for consumers to competently assess the information and consequently makes them stick to defaults without questioning them or looking for better solutions.¹⁵ This is just to state a few examples.

A research conducted for European Commission also showed that consumers generally do not read the terms and conditions of contracts they sign.¹⁶ Even when they do, or when they suffer from the unfair terms and conditions, they quite often do not take any action to bring the matter before the court or other authority.¹⁷ This made me think about the efficiency of the Unfair Contract Terms Directive (UCTD).¹⁸ One could say that there is no reason to worry since the UCTD prescribes that the unfair terms shall not be binding whether or not consumers read them.¹⁹ Also, UCTD obliges the Member States to provide effective means of protection against unfair contract terms which also means allowing third parties such as consumer organizations or public authorities to take actions against unfair T&Cs.²⁰ Next to the unfairness test²¹, UCTD, furthermore, provides for a non-exhaustive list of terms and conditions that may be deemed unfair.²² Some Member States, like the Netherlands, introduced black and gray lists, the former representing the list of terms that are always deemed to be unfair, and the latter containing terms that are refutably assumed to be unfair²³ making the matter much easier for the ones who are to assess the fairness of the terms. Therefore, if consumers

¹⁴ K. Mathis, A. D. Steffen, 40.

¹⁵ M. Engel, J. Stark, "Buttons, Boxes, Ticks, and Trust: On the Narrow Limits of Consumer Choice", in: *European Perspectives on Behavioral Law and Economics* (ed. Klaus Mathis), Cham 2015, 113.

¹⁶ European Commission, Study on consumer's attitudes towards Terms and Conditions (T&Cs), Final report, 2016 - Study, https://ec.europa.eu/info/sites/info/files/terms_and_conditions_final_report_en.pdf, last visited November 12, 2018, 5. Note that this study showed that consumers do not read T&Cs when concluding online contracts, but even if one goes to e.g. telecommunications company to conclude a contract on the spot, does one really reads the T&Cs before he/she signs the contract?

¹⁷ *Ibid.*, 10.

¹⁸ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts - UCTD, *OJL* 95/29.

¹⁹ UCTD, Article 6 (1).

²⁰ UCTD, Article 7 (2): "...shall include provisions whereby persons or organizations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms."

²¹ UCTD, Article 3 (1).

²² UCTD, Article 3 (3) and Annex to the Directive.

²³ A. Radonjić, "Unfair Contract Terms and SMEs in BW and Draft CC of Serbia", *Strani pravni život* 4/2017, 242.

do not read T&Cs, these will still be invalidated by the court or other authority, and if consumers do not initiate these proceedings there are others authorized to do that.

Still, this empowerment of other actors beside consumers with the right to initiate a procedure for the assessment of the fairness of the terms and conditions is said not to have yielded desired results.²⁴ This implies that there is a lot to be done to solve the problem of unfair contract terms in consumer contracts, and that some changes to the mechanism established by the UCTD are warranted. These changes regard both the regulatory and the enforcement policies. In this paper I will focus on the regulatory aspect. A starting point in this paper is that these changes should be informed by findings of behavioral research, and I will try to look for concrete solutions.

I will first present what I find to be the key challenges to the existing system of control of T&Cs. Then I will present the possible solutions offered in the literature. Finally, I will draw some conclusions. The method I will use in this paper is theoretical application of behavioral findings to the legal issue²⁵ I chose. I opted for this method because, for the time being, I do not have training and knowledge to perform relevant behavioral research on my own.

2. The most pressing problems in the realm of unfair terms and conditions

2.1. Consumers do not read T&Cs

As Ben-Sahar simply puts it: “Real people don’t read standard form contracts.”²⁶ This has been also confirmed in research.²⁷ There are various reasons for this, and usually they are combined. People lack time.²⁸ They also overestimate their knowledge of their rights as consumers.²⁹ T&Cs are hard to understand due to complicated legal language and their length, and even simplified ones are not always easy to comprehend.³⁰ Furthermore, consumer’s ability to foresee potential harms arising out

²⁴ H. A. Luth, 232.

²⁵ A. Tor, 275.

²⁶ O. Ben-Sahar, “The Myth of the Opportunity to Read in Contract Law”, *European Review of Contract Law* (ERCL) 1/2009, 2.

²⁷ See e.g. the Study, 9, or M. G. Faure, H. A. Luth, 349.

²⁸ O. Ben-Sahar, 14.

²⁹ Study, 10.

³⁰ O. Ben-Sahar, 13.

of usage of a product or a service is limited hence limiting the ability to understand the importance of particular T&Cs.³¹ Consumers would also have to know the default rules of contract law in order to assess whether the T&Cs deviate from those default rules, and in whose favor,³² which they usually do not know. Finally, consumers lack the incentive to read regardless the previous constraints because there is nothing they can do about the T&Cs; the scenario in which a consumer renegotiates the T&Cs with a big company is not a realistic one.³³

2.2. *Egocentric bias*

As explained in the introduction to this paper, egocentric bias results in over-optimism and overconfidence leading to underestimating the possibility of something bad happening to a person, and to overestimating probability of positive outcomes.³⁴ The research showed that consumers often overestimate their future self-control which makes them to accept e.g. fitness -club or mobile phone subscription plans which are not the most beneficial to them.³⁵ The same bias could make them to accept unfair T&Cs in those contracts even when they read them. It is fair to assume for instance that a person would accept a clause in those subscription plans that obligates them to pay a lot of money as a penalty in case of premature rescission of the contract. Since one is confident that they will stick to the subscription plan, one would not attach much importance to this clause even if it is unfair because they are confident that they would not rescind the contract. So over-optimism is relevant in situations where consumers judge the probability of occurrence of negative outcomes, especially outcomes which occurrence in part depends on consumer's behavior.³⁶ Therefore, it is particularly important to take this bias into the account when assessing the T&Cs which attach some kind of penalty to an outcome that is at least partly dependable of consumer's behavior. By assessing I do not just mean the assessment by the court, but also the assessment which terms and conditions should be prohibited or assumed to be unfair, or labeled as such.

³¹ *Ibid.*, 14.

³² *Ibid.*

³³ O. Ben-Sahar, 2.

³⁴ See n. 14.

³⁵ H. A. Luth, 63.

³⁶ A. Tor, 278.

2.3. *Status quo bias and the endowment effect*

Status quo bias means that people generally prefer their present state instead of an alternative one.³⁷ This makes a person to stick to defaults, and when terms provided by the trader are perceived as defaults it is likely that consumers will stick to them.³⁸ Consumers are likely to hold on to even inefficient T&Cs if the effects of status quo bias outweigh the possible benefits of rescinding the contract.³⁹ This is closely connected to loss aversion which makes people give greater significance to losses, than to equivalent gains, which leads to inability to realize potential gains.⁴⁰ Add to this the information overload and inability to process and assess all the information available it is clear consumers will be very reluctant to switch to another trader or to different T&Cs.

Endowment effect is closely related to the status quo bias, and it manifests itself as a person's tendency to attach greater value to objects he or she owns than to those they do not own.⁴¹ In the context of unfair T&Cs the long free trial periods could create a sense of ownership and make consumers attach the greater value to the good on trial than they would actually value it⁴² and consequently lead them to disregard or undervalue the unfavorable terms and conditions of a contract for purchase of that good.

2.4. *Framing effect*

Framing effect denotes the influence of the presentation of information or choices to perception of that information or those choices which then influences the decision making. The now famous "Asian disease" problem demonstrates how people can choose one alternative over another, but reject the alternative with the same outcome only differently described, and vice versa.⁴³ This made me think that presentation of T&Cs can also play an important role, and that unfavorable or unfair T&Cs can be formulated in such a way that they are perceived as fair and benign.

Another aspect of framing is the fact that choices are reference-dependent, which means that we assess alternatives as gains or losses against

³⁷ *Ibid.*, 264.

³⁸ H. A. Luth, 64.

³⁹ A. Tor, 268, for this matter see also n. 15.

⁴⁰ K. Mathis, A. D. Steffen, 40-41.

⁴¹ M. G. Faure, H. A. Luth, 344.

⁴² H. A. Luth, 65.

⁴³ For a detailed description of the experiment see A. Tor, 260-261.

some reference point.⁴⁴ This means that one and the same outcome could be favored or undesired depending of the reference point we acquired. I will discuss this particular aspect of framing effect down the road when I will search for solutions to behavioral challenges to current policy on unfair terms.

3. Possible solutions

3.1. Increase the readership of T&Cs

As it was mentioned before one of the problems consumers encounter, is information overload. Add to this problem the complexity of T&Cs and one can hardly blame a person giving up on reading them at all. So, in order to increase the readership of T&Cs reducing the number of information provided, and simplifying them and taking care of the form these are provided in should be considered. The research commissioned by European Commission showed that simplifying the language of T&Cs increased the readership by 16%.⁴⁵ The same research showed that indicating that reading the T&Cs will take only 5 minutes increased the readership by little more than 10%.⁴⁶

Furthermore, the complexity of the content of information is not the only problem; it is also the form in which information is presented.⁴⁷ Thus, suggestions as to the letters sizes used for different parts of the texts, summaries, shorter sentences etc. can be found.⁴⁸ There are recommendations that longer texts, such T&Cs typically are, ought to be user-friendly structured by using headings, highlighted keywords, or that some information should be presented in the form of FAQs etc.⁴⁹ Also T&Cs should be related to real-life situations, supported by examples and put in the context so that consumers better understand them.⁵⁰

However, all these strategies to increase the number of consumers who read T&Cs are welcome but generally of limited success. As to the percentages stated above, if we take that studies show that only 4-5% of consumers read the T&Cs⁵¹ then an increase in 10 or 16% is not significant success in absolute numbers. Furthermore, the European Commission's

⁴⁴ *Ibid.*, 261.

⁴⁵ Study, 12.

⁴⁶ *Ibid.*, 10-11.

⁴⁷ N. Helberger, "Form Matters: Informing Consumers Effectively", Amsterdam Law School Legal Studies Research Paper No. 2013-71, 4, <http://ssrn.com/abstract=2354988>, last visited November 12, 2018.

⁴⁸ *Ibid.*, 25.

⁴⁹ *Ibid.*, 27.

⁵⁰ *Ibid.*, 29.

⁵¹ M. G. Faure, H. A. Luth, 349.

study showed that one and the same contract term was seen as unfair before it was simplified and as fair after it was put in simpler language.⁵² This shows that simplifying the terms does not necessarily lead to better understanding of those terms, and that substantive control and outlawing certain terms and conditions is still needed.

When it comes to better visual presentation of T&Cs and their form it seems fair to demand from businesses to use at least part of their resources they invest into marketing techniques to convince consumers to buy their services and products into more user-friendly display of T&Cs. However, if we want to translate that duty into legal norm it is hard to go much beyond what we already have.⁵³ So model forms of T&Cs would make a good addition to the general call for simple and comprehensible language. I will deal with this idea in more detail a bit later.

At this point I wish to conclude this part that all the strategies aiming at raising the readership of T&Cs are limited, as I have shown, because in the absolute numbers the readership, generally, will not be very high. These strategies, however, could be quite useful in those industries where consumers typically read the contracts. For instance it is reported that 72% of consumers read car rental contracts, and that 73% of consumers read mortgage contracts.⁵⁴ Once again, even in these industries high readership does not guarantee high understanding of the terms and clauses, and here as in other fields policymakers must go beyond the readership-increase strategies.

3.2. Labeling and rating

Since it is established that consumers usually will not read the contracts for many reasons, and that even if they do it is likely they will not be able to understand them well enough to make a sound decision, the alternative is to signal the consumers in a simple and catchy way that T&Cs of a contract they wish to conclude are fair or unfair. The question is how?

One way would be labeling. Similar to food labels the most relevant contract terms to consumers would have to be displayed on products.⁵⁵ The point is to summarize essential information in easily readable format displayed with or on products making that information available prior to purchase.⁵⁶ It is also important that these information focus on negative

⁵² Study, 12.

⁵³ UCTD prescribes that T&Cs have to be drafted in plain and intelligible language, see. Art. 4 and 5.

⁵⁴ M. G. Faure, H. A. Luth, 349.

⁵⁵ H. A. Luth, 246.

⁵⁶ O. Ben-Sahar, 25.

aspects or unfavorable T&Ss just as food labels put the spotlight on fat, sugar, certain fatty acids or other unhealthy ingredients.⁵⁷ As Ben-Sahar said: “The reason why in the first place we are concerned with unreadable terms is the existence of negative terms, and thus these are the terms that would prominently appear on the label.”⁵⁸

Labeling, however, has flaws. First, it does not guarantee that consumers would understand the implications of displayed terms. They still could make wrong assessments of those terms as they usually do particularly when assessing the risks.⁵⁹ Second, many terms are excluded from scrutiny.⁶⁰ It is possible to identify terms that regulate issues that are most relevant to consumers or that consumers usually complain about,⁶¹ and then prescribe mandatory labeling of those terms. Nevertheless, this leaves room to traders to hide other detrimental terms and conditions among those not on the label.

The other way of signaling the quality of T&Cs to consumers would be rating. It means collecting data about T&Cs and giving a contract a particular mark or score depending on the quality of those terms.⁶² The simplest methodology is developed by Florencia Marotta-Wurgler where she assigns a value of +1 to every term which favors a buyer more than a default rule set by the law, -1 for every term that offers a buyer less than what is offered by default rule set by the law, and 0 for a term that is as beneficial to a buyer as default rule set by the law.⁶³ Since she was testing the end-user license agreements (EULAs), all with the same number of T&Cs she determined the overall score of the contract as the sum of all the values.⁶⁴

One objection to this method could be that contracts do not necessarily have the same number of terms as is the case with EULAs that were tested by Marotta-Wurgler, so the aggregate score could be misleading. But this can be overcome using the simple proportion where the score would be displayed in percentages. Furthermore, I would add to this very visible information that the score means that contract offers n more than the law or n less than the law in order to set the default

⁵⁷ O. Ben-Sahar, 26.

⁵⁸ *Ibid.*

⁵⁹ H. A. Luth, 246.

⁶⁰ *Ibid.*, 247.

⁶¹ For example, the Study showed that most frequent problems consumers have are related to delivery and return of goods, the Study, 10.

⁶² H. A. Luth, 245.

⁶³ F. Marotta-Wurgler, “Are ‘Pay Now, Terms Later’ Contracts Worse for Buyers? Evidence from Software License Agreements”, *The Journal of Legal Studies* 2/2009, 312.

⁶⁴ *Ibid.*

rules of the law as a reference point for a consumer. The consumer does not even have to know the default rule. They are informed that T&Cs offer them something more or less than it is offered by the law, and it is a clear enough signal to them that by these terms they win or lose something. This way the reference-dependence bias can be used in favor of consumers, not against them.

There is another objection to this method that comes to my mind. I am not sure if we should ascribe the same value to all the T&Cs. Namely, if certain T&Cs govern the issues that are unlikely to arise, it is questionable to what extent they should influence the total score of the contract. It could happen that some contracts get better or worse scores on account of less important terms and conditions. Still, even with this flaw, I consider this method useful. It does not single out unfair T&Cs, but all the ones which offer less than default rules set by the law, which means that it potentially can influence the overall enhancement of T&Cs, not just eradication of unfair ones. Which is more, it is simple, and objective (more objective than customer experience for sure), and it's easy to check the credibility of the assessor (if they lied or not about the score).

That last remark leads to the question of who would do the rating. Would that be a public authority, a consumer organization(s), or a third private party. Given the simplicity of the method described it should not incur significant costs so rating could be entrusted to a consumer organization. This could be a good solution given that the research showed the quality cues provided by consumer organizations are the most trusted by consumers.⁶⁵ The precondition to the rating is that traders make their T&Cs available to the public in an easily accessible format.

3.3. Smart disclosure

If consumers would be able to get deciphered information about products and services they buy and T&Cs under which they buy those, and get the information on time, they would be able to assess if those goods or services suit their needs and to compare offers available on the market. To make this happen, we can use technology for processing the ever-growing amount of data humans generate every day. In order for technology to process this data in a most effective manner, it has to be in a machine readable format.⁶⁶ This idea was promoted by Thaler

⁶⁵ Study, 11.

⁶⁶ R.H. Thaler, W. Tucker.

and Sunstein as Record, Evaluate, and Compare Alternative Prices (RECAP).⁶⁷ In the USA a version of this idea was adopted under a catchy name Smart Disclosure which means: “timely release of complex information and data in standardized, machine-readable formats in ways that enable consumers to make informed decisions.”⁶⁸

There are examples of services developed by private parties that use the available data to help us make informed decisions. Compare engines make good example. We can use them to compare the prices of hotel rooms, to check if products we want meet our environmental or social standards etc.⁶⁹ Also, applications and services that would use personal data of product and service users could be very helpful in suggesting them the appropriate subscription plans or making them aware of their use patterns, or average use patterns⁷⁰ to override the effect of egocentric biases. Informing consumers about the average use patterns could also set new, more realistic defaults or reference points thus using these biases in favor of consumers. Information about average use patterns would be particularly beneficial if a consumer is to subscribe for a service for the first time so there are no data about their habits and usage so the personalized subscription plan cannot be suggested. But in order to make it possible to assess the quality of T&Cs for these services, they have to be, not only accessible online in real time, but machine readable.⁷¹ And there is also the issue of personal data and its usage. There are already in place, in different sectors, duties to provide information in standardized machine readable format that for example improve decision making regarding investment.⁷² It is not unimaginable to make mandatory to disclose T&Cs in standardized machine readable language which would then open the door for services similar to compare engines which would compare the T&Cs under which services and goods are offered. This way, consumers would be able to choose more favorable T&Cs among many (without actually reading them) on the market inciting competition between traders regarding T&Cs. And as for the usage of the data about our behavior, well we already disclose them just for the sake of being able to post on Facebook or Twitter. Why not disclose them for the sake of better terms of service we give money for?

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ See more on this in N. Helberger, 32-34

⁷¹ R.H. Thaler, W. Tucker.

⁷² *Ibid.*

The challenge on the path to make the disclosure of T&Cs smart is to distribute the burden of translation of T&Cs into machine readable formats justly. It should not impose significant costs upon private sector.⁷³ Also, in my view another challenge is not to oversimplify the law, and not to prevent the creativity and innovation in contracts if the costs of translation into machine readable formats show to be significant, or the capacity of this technology shows to be insufficient to follow the developments of new notions and ideas which may arise in contract law. Of course, this is not the reason to discard smart disclosure, but to search for solutions to counter its possible flaws.

This technology could be coupled with rating making the latter automatic and more efficient. However, I have a doubt regarding both methods and their combination. Namely, I find it hard to imagine that the technology behind these services could be so sophisticated to apply fairness test in form of a general rule like it is prescribed by UCTD. There are too many variables and too many nuances in the language that can cause the term to be unfair that I just do not think machine can cope with in the proper way. Then again, this is not a very strong argument since I am not an expert for this technology. It is just my skepticism, and only the time will show if it was justified or not. Furthermore, no one says that machines would have to replace the judges in interpreting the law. If they succeed to inform consumers in an easily understandable way who offers better T&Cs for the same product or service, that would enable consumers to shop for better T&Cs. This could provoke competition among traders to offer better T&Cs which in turn could lead, as a side effect, to rare use of unfair T&Cs by the traders.

3.4. Pre-approval of T&Cs

Pre-approving T&Cs by an administrative body or a private interest group is another idea how to cope with unfair T&Cs.⁷⁴ The competent body would check if the T&Cs which trader wishes to use complied with all legal requirements, and if they did the approval would be issued.⁷⁵ The version of this solution is used in Israel where companies may submit their T&Cs for pre-approval to Standard Term Tribunal.⁷⁶ If the Tribunal

⁷³ *Ibid.*

⁷⁴ H. A. Luth, 258.

⁷⁵ *Ibid.*, 258-259.

⁷⁶ *Ibid.*, 259.

determines that T&Cs do not contain “any “unduly disadvantages” or onerous terms” then it approves them.⁷⁷ A business which acquired the approval by the Tribunal is then allowed to place the seal of approval on the contract or make it visible to consumers in other ways.⁷⁸

This approach could be coupled with rating mechanism mentioned earlier so the seal issued by the competent authority could also signal if T&Cs offer more to consumers than the minimum required by the law. This could be the answer to the critique that pre-approval does not necessary guarantee high quality of contracts if the minimum level set by the law is not very high either.⁷⁹

3.5. Negotiated model forms of T&Cs

Negotiated model forms of T&Cs would be standard model contracts resulting from the negotiations between business and consumer organizations, thus enabling consumer representatives to take part in drafting of T&Cs.⁸⁰ This mechanism is already in use in many European countries (Scandinavian countries, the Netherlands, France etc.).⁸¹ The experience shows that this approach is less successful where the signed agreements on model contracts are binding only to the signatory parties and at the local level.⁸² Therefore, it seems more effective if the once agreed model is binding countrywide and to all the market participants.

The argued advantages of this regulatory strategy are many. First, it is said that these negotiations, since they are carried out by those who are most affected by the T&Cs and mostly familiar with their own preferences regarding them, should provide most efficient contract forms.⁸³ Second, it provides legal certainty for businesses because there is low or no chance of legal disputes should they adhere to negotiated model forms.⁸⁴ It would also reduce the costs of drafting T&Cs which is particularly beneficial to small and medium sized enterprises (SMEs).⁸⁵ It is also a good forum to make model forms in consumer-friendly language, and to employ the knowledge of marketing experts for the benefit of consumers. This way the

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*, 260.

⁸⁰ H. A. Luth, 263.

⁸¹ *Ibid.*, 263-264.

⁸² *Ibid.*, 265.

⁸³ *Ibid.*, 266.

⁸⁴ *Ibid.*, 267.

⁸⁵ *Ibid.*, 266.

impossibility to make more precise legal norm regarding intelligibility and comprehensiveness of the language of T&Cs would be bridged. Not only the content, but the form too would be negotiated. Finally, the fact that a business is adhering to a negotiated standard contract could be interpreted as a sign of quality of T&Cs offered.⁸⁶ This approach could then signal the consumers which T&Cs have certain level of quality even if consumers do not read them, and it would provide more comprehensible language of T&Cs for those consumers who actually would read the T&Cs.

The possible downside of this regulatory strategy is inadequate consumer representation. Namely, it is fair to expect that consumer organizations would not be able to negotiate on equal footing with business organizations because former have less funds and expertise, weaker bargaining power, and represent potentially very diverse interests.⁸⁷ Therefore, before introducing this model of regulation of T&Cs, the practices from the countries where this model showed to be successful should be investigated and checked if they are applicable in the domestic setting. Also, funding and training to consumer representative organizations should be provided should the policymakers opt for this model.⁸⁸

4. Conclusion

As it is shown in this paper, the main problem of the mechanism established by UCTD is that consumers do not read T&Cs for various reasons many of which are objective and justified. Even if consumers would read the T&Cs it is questionable if they would be able to understand them correctly, and if they would be able to assess and interpret them properly due to various cognitive biases. The other problem is reluctance of consumers to initiate proceedings against unfair T&Cs. This lack of action is partly caused by the lack of readership because one has to read the T&Cs to know if they should act upon it. Even the authorization of third parties to initiate the proceedings instead of consumers seems not to have given the desired results. The whole mechanism of UCTD rests on the action by the consumer or other party against the T&Cs because otherwise the competent authority will not be able to assess the fairness of the T&Cs. This does not mean that the mechanism set by UCTD should be discarded. It only means that it should be complemented.

⁸⁶ *Ibid.*, 267-268.

⁸⁷ *Ibid.*, 270.

⁸⁸ *Ibid.*, 271.

Therefore, the persistence of unfair and unfavorable T&Cs should be cured in other ways complementary to the regime set by UCTD. These other ways should be behaviorally informed. Since the research showed that readership-increase-strategies do not raise the number of readers significantly, and that raising the number of readers and simplifying the T&Cs does not guarantee better understanding of them, the main aim should not be to increase the readership. The aim should be to raise the awareness of consumers about the quality of T&Cs without actually reading them. The most promising approach to this end in my view is smart disclosure despite all my skepticism. However, it seems that it takes time and money to implement it. Negotiated-model-forms-approach seems like a good mechanism, but the one that demands specific preconditions to be met in order to be efficient. One of those preconditions is well trained and financially empowered consumer NGO sector which is also something to be accomplished on the long run at least in poorer Member States. What I believe is possible to be done in a short term is the implementation of some simple method of rating like Wurgler's is by consumer organizations or public authorities especially if coupled with pre-approval mechanism. The latter seems simple, cheap and effective enough while the scene is being prepared for the smart disclosure.

Finally, it should be noted that judicial review of T&Cs or pre-approving them by a public authority are fit procedures for the assessment of the fairness of T&Cs. Other mechanisms suggested here are not proper tools or forums for such assessments. However, the latter are designed to signal if a consumer should look for a better choice regardless of the unfairness. This is an important addition to the policing of unfair T&Cs. This could lead to the raise of overall quality of T&Cs which is a significant step beyond the control of unfairness. Therefore, behavioral approach to the issue of unfair T&Cs could set consumers on a more equal footing with businesses.

References

- Ben-Sahar, O., "The Myth of the Opportunity to Read in Contract Law", *European Review of Contract Law* (ERCL) 1/2009, 1-28.
- Engel, M., Stark, J., "Buttons, Boxes, Ticks, and Trust: On the Narrow Limits of Consumer Choice", in: *European Perspectives on Behavioral Law and Economics* (ed. Klaus Mathis), Cham 2015, 107-123.

- Faure, M. G., Luth, H. A., “Behavioural Economics in Unfair Contract Terms Cautions and Considerations”, *Journal of Consumer Policy* 3/2011, 337-358.
- Marotta-Wurgler, F., “Are “Pay Now, Terms Later” Contracts Worse for Buyers? Evidence from Software License Agreements”, *The Journal of Legal Studies* 2/2009, 309-343.
- Mathis, K., Steffen, A. D., “From Rational Choice to Behavioral Economics: Theoretical Foundations, Empirical Findings and Legal Implications”, in: *European Perspectives on Behavioral Law and Economics* (ed. Klaus Mathis), Cham 2015, 31-48.
- Miller, G. A., “The Magical Number Seven, Plus or Minus Two: Some Limits on Our Capacity to Process Information”, *The Psychological Review* 2/1956, 81-97.
- Radonjić, A., “Unfair Contract Terms and SMEs in BW and Draft CC of Serbia”, *Strani pravni život* 4/2017, 239-251.
- Sibony, A-L., “Can EU Consumer Law Benefit from Behavioural Insights? An Analysis of the Unfair Practices Directive”, *European Review of Private Law* 6/2014, 901-941.

Legal sources

- Directive 2011/83/EU of the European Parliament and of Council of 25 October 2011, *OJ L304/64*.
- Council Directive 93/13/EEC of 5 April 1993, *OJ L95/29*.

Website references

- European Commission, Study on consumer’s attitudes towards Terms and Conditions (T&Cs), Final report, 2016, https://ec.europa.eu/info/sites/info/files/terms_and_conditions_final_report_en.pdf, last visited November 12, 2018.
- Helberger, N., “Form Matters: Informing Consumers Effectively”, Amsterdam Law School Legal Studies Research Paper No. 2013-71, <http://ssrn.com/abstract=2354988>, last visited November 12, 2018.
- Luth, H. A., *Behavioral Economics in Consumer Policy: The Economic Analysis of Standard Terms in Consumer Contracts Revisited* (PhD thesis), Erasmus University Rotterdam, Rotterdam 2010, <https://repub.eur.nl/pub/19572/Proefschrift-Hanneke-A.-Luth.pdf>, last visited November 14, 2018.

Thaler, R. H., Tucker, W., "Smarter Information, Smarter Consumers", *Harvard Business Review* 1/2013, <https://hbr.org/2013/01/smarter-information-smarter-consumers>, last visited November 22, 2018.

Tor, A., "The Methodology of the Behavioral Analysis of Law", *Haifa Law Review* 4/2008, https://scholarship.law.nd.edu/law_faculty_scholarship/836, last visited September 26, 2018, 237-327.

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BIHEVIORALNI PRISTUP NEPOŠTENIM UGOVORNIM KALUZULAMA U POTROŠAČKOM PRAVU EU

Rezime

U radu se polazi od toga da je osnova potrošačkog prava EU u velikoj meri i dalje teorija racionalnog izbora. Ova teorija podrazumeva da su potrošači racionalni i da kada imaju dovoljno informacija donose odluke koje maksimizuju njihovu dobrobit. Bihevioralna istraživanja u psihologiji i ekonomiji opovrgavaju ovu teoriju i pokazuju da se iz različitih objektivnih razloga potrošači ne ponašaju u skladu sa njom. Kada je reč o nepoštenim ugovornim klauzalama i sistemu kontrole koji je uspostavljen Direktivom EU o nepoštenim ugovornim klauzulama pokazalo se da mehanizmi koje ona predviđa nisu dovoljni kako bi se potrošači zaštitili od takvih ugovornih klauzula. Sistem koji je ovim propisom uspostavljen u velikoj meri zavisi od toga da li potrošači čitaju ugovore, ako ih čitaju da li su u stanju da ih razumeju i tumače na ispravan način i da li pokreću sudske ili druge postupke kada su pogođeni nepoštenim ugovornim klauzulama. Istraživanja pokazuju da oni ne čitaju ugovore, čak i kada ih čitaju često nisu u stanju da razumeju ugovorne odredbe i da se retko upuštaju u sudske ili druge postupke. U literaturi se tvrdi da čak ni ovlašćivanje organizacija potrošača da pokreću postupke zbog upotrebe nepoštenih ugovornih odredbi nije dalo odgovarajuće rezultate. Opisano ponašanje potrošača i njihova nesposobnost da procene značaj pojedinih ugovornih odredbi se može objasniti različitim kognitivnim ograničenjima koja su imanentna ljudima bez obzira na stepen obrazovanja i obazrivost.

Zbog toga se u radu nabrajaju najrelevantniji bihevioralni problemi u vezi s nepoštenim ugovornim klauzulama. Zatim se razmatraju i ocenjuju konkretna rešenja na koja se naišlo u literaturi. Metod koji se koristi jeste teoretska primena rezultata bihevioralnih istraživanja. Na kraju se izvodi zaključak da bihevioralni pristup zaštiti potrošača od nepoštenih ugovornih klauzula predstavlja važan dodatak postojećem sistemu kontrole ovih ugovornih odredbi; da predložene mere ne mogu zameniti sudsko odlučivanje o nepoštenosti ugovornih odredbi, ali da mogu dovesti do podizanja ukupnog kvaliteta ugovornih klauzula koje trgovci nude potrošačima, što je i više od kontrole nepoštenosti tih ugovornih klauzula.

Ključne reči: potrošačko pravo, nepoštene odredbe potrošačkih ugovora, bihevioralni pristup.

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Original scientific paper
UDC: 347.19.11:341.645
doi: 10.5937/spz0-20339

INDIRECT APPROACH TO ACCOUNTABILITY OF CORPORATE ENTITIES THROUGH THE LENS OF THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

Abstract

*The case law of the European Court of Human Rights (ECtHR) pertaining to human rights protection of legal persons, including corporate entities, is well developed and extensively analyzed in legal literature. The international law of human rights is in the process of transformation from imposition of obligations only on States, to gradually taking into consideration the accountability of non-State actors, particularly corporate entities. The objective of the paper is to analyze the conceptualization of corporate accountability for violations of human rights in the case law of the ECtHR. The paper shows that the ECtHR thus far has approached the corporate accountability and has called for regulation of corporate activities at the national level by means of applying the doctrine of horizontal effect of rights guaranteed by the European Convention on Human Rights (ECHR) referred to as *Drittwirkung* and the doctrine of positive obligations of the states. The authors argue that the ECtHR so far in its jurisprudence has missed to fully take into account the overarching social and policy developments, and that it should take a more proactive role in conceptualizing its approach to violations of human rights committed by corporate entities.*

Keywords: *corporate accountability, human rights, ECtHR, violation of human rights, horizontal effect, positive obligations of states.*

1. Introduction

The international law of human rights is in the process of transformation from imposition of obligations only on States – to gradually taking into consideration the accountability of non-State actors – **particularly corporations**. The concept of corporate accountability gained

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more and more importance over time. It has been even described as “the human rights issue of the 21st century”.¹

The United Nations (UN) Human Rights Council’s Protect, Respect and Remedy (or “Three Pillar”) Framework on Business and Human Rights and the Guiding Principles on Business and Human Rights represent a significant step in this direction. These UN-level efforts are complemented by the OECD Guidelines for Multinational Enterprises and ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. However, these international developments are mostly attributable to a set of ‘soft’ law instruments adopted by aforementioned international organizations, while so far no ‘hard’ law has been adopted in the given field at the international level. Nevertheless, it is noteworthy that some efforts were invested in that regard. The adoption of Resolution A/HRC/26/L.22/Rev.1 for the “Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights” constitutes a positive step on the way to make corporations accountable for human rights’ violations. The Resolution was adopted by majority at the Human Rights Council’s 26th Session on 26th June 2014 in spite of the opposition coming mainly from the USA and the EU.²

At the same time, the international developments related to corporate accountability were further endorsed by national regulatory and judicial efforts, most notably in the adoption of the Alien Tort Claims Act in the United States (US).³ This act allows, *inter alia*, non-US citizens to file a case in US federal court for torts committed by corporations in violation of international law. However, recent tendencies in the US jurisprudence have significantly limited one of the main avenues for victims of corporate human rights violations leading to multiple suits against corporate actors for human rights abuses committed abroad being thrown out of US courts. More concretely, the US Supreme Court held in *Kiobel v. Royal Dutch Petroleum* in 2011 that federal courts do not have jurisdiction over those cases unless the given claims “touch and concern” the United States with “sufficient force.”⁴

¹ S. Khoury, D. Whyte, *New Mechanisms of Accountability for Corporate Violations of Human Rights*, www.livrepository.liverpool.ac.uk/3001783/1/New%20mechanisms%20of%20accountability%20for%20corporate%20violations%20of%20human%20rights.pdf, last visited December 1, 2018.

² *Ibid.*, 2.

³ S. Khoury, “Transnational Corporations and the European Court of Human Rights: Reflections on the Indirect and Direct Approaches to Accountability”, *Sortuz, Oñati Journal of Emergent Socio-Legal Studies*, Volume 4, 1/2010, 100.

⁴ M. Fasciglione, “Corporate Liability, Extraterritorial Jurisdiction and the Future of the Alien Tort Claims Act: Some Remarks After *Kobel*”, *Diritti Umani e Diritto Internazionale, Società editrice il Mulino*, Volume 7, 2/2013, 412-413.

The severe narrowing of this national avenue of redress for victims of corporate human rights violations shed the light to the importance of other effective avenues for victims of corporate human rights violations, which are available at the regional level, such as the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights. Both supranational courts are engaged in scrutinizing potential violations of human rights by companies, even though they are not entitled to hold them accountable.

The case law of the Inter-American Court of Human Rights will remain out of the focus of this paper as it is considerably less extensive than that of the ECtHR, due to fact that private entities do not have standing before the former court. Instead, this paper will firstly examine whether it is more feasible for the ECtHR, at this stage of development of European human rights system, to apply the concept of indirect or direct corporate accountability. The paper will further critically assess to what extent the ECtHR so far, applying the indirect approach to corporate accountability, has scrutinized the possible violations of human rights allegedly committed by corporate entities. The paper is expected to conclude that the case-law of the ECtHR in the field of accountability of corporate entities for human rights violations has to be further developed as to ensure that afforded protection for victims of corporate human rights violations goes hand in hand with the achieved level of protection of the fundamental rights of corporate entities before the ECHR.

2. Direct v. Indirect Approach to Corporate Accountability

The scholars are divided on the question of the best way for ECtHR to deal with the human rights violations committed by corporate entities. Some authors claim that the introduction of direct accountability of corporate entities before the ECtHR constitutes the most feasible way for the ECtHR to deal with the human rights violations committed by corporations, the so called direct approach.⁵

The direct approach to corporate accountability is primarily criticized as it would imply the elevation of corporations to the status of states in international public law. It is argued that, at this stage of development of the European human rights system, it is not realistic to expect that there is a political will to amend the ECHR as to introduce

⁵ E.A. Alkema, "The Third-Party Applicability or 'Drittwirkung' of the European Convention on Human Rights", In: *Protecting Human Rights: the European Dimensions/ Protection des droits de l'Homme: la dimension européenne: Studies in honour of Mélanges en l'honneur de Gérard J. Wiarda* (eds. F. Matscher, H. Petzold), Carl Heymanns Verlag KG, Berlin 1990², 33-57.

an additional formal procedure that will allow a radical change such as the lodging of a complaint against a private person.⁶ Furthermore, it is stressed that application of the concept of direct liability of corporate entities seems to be a profoundly unfeasible *option in the near future*, as it would be more realistic to presume that the international community can watch the States than an inestimable number of private entities. On the other hand, the states are those that are the most suitable to insist that its nationals comply with international law.⁷

On the other hand, the stance taken by the other group of authors seems better grounded. They argue for the application of indirect approach to corporate accountability, which implies maintaining the state-centered approach of the ECHR system. Supporters of indirect approach claim that even though, for the time being, private actors do not have direct obligations under the ECHR, they may still violate the ECHR as long as they infringe the protected rights.⁸

In justifying their approach, they remind that the ECtHR, through its jurisprudence, established that certain provisions of the ECHR may be interpreted as to impose positive obligations “not only on Member States, but also, indirectly, on private persons”, thus including corporate entities.⁹ In that context, particularly relevant are Article 1 and Article 17 of the ECHR, which provide textual hook upon which to hang the concept of indirect liability of corporate entities.¹⁰ Firstly, Article 1 explicitly secures to everyone within Contracting Parties’ jurisdiction the rights set forth in the ECHR, without providing additional requirements such as that those rights, in order to be secured, must be violated directly by the state authorities. By doing so, Article 1 leaves room for the development of the concept of indirect corporate accountability. Article 17 is of key importance for the justification of the indirect approach to corporate accountability as it explicitly prohibits any act of abuse of the ECHR rights to be committed either by state or private individuals.

However, the concept of indirect accountability is also criticized among scholars, as it does not create obligations for private entities, which can be enforced through respective supervisory organs in an

⁶ C.M. Vasquez, “Direct vs. Indirect Obligations of Corporations under International Law”, *Columbia Journal of Transnational Law*, Volume 43, 2005, 936 etc.

⁷ S. Khoury, 86.

⁸ See for instance L. Garlicki, “Relations between Private Actors and the ECHR”, in: *The Constitution in Private Relations* (eds. A. Sajó, and R. Uitz), Eleven International Publishing, Utrecht 2005, 132 etc.

⁹ Ibid.

¹⁰ D. Spielmann, “Companies in the Strasbourg Courtroom”, *Cambridge Journal of International and Comparative Law*, Vol. 5, 3/2016, 411.

international forum.¹¹ This constitutes a major limitation of the indirect approach to the human rights law endorsed by the ECtHR. In the absence of an international supervisory mechanism to enforce the obligations of private entities, it is left within a State's "margin of appreciation" to decide about how to ensure respect of human rights obligations between private entities. In other words, corporations can bypass any accountability by avoiding litigation before national courts.¹²

Notwithstanding the existing limitations of the indirect approach to provide fully effective protection to victims, at this stage of development of international human rights law, it seems needed to examine the current application of this concept and to propose its further improvements. The application of indirect approach is legitimate as only through scrutinizing the potential human rights violations allegedly committed by the corporate entities, a balance may be created with the high level of protection of corporate entities as potential victims of human rights violations, which has been so far provided by the ECtHR. Namely, the legitimacy of considering corporations as potential victims of human rights violations has never been truly questioned by the ECtHR. Its extensive case-law concerning the protection of property, respect for home and privacy and freedom of expression shows the successfulness of claims which were brought by the companies.¹³ In addition, by placing a particular emphasis on the concept of indirect corporate accountability, the ECtHR may contribute to decreasing the rate of corporate involvement in human rights violations.

3. The Extent to which the ECtHR Scrutinizes the Potential Violations of Human Rights Attributable to Corporate Entities

In order to determine the extent of the ECtHR reach to corporations it is firstly important to identify the "tools" the ECtHR applies in that group of cases as to enable the application of the concept of indirect accountability of corporate entities. Thus far, the ECtHR approached the indirect corporate accountability and has called for regulation of corporate activities at the national level by means of applying the doctrine of horizontal effect of the ECtHR rights (*Drittwirkung*) and the doctrine of positive obligations of the states. Besides those "tools", the ECtHR

¹¹ See for instance E.A. Alekma, 41-43.

¹² S. Khoury, 88.

¹³ See A. Višekruna, "Protection of Rights of Companies before the European Court of Human Rights", in: *Procedural Aspects of EU Law* (D. Duić, T. Petrašević), Faculty of Law Josip Juraj Strossmayer University of Osijek 2017, 111-126.

also occasionally relies on the following principles of interpretation when applies the concept of indirect corporate accountability: the principle of living instrument and the principle according to which protection of the ECHR's rights must be practical, concrete and effective, and not illusory or theoretical.¹⁴

When it comes to the positive obligations doctrine, it was inaugurated by the ECtHR in 1968 in the *Belgian Linguistics Case* concerning the right to education guaranteed in Article 2 of the Protocol 1 to the ECHR. Ten years later in the case *Marckx v. Belgium*, the ECtHR clearly distinguished, for the first time, among its positive and negative obligations stating that Article 8, which guarantees the right to respect for private and family life “does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective ‘respect’ for family life”. Through its case law, the ECtHR gradually extended the reach of the doctrine of positive obligations to a broad spectrum of rights guaranteed by the ECHR, including, *inter alia*, Articles 2, 3, 8, 10 and 11.

On the other hand, the doctrine of horizontal effect (*Drittwirkung*) derives from the German theory of the application of fundamental rights values between private parties. Instead of literally adopting *Drittwirkung*, as such, the ECtHR has established in its case law that ECHR's rights, including those guaranteed by Articles 3, 8-11 and 13, may apply in the private sphere, although indirectly. *Drittwirkung* is considered to be a very complex concept in international human rights law. It is generally acknowledged that the ECtHR applies this doctrine to a lesser extent than the doctrine of positive obligations.¹⁵

The ECtHR, in its case law, establishes a link between the doctrine of horizontal effect and positive obligations by reiterating that ‘*positive obligations* may involve adoption of measures even in the *sphere of the relations of individual between themselves*’. Their connection is further identified by the scholars who hold that positive obligations and the horizontal effect are ‘two sides of the same coin’, or ‘two things which go hand in hand’ given that the State guarantees the rights in the ECHR and must do everything to ensure their protection, which does not necessarily amount to abstaining from interference, but in certain cases requires adoption of measures in the sphere of the mutual relations between individuals.¹⁶

¹⁴ D. Spielmann, 412.

¹⁵ S. Khoury, 86-88.

¹⁶ *Ibid.*

Although those ‘tools’ on which the ECtHR relies when applying the concept of indirect corporate accountability can be easily identified in the jurisprudence of the ECtHR, it is quite difficult, based on the available case law, to determine their precise scope particularly when it comes to the extent to which they allow the ECtHR to scrutinize possible violations of human rights committed by corporate entities. The ECtHR was even expressly reluctant to elaborate upon some general theory of applicability of the doctrine of horizontal effects in the private sphere in *Vgt Verein gegen Tierfabriken v. Switzerland*. Namely, in that case the ECtHR declared that “[it] does not consider it desirable, let alone necessary, to elaborate a general theory concerning the extent to which the Convention guarantees should be extended to relations between individuals *inter se*”.

Therefore, in order to provide grounds for further development and conceptualization of the specific theory on the extent to which the ECHR’s guarantees are applicable to victims of human rights violations committed by the corporate entities, the relevant case law of the ECtHR pertaining to the indirect corporate accountability needs to be examined in more detail.

Many cases before the ECtHR pertain to the acts or omissions which were allegedly committed by corporate entities. Those cases have been initiated under different provisions of the Convention and the Protocols, including (*inter alia*) Article 2, Article 3, Article 4, Article 8, Article 10 and Article 14 of the ECtHR. To put it differently, the existing body of case law relevant for the concept of indirect corporate accountability predominantly extends to the following issues: environment,¹⁷ surveillance at workplace,¹⁸ personal data protection,¹⁹ trafficking in human beings,²⁰

¹⁷ The ECtHR’s case of *Özel and Others v. Turkey* (App. Nos. 14350/05, 15245/05 and 16051/05, Judgement of 17 November 2015) is an important case pertaining to the death which resulted from natural disaster. In this case the ECtHR held that there had been a violation of Article. See also *Guerra v. Italy*, App. No. 116/1996/735/932, Judgement of 19 February 1998, *Lopez Ostra v. Spain*, App. No. 16798/90, Judgement of 9 December 1994, *Budayeva v. Russia*, App. Nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, Judgement of 20 March 2008 and *Kolyadenko and Others v. Russia*, App. Nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, Judgement of 28 February 2012.

¹⁸ For instance, see the decision on admissibility in the case *Köpke v. Germany*, App. No. 420/07, Decision of 5 October 2010 and the case *López Ribalda and Others v. Spain*, App. Nos. 1874/13 and 8567/13, Judgement of 09 January 2018, Referral to the Grand Chamber, 28 May 2018.

¹⁹ See for instance, *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* (App. No. 931/13, Judgement of 27 June 2017, Grand Chamber), where the ECtHR found that there was no violation of Article 10.

²⁰ For instance, in the case *Rantsev v. Cyprus and Russia*, (App. No. 25965/04, Judgement of 7 January 2010) the ECtHR found the violation of Articles 2 and 4. This constitutes a landmark judgement whose subject-matter was human trafficking. More concretely, it deals with the sexual exploration which was committed by commercial operators.

safeguarding the health and safety of workers.²¹

Although the ECtHR case law on the issue of indirect corporate accountability *prima facie* seems very extensive, it does not mean that it contains a lot of judgements finding human rights violations that are committed by corporate entities. It is important to keep in mind that most of the claims brought to the ECtHR did not result in rulings determining violations of the ECtHR. Moreover, in order to properly select and understand the relevant case law it firstly should be distinguished between indirect accountability of private and public corporate entities. The notion of corporate accountability, applied by both scholars and international lawyers, in principle, covers both categories of corporate entities.

However, this section is mainly focused to the cases where the accountability is attributable to private corporations; as such cases turn to be more problematic in practice. While the acts or omissions of the public corporate entities are automatically attributable to the respective state as a respondent, the same apparently does not apply to acts or omissions committed by private corporate entities. As it was elaborated, in those group of cases the link between a private corporate and a state entity shall be established by the ECtHR, through invoking the doctrine of horizontal effect or positive obligations doctrine. However, the existing body of ECtHR's case law shows that in certain instances, the ECtHR missed the opportunity to establish the given link, which further resulted in the rulings finding no violations of the ECtHR without providing any justification in that regard.

Apparently, the main weakness of the indirect approach to corporate accountability is evident in the lack of the conceptualization of the indirect corporate accountability, or more concretely, in the ECtHR failure to specify the human rights obligations of companies and the extent to which it can scrutinize violations allegedly committed by them. In that context, Verdonck rightly observed in his comment on *Özel v. Turkey* that given that 'the international legal framework burdens States with a tremendous responsibility to enforce corporate accountability, human rights bodies could at least create a level playing field regarding the concrete duties of corporate entities'.²²

Therefore, in most of cases where the ECtHR found violation of the certain provision of the ECHR, such as for instance the case of *Özel*

²¹ *Vilnes and Others v. Norway*, App. Nos. 52806/09 and 22703/10, Judgement of 5 December 2013.

²² L. Verdonck, "How the European Court of Human Rights evaded the Business and Human Rights Debate in *Özel v. Turkey*", *The Turkish Commercial Law Review*, Vol. 2, 2016, 115.

v. Turkey, it failed to explicitly mention the responsibility of the involved corporations. Instead, the ECtHR judged such cases purely in light of the state's shortcomings. In that context, Verdonck further indicates that the ECtHR 'should have discussed the interplay between different liability regimes – state versus private actor liability, criminal versus civil liability and corporate versus individual liability'.²³ The given remarks are mostly applicable to the entire body of ECtHR's case law, given that the ruling in *Özel v. Turkey* is in line with the ECtHR's established case law on corporate accountability.

The lack of the systematic ECtHR approach towards corporate accountability is also evident at terminology level. The ECtHR so far has not coined uniformed terminology regarding this matter. It did not use the term of "corporate accountability" in any single ruling. Instead of that, it occasionally recurses to different terms such as "accountability", "companies", "business interests", "commercial interest" when it tries to explain its approach to corporate accountability.

Finally, it is a bit disappointing that the ECHR in times of significant development of international soft and hard law instruments on corporate accountability did not seize the opportunity to invoke and elaborate on some of international soft law instruments while scrutinizing the possible violations of human rights committed by corporate entities. The fact that the ECtHR did not quote any of the international acts on corporate accountability contradicts to approach it follows when adjudicating on some other issues, such as for instance prohibition of torture guaranteed under Article 3. On the other hand, the ECtHR invokes some international conventions pertaining to trafficking in its case law on corporate accountability, for instance in the cases *Siliadin v. France* and *Rantsev v. Cyprus and Russia*²⁴ without giving any mention to the applicable set of instruments on corporate accountability.

4. Conclusion

Currently, no international human rights judicial body, except the International Criminal Court, has jurisdiction to hold private actors accountable. However, the prosecution of corporations was expressly excluded from the International Criminal Court. On the other hand,

²³ *Ibid.*

²⁴ *Siliadin v. France*, App. No. 73316/01, Judgement of 26 October 2005; *Rantsev v. Cyprus and Russia*, App. No. 25965/04, Judgement of 7 January 2010.

there is an ever increasing number of international ‘soft’ law instruments that were adopted by various organizations such as the UN, OECD, EU and ILO. In order to bridge that gap as well as to strengthen and further improve the implementation of the concept of corporate accountability, the ECtHR should take more active and clear approach by specifying clear conditions and formulating a test on how to best scrutinize possible violations of human rights committed by the corporate entities and consequently, their accountability.

Instead of that, the approach the ECtHR taken so far has been neither consistent nor comprehensive. In most of cases where the ECtHR found violation of certain provision of the ECHR, such as for instance the case of *Özel v. Turkey*, it declined to explicitly mention the responsibility of the involved corporations. Instead, the ECtHR judged such cases purely in the light of the State’s shortcomings. By specifying the conditions under which it scrutinizes possible violations of human rights committed by corporate entities, the ECtHR would surely ‘eliminate discrepancies under national laws and create a level playing field by identifying and developing minimum requirements’.²⁵ Furthermore, a more consistent and comprehensive approach on the scrutinizing the corporate accountability is also needed as to strike a fair balance with the high level of protection of corporate entities as potential victims of human rights violations, which has been so far awarded by the ECtHR.

Finally, such a proactive role of the ECtHR that we suggest is in line with its established dynamic approach, which implies that the ECtHR extends and applies the ECHR ‘in light of political and social developments and changes of conditions of life, beyond the original conceptions of the period when the Convention was drafted or entered into force’.²⁶ In favor of the application of such dynamic approach is also the International Law Commission in its report on fragmentation.

References

Alkema E.A., “The Third-Party Applicability or ‘Drittwirkung’ of the European Convention on Human Rights”, In: *Protecting Human Rights: the European Dimensions/ Protection des droits de l’Homme: la dimension européenne: Studies in honour of/ Mélanges en l’honneur de Gérard J. Wiarda* (eds. F. Matscher, H. Petzold),

²⁵ L. Verdonck, 117.

²⁶ S. Khoury, 82.

- Carl Heymanns Verlag KG, Berlin 1990², 33-57.
- Fasciglione, M., “Corporate Liability, Extraterritorial Jurisdiction and the Future of the Alien Tort Claims Act: Some Remarks After Kobel”, *Diritti Umani e Diritto Internazionale, Società editrice il Mulino*, Vol. 7, 2/2013, 401-435.
- Garlicki, L., “Relations between Private Actors and the ECHR”, in: *The Constitution in Private Relations* (eds. A. Sajó, and R. Uitz), Eleven International Publishing, Utrecht 2005, 129-144.
- Khoury, S., “Transnational Corporations and the European Court of Human Rights: Reflections on the Indirect and Direct Approaches to Accountability”, *Sortuz, Oñati Journal of Emergent Socio-Legal Studies*, Volume 4, 1/2010, 68-110.
- Spielmann, D., “Companies in the Strasbourg Courtroom”, *Cambridge Journal of International and Comparative Law*, Vol. 5, 3/2016, 404-417.
- Vasquez, C.M., “Direct vs. Indirect Obligations of Corporations under International Law”, *Columbia Journal of Transnational Law*, Volume 43, 2005, 927-959.
- Verdonck, L., “How the European Court of Human Rights evaded the Business and Human Rights Debate in *Özel v. Turkey*”, *The Turkish Commercial Law Review*, Vol. 2, 2016, 111-118.
- Višekruna, A., “Protection of Rights of Companies before the European Court of Human Rights“, in: *Procedural Aspects of EU Law* (D. Duić, T. Petrašević), Faculty of Law Josip Juraj Strossmayer University of Osijek 2017, 111-126.

Legal sources

- Özel and Others v. Turkey*, App. Nos. 14350/05, 15245/05 and 16051/05, Judgement of 17 November 2015
- Guerra v. Italy*, App. No. 116/1996/735/932, Judgement of 19 February 1998
- Lopez Ostra v. Spain*, App. No. 16798/90, Judgement of 9 December 1994
- Budayeva v. Russia*, App. Nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, Judgement of 20 March 2008
- Kolyadenko and Others v. Russia*, App. Nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, Judgement of 28 February 2012
- Köpke v. Germany*, App. No. 420/07, Decision of 5 October 2010
- López Ribalda and Others v. Spain*, App. No. 1874/13 and 8567/13, Judgement of 9 January 2018, Referral to the Grand Chamber, 28 May 2018
- Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, App. No.

931/13, Judgement of 27 June 2017, Grand Chamber
Rantsev v. Cyprus and Russia, App. No. 25965/04, Judgement of 7 January 2010
Siliadin v. France, App. No. 73316/01, Judgement of 26 October 2005
Marckx v. Belgium, App. No. 6833/74, Judgement of 13 June 1979
Kiobel v. Royal Dutch Petroleum Co., Decision of the United States Supreme Court, 569 US 108 (2013)
Vgt Verein gegen Tierfabriken v. Switzerland, App. No. 24699/94, Judgement of 28 June 2001
Vilnes and Others v. Norway, App. Nos. 52806/09 and 22703/10, Judgement of 5 December 2013
Resolution A/HRC/26/L.22/Rev.1 for the “Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights”

Website references

Khoury, S., Whyte, D., New Mechanisms of Accountability for Corporate Violations of Human Rights, www.livrepository.liverpool.ac.uk/3001783/1/New%20mechanisms%20of%20accountability%20for%20corporate%20violations%20of%20human%20rights.pdf, last visited 1 December 2018.

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INDIREKTNI PRISTUP ODGOVORNOSTI PRIVREDNIH SUBJEKATA U SVETLU PRAKSE EVROPSKOG SUDA ZA LJUDSKA PRAVA

Rezime

Sudska praksa Evropskog suda za ljudska prava (ESLJP) u vezi sa zaštitom ljudskih prava pravnih lica, uključujući i privredne subjekte, je dobro razvijena i analizirana u pravnoj literaturi. Međunarodno pravo

ljudskih prava se razvija u pravcu uspostavljanja pravila i prakse utvrđivanja odgovornosti za povrede ljudskih prava ne samo u odnosu na države, već i odgovornosti drugih pravnih lica, naročito privrednih subjekata. Autorke u ovom radu analiziraju način na koji je ESLJP u svojoj sudskoj praksi konceptualizovao odgovornost privrednih subjekata za povredu ljudskih prava. U radu autorke ukazuju na to da je u svojoj dosadašnjoj praksi ESLJP uglavnom pristupao odgovornosti privrednih subjekata i ukazivao na potrebu regulisanja aktivnosti poslovnih subjekata na nacionalnom nivou kroz primenu doktrine horizontalnog dejstva prava zajemčenih Evropskom konvencijom o ljudskim pravima (*Drittwirkung*) i doktrine pozitivnih obaveza država. Autorke potom iznose stav da je ESLJP na taj način u svojoj praksi propustio da u punoj meri uzme u obzir opšte tendencije u razvoju društvenih odnosa i politika, te da bi zapravo trebalo da preuzme proaktivnu ulogu u konceptualizaciji svog pristupa i postupanja u slučajevima povrede ljudskih prava od strane privrednih subjekata.

Ključne reči: odgovornost privrednih subjekata, ESLJP, povreda ljudskih prava, horizontalno dejstvo, pozitivne obaveze država.

THE CONCEPT OF THE FUNDAMENTAL BREACH OF CONTRACT IN THE CISG

Abstract

When contracting party fails to perform the contract for the international sale of goods, then the other party can use certain remedies, including the right to terminate the contract. The termination of the contract in situation when the debtor has breached his contractual obligation opposes the principle pacta sunt servanda and all legal systems provide for the conditions and limitations under which creditor can acquire and realize that right. The most important limitation in that sense refers to the requirement that the breach of contract must be serious and severe.

The Vienna Convention on Contracts for the International Sale of Goods in this respect provides for the concept of fundamental breach of contract, as the general ground for termination the contract due to its non-performance. General because it takes no account what exactly debtor do or not do when violated the contract; it is only important that his actions fits with the conditions for qualification the fundamental breach of contract. In that sense the Convention sets three criteria for estimate that question: first, that the debtor has breached the contract; second, it has resulted in such detriment to the other party as substantially deprives him of what he is entitled to expect under the contract and third, the debtor did not foresee such a damage as a consequence of breach of contract nor such a result could foresee a reasonable person of the same kind in the same circumstances.

The concept of fundamental breach of contract is the original solution of the Vienna Convention and is the result of decades of work on the unification of the law of the international sale of goods. The most important achievement of such solution is that it introduced applicable objective criteria and standards for the evaluation of the significance and severity of the breach of the contract which are sufficient to activate the creditor's right to terminate it. Several decades of successful implementation of the Convention contributed to the developing of that concept in practice and to its increasingly application not only

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in other international sources of law for the contract of sale of goods, but also in significant number of national laws. On that way legal systems harmonize over time in relation to this question, which contributes to the simplification of trading on the international market and to economic development and prosperity.

Keywords: *sale of goods, breach of contract, Vienna convention, the general ground for termination the contract due to its non-performance, concept of fundamental breach of contract.*

1. Introduction

When a debtor fails to perform what he has accepted as his contractual obligation from a contract on the international sale of goods, then the other party may be able to use a certain legal remedies against him in order to restore the balance of mutual contractual benefits, which has been disrupted by the breach of the contract. These remedies include the right of the creditor to terminate the contract if other conditions as well, have been met. The termination of the contract is contrary to the principle of *pacta sunt servanda* and all legal systems set limits under which the creditor acquires or realizes that right, which is necessary to prevent its abuses, as well as to maintain and enforce as many contracts as possible. In this regard, in the comparative law, the view that the termination can only be achieved for the most serious violations of the contract prevails. Bearing in mind that it is impossible to precisely determine all such violations in advance, the issue of the conditions for acquiring the right to terminate contracts in legal sources is regulated by the special and by the general rules on a regular basis. The formulation of a general rule, which is appropriate for application to the situations not being covered by specific rules is not easy to achieve, and in comparative law, the concept of a fundamental breach of contract in the Vienna Convention on Contracts for the International Sale of Goods¹ stands out as a good example (further: the Vienna Convention).

¹ The UN Convention on Contracts for the International Sales of Goods, Vienna 1980. The quality of the Vienna Convention's solution is clearly confirmed by the fact that it has been successfully applied for more than three decades and is taken over not only by international sources of contract law but also by an increasing number of national regulations. Thus, for example, UNIDROIT Principles of International Trade Contracts (UNIDROIT Principles), Principles of European Contract Law and Draft Common Frame of Reference (DCFR), similar to the concept of fundamental breach of contract in the Vienna Convention, provide the "essential non-performance" as basis for the termination of the contract (Art. 7.3.1. UNIDROIT Principles; Art. 8: 103 Principles of European contract law; Art. 3: 502 DCFR. In national regulations this concept has long been accepted in Scandinavian law, but also in Estonian Law of Obligations, The Netherlands Wetboek; Chinese Contract Law, and as an alternative proposal is also formulated in Art. 264. Draft of the Civil Code of the Republic of Serbia (text of May 29, 2015).

2. The determination of a fundamental breach of contract

The rule on a fundamental breach of contract was set forth in Art. 25. of the Vienna Convention, which reads as follows: “A breach of contract committed by one of the parties is fundamental if it results in such a detriment to the other party, so as to substantially deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.”²

Based on what is previously exposed, there are three requirements that have to be met in order for one violation of the contract to be qualified as fundamental: first, that the debtor has violated the contract; second, that the other party suffer damage as consequence of the breach of contract, which essentially deprives him of what he was justifiably expected from the contract performance; third, that the party that committed the violation had foreseen the damage as its consequence, or that such a consequence could have been predicted by a reasonable person of the same characteristics given the same circumstances.

2.1. Violation of the contract

Legally valid contracts bind on the parties that concluded it and, most widely, any deviation from what was agreed represents a breach of contract. However, things cannot be simplified so much because there are many circumstances to be considered before it is concluded that the debtor has violated the contract in a way which is relevant from the legal point of view and give the creditor right to legal remedies.³ In the Vienna Convention, this issue has been regulated in accordance with the unitary concept of non-performance of the contract, which is characterized by the principle that any deviation from what the contract stipulates represents its non-performance⁴ The debtor’s fault is not relevant to assessing whether a contract has been breached or to qualify one breach of contract as a

² On the origin of a provision on fundamental breach of contract in the Vienna Convention, see J. Perović, *Bitna povreda ugovora - Međunarodna prodaja robe*, Službeni glasnik SCG, Beograd 2004, 126-131.

³ K. Jovičić, „Određenje pojma neizvršenja ugovora, s osvrtom na neizvršenje ugovora o prodaji robe”, *Strani pravni život* 1/2014, 70.

⁴ In the case of a contract for the sale of goods, this may be a failure to fulfill any contractual obligation, both on the seller’s side and on the buyer’s side, regardless of the reason that led to it and irrespective of the fact whether the debtor had failed to perform the contract, or hadn’t fulfilled it, as foreseen. This may also be a delay in the fulfillment of an obligation, partially fulfillment, or any other deviation from the agreed terms, including failure to fulfill the obligation to cooperate. *Ibid.*, 71.

fundamental; it is significant only for determining the remedies available to the creditor. Thus, the fact that the debtor is excused from the contractual liability⁵ always prevents the creditor from claiming compensation, and if it becomes impossible to fulfill the obligation (which is also the basis for the exclusion from contractual liability), then he also loses the right to claim the specific performance. However, all other remedies, and thus the right to terminate the contract under the stipulated conditions, remain at his disposal.

2.2. Detriment of a contractual interest

In order for a breach of contract to be fundamental, it is necessary that the creditor has suffered damage and not just any damage, but only the damage which essentially deprives him of the benefit he justifiably expected from the contract and its performance. This question is assessed with regard to the interests of the injured creditor. The subjective criterion is primary, but it is not, however, exclusive nor should be because such a solution could be a source of abuse. For this reason, the rule requires that only the creditor's justified expectations are to be taken into account. In this regard, the degree of the vulnerability of his interests is primarily based on the assumption that the contract, in addition to regulating contractual obligations, also indicates the importance of the parties that have concluded it. Thus, for example, if the contract stipulates that delivery should be within a fixed period of time and the seller misses that deadline, then this fact itself is sufficient to constitute a fundamental breach of contract. In the same situation, however, without a fixed deadline, the breach of contract would not be so qualified.

Instead of the term "damages" in Art. 25. of the English text of the Vienna Convention, the term "detriment" is used, which is specific in a way that it is not usually used in other texts of the same kind, nor is it mentioned elsewhere in the Convention. Since the definition of "detriment" is not given in the text of the Vienna Convention, and in Art. 74., which regulates the notion of damage⁶ uses the term "damage", it is concluded that those are not an analogous terms. In relation to this issue in the literature prevails the view that the damage in the sense of Art. 25. of the Vienna Convention, i.e. as part of a substantive violation of the

⁵ The issue of the exemption of a debtor from contractual liability is regulated by Art. 79. of the Vienna Convention.

⁶ Art. 74. provides that the compensation for damages for the breach of contract consist of a sum equal to the loss, including loss of profit suffered by the other party.

contract, has to be widely interpreted and that the concept of “damage” includes both actual and future monetary losses, as well as any other negative consequence in the form of material or non-pecuniary damage.⁷

Further, this damage must be such that it substantially deprives the party which is loyal to the contract of benefits that were expected from it. The emphasis is, therefore, on the effects that the damage, as a result of the breach of contract, has caused to the other contracting party⁸. That exactly is necessary to justify the claim for termination of the contract⁹ - that no other legal remedy in this situation would be adequate for the injured party. The fact that the Convention does not give a closer definition of the term “substantially” but to decide on it by court or arbitration according to the circumstances of the particular case, may cause problems in the application of the concept of the fundamental breach of contract due to the different interpretations of that term¹⁰.

⁷ The same: F. Ferrari, „Fundamental Breach of Contract Under the UN Convention on the International Sale of Goods – 25 Years of Article 25 CISG”, *Journal of Law and Commerce* Vol. 25/2006, 495; M. Will, „Article 25”, in: *Commentary on the International Sales Law, The 1980 Vienna Sales Convention* (eds. C. M. Bianca and M. J. Bonell), Giuffrè, Milan 1987, 211.

⁸ In this way, it is clearly pointed out that the decisive criterion is not reflected in the degree of damage, but in the significance of the interests that the contract and the specific contractual obligation had for the injured party. See J. Perović, 133. That does not exclusively depend on size of the damage, though the size of the damage is one of the important elements when determining the significance of the damage for the creditor. See U. Schroeter, „Art. 25”, in: *Schlechtriem&Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)* (ed. I. Schwenzer), Oxford University Press, Oxford 2016, 428-429.

⁹ This is assessed according to the circumstances of each case in particular. Thus, for example, if the seller fails to fulfill his obligation to pack goods, but the goods are delivered to the buyer properly, the damage in the sense of “detriment” exists if the circumstance precisely deprived the buyer of the possibility to sell goods to third parties (for example, the goods are recognizable by their packaging, which distinguishes them from goods of the same type of other manufacturers, which are of doubtful quality). P. Schlechtriem, *Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods*, Manz, Wien 1986, 60.

¹⁰ In assessing this issue, the court or arbitration can be guided by previous court decisions and doctrinal attitudes. The Commentary of the UNCITRAL Secretariat can also be of great help which, in this regard, recommends that the following circumstances should be taken into account: the value of the entire contract, the monetary loss resulting from the breach of the contract, and to what extent the violation of the contract made by one party affects the other activities of the other contracting party. See: <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-25.html> (last accessed September 20, 2018). These guidelines, however, are given in the context of comments on Art. 23. of the Draft of the Convention of 1978, which has been amended to the final wording of Art. 25. of the Convention, and it should be taken into account with caution. The most complete change between the draft of the provision on a fundamental breach of contract and its final text is reflected in the fact that instead of the degree of damage, the emphasis was put on the importance of the interests that the contract and the specific contractual obligation had for the injured party. On the basis of this, it is concluded that the existence of a fundamental breach of contract can only be said in the event that that interest is brought into question, that is, only if the injured party loses interest in the contract being executed after his injuries have occurred. For details see P. Schlechtriem, *Commentary on the UN Convention on the international Sale of Goods*, Clarendon Press, Oxford 1998, 177.

Here, the question of when the damage, that the creditor suffers from the breach of the contract, becomes such that it substantially deprives him of what he expects from the contract, is being raised. Pursuant to the provisions of Art. 25, it follows that this is the moment when the injured party has to prove that fact or that the breach of contract inevitably leads to that consequence. In the assessment of this issue, not only is the subjective interest of the injured party relevant, but also should be taking into account the expectations that are objective, first of all based on the provisions of the contract itself and on the circumstances of the particular case¹¹.

2.3. *The predictability of the damages*

Finally, when it is established that the creditor suffered damage due to a breach of contract and that because of it he is substantially deprived of what he reasonably expected from its performance, then it still does not mean that a fundamental breach of contract has occurred. This is because the debtor has the right to prove that such a consequence he did not have foreseen, nor would a reasonable person of the same kind in the same circumstances have foreseen such a result.¹² If he proves that with success, then there is no fundamental breach of contract, even if the qualification requirements for the damage are satisfied.

The question whether the damage could have been known to the party that violated the contract primarily depends on the circumstances of the particular case, but also on the personal ability of the debtor (for example, from his experience, from ability to perceive the circumstances of the matter in question, etc.) However, even here there was not only a subjective criterion but an objective criterion as a corrective, which is reflected in the “reasonable person of the same kind”¹³. An objective criterion is necessary because, otherwise, the party that violated the contract could always refer to the unforeseeable circumstances i.e. to the unforeseeable consequences of his actions, and that would be sufficient

¹¹ M. Will, 215.

¹² The second part of the sentence, Art. 25. The test of the predictability of damage is also the final condition for qualifying one breach of contract as fundamental. The justification of this additional filter is found in the need to balance the interests of both parties and in unusual, special circumstances. This contributes to the fact that a party, aware of the possible consequences of its failure to perform a contract, may not enter into a contract, or will take the necessary measures to prevent its non-performance. See *Ibid.*, 215-216.

¹³ Since the persons who conclude the contracts on the international sale of goods, as per the rule, are professional traders, the phrase “reasonable person” can also be understood as a “reasonable trader” or a person with the necessary skills to deal with the business.

to prevent qualification of a breach of the contract as a fundamental one. That is why both criteria are interconnected and must be used together, since only in this way can the controversy be corrected.¹⁴

Here also raises the question in which moment the party that breached the contract, should anticipate the consequences of such conduct? Is it the moment when the contract is concluded, or a moment after that and if so, which one? Since the Vienna Convention does not provide the answer to this question, in the literature it is the source of various interpretations. Thus, while one group of authors considers that the moment of the conclusion of the contract¹⁵ is relevant, the others deem that it is the moment in which the contract is breached or the period immediately prior to that¹⁶, while professor Hannold states that the moment when creditor inform the other party that the breach of a contract cause him a fundamental damage should be considered as relevant¹⁷.

The above points of view would make sense if there had been made a mistake in the determination of the text of the Vienna Convention, due to which this essential issue remained unsettled. However, there is no real basis for such attitude, given that the history of work on the formulation of Art. 25 of the Convention shows that the proposal which explicitly states that the predictability of the damage is related to the moment of the conclusion of the contract, is not accepted. Based on this, it can be concluded that, by omitting any definition of the moment relevant to the assessment of predictability, the Vienna Convention actually wanted to enable courts and arbitrations to decide on the matter on the basis of a flexible norm, so that they can decide with respect to the circumstances

¹⁴ Thus, for example, an experienced and wise trader can know more and predict better than the average person in his profession, and by applying a purely objective criterion, he could successfully oppose the qualification of a breach of contract made by him, as relevant. In this way, a real person would be able to hide behind the standard of an imaginary "reasonable person", and this is not what is desirable with this provision. See M. Will, 220.

¹⁵ See more: R. Herber, B. Czervenka, *Internationales Kaufrecht, Kommentar zu dem Übereinkommen der Vereinten Nationen vom 11. April 1980 über Verträge über den internationalen Warenkauf*, Beck, München 1991, 87; P. Schlechtriem, 181; J. Perović, 160.

¹⁶ M.Â.B. Soares y R.M.M. Ramos, *Contratos internacionais: compra e venda, cláusulas penais, arbitragem*, Almedina, Coimbra 1986, 128; J. D. Feltham, „The United Nations Convention on Contracts for the International Sale of Goods”, *Journal of Business Law* 1981, 346.

¹⁷ This notice should be given after the conclusion of the contract, but before its execution. Professor Hannold, in support of this view, also cites the case-law in which the court decided whether there was a substantial breach of contract because the seller did not pack the goods (rice) into the new bags, as the contract stipulated, nor was it done after the contract was concluded, but before the delivery, when the buyer informed him that he solely wanted the goods to be packaged in new bags, as only under this condition could they be sold to the third parties. J. Hannold, *Uniform Law for International Sales under the 1980 United Nations Convention*, Kluwer Law International, The Hague 1999, 209.

of the particular case¹⁸. This, however, contributed to a legal uncertainty, which could have been avoided if a different solution was accepted, that is, if this issue was explicitly resolved by the Vienna Convention itself.

Of all the foregoing proposals it seems that it can be argued with the strongest arguments that the predictability of the damage should be related to the moment of the conclusion of the contract. Namely, if it turns out that the question of justified expectations from the injured party's contract is assessed by the moment of its conclusion (which has already been said in the consideration of the question of "Detriment of a contractual interest"), then the same principle can be applied also in relation to the predictability of the consequences of the injured contract. In other words, if the expectations of the contracting parties from the performance of the contract are formed at the time of its conclusion, then the consequences of the non-performance of the contract should also be foreseen at the same time. Any other solution that takes into account some other moment as relevant (which would necessarily be after the conclusion of the contract) leads to legal uncertainty, because the parties assume that the contract will be performed under the circumstances in which it was concluded and the question is, whether they at all conclude a contract if they knew that one of them would later require the change contractual obligation or one part of it.

3. The burden of proving the predictability of damage in the context of a fundamental breach of contract

The Vienna Convention in Art. 2 explicitly states that the party in breach has to prove that the damage was unpredictable if he wishes to challenge the creditor's assertion that the breach of the contract is fundamental. This rule does not cause any dilemma in situations when it is not disputable that the contractual obligation which had been violated, constitutes an essential element of the contract (for example, when the delivery time is fixed), as well as when the request is satisfied that a "reasonable person of the same characteristics in the same

¹⁸ About this question see: *Legislative History 1980 Vienna Diplomatic Conference and preparations for the Conference, CISG, Article 25*, <http://www.cisg.law.pace.edu/cisg/chronology/chrono25.html> (last accessed September 20, 2018). Moreover, in Art. 74 concerning compensation for damages, the predictability of damage is explicitly related to the moment of the conclusion of the contract, unlike in Art. 25, and on the basis of this, it can be concluded that there was no intention that Art. 25 sets such a restriction.

circumstances” would have predicted the nature of the injury done¹⁹. The issue is, however, more complex when a specific case is characterized by special, unusual circumstances, which the party that breached the contract did not know, and that such circumstances could not be known to a “reasonable person with the same characteristics”, too. Under these conditions, the breach of contract cannot be qualified as fundamental. However, in the described situation, the injured creditor has the right to prove that he has notified the debtor in a timely and appropriate manner about the special circumstances, or that the debtor has been informed about those circumstances on the otherwise manner. This practically means that the injured party can also obtain the fundamental breach of contract in circumstances under which this would be difficult to achieve in the normal order of the things and actions.²⁰

4. Conclusion

The conditions under which the violation of the contract’s obligations may be qualified as a fundamental breach of contract set for in the Vienna Convention, clearly indicate that this legal source respects the principle of *pacta sunt servanda* and seeks to keep and enforce as many contracts as possible. The restriction for acquiring and using the right to terminate the contract due to its non-performance, imposed by the concept of a fundamental breach of contract and the rule of foreseeability, are in the interest of the debtor because, in this way, he gain an additional possibility for the contract to be executed. The predictability rule, however, is not at the expense of the injured party’s interests, but its primary function is to limit the right for termination the contract to justified cases only, when other legal remedies, first of all, claim for damages, cannot adequately compensate for the losses that the creditor suffers from a non-performance.

However, a flexible formulation of the concept of a fundamental breach of contract means that a court or arbitration ultimately decides upon it on the basis of circumstances of every particular case, which may lead to arbitrariness and legal uncertainty. Therefore, this concept carries a

¹⁹ “If, for example, when interpreting a contract, a particular understanding of a particular trade profession is found to be relevant, then the party that breached the contract cannot be relied upon its own ignorance. In order to avoid the termination of a contract on the basis of a fundamental breach of contract, the lack of personal knowledge of the parties in question is not sufficient; in order to challenge the existence of a fundamental breach of contract, such a defect should exist, both on the party that committed the injury and on the side of a reasonable person of the same characteristics in the same circumstances.” J. Perović, 163.

²⁰ *Ibid.*, 164.

special risk for the injured party, which is reflected in the fact that he cannot know in advance whether the breach of the contract made by the debtor is fundamental, i.e. whether he can terminate the contract on that basis. In order to avoid this risk, the injured creditor will often use another legal remedy, which may be less appropriate to him. These uncertainties can be reduced only if the parties to the contract clearly and precisely compile their contract, in which the obligations and their significance are determined so that the need for interpretation is reduced to the minimum. However, the practice of applying the Vienna Convention, as well as the expert and scientific papers on the fundamental breach of contract, undoubtedly positively influence the overcoming of these uncertainties. In support of this goes the fact that the concept of a fundamental breach of contract is accepted by other international instruments for unification of the contract law, as well as fact that the number of national laws which opt for it constantly increase.

References

- Feltham, J. D., „The United Nations Convention on Contracts for the International Sale of Goods”, *Journal of Business Law* (1981).
- Ferrari, F., „Fundamental Breach of Contract Under the UN Convention on the International Sale of Goods – 25 Years of Article 25 CISG”, *Journal of Law and Commerce*, Vol. 25/2006.
- Hannold, J., *Uniform Law for International Sales under the 1980 United Nations Convention*, Kluwer Law International, The Hague 1999.
- Jovičić, K., „Određenje pojma neizvršenja ugovora, s osvrtom na neizvršenje ugovora o prodaji robe”, *Strani pravni život*, 1 /2014.
- Perović, J., *Bitna povreda ugovora - Međunarodna prodaja robe*, Službeni list SCG, Beograd 2004.
- Rolf, H., Czervenka, B., *Internationales Kaufrecht, Kommentar zu dem Übereinkommen der Vereinten Nationen vom 11. April 1980 über Verträge über den internationalen Warenkauf*, Beck, München 1991.
- Schlechtriem, P., *Commentary on the UN Convention on the international Sale of Goods*, Clarendon Press, Oxford 1998.
- Schlechtriem, P., *Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods*, Manz, Wien 1986.
- Schroeter, U., „Art. 25”, in: *Schlechtriem & Schwenger Commentary on the UN Convention on the Internatioinal Sale of Goods (CISG)*, (ed. Ingeborg Schwenger), Oxford University Press, Oxford 2016.
- Soares, M. Â. B., Ramos, R. M. M., *Contratos internacionais: compra e venda*,

cláusulas penais, arbitragem, Almedina, Coimbra 1986.

Will, M., „Article 25”, in: *Commentary on the International Sales Law, The 1980 Vienna Sales Convention*, (eds. Cessare Massimo Bianca and Michael Joachim Bonell), Giuffrè, Milan 1987.

Legal sources

The UN Convention on the Contracts for the International Sale of Goods, 1980.

<https://www.cisg.law.pace.edu/cisg/text/treaty.html>.

The UNIDROIT Principles of International Commercial Contracts, 1994. <https://www.trans-lex.org/400120>.

The Principles of European Contract Law, 1995, 1997, 2003. <https://www.trans-lex.org/400200>.

Website references

Legislative History 1980 Vienna Diplomatic Conference and preparations for the Conference. <http://www.cisg.law.pace.edu/cisg/chronology/chrono25.html>.

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KONCEPT BITNE POVREDE UGOVORA U BEČKOJ KONVENCIJI O UGOVORIMA O MEĐUNARODNOJ PRODAJI ROBE

Rezime

Kada ugovorna strana propusti da izvrši svoju obavezu iz ugovora o međunarodnoj prodaji robe, onda druga strana stiče pravo na određena pravna sredstva, uključujući i pravo da ugovor raskine. Raskid ugovora u toj situaciji suprotstavlja se načelu *pacta sunt servanda* i svi pravni sistemi predviđaju uslove i ograničenja pod kojima poverilac to pravo stiče, odnosno može da koristi. Najvažnije ograničenje u tom smislu je zahtev da povreda ugovora mora biti ozbiljna i teška.

Bečka konvencija o ugovorima o međunarodnoj prodaji robe u odnosu na ovo pitanje predviđa koncept bitne povrede ugovora kao opšti razlog za raskid ugovora zbog neispunjenja. Opšti zato što se primenjuje nezavisno od toga šta je dužnik tačno učinio, odnosno nije uradio kada je ugovor povredio; bitno je samo da njegovo postupanje može da se kvalifikuje kao bitna povreda ugovora. U tom smislu Konvencija postavlja tri kriterijuma na osnovu kojih se procenjuje to pitanje: prvo, da je dužnik povredio ugovor; drugo, da je time prouzrokovao takvu štetu drugoj ugovornoj strani da je ona izgubila mogućnost da ostvari svoja očekivanja od ugovora; i treće, da je dužnik predvideo takvu štetu kao posledicu povrede ugovora ili da bi takvu štetu predvidelo drugo razumno lice istih sposobnosti u istim uslovima.

Koncept bitne povrede ugovora je originalno rešenje Bečke konvencije i rezultat je decenijskog rada na unifikaciji prava međunarodne prodaje robe. Njeno najvažnije dostignuće u pogledu ovog rešenja je u tome što ono uvodi primenjive objektivne kriterijume i standarde za evaluaciju značaja i težine povrede ugovora, koja je dovoljna da aktivira poveriočevo pravo da ugovor raskine. Skoro 40 godina uspešne primene Konvencije širom sveta doprinelo je razvoju ovog koncepta u praksi i njegovoj sve široj primeni jer ga prihvataju ne samo međunarodni izvori prava za ugovor o međunarodnoj prodaji robe, već i sve veći broj nacionalnih prava. Na taj način se pravni sistemi vremenom harmonizuju u odnosu na ovo pitanje, što doprinosi pojednostavljenju trgovine na međunarodnom tržištu i ekonomskom razvoju i blagostanju.

Ključne reči: prodaja robe, povreda ugovora, Bečka konvencija, opšti osnov za raskid ugovora zbog neizvršenja, koncept bitne povrede ugovora.

CONFLICT OF THE AUTHORITY OF JUDICIAL POWER AND NON-JUDICIAL INSTITUTIONS

Abstract

The subject of the analysis of this paper is the mutual relation between the judicial authorities and non-judicial institutions, those whose decisions directly or indirectly influence the exercise of judicial power¹. The author's attention will not be directed towards relations with institutions of legislative and executive power, but on non-judicial institutions that do not belong to governmental ones, and have an impact on judicial decision making. This relationship will be presented through the prism of the conflict of authority, which is based on the institutional position of the analyzed institutions, the legal effect and the possibility of reconsidering their decisions, and the conflicting relationship in the decision making process. The complexity of the analyzed relationship also speaks of the dilemma of the author regarding the name of this paper, so the analysis can thus be described as "the interrelation of the judicial authorities and non-judicial institutions, as an attachment to the functionality or dysfunctionality of the legal system", "encroaching on powers of judicial authorities by non-judicial institutions", "allowed and disallowed operation frameworks for non-judicial institutions in relation to the exercise of judicial power", or "conflict of jurisdiction between regular courts and non-judicial institutions". It seems that, regardless of the different angle of observation, and the different marking of the disputed points, the essence of the disputed relationship is precisely the authority of the analyzed institutions, the conflict based on legitimate reconsidering of judicial decisions (a real conflict of authority), and a potential conflict in case of an illegitimate impact (not real conflict of authority).

Non-judicial institutions whose relationship with the judicial ones is being considered are the Constitutional Court and the State Audit Institution,

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¹ Hereinafter, depending on the context, the terms "judicial authority", "ordinary courts", "Supreme Court of Cassation", will be used.

which, regardless of whether it is an allowed or disallowed influence, have the possibility, due to the nature of their position and the nature of the decisions, influence the exercise of judicial power.

Keywords: Constitutional Court, judicial power, State Audit Institution, conflict, basic rights, authority of institutions.

1. The authority of the institutions

Common to the Supreme Court of Cassation as an exponent of the exercise of judicial power on the one hand and the Constitutional Court and the State Audit Institution on the other, is their “institutional authority”, as well as “the authority of decisions i.e. acts made”. As constitutional categories, they base their institutional authority on the Constitution as the highest legal act. According to the letter of the Constitution, the Supreme Court of Cassation is „the highest court in the Republic of Serbia”², the Constitutional Court is “an autonomous and independent state body that protects constitutionality and legality and human and minority rights and freedoms”³, while the State Audit Institution is “the highest state body for the audit of public funds in the Republic of Serbia, is autonomous and subject to the control of the National Assembly, to which it is accountable”⁴.

On the other hand, the authority of the decisions taken, which is reflected in the legal effect of the decisions and the possibilities of their review, is not only established by the Constitution, but also by the relevant laws regulating the field of operation of these institutions. The Constitution defines that court decisions are “mandatory for all and cannot be subject to extra-judicial control” and “can only be reviewed by the competent court in the legally prescribed procedure”⁵, and that, on the other hand, “the decisions of the Constitutional Court are final, executive and mandatory”⁶. When talking about the State Audit Institution, the situation is somewhat different, in that the actions of the Institution are not determined as a decision, but as acts of the Institution and that the legal effect of decisions or acts, is defined by the Law⁷. Thus, the decision making authority received its expression in a provision that stipulates that

² Art. 143, par. 4 of the Constitution of the Republic of Serbia - Constitution of RS, *Official Gazette*, No.98/2006.

³ Art. 166, par. 1 the Constitution of the Republic of Serbia.

⁴ Art. 96, par. 1 the Constitution of the Republic of Serbia.

⁵ Art. 145, par. 3 and par. 4 the Constitution of the Republic of Serbia.

⁶ Art. 166, par. 2 the Constitution of the Republic of Serbia.

⁷ The Law on State Audit Institution - Law on SAL, *Official Gazettes of the Republic of Serbia*, No. 101/2005, 54/2007 and 36/2010.

“the acts by which the Institution exercises its audit authority cannot be challenged before the courts and other state bodies”⁸.

The lack of a constitution and law established subordination between the analyzed institutions (it would not be possible), and insisting on “exclusive” positions and rights⁹, necessarily leads to a conflict of authority.

2. The judicial power and the constitutional court- real conflict of authority

Positioning the Constitutional Court to non-judicial institutions is not aimed at minimizing the role and importance of the Constitutional Court, but it is rather a result of a clear constitutional distinction with the judicial authority at the top of the pyramid of which is the Supreme Court of Cassation as the highest court in the Republic of Serbia, or the highest court in the system of regular courts. Also, the contribution to this demarcation give the constitutional definition of the Constitutional Court as an autonomous and independent “state organ”, as well as a normative split in relation to judicial power.

The basis of the conflict of authority between the judicial power and the Constitutional Court lies with the Constitutional Court’s authority to review judicial decisions when fundamental human rights and freedoms are violated¹⁰. Given the legitimacy of the Constitutional Court, we are talking about the real conflict of authority.

The critique of this “new” jurisdiction of the Constitutional Court is moving in three directions:

The first is based on the attitude of the inadmissibility of reviewing court decisions by institutions outside the judicial system, which is why such a model of the functioning of the Constitutional Court is characterized as contrary to the principle expressed in Article 145 paragraph 4 of the Constitution. This traditional attitude stems from the essence of relations with the Constitutional Court, which is why it is largely abandoned, and it seems that the dogma about the inviolability of judicial decisions¹¹ is a past. However, although abandoned, its permanent presence cannot be denied, which strengthens with every defect in constitutional law

⁸ Law on SAI, art. 3, par. 4.

⁹ V. Petrov, On the change of constitution and Constitutional Court, interview, <https://www.paragraf.rs/intervju/vladan-petrov.html>, December 15, 2018.

¹⁰ Hereinafter “fundamental rights”.

¹¹ D. Stojanović, „Ustavnosudsko ispitivanje sudskih odluka”, *Zbornik radova Pravnog fakulteta u Nišu* 74/2016, 35-37.

protection of fundamental rights, especially in the segment of protection subject, and non-existence of clear distinction between the category of specific constitutional law and ordinary law.

The second concept of criticism is based on challenging the way to eliminate the consequences of violations of fundamental rights in court decisions. Advocates of the said concept consider the annulment¹² or cancellation¹³ of court decisions by the Constitutional Court a threat to the authority of the judicial power. As an alternative, the possibility is offered that by its decision the Constitutional Court only finds that a court decision violates some of the basic rights, and afterwards everything is returned to the appropriate court procedure. The decisions of the Constitutional Court would so have a “declaratory character”, as with the decisions of the European Court of Human Rights¹⁴. In this way, the legal effects of a decision of the Constitutional Court could be achieved through the filing of an appropriate extraordinary legal remedy, and in that context, through the application of the provisions relating to the institute of renewal of proceedings¹⁵.

The third direction of criticism relates to the established aspiration of the Constitutional Court, that in invoking the protection of fundamental rights in its decisions, it often enters into substantive and procedural issues within the jurisdiction of the judicial power. The taking of legal opinions by the Constitutional Court concerning legal issues within the jurisdiction of courts of record would be a threat to the established system of protection of fundamental rights, in which way the dysfunctionality of the whole of the legal system would be significantly contributed.

3. Basic rights as „specific constitutional right”

The task of the Constitutional Court is not to take the stand whether a court decision is good or not good “for parties” rather than provide the answer to the question whether it is good or not good “for society”. To this determinant can also be added the following conclusions:

¹² Practice of the Constitutional Court of the Republic of Serbia.

¹³ Practice of the Federal Constitutional Court of Germany, one of BVerfGE 128, 226.

¹⁴ M. Nastić, „Odnos Ustavnog suda i redovnih sudova - komentar odluke Ustavnog suda Republike Srbije”, *Zbornik radova Pravnog fakulteta u Nišu* 65/2013, 379.

¹⁵ N. Bodiroga, „Ponavljanje parničnog postupka zbog odluke Ustavnog suda”, *Analiz Pravnog fakulteta u Beogradu* 2/2013.

- that the judicial authority gives an answer to the question of what is right, and the Constitutional Court - what right should be (M. Arlović)¹⁶,
- that a specific constitutional right will not be hurt when a regular court passes some, given the usual right, objectively wrong decision, but it must be violation of one of the fundamental (basic) rights guaranteed by the Constitution, i.e. specific constitutional law. (S. Rodin)¹⁷

By analyzing these conclusions we can come closer to understanding the notion of a *specific constitutional law*¹⁸. The specificity of constitutional law has two aspects:

- the first one that relates to a *specific subject of protection*. Thus, the focus of constitutional protection is directed only and solely on the protection of fundamental rights, and
- the second aspect observed in the broader sense is the *specific jurisdiction* of the Constitutional Court in the protection of fundamental rights that are violated by court decisions. This specificity is reflected in the extraordinary authority of the Constitutional Court to review court decisions merely and only in the domain of respect for fundamental rights.

By positioning the Constitutional Court as a protector of fundamental rights, it automatically dissociates this institution from encroaching into “ordinary rights” that are the subject of a dispute before the courts. Thus, the Constitutional Court would exclude the discussion of rights from property relations, family relationships, labor relations and the like. In this way, the judicial authority retains the “exclusive right” to decide on the rights of the parties, and retains the position of the decision maker in the domain of “ordinary law”. These decisions, if they are made in accordance with fundamental rights, cannot be subject to review outside the judicial system of authority. On the other hand, it is made possible for the Constitutional Court to intervene in the framework of protection of fundamental rights, which, as a sort of “overright” stands above the

¹⁶ M. Arlović, „Međuodnos Ustavnog suda Republike Hrvatske i sudbene vlasti u Republici Hrvatskoj”, *Zbornik radova Pravnog fakulteta u Splitu* 2/2015, 387: “While the judiciary, in principle, responds primarily to the question of what is the right in a country of the rule of law and legal security, a constitutional court must answer the question what right should be”.

¹⁷ S. Rodin, „Odnos Ustavnog suda Republike Hrvatske i Suda pravde Europskih zajednica u Luksemburgu nakon ulaska Republike Hrvatske u punopravno članstvo Europske unije”, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&ved=2ahUKEwjR0rXO65LgAhXos4sKHcOIC-7cQFjAEegQIBRAC&url=https%3A%2F%2Fbib.irb.hr%2Fdatoteka%2F388258.tekst_Rodin_out_final.doc&usq=AOvVaw27rTpKT_4do5YfjV3GdJf, 7.

¹⁸ Among others, S. Rodin, section 1.3.a. “Distinction of a specific constitutional right from ordinary law”; D. Stojanović, part 3.1. “Violation of specific constitutional law”; J. Omejec, „Jurisprudencija nemačkog Saveznog ustavnog suda i hrvatsko ustavno sudstvo”, u: *Izbor odluka Ustavnog suda Savezne republike Nemačke* (ur. Tobias Zern, Martin Bauch), Zaklada Konrad Adenauer program, Zagreb 2015, 21-23.

private interests of the participants in the court proceedings, and includes an increased public interest in its protection (specific constitutional law).

In such “division” of jurisdiction, the consideration of the position of the Constitutional Court as a “super-revising court” and disrespect of a specific position and jurisdiction, which this court has today, are excluded. Our society, by entrusting the Constitutional Court with jurisdiction over the review of court decisions in the domain of protection of fundamental rights, has placed our country among the European countries with the same protection principle (the European model)¹⁹.

4. Limits of reconsidering judicial decisions

Defining the basic rights as an object of protection, in the decisions of the Constitutional Court to review the court decisions, is not in itself sufficient. Based on this general definition, the constitutional court practice had to answer the question, what are the situations when a court decision violates some of the basic rights. In practice, the Constitutional Court of the Federal Republic of Germany has crystallized several characteristic situations²⁰ of violation of fundamental rights by the court:

- when the court of record violates any of the constitutionally guaranteed fundamental procedural rights of the parties to the proceedings
- when the court of record applies a law that is contrary to the constitutionally guaranteed fundamental rights
- when the ordinary court of record interprets the law or enforces the law in a manner contrary to fundamental rights;
- when the court of record passes a decision arbitrarily (arbitrariness).

4.1. Application of the law and taking of a position that is contrary to the basic rights

When it comes to situations that involve the application of laws and the taking of views that are contrary to fundamental rights, it seems that the matter is quite clear. In both cases, the application of any provision of the law was excluded, the application of which would lead to the violation of a guaranteed basic right. This implies the first situation where the application of provisions that are contrary to fundamental rights is forbidden. In this case, the

¹⁹ O. Vučić, D. Stojanović, „Evropski model ustavnog pravosuđa”, *Zbornik radova Pravnog fakulteta u Nišu* 69/2015.

²⁰ S. Rodin, 6. referring to Benda/Klein, *Lehrbuch des Verfassungsprozessrechts*, C.F. Müller Juristischer Verlag, Heidelberg 1991, 253, note 43 and BVerfGE 11, 343 (349) and especially BVerfGE 18, 85.

Constitutional Court is authorized to annul a court decision based on a provision of a law that is contrary to the constitutionally guaranteed basic rights in the proceedings under a constitutional complaint, even in a situation where those provisions were not subject to constitutional review. (“direct control of the constitutionality of the law”)²¹.

In another situation, the prohibition refers to the acceptance of attitudes in the application of the law, which would be contrary to the guaranteed fundamental rights and freedoms. A characteristic case that can be classified in the wider sense in this model of injuries and which at the moment represents the “painful point” of our legal system is to take over the position of the court, which is opposite to either horizontally or vertically harmonized court practice.

4.2. Violation of the basic procedural rights of the parties

The situation in which a court violates one of the basic procedural rights of the parties is the only one mentioned, which refers to the existence of a formal defect. The complexity of the problem in this type of violation is reflected in the obligation of the Constitutional Court to take a stand on which procedural rights would have the character of the basic ones, and which are ordinary. The answer to this question is crucial for assessing whether the violation of the procedural law of the parties enjoys constitutional protection or not. Unlike the previous two situations mentioned above, where the violation is of material nature and therefore “more visible”, in the case of procedural defect, the thing is different. It is simply impossible to “line up” the line and make a clear distinction between ordinary injuries and basic procedural injuries.

The division of the breach of proceedings into absolutely essential and relatively significant violations in procedural laws could not be helpful. Namely, absolutely essential procedural violations should not be classified in the category of violation of basic procedural rights by automatism. If the solution of the problem was set up in this way, a paradoxical situation would arise that the Constitutional Court, in relation to the absolutely essential violations of the procedure, proceeds in the same way as a second instance appeals court, that is, as a court of review. Bearing in mind the aforementioned premises, it is clear that there is no possibility of “codifying” procedural injuries, which would have the character of the basic ones, and that is why the help in taking over the position could come from the other side.

²¹ *Ibid.*, 10. note by the author “concrete control of the constitutionality of the law”.

All absolutely essential procedural violations (or at least the majority) can be broadly subsumed under a violation of the right to a fair trial. When analyzing two groups of possible situations, there would be obvious differences in the nature of the injury.

The first group of assumed situations would be:

- in the course of many years of civil procedure, in one of its stages one of the submissions has not been submitted to the opposite party. This would be a violation of the hearing principle, which is defined as an absolutely essential injury;²²
- during the procedure, a person who is not familiar with the language in official use in the court is prevented from engagement of a court interpreter at one or more hearings, on which no evidence has been produced, nor has it been pointed out that there is a fact essential to the resolution of the dispute. In this case, it would be possible to talk about a violation of the right to equal protection before a court that would also qualify as an absolutely essential violation²³.

In a wider sense, both cases could be qualified as violations of fundamental rights, violations of the right to a fair trial. The degree of vulnerability of fundamental rights is different between these two examples of the same group, in favor of the other, where the degree of vulnerability seems to be greater than in the first situation. However, given the low degree of intensity of injury in both cases, the question arises as to whether the mentioned procedural deficiencies should be classified as a violation of fundamental rights, and with the intervention of the Constitutional Court, the proceedings should be brought back to court, thus risking the establishment of conditions for establishing a violation of the right to trial in a reasonable time.

Unlike the mentioned group of cases where it is justifiable to ask the question of the purpose of annulment of a court decision, in some other situations this is set as a necessity. Then we could talk about the second group of assumed situations:

- during many years of civil proceedings, the submissions have not been submitted at all or in most cases to one of the litigious parties
- a person who does not know the language that is in official use in the court shall be prevented from engagement of a court interpreter during the entire procedure.

²² Art. 374, par. 2, point. 7. of the Law on Civil Procedure – LCP, *Official Gazettes of RS*, Nos. 72/2011, 49/2013, 74/2013, and 55/2014.

²³ Art. 374, par. 2, point. 8. LCP.

Unlike the previous group of cases, there is a significantly higher intensity and a significantly higher degree of vulnerability to violations of basic rights. Therefore, it could be said that situations from the second group of procedural violations infringe upon the very essence of the procedure and essentially jeopardize the position of the party.

The above examples lead to the conclusion that in taking an attitude about the character of a procedural violation, the broadest interpretation of the established standards of respect for human rights should not begin, because it would be counterproductive for the entire legal system. On the other hand, we should bear in mind the terms and qualifications that follow human rights and freedoms²⁴, and which can certainly indicate the required high level of seriousness of the violations that would be sanctioned. Violations of procedural rights that cannot be said to compromise the foundations and basic values of a society, and which can be attributed only to the lack of a *form*, but not to the *substance*, must not be the subject of constitutional and judicial protection.

4.3. Arbitrariness in decision making

Arbitrariness in decision making, as one of the characteristic situations of violation of basic rights, enjoys certain specificities. This violation should be distinguished from seemingly similar situations, which due to their (un)importance do not enjoy protection as violations of basic rights.

Therefore, this situation should be distinguished from the following:

- when in its decision the court does not refer at all, or it wrongly refers to the provisions of the law on the basis of which the decision was made. In these cases, there are benign shortcomings, which are very easily corrected in the appeal or review procedure.
- If the court decides on a determined factual situation in accordance with the law, and if the explicit non-recourse or misapplication of the provisions of the law is the only defect, it would not be a reason for the cancellation of the decision.
- when in its decision the court refers to “free judicial conviction”. The use of the right to a free judicial conviction is a legitimate and based on the law authority²⁵, which is diametrical in relation to the position

²⁴ Basic, fundamental, guaranteed, overright, and the like.

²⁵ Among other articles 8 (free evaluation of evidence) and 232 (free assessment of the amount of material damage) of LCP.

of illegitimacy of arbitrariness in decision making.

- when the court decision did not give reasons for decisive facts. This violation, defined as an absolutely essential injury²⁶, also distances itself from the system of protection of fundamental rights.

In contrast to this, the arbitrariness in deciding exclusively falls within the domain of material defect or lack of essentiality. A characteristic situation of arbitrariness is the interpretation of the provision of the law in a way that is contrary to its clarity and precision. In other words, a legal norm that is clearly defined and which does not leave the possibility of a different interpretation of what it says is interpreted to the contrary. In this situation, there is a clear need to “eliminate” the arbitrary interpretation of the norm, but there is a clear danger that the Constitutional Court will take a different attitude from the attitude taken in the court decision, considering that its position fully reflects the essence of the analyzed provision of the law.

As with the violation of basic procedural rights, a question also arises how deeply one can analyze the court decision to avoid the risk of taking positions in the jurisdiction of the judicial authority.

4.4. Three-dimensional quality of analysis and the rule “at first sight”

The concept of the boundary of the review of a court decision can be seen from two aspects. The first one determines the jurisdiction, i.e. the framework of the Constitutional Court’s functioning in the analysis of court decisions, and then we are talking about the analysis “in breadth”, that is, about the two-dimensional character of the analysis. On the other hand, the analysis of court decisions by investing “in depth” of court proceedings in order to exercise jurisdiction over the protection of fundamental rights, could represent a three-dimensional character of the analysis.

Entering into the depth of the court proceedings constitutes a risk for the Constitutional Court - to create a need for taking a position on procedural and substantive matters and even to deal with the analysis of the established factual situation. In this way, the Constitutional Court, from the analysis of the violation of fundamental rights, would move to the level that implies the analysis of ordinary law, which is within the jurisdiction of the judicial authorities. One of the possible solutions based on which the problem would be overcome is the application of the “at first sight” rule.

²⁶ LCP, art. 374, par. 2, point 12.

The character of the violation of basic, or fundamental rights, seems to imply a more pronounced degree of obviousness. In other words, this means that violation of fundamental rights in the review process of court decisions must be obvious, and already “at first sight” ascertained. The importance of the violation is, on the one hand, by some unwritten rule, proportionate to its obviousness on the other. By such an approach to resolving a disputed relationship with a constitutional complaint, the Constitutional Court could doubt the importance of the violation of fundamental rights if it was not obviously established, that is, in the first or second step. Also clearly evident and obvious violation of basic rights can strengthen the need for the activation of the protection mechanism at the Constitutional Court.

If the above two situations, which involve violation of basic procedural rights and arbitrariness in decision making, applied the rule “at first sight”, then the definition of characteristic situations of violation of fundamental rights should include the notion of obviousness.

The rule “at first sight” through the notion of “obvious”, which would be defined as a rule of any written or unwritten character, would have the purpose of providing support to the Constitutional Court, not to cross the field of protection of ordinary law that is not within its competence.

Except in the social sphere, this rule seems to have its manifestation also in nature, where the most intense natural phenomena are almost always clearly perceptible and visible to the naked eye. If, on the other hand, the explanation of this model were to be found in philosophical doctrine, then it could be said that what is absolute reveals itself with the “flash of self-obviousness” (“flash of evidence”), that is, in intuition and not analytical scientific method²⁷.

5. “Self-limitation” of the Constitutional Court in the decision making process

The Constitutional Court is in a kind of comfort zone in reviewing court decisions for violation of fundamental rights. Firstly, it manifests itself through the absence of the right to an effective remedy against its decisions, and secondly through the protection mechanism implemented in a unilateral proceeding. In a constitutional appeal procedure, one of the parties that is a party to a legal relationship decided by a court of record, nor does it participate in the proceedings on a constitutional complaint, nor is it, in most cases, aware that the proceedings have been initiated. In this way, the application of

²⁷ Henri Bergson, French philosopher (1859-1941) the work *Creative Evolution* (1907).

the hearing principle is absent, although the legal effects of a decision of the Constitutional Court that annuls the decision of a court of record relates also to a party who did not participate in the relevant proceeding.

It seems that the Constitutional Court must be aware that its decisions that have not been made in accordance with the “rules of the game” can significantly contribute to the lack of harmonization of the legal system. For these reasons, in the absence of other mechanisms, the Constitutional Court must introduce significant factors of “self-restraint” and “self-control” in decision making so as not to take over the jurisdiction of courts of record by its decisions.

Thus, self-restraint and self-control of the Constitutional Court in the review of court decisions could go in several directions:

The first, which would represent a clear awareness that the Constitutional Court gives the first, and also, the last word about the violation of basic rights in court decisions.

The second, it would be based on the principle of not taking a position on matters within the jurisdiction of the judicial authority. It includes the non-determination of the Constitutional Court in relation to court decisions in substantive matters, procedural issues, and especially not according to the established factual situation,

The third would insist on constant communication with the Supreme Court of Cassation. This communication as M. Arlović states in the analysis of relations between the Constitutional Court of Croatia and the judiciary would rest on the principle of mutual cooperation and mutual checks²⁸. If the position on the necessity of mutual cooperation is generally accepted, the entire future action would be based on the attitude of V. Petrov, that the protection of the constitutionally guaranteed rights as constitutional values is possible only with the complementary activity of both bodies²⁹.

The last fourth direction would include the introduction of measures and criteria for assessing violations of fundamental rights. Thus, a “measure of obviousness” (the rule at first sight), a “measure of the intensity of the injury”³⁰, and a measure based on the “degree of vulnerability” of social values, could be established as benchmarks.

By establishing control mechanisms in the process, a clear idea of the nature and seriousness of the violation of fundamental rights

²⁸ M. Arlović, 369.

²⁹ V. Petrov, see fn. 10.

³⁰ J. Omejec, 22 (referring to Rūth Christina and Lohse Kai) points to the practice of the German Federal Constitutional Court, which recognizes “the intensity of interference in fundamental law” as one of the measures of specific constitutional law.

would be formulated, and the negative aspects of the functioning of the Constitutional Court would be mitigated or completely eliminated.

6. Absence of control mechanisms and negative aspects of Constitutional Court actions

The negative functioning of the Constitutional Court means the departure from the framework of a specific constitutional right and the transition to the field of common law, the understanding of the system of protecting the fundamental values of the society as a matter of form, not just the substance, and a very broad interpretation of the applied standards of protection of fundamental rights.

The absence of (self-)control mechanisms in the work of the Constitutional Court can lead to numerous negative consequences, among which are distinguished:

- threatening the authority of courts of record, and therefore the Supreme Court of Cassation as the highest court,
- devaluation the “victim status”. This colloquial term refers to a person who has been violated with basic rights and who is seeking help and protection within the legal system. However, the status of the victim is “only enjoyed” by the person whose rights are essentially violated in the essential sense. Opposite him stands a person whose rights are hurt in the formal sense and it seems that he gets the status of a hunter, a person who “hunts” formal failures in court decisions. By presenting these omissions as a violation of fundamental rights, he wants to, through a positive decision of the Constitutional Court, bring the case back to the start and thus realize his private interests.
- devaluation of the human rights protection system which involves the transition from the level of “respect for fundamental rights”, to the level of “respect for formal rights”,
- threatening the authority of the Constitutional Court itself, which citizens increasingly view as an institution for the protection of their private interests (ordinary right), and less and less as an institution that represents a guarantor of respect for the Constitution, laws and fundamental values of a society (specific constitutional right)
- permanent danger of the so-called “DDoS effect”³¹. This term, taken from the information technology dictionary, implies the complete or

³¹ DDoS is the abbreviation for the Distributed Denial-of-Service attack, and denotes the prevention of attacks on the computer system by utilizing many of the dispersed resources most found on the Internet.

limited impossibility of functioning of the system, due to its overload. The Constitutional Court, by its actions, gives hope to the citizens to change the decision of the court of record before this court, not only from the domain of a specific constitutional right, but also from the domain of ordinary law (private-legal interest). For this reason, citizens are motivated to seek protection of their rights and before the Constitutional Court, whose effective treatment, due to a large number of requests, is almost completely disabled.

7. A practical view of the conflict of the authority with the constitutional court

7.1. The obsolescence of the right to compensation for damage caused by criminal offense

At a regular session held on July 7, 2011, the Constitutional Court delivered the position which refers to “*the limitation period for damages caused by criminal offense*”, which (in part) reads as follows:

In the event that the damage is caused by a criminal offense (Article 377, LOO, Law on Obligations), if the period of obsolescence foreseen for criminal offense prosecution is longer than the deadlines prescribed in Article 376 of the Law on Obligations, the claim for compensation of damages to every responsible person, and not only the person who caused the damage, becomes obsolete when the time limit for statute of limitations expires only if the verdict has established the existence of a criminal offense and the defendant is found guilty of a criminal offense.

The Supreme Court of Cassation at the Civic Department session on March 10, 2015 took the following position:

Whenever the damage is caused by a criminal offense, if the period of obsolescence foreseen for criminal offense prosecution is longer than the deadlines prescribed in Article 376 of the Law on Obligations, the claim for compensation for damage to each responsible person, and not only the person who caused the damage, is outdated when the time limit for prosecution obsolescence expires only if the existence of a criminal offense is found by a final judgment and the accused found guilty of a criminal offense.” (Sentence from the judgment of the Supreme Court of Cassation Rev1 41/2014 of December 12, 2014)

7.2. Interest on the costs of civil procedure

The Appellate Court in Belgrade held a session of its Civil Division on December 24, 2014 and took the following position:

The obligation to compensate for litigation expenses is a monetary obligation that is due to the decision, to which the debtor is obliged to pay default interest from the decision making to the payment.

At the session of its Chamber held on November 19, 2015, the Constitutional Court decided to approve the constitutional complaint and annul the decision of the Commercial Court of Appeal, with a part of the explanation as follows:

The Constitutional Court considers that the debtor (litigation party) falls due only when the decision on the procedure expenses becomes final (either after the expiration of the appeal deadline, if the party did not appeal, or by passing a final decision on the appeal) and when the deadline for its voluntary fulfilment expires. Therefore, the arrival of debtor in arrears in this situation coincides with the moment when the decision of the court, by which he is obliged to compensate the litigation costs, becomes executive. Naturally, this consequently gives the right to the creditor from the executive document to claim from the debtor a default interest in accordance with the provisions of Article 277 paragraph 1 of the LOO.

(extract from Constitutional Court decision's (Už-9130/2013) citation)

By simple analysis of these examples it can be concluded that it is impossible to give a logical explanation that would justify the adoption of legal attitudes in the same legal matters by two institutions which act in different jurisdictional frameworks recognized by the Constitution and law.

8. Judicial power and state audit institution - not real conflict of authority

In relation to the judicial authority, the position of the State Audit Institution is diametrical to the Constitutional Court. This opposite position is reflected in an illegitimate impact on the judicial authority (not real conflict of authority), unlike the previously explained legitimate action of the Constitutional Court (real conflict of authority). The institution does not have the power to review or control the court decisions, but nevertheless, through its actions, there is a tendency to influence the judicial authority by taking positions on substantive issues. Given the competence of the Institution in the field of public funds audit,

it is natural that the target groups of audit control are the beneficiaries of public funds (budget users). Among these beneficiaries, a certain number are legal entities in which citizens exercise their rights in the legally prescribed administrative procedure.

In its audit reports on these beneficiaries, the Institution often makes recommendations for the “proper application” of the law in the domain of that legal entity. As a rule, against the final administrative act of a legal entity, an administrative dispute can be brought before the competent Administrative Court, where that court would give a final opinion on the legality of the disputed administrative act.

It is precisely because of the fact that in the practice of the Institution it is noted that it makes recommendations and interpretations of legal solutions, and that these attitudes not only influence the scope of work of a controlled legal entity, but also the exercise of judicial power in the procedure of controlling the legality of the administrative act, we can also speak on the “indirect impact” on the judicial authority.

9. Practical look at the conflict of the authority with the state audit institution

One of the budget users whose work is subject to auditing is the Republican Pension and Disability Insurance Fund. For the sake of reminding, before the Fund, citizens enjoy their rights in the legal procedure prescribed in the law, in which two instances are provided³², and an administrative dispute may be brought against the final decision of the Fund³³. For these reasons, if the Institution takes an opinion on the legal issue within the domain of the Fund’s competence in the audit control, it indirectly encroach upon the competence of the Administrative Court, which, in the “last instance” in case of initiating an administrative dispute, will give the final view on the application of the law.

The example to be mentioned just refers to such a situation.

³² Art. 92 and Art. 99 Law on Pension and Disability Insurance - Law on PDI, *Official Gazette of RS*, Nos. 34/2003, 64/2004, 84/2004, 85/2005, 101/2005, 63/2006, 5/2009, 107/2009, 101/2010, 93/2012, 62/2013, 108/2013, 75/2014, and 142/2014.

³³ Art. 103, Law on PDI.

9.1. Costs of a burial

During October-December 2013, the State Audit Institution audited the operations of the Republican Pension and Disability Insurance Fund and provided an appropriate audit report in which certain recommendations were given. The recommendation we are interested in was:

that the funeral expenses compensation is paid in the amount of one and a half average pension in the Fund in the previous quarter, in the same amount for all categories of pensioners, not for each category separately as was the case before the reporting.

The reason for passing this recommendation lies in the “disagreement” of the auditing institution with the previous position of the Fund, according to which the basis for the payment of one and the half average pension was calculated according to the average pension of the respective group of insured persons (agricultural pensioners, civil pensioners, etc.) In this way, lower reimbursement for the cost of funeral was paid for agricultural pensioners, given that their average pensions were lower than the average pensions of other groups of pensioners.

After the auditing institution took such an attitude, the question of removing the stated consequences of payment of less compensation was raised, i.e. whether the reduced payment would be eliminated by applying Article 105 of the Law on Pension and Disability Insurance, which means within the limits of the administrative procedure or administrative dispute, or in court proceedings by applying the institute of compensation for damages.

The answer to that question was given by the Supreme Court of Cassation through the position adopted at its Civil Division’s session held on March 17, 2016 and it reads as follows:

A court of general competence is indeed competent to rule on a lawsuit in order to compensate for the unlawful or improper work of the administrative authority in connection with the payment of the difference from the amount paid to the pertaining amount of funeral expenses incurred as a result of the death of the beneficiary of agricultural pensions.

However, for the analysis of the topic of authority conflict, a more interesting is the part of the citation of the above paragraph that reads:

In this case, the jurisdiction of the administrative body prescribed by the Law on Pension and Disability Insurance for determining the right to payment of funeral expenses does not exclude the jurisdiction of a court of general competence to act in a lawsuit for compensation of damages

due to illegal or irregular work of administrative bodies (article 1 of the Law on Civil Procedure and article 172, paragraph 1 of the Law on Obligations). When it comes to compensation for the funeral expenses of deceased users of agricultural pensions, paid in lower amounts than those pertaining to them, the State Audit Institution pointed out irregularities in the work of the Pension and Disability Insurance Fund.

(Extract of the part of the explanation of the position adopted at the session of the Civil Division of the Supreme Court of Cassation, held on March 17, 2016.)

The following conclusions can be drawn from this part of the reasoning:

- The Supreme Court of Cassation accepts the competence of the audit institution in taking over the position and interpretation of the provisions of the Law on Pension and Disability Insurance
- The Court also accepts and “verifies” the attitude of the audit institution in the meaning and application of the term “average pension” from Article 75 of the Law on Pension and Disability Insurance,
- The Court also accepts that the Fund has acted illegally and irregularly in terms of the attitude taken by the audit institution,
- The Court excludes the possibility of suspicion of the correctness of the position of an audit institution, in which way it establishes its binding application.

In this way, the Administrative Court did not fully exercise its competence in assessing the legality of the Fund’s decisions in the administrative dispute (it was not initiated), nor was it possible for the court in the civil procedure to take an attitude (perhaps different) about (non) existence of illegality or irregularity in the Fund’s work as the basis for compensation for damages.

Regardless of the fact that the stated attitude of the auditing institution is very likely correct, there were circumstances that could have been a basis for taking on a different attitude. The question of interpretation of the mentioned provision of Article 75 of the Law was raised in relation to the provision of Article 5 paragraph 1, which reads as follows: “rights from pension and disability insurance are acquired and realized depending on the length of investment and the amount of the base on which the contribution for pension and disability insurance has been paid, and with the application of the principle of solidarity”.

In this situation, the question could arise whether the mentioned provision of the Law was met, that is, whether all groups of insured persons are entitled to the same amount of compensation, regardless

of their various participations in investments, and a smaller amount of contributions for PDI paid, as is the case with agricultural pensioners.

The above example and the analysis did not aim to make a different opinion about the occupied attitude of the auditing institution, but to point to the fact that by taking over the position of the Institution, the courts of record have been circumvented, who are solely responsible for determining the unlawfulness of an administrative act (administrative court) or evaluation of illegal or irregular work as the basis for compensation for damages (competent court in civil procedure). If the problem arises within the jurisdiction of the Constitutional Court, which assesses the violation of fundamental rights, the question might be raised whether in the same factual situation there would be a place for acting on constitutional complaint and finding an arbitrary interpretation of the provision of Article 75 of the Law by the Fund, to the detriment of the party. In this situation, the condition would be the exhaustion of legal remedies as a condition of protection before the Constitutional Court, and in that sense the issue of the need for previous takeover of the position of the second instance administrative body, and finally the administrative court in the administrative dispute, would be raised, and only in that way it could be said that there are assumptions as a condition for submitting a constitutional complaint.

By taking a position and interpreting the provisions of the Law relating to the exercise of rights in the field of pension and disability insurance, which are in the domain of the jurisdiction of the Fund and the Administrative Court, a number of issues arise that mostly concern the issue of “conflict of authority in decision making”.

10. Instead of conclusion

The Constitutional Court, the institutions of the judicial authority and the State Audit Institution are indisputably institutions with a high level of authority, both because of their position and the nature of their decisions. However, in this triple conflict, viewed from the practical aspect, only the authority of the judicial authority is questioned. If we admit it or not, the judicial authority is in a state of a kind of anxiety and depression, which is a direct consequence of:

- first, the inability to influence the review of its decisions by the Constitutional Court from the point of view of violation of fundamental rights,
- second, the impossibility of influencing the confrontation of the Constitutional Court with the views of courts of record in the domain of the

application of common law and,

- third, the impossibility of influencing the encroachment upon court jurisdiction by institutions acting outside the system of constitutional control, as is the case with the State Audit Institution.

The stated restrictions on the judicial authority are not the best framework in which it feels very comfortable, which, although it has tacitly accepted the restrictions in the domain of violation of fundamental rights, cannot accept encroachment into the legal issues under its jurisdiction, nor by the Constitutional Court, and especially not from the side of other institutions. It seems that all three institutions must show a sufficient degree of will to establish mutual cooperation, as well as a sufficient degree of awareness of the impact of their decisions on the stability of a legal system.

References

- Arlović, M., „Međudnos Ustavnog suda Republike Hrvatske i sudbene vlasti u Republici Hrvatskoj”, *Zbornik radova Pravnog fakulteta u Splitu* 2/2015.
- Bodiroga, N., „Ponavljanje parničnog postupka zbog odluke Ustavnog suda”, *Anali Pravnog fakulteta u Beogradu* 2/2013.
- Vučić, O., Stojanović M. Dragan, „Evropski model ustavnog pravosuđa”, *Zbornik radova Pravnog fakulteta u Nišu* 69/2015.
- Nastić, M., „Odnos Ustavnog suda i redovnih sudova - komentar odluke Ustavnog suda Republike Srbije”, *Zbornik radova Pravnog fakulteta u Nišu* 65/2013.
- Omejec, J., „Jurisprudencija nemačkog Saveznog ustavnog suda i hrvatsko ustavno sudstvo”, u: *Izbor odluka Ustavnog suda Savezne republike Nemačke* (ur. Tobias Zern, Martin Bauch), Zaklada Konrad Adenauer program, Zagreb 2015.
- Stojanović, D., „Ustavnosudsko ispitivanje sudskih odluka”, *Zbornik radova Pravnog fakulteta u Nišu* 74/2016.

Website references

- Petrov, V., O promeni ustava i ustavnom sudu, intervju, *Paragraf* https://www.paragraf.rs/intervju/vladan_petrov.html, 15. decembar 2018.
- Rodin, S., „Odnos Ustavnog suda Republike Hrvatske i Suda pravde Evropskih zajednica u Luksemburgu nakon ulaska Republike Hr-

vatske u punopravno članstvo Europske unije”, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&ved=2ahUKEwjR0rXO65LgAhXos4sKHcOiC7cQFjAEegQIBRAC&url=https%3A%2F%2Fbib.irb.hr%2Fdatoteka%2F388258.tekst_Rodin_out_final.doc&usg=AOvVaw27rTpKT_4do5YVfv3Gtdf.

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KONFLIKT AUTORITETA SUDSKE VLASTI I NESUDSKIH INSTITUCIJA

Rezime

Odnos sudske vlasti i nesudskih institucija koje donose odluke opšteobavezujućeg karaktera (ne mogu se preispitivati u sudskom postupku), i kojima se zadire u nadležnost sudova, označavamo konfliktom autoriteta. Za razliku od odnosa sa institucijama koje nemaju ovlašćenja da utiču na vršenje sudske vlasti, i čije se delovanje može označiti kao “incidentno”, konfliktni odnos sa Ustavnim sudom zasnovan je na postupanju suda, koji podrazumeva izlazak iz okvira legitimne zaštite “specifičnog ustavnog prava”. Ovaj negativan aspekt delovanja Ustavnog suda, moguće je znatno ublažiti, ili možda potpuno eliminisati uvođenjem mehanizama samoograničenja i samokontrole u postupanju. Uspostavljanjem (samo) kontrolnih mehanizama, formirala bi se jasna predstava o karakteru i ozbiljnosti povrede osnovnih prava, odredila jasnija razlika između specifičnog ustavnog prava i običnog prava, i učvrstio stav o shvatanju zaštite osnovnih prava kao pitanje suštine, a ne forme.

Međutim, bez obzira na moguće pozitivne efekte kontrolnih mehanizama, uslov svih uslova za prevazilaženje nastalog konflikta je uspostavljanje intenzivne saradnje između institucija, i jačanje svesti o neophodnosti zajedničkog delovanja u oblasti zaštite temeljnih vrednosti našeg društva.

Ključne reči: Ustavni sud, sudska vlast, Državna revizorska institucija, konflikt, osnovna prava, autoritet institucija.

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Original scientific paper
UDC: 347.962
doi: 10.5937/spz0-20572

JUDICIAL TRAINING AND EU LAW: A VIEW ON COMPARATIVE AND SERBIAN PRACTICE

Abstract

EU law is a pivotal issue in modern-day judicial education in Europe. It is particularly important to ensure that, prior to EU accession, the judges of the acceding country are adequately trained on the fundamentals of EU law and its relation with national law and the role of the national judge in the European judicial space. Once a country becomes an EU member state, it is necessary to continue with adequate training and support to proper implementation of EU acquis by national judges. There is no right or wrong way to incorporate EU law in judicial training, although some best practice examples have been identified in the practices of EU member states, both of those that have joined the EU relatively recently and of the “older” EU member states.

The authors will investigate the practices related to judicial training on EU law in Serbia in the light of good comparative practices of judicial training institutions in Europe and formulate recommendations for Serbia in the context of EU accession.

Keywords: *European Union, judicial training, independence, competence, comparative practices.*

1. Judicial competence a key element of judicial independence

Judicial independence is a requirement stemming from the right to an effective remedy before a tribunal enshrined in a number of international documents related to the judiciary. It guarantees the fairness,

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predictability and certainty of the legal system.¹ Judicial education and training are an essential element of judicial independence, as they help to ensure the competency of the judiciary. In an age that increasingly demands more judicial independence and competence needed to solve the complex and sensitive issues that arise in court cases, the need for judicial education is greater than ever.

This position, as Thomas underlines,² is particularly common in European continental-law countries, and is supported by the idea that training helps to ensure the competency of the judiciary. It is possible to take this claim even further – when one thinks of a model of education of judges, one also necessarily thinks of desired model of a judge or a prosecutor.³ To contemplate an ideal model of a judge or a public prosecutor also implies the obligation of contemplating the ideal of a society one wishes to build, of considering its political, economic and social organisation, and of the system of checks and balances.⁴ Judicial independence and judicial education are intrinsically related.

Several international instruments recognise the importance of judicial independence and hence judicial education and training, including Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms,⁵ and Article 14 of the International Covenant on Civil and Political Rights,⁶ as well as the United Nations Basic Principles on the Independence of the Judiciary of 1985.⁷

¹ Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions — The 2017 EU Justice Scoreboard, COM(2017) 167 final, 37, https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2017_en.pdf, last visited 30 March, 2018. The EU justice scoreboard provides comparable data on the independence, quality, and efficiency of national justice systems. It is an information tool that helps the EU achieve more effective justice. The scoreboard mainly focusses on civil, commercial and administrative cases to pave the way for a more investment, business and citizen-friendly environment.

² C. Thomas, Review of Judicial Training and Education in Other Jurisdictions, 13, https://www.ucl.ac.uk/judicial-institute/sites/judicial-institute/files/judicial_training_and_education_in_other_jurisdictions.pdf, last visited October 30, 2018.

³ A. Knežević Bojović, O. Purić, “In-service Training of Judges in Europe”, *Strani pravni život* 4/2016, 57-70.

⁴ A. Cluny, *Training of judges and public prosecutors in the function of quality of judicial system*, Judge’s Association of Serbia, Belgrade 2015, 17.

⁵ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, <https://rm.coe.int/1680063765>, last visited December 15, 2018.

⁶ United Nations, International Covenant on Civil and Political Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49, <https://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf>, last visited December 15, 2018.

⁷ United Nations, Basic Principles on the Independence of the Judiciary Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, <https://www.ohchr.org/en/professionalinterest/pages/independencejudiciary.aspx>, last visited December 15, 2018.

In addition, a number of regional framework documents also provide guidance to states on their obligations with respect to judicial training – among these the European framework is of particular interest.

The European Charter on the Statute of Judges of 1998 makes direct references to the level and scope of appropriate training that judges should receive both prior to the service and in-service.⁸ The Council of Europe has also developed a set of instruments governing key aspects for establishing an efficient system of education and training of judges. These include:

- Committee of Ministers Recommendation No. (2010) 12 on Judges independence, efficiency and responsibilities⁹ – in its section 56 the Recommendation states that judges should be provided with theoretical and practical in-service training, entirely funded by the state, which should include economic, social and cultural issues related to the exercise of judicial function;
- Recommendation No. (2004) 4 on the European Convention on Human Rights in university education and professional training,¹⁰ recommending that training concerning the Convention and the case-law of the Court exist at national level as a component of the continuous training provided to judges, prosecutors and lawyers;
- Opinions of the Consultative Council of European Judges (CCJE) No. 1¹¹ (2001) and No. 3 (2002)¹² and, most importantly, Opinion No. 4 (2003) of Consultative Council of European Judges (CCJE) on appropriate initial

⁸ Council of Europe, European Charter on the statute of judges, 1998, <https://rm.coe.int/16807473ef>, last visited December 15, 2018. Articles 2.3, 4.4 of the Charter. The explanatory memorandum to the Charter underlines that judges “must have regular access to training organized at public expense, aimed at ensuring that judges can maintain and improve their technical, social and cultural skills...”

⁹ Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers’ Deputies), <https://rm.coe.int/16807096c1>, last visited December 15, 2018.

¹⁰ https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805dd13a, last visited December 15, 2018.

¹¹ Opinion No 1 (2001) of The Consultative Council of European Judges (CCJE) for the attention of the Council of Europe on standards concerning the independence of the judiciary and the irremovability of judges (Recommendation no. R (94) 12 on the independence, efficiency and role of judges and the relevance of its standards and any other international standards to current problems in these fields), Strasbourg, 23 November 2001, <https://rm.coe.int/1680747830>, last visited December 15, 2018.

¹² Opinion no. 3 of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges’ professional conduct, in particular ethics, incompatible behaviour and impartiality. It states that the effectiveness of the judicial system also requires judges to have a high degree of professional awareness, and that judges are required to ensure maintain a high degree of professional competence through basic and further training, Strasbourg, 19 November 2002, <https://rm.coe.int/168070098d>, last visited December 15, 2018.

and in-service training.¹³ The need for the independence of judicial training institutions, the importance of appropriate training for young judges, particularly focused on the acquisition of skills and "judgecraft" qualities, as well as the recognition of time spent on training as an investment in the quality of justice, are amongst the core principles enshrined in these instruments;

- Recently, on 28 June 2016, the General Assembly of the European Judicial Training Network adopted Nine Principles of Judicial Training.¹⁴ The principles establish key statements relating to the nature of judicial training, the importance of initial training, the right to regular continuous training and the integral nature of training in daily work. The principles also address the scope of competences of national training institutions regarding the content and delivery of training, clarify who should deliver training and stress the need for modern training techniques. Moreover, the principles underscore the need for funding of judicial training and support commitments from authorities.¹⁵

Institutionalised initial and continuous training of judicial office holders is a long standing tradition in some European countries, such as France¹⁶, Spain¹⁷ and Germany¹⁸. On the other hand, new Central and East European EU member states have had a different legal tradition regarding judicial independence and judicial education and training¹⁹ - however, these traditions and practices seem to be converging in the past years.²⁰

¹³ Opinion No 4 of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on appropriate initial and in-service training for judges at national and European levels, Strasbourg, 27 November 2003, <https://rm.coe.int/1680747d37>, last visited December 15, 2018.

¹⁴ EJTN, Judicial training principles, http://www.ejtn.eu/PageFiles/15004/Judicial%20Training%20Principles_EN.pdf, last visited March 25, 2018.

¹⁵ *Ibid.*

¹⁶ For more information see: J. P. Reichert, "Recruiting and Training Judges in France", *Judicature*, Vol. 57, 4/1973, 145-149.

¹⁷ L. Muniz-Argüelles, M. Fraticelli-Torre, "Selection and Training of Judges in Spain, France, West Germany, and England", *Boston College International and Comparative Law Review*, Vol. 8, 1/1985, 1-37.

¹⁸ *Ibid.*

¹⁹ On challenges of judicial independence in these countries see, in particular: C. Dallara, "Judicial Reforms in SEE Democratising Countries. Towards a Contextualized Framework for the Analysis", in: *Democracy and Judicial Reforms in South-East Europe: Between the EU and the Legacies of the Past*, Springer International Publishing, 2014, 1-30; D. Kosar, *Perils of Judicial Self-Government in Transitional Societies: Holding the Least Accountable Branch to Account*, Cambridge University Press, 2016; Z. Kühn, *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?*, Brill, 2011.

²⁰ C. Thomas, *op. cit.*

2. Judges and European Union Law

European law has submerged domestic laws in EU member states,²¹ in a framework of progressively Europeanized national legal sources.²² This is due to the overwhelming number of EU legislative acts, which touch upon virtually every field of law. In addition, effective application of European Union law cannot be ensured by the European Union and its courts alone - it depends strongly on domestic courts and individuals that initiate proceedings before these courts to enforce their rights under European Union law.²³ EU law must be applied by the domestic judge because it enjoys precedence over internal law.²⁴ EU law can also have indirect effects because all provisions of domestic law must be interpreted, so far as possible, in a way that enables achievement of the result sought through the relevant EU law.²⁵ Finally, EU law requires effective judicial protection, which means that if EU law creates rights, member states must provide access to courts to enforce these rights.²⁶ The doctrines of primacy and direct effect of EU law, harmonious interpretation, effectiveness, and the preliminary ruling procedure allow national judges to undertake judicial actions normally not permitted under national law, while at the same requiring from them a thorough knowledge of EU law.

However, various studies illustrate that national judges are frequently critical of their familiarity with EU law and that they often experience difficulties with resorting to and applying EU law.²⁷ This clearly demonstrates the need to advance the knowledge of EU law within national judicial systems, in order to ensure its effective application.

Recognising the importance of judicial training in EU law, the European Commission published a Communication on “Building trust

²¹ EJTN, Handbook on Judicial Training Methodology in Europe, 18 www.ejtn.eu/Documents/EJTN_JTM_Handbook_2016.pdf, last visited March 31, 2018.

²² See J. A. Mayoral, U. Jaremba, T. Nowak, “Creating EU law judges: the role of generational differences, legal education and judicial career paths in national judges’ assessment regarding EU law knowledge”, *Journal of European Public Policy*, Vol. 21, 8/2014, 1121; M. Eliantonio, *Europeanisation of Administrative Justice? The Influence of the ECJ’s Case Law in Italy, Germany, and England*, Europa Law Publishing, 2008; W. C. Muller *et al.*, “Legal Europeanization: comparative perspectives”, *Public Administration*, Vol. 88, 1/2010, 75–87.

²³ Case 26/62 *Van Gend & Loos* [1963] ECR I. See: P. Craig, C. de Burca, *EU Law Text, Cases and Materials*, Oxford University Press, 2011, 181 *et seq.*

²⁴ Case 6/64 *Costa v Enel* [1964] ECR 585; Case C 409/06 *Winner Wetten* [2010] ECR I 8015, par. 53.

²⁵ Joined Cases C 397/01 to C 403/01 *Pfeiffer and Others* [2004] ECR I 8835; Case C 282/10 *Dominguez* [2012] ECR I 0000.

²⁶ Case 222/86 *Heylens and others* [1987] ECR 4097; Case C 240/09 *Lesoochranárske zoskupenie* [2011] ECR I 1255, par. 48-51.

²⁷ J. A. Mayoral, U. Jaremba, T. Nowak, 1121.

in EU-wide justice, a new dimension to European judicial training” in September 2011.²⁸ The aim of this Communication was to give a new dimension to European judicial training and to enable an even greater number of legal practitioners to access high-quality training in European Union law. According to data provided in the European Parliament’s Study “Judicial training in the European Union Member States”²⁹ the preliminary results of which have informed the Communication, in 2011, 42% of judges and 56% of prosecutors declared that they had never participated in judicial training on EU or another Member State’s law, while 76% of judges and 73% of prosecutors declared that the number of cases involving EU law had increased over the years. 31% of respondents had never attended training on EU law because no such training had been available.³⁰ In the Communication, the Commission has set the target of enabling half of the legal practitioners in the European Union – therefore not just judges and prosecutors, but also lawyers, solicitors, barristers, notaries and other legal practitioners - to participate in European judicial training activities by 2020 through the use of available resources at local, national and European level. The Communication offers guidance on how to ensure the attainment of this target, expressly referring to increased number of trainings on EU law, but also to improvement of language skills, e-learning and development of the e-justice portal.

The Commission has taken concrete steps within its purview in a continued commitment to this objective, including:

- increasing the funding available for European judicial training;
- support to AIAKOS,³¹ a two-week exchange programme for new judges and prosecutors, managed by the European Judicial Training Network;
- development of training modules on the implementation of specific European legislative instruments, which are available free of charge and can be adapted to national contexts.³²

²⁸ Communication from The Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Building Trust In EU-Wide Justice a New Dimension To European Judicial Training, COM/2011/0551 final.

²⁹ See at: [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/453198/IPOL-JURI_ET\(2011\)453198_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/453198/IPOL-JURI_ET(2011)453198_EN.pdf); last visited December 15, 2018.

³⁰ *Ibid.*, 116-120.

³¹ EJTN, AIAKOS Programme, <http://www.ejtn.eu/Exchange-Programme/Activities/AIAKOS-Programme/>, last visited March 30, 2018.

³² The materials are available at: https://e-justice.europa.eu/content_training_material-252-en.do?clang=en, last visited March 29, 2018.

3. Comparative approaches to judicial training on EU law in EU Member States

Comparative experience shows that the approach to judicial training on EU law in European Union member states is not uniform. It is important to note that there is no right or wrong way to incorporate EU law in judicial training, although some best practice examples have been identified.³³ These best practices feature multi-faceted approaches to training in EU law, which sometimes combine face-to-face and distance learning methods.

In EU law countries, training on EU law is organised both in the form of special seminars dedicated to specific areas of EU law, e.g. the European judicial space in the field of social security, or harmonisation of labour and social security national laws with the *acquis*, or as an integral part of training on given issues, e.g. intellectual property law, where the relevant sources of EU law are also covered. In Poland, for instance, EU law is an integral part of trainings on other topics, but there are also separate seminars dealing with EU law issues, such as mutual legal assistance in civil matters, a seminar on consequences of EU membership for judges, etc.³⁴ Similarly, the Spanish continuous training curriculum for judges offers a set of trainings on the application of EU law and seminars focusing on legal linguistics of EU law.³⁵ In Italy, a network of local trainers who are competent to address training needs in EU and ECHR law is formed to support judges in applying EU law.³⁶

In the Netherlands, all judicial training materials that incorporate information on EU law are clearly marked with an EU flag, so as to increase the visibility of EU law in judicial training.³⁷

When it comes to countries that have joined the EU relatively recently, the focus of training on EU law has shifted from raising awareness on EU law and providing access to information, to integrating EU law in courses on domestic substantive law and enabling judges and prosecutors to apply EU law and its instruments in their daily practice.

³³ European Commission, Final Report – Tender JUST/2 012/JUTR /PR/0064/ A4 Lot 1 “Study on best practices in training of judges and prosecutors”, 2014, http://www.ejtn.eu/Documents/Resources/Lot1_final_Jan2015.pdf, last visited March 27, 2018.

³⁴ The EP Pilot Project on European Judicial Training (material provided by courtesy of Serbian Judicial Academy).

³⁵ *Ibid.*

³⁶ A. Knežević Bojović, Comparative analysis of judicial training curricula, 2018, 25, https://www.pars.rs/images/projekti/JAP/Komponenta-2/A4_IIR-Comparative-analysis-of-judicial-training-curricula-Uporedna-analiza-programa-obuke-nosilaca-pravosudnih-funkcija.pdf, last visited December 14, 2018.

³⁷ *Ibid.*

For instance, in Bulgaria, training activities on EU law and international judicial co-operation are complemented by provision of access to resources and up-to-date information through a digital platform. This approach was also followed in Romania. Similar practices are present in the Czech Republic and Portugal.³⁸ In addition, a network of “judge coordinators” on EU law was established in Bulgaria – these judges act as key reference points for their colleagues with regard to finding specific information or applying EU law. The Croatian continuous training curriculum offers specialised courses on various aspects of EU law, including EU civil procedure, EU bankruptcy and enforcement procedure, judicial cooperation in civil and criminal cases, and the like.³⁹

Another good example of a multi-faceted and integrated approach was pursued by the four countries of the Visegrad group (Hungary, Czech Republic, Poland and Slovakia), which have organised joint trainings for judges and prosecutors from neighbouring countries/regions in EU law.⁴⁰

4. EU law and Judges in Accession Countries

Rule of law principle is considered to be a core pillar of the European Union and by implication a core benchmark for accession by candidate countries. Rule of law is not only one of the basic values of the European Union, but also one of the fundamental principles of the member states’ legal systems, a part of what the European Court of Justice sees as the “European constitutional heritage”.⁴¹

When it comes to accession, the idea is that the process is not only about shared values, but also about shared practices: the existence of states capable of not only adopting, but also enforcing EU laws or EU-compatible national laws. The principle of legality in the performance of governments, including public administration and judiciary, underpins both the political and economic stability of any aspiring member state.

On February 6, 2018, the European Commission adopted a strategy document entitled “A credible enlargement perspective for an enhanced EU

³⁸ *Ibid.*, 24. For details on Romanian approach see: [http://www.ejtn.eu/Documents/Methodologies_Resources/Best%20practices%20Lot%201%20EN/ITT_UP%2003_Romania_EU_en%20\(2\).pdf](http://www.ejtn.eu/Documents/Methodologies_Resources/Best%20practices%20Lot%201%20EN/ITT_UP%2003_Romania_EU_en%20(2).pdf), last visited December 14, 2018. For Portugal see: [http://www.ejtn.eu/Documents/Methodologies_Resources/Best%20practices%20Lot%201%20EN/ITT_UP%2002_Portugal_EU_en%20\(2\).pdf](http://www.ejtn.eu/Documents/Methodologies_Resources/Best%20practices%20Lot%201%20EN/ITT_UP%2002_Portugal_EU_en%20(2).pdf), last visited December 14, 2018.

³⁹ A. Knežević Bojović, 24.

⁴⁰ http://www.ejtn.eu/Documents/Methodologies_Resources/Best%20practices%20Lot%201%20EN/ITT_39-I_Hungary_1_EU_en.pdf, last visited December 14, 2018.

⁴¹ K. Nicolaidis, R. Kleinfeld, Rethinking Europe’s “Rule of Law” and Enlargement Agenda: The Fundamental Dilemma, SIGMA Paper No. 49, 8, www.sigmaxweb.org/publicationsdocuments/sigma_sp49_061112_Eng.pdf, last visited March 15, 2018.

engagement with the Western Balkans”.⁴² The strategy confirms the European future of the region, but at the same time urges the Western Balkans countries to redouble their efforts, address vital reforms and complete their political, economic and social transformation. Rule of law and fundamental rights are identified as the most pressing issue, and it is underlined that rule of law is not only an institutional issue, but that it requires societal transformation. More specifically, the Strategy underlines that the independence of the judiciary and of individual judges is essential to ensure fairness and to hold the executive and legislative branches of government to account, as a precondition for any democratic society based on the rule of law and for its economic development. The Strategy refers to 2025 as the earliest possible date for accession. On May 17, 2018, EU leaders issued the *Sofia Declaration*⁴³ of the EU-Western Balkans summit, reaffirming their support to the European perspective of the Western Balkans. The political momentum of this Summit was somewhat undermined by the statement of the French President Emmanuel Macron about the need for performing an internal EU reform prior to the next enlargement round. President Macron was explicit in saying that “The past 15 years have shown the path of weakening Europe, while we have been working on its expansion all the time. We will not do the service neither to the candidate countries nor to us if we have a mechanism that, in a way no longer has rules and keeps moving toward more enlargement.”⁴⁴ While this message may have created an unwelcome uncertainty as to the timeline of the next enlargement, it is nonetheless connected with the progress of candidate countries in the domain of the rule of law. This linkage is best captured by the statement of the EU Commissioner for European Neighbourhood Policy and Enlargement Negotiations, Johannes Hahn, of December 2017, that, “while speed matters, it is the quality of the reforms that counts”.⁴⁵

Within this framework, the relevance of EU law and the EU accession process for judges is threefold:

- Firstly, judges need to demonstrate competence and knowledge that will qualify them as future judges of a single EU judicial system;
- Secondly, judges need to be adequately prepared to implement the relevant principles of EU law, be acquainted with the preliminary ref-

⁴² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A credible enlargement perspective for and enhanced EU engagement with the Western Balkans, Strasbourg, 6.2.2018, COM(2018) 65 final.

⁴³ https://www.consilium.europa.eu/media/34776/sofia-declaration_en.pdf, last visited December 1, 2018.

⁴⁴ <https://europeanwesternbalkans.com/2018/05/25/macron-eu-enlargement-cold-water-warm-bath/>, last visited December 1, 2018.

⁴⁵ https://www.b92.net/info/vesti/index.php?yyyy=2017&mm=12&dd=12&nav_category=1262&nav_id=1335158, last visited December 1, 2018.

erence procedure and also with substantive EU law in their respective areas of professional interest, in order to correctly apply the principles related to EU *acquis* once the country becomes an EU member state;

- Thirdly, judges may find themselves in the position to apply provisions of EU law even in the course of the accession process, either by virtue of the provisions of the Stabilisation and Association Agreement that call for implementation of EU *acquis* or the provisions calling for a proper implementation and enforcement of legislation that is compatible with EU *acquis*.⁴⁶

Countries wishing to join the European Union tackle this challenge differently, and in line with their respective judicial training traditions and practices, within the framework of general judicial education. This may result in side-lining of judicial education on EU law issues – the majority of training is dedicated to the national law subjects, given the intensive legislative demands related to harmonisation with EU law, but also related to inherent needs for reforms in various legal areas which may not always be accession-driven. In this paper we will demonstrate this observation on the example of Serbia, currently a front-runner for EU accession.

5. Judicial training on EU law in Serbia

When it comes to judicial training, Serbian regulatory framework⁴⁷ does not envisage compulsory in-service training for judges.

Continuous training is provided by the Judicial Academy, but the majority of programmes are organised on *ad hoc* basis and financed from donor funds. In an attempt to coordinate various donor initiatives, steering

⁴⁶ Stabilization and Association Agreement between the European Communities and their Member States of the one part, and the Republic of Serbia, of the other part, for instance, prescribes in Article 73, paragraph 2: “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.”. In addition, Article 72, paragraph 1 of this Agreement states: “Serbia shall endeavor to ensure that its existing laws and future legislation will be gradually made compatible with the Community *acquis*. Serbia shall ensure that existing and future legislation will be **properly implemented and enforced**” (emphasis added). The obligation to proper implementation lies, *inter alia*, on courts and judges. For a more detailed analysis see: M. Stanivuković, “Pravo Evropske unije i sudovi u Srbiji”, *Zbornik radova Pravnog fakulteta*, Novi Sad, Vol. 46, 1/2012, 203-221.

⁴⁷ Law on judges, *Official Gazette of the Republic of Serbia*, No. 116/2008, 58/2009 - decisions of the Constitutional Court, 104/2009, 101/2010, 8/2012 - decisions of the Constitutional Court, 121/2012, 124/2012 - decisions of the Constitutional Court, 101/2013, 111/2014 - decisions of the Constitutional Court 117/2014, 40/2015, 63/2015 - decisions of the Constitutional Court and 106/2015; Law on Public Prosecution, *Official Gazette of the Republic of Serbia*, No. 116/2008, 104/2009, 101/2010, 78/2011 – other law, 101/2011, 38/2012 - decisions of the Constitutional Court, 121/2012, 101/2013, 111/2014 - decisions of the Constitutional Court, 117/2014 and 106/2015; Law on High Judicial Council, *Official Gazette of the Republic of Serbia*, No. 116/2008, 101/2010, 88/2011 and 106/2015; Law on State Prosecutorial Council, *Official Gazette of the Republic of Serbia*, No. 116/2008, 101/2010, 88/2011 and 106/2015; Decision on Changes and Amendments to the Rules of Procedure of High Judicial Council, *Official Gazette of the Republic of Serbia*, No. 29/13.

them towards development and delivery of trainings that are instrumental for improving the quality of judicial decisions and processes and ensuring responsiveness to the needs of the Serbian judicial system, the Judicial Academy has adopted a set of measures aimed at improving the overall quality of judicial training. One such mechanism was the adoption of a Rulebook on Training Need Assessment in early 2017, its piloting in 2017 and the development of the 2018 Judicial Academy Continuous Training Curriculum, informed by this exercise.⁴⁸ The training curriculum for 2019, recently adopted by the Judicial Academy, is also informed by a TNA conducted according to the Rulebook.

As a result of this systemic effort, EU law is recognised as a priority training subject for judges of all instances. When it comes to specific topics, the following figure shows the priorities in training on EU law as identified by Serbian judges and prosecutors:

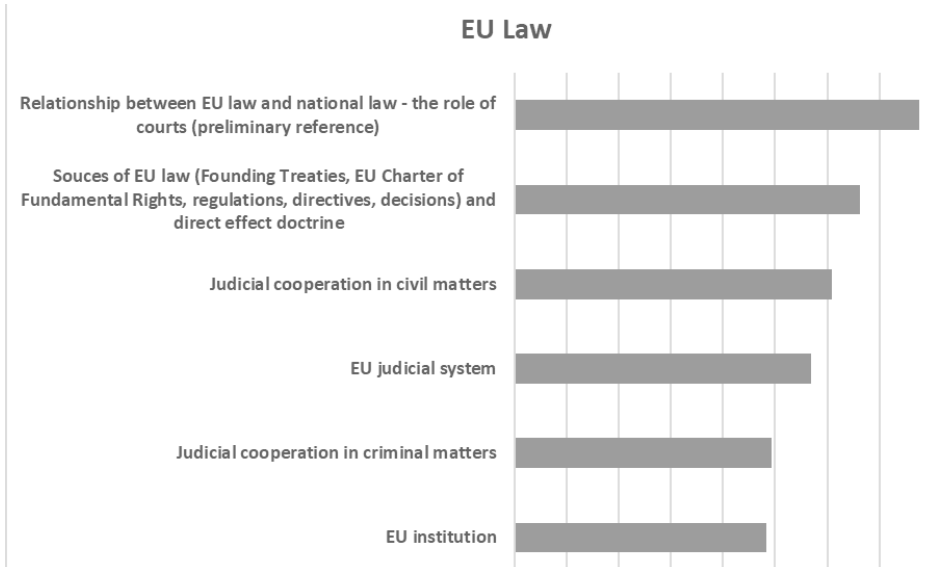


Figure 1: Cross-comparison of results for courts of general jurisdiction and commercial courts of all instances and Administrative Court⁴⁹

The TNA has further identified that one of the constant challenges the Serbian JA faces is the need to organise and deliver large-scale trainings related to introduction of new laws. These trainings consume a considerable

⁴⁸ Results of the TNA are available at O. Purić, A. Knežević Bojović, Training needs assessment for the Serbian Judicial Academy Results and recommendations, 2018, https://www.pars.rs/images/projekti/JAP/Komponenta-2/A5_3IR-TNA-for-the-Serbian-JA-Results-and-recommendations-no.-2-TNA-u-okviru-PA-u-RS-br.-2--rezulati-i-preporuke.pdf, last visited December 14, 2018.

⁴⁹ *Ibid.*, 18.

portion of the JA resources and shift the focus from other topics. It therefore called on the JA to recognise the need for ensuring continuous training on a variety of topics, using different training methods at both basic and advanced knowledge levels, ensuring a multi-faceted approach to training wherever possible.⁵⁰ EU law is a subject that is particularly well-suited for such an exercise, combining different topics and methodologies.

Responding to the identified needs, the Judicial Academy has launched as systemic approach to judicial training on EU law in 2017 and 2018.

Firstly, a comprehensive EU training curriculum was developed for “Fundamentals of EU law” and four trainings have been delivered to judges and advisors of the Supreme Court of Cassation and appellate court judges of all four Serbian appellate courts. In addition, three advanced-level curricula have been developed for EU Civil Law, EU Criminal Law and EU Administrative Law, followed by a training of trainers for the three mentioned curricula in the first half of 2018.

Learning from best comparative practice examples, in early 2018, the Judicial Academy has set up a Network of National Judges and Prosecutors on European Standards of Judicial Protection of Human Rights.⁵¹ The network is envisaged as a peer-support mechanism focusing on Council of Europe and European Union standards of judicial protection of human rights. As the Network has been established only recently, it is still early to assess its impact on improving the competences of Serbian judges and prosecutors; however, given the positive experiences in comparative practice and the endorsement provided to its work by the High Judicial Council and the State Prosecutor’s Council, it is reasonable to expect that the network will, at a minimum, ensure improved access to information related to EU law and the jurisprudence of the Court of Justice of the European Union related to human rights’ protection, serving as an on-demand knowledge hub.

6. Going forward

As described above, in 2011 the European Commission set the target that by 2020 all legal practitioners in the EU should have attended training on EU law or on the law of another Member State. In 2016, more than 143 000

⁵⁰ *Ibid.*, 58.

⁵¹ See at:

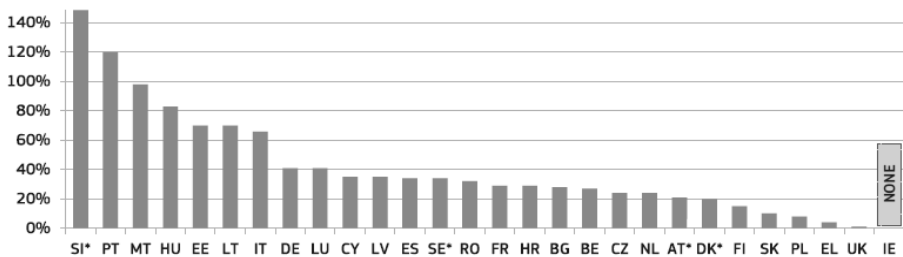
<http://www.pars.rs/en/vest/5785/two-day-seminar-entitled-importance-of-the-implementation-of-the-standards-of-the-european-court-of-human-rights-in-the-republic-of-serbia-.php>, last visited March 27, 2018.

EU legal practitioners received training on EU law or on the national law of another Member State.⁵² At the same time, EU legislation and EU case law are still growing and regular updates of knowledge need to be performed.

The EU Justice Scoreboard, a comparative information tool on national justice system of EU member states, enables monitoring the progress in judicial reforms and the functioning of the judicial systems in EU countries on an annual basis. The main elements for monitoring set out in the EU Justice Scoreboard are classified in the following three categories: Efficiency of the justice system, Quality of the justice system and Independence. One of the indicators used to assess the quality of the justice system is the percentage of judges participating in continuous training activities in EU law or in the law of another Member State. The results for 2018 show that most EU member states still have quite a long way to go before attaining the goal set in the above-mentioned communication:

Judges participating in continuous training activities in EU law or in the law of another Member State (*) (as a percentage of total number of judges)

Source: European Commission



(*) Values of some Member States have been reduced for presentation purposes (SI=243%). In a few Member States the ratio of participants exceeds 100%, meaning that some participants attended more than one training activity. DK: including court staff. AT: Including prosecutors. SE data are for 2015.

Figure 2: Judges participating in continuous training activities in EU law or in the law of another Member State⁵³

The information monitored in the EU Justice Scoreboard is important for Serbia for two reasons: firstly, the Scoreboard will become a monitoring tool for the Serbian judicial system once Serbia becomes an

⁵² See at:

https://e-justice.europa.eu/content_the_european_judicial_training_policy-121-en.do, last visited April 1, 2018.

⁵³ The EU Justice Scoreboard 2018, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions COM(2018) 364 final, 34, https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2018_en.pdf, accessed on December 15, 2018.

EU member state. Secondly, the Serbian Supreme Court of Cassation has already adopted this framework as a point of reference for their reporting. So how should Serbia continue forward with judicial training on EU law?

Thinking early of a comprehensive approach to judicial training on EU law can help ensure a smooth transition from an aspiring EU country to a full-fledged functional member state. In this vein, in the years preceding the EU accession, the judicial training institutions in accession countries should ensure that training on the fundamentals of EU law, such as the sources of EU law, the relationship between national law and EU law, the role of the national judge in implementing EU law, the preliminary reference and the principle of direct effect has as wide a coverage as possible, including judges and prosecutors at all levels. Serbian Judicial Academy has already taken steps in this direction; however, the effort needs to be intensified, while the percentage of judges who have already participated in some level of training on EU law should be identified to help guide the exercise.

Training on judicial cooperation in civil and criminal matters in EU law in accession countries, should also have wide coverage, as it can quickly become relevant and applicable. Furthermore, prior to accession, specialised and focused training on certain topics of EU law should be primarily offered to judges of commercial and administrative courts. Serbian Judicial Academy, as can be seen, is taking systemic steps towards ensuring that this recommendation is followed, and it is important for this momentum to be maintained.

As a general rule, the years preceding the EU accession should be used for training of trainers on EU law among holders of judicial offices in order to ensure sustainability and duly respond to EU's strategic approach to judicial training on *acquis*. These efforts need to be stepped up in Serbia.

It is commendable that among Western Balkan countries Serbia has pioneered the establishment of a network of judges and prosecutors who would be appointed as focal points on certain aspects of EU law, particularly given that this practice has proven to be a useful peer-to-peer support mechanism, as outlined above in the text. Ideally, this effort should be further supported by the development of a platform enabling access to up-to-date materials on EU law for judges and prosecutors. Since the development of such a platform requires additional funding, this could be set as a further target for the Serbian Judicial Academy, which certainly seems intent on doing so.

Further recommendations for advancing judicial training on EU

law that Serbian Judicial Academy should consider are the following:

- Training courses on EU law organised by ERA and EJTN should be offered to national judges, where economically feasible.
- Existing EU law curricula on general or specialised topics developed by European judicial training institutions could be utilised to deliver training on specific issues of EU law, e.g. the training modules on European Legislative instruments on cross-border cooperation in civil matters⁵⁴ or on environmental law.⁵⁵
- A regional approach to training on EU law, similar to that adopted by the Visegrad group judicial training institutions (e.g. joint trainings on could be considered as an innovative training method) could be utilised to facilitate and streamline training efforts.
- Training on EU law could be coupled with specialised linguistic training, as this simultaneously ensures full understanding of the key legal concepts and the linguistic nuances of eurojargon and *acquis*, applied to the national setting.

On its way towards the EU, Serbia is currently addressing the main needs of its judges related to knowledge of EU law. As the process continues to advance, so will the needs of the Serbian judiciary, and it is imperative for the Serbian judicial system to draw from the experiences of both „old“ and „new“ member states in defining the models for getting Serbian judges and prosecutors fully familiar with the EU law. The bar in the EU is raised high, and Serbia has to be ready to invest significant efforts to attain it and measure up to standards.

References

- Cluny, A., *Training of judges and public prosecutors in the function of quality of judicial system*, Judge's Association of Serbia, Belgrade 2015.
- Craig, P., de Burca C., *EU Law Text, Cases and Materials*, Oxford University Press, 2011.
- Dallara, C., „Judicial Reforms in SEE Democratising Countries. Towards a Contextualized Framework for the Analysis“, in: *Democracy and Judicial Reforms in South-East Europe*, Springer International Publishing, 2014, 1-30.
- Eliantonio, M. *Europeanisation of Administrative Justice? The Influence of the ECJ's*

⁵⁴ ERA, Training modules on the European legislative instruments for cross-border cooperation in civil matters, https://www.era-comm.eu/EU_Civil_Justice_Training_Modules/index_html, last visited April 1, 2018.

⁵⁵ European Commission, EU Environmental Law Training Package, http://ec.europa.eu/environment/legal/law/training_package.htm, last visited March 31, 2018.

- Case Law in Italy, Germany and England*, Europa Law Publishing, 2008.
- Knežević Bojović, A., Purić, O., “In-service Training of Judges in Europe”, *Strani pravni život*, 4/2016, 57-70.
- Kosař, D. *Perils of Judicial Self-Government in Transitional Societies: Holding the Least Accountable Branch to Account*, Cambridge University Press, 2016.
- Kühn, Z. *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?*, Brill, 2011.
- Mayoral, J.A., Jaremba U., Nowak T. “Creating EU law judges: the role of generational differences, legal education and judicial career paths in national judges’ assessment regarding EU law knowledge”, *Journal of European Public Policy*, Vol. 21, 8/2014, 1120-1141.
- Muller, W.C., Bovens M., Grønnegaard Christensen J., Jenny M., Yesilkagit K., “Legal Europeanization: comparative perspectives”, *Public Administration*, Vol. 88, 1/2010, 75–87.
- Muniz-Argüelles, L., Fraticelli-Torres M. “Selection and Training of Judges in Spain, France, West Germany, and England”, *Boston College International and Comparative Law Review*, Vol. 8, 1/1985, 1-37.
- Reichert, J. P., “Recruiting and Training Judges in France”, *Judicature*, Vol. 57, 4/1973, 145-149.
- Stanivuković, M., “Pravo Evropske unije i sudovi u Srbiji”, *Zbornik radova Pravnog fakulteta*, Novi Sad, Vol. 46, 1/2012, 203-221.
- The EP Pilot Project on European Judicial Training (provided by courtesy of Serbian Judicial Academy).
- Training Needs Assessment for the Serbian Judicial Academy (provided by courtesy of the Serbian Judicial Academy).

Legal sources

- Case 222/86 *Heylens and others* [1987] ECR 4097.
- Case 26/62 *Van Gend & Loos* [1963] ECR 1.
- Case 6/64 *Costa v Enel* [1964] ECR 585.
- Case C 240/09 *Lesoochránárske zoskupenie* [2011] ECR I 1255.
- Case C 282/10 *Dominguez* [2012] ECR I 0000.
- Case C 409/06 *Winner Wetten* [2010] ECR I 8015.
- Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions — The 2017 EU Justice Scoreboard, COM(2017) 167 final, <https://ec.europa>.

eu/info/sites/info/files/justice_scoreboard_2017_en.pdf, last visited 30 March, 2018.

Communication from The Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Building Trust In EU-Wide Justice a New Dimension To European Judicial Training, COM/2011/0551 final.

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A credible enlargement perspective for and enhanced EU engagement with the Western Balkans, Strasbourg, 6.2.2018, COM(2018) 65 final.

Council of Europe, European Charter on the Statute of Judges, 1998, <https://rm.coe.int/16807473ef>, last visited December 15, 2018.

Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, <https://rm.coe.int/1680063765>, last visited December 15, 2018.

Council of Europe, Recommendation No. (2004) 4 on the European Convention on Human Rights in university education and professional training, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805dd13a, last visited December 15, 2018.

Decision on Changes and Amendments to the Rules of Procedure of High Judicial Council, *Official Gazette of the Republic of Serbia*, No. 29/13.

Joined Cases C 397/01 to C 403/01 *Pfeiffer and Others* [2004] ECR I 8835.

Law on High Judicial Council, *Official Gazette of the Republic of Serbia*, No. 116/2008, 101/2010, 88/2011 and 106/2015.

Law on judges, *Official Gazette of the Republic of Serbia*, No. 116/2008, 58/2009 - decisions of the Constitutional Court, 104/2009, 101/2010, 8/2012 - decisions of the Constitutional Court, 121/2012, 124/2012 - decisions of the Constitutional Court, 101/2013, 111/2014 - decisions of the Constitutional Court 117/2014, 40/2015, 63/2015 - decisions of the Constitutional Court and 106/2015.

Law on Public Prosecution, *Official Gazette of the Republic of Serbia*, No. 116/2008, 104/2009, 101/2010, 78/2011 – other law, 101/2011, 38/2012 - decisions of the Constitutional Court, 121/2012, 101/2013, 111/2014 - decisions of the Constitutional Court, 117/2014 and 106/2015.

Law on State Prosecutorial Council, *Official Gazette of the Republic of Serbia*, No. 116/2008, 101/2010, 88/2011 and 106/2015.

Opinion No 1 (2001) of The Consultative Council Of European Judges

- (CCJE) for the attention of the Council of Europe on standards concerning the independence of the judiciary and the irremovability of judges (Recommendation no. R (94) 12 on the independence, efficiency and role of judges and the relevance of its standards and any other international standards to current problems in these fields), Strasbourg, 23 November 2001, <https://rm.coe.int/1680747830>, last visited December 15, 2018.
- Opinion No 4 of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on appropriate initial and in-service training for judges at national and European levels, Strasbourg, 27 November 2003, <https://rm.coe.int/1680747d37>, last visited December 15, 2018.
- Opinion no. 3 of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, Strasbourg, 19 November 2002, <https://rm.coe.int/168070098d>, last visited December 15, 2018.
- Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies), <https://rm.coe.int/16807096c1>, last visited December 15, 2018.
- Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and the Republic of Serbia, of the other part.
- United Nations, Basic Principles on the Independence of the Judiciary Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, <https://www.ohchr.org/en/professionalinterest/pages/independencejudiciary.aspx>, last visited December 15, 2018.
- United Nations, International Covenant on Civil and Political Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49, <https://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf>, last visited December 15, 2018.

Website references

- EJTN, AIAKOS Programme, <http://www.ejtn.eu/Exchange-Programme/Activities/AIAKOS-Programme/>, last March 30, 2018.
- EJTN, Handbook on Judicial Training Methodology in Europe, www.ejtn.eu/Documents/EJTN_JTM_Handbook_2016.pdf, last visited March 31, 2018.
- EJTN, Judicial training principles, http://www.ejtn.eu/PageFiles/15004/Judicial%20Training%20Principles_EN.pdf, last visited March 25, 2018.
- ERA, Training modules on the European legislative instruments for cross-border cooperation in civil matters, www.era-comm.eu/EU_Civil_Justice_Training_Modules/index_.html, last visited April 1, 2018.
- European Commission, Final Report – Tender JUST/2 012/JUTR / PR/0064/ A4 Lot 1 “Study on best practices in training of judges and prosecutors”, 2014, http://www.ejtn.eu/Documents/Resources/Lot1_final_Jan2015.pdf, last visited March 27, 2018.
- European Parliament, Judicial training in the European Union member states, [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/453198/IPOL-JURI_ET\(2011\)453198_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/453198/IPOL-JURI_ET(2011)453198_EN.pdf), last visited December 15, 2018.
- http://ec.europa.eu/environment/legal/law/training_package.htm, last visited March 31, 2018.
- http://www.ejtn.eu/Documents/Methodologies_Resources/Best%20practices%20Lot%201%20EN/ITT_39-I_Hungary_1_EU_en.pdf, last visited December 14, 2018.
- [http://www.ejtn.eu/Documents/Methodologies_Resources/Best%20practices%20Lot%201%20EN/ITT_UP%2003_Romania_EU_en%20\(2\).pdf](http://www.ejtn.eu/Documents/Methodologies_Resources/Best%20practices%20Lot%201%20EN/ITT_UP%2003_Romania_EU_en%20(2).pdf), last visited December 14, 2018.
- [http://www.ejtn.eu/Documents/Methodologies_Resources/Best%20practices%20Lot%201%20EN/ITT_UP%2002_Portugal_EU_en%20\(2\).pdf](http://www.ejtn.eu/Documents/Methodologies_Resources/Best%20practices%20Lot%201%20EN/ITT_UP%2002_Portugal_EU_en%20(2).pdf), last visited December 14, 2018.
- <http://www.pars.rs/en/vest/5785/two-day-seminar-entitled-importance-of-the-implementation-of-the-standards-of-the-european-court-of-human-rights-in-the-republic-of-serbia-phi>, last visited March 27, 2018.
- https://e-justice.europa.eu/content_the_european_judicial_training_policy-121-en.do, last visited April 1, 2018.
- https://e-justice.europa.eu/content_training_material-252-en.do?clang=en, last visited March 29, 2018.
- <https://europeanwesternbalkans.com/2018/05/25/macron-eu-enlargement-cold-water-warm-bath/>, last visited December 1, 2018.

- https://www.b92.net/info/vesti/index.php?yyyy=2017&mm=12&d=12&nav_category=1262&nav_id=1335158, last visited December 1, 2018.
- Knežević Bojović, A. Comparative analysis of judicial training curricula, 2018, https://www.pars.rs/images/projekti/JAP/Komponenta-2/A4_IIR-Comparative-analysis-of-judicial-training-curricula-Uporedna-analiza-programa-obuke-nosilaca-pravosudnih-funkcija.pdf, last visited December 14, 2018.
- Nicolaidis, K., Kleinfeld R., Rethinking Europe's 'Rule of Law' and Enlargement Agenda: The Fundamental Dilemma, *SIGMA Paper No. 49*, www.sigmaweb.org/publicationsdocuments/sigma_sp49_061112_Eng.pdf, last visited March 15, 2018.
- Purić, O., Knežević Bojović A. Training needs assessment for the Serbian Judicial Academy Results and recommendations, 2018, https://www.pars.rs/images/projekti/JAP/Komponenta-2/A5_3IR-TNA-for-the-Serbian-JA-Results-and-recommendations-no.-2-TNA-u-okviru-PA-u-RS-br.-2--rezulati-i-preporuke.pdf, last visited December 14, 2018.
- Sofia Declaration, https://www.consilium.europa.eu/media/34776/sofia-declaration_en.pdf, last visited December 1, 2018.
- Thomas, C., Review of Judicial Training and Education in Other Jurisdictions, 2006, https://www.ucl.ac.uk/judicial-institute/sites/judicial-institute/files/judicial_training_and_education_in_other_jurisdictions.pdf, last visited October 30, 2018.

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**OBUKA SUDIJA I PRAVO EU: POGLED NA
UPOREDNOPRAVNU I PRAKSU SRBIJE**

Rezime

Pravo Evropske unije predstavlja ključno pitanje u savremenom obrazovanju sudija u Evropi. Posebno je važno osigurati da pre pristupanja Evropskoj uniji, sudije iz zemalja članica budu adekvatno obučene o osnovama prava EU i o njegovom odnosu sa nacionalnim pravom i ulozi nacionalnog sudije u evropskom sudijskom prostoru. Kada država postane članica EU, potrebno je nastaviti sa adekvatnom obukom i pružanjem podrške sudijama država članica u implementaciji tekovina Evropske unije. Ne postoji ispravan ili pogrešan način na koji se pravo EU može uvesti u sudijsku obuku, iako se mogu identifikovati primeri dobre prakse u državama članicama, kako u onima koje su se relativno skoro pridružile EU, tako i u “starijim” članicama.

Autorke će ispitati praksu u vezi sa sudijskom obukom u pogledu prava EU u Srbiji u svetlu dobre uporednopravne prakse u institucijama za obuku sudija u Evropi i formulisaće preporuke za Srbiju u daljem sprovođenju procesa pristupanja.

Ključne reči: Evropska unija, obuka sudija, nezavisnost, stručnost, uporedna praksa.

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Review scientific paper
UDC: 340.12
doi: 10.5937/spz0-20548

US LEGAL SYSTEM IN THE CONTEXT OF ENGLISH LEGAL HERITAGE AND THEORY OF THE NATURAL RIGHTS OF JOHN LOCKE

Abstract

The paper discusses several characteristics of the US legal system that rest upon English legal heritage, brought from England to North America by the first colonists. The author starts from the premise that constant modifications of basic principles of English common law system and legal and judicial practice gave rise to a specific US legal system that has a dual nature, based on common law principles on the one hand and the letter of the written law on the other.¹ The paper also analyzes the legacy of the philosophical system of John Locke on natural rights, the status of property and the government on establishing American political and legal thought, embodied in the Declaration of Independence and the Bill of Rights.

Keywords: *US legal system, legal heritage, US Constitution, common law, natural rights, judicial review, precedent.*

1. Legacy of English Common Law

The US legal system was developed on the legacy of English common law, where it identified as its key institute the one of precedent, at least for the US. While the English legal system formed two categories of courts of law², quite a unique judicial model developed in the US, combining the elements of common and precedent law, with the parallel development of written legislation. Colonists felt slightly resistant to the

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¹ The paper presents the part of material from Chapter Five of the author's PhD dissertation, "US Political and Legal Values in light of American Critical Thinking of 19th Century", defended at the Faculty of Political Sciences, University of Belgrade, September 2018.

² For integral overview of US law consult E.A. Farnsworth, *Uvod u pravni sistem Sjedinjenih Američkih Država*, Savremena administracija, Beograd 1973. Also: David S. Clark, David, Turgul Ansay (eds.), *Introduction to the Law of the United States*, Kluwer Law International, The Hague 2002.

English legal system, and the pace and specific nature of colonial life development did not allow for legal practices to be simply transferred. The practices were adjusted, and also “some kind of traditional law derived from the Bible was enforced, as well as local customs and so on”³.

The main principles taken over from the common law system were the idea of the rule of law, the precedent institute, and the concept of trial as litigation, with two opposing parties before the jury. English supremacy of law had a key political impact on the development of US civil society.⁴ The issue of rights of the colonists as English subjects, and their right to have representatives in the Parliament, were indeed the legal and political axis of the War of Independence⁵. This issue arose from English legal heritage founded by *Magna Carta*⁶ and limitations to sovereign’s powers. The supremacy of law influenced also establishment of the institute of judicial review⁷. It remained a fundamental principle in the US legal order as well, but here each individual legal situation required additional observation and conclusions, since the system of written laws developed in parallel with the common law system, especially at the federal level. This dual legal system, both at the federal and state levels, represents a unique combination of the common law system and written legislation, where the Constitution is the “supreme Law of the Land”⁸, and courts are entitled to review the constitutionality of acts. Although English doctrine of precedent is indeed a dominant legal practice in the USA, the common law tradition was not taken over in full, due to a number of reasons: colonists resisting English institutions, lack of educated jurists, many procedures and legal practices ill adjusted to the conditions of colonial life, dynamic social and economic development of the colonies, and later of the US as well.

All that called for legal modifications of English legal heritage which, given time, created a unique legal system of the USA. What gave rise to this difference were a completely new experience of the colonial life, legal vacuum requiring the creation of legal space *ex nihilo*, lack

³ D. Vranjanac, “Uvod u pravni sistem Sjedinjenih Američkih Država“, *Uvod u pravo SAD* (ed. Jovan Ćirić), Institute for Comparative Law, Belgrade 2008, 16.

⁴ This corresponds with philosophical systems of the epoch, primarily with theories by Locke, Montesquieu and Scottish Enlightenment.

⁵ Political statement “No taxation without representation” meant that colonists found themselves not obliged to pay tax to the English crown due to the fact that they did not have their political representatives in the Parliament.

⁶ *Magna Carta Libertatum* (1215), <https://www.bl.uk/collection-items/magna-carta-1215>.

⁷ The power of the courts to declare violation of the US Constitution by legislative or executive act. The doctrine established by the Chief Justice, John Marshal, in the *Marbury v. Madison* (1803) case.

⁸ Article 6, clause 2, United States Constitution, <https://www.archives.gov/founding-docs/constitution-transcript>.

of theoretical and practical legal knowledge in most law practitioners, creation of legal practices while facing actual life in colonies, legal practices as support to establishing colonies as political communities and as support to the colonists' religious tasks⁹, contractual relationship between the colonies and Mother Country¹⁰, impact of philosophic theories of the Enlightenment, practice of writing down legal transactions, sturdy bureaucratic apparatus of the British rule not being present in the colonies, absence of clearly divided social strata, absence of hereditary nobility, need for developed legal practice in order to realize and protect economic interests of the colonies.

In the US legal system, the doctrine of precedent is prevalent to this very day, but it is important to highlight that “there this *stare decisis* doctrine¹¹ never had the importance it had in England. American justice often restricted the scope of earlier rulings, at times taking even opposing views if need be, which resulted from weaker presence of centralization and the necessity of constant adaptation of the law to social needs”.¹² Jury trials led to situations where the focus of the court proceedings was on the process¹³ or on the prosecutor¹⁴, the judge played no inquisitorial role, and all the attention was paid to the process of presenting evidence and the verdict of the jury. When this is compared to the position of the judiciary within the state apparatuses at the federal and state levels it can be seen that the presence of the jury was the channel that served to preserve, to a large extent, the institution of proceedings in equity, in addition to the function of the judge, also one of the guardians of this system in the USA.

In early 17th century North America was *terra incognita* to all intents and purposes. Intensive legal regulation was necessary in order to regulate the life of the community, prevent anarchy and ensure survival. Shortage of educated jurists led to many colonists without education being included into legal processes, and thus learning legal logics, terms and expressions, a legal way of thinking. Economic development generated the need for

⁹ Particularly refers to the colonies of New England.

¹⁰ Colonial charters were official acts and in fact contracts by which the King of England gave right to the settlers to establish a colony (e.g. Massachusetts was established by Massachusetts Bay Colony) or to the individuals (Lord of Baltimore was the founder of the colony of Maryland).

¹¹ “According to the *stare decisis* doctrine, cases whose factual framework is similar to an earlier case that has already been resolved in the past by a precedent, will be judged in the same way. The *stare decisis and non quita movere* principle - to abide by the decisions already made and the issues solved not to be disturbed.”, S. Danković Stepanović, *Pravo i politika konkurencije*, Fakultet političkih nauka, Beograd 2014, 300.

¹² J. Čeranić, „Izvori američkog prava“, *Uvod u pravo SAD* (ed. Jovan Ćirić), Institute for Comparative Law, Belgrade 2008, 23.

¹³ In civil disputes.

¹⁴ In criminal proceedings.

legal transactions and for the colonists to be protected from England. All of that happened on the platform English legal tradition, suffering significant changes in the new conditions. Continuity of legal practice in the colonies, outside of the religious discourse, was additionally strengthened by theories of John Locke, Montesquieu and Scottish Enlightenment.¹⁵ The philosophy of enlightenment made the legal discourse into a creator of the idea of separation of church and state, which will be defined by the First Amendment.¹⁶

The experience of legal regulation led to the efforts aimed at legal advancement of the society and radical thinking, since “nothing is more characteristic of American society than efforts to reform it. From the earliest days of colonial settlement, virtually every generation has witnessed some endeavor to improve the institutions of American life.”¹⁷ The emergence of radicalism was brought about by religious confessions, Puritans and Quakers in particular, and Anglicans to a smaller degree, while Virginian political activism played a significant role.¹⁸ Daily practicing and exercise of law had an exceptional impact on these processes. On the eve of the War of Independence the colonists had acquired ample experience in law and legal practice, since they had been practicing legal discussions on freedoms and rights for over 170 years of the colonial period¹⁹. English legal heritage had taught them critical thinking about freedom, equality, rights of man, and political representation. It was on the matrix of English common law that they learned future American values that would be voiced by the Declaration of Independence and the US Constitution.

2. Natural Law and Individual Liberty in the New World

The legal debate between the colonies and England during the pre-revolutionary period concerned the liberties and rights of colonists as English subjects. Their arguments were based on Locke’s theory of

¹⁵ Scottish Enlightenment was a period in 18th and early 19th centuries, characterized by intensive intellectual development and work of a significant generation of thinkers such as David Hume, Adam Smith, Tomas Reid, Adam Ferguson, Joseph Black. One of the most influential was Adam Smith (1723-1790), with his groundbreaking book, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776). He opposed the theory of mercantilism, which defined English economic system at that time.

¹⁶ This principle had religious roots and emerged even before the Bill of Rights (1791). One of the acts prior to the Declaration was The Virginia Statute for Religious Freedom.

¹⁷ E. Fonner, *Radical Individualism in America: Revolution to Civil War*, <https://www.libertarianism.org/publications/essays/radical-individualism-america-revolution-civil-war>, last accessed on November 27, 2017.

¹⁸ Virginian colonial higher classes were deeply devoted to political activity and political thought.

¹⁹ The Watertown Protest against taxation without representation is considered to be the earliest civil protest in the colonies, caused by the issues of economic freedom and rights. See in W. M. West, *A Source Book of American History to 1787*, Allyn and Bacon, Boston-New York-Chicago 1913, 180.

natural law. According to Locke, natural rights are right to life, body, liberty and property. Identifying a link between liberty and property, i.e. ownership, is a revolutionary novelty that will significantly affect the dialectics of this relationship in the US political thought and legal practice. There is a dichotomy in understanding property in Locke's system. In its narrower meaning, Locke understands property as ownership over the material things. In its broader sense, the term refers to the man's inner world, his being, which comprises ideas, desires, ambitions and thoughts. Property is therefore, according to Locke, man's essential possession, where no government should enter if just and constrained by laws. The idea of property is the principle that would serve as foundation for the most famous principle of the Declaration of Independence – the right to the pursuit of happiness. It is this principle that took the place of Locke's right to property in the Declaration of Independence. The right to the pursuit of happiness has the capacity to include every individual act of freedom that the man exercises in order to have a life after his own heart. This expression includes also the notion of property in terms of material possession, but the conceptual context of pursuit for happiness leaves infinite room for individual interpretations, allowing each man the choice of the best life in line with his personality.

Colonial practice anticipated Locke's ideas that, in legal and political terms, would be realized in the outcomes of the American Revolution – establishment of the USA and the new form of government that both Locke and the Founding Fathers deemed necessary in order to protect, in the multitude, the liberty and rights of each individual in the body politic. The government is the mechanism to bridge over the dangers of the natural state of freedom, and it is established by way of agreement among free men. Consensus makes legitimate the enforcement of the rule of the established political body over those who transferred to that body part of their own liberties, powers and authorities. For Locke the issue of consent of the governed is basis for the good rule and legitimacy of the government aspiring to be just and fair, and the Founding Fathers would shape that into an electoral system at two levels of government, executive and legislative. Liberty is the premise giving rise to the position that at the roots of every government there is consent, whereas later deviations and degenerations arise from other causes, such as absence of positive laws, abuse of the prerogative, or human actions. Since only a part of the mentioned prerogatives is transferred to the government,

then absolute power over people is against the natural law²⁰. Thus, for Locke the legislative government is the true supreme power, since it protects the freedom that is embodied through well-ordered laws. The US Constitution in its main part mostly adheres to the position of the legislative power imperative, but what can be seen in the case of the USA is that prerogatives of the executive branch became stronger over time²¹, so that currently the position of the US President has characteristics of a monarch in many aspects²², which is a degenerative process, if the original premises of the creators of the Constitution are taken into account.

Locke, however, despite his position that the idea of good is inherent to man, had no faith in equality in absolute terms, believing that within the political community the man is made to obey not by his conscience, but by knowledge of the right of government to exercise power defined by the laws. And in that the Founding Fathers would take their cue from him when drafting the US Constitution. In the footsteps of Locke and even more of Thomas Hobbes, American legislators show little trust in human honesty, but always believe that the man is smart. During the Constitutional Convention, the Founders would, as was explicitly noted in *Federalist Papers*²³ and Madison's notes²⁴, rely on personal human interests in obeying the law, and much less on the principle of the good in the man.

Locke's theoretical system on natural law and individual liberty found its way into the following American values in the Declaration and the Constitution: separation of church from state, negative definition of powers of federal government by the formula "Congress shall make no law", right to keep and bear arms, individualism and entrepreneurship, relying on your own strength, and spatial mobility. However, it is accepted as correct that the idea of rule of law is relatively controversial, since according to the theory of natural law "the rule of law is opposed to

²⁰ It was the essence of the colonial disputes with England, ending in the American Revolution. The colonists were convinced that the English Parliament jeopardized their natural rights, as well as the contractual agreements between the King and particular colonies, also defined within the context of natural law and natural rights.

²¹ From President Polk to Theodore Roosevelt, from early 20th century and later on, and also by individual acts of the elected presidents.

²² See in D.W. Brogan, *The Highest Office*, <http://www.americanheritage.com/content/highest-office>, accessed on November 2, 2017.

²³ *Federalist Papers* (other title: *The Federalist*), is a collection of 85 essays written by three Founding Fathers, Alexander Hamilton, James Madison, and John Jay, in order to promote and support the ratification of the US Constitution. See A. Hamilton, Dž. Medison, Dž. Džej, *Federalistički spisi*, Radnička štampa, Beograd 1981.

²⁴ James Madison's, *Notes of Debates in the Federal Convention of 1787*, represent the collection of his records written during the Constitutional Convention.

any system of government that allows public officials to exercise broad, arbitrary or discretionary powers of coercion. As such, the rule of law was embedded into the context of individualism of the common law system”²⁵ and ensured through numerous mechanisms such as common sense, pragmatism, jury trial with initiative of the parties, judicial interpretation of the legal norm, legal certainty, *habeas corpus*, free exercise clause, confrontation clause²⁶, allowing for constant reviewing of boundaries to the citizen’s liberty versus the political community.

3. Fusion of Law and Equity and civil rights

In the US legal system, the principle of equity is one of the essential categories. The presumption of fair trial and legal certainty for the parties is exercised only in the presence of independent and unbiased judicial system. The equity of court proceedings ensures protection of citizens before the state apparatus. Equity is understood as “the idea of justice applied in practice. The term ‘justice’ would denote an abstract idea, while the term ‘equity’ would denote the application of this abstract idea to concrete cases. Equity is, thus, concrete embodiment of justice in individual legal situations”²⁷, and “since law and justice need not be the same, then, by introducing equity into the immediate legal life (*ius aequum*), rigid legal norms become more subtle, more appropriate for the true wealth of diversity that a legal norm must cover”²⁸. Equity in judicial proceedings involves, therefore, considering an individual legal situation as unique and unrepeatable, while taking into account all the particular circumstances that indirectly and directly led to that situation.

The fusion of law and equity in the US legal system made the citizen safe in relation to the structures of power, and at the same time, combining the practices of common and written law, left room for several relevant interpretations of legal norms in each individual case. The principle of equity is preserved in the precedent doctrine at the federal and state levels since it is “that curious, almost universal sense of justice that urges that all men are

²⁵ S. Perović, *Besede sa Kopaonika*, sopstveno izdanje, Beograd 1997, 35.

²⁶ Confrontation Clause, referring to the 6th Amendment to the Constitution, states, *inter alia*, that the accused has the right “to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense”.

²⁷ R. Knežević, O pravdi, pravičnosti, pravu, <https://blog.aks.org.rs/o-pravdi-pravicnosti-pravu/>, accessed on November 25, 2017.

²⁸ S. Perović, *Pravno-filozofske rasprave*, Službeni list SRJ, Beograd 1995, 156.

properly to be treated alike in like circumstances”²⁹, and “this equality of treatment in turn serves to limit bias and arbitrariness and allows parties to rely with some certainty on how the system has dealt with cases similar to theirs”³⁰. US Constitution defined the position of federal judiciary, judges, Supreme Court and the Constitution itself, whereby the equity principle is thus defined: “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party...”³¹ In addition to the *habeas corpus* clause that states that “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it”³², the Constitution defined in two articles also the *ex post facto* clause as a strong mechanism of legal certainty, based on the *Calder v. Bull* of 1798³³: „No Bill of Attainder or ex post facto Law shall be passed...”³⁴ No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.”³⁵

On the other hand, the Articles of Confederation do not mention the citizen as a political subject, or the rights of the citizen related to judicial proceedings and ensuring equity. The Articles of Confederation perceive the US as “firm league of friendship with each other” where “Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled”³⁶. Based on the mutual trust of members of the Confederation, the Articles defined that “Full faith and credit shall be given in each of these States to

²⁹ W. Burnham, *Introduction to the Law and Legal System of the United States*, Wayne State University Law School, 2003³, 64.

³⁰ *Ibid.*

³¹ US Constitution, Article 3, Section 2.

³² US Constitution, Article I, Section 9.

³³ *Calder v. Bull*, 3 US 386, 1 L. Ed. 648, 1 L. Ed. 2d 648 (1798).

³⁴ US Constitution, Article I, Section 9.

³⁵ US Constitution, Article I, Section 10.

³⁶ Articles of Confederation and Perpetual Union, also known as the first US constitution. Approved on November 15, 1777 by the Second Continental Congress, put into force in 1781. They were created upon the premise of independence of 13 colonies now states, while the US was ineffective, weak and without concrete power to exercise. The Articles were replaced by the US Constitution in 1787.

the records, acts, and judicial proceedings of the courts and magistrates of every other State”³⁷, not affecting on any ground the judicial systems or legal frameworks of Union member states.³⁸ In this way equity and legal certainty were left completely to the Confederation states to regulate as they wished. Bearing in mind the problems and circumstances that led to creating a firmer alliance and US Constitution, it may be concluded that legal certainty and equity in judicial proceedings were among fundamental issues to be solved by the new constitution, since the confederation experience revealed the negative consequences of insufficiently clear legal categories.

In parallel with common law practice, the development of written legislation influenced the strengthening of fusion of law and equity, but now in the opposite direction. Unlike Continental law, based on written law as a general legislation framework allowing a broader range of interpretations in particular judicial proceedings, American laws go into more detail. They do not allow hues and shades in interpretation but require literal enforcement of their letter in the final judicial decision. That is a specific “common law approach toward statutes that differs from the approach taken in most civil law countries. Common law judges see statutes as containing specific rules of law that will be applied fairly according to their terms, but not beyond. Subject matter outside the terms of the statute remains governed by the common law. This means, as a general rule, US courts will not interpret statutes in two ways that are routine in the civil law countries”.³⁹

This seemingly contradictory position of common law v. written law in the context of interpretation is an efficient mechanism of legal certainty for citizens facing the institutions of the system. Detailed definitions in written acts and their literal enforcement protected many civil rights from the tyranny of the legislator. On the other hand, however, the breadth of interpretation presents in common law resulted in many legal situations interpreted in line with the customs of the time, overall social changes, and based on judicial experience. The main “question actually is how to regulate specific social relationships through the legal norm without allowing the exclusive requirements of formal legal application to harm

³⁷ Articles of Confederation, Section IV.

³⁸ At the same time, in the 9th article of the Articles of Confederation is written that “The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction or any other causes whatever “.

³⁹ W. Burnham, 50.

the sense of equity, or to prevent the exclusive requirements of equity from threatening the principle of legal certainty”.⁴⁰ This is the topic that attracted the attention of federal courts in many judicial proceedings that indirectly or directly dealt with economic and social relations during 19th century in particular.

4. Concluding remarks

The English legacy in US legal system has actually two main parallel tracks: English common law legacy on one hand and the Lockean philosophical legacy. The heritage of English common law system made it possible to protect, through the precedent doctrine and the principle of equity, the freedoms and rights of US citizens in the period of forming the USA. Over time, English legal heritage, combined with specific characteristic of colonial life in North America, created a separate legal space where the common law system suffered radical changes that remained typically American. Partiality for legal regulation, legal logic and juristic system of thought gave rise to many particularities of the US legal system. Detailed definitions in written acts and their direct application protected many civil rights from the tyranny of the legislator. On the other hand, however, the extensiveness of interpretation in common law led to many legal situations being interpreted in line with the customs of the time, overall social changes and based on the case law. Legacy of natural rights narrative, however, altogether with the issue of the just and responsible government established by consent of the governed and constrained by legislature, is the cornerstone of the US ideological legacy, embedded in the Declaration of Independence and in one of the most progressive section of the US Constitution, Bill of Rights.

References

- Burnham, W., *Introduction to the Law and Legal System of the United States*, Wayne State University Law School, 2003³.
- Clark, D. S. and Ansary, Turgul (eds.), *Introduction to the Law of the United States*, Kluwer Law International, The Hague 2002.
- Ćeranić, J., „Izvori američkog prava“, *Uvod u pravo SAD* (ed. Jovan Ćirić), Institut za uporedno pravo, Beograd 2008.
- Danković Stepanović, S., *Pravo i politika konkurencije*, Beograd, Fakultet

⁴⁰ S. Perović (1995), 156.

- političkih nauka, 2014.
- Farnsworth, E.A., *Uvod u pravni sistem Sjedinjenih Američkih Država*, Beograd, Savremena administracija 1973.
- Hamilton, A., Medison, Džejsms, Džej, Džon, *Federalistički spisi*, Beograd, Radnička štampa, 1981.
- Perović, S., *Besede sa Kopaonika (1990-1996)*, Beograd, sopstveno izdanje, 1997.
- Perović, S., *Pravno-filozofske rasprave*, Službeni list SRJ, Beograd, 1995.
- Vranjanac, D., “Uvod u pravni sistem Sjedinjenih Američkih Država“, *Uvod u pravo SAD* (ed. Jovan Ćirić), Institut za uporedno pravo, Beograd 2008.
- West, W. M. (ed.), *A Source Book of American History to 1787*, Allyn and Bacon, Boston-New York-Chicago 1913.

Legal sources

- United States Constitution, <https://www.archives.gov/founding-docs/constitution-transcript>.
- Articles of Confederation, Avalon Project, Document in Law, History and Diplomacy, Yale Law School, Lillian Goldman Law Library, http://avalon.law.yale.edu/18th_century/artconf.asp.
- Magna Carta Libertatum (1215), <https://www.bl.uk/collection-items/magna-carta-1215>.

Website references

- Brogan, D. W., The Highest Office, <http://www.americanheritage.com/content/highest-office>, last accessed November 2nd, 2017.
- Foner, E., Radical Individualism in America: Revolution to Civil War, <https://www.libertarianism.org/publications/essays/radical-individualism-america-revolution-civil-war>, last accessed November 27th, 2017.
- Knežević, R., O pravdi, pravičnosti, pravu, <https://blog.aks.org.rs/o-pravdi-pravicnosti-pravu/>, last accessed November 25, 2017.

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**AMERIČKI PRAVNI SISTEM U KONTEKSTU ENGLESKOG
PRAVNOG NASLEĐA I TEORIJE PRIRODNIH
PRAVA DŽONA LOKA**

Rezime

Rad razmatra neke osobenosti američkog pravnog sistema koje su utemeljene na engleskom pravnom nasleđu koje su prvi engleski kolonisti doneli u Severnu Ameriku. Autorka polazi od pretpostavke da su stalne izmene osnovnih principa engleskog sistema običnog prava i pravne i sudske prakse dovele do određenog američkog pravnog sistema koji ima dvostruku prirodu, zasnovanu na principima *common law* sistema sa jedne strane i slova pisanog zakona sa druge. Rad analizira i fundamentalan uticaj filozofskog sistema Džona Loka o prirodnim pravima, statusa svojine i vlade idejna na uspostavljanje američke političke i pravne misli, oličene u Deklaraciji i Povelji o pravima.

Ključne reči: pravni sistem SAD, pravno nasleđe, Ustav SAD, *common law*, prirodna prava, sudska revizija, precedent.

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Review scientific paper
UDC: 331.1 - 053.2
doi: 10.5937/spz0-19579

SUPPRESSION OF CHILD LABOUR – BRIEF OVERVIEW OF INTERNATIONAL STANDARDS

Abstract

The notion of child labour is well determined by relevant international instruments and it can be said that it is theoretically unquestionable. In practice, however, there are various concerns about how to distinguish legal child work from illegal child labour. Sexual exploitation of children, as well as trafficking in children for further exploitation, are still reality in many countries of the world, although they are characterized as the worst forms of child abuse and incriminated as criminal offenses. In addition, a large share of child labour falls under labour in agriculture and household work – these are forms that are very difficult to perceive, and in some cultures and traditions are practically allowed, regardless of the existing legal prohibitions. There are also different strategies which countries are developing to approach the problem of child labour. The aim of the research is to show that the theoretical framework of the content of child labour is undisputed and that it allows clear distinction of child work from child labour. Also, by examining content and scope of basic legal institutes it can be concluded how an effective system for protecting children from labour exploitation and other forms of illicit engagement should potentially look like.

Keywords: *child work, child labour, child labour monitoring system, labour inspection, ILO standards, intersectoral cooperation, child exploitation.*

1. Introductory remarks

The concept of child labour is clearly defined by international instruments, primarily conventions of the International Labour Organisation (hereinafter: ILO). It is also further elaborated in the European framework

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for the prohibition of child labour, as well as in national legislation of the vast majority of countries.

Convention no. 182 on the worst forms of child labour¹ and the Recommendation 190 concerning the prohibition and immediate action for the elimination of the worst forms of child labour of the ILO provide the main international legal framework for the prohibition of child labour. Pursuant to Article 3 of the Convention No. 182, worst forms of child labour comprise different activities of prohibited engagement of children: slavery or practices similar to slavery, including forced or compulsory labour and compulsory recruitment of children; use of children for prostitution or production of pornography; use of children for performing illicit activities, in particular for the production and trafficking of narcotic; and any other work which, by its nature or circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

Convention no. 138 concerning minimum age for admission to employment² sets the lower threshold for work ability to 15 years of age, and this limit can only exceptionally be moved to 14 years. In addition, the Convention envisages that national legislation may permit the work of children on light work which is not harmful to their health or development, and which do not prejudice their education, for persons 13 to 15 years of age.

Convention on the rights of the child³ does not contain specific prohibition of child labour. However, it contains a number of provisions that are important for eliminating the exploitation of children, especially when viewed in context with other international instruments:

- States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse (Article 19.1);
- States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development (Article 27.1);
- States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be

¹ Convention No. 182 on the worst forms of child labour, *FRY Official Gazette – International Treaties*, no. 2/2003.

² Convention no. 138 concerning minimum age for admission to employment, *SFRY Official Gazette – International Treaties*, no. 14/82.

³ Convention on the rights of the child, *SFRY Official Gazette – International Treaties*, no. 15/90 and *FRY Official Gazette – International Treaties*, nos. 4/96 and 2/97.

- hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular: (a) Provide for a minimum age or minimum ages for admission to employment; (b) Provide for appropriate regulation of the hours and conditions of employment; (c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article (Article 32);
- States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse (Article 34);
 - States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare (Article 36).

The Directive on the protection of young people at work⁴ expressly sets the minimum age for admission to work at 15 or at the end of a child's formal education. Children can by no means perform jobs that would constitute their exploitation and or would be likely to harm their safety, health or physical, mental, moral or social development or to jeopardize their education. The Directive, however, does not apply to domestic service in a private household, nor to the work regarded as not being harmful, damaging or dangerous to young people in a family undertaking. Both these exemptions are allowed only if such work is occasional or short-term (Article 2 of the Directive). Under certain conditions, children between 13 and 15 years of age may be engaged in certain jobs (Articles 4 and 5 of the Directive).

When it comes to the terminology used in the mentioned documents, the distinction between the concepts of legal "child work" and illegal "child labour" has been made. The concept of "child work" includes all varieties of permitted work for children, regardless of the age of the child and the existence of working ability (in the range of light household duties, over school obligations, to working tasks in the formal employment of children older than 15 (14) years).

In the above mentioned Directive, the term "child" means any young person of less than 15 years of age, whilst "adolescent" means a young person of at least 15 years of age but less than 18 years of age. However in ILO conventions, the term "child" has been used for any person below the age of 18.

⁴ Council Directive 94/33/EC on the protection of young people at work of 22.06.1994, *EU Official Journal* no. L216/12.

Research deals with different aspects and set standards of work engagement of children, as well as mechanisms established by the states for the prevention, detection and sanctioning of the of child labour. Child labour is a complex social problem, which must be addressed through the engagement of various state bodies, trade unions, employers and the civil sector. The complexity of the child labour phenomenon is reflected primarily in the fact that children can be (ab)used in the sphere of work in various ways. Sometimes the responsibility for their work engagement shall be borne by the employer, sometimes by the family or by other persons.

The research is based on several hypotheses, which have emerged as a product of the previous experience of the author in the field of suppression of child labour:

- The existing framework for the prohibition of labour exploitation of children provides enough opportunities for states to clearly distinguish between the permissible and recommended activities of children, and others which are to be considered inhuman treatment of the child, his/hers abuse and neglect.
- The gradual inclusion of the child on the labour market and in work processes should be under the special control of the state. Child labour cannot be equated with the work of adults, regardless of the specific type of work and work responsibilities given to the child, nor the economic need of the family for child labour.
- The effective suppression of the child labour, and in particular its worst forms, presupposes the existence of intersectoral cooperation between state services, authorities and institutions, as well as cooperation with other relevant entities involved in child's everyday activities (such as his/hers family, schools, employers). In order to be effective, this cooperation can take place at the local or national level, as well as at the regional and global level.

These questions, as well as some other, will be analysed in the following text. Firstly, attention will be focused on a deeper analysis of the notion of child labour. The basis for developing mechanisms of prevention, perception and suppression of child labour will also be critically considered in the main part of the research. Finally, a part of the research is dedicated to the situation in Serbia, where a lot of progress has been made in the normative sense over past couple of years, and where for the first time mechanisms of intersectoral cooperation have been established for solving existing problems of child labour. Based on such concept of the research, the author will try to answer whether the preliminary hypotheses are in line with normative reality and

practice, and whether it is possible to make additional efforts to address the problem of child labour at a global level more efficiently.

2. The notion of the child labour

Child labour is specific form of child abuse and neglect. Indicators of the various forms of child abuse and neglect were developed at the Consultation on Child Abuse Prevention at the World Health Organisation in Geneva in 1999:

Physical abuse of a child is that which results in actual or potential physical harm from an interaction or lack of an interaction, which is reasonably within the control of a parent or person in a position of responsibility, power or trust. There may be a single or repeated incidents.

Emotional abuse includes the failure to provide a developmentally appropriate, supportive environment, including the availability of a primary attachment figure, so that the child can develop a stable and full range of emotional and social competencies commensurate with her or his personal potentials and in the context of the society in which the child dwells. ...

Neglect is the failure to provide for the development of the child in all spheres: health, education, emotional development, nutrition, shelter, and safe living conditions, in the context of resources reasonably available to the family or caretakers and causes or has a high probability of causing harm to the child's health or physical, mental, spiritual, moral or social development. This includes the failure to properly supervise and protect children from harm as much as is feasible.

Child sexual abuse is the involvement of a child in sexual activity that he or she does not fully comprehend, is unable to give informed consent to, or for which the child is not developmentally prepared and cannot give consent, or that violate the laws or social taboos of society. ... This may include but is not limited to:

- The inducement or coercion of a child to engage in any unlawful sexual activity.
- The exploitative use of child in prostitution or other unlawful sexual practices.
- The exploitative use of children in pornographic performances and materials.

Commercial or other exploitation of a child refers to use of the child in work or other activities for the benefit of others. This includes, but is not limited to, child labour and child prostitution. These activities are to the detriment of the child's physical or mental health, education, or spiritual, moral or social-emotional development."⁵

⁵ *Report on the Consultation on Child Abuse Prevention*, p. 15-16, <http://apps.who.int/iris/handle/10665/65900>.

Child labour is therefore specific type of work exploitation of the child, which could encompass several mentioned modalities of child abuse and neglect. For instance, child trafficking for the purposes of sexual exploitation will simultaneously include physical, sexual and emotional abuse of the child. It will also represent child neglect and a type of commercial exploitation. Therefore, it is clear that child labour could come in many forms and should be perceived in different types of situations that lead to unlawful engagement of a child into work process.

ILO Convention 182 defines worst forms of child labour:

“For the purposes of this Convention, the term the worst forms of child labour comprises:

- (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;
- (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
- (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;
- (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.”⁶

Recommendation 190 further explains some of the forms of child work from the Convention 182:

“3. In determining the types of work referred to under Article 3(d) of the Convention, and in identifying where they exist, consideration should be given, inter alia, to:

- (a) work which exposes children to physical, psychological or sexual abuse;
- (b) work underground, under water, at dangerous heights or in confined spaces;
- (c) work with dangerous machinery, equipment and tools, or which involves the manual handling or transport of heavy loads;
- (d) work in an unhealthy environment which may, for example, expose children to hazardous substances, agents or processes, or to temperatures, noise levels, or vibrations damaging to their health;
- (e) work under particularly difficult conditions such as work for long hours or during the night or work where the child is unreasonably confined to the premises of the employer.

4. For the types of work referred to under Article 3(d) of the Convention and Paragraph 3 above, national laws or regulations or the competent au-

⁶ Convention 182, Article 3.

thority could, after consultation with the workers' and employers' organizations concerned, authorize employment or work as from the age of 16 on condition that the health, safety and morals of the children concerned are fully protected, and that the children have received adequate specific instruction or vocational training in the relevant branch of activity.”⁷

It can be noticed that terms “worst forms of child labour” and “child labour” are separated primarily in the function of their gradation, not exclusion of certain practices. This seems to be properly understood in national legislations, which commonly recognize the worst forms of child labour through one or more criminal offenses, while their existence does not exclude other ways of labour exploitation of children. There is also a clear functional link between the prohibition of certain types of work engagement of children and their social development, education and psychological maturation. The prohibition of child labour does not rest only on the principle of the protection of life and physical integrity of children, but also on the realization of a complex set of preconditions for their proper upbringing.

In addition to the potential dilemma of what is child labour, one can also discuss what does not constitute forbidden children's practices. The need to protect children and their exclusion from some jobs and work processes does not mean their complete separation from activities that are common, even recommended for certain age groups. Thus, the notion of child labour will not imply to the activities that child will accomplish at school, through practical classes, or other extracurricular educational activities that serve to encourage and develop his/her talent, creativity and interests in certain professions and hobbies. It is understood that in these mentioned activities, the child cannot be in any way endangered, or exploited.

The work of a child at home and in a household must be perceived from the same viewpoint as work in a school, or with an employer. Although there are various traditional stereotypes in this area, it is important to realise that the safety, health, development and education of the child are equally endangered in situations where parents or other family members decide on his/her working tasks. There is also the problem of activation of gender stereotypes and the division of jobs into men's and women's from the earliest childhood, which can have negative impact on development of the child. Particular problems arise in agricultural households, where children from the earliest age are considered as helpful members of the group, whose work is implied.

⁷ Recommendation 190, Paragraphs 3 and 4.

It is of utmost importance that when determining which jobs are suitable for a child, the following facts are taken into account:

- certain jobs are absolutely prohibited for children;
- remaining jobs that may be considered permissible must be observed in relation to the particular child, since the individual development can be significantly different;
- it is necessary to ensure continuous monitoring of the work of the child.

If at least one of the above elements is missing, or one or more of these three conditions are not met, it is possible to talk about the potential existence of child labour.

3. Mechanisms of prevention and perception of child labour

Although the notion of child labour is relatively clear, there are numerous challenges that could stand between control body and employer, which affect perception of child labour and adequate reaction in order to stop it. Some of most common situation could be: employer refuses to cooperate and actively or passively prevents inspection of its premises; employer hides and withdraws, in an organised or unorganised manner, the children who are included in the labour process, immediately before control or at the time the control commences; employer is an unregistered entity and carries out the work process in various places, periodically changing the location; children who illegally participate in the work process are intimidated and hide from authorities; child labour is happening in a family household or in a farm household. In such situations, classical oversight mechanisms are not effective. This is why many countries in the last few decades, when creating a system of reaction to child labour; turn to complex intersectoral cooperation between a number of institutions and organizations.

According to the ILO guidelines, “Child labour monitoring (CLM) is the active process that ensures that such observation is put in place and is coordinated in an appropriate manner. Its overall objective is to ensure that as a consequence of monitoring children and young legally employed workers are safe from exploitation and hazards at work.”⁸ CLM mechanisms therefore have to provide enough information to the oversight body in order for it to provide conclusion whether any child’s activity can be considered as child labour. It also creates such environment which obliges and enables different actors that play active role in child’s

⁸ *Overview of Child Labour Monitoring*, ILO, Geneva 2005, 1.

life to observe his/her daily activities and react on the first indicators of potential exploitation. For example, if a child starts to drop out of school or there is a sudden decline in the quality of his/her results, the school will inform parents of the circumstances. However, if there is a suspicion that child has less interest in education because it has been engaged in some sort of working agreement (legal or illegal, written or oral) a step further in this process is that school alerts social services as well. Social workers could further alert labour inspection, or even police, if they suspect that child has been exploited in any of the worst forms of child labour, as described in the text above. Effective CLM mechanisms closely engage education institutions, social services and other organs and institutions.⁹ They of course work in order to protect the best interests of the child, but also to protect the family as a whole. Family is thus important component in the system which is involved in each of the stages of control over child work. CLM can also be used for education and prevention – it does not react only to illegal practices, but it also teaches both children and their parents on how to recognise and avoid falling into the trap of child exploitation.

Basic activities in CLM are: tracking, identification/assessment, dissemination and reaction/protection.¹⁰ Tracking of the child is possible through communication between his/her family and school, as well as with social services. If the child is legally engaged in some sort of work, both employer and trade union are relevant addresses for constant oversight. It can be done both by the school (for example, when it comes to practical teaching) and by the labour inspection (if the child has legal labour contract with the employer). Some industries are traditionally linked to child labour – oversight control over them will be more done more closely and more frequently. In some cases, the perception of child labour will be closely linked to the regular activities of supervisory authorities or the police – such as overseeing busy crossroads, public places, shopping malls, and the like. Raising awareness of the general public on the problem of child labour could also help to receive useful information on cases of unwanted treatment of child workers.

⁹ As it is stated in the ILO document, there are several ways of monitoring in order to perceive child work and potentially identify child labour: “School inspection by school inspectors, teachers and parents groups; Workplace monitoring by labour inspectors and/or independent monitoring teams; Community monitoring by local government, peoples’ organizations, local action groups and community vigilance committees; Social auditing, industry-specific labelling and certification schemes, voluntary self-monitoring, industry codes of conduct.” *Ibid.*, 2.

¹⁰ For more elaborate list of potential activities, see: *Ibid.*, 7.

Next step is assessment of the situation, during which usually comes to identification of the illegal child labour. This can sometimes be done by the parents, or teachers, but sometimes it had to be done by the professionals (most likely labour inspection or similar organ, sometimes by the trade union delegate). When child labour has been noted, dissemination of information to the competent authorities is of crucial importance. This kind of information is usually communicated to social services and labour inspection, sometimes to the police (especially if the child is endangered by the work process and there is a great chance of being injured, or a fatal outcome). Dissemination of information as the next phase actually means that a person, body or institution that has come to the knowledge of child labour will inform the competent services in the shortest time possible. Finally, there is reaction phase in which there are two main goals: to secure the child and remove him/her from the working process, and to determine the responsibility and sanction the employer who exploited the child. Securing the child does not necessarily means that he/she should be removed from the working process. If there was a minor offense – for example, the child worked at night, even though this was prohibited by national law, employer would be penalized with a misdemeanour sanction but the child could continue to work with it. However, if there was breach of child labour regulation which constituted criminal responsibility, child would be removed from the working process permanently. If there is potential responsibility of his/her parents (for example, parents were aware of the dangers at work and the illegality of the working conditions, or the child labour came as a result of the employer's agreement with the parents), child could potentially be removed from the family as well, placed with temporary caregivers until the procedure is completed.

It is clear that in order for this system to function, several preconditions have to be realised. It is usually being said that prevention of child labour starts on the level of general policies of the state. High employment and decent living standards would most certainly decrease number of young people searching for the work without looking for minimum working conditions standards. Legally speaking, state level is the one that whole legal framework is developed, although in different states decentralised government may lead to autonomous legal and policy regimes in different administrative units. Furthermore, it is of high importance to have one intersectoral overview body at the national level, that will draft necessary law and by-law framework, overview the system as a whole, and react to individual problems and situations that may occur (such as competence overlapping, urgent need to activate international cooperation mechanisms,

and similar). At the local level, all local self-government bodies and other institutions need to communicate between themselves in accordance with established protocols on joint monitoring and actions. These activities are much needed when it comes to reaction to child labour, but also for perception of child labour, identification of the employer and removal of the child from this unlawful position. Local authorities are key factor in the whole process, because local actors have much better understanding on children’s activities, needs, potential employers and potential exploitators.

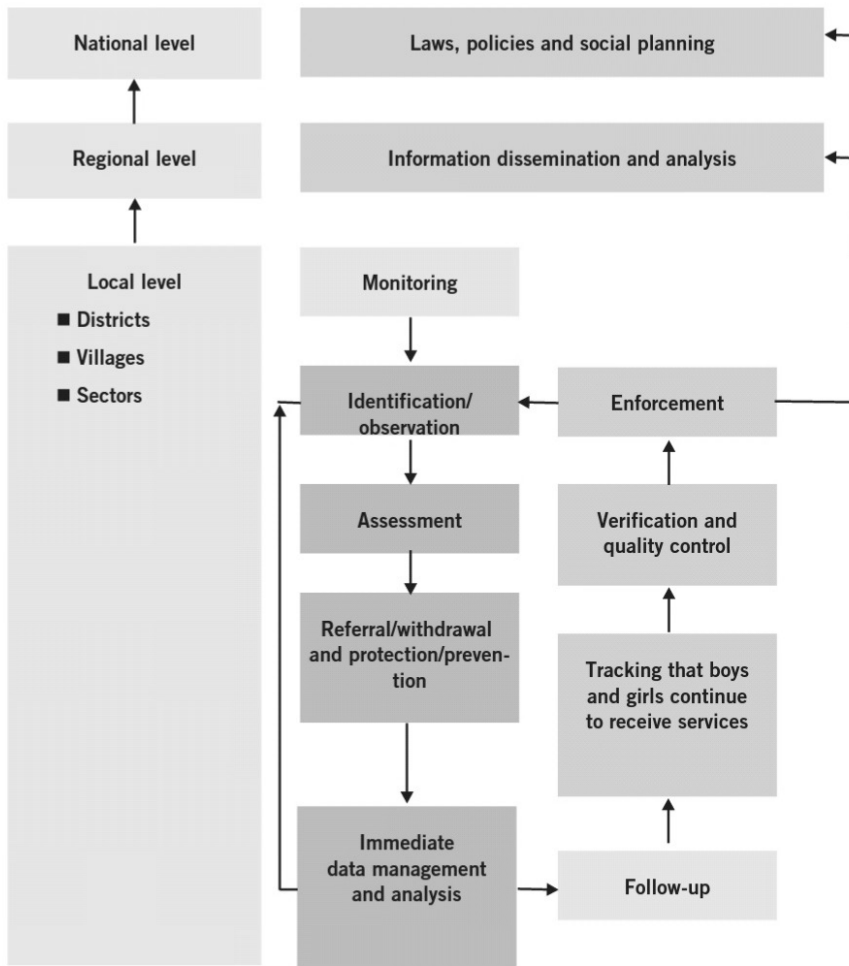


Figure 1: The CLM model¹¹

¹¹ *Guidelines for Developing Child Labor Monitoring Processes*, ILO, Geneva 2005, 8.

4. Recent development of the legal framework in Serbia

The Republic of Serbia has signed and ratified both Convention 138 and Convention 182. Furthermore, it has ratified Convention on the rights of the child, while the Directive on the protection of young people at work is not part of its legislation (since it is not EU member state) and domestic legal system has not yet been harmonised with its content. Legislative framework on child labour is nevertheless very detailed. In 2017, three significant steps were made towards full implementation of international standards in protection of children at work. Labour Inspectorate adopted checklist for inspection oversight on child work. This does not represent the extension of the competencies of the Inspectorate, but it will certainly contribute to more effective supervision and better perception of potential child labour cases. Minister of labour also adopted Special protocol of Labour Inspection for protecting children from child labour, which for the first time in Serbian legal system puts in focus intersectoral cooperation between labour inspectors and other institutions and organisations regarding suppression of the child labour. Finally, Regulation on determining hazardous work for children¹² has been adopted by the Government of Serbia, which was crucial step towards full harmonisation of Serbian legislation with the ILO Convention 182. In this way, the legal system is supplemented with important missing regulations and the way to the full cooperation of various state institutions and services in order to eradicate child labour was created.

Intersectoral cooperation is realised through exchange of information between labour inspection, social services and police and regulated in details in Special protocol.

In every office of the Labour Inspectorate at the district level there is a contact person who has gone through training on intersectoral cooperation and recognition of child labour, and whose task is to collect information on cases that have been initiated regarding the child labour on the territory of the district, and electronically archive in one place all records regarding the completed inspections in the field of protection of children from child labour. Each labour inspector that records child work or child labour, delivers information on that occurrence to the contact person at his/her district office of Labour Inspectorate. All information from the checklist for inspection oversight on child work or form for extraordinary inspection oversight over child labour has to be delivered,

¹² Regulation on determining hazardous work for children, *Official Gazette of RS*, no. 53/2017.

as well as the report on conducted oversight. Labour inspector is obliged to update contact person on any additional information and circumstances he/she learns, especially regarding intersectoral cooperation and his/her involvement in special procedures initiated before other institutions.

If the labour inspector finds during inspection that circumstances and facts have been established that require the activation of other bodies, labour inspector shall file an application to the police, the social service, the health care institution, other inspectorates and to other bodies and institutions competent for protecting the rights and interests of the child. The inspector shall inform the competent social service each time child labour has been identified. In cases when there is a need to react immediately, the labour inspector shall point out the need for urgent action. The labour inspector shall inform the competent social service of the existence of indications that child labour has taken place even in cases when the labour inspector is unable to perform the inspection due to the lack of competence.

If, during inspection, the labour inspector suspects that a criminal offence is being committed and that life, health or safety of a child are endangered, the labour inspector shall immediately inform the police in the manner he or she considers most efficient (e.g. by phone). In the event that a labour inspector suspects that child labour abuse is the result, or one of the forms, of trafficking of children, he or she shall promptly notify the Center for the protection of victims of trafficking, in order to perform expert assessment of whether it is human trafficking and undertake other appropriate steps to protect the child.

If, during inspection, the labour inspector learns of irregularities that are in the competence of another inspector, the labour inspector shall immediately inform the competent inspectorate thereof, in accordance with the Law on inspection oversight¹³.

The labour inspector shall ensure an intervention of a healthcare institution, that is, shall provide adequate medical assistance to the child, if he or she assesses that the child needs such help. This help is not restricted only to cases of work injuries, but covers the assessment of the entire physical and psychological condition of the child (e.g. the child is malnourished, weak, feverish, old injuries have been detected, the child is anxious and the like).

¹³ Law on inspection oversight, *Official Gazette of RS*, nos. 36/2015 and 44/2018 – other law.

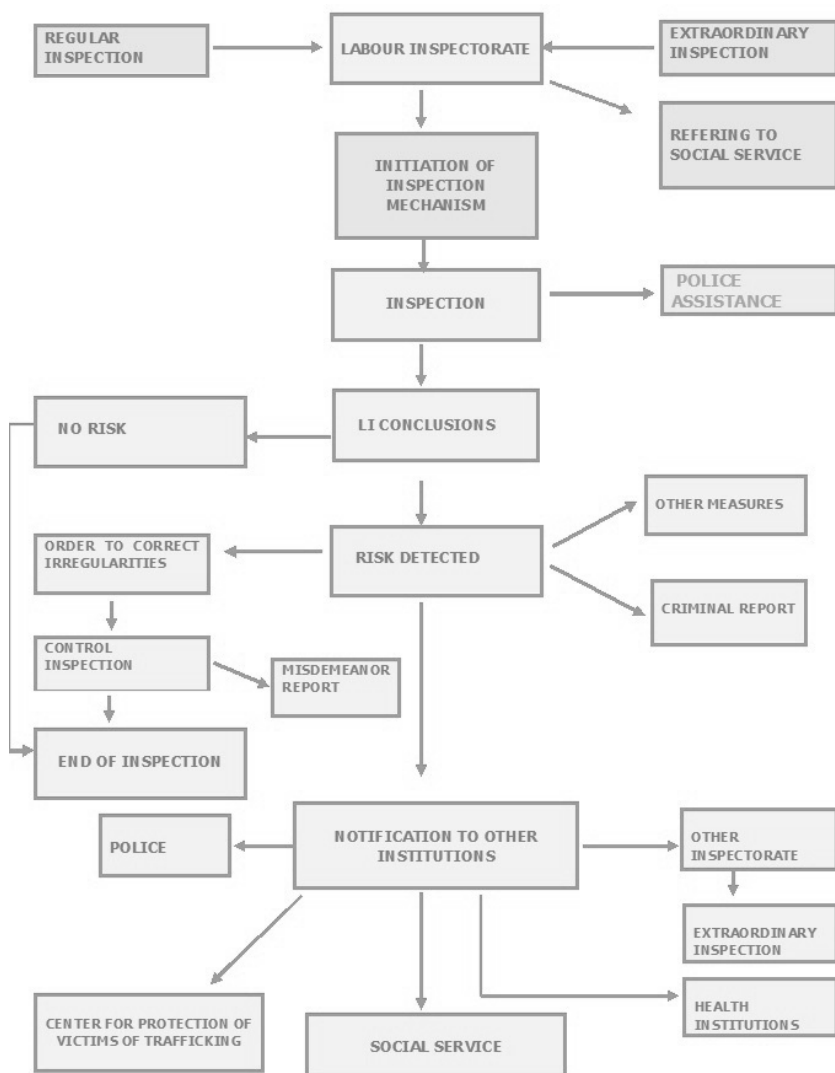


Figure 2: Intersectoral cooperation according to the Special Protocol

Contrary to these positive steps in order to suppress child labour, there is still some work to be done. The main disadvantages that continue to cause problems in the system are certainly the following:

- Child beggars are not within competencies of the labour inspector and police has limited means of suppressing this type of child exploitation. Cooperation and communication of these institutions with social

services has to be much more efficient and legal basis for sanctioning adults that accompany these children have to be more strict.

- Labour inspector is unable to control the work in a family household – this is where cooperation with social services has to be much more developed that it is currently;
- Labour inspector cannot control work in farm households that are nor registered in Serbian Business Registers Agency and do not have the capacity of an employer – again, this is the point where communication and cooperation with social services comes in place;
- Newly adopted Law on dual education¹⁴ has left vast space for child abuse and exploitation – it should be amended in order to provide at least basic safeguards for the children on dual education and its implementation oversight should be much more extensive and detailed.

In addition, it should be noted that the application of the Special Protocol will require additional training of both labour inspectors and other entities in the system with which labour inspectors will cooperate in its application.

5. Concluding remarks

It has to be noted that international instruments regarding child labour are fully developed and represent a coherent system of norms covering variety of dangers that may arise in the context of the exploitation of children. However, as it can be seen from the example of Serbia, some forms of child labour are still perceived as permitted, although this should not be the case. Also, some forms of labour exploitation of children are tolerated, or not perceived at all, although they are clearly prohibited by regulations – classic example of this ignorant behavior of the state can be seen in cases of the abuse of children for purposes of beggary. This problem is not always about institutional deficiencies. On the contrary, it seems that main deficiency lies in the fact that they do not implement rules on the protection of children consistently and completely (in order to encompass all potential threats to child's safety and security) which results in legal voids in areas that regulate very important issues of child engagement and potential exploitation. Therefore, further efforts are needed to bring national legal systems rounded up in relation to prohibitions that must be introduced in order to fully eradicate child labour – and this is particularly true for countries that are burdened with the traditional heritage of child engagement in ways that are unacceptable in the contemporary society.

¹⁴ Law on dual education, *Official Gazette of RS*, no. 101/2017.

Intersectoral cooperation is an excellent basis for creating a system that will be able to respond to the challenges of modern society and lead to effective monitoring of complex impacts on possible work engagement of the child. However, different factors can affect the insufficient cohesion of elements (institutions, services) in such system: lack of training; lack of awareness and knowledge of the existence of a system for cooperation; insufficient exchange of information or exchange of information that is not essential and executed mechanically only in order to fulfil the prescribed form; negative conflict of jurisdiction (competence) of institutions; indifference of individuals in the system to react; prejudices of individuals who judge whether any work is illegal; conflict of jurisdiction of local and national authorities; corruption; and other similar circumstances. Consequences of such anomalies in the system may be different but certainly lead to reduction in its effectiveness. Children who work in illicit conditions in certain sectors of the economy, agriculture, households, as well as those found in the worst forms of child labour incriminated by criminal laws, can often remain out of the reach of the legal system and state institutions. This is a type of systematic flaw that must be dealt with at the level of each individual state. It is also one of the fields countries perceive great attention in recent years, especially ones in which high levels of child labour were perceived in the past.

Countries have adopted different system of gradual inclusion of children into labour market. Common solutions contain a variety of child work restrictions, and can generally be divided into age-related restrictions, a work-related constraint, and a constraint that is associated with the child's working conditions. It is indicative that states have set an age limit in line with international standards and that in vast majority of countries, it is inconceivable that children under the age of 14 (15) years can be found working legally. However, the gray figure of child work which is not observed in official statistics and, as a rule, represents share of illegal child labour, clearly reveals that there is room for improvements in supervision systems over the application of regulations. There are also reasons to be worried about tendencies to legalize certain forms of child work that can easily be abused in countries with insufficient control of employers or high corruption levels, such as so-called "dual education". That is why children's labour is likely to remain an important and relevant issue in the coming years, and approach of individual countries to its solution will be surely guided primarily by economic, rather than by human motives.

References

- Report on the Consultation on Child Abuse Prevention, <http://apps.who.int/iris/handle/10665/65900>.
- Overview of Child Labour Monitoring*, ILO, Geneva 2005.
- Guidelines for Developing Child Labour Monitoring Processes*, ILO, Geneva 2005.

Legal sources

- Convention no. 182 on the worst forms of child labour, *FRY Official Gazette – International Treaties*, no. 2/2003.
- Convention no. 138 concerning minimum age for admission to employment, *SFRY Official Gazette – International Treaties*, no. 14/82.
- Convention on the rights of the child, *SFRY Official Gazette – International Treaties*, no. 15/90 and *FRY Official Gazette – International Treaties*, nos. 4/96 and 2/97.
- Council Directive 94/33/EC on the protection of young people at work of 22.06.1994, *EU Official Journal* no. L216/12.
- Regulation on determining hazardous work for children, *Official Gazette of RS*, no. 53/2017.
- Law on inspection oversight, *Official Gazette of RS*, nos. 36/2015 and 44/2018 – other law.
- Law on dual education, *Official Gazette of RS*, no. 101/2017.

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SUZBIJANJE ZLOUPOTREBE DEČIJEG RADA – KRATAK PREGLED MEĐUNARODNIH STANDARDA

Rezime

Pojam zloupotrebe dečijeg rada detaljno je uređen relevantnim međunarodnim instrumentima i može se reći da je njegova sadržina u teorijskom smislu neupitna. U praksi se međutim javljaju različiti problemi o tome kako načiniti razliku između dozvoljenog dečijeg rada i

nedozvoljene zloupotrebe dečijeg rada. Seksualna eksploatacija dece, kao i trgovina decom radi dalje eksploatacije, još uvek predstavljaju realnost u mnogim državama sveta, iako su označeni kao najgori oblici zlostavljanja dece i inkriminirani kao krivična dela. Dalje, veliki udeo zloupotrebe dečijeg rada sreće se u poljoprivredi i radu u okviru domaćinstva – ovo su oblici koje je veoma teško primetiti, a u nekim kulturama i tradicijama su praktično dozvoljeni bez obzira na postojeće formalnopravne zabrane. Takođe, postoje različite strategije kojima države pristupaju problemu zloupotrebe dečijeg rada. Cilj istraživanja je da pokaže da je teorijski okvir sadržine pojma zloupotrebe dečijeg rada nespornan i da omogućava jasno razlikovanje dozvoljenog dečijeg rada od zloupotrebe dečijeg rada. Takođe, kroz analizu sadržine i domašaja osnovnih pravnih instituta može se zaključiti kako bi jedan efektivan sistem zaštite dece od radne eksploatacije i drugih oblika nezakonitog angažovanja, potencijalno mogao da izgleda.

Ključne reči: dečiji rad, zloupotreba dečijeg rada, sistem nadzora nad dečijim radom, inspekcija rada, standardi MOR, međusektorska saradnja, eksploatacija dece.

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Review scientific paper
UDC: 351.74(497.1)
doi: 10.5937/spz0-20224

CHALLENGES IN RECRUITMENT AND SELECTION OF THE POLICE OFFICERS IN MONTENEGRO

Abstract

The objective of the paper is to analyse the legal framework and challenges in the recruitment and selection of the police officers in Montenegro. In the first section of the paper the author examines the international standards regarding recruitment and selection of the public sector employees, including the police officers, which serve as a benchmark for assessing the respective Montenegrin legal framework and its implementation. In the second part of the paper, the author analyses the relevant provisions of the Law on Internal Affairs and the Civil Service Law which refer to the recruitment and selection of the police officers. The author concludes that the current legal framework is not fully aligned with the international standards, especially since it prescribes the exceptions to carrying out of the public competition. Current challenges in the recruitment and selection process result in the low level of confidence of the public in its fairness. For these reasons, it is necessary to undertake measures to increase the merit in the recruitment and selection of the police officers and reduce secrecy and patronage.

Keywords: *police officers, recruitment and selection, public service, Montenegro.*

1. Introduction

Efficient human resource management in the police one of the preconditions for effective performance of the police duties in modern democracies.¹ Police officers carry out complex tasks related to maintaining public order, protecting and upholding fundamental human

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¹ Z. Vukašinić Radojičić, "Specifičnosti sistema službeničkih odnosa u policiji", *Pravni život* 10/2013, 335-347.

rights and freedoms, preventing and combating crime, as well as providing assistance and services to citizens. The police officers' performance and effectiveness in carrying out law enforcement and public order duties depend to a large extent upon the level of their professional knowledge, skills and attitudes. For these reasons, the area of human resources management in the police has been a subject of significant changes in a number of countries over the past decades, aiming to improve all human resources management aspects, including attraction and recruitment, professional development and training of police personnel.²

Montenegro is currently in the process of the EU accession, which, *inter alia*, requires strengthening of administrative capacities of the police.³ Montenegro needs to adopt and implement instruments from the Chapter 24 – Justice, Freedom and Security, which relate to the development and strengthening the capacities of the police. One of the requirements of the Chapter 24 is to create a reliable and professional police system that will be able to adapt to the EU and Schengen needs. Development of an effective human resource management system is one of the preconditions for achieving that goal.

This paper analyses one of the segments of the human resources management in the police of Montenegro – the process of recruitment and selection of the police officers. The first section of the paper examines the international standards regarding recruitment and selection of the public sector employees, including the police officers, which serve as a benchmark for assessing the respective Montenegrin legal framework and its implementation. In the second part of the paper, the relevant provisions of the Law on Internal Affairs and the Civil Service Law, which refer to the recruitment and selection of the police officers, are examined. The concluding section of the paper provides guidance on how to improve the current legal framework, as a basis for increasing the transparency and strengthening the merit and integrity of the recruitment and selection process of the police officers.

² J. Drew, T. Prenzler, "The Evolution of Human Resources Management in Policing", in: *The Fitzgerald Legacy: Reforming Public Life in Australia and Beyond* (eds. C. Lewis, J. Ransley, R. Homel.), Australian Academic press, 2010, 134-153.

³ The Police Directorate Strategy Development 2016-2020, Podgorica, December 2015.

2. International human resource management standards in the public service regarding recruitment and selection

The area of human resources management in the police is not, as such, subject to specific international standards. The way Governments around the world manage their human resources is considered to be an area of a national interest. The same holds true for the human resources management in the police, which is traditionally an organisation whose operation is shielded with a veil of secrecy. Nevertheless, there are several general international instruments which define the best international standards in the area of HRM in the public service, including the police organisations.

The key internationally accepted human resource management standard in the public administration is the principle of merit. The merit principle can broadly be defined as the setting up of a special public administration value system, based on professionalism, competence and integrity to pursue the public interest.⁴ The merit-based system represents a counterbalance to that of political loyalty, popularly known as the “patronage or the spoils system“, in which public administration posts are filled solely on the basis of political connections instead of professional merit.⁵

Several international instruments require the observance of the merit principle in the recruitment and selection of public servants, including the police officers. For example, the UN Convention against Corruption (2003) especially emphasizes the importance of merit and transparency in the recruitment process of public servants. In the similar vein, the Council of Europe’s Recommendation No. R (2000) 6 on the Status of Public Officials in Europe,⁶ stresses the need for the existence of legal framework concerning the status of public officials and recruitment and selection based on merit and fair and open competition. The Council

⁴ P. W. Ingraham, “Building Bridges over Troubled Waters: Merit as a Guide“, *Public Administration Review*, 2006, 486–495.

⁵ In the XIX century in the USA, the “spoils system“ was thought to be the best state administration system for a democratic society. The US President Jackson said: “in a country where services were created solely for the benefit of people, no individual is entitled to serve more than others.“ However, the spoils system gave rise to rampant corruption and abuse in the US federal administration system, and was therefore abandoned when the Pendleton Act was passed in 1883 due to a civil service reform movement. Cf. E. Pusić, *Nauka o upravi*, Školska knjiga, Zagreb 1973, 178–179.

⁶ The Council of Europe’s Recommendation No. R (2000) 6 of the Committee of Ministers to member states on the status of public officials in Europe, adopted by the Committee of Ministers on 24 February 2000 at the 699th meeting of the Ministers’ Deputies. The recommendation constitutes a follow up on the Parliamentary Assembly Recommendation 1303 (1996) which asked the Committee of Ministers to include the drawing-up of European legal instruments on the civil service and the Parliamentary Assembly Recommendation 1322 (1997) on civil service in an enlarged Europe.

of Europe's Code of Police Ethics⁷, *inter alia*, stresses the need that recruitment process of the police officers is based on the merit principle and that the selection of candidates should be based on objective criteria and testing procedure. The police personnel should be recruited on the basis of their personal qualifications and experience which is relevant to police operation and assignments.⁸ The Code also emphasises the need that the recruitment policy should aim at attracting candidates from various parts of the society: both men and women from different social groups, including ethnic minority groups, with the overall objective of making police personnel reflect the society they serve.⁹

Recruitment and selection in the police is not explicitly part of the EU *acquis communautaire*, but is governed by *soft acquis*, comprising shared standards of the EU member states and affecting indirectly the development of the national law.¹⁰ Though not legally binding, these standards have significant practical effects on the aspiring countries, given that the European Commission assesses their progress against such standards. To provide a more detailed elaboration of the EU Commission's human resource management requirements, in 2014 SIGMA/OECD¹¹ programme prepared a document entitled "Principles of Public Administration" in 2014.¹² One of the areas covered within the principles is the field of human resources management, which are relevant for public servants, including the police officers.¹³

⁷ European Code of Police Ethics, Recommendation No. (2001)10 adopted by the Committee of Ministers of the Council of Europe on 19 September 2001.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ M. Keune, „EU Enlargement and Social Standards – Exporting the European Social Model?“, *The European Union and the Social Dimension of Globalisation, How the EU Influences the World* (eds. J. Orbie, L. Tortell), Routledge, 2009, 52.

¹¹ Having recognized the importance of well-regulated and organized state administration for compliance with membership requirements in all sector areas, in 1992 EU and OECD founded SIGMA - *Support for Improvement in Governance and Management*. This programme aims at supporting public administration reform activities of (potential) EU candidate countries. SIGMA, largely financed through EU PHARE, represents one of the main European Commission's instruments for promoting the development of public administration capacity in Central and Eastern Europe, and providing technical assistance to candidate countries.

¹² SIGMA/OECD, *Principles of Public Administration*, OECD publishing, 2014.

¹³ SIGMA defines a concept of a public servant based on the European Court of Justice (ECJ) case 149/79 and European administrative law principles defined in SIGMA paper No. 27, 1999 and includes in this concept the following organisations: 1) ministries and administrative bodies reporting directly to the Government, Prime Minister or ministers, i.e. civil service strictly speaking, which includes the police organisations; 2) administrations of the Parliament, the President and the Prime Minister; 3) other administrative bodies at the level of central administration if they exercise public authority conferred by public law and are responsible for safeguarding the general interest of the state or other public bodies 4) independent constitutional bodies reporting directly to Parliament. Cf. SIGMA/OECD, *Principles of Public Administration*, OECD publishing, 2014, 42-43.

SIGMA requires that the recruitment and selection process, either external or internal and regardless of the category/class of public servant, is clearly based on merit, equal opportunity and open competition. It also requires that the law which governs the position of public servants be clearly establishes that any form of recruitment and selection not based on merit is considered legally invalid.¹⁴

In order to ensure impartiality, competition procedure needs to be implemented by recruitment and selection committees, operating independently from political influence. Members of these committees should possess solid understanding of the tasks performed in the advertised position, along with the skills and knowledge required for their performance.¹⁵ They also need to be trained on selection procedures in order to be able to implement them in a consistent and fair fashion.

Special attention is paid to senior, i.e. managerial civil servants. SIGMA requires that direct or indirect political influence on senior managerial positions be prevented. This should be achieved by including the senior managerial positions into the scope of public service and establishment of the clear criteria for recruiting persons to the senior managerial positions. The recruitment and selection process to the senior managerial positions, either external or internal, should be based on merit, equal opportunities and open competition. Finally, the termination of employment of public servants holding senior managerial positions should only be admissible in cases explicitly provided for, and under the procedural provision established in the law.¹⁶

3. Strategic and legal framework for recruitment and selection of the police officers in Montenegro

The recruitment and selection process in the police should be viewed within the broader strategic framework providing strategic guidelines for the development of the Montenegrin police. In that regard, particularly important are the following documents: the Public Administration Reform Strategy 2016-2020;¹⁷ the Montenegrin Fiscal Strategy 2017-2020;¹⁸ and the Human Resources Management Strategy of the Police Directorate for the period of 2019-2024 and Action plan for its implementation for

¹⁴ *Ibid.*, 48.

¹⁵ *Ibid.*

¹⁶ *Ibid.*, 50.

¹⁷ Government of Montenegro, Public Administration Reform Strategy 2016-2020.

¹⁸ Government of Montenegro, Fiscal Strategy of Montenegro 2017-2020.

2019-2020.¹⁹

The Public Administration Reform Strategy 2016-2020, apart from other priorities, sets out those relating to the management of human resources in the public administration system. The Strategy places particular importance on the need to improve the recruitment and professional development system. The Montenegro Fiscal Strategy for 2017- 2020, addresses the need to ensure more efficient public administration as an important factor leading to better business environment necessary for further investment and overall economic growth. The key challenge in this area is to make budget savings and optimize the number of public authorities and their employees, including the Police Administration.

In July 2018, the Government of Montenegro adopted the Public Administration Optimisation Plan 2018-2020,²⁰ which will also affect recruitment and selection in the police. This plan defines, *inter alia*, the following measures: restriction of recruitments under open-ended employment contracts in state authorities until 1 March 2019; ending fixed-term employments upon expiration of such term, without the possibility of extension, until 1 March 2019.

The most important document which provides a strategic guidance for all aspects of human resources management in the police, including the recruitment and selection process, is the Human Resources Management Strategy in the Police Directorate 2019-2024 with the Action Plan for its implementation for the period of 2019-2020. These documents were adopted by the Government only recently, in September 2018. One of the key objectives of the Strategy is to attract and recruit high quality candidates for the police job, as will be discussed in more detail in the course of the ensuing analysis.

The legal framework regarding recruitment and selection of police officers in Montenegro is currently regulated by two key pieces of legislation: the Law on Internal Affairs²¹ and the Law on Civil Servants and Employees (hereinafter Civil Service Law).²²

It should also be noted that over the past year, the Ministry of the Interior/the Police Directorate of Montenegro have been working on a new draft Law on Internal Affairs, which aims to improve the current legal framework governing human resource management in the police,

¹⁹ Government of Montenegro, Human Resources Management Strategy in the Police Directorate 2019-2024 and the Action Plan for its implementation for the period 2019-2020.

²⁰ Government of Montenegro, *Public Administration Optimisation Plan*, 2018-2020.

²¹ Law on Internal Affairs, *Official Gazette of Montenegro*, No. 44/12,36/13,1/15, 87/2018.

²² Law on Civil Servants and Employees (hereinafter CSL), *Official Gazette of Montenegro*, No. 2/18.

including the recruitment and selection issues. As the current legal text is only in the form of a draft, which is not publicly available, it, however, will not be analysed within this paper.

4. Assessment of the legal framework and the implementation challenges

The criteria for entering into employment into the police service, prescribed by the Law on Internal Affairs, are generally in line with the international standards. In addition to the general recruitment criteria regulated by the Civil Service Law,²³ the Article 85 of the Law of Internal Affairs requires a person to meet the following criteria in order to be recruited in the police service: 1) to have secondary school education (general or expert) as a minimum education requirement 2) to have special physical abilities 3) to be worthy to carry out police duties.²⁴ The Law specifies the term of “unworthiness to carry out the police duties” in the following manner: if a person has been convicted to a criminal offense of endangering public traffic on roads made under the influence of alcohol, drugs or other psychoactive substances; a person punished for an offense against public order and peace with elements of violence or another offense that makes him/her unworthy of carrying out internal affairs tasks; a person whose previous behaviour, habits or preferences indicate unreliability for doing these jobs.²⁵

The legal definition of the “unworthiness” of a candidate for a police officer, however, provides grounds for concern and discretion. The Law on Internal Affairs prescribes that the unworthiness of a police officer’s candidate is tested in accordance with a special act adopted by a minister,²⁶ i.e. the Rulebook on Establishing the Worthiness of Persons to Perform the Police Duties.²⁷ The provisions of this Rulebook are not, however, very comprehensive and do not provide clear criteria on how the “unworthiness” is to be measured. This poses a risk for discretion in the recruitment and selection process.

The Law on Internal Affairs also requires that during the recruitment and selection process special care be taken to ensure proportional

²³ Articles 36 of the CSL.

²⁴ Article 85, paragraph 1 of the Law on Internal Affairs.

²⁵ Article 85, paragraph 2 of the Law on Internal Affairs.

²⁶ Article 85, paragraph 3 of the Law on Internal Affairs.

²⁷ Rulebook on Establishing Worthiness of Persons to Perform the Police Duties, *Official Gazette of Montenegro* No. 44/23.

representation of the members of minority peoples and other minority national communities.²⁸ This provision is in line with the international standards, especially the earlier mentioned Code of the Police Ethics of the Council of Europe.

The key contentious issue regarding recruitment and selection is a possibility to recruit a person to a position of a police officer without a public competition, which clearly goes against the principle of merit. Namely, the paragraph 1 of the Article 86 of the Law on Internal Affairs stipulates that a public competition is a mandatory method of selection of police officers. Paragraph 2 of the same article, however, envisages exceptions to this rule. Public competition is not required for vacancies which are identified in the MoI/PA internal organisation and systematisation rulebook.²⁹

In spite of the fact that the number of positions exempted from the public competition is relatively small (3-5 % of the total number of posts in MoI/PA), these exceptions are not in line with the international standards. The current exceptions to the public competition allow the existing practice that the police officers from the Ministry of Interior or the Police Directorate can simply “approach” a candidate they consider suitable for a certain positions, without any prior selection or testing process. This opens wide possibilities for discretionary decisions and recruitment based on party or political connections instead of the merit principle. These exceptions are also contrary to the recruitment standards required by the SIGMA Principles of Public Administration or the CoE Code of Police Ethics.

It may, however, be argued that due to specificities of the police organisations and the nature of the police work, recruitment and selection for certain vacancies in the police (especially in the criminal department) do require competition procedures which are specifically tailored to the police needs. In the current legal set up, all vacancies which are advertised need to be filled in cooperation with the Human Resources Management Authority. For a certain types of positions, such as an undercover agent, or other criminal investigation officers, it may be more suitable that the competition procedure is carried out within the police organisation itself. These procedures, however, also need to be based on the principle of merit and transparency.

Let us now have a closer look at the open competition procedure for recruitment of police officers in case when exceptions do not apply.

²⁸ Article 86, paragraph 5 of the Law on Internal Affairs.

²⁹ Article 86, paragraph 4 of the Law on Internal Affairs.

This procedure is carried out in cooperation with the Human Resources Management Authority and is regulated in more detail by the provisions of the Civil Service Law³⁰, since it is applicable to all other civil service institutions in Montenegro.

Each recruitment and selection procedure is carried out by an *ad hoc* competition commission, which is composed of three members. One of the members of the competition committee is a representative of the Ministry of Interior/Police Directorate, who should, as a rule, be the head of an organisational unit in which the vacancy is filled; the second one is a representative of the HRMA; and the third member is an expert in the field.³¹ Although the composition of the competition commissions is generally in line with the SIGMA standards, in practice it is often the case that managers of organisational units (especially in the decentralised police units - security centres), often do not take part in these panels and usually meet their new recruit only after the recruitment process is finalised.

The selection process is regulated in more detail by a Decree³² and is carried out on the basis of the written test and the interview.³³ The written tests comprises the theoretical and the practical part. Only the candidates who obtain high scores on the theoretical and practical part of the written test are eligible to pass to the final stage of the selection process based on the structured interview. The rules for the selection process are fully in line with the international standards, but it is still difficult to assess their effectiveness in practice as they have only recently started to be implemented, in July 2018.

At the end of the selection process, the Human Resources Management Authority provides a police director with three shortlisted candidates (or more, if they have the same score) so that he/she can choose one from the list.³⁴ Although director, as a rule, must choose the highest-ranking candidate, he/she can also choose some other candidate from the list of successful candidates. Discretionary power of the police director to select any of the shortlisted candidates opens the door to patronage and politicisation.³⁵ In practice, decisions to recruit candidates other than those

³⁰ Articles 34-51 of the CSL.

³¹ Article 46, paragraph 3 of the CSL.

³² Decree on the Criteria and Methods on Carrying out Testing of Knowledge, Abilities, Competences and Skills for Work in State Authorities, *Official Gazette of Montenegro*, No. 50/2018 adopted on 20 July 2018.

³³ Article 5-15 of the Decree on the Criteria and Methods on Carrying out Testing of Knowledge, Abilities, Competences and Skills for Work in State Authorities.

³⁴ Article 47, paragraph 3 of the CSL.

³⁵ M. Milošević, "Upravljanje ljudskim resursima", in: *Procjena integriteta policije u Crnoj Gori* (ed. S. Muk), Institute Alternative, Podgorica 2016, 35.

with the highest score largely remain unexplained, resulting in problems during appeal and court procedures. These problems are expected to be resolved, at least to some extent in the future, as the new Civil Service Law requires mandatory conducting of the interview with all shortlisted candidates and mandatory justification for the appointment decision.³⁶

Finally, one of the most important ways to enter into employment in the police of Montenegro is to complete the Police Academy course of education. The Police Academy education is considered to be post-secondary vocational in the duration of two years. According to the Decision on the Establishment of the Public Institution – Vocational School “Police Academy”,³⁷ the Academy is founded as a post-secondary vocational school delivering vocational education programmes for which the Police Academy is licensed.

The Police Academy graduates, however, do not automatically enter into employment in the Police Administration after graduation. They, instead, have to either apply for a vacancy announcements of the Ministry of Interior/the Police Academy or can be admitted without a competition procedure. The latter possibility is possible if the vacancy for which they apply is marked in the Rulebook on Internal Organisation and Systematisation as “confidential”. This again opens up a wide leeway of discretion in the recruitment process.

The existing problems related to police officer recruitment are also reflected in a low level of public confidence in impartiality of the recruitment process. An opinion poll from September 2017³⁸ shows that many Montenegrin citizens believe the police selection and recruitment process takes place in the presence of bribery, through political and family and friends connections (Graph 1), regardless of the public competition being formally organised.

³⁶ Article 48, paragraph 4 of the CSL.

³⁷ Decision on Organisation of the Public Institution of Higher Vocational Education “The Police Academy”, *Official Gazette of Montenegro*, No. 40/2012.

³⁸ Pointpulse, “Report – The citizens’ opinion of the police, Results of the public opinion survey for Montenegro,” September, 2017.

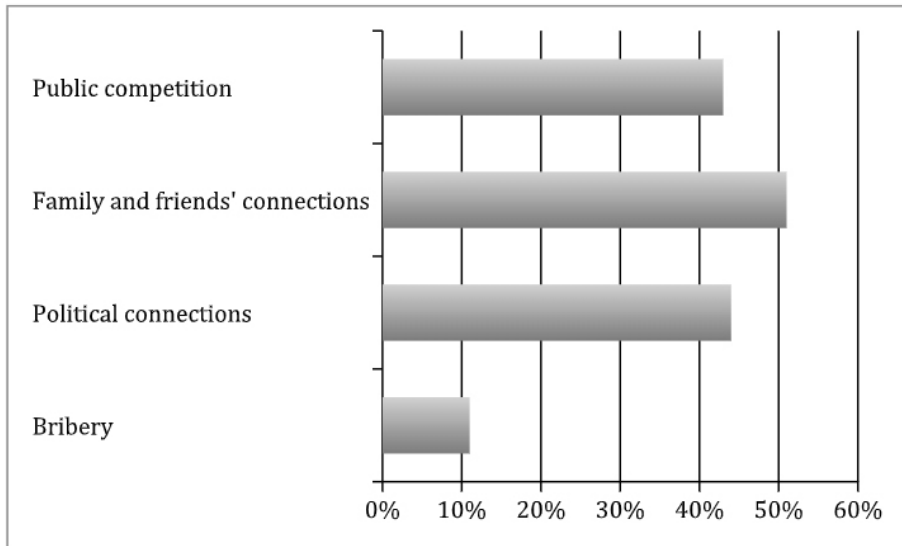


Figure 1. Citizen perception of how the Police Administration of Montenegro recruits its personnel³⁹

In the view of the existing general challenges related to human resource management activities in the police, the Government of Montenegro has recently adopted the Human Resources Management Strategy in the Police Directorate, which outlines recommendations for overcoming the current challenges in all HRM aspects, including the recruitment and selection of the police officers. The proposed strategic measures with respect to recruitment and selection include: 1) conducting a media campaign to attract desirable police job candidates, with emphasis on attracting women; 2) introducing an obligation of the Police Directorate to recruit persons who have graduated from the police education institution; 3) regulating, by a separate piece of legislation adopted by the minister, the filling of vacancies which are currently not advertised (to be advertised in accordance with a special procedure); 4) regulating in more detail the security vetting activities taken while selecting candidates.

The attainment of the objective is to be measured by two indicators which are defined in the following manner: 1) the number of police education graduates whose education was funded by the budget who are recruited by the Police Directorate (in percentages) - baseline value for

³⁹ *Ibid.*

2017 is 70%, while the target value for 2024 is 100%; and 2) percentage of the Police Directorate vacancies which are filled in compliance with the prescribed recruitment procedures; the baseline value for 2017 is 90 per cent, while the target value for 2024 is 100 per cent.

5. Recruitment and selection of senior officials in the Police

Senior police managers, including director and deputy director of the Police Administration, enjoy a special legal status. Under the Civil Service Law, the position of police director belongs to the “head of authority” category, while deputy directors fall under the “senior managerial staff” category.⁴⁰ Appointment and dismissal of both director and his/her deputy are regulated by the Civil Service Law.⁴¹

Requirements for the jobs of police director and deputy director are defined by the law, which is in line with the international standards. The minimum requirement for these positions, defined by the Law on Internal Affairs, are as follows: 1) for the police director - university education and 15 years of work experience, 5 of which in managerial positions in the police, court, prosecutor’s office or the National Security Agency.⁴² In the case of a deputy director, the minimum requirements include higher education and 10 years of work experience, 3 of which in managerial positions in the police, court, prosecutor’s office or the National Security Agency.⁴³ It may, however, be argued that these work experience requirements are quite broadly defined, as they do not include the previous work experience in the police. Opening up a possibility for so called “outsiders” from the police system to become managers of the police organisation may bring about a number of challenges and difficulties in practice, due to a lack of knowledge of the specificities of the work of the police organisation.

Applicants for the positions of a director and an assistant director are tested by a competition commission, formed by the Human Resource Management Authority, while the formal appointment decision is issued by the Government. The Government appoints the director and his/her assistants for a five-year term of office. Having tested the candidates for deputy director’s position, the HRMA supplies police director with the list of successful candidates. Once a director conducts interviews with

⁴⁰ Article 18 of the Civil Service Law.

⁴¹ Articles 56-59 of the Civil Service Law.

⁴² Article 9, paragraph 1 of the Law on Internal Affairs.

⁴³ Article 9, paragraph 6 of the Law on Internal Affairs.

all of them, he/she is required to propose one of them to the Government to make a formal appointment. In the case of selection of the Police Administration director, the HRMA is to provide such list to the minister of interior, who proposes the appointment of a prospective candidate to the Government.⁴⁴ In the case of recruitment of the police director, the Government is also obliged to nominate the proposal for the appointment to the Parliament of Montenegro for the purpose of providing an opinion on the perspective candidate(s).⁴⁵ The Assembly, after hearing in the competent working body, provides an opinion on the proposed candidate.⁴⁶

In practice, changes of the top police management personnel are quite frequent, which impedes the continuity of operation and adversely affects the performance of the police. Such frequent changes in the top management structure trigger replacement of the middle management (the so-called expert-management staff), who cannot be assigned to other appropriate posts, thus becoming “unassigned personnel”. The category of “unassigned personnel” includes the police officers who have been dismissed from their posts and have not been assigned to new duties, which means that they actually do not work, but continue to enjoy the employment benefits, such as regular pay, health and pension insurance. The mere existence of such a category of staff is a clear exemplary of the deficiencies and challenges of the current human resource management system which the Montenegrin police is currently facing and which yet need to be overcome.

6. Conclusion

The recruitment and selection of process of the police officers of Montenegro is faced with important challenges. Even though the basic prerequisites for applying the merit principle have been generally established through the existing legislative framework, the police still has to increase transparency and ensure merit in the recruitment and selection process. The police organisation, just like other public sector segments, is increasingly pressured to recruit officers enjoying appropriate political or other kind of support. This is partly the consequence of the economic crisis, which reduced employment opportunities in the private sector and left little choice to job seekers. The legislation in place, which makes it possible to get a job without

⁴⁴ Article 9, paragraph 2 of the Law on Internal Affairs.

⁴⁵ Article 9, paragraph 3 of the Law on Internal Affairs.

⁴⁶ Article 9, paragraph 4 of the Law on Internal Affairs.

a public competition process, provides a fertile ground to such practice.

The recently adopted HRM Strategy for the Police Administration has introduced several important strategic measures for improving the current situation in the recruitment and selection process in the police. One of the most important measures envisaged by the Strategy is the requirement that all vacancies should be filled on the basis of the competition, which is certainly the step in the right direction. Other strategic measures, such as for example, regulating the security vetting activities taken while selecting candidates in more detail are also expected to bring about improvements in this important area.

One of the key areas which, however, have been neglected by the Strategy is the need to reduce politicisation and increase fairness in the recruitment and selection of the senior police officials. In order to overcome this challenge it is advisable to introduce a more detailed appointment/nomination procedure for police director and deputy director, including stricter requirements in terms of years of experience that candidates for these positions must have. It would also be important to require from such candidates longer relevant police experience (for example the minimum of 15 years of police service), in order to be able to effectively respond to the day-to-day challenges of managing the police organisation.

Finally, if we want to substantively improve the recruitment and selection process in the police of Montenegro, changes of the strategic and legal framework will not be sufficient. The experience of the other transitional countries shows that internalisation of the merit principle in the public service is a slow and reversible process, which very much depends on the broader and political and social environment.⁴⁷ In order to achieve substantive improvements in this area, there is a need to build awareness of all key societal stakeholders, primarily politicians, that professional administration is the main factor to ensure implementation of the Government programs and assist them to win citizens' trust in the next elections. This process, however, depends on the pace of the democratization of the country, which requires time and patience.

⁴⁷ J.M. Sahling, "Sustainability of Civil Service Reforms in Central and Eastern Europe Five Years after EU Accession", *SIGMA paper 44*, 2009, GOV/SIGMA (2009)1, OECD/SIGMA publishing.

References

- Pusić, E., *Nauka o upravi [Administrative Science]*, Školska knjiga, Zagreb 1973.
- Vukašinović Radojičić Z., *Pravna pitanja službeničkih odnosa [Legal Civil Service Issues]*, edition monographs, book 5, Criminalistic-Police Academy, Belgrade, 2015.
- Drew, J., Prenzler, T., “The Evolution of Human Resources Management in Policing”, in: *The Fitzgerald Legacy: Reforming Public Life in Australia and Beyond* (eds. C. Lewis, J. Ransley, R. Homel), Australian Academic press, 2010, 134-153.
- Ingraham, P. W., “Building Bridges over Troubled Waters: Merit as a Guide“, *Public Administration Review*, 2006, 486–495.
- Keune, M., „EU Enlargement and Social Standards – Exporting the European Social Model?“, *The European Union and the Social Dimension of Globalisation, How the EU Influences the World* (eds. J. Orbie, L. Tortell), Routledge, 2009, 52.
- Milošević, M., “Upravljanje ljudskim resursima” [“Human Resources Management”], in: *Procjena integriteta policije u Crnoj Gori [Integrity Assessment of the Police in Montenegro]* (ed. S. Muk), Institute Alternative, Podgorica 2016, 35.
- Vukašinović Radojičić, Z., “Specifičnosti sistema službeničkih odnosa u policiji” [“Specificities of the Civil Service Relations in the Police”], *Pravni život* 10/2013, 335-347.

Legislative sources

- Law on Internal Affairs, *Official Gazette of Montenegro* No. 44/12,36/13,1/15, 87/18).
- Law on Civil Servants and State Employees, *Official Gazette of Montenegro* No. 2/2018.
- Law on Higher Education, *Official Gazette of Montenegro* No. 44/14, 52/14, 47/15, 40/16, 42/17.
- Decision on the establishment of the post-secondary vocational school “Police Academy” *Official Gazette of Montenegro* No. 40/2012.
- Rulebook on establishing worthiness of persons to perform police duties, *Official Gazette of Montenegro* No. 44/23.
- Decree on the Criteria and Methods on Carrying out Testing of Knowledge, Abilities, Competences and Skills for Work in State Authorities, *Official Gazette of Montenegro*, No. 50/2018 adopted on 20 July 2018.

European Code of Police Ethics (Recommendation (2001)10 adopted by the CoE Council of Ministers on 19 September 2001.

The Council of Europe's Recommendation No. R (2000) 6 of the Committee of Ministers to member states on the status of public officials in Europe, adopted by the Committee of Ministers on 24 February 2000 at the 699th meeting of the Ministers' Deputies.

SIGMA/OECD, *Principles of Public Administration*, 2014, OECD publishing.

Strategic and other documents

MoI of Montenegro, Police Administration Development Strategy 2016-2020, Action Plan for the Implementation of the Police Administration Development Strategy 2016-2017.

Government of Montenegro, Fiscal Strategy of Montenegro 2017-2020.

Government of Montenegro, Public Administration Reform Strategy 2018-2022.

Government of Montenegro, Public Administration Optimisation Plan 2019-2020.

Pointpulse, "Report – The citizens' opinion of the police, Results of the public opinion survey for Montenegro," September, 2017.

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IZAZOVI U POSTUPKU ZAPOŠLJAVANJA POLICIJSKIH SLUŽBENIKA U CRNOJ GORI

Rezime

Cilj rada je analiza pravnog okvira i prakse zapošljavanja policijskih službenika u Crnoj Gori. U prvom delu rada autor analizira međunarodne standarde koji se odnose na zapošljavanje javnih službenika, uključujući i policijske službenike, koji služe kao osnov za procenu pravnog okvira zapošljavanja policijskih službenika i njegove primene u Crnoj Gori. U drugom delu rada, autor analizira relevantne odredbe Zakona o unutrašnjim poslovima i Zakona o državnim službenicima i nameštenicima koji se odnose na zapošljavanje i selekciju policijskih službenika. Autor zaključuje da trenutni pravni okvir nije u potpunosti

usklađen sa međunarodnim standardima, posebno zbog toga što predviđa izuzetke od sprovođenja javnog konkursa. Trenutni izazovi u procesu zapošljavanja policijskih službenika kao posledicu imaju i nizak stepen poverenja javnosti u pravičnost ovog procesa. Iz svih pomenutih razloga, neophodno je preduzeti mere na unapređenju pravnog okvira koji reguliše zapošljavanje, kao osnove za primenu principa profesionalnih sposobnosti pri zapošljavanju policijskih službenika.

Ključne reči: policijski službenici, zapošljavanje, javna služba, Crna Gora.

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Review scientific paper
UDC: 343.346(497.1)
doi: 10.5937/spz0-20365

THE SUBJECT MATTER OF ENDANGERING ROAD TRAFFIC IN THE CRIMINAL LEGISLATION SYSTEMS OF THE FORMER YUGOSLAV REPUBLICS

Abstract

This paper gives an analogous analysis of the legislations of the former Yugoslavia republics (Serbia, Croatia, Slovenia, Montenegro, Bosnia-Herzegovina and Macedonia) regarding criminal offenses against road traffic safety. The similarities and differences with the law of the Republic of Serbia, which is the result of a common legal tradition, were highlighted. The similarities and differences were examined with the case of the criminal offense of endangering road traffic taken into consideration, one which is prescribed in all analyzed legislation systems and the one most commonly reported in practice. Legislative solutions related to the prescribed sanctions (penalties and security measures) were also compared. Based on a comparative analysis, the author proposes amendments to the existing legislation of the Republic of Serbia by foreseeing serious bodily injury of the participants in traffic as an objective condition of the penalty.

Keywords: *criminal offense, endangering road traffic, foreign legislation, penalties, security measures.*

1. Introduction

The number of traffic accidents worldwide increases every year. Earlier mortality data shows that “one million more of deaths from injuries occurred in 2010 (5.1 million) than two decades earlier, with a total increase of 24%”¹. At the same time, 20 to 50 million people were

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injured, while the economic costs of the consequences of such traffic accidents can be counted in billions of dollars.² According to 2011 World Health Organization (WHO) indicators, are predicting that by 2030, traffic accidents with fatalities will become the 5th leading cause of death, with a markedly pronounced difference in high and low income countries, unless certain measures and actions are taken to provide prevention in road traffic. The WHO proclaimed decade of 2011-2020 as an Action for *Road Safety*. According to the current WHO data about road safety, every year in road traffic accidents (predominantly in low- and middle-income countries), approximately 1.35 million people die, whereas between 20 and 50 million more suffer non-fatal injuries³.

In Europe it is generally a low death rate in traffic accidents, but WHO data from 2018 show that death rate in road traffic accidents is significant in countries, especially from former Socialist Federative Republic of Yugoslavia (Serbia, Croatia, Bosnia and Herzegovina, Montenegro, Macedonia and Slovenia) and varies from 6.3 (Slovenia, Macedonia) up to 15.7 (Bosnia and Hercegovina)⁴. All six former Yugoslav republics that became independent states after the breakdown of the former Socialist Federal Republic of Yugoslavia (hereinafter: Yugoslavia) are centered in an area of some of the most important European routes: Corridor 10 - passing through Slovenia, Croatia, Serbia and Macedonia, a road and rail between Salzburg (Austria) and Thessaloniki (Greece); Corridor 5 – passing through Slovenia, the route from Venice (Italy) to Lvov (Ukraine), while some of the branches of that road or railway networks pass through Croatia and Bosnia, as well; Corridor 7 - the Danube waterway that passes through Croatia and Serbia on the route from Schwarzwald (Germany) to Constanta (Romania); and Corridor 8, which is a road and rail network from Bari (Italy) on its way to Varna (Bulgaria) passing through Macedonia.⁵ The amount of traffic on these roads undoubtedly affects the frequent occurrence of road traffic accidents involving both locals and foreigners. Therefore, the question arises - whether the laws of the mentioned countries regulate criminal offenses against road traffic safety and whether there are differences that would affect unequal criminality of potential offenders. The base of the comparative analysis is

² G. Jacobs, A. Aeron-Thomas, A. Astrop, Estimating global road fatalities, Crowthorne (TRL Report 445), 2012, 9-11, <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.174.5207&rep=rep1&type=pdf>.

³ WHO, Road Traffic Injuries, 2018, <https://www.who.int/news-room/fact-sheets/detail/road-traffic-injuries>.

⁴ WHO, Road Traffic Injuries, Table A2, Road Traffic Deaths (Country List), 2018, https://www.who.int/violence_injury_prevention/road_safety_status/2018/Table_A2_Road_Traffic_Deaths.pdf?ua=1.

⁵ Pan-European corridors, <http://www.pks.rs/e-learning/fiata/osnove/geografija/koridor.htm>, last accessed on December 10, 2018.

the criminal offense of endangering road traffic, which is prescribed in all the above mentioned legislations and the one that oftenest occurs in practice.

2. Historical review

Traffic-related offenses were first written in the Criminal Code of the Kingdom of Yugoslavia⁶ on January 27, 1929, and were applied to the entire area of the common state to which Serbia belonged to from January 1, 1930. Criminal acts against traffic were classified together with criminal offenses against the safety of people and property in a single Chapter 18 entitled: Criminal offenses against the road traffic safety for people, property and newspapers (par. 204 to 213). These were related to two separate offenses: endangering traffic safety on the streets, roads or squares (par. 204) and endangering the safety of other types of traffic (par. 206): railway, tram, air and maritime traffic. Both criminal offenses had qualifying forms envisaged in par. 205 and 207. The qualified circumstances were related to the severity of the consequences (endangering a large number of persons or the occurrence of significant consequences - serious body harm or death). The Code foresaw that the crimes committed in traffic out of intent and that of negligence could be held as accountable.

All subsequent criminal laws that were applied on the territory of Yugoslavia in the period after the World War II, first of all federal and then the republic and provincial, regulated similarly the area of traffic crimes. It is interesting to note that in older laws, criminal offenses against road traffic safety were foreseen in the same section as criminal charges against the general safety of people and property and only later were the criminal offenses against road traffic safety separated into a different group.

The first codification mentioning criminal offenses against road traffic safety is the FNRJ Criminal Code from 1951 (hereinafter: CC 51),⁷ which was applied on the territory of Yugoslavia from July 1, 1951 to 1977, with amendments to the legal text. Criminal offenses against the safety of public transport were prescribed in Chapter XXI in the chapter criminal offenses against the general safety of people and property (Art. 268-278). Furthermore,

⁶ Krivični Zakonik Kraljevine Jugoslavije [The Criminal Code of the Kingdom of Yugoslavia], *Službene novine Kraljevine Jugoslavije*[Official Gazette of the Kingdom of Yugoslavia], no. 33 dated Feb. 9, 1929 with amendments in no. 295 dated Dec. 24, 1930 and no. 245 dated Oct. 20, 1931. The Code provision commentary in: M. Čubinski, *Naučni i praktični komentar Krivičnog zakonika Kraljevine Jugoslavije*, [Scientific and practical commentary of the Criminal Code of the Kingdom of Yugoslavia], Geca Kon, Beograd 1934, 370-374.

⁷ Krivični zakon FNRJ [Criminal Code of FRY], *Off. Gazette of the FNRJ*, no. 13/51, 31/59, 11/62, 37/62, Krivični zakon SFRJ [Criminal Code of SFRY], *Off. Gazette of the SFRY*, 15/65, 15/67, 20/69 and 11/73.

that group contained four criminal acts pertaining to road traffic safety. From that number, three crimes were related exclusively to road traffic safety and were passed into later criminal codes under the same name. These are the following: endangering public traffic (Art. 271), lack of proper supervision over road traffic (Art. 272), and dangerous transportation of explosives or inflammable materials (Article 274). The fourth crime is related to traffic safety, but it had a dependent character, since at the same time it included some of the most difficult forms of criminal offenses from this group and from the group against general security; namely, these are crimes against general security (Art. 271). Later laws also adopted the practice of a legal-technical separation of crimes against road traffic into a special chapter. For criminal offenses against road traffic safety, the perpetrator could have a penalty imposed with the driving license being revoked, as envisaged in Art. 61c.

According to Art. 271, par. 1 of the CC 51, only a driver of a motor vehicle could carry out the crime of endangering road traffic, or as the disposition of the said article read: “Whoever endangers road traffic on bridges and streets with dangerous or erratic driving thereby endangers people’s lives or property on a large scale.” Despite the fact that the disposition suggests that this is a *delictum communium*, the prescribed enforcement suggests that only certain categories of road users can commit this crime, such as drivers of motor vehicles, rigs and cyclists.⁸

Since 1977, there had been a duality in the regulations of criminal legislation. At the same time, federal and republic or provincial criminal laws were applied simultaneously. The SFRY Criminal Code, which was enacted in 1976 and entered into force on July 1, 1977 (hereinafter: SFRY CC), regulated general institutes of substantive criminal law and certain criminal offenses within the jurisdiction of federal institutions. For traffic crimes, it is significant that Art. 68 of the CC of the SFRY prescribed a ban on driving a motor vehicle, while crimes against air traffic safety were envisaged in a separate chapter, as SFRY was a signatory to international treaties dealing with these matters. In the later Federal Republic of Yugoslavia, the provisions of that federal law were contained in the so-called Basic Criminal Code⁹ (hereinafter: BCC). With the independence of the Republic of Serbia, all these matters, together with other content of the Criminal Code (hereinafter: CC), have been consolidated in the Criminal Code passed in 2005.

⁸ B. Nešković, “Krivična dela protiv bezbednosti javnog saobraćaja – Neka zapažanja i neka sporna pitanja”, *Sudska praksa*, 3/1996, 58.

⁹ Osnovni krivični zakon [The Basic Criminal Code], *Sl. list SR Jugoslavije* [Off. Gazette of the SRY] no. 35/92, 16/93, 31/93, 37/93, 24/94 and 61/01, *Sl. glasnik R Srbije*, [Off. Gazette of the RS], no. 39/03.

The former republic's criminal codes passed in 1977 regulated crimes against road traffic safety on roads, railroads, ships or cable car traffic. In Serbia, they were regulated by the Criminal Code of the SR of Serbia,¹⁰ which was passed on June 30, 1977, and came into force on July 1, 1977, to be later applied as the Criminal Code of the Republic of Serbia. Criminal offenses against road traffic safety were prescribed in the Criminal Code in Chapter 18 as a special group of criminal offenses. After the criminal offense of endangering road traffic due to a stupor (Art. 196) was deleted from the Criminal Code by changes in the criminal law from 1994 to date, the systematics, number and names of criminal offenses in the road traffic safety group were not substantially changed, except that the offenses against air traffic safety were added to the group of criminal offenses against road traffic safety in 2005.

3. Road traffic violations in the legislation of Serbia, Croatia, Bosnia and Herzegovina, Montenegro, Macedonia and Slovenia

All criminal legislations of the mentioned states from the territory of the former Yugoslavia contain special chapters that refer to a group of criminal offenses against road traffic safety. The comparative analysis is based on two criminal offenses: endangering road traffic and a crime against road traffic safety, as they are the most frequent offenses that occur in the practice of competent police authorities, public prosecutors and courts. The analysis of new legal solutions should show how the legal descriptions of criminal offence endangering road traffic are transformed. New legislatives, according to Dežman, have "inherited" many theoretical and practical dilemmas which were arising from the common legal tradition of the former Yugoslav state¹¹.

3.1. Serbia

The Criminal Code of the Republic of Serbia (hereinafter: CC)¹² contains in a separate section in Chapter XXVI Criminal Offenses Against Road Traffic Safety, a total of 9 criminal offenses, five of which are related

¹⁰ Krivični zakon R Srbije [Criminal law of the Republic of Serbia], *Sl. glasnik SR Srbije [Off. Gazette of the SR Serbia]*, no. 26/77, 28/77, 43/77, 20/79, 24/84, 39/86, 51/87, 6/89, 42/89, 21/90, *Sl. glasnik R Srbije [Off. Gazette of RS]*, no. 16/90, 49/92, 23/93, 67/93, 47/94, 17/95, 44/98, 10/02, 11/02, 80/02, 39/03 and 67/03.

¹¹ Z. Dežman, „Kaznenopravna zaštita cestovnog prometa prema KZ Slovenije i KZ Hrvatske“, *Hrvatski ljetopis za kazneno pravo i praksu*, vol. 21, 1/2014, 137.

¹² Krivični zakonik R Srbije [Criminal Code of the Republic of Serbia], *Sl. glasnik RS [Off. Gazette of the Republic of Serbia]* no. 85/05, 88/05, 107/05, 72/09, 111/2009, 121/12, 104/13, 108/14 and 94/16. Zakon o bezbednosti saobraćaja na putevima [Zakon o Law on Road Traffic Safety], *Sl. glasnik RS [Off. Gazette of the Republic of Serbia]*, no. 41/09, 53/10, 101/11, 32/13, 55/14, 96/15, 9/16, 24/18.

to road traffic. These are the following crimes: endangering road traffic (Art. 299 CC), endangering traffic by reckless driving and dangerous means (Art. 290 CC), lack of proper supervision over road traffic (Art. 295 CC), failure to provide assistance to persons injured in road accidents (Art. 296 CC) and the crime against road traffic safety (Art. 297 CC). Other crimes in this chapter are related to air or maritime traffic.

The practice of the basic form of the criminal offense of endangering road traffic referred to in Art. 299, par. 1 of the CC consists of a failure to comply with traffic regulations. This is defined as any action by traffic participants that is contrary to the regulations governing road traffic and which in turn endangers road traffic safety so that the lives of people or property on a large scale are at risk. The disposition is a blanket rule, so that the existence of a crime in a specific case depends on numerous regulations governing road traffic. The most important is the Law on Traffic Safety (hereinafter: LTS)¹³ with accompanying by-laws.

The individual, i.e. the perpetrator of a crime that endangers road traffic is an objectively important feature of the crime, as the crime can be perpetrated only by a traffic participant. A traffic participant is a person who takes part in traffic in any way (Art. 7, par. 67 LTS). In the case of crimes of endangering road traffic, the definition of the traffic participant is not only reserved for a driver, but also includes other categories of participants, as well as pedestrians.

The consequence of formulation of the basic form of crime is that the endangerment to road traffic is a concrete danger to the lives of people or property on a large scale. The criminal act of endangering public traffic can be done with intent and out of negligence.

In order for the behavior that corresponds to the description of the criminal offense referred to in Art. 279 to be punishable, it is necessary that the condition of punishment is fulfilled (objective condition of incrimination). Therefore, the condition is that the act of dangerous driving by traffic participants has caused property damage exceeding the amount of two hundred thousand dinars or a slight body injury.

Qualified forms of the criminal offense of endangering road traffic safety and all other criminal offenses from Chapter XXVI are prescribed in Art. 297 of the CC, titled: Severe acts against road traffic safety. The aforementioned criminal offense includes the most severe forms of the mentioned crimes with serious body injuries, death of a person or property damage on a large scale. According to the still valid legal understanding of the Criminal Department

¹³ Zakon o bezbednosti saobraćaja na putevima [Law on Road Traffic Safety], *Službeni glasnik RS [Off. Gazette of the RS]*, no. 41/09, 53/10, 101/11, 32/13, 55/14, 96/15, 9/16, 24/18,

of the Supreme Court of Serbia (VSS), there is property damage on a large scale in certain forms of this criminal offense - from par. 1 and 3 when the damage exceeds the amount of 6,000,000 dinars.¹⁴ In all forms of criminal offenses, the safety measure is the banning of the offender from driving a motor vehicle for the crime against road traffic safety.

3.2. Macedonia

The Criminal Code of the Republic of Macedonia (hereinafter: CCRM)¹⁵ in a separate section in Chapter XXVII dealing with criminal offenses against road traffic safety contains a total of 8 criminal offenses, five of which refer to road traffic.

These are: endangering road traffic (Art. 297 CCRM), endangering traffic by reckless driving and transportation of dangerous goods (Art. 298 CCRM), lack of supervision over road traffic (Art. 299 CCM), failure to provide assistance to persons injured in a road traffic accident (Art. 301 CCM) and crime against road traffic safety (Art. 300 CCM). The other criminal offenses from this chapter in the CCRM relate to air or maritime traffic. The provisions of the CCRM relating to the criminal offense of endangering road traffic (Art. 297 CCRM), or a severe crime against road traffic safety (Art. 300 CCM), are the same as those in the CC, except that the provisions relating to the criminal offense of endangering road traffic do not lay out a fine for damage as an objective condition of incrimination.

From CCRM in 2004 the prohibition of driving a motor vehicle has been categorized as punishment, and not as security measure as in the most of analyzed legislations¹⁶. Prohibition of driving a motor vehicle is an additional penalty. This punishment may be imposed if the offender has been sentenced to imprisonment or a fine has been imposed, or a suspended sentence or judicial remedy. The ban of driving a motor vehicle can be imposed on the offenders for a period from three months to five years, and can also be imposed as a single penalty for the perpetrator of negligence for which a fine or imprisonment of up to one year is prescribed if the offense has been committed under particularly mitigating circumstances.

¹⁴ The legal opinion adopted at the session of the Criminal Department of the Supreme Court of Serbia on April 17, 2006, *Court practice Bulletins of the Supreme Court of Serbia*, 2006, no.1 and 2008, no. 4.

¹⁵ Krivičen zakonik na R. Makedonija [Criminal law of Macedonia], *Služben vesnik na Republika Makedonija*, [Off. Gazette of the Republic of Macedonia], no. 37/96, 80/99, 4/02, 43/03, 19/04, 81/05, 60/06, 73/06, 7/08, 139/08, 114/09, 51/11, 135/11, 185/11, 142/12, 166/12 and 55/13.

¹⁶ Kambovski says that this way has reduced the scope of the legislative maneuver to sanctions that have a punitive character as security measures. V. Kambovski, *Kazneno pravo, opšt del*, Kultura, Skopje 2005, 820.

When the offender is a professional driver, duration of the sentence may not be less than one year nor more than ten years. The court will be obliged to impose the said sentence if the offender committed the criminal offense of endangering road traffic under the influence of alcohol. When imposing a suspended sentence, the court may order that the conviction can be revoked if the offender violates the ban on driving a motor vehicle. Also, the ban can be set if the court has imposed a safety measure of compulsory psychiatric treatment and custody in a health institution, or at liberty for the offender.

3.3. Montenegro

The Criminal Code of Montenegro (hereinafter: CCMN)¹⁷ in a separate section in Chapter XXVII entitled “Crimes against road traffic safety” contains a total of 10 criminal offenses, out of which 5 are related to road traffic. All these offenses correspond to the criminal offenses according to their respective crimes from the Criminal Code of the Republic of Serbia. These are: endangering road traffic (Art. 339 CCMN), endangering traffic by reckless driving and transportation of dangerous goods (Art. 340 CCMN), lack of proper supervision over road traffic (Art. 346 CCMN), failure to provide assistance to injured persons in a road accident (Art. 347 CCMN) and severe crimes against road traffic safety (Art. 388 CCMN). Other crimes in this chapter are related to air or maritime traffic.

The CCMN, within the framework of the provisions of the general part, provides the safety measure of a ban on driving a motor vehicle, which can be imposed on the offender optionally, for a period from three months up to five years. It is worth mentioning that the possibility of a permanent safety measure is foreseen in the following case: if the crime resulted in one or more traffic fatality, in the case that the offender has already been banned from driving. In addition, the ban on driving a motor vehicle may be imposed on offenders and punishable by imprisonment, fines, suspended sentence, judicial warning or the perpetrator can be free from punishment. If a perpetrator has been convicted with a suspended sentence, there is the possibility of revocation if the perpetrator violates the ban on driving a motor vehicle.

¹⁷ Krivični zakonik Republike Crne Gore [Criminal Code of R of Montenegro], *Sl. list RCG [Off. Gazette of the Republic Montenegro - MN]*, no. 70/03, 13/04, 47/06, *Sl. list CG [Off. Gazette of MN]*, no. 40/08, 25/10, 32/11, 64/11, 40/13, 56/13, 14/15, 42/15, 58/15, 44/17 and 49/18.

New solutions from the CCMN could be inspirational for the legislators of the Republic of Serbia. For example, in the legal formulation of a criminal offense, the endangerment to road traffic (Art. 339, par. 1) and all other criminal offenses in this group, there is a precise laying out of the objective requirement of incrimination, thus the need for interpretation of legal standards ceases. Thus, in Art. 339, par. 1, CCMN foresees that the act will be punishable if the damage to property exceeds the amount of 20,000 EUR, and in the case of a severe crime against the safety of road traffic referred to in Art. 348, par. 1 and 3, damage should exceed the amount of 40,000 EUR.

3.4. Bosnia and Herzegovina

The most complex legal system in relation to the others analyzed in this paper is one of the Republic of Bosnia and Herzegovina, in which there are four legal sub-systems: the legislation of Bosnia and Herzegovina, Republika Srpska, the Federation of Bosnia and Herzegovina and Brčko District. In each of these subsystems there is a special Criminal Code or Criminal Procedure Code.

Bosnia and Herzegovina, as a state consists of two entities and one district. It has Criminal Code (hereinafter: CCBH),¹⁸ but separate provisions fail to lay out criminal offenses against road traffic. The only provision concerns the definition of the term ‘means of transport’ in Art. 1, par. 27. A means of transport shall be understood as “any vessel, vehicle and aircraft, as well as any other means which may be used for transport on land, water or air transport, regardless of type of operation.”

3.4.1. Federation of Bosnia-Herzegovina

The Criminal Code of the Federation of Bosnia-Herzegovina (CCFBH)¹⁹ in a separate section in Chapter XXVIII “Criminal offenses against road traffic safety” contains a total of 6 criminal offenses that are all related to road traffic safety. These are crimes that, by their names but also legal descriptions correspond to individual crimes from the Criminal Code of the Republic of Serbia. This relates to the following crimes:

¹⁸ Krivični zakon Bosne i Hercegovine [Criminal Code of Bosnia-Herzegovina], *Službeni glasnik BiH [Off. Gazette of B-H]*, no. 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 56/06, 32/07, 8/10, 47/14, 22/15, 40/15 and 35/18.

¹⁹ Krivični zakon Federacije BiH [Criminal Code of B-H Federation], *Službene novine FBiH [Of. Gazette of FBH]*, no. 36/03, 37/03, 21/04, 69/04, 18/05, 42/10, 42/11, 59/14 and 76/14.

endangering road traffic (Art. 322 CCFBH), endangering road traffic by reckless driving (Art. 334 CCFBH), lack of proper supervision over road traffic (Art. 355 CCFBH), severe crimes against road traffic safety (Art. 366 CC FBH) and failure to provide assistance to persons injured in road traffic accidents (Art. 377 CCFBH). The only criminal offense that does not exist in the Criminal Code of the RS is the criminal offense of endangering public traffic due to stupor (Art. 333 CCFBH).

The framework of the criminal offense of endangering road traffic (Art. 332) regulates the improper traffic behavior of those who fail to comply with traffic regulations, thus endangering road traffic and the lives of people or property on a larger scale and therefore, property damage over 5,000 KM, regardless of whether the offense was committed with intent or out of negligence. The provision relating to severe crimes against road traffic safety (Art. 336) regulates the qualified forms of this criminal offense. They exist if, in the course of committing a danger to road traffic referred to in Art. 332 (as well as others from Chapter XXVIII of the CCFBH), property damage on a large scale has been caused, or serious body injury of a person or one or more fatalities carried out with intent or out of negligence.

One of the security measures that can be imposed on the offender of these crimes is a ban on driving a motor vehicle, which in 2010 suffered a change of name and is now called the ban of managing a vehicle. It is carried out optionally for a period from three months to five years. The offender may be sentenced to imprisonment (in place of community service not fully implemented within a specified time limit) or a suspended sentence (with the possibility of revocation if the perpetrator violates the ban on driving a vehicle).

3.4.2. Republic of Srpska

The Criminal Code of the Republic of Srpska (hereinafter: the CCRSr)²⁰ contains criminal offenses against road traffic in Chapter XXXI. All five legal descriptions of criminal offenses are related to road traffic: endangering road traffic safety (Art. 402 CCRSr), endangering specific types of traffic (Art. 403 CCRSr), endangering road traffic by reckless driving or by using dangerous means (Art. 404 CCRSr), lack of proper supervision over road traffic (Art. 405 CCRSr), failing to assist

²⁰ Krivični zakonik R Srpske [Criminal Code of R Srpska], *Službeni glasnik Republike Srpske [Off. Gazette of Republika Srpska]*, no. 64/2017.

persons injured in road traffic accidents (Art. 406 CCRSr). The names of all criminal offenses and their legal descriptions are similar to the existing ones in the legal system of Republic of Serbia. The criminal offense of endangering road traffic (Art. 402) is perpetrated by a road user who fails to comply with traffic regulations and poses an imminent danger to people or property on a large scale. Punishment is imposed only when the unlawful act has caused serious body injury to another person. A criminal act can be carried out with intent or out of negligence.

The new 2017 Criminal Code of Republika Srpska brought enormous novelties in relation to the former Criminal Code of Republika Srpska (hereinafter: the old CC of RSr)²¹ which was in force until the new CCRSr entered into force. First of all, the ban on driving a motor vehicle was changed from a security measure to a sentence. In fact, it can only be pronounced as a secondary sentence together with a prison sentence, a fine and a suspended sentence. The said secondary sentence can be imposed for a period of six months to five years (a longer period than previously). If the result was one or more fatalities, a secondary penalty for driving a motor vehicle may be imposed for a period of one to eight years. Similar to the solution in the Republic of Serbia's Criminal Code, the consequences of the violation of the ban on driving a motor vehicle are prescribed in the event that the accused drove a motor vehicle while the ban was enforced; the court is authorized to replace it with a ban of six months for every month of imprisonment.

In the legal description of the criminal offense of endangering road traffic (Art. 402, par. 1) there was a lack of the objective condition of incrimination in the form of the amount of property damage caused and serious body injury is prescribed as an objective incident of incrimination. A novelty is also the provision from par. 2 of Art. 402 which prescribes a severe crime in the case that the offender was under the influence of alcohol (over 1.50g/kg of alcohol in the blood) or narcotics during the criminal act of endangering road traffic safety, or driving 50 km/h over the speed limit. This severe crime is penalized, along with a sentence of imprisonment, with a mandatory penalty. Mandatory punishment by a penalty is also prescribed for those severe crimes when reckless driving resulted in one or more fatalities, regardless of whether the offense was committed with intent or out of negligence.

²¹ Krivični zakonik R Srpske [Criminal Code of R Srpska], *Službeni glasnik Republike Srpske* [Off. Gazette of Republika Srpska], no. 49/03, 108/04, 37/06, 70/06, 73/10, 1/12 and 67/13-Art. 410.

3.4.3. Brčko District

The Criminal Code of Brčko District (hereinafter: CCBD)²² regulates criminal acts against road traffic safety in Chapter 28. Six offenses have been prescribed, which, according to their names and legal descriptions, correspond to certain crimes from the Criminal Code of the Republic of Serbia. Thus, the following criminal offenses are laid out: endangering road traffic (Art. 326), endangering road traffic by reckless driving (Art. 328), lack of proper supervision over road traffic (Art. 329), severe criminal offenses against road traffic safety (Art. 330) and failure to provide assistance to persons injured in road traffic accidents (Art. 331). Similarly to the CCBH, the Criminal Code of BD also lays out a criminal offense that does not exist in the Criminal Code, namely, the criminal offense of endangering road traffic due to stupor (Art. 327). The criminal offense of endangering road traffic (Art. 326) is regulated in the same way as in the legislation of the Republic of Serbia and involves the unlawful behavior of road traffic participants. The following is necessary for it to be qualified as a criminal offense: consequences of the criminal offense (endangering lives of people or property on a large scale) and fulfillment of the objective condition of punishment - the emergence of further consequences in the event of an injury (property damage exceeding 5,000 KM or serious bodily harm). The offender is responsible regardless of whether they had acted with intent or out of negligence.

Legal-technical solutions similar to those in the former Yugoslav legislation were adopted by the CCBD: in particular, qualified forms of criminal offenses in the field of road traffic were regulated by the provision called severe crimes against road traffic safety (Art. 330), in a special way. The first severe form exists if it involves a criminal offense of endangering road traffic from Art. 326, par. 1 causing damage to property on a large scale, but the form referred to in par. 2 of the same article and other criminal offenses from the group against traffic safety requires the causing of serious body harm to a person. The severe forms exist if there is a qualifying circumstance in the form of one or more fatalities. Criminal offenses can be committed with intent or out of negligence.

The CCBD provides the safety measure of a ban on driving a motor vehicle. The measure is optional for the offender and may

²² Krivični zakon Brčko Distrikta Bosne i Hercegovine [Criminal Code of Brčko District in Bosnia-Herzegovina], Službeni glasnik Brčko Distrikta Bosne i Hercegovine [*Off. Gazette of Brčko District in B-H*], no. 10/03, 6/05, 21/10 and 9/13, 33/13, 26/16, 33/17, 50/18.

last from three months to five years (as in the Republic of Serbia). In addition, the underlined security measure may be imposed on offenders and punishable by a prison sentence (replacing a non-executed community service) or a suspended sentence, which may be revoked if the punishment violates the ban on driving a motor vehicle. It is shown that the three aforementioned laws in Bosnia-Herzegovina have adopted various formulations of the criminal offense of endangering road traffic safety, especially with regard to the objective conditions of punishment. Moreover, in the Brčko District and the Federation of Bosnia-Herzegovina, the criminal offense of endangering road traffic entails a traffic participant who, by unlawful conduct, has caused property damage exceeding the amount of KM 5,000 (Art. 326, p. 1 CCBD, CCBH and Art. 1 CCBH), while in the Republic of Srpska only the unlawful behavior in traffic which causes serious body harm to a person (Art. 410, p. 1 CCRSr) is punishable. The existence of differences leads to the citizens of Bosnia-Herzegovina having an unequal status.

3.5. Croatia

In 2011, a new Penal Code of the Republic of Croatia (hereinafter: CCRC) was adopted and entered into the force on January 1, 2013.²³ Unlike the previous Criminal Code (the old CC of Croatia),²⁴ in which systematics on the basis of the former Yugoslav legislation was abandoned, the criminal offenses against road traffic safety were classified in the general Chapter 20, which was entitled “Criminal offenses against general human security and property and traffic safety,” a separate Chapter 22 was created in the new CC of the Republic of Croatia. This chapter classifies criminal offenses against road traffic safety. Out of the total of five criminal offenses, three legal descriptions refer to criminal offenses against road traffic safety, such as the following: endangering road traffic by reckless driving or dangerous means (Art. 224), irresponsible driving (Art. 226) and causing an accident in road traffic (Art. 277).

Causing an accident in road traffic (Art. 227), in addition to the changed name, essentially contains a legal description that corresponds to the previous criminal element of endangering road traffic (Art. 272 from

²³ Kazneni zakon R Hrvatske [Criminal Code of R Croatia], *Narodne novine* [Off. Gazette of Republic Croatia], no. 125/11, 144/12, 56/15, 61/15 i 101/17.

²⁴ Kazneni zakon R Hrvatske [Criminal Code of R Croatia], *Narodne novine* [Off. Gazette of Republic Croatia], no. 110/97, 27/98, 40/00, 129/00, 51/01, 111/03, 190/03, 105/04, 84/05, 71/06, 110/07, 152/08 and 57/11.

the old CCC). A criminal offense is defined as the behavior of a traffic participant who, by violating road traffic safety regulations, causes a traffic accident in which another person is seriously injured or there are one or more fatalities or property damage on a large scale. The crime is appropriate regardless of whether it was done with intent or out of negligence.

The offender can be penalized by the safety measure of a ban on driving a motor vehicle from one to five years in addition to a sentence or a suspended sentence. It is interesting that the CC of the Republic of Croatia lays out the optional possibility of pronouncing the mentioned security measure as a lifelong one, provided that, if the offender had previously committed a traffic violation, there is the expectation that even after the expiration of a five-year ban, the offender may recommit a criminal offense against road traffic safety. The possibility of reviewing the said decision on a lifetime ban of driving a motor vehicle upon the proposal of the offender has been introduced. However, if the proposal is adopted, the offender must retake the driving test. In the event that the court turns down the offender's proposal, the offender, after the expiration of a year, may repeat the proposal to review the decision on lifelong ban on driving a motor vehicle.

It is also curious that the Croatian code stipulated reckless driving as a separate criminal offense, even when only a specific danger to the lives of people was caused (a serious violation of traffic regulations under the influence of at least 1.5g/kg of alcohol, narcotics or psychoactive drugs or driving in the opposite direction, overtaking a line of vehicles in a no-overtaking place, driving 50 kilometers per hour over the speed limit).

3.6. Slovenia

The Republic of Slovenia has retained the previous system inherent in the former Yugoslav legislation, by which criminal offenses against road traffic safety are laid out in a separate chapter. Chapter 31 of the Criminal Code of Slovenia (hereinafter: CCS)²⁵ mentions nine criminal offenses, five of which are related to criminal offenses against road traffic safety. These are causing a traffic accident by negligence (Art. 323), reckless driving in road traffic (Art. 324), endangering road traffic by reckless driving or by using dangerous means (Art. 326), lack of proper supervision over road traffic (Art. 327) and failure to provide assistance to persons injured in road

²⁵ C Kazenski zakonik R Slovenije [Criminal Code of Slovenia], *Uradni list R Slovenije* [Off. Gazette of the RS], no. 55/08, 66/08, 39/09 CC 1A, 91/11 CC 1B, 50/12 CC 1UPB 2, 6/16 CC 1UPB 2p, 54/15 KZ 1C, 38/16 CC 1D and 27/17 CC 1E.

traffic accidents (Art. 328). As in Croatian legislation, a criminal offense of reckless driving in road traffic was introduced in the Criminal Code, which was given a new name in the Criminal Code of Slovenia 1B²⁶: dangerous driving in road traffic.

The CC of Slovenia lays out the ban on of driving a motor vehicle as one of three penalties, this being the secondary penalty that can be imposed with one of the two main sentences (imprisonment and fines), as well as a suspended sentence. The duration of the ban as a secondary penalty can not be shorter than six months or longer than two years, and a penalty may be imposed on the offender who commits the offense while using a motor vehicle. Of the six foreseen security measures that can be imposed, the penalties from this group of offenses include the safety measure of revoking the offender's driving license. Imposing the mentioned measure which can last from one to five years is conditional.

The offense of causing a traffic accident due to negligence (Art. 323 CCS) constitutes a violation of traffic regulations thereby which the offender causes a traffic accident in which another person suffers serious bodily harm. There is a serious crime if a qualified consequence is achieved (one or more fatalities). The offender can be punished by a fine or imprisonment for up to 3 years for the basic crime, while a sentence of up to eight years in prison and a ban on motor vehicle driving (cumulative) is predicted for serious forms. Paragraph 3 of the same Article lays out the conditions for the seizure of a motor vehicle.

It is important to note that the Road Traffic Regulations Act,²⁷ in order to consistently separate traffic offenses from criminal offenses, classifies traffic accidents into four categories. Offenses are traffic accidents categories I and II, which result in property damage or minor injuries. Category III and IV traffic accidents are those involving serious bodily harm or fatalities. They qualify as a criminal offense under Art. 323 of the CC of Slovenia.

4. (Non)compliance of the analyzed legislation

Earlier systematics of criminal legislation and legal and technical formulations of legal descriptions of criminal offenses against road traffic safety influenced the manner in which the criminal offenses laid

²⁶ *Off. Gazette of the RS*, no. 91/11.

²⁷ *Zakon o pravilima cestnega prometa [Law on road traffic]*, *Uradni list RS [Off. Gazette of the Republic of Slovenia]*, no. 109/10.

out in the new legislation of the states emerged on the territory of the former Yugoslavia. Therefore, there is a general similarity between the aforementioned legislation in that criminal offenses against road traffic safety are classified as a special group of criminal offenses (which is done in the CC of Croatia by subsequent amendments). In all the analyzed legislation, the greatest attention is focused on endangering road traffic. Such offenses belong solely in the CCFBH, CCRS and CCBD group against road traffic safety or in the group where they dominate by number (all other legislations). Further similarity is noted in the names and descriptions of the criminal offenses, in the definition of the term motor vehicle, in the accepted system of punishments, in which, in addition to the sentence or warning, a safety measure on the restrictions of driving a motor vehicle can be imposed on the offender.

The gradual changes in the legislation of the former Yugoslavia republics entail a distancing from the traditional solutions. The changes were incited by the need to ensure an effective protection of road traffic. Thus, in the general part of the CCM and the CCRS_r, the ban on driving a motor vehicle is classified as a penalty, while in other legislations, the ban on driving a motor vehicle (CCMN, CCFBH, CCBDBH, CCC, and the Republic of Serbia) is considered a security measure. Slovenia is a special example, where the ban on driving a motor vehicle is defined as punishment, but the revoking of a driver's license is a security measure (exactly the opposite as in the Republic of Serbia's Criminal Code).

The traditional solution that it is enough to cause light bodily harm for an objective condition of incrimination to exist (sometimes alternatively, significant property damage in addition) is accepted by the Criminal Code of the Republic of Serbia, CCM, CCMN and CCFBH). In other legislations, however, even with the addition of reckless driving, the criminal offense of endangering road traffic safety narrows down the zone of incrimination. This is done by imposing serious bodily harm to another person by improper behavior in traffic as an objective condition of punishment (CCRS_r, CCBDBH, CCC and CCS).

Regarding the amount of property damage as a further consequence of the criminal offense of endangering road traffic (objective condition of punishment), there are particular differences, since it is not foreseen as a condition of punishment at all (in Slovenia it is a violation), and other legislation systems, with the exception of Montenegro and the Republic of Croatia in whose legislation this is precisely defined, must specify the "property damage on a large scale" legal standard to the higher courts.

5. Conclusion

After more than two decades since the break-up of the former Yugoslavia, the legislation systems of Serbia, Croatia, Bosnia and Herzegovina, Montenegro, Macedonia and Slovenia have noted great similarities in their criminal legislation systems. Criminal offenses against road traffic safety have been placed in a separate category, and within it, the predominant criminal offense is endangering road traffic safety. Similarities are the result of the accepted construction (for influence in German law) of the criminal offence of endangering as intentional criminal act, which can be committed also from negligence²⁸. Comparisons of new legal solutions in Slovenia and Croatia are pointing out to problems in attempting to transform the basic dogmatic concept²⁹. Therefore, in the law of Serbia, the current definition of the criminal offense of endangering traffic should be maintained.

Despite the fundamental similarities among the analyzed legislation systems, there are also some obvious differences, which are the result of the effort to improve general traffic safety in every each country. As a matter of fact, the observed differences could be inspirational to our lawmakers. They could improve legal solutions by foregoing the objective conditions of incrimination in the form of light body harm and property damage within the criminal offense of endangering road traffic safety. It would be sufficient to foresee serious body harm as an objective condition of incrimination. If the legislator, however, still retains the existing penalty conditions, it would be advisable to avoid legal standards in describing criminal offenses in the chapter of endangering road traffic safety. This can be done by accurately defining the amounts to be paid in the case of property damage.

References

- Bavcon, Lj., „Varnost cestnega prometa in kaznovalno pravo“, in: *Varnost cestnega prometa* (ed. Dragan Petrovec), Inštitut za kriminologijo pri Pravni fakulteti, Ljubljana 2011, 11-25.
- Čubinski, M., *Naučni i praktični komentar Krivičnog zakonika Kraljevine Jugoslavije*, Geca Kon, Beograd 1934.
- Dežman, Z., „Kaznenopravna zaštita cestovnog prometa prema KZ Slovenije i KZ Hrvatske“, *Hrvatski ljetopis za kazneno pravo i praksu*, vol. 21,

²⁸ Lj. Bavcon, „Varnost cestnega prometa in kaznovalno pravo“, in: *Varnost cestnega prometa* (ed. Dragan Petrovec), Inštitut za kriminologijo pri Pravni fakulteti, Ljubljana, 2011, 17-18, 21.

²⁹ Z. Dežman, 135, 139, 155.

1/2014, 135-161.

Kambovski, V., *Kazneno pravo, opšt del*, Kultura, Skopje 2005.

Lozano, R, *et al.*, „Global and regional mortality from 235 causes of death for 20 age groups in 1990 and 2010: a systematic analysis for the Global Burden of Disease Study 2010”, *Lancet*, Vol. 380, 2012, 2095–2128.

Nešković, B., „Krivična dela protiv bezbednosti javnog saobraćaja – Neka zapažanja i neka sporna pitanja”, *Sudska praksa*, 3/1996.

Legal sources

Yugoslav legislation

Krivični zakonik Kraljevine Jugoslavije [The Criminal Code of the Kingdom of Yugoslavia], *Službene novine Kraljevine Jugoslavije* [Official Gazette of the Kingdom of Yugoslavia], dated Feb. 9, 2, 1929 with amendments in no. 295 dated Dec. 24, 1930 and no. 245 dated Oct. 20, 1931.

Krivični zakon FNRJ [Criminal Code of FRY], *Off. Gazette of the FNRY*, no. 13/51, 31/59, 11/62, 37/62. Krivični zakon SFRJ [Criminal Code of SFRY] *Off. Gazette of the SFRY*, 15/65, 15/67, 20/69 and 11/73.

Osnovni krivični zakon [The Basic Criminal Code], *Sl. list SR Jugoslavije* [Off. Gazette of the SRY] no. 35/92, 16/93, 31/93, 37/93, 24/94 and 61/01, *Sl. glasnik R Srbije*, [Off. Gazette of the RS] n, no. 39/03.

Republic of Serbia

Krivični zakon R Srbije [Criminal law of the Republic of Serbia], *Sl. glasnik SR Srbije* [Off. Gazette of the SR Serbia], no. 26/77, 28/77, 43/77, 20/79, 24/84, 39/86, 51/87, 6/89, 42/89, 21/90, *Off. Gazette of RS*, no. 16/90, 49/92, 23/93, 67/93, 47/94, 17/95, 44/98, 10/02, 11/02, 80/02, 39/03 and 67/03.

Krivični zakonik R Srbije [Criminal Code of the Republic of Serbia], *Sl. glasnik RS* [Off. Gazette of the Republic of Serbia] no. 85/05, 88/05, 107/05, 72/09, 111/2009, 121/12, 104/13, 108/14 and 94/16.

Zakon o bezbednosti saobraćaja na putevima [Zakon o Law on Road Traffic Safety], *Sl. glasnik RS* [Off. Gazette of the Republic of Serbia], no. 41/09, 53/10, 101/11, 32/13, 55/14, 96/15, 9/16, 24/18.

Bilten sudske prakse Vrhovnog suda Srbije [Court practice Bulletin of the Supreme Court of Serbia] 2006, br.1

Bilten sudske prakse Vrhovnog suda Srbije [Court practice Bulletin of the Supreme Court of Serbia], 4/2008.

Republic of Bosnia and Herzegovina

- Krivični zakon Bosne i Hercegovine [Criminal Code of Bosnia-Herzegovina], *Službeni glasnik BiH [Off. Gazette of B-H]*, no. 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 56/06, 32/07, 8/10, 47/14, 22/15, 40/15 and 35/18.
- Krivični zakon Federacije BiH [Criminal Code of B-H Federation], *Službene novine FBiH [Of. Gazette of FBH]*, no. 36/03, 37/03, 21/04, 69/04, 18/05, 42/10, 42/11, 59/14 and 76/14.
- Krivični zakonik R Srpske [Criminal Code of R Srpska], *Službeni glasnik Republike Srpske [Off. Gazette of Republika Srpska]*, no. 64/2017.
- Krivični zakonik R Srpske [Criminal Code of R Srpska], *Službeni glasnik Republike Srpske [Off. Gazette of Republika Srpska]*, no. 49/03, 108/04, 37/06, 70/06, 73/10, 1/12 and 67/13.
- Krivični zakon Brčko Distrikta Bosne i Hercegovine [Criminal Code of Brčko District in Bosnia-Herzegovina], *Službeni glasnik Brčko Distrikta Bosne i Hercegovine [Off. Gazette of Brčko District in B-H]*, no. 10/03, 6/05, 21/10 and 9/13, 33/13, 26/16, 33/17, 50/18.

Republic of FYR Macedonia

- Krivičen zakonik na R Makedonija [Кривичниот законик на Република Македонија, Criminal law of Macedonia], *Služben vesnik na Republika Makedonija, [Off. Gazette of the Republic of Macedonia]*, no. 37/96, 80/99, 4/02, 43/03, 19/04, 81/05, 60/06, 73/06, 7/08, 139/08, 114/09, 51/11, 135/11, 185/11, 142/12, 166/12 and 55/13.

Republic of Montenegro

- Krivični zakonik Republike Crne Gore [Criminal Code of R of Montenegro], *Sl. list RCG [Off. Gazette of the Republic Montenegro - MN]*, no. 70/03, 13/04, 47/06, *Sl. list CG [Off. Gazette of MN]*, no. 40/08, 25/10, 32/11, 64/11, 40/13, 56/13, 14/15, 42/15, 58/15, 44/17 and 49/18.

Republic of Croatia

- Kazneni zakon R Hrvatske [Criminal Code of R Croatia], *Narodne novine [Off. Gazette of Republic Croatia]*, no. 125/11, 144/12, 56/15, 61/15 i 101/17.
- Kazneni zakon R Hrvatske [Criminal Code of R Croatia], *Narodne novine [Off.*

Gazette of Republic Croatia], no. 110/97, 27/98, 40/00, 129/00, 51/01, 111/03, 190/03, 105/04, 84/05, 71/06, 110/07, 152/08 and 57/11.

Republic of Slovenia

Kazenski zakonik R Slovenije [Criminal Code of Slovenia], *Uradni list R Slovenije* [Off. Gazette of the RS], no. 55/08, 66/08, 39/09 CC 1A, 91/11 CC 1B, 50/12 CC 1UPB 2, 6/16 CC 1UPB 2p, 54/15 KZ 1C, 38/16 CC 1D and 27/17 CC 1E.

Zakon o pravilima cestnega prometa [Law on road traffic], *Uradni list RS* [Off. Gazette of the Republic of Slovenia], no. 109/10.

Website references

Jacobs, G., Aeron-Thomas, A., Astrop, A., Estimating global road fatalities, Crowthorne (TRL Report 445), 2012, <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.174.5207&rep=rep1&type=pdf>, 12. 11. 2017.

Pan-European corridors, <http://www.pks.rs/e-learning/fiata/osnove/geografija/koridor.htm>, last accessed on December 10, 2018.

WHO, Road Traffic Injuries, 2018, <https://www.who.int/news-room/fact-sheets/detail/road-traffic-injuries>, last accessed on December 10, 2018.

WHO, Road Traffic Injuries, 2018, Table A2, Road Traffic Deaths (Country List), https://www.who.int/violence_injury_prevention/road_safety_status/2018/Table_A2_Road_Traffic_Deaths.pdf?ua=1, last accessed on December 10, 2018.

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**UGROŽAVANJE DRUMSKOG SAOBRAĆAJA U KRIVIČNOM
ZAKONODAVSTVU BIVŠIH JUGOSLOVENSKIH REPUBLIKA**

Rezime

Ovaj rad pruža analognu analizu zakonodavstava bivših jugoslovenskih republika (Srbije, Hrvatske, Slovenije, Crne Gore, Bosne i Hercegovine i Makedonije) u pogledu krivičnih dela protiv bezbednosti drumskog saobraćaja. U radu se naglašavaju sličnosti i razlike u odnosu na pravni sistem Republike Srbije, što je rezultat zajedničke pravne tradicije. Sličnosti i razlike se ispituju u odnosu na slučajeve ugrožavanja drumskog saobraćaja, imajući u vidu da je to delo propisano u svim analiziranim zakonodavstvima i da je jedno od najčešćih u praksi. Zakonodavna rešenja u vezi sa propisanim sankcijama (kazne i mere bezbednosti) su takođe upoređivane. Na osnovu uporednopravne analize, autor predlaže izmene postojećeg rešenja u pravu Republike Srbije predviđanjem teške telesne povrede učesnika u saobraćaju kao objektivni uslov inkriminacije.

Ključne reči: krivično delo, ugrožavanje bezbednosti saobraćaja, strano zakonodavstvo, kazne, mere bezbednosti.

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Review scientific paper
UDC: 343.132
doi: 10.5937/spz0-20471

**ISSUING SEARCH WARRANTS BASED ON THE
INFORMATION OBTAINED FROM
POLICE SOURCES
(A comparative research of adversarial and continental
legal system)**

Abstract

In the Republic of Serbia, there have been major changes in the implementation of criminal investigations. The main goal in the legal regulation of criminal procedure in any democratic and legal state is the establishment of an optimal relationship between the two opposing tendencies in criminal proceedings.

One of them strives to its full effectiveness and efficiency, and the other seeks to prevent excessive and unnecessary restrictions of rights and freedoms of citizens. In this work, using the method of comparison and correlation, based on content of analysis of legal acts from the adversarial legal system we investigate the updating and implementation of the search of the apartment based on the information from police sources, in the light of the prosecutorial investigation and the possibility or impossibility of issuing a search warrant from the court. Research grounds for the search of the apartment on the basis of information from operational sources of the police, has not been carried on our theory so far. As a starting point we take the analysis of the formal legal and institutional framework within which the problem and the subject of research should be defined. The decision to write an article about the use of police information to obtain orders for undertaking the search of the apartment, has been imposed after the changes that have been made by the criminal procedural code in Serbia. The work on one hand explores the application of knowledge ranges from police sources in establishing substantive and legal basis for receiving the command to enter the apartment and searching, in a new constructed adversarial evidence procedure in Serbia. On the other hand, it points to the necessity of adoption of the Directive by which the

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prosecutor would prescribe what an operating source, criminal investigation and criminalistics operations are.

Keywords: *police source, cognition, search, search warrant.*

1. Opening remarks

In order to obtain a search warrant in the process of adversarial constructed process of hearing the evidence in the United States, the fourth amendment provides that trial (search) must be reasonably and specifically decreed. What does it mean? It means that for a search warrant must be a valid legal and material base and specific because as only a specific object can be searched for which a warrant from a court (judges) has been searched (obtained) precisely defined by geographic parameters, such as the city, the location and which room is being searched. Other rooms on the site belonging to the above-mentioned object, such as bedrooms, outbuildings, persons, vehicles, etc. to undergo trial (the subject of the search) requires additional search warrants.

The process of obtaining a search warrant based on information to which the police came from operative sources has several of its phases. The official police person must first prove the validity of the source from which he has obtained the information. What does it mean? It means that he has to prove that the knowledge passed formalization phase and moved up to the fact that the source is an immediate, or direct, that knowledge is not in the domain of "hearsay ". No matter that the standard for search is of lower level than the standards required for a subsequent conviction, there must be a reasonable cause of the material and legal basis of the grounds for suspicion, based on direct information (i.e. are obtained by the personal observation of a cop-observation, covert monitoring, etc.) or operating source reliability. Explanation that official must provide to the court must have the following capacities: a) to prove that the evidence that can be collected without a warrant may not be sufficient to convict a person, b) but may be sufficient to suggest that the evidence to convict a person, can be found using the warrant.

When we explore the existing legal theory and jurisprudence the necessity that the official design an official request with the court for the issuance of a search warrant, we find the statement ("warranty") that is given by the official person under oath, so the impression is that we keep in mind certain "guarantee". It is so treated in the adversarial legal theory and jurisprudence. Thus, the police officers have to make certain

the reason for the trial in the documentary sense and on the other part in the formal sense, to prove that the source has collected the knowledge in a lawful manner. To prove that the source is a “concerned citizen“ who can be qualified as a “source of informant“ and is not a part of a criminal enterprise and criminal circles. As such, the source has provided the material basis for the possible cause of trial, data by which the request for the issuance of a search warrant is supported. On the other hand, the defence in the proceedings before the Court have the duty to prove that the source has not been reliable or that is a part of a criminal milieu.

That the information that he has obtained is not legal and therefore cannot be taken as an established cause of material grounds as well as the base of suspect in the formal legal sense for the issuance of a search warrant of the apartment, and therefore requires that the evidence so obtained does not perform as evidence in the proceedings. So his intervention in court before a judge is to prove that there was no corroboration that would established the requirement for the issuance of a search warrant, thus the evidence collected in that way oppose the doctrine of the fruit of the poisonous tree so the chain of causation between the illegal action and infected evidence is decisive, not too weakened, and the evidence would not have been inevitably discovered.

2. The Republic of Serbia and using the police sources for obtaining the search warrant

No matter that by the major changes in the Code of criminal procedure¹ of the Republic of Serbia has passed from the court to the prosecutorial investigation, the functioning of crime operations by applying Instruction has still remained, that are made by the competent Ministers of the Interior. Thus, formal Code has introduced a new procedure that is so constructed that the prosecutor is authorized to carry out the investigation, and that there has not been necessary changes to accompany the novelty in the content and meaning of the operating sources and criminal operations.² The judge in adversarial system as is at work in Serbia does not engage in the kind of material basis for the possible cause of a trial provided by the source, as well as the data

¹ Zakonik o krivičnom postupku, *Službeni glasnik RS [Official Gazette of the RS]*, br. 72/2011, 101/2011, 121/2012, 32/2013 45/2013, 55/2014.

² Based on the search warrants which have been issued by the court in a few previous months, the officials come across the facts that the person is abroad or dead. These facts support the view that the judge orders the search warrant without going into the merits of a material fact required by the police.

which supported all requirements for the issuance of a search warrant. The defence counsels in proceedings before the court cannot prove that the source has not been reliable, or that are from the criminal milieu, that information obtained by them are not legal and therefore cannot be taken as an established cause of the material as well as grounds to suspect the legal terms for the issuance of a search warrant of the apartment. Thus, in court before a judge defence counsel has no mechanisms that would prove that there was no corroboration that would establish the requirements for the issuance of a search warrant, that the evidence collected by the fruits of the poisonous tree doctrine was therefore the chain of causation between the illegal action and infected evidence.

In contrast to the adversarial system in countries where it has application for many decades, where a police officer is in an official obligation that in presence of the prosecutor before the preliminary procedures in case that a defence counsel put to the court: to provide knowledge about the credibility of the operating sources, presents the facts from the court documents by which a search warrant has been reasoned and required, from which source he has collected data for obtaining the request for the search warrant of the apartment before the court and by the court, in a formal Code of Serbia, such an obligation is not prescribed.

Furthermore, according to the regulations in the formal Code of the Republic of Serbia, the police officer should not have to make certain the reason for the search in the documentary sense, but on the other hand in a formal sense he has not binding requirement to prove that the operational source of knowledge collected information in a lawful manner, in which he based his reasoned proposal to the prosecutor. A police officer is under no obligation to prove that it is a source of “concerned citizen“ who can be qualified as a “source of informant“ and is not a part of a criminal enterprise and criminal circles.

The judge in adversary system such as at work in Serbia, when issuing commands to search the apartment, based on a reasoned proposal of the Prosecutor, does not engage himself in what kind of a source provided the material basis for the possible cause of the search, as well as the data which supported the request for the issuance of commands to search the apartment. Furthermore, in adversary system of investigation in Serbia, a judge does not investigate whether it is substantiated suspicion before the issuance of warrant, or a citizen s space is entered in order to look for evidence. Research suggests that entry into the apartment to find grounds for suspicion prevailing in Serbia. On the other hand, from the

results of research to which we have come, the rules of the enlightened nations suggest that it is necessary to have a reasonable doubt in order to obtain a search warrant, and that it is unacceptable that after entering the area, the search is directed to looking for the grounds for suspicion.

Furthermore, defence counsels in the proceedings before the prosecutor who is now conducting an investigation, or before the judge for preliminary proceedings should have the mechanisms to file a claim, that before the decision on determining the measure of search at the request of the prosecutor, the previously established after the citizen entered the status of the suspect, what is the source used by the prosecutor to make a reasonably based proposal for the issuance of a search of an apartment with the court?

Thus, the defence counsel should require before the preliminary procedure that the plaintiff provides evidence that the source was reliable, that the information obtained by the Prosecutor are legally collected, and thus could be used as the fundamental cause in the material sense and suspicion ground in the formal sense for the issuance of a search of the apartment, that there is no doubt in the chain of causation as a basis for obtaining commands to search the apartment.

Otherwise, if the prosecutor before the judge for preliminary proceedings could not prove that the operational source through which he came to knowledge and on which he bases a reasoned proposal for obtaining commands to search the apartment, is credible, the evidence collected in that way, on which the plaintiff based reasonable suspicion, would be in the domain of illegal actions and infected evidence.

The Constitution³ of the Republic of Serbia, adopted before the adoption of the adversarial investigation system, in ‘special rights of the defendant’ in Article 33 provides: “every person charged with a criminal offense has the right to be informed promptly, in accordance with the law and in detail in a language which he understands of the nature and cause of that for which he is charged, as well as about the evidence collected against him”.

The Code of criminal procedure of the Republic of Serbia (“Chapter I-Basic Provisions – Subject of the Code”), in Art. 2 “Definition of Terms” in paragraph 1 provides: “a suspect is a person against whom a competent public authority has undertaken a certain act stipulated under this Code in the pre-investigation proceedings due to existence of grounds of suspicion that he committed a criminal offence, and a person against whom an

³ Ustav Republike Srbije, *Sl. glasnik RS [Official Gazette of the RS]*, br. 98/2006.

investigation is being conducted; 2) a defendant is a person against whom an indictment has been filed but not yet confirmed, or against whom a motion to indict, a private prosecution or a motion to pronounce a security measure of compulsory psychiatric treatment has been submitted, and the date of the trial or hearing for pronouncing a criminal sanction has not yet been set, but also a term used as a general term for a suspect, an accused person, a defendant and a convicted person”.

Thus, according to the provisions of the Constitution and the Code of criminal procedure, the suspect should be the same as the defendant, because the Constitution does not recognize the suspect. Well, if it's really so? In systems where the adversary investigation system has been at work for decades, that is the case, so the defence counsel of the suspect before the preliminary procedure may put the request and the prosecutor is obliged to state in front of the judge the ground for engaging the operating source, who is the source as well as what his credibility is based on. If the plaintiff fails to prove the credibility of the source from which obtained the knowledge of conceiving a reasoned proposal for obtaining commands to search the apartment, the referee will immediately direct the Prosecutor to what he collected and offers as evidence in court, has no character of evidence.

Pursuant to provisions set in the Code of criminal procedure, the moment when the suspect becomes the accused is a long way because, as referred to in paragraph 1 of Article 2 of the Criminal Procedure Code, stems that suspects is not found guilty, he does not have to enter the status of the defendant, he is the person against whom they have not raised charges that are not yet confirmed. So, no matter what the suspect lawmaker in paragraph 2 of Article 2 of the Code of Criminal Procedure, provides a definition of or a term that serves as a general term for a suspect, defendant, accused and convicted. This definition is specific to the law of the Republic of Serbia (in the law of other countries it is not prescribed), because it clearly defines the status of every accused person, from a suspect to a convict and prisoners convicted and serving a sentence. Furthermore, the suspect is sufficient grounds for suspicion, while for the defendant it cannot be said, because indictment in Serbia, and from the results of research in the countries where the adversary investigation system is in practice, determines that reasonable suspicion is necessary. Thus, there are essential elements of reasonable suspicion which support the indictment (par. 331 Code of criminal procedure).

3. A search warrant on the basis of police information in adversary legal system

According to legal theory in an adversary system a search warrant is an order issued by the judge, allowing the (points) officer to search a specific place, person or thing. The judge must decide whether the order should be issued or not.⁴ That the police could use a search warrant must specifically describe: a place where it is necessary to conduct a search and describe the thing or the person being sought.⁵ On the other hand, the specificity applied in adversary system while searching the car is regulated in such a way that the inspection or search of the car is significantly different from the search of the apartment.⁶ Namely, when stopping a passenger car and driver and vehicle control, a police officer must be able to prove the existence of probable cause, and thus reasonable assurance that will prove that in the vehicle is a subject that under legal rules may not be possessed.⁷ If the driver or a passenger has been arrested, the police may search the interior of the car, but not a person.⁸

In the American legal system is particularly important institution of consent, which is not known in the continental system because it is not known in the formal criminal codes, when a police officer may search an apartment if gets the consent of the owner of the apartment or car, even if it is in such cases normally required a search warrant issued by the court.⁹ Then all the actions undertaken by the official police officer have the same legal effect as made on the basis of a warrant issued by a

⁴ J. Dressler, *Understanding Criminal Procedure*, LexisNexis, Newark 2002³.

⁵ H. A. Jackson, "Arizona v. Evans: expanding exclusionary rule exceptions and contracting Fourth Amendment protection", *Journal of Criminal Law and Criminology*, Vol. 86, 4/1996, 1218.

⁶ *Hernandez v. State*, 60 S.W.3d 106, 112-14, 115 (Tex. Crim. App. 2001),

⁷ A. Liptak, Supreme Court Edging Closer to Repeal of Evidence Ruling, N. Y. TIMES, Jan. 31, 2009, at A1 (naming Justices Roberts, Alito, Scalia and Thomas as justices willing to abolish the exclusionary rule entirely).

⁸ R. E. Barnett, "Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice", *Emory Law Journal*, Vol. 32, 1983, 941-942 (calling for an alternative to the exclusionary rule); D. Dripps, "The case for the contingent exclusionary rule", *American Criminal Law Review*, Vol. 38, 2001, 5-23 (detailing the long history of criticisms of the exclusionary rule and other criminal procedure protections); Y. Kamisar, "In defense of the search and seizure exclusionary rule", *Harvard Journal of Law & Public Policy*, Vol. 26, 1/2003, 119 (citing dozens of articles); R. R. Rader, "Legislating a Remedy for the Fourth Amendment", *South Texas Law Journal*, Vol. 23, 1982, 606-07.

⁹ J. Gittins, "Excluding the Exclusionary Rule: Extending the Rationale of *Hudson v. Michigan* to Evidence Seized During Unauthorized Nighttime Searches", *BYU Law Review*, 2/2007, 451; M. J. O'Laughlin, "Exigent Circumstances: Circumscribing the Exclusionary Rule in Response to 9/11", *UMKC Law Review*, Vol. 70, 2001, 707, 708.

court.¹⁰ Furthermore, another important legal institution when a search is carried out with the consent refers to consent given by a person who doesn't live alone in the apartment.¹¹ Thus consent extends to everything that benefits another person.¹² The exception is that then the official police officer cannot go into those rooms that are not commonly used with the person who gave the consent, such as: bedroom.¹³ In addition to the results shown here are a few situations when you do not need a search warrant, such as: a) if the officer already has the right to be on your property and see the goods, or evidence of a crime that is clearly visible, the object can be legally taken away to be used as evidence.¹⁴ For example, if the police were called and entered the house in case of a family violence, and saw the marijuana plants on the sill, the plants could be seized as evidence, b) if the arrested is at his home, police officers can search for weapons or other accomplices in order to protect their safety (institute known as "protection movement"), c) to prevent the destruction of evidence, d) extraordinary circumstances-this exception applies to emergency situations where the process of obtaining a search warrant jeopardizes public safety or could lead to the loss of evidence.¹⁵

In the UK search warrants are issued by local judges and require the official to provide evidence that can support the basis for the search warrant.¹⁶ In the vast majority of the cases in which police already had somebody in custody, the search¹⁷ of the premises can be done without a warrant in accordance with "Article 18. - The Police and evidence of a criminal offense".¹⁸ A review in accordance with "Article 18.- the Police and Criminal Law, can be implemented immediately by the police constable without requiring approval by the inspectors in accordance with Article 18 (5)".¹⁹ This subsection provides that the address of the suspect person can

¹⁰ M. S. Bransdofer, "Miranda Right-to-Counsel Violations and the Fruit of the Poisonous Tree Doctrine", *Indiana Law Journal*, Vol. 62, 1986.

¹¹ D. Dripps.

¹² Y. Kamisar "Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts", *Minnesota Law Review*, Vol. 43, 1958, 1145-1150.

¹³ *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 1920.

¹⁴ T. S. Schrock, R. C. Welsh "WUp from Calandra: The Exclusionary Rule as a Constitutional Requirement", *Minnesota Law Review*, Vol. 59, 1974, 308-09.

¹⁵ A. T. Webster, "Protecting Society's Rights While Preserving Fourth Amendment Protections: An Alternative to the Exclusionary Rule", *South Texas Law Journal*, Vol. 23, 1982, 693, 706 (advocating abandonment of the modern exclusionary rule).

¹⁶ See *Perry v. the United Kingdom* (dec.), no. 63737/00, 26 September 2002.

¹⁷ *United Kingdom* [GC], no. 24888/94, § 69, ECHR 1999-IX; *Ramirez Sanchez v. France* [GC], no. 59450/00, § 116, ECHR 2006-IX, and *Saadi v. Italy* [GC], no. 37201/06, § 127, ECHR 2008.

¹⁸ *Ibid.*

¹⁹ See *Perry v. the United Kingdom* (dec.), no. 63737/00, 26 September 2002.

be searched. If a person is arrested in his own home or immediately after leaving his room,²⁰ the officer can immediately search the immediate area in which the person was in accordance with “Article 32 of the same Act “.²¹

4. Limitations in search of adversary formal criminal procedure

In the United States constitutional law and criminal procedure, the term “sugar bowl “²², refers to the legal maxim in connection with one of the limitations of search and seizure imposed by the Fourth Amendment of the US Constitution.²³ This applies particularly to areas that can be searched in looking for the objects listed in items of the orders in respect of any other evidence of criminal offence that can be found.²⁴ The maxim (often cited as: “If you are looking for a stolen television set, you cannot look into the sugar bowl “)²⁵ refers to the difference between what is described in the search warrant of the apartment, persons or things that can be validly requested.²⁶

What can be conducted during the search and what cannot, we will see in the following examples: a) According to the law, only those areas that realistically could include things that are looked for, can be searched,

²⁰ P. Stewart “The road to *Mapp v. Ohio* and beyond: the origins, development and future of the exclusionary rule in search-and-seizure cases”, *Columbia Law Review*, Vol. 83, 1983, 1365, 1392.

²¹ C. A. Harkins, “The Pinocchio Defense Witness Impeachment Exception to the Exclusionary Rule: Combating a Defendant’s Right to Use with Impunity the Perjurious Testimony of Defense Witnesses”, *University of Illinois Law Review*, 1990, 375, 378 (saying the Supreme Court announced the Fourth Amendment exclusionary rule in *Weeks*). D. S. Jones, „Application of the exclusionary rule to bar use of illegally seized evidence in civil school disciplinary proceedings“, *Washington University Journal of Urban and Contemporary Law*, Vol. 52, 1997, 375, 376 (claiming the Supreme Court created the exclusionary rule in *Weeks*); J. Stribopoulos, “Lessons from the pupil: A Canadian solution to the American exclusionary rule debate“, *Boston College International and Comparative Law Review*, Vol. 22, 1999, 77, 94 (claiming the Supreme Court “introduced the exclusionary rule to American law through its 1914 decision in *Weeks*”); D. R. Wright, “How to Improve Military Search and Seizure Law”, *Military Law Review*, Vol. 116, 1987, 157, 171 (stating *Weeks* “originated” the exclusionary rule).

²² M. J. Klarman, „The Racial Origins of Modern Criminal Procedure“, Vol. 99, *Michigan Law Review*, 2000, 48.

²³ R. Roots, „The Originalist Case for the Fourth Amendment Exclusionary Rule“, *Gonzaga Law Review*, Vol. 45, 2010, 20.

²⁴ Related cases: *Virginia v. Moore*, 128 S.Ct. 1598, 1603-04 (2008); *Atwater v. City of Lago Vista*, 532 U.S. 318, 332 n.6 (2001), *City of West Covina v. Perkins*, 525 U.S. 234, 247 n.2 (1999) - citing A. R. Amar, „Fourth Amendment First Principles“, *Harvard Law Review*, Vol. 107, 1994; *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1212 (10th Cir. 2003) (citing A. R. Amar, *The Constitution and Criminal Procedure: First Principles*, New Haven, 1997, 7-19 (for the proposition that “[n]ot all searches lacking warrants or consent are unconstitutional under the Fourth Amendment”).

²⁵ S. E. Pitler, „Comment, The Origin and Development of Washington’s Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy“, *Washington Law Review*, Vol. 61, 1986, 459, 466.

²⁶ L. K. Gaines, R. LeRoy Miller, *Criminal Justice in Action*, The Core. Belmont, CA, Thomson/Wadsworth, 2006⁷, chapter 6.

and as such it is the only valid proof that can be received by the court in the proceedings; b) if the search warrant states the seeking of the stolen TV and it is the motive and reason for the search, officers of the law cannot search the persons who may possess other stolen thing.²⁷ On the other hand, the police officer can search the other hiding places/areas where TV can be hidden, such as a closet, attic or a shed; c) if a search warrant requires a stolen ring as the subject, the officer can perform search the sugar bowl; d) the intention of this legal approach is to limit a search to only those areas or objects, where the hidden object from the warrant can be reasonably found.²⁸ This does not exclude evidence of other crimes in areas that the warrant reasonably allows those who search to carry out the action, or the evidence is in plain sight; e) an extension of this concept prevents the search space, things and persons that could not be the subject of the search warrant. From the analysis of such a legal approach is an evident a desire of the legislator that the maxim: “Sugar Bowl“ to be a reminder of law enforcement to carefully determine the scope of the warrant.²⁹ In the opposite treatment, if the evidence is collected, and which is outside of the scope of the warrant areas, then it is very likely that it would be excluded from the proceedings because it is an illegal search and seizure of the objects.³⁰

5. Adversary legal system and the importance of the doctrine – the poisonous tree fruits

Fruit of the poisonous tree is the metaphor in the legal system of the United States.³¹ It is used to describe the evidence that has been obtained illegally. It starts from the fact that if the infected source (“tree“) of evidence or the evidence itself, then nothing is proved- because it is infected. Such evidence is not generally admissible in court.³²

²⁷ M. S. Bransdofer, 1986.

²⁸ P. Tinsley *et al.*, „In Defense of Evidence and Against the Exclusionary Rule: A Libertarian Approach“, *Southern University Law Review*, Vol. 32, 2004, 63, 64.

²⁹ *Lawson v. Buzines*, 3 Del. (3 Harr.) 416, 416 (1842); *Boggs v. Vandyke*, 3 Del. (3 Harr.) 288, 288 (1840); *Hall v. Hall*, 6 G. & J. 386, 409 (Md. 1834) (holding that “[t]he constable in execution of a warrant to arrest a party, breaks another’s house at his peril”).

³⁰ T. Y. Davies, „Recovering the Original Fourth Amendment“, *Michigan Law Review*, Vol. 98, 1999, 547, 663-66.

³¹ K. T. Lash, “James Madison’s Celebrated Report of 1800: The Transformation of the Tenth Amendment”, *George Washington Law Review*, Vol. 74, 2/2006, 165, 192-194 (describing the Supreme Court’s occasional treatment of the Ninth and Tenth Amendments as “mere truisms,” i.e., statements of the existing relationships among the states, the people, and the national government, without any distinct authority to limit government).

³² Justice Hugo Black, widely known as the arch-textualist of his era, expressed the opinion this way: “[T]he federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate.” *Wolf*, 338 U.S. at 39-40 (Black, J., concurring).

The doctrine is an extension of the exemption rule, which, in accordance with some exceptions, prevents evidence obtained in contravention of the Fourth Amendment³³ to be admitted in criminal proceedings.³⁴ As a rule of exemption, the doctrine of the “fruit of the poisonous tree” aims to distract the police from the use of illegal means to obtain evidence, because there is no benefit.³⁵ Such evidence is not generally admissible in court.³⁶ If a police officer conducted an unconstitutional search of the house because he has got the key of the locker and the evidence of the crime came from it than the evidence would likely be excluded.

This legal doctrine has four exceptions. The evidence is admissible if: a) it is detected in the partial search as a result of an independent source; b) would have been inevitably discovered despite the infected source; c) the chain of causation between the illegal action and infected evidence is too weakened;³⁷ and d) a search warrant is valid based on probable cause,³⁸ but it has been lost by the government agents in good faith³⁹ (this is called the exception of goodwill).⁴⁰

³³ W. C. Heffernan, “On Justifying Fourth Amendment Exclusion”, *Wisconsin Law Review*, 1989, 1193, 1224 (concluding that the exclusionary rule is implicitly required by the text and history of the Fourth Amendment).

³⁴ B. J. Killian, „United States v. Crews: Fruit of the Poisonous Tree—A New Wrinkle?“, *Idaho Law Review*, Vol. 18, 1982, 18: 151.

³⁵ F. Schauer, „On the Supposed Jury-Dependence of Evidence Law“, *University of Pennsylvania Law Review*, Vol. 155, 1/2006, 165, 168.

³⁶ B. P. Wilson, „The Fourth Amendment as More Than a Form of Words: The View from the Founding” in: *The Bill of Rights: Original Meaning and Current Understanding* (ed. Eugene W. Hickock, Jr.), 1991, 151, 154.

³⁷ M. J. O’Laughlin, „Comment, Exigent Circumstances: Circumscribing the Exclusionary Rule in Response to 9/11“, *University of Missouri-Kansas City Law Review*; Vol. 70, 2011, 707, 708.

³⁸ A. R. Amar, 757, 764. *Virginia v. Moore*, 128 S.Ct. 1598, 1603-04, 2008.

³⁹ R. Roots (2010) lists the most important court cases: *Findlay v. Pruitt*, 9 Port. 195, 200 (Ala. 1839) (upholding liability of arrestor for trespass and assault for arrest with insufficient cause); *Braveboy v. Cockfield*, 27 S.C.L. (2 McMul.) 270, 273 (S.C. 1841) (holding that words on the arrest warrant were insufficient to justify an arrest, thus placing liability on constable); *Colvert v. Moore*, 17 S.C.L. (1 Bail.) 549, 549 (S.C. 1830) (action against arrestor for assault and false imprisonment); *Garvin v. Blocker*, 4 S.C.L. (2 Brev.) 157, 158 (S.C. 1807) (successful suit against constable and justice of the peace). During the early 1800s, there was virtual strict liability for every search and seizure violation. See: *Randall v. Henry*, 5 Stew. & P. 367 (Ala. 1834) (suggesting that someone—the magistrate, the complainant or the arrestor—was liable for every false arrest); *Reed v. Legg*, 2 Del. (2 Harr.) 173, 176 (1837) (holding that complainants are liable for procuring a search warrant that turns up nothing, even if an executing officer is protected by the warrant); *Simpson v. Smith*, 2 Del. Cas. 285 (1817) (holding person who swore out search warrant application liable, regardless of the existence of probable cause and the procedural propriety of his claims, when the arrestee was found innocent); *State v. McDonald*, 14 N.C. (3 Dev.) 468, 471-72 (1832) (officer and other defendants liable for searching a house upon inaccurate search warrant).

⁴⁰ D. E. Steinberg, „The Original Understanding of Unreasonable Searches and Seizures“, *Florida Law Review*, Vol. 56, 2004, 1052, 1072 (“Prior to *Boyd v. United States*, constitutional search and seizure provisions probably were discussed in fewer than fifty opinions.”).

6. Concluding remarks

The results of these investigations indicate the findings, which can be summarized as follows: no matter what major changes in the criminal-procedural code of the Republic of Serbia passed from trial to the prosecutorial investigation, crime operations using the instructions and directions taken by the competent ministers interior remain still in function. Thus, formal Code introduced a new procedure that is so constructed that the prosecutor is authorized to conduct an investigation, and that there were no necessary changes to accompany the novelty in the content and meaning of the operating sources and criminal operations because the prosecutor did not bring the directive about the operational source, working with the source, mode of implementation of the operations to collect information from the source.

In contrast to the adversarial system in countries where it has been applied for many decades, where a police officer is in an official obligation that in the presence of the prosecutor before the judge for preliminary procedure if the request has been put by the defence of the suspect: to provide the knowledge about the credibility of the operating sources, to present the facts from the court documents by which the issuance of a search warrant has been reasoned and asked, from which source the data has been collected and by which the request for order to search the apartment has been based before the court and by the court, in a formal Code of Serbia, such an obligation is not prescribed. Furthermore, according to the provisions in the formal Code of the Republic of Serbia, the police officer would not have to make certain the reason for the trial in the documentary sense, but on the other hand in a formal sense there is no binding requirement to prove that the operational source has collected the knowledge in a lawful manner in which his reasoned proposal to the prosecutor has been based. A police officer is under no obligation to prove that it is a source of “concerned citizen“ who can be qualified as a “source of informant“ and is not part of a criminal enterprise and criminal circles.

The judge in adversary system such as in Serbia, when issuing commands to search the apartment, based on a reasoned proposal of the prosecutor, does not engage himself in what kind of a source provided the material basis for the possible cause of the search, as well as the data by which the request for the issuance of commands to search the apartment has been supported. Furthermore, in adversary system in Serbia a judge does not engage himself in the fact whether the suspicion has been sustained

before the issuance of commands, or a space of the citizen is entered to look for suspicion. Research suggests that entry into the apartment to find grounds for suspicion is prevailing in Serbia. On the other hand, from the results of research to which we have come, the rules of enlightened nation suggest that it is necessary to have a reasonable doubt in order to obtain a search warrant, and that it is unacceptable that after entering the area the search is directed to seeking the grounds of suspicion.

Furthermore, defence counsels in the proceedings before the prosecutor who is now conducting an investigation, or before the judge for preliminary proceeding should have the mechanisms to file a claim, that before the decision on determining the measure of search at the request of the prosecutor, the previously established after the citizen entered the status of the suspect, what is the source used by the prosecutor to make a reasonably based proposal for the issuance of a search of an apartment with the court?

Thus, the defence counsel should require before the preliminary procedure that the plaintiff provides evidence that the source was reliable, that the information obtained by the Prosecutor are legally collected, and thus could be used as the fundamental cause in the material sense and suspicion ground in the formal sense for the issuance of a search of the apartment, that there is no doubt in the chain of causation as a basis for obtaining commands to search the apartment. Otherwise, if the prosecutor before the judge for preliminary proceedings could not prove that the operational source through which he came to knowledge and on which he bases a reasoned proposal for obtaining commands to search the apartment, is credible, the evidence collected in that way, on which the plaintiff based reasonable suspicion, would be in the domain of illegal actions and infected evidence. The Constitution of the Republic of Serbia, adopted before the adoption of the adversial investigation system, in 'special rights of the defendant' in Article 33 provides: 'every person charged with a criminal offense has the right to be informed promptly, in accordance with the law and in detail in a language which he understands of the nature and cause of that for which he is charged, as well as about the evidence collected against him.

The Code of Criminal Procedure of the Republic of Serbia ('Chapter I-Basic Provisions –Subject of the Code'), in the Article 2. 'Definition of Terms' in paragraph 1 Provides that a suspect is a person against whom a public authority has undertaken an act in pre-trial proceeding or investigation is conducted on the grounds of suspicion that that he committed the criminal offense and that the a defendant is a person against

whom has been initiated a procedure using an indictment, private claim or request for compulsory psychiatric treatment of mentally ill offender. At the same time in the Code is prescribed, that the term defendant will be used as a general term for a suspect, an accused person, a defendant and a convicted person.

Thus, according to the provisions of the Constitution and the Criminal Procedure Code in the Republic of Serbia, the suspect should be the same as the defendant, because the Constitution does not recognize the suspect. Well, if it's really so? In systems where the adversary investigation system has been at work for decades, that is the case, so the defence counsel of the suspect before the preliminary procedure may put the request and the prosecutor is obliged to state in front of the judge_ the ground for engaging the operating source, who is the source as well as what his credibility is based on. If the plaintiff fails to prove the credibility of the source from which obtained the knowledge of conceiving a reasoned proposal for obtaining commands to search the apartment, the referee will immediately direct the Prosecutor to what he collected and offers as evidence in court, has no character of evidence.

Pursuant to provisions set in the Criminal Procedure Code of the Republic of Serbia, the moment when the suspect becomes the accused is a long way because, as referred to in paragraph 1 of Article 2 of the Criminal Procedure Code, stems that suspects is not found guilty, he does not have to enter the status of the defendant, he is the person against whom they have not raised charges that are not yet confirmed... So, no matter what the suspect lawmaker in paragraph 2 of Article 2 of the Code of Criminal Procedure provides a definition of ... 'or a term that serves as a general term for a suspect, defendant, accused and convicted. This definition is not immanent for formal codes in the world, because it clearly defines the status of every citizen, from a suspect to a convict and prisoners convicted and serving a sentence. Furthermore, the suspect is sufficient grounds for suspicion, while for the defendant it cannot be said, because indictment in Serbia, and from the results of research in the countries where the adversary investigation system is in practice, determines that reasonable suspicion is necessary. Thus, there are essential elements of reasonable suspicion which support the indictment in the case of a defendant in reasonable suspicion.

References

- Amar, A.R., *The Constitution and Criminal Procedure: First Principles*, Yale University Press, New Haven 1997.
- Amar, A.R., "Fourth Amendment first principles", *Harvard Law Review*, Vol. 107, 1994, 757-819.
- Barnett, R. E., "Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice", *Emory Law Journal*, Vol. 32, 1983, 937-985.
- Bransdorfer, M.S., "Miranda Right-to-Counsel Violations and the Fruit of the Poisonous Tree Doctrine", *Indiana Law Journal*, Vol. 62, 1986, 1061-1100.
- Davies, T. Y., "Recovering the Original Fourth Amendment", *Michigan Law Review*, Vol. 98, 3/1999, 547-750.
- Dressler, J., *Understanding Criminal Procedure*, LexisNexis, Newark 2002³.
- Dripps, D., "The case for the contingent exclusionary rule", *American Criminal Law Review*, Vol. 38, 1/2001, 5-23.
- Gaines, L.K., LeRoy Miller, R., *Criminal justice in action*, The Core. Belmont, CA, Thomson / Wadsworth, 2006⁷.
- Gittins, J. R., "Excluding the Exclusionary Rule: Extending the Rationale of *Hudson v. Michigan* to Evidence Seized During Unauthorized Nighttime Searches", *BYU Law Review*, 2/2007.
- Harkins, C. A., "The Pinocchio Defense Witness Impeachment Exception to the Exclusionary Rule: Combating a Defendant's Right to Use with Impunity the Perjurious Testimony of Defense Witnesses", *University of Illinois Law Review*, 1990, 375-473.
- Heffernan, W. C., "On Justifying Fourth Amendment Exclusion", *Wisconsin Law Review*, 1989, 1193-1254.
- Jackson, H. A., "Arizona v. Evans: expanding exclusionary rule exceptions and contracting Fourth Amendment protection", *Journal of Criminal Law and Criminology*, Vol. 86, 4/1996, 1201-1227.
- Jones, D. S., "Application of the exclusionary rule to bar use of illegally seized evidence in civil school disciplinary proceedings", *Washington University Journal of Urban and Contemporary Law*, Vol. 52, 1997, 375-397.
- Kamisar, Y., "Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts", *Minnesota Law Review*, Vol. 43, 1958.
- Kamisar, Y., "In defense of the search and seizure exclusionary rule", *Harvard Journal of Law & Public Policy*, Vol. 26, 2003.
- Killian, B.J., "United States v. Crews: Fruit of the Poisonous Tree-A New Wrinkle", *Idaho Law Review*, Vol. 18, 1982, 151.

- Klarman, M. J., "The racial origins of modern criminal procedure", *Michigan Law Review*, Vol. 99, 1/2000, 48-97.
- Lash, K.T., "James Madison's Celebrated Report of 1800: The Transformation of the Tenth Amendment", *George Washington Law Review*, Vol. 74, 2/2006, 165-200.
- Liptak, A. Supreme Court Edging Closer to Repeal of Evidence Ruling, N. Y. TIMES, Jan. 31, 2009, at A1.
- O'Laughlin, M. J., "Exigent Circumstances: Circumscribing the Exclusionary Rule in Response to 9/11", *University of Missouri-Kansas City Law Review*, Vol. 70, 2001.
- Pitler, S. E., "The Origin and Development of Washington's Independent Exclusionary Rule: Constitutionally Compelled Remedy", *Washington Law Review*, Vol. 61, 1986.
- Rader, R. R., "Legislating a Remedy for the Fourth Amendment", *South Texas Law Journal*, Vol. 23, 1982.
- Roots, R. "The Originalist Case for the Fourth Amendment Exclusionary Rule", *Gonzaga Law Review*, Vol. 45, 2010, 1-66.
- Schauer, F., "On the supposed jury-dependence of evidence law", *University of Pennsylvania Law Review*, Vol. 155, 1/2006, 165-202.
- Schrock, T.S., Welsh, R.C., "Up from Calandra: The Exclusionary Rule as a Constitutional Requirement", *Minnesota Law Review*, Vol. 59, 1974.
- Steinberg, D. E., "The Original Understanding of Unreasonable Searches and Seizures", *Florida Law Review*, Vol. 56, 2004, 1052-1096.
- Stewart, P., "The road to Mapp v. Ohio and beyond: the origins, development and future of the exclusionary rule in search-and-seizure cases", *Columbia Law Review*, Vol. 83, 1983.
- Stribopoulos, J., „Lessons from the pupil: A Canadian solution to the American exclusionary rule debate“, *Boston College International and Comparative Law Review*, Vol. 22, 1999.
- Stuntz, W. J., "Warrants and Fourth Amendment Remedies", *Virginia Law Review*, 1991, 881-943.
- Tinsley, P., Kinsella, S., Block, W., "In Defense of Evidence and Against the Exclusionary Rule: A Libertarian Approach", *Southern University Law Review*, Vol. 32, 2004, 63-80.
- Webster, A. T., "Protecting Society's Rights While Preserving Fourth Amendment Protections: An Alternative to the Exclusionary Rule", *South Texas Law Journal*, Vol. 23, 1982.
- Wilson, B.P., "The Fourth Amendment as More Than a Form of Words: The View from the Founding", in: *The Bill of Rights: Original Meaning and*

Current Understanding (ed. Eugene W. Hickock, Jr), University Press of Virginia, Charlottesville, 1991.

Wright, D.R., "How to Improve Military Search and Seizure Law", *Military Law Review*, Vol. 116, 1987.

Legal sources

Zakonik o krivičnom postupku, *Službeni glasnik RS [Official Gazette of the RS]*, br. 72/2011, 101/2011, 121/2012, 32/2013 45/2013, 55/2014.

Ustav Republike Srbije, *Sl. glasnik RS [Official Gazette of the RS]*, br. 98/2006.

Caselaw

Boggs v. Vandyke, 3 Del. (3 Harr.) 288, 288 (1840).

Chahal v. the United Kingdom, 15 November 1996, § 79, *Reports* 1996-V.

Colvert v. Moore, 17 S.C.L. (1 Bail.) 549, 549 (S.C. 1830).

Findlay v. Pruitt, 9 Port. 195, 200 (Ala. 1839).

Garvin v. Blocker, 4 S.C.L. (2 Brev.) 157, 158 (S.C. 1807).

Hall v. Hall, 6 G. & J. 386, 409 (Md. 1834).

Hernandez v. State, 60 S.W.3d 106, 112-14, 115 (Tex. Crim. App. 2001).

State of Tennessee v. Michael T. Shelby, John H. Gasaway, Judge, No. M2011-01289-CCA-R3 Cd- Filed June 19, 2013.

Lawson v. Buzines, 3 Del. (3 Harr.) 416, 416 (1842).

Perry v. the United Kingdom (dec.), no. 63737/00, 26 September 2002.

Ramirez Sanchez v. France [GC], no. 59450/00, § 116, ECHR 2006-IX.

Randall v. Henry, 5 Stew. & P. 367 (Ala. 1834).

Reed v. Legg, 2 Del. (2 Harr.) 173, 176 (1837).

Saadi v. Italy [GC], no. 37201/06, § 127, ECHR 2008.

Silverthorne Lumber Co. v. United States, 251 U. S. 385, 1920.

Simpson v. Smith, 2 Del. Cas. 285 (1817).

State v. McDonald, 14 N.C. (3 Dev.) 468, 471-72 (1832).

V. v. the United Kingdom [GC], no.24888/94, § 69, ECHR 1999-IX.

Virginia v. Moore, 128 S.Ct. 1598, 1603-04, 2008.

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**IZDAVANJE NAREDBE ZA PRETRES STANA NA
OSNOVU OBAVEŠTENJA PRIBAVLJENOG IZ
POLICIJSKOG IZVORA
(komparativno istraživanje iz adverzijalnog i kontinentalnog
pravnog sistema)**

Rezime

U Republici Srbiji, došlo je do krupnih promena u sprovođenju krivične istrage. Glavni zadatak prilikom pravnog uređenja krivičnog postupka u svakoj demokratskoj i pravnoj državi jeste uspostava optimalnog odnosa između dveju suprotstavljenih težnji u krivičnom postupku. Jedna od njih teži njegovoj delotvornosti i punoj efektivnosti, a druga nastoji onemogućiti prekomerna i nepotrebna ograničenja prava i sloboda građana. U ovom radu primenom metoda komparacije i korelacije, na osnovu analize sadržaja pravnih akata iz adverzijanog pravnog sistema istražujemo noveliranje i primenu pretresa stana na osnovu saznanja iz policijskog izvora, u svetlu tužilačke istrage i mogućnosti ili nemogućnosti izdavanja naloga za pretres od strane suda. Istraživanje osnovanosti pretresa stana na osnovu saznanja iz operativnih izvora policije, do sada u našoj teoriji nije sprovedeno. Kao polaznu tačku uzimamo analizu formalno-pravnog i institucionalnog okvira unutar koga je definisan problem i predmet istraživanja. Odluka da napišemo jedan tekst o upotrebi policijskih saznanja za dobijanje naloga radi preduzimanja pretresa stana, nametnulo se nakon promena koje su učinjene procesnim krivičnim zakonikom u Srbiji. Rad sa jedne strane istražuje domete primene saznanja iz policijskog izvora u zasnivanju materijalnog i pravnog osnova za dobijanje naredbe za ulazak u stan i vršenje pretresa, u novom konstruisanom adverzijalnom dokaznom postupku u Srbiji. Sa druge strane, ukazuje na nužnost donošenja Direktive kojom bi tužilac propisao šta je operativni izvor i kriminalistička operacija.

Ključne reči: policijski izvor, saznanje, pretres, nalog za pretres.

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Uputstvo uređuje način oblikovanja naučnih članaka i ostalih priloga koji se dostavljaju redakciji *Stranog pravnog života*. Molimo autore da svoje priloge prilagode tematici časopisa i predviđenom načinu oblikovanja rukopisa, kako ne bi bio eliminisan nakon početne provere, budući da uredništvo primenjuje kriterijume iz važećeg podzakonskog akta o uređivanju naučnih časopisa.

Naučni i stručni članci mogu biti napisani na srpskom ili engleskom jeziku. Moraju sadržati podatke o autoru, naslov, apstrakt (sažetak), ključne reči i spisak referenci (literaturu i pravne izvore, po potrebi i spisak citiranih sudskih i drugih odluka). Uz priloge koji se objavljuju na srpskom jeziku, dostavlja se prevod naslova rada, apstrakta i ključnih reči na engleskom jeziku. Prilozi koji se dostavljaju na engleskom jeziku, sadrže prevod naslova, apstrakta i ključnih reči na srpski jezik.

Autorski članci po pravilu ne prelaze obim od jednog autorskog tabaka (28.800 znakova sa razmacima), font Times New Roman 12, prored 1.5, leva margina 3,5 cm, a desna 3 cm. Izuzetno, prihvaćće se duži rukopis obima do 1,5 tabaka, ako to zahteva tema rada, po prethodnom dogovoru autora sa glavnim i odgovornim urednikom. U ostalim situacijama, rad većeg obima biće vraćen autoru radi skraćivanja. U obim se ne računaju tekstovi navedeni u beleškama na dnu strane (dodatni podaci o autoru, organizaciji u kojoj je zaposlen, druge napomene), naslov članka, apstrakt (do 800 karaktera sa razmakom), ključne reči (do 5 pojmova ili sintagmi), spisak literature, pravnih izvora i sudskih odluka.

Naučni članci se klasifikuju u: originalne (u kojima se iznose prethodno neobjavljeni rezultati sopstvenih istraživanja zasnovanih na primeni naučnih metoda) i pregledne (sadrže originalan, detaljan i kritički prikaz istraživačkog problema ili područja u kojem je autor ostvario određeni doprinos, prikazan u vidu autocitata). Za razliku od naučnih radova, u stručnom radu autor na osnovu izvršenog istraživanja zasnovanog na prikupljanju postojećih teorijskih saznanja i raspoloživih činjenica ukazuje na iskustva značajna za unapređenje prakse u određenoj oblasti, preporučuje promene u načinu primene propisa i slično.

U časopisu je moguće objaviti i naučnu kritiku ili polemiku, koja predstavlja raspravu, zasnovanu na naučnoj argumentaciji, na određenu naučnu temu. Obim naučnog rada ove vrste može da iznosi do 10.000 karaktera sa proredom. Osim podataka o autoru i naslova članka, naučna kritika mora da sadrži apstrakt (do 400 karaktera sa razmakom), ključnim rečima (do 5 pojmova ili sintagmi) i spisak bibliografskih izvora. Svi navedeni podaci ne uračunavaju se u obim rada.

Ostali prilozi. Komentari sudskih odluka mogu da imaju najviše do 15.000 kompjuterskih znakova. Izlaganja sa naučnih i stručnih skupova, prikazi knjiga i slično po pravilu ne smeju biti obima većeg od 7.000 kompjuterskih znakova. Ne sadrže apstrakt i rezime.

Osnovno oblikovanje teksta. Svi prilozi moraju biti sačinjeni u Microsoft Word-u, latiničnim pismom, fontom Times New Roman, veličine 12 pt., prored 1,5, na stranici formata A4, sa levim ravnanjem i uvlačenjem pasusa za 1 tab, bez deljenja reči na slogove (hajfenacije). Posle svakog znaka interpunkcije staviti

samo jedan prazan karakter. Za posebna slova iz srpskog i stranog latiničnog pisma koriste se raspoloživi simboli – dijaktirički znaci. Ćirilичni znakovi iz stranog pisma i iz drugih pisama (kineskog, japanskog, arapskog itd.) transliterišu se i transkribuju prema tablici dostupnoj na: <http://www.loc.gov/catdir/cps0.roman.html>. Imena i prezimena stranih autora navode se u originalu, osim kada se moraju transkribovati na latinicu. Kada se autor poziva na radove objavljene u *Stranom pravnom životu*, koristi isključivo naziv časopisa na srpskom jeziku. Reference na srpskom jeziku koje se citiraju u radu pisanom na engleskom jeziku se ne prevode.

Prevod stručnih pojmova iz strane literature, kada je to moguće, treba da bude zamenjen odgovarajućim nazivom u srpskom jeziku. Prevod latinskih pravnih izraza ili izreka nije potreban. Pišu se kurzivom. Druge strane reči ili sintagme koje označavaju specifične izraze ili institute u stranom pravu, koje se ne mogu sa precizno prevesti na srpski jezik ili ne postoje u srpskom pravu, zadržavaju se u originalnom nazivu (složene kurzivom), s tim što se objašnjava njihovo značenje na srpskom jeziku. U tekstu se ne treba koristiti podebljana (boldirana) niti podvučena slova.

Strani pravni život prihvata citiranje i oblikovanje referenci prema Harvardskom stilu citiranja i referenciranja – britanski standard, prema modelu autor/rad. Navedeni stil je modifikovan jedino u pogledu načina citiranja pravnih izvora. Način primene navedenog stila pri citiranju i sastavljanju spiska literature i popisa pravnih izvora objašnjen je detaljno u ovom uputstvu.

S obzirom na prihvaćeni stil referenciranja, beleške u dnu teksta (fusnote) sadrže dopunska objašnjenja, a ne treba da upućuju na korišćenu literaturu, što se čini u tekstu. Članovi i stavovi pravnih odredbi na koje se poziva autor navode se u tekstu, a ne u fusnotama.

Puno ime, srednje slovo i prezime autora (jednog ili više njih) navodi se na prvoj strani rukopisa u gornjem levom uglu. Piše se uz upotrebu posebnih znakova (č, đ, š itd.), bez naučnih titula. Imena stranih autora takođe se pišu dijaktiričkim znacima, bez obzira na jezik rada.

Ostali podaci koji se odnose autore: naučna i stručna zvanja, akademske titule, stručna zvanja, ORCID broj autora (ako ga ima), naziv ustanove autora i podaci za kontakt (mejl autora) navode se u posebnoj belešci (fusnoti) na istoj strani ispod teksta, označeni zvezdicom.

Naziv ustanove autora (afilijacija): navodi se potpun, zvanični naziv i sedište ustanove u kojoj je autor zaposlen ili u kojoj je obavio istraživanje. Studenti poslediplomskih studija navode naziv ustanove u kojoj studiraju.

U zahvalnici (posebnoj napomeni na prvoj strani rada ispod teksta označeno zvezdicom posle naslova rada) navode se imena drugih lica koja nisu autori, ali su imali učešća u istraživanju ili su pomagala da priredi rad, sa

objašnjenjem njihove uloge ili obaveštenja da je rad urađen u okviru određenog naučno-istraživačkog projekta, da je preveden, ranije usmeno izlagan na naučnom skupu i slično..

Naslov rada piše se velikim slovima na sredini, font 14 pt. Naslov ne bi trebalo da ima više od 10-12 reči.

Apstrakt (sažetak) se navodi ispod naslova članka, dva proreda ispod. Apstrakt ne sme da bude duži od 800 znakova bez razmaka. Veličina fonta je 11 pt (složeno kurzivom). U apstraktu autor ukazuje na značaj teme, osnovno istraživačko pitanje/hipotezu, cilj istraživanja, metodologiju i rezultate istraživanja. U apstraktu treba koristiti termine koji se često koriste za indeksiranje i pretragu članaka.

Ključne reči su termini ili fraze koji najbolje opisuju sadržaj članka za potrebe indeksiranja i pretraživanja. Potrebno je dati 5 ključnih reči ili sintagmi na srpskom. U članku se navode ispod apstrakta (veličina fonta 11 pt).

Podnaslovi u tekstu se pišu na sredini, malim slovima (font 12) i boldom i numerišu se arapskim brojevima. Uvod i zaključak se, takođe, označavaju rednim brojevima.

Tabele, grafici i slični prilozi dostavljaju se posebno u formatu i rezoluciji pogodnoj za štampu.

Popis korišćene literature, pravnih izvora i spisak sudskih i drugih odluka navode se na kraju rada, fontom 11 pt. Popis bibliografskih jedinica sastavlja se po abecednom redosledu imena autora, bez numerisanja.

Na kraju rada, u levom uglu, složeno slovima 12 pt, navodi se na **engleskom jeziku ime, srednje slovo i prezime autora**. U drugom redu se navodi naučno zvanje ili titula, ustanova autora i elektronska kontakt adresa. Na sredini strane navodi se engleski prevod naslova rada, napisan velikim slovima. Rezime na engleskom jeziku (*Summary*) ima karakter proširenog apstrakta. Ne sme da prelazi 1500 znakova bez razmaka. **Ključne reči** (*Keywords* pisano bez razmaka) u prevodu na engleski jezik navode se ispod rezimea. Treba koristiti uobičajene pravne termine iz engleskog jezika, kako bi se olakšalo pretraživanje. Kod članaka na engleskom jeziku, rezime se piše na srpskom jeziku. Ostala pravila su ista.

NAČIN CITIRANJA I SASTAVLJANJA SPISKA REFERENCI

Navođenje izvora unutar teksta

Od autora se očekuje da navedu korišćene izvore i to potpuno i tačno i da precizno prenesu tuđe navode, te se kod citiranja knjiga ili članaka preporučuje da, gde je moguće, budu navedene stranice sa kojih se preuzima

tuđi tekst. Brojevi stranica moraju biti sadržani kod doslovnog citiranja tuđeg teksta, prilikom parafraziranja ili upućivanja na određeni deo knjige ili članka. Jedna stranica se označava sa p., a više strana sa pp. (skraćeno lat. *paper – pluta paper*). Moguće je koristiti i rad prihvaćen za objavljivanje, pod uslovom da je za rad određen digitalni identifikator (DOI broj), koji će biti naveden u spisku literaturu uz druge podatke o citiranom radu.

Način navođenja izvora zavisi od toga da li je potrebno istaći ime autora ili sadržaj njegovog teksta. U prvom slučaju se ime autora čiji se rad koristi navodi se u samoj rečenici; u drugom slučaju se navodi na kraju rečenice u zagradi, uz godinu objavljivanja rada (po potrebi i stranu). Na primer:

Kako je istakao profesor Konstantinović (2006, p. 36) obimnost Skice za Zakonik o obligacijama i ugovorima bila je posledica težnje da zakon bude razumljiv svima, a ne da učesnike u prometu nauči pravu.

Skica za Zakonik o obligacijama i ugovorima bila je obimna, zato što se težilo da zakon bude razumljiv svima, a ne da učesnike u prometu nauči pravu (Konstantinović, 2006, p. 36).

Isticanje imena autora Kada se u rečenici pominje ime nekog autora, bez dodatnih informacija o sadržaju rada koji se citira (sumarni pregled ili ukazivanje na izvor), dovoljno je navesti prezime autora i u zagradi godinu u kojoj je objavljen rad. Navodimo primer:

U svom radu Ćirić (2008) konstatuje da je ...

Kada se upućuje na posebne delove u radu, mora biti naveden i broj stranice ili stranica na kojima se nalazi citat. Broj stranica se skraćeno označava p. ili pp. prema engl. *page/pages*. Primeri:

U svom radu Ćorić (2017, pp. 26-30) opisuje procesna sredstva za naknadu štete u sudskom poretku Evropske unije.

Stoga, prema Đorđeviću (2016, pp. 28-29), trebalo bi da se uzmu u obzir i drugačija rešenja iz uporednog prava.

Preuzeti sadržaj drugog autora se može saopštiti i parafraziranjem:

Stoga Perović u predgovoru ponovljenom izdanju Skice za Zakonik o obligacijama i ugovorima (Konstantinović, 2006, p. 16) zaključuje da svaki pravni sistem dopušta slobodu ugovaranja, ali do izvesne granice.

Ako se citira neodređen broj strana, navodi se samo početna stranica sa koje se preuzima citat, dok iza nje stoji „i dalje“. Na primer:

Sve ove teorije se mogu podeliti u nekoliko grupa (Čolović, 2009, pp. 83 i dalje)...

Kada se upućuje na izvor iz fusnote nekog rada, posle broja strane piše se skraćena „fn.“ Recimo:

Navedeno rešenje je nesumnjivo podložno kritici (Jovanović, p. 8, fn. 14)...

Doslovno citiranje koristi se retko, uglavnom da bi se izbeglo pogrešno tumačenje originalnog teksta, da se istakne bitan argument ili ideja koja će potom biti posebno analizirana ili pobijana ili kada je na lep i efekatan način autor izrazio svoju misao, a taj efekat bi parafraziranje poništilo. U svakom slučaju doslovnog citiranja teksta drugog autora neophodno je navesti tačnu stranicu (ili strane) na kojima se citat nalazi, kako bi zainteresovani čitalac mogao proveriti iznete podatke.

Kraći citati, dužine do 30 reči, sastavni su deo rečenice, istaknuti navodnicima. Mogu biti direktno ili indirektno citirani, na primer:

Kako ističe Stanković (1972, p. 177) „neimovinska šteta predstavlja posebnu pojavu i pojam za sebe“. Ili:

Sve su to razlozi što treba prihvatiti da „neimovinska šteta predstavlja posebnu pojavu i pojam za sebe“ (Stanković, 1972, p. 177).

U citate duže od 30 reči autor nas uvodi svojim rečima, a zatim počinje citat, koji ističe navodnicima, obavezno uz naznaku prezimena autora i tačne strane ili stranica na kojima se nalazi citat. Tekst se može preuzeti direktno:

Nemogućnost korišćenja uništene stvari može da izazove neimovinsku štetu, nezavisno od pretium affectionis. Prema Stankoviću (1972, p. 307) reč je o slučajevima: „u kojima nemogućnost upotrebe uništene odnosno oštećene stvari unosi veliki poremećaj u oštećenikov svakodnevni praktični život, lančanu reakciju raznovrsnih maltretiranja i ograničavanja, koja mogu predstavljati potpunu dezorganizaciju oštećenikovog načina života i njegovih svakodневnih navika“.

Indirektno se isti tekst može preuzeti na sledeći način:

Nemogućnost korišćenja uništene stvari može da izazove neimovinsku štetu, nezavisno od pretium affectionis, u slučajevima „u kojima nemogućnost upotrebe uništene odnosno oštećene stvari unosi veliki poremećaj u oštećenikov svakodnevni praktični život, lančanu reakciju raznovrsnih maltretiranja i ograničavanja, koja mogu predstavljati potpunu dezorganizaciju oštećenikovog načina života i njegovih svakodnevnih navika“ (Stanković, 1972, p. 307).

Dugačke citate bi najpravilnije bilo preuzeti tako što se iza dve tačke navedu u posebnom redu uvučeno, složeno manjim fontom (11pt), uz naznaku izvora i stranice.

Izostavljeni deo reči iz citata označava se trima tačkama u zagradi, na primer: Prilikom organizacije izvršenja rada u javnom interesu „pragmatični razlozi (...) ukazivali bi na potrebu većeg učešća lokalne zajednice (u sektoru službi socijalne zaštite)“ (Alternative zatvorskim kaznama, 2005, p. 44).

Citiranje različitih radova dva autora. Kada se u istoj rečenici upućuje na radove dva autora (bilo da imaju saglasne ili oprečne stavove) u tekstu se navodi

prezime svakog od autora, uz godine kada su radovi objavljeni, prema sledećim primerima:

I Đorđević (2012, p. 34) i Mrvić Petrović (2011, p. 86-87) smatraju da uvođenje sistema dani-novčane kazne nije ostvarilo željene efekte u pravnom sistemu Republike Srbije.

Kauzalitet kod propuštanja se različito objašnjava po teoriji aliud agere u odnosu na teoriju prethodno preduzete radnje (v. za prvu Welp, 1968, p. 30, a za drugu Rudholphi, 1972).

Citiranje imena dva ili tri autora istog rada. U tekstu se upućuje na zajednički rad autora uz navođenje prezimena oba autora povezana simbolom &, dok se u zagradi navodi godina u kojoj je rad objavljen.

Na ovakav odnos države i crkve trebalo bi da obratimo posebnu pažnju (Đorđević & Stanić, 2015, p. 63).

U svom radu Nikolić & Čović (2018) ukazali su na...

Uporednopravno istraživanje (Mrvić Petrović & Petrović, 2018) potvrdilo je... Mrkšić, Popović & Novaković (2018, pp. 477) analiziraju

Citiranje rada koji ima više od tri autora. U tekstu se navodi samo prezime prvog autora i iza njega opšte prihvaćena skraćena et al. (*et alia*). Na primer: Čeranića et. al (2018) istražili su..

Citiranje više radova istog autora, objavljenih iste godine. U tekstu se uz prezime autora i godinu dodaju latinična slova a, b, c, d, kako bi se označili različiti radovi istog autora objavljeni iste godine. Primer:

Svakako, navedeni vid krivice trebalo bi da je više u našem fokusu (Ćirić, 2004a, p. 70). ...Pored „tvrde“, ne bismo smeli da zaboravimo „meku moć“ ... (Ćirić, 2004b, p. 334).

Citiranje rada objavljenog pod okriljem organizacije. U slučaju da je navedeni tekst objavila neka organizacija (pravno lice, udruženje, ustanova, međunarodna, nevladina organizacija i slično), tako da pojedini autor nije posebno naveden, u tekstu treba uputiti na naziv organizacije i godinu objavljivanja rada. Dozvoljena je upotreba uobičajenih službenih skraćena međunarodnih organizacija ili njihovih tela, a primer:

Od presudne je važnosti istraživati izborne procese u domaćem i stranom pravu (Institut za uporedno pravo, 2013, p. 32-35).

Media and information technologies can offer such spaces to allow different groups to interact with each other, so in Tallin Guidelines on National Minorities and the Digital Age (OSCE, 2019)...

Citiranje rada nepoznatog autora. Umesto podataka o autoru koristi se naslov rada:

U *Teoriji države i prava* (1995, p. 204) jasno se kaže...

Rad nepoznate godine izdanja U navedenom slučaju koristi se skraćenica n.d. (od *no date*):

Zirojević (*n.d.*) ukazuje na obeležja terorizma ili indirektno:

Obeležja savremenog terorizma su.... (Zirojević, *n.d.*).

Sekundarne reference. Ako primarni izvor niste mogli pronaći, nego ga preuzimate iz rada drugog autora, morate se pozvati na primarni izvor i sekundarnu referencu na sledeći način:

Zlatarić (1967), kako navodi Kambovski (2005, p. 701) uključuje u saizvršilaštvo i radnje preduzete pre ili posle dovršenja krivičnog dela.

Ili:

U ranijoj teoriji se smatralo da saizvršilaštvo uključuje i radnje preduzete pre ili posle dovršenja krivičnog dela (Zlatarić, 1967, navedeno u Kambovski, 2005, p. 701).

Navođenje propisa. Naziv zakona i drugog propisa navodi se punim nazivom (složeno običnim slovima), potom se kurzivom navodi službeno glasilo u kome je propis objavljen, a posle zareza broj i godina objavljivanja (obična slova). Prilikom prvog pominjanja propisa može se dodati crta posle naziva i navesti skraćenica pod kojom će se isti propis dalje u tekstu navoditi. U daljem tekstu dovoljno je koristiti samo skraćenicu. Isto pravilo važi i za inostrane pravne akte, s tim što se podaci koji se na njih odnose navode na način kako je to uobičajeno za to strano pravo. Skraćenice se sačinjavaju prema izvornom nazivu propisa, a ne prema njihovom prevodu na srpski ili engleski jezik. Može se koristiti i tekst propisa preuzet sa Interneta, uz naznaku osnovnih podataka o propisu i godini u kojoj je objavljena poslednja verzija dostupna na službenoj stranici nadležnog organa ili preuzeta sa javnog servisa zaduženog za objavljivanje pravnih propisa i praćenje izmena (što će biti navedeno u spisku referenci). Autor može da koristi tekst propisa i prema objavljenom službenom prevodu na engleski (ili neki drugi) jezik.

Ista pravila odnose se i citiranje akata međunarodnih organizacija: mora biti vidljivo ko je donosilac tog akta, koji se navodi sa punim nazivom prvi put, a kasnije se može koristiti službena skraćenica. Kada se citiraju akti Evropske unije, u zagradi se obavezno navodi broj službenog glasila u kome je propis objavljen i strana na kojoj se nalazi.

Autor se po pravilu poziva na propis koji važi u vreme pisanja rada. Ako analizira određenu izmenu ili dopunu propisa, navešće kao izvor službenog glasila u kome je objavljena takva izmena. Primenu navedenih pravila ilustruju sledeći primeri:

Krivični zakonik – KZ, *Službeni glasnik RS*, br. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016.

Temeljna reforma krivičnih dela protiv privrede u pravu Republike Srbije

izvršena je 2016. godine (Zakon o izmenama i dopunama Krivičnog zakonika, *Službeni glasnik RS*, br. 94/2016).

Pravo na obeštećenje se žrtvama nasilja u Nemačkoj priznaje od 1976. godine na osnovu posebnog saveznog zakona, s tim što je 1985. godine donet novi (Gesetz über die Entschädigung für von Gewalttaten, – OEG, 1985, *Bundesgesetzblatt – BGBl*, I S. 1, poslednje izmene drugim zakonom od 17. jula 2017. godine (BGBl. I S. 2541).

U francuskom Građanskom zakoniku (*Code civil – CC* iz 1804. godine, poslednja verzija od 1. oktobra 2018. godine) predviđeno je

U Istanbulskoj konvenciji Saveta Evrope od 11. 5. 2011. godine (CoE CETS No.210) predlaže se

Prava deteta, regulisana Konvencijom Organizacije ujedinjenih nacija o pravima deteta (Zakon o ratifikaciji Konvencije Ujedinjenih nacija o pravima deteta, *Službeni list SFRJ – Međunarodni ugovori*, br. 15/90, *Službeni list SRJ – Međunarodni ugovori*, br. 4/96 i 2/97),..

U pravu Evropske unije doneta je Uredba o stečajnim postupcima br. 1346/2000 (*Official Journal*, L 160, pp. 1-18)...

Član, stav i tačka propisa skraćeno se pišu čl., st. i tač., a iza napisanih brojeva se ne stavlja tačka. Na primer: čl. 5, st. 2, tač. 3 ili čl. 5, 6, 9 i 10 ili čl. 4–12.

Navođenje sudske prakse i odluka drugih organa. Autor treba da navede što potpunije podatke: vrstu odluke sudskog, upravnog tela ili Ustavnog suda, naziv donosioca i druge podatke na osnovu kojih je odluka klasifikovana (slovo koje označava vrstu postupka, broj postupka, godinu pokretanja postupka) i datum kada je doneta i, ako postoji, izvor iz kog je preuzeta. Za presude Evropskog suda za ljudska prava merodavan je i broj predstavke.

Na primer:

Odluka Ustavnog suda Republike Srbije, broj IUo-173/2017 o utvrđivanju nesaglasnosti sa Ustavom i Zakonom Pravilnika opštine Bečej iz 2013. Godine o kriterijumu i postupku dodele sredstava crkvama i verskim zajednicama (*Službeni glasnik RS* br.68/2018).

Cass. crim., 19 December 1991, RCA 1992.170 (*Ius Commune Casebook for the Common Law of Europe*, 2018).

Presuda Apelacionog suda u Beogradu, Gž.636/2011 od 28. 5. 2012 (*Arhiv Apelacionog suda u Beogradu*, 2012).

Odluke međunarodnih sudova i tribunala treba da sadrži što potpunije podatke (vrsta odluke, podaci o sudskom veću koje je odluku donelo, datum donošenja odluke, uobičajeni naziv predmeta, registarski broj, kod (ako ga ima), strana, stav ili tačka na koju se upućuje ili sa koje je citiran deo odluke).Odluke međunarodnih sudova ili tribunala navode se uz korišćenje skraćenica za

nazive sudova npr: PCIJ, ECHR, ICJ, ICTY i slično. Prilikom citiranja sudskih slučajeva koristi se veznik skraćena „v“ za veznik *versus*, npr. *Fremkin v. Russia, Goobald v. Mahmood*.

Prilikom citiranja prakse Evropskog suda za ljudska prava navodi se i broj podnete predstavke. Na primer:

Borodin v. Russia, predstavka br. 41867/04, presuda ECHR, 6. 2. 2013, par. 166.

Sudska praksa Suda Evropske unije obavezno se navodi uz korišćenje evropske identifikacione oznake sudske prakse (*European Case Law Identifier – ECLI*). Na primer:

Judgment of the General Court (Second Chamber) of 13 October 2015. *Intrasoft International SA v European Commission* (Case 403/12, ECLI:EU:T:2015:774)

Citiranje referenci preuzetih sa Interneta

Ukoliko se u radu koriste sadržaji sa Interneta, navode se na isti način kao i ostali sadržaji, ako su poznati autori ili organizacije ili državne ustanove koje su ih publikovale, s tim što će u spisku literature na odgovarajući način biti naglašeno da je reč o URL izvoru ili o članku sa DOI brojem. Elektronski dostupni sadržaji retko imaju označene stranice, pa se preciznost kod navođenja citata postiže ako se pozovete na odeljke ili pasuse, ako su numerisani u tekstu.

Citiranje rada nepoznate godine izdanja ili rada nepoznatog autora

U radu se navedena vrsta rada citira tako što se na mestu gde bi trebalo da stoji godina navodi nd (*non dated* - nepoznat datum):

Njihov značaj za parlamentarne procese je nemerljiv (Ostrogorski, nd).

Ako se u rukopisu koristi rad nepoznatog autora, navešće se naslov rada koji se citira, uz godinu, ako je poznata:

Sve nam to potvrđuje i mešovita, objektivno-subjektivna teorija (Elementi krivičnog dela, 1986, p. 13).

Sastavljanje spiska literature i popisa pravnih izvora

Spisak literature je obavezan na kraju rada. U spisak literature se unose svi bibliografske jedinice korišćene u radu, osim pravnih izvora i spiska sudskih odluka, koji se posebno navode, iza spiska literature.

U spisku literature se pojedine bibliografske odrednice (reference) navode po abecednom redu, prema početnom slovu prezimena autora, početnom slovu organizacije u slučaju da je autor nepoznat ili, ako su nepoznati i autor i organizacija, prema početnom slovu naslova bibliografske jedinice. Kod koautorstva, neophodno je navesti prezime i početno slovo imena svakog koautora.

Knjige (elektronske), druge monografije i udžbenici, poglavlja u monografijama

Navode se obavezno sledeći elementi po modelu: Prezime, inicijal(i) autora. Godina izdavanja. *Naslov: podnaslov*. Podatak o izdanju. Mesto izdanja: izdavač. Kada ima više od četiri autora, knjiga se sortira prema početnom slovu prezimena prvog autora, a umesto imena ostalih autora može se koristiti skraćunica *et al.* Kada knjiga nema podatak o autoru, ali je istaknuto ime urednika ili organizacije, umesto autorovog imena navodi se ime urednika (uz naznaku tog svojstva) ili naziv organizacije koja je izdala publikaciju.

Za urednike koristiti skraćenicu ur. (ako je knjiga izdata na srpskom jeziku), a ed. (za knjige na engleskom jeziku sa jednim urednikom) ili eds. (kada ima dva ili više urednika). Na primer:

- Ćirić, J. 2008. *Objektivna odgovornost u krivičnom pravu*. Beograd: Institut za uporedno pravo.
- Ćeranić, J. 2015. *Unitarni patent*. Beograd : Institut za uporedno pravo ; Banja Luka : Pravni fakultet Univerziteta.
- Sime, S. 2018. *A Practical Approach to Civil Procedure*. 31st ed. Oxford: Oxford University Press.
- Carlen, P. & Worrall, A. 1987. *Gender, Crime and Justice*. Philadelphia: Open University.
- UNICRI, 1997. *Promoting Probation Internationally*. Publ. no 58. Rome/London: UNICRI.
- Tappan, P. W., ed. 1951. *Contemporary corrections*. New York: McGraw-Hill.
- Srzentić, N., Stajić, A. & Lazarević, Lj. 1995. *Krivično pravo Jugoslavije*. Opšti deo. 18. izd. Beograd: Savremena administracija.

Obavezni elementi koji se moraju navesti kada se citira sadržaj elektronske knjige su: Autor, Inicijal(i) godina. Naslov knjige, [e-book], Izdanje (samo u slučaju da se ne radi o prvom izdanju), Mesto izdavanja e – knjige: Izdavač, pristup preko Naziv baze podataka, URL za tu e – knjigu (datum pristupa). Na primer:

- Molan, M. T. 2012. *Series: Questions & Answers*, [eBook]. 8th ed, 2012-2103. Oxford : OUP Oxford. Database: eBook Academic Collection. <http://eds.a.ebscohost.com/>, 18. 1. 2019.

2. Doktorske disertacije, magistarski ili završni master radovi

Obavezno se navode: Prezime, inicijal(i) autora. Godina izdavanja. *Naslov*. Doktorska disertacija. Mesto publikovanja: fakultet/univerzitet na kome je odbranjen. Na primer:

- Stanić, M. 2017. *Pravna priroda poslaničkog mandata*. Doktorska disertacija. Beograd: Pravni fakultet Univerziteta u Beogradu.

3. Poglavlja u knjigama i naučni/stručni radovi objavljeni u zbornicima i zbirkama radova sa naučnih skupova

Podaci o navedenim bibliografskim jedinicama sadrže obavezno sledeće elemente koje treba navesti po modelu: Prezime, inicijal(i) autora. Godina izdavanja. Naslov rada: podnaslov. U: Prezime, inicijal(i) urednika (ur.). *Naslov zbornika: podnaslov*. Mesto izdavanja: izdavač, str. od-do.

Za urednike koristiti skraćenicu ur. (ako je zbornik na srpskom jeziku), a ed. (za zbornike na engleskom jeziku sa jednim urednikom) ili eds. (kada zbornik uređuju dva ili više urednika). Primer:

- Moss, G. 2015. New World and Old World: Symphony or Cacophony? In: Parry, R. and Omar, P. (eds.), *International Insolvency Law: Future Perspectives*. Nottingham/Paris: INSOL Europe, pp. 17-42.
- Čolović, V. 2011. Status stranog stečajnog postupka u nemačkom zakonodavstvu. U: Vasiljević, M. i Čolović, V., *Uvod u pravo Nemačke*. Beograd: Institut za uporedno pravo i Pravni fakultet Univerziteta u Beogradu, pp. 524-541.

4. Članci

Obavezni elementi koji se navode su: Prezime, inicijal(i) autora. Godina izdavanja. Naslov članka: podnaslov. *Naslov časopisa*, oznaka sveske/godišta/volumena (broj), str. od-do. Ako je članak prihvaćen za objavljivanje ili je već objavljen sa DOI brojem, taj broj treba dodati u obliku linka: <https://doi.org/DOIbroj>. Navodimo primere:

- Kostić, J. 2018. Investiranje društava za osiguranje na tržištu kapitala Republike Srbije. U: Petrović, Z. I Čolović, V., *Odgovornost za štetu, naknada štete i osiguranje: zbornik radova sa XXI međunarodnog naučnog skupa*. Beograd-Valjevo: Institut za uporedno pravo, pp. 463-176.
- Gasmi, G., Prlja, D. i Jerotić, A. 2017. European leading legal principles of combating gender based violence : “Istanbul Convention”. U: Lilić, S. (ur.), *Perspektive implementacije evropskih standarda u pravni sistem Srbije : zbornik radova. Knj. 7*, (Biblioteka Zbornici). Beograd: Pravni fakultet, Centar za izdavaštvo i informisanje, pp. 335-349.
- Đukić-Milosavljević, I. et al. 2017. Jedinice za podršku deci žrtvama i svedocima u krivičnom postupku – Domaće pravo i praksa. *Temida*, 20(1), pp.45-64.
- Višekruna, A. 2018. Ostvarivanje saradnje u stečajnim postupcima sa elementom

inostranosti: primer protokola. *Strani pravni život*, 62(3), pp. 65-88. Dostupno na: <https://doi.org/10.5937/spz1803065V> (pristup: 18. 1. 2019).

5. Članci objavljeni u elektronskom časopisu ili *online* bazi podataka

Navode se sledeći podaci: Prezime, inicijal(i) autora. Godina izdavanja. Naslov rada: podnaslov. *Naslov časopisa* volumen/godište (broj). DOI broj, ako ga članak ima ili URL adresa elektronskog izdanja časopisa ili naziv online baze podataka (datum posete stranice). Odlučujući kriterijum za određeni način navođenja jeste kako korisnik najlakše može pronaći dokument koji ste citirali. Na primer, prethodno navedeni izvor u kome je naznačen link sa DOI brojem (Višekruna, A.) može biti citiran i na sledeće načine:

- Višekruna, A. 2018. *Ostvarivanje saradnje u stečajnim postupcima sa elementom inostranosti: primer protokola. Strani pravni život*, 62(3), pp. 65-88. Dostupno na: <https://www.stranipravnizivot.rs/index.php/SPZ/article/view/686> (pristup: 18. 1. 2019).

Ili:

- Višekruna, A. 2018. *Ostvarivanje saradnje u stečajnim postupcima sa elementom inostranosti: primer protokola. Strani pravni život*, 62(3), pp. 65-88. Dostupno u: SCIndeks.ceon.rs (pristup: 18. 1. 2019).

6. Članci, izveštaji, radovi iz zbornika dostupnog na Internetu, koji imaju autora

Članci koji su dostupni Internetu, sa poznatim autorom, ali nisu iz elektronskog časopisa i različiti izveštaji navode se prema sledećem modelu: Prezime, inicijal(i) autora. (godina izdavanja). *Naslov: podnaslov*. Mesto izdavanja: izdavač ili organizacija odgovorna za održavanje stranice na internetu. URL: (datum posete stranici). Na primer:

- Mutavdžić Obradović D. 2015. *Odgovornost vladnika odnosno držaoca psa za štetu koju je prouzrokovao drugom licu*. Beograd: Paragraf. <https://www.paragraf.rs/> (18. 1. 2019).
- Lietonen, A. and Ollus, N. 2017. *The costs of assisting victims of trafficking in human beings: a pilot study of services provided in Latvia, Estonia, Lithuania, Report Series 87*. Helsinki: HEUNI. Dostupno na: https://www.heuni.fi/material/attachments/heuni/reports/HY3EXasQ3/HEUNI_Report_no.87.pdf (18. 1. 2019).

Podaci o radu iz zbornika čiji je sadržaj objavljen na Internetu navode se na sledeći način: Prezime, inicijal(i) autora. Godina izdavanja. *Naslov rada* (sa nazivom časopisa i drugim podacima koji se zahtevaju za članak). URL: (datum posete stranici).

- Rabrenović, A. 2008. Razvoj službeničkog sistema federalne uprave SAD: od potrage za političkim plenom ka ostvarenju javnog interesa. U: Ćirić, J. (ur.), *Uvod u pravo SAD*. Beograd: Institut za uporedno pravo, pp. 49-70. Dostupno na: <http://iup.rs/wp-content/uploads/2017/10/Uvod-u-pravo-SAD.pdf> (18. 1. 2019).

7. Članak dostupan na Internetu koji nema naznačenog autora

Osnovni podaci koje treba navesti su: Naslov rada, godina izdanja, URL ili naziv *online* baze podataka, (datum pristupa stranici). Na primer:

- National Action Plan to combating corruption – Mongolia 2016. Dostupno na: <https://www.opengovpartnership.org/.../06-national-action-plan-combating-corruption> (18. 1. 2019).

8. Spisak korišćenih pravnih izvora i izvora sudske prakse

Popisuju se nazivi u radu korišćenih zakona i drugih propisa, sa brojevima službenih glasila u kojima su objavljeni ili podacima o elektronskim izvorima sa kojih su preuzeti. U slučaju potrebe, razdvajaju se domaći od stranih propisa (u podnaslovima se navodi na koju se državu propisi odnose). Propisi se navode prema hijerarhiji citiranih pravnih akata (od Ustava, preko zakona do uredbi i pojedinačnih akata). Ako se navodi više akata iste pravne snage, koristi se abecedni red.

Dokumenti međunarodnih organizacija navode se u popisu pravnih izvora na sledeći način:

- UNSC Resolution 1286, UN dok. S/RES/1286 (19 January 2000).
- EU, Commission Decision of 5 February 2010 on standard contractual clauses for the transfer of personal data to processors established in third countries under Directive 95/46/EC of the European Parliament and of the Council (notified under document C(2010) 593) (Text with EEA relevance) *OJ L 39, 12.2.2010, p. 5–18*.
- CoE, Recommendation CM/Rec(2011)13 of the Committee of Ministers to member states on mobility, migration and access to health care Adopted by the Committee of Ministers on 16 November 2011.

Izvori sudske prakse ili prakse drugih državnih organa se posebno navode. Praksa međunarodnih sudova ili tribunala navodi se uz korišćenje službenih skraćenica sudova, na primer: ICJ, PCIJ, ICTY, ICTR, ECHR, zatim se piše naziv predmeta, vrsta odluke, datum donošenja, publikacija u kojoj je odluka objavljena i strane na kojoj je objavljena.

Kod presuda međunarodnih krivičnih tribunala se nakon naziva predmeta navodi i sudsko veće (po potrebi i podaci koji se tiču izdvojenih sudskih mišljenja, ako se na njih pozivao autor u radu), dok se kod odluka Evropskog suda za ljudska prava navodi i broj predstavke.

Domaće i strane sudske presude, pravna shvatanja i slično, kao i presude međunarodnih sudova mogu se navoditi uz pozivanje na elektronske pravne baze iz kojih su preuzete (Paragraf Lex, Intermex, EUR-Lex, CURIA, Lexiweb.co.uk, Légifrance, HUDOC itd.).

Različite načine navođenja ilustruju sledeći primeri:

- Pravno shvatanje utvrđeno kroz odgovore na pitanja na sednici Odeljenja za privredne sporove Višeg privrednog suda od 6. oktobra 1999., dostupno u elektronskoj pravnoj bazi Paragraf Lex.
- Goobald v. Mahmood (2005) All ER (D) 251 (Apr), dostupno na <https://Lexisweb.co.uk/cases/2005/april/godbold-v-mahmood> (18. 1. 2019).
- EGC, Judgment of the General Court (Second Chamber) of 13 October 2015. Intrasoft International SA v European Commission (Case 403/12, ECLI:EU:T:2015:774). <https://eur-lex.europa.eu/l> (18.1. 2019).

Uredništvo stoji na raspolaganju autorima i za sva druga neophodna razjašnjenja (pitanja uputiti elektronskom poštom na adresu uredništva **redakcijaspz@gmail.com**).