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MEMBERSHIP IN THE EU AND NATIONALISTIC DISCOURSE IN THE WESTERN BALKANS – LEGAL ASPECTS

Abstract

The phenomenon of refurbished ethnic nationalism, which, in the republics of former Yugoslavia, had started already in the late eighties and early nineties, have undoubtedly had devastating consequences for numerous citizens of all successor states. The armed conflicts in the 90-ies have been fuelled by the discourse based on excessive self-victimisation, highly mediatised revival of frustrations originating from the First and the Second World and nationalistic myths. In spite of the fact that the last two decades have brought relatively peaceful coexistence, the global economic crisis and new vague of migrations from Middle East and Africa have caused the revival of the nationalistic discourse all over Europe, including the countries of former Yugoslavia. However, all ex-Yugoslav countries share an important legal, political and cultural heritage, while, during at least last twenty years, the perspective (or realization) of the membership in the EU have certainly had certain calming effects on inter-ethnic relations in the entire region now often referred to as the Western Balkans. One of the important vectors of influence that the EU has – both on its member states and on candidates for membership – is the process of harmonisation of national legislations with the EU acquis. Notwithstanding the fact that the effect of this process on nationalistic discourse and hatred that it generates are mainly meta-legal and indirect, it is beyond any doubt that the EU's political agenda and its legal and economic system can give significant incentive to the reduction of interethnic tensions. The ambition of this article is to demonstrate the results in this process, the obstacles that are still on its way, as well as to propose some solutions.

Keywords: *EU accession process, law harmonisation, nationalistic discourse, Western Balkans.*

1. Introduction

Compared to numerous other ex-socialist European states, the political and legal system of the former Yugoslavia was relatively liberal, mainly in the sphere of economy – it allowed individual entrepreneurship and provided basic guarantees of private property. This was particularly the case after the break, in June 1948, with Stalin's Soviet Union, the

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moment when – in spite of its formally neutral position in the world progressively entering in the cold war and notwithstanding the country's orientation towards the creation of the Movement of Non-Aligned Countries – the socialist Yugoslavia significantly strengthened its visible and invisible ties with the United States and numerous other Western democracies. Although the country enjoyed more than four decades of undeniable economic, societal and cultural prosperity – the situation allowing various kinds of inter-ethnic interactions and enabling the creation of strong cultural and identitary ties, which, according to some, enabled the appearance of the first generations of 'real Yugoslavs'[1] – strengthening of nationalisms led to the dismantling of the federal state in the most devastating armed conflict in Europe after the 2nd World War. The instauration of a precarious peace in 1995 did not bring a significant decrease of hate speech and nationalistic discourse in newly established post-Yugoslav states. For various political, bureaucratic and identitary reasons, it has even become inappropriate to use the term 'ex-Yugoslav' to commonly denominate the successors of the federal socialist state, while the sterile, somewhat ambivalent and politically correct term of 'Western Balkans'[2] was introduced in the administrative and scientific jargon. To a certain extent, the European Union (EU) became for all South-Slavic nations what previously was the common federal state – an entity that encourages cooperation and mutual understanding and discourages any identity-based discourse that may represent a threat for the stability and regional integration. The objective of this paper is to analyse if (through which mechanisms and with what success) the perspective of EU membership and the acceptance of its legal system could contribute in order to prevent nationalistic discourse in ex-Yugoslav countries. Consequently, the further analysis will be performed in three parts. In order to provide an appropriate historical and social perspective, in the first chapter, the focus will be on the common political, legal and cultural heritage of ex-Yugoslav countries. Subsequently, the EU-related legal and political mechanisms potentially influencing various manifestations of the nationalism will be examined in the second chapter, while the closing chapter will be dedicated to the revival of nationalism and the EU, with the focus on how to apply lessons learned from the ex-Yugoslav case. The ambition of this paper is not to analyse the causes or effects of the ethnic nationalism in the Western Balkans, but to put some more light on the possible influence that both the EU's 'soft power' and its legal or policy acts may exercise over the nationalistic discourse and practices.

2. Common political, legal and cultural heritage of ex-Yugoslav countries

Any endeavour aiming to analyse post-Yugoslav nationalisms and the influence the European integration may have on their practices and discourses would be incomplete

[1] A study from the late eighties found that over only one decade (between 1971 and 1981 censuses) 'the number of individuals who declared Yugoslav identity increased 4½ fold, from 273,077 to 1,219,004' (Burg & Berbaum, 1989, pp. 535-554).

[2] One may even argue that the EU gave birth to the term 'Western Balkans', given that it 'first appeared in the context of the Stabilisation and Association Process'. Branković *et al.* (eds), 2014, p. 66.

without the reference to the several decades of common political, legal and cultural history. Moreover, the real headache for numerous researchers and social scientist[3] starts when they try to explain how the years of undeniable economic prosperity in the context of a shared cultural (and linguistic) space could possibly lead to devastating hatred and militant nationalism. Therefore, in this chapter will be analysed some crucial characteristics of Yugoslav constitutional system (2.1) and common legal heritage it has produced (2.2), before turning to the reasons of the failure of common Yugoslav cultural identity against ethnic nationalisms (2.3).

2.1. Political and economic freedoms in the context of a weakening constitutional system

Having managed, during the turbulent three decades (1945-1975) that followed the 2nd World War, to achieve significant advances in the fields of economy and foreign policy, the socialist Yugoslavia had developed a highly original political model. While maintaining the monopoly of the League of Communists of Yugoslavia on political and economic life of the country, the regime of President Josip Broz Tito enabled – situation impossible to imagine in any of the countries of Central and Eastern Europe belonging to the Soviet bloc – full political, diplomatic, economic and military independence of Yugoslavia. Yugoslav legal system – established by the 1953 Constitution and the two successive constitutional reforms adopted during the sixties and seventies – allowed significant political, economic and social advances and the level of liberty unfamiliar in any other state with one-party political system. Therefore, after the demise of the socialist federal government, all six Yugoslav republics continued to share a considerable legislative heritage, whose important elements, starting from their adoption, showed the intention to establish a socialist economy market[4], where private property and other economic and social rights were guaranteed and protected.

The socialist Yugoslav federation has undergone two major reforms resulting from the adoption of two successive constitutions in 1963 and 1974. However, the common political and legal legacy of Yugoslav republics is the result of a weak federalism established by the second of these texts. Although it has kept the official name of the country, approved by the 1963 Constitution (Socialist Federal Republic of Yugoslavia – SFRY), the new 1974 Constitution made a profound change in country's federal model. It should first be noted that it introduced the principle according to which the decisions of federal interest, including the decision on the constitutional amendments, must meet the consensus of the delegations of six republics and two autonomous provinces within Serbia (Vojvodina

[3] See, for example, Cohen & Dragović-Soso (eds), 2008; Denitch, 1997.

[4] Regarding the issue of somewhat controversial conception of 'socialist economy market' and the unique concept of 'socialist self-management', the doctrinal bases are presented by one of its main ideologists Edvard Kardelj in his work 'Self-management and the political system' (*Socialist Thought and Practice*, 1980). For a more global perspective of the issue, see Estrin, 2010.

and Kosovo)[5]. Moreover, this text had declared – in the context of a vague wording of its preamble – that the nations of Yugoslavia established the federal state 'based on the right of self-determination, including the right of secession, of every nation' (Constitution SFRY 1974, Preamble). Many legal and political scientists[6] consider that such a conception of federalism could only strengthen the centrifugal political forces and endanger the viability of the federation. The weakness that the federal state has shown in the second half of the eighties, as well as its swift implosion after several successive declarations of independence, rapidly confirmed the validity of this standpoint. Country's weak constitutional basis and devastating effects of Serbian, Croatian and Bosnian nationalisms had put an end to the Second Yugoslavia and heavily deteriorated the relations between the newly born countries in the region of Western Balkans.

2.2. Importance of the federal legal heritage

Despite the week constitutional basis of the socialist Yugoslavia, numerous laws adopted between 1945 and 1990 are still in effect in all countries established after the dismantling of the federal state. Even though few legal experts would now admit it – especially if they are still under the influence of the nationalistic concept of the 'greatness and uniqueness' of their newly born country – some substantially very good laws were adopted in ex-Yugoslavia. This was especially the case the Yugoslav (federal) Law on Obligations, adopted in 1978, the act that, besides its undisputed nomotechnical quality, guaranteed effective and modern contractual relations. In this and similar cases, national law-making authorities were only supposed to operate the reception of the Yugoslav legal heritage in their national legal system. The benefit for the new model of cooperation in the region is clear: the legal basis for trade and other private-law related operations is generally similar in all the countries of the region.

Politically and legally more demanding are the cases when the national legislator is facing legal *tabula rasa*, weather because the socialist Yugoslavia has not adopted laws in certain fields or, as it was more often the case, because the new law-making authority too rapidly and with too much arrogance abrogated federal laws. In this case, the EU model of harmonization and/or unification of laws and its amazing textual result (hundreds of pages of so-called *acquis communautaire*) could be the good example for ex-YU countries. However, even if it is clear that this approach could be followed in some formal aspects of normative convergence, the substance of the new legal solutions should take into account: 1) the nature and importance of each country's commercial relations and 2) its eventual ambition to join the EU.

Finally, the nature of the commercial relations of ex-Yugoslav countries mentioned in the context of the law making is, maybe, the key for understanding the substance of the

[5] Article 398 of the 1974 Constitution provided that 'any decision involving an amendment to the Constitution of the SFRY shall be adopted by the Federation Chamber of the SFRY Assembly, with the consent of the assemblies of all republics and autonomous provinces' (Constitution SFRY, 1974).

[6] See, for example, Kavalski & Zolkos, 2008.

new model of cooperation. Economic systems of all six Yugoslav federal republics were, during the last 50 years, established and developed to be fully complementary; devastating consequences of armed conflicts in Croatia (1991-1995) and Bosnia (1992-1995) could not considerably change this fact. Therefore, every significant step in economic cooperation on European or international level will certainly be the function of the ability to establish and maintain prosperous and sustainable cooperation in the region.

2.3. Common Yugoslav cultural identity and how it failed against ethnic nationalisms

The notion of culture and, consequently, the concept of cultural identity, are complex and multifaceted phenomena. Moreover, the cultural progress is often seen as a mere function or a direct consequence of economic growth, given that, 'as an epiphenomenon, culture represents a projection of economic development in mind […] with definite forms of culture corresponding to each stage of economic progress' (Greenfeld, 2016, p. 85). In the same vein, 'nationalism, being essentially a matter of culture, and corresponding chronologically to the development of capitalism and industrialization, is therefore seen as either a reflection or a functional prerequisite of economic modernization' (Greenfeld, 2016, p. 85 – Ref. 8). While this reasoning may be true for 19th century nationalism in Western Europe, it is inapplicable to ex-Yugoslav ethnic nationalisms in the late 20th century. More precisely, several decades of shared political and economic development have created a significant common heritage, where 'political governance of Yugoslav socialist community translates itself into a project of national cultural defining and distilling Yugoslav cultural identity' (Mišina, 2013, p. 8). In other words, ethnic nationalisms slowly developing already from the early seventies within constituent nations of Yugoslavia were neither a reflection, nor – even less possible to imagine – 'functional prerequisite' of economic modernization. The picture becomes even more complex when one takes into consideration that the process of 'ethnification' of then-republics of Yugoslavia was concomitant with the process of undeniable construction of an overarching, Yugoslav political and cultural identity. What are the main reasons why identitary particularisms and centrifugal political tendencies triumphed over the unifying forces of non-negligible common social, cultural and – as it was demonstrated in previous sub-chapters – legal and political heritage?

Because of disintegrative tendencies materialised by the significant increase of competencies of federal units by 1974 Constitution, the capitals of all six republics – and, to some extent, two autonomous provinces – became the epicentre of numerous important political and social processes. While the freedom of movement of persons, goods and capital, as well as the common economic and cultural space, were strongly working in favour of inter-republic and trans-ethnic cooperation, the revamped nationalistic elites in Serbia and Croatia were progressively introducing the discourse based on nationalistic myths, using the self-victimisation and perfidiously reviving historical frustrations. Permissive, disinterested and, very often, corrupted and incompetent federal political elites were unable or unwilling to put an end to more and more direct and aggressive verbal expressions of nationalism. Moreover, from the early eighties, the religious authorities of all

three big confessions started to participate more openly in the social and political life, most often fuelling ethnic resentments and invoking danger of proselytism whenever they felt the 'national and religious unity' was put in danger. As a sum of all mentioned phenomena combined with economic crisis of mid-eighties, the common Yugoslav cultural identity and resulting values were in retreat, so much so that the refurbished nationalisms could happily contemplate the multi-ethnic country disappearing in the flame of armed conflict.

3. The indirect influence of the EU in the prevention of nationalistic discourse

The direct interference of the EU in the interior political affairs of its member states and candidates for membership is not in accordance with the primary law and basic principles on which the Union is founded. This is a consequence of the fact that, on the one hand, the Member States confer competences on the EU 'to attain objectives they have in common'[7], while, on the other 'competences not conferred upon the Union in the Treaties remain with the Member States' (Article 4 of the TEU). However, throughout the membership negotiation process with a candidate country, various EU institutions and instances have numerous opportunities – via, among others, the opening and closing benchmarks for some of negotiation chapters, and especially those related to judiciary and fundamental rights (Chapter 23), justice, freedom and security (Chapter 24) and foreign, security and defence policy (Chapter 31) – to influence – and, to some extent, even forge – the interior political developments within the candidate country negotiating its future membership. A relatively direct political influence can also be carried out through the mechanisms of Union's external action and its common foreign and security policy, which is clearly demonstrated by the substantive involvement of the European External Action Service (EEAS) and the High Representative of the Union for Foreign Affairs and Security Policy in the process of negotiation between Belgrade and Pristina authorities. However, all these 'heavy weight' mechanisms will not be analysed in this chapter, given that they do not represent the long-standing processes which can seriously and more permanently influence the nationalistic political discourse in a candidate country or, to some extent, member state. On the other hand, what will be examined here is the role of a grand political orientation – such as the decision to join the EU – and its consequences – such as the harmonisation of national legal systems with the EU *acquis* – in the weakening or strengthening of social and political factors influencing the nationalism and its presence in public discourse.

3.1. Potential membership in the EU – from a calming effect to an irritating disappointment

In all states established after the disintegration of socialist Yugoslavia, the clear political orientation towards the membership in the EU was set already in the nineties (for Serbia in 2000), but (for all except Slovenia) it became fully politically operational

[7] Article 1 of the Treaty on European Union (TEU), 2010 *OJ* C 83, 13.

after the European Council and the EU-Western Balkans Summit of Thessaloniki, held in June 2003 and often treated as 'a milestone'[8] in the EU's relations with this geographical zone of potential enlargement. Very soon, it became clear that the good relations between all the states that share the EU membership aspirations is vital for their future accession, given that 'fragmentation and divisions along ethnic lines are incompatible with the European perspective, which should act as a catalyst for addressing problems in the region' (Paragraph 5-3 of the Declaration issued after the EU-Western Balkans Summit, 2018). The political discourse is programmatic and highly proclamatory, while the word 'ethnic(ally)' appears four times in the Thessaloniki Declaration, out of which three times only in paragraph 5. Almost every political, diplomatic or societal challenge is seen under the auspices of ethnicity: 'sustainable return of refugees and internally displaced persons is critical for *ethnic* reconciliation' (Paragraph 5-2 of the Declaration issued after the EU-Western Balkans Summit, 2018), while 'the role of education, culture and youth (is) in promoting tolerance, ensuring *ethnic* and religious coexistence and shaping modern democratic societies' (Paragraph 5-2 of Declaration issued after the EU-Western Balkans Summit, 2018). The political spill-over effect this ethnic-based perspective have had on the internal political discourses in the Western Balkans countries is undeniable. The party leaders and opinion-makers understood that politically correct language imposes affirmative treatment of 'ethnic reconciliation' and 'ethnic coexistence'. Notwithstanding the undisputedly positive effects such orientation and practice have had on the real inter-ethnic relations – both between diverse groups within each of the countries and between the ex-Yugoslav states previously involved in armed conflicts – it was, very often, purely proclamatory and emptied of any real political content.

The 'enlargement fatigue' is a notion present in the EU-related literature for almost a decade; it indicates the saturation of public discourse with diverse negative effects of 2004 and, especially, 2007 enlargements, but it also implies the inaptitude of various EU structures to keep up the EU's attraction in the eyes of candidate countries and their respective populations. In other words, this 'fatigue' is 'another factor that undermines the EU's ability to use accession conditionality for foreign-policy objectives' (Walace, Pollack & Young (eds), 2015, p. 432). The counterpart of this phenomenon in candidate countries – the importance of which is considerably accentuated by global economic crisis, interior political instability and migratory crisis – is the similar saturation by the EU-related issues and even more accentuated disillusion concerning the benefits of country's European orientation and efforts invested in more and more uncertain accession. Such a constellation of irritating disappointments – with both the EU as a political project and its positive effect for citizens – is additionally emphasised by the media and, as such, represents an ideal opportunity for extreme-right and extreme-left nationalistic and/or neo-communist political agendas, out of which many use openly nationalistic discourse. Every political event, such as Brexit, that weakens the EU is seen as a blessing by such political forces, while the slowness of EU's enlargement-related bureaucratic procedures slowly but gradually contributes to the refurbishment of ethnic particularism and nationalism.

[8] European Commission, Press Release Ip/03/860, Brussels, 18 June 2003, 'The Thessaloniki Summit: a milestone in the European Union's relations with the Western Balkans'.

3.2. Role of the harmonisation of national legal systems with the EU acquis

The issue of law approximation necessary for the EU accession is often seen as highly technical question and, consequently, devoid of any significant interest in public discourse and media. However, the real, substantial changes in national political and economic systems – as well as in the real, everyday life of the citizens of candidate countries – can only be made through gradual changes of the legislation, influencing social, economic and political realities. Harmonisation of various provisions of internal legal systems with the EU law, policy the objective of which is 'is to eliminate the inconsistent differences in national legislations'(Ćemalović, 2015, p. 258) cannot, as such, significantly influence the global presence of nationalism and identitary discourse. However, the progressive alignment of various factors influencing day-to-day functioning of industry, commerce, transport and communication – allowing faster and easier cross-border movement of persons, goods and ideas – can have quite indirect, but tremendously positive effects on the retreat of nationalistic feelings. Given that every identitary speech is based on constructs reflecting the uniqueness and endangered specificity of one group, the mere possibility for more trans-national interaction can have far-reaching positive consequences. On the EU level, the progressive implementation of the legislation reducing the costs of roaming[9] provides a sound example, given that 'this approach strengthens the EU's output legitimacy, which is especially important, as citizens increasingly have the impression that the EU has lost its ability to produce concrete added value' (Kaczyński, 2009, p. 7). Applied to candidate countries of the Western Balkans, such strategies have a good potential not only to improve the Union's image, but, more importantly, to allow more substantial channels of cross-border communication and cooperation and, consequently, to contribute to the reduction of nationalistic feelings and practices.

4. Revival of nationalism and the EU: how to apply lessons learned from the ex-Yugoslav case?

Over the last decade, the progressive revival of nationalism was not an exclusive particularity of the countries of the Western Balkans. The global economic and, more recently, migratory crisis, have had undeniable effects and the refurbished nationalism – often referred to as 'the new nationalism' – has shown its strength in a series of parliamentary and presidential elections all over Europe. Here it would suffice to mention the two revealing examples. The percentage of votes gained by anti-European, isolationist and nationalistic UK Independence Party (UKIP) at British parliamentary elections has grown from 3.1% (2010 elections) to 12.6% (2015 elections); in spite of the fact that 'the UKIP's public support did not translate into seats' (Kubicek, 2017, p. 256) the tendency was clear. The real political earthquake of Brexit happened one year later, and it is difficult

[9] According to the European Commission's Strategy for Digital Single Market (COM/2015/0192 final), 'the EU has ended roaming surcharges for all people who travel periodically within the EU', given that 'roaming charges have been gradually reduced starting from 2006', while 'since 15 June 2017, people pay only domestic charges'.

to claim that it was not timely and adequately announced by the rise of anti-immigrant and anti-EU political discourse. Another sound example are the last Polish presidential (May 2015) and parliamentary (October 2015) elections. Without entering into the particularities of electoral processes and their results, two important mentions should be made. The surprise that the electoral block led by *Paweł Kukiz* made in the first round of presidential elections has shown that the electorate was more and more open to the far-right extremist ideas, even when political newcomers often openly using the hate speech present them. Subsequently, the success that 'more nationalistic (particularly *vis-à-vis* Germany and Russia) and critical of the EU' (Kubicek, 2017, p. 256) political discourse has made on parliamentary elections was not a surprise.

Notwithstanding some recent positive developments in Europe (good examples are the Austrian presidential and Dutch and French parliamentary elections) – and regardless certain political and historical particularities of the states of Western Balkans established after 1990 – the lessons, learned from ex-Yugoslav case, about fast-spreading and devastating features of nationalism are widely applicable to the 'new nationalisms' refurbishing all over Europe. Based on the analysis performed and conclusions made in Chapter 3, here the focus will be on the possible transformative influence of EU-related legal and policy instruments on nationalistic discourse; most of the conclusions and recommendations are equally applicable to both member states and candidates for membership.

1. Economic development, progress in the establishment of common (interior) market and deepening of economic relations – as well as parameters such as growth of global GDP, reduction of unemployment or improvement of the quality of life – do not necessarily imply the reduction of nationalistic feelings and the readiness of various political factors and media to use/spread ethnic stereotypes, nationalistic myths and discourse based on self-victimisation. As the examples of ex-Yugoslavia in early nineties and several EU member states over last 5 years have clearly shown, relative prosperity and several decades of undoubted economic progress are not the guarantee that 'the attachment to common values and principles, the increasing convergence of attitudes to life, the awareness of having specific interests in common' (Paragraph 3 of the Declaration on European Identity, adopted in Copenhagen on 14 December 1973) have definitely won the battle over particularisms and destructive nationalism.

2. For the countries that are candidates for the EU membership, the perspective of joining the Union certainly has, in the short term, numerous positive repercussions related to the reduction of nationalistic discourse and 'determination to take part in the construction of a United Europe' (Kaczyński, 2009, p. 7). However, the slowness of EU's enlargement-related procedures progressively darkens the perspective of integration, provoking the resentment of 'unwanted partner' and, consequently, inciting irritation and relapse of nationalism.

3. In such a context, only effective and tangible EU legislative and policy initiatives – visible and present in everyday life of citizens – have a potential to increase convergence and reduce the impact of identity-based discourses. Projects such as Erasmus and

Erasmus+[10] or legislative efforts such as those facilitating movement and communication, can significantly improve the sustainable transnational understanding and, as some authors suggested, even initiate the creation of a 'space for transcultural existence' (Tamcke, 2013). As the ex-Yugoslav example clearly shows, even (to a significant extent) shared language and important elements of common cultural identity cannot prevent the risks of nationalistic discourse paving the path to armed conflict.

5. Conclusion

In spite of a significant common political, legal and cultural heritage shared by the former republics of socialist Yugoslavia, important elements of partially achieved transethnic identity could not prevent the devastating consequences of identitary discourse and destructive nationalism. On the other hand, the role of a grand political orientation (decision to join the EU) and its consequences (harmonisation of national legal systems) have undeniable effects on weakening or strengthening of social and political factors influencing the nationalism and its presence in public discourse. On the basis of universally applicable conclusions that could be made through the analysis of both EU's policy and legal instruments applied to the case of Western Balkans, this paper endeavoured to formulate a number of conclusions and recommendations equally applicable to both member states and candidates for membership. It is argued that possible transformative influence of EU-related legal and policy instruments on identity-based discourse is globally unrelated with the overall economic conjuncture, while only the initiatives with tangible transcultural effects can have a potential to increase convergence and reduce the impact of nationalistic practices and discourses.

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[10] See, for example, Feyen & Krzaklewska (eds), 2012; Mutlu, 2015.

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ČLANSTVO U EU I NACIONALISTIČKI DISKURS NA ZAPADNOM BALKANU – PRAVNI ASPEKTI

Sažetak

Potpirivanje međunacionalne netrpeljivosti, koji se rasplamsalo krajem osamdesetih i početkom devedesetih godina prošlog veka, imalo je tragične posledice za sve novonastale države u regionu Zapadnog Balkana. To je posebno bio slučaj kada su u pitanju odnosi između republika bivše Jugoslavije, čija se koegzistencija u okvirima federalne države završila nizom pogubnih oružanih sukoba, koji su podsticani oslanjanjem na nacionalističke mitove, auto-viktimizaciju i oživljavanje istorijskih trauma koje su imale svoje poreklo u prethodnim ratovima. Svi ovi fenomeni, kao i tenzije koje su izazvali, u širem evropskom kontekstu su doživeli delimično oživljavanje zbog globalne ekonomske i migracione krize, čineći pojavu koja se često označava terminom „novi nacionalizam". Sa druge strane, sve države bivše Jugoslavije dele značajno i opsežno pravno, političko i kulturno nasleđe, dok, tokom već najmanje prethodne dve decenije, perspektiva (ili realizacija) članstva u Evropskoj uniji (EU) nesumnjivo ima izvesne smirujuće efekte na međunacionalne odnose u regionu Zapadnog Balkana. Jedan od značajnih vektora uticaja koje EU ostvaruje kako na svoje članice, tako i na države kandidate za članstvo, tiče se i procesa usklađivanja nacionalnih zakonodavstava sa pravnim tekovinama Unije. Iako su efekti ovog procesa na nacionalistički diskurs i netrpeljivost koju izaziva uglavnom meta-pravni i posredni, nesumnjivo je da politička agenda EU i njeno pravno-ekonomsko uređenje mogu značajno da utiču na smanjivanje međunacionalne netrpeljivosti. Ambicija ovog članka je da ukaže na ostvarene rezultate u ovom procesu, prepreke koje mu stoje na putu i neka od mogućih rešenja.

Ključne reči: proces pristupanja EU, usklađivanje zakonodavstva, nacionalistički diskurs, Zapadni Balkan.

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TOWARDS A BETTER UNDERSTANDING OF THE STANDARD OF ADEQUATE REPRESENTATION OF PERSONS BELONGING TO NATIONAL MINORITIES IN PUBLIC SECTOR

Abstract

Article 15 of the Framework Convention places an obligation upon the State Parties to provide conditions for the participation of persons of minority origin in the work of their public administration and other segments of the public sector. As it is the case with the other strands of Article 15, the degree of realisation of this duty is measured against the standard of adequate representation. Due to the novel nature of the obligation and the programmatic character of Article 15 the standard of adequate representation in non-elected public bodies has remained underdeveloped and vague. In the paper, the author seeks to identify the legal objectives behind the standard of adequate representation by analysing the Advisory Committee's thematic commentaries and country-specific opinions. The purpose of the paper is to contribute to the further normative elaboration of the standard of adequate representation in a way which would increase its interpretative value.

Keywords: *Article 15, standard of adequate representation, public sector bodies, Advisory Committee, national minorities.*

1. Introduction

Intensive development of international minority law in the last decades of the XX century reached its peak with the adoption of the Framework Convention for the Protection of National Minorities. One of the key provisions of this hard law document is found in its Article 15, which establishes a duty of the State Parties to create conditions for effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs. This minority rights norm can be seen as an attempt to answer to the recognition v. redistribution dilemma marking the last thirty years of the political and legal theory on equality.[1] As a simple but eloquent expression of the maxim of "indivisible, interdependent and interrelated" nature of human rights it is meant

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[1] Here could be worth to mention Nancy Fraser (1997), who was one of the leading proponents of a view that redistribution v. recognition dilemma is a false one and that any meaningful approach to social justice should encompass both aspects of inequality among the groups.

to serve both recognition and redistribution related needs of national minorities. It is at the same time an instrument for the realisation of other minority rights laid down in the Convention and the degree of its fulfilment is an important indicator of the degree of fulfilment of these other rights.[2]

Article 15 places an obligation upon the State Parties to provide conditions for effective participation of persons belonging to minority communities in public affairs of a country. Although the scholarly texts and interpretative documents typically emphasize participation in the elected bodies, the concept of public affairs is here used in the broadest possible sense and includes the non-elected public bodies. Differently from the provisions of Article 25 of the ICCPR, which is to some extent an antecedent of Article 15 and where the concept of public affairs relates to the exercise of political powers, here the notion of public affairs connotes to the wider notion of bodies vested with public powers.[3] The participatory rights from Article 15 cover all segments of public administration at all levels of its territorial organization, be it international, national, regional and local.[4]

As it is the case with the other Article 15 participatory rights, the level of realisation of the right to participate in public affairs is measured against the standard of adequate representation. The Advisory Committee on the Framework Convention for the Protection of National Minorities[5] has shaped this particular aspect of the standard into what we could name "the standard of adequate representation of persons belonging to national minorities in public sector".[6] This subtype of the standard of adequate representation is meant to guide the State Parties and to serve as a benchmark against which the conditions

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[2] See Advisory Committee on the Framework Convention for the Protection of National Minorities, Commentary No. 2: The Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs, (further: Commentary No. 2), p. 16, para. 3. See also Basta Fleiner, 2013, pp. 19-36.

[3] In Article 25 of the ICCPR, access to public service positions is regulated in a separate subparagraph (Article 25, para. c). In its General Comment No. 25, the Human Rights Committee interprets the conduct of public affairs broadly as the exercise of power in the legislative, executive and administrative branches (General Comment No. 25: The Rights to participate in public affairs, voting rights and the right of equal access to public service (Art. 25), para. 5).

[4] The logical necessity of such a broad conception of the notion of public affairs is even more evident in those interpretations of the scope of Article 15 which do not depart from the types of powers vested on a particular body i.e. from the question whether a body was entrusted with the conduct of public affairs, but from the types of matters at stake. For instance, Malloy *et al.* (2009, pp. 73-74) refer to "participation in decision-making and self-governance" as the two principal components of the Article 15 right to participation in public affairs, while for Kostadinova (2011, p. 174) the right to effective participation in public life concerns two principal categories: issues affecting minority communities and public affairs of the country as such.

[5] Further: "the Advisory Committee".

[6] The given subtype of the standard of adequate representation is not named as such in the documents produced through the work of the Advisory Committee, but it can be derived from the Advisory Committee's comments on this particular aspect of the Article 15 participatory rights. See, for instance, Second Opinion on Bosnian and Herzegovina, p. 36, para. 200; Second Opinion on Italy, p. 31, para. 136; Second Opinion on Kosovo*, p. 45, paras. 252, 256; Third Opinion on Estonia, p. 39, para. 177; Third Opinion on Italy, p. 40, para. 239; Third Opinion on Serbia, p. 44, para. 181. Apart from the adjective "adequate", the Committee at times also uses the adjective "appropriate" (Second Opinion on Serbia, p. 42, para. 236) or speaks about the "fair number of persons" (Opinion on Cyprus, p. 12, para. 43). In the context of the North Macedonia, the Committee often uses the term "equitable representation", in accordance with the expression used in the national legal framework which guarantees the right to the equitable representation of ethnic communities in the public sector, at central and local levels (Fourth Opinion on North Macedonia, p. 5, para. 4; p. 13, para. 24; p. 19, para. 43, etc).

for the participation of persons of minority origin in the work of public administration and other segments of the public sector are to be reviewed.

Differently from the aspect of the standard which concerns participation in elected public bodies, this second aspect has so far remained almost as vague as the duty for which it is supposed to provide guidance. The experience of Western Balkan countries which received negative findings of the Advisory Committee *vis-à-vis* the degree of representativeness of their public administrations shows that the standard of adequate representation can be more puzzling then instructive for the governments trying to implement the duty.[7] Their efforts, because of the vagueness of the very standard they are supposed to meet, often become a bewildering drifting between the cosmetic changes of their legal and institutional set-up and the complex systems of employment quotas.[8]

In this paper, the author examines the objectives behind the standard of adequate representation in non-elected public sector bodies. The paper is based on the premise that a clearer understanding of the objectives behind certain rule or, in this case, standard, is a good method for the more systematic elaboration of its normative content. An answer to the question of why they are expected to create conditions for adequate representation of persons of minority origin in public sector would also equip the State Parties with the clearer view on how they are to realise this obligation. The author charts the objectives behind the standard of adequate representation in the Advisory Committee's thematic commentaries and country-specific opinions. The purpose of the paper is to contribute to the further development of the standard of adequate representation in a way which would increase its interpretative value or, in other words, bring an additional dose of certainty to the standard itself and the process of monitoring conducted by the Advisory Committee.

The structure of the paper is as follows. The author firstly ponders briefly over the nature and the role of the standard of adequate representation. Following that she provides an overview of the most typical references to its objectives as found in the texts of the Advisory Committee. In the central part of the paper, the author translates political notions identified in the previous part into their legal counterparts found in the principle of non-discrimination and the right to identity and then analyses their relationship with the standard of adequate representation. In conclusion, the author summarizes the main findings.

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[7] For instance, the question of what does "adequate representation" means was one of the most perplexing elements in the considerations of the officials of the Republic of Serbia on how to satisfy this Article 15 requirement and, hence, respond to the findings of the Council of Europe Committee of Ministers that its central level public administration is not enough inclusive (personal experience of the author gained during the participation in the project aimed at providing support to the Government of the Republic of Serbia to improve its legal framework laying down the conditions for the use of affirmative action measures for the employment of persons belonging to national minorities in public sector).

[8] See, for instance: Fourth Opinion on Croatia, p. 33, para. 91; Fourth Opinion on Kosovo*, p. 38, para. 103; Third Opinion on Montenegro, p. 39, paras. 151, 153; Fourth Opinion on North Macedonia, pp. 35-37, paras. 86, 87, 89; Fourth Opinion on Serbia, p. 37, para. 135; p. 38, para. 128.

2. Briefly on the problem of the incompleteness of the standard of adequate representation

The paper departs from the view that the standard of adequate representation is a legal standard in the meaning of a rule which specifies the conditions which are necessary for meeting certain legal obligations. A reading of the thematic commentaries and country-specific opinions on the implementation of the Framework Convention shows that the Advisory Committee uses the standard of adequate representation to interpret the obligations laid down in Article 15 which concern effective participation of persons belonging to minority communities in the work of public sector bodies. As such, the standard of adequate representation should guide the State Parties in their attempt to devise legal and policy strategies which could pave the way towards effective participation of minorities in public affairs and it should serve as a yardstick against which these attempts are to be reviewed.

There are different views in the legal theory on the nature and role of legal standards.[9] For Dworkin (1977, p. 36), they are those considerations which courts characteristically use when deciding a case, which cannot be derived directly from a legal provision and which "incline decision one way, though not conclusively, and […] survive intact when they do not prevail". According to Baude & Sachs (2017, p. 1084), standards or principles make up the "law of interpretation"; "they are pre-existing rules […] that determine the legal effect of written instruments". Greenberg (2017, p. 114) also recognises the role of standards in determining the content of the law but at the same time insists that they are only one element for the interpretation of the law. Brink (1998, pp. 125-126) observes that "legal interpretation of legal standards involves appeal to underlying principles as well as to the meaning of the words in which the standards are expressed", but that one must beware that purposes or intentions of the framers of a legal standard can be determined at various levels of abstraction.

No matter how we define and what role we assign to legal standards it is indisputable that in order to be useful as the tool of legal interpretation, a legal standard should be to a reasonable degree certain. Certainty here stands for the quality of being reasonably definite and complete. A standard which is uncertain neither provides guidance nor serves the fundamental principle of fairness that all similar cases should be treated alike.[10]

The standard of adequate representation exhibits a low degree of certainty *i.e.* it can be said that its meaning is neither definite nor complete. To some extent, the vagueness of the standard could be ascribed to the programmatic character of Article 15. The provision of Article 15, as most of the other provisions of the Framework Convention, lacks direct applicability and leaves the States concerned with a broad margin of discretion with regards to the methods for its implementation. This is a logical consequence of the fact that the State Parties exhibit a variety of different contexts and issues to be tackled, for the reason of which it was necessary to give them a wide margin of discretion in the

[9] Although these questions are in the legal theory primarily considered in the context of judicial adjudication in the common law systems, given the specific role of the Advisory Committee one can nevertheless draw useful conclusions.

[10] See on this Moore (1969, p. 253), albeit in a completely different context.

implementation of the Framework Convention (Explanatory Report to the Framework Convention for the Protection of National Minorities, p. 12, para. 11). "A measure that leads to effective participation in one State Party", the Advisory Committee notes, "does not necessarily have the same impact in another context" (Commentary No. 2, p. 69, para. 148). Yet, the wide margin of discretion given to the State Parties does not mean that they can meet their Article 15 obligations by mare attempts to achieve therein contained objectives. Despite the high degree of their indeterminateness, the obligations arising from Article 15 are not the obligations of conduct but the obligations of result (Malloy *et al*., 2009, p. 96). In other words, the State Parties to the Convention should ensure that there is effective participation of persons belonging to national minorities in public affairs, no matter which method they use. This is reflected in the monitoring process as well. Given the nature of obligations placed before the State Parties, the Advisory Committee cannot go beyond what is necessary while giving guidance on their appropriate implementation, nor it could propose concrete solutions, no matter how appropriate they would be for the achievement of the Convention's objectives in a given context. The Advisory Committee can go only thus far as to identify the principal areas of concern for the effective realization of obligations and point to adaptable patterns of best practice by encouraging State Parties to continue with the implementation of certain measures, or by criticizing other measures as ineffective or contrary to the objectives of the Framework Convention.

The second reason for the vagueness surrounding the standard surely lays in the novelty of this type of obligations (Kostadinova, 2011, p. 176). The extent to which the standard of adequate representation of persons belonging to national minorities in public sector is new can be seen in the Advisory Committee's findings from the first monitoring cycle, in which none of the reviewed countries had met the standard when it comes to the executive branch of public bodies (Weller, 2004, p. 289).[11] This is also observable in the low attention given to this subject-matter in the scholarly literature and in the work of international standard-setting bodies, which are primarily focused on the question of minority representation in elected public bodies and bodies in charge of the issues of special concern for national minorities (See, for instance: Phillips, 2009; Venice Commission, 2011).

What we know from the Advisory Committee commentaries and opinions is that representation of persons of minority origin is an essential (but not sufficient) condition for their effective participation in public affairs. What it takes to fulfil this condition cannot be discerned by recourse to the standard given that the notion of "adequate representation" does not contain any parameters that could answer that question. For that reason, to understand what is meant by an adequate representation of persons of minority communities in public administration bodies we need to understand the legal rationale behind Article 15 and the duty of adequate representation. Why should public administration be representative of the different ethnic groups living in a country? The mainstream human and minority rights discourse is dominated by the notions of diversity, social inclusion, social cohesion, fair and democratic governance, etc. to the point that this question sounds redundant and the answer to it self-evident. As we will see from the

[11] In effect, until fairly recent times the monolingual public administration was the dominant model in most of the European countries. See on this, Malloy & Wolf, 2016, p. 486.

following passage, these notions also prevail in the Advisory Committee's interpretations of the objectives behind Article 15 and the standard of adequate representation.

3. On the broad objectives behind the standard of adequate representation

The broadly stated goal of preserving and enhancing the diversity of the European societies dominates the Advisory Committee's reflections on the rationale of the standard of adequate representation. "Public administration should, to the extent possible, reflect the diversity of society", says the Commentary on the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs from 2008 (p. 8, para. 120, p. 31).[12] The recruitment of persons belonging to national minorities in public administration should be promoted as "a means to […] attest to the government openness towards diversity in society" (Fourth Opinion on Norway, p. 32, para. 91). This general purpose is then complemented by other similarly broad statements evolving around the goal of social cohesion: "The effective participation of persons belonging to national minorities in various areas of public life is essential to ensure social cohesion and the development of a truly democratic society" (Commentary No. 2, p. 15, para. 1).[13] Good governance, in the meaning of inclusive governance, is another value invoked by the Advisory Committee as an objective behind Article 15 participatory rights. According to the Committee, "[c]reating the conditions for effective participation of persons belonging to national minorities should […] be considered by the State Parties as forming an integral part of the implementation of the principles of good governance in a pluralistic society" (Commentary No. 2, p. 19, para. 8). The reflections on the purpose of Article 15 are also found in the Advisory Committee's references to the ideal of fairness of governing structures. Public administration should meet needs of all the segments of society, including the specific needs of persons belonging to national minorities, and "the recruitment of persons belonging to minorities into public administration, […] should be promoted as a means to better respond to their needs" (Fourth Opinion on Finland, p. 32, para. 96). In the Advisory Committee's opinion, this is closely related to the need to secure the true legitimacy of democratic institutions, which can be achieved only if the members of national minorities are treated equally with the members of majority population by accommodating their specific linguistic and other needs (Commentary no. 2, p. 32, para. 1; p. 58, para. 120). Given the more and more pronounced tendency to link human rights goals with economic efficiency, which in the last two decades marks the mainstream human rights discourse, the Committee also refers to the importance of participatory rights to prevent marginalisation of persons belonging to national minorities, which brings "the risk of losing their contribution and additional input to society" (Commentary No. 2, p. 19, para. 9). In the end, the need to ensure effective participation of national minorities in public affairs, including through their adequate representation in public sector bodies, is often

[12] See also: Fourth Opinion on Finland, p. 32, para. 96; Fourth Opinion on the Slovak Republic, p. 27, para. 79.

[13] See, similarly, Opinion on the Netherlands, para. 79, para. 83.

linked to the integration of national minorities.[14] The importance of public administration makes of it a place in which minority languages and cultures need to be specially nurtured as an integral part of mainstream society, including through the employment of persons with the minority background. For that reason, the Advisory Committee notes that prevention of assimilation requires not only removal of policies with the assimilatory effect, but also positive measures that would enable persons belonging to minority communities to preserve and develop their culture (Commentary No. 3, p. 17, para. 79).

We see that the Advisory Committee explains the rationale of the standard of adequate representation of persons belonging to minority communities in public sector bodies through the notions of diversity, social cohesion, democratic governance, inclusive society and integration. Identical remark can be given about the relevant soft law instruments (see OSCE High Commissioner on National Minorities, 1999, 2012). The same can be also said about the scholarly texts on the topic, as most of the authors refer to these notions as to the self-explanatory truths behind the participatory rights laid down in Article 15. While the given notions play an important role of rooting the Article 15 participatory rights in the broader system of values from which they can draw their moral force, the question is to what extent they can be helpful for the further articulation of these rights. How much guidance they can give to the State Parties attempting to understand what is required under the standard of adequate representation and trying to develop, based on such an insight, the legal and policy strategies which would secure the realization of duties enshrined in Article 15? No matter how important is their rhetorical function for the human and minority rights discourse, diversity, social cohesion, good governance, etc. are all political concepts from which the normative content of the standard of adequate representation cannot be derived nor could they guide the practice of the State Parties aimed at its realisation.

4. In search of the legal rationale of the standard of adequate representation

Law and politics are closely related fields of social practice with many concepts in common. This is particularly observable in the constitutional texts and international human rights treaties such as the Framework Convention, in which the social ideals and legal justice goals are closely intertwined. Law has its language and its logic determined by the objectives and scope of legal justice and methods of legal interpretation. For that reason, social goals need to be filtered and translated into corresponding legal goals to arrive to their elements which can be preserved and protected through the mechanisms of legal justice. The process of filtering means in the first place that the relationship between the values protected in the newly enacted provisions and those protected in the existing provisions of a higher legal order is established in a way in which the first can be deduced

[14] Advisory Committee understands integration "as a process of social cohesion that respectfully accommodates diversity while promoting a positive sense of belonging for all members of society" (Commentary No. 3: The Language Rights of Persons belonging to National Minorities under the Framework Convention, (further: Commentary No. 3), p. 17, para. 25).

from the second, hence, ensuring vertical unity of a legal system.

The Framework Convention introduced new standards into the world of minority rights protection. Due to their novel nature, the connection between these standards and the social choices from which they originate is in many of its provisions very palpable. Yet, the Framework Convention is a legal text and in order to serve to legal justice goals, its provisions need to be interpreted in the first place by reference to the higher-ranked legal rules and principles *i.e.* deduced from the legal premises laid down in the broader framework of international human rights law. In other words, even though the key provisions of the Framework Convention, including Article 15, are of a programmatic character which situates them halfway between law and politics, their normative elaboration is possible only by recourse to the more general legal rules and principles.[15]

This means that to identify the legal objectives behind Article 15 and its standard of adequate representation, we need to depart from the legal expressions of the political notions singled out in the previous section which, as we saw, embody the social values that Article 15 is meant to protect. When placed in the broader framework of the international human rights law, the value of diversity leads us to the right to identity, as guaranteed in Article 27 of the ICCPR.[16] The value of social inclusion and of fair and democratic institutions can be translated in the principles of equal treatment and non-discrimination, as guaranteed in Article 7 of the Universal Declaration of Human Rights, Article 2. Para. 2 of the International Covenant of the Economic, Social and Cultural Rights and Articles 26 in conjunction with Article 27 of the International Covenant on Civil and Political Rights. This path then brings us to Article 4 and Article 5 of the Framework Convention, as the embodiments of the general principles of equal treatment and non-discrimination and the right to identity in the context of European minority rights law.

4.1. The relationship between the standard of adequate representation, the principles of equal treatment and non-discrimination and the right to identity

This comes to no surprise, given that the principles of equal treatment and non-discrimination and the right to identity are the foundational norms of minority rights protection.[17] In effect, the Advisory Committee interprets Article 15 in the first place through its relationship with Article 4 and Article 5 of the Convention. In its words, Articles 4, 5 and 15 make up "the three corners of a triangle which together form the main foundations of the Framework Convention" (Commentary No. 2, p. 20, para. 13).

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[15] A reflection on the advantages of "the administration of justice according to law" in Pound, 1913, p. 709.

[16] For instance, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities is a direct result of an attempt to create a more effective and comprehensive system for the protection of minority rights by building upon Article 27. See Commentary of the Working Group on Minorities to the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, p. 2, para. 3.

[17] Many authors point to, what they call, the "principle of substantive equality" as the foundational principle of minority protection (Henrard, 2009; Kostadinova, 2011). However, the problem with the notion of "substantive equality" is that it has itself a very indeterminate meaning.

The principles of equal treatment and non-discrimination are in the Framework Convention laid down in Article 4, para. 1, through the guarantees of equality before the law, equal protection of the law and protection against discrimination:

> "The Parties undertake to guarantee to persons belonging to national minorities the right of equality before the law and of equal protection of the law. In this respect, any discrimination based on belonging to a national minority shall be prohibited."

Article 4 embraces both formal and *de facto* equality. The later, as a reflection of the Aristotelian view of justice that equals should be treated equally and those who are unequal unequally, implies non-identical treatment of persons from a minority background to address their differences from the majority population. This is reflection of a broader conception of the equal treatment principle which was tacitly expressed in *Thlimmenos* v *Greece* case when the European Court of Human Rights said that "[t]he right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without objective and reasonable justification fail to treat differently persons whose situations are significantly different" (Judgment, 6 April 2000, para. 44).

As different from the general human rights instruments from which Article 4 can be derived, the minority rights law significantly expands the reach of the principles of equal treatment and non-discrimination by making the proactive measures under certain conditions mandatory and not only permissible (Commentary No. 3, para. 24, p. 17). This ensues from the second paragraph of Article 4 in which the Framework Convention places upon the State Parties a duty to adopt proactive measures when that is indispensable for the full and effective equality of persons belonging to minority communities:

> "The Parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority. In this respect, they shall take due account of the specific conditions of the persons belonging to national minorities."

This duty spans a variety of different measures, from affirmative action to reasonable accommodation. Some authors emphasise the importance of reasonable accommodation. Ringelheim, Bribosia & Rorive (2010, p. 139) note that "where the controversial measure seems the best way to achieve a certain legitimate objective, the adjustment of that measure by means of an exception may be the only way to eliminate the discriminatory character without compromising the measure's purpose". Other authors place an accent on the duty to adopt affirmative measures as a corollary of the prohibition of indirect discrimination (de Vos, 2007, p. 14; Henrard, 2009, p. 556; compare with Tobler, 2008, pp. 51-53). To make the adoption of proactive measures of either kind possible, the drafters of the European Convention in the last paragraph of Article 4 reiterate that the proactive measures should be seen as legitimate means to ensure effective equality of persons of minority origin:

> "The measures adopted in accordance with paragraph 2 shall not be considered to be an act of discrimination."

In the number of its country-specific opinions, the Advisory Committee followed such broad understanding of the principles of equal treatment and prohibition of discrimination while investigating whether and to what extent the State Party concerned has realized the standard of adequate representation of minority communities in public sector. Where the Committee found that persons of minority origin underwent a systematic exclusion from public sector bodies it required from a State Party not only to establish individual grievance mechanisms but also to adopt proactive measures (Opinion on Croatia, p. 14, para. 57). The Committee insisted on the later as well in those cases in which the State Parties concerned claimed that there was a level playing field for all candidates for the positions in public administration bodies, but their public administration workforce was far from reflecting the ethnic complexity of the society (Weller, 2014, p. 283). Given that underrepresentation of persons of minority background in public administration is caused by a mixture of different factors (apart from the cases of direct discrimination), the Advisory Committee is rarely in the position to ascribe underrepresentation to a concrete discriminatory rule or practice. The structural discrimination, which is in the roots of such underrepresentation, cannot be reduced to a single or clearly identifiable source of discrimination, which is yet another reason why in its recommendations the Advisory Committee points to the proactive measures as a response to this phenomenon and a means to fulfil the standard of adequate representation.

The very purpose of proactive measures is to provide for effective equality of persons belonging to minority communities by meeting their special needs. Due to their past discrimination or their characteristics, without these measures the minority groups would not enjoy an equal treatment through the guarantees of formal equality only. The special needs of these groups, which are to be catered through proactive measures, are either consequence of their past or present unequal position with regards to the access to the basic public goods in comparison with the majority population, as an effect of prejudice and/or direct or indirect forms of discrimination, or ensue from the need to preserve their identity which, being different from the identity of majority population, demands additional efforts to be preserved.

This second aspect is elaborated in Article 5 of the Convention, which not only prohibits assimilationist policies or practices (para. 2), but requires the active engagement of the State Parties with the aim to provide the conditions for the preservation of the identity of minority communities:

> "The Parties undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage (Commentary No. 3, p. 17, para. 24)."

Article 15 points to the most important way in which the special needs of minority communities are to be met to ensure their effective equality with the majority population.[18] It provides the means by which "the concerns of persons belonging to minorities regarding full and effective equality, and regarding their right to preservation and development of their specific identity, are heard and effectively taken into account" (Commentary No. 2, p. 21, para. 15). The adequate representation of persons belonging to minority communities in public affairs is one of these means and as such it represents one of the core elements of what some authors call "the participatory equality" established by the Convention (Kostadinova, 2011, p. 177). The participation of persons belonging to minority communities in public affairs and, as such, their effective equality with the members of the majority community, is impossible without their adequate representation in public sector bodies.

To summarise, the analysis of the relationship of Article 15 with Articles 4 and 5 of the Convention shows that the standard of adequate representation of persons of minority origin in public sector bodies serves for the realisation of three specific objectives:

1. To eliminate prejudice against persons belonging to minority communities, which have led to their exclusion or their underrepresentation in the public sector employment;
2. To provide for equal access to the public services for those members of minority communities whose access to these services is impeded by linguistic obstacles or obstacles arising from the specific cultural practices characterising these communities;
3. To ensure that the specific elements of the identity of persons belonging to minority groups, such as minority language, are preserved.

4.1.1. Elimination of prejudice

Adequate representation of persons belonging to minority communities in public sector employment is a way to uproot discriminatory attitudes and prejudices towards minority groups. The public sector employment, as different from the private one, is subject to a complex set of merit-oriented requirements and due to its importance for the society at large, it is under continuous public scrutiny (Vukojičić Tomić, 2017, p. 366). The employment of persons belonging to minority communities in public administration sends a strong message of their equal worth and can also serve as model for the private sector employers, thus creating conditions for an improved access of persons of minority origin to the labour market and their more effective participation in the socio-economic life of a country (Vukojičić Tomić, 2017, p. 370). This is particularly applicable to the societies with the high unemployment rate and a significant share of persons working in the black labour market, given that state as an employer in many of these countries engages the significant

[18] For that reason, as already said, the Advisory Committee considers Article 15 to be a central provision of the Framework Convention (Commentary No. 3, p. 53, para. 84).

portion of a labour force and provides salaried and stable employment. Needless to say, greater participation of persons of minority origin in the public sector employment has positive effects on the social mobility of the members of minority communities (Vukojičić Tomić, 2017, p. 370). In general, the presence of persons who speak minority languages among the public sector employees has an important role in the elimination of prejudices against the minority groups. As noted by Rubio-Marín (2003, p. 64):

> "[…] part of the eradication [of prejudice] process will necessarily have to consist in some degree of public accommodation of the languages of the discriminated groups, so that the latter come to be respected as holders of a cultural identity. Only through such accommodation will the speakers of the dominant language, who may have never experienced obstacles of linguistic access themselves, perceive language minorities as more than 'poor speakers' of the dominant language; as people who have their own culture and are in the process of supplementing it with elements of a new one."

4.1.2. Equal access to public services

Without adequate representation of persons belonging to minority communities in public sector, the rules, standards, policies and practices for the provision of public services are created without their participation, hence, potentially reflecting only the interests and needs of the majority community.[19] This might, as a consequence, lead to the situation in which the provision of public services was organised in a way which placed before the minority groups barriers to their equal access to these services and/or resulted in the situation in which these services could not satisfy their specific needs. The Advisory Committee notes that the obstacles to an effective realization of socio-economic rights of persons belonging to minority communities might arise "from the insufficient capacity of the administrations concerned to cater for the specific needs of persons belonging to national minorities" (Commentary No. 2, p. 29, para. 37).

This is especially true for their linguistic needs. Difficulties arising from the asymmetric bilingualism of persons belonging to national minorities *i.e.* their lack of proficiency in dominant language can negatively affect the realisation of the wide panoply of rights and freedoms (Rubio-Marín, 2003). Here, we are not speaking only about language barriers which may amount to direct or indirect forms of discrimination. "Because language skills are so crucial to functioning in society […] and to interacting with state authorities", Rubio-Marín notes, "there are many ways in which lack of knowledge of the public and dominant language(s) can diminish people's chances even where this is not

[19] For that reason, in its Opinion on Italy, the Advisory Committee praises the Italian legal framework which requires "an adequate representation of the Slovene minority in the bodies drawing up socio-economic and environmental plans so as to safeguard the historic and cultural interests of this minority" (Second Opinion on Italy, p. 31, para. 136). One should, however, be aware of the danger of "symbolic participation" of national minorities in public sector bodies. More on this in Penasa, 2014.

linked to discrimination" (2003, p. 65). The barriers arising from an insufficient command of the language(s) in official use can be part of a broader set of interconnected and mutually reinforcing obstacles which result in a phenomenon of structural discrimination, a form of discrimination which cannot be dissected into concrete discriminatory acts.

The possibility to approach public authorities, especially the public administration bodies, in minority languages is a particularly important aspect of equality through linguistic rights (Palermo, 2007, p. 13). The Advisory Committee observes that "[p]ersons belonging to national minorities frequently face significant difficulties in accessing the labour market, education and training, housing, health care and other social services", often because of "language barriers related to insufficient command of the official language" (Commentary No. 2, p. 54, para 86). These barriers, according to the Committee, are even greater in case of "persons belonging to national minorities who, due to low-quality minority language learning possibilities, graduate with only limited minority language skills and without proficiency in the official language" (Commentary No. 2, p. 54, para. 86). These specific linguistic needs of persons belonging to some minority groups, the Advisory Committee concludes, require that "the effective participation of persons belonging to national minorities and/or speaking minority language(s) is ensured within the administration" (Commentary No. 3, p. 56, para. 89).[20] A greater representation of minority communities among the public sector workforce facilitates their easier access to the public services, enables the realisation of their socio-economic rights and, in the long run, the overall improvement of their socio-economic position.

4.1.3. Accommodation of identity-related needs of national minorities

Although at the first glance, adequate allocation of resources for the acquisition of the dominant language by the linguistic minorities might seem the best road towards their effective participation in public affairs and equal access to public services, this is not enough for the realisation of the participatory rights enshrined in Article 15.[21] "The fact that persons belonging to national minorities also have a command of the German language is not decisive", the Advisory Committee says in its first opinion on Germany, "as the effective use of minority languages remains essential to consolidate the presence of those languages in the public sphere" (Opinion on Germany, 2002, p. 14, para. 49). Language is the basic element of one's identity and the carrier of identity that enables cultural reproduction (Commentary No. 3. p. 5, para. 1). The opportunities to use the language both in private and in public represent an important condition for both material and spiritual wellbeing of linguistic minorities (Packer, 2005, p. 263). A language which is not used in communication with public authorities and in access to public services, "will gradually lose all its terminological potential in that field and become a 'handicapped' language, incapable of expressing every aspect of community life" (Explanatory Report to the European Charter for Regional or Minority Languages, p. 16, para. 101). With

[20] See also Fourth Opinion on Finland, p. 32, para. 96.

[21] See, for instance, Fourth Opinion on Moldova, p. 35, para. 97.

that in mind, the Advisory Committee stresses that identity of national minorities can be preserved only through the continuous use of their languages (Commentary No. 3, p. 16, para. 22), both in private and in the public sphere (Commentary No. 3, p. 32, para. 51).

The very fact that language is an essential element of identity and that to be preserved language needs to be practised in private as well as in public, explains why the right to identity enshrined in Article 5, para. 1, mandates its presence in the work of public bodies. Use of minority languages before the administrative authorities is indispensable for "the creation of an overall environment that is conducive to the use of these languages, in order to prevent their disappearance from public life" (Commentary No. 3, p. 17, para. 24). The Committee observes that the provision of conditions for the realisation of linguistic rights through the adequate representation of persons belonging to national minorities and/or speaking the language(s) of national minorities in public administration is not only indispensable for their effective participation in public affairs, but also for the preservation and further development of their identity (Commentary No. 3, p. 5, para. 2).[22]

The link between the standard of adequate representation of national minorities in public sector and their right to identity has found direct expression in the provision of Article 10, para. 2, which reads as follows:

> "In areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if those persons so request and where such a request corresponds to a real need, the Parties shall endeavour to ensure, as far as possible, the conditions which would make it possible to use the minority language in relations between those persons and the administrative authorities."

For the realisation of the right to use minority languages in dealings with authorities, the Advisory Committee says, the effective participation of persons belonging to national minorities and/or speaking minority language(s) through their recruitment, promotion and retention need to be ensured within administration (Commentary No. 3, p. 56, para. 89).[23] Although at the first reading this might sound as if the national authorities were under the duty to secure the given right only if persons belonging to minority communities had no command of the official language, the scope of Article 10, para. 2 is actually much wider. According to the Advisory Committee it also encompasses the need to preserve minority languages:

> "'Need' in this context does not imply the inability of persons belonging to national minorities to speak the official language and their consequent dependence on services in their minority language. A threat to the functionality of the minority lan-

[22] This ensues, in the first place, from the identity-related needs of minority groups. There are, however, number of theories which build the case for linguistic rights not because of minority groups and their needs but in the name of the goal of preservation of linguistic diversity which is postulated in a similar fashion as the goal of preserving biodiversity. An overview and critical observation of such an approach to linguistic rights in Boran, 2003. An interesting discussion on the linguistic rights based on the conception of language as a public good in Van Parijs, 2003.

[23] See also, Second Opinion on Albania, p. 37, para. 209.

guage as a communication tool in a given region is sufficient to constitute a 'need' in terms of Article 10.2 of the Framework Convention. Protective arrangements must be in place to maintain services in the minority language, even if it is not widely used, as it may otherwise disappear from the public sphere" (Commentary No. 3, p. 35, para. 56).

Such a broad understanding of "need" in the context of Article 10 confirms the conclusion that the rationale of the standard of adequate representation is to be found both in the removal of linguistic barriers to an equal access to public services for the members of minority groups, as well as in providing the conditions for the preservation of their minority identity through the preservation of their language. The fulfilment of these two, eventually, also leads to the fulfilment of the objective of eradication of prejudice, as a consequence of the strong interrelatedness of the three above-identified objectives of the standard of adequate representation of persons of minority origin in public sector bodies.

5. Conclusion

Article 15 of the Framework Convention is an attempt to serve at the same time both representational and socio-economic equality claims of national minorities and in that way overcome the dichotomy between their recognition and redistribution related needs. Whether and to what extent such an approach can bring significant improvements of the position of European minority groups *vis-à-vis* the majority population cannot be assessed without a suitable benchmark to measure the level of fulfilment of Article 15. The Advisory Committee to the Framework Convention has been using the standard of adequate representation to evaluate the degree of implementation of Article 15 participatory rights, but some aspects of the standard have remained underdeveloped. This is, in particular, the case with the subtype of the standard of adequate representation which concerns the participation of persons of minority origin in the work of public administration and other segments of the public sector. Due to the novelty of this particular duty and the programmatic character of Article 15, the standard of adequate representation of persons belonging to minority communities in public sector bodies has so far remained almost as vague as the duty the implementation of which it is supposed to measure. Neither the legal theory nor the practice of the Advisory Committee has so far managed to bring an additional dose of certainty to the standard and, hence, increase its interpretative value, even though that there is a clear need to give additional guidance to the State Parties with regards to this particular strand of Article 15.

The paper departs from the premise that further normative elaboration of the standard requires a clearer understanding of what are the objectives to be achieved by the adequate representation of persons belonging to national minorities in public sector bodies. The mainstream human and minority rights discourse is dominated by the notions of diversity, social inclusion, social cohesion, fair and democratic governance, etc. to the point that the question of objectives behind the standard of adequate representation

sounds redundant. These notions also act as the explanatory dogmas in the Advisory Committee's interpretations of the objectives behind Article 15 and the standard of adequate representation. Although the notions of diversity, social cohesion, good governance, etc. have an important rhetorical function in the minority rights discourse, they cannot usher further development of the normative content of the standard of adequate representation, nor could they guide the practice of the State Parties.

With that in mind, in the paper these social ideals are translated into their legal expressions found in the right to equal treatment and non-discrimination and the right to identity, which are then analysed as the main determinants of the objectives behind the standard of adequate representation. Through an investigation of the relationship between the standard of adequate representation and these two rights (Articles 4 and 5 of the Framework Convention), three principal legal objectives behind the standard of adequate representation have been established: elimination of prejudice, equal access to public services and accommodation of identity-related needs of national minorities. Adequate representation of persons belonging to minority communities in the public sector should serve to uproot discriminatory attitudes and prejudices towards minority groups. The legal rationale of the standard of adequate representation is also in the removal of linguistic and other obstacles to equal access to public services for the members of minority groups, and in providing the conditions for the preservation of their minority identity through the preservation of their language and other elements of their culture. The three objectives are interrelated to the point that a greater level of fulfilment of one objective also leads to the greater fulfilment of the other two objectives.

The identification of the legal objectives behind the standard of adequate representation surely does not bring answers to all the questions arising from the application of the standard. Yet, a deeper insight into the goals to be realized can help to minority communities and governments to have a clearer view of the claims which can be reasonably made and of the reasonable means which are at their disposal to implement this strand of Article 15. While it is true that an awareness of the ends to be achieved does not point to the best means, by identifying these ends we have covered at least part of the distance towards a better understanding of what does it take to fulfil the standard of adequate representation of persons belonging to national minorities in public sector bodies.

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KA BOLJEM RAZUMEVANJU STANDARDA ADEKVATNE ZASTUPLJENOSTI PRIPADNIKA NACIONALNIH MANJINA U JAVNOM SEKTORU

Sažetak

Članom 15 Okvirne konvencije nalaže se državama članicama da stvore uslove potrebne za delotvorno učešće pripadnika nacionalnih manjina u radu državne uprave i drugim segmentima javnog sektora. Kao što je to slučaj i sa ostalim elementima čl. 15, stepen ispunjenosti ove obaveze ocenjuje se spram standarda adekvatne zastupljenosti. Obaveza obezbeđenja uslova za adekvatnu zastupljenost pripadnika nacionalnih manjina i/ili osoba koje govore manjinske jezike u javnom sektoru predstavlja novinu u načinu organizacije javne uprave jer su sve do donošenja Okvirne konvencije one po pravilu bile jednojezične. To, kao i okolnost da su odredbe čl. 15 programatskog karaktera, dovodi do izražene neodređenosti standarda adekvatne zastupljenosti. U radu autorka pristupa ovom problemu kroz nastojanje da identifikuje pravne ciljeve koje treba ostvariti primenom standarda adekvatne zastupljenosti pripadnika nacionalnih manjina u javnom sektoru, te sa tim naumom analizira tematske komentare i pojedinačna mišljenja Savetodavnog komiteta za Okvirnu konvenciju. Svrha rada je da se kroz potpunije razumevanje pravnih ciljeva koji leže u temelju standarda adekvatne zastupljenosti doprinese njegovom daljem normativnom elaboriranju. Ovo je neophodno kako bi standard postao određeniji i jasniji, te time i korisniji kako državama članicama Okvirne konvencije u njihovim nastojanjima da ispune obavezu stvaranja uslova za delotvorno učešće pripadnika nacionalnih manjina u radu javnog sektora, tako i samom Savetodavnom komitetu prilikom procene stepena ispunjenosti čl. 15.

Ključne reči: čl. 15, standard adekvatne zastupljenosti, tela javne uprave, Savetodavni komitet, nacionalne manjine.

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CONFLICT OF INTEREST – CASE OF THE PUBLIC PROCUREMENT IN SLOVAKIA**

Abstract

Article deals with the conflict of interest occurring in the process of public procurement. Conflict of interest is a negative phenomenon, which is generally forbidden. Contracting authorities are obliged to adopt adequate measures to prevent and remedy conflict of interest. If they fail to fulfil this obligation, consequences may appear in the form of cancellation of the procurement process, or even in the form of claim for damages caused by maladministration. Author compares European Union´s and Slovak approach to this topic with regard to recent case law of the courts of the European Union.

Keywords: *internal market, conflict of interest, public procurement, damage, sound administration.*

1. Introduction

An operational internal market belongs to the goals of the European Union. Operationability of the market directly depends on the *fair business environment and effectivity of enforcement* and Union shall adopt suitable measures. Pursuant to Article 3 of the Treaty on European Union (hereinafter: TEU) and Article 26 of the Treaty on Functioning of the European Union (hereinafter: TFEU) Union shall establish an internal market, which comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured. It shall even reflect, within the free movement of persons, new migration challenges (Mokrá, 2016). Internal market is then a precondition for sustainable development of the Europe based on balanced economic growth and price stability, a highly competitive social market economy, and a high level of protection and improvement of the quality of the environment. Achievement of the sustainability of economy was not only the pre-accession condition, but it is ongoing duty

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of each member state to strengthen administrative capacities necessary for implementation and application of European Union law (Mokrá, 2017, p. 283).

Public procurement is an integral part of this settlement. European Union provides exhaustive legislation (hereinafter: EU Public Procurement Directives[1]) with the aim to prevent discrimination of undertakings (or preferential treatment) and to preserve a transparent competitive environment at the market of public contracts, which ensures an effective spending of public finances. As the European Commission states on its website (European Commission, n.d.), over 250 000 public authorities in the EU spend around 14% of GDP (around €2 trillion) per year on the purchase of services, works and supplies. Therefore, ensuring of functional market is crucial. Management and eliminating of the conflict of interest is just one step of this task, but it undoubtedly provides a safeguard for the fair, competitive and sound procurement.

In this article, author is focused on the conflict of interests in the process of public procurement. Analysis deals with the approach of the contracting authority to this issue with regard to current EU and Slovak legislation, case law and introduced best practices. The aim of the article is to verify, whether recent Slovak regulation on conflict of interest is sufficient, and if not, to suggest its improvement.

2. The European concept of conflict of interest

Conflict of interest is a negative phenomenon which is generally forbidden. The conflict of interest is present in various areas of law and many definitions of this term exist. OECD provides definition, that 'conflict of interest' involves *"a conflict between the public duty and private interest of a public official, in which the public official has private-capacity interests which could improperly influence the performance of their official duties and responsibilities*" (OECD, 2003, p. 24). Also McDonald (2006) recognizes three basic elements of the conflict of interest: (1) existence of the official duty, which origins from the position connected with public power; (2) existence of the private or personal interest, which can have form of a financial interest, or provision of special advantage to the officer or his/her relative; and (3) interference of private interest with professional responsibilities (objective professional judgement). These general definitions can be used as a starting point. EU market regulations, however, do not use common general definition for whole internal market, but introduce special definitions for various market areas (e.g. competition law, state aid law, public procurement law).[2]

Regarding the public procurement, the conflict of interest is prohibited, too. If it occurs, it results into violation of the principle of equality and principle of non-

[1] These are: Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC; Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.

[2] See for example Article 61 (3) of the Regulation (EU, EURATOM) 2018/1046 or Article 4 (2) of the Directive (EU) 2019/1.

discrimination, as *links between procurer and tenderer provide to related tenderer an uncompetitive advantage over other tendering competitors* [underlined by the author]. Due to this fact, public sources[3] are considered to be spent ineffectively. *The contracting authority* is therefore, at all events, *required to determine whether any conflict of interests exist and to take appropriate measures* in order *to prevent* and *detect conflict of interests and remedy* [underlined by the author] them (*eVigilo*, 2015, para 43).

Such opinion of the court is reflected either in interpretative Recital[4] of the *EU Public Procurement Directive 2014/24/EU* either in its binding part (Article 24) by stipulating that the concept of conflict of interest shall at least cover" any situation where *staff members of the contracting authority* or of a procurement service provider acting on behalf of the contracting authority *who are involved in the conduct of the procurement procedure or may influence the outcome* of that procedure *have, directly or indirectly, a financial, economic or other personal interest* which might be perceived to compromise their impartiality and independence in the context of the procurement procedure. Member States shall ensure that *contracting authorities take appropriate measures* to effectively prevent, identify and remedy conflict of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators" [underlined by the author].

By interpreting the concept of conflict of interest, EU courts have established some standards:

- a conflict of interests entails the risk that the *contracting authority may choose to be guided by considerations unrelated to the contract* in question and that on account of that fact alone preference may be given to a tenderer (*eVigilo,* 2015, para 35);
- a conflict of interest is, objectively and in itself, a **s***erious irregularity without the necessity to qualify* it by having regard to the *intentions of the parties* concerned and whether they were acting in good or bad faith (*European Dynamics*, 2016, para 46).
- management of conflict of interest requires a *compliance with the principle of proportionality and principle of sound administration*. When assessing the conflict of interest, contracting authority is obliged to realise a thorough investigation to find out, whether such a conflict of interest could affect the conducting of tendering procedure and its outcome. Automatic exclusion of the tenderer from the tender is considered in the EU case law as disproportionate.[5]
- the existence of a conflict of interest must lead the contracting authority to *exclude the tenderer concerned, where* that approach is the only measure available to avoid an infringement of the principles of equal treatment and transparency, which are binding in any procedure for the award of a public contract. That is to say, that *no less restrictive*

[3] Not only national public finances, but also the finances from the Structural and Investment Funds of the EU as public procurement of goods, services and works are an essential condition for receive financial support from the EU.

[4] Para. 16 of the Recital requires contracting authorities to make use of all possible means (including procedures to identify, prevent and remedy conflict of interest) at their disposal under national law in order to prevent distortions in public procurement procedures stemming from conflict of interest.

[5] See to this regard for example *Lloyd´s of London v Agenzia Regionale per la Protezione dell´Ambiente della Calabria.*

measures exist in order to ensure compliance with those principles (*European Dynamics*, 2018, para. 46).

- a tenderer with the conflict of interest shall be excluded from the awarding of public contract *only if* the situation of a *conflict of interests is real and not hypothetical* (*Vakakis kai Synergates*, 2018, para. 99).

In order to ensure the operationability of the public contracts market on the national level (with purpose to preserve the implementation of the principles of the internal market), it is inevitable for Member States to ensure proper transposition of the EU procurement rules into their legal systems. This includes either an effective prevention or remedying the conflict of interest. The EU legislation did not stipulate the exact measures to be adopted, so it is the Member State's responsibility to choose and adopt adequate measures to meet the intended goals.

3. The Slovak concept of the conflict of interest

The EU Public Procurement Directives were transposed into Slovak law by the Public Procurement Act of 18 November 2015 (Act No. 343/2015 Coll. on public procurement and on amendment and supplement of other acts). This Act in Article 23 stipulates that *contracting authority shall ensure that there does not exist any conflict of interest in the procurement that is capable of distorting or restricting the competition or infringing the principles of transparency and equal treatment* [underlined by the author]. As it explains further, the conflict of interest covers mostly (not exclusively) a situation, where person involved[6] in the outcome or the process of the procurement, has a direct or indirect financial interest, economic interest or other personal interest which may compromise his/her impartiality and independence relating to the procurement.

"Remedy" in the terms of Slovak law, shall be guaranteed by the duty of involved person to notify immediately the contracting authority of the existence of the conflict of interest in relation to tenderer participating in the procurement in any phase of the process. Contracting authority is then obliged to adopt reasonable measures and realise a remedy. Reasonable measures, according to the applicable Slovak law are mostly: an exclusion of the involved person from the process of procurement or the modification of the obligations and responsibilities of the involved person in order to avoid a conflict of interest. The binding text of the Slovak law complies with the European Union's. The exemplificative enumeration of the relevant situations differs from the EU approach and covers only a minimum number of situations. An attention should be raised regarding the fact that while the EU concept, when identifying the conflict of interest, deals with the

[6] Pursuant to Art. 23 (3) of the Public Procurement Act by *involved person* we can understand mostly (not exclusively) the employee of the contracting authority, who participates in preparation or realization of the procurement, or other person, who provides support to contracting authority and who participates in preparation or realization of the procurement; person with decisive powers of contracting authority which may affect the result of the procurement without necessarily being involved in its preparation or implementation.

exclusion of the tenderer, Slovak concept relies rather on the exclusion of the employee. This may weaken the effectiveness, as contracting authority itself may still remain involved.

Slovak approach is focused on the relation of the involved person to the tenderer. *As there is only a general clause, lot of questions arise*. How, for example, can the relation of the involved person to the tenderer be assessed? Must the tenderer be a close relative or any relative at all? How far relative must the tenderer be in order not to be considered in relation with the involved person? And, what happens in the situation, when the close relative of or close person to the involved person has the business connection with the tenderer, or the statutory body of the tenderer? Or what if they were friends? What if none of them (involved person and tenderer) discloses the truth about their relation?

Assessment of these questions, as well as effectiveness of the preventive and remedy measures relies on the (subjective) abilities of the contracting authorities (e.g. state institutions, villages, schools, companies own by the state, etc.).[7] This is the weakest point of the regulation, as many contracting authorities are unaware of the meaning and the wide scope of the concept of the conflict of interest (especially regarding the recent case law of the CJEU). Effectiveness of its implementation is therefore questionable.

With an aim to help, the Public Procurement Office issued a soft law instrument. In its guidance on identification of conflict of interest (Public Procurement Office, 2016) the Public Procurement Office recommends contracting authorities to adopt their own code of conduct and to identify a group of involved persons, who may participate in the process of procurement. It also introduces a draft form, which is supposed to help contracting authority to identify involved persons with conflict of interest. Contracting authority is recommended to submit this form to its employees participating in procurement process. A form requires data (beside the identification of the person) regarding that person's status (whether person is/is not an employee of the contracting authority or cooperates on the other contractual basis) or powers in relation to the public procurement (e.g. person is responsible for elaborating the procurement contract, or approving tender material, or is a member of assessment committee, or prepares an electronic auction, etc.) and declaration of the person, whether, in relation to the relevant public procurement, he/she is in conflict of interest regarding the tenderer in various phases of the procurement. It is clear, that such "help" covers the basic line of the topic but does not provide effective (complex) solution to any of the above-mentioned questions.

Question on relation between the involved person and the tenderer is essential. From the Slovak law, it is not clear, how this should be implemented. On the one hand, strict interpretation of the relation could cause the infectivity of regulation. On the other hand, too wide interpretation may cause the breach of the principle of proportionality. To find answer to this question, we can look for inspiration in other legal sources. For example, Slovak Bankruptcy Act (Act No 7/2005 Coll on bankruptcy and restructuring and on change and amendment of other acts)[8] provides an exhaustive definition of the related persons. Inspired by the Bankruptcy Act, involved person could be deemed related to the tenderer if he/she:

[7] Contracting authorities are defined in Articles 7-9 of the Public Procurement Act.

[8] See the Article 9 of the Slovak Bankruptcy Act.

- is or was an employee, statutory body or a member of the statutory body, manager, procurator, or member of the supervisory board of the tenderer, or
- holds a qualified interest in the tenderer, which is equal to at least 5% of the registered capital of the legal entity or the voting rights in the tenderer, or the possibility to exercise control over the management of the tenderer, or indirect interest (which means an interest held indirectly through legal entities, in which he holds a qualified interest);
- is or was an employee, statutory body or a member of the statutory body, manager, procurator or member of the supervisory board of the legal entity, which holds a qualified interest in the tenderer, or
- is a person, who is close (i.e. ascendant or descendant in direct line, sibling, spouse or other person, who would feel the harm suffered to the party as his own) to the tenderer, or above-mentioned subjects.

To this regard, it would correspond to the principle of legal certainty, if such definition or other would be provided either as a definition in the legal act, or as the part of best practice introduced by the market regulator. Uniform application of this question by Slovak contracting authorities would help to achieve the homogeneity of the market.

Other sources of inspiration for management of the conflict of interest could be found in the OLAF's *practical guide on identifying the conflict of interest in public procurement* (OLAF, 2013), which explains how to identify, manage, prevent and sanction conflict of interest existing between contracting authority (its employees) and tendering competitors. As Public Procurement Office did not recommend any best practices in its guidelines, it should at least refer to this document as referential code of conduct policy. Reference to the recent case law of the EU courts would be useful, too.

For the management of the conflict of interest, author recommends the following approach:

Firstly, the Public Procurement Office should issue a better (improved) conflict of interest policy guide and code of conduct on this matter. These will ensure homogeneity, legal certainty and the proper implementation of the principle of transparency in the procurement process.

Secondly, the involved person shall provide contracting authority with the list of existing related persons. This list shall be updated annually, or when it is relevant (e. g. when participating in public procurement). At the beginning of the procurement, every participating employee or cooperating person shall fill in a declaration of absence of conflict of interests.

Thirdly, contracting authority shall actively and provably investigate and check on case by case basis, that there is no conflict of interest. When the conflict of interest is detected, contracting authority shall assess, whether it has potential to affect the process or outcome of the procurement. If so, it shall adopt proportional, transparent and effective measures (e.g. notification on this fact, suspension of the involved employee, exclusion of the problematic tenderer, etc.).

Besides that, other effective tools that can improve the management of the conflict of interest might be education and professionalization of the contacting authorities regarding

this matter, sufficient remuneration of the procurers, as well as a deterrent consequence for the partially process and decision.

4. Consequences of the breach of the conflict of interest

Failure of the contracting authority to provide an inquiry and assessment of the conflict of interest means at the same time the infringement of the obligation of due diligence and sound administration. Also, it directly results into infringement of the principle of equal treatment of tenderers and may have *two consequences*:

(1) the Public Procurement Office may order contracting authority to remove wrongful act or cancel the whole procurement;
(2) harmed tenderer may claim damage for the lost opportunity.

As the ECJ reminded in *Vakakis kai Synergates* (2018, para. 150, 151), the contracting authority is required to ensure, at each stage of a tendering procedure, respect for equal treatment and, in consequence, that all tenderers enjoy equal opportunities. Therefore, in order to ensure respect for the principle of equal treatment, it is required to determine on a case-by-case basis, and following a detailed evaluation, whether a person or candidate is in a situation of conflict of interests prior to the decision whether to exclude him/her from the tendering procedure and to award the contract.

As abovementioned option No. (1), i.e. when the infringement of the procurement principles is detected, causes no application problems, author will further focus on the claim for damage having in mind the recent case law. Regarding the conflict of interest, author referred to the EU case law as there is no relevant case law of the Slovak courts in this matter.

In case *Vakakis kai Synergates*, the contracting authority, while preparing the procurement, asked a company A. and its expert to provide certain information for the preparation of the Terms of Reference. Expert of this company provided requested information. Later, a consortium, whose member was also company A., which participated in the preparation of Terms of Reference, participated in the tender and won. Despite the fact that contracting authority was informed by the applicant (Vakakis Kai Synergates) and two other companies on possible existence of the conflict of interest (undertaking A.'s involvement in the drafting of the Terms of Reference constituted an advantage over the other competitors), it *did not provide the proper investigation* and responded that there was no conflict of interest and that there had been no unfair competition in the procedure. Such unlawful acts in the conduct of the tendering procedure fundamentally vitiated that procedure and affected the chances of the applicant, whose tender was ranked second, being awarded the contract. If the contracting authority had fulfilled its obligation of due diligence and had adequately investigated the extent of involvement of the employee of one member of winning consortium in the drafting of the Terms of Reference, it is not excluded that it might have established the existence of a conflict of interests in favour of company A justifying its exclusion from the procedure. Therefore, *by deciding to award the contract* to

the consortium with member A. *without having conclusively established that the latter was not in a situation of a conflict of interests* even though significant evidence suggested the existence of an apparent conflict of interests, *the contracting authority affected the chances of the applicant being awarded the contract.* Therefore, applicant in this case won the claim for damage caused by the loss of an opportunity.[9]

From this case we can conclude, that *obligation of contracting authority to due diligence when assessing the conflict of interest is an immanent part of the principle of sound administration* guaranteed in the Article 41 of the Charter of Fundamental Rights of the European Union (OJ C 326, 26.10. 2012, pp. 391-407). In Slovakia, it is applied through the case law of the Slovak Supreme Court, which in *ŽSR* case (*Železnice Slovenskej republiky*, 2017) concluded that, even in public procurement (which explicitly excludes the applicability of general administrative law) Article 41 of the Charter of Fundamental Rights of the European Union, as well as Recommendation CM/Rec (2007) 7 of the Committee of Ministers to member states on good administration, must be taken into consideration.

Breach of the principle of sound administration may therefore result also in the cancellation of the tender by the decision of the Public Procurement Office and to claims for damages caused by maladministration.

5. Conclusion

The issue of conflict of interest is complex and has many layers and it was not possible to cover it all in this article. However, even by choosing a few aspects of the topic author found that Slovak legislation and practice have gaps regarding this matter.

Firstly, a more precise definition of conflict of interest is missing. Therefore, a legislative change would be appropriate. For example: *the contracting authority or its employees in charge shall not take any action which may bring their own interests into conflict with those of public procurement process. They shall also take appropriate measures to prevent a conflict of interests from arising in the functions under their responsibility and to address situations which may objectively be perceived as a conflict of interests. A conflict of interest exists where impartial and objective exercise of the functions of a contracting authority is compromised for reasons involving family, emotional life, political or national affinity, previous working connection realised in the last 5 years, economic interest or any other direct or indirect personal interest.* Such definition shall be supplemented by a Code of conduct of the contracting authority containing the recent best practices of the EU and Slovak procuring authorities, above-mentioned declarations, procedural protocols and sanctions, which shall be reflected also in the employment contracts of the employees of the contracting authority.

At this point, author agrees with Lecheva (2015), that thoroughgoing verification of red flags indicating the conflict of interest will not only ensure the fair and sound procurement, but at the same time frustrate and prevent multiple corruption, irregularities and fraud in the award and execution.

[9] See para. 193 of the Judgement to the conditions for compensating and Judgement in this case from 12 February 2019 to the amount of damage.

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SUKOB INTERESA – PRIMER JAVNIH NABAVKI U SLOVAČKOJ

Sažetak

Članak se bavi pitanjem sukoba interesa koji se pojavljuje u procesu javnih nabavki. Sukob interesa je negativni fenomen koji je generalno zabranjen. Ugovornici su dužni da preduzmu odgovarajuće mere kako bi se sukob interesa sprečio i otklonio. Ako se ova obaveza ne ispuni, mogu se pojaviti posledice u formi poništavanja postupka javnih nabavki, ili čak i u obliku zahteva za naknadu štete zbog loše uprave. Autorka poredi pristup Evropske unije i Slovačke u vezi sa ovom temom, imajući u vidu praksu sudova Evropske unije.

Ključne reči: unutrašnje tržište, sukob interesa, javna nabavka, šteta, dobra uprava.

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MECHANIST PHILOSOPY, CONCEPT OF „OWNERSHIP“ AND LEGAL STATUS OF HUMAN BODY PARTS**

Abstract

The article deals with the rise of philosophical concept of mechanism, especially in the period of Molecular Biology development and its impact on legal approach to human body. The new challenges such as cloning or human genome editing are key for the dominating concept of mechanism, however, there are some limits as well. The basic question seems to be how far we „own“ our bodies. There is also an increasing role of parents by the „enhancing“ of their children. All this trends seem to be influenced by mechanism, however it creates a threat for other rights of the „enhanced“ children.

Keywords: *mechanist philosophy, ownership, status of human body.*

1. Introduction

The discussion about the status of human body parts is certainly one of the most important issues of current bioethical and legal discussions in the world. The status of the human body and the question of relationship between the human body and a human being as subject of rights are certainly important topics and not only for the contemporary Slovak debate. Do we own our bodies or are we our bodies? That is an eternal question and uneasy one. The search for an answer was strongly influenced by the rise of the mechanist philosophy during last centuries and the status of human body parts seems to be an open topic in the modern era of developing molecular biology. Especially editing of human genome seems to be a challenge for our contemporary mechanist approach to human body.

2. Vitalism versus mechanism

For centuries, two different and contradictory concepts of the human body and life have fought for dominance in the western philosophy – vitalism and mechanism. Vitalism claimed that the natural activities of the body are governed by the supernatural force (vital

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principle, life force) that gives them life. The life is not necessary a variety of physical and chemical phenomena, which are in mutual harmony, but their interaction depends on the vital principle (Gonzales-Crussi, 2008, p. 75).

The roots of vitalism go back to Aristotle, who believed that the soul revives and controls the body, and he can be considered the main representative of the school of vitalism in antiquity (Gonzales-Crussi, 2008, p. 75). Later, in the XVII century, the main representative of vitalism became G. E. Stahl. He put forward the concept of "flogiston" (vital substance), a substance able to leak when burning (Chang, 2009, pp. 770 etc). Perhaps the most famous vitalist was X. Bichat, which is known by the assertion that life is a set of functions that defy death. Bichat believed in two forms of life – animalistic and organic. The human thinking soul is related to the „anima", vegetative life (breathing, digestion) with organic.

In the past, prevailed a rather vitalistic view that living and inanimate objects exist separately from each other, are unrelated and belong to two separate incompatible areas. However, since 19th and especially 20th century, the mechanism began to prevail, and its dominance was confirmed mainly by discoveries in molecular biology and genetics. The mechanism claimed that the body is an ingenious machine folded from inanimate parts. All forms of life can be perfectly explained by physical laws. Life is just a very complex physical and chemical phenomenon, although combined into one huge tangle. The soul is something layered on it. This was the basic doctrine of Cartesian dualism (Dercová, 2010).

The main representative of the mechanism and the creator of Cartesian dualism was R. Descartes (Rutheford, 2017). He and many other mechanists imagined the body as a machine. Life would be, according to them, the intricate complex of rivers with strong current substances, whose composition varies at intangible substance and that carries information throughout the body. Since this is a machine, its study requires strict observance of the laws of physics. So the school of iatrophysics was formed. To its main representatives belongs A. Borelli. His works on the volitional activity of muscles on the basis of physical laws are still valid. In addition to iatrophysics, iatrochemistry also developed, which explained the life processes at the base of chemical reactions (Campillo, 2017).

Finally, in the 19th and 20th century the iatrophysics and iatrochemistry disappeared to molecular biology. Genetic material in living cells in the form of deoxyribonucleic acid has been proven. The basic properties of the organism began to be addressed from the point of view of the molecular structure, and this was a great blow for vitalistic theories. Although at the moment the mechanism seems to have clearly prevailed, it leads to many open question in the field of law and ethics. The reaction to the Cartesian view of the human body was the desire to grasp a person in his entirety. However, there are other possible approaches.

One of them is phenomenology tries on the mutual unity of mind and body, with the fact that physicality is an important part of a person's personality. Normally, we do not realize our body. However, in cases such as pain, we find that with the body we create an indissoluble unity. However, phenomenology reveals hidden, characteristic features of our personal relationship to our body, thereby understanding what it means to us. We are the perceiving subject of our own body, we have a relationship to it and at the same time we can distinguish it from other objects around us. According to S. K. Toombs only through

our body we are able to communicate with the outside world (Toombs, 2002, pp. 73-78). Phenomenology points to the body as the body of the will, just by using it we make impact to the outside world, only through fact that we perceive and experience the outside world (Kazanjian, n.d.). The body of each person has its own peculiarities (voice, movements, etc.), on the basis of which it differs from other individuals. It is by this that we perceive ourselves and create a specific relationship for ourselves and our body. We create and form our own identity. Based on our bodily features and peculiarities, we are perceived by other individuals, we are an object for them.

3. Limits of mechanist approach and status of human body

As mentioned, the Cartesian approach to the human body represented the innovative attitude of the modern era. From the ethical point of view, it is important to state that a person „owns" his or her body in some way, which, however, cannot be equated with the legal concept of property ownership. It is for this phenomenological point of view, the person's reference to his or her body, the idea of giving a part of it seems unacceptable. Similarly, the idea of considering our body as goods is even less acceptable, since it is incompatible with our dignity.

The human body can be defined from different points of view. From a medical point of view, this is a coherent set of organs or a substance formed by cells and intercellular matter. From a chemical point of view, it consists of water, fats, proteins and carbohydrates. According to some opinions, the chemically calculated value of the human body was at the beginning of 21st century only 68 cents (Hildmann, 2010, p. 15). However, this does not tell us anything about the integrity of the human organism. At present, it can be said that the human body is approached from two points of view. The first is that our perception of the human body is different than the perception of other objects in the surrounding world. We choose a different way of dealing with it than with surrounding objects. The second attitude is characterized by subjective perception of our body through which we are in touch with the outside world, we perceive it and deal with it. In addition, it is also necessary to discuss whether we are truly owners of our body and our organs or tissues, as the libertarians in particular justify (Šuster, 2008, pp. 1-2).

Despite the fact that in the Slovakia prevails rather the opinion on the relations to the human body through the personal rights (Fábry, 2014) there are strong arguments for the position originating from mechanist idea of human as a machine. In most legal systems, the concept of a person also differs from the concept of human. However, the discussion on legal status of a part of the human body does not solve this at all. There are opinions that the human body is an object of *sine domine* and *extra commercio* (Štěpán, 1989, p. 348). The previous definition might be considered as vague, since it does not contain an answer to question what kind of object it is. Because if the human body is the object *sui generis*, we must also provide it with *sui generis* legislation.

Some authors from the inapplicability of specific types of legal relationships to the human body (in particular the impossibility of purchase) derived that in case of human

body and its parts, human body has to be considered as a separate kind of object. However, the question also arises as to how impossible are the sale and purchase of the human body parts. An obstacle seems to be understanding of concept of a thing. Of course, some parts of the human body are an object of legal relations (Fábry, 2014). What are they for objects? Even the laws are ambiguous in this matter. Even the boundaries of notion „right of things" are quite difficult to determine (Mlkvá Illyová & Dufalová, 2019).

The human body parts are often seen as an object of legal relations and sometimes as a thing, although certain types of relationship are excluded. If we understood the human body and its components as things, it would be fairly well definable. However, for the concept of parts of the human body, the concept of "thing" would then be useful. Despite the fact that proclaiming human body parts as things, many legal relations would become simpler, the notion of the integrity of Man still prevails. It must be mentioned that there are prohibitions on "inhuman treatment" and "torture" (even with consent), which undoubtedly include the interventions into the human body. So, although, on the one hand, the concept of the thing could at least somewhat contribute to the definition of the legal nature of the human body, on the other hand, the view of the human body as the thing does not reflect the importance of categories like human dignity (Fábry, 2014).

4. Human genome as a new challenge

The contemporary bioethical topics are one of the reasons, why the philosophy of property rights in human body parts meets its ideological frontiers. The human genome will be considered in categories like „heritage" and the disposition of patient will be described in terms like „testament" (e. g. *testamento biologico*). Using this terminology is a basis for extension of property institutions, because notions like „testament" the majority interprets like some property institution. What should we mean as to using the notion: „human genome as a common heritage"? Should it be considered as the common property of all mankind? Has every form of cloning impact on the rights of others?

Body parts transferable in a market are another difficult problem of the contemporary philosophy. „Body parts" include any organs, tissues, cells, or genetic material on the or within the human body, or removed from it, except for some waste products. There is no easy transition from the mere existence of a market in the body parts to a sound objection in terms of commodities and human dignity. If we consider European idea of human dignity as a central one, there are several arguments against property rights in human body parts. Dignity is an unconditioned and incomparable value. Entities with dignity differ sharply from entities that have a price on the market. If human beings had property rights in body parts and exercised those rights, they would treat parts of their bodies in ways that conflict with their dignity (Fábry, 2005, pp. 371-372).

A year ago, an event took place in the field of genetics, which the scientists considered as a similar act to a fundamental breakthrough in evolution. Man took over his own evolution, began to "Play God". The case divided the world's scientific community and led to passionate debates not only among biologists, but mainly among the lawyers. It is

not so much a medical problem, but mainly legal and ethical, where the abuse of a method can lead to far-reaching negative consequences (Fábry, 2005, pp. 374-375).

A few months ago, children were born in China, twins, whose genome was edited by Chinese scientist He, who was utilizing the method of CRISP/Cas9. Two girls were born, one of which could not get sick of AIDS infection, whereas the second child's outcome was not so unique. In other words, Dr. He prepared a kind of "genetic vaccine". This major case, which triggered a wave of disapproval, was that these changes will also inherit in subsequent generations (Sýkora, 2019, p. 512). Genetic manipulations carried out so far in the world have always ended with the death of an individual and were not transferred to the offspring.

Our approach to human body has changed with that step. Once the method is perfected, the "improvement" of the genome is conducted according to the parents' wishes. But what do we want to improve? Will the individual be satisfied with the "improvement" of human body prepared by the parents for him or her? Did he or she not have human body parts that he or she would like? The child should have an open future. Mechanist approach makes possible that a child will be born as an attempt by his parents, but the man has greater freedom if he or she „owns" a genetic mix than a pre-determined genetic assembly.

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MEHANISTIČKA FILOZOFIJA, KONCEPT "VLASNIŠTVA" I PRAVNI STATUS DELOVA LJUDSKOG TELA

Sažetak

Članak se bavi pitanjem uspona filozofskog koncepta mehanizma, posebno u periodu razvoja molekularne biologije i njenog uticaja na pravni pristup ljudskom telu. Novi izazovi kao što su kloniranje ili izmena ljudskog genoma su ključni za dominantni koncept mehanizma, ali postoje i neka ograničenja. Osnovno pitanje je, čini se, u kojoj meri mi „posedujemo" svoja tela. Takođe, javlja se pojačana uloga roditelja u „poboljšanju" svoje dece. Čini se da na sve ove trendove utiče mehanizam, međutim, to rađa pretnju za druga prava „poboljšane" dece.

Ključne reči: mehanistička filozofija, vlasništvo, status ljudskog tela.

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REFORM OF THE CLEAN VEHICLES DIRECTIVE – FROM PERFORMANCE CRITERIA TO TARGET VALUES**

Abstract

The paper sets the reform of the Clean Vehicles Directive in the broader context of the European environmental policies and inclusion these horizontal policies into public procurement rules. The analysis of effectiveness of that directive is provided from the overall European point of view as well as from the point of view of examples of transposition and different approaches to transposition in the Member States. The Clean Vehicles Directive underwent substantial reform in 2019 which removed case-by-case assessment of environmental impacts of particular vehicles and introduced new approach by setting minimum quantitative criteria for procurement of 'clean' vehicles. Limited scope of the directive aligned to the thresholds of application of the public procurement directives, remained.

Keywords: *public procurement, EU law, environmental policy, Clean Vehicles Directive.*

1. Introduction – green public procurement as current agenda of the European Union

Environmental agenda starts to be crucial element of national as well as international policy, visible via rise of environmentally-oriented parties in Europe and activities of civil society. Urgency of impact of deteriorating of life environment and climate change is not only limited to economic sphere, but also can lead to the migration of people, so-called climate refugees (Matuška & Patakyová, 2018).

It is visible from the agenda of President-elect of the European Commission Ursula von der Leyen that environmental issues will be crucial in European politics when she put 'A European Green Deal' on the first place of her Political Guidelines (Leyen, 2019) and confirming this devotion during her presentation of her team: "I want the European Green Deal to become Europe's hallmark. At the heart of it is our commitment to becoming the world's first climate-neutral continent. It is also a long-term economic imperative: those who act first and fastest will be the ones who grasp the opportunities from the ecological transition. I want Europe to be the front-runner. I want Europe to be the exporter of

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knowledge, technologies and best practice." (European Commission, 2019b).

Along with the directives and regulations setting limits for pollution, technical standards (Zannoni, 2018a, pp. 1-3), fiscal measures (environmental taxes) or development programmes (for more detail see Zannoni, 2018b), green public procurement can develop into effective vehicle for implementation of environmental consideration into day-to day policy. "Green public procurement encourages public authorities to procure goods and services that have a reduced environmental impact throughout their life cycle when compared to comparable goods and services that would otherwise be procured. The purchasing power of public procurement amounts to approximately 14 % of GDP. A substantial proportion of this money goes to sectors with a high environmental impact such as construction or transport. Therefore, GPP can help to significantly lower the negative impact of public spending on the environment and can help support sustainable innovative businesses"(European Commission, 2019a). Moreover, public procurement is also directly linked with spending of the European Union itself via structural funds and therefore shaping public procurement rules cover both, impact of EU fiscal policy as well as fiscal policy of the Member States (Kováčiková, 2018).

Green procurement (both public and private) can include several factors, objectives and socio-economic goals (Cf. Achillas *et al.*, 2019, p. 40):

1. seeking green/environmentally friendly products or services ('core' green procurement), i.e. products and services that minimize their environmental impact during life cycle (e.g. lower CO2 and NOx emissions, decreasing water consumption);
2. focus on social and economic aspects of procurement, i.e. sustainable development;
3. limiting the burden to the environment directly related to policy choices of contracting body;
4. involve and spread a pro-environmental mentality within contracting body, its suppliers as well as general public;
5. support and promote companies that follow eco-friendly criteria as a part of policy.

It must be noted that statutory limits of implementation of green public procurement differentiate private procurement from public procurement. While in the private sector there are no restrictions regarding implementation of green policies, the public bodies shall follow also other statutory duties, seldom directly contradicting to environmental policy. Public body as a contracting authority can contemplate several policy goals, including effective and eco-friendly performance of its own duties, supporting environmental activities of other public bodies and incentive for environmental and human rights consideration of business actors. Environmental dimensions in public procurement can be limited internally as well as externally. Internal limits are stemming from the policy attitude of contracting authority itself and follow ideological, partisan and personal mind set of policy maker. External limits are laid down by local, national and European legislation. European framework of public procurement (PP) is the most visible token of PP rules in Europe.

The Directive on public procurement (Directive 2014/24/EU) is not itself a measure of green public procurement (GPP). In fact, this directive "enables" and "allows"

GPP under its still strict rules, particularly within technical standards or life-cycle costs where environmental externalities can be included into the calculation.

Environmental requirements and standards may be required as far as they are linked to the subject-matter of the contract (Semple, 2015):

- in relation to technical specification (Art. 21(1) Directive 2014/24/EU)
- in relation to the criteria underlying labels (Art. 43(1)(a) Directive 2014/24/EU)
- in relation to variants (Art. 45(1) Directive 2014/24/EU)
- in relation to selection criteria (Art. 58(1) Directive 2014/24/EU)
- in relation to award criteria (Art. 67(2) Directive 2014/24/EU)
- in relation to contract performance (Art. 70 Directive 2014/24/EU).

Although in general, GPP still remains "optional" or voluntary" and depends on the decision of contracting authority or general policy of a Member State, the EU developed several rules of "mandatory" GPP. Zero-energy plan can serve as an example of mandatory GPP. Under Art. 9(1)(b) of the Energy Performance of Buildings Directive "*Member States shall ensure that after 31 December 2018, new buildings occupied and owned by public authorities are nearly zero-energy buildings*" (Directive 2010/31/EU). Minimal standards for energy effectiveness of office equipment are enshrined into regulation implementing the Agreement of 20 December 2006 between the Government of the United States of America and the European Community on the coordination of energy-efficiency labelling programmes for office equipment. The "Energy Star" regulation requires contracting authorities to specify energy-efficiency requirements not less demanding than "Common Specifications", i.e. standards for Energy star ecolabel (Art. 7 Regulation No 106/2008).

Similarly, 2009 version of the Clean Vehicles Directive required minimal list of the operational lifetime energy and environmental impacts that shall be considered when purchasing road transport vehicles (Directive 2009/33/EC). However, this approach regarding vehicles was abandoned due to the substantial amendment of the Clean Vehicles Directive and "performance" assessment was replaced by "targeting" of amount of "clean vehicles" (Directive (EU) 2019/1161). This change of the approach to procurement of "clean vehicles" will be analysed further in this paper.

2. The Clean Vehicles Directive 2009

Although the full title of the Clean Vehicles Directive 2009 (Directive 2009/33/EC) was "*on the promotion of clean and energy-efficient road transport vehicles*", according to Art. 1 it focused only on one means of promotion of "clean vehicles", i.e. via GPP. The Clean Vehicles Directive 2009 saw GPP as purchasing road vehicles "*with the objectives of promoting and stimulating the market for clean and energy-efficient vehicles and improving the contribution of the transport sector to the environment, climate and energy policies of the [Union]*" (Art. 1 Directive 2009/33/EC). The directive imposed on the Member States duty to require contracting authorities and contracting entities (according to directives on

public procurement), as well as entities providing public transport services by rail and road due to public service obligations under a public service contract, to take into account the operational lifetime energy and environmental impacts when purchasing road transport vehicles (Art. 3 and Art. 5(1), Directive 2009/33/EC). The restricted subject-matter of the directive is one of its weaknesses, i.e. it is applicable merely on public procurement, which value is not less than thresholds set for the application of public procurement directives (Art. 4 Directive 2014/24/EU). Since this threshold is currently 144.000 euros (Commission Delegated Regulation (EU) 2017/2365) and therefore it is hardly applicable on purchases of single cars and applies on purchases of certain number of cars, or bus or heavy-duty vehicles. Due to these limits, merely 14% of public purchases of passenger cars in 2009-2015 were covered by the Clean Vehicles Directive comparing to 74.7% of public purchases of trucks and 43.3% regarding buses (European Commission, 2017, p. 17). Moreover, the directive did not cover lease, rental and hire-purchase of vehicles, and any contracts for services.

The directive stipulated minimal standards of operational and environmental impacts that shall be taken into consideration: energy consumption; emissions of CO2; and emissions of NOx, NMHC and particulate matter (Art. 5(2) Directive 2009/33/EC). The Member States may allow involving other operational and environmental impacts for consideration.

This minimum-standard technique of harmonization (for methods of harmonisation see e.g. Woods, Watson & Steiner, 2017) is "implemented" by optional harmonisation method. The operational and environmental impacts can be taken into consideration either (a) by setting technical specifications for energy and environmental performance (or other impacts) in the documentation for the purchase (Art. 5(3)(a) Directive 2009/33/EC), or (b) by including energy and environmental impacts in the purchasing decision (Art. 5(3) (b) Directive 2009/33/EC). This optional harmonisation appears to be another weakness of the directive. The requirement of setting technical standards in the documentation for the purchase does not seem to be rigorous requirement for "green" procurement because it does not prevent contracting authority from setting environmental and operational criteria too leniently, e.g. merely equal to legal technical standards for motor vehicles. Thus, it is quite easy for a contracting party to fulfil requirements of the Clean Vehicles Directive at least purely formally.

For the inclusion of those impacts into purchasing decision, the Clean Vehicles Directive required to include operational and environmental impacts as criteria for decision (Art. 5(3)(b) Directive 2009/33/EC). On the other hand, the directive did not require any minimum level of weight of these criteria in assessment of respective bids. Moreover, in cases where these impacts are monetised for inclusion in the purchasing decision, the methodology stipulated in the directive shall be used. This methodology is in detail described in Art. 6 of the Clean Vehicles Directive based on fuel consumption (in MJ), costs of emission in road transport in euros and lifetime mileage of road transport vehicles (Art. 6, Table 1, 2 and 3 Directive 2009/33/EC).

The Public Procurement included life-cycle costs under Clean Vehicles Directive as mandatory formula if this method of award criteria is included in the procurement

procedure in question (Art. 68(3) Directive 2014/24/EU). On the other hand, the life-cycle costs calculation was not mandatory for vehicle purchases, in general.

3. Transposition of the Clean Vehicles Directive 2009

The Member States were quite reluctant to transpose and only Denmark, Czech Republic and Portugal transposed and notified of transposition within transposition period. The European Commission sent a letter of formal notice to 13 EU Member States due to non-communication of national measures (Belgium, Germany, Spain, Finland, France, Italy, Cyprus, Lithuania, Hungary, Malta, the Netherlands, Poland and Romania), sent the reasoned opinion to 10 Member States (Austria, Bulgaria, Estonia, Greece, Ireland, Luxembourg, Slovenia, Slovakia, Sweden and the United Kingdom) and sent the reasoned opinion as well as referred case to CJ EU regarding Finland (European Commission, 2013, p. 3). The Clean Vehicles Directive provided certain flexibility to the Member States and almost all Member States allowed all options for inclusion operational and environmental impacts. Hence the main responsibility for "greener" public procurement was referred to contracting authorities themselves. These options were restricted by Slovenia, Czech Republic and Sweden. Slovenia exclusively allowed the energy and environmental impacts to be used as award criteria, the Czech Republic did not permit the use of the monetisation option, and Sweden, did not explicitly allow energy and environmental impacts to be used as award criteria (European Commission, 2013, p. 5).

Approaches to transposition of the directive were also different among the Member States - from genuine devotion to the ecological approach to public procurement of road vehicles to quite formal transposition. Belgium developed its own system of scoring vehicles based of "ecoscore" (www.ecoscore.be) that includes environmental and operational impacts in the meaning of the Clean Vehicles Directive (Ministerie de la Region de Bruxelles-Capitale, 2009), as well as noise levels (Art. 1(11) Ministerie de la Region de Bruxelles-Capitale, 2014). Thus, along the Clean Vehicles Directive limits and calculations the "Ecoscore" system involved much more precise and realistic criteria and assessment (Sergeant, Messagie & Van Mierlo, 2011). Slovakia, on the other hand, literally copied the text of the directive into a separate act (Zákon č.158/2011) whose application is mandatory, however, only in cases when the value of purchase is at least equal to thresholds for application of Public Procurement Directive (§ 45 Zákon č. 343/2015). These two approaches can be compared on following example: If we take into consideration the most popular cars in Slovakia bought usually by public authorities (Škoda Fabia, Škoda Octavia, Kia Ceed), ecoscore of Škoda Octavia does not exceed 65 (diesel) and 74 (petrol), Škoda Fabia 75 (petrol), Kia Ceed 66 (diesel) and 71 (petrol) (*Ecoscore*, 2019), comparing the current ecoscore minimum limit for Belgian public purchases is currently 75 (Annex 1, Ministerie de la Region de Bruxelles-Capitale, 2014). Nevertheless, several countries followed such form of transposition, i.e. adoption of separate law copying the text of the directive (e. g. Portugal - Decreto-Lei n.o 140/2010; Romania - Ordonanţa de urgenţă a Guvernului nr. 40/2011). Some countries, on the other hand, included transposition of

the Clean Vehicles Directive into broader concept of "green" public procurement covering also other products (Art. 106 Ley 2/2011, de 4 de marzo; Art. 4(1)(15) Uredba o zelenem javnem naročanju).

On a basis of data from the period 2009-2015, it is apparent, that in the Europe-wide context, the inclination towards "clean" vehicles was almost minimal and impact of the Clean Vehicles Directive was definitely limited.

Table 1 (based on data European Commission, 2017, p. 10)

	Petrol/Diesel	Clean (low- and zero-emission)
Passenger cars	95,3 %	4,7 %
Vans	99,6 %	0,4 %
Rigid trucks	99,9 %	0,07 %
Buses	98,3 %	1,7 %

4. The Clean Vehicles Directive Reform 2019

After analysis of the effectiveness of the regime of the Clean Vehicles Directive (European Commission, 2017), in 2019 the amendment of the Clean Vehicles Directive was adopted (Directive (EU) 2019/1161). The legislative technique of this amendment is peculiar: it renamed the original directive to "*Directive 2009/33/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of clean road transport vehicles in support of low-emission mobility*" (hereinafter also Reformed Clean Vehicles Directive 2019) and replaced text of every article of the original directive by new text. Although the Clean Vehicles Directive 2009 was not repealed or explicitly replaced by new directive, the amendment of 2019 has the same effects. The scope of the Reformed Clean Vehicles Directive 2019 was broadened to purchase, lease, rent or hire-purchase, public service contracts as well as other transport contracts (Art. 1(4) Directive (EU) 2019/1161). However, it still remained linked to thresholds of the Public Procurement Directive.

The reformed directive completely abandoned approach of assessment of operational and environmental impacts as well as life-cost calculation formula replacing them with minimum procurement targets. Under Art. 5 of the Reformed Clean Vehicles Directive, these targets are expressed as minimum percentages of clean vehicles in the total number of road transport vehicles covered by the aggregate of all contracts covered by the directive, awarded between 2 August 2021 and 31 December 2025, for the first reference period, and between 1 January 2026 and 31 December 2030, for the second reference period.

These thresholds were set at different levels for the different Member States because "setting the same requirement for all Member States would risk setting a minimum requirement that could be meaningless for some Member States, but too challenging for others" (European Commission, 2017, p. 37). These thresholds were set on a basis

of economic capacity of the Member States (GDP) and exposure to pollution (urban population density (Rec. 12 Directive (EU) 2019/1161) and slide form 17,6 % to 38,5 % regarding light-duty vehicles, 6% to 15 % for trucks and 29 % to 75 % for buses.

The Reformed Clean Vehicles Directive 2019 provided also time-dynamic definition of clean vehicles. For 2030 the clean vehicles under the directive will be really "clean", since zero CO2 emissions as well as no other pollutant are required for this definition. For 2025 "clean" vehicles can produce certain small amount of CO2 and other pollutant. Moreover, all vehicles using so-called alternative fuels[1] are also considered clean vehicles.

On the one hand, the previous regime of Clean Vehicles Directive appeared to be truly ineffective. On the other hand, the reformed directive has still several shortcomings. First of all, it still remains stuck to the scope of public procurement directives (Rec. 8 Directive (EU) 2019/1161). Particularly in smaller EU Member States in which it is not necessary to purchase more cars in the same year, effect on light-duty vehicles can be limited. Second, the directive focuses merely on number of vehicles, but not on overall environmental impact of all vehicles covered by the directive, i.e. how "clean" clean vehicles are and what will be environmental exposure of vehicles that are not considered clean. Moreover, thirdly, overall emissions of vehicles during their operational time are not taken into account. Indeed, actual effects of the directive can be assessed in the future due to precise schedule of reports and evaluations stipulated in Art. 10 of the Reformed Clean Vehicles Directive 2019.

5. European Economic Area and association agreements

The Reformed Clean Vehicles Directive 2019 was labelled as European Economic Area (EEA) relevant document. The original 2009 directive was included into EEA regime by the decision of the EEA Joint Committee (Art. 1 EEA, 2013) and after fulfilment of constitutional requirements came into force 1 July 2017 within the EEA (EEA, 2018). Therefore, it is possible to apply the whole regime of the 2009 directive also in non-EU countries of the EEA, whereas the regime of 2019 directive is not applicable in the non-EU countries. The Reformed Clean Vehicles Directive 2019 does not provide any thresholds for Norway, Iceland and Liechtenstein. This situation can lead to the following outcomes. First, the EEA Joint Committee does not include the Directive of 2019 into EEA legal regime. Since the directive of 2009 was not repealed but amended, it can remain in force within the EEA regime in the original version. Second, when the EEA Joint Committee includes the directive of 2009 into EEA legal regime, it will become inapplicable for non-EU member states of the EEA.

The situation is similar vis-à-vis associated countries. It was possible for them to approximate to public procurement regime including the Clean Vehicles Directive 2009 however from the Clean Vehicles Directive 2019 they lost their guidance due to the lack of limits for such countries. Nevertheless, the associated countries could still use threshold

[1] Electricity, hydrogen, natural gas including biomethane, in gaseous form (compressed natural gas - CNG) and liquefied form (liquefied natural gas - LNG).

given for the EU countries with the closest level of the GDP per capita and urban density as a guidance for approximation in order to gradually fulfil overall environmental targets of the EU for pollution.

6. Conclusions

The aim of the EU in environmental policies is obvious: to be an environmental leader of the world. However, setting merely general targets is not a measure precise enough to be achieved. The Clean Vehicles Directive is quite a small stone in the mosaic of environmental measures. On the other hand, under the wording of the Clean Vehicles Directive 2009 it was possible to ignore these environmental goals without violating the directive itself. Some Member States transposed the directive very formally, e.g. by copying the text of the directive it the national legal order, while the others tried to involve strict environmental criteria (e.g. Belgium).

In 2019 this regime was abandoned by setting procurement targets for "clean" vehicles, however, the main shortcoming of this reform is, again, its limited scope aligned to the scope of public procurement directives, ignoring procurement activities under these thresholds. The Reformed Clean Vehicles Directive is less focused on the terms and conditions within the public procurement, so it is less a "public procurement" directive. Using "green" targets, it lays down criteria for general policies of the Member States that shall achieve certain amounts of eco-friendly vehicles in public sector. Since it is still quite easy to circumvent the directive, environmental goals still mainly remain the responsibility of the Member States, and the real impact of the directive depends on its transposition. The Reformed Clean Vehicles Directive does not provide any guidelines for transposition and paths for achievement of the goals. It possible that some states rely on the "old" system of setting criteria under Clean Vehicles Directive 2009, which can provide one of the options to achieve envisaged targets. However, the specific character of the directive stemming from the method of harmonization (more precisely, the directive does not harmonize laws of the Member States at all) can also cause that it will be quite difficult to assess proper transposition of the directive before the target dates. Failure to fulfil duties of a Member State will have irreparable consequences at the due date of achievement of target values. Thus, infringement can hardly lead to fulfilment of the goals of the directive – clean transportation. Therefore, proper transposition and implementation of the Reformed Clean Vehicles Directive is one of the environmental challenges of the Member States, as well as the new von der Leyen's European Commission.

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REFORMA DIREKTIVE O ČISTIM VOZILIMA (CLEAN VEHICLES DIRECTIVE) – OD KRITERIJUMA USPEŠNOSTI DO CILJANIH VREDNOSTI

Sažetak

Rad postavlja reformu Direktive o čistim vozilima (*Clean Vehicles Directive*) u širi kontekst evropske politike zaštite životne sredine i uključivanje ovih horizontalnih politika u pravila o javnim nabavkama. Analiza efikasnosti direktive se sprovodi sa opšteg aspekta EU, kao i sa aspekta primera i različitih pristupa primene/transpozicije ovih pravila u državama članicama. Direktiva je prošla kroz značajnu reformu 2019. godine, koja je uklonila kazuističku procenu ekološkog uticaja konkretnih vozila i uvela novi pristup postavljajući minimalne kvantitativne kriterijume za nabavku „čistih" vozila. Ograničen domen primene ove direktive usklađen sa pragovima primene direktiva o javnim nabavkama i dalje ostaje.

Ključne reči: javna nabavka, pravo EU, politika zašite životne sredine, Direktiva o čistim vozilima (*Clean Vehicles Directive*).

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INFLUENCE OF LAW OF THE EUROPEAN UNION ON LEGAL SYSTEMS OF THIRD COUNTRIES: SOME CONTEMPORARY TENDENCIES

Abstract

The paper is devoted to the analysis of EU legal order's impact on non-member states. EU law serves as the main tool for this process as the expansion of EU law outside of the Union is one of the priorities of its external actions. This is implemented through conclusion of international treaties with third countries. The author investigated provisions of association and partnership agreements of the European Union with different countries. The conducted analysis lets us make conclusions on the character and ways of influence of EU law on legal systems of non-member states, which depend on the level of cooperation between the parties that is precisely determined by relevant international agreements.

Keywords: *European Union, EU law, approximation, acquis communautaire, Russian Federation, international treaties, implementation.*

1. Introduction

At present, the expansion of legal norms of the European Union beyond its borders is one of the most important areas of its foreign policy (Cardwell, 2012, p. 218). This applies, first of all, to relations with those states that are not part of it, but the stabilization of relations with them serves foreign policy interests of the expanding Union (Lavenex, 2004, p. 681). In addition, researchers draw attention to the fact that a relatively new characteristic of the EU is the adoption by its institutions of acts addressed to legal entities of third countries (the so-called extraterritorial effect) (Scott, 2014, p. 1343). This practice causes a lot of controversy from the point of view of the concept of state sovereignty, since it aims to impose on other subjects of international law a regime of cooperation that, under certain circumstances, may deprive them of the means to effectively protect their interests.

The legal basis of the EU influence on legal orders of third countries, namely, candidate countries and neighboring states, are relevant international treaties concluded with them. Moreover, when concluding international treaties with third countries, the

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European Union widely uses the practice of including in these agreements provisions similar to those contained in founding treaties or acts of EU institutions that are addressed to the Member States. This creates legal grounds for the assimilation of the provisions established by law of the European Union by the domestic legal systems of third countries (Hillion, 2005).

Among third countries with which the EU has treaty relations, the candidate states for accession and the neighboring states occupy a special place, since they are the ones which work most closely with the Union. The state acquires the legal status of an EU accession candidate after submitting an official application and a positive decision made by the EU Council to open a negotiation process with that state. According to Article 8 of the EU Treaty, the Union shall develop a special relationship with neighboring countries, aiming to establish an area of prosperity and good neighborliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation. To this end, the Union may conclude specific agreements with the countries concerned. These agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly. Their implementation shall be the subject of periodic consultation (Consolidated version of the Treaty on European Union).

We would like to pay special attention to association and partnership agreements concluded by the Union with neighboring countries.

2. The role of EU law in the association agreements

The conclusion of association agreements with European countries is often perceived as a steppingstone towards EU membership (Phinnemore, 1999). However, there is no automatic link between association and accession prospects (Van Der Loo, Van Elsuwege & Petrov, 2014). Nevertheless, due to conclusion of an association agreement a state is recognized as capable of negotiating accession to the EU. Nowadays these agreements have been concluded with all candidate countries, with some of the applicant states and other third countries. For example, in 2014, an Association Agreement was signed with Ukraine (Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part).

The closest cooperation within the framework of the association is provided for by the Agreement on the European Economic Area (hereinafter — EEA), which actually reproduces the main provisions of the EU Treaty and acts of the institutions of the Union, providing for their fullest recognition of EU law in cooperation areas stipulated by that Agreement. The emphasis is on the inclusion in national law of the EEA member states of entire blocks of EU law both by reproducing the provisions of the Treaty on the European Union in the Agreement on the EEA, as well as, by referring to the EU regulations and directives referred to in the annexes to the Agreement and acts of association bodies, created according to the Agreement and which provisions become part of the national legal orders of associated states.

One of the ways for approximation of legislation is to introduce directives of EU institutions in the national legal systems of the associated countries through references to these acts or their inclusion in the annexes to the EEA Agreement or acts of association bodies. It should be specially noted that by implementing the provisions of the EU directives in the national legal orders of the associated countries, their national law is being brought closer to law of the European Union. In the same way, harmonization of national legislations in member countries is applied in the Union itself (Kaczorowska, 2011, p. 224).

As a rule, the provisions of the agreements relating to the adaptation of national legislation of associated countries to EU law should have the character of both "hard" and "soft" obligations of the parties depending on the areas in which the adaptation is carried out. However, the definition of the spheres themselves, as a rule, takes into account the special nature of relations with a particular country, although certain spheres, in particular, protection of intellectual property rights, competition law, etc., are enshrined in all association agreements (Ghazaryan, 2014, pp. 68-72).

When conducting adaptation, all associated states must deal with the same EU acts. In practice, there is a selective approach, when for certain associated countries or groups of countries, depending on goals and areas of cooperation defined by an agreement, from the whole mass of EU acts, those whose implementation should ensure that the parties fulfill their obligations are specially selected (Galushko, 2017, pp. 85-86). So, for the associated countries of Central and Eastern Europe, in May 1995, the White Paper "On the Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union" was adopted by the EU Commission in order to determine specific obligations for joining the European Union. Particular attention was paid to the adaptation of national legislation of associated countries to law of the European Union and the expansion of EU law to these countries was also considered. The white paper serves as a reference to be used by current and future associate countries. Its provisions are not binding, but serve as a guide for the EU accession. As regards the practice of implementation of the EU acts included in the White Paper by the associated countries of Central and Eastern Europe, it comes down to the reception of the provisions of acts of EU institutions.

The adaptation of the legislation of the associated countries to EU law is more limited than that carried out within the framework of the EEA, since it covers only areas of cooperation clearly defined by European agreements. Another difference is that the adaptation of legislation of the state parties to agreements to EU law is carried out at two levels — internationally and at the EU level. Adaptation methods come down mainly to the accession of associated countries to the relevant multilateral international treaties that have already been implemented in EU law.

Based on the analysis of the experience of cooperation of the associated countries with the European Union, we can distinguish the following main ways of approximation between national law of these countries and EU law. Firstly, the adoption of national legal acts that take into account, to one degree or another, the provisions of EU law. The second way involves joining a non-EU country to international agreements that are binding for the EU and its member states. The third way is the inclusion of EU legal acts in national law.

Another way is the mutual recognition by the parties of the legal norms in force in each of them. Finally, as a way of adaptation, the parallel adoption by the associated countries of normative acts that are identical or similar in meaning to the acts of the European Union can be used.

3. Partnership and cooperation agreements as a basis for EU law expansion

The European Union's Partnership and cooperation agreements with third countries define similar ways to bring national law of respective third countries closer to EU law. We are talking about concluding or joining international agreements, the adoption of national legal acts, provisions of which comply with the norms of the Union's law, as well as the mutual recognition by the parties of rules of the other party in a certain field. However, such a process is predominantly one-sided in nature, since its implementation is about bringing legal norms adopted by third countries in line with EU law.

Today, the European Union has concluded partnership and cooperation agreements with most of the countries that were part of the former USSR, among which there are both neighboring states and EU partner states, including the Russian Federation.

EU partnership and cooperation agreements may include provisions on the adaptation of relevant legislation of non-member states to law of the European Union, and the main ways of adaptation are joining the agreements to which the EU member states are parties, adoption of normative acts which provisions would comply with EU law, mutual recognition of relevant standards in force in participating countries. It should be noted that the partnership and cooperation agreements also require the creation of legal instruments relating to various fields and are not limited to issues of customs procedures and trade in goods.

The purpose of legal approximation of the Russian legal system to EU law was included in the Partnership and Cooperation Agreement between the European Communities and the Russian Federation (see Agreement on Partnership and Cooperation establishing a partnership between the European Communities and their Member States, of the one part, and the Russian Federation, of the other part), providing in Article 55, that "the Parties recognize that an important condition for strengthening the economic links between Russia and the Community is the approximation of legislation. Russia shall endeavour to ensure that its legislation will be gradually made compatible with that of the Community. The approximation of laws shall extend to the following areas in particular: company law, banking law, company accounts and taxes, protection of workers at the workplace, financial services, rules on competition, public procurement, protection of health and life of humans, animals and plants, the environment, consumer protection, indirect taxation, customs law, technical rules and standards, nuclear laws and regulations, transport (Agreement on Partnership and Cooperation establishing a partnership between the European Communities and their Member States, of the one part, and the Russian Federation, of the other part).

The subsequent documents on cooperation between Russia and the EU confirmed the goal of legal approximation of the legal systems of both parties. The European Union's overall strategy towards Russia in 1999 specified that "the progressive approximation of legislation and standards between Russia and the European Union, in accordance with the PCA, will facilitate the creation of a common economic area" (Common Strategy of the European Union of 4 June 1999 on Russia (1999/414/CFSP)).

The scope of the partnership agreements with the EU penetrates deeply into the domestic policies and law of the parties. Thus, the subject of regulation of the partnership and cooperation agreements with Azerbaijan (see Partnership and Cooperation Agreement with Azerbaijan), Armenia (see Comprehensive and Enhanced Partnership Agreement with Armenia), Georgia (see Partnership and Cooperation Agreement with Georgia), Tajikistan (see Partnership and Cooperation Agreement with Tajikistan) and Turkmenistan (see Partnership and Cooperation Agreement with Turkmenistan) is, among other things, also cooperation in relation to democracy and the protection of human rights. In agreements with the Russian Federation and Uzbekistan, the subject of cooperation, for example, is the prevention and combating of illegal migration, drug trafficking, and the laundering of "dirty" money. For the countries, this state of affairs is a serious test, since the full implementation of such agreements will require far-reaching efforts to adapt domestic legislation in various directions: both in the political and economic spheres, and in matters of improving administrative management and legal proceedings. Extraordinary measures must also be taken in the direction of reforming and restructuring the economy to establish the necessary trust between market participants, as well as institutions that oversee their activities. Thus third countries, parties to partnership and cooperation agreements, in adaptation of their national legislation use selective approach, choosing EU legal norms according to their interests, possibilities and needs in relation to the Union and other countries.

To a large extent, the association agreements are similar to partnership and cooperation agreements (this applies to the provisions on political dialogue, the establishment of enterprises, the movement of labor and capital and on cooperation in the economic, financial and cultural fields). At the same time, the differences that exist between association agreements and partnership and cooperation agreements are primarily due to trade issues, since the first ones are preferential agreements aimed at creating free trade zones for goods and services and cover almost all trade issues between the parties.

If the partnership and cooperation agreements are concluded with states that chose the usual format of interstate cooperation, association agreements (stabilization and association agreements) are concluded with the aim of preparing the state for membership in the European Union and provide for a greater degree of self-restriction of sovereign rights in favour of the supranational organization.

In particular, the bodies of cooperation between states and the EU, on the basis of the partnership and cooperation agreements, only make advisory decisions, which are covered by the concept of "soft law", being essentially political arrangements. In this case, the state has four possible options for behaviour: a) fully implement recommendations submitted by the EU regarding the format of cooperation at the national level and take

appropriate measures; b) carry out a partial implementation of the recommended norm; c) save the status quo; d) improve the mechanism for implementing existing legislation. If the provisions of the recommendations submitted by the EU are not taken into account or are not fully taken into account, the state will not be held legally liable, unlike the EU member states, which are obliged to implement *acquis communautaire* in their own legal systems. This circumstance can only create obstacles in the further process of a state's EU integration.

At the same time, in the association agreements it is assumed that common bodies can be empowered to make binding decisions. For institutional arrangements created through association agreements, it is usually used a structure based on the model of EU institutions, but with limited functions. In addition, unlike the partnership and cooperation agreements, an indispensable economic basis for association with the EU is the creation of a free trade zone or a customs union between the Union and the associated country, the legal regime of which affects the state's exercise of its sovereign powers in the economic sphere. So, the free trade zone provides for the abolition of customs rates, taxes, fees and quantitative restrictions in mutual trade of goods between its participants. At the same time, the states retain the right to independently carry out their trade policy with third countries.

The legal regime of the free trade zone does not require a review of existing free trade agreements with other countries. Therefore, a country, at its discretion, may simultaneously introduce several free trade zones with different groups of countries, including the EU; however, it should not violate its obligations in accordance with the concluded agreements on the establishment of this trade regime. But the customs union is a higher level of integration and involves the implementation of certain restrictions on the right of the state to exercise sovereign rights in relation to foreign trade. According to the rules of this regime, it provides not only the abolition of duties and other trade fees between its participants, but also the unification of foreign trade rules with third countries and the introduction of a single customs tariff for all its participants. State membership in the customs union with the European Union excludes the simultaneous possibility of its membership in other customs unions. Thus, the customs union restricts the parties' right of independent trade policy with third states and requires coordination with other members of the association.

4. Conclusion

In conclusion, it can be noted that the means of the influence of the European Union on the legal systems of third countries is EU law, which turns into an instrument for the effective protection of the interests of the European integration association and its member states in relations with other subjects. As the analysis of the practice of legal regulation of EU cooperation with third countries shows, this is possible, first of all, due to the autonomy of law and the expansion of its norms outside the EU, which is accompanied by the process of adaptation of national legislation of third countries to the standards of the

EU legal system. Thus, third countries are gradually becoming involved in the processes of legal integration within the framework of the European Union.

Such an involvement also depends on a type of relations between the state and the European Union and their intensity as well as aims of cooperation between two parties. Countries, parties of association agreements, seeing these treaties as a way for the future accession to the Union, are more likely to adapt their legislation to the EU legal norms in the light of potential membership, fixing the obligations in relevant agreements. Third countries, parties to partnership and cooperation agreements, in adaptation of their national legislation use selective approach, choosing EU legal norms according to their interests, possibilities and needs in relation to the Union and other countries. In any case, influence of the EU legal order on the legal systems of the third countries is one-sided, prescribing transposition of *acquis communautaire* to national law of non-member states depending on the level of cooperation between the parties, which is precisely determined by relevant international agreements.

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UTICAJ PRAVA EVROPSKE UNIJE NA PRAVNE SISTEME TREĆIH ZEMALJA: NEKE SAVREMENE TENDENCIJE

Sažetak

Rad je posvećen analizi uticaja pravnog poretka Evropske unije na države nečlanice. Pravo EU služi kao glavno sredstvo u ovom procesu, imajući u vidu da je širenje prava EU izvan Unije jedan od prioriteta njenog spoljašnjeg delovanja. Ovo se sprovodi kroz zaključivanje međunarodnih ugovora sa trećim državama. Autor je ispitivao odredbe ugovora o pristupanju i partnerstvu sa trećim državama. Sprovedena analiza omogućava izvođenje zaključka o karakteru i načinima na koje pravo EU utiče na pravne sisteme država nečlanica, što zavisi od stepena saradnje između strana, a što se precizno utvrđuje relevantnim međunarodnim ugovorima.

Ključne reči: Evropska unija, pravo EU, aproksimacija, *acquis communautaire*, Ruska Federacija, međunarodni ugovori, implementacija.

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THE EVOLVING CONCEPT OF LEX MONETAE IN INTERNATIONAL AND EUROPEAN MONETARY LAW**

Abstract

The subject of analysis in the paper is the examination of the application and derogation of the contemporary international and European monetary law principles. In this context, the first part of the paper points to the specificity of the subject of legal regulation of international monetary relations and examines the normative features of the international monetary system. The second part of the paper points to the basic postulates of international monetary law, embodied in the principles of traditional lex monetae and lex contractus, with particular emphasis on the application of these principles in globalized financial flows. The subject of the analysis is to identify the new wave in development of the legal regulation of monetary relations, as well as the role of International Monetary Fund in the process of money regulation, which, according to the author, has significant implications not only for preserving the acquis and values of the international monetary order, but also for the maintenance of internal monetary stability.

***Keywords**: monetary law, EU, monetary jurisdiction, International Monetary Fund, lex monetae.*

1. Introduction

The basic reason for studying the discipline of European and International monetary law is reflected in the need for legal regulation of international monetary relations that alter the scope of monetary sovereignty components. It is interesting that, historically, the concept of monetary sovereignty has not enjoyed the recognition by the international community for a long time, although it is a key institute of international monetary law that has not explicitly found its justification and protection in Articles of Agreement of the International Monetary Fund (IMF). In fact, the first official recognition of this concept does not have its source in jurisprudence, but in the case law of the former Permanent Court of International Justice, in a judgment concerning the legitimacy of a

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public loan in the case of *France vs. Serbia* (where the state prerogative to independently and completely regulate all issues related to the definition and use of the its currency is explicitly recognized).[1] In the globalised economic and financial relations there is a qualitative evolution of the monetary sovereignty concept in the meaning of its adapting to modern economic occasions and international circumstances.

It is clear that due to the conceptual disagreement of the national and international monetary policy programmes, the legislator often made *trade-offs*, but the restriction of national measure in the determination of monetary targets is fulfilled by the legal power of the international monetary instrument (agreement), characterised by a wider field of application, plenty of financial and monetary support measures, as well as prudent monetary cooperation (Dimitrijević, 2018, pp. 49-52). At the same time, we need to be aware that monetary policy is not just an ordinary set of administrative activities that must be under judicial control in order to exercise and protect individual rights. It implies the use of complex techniques and models aimed at sustainable economic growth which judges usually don't understand. While it is clearly understood for monetary law scholars that monetary regimes must be effective, the fact is that the concept of efficiency today still remains a little bit abstract, as it is primarily determined by the mechanics of designing legal solutions, which include a careful selection of doctrinal and legal concepts, form, language, style, and "luck" in regaining the right of certain views (Mousmoti, 2019, p. 7). In the field of monetary law, as a *hybrid branch of law* with private and public interest represented, the requirement of normative efficiency is further complicated, because at the same time, monetary legal norms, due to their dialectical connection to the economic law, must satisfy the condition of economic efficiency, too. This connection is a natural product of legal definition of money, which in attempts to be optimal must include some economic functions of money as commodity and monetary sovereignty prerogative (Gleson, 2018, p. 27).

2. The international monetary system in contemporary law

In the monetary law literature, it is stated that it is not possible with great precision to determine the exact date of the constitution of the international monetary system (Byttebier, 2017, pp. 1-10). Of course, we must point out that the manifestation forms, structure and techniques of contracting international monetary treaties have been changed significantly since the expiration of the classic gold standard. The dynamics in the regulation of specific legal and economic relations is accompanied by a change in the awareness of legal entities, which is why the process of finding a compromise solution can be quite complicated and jeopardised by the implacable legal argumentation of monetary entities that appear in all "issues of state money" as a matter of particular importance to life and the survival of one nation. Namely, the interests of states in establishing legal regulations on international monetary relations cannot be unilaterally reduced to economic

[1] Case Concerning the Payment of Various Serbian Loans Issued in France (*France v. Serbia*), Judgment of 12 July 1929, PJC Rep Series A Nos 20-21. The main question referred under what conditions the holders of Serbian bonds were entitled to obtain the payment of nominal amount of their coupons.

or political ones, as there are many other (non-economic) factors, such as geographical, cultural, ideological, and even affective one (which condition their appearance in practice). At this place a question must be raised: Can common practice created by the international monetary order have primacy over legal rules in the regulation of international monetary relations? Of course, it is obvious that, in the absence of a legal rule that would apply to a specific national problem (issue) from an international monetary relationship, common practice as a subsidiary principle will be applied, although in the majority of cases the absence of a particular legal rule means the absence of a principle (Gold, 1979, p. 36).

The concept of an international monetary system itself is now defined primarily in the legal sense. For the first time, the term is used within the *General Arrangements to Borrow*, which are an integral part of the IMF Founding Agreement. As such, the term is used in legal traffic from January 5, 1962 (more precisely, it became effective after the postponement clause was executed on October 24), when a loan agreement between the IMF and ten borrowers was concluded. The term itself has gained far greater legal significance when it was incorporated into the *Second Amendment* of the Agreement on the IMF (although as such it is not mentioned anywhere in the basic text of the Agreement). In the usual sense, under this term, we include the relations between the member states that are members of the IMF that oversees the management of the entire international monetary system. Nevertheless, we should be cautious about reducing the term *per se* to its purely normative elements, because such approach does not leave enough room for the application of a principle that would unite all the elements (therefore, those no-normative) of international relations in a universal way. The problem with the identification of the international monetary system with its normative elements is also reflected in the fact that these elements are variable, i.e. that their content and meaning can be interpreted differently over time. At the same time, some new elements may need to be taken into consideration or need to be removed from the definition framework. Thus, for example, in 1969, the concept of holding reserves in the form of *special drawing rights* was introduced with the adoption of the First Amendment to the IMF Agreement, or the elimination of gold from primary reserves was established by the Second with the amendment of the Agreement.

The definition of the international monetary system can be given from the aspect of the goal and the essence of the currency problems that it wants to solve. The problem with this approach is that it does not provide the establishment of criteria that separate countries that are not IMF members, but also participate in the international monetary system. The best theoretical principle in defining international monetary system is the one based on the overall payments balance of the states participating in international monetary relations (which are regulated by national monetary legislation). The main monetary authorities in the creation of these rules are the central bank, funds for economic development and stabilisation of economic flows, public debt agency and similar fiscal agencies. Also, we can define international monetary system as a set of rules governing the balance of payments seen as the totality of economic transactions of one country with the rest of the world.

In understanding the precise concept of international monetary system, the theory of monetary law governed the differences between the *two doctrines*. According to the *first one*, this term implies all the rules that apply to transactions between monetary authorities

and private individuals if those payments affect the total balance of payments in any aspect. According to the *secon*d doctrine, it is considered that the term can only be applied to those rules that regulate transactions between monetary authorities in the form of international contracts. The problem is that according to some theoretical considerations, contracts concluded between central banks cannot be treated as classic international treaties (which is partially our opinion, too). The fact that this category of contract cannot be placed in any of the existing classifications in international public law *per se* remains without effect in the matter of international monetary law, because such contracts are natural and logical manifestations of the legal and business capacity of supreme monetary institutions in international transactions.

Of course, the impact of the international public law on the international monetary law is undeniable and can be seen in the development of the IMF from its foundation, through the extension of its competence to proposals for institutional reforms and the introduction of new arrangements. Certainly, this impact is strictly determined and limited by the founding members, because the IMF has its own *corpus juris* since it is the main promoter of the development and regulation of the international system.

The fact is that the international monetary system cannot be considered as a simple set or sum of national monetary systems (their national monetary regulations and participant states in international monetary relations), because it is a legal institute characterised by supranational rules, supranational entities with global legal and economic consequences. Consequently, we consider that there is a relationship of complementarity between the international and national monetary system, because a well-regulated and established national system implies a functioning supranational system. This means that the legislator must make greater efforts in order to create and search for optimal monetary rules whose effects will spill over to the international monetary environment, and when this is not possible, the international environment must impose its own rules to "weak" national monetary authorities and thus strike a balance. The conclusion is that the logic of both systems is the same, but paths of its manifestation are different and independent, which is very useful in practice, because the weaknesses of the small national monetary system can be replaced by the authoritative and credible functioning of the international monetary system.

3. The principles of international and European monetary law

The principles of international monetary law are determined by the rules of national monetary law that have *extraterritorial dimension*, but also in the new circumstances in cases (especially evident in terms of global economic and financial crises) when the states conclude special international agreements with the new monetary institutions or when they decide to join monetary unions and international monetary and financial organisations. We are of the opinion, that in international monetary law we can distinguish *borrowed* principles (from the sphere of national monetary law and international economic and financial law) and the *original* principles that its subjects develop independently. The

theoretical understanding of these principles as *primary* (in the context of borrowed) and *secondary* (in the context of the original ones) have relative importance in jurisprudence, since both groups of principles must be respected by monetary entities at all levels of monetary governance. It is only through their synchronised action that it is possible to provide a contribution to achieving international monetary stability. Today, the most important principles have found their place and confirmation in the new legal mechanisms of economic policy coordination within the Eurozone and they are regulated by the provisions of the EU's agreement and the Washington Agreement establishing the Bretton Wood's system. Of course, these principles cannot be viewed isolated from the principles of national monetary law defined by national monetary acts (central bank laws, monetary strategies and, in particular, public debt management strategies).

3.1. Lex monetae in traditional monetary law

The basic principle of monetary law is the principle of *lex monetae* which implies that entities that conclude a public loan contract are generally free to choose the currency in which they will be denominated, but once they make this choice no later decisions of the State issuing can affect its validity. This means that replacing the existing currency with a new one (which could be observed in some countries during the period of hyperinflation to avoid a complete collapse of the monetary system) does not affect the nature and duration of the contractual monetary obligation (Giovanoli, 2000, pp. 122-123). The monetary literature states that this principle implies not only to the definition of a currency unit but also determines its subunits as well as specific items that have the status of a legal tender. Widely viewed, it is clear that the principle of *lex monetae* is in the function of protecting the legal security and the interests of *bona fides* contracting parties. The principle finds its place in the Charter of the United Nations (Art. 2 pg. 7) in the form of state nominalism, i.e. state theories on the legal definition of money. This principle can also be defined in a negative way, as an inability of states to influence the determination of monetary units in other countries.

The application of the principle follows the perception of civil law that monetary obligations are indestructible, even in case of termination of the currency in which the contract is concluded. Various theoretical approaches to the content of the principles can be found in the literature of monetary law. It is common to make a distinction between the principles of the *lex monetae* in the wider and broader sense (Giovanoli, 2000, pp. 153-154). The narrow definition includes the right to define the currency (in particular, the segment of the old currency exchange with a new one), while the wider definition includes all primary and secondary legislation protecting the domestic currency. A narrow definition gave its interpretation to the Taipei Conference of the Association for International Monetary Law, understood as "the right of a state or group of countries that have a common currency to define or redefine a currency unit and to determine the exchange rate between the new and the old currency unit" (that is, the unit they want to substitute) which includes the definition of the so-called recurrent link.

3.2. Monetary dimension of lex contractus

The mentioned principle of *lex monetae* should not be confused with the principle of legal continuity (*lex contractus* or *lex cause*), which implies the freedom of contracting parties to conclude a particular contract (Lastra, 2015, pp. 16-17). The freedom to conclude a contract and to determine all of its essential elements (lat. *essentialia negotii*) and sporadic elements are the universal principles of civil law. Its contents also include the issue of legal protection of interests of the contracting parties in the event of a change in the particular circumstances under which the contract was concluded, or the issue of its validity, which in the field of monetary obligations has special consequences in case of conversion of the currency in which the contract on a public loan was concluded.

Under the conditions of monetary integration, this principle was especially relevant in the formation of the European economic and monetary union (EMU), through the liberalisation of economic and financial flows, the creation of a European monetary system and the introduction of a single currency (Hermann & Dornacher, 2017, p. 99). For this reason, EC Regulation 1103/97 confirmed the continuity of previously concluded contracts on monetary flows and transfers in order to protect the interests of the legal order, and in particular the principles of already acquired rights (the principle of retention).

In the case of the EU, the majority of authors state that the unilateral transfer of monetary sovereignty is realised without the contextual transfer of legislative and regulatory powers. This fact is best illustrated by the centralisation of monetary policy at the communitarian level and the financial supervision that is still carried out by the national central banks. The controversy arising from this plan is due to the fact that the *lex monetae* has been transferred to the level of the EU. These understandings are confirmed by the fact that all Member States retained a certain degree of influence on the monetary policy that is best reflected in the exercise of the voting rights of the governors of the national central bank in the Board of Directors of the ECB. The great challenge in determining the monetary sovereignty in EMU is measuring the level of remaining national monetary sovereignty and setting the boundaries among the members, because it is hard to determine where the sovereignty of one Member State actually ends and where the monetary sovereignty of another Member State begins. The evolution of *lex monetae* is very evident in the example of European banking union which represents a centralisation of banking policy under the role of European Council. The structure of the Banking Union is based on three pillars: *Single Supervisory Mechanism*, *Single Resolution Mechanism* and related financing mechanisms such as *Common Deposit Guarantee Fund*, the *Single Occurrence Deposit Insurance Scheme* and the *Common Security Mechanism* (the so-called credit line). Creating a complete banking union would eliminate all the deficiencies of national supervision of banks, which at the same time implies both the stability of the banking system and the stability of the public finances of the Member States. There are *two aspects* to this link that are reflected in the requirement to protect relevant state funds from the financial pressures that result from the restructuring of insolvent banks and at the same time protect the banks from the debt monetisation (Binder & Gorstos, 2017, p. 11). Although the ECB is the supreme monetary institution, its work can be limited by

the application of the principle of institutional equilibrium, which is closely related to the *Meroni doctrine*[2] on the delegation of authority, which defines the pillars and scope of the institutional balance of power (Lackoff, 2017, p.10).

At this point, we must emphasise the importance of *monetary disputes* as a special kind of administrative disputes, which involve a central bank (active or passive procedural legitimacy) as the keeper of *lex monetae*. Due to the specific nature of relationships and outcomes, monetary disputes cannot be guided by the interests of the politically influential members of the EU and justified by reasons of pragmatism. They must be primarily motivated by the protection of supreme monetary institutions that perform their tasks in the interests of society and economy, which was, *in our opinion*, confirmed in the *OMT case* (outright monetary transaction).[3] The European Court of Justice confirmed legitimacy and legalities to the proposed measures of the ECB, explaining it by the fact that the OMT program falls under the program of a unified monetary policy which the ECB conducted in accordance with the monetary strategy in order to preserve monetary stability (i.e. price stability as the primary goal that is more consistently realised by the application of these measures). We can note that in monetary disputes the requirements for the assessment of constitutionality and legality are subject to certain limitations. It is clear from the Court's decision that the conduct of monetary policy requires the possession of expert knowledge and expertise, which in European monetary law only ECB enjoyed with full discretionary powers for their implementation.[4] Although for some theorists, this decision represents another confirmation of the expansion competence trend of the communitarian institutions by the provisions of secondary legislation, we consider that in this case the conduct of the ECB was not contrary to the provisions of primary law, but rather represents a new way of manifesting the competence in conditions of crisis.

4. External effects of *lex monetae* principle

Although the mentioned principle according to its nature predominantly has a territorial application, in certain situations it can enjoy extraterritorial application (validity). These are the cases of depression, devaluation, currency imbalance and the imposition of foreign exchange controls (Proctor, 2012, pp. 505-509). It is very important to point out this fact because national monetary prerogatives can also be subject of control in international courts, which is otherwise established in Art. 36 of the Statute of the International Court of Justice. For example, although the protection of sovereign monetary powers is indisputable in peacetime circumstances, the question arises as to what happens to the object of protection in war circumstances, and can the provisions of

[2] The *Meroni doctrine* refers to the possibility of EU institutions to delegate powers and tasks to the regulatory bodies and agencies, but without broad discretion. It is defined by the European Court of Justice judgment in cases C-9/56 and C-10/56 (*Meroni v High Authority* [1957/1958] ECR 133).

[3] This program contains monetary measures for buying bonds in secondary financial markets.

[4] Given that in monetary disputes, the court cannot impose the essence of monetary measures (because it does not have competence for such a thing).

Hague Convention (1907) that prohibit the change of the currency system in the occupied states by the occupiers be applied. It is interesting to note that the change of currency system in post-war Germany by the Alliance forces was justified by the fact that the former state as such had ceased to exist and that there was no place to apply the provisions of the Convention, while during the crisis in Iraq, the UN Security Council called for respect for the same Convention. Based on these examples, it is noted that the introduction of a new currency *per se* is not a violation of the provisions of the Hague convention in the part concerning the undertaking of economic measures in the field of monetary system, so that the admissibility of the measure will be assessed depending on its eventual confiscatory character and interest in the protection of public goods, because monetary stability *de facto* represents a public good. Similarly, the right to determine the value of a currency on a particular topic is obtained when using a foreign public loan when capitalising the budget deficit. The change in the value of the domestic currency does not constitute a violation of the norms of international monetary law, and the states will not be liable for the consequences to creditors of the loan, but the permissibility of such changes is of particular importance in cases of devaluation and revaluation of the domestic currency. Of course, if the motive for the realisation of this right is met with deliberate causing of damage to the creditors of a loan or is basically a discriminatory one, it will result in its narrowing in legal transactions (Dimitrijević, 2017, pp. 41-42).[5]

In certain cases, in order to protect the national or international security it is possible that the state asks the IMF to grant full enjoyment of *lex monetae* beyond the above-mentioned principles, where IMF within 30 days, must inform the concrete country about the justification of such measure (Articles of Agreement of the IMF, 2016, pp. 1-20). Even when the IMF finds it justifiable to impose such measures, the recognition of such restrictions in a foreign monetary context may be the subject of numerous disputes. Namely, the recognition of restrictions on the use of domestic currency abroad must be based on the principle of *lex loci solutionis, lex contractus* or art. 7. The Rome Convention on Contractual Obligations, but they do not even have to be recognised in certain monetary jurisdictions despite the fulfilment of these conditions, i.e. the existence of a legal basis for their extraterritorial application. Article VIII (2) of the Agreement on the IMF imposes limited restrictions on such application.

5. New trends in the development of international and European monetary law

The mortgage crisis in the US (2008) and its later expansion to the rest of the world in the form of a global financial crisis have largely influenced the changing of traditional postulates, both in national and international monetary law. Until the first consequences of this global crisis, movements in the balance of payments difficulties (observed globally) did

[5] For this reason, Articles IV and VIII of the IMF Agreement determine the limitations of this authorization, in the context of the prohibition of the application of the gold standard, the manipulation of a change in value that jeopardizes effective payments or the acquisition of benefits and unfair competitive advantage over other members as well as the involvement in the practice of multiple exchange rates (which is strictly forbidden).

not initiate some serious demands for radical monetary reforms. Despite the widespread viewpoint that after the economic and financial decline, the international monetary system would regain the distorted balance *per se*, that did not happen in practice and some serious legal reforms have emerged. In the example of EU debt crisis, affected Member States have become especially aware of the significance of the legal concept of economic policy co-ordination for the normative and economic efficiency of monetary solutions. Also, the *primary sources* of monetary law, due to their rigidity and difficult process of adaptation (in some ways became a relic of traditional economic integration) and therefore had to be supplemented by provisions of secondary legislation embodied in new institutional models of economic governance, such as the *European Semester*, *European Stability Mechanism* and the *Treaty on Stability, Coordination and Governance in the EMU* (Fiscal Stability Treaty) that initiated monetary and fiscal disputes before the European Court of Justice. This is complementary with the new tasks of ECB in implementation of forward guidance and nonstandard monetary policy measures in preventing future market risks (Conti-Brown & Lastra, 2018, p. 188). The handling of the Court in *fiscal disputes* (related to the application of fiscal rules) and monetary disputes pointed to the urgent need to educate judges, advocates and lawyers for acquiring specialized knowledge in the field of monetary law. The role of soft law in optimal regulation of monetary relations is crucial, because it balances between extremely dynamic monetary events that require the intervention of public authorities, on the one hand, and insufficiently adaptable primary monetary legal sources whose slow adaptation (reforming) potentially threatens to deepen the external time-lag in fulfilling desired results, on the other hand. This does not mean that secondary legal sources are in conflict with the primary one, since we must not forget that the primary legal projections are *conditio sine qua non* for determination the monetary order in dimensions of its financial legitimacy, credibility and transparency. The hybrid character of monetary law in certain circumstances can also give major importance to the precedents presented in secondary legislation (for example, no bailout clause for public debt in EU is relativized in practice). Mandatory introduction of a provision on financial support eligibility represents a major change in European monetary law. Success in the application of this provision is conditioned by factors affecting the degree of predictability and stability of the legal result that are expected from its application (Wojcik, 2016, p. 92).

Of course, the mentioned does not speak about the imperfection of monetary norms, but *in our opinion*, this only confirms the "life" of this branch of law, which does not pretend to be perfect in its nomotechnics, but surely distant from real events in the economic sphere of social life! As monetary law stands in a close synthetic-dialectical connection with monetary finance as an economic discipline, the fact that in some cases secondary legal sources protect the economic stability against the legal and not so surprising. Moreover, the question that here arises is whether the implementation of monetary norms at the moment of international crisis diminishes the distinction between legal and economic security, which are observed trough the same social value instead of the separate (opposing) levels, which once again confirms its sophisticated nature that goes beyond all limitations of others types of legal norms that cannot withstand a "*test*" of global economic and political earthquakes.

6. Conclusion

In considering the subjects of international and European monetary law, we must take into account the fact that it evolved from national monetary law, which has long been studied almost exclusively in the domain of private (civil) law because monetary obligations are a very widespread element of different types of freight contracts. We consider that this approach in defining the national monetary law is rather unilateral and as such leaves space for numerous legal gaps, which can partly explain the unsatisfactory legal arguments of the courts in resolving monetary disputes with an international context. Namely, we consider that the monetary norm is conceived as a special form of a legal norm that governs social relations with the monetary element in the broadest sense of the word. At the moment of the monetary event determined by concrete monetary norm, the abstract monetary relationship becomes a concrete one and, as such, produces the effects in the monetary circulation. This hybrid factual situation is not solely determined by legal facts, but also by some economic standards, which explain that in the legal definition of money, we must respect the functions of money as an economic category defined in the broadest sense, too. If we carefully look at events in regional and international monetary relations in the last decade, we can notice a new wave of international monetary law, more intense, richer and more complex than ever before in monetary history. New tendencies are characterised by the primacy of soft law over primary monetary solutions, new jurisdictions of international judicial instances for resolving monetary and fiscal disputes, new central bank powers, the evolution of monetary sovereignty concept, and disintegration process of international monetary law which nowadays includes IMF Law and ECB Law as separate positive legal branches. All mentioned is accompanied by serious reforms of the national monetary regulations and financial standards that constitute the global financial architecture, whose pillars are now reinforced in order to maintain monetary and general financial stability as a global public good. *Lex monetae* in these new occasions is much more than just a principle, it becomes effective axiological tool and common value pattern which invokes new arrangements and institutional reforms of the IMF in order to create an efficient and sustainable legal framework for financial supervision. From the other side, there is also a tendency to consolidate international monetary law at more "human approach" considering the influence of IMF and ECB on the protection of social and economic rights.

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EVOLUTIVNI KONCEPT *LEX MONETAE* U MEĐUNARODNOM I EVROPSKOM MONETARNOM PRAVU

Sažetak

Predmet analize u radu jeste sagledavanje primene i derogacije principa savremenog međunarodnog i evropskog monetarnog prava. U tom kontekstu se u prvom delu rada ukazuje na specifičnost predmeta pravnog regulisanja međunarodnih monetarnih odnosa i sagledavaju normativna obeležja međunarodnog monetarnog sistema. U drugom delu rada ukazuje se osnovne postulate međunarodnog monetarnog prava oličene u principima tradicionalnog *lex monetae* i *lex contractus* (njegovim eksternim efektima) sa posebnim akcentom na primenu ovih principa u globalizovanim finansijskim tokovima. Predmet naročite pažnje jeste identifikovanje novog talasa u razvoju pravne regulative monetarnopravnih odnosa, kao i uloga Međunarodnog monetarnog fonda u tom procesu, što prema mišljenju autora, ima značajne implikacije ne samo na očuvanje tekovina i vrednosti međunarodnog monetarnog poretka, već i održavanje unutrašnje monetarne stabilnosti.

Ključne reči: monetarno pravo, EU, monetarna jurisdikcija, Međunarodni monetarni fond, *lex monetae*, međunarodni monetarni poredak.

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YET ANOTHER LOOK AT THE U.S. CONSTITUTIONALISM AND THE PHENOMENON OF 'WE THE PEOPLE'

Abstract

American constitutional scholars are unremittingly exploring their country's Constitution, as they are still deeply at odds on how the judges should seek out to discern the meaning of the solemn document. This article thus aspires to cast yet another look at the U.S. constitutionalism and constitutional theory of interpretation, so as to re-examine the institution of judicial law-making in our divisive political times, albeit not from the standpoint of 'hot' topics – one being the imminent impeachment procedure – but rather from the standpoint of the constitutional framework, its origin and legitimacy, most notably the Constitution' Preamble and its intrinsic 'We the People' phenomenon (People's Constitution for the People). Over the past years, these topics have enjoyed a major resurrection, primarily due to their association to a larger issue, namely fidelity to the law of the Constitution.

Keywords: *American constitutionalism, constitutional historicism, constitutional interpretation, judicial law-making, 'We the People'.*

1. The historical approach to constitutionalism

I say – and I say no longer with any doubt –
that a man may live greatly in the law…

Oliver Wendell Holmes Jr., 1886[1]

When we think of the U.S. constitutionalism and the origin of judicial law-making which indisputably accounts to enduring legitimacy of the U.S. constitution, we must necessarily think historically. As Robert W. Gordon has written, "history is not only a source of authority but of legitimacy." (Gordon, 1997, p. 1023) Some authors are even contending that the historicity of law is its single most prominent feature (in Kahn, 1999). These opinions are the major inspiration for the article before you, in which I am attempting to make more evident some of the ways we contemplate American constitutional history

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[1] From the talk given to the students of Harvard College.

and the present day constitutionalism. The central hypothesis of this article is the argument that our view of history determines our capability to understand the needs of the present. In other words, as the ultimate ambition is to bring together the historicity and present day constitutional legitimacy, 'We the People' of now are to be led by 'We the People' of then.

Constitutional historicists are infatuated with going back to the past for they see historical inquest as an objective and technical process, and because of their want for certainty they focus on authoritative documents and critical historical events. They insist that history conveys tradition and consent, and thus authority. Naturally, constitutional historicists are expected to explain this assertion in legal terms. They put forward that history can provide definite constitutional meanings for the present, and thereby lend both authority and restraint to constitutionalism and the scrupulous practice of judicial law-making (judicial review).

Historicism, as depicted above, holds an outstanding place in modern constitutional literature. Raoul Berger is one of most prominent contemporary proponents, as he debates almost entirely on historicist thread. A truly self-made originalist, he maintains that historical inquiry into constitutional interpretation can solve even the most complicated constitutional problems. In his own words, originalism is "not a scholastic exercise rooted in abstraction. It serves as a break on judicial revision of legislative enactments" (Berger, 1997, p. 526). Originalists claim that their mode of interpretation is superior to all others as it serves democracy the best. Robert H. Bork contends that "the original Constitution was devoted primarily to mechanisms of democratic choice" (Bork, 1984, p. 9), while former Attorney General Edwin Meese III in his famous speech to the American Bar Association reiterated: "A jurisprudence of original intention […] reflects a deeply rooted commitment to the idea of democracy" (Meese, 1985, p. 9).

Another modality of historicism is textualism. Late Justice Antonin Scalia, an ostensible textualist, argues that history is objectively discernible and offers the finest interpretive techniques to give fixed meaning to constitutional text. He asserts that "for the vast majority of questions the historical answer is clear" (Scalia, 1989, p. 863), hence promoting the originalist interpretation into a chief limitation on judicial transgressions: "the main danger in judicial interpretation of the Constitution is that the judges will mistake their own predilections for the law…[O]riginalism does not aggravate the principal weakness of the system, for it establishes a historical criterion that is conceptually quite separate from the preference of the judge himself" (Scalia, 1989, p. 864).

One less popular form of originalist interpretation is traditionalism, which draws constitutional guidance from the tenets of tradition.[2] These authors perceive tradition as a common consent on society's aspirations and values that ought to bind us to the present day. They see the adherence to tradition as an obligation to previous generations, and attribute to the past the paradigmatic authority. Traditionalists concentrate on major events and cultural heritage, thus perpetuating the preeminence of those who have inherited the privilege to determine and pass on the legacy and cultural ideals.[3]

[2] One of the most tenacious critiques of traditionalism comes from Jack Balkin's pen: "[t]he continuation of any tradition must necessarily kill off other possible lines of development, and relegate them to the margins or brand them as heretical" (see Balkin, 1997, p. 1715).

[3] For more information on traditionalism, see Brown, 1993, pp. 177-222.

The most unpretentious variety of historicism admits that a bulk of historical questions surrounding American Constitution cannot be decisively answered, but assert that when they can, the answers should be granted the authority of present day. The principal hypothesis of so-called descriptivist argument is that "good history can accurately portray past reality" (Nelson, 1987, p. 1246).

So dominant is historicism in American constitutional thought that even the most vigorous opponents of historicism often resonate in the 'historical' registry. For instance, Cass R. Sunstein, professes himself a 'soft originalist' (Sunstein, 1995, p. 313), as he constantly entertains history in his constitutional interpretation, although from the stance of towering height of generality akin to Ronald Dworkin's or Justice Brennan's styles. Many constitutional historians admit that they choose to "emphasize all the ways in which the meaning of past practices depends upon the material conditions, symbolic system and tacit assumptions in which they were embedded" (Gordon, 1997, p. 1025). Perhaps the most exemplar of such argument is the infamous H. Jefferson Powell's endeavor to 'out' the originalists by pointing that "original intentionalism was in fact a form of structural interpretation," and that "[t]o the extent that constitutionalist interpreters considered historical evidence to have any interpretive value, what they deemed relevant was evidence of the proceedings of the state ratifying conventions, not of the intent of the framers" (Powell, 1985, p. 888). That is also why this vein of argument is more adequately depicted as progressive, e.g. an understanding of past motivated by the narrative of progress of how one should relate to constitutional history.[4]

Historicism relies almost solely on the views of the Framers, and time and again put across, but seldom owns up, the supposition that the views of the Framers are central to defining the Constitution's meaning. Historicists repeatedly turn to the most prominent written documents, i.e. Madison's notes on Philadelphia Constitutional Convention and the Federalist Papers, wishing to sound as convincingly as possible, thus inevitably narrowing down already limited scope of their attention and via that upholding the mirage of *sui generis* authority. This immanent bias built into historical approach actually elevates historical arguments into not only effective but truly authoritative interpretative triumph. And that is why, irrespective of the said bias, we are to explore the captivating influence of historical approach to judicial law-making.

2. The validity of (historical) judicial law-making

Those of us to whom it is not given to 'live greatly in the law'
are surely called upon to fail in the attempt.

Justice Oliver Wendell Holmes

This famous quote was not randomly picked, for the language used actually reveals "[t]he voice of the veteran of the Civil War. Speaking to restless young man who had never known the challenge and adventure of any similar experience Holmes offered neither

[4] One the most analytical authors in this sense is Jack N. Rakove (see more in Rakove, 1996).

argument nor authority, apart from his own. It was pure inspiration"…as further along he also used perennial wisdom to say "[w]hatsoever thy hand findeth to do, do it with thy might" (Wooten, 2008, p. 201). The enduring appeal of Holmes' legacy spanned the centuries, irrespective of his - in today's observers' eyes – questionable judicial choices, encompassing bad man's theory of the law and support to capital punishment. What is more important, for the purposes of present analysis, is that Holmes was the Justice who was interpreting the law with 'thy might': "I recognize without hesitation that judges do and must legislate." (*S. Pac. Co. v. Jensen*). A full century later, Holmes' voice simply echoed the ferociousness of his glorious predecessor's Chief Justice John Marshall *dictum*: "[I]t is a constitution we are expounding." (*McCulloch v. Maryland*).

Judicial law-making is a refined art and a dynamic process, depending on various factors that are not going to be explored here. What is going to be examined here is the very fact of judicial law-making existence[5], and the primary concern of the entire legal academy: the propriety of such law-making. Or, in other words, how judges should (or shouldn't) execute their function in saying what the 'Law of the Land' is – not what it should be: "A judge who announces decision must be able to demonstrate that he began from recognized legal principles and reasoned in an intellectually coherent and politically neutral way to his result" (Bork, 1990, p. 2).

Under the keen scrutiny, constitutional scholars have ventured to identify and illuminate the constitutional principles that are steering the judicial law-making. In doing so, they departed from the Constitution itself, the document that Frank Michelman has labeled the ultimate 'law of lawmaking' (Michelman, 1998, p. 400). But, aware that not all of the limits on judicial law-making are explicitly expressed in the Constitution, these scholars relied almost solely on the views of the Framers, thus embracing the notion that Framers' intentions matter the most when it comes to discerning (construing) the true meaning of the Constitution. Admittedly, the scholars at case cross-referenced the Framer's intentions with a compilation of doctrines created by the judiciary via two centuries of judicial review, thereby crafting the self-explanatory syntagma 'Constitution of judicial law-making' (Greenawalt, 1975, p. 359[6]).

Addressing judicial law-making from the above described viewpoints has proven valuable indeed, as it confirmed that only 'constitutional principles' can determine whether the law-making judicial decisions are valid. Moreover, it allowed judges to forge their arguments more freely, as they opined on the foundation of established legal theories.

Historical approach to judicial law-making also permitted more profound understanding of judicial law-making practice, given that the established 'constitutional limits' imposed the fundamental precincts for valid judicial law-making function: judges will have unbounded law-making authority only when they are acting within the limits set forth by the 'law of law-making'.[7]

[5] "Judges make law, and the public should know that they do" (Aharon, 2002, p. 62.).

[6] Leaning on Benjamin Cardozo (Cardozo, 1921).

[7] It is worth mentioning, although it is *stricto sensu* outside of the scope of this article, that Philip Bobbitt classified six modalities of acceptable 'constitutional' argument: historical, textual, structural, doctrinal, ethical, and prudential (Bobbitt, 1991, pp. 12-13).

The constitutional approach to judicial law-making is normatively neutral regarding the content of 'judge-made constitution'. The constitutionalists recurrently disagree over the norms that are governing particular constitutional issues and, accordingly, over the principles that are limiting the extent of judicial law-making. Nonetheless, espousing constitutional perspective on judicial law-making puts forward an important indicator for evaluating jurisprudence and the judiciary's law-making role. This means that ensuing constitutional arguments are competing, allow for distinguishing valid from invalid judicial law-making, and, as a consequence, might even inspire judges to reconsider their approach to law-making responsibility.

Recommending ample solutions for every single aspect of the constitution that governs judicial law-making is far beyond the reach of any, let alone this article. Yet, one can still differentiate between constitutional principles, and those that are not constitutional by nature. That being said, one can therefore reasonably assume that such a distinction might instigate a more comprehensive debate about judicial law-making canons in an array of diverse constitutional contexts.

3. Making sense of the Constitution's Preamble and the 'We the People' phenomenon

We the people of the United States, in order to from a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Philadelphia, 1787

(Library of Congress)

It was Governor Morris, perhaps the most eccentric of all Founding Fathers who coined the phrase 'We the People' and bestowed it on all the Americans of 'then' and 'now'. For, "[g]overnments are in fact…agents and trustees of the people…" (Madison, Federalist No. 46, in: Hamilton, Madison & Jay, 2001).

The a-historic notion of 'We', which tantamount to paradigmatic 'We', actually conflates the identity of 'We the People Present' with the identity of 'We the People Past'. This was inevitable, as people are bound to the past so that they could understand the times in which they live in. People are born into history and language, as well as into the constitutional makeup not of their doing. The essential question thus becomes not why it is so, but who is to inhabit the power to uncover constitutional meaning, and how? This is how the public trust doctrine emerged.

As Justice Breyer methodically argued, the Constitution is to be interpreted in the light of a handful of its general purposes: "Its provisions form a simple coherent whole, permitting readers without technical knowledge to understand the document and the government it creates. And it traces the government's authority directly to a single source

of legitimizing power – 'We the People' (Breyer, 2010, p. 1).

Justice Breyer actually advocates an approach to constitutional interpretation that applies enduring constitutional values to ever changing circumstances. Catherine A. MacKinnon, in connection to *United States v. Morrison*,[8] illustrates this stance perfectly: "No woman had a voice in the design of the legal institutions that rule the social order under which women, as well as man, live" (MacKinnon, 1991, p. 1281). Her contention was that women were not the subject of constitutional design (equal protection clause of the Fourteenth Amendment), and that this exclusion fashioned the ensuing constitutional discourse in its entirety.[9] Some of the Supreme Court's decisions hinge on the very same argument (*United States v. Lopez* and *United States v. Morrison*), whilst invoking a tremendously old jurisprudence (such as: *Marbury v. Madison* or *A.L.A. Schechter Poultry v. United States*.

Another illustrative instance of exemplary constitutional interpretation orbiting around history and public trust, comes from the province of the Fourteenth Amendment Due Process Clause jurisprudence, no matter how fierce are the criticisms of its modern application. Against such background, it is noteworthy to emphasize that "despite the nearly identical phrasing of the Fifth and Fourteenth Amendment Due Process Clauses, only the latter was originally understood to embrace a recognizable form of substantive due process" (Williams, 2012).

Contemporary substantive due process jurisprudence is an invention of the Warren and Burger Courts, having no remarkable antecedents in the *Lochner* era (*Lochner v. New York*). In his seminal dissent in *Lochner*, Justice Holmes rejected the majority's natural rights due process premises and any test that previously required courts to determine whether the legislation was arbitrary or unreasonable (Holmes, 1905, p. 75). Holmes' dissent eventually overturned *Lochner* and instilled the thirty years long pursuit for a new theory of due process protection. Henceforth, the Court became increasingly liberal, which prompted Justices to anchor their due process decisions in the notion of liberty and produced landmark activist cases such as *Griswold v. Connecticut* and *Roe v. Wade*.

Irrespective of the differing interpretations of the Due Process Clause' original meaning, the historical evidence remains to be strong. Unfortunately, this thought attracted sizably little attention in both legal scholarship and judiciary. The absence of this attention, however, cannot prevent a fair and impartial inquest into the original meaning of due process. It is likely no coincidence that the eminent contemporary critics of *Lochner* era failed to detect historic support for substantive due process, as it is no coincidence either that more current critics of post-*Lochner* era substantive due process decisions have tended to endorse the very conclusions of the *Lochner* era critics.

Most of the constitutional scholarship supports the existing state of affairs on the basis of non-originalist arguments. Admittedly, the debate is conducive to winner-takes-it-all style argument, as there is a lot at stake ideologically speaking. In the light of so

[8] Where the Supreme Court partially annulled the Violence against Women Act (VAWA).

[9] The majority opinion derived its authority from the sources that were devised much ahead of the enfranchisement of women as a class. For more information on how women are excluded from the original (constitutional) contract and incorporated into new contractual order, see Patenam, 1998, p. 276.

incremental evolution of due process concept, the framers from 1868 positively failed to recognize the inconsistency of their own understanding of due process and the one that was prevalent in 1791: "[t]his failure of intergenerational constitutional communication, though regrettable, does not justify a departure from the traditional default rule that identifies the original semantic meaning of a provision with its meaning at the time of enactment...[A]pplying this default rule…yields a simple and straightforward conclusion: the original meaning of one, and only one, of the Constitution's two Due Process Clauses – the Fourteenth Amendment Due Process Clause – encompasses a recognizable form of substantive due process." (Williams, 2010, p. 508)

At the very end, and to spice it up even more[10], a brief consideration of the impeachment proceedings history appears to be worthy of attention after all. Impeachment was devised as an indispensable punitive action "against the incapacity, negligence or perfidy of the chief Magistrate" (Madison, 1787), for as Cicero wrote "they who administer the government should be like the laws which are led to inflict punishment not by wrath but by justice" (Cicero, *De Offices*)[11]. And, further along, "[it is] peculiarly the place of a magistrate to bear in mind that he represents the state and that it is his duty uphold its honor and its dignity, to enforce the law, to dispense to all their constitutional rights, and to remember that all this has been committed to him as a sacred trust". (Cicero, *De Offices*).

Governor Morris who was doubtful about the necessity of impeachment clause, eventually succumbed to Madison's argument, underscored by Hamilton who brought into play the public trust argument. In ensuing dealings, the Impeachment and Removal from Office Clause was largely supported by the public trust doctrine. Public trust argument was in fact used to resolve a hoary disagreement over whether an impeachable offence ("Misdemeanor") must constitute a violation of criminal law. Reverting to the public trust argument, Madison enumerated impeachable offences, including those coming outside of the criminal law. Some contemporary authors are doing pretty much the same (see Ackerman, 2019).

4. Concluding remarks

"I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense 'make' law." (*James B. Beam Distilling Co. v. Georgia*, Scalia, L., concurring). It is with these words that I am opening the concluding remarks, as I am not about to hide behind the reality of judicial law-making.

To propose comprehensive account of any constitutional theory of interpretation is a pretty hefty task, well beyond the scope of any single article. This is especially true when the theory purports to defend the historical argument, given the extensiveness of its sources and the abundance of relevant literature and jurisprudence. When the attempt

[10] Through a fresh insight into the Founding Fathers' acts of constitutional statesmanship regarding similar challenges to those confronting populist leaders of the present day, including President Trump, see more in Ackerman, 2019 (last Chapter).

[11] Sporadically cited in the newspapers during the ratification debates.

is coupled with an ambition to tie such a theory to some normative claims, like popular sovereignty, popular consent or the authority of the Constitution, the task becomes almost insurmountable. Most of the said claims are highly over-theorized and complex by nature, so to dare proposing solutions is a heavy-duty endeavor indeed.

Nonetheless, the effort employed is never futile, insofar as it aspires to also acknowledge the constitutional legacy that will necessarily shape the understanding of future constitutional struggles. As we search for guidance on the great constitutional issues of our own time, it is the constitutional accountability that we may never overlook. For, "[t]he constitutional accountability stems from the foundational constitutional concept that the power of government flows from the people through the Constitution...[a]ccodingly, accountability to the people is an ineluctable component of any exercise of…power" (Brown, 2013, p. 1403).

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JOŠ JEDAN POGLED NA AMERIČKI KONSTITUCIONALIZAM I FENOMEN '*WE THE PEOPLE*'

Sažetak

Predmet ovog članka jeste analiza američkog konstitucionalizma, a u svetlosti istorijskog argumenta u ustavnoj interpretaciji i fenomena legitimizacije američkog Ustava posredstvom čuvene sintagme '*We the People*' zabeležene u njegovoj preambuli. Članak tretira osobenosti istorijske teorije tumačenja ustava, imajući aspiraciju da čitaocu približi ovu školu mišljenja, pokuša da objasni njene pretpostavke i varijetete, sve braneći njene zaključke. Kako istoricizam u američkoj pravnoj književnosti odskora iznova pobuđuje pažnju američke doktrine, u samo središte debate nužno stavlja ne samo raspravu o adekvatnom metodu ustavne interpretacije, već i pitanje adekvatnosti i legitimiteta najdragocenije američke pravne ustanove – ustanove kontrole ustavnosti (*judicial review*). Pristalice istoricizma, naime, insistiraju na iznalaženju značenja i smisla ustava u samom tekstu ustava i njegovim izvorima, tzv. "originalnoj nameri" američkih očeva osnivača. Time zapravo podižu pravno-teorijski i politički ulog svake ustavne debate u SAD, a izazivajući dominirajuću američku misao o superiornosti suda - jedinom autoritetu vlasnom da tumačenjem fundamentalnih principa ustava otklanja slabosti i tenzije demokratskog političkog procesa.

Ključne reči: američki konstitucionalizam, ustavni istoricizam, tumačenje ustava, sudsko stvaranje prava, '*We the People*' fenomen.

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COMPENSATION OF WORK INJURIES AND OCCUPATIONAL DISEASES – A COMPARATIVE APPROACH

Abstract

The risk of work injury, as well as the risk of occupational disease, now traditionally, have preferential treatment when it comes to the matter of compensation - which has not always been the case and which is being challenged by some even nowadays. The aim of this research is to present an overview of different systems of compensation when it comes to these risks, as well as to give an idea of their positive and negative characteristics. This due to the fact that it is a matter of great importance for the employees and for the employers alike. The conclusion is that it is not easy to form a decisive stand on which of the elaborated systems is better, as they all have advantages and disadvantages. Nevertheless, the state in question - that is its legislature, should make balance of interests of employees and employers its main goal while addressing this matter in order for social peace and social justice to be acquired.

Keywords: *work injury, occupational disease, compensation, workers' compensation system, employers' liability system.*

1. General observations

In the feudal period no one would have regarded the risk of accidental injury or death at work as other than part of the ordinary risk of existence itself (Hendy, 2006, pp. 2-3). Things got even worse with the beginning of the industrial revolution and the application of the *laissez faire* politics which excluded the possibility of state intervention when it came to labour relations (Ravnić, 2004, p. 335). Namely, this meant that the lawmaker could not intervene when it came to the matter of social security in order to protect the victims of risks related to work up until the end of the nineteenth century. Therefore, since the freedom of entrepreneurship and ruthless competition of the time could not recognize solidarity and humanity as a virtue, this led to them being only possible virtues of rare individuals (Lubarda, 2013, pp. 475-476).

Consequently, the protection of social risks themselves was, in the beginning, secured within the family, or on the basis of some other forms of private assistance, savings, insurance and civil liability, which had proved to be inefficient and insufficient.

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Civil liability itself, for example, was not good enough of a solution due to the fact that the employee had to prove the fault of the employer for the damage caused by the accident at work (Kovačević, 2007, pp. 71-78). Namely, the fault of the employer was almost impossible to be proved and the reason for dissatisfaction was that employers were quite successful in avoiding liability in the nineteenth century. This was due to the doctrines of *contributory negligence, assumption of risk* as well as *the fellow servant rule* (Glynn, 2016, p. 92) – the so called „unholy" trinity od defences (Wagner, 2012, p. 12). With that being said, it was clear to see that this type of protection would almost certainly leave the employees uncompensated.

Since the labour force was abundant and there were hardly any protective regulations, the employees had to struggle with difficult working conditions and poor safety and health at work which had resulted in numerous accidents at work (many of which were fatal). Such treatment of workers was not in accordance with the idea of social justice, which led to adoptions of laws that dealt with the matter of protection of workers from accidents at work (Kovačević, 2007, pp. 71-79). Therefore, at the end of the nineteenth century mandatory state organized social insurance for industrial injuries was introduced, with Germany as a pioneer - that is as the first country that has established it in the year of 1884 (Hoop, 2007, pp. 93-94).

In this paper we will present different types of systems designed for the purpose of compensating the risks of work injuries and occupational diseases, with in detail description of their notable characteristics. The named description is needed in order to form the idea not only about those systems themselves, but also to form an understanding of the way that they function, as well as to comprehend the aftermath of their application.

2. Possible forms of compensation of work injuries and occupational diseases

Work injuries and occupational diseases nowadays traditionally enjoy preferential treatment comparing to injuries and diseases that are not caused by work. Reasons for this kind of preferential treatment may vary from: the high value which society places on work; the fact that employees are obliged to obey their employers and that employers have full control over the working conditions and matters of safety, to the need to provide an incentive for the people who carry out dangerous but essential work. On the other hand, we also encounter a different opinion of the mentioned status of these risks, which is that this kind of preferential treatment ("industrial preference") is unwarranted due to the fact that financial needs created by bodily injuries and diseases are the same for everyone. This also leads to a conclusion that the general system of social security should be designed accordingly, treating every citizen equally and making the level of benefits contingent on needs only (Wagner, 2012, pp. 34-35). Adding on – some authors state that this preference at first actually took place only due to powerful political arguments and the desire to comply with the demands of the trade unions (Parsons, 2002, p. 360; Lewis, 2012, p. 142). Therefore in countries such as the United Kingdom (UK) and the Netherlands the only thing that matters is the severity of the injury or disease and the

demand for medical treatment or income replacement created by it, regardless of the cause of the disease or the injury (Wagner, 2012, p. 35). In that sense it should be noted that national work injury compensation systems may vary from *employers' liability systems* to *workers' compensation systems* - although the two of them (in most cases) exist at the same time, function mutually and supplement each other. It should also be noted that in countries where workers' compensation system does exist, the additional right to sue the employer varies from country to country (Kun, 2014, p. 66). And while in countries such as Germany the workers' compensation system still stands strong, in the Netherlands workers' compensation system is essentially replaced with a combination of social security benefits and supplementary employers' liability (Wagner, 2012, p. 36). Namely, this happened due to an obvious trend (which also took place in the UK) of a reorientation of national no fault compensation systems towards employers' civil law based liability (Kun, 2014. p. 67). But, in our opinion, it also seems to have a lot to do with the approach to the treatment of work injuries and occupational diseases. Anyhow, it should be known that no European country has gone that far as to deprive injured employees from any sort of compensation in the absence of fault or breach of the legal duty on the part of the employer, and to apply the employers' liability as an exclusive remedy (Parsons, 2002, p. 363).

Regardless of the type of scheme that is applied in one country (that is whether a workers' compensation system or employers' liability system was introduced), there are three main functions that they are to perform. Those functions are the support of prevention, assistance in the rehabilitation process and, finally, compensation to the individual workers – the so-called holistic approach (ILO, 2013, pp. 1, 15).

2.1. Workers' compensation system

Workers' compensation for damage from work injuries and occupational diseases is a specific form of social security which is - in most countries, included in national social security systems. Work accident insurance itself usually is a separate component of the social security system, but in some countries it is completely integrated into the overall social security system (Kun, 2014, pp. 66-67). Some of the examples for the latter are the Republic of Serbia, as well as Hungary (Kun, 2014, p. 67) and Greece (Kremalis, 2015, p. 114). This system can also be viewed as an underdeveloped type of workers' compensation system since it doesn't recognize the application of a specific, independent insurance scheme against accidents at work and occupational disease (Kun, 2014, p. 70).

Some of the basic features of workers' compensation systems are the fact that *workers are entitled to compensation regardless of fault on the part of the employer*, *limited compensation* and *immunity of employers from damages suits,* (Wagner, 2012, pp. 5-10) while, as pointed out by Kun (2014, p. 69), the perceived advantages of such systems are their automatic, speedy, transparent and fair results in recompensation.

As already stated – the entitlement to compensation of work injuries and occupational diseases within workers' compensation systems exists regardless of fault on the part of the employer which in other words means that workers' compensation systems

are based on the principle of strict liability. In practice this actually means that the party that is strictly liable is not the employer himself but rather the public insurance carrier, although - since the employer is the one that bears the costs of financing of such a system, he remains strictly liable (Wagner, 2012, pp. 5-6). This due to the fact the employers' liability is based on liability for the *risque professionnel*, which essentially means that the risk of engaging in some kind of economic activity represents the basic criteria for the right to a damage claim against the employer (Kovačević, 2007, p. 79), that is, as we could see, the insurance carrier in this case. The liability comes from the „hazardous item" or from the „hazardous activity" itself, which means that it is the item or the activity itself that inevitably comes along with danger (Ravnić, 2004, p. 370).

The second aforementioned characteristic of workers' compensation systems means that the amounts paid out from compensation systems are standardised and therefore limited, which is the reason why it is possible for a parallel, supplementary role of the employers' civil law based liability to exist (Kun, 2014, p. 67). One can wonder, on the other hand, whether this side of workers' compensation systems is questioning the existence of before mentioned fair results in compensation – which are perceived to be their advantage. In that sense it can also be claimed that „workers' compensation systems are based on an implicit bargain in which the worker eschews full compensation of any loss sustained in exchange for no-fault liability of a public insurance carrier" (Wagner, 2012, p. 50). This brings us to the third characteristics of workers' compensation systems which is the immunity of the employer.

The reason for the immunity of employers for damages suits lies in the fact that the employers are the ones who bear the costs of funding of such systems, which is why the costs of the individual claims brought against them would basically double their costs. That would – as a result, force the employees to accept lower wages. On the other hand, this doesn't mean that this immunity is absolute, which is why it doesn't apply if the employer intentionally caused the harm (Wagner, 2012, pp. 10, 46). In that sense, Parsons (2002, p. 363) notices that „strict employers' liability is somewhat anomalous in a system where no-fault workers' compensation benefits are also available" . On the other hand, in some countries (Republic of Serbia being one of them) such immunity does not exist. Therefore, in the Republic of Serbia for example, the employer can be held liable for the occurrence of work injury or occupational disease (Labour Law, 2005, art. 164) on the basis of strict liability as well as on the basis of fault liability (Law of Contracts and Torts, 1978, art. 97, 161-163, 173-177). But one should have in mind here that in the Republic of Serbia contributions for these risks are being paid both by employers and employees. Namely, in the Republic of Serbia earmarked accounts do not exist, whilst the workers' compensation system is financed not only by employers, but also by employees (Law on Contributions for Compulsory Social Insurance, 2004, art. 7-12). Similar approach can, for example, also be found in Greece (MISSOC database, n.d). On the other hand, the fact that the workers' compensation system itself is not solely financed by employers does not necessarily have to be perceived as an insuperable obstacle for a different solution in that sense. Therefore it should be noted that in Greece, according to the previous regulations, the employer had no obligation when it came to the compensation of work injuries and occupational diseases of the affected employee –

unless the accident was the result of the employer's wilful misconduct or wilful misconduct of his representatives in the workplace (Douka & Koniaris, 2015, p. 173). The reason for this was the obligation of the employer to pay an additional insurance contribution of 1% of the total wages to the Social Insurance Institute (IKA) (Dontas, 2017). However, when it comes to workers' compensation, government will, as a rule, try to separate its accounts from the general budget and revenue systems, which is basically done by establishing earmarked accounts. The goal of the above-mentioned approach is to have the employers fund these separate programs (Klein & Krohm, 2006, p. 2).

The named immunity of employers has actually led to some interesting consequences in some countries. The best example for this would be the case of the United States of the America (USA). Namely, In the USA the limitation of the right to a tort suit when the worker is covered by the workers' compensation system goes as far as to the sole remedy for workplace injuries being workers compensation' system benefits, unless the employer intentionally hurt the worker. This has led to a common politics of tort lawsuits against third parties such as manufacturers (Glynn, 2016, p. 94). On the other hand, in Germany the immunity of employers is also established when it comes to cases of non-pecuniary loses, which, as such, are not covered by the workers' compensation system. This is why such an exclusion of damages for non-pecuniary loses from the benefits offered by the workers' compensation system has been challenged in front of the Federal Constitutional Court more than once (Wagner, 2012, pp. 49-50). This also brings us to another characteristic of workers' compensation systems that was not mentioned before, and that is that non-pecuniary damages are, as a rule, not compensated by social security (Kun, 2014, p. 67).

As we can see here, the idea behind workers' compensation systems is to find an easier and just way for the employee who has been hurt to reach for compensation. It also seems logical that this system can be beneficial for employers as well, since it - as a rule, provides some kind of certainty when it comes to the costs of work injuries and occupational diseases (due to the immunity rule). Therefore it may seem that this system creates a certain balance of both of their interests – that is both of the interests of the employee and of the employer in question. On the other hand, even though there is no need for proving guilt on the side of the employer, the fact is that benefits provided within the workers' compensation system itself do not fully compensate the loss of the employee. In that sense, it seems to us that this feature of the mentioned system may bring to a certain discontent of the employee in question, and especially if the level of those benefits is not decent. Therefore, even though this approach has its good sides it cannot be said that it is perfect.

2.2. Employers' liability system

The key feature of employers' liability schemes is that employees must turn to courts for remedy while, on the other hand, employers can rely on specific grounds for exemption and defence (Kun, 2014, p. 66). In addition to that, another feature of these systems is that the claimant can be entitled to a full compensation of his losses (including damages for pain and suffering) (Wagner, 2012, pp. 12-13), which doesn't change the fact

that even though this scheme can assure full compensation, court procedures themselves can be costly and time consuming, while their outcome is rather uncertain. With that being said, we also add that they can represent incalculable risks for employers (Kun, 2014, pp. 69-70), while they also pose a threat to social peace, since workplace conflicts tend to be one of the characteristics inherent to civil liability actions (Eengelhard, 2007, p. 17).

The whole idea behind employers' liability is generally based on the fact that employees are obliged to obey their employers while, on the other hand, employers have almost full control over the matters of safety (Kun, 2014, p. 66) - which can be questioned as there is a great deal of individual autonomy at work and accidents don't always occur due to a specific order (Lewis, 2012, p. 142). It should also be noted that the actual satisfaction of claims for damage might not be ensured since the victim bears the risk that the employer might not be solvent or that he might not even exist at the time of judgment (Wagner, 2012, p. 13). So – as we can see, even though this system tends to fully compensate the victim, the possibility still exists that it might fail in that sense.

Anyhow, employers' liability systems may vary from the ones where employers' liability is highly restricted - such as the one applied in Germany (Deinert, 2013, p. 145), the ones where employers' liability plays a big part – such as those applied in the UK and the Netherlands (Wagner, 2012, p. 12) to the extremely rare ones where the employers' liability is an exclusive remedy - such as the system applied in Bangladesh (Klein & Krohm, 2006, p. 3), or the ones in Kenya and Tanzania (ILO, 2013, p. 5).

2.3. Shifts from workers' compensation system approach towards a combination of general social security and employers' liability

Even though in most European states employers' liability is of marginal importance (Parsons, 2002, p. 365), it was revived within the jurisdictions of the UK and the Netherlands, which had abandoned workers' compensation approach (Wagner, 2012, p. 12). Part of the reason for this change of the approach when it comes to the matter of compensation of work injuries and occupational diseases was that the „industrial preference" was deemed unwarranted (Wagner, 2012, p. 34). In the UK in 2010/2011, for example, the number of claims that were made in tort was almost twice the number of claims that were made for industrial injuries benefit (Lewis, 2012, p. 186). This, in our opinion, is a clear evidence of the revival of employers' liability when it comes to work injuries and occupational diseases which is why - for better understanding of this phenomenon, a brief presentation of the approach to the matter of compensation of these two risks in the UK and the Netherlands will be made.

In the Netherlands workers' compensation system was introduced in the year of 1901 by the Industrial injuries act, and it was a system that was financed by employers and which was supposed to provide better protection to victims of work injuries. The system itself was based on the *risque professionnel* approach, while employers enjoyed immunity of civil liability. This approach was abandoned in the year of 1967, mostly due to the aspiration to adequately compensate the non-working disabled. Namely, the standpoint

that was taken was that it is not decisive how someone got unable to work, but the fact that the person in question was not able to work – which has social consequences (Hoop, 2007, pp. 95-105). Hence, the workers' compensation system which was focused on the so called *risque professionnel* was replaced by a combination of generous social security benefits and supplementary employers' liability. Unfortunately, this high level of benefits proved to be unsustainable in the long run due to the fact that those benefits were prone to abuses, while the system itself was perceived to be out of control. Therefore, the level of assistance available was gradually lowered (Wagner, 2012, pp. 36-39) And even though social security rules make no difference between accidents at work and the other accidents, some kind of special protection was offered in a way by a rather strict "no fault" oriented regime of tort law liability for damages that were left uncompensated by social security (Engelhard, 2007, p. 10).

In the UK on the other hand, workers' compensation system was established in the year of 1897 through the Workmen's compensation act. The system itself was a no-fault system, which was created outside of tort and was financed by employers. The administration of this scheme was gradually integrated within the general structure of social security - which culminated in abolition of the separate fund for industrial injuries while the funding of the scheme also faced changes and became wholly tax supported. The industrial injuries scheme, which is now a part of general social security provision, is administered by the Department for Work and Pensions, and the claimant has not only the right to claim the industrial injury benefit under this scheme, but also to sue the employer in court (Lewis, 2012, pp. 140, 168, 173). Unlike the employers' liability system, the industrial injuries scheme does not involve fault being established and it can also, in some cases, be the means of support for employees while they pursue the lengthier process of employers' liability claims (Philipsen, 2009, p. 176). Even though a few decades ago there were several different benefits available under industrial scheme nowadays only disablement benefit remains, which is a payment only for non-pecuniary loss, whereas the claimant remains entitled to other benefits under the social security scheme regardless of the cause of ill health. These social security benefits are not very generous, which is partly counterbalanced by the fact that claimants are also being allowed to sue the employer for their work injuries (Lewis, 2012, pp. 162-163). Therefore, since the year of 1972 it became compulsory for the employer to insure against liability to their employees injured in the course of their employment and the failure to comply with this statutory obligation to insure is a subject to sanctions in criminal law (Lewis, 2012, pp. 194-195). The idea behind this employers' liability compulsory insurance was to provide greater security to employers as well as to employees due to the fact that compensation would be available even if the employer becomes insolvent (Philipsen, 2009, p. 176). The introduction of the employers' liability compulsory insurance seems logical as it looks like that, since social security benefits seem to compensate the claimants in small amount, they are to be tempted to sue in court. That being said, we add that the work injury tort claims account for about 78,000 claims a year (Lewis, 2012, p. 140).

The experience of the United Kingdom and the Netherlands, both of which abandoned workers' compensation for a combination of general social security benefits and employers' liability, has been evaluated as not encouraging enough for the described approach to be considered as recommendable when it comes to this matter. One of the reasons being that generous general social security schemes can be subject of fraud and abuse which is difficult to be controlled (Wagner, 2012, p. 59).

3. Final remarks

The importance of protection of employees when it comes to the risk of work injury as well as the risk of occupational disease has not always been considered to be as important as it is nowadays. At the begging these risks were considered to be the risks of the existence itself, while the protection that was provided within the family or via some other form of private assistance, savings, insurance and civil liability had proven to be insufficient. *The laissez faire* politics of the time didn't help this matter whatsoever, which is why the employees were made extremely vulnerable due to the lack of protective regulations. Significant change to this subject came with the introduction of state managed compulsory insurance at the end of the nineteenth century. Nowadays, the risk of work injury as well as the risk of occupational disease traditionally have preferential treatment comparing to injuries and diseases that are not related to work. Although there are numerous reasons for this kind of treatment of these injuries and diseases, this approach faces some serious critiques and reconsiderations – which is why it was abandoned in some countries in the last few decades. Anyhow – the approach to compensation of work injuries and occupational diseases may vary from the application of the workers' compensation system to the application of employers' liability system, although they usually coexist and supplement each other. The choice between the various systems depends upon the decision of the state in question, although it should be brought to one's attention that the application of the employers' liability system as an exclusive remedy is a choice no European state has gone that far to enforce. What is also noted to be a tendency in some states is the shift from workers' compensation systems as such, to systems which prioritize court procedures, whereas it is an option that has marginal significance in countries with a workers' compensation system in force. On the other hand even in those countries employees are not deprived of all of the social security benefits (whose main purpose is to cover their basic financial needs). Each one of the systems has its advantages and disadvantages. And while workers' compensation system's perceived advantages are their automatic, speedy, transparent and fair results in compensation (the last one being questionable), they can't assure full compensation, whereas the employers' liability system can assure full compensation, but along with the danger of being costly and time consuming, while their outcome is rather uncertain. In addition to that, employers' liability schemes pose a threat to social peace, since workplace conflicts tend to be one of the characteristics inherent to civil liability actions.

It seems difficult to find the right balance when it comes to this matter - since it is hard to please the interests of employees without being maybe even unfair to employers and vice versa. The conclusion is therefore that, regardless of the approach taken by the state in question, when it comes to the matter compensation of work injuries and occupational diseases, the legislature itself has to make the balance between the interest of the employees for an adequate protection and compensation from the damages caused by work injuries and occupational diseases and the interest of the employers to reduce their costs its main goal. This seems to be one of the elements needed in order for social peace and social justice to be acquired when it comes to this issue.

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ODŠTETA POVREDA NA RADU I PROFESIONALNIH BOLESTI – KOMPARATIVNI PRISTUP

Sažetak

Značaju zaštite zaposlenih kada je reč o rizicima povrede na radu i profesionalne bolesti nije oduvek bila pridavana pažnja kao danas. Na početku ovi rizici su smatrani rizicima samog postojanja dok danas oni, već tradicionalno, imaju preferencijalni tretman u odnosu na povrede i bolesti koje nisu nastale u vezi sa radom. I iako postoje mnogobrojni razlozi za ovakav pristup on trpi i ozbiljne kritike - te je stoga i napušten u nekim zemljama. Bilo kako bilo – sam pristup pitanju odštete povreda na radu i profesionalnih bolesti može ići od primene *sistema odštete zaposlenih*, pa do *sistema odgovornosti poslodavca za odštetu zaposlenih*, mada oni po pravilu postoje istovremeno i dopunjuju jedno drugo. Izbor u pogledu toga koji će se od pomenutih sistema primenjivati zavisi od države u pitanju, mada treba imati u vidu da primena sistema odgovornosti poslodavca za odštetu zaposlenih kao jedinog "leka" jeste rešenje kojem ni jedna evropska država nije pribegla, iako je u nekim državama primećena tendencija napuštanja sistema odštete zaposlenih, uz davanje prioriteta sudskoj proceduri.

Kako se radi o tematici koja je značajna i za zaposlene i za poslodavce, ovo istraživanje obavljeno je sa ciljem da se napravi pregled različitih sistema odštete, kao i da se stvori ideja o njihovim osobinama. S tim u vezi, zaključak do kog se dolazi jeste da, bez obzira na pristup za koji se država u pitanju odluči kada govorimo o odšteti zaposlenih za povrede na radu i profesionalne bolesti, zakonodavac mora težiti rešenju kojim će se postići ravnoteža interesa zaposlenih za adekvatnom odštetom, kao i interesa poslodavaca da umanje svoje troškove. Ovo se čini neophodnim kako bi se postigli socijalni mir i socijalna pravda u pogledu ove problematike.

Ključne reči: povreda na radu, profesionalna bolest, odšteta, sistem odštete zaposlenih, sistem odgovornosti poslodavca za odštetu zaposlenih.

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COLLECTIVE BARGAINING WITH SPECIAL REFERENCE TO THE LAW OF GERMANY AND REPUBLIC OF SERBIA

Abstract

Collective bargaining is type of dialogue between social partners (representative trade unions and representative employer organization) which lead to conclusion of collective agreement. For success of collective bargaining, it must necessarily be laid on a democratic basis and it must be in accordance with appropriate legal framework that enables the social partners to act autonomously and independently. This means that employees, on the one hand, and employers, on the other, have the right to freely choose to form their own organizations (trade unions and employers' organizations), and to join them under the conditions prescribed by their own statutes or rules.

The author considers right to collective bargaining as one of the cornerstone rights adopted by International Labour Organisation and give a special attention to legal framework and situation regarding collective bargaining in Germany and Republic of Serbia.

***Keywords**: collective bargaining, collective agreement, social dialogue, collective labour law.*

1. Collective bargaining: significance and importance

The right to bargain collectively and conclude collective agreements is a collective right exercised in the function of protecting the collective interests of employees and employers. The subjects of the collective right to collective bargaining are the representative representatives of employees (trade unions) and the representative representatives of employers (employers' associations).

Collective bargaining is the process of negotiating which includes all kinds of bilateral and tripartite discussions of problems work-related issues that directly or indirectly affect workers (Bodiroga-Vukobrat & Laleta, 2007, p. 6). In the narrow sense, collective bargaining involves the negotiation process between employers and employee representatives, as well as the agreement which contains binding rules (Blanpain, 1997, p. 570). In terms of collective law, collective bargaining is the process in which a representative trade union and a representative association of employers, while representing the interests

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of their membership, with appropriate argumentation but also tolerance and willingness to yield and settle, try in good faith (*bona fides*) to determine the content, reach agreement and sign a collective agreement.

When it comes to the importance of collective bargaining, it should be highlighted that collective bargaining requires communication skills because, negotiation is a process of communication. Only if the parties communicate with each other negotiation is possible. If each party "relents" to its initial requirements, then a contract is concluded as a result of a compromise (Učur, 2006. p. 549).

In addition to the freedom of association, the effective recognition of the right to collective bargaining is fundamental principle of the highest importance. In regards to the promoting interest of workers and human dignity at work, social dialogue has an important role as a very valuable mean in order to extend democracy and workers' rights. Some of the very crucial questions for workers such as safety and health at the workplace, working conditions and wages have successfully been improved through collective bargaining, expending in this way scope of collective bargaining (The right to bargain collectively).

2. Normative framework of collective bargaining: International Labour Organisation conventions

Collective bargaining is fundamental to the International Labour Organization (in further text: ILO). Since the very founding of the ILO in 1919, collective bargaining has been acknowledged as an instrument of social justice (Convention No 154, Promoting collective bargainig, 2005, p. 5). Therefore, it is not surprising that, two Conventions that protect the collective bargaining rights of all workers including public sector employees, are included under the scope of those Conventions described as the "cornerstone documents" adopted by ILO, establishing in that way the base for this right (Carabetta, 2014, p. 278). These two Conventions are the Right to Organise and Collective Bargaining Convention No 98 (Right to Organise and Collective Bargaining Convention) and the Freedom of Association and Protection of the Right to Organise Convention No 87 (Freedom of Association and Protection of the Right to Organise Convention, No. 87).

Even though these Conventions are part of *Core Labour Conventions*, the ILO supervisory bodies have considered that these Conventions itself are not enough to provide wholly enforcement of the right to collective bargaining. According to recommendations some issues should have been included on the collective bargaining agenda as covering "the type of agreement to be offered to employees or the type of industrial instrument to be negotiated in the future, as well as wages, benefits and allowances, working time, annual leave, selection criteria in case of redundancy, the coverage of the collective agreement, the granting of trade union facilities, including access to the workplace beyond what is provided for in legislation etc." (See Digest of the Decisions of the Committee of Freedom of Association, 2006, p. 913).

Fortunately, Conventions No 98 and No 87 have been acompanied by Collective Bargainig Convention No 154 adopted in 1981 which promotes freely and voluntarely collective bargainig (Collective Bargaining Convention, No. 154). The Collective Bargaining Convention No. 154 and its accompanying Recommendation No. 163 are key to furthering the promotion and implementation of the basic principles of Convention No. 98 in which, it is not specified how this is to be done. Contrary to Convention No 98, Convention No. 154 and Recommendation No. 163 show how it can be done in a practical way. Beacuse of its promotional character, Convention No. 154 is extremely accommodating and flexible, and acompanied by Recommendation No 163 contributes to the effective exercise of the right to collective bargaining. Due to its flexibility, Convention No. 154 can be easily implemented in countries with different economic and social situations, legislative frameworks and industrial relations systems. (Convention No 154, Promoting collective bargainig, 2005. pp. 4-5). It might be meaningful to mention that Convention No 154 sets out the goals which measures taken to promote collective bargaining should strive for, so as not to restrict the freedom of collective bargaining. Specifically, these goals relate to universality, progressive expansion, procedural rules and dispute resolution. (Convention No 154, Promoting collective bargainig, 2005, p. 7).

3. Content of collective bargaining

The subject of a collective agreement, considered as a consequence of successfully ended collective bargaining, is determined, in principle, by the relationship between the forces of workers and employers organizations. The strength and organization of both depends on which issues will be included in the negotiating agenda and on the content of the collective agreement.

According to International Labour Organisation reports from a few decades ago, the main issues that, now traditionally, override the interests of employees and employers in Europe are: "economic development and unemployment, wages, schedule, use of working hours and vacations, occupational safety, use capacity and redundancies etc. In essence, collective bargaining participants are free to determine the subject matter and content of the collective bargaining agreement" (Jovanović, 2009, p. 102). However, only what is in accordance with the law and good practices can be contracted.

The presumption of successful collective bargaining is the high level of organization of the social partners involved in the process. The theory and practice of European countries agree that, the main actors in collective bargaining are employers and workers with the participation of a state, objectively emerges as a participant with two significant attributes: as a regulator of general social relations with the prerogatives of the authorities and simultaneously as an employer in certain significant areas of work. Considering that collective bargaining implies equality of participants, the attitude of the state towards other social partners in the collective bargaining process is a criterion and measure of democracy in a society (Lakićević, 2011, p. 33).

Finally, the goal of collective bargaining is replacement unilateral decision-making by employers in determining working conditions in order to prevail the weaker position of workers. The purpose of collective bargaining was (and remained primary) ensuring a balance of interests in the work process as well as an instrument that makes the union more favorable negotiator than an individual who would have to negotiate directly with an employer. (Herman & Ćupurdija**,** 2011, p. 40)

4. Collective bargaining in Germany

Germany is well to the fore in terms of collective bargaining decentralisation in Europe (See Keune, 2011, pp. 86-94). In the international literature it is often regarded "*as a standard case of 'organised' or 'controlled decentralisation', within the framework of which the bargaining parties at sectoral level define the scope for derogations at company level via so-called 'opening clauses*" (Schulten & Bispinck, 2017, p. 3). Summirised, decentralisation of collective bargaining may be considered as a delegation of competencies for collective bargaining to union workplace representatives. The roots of decentralisation in collective bargaining can be found in the increasing growth in the number of atypical employees, higher rates of unemployment, the greatly diminished costs of entry into industries, the increase in the number of small enterprises and so on (Vettori, 2005, p. 196).

In many European countries, Germany experiences are considered as an important role model for reform of national collective bargaining systems. The international perception of the German variant of decentralisation, however, does not reaect German collective bargaining in its all diversity. Two fundamental problems reflect decentralisation in the field of collective bargaining in German. „First, its development is very much viewed through the lenses of major manufacturing industries, such as chemicals or metalworking, which industrial relations regimes very much from those in other sectors, such as private services Secondly, the concept of 'organised decentralisation' often takes too rosy a view and underestimates the level of conflict" (Dribbusch *et al.*, 2017).

As German experiences show clearly, collective bargaining decentralisation is not about a more or less 'intelligent' mode of regulation, but about different interests and power relations. It deals with the fundamental conflict between setting up a level playing field for all companies and recognising the specific interests and circumstances of individual firms. (Dribbusch *et al.,* 2017). In the past few years the new trend towards decentralisation changed a lot the German collective bargaining system in that matter that organised and non-organised forms of decentralisation exist side by side, together with an overall trend toward the erosion of collective bargaining in some parts of the economy (Schulten & Bispinck, 2017, p. 3), while the industry-wide bargaining in Germany is maintaining to be the main manifestation of collective bargaining in the vast majority in Europe, with the exception of eastern Europe (Bispinck *et al*., 2010).

Legally-wise what made the collective bargaining possible in Germany is Collective Agreements Act of 1949 (ger. *Tarifvertragsgesetz*). The parts in such agreements may be employers' associations (or individual employers) and trade unions. On the other hand,

works councils – which represent the employees on a company level, are able to conclude solely works agreements.

Works agreements in Germany, as stated by the Works Constitution Act (ger. *Betriebsverfassungsgesetz*), 'may not deal with remuneration and other conditions of employment that have been fixed, or are normally fixed, by collective agreement'. (Betriebsverfassungsgesetz, Article 77, para. 3). The system in which unions' have the ability to conclude collective agreements, while works councils, even though are not part of union bodies, can arrange and supervise their execution on a company level is called in Germany a dual system of interest representation. All parties involved in such agreements are immediately bound by them, more precisely: employees that are included in the signatory unions and all companies that are members of such unions, or alternatively a single company if the agreement in question is a company agreement. In real life situations, employers that took part in a collective agreement most likely will respect and apply all provisions stated in the agreement to all employees, with or without them being a member of a trade union (Schulten & Bispinck, 2017, p. 7). Having in mind 'favourability principle' (ger. *Günstigkeitsprinzip*), any derogations from collectively-agreed provisions are possible when they are favouring employees. For example, a works agreement can provide better employment conditions than a collective agreement, but otherwise can not be possible.[1]

Despite the favourability principle, employees are not fully protected because, the bargaining parties may agree on so-called 'opening clauses' in collective agreements. These clauses may allow, a derogation from collectively agreed standards, even though these clauses change employment conditions for the worse (WSI, 2019).

Although many European countries have been faced with a trend towards decentralisation of collective bargaining since the 1990s, this development has usually not led to a decline in the bargaining coverage.[2] For example, in the UK since the 1980s the company has become the dominant bargaining level. In contrast to that, most central and eastern European countries have predominately company bargaining with the exception of Slovenia which has established a sector-level bargaining system (Kohl, 2009).

5. Collective bargaining in the Republic of Serbia

Labour legislation of the Republic of Serbia contains solutions regarding the system of collective bargaining which are in accordance with international labour law. Such solutions provide to employers and employees safety that their rights are going to be fullfiled.

Having in mind the solution contained in the Labour Act of Republic of Serbia, employer is obliged to bargain. However, there is not any provision that forces employer to conclude a collective agreement and give more rights to the workers than he wants or can

[1] The same principle is valid in the Labour Law of the Republic of Serbia.

[2] Collective bargaining, like all other socio-economic rights, was almost completely marginalized in the EU Countries before the 1990s, when suddenly, thanks primarily to the provisions of the Maastricht Treaty, it gained in significance. We see the reasons for this change in the status of the right to collective bargaining in EU law primarily for economic reasons. More about collective bargainig in the EU See: Božičić, 2017, pp. 173-190.

bear. Furthermore, Labour Act provides that a trade union, or association of employers, which has been established as representative in accordance with Labour Act, has the right to collective bargaining and to conclude a collective bargaining agreement at the appropriate level (Labour Law Act, Art. 239). A collective agreement must not contain provisions which give less rights or set less favourable employment conditions than the rights and conditions determined by the law, while collective agreement can contain only conditions which are more favourable for employees (Kulić *et al*., 2018).

Nonetheless, Labour Law of Republic of Serbia does not accept international labour standards regarding collective bargaining completely. Hence, it does not have needed infulence on social partners to make them to approach to the collective bargaining and afterwards to conclude collective agreement. In order to solve this kind of "problem", it is necessary for Republic of Serbia to ratify Convention 154 on collective bargaining and Recommendation 163 on collective bargaining. By implementing these two Acts adopted by ILO, the public authorities in Republic of Serbia will send clear sign that they are ready to support further development of social dialogue and to promote thorough legal regulations regarding collective bargaining (Urdarević *et al*., 2019, p. 100).

One may argue that a consequence or perhaps a reason too, for above mentioned lack could be found in the fact that in the Labour Law of the Republic of Serbia, General Collective Labour Agreement does not exist which lead to the fact that right to collective bargaining, as one of the most important rights in the field of labour law yet, does not have the status which it deserves. The last General Collective Labour Agreement was concluded in the 2008, (General Collective Labour Agreement) and it expired in the 2011, because of the expiry of the period to which it is contracted.

One more reason, may be found in the number of the concluded contracts at the company level, which, despite the needs and expectations, does not grow. According to that, it is justified to ask, what is the main obstacle for conclusion of a collective agreement. The reason for the underdeveloped collective bargaining at the lowest level, that is, perhaps can be found in the generally difficult economic situation in the country, due to which many employers are not even able to meet the level of employees' rights guaranteed by law, and especially not to raise their quality through collective agreements on the higher level.

The effective law enforcement affirmatively affects the development of consciousness workers and employers regarding the importance, role and dimensions of collective bargaining as an effective way to deal with economic and social issues problems, prevention and resolution of conflicts between them. Behavior of the social partners will develop gradually, primarily through the successful peaceful settlement of collective labour disputes and the regulation of mutual relations through collective bargaining and the conclusion of collective agreements. Even though social partners know that social dialogue and collective barganing are more useful than i.e. strike and other form of industrial action which potentially lead to further conflict they do not show willingness to make a compromise when it comes to specific questions (Mirjanić, 2013, p. 23).

6. Concluding remarks

An essential element of freedom of association is the right to collective bargaining. That is why it is extremely important that trade unions have the right, through collective bargaining or other legal means, to seek to improve the living and working conditions of those whom they represent.

In addition, collective bargaining is an important form of social dialogue. Institutions for social dialogue and collective bargaining help protect the fundamental rights of workers, help provide social protection and promote sound industrial relations (Promoting collective bargaining Convention No. 154, 2011. p. 5)

In order to allow the right to collective bargaining to be enjoyed without any infringement, public authorities should refrain from any interference that would restrict this right or impede the lawful exercise thereof. Any such interference would lead to the breach of the principle of enabling workers and employers' organisations to enjoy the right to organise their activities and to formulate their programs. Any such interference would result in an infringement of the principle that workers and employers organisations should have the right to organise their activities and to formulate their programmes.

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KOLEKTIVNO PREGOVARANJE UZ POSEBAN OSVRT NA PRAVO NEMAČKE I REPUBLIKE SRBIJE

Sažetak

Kolektivno pregovaranje važan je oblik socijalnog dijaloga između socijalnih partnera - reprezentativne organizacije zaposlenih i poslodavaca. Institucije za socijalni dijalog i kolektivno pregovaranje pomažu u zaštiti osnovnih prava radnika, u pružanju socijalne zaštite i promovišu zdrave industrijske odnose. Sa stanovišta Međunarodne organizacije rada, koja je razvoj kolektivnog pregovaranja postavila kao jedno od primarnih ciljeva još od svog nastanka 1919. godine, kolektivno pregovaranje je važan put za radnike, poslodavce i njihove organizacije da postignu dogovor o pitanjima koja utiču na svet rada i radne odnose. Iako se kolektivno pregovaranje često smatra sporednim procesom kada je reč o njegovoj važnosti za unapređenje odnosa radnika i poslodavaca, trebalo bi ga češće koristiti za izgradnju poverenja između socijalnih partnera koje se može ojačati i dijalogom nakon okončanja pregovora, jer rešenja koja su izgrađena na poverenju uživaju istinsku podršku obe pregovaračke strane.

Kada je reč o implementiranju odredaba konvencija Međunarodne organizacije rada kojima se reguliše kolektivno pregovaranje u nacionalna zakonodavstva, uspešnost često može zavisiti od modela kolektivnog pregovaranja koji je u određenoj zemlji dominantan. Tako, na primeru Republike Srbije i Nemačke, može se potencijalno uvideti sa kojim problemima se ove dve zemlje susreću kada je reč o kolektivnom pregovaranju.

Važno je naglasiti da nezavisno od sistema kolektivnog pregovaranja u svakoj od zemalja potpisnica konvencija Međunarodne organizacije rada kojima se reguliše kolektivno pregovaranje, ono mora biti uređeno na način da se slobodno pregovaranje radnika i poslodavaca o uslovima rada odražava kao suštinski element slobode udruživanja, a sindikatima radnika omogućava da kolektivnim pregovaranjem i drugim zakonitim sredstvima, poboljšaju uslove života i rada onih koje predstavljaju. Dodatno, državne vlasti ne smeju na bilo koji način ograničiti ovo pravo ili ometati njegovo zakonito sprovođenje, u suprotnom, krši se pravo radnika i organizacija poslodavaca da formulišu svoje programe i u skladu sa njima organizuju svoje aktivnosti.

Ključne reči: kolektivno pregovaranje, kolektivni ugovor, socijalni dijalog, kolektivno radno pravo.

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