INSTITUTE OF COMPARATIVE LAW

SERBIAN LAW IN TRANSITION – CHANGES AND CHALLENGES

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Publisher:

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Printed by:
GORAGRAF, Beograd

Number of printed copies:
300

ISBN 978/86/80059-66-2

We would like to express our gratitude to ***Mr. Đurica Krstić, LL.D.*** *who translated the articles of Branislava Knežić, Dragana Petrović, Slobodan Vuković, Dragan Jovašević and Milan Milošević. He also was the language editor of the articles of Jovan Ćirić, Vladimir Čolović, Mario Reljanović and Predrag Vukasović*

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Belgrade, 2009.

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EDITOR'S FOREWORD

Transition began in 1990s, as a global process of transferring fomer socialist into market economies.

However, transition is a wider notion than a process referring to former socialist block; it is a process of transformation of centrally-oriented socialist economy into market economy, as well as of non-democracy into democracy, it makes socialist companies equal to the new market competitors, and finally, it is an attempt to use knowledge and modernization to bridge a century-long civilization gap between developed and undeveloped countries within a relatively short period of between one and several decades. Transition can also be observed as a process of integrations into the EU.

The exact moment when this process started in Serbia is not easy to determine. Namely, although the transition process was based on a well-composed program dated from 1989-1990, it made some serious progress only after 2000.

Transition, which many people call a painful process, in Serbia interlaced with globaliation, i.e. the global social process which marked the last two decades of the 20th century, covering economic, cultural, and political sphere. In economic sphere, globalization signifies removal of all borders in movement of capital, increase of international share in trade with commodities, expansion of trans-national companies, growth in direct foreign investments, increase of speed and range of financial transactions. Apart from that, globalization leads to significant changes in means of communication, science, technology, and in cultural-technological sphere, which is embodied in creation of a special global system of values and morality. In the domain of politics, globalization implies development of democratic system and institutions, spreading democratic practice, absence of discrimination, and as law is inseparable from politics, acceptance of legal and regulatory standards in line with the rule of law principle.

In the transition and globalization process, the Serbian law strove to replace or change the existing laws in accordance with these principles.

One of the main aims in the field of law is harmonization of domestic regulations with the EU law. The harmonization process represents adoption of new and change of the existing laws and by-laws, whose provisions should be in line with the EU law, that is with acquis communautaire – a collection of rights and obligations that connect the EU members.

The former Yugoslav government in 1996 held the first debate on harmonization of the domestic regulations with the EU law. After the changes that occurred in 2000, the process of harmonization of the domestic regulations with the EU law was set as a primary one in the sphere of law. The collection of rights and regulations is constantly being innovated, so it is a continuous process, and our legislation should also be one of its whose parts.

Since 2000, all legal branches went through some changes in accordance with the given principles of rule of law and harmonization of the domestic regulations with the EU law. Is it possible, and at what extent, to implement in a few years what has been developing in Europe for 50 years, precisely because the harmonization process is not limited only to harmonization of the domestic regulations with the EU law, but, as it was stated above, with entire acquis communautaire.

The authors of articles in this book attempted to answer this question, point at some of the most important changes that are yet to come, as well as at those that occurred in the Serbian law in the last decade.

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SUICIDE IN A CHANGING SOCIETY[1]

No one kills himself in order to prove an absurd!
People resort to suicide when they feel bad!
Borislav Pekić

Summary

Suicide does not choose neither civilization nor nation, neither class nor religion, and that problem has always been occupying the attention of science (anthropology, philosophy, law, psychiatry, psychology, sociology…), religion and arts. But still there is not enough knowledge about that phenomenon and probably we will never definitely find out why a man voluntarily renounces his life and resorts to the most (un)natural salvation.

We can ask ourselves with Albert Camus: does deliberating on one's own existence is at the same time its "undermining"? Considering the "essential philosophical question" regardless of challenges surpasses the intention for writing this text, naturally limited by its heading and/or subject-matter. Consequently, its purpose is to offer a brief review of apparently trivial changes which were paid by the lives of those – as social psychologist would call them – not oriented toward the future. In fact, at issue here are the ones who, although entirely conscious and of common sense, renounced the life and to whom the changes have brought about disaster instead of salvation. It seems that they were unable

[1] This work is a result of work on the project "Prevention of Criminality and Social Deviations" financed by the Ministry of Science and Technological Development of the Republic of Serbia, no. 149016.

or unwilling to adapt to social, political, economic, cultural and ethical changes that have taken place in our country during the past twenty or so years. We experienced, unfortunately, in comparison with others, much more serious changes, including considerable State and social "earthquakes".

And the voice of hope which usually comes down to promises is sometimes quick to betray, particularly when the life falls on the margin of survival and/or the border of the humanly possible.

Key words: *social changes, hopelessness, suicide.*

Social Changes

The end of 20th and the beginning of 21st century is marked by numerous changes in the world: from the fall of Berlin Wall until the unification of Germany; from disintegration of USSR up to the end of Cold War; from wars in and disintegration of SFRY and creation of new states; from separation of Czechoslovakia into two states and up to expansion of the European Union; from globalization, extinguishing of socialism and one-party system to the creation of new world order; from demolishing the Towers and growing wild of terrorists, up to disseminating unprecedented fear around the world; from the world crisis to…

Developments that are not isolated, instead amounting to a part of global changes known as transition have been present during the past twenty or so years in the sphere of social order and the economies of so-called socialist countries in Europe which only follow the transformations at the wider international level. This is a process of complex social, political, economic, educational and cultural changes coupled, unfortunately, also with negative consequences (unemployment, uncertainty of employment, poverty striking one part of population and quick acquisition of riches by the other part, lower standard of living, the crisis of social services and criminal law system, etc.

Included to the above are geopolitical and geostrategic interests and purposes of big powers which considerably influence the smaller countries. On the contrary, we have experienced something that we have never expected: disintegration of our country, wars in the region, exodus, refugees, migrations and emigration, sanctions and isolation by international community, hyperinflation, bombardment by NATO and a state whose borders are still unknown to us.

It is not surprising that on top of the above evils, the following did not miss us too: the increase of easily available arms, rise of serious forms of crimes and corruption, drug-addiction, alcoholism, various types of aggres-

sion aimed at others and at ourselves. Political murders and terrorist acts were also not unknown, so that we have to at least mention them as well.

Privatization and abolishing of social ownership, introduction of free-market economy, lagging behind in economic and technological development, unemployment, functional illiteracy, decay of economy, withering away of village and abandoning of agriculture, loss of jobs, lowering the quality of life due to existential uncertainty, the changed demographic structure, an ever greater poverty and disappearance of the middle class, together with the phenomenon of "new wealthy men", are but rather well-known developments that supplied the cause for melting the patience of many those who burst out under the pressure of uncertainty they could not stand.

One must not neglect the fact that some have gained profit in the war and on its victims. Others have gained enormous riches by exploiting the failed companies and clumsy privatizations so that it is humanly understandable that those left without job and their daily bread took these developments with utmost resentment. In an atmosphere of perverted social consciousness to be a Mafioso became regarded as some kind of respected thief. It is known that crumbling down of moral values creates a favorable climate for all kinds of social deviations, including the suicide.

There is a reasonable ground for assuming that suicide is not only a personal decline of those who are sensible, vulnerable and sick. For those who took lightly the changes as being a speedy way out of unfavorable social and economic situation, without being ready to face the new relations and values brought about by transition, the responsibility of society did not live up to expectations. Incredulity in better future has ''made easier'' for many to take the road with no return or – to paraphrase our only Nobel prize winner – the ones who lost everything have felt the easiness of excessive pain. Without roots in social circumstances and their existence, they separated themselves voluntarily from their lives.

We live in the times when many values of life are undermined and when violence, aggression, selfishness and lack of feelings replace security, love and humaneness among people and, unfortunately, even within the family. Traditional readiness and solidarity with others seems to be lost somewhere.

The changes resulted also in making former so-called town gygants were compelled to "beg" for help in big shopping centers to obtain food whose safe consumption term has expired. This was named "food bank" and the intenbtion was to assist those citizens who were economically or, better to say, existentially jeopardized, while still having no right to use the welfare kitchens

for those extremely poor. As a matter of fact, these institutions too began to be closed for lack of money to finance them. Searching for a cause of deviant phenomena, and partricularly suicide, parallel with social developments that may lead to collective apathy a nd loss of hope, should be directed also to disfunctional family and nmerous stress situations (disturbed relations within, loneliness the family, impossibility to obtain adequate medical care, jealousy, indebtedness, bankruptcy…).

In other words, final escape from "chaos" is not attempted by mental patients only but also by those who make a life balance sheet, so that point must not be neglected. But regardless of the specific reason, we do agree with Dušan Kecmanović (2002) that suicide in essence is somewhere in the middle between normal and pathological behavior.

Suicide: unfavorable consequences of social changes

In terms of semantics, the notion "suicide" directs to a monosemic connotation – killing oneself, which does not mean that there is a well-known and unanimous definition of that notion. There is no need to point out in the present context at the complexity of determination and classification of this phenomenon as well as at the kinds and theoretical starting points in considering the historical development of suicide, since many serious studies do exist in various research areas: anthropology, philosophy, psychiatry, psychology, sociology, theology, suicidology,[2] but the field for discussion is still open regarding the intention, the awareness of the outcome of decision of an individual to deliberately take his life out of most different reasons that may be either of personal or social nature – which all makes a component part of the definition.

The complexity of defining this phenomenon is joined by all the problems and particularities of its research as well. Due to lack of sufficiently reliable information about those committing suicide (who, how and why?) we have to

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[2] For more see: Miličinski L. (1981), Suicidnost, Zagreb, Psihijatrija; Biro M. (1983), Samoubistvo – psihologija i psihijatrija, Beograd, Nolit; Drkem E. (1997), Samoubistvo, Beograd BIGZ; Nikolić D., Dimitrijević D. (2002), Nasilna smrt u Jugoslaviji 1950 - 2000 , Beograd, Ars libri; Petrović R., (1990) Rasprostranjenost samoubistva u Jugoslaviji, Samoubistva u Jugoslaviji, Beograd, Institut za sociološka istraživanja; Srna J. (1998), Biti ili ne biti, Studija samoubistava mladih, Beograd, Institut za psihologiju i IP Žarko Albulj; Pilić D. (1998), Samoubojstvo: oproštajna pisma, Zagreb, Marjan Express; Knežić B. (2008), Istraživanje samoubistva – metodološke osobenosti, Beograd, Zbornik Instituta za kriminološka i sociološka istraživanja, no. 1-2, etc.

accept incomplete public service statistical data (Republic Statistical Institution, Police, Public Prosecutor's Office, etc.). It is also not very human and scientifically responsible to subsequently, i.e. posthumously, determine diagnoses to those who did not have one or were not aware of them. Quite often we study this phenomenon on the ground of scarce information not methodologically founded and full of shortcomings. Official statistics probably would have to be supplemented by data relating to those indicated in newspaper as missing persons, car accidents of doubtful explanation, overdosed drug or alcohol addicts or, as the case may be, those who refuse medicines and food (so-called passive suicides).

Suicide is a social phenomenon that could be viewed from the aspects of many already mentioned areas of science, while our intention now is to consider "trivial" connections between the society and the individual that are material for suicide. It has been clear already since Emile Durkheim (1858 – 1917) and sociological starting points after him that suicide as a form of deviant behavior is preceded by a group of negative social factors (with the exception of mental patients suicides). Durkeim's thesis is that suicide is the consequence of disturbed social connections, so that principal cause should be sought in studying the social environment as instrumental in changing the suicide rate. For Durkeim (1997) there are two forms of anomy: the economic one (i.e. the positive correlation between suicides and economic crisis) and the family one (higher suicide rates are notices in divorced or single men). These facts according to him are of an external character vis-ŕ-vis the individual, which brought him to generalization relating to social integrations and suicide rate.

Here is Durkheim's typology of suicide:

- egotistic, as a consequence of loss of social interest or insufficient integration in he society but also of intensified individualization;
- altruistic, as a consequence of insufficient individualization or excessive social integration – rarely present in contemporary societies, for instance suicide of a women after the death of husband, hara-kiri, soldiers at the battlefield, and the like;
- anomic, as a consequence of sudden social crises resulting in society's incapacity to direct the individual and to control him. This brings about the lack of balance of social norms, regardless of whether they reflect prosperity or lagging behind.

Considered here should also be fatalistic suicide where the society imposes rules by making pressure against the individual, so that suicide is seen as the

only way out of the problems (e.g. the case of childless young women where social norms require childbirth).

Characteristic of this thesis of conceiving, understanding and explaining the suicide regardless of type, is that it is determined by a given social environment, i.e. by the relationship between the individual and the society (social integration – the explanation notion introduced by Durkheim). Lowering family, religious and political integration favors the rise of the suicide rate. Egotism is thus the cause of political crisis, while anomy – of the economic one. Also, the first is connected with family relations and the second with marital ones. Durkheim points out that lack of balance that follows anomy corresponds to the lack of the very sense of life.

It is possible to agree with Grigorij Chartishvili (2006) with his statement on inhabitants of Russia in the 1920s, which may refer to our conditions as well, acording to which there is no need for explanation of anomic (social vacuum type) suicide since that type has doubled the number of sucidies.

The fact that already changed societies do not lack suicides is confirmed by the unhappy data and bad news columns in the press. Suicides because of anomie, collective hopelessness, privatization, loss of job and missed-chance-life are still going on in Serbia, as in the case of most countries in transition (implying social, political, economic, cultural and educational changes). The rise of suicide rates in Europe is ascribed by D. Nikolic and D. Dimitrijevic to transitional changes going on in social systems and is expressed in loss of people's confidence in the basic values, in their complete incapacity for changing things to the better, in the weakening of family ties, etc. – which more and more prompts them to lose the sense of living.[3]

In spite of numerous research and results as well as standpoints regarding suicide (as an illness of individuals and society, a disturbed value system and implying the loss of sense of existence, including a wider view on the phenomenon as an ethical and philosophical problem), there is no magic key that would aleviate the just concern about the crime against oneself which, according to statistics, is at present rising in numbers. That rise in Serbia and surrounding countries is visible since the time of disintegration of SFRY that has created an excepitionally unfavorable atmosphere characterised, after all these wars, with painful facing the losses and lost expectations. Already research done on specimen of Vietnam veterans it became clear that there is straight connection between the post-traumatic stress and suicidal behavior.[4]

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[3] More in: Nikolić D., Dimitrijević D., op. cit.

The same is confirmed by the report of the WHO[5] as well: suicide is at the 13th place as a cause of death in the world, since every 40 seconds one person loses his life in that way. This, in 2000 815,000 persons took their own lives. World statistics inform us that even those who "do not suffer from hunger" find some reason to raise their own hand against themselves, disregarding the fact that life was given to them by God.[6]

According to data supplied by Penev G. and Stefanovic M. (2007) Serbia is, at the beginning of 21st century, with 20 suicide cases per 100,000 inhabitants, was in the upper half of the European list. According 2005 data, Belgium excepted in terms of 1997 report, higher rates[7] than the Serbian ones are noted in the transition countries (Latvia, Bela Rus, Russia, Lithuania, Hungary, Estonia, Slovenia, Ukraine, Croatia). Somewhat lower than in Serbia are noted in Finland and Montenegro. Following are the countries with high rate indicated during the last decade or so: Lithuania (38.6 in 2005), Bela Rus (35.1 in 2003), Russia (32.0 in 2005), Hungary (26.0 in 2005), Slovenia (25.1 in 2005). The rate lower than 10 is reported in Greece, Albania, Italy, Malta, Spain, Portugal and Macedonia. As a specificity of suicide in Croatia (19.7 in 2005) are reported: high numbers of traumatized persons – participants and sufferers in the war, high numbers of retired persons, frustrated young people usually having an unorganized life, high availability of arms, economic stratification of society, etc. (Kocijan-Hercigonja D., Folnegovic-Smalc V., 1999). In the Republic of Srpska the highest number of suicides was committed in the group of over fifty.[8]

The following Serbian official statistics,[9] illustrate the suicide number and rates, and indicate an almost double rise in the 1956 – 2004 period. Conspicuous rise which, followed by slight oscillations still continues until the present, is noted in 1991.

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[4] According to statistical data relating to suicides of defenders in Croatia, more than 1,650 of them ended their lives by suicide in the 1991 – 2008 period (www.javno.com)

[5] http://.danas.co.yu 200210/terazije.htm

[6] Japan, just as other European developed countries and the USA, has a big problem with the rise of suicides, one of the particularities being agreeing via internet about collective suicide in most monstruous ways. Considering the rise of drug addiction and alcoholism, this might be the ground for concluding that even material well-being quite often causes the crisis of living.

[7] Low rates: 8 – 16 per 100,000; medium rates: 16 – 20, and high, exceeding 20.

[8] http//www.nezavisne.com/revija

[9] Since 1991 data for Serbia do not include Kosovo and Metohija.

Table 1 – Number and rate according to age and gender

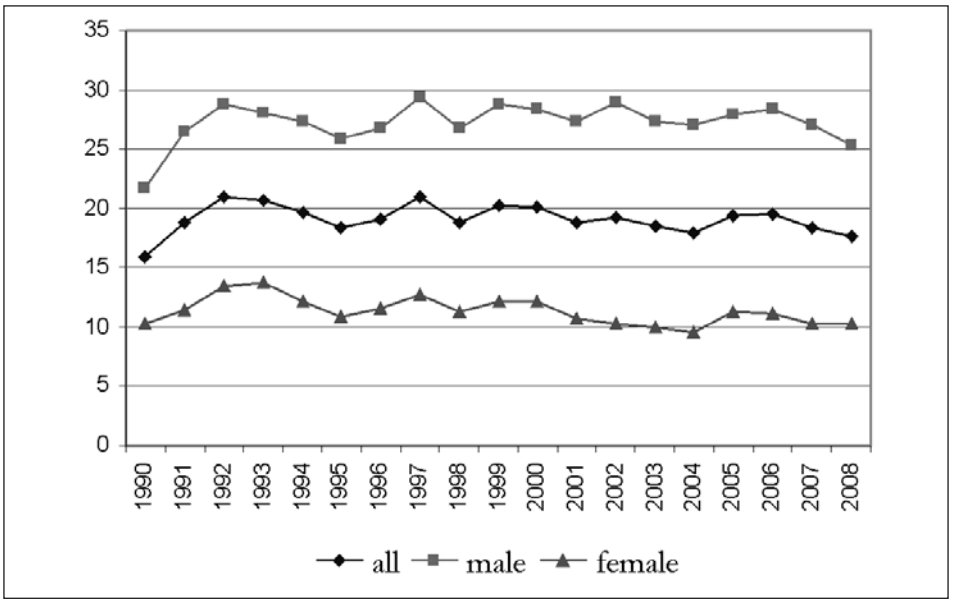
Year	1956	1961	1971	1981	1991	1997	2002	2004
	758	924	1146	1341	1472	1661	1449	1346
Masculine	490	586	793	932	1016	1143	1053	979
Feminine	268	338	353	409	456	518	396	367
Rate per 100,000 inhabitants	10	12	14	14	19	17	19	18

Numbers in the Table clearly indicate the situation demonstrated that took place after various changes and developments in the territory of Serbia and its surroundings, which situation had an impact on social, political, demographic, economic and cultural developments. The lowest rates in 1950, i.e. 10 and the highest ones in 1991 – 19, illustrate an almost double rise of number of suicides. We are left to "guess" the causes, motives and reasons for self-destruction. Human tragedies transformed into figures are but only a mild reflection of the real state of affairs, because reality is much harsher and darker than statistics.

Table 2 – Suicides according to age and gender

Serbia	Number of deaths			Deaths per 100,000 inhabitants		
Year	Total	Masculine	Feminine	Total	Masculine	Feminine
1990	1254	844	410	15,9	21,7	10,2
1991	1472	1016	456	18,8	26,4	11,4
1992	1638	1104	534	20,9	28,8	13,4
1993	1619	1072	547	20,7	28	13,7
1994	1527	1046	481	19,6	27,3	12,1
1995	1426	992	434	18,3	25,9	10,9
1996	1484	1025	459	19,1	26,8	11,6
1997	1622	1117	505	20,9	29,3	12,7
1998	1460	1015	445	18,8	26,7	11,3
1999	1572	1092	480	20,3	28,8	12,2
2000	1546	1072	474	20,1	28,4	12,1
2001	1443	1026	417	18,8	27,3	10,7
2002	1449	1053	396	19,3	28,9	10,3
2003	1381	998	383	18,5	27,4	10
2004	1346	979	367	18	27	9,6
2005	1442	1010	432	19,4	27,9	11,3
2006	1444	1022	422	19,5	28,4	11,1
2007	1354	969	385	18,3	27,0	10,2
2008	1290	903	387	17,6	25,3	10,2

Suicide rate in the 1990 – 2008 period



While following the suicide numbers and rates in Serbia, one notices that they have reached their maximums in 1992, 1993, 1997, 1999 and 2000, when they approached the margin of 21. Comparing to 2004, the rate is conspicuously increased in 2005 and 2006 while reaching 19.4. The breakdown according to gender is not different than the ones in the rest of the world: men, namely, predominate along the 1956 - 2008 curve since their number is doubled in comparison with women.

Former research[10] in Vojvodina Province indicates a long-term high rate of suicide, which goes up event to 30. The relevant factors include the following suicide risks: gender, age, marriage status, education level, profession, loneliness, health condition, season of the year, alcohol consumption, drug addiction and the like, as well as the motives which include a whole array reflecting, naturally, the differences among individuals: loss of partner, loss of job, disturbed family relations, bankruptcy, financial difficulties, loneliness,

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[10] More in: Biro M., op. cit.; Kampadžija B., 1976, Suicidogeni faktori, II jugosl. Simpozijum o prevenciji suicida, Galenika 9-18, Beograd; Nikolić D., Dimitrijević D., op. cit.; Petrović R., op. cit.; httpČ//www.politika.co.yu. Penev G. - Demographic Research Center, points at the already known fact of the inequality of distribution of suicide in Serbia since Vojvodina predominates comparing to the rest of Serbia; Hungarians' and Bulgarians' rate is around 40, while that for Walachas and Albanians is lower than 5.

dependence from others, loss of perspective, physical and spiritual illness and anguish, loss of vitality, etc.

Miklos Biro (1982) points at the age dimension which is influential in more than a third of the number of suicides and should we oversimplify the matter, we could conclude that the same value is shared by the feelings of loss of perspective and pessimistic attitude at the one hand, and the unsupportable suffering and the lack of "joy of life", at the other.

Speaking of young people, Serbia does not depart from the countries in the Region. Suicides of the young ones are dangerous if coupled with drug addiction, alcoholism and influence of religious sects. Responsibility of society, i.e. of schools and various sports and recreation activities is undoubtedly rather important. Developments in course of adolescence too, imply the higher suicide risk through the conflicts with parents, peer groups, environment.

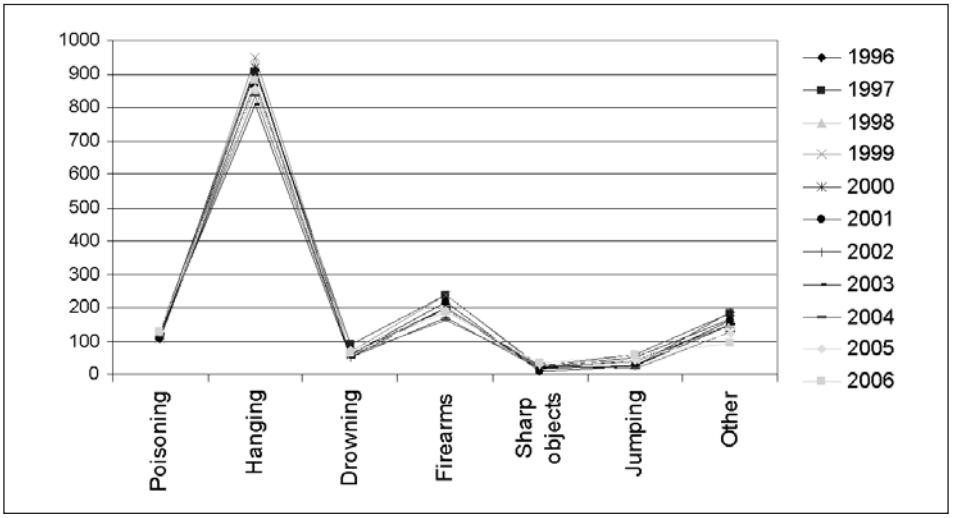
Table 3 – Suicides according to the way of committing

	Poisoning	hanging	drowning	Firearms	Sharp object	jumping from a high place	remaining ways
1996	108	909	62	196	18	44	147
1997	121	907	88	239	25	61	181
1998	115	857	72	196	22	44	154
1999	107	947	70	239	22	39	148
2000	127	919	59	200	23	50	168
2001	107	860	61	218	10	26	161
2002	116	876	52	172	18	27	188
2003	122	807	51	202	23	26	150
2004	114	836	61	161	28	18	128
2005	127	856	73	191	31	41	123
2006	128	881	65	187	32	58	93

In terms of the structure of suicide population according to the way of taking one's life, most of them choose hanging, followed by firearms and jumping from a high place choose strangling. The most frequent way is the latter one mentioned, but men often apply firearms, while characteristic of women are poisoning and jumping. In terms of age groups, the most frequent ways are hanging and strangling. The only exception is found at the 15 – 24 age group, since they use firearms; the number indicating that way of suicide is followed by the number illustrating the hanging. Jumping from a high place, as far as age groups 25 – 34 and 35

– 44 are concerned, is the characteristic way used, but the older age groups, those 45 – 54 and 55 – 64, prefer to use firearms. The oldest group, that over 65, chooses as the second frequency way the firearms and jumping from a high place (Knezic B., 2007).

Number of suicides according to the way of committing



Since they were unable to settle their misunderstandings with themselves and/or their environment and to make a compromise, it will be useful to indicate certain circumstances representing possible reasons for such attitude: disintegration of the country, refugee status and change of residence; new social and political climate and unfulfilled expectations; social and economic changes and unfavorable stratification of society; serious forms of criminality, corruption and social deviations; loss of job and poverty; lack of sense and the feeling of uselessness in leisure time (as a consequence of loss of job due to technological surplus, etc.;[11] including the element which is both at the end and the beginning – loss of a family member or disintegration of family.

[11] Here are some examples of consequences of firing: D. D., a citizen of the town of Bor took his life by shooting himself without a parting letter since, according to his colleagues, he was so lonely that there was no one to write it to. A.V. has jumped from sixth floor. In the town of Donji Milanovac two people hanged themselves withina 10 day period. D. S. from Gornji Milanovac hanged herself after being fired, indicating in her last letter that she was unable to finance daughter's education, etc. http//www.novosti.co.yu

All the above is but only one side of the medal, but the other one – personal which is the topic of psychiatry and medicine, is not considered here. Placing the suicide problem into social context, on the other hand, does not at mean neglecting the individual motives and reasons.

Unfavorable consequences of compulsory displacement and becoming a refugee are never forgotten because these people in fact were uprooted not only from their homes, but out of life as well. They have lost their homeland, friends, job and often the family too. It seems that the only right left to them is to take their own life because they were deprived of everything else, while their alleged rescuers and caretakers have provided to them a reality most of them could not stand any more. Transplanted into a surrounding that do not need special description, many of them had no strength to accept them, the more so since we all know that humiliation is the hardest thing to experience. According to information and data supplied by refugees' associations, more than one thousand of men and women committed suicide in Serbia in the 1991 – 2000 period, and most of them were those settled in collective refugee centers.[12] Stretched between defeat and hope, anxiety and promises, they could not hold out. It seems that suicide caused by poverty is less detrimental than the uneasy waiting for a better tomorrow and for returning home.

Whether those who attempted to live outside their former republics have found a safe shelter – we do not know. Deliberating on sufferings of Russian émigrés who could not any more stand the life separated from their homeland, Nikolaj Berdjajev (1874 – 1948) has probably thought on temptations and sufferings of all displaced persons in the world, which may as well be applied to our situation today.

The above described difficulties of disintegrated country and the creation of new states have changed the regular course of living. The population of the former common state was not exposed only to negative effects of mentioned changes, but also to the drama of disintegrated families along the religious and national lines. Some among refugees and displaced persons could not emotionally stand forcible change of village, town and country; others have lost the hope for a better time promised to them; while still others were not cured by the time otherwise supposed to heal the wounds inflicted by their "relatives"

Globalization and transition that are neither regional nor local as well as our specificities (sanctions, displacement of people, moral crisis, poverty and

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[12] Newspaper "Glas", Belgrade,25 July 2001.

lagging behind in economic and technological spheres, unemployment and functional illiteracy) are the causes of impossibility to find a way and the road of getting out of poverty. It is clear that loss of job is a cause for stress evidenced by suicides provoked among those hit whose companies had to be closed, in many a case due to failed privatization in former industrial centers of Serbia (Kragujevac, Smederevo, Bor, Majdanpek, Niš…). This is further evidenced by newspaper reports and messages describing the destiny of people putting a noose around their neck, people who jump in the river, place a pistol against their temple, or drink various poisons. How often social changes contribute to undermining one's resistance is demonstrated by data indicating the firing of workers caused by the world financial crisis.[13] Otherwise, the threshold of resisting physical pain and moral humiliation in macro and micro environments as well as other impediments is an individual matter. The area of employment is therefore a factor in determining the income, the social stability, as well as social connections and quality of life, but also in gives ground for participation in educational and cultural life.

It is to be expected that political, economic, social, educational, technological and similar changes could entail negative consequences such as: unemployment, loss of job, poverty, and early retirement sometimes due to functional illiteracy which, as a rule, is characteristic of people over fifty.

Deterioration of economic conditions causes not only material but also moral disintegration of society and family. Serbia and countries bordering it are still in the process of transition and, consequently, face the negative effects of considerable stratification of their population (small number of rich ones and large number of those hit by poverty), which fact is drastically reflected on the security and stability of family. In addition to existential problems, disturbed system of values and unfavorable changes, one should by no means omit to consider the "inner" motives, the frustrations and the patriarchal relations in the family as a trigger for murders and suicides. It is understandable that rather relevant in the problem of suicide, in addition to personal motives, is the influence of society. Failure of an individual to be included in society – which is but a natural thing for man – is much more difficult to stand, than the element of time itself which ran over him. Without seeing the way out of

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[13] One title was "The wave of suicide of desperate workers" reporting that more than 20 employees of French Telecom committed suicide in the precedeing 18 months due to problems on the job ("Politika", 12 September 2009. Another tragic case was the crime of a man who lost his job and has killed his wife, three children and his mother in law (Belgrade Television, 2008).

the problem to maintain the family's and his own existence, and left without help, the rescission with himself is not apparent or virtual opposing the Planet Earth, but in fact opposing his right to life. If the saying "man is a wolf to man" is correct, than it turns out that social community looks like a preserve of game to suicides, providing no care to them, and leaving them to their fate in spite of their hopes and expectations.

Even those who involved in some way in crimes and a series of suspicious business are not immune against suicide. Cases are rather known of suspects apprehended in various malversations who managed to end their lives during preliminary detention without being able to find the way out of the burden that suddenly pressed them. Added to these may be the ones who, caught in mutual settlement of accounts with gang members and, anxious about possible vendetta, decided to voluntarily outrun the justice and law.

Indebtedness prompted by the attempt to find a way for sustaining the family and children, but also a useless hope to get rich overnight, may also be mentioned as causes of looking at the former life as a failure due to the fault of others.

Inadequate evaluation of one's own financial possibilities and social conditions are sometimes the ground for a fatal decision.[14] One finds also individuals unprepared to face the loss of job and decided that the only way out was the suicide. In such situations they have no mercy for themselves or justification. May we therefore conclude that these are but consequences of frustration accumulated in the preceding one or two decades? Does the hope for a better tomorrow in unstable social conditions last too long, only favoring the unthinkable human heartlessness that is not expressed immediately?

Many tragic murders followed by suicide as a consequence of material disaster and one's concern for the life of family members warn us that accumulated uncertainty, dissatisfaction and lack of perspective are expressed in the form of making the final balance sheet of one's life (Knezic B., 2009).

Regardless of the approach of various and already mentioned branches of science to the problem of suicide (philosophy, theology, criminal law, psychology, sociology, etc.), including the elements of economy, society, family conditions, health condition, i.e. psychiatric diagnosis, lack of capacity to settle problems, one thing seems quite sure: not one and a single factor may be taken as a dominant and reliable motive.

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[14] The newspapers are full of reports such as: Z. G. killed his wife and children and then committed suicide, etc. This reason is also found in farewell letters where debts and financial problems are stated. http//arhiva.glas-javnosti.co.yu

The cause and the motive are a composite matter, often of long-term nature while the immediate inducement may include the following: momentary escape out of an unsupportable financial situation; loss of self-control; break of an emotional relationship and/or marriage; misunderstanding with children and parents. Alcoholism and drug addiction may put more oil to the fire. We have no hesitation in agreeing with Kecmanovic D. (2002) that the puzzle of someone's deliberately chosen death may never be completely understood, while always being full of unexplained suspicions and almost inevitable sensed of guilt. Suicides prompt us to pose questions but leave us without answer, regardless of whether they are known to us or whether they gave left any letter behind them. The decision to refuse to live, as Camus said, is a long-term preparation in the silence of heart, just as a great work is and, as we know, great works do not happen accidentally of instantaneously.

We think on those who had no capacity or intention to coordinate the possibilities and needs with the requirements of social environment, or knew Monteigne's sentence – that life depends on the volition of others but death is something that depends on us. Long-term processes of social changes and incapacity of accepting difficulties of life result in consequences that activate the weaknesses of individuals, forever darkening thus the picture of a reality that could be appropriate for living.

If this is so and if otherwise is impossible, successful changes in the society imply corresponding legal and legislative framework as well as a strategy of development of economy and agriculture, of social policy and education and culture. But whatever varieties of inducement and causes may be, they will have to be viewed in the social, political, economic, educational and cultural contexts.

And let us remember Berdjajev's words (N. B., 2002): regardless of variety of suicide motives, this phenomenon can never be separated from despair and loss of hope.

Instead of conclusions

Self-destruction is neither a social nor scientific novelty, but sound reason dictates to us the idea that these "supporters of death" may be opposed by applying social heedfulness. If killed by others, we would not call them suicides, but their large numbers does not permit the exoneration from liability and scientific curiosity of any social group. A society failing to render sufficient assistance in saving these sufferers unjustifiably uses the name of their caretaker. That same society of transformation and/or transition did not want or was unable to take from suicides their right to own looking of reality.

When life becomes an excessively hard burden, the man is easily prone to glide off down the precipice because lacking an adequate support and/or helping hand to rescue him out of despair caused by: loss of native home, family, job, impossibility of obtaining medical assistance, loss of labor rights, failure to finance children's education, etc. Most numerous are the ones whose retirement income looks like alms. Daily press and television inform us continuously about those masters of own life, while official statistics remind the audience on the spread of success (i.e. failure) of this phenomenon. However, impermissible social self-delusion and hiding behind either anger or helplessness permeated to the very end the race of desperados for survival.

It seems that a society in course of transformation as well as all other societies, and the suicides do not notice each other, and it is clear who the party is the one giving its life in the "relationship". There are so many reasons making a man in this transition of ours from "social into liberal" a victim of the time, compelling him to experience himself as a looser, but who else must be at hand to the poor fellow unless social factor intervene in his life.

Perhaps the least sense in the entire debate may be found in the idea that social community has in vain attempted to apply measures of encountering and preventing that apparently senseless, irrational or helpless suicide act.

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SAMOUBISTVO U DRUŠTVU PROMENA

Samoubistvo ne bira ni: civilizaciju, naciju, klasu, rasu niti religiju i oduvek je taj problem zaokupljao pažnju nauke (antropologije, filozofije, prava, psihijatrije, psihologije, sociologije…), religije i umetnosti. Ali se, još uvek, nedovoljno zna, a možda nećemo nikada ni saznati, šta je to što čoveka nagoni da se samovoljno odriče života i opredeljuje za naj(ne)prirodniji spas.

Možemo se zapitati zajedno s Kamijem: da li promišljanje vlastite egzistencije ujedno znači i njeno "potkopavanje"? Razmatranje "suštinskog filozofskog

pitanja", bez obzira na izazove, prevazilazi namere ovog teksta koji je ograničen naslovom, odnosno predmetom.

Cilj je rada da damo mali osvrt na, izgled sitne, društvene promene koje su života koštale one, kako bi ih socijalni psiholozi nazvali, neorjentisane na budućnost. Ustvari, reč je o onima koji su - pri svesti i zdravog razuma - odustali od života i kojima su promene donele više propast nego spas. Izgleda, da se nisu mogli ili hteli prilagoditi: društveno-političkim, ekonomskim, kulturnim i etičkim promenama nastalim u proteklih dvadesetak godina u nas. Desile su nam se, nažalost, mnogo veće promene nego drugima i pogodili nas teži državni i društveni "zemljotresi".

A glas nadanja, koji obično spada na obećavanja, ponekad, brzo izda, pogotovo onda kad život padne na granicu opstanka odnosno granicu ljudskog.

Ključne reči: promene u društvu, beznađe, samoubistvo

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CIVIL SERVICE REFORM IN SERBIA –OVERCOMING IMPLEMENTATION CHALLENGES

Abstract

Similar to other countries in the region, Serbia embarked on a process of comprehensive civil service reform over the past couple of years. The motivation for the reform has been the need to strengthen the civil service capacity, lessen political interference and improve the efficiency and effectiveness of civil service functioning. Following the passage of the Government Public Administration Strategy in 2004, two key pieces of legislation: Civil Service Law and Law on Civil Service Salaries were adopted in 2005 and 2006 respectively and their implementation commenced in mid 2006 and early 2007.

The objective of the paper is to analyse key elements of new civil service legal framework and point out its main implementation challenges. The paper restricts itself to the following reform elements of civil service system – attempts to depoliticise and professionalise senior civil service cadre, enhance effectiveness and impartiality of recruitment and selection process, and make the civil service a more attractive employer through reform of its remuneration system. The authors argue that although important progress has been made in putting in place the civil service legislation which is in line with European standards, significant efforts need to be invested in order to implement and sustain this ambitious reform programme. The greatest challenges that lie ahead are ensuring the civil service professionalisation and competitiveness and creating an environment of trust, participation, shared values and objectives in which civil servants' performance and talent will be able to be fully recognized and appreciated.

Key words: civil service reform, professionalisation, depoliticisation, European standards, human resource management, capacity building

Introduction and background of reforms

Unlike most Central and East European countries, Serbian civil service has a distinct tradition of professionalism and high degree of impartiality which was retained under most of the period under communism.[1] The Serbian and ex Yugoslav civil service tradition is based on the Habsburg model, which implies a conservative continental European approach to the state and its management, including a high degree of civil servants job security.

However, a high degree of professional prestige that the civil service enjoyed during Tito's rule was seriously undermined throughout the 1990s, when a number of qualified personnel left the administration. Political loyalty became the key principle for recruitment and career advancement, especially regarding senior civil service posts which became excessively politicised. This has left the civil service to rely on politicians and the personnel who above all appreciated job security of the civil service and certainty of career advancement, regardless of the inadequate working conditions (including remuneration levels).

When the new democratic Government came to office in 2001, it was faced with a lack of competent staff who would be able to carry out a comprehensive Government economic and social reform programme. The system of public administration also suffered from the week institutional capacities of the ministries and other Government agencies and support structures, significant lack of horizontal coordination mechanisms and an underpaid and understaffed career civil service, constantly facing the problem of a 'brain drain', as most capable civil servants were continually leaving the administration.

Another important problem was continuation of the politicisation of senior civil service posts, which were subject to simple Government appointment/dismissal. Frequent government reshuffles have resulted in the turnover of a substantial number of senior civil servants, with the majority of them usually being replaced after arrival of the new Minister. This has created serious problems for the effective management of ministries and has had an adverse effect on the continuity of both policy-making and implementation processes.

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[1] Sevic Z, Rabrenovic A (1999), "Civil Service of Yugoslavia: Tradition vs. Transition", in: T. Verheijen, (ed.), *Comparative Civil Service Systems: Central and Eastern Europe*, Edward Elgar, Cheltenham, pp. 47-82.

Furthermore, there was an absence of modern human resource management principles which would ensure impartial and merit based recruitment and promotion. Although elements of human resource management system were regulated by the law (Law on Labour Relations in State Organs)[2], they were not defined in a precise and clear way, opening up a space for various legal interpretations and fairly discretionary implementation.[3] Promotion practices were based mainly on work experience and professional competences and not on merit. Moreover, there was no established system of systematic, planned civil servants training which would develop knowledge and skills of civil servants and improve the quality of work, which further exacerbated already weak civil service capacity.

The immediate answer to the capacity problem was first found through donor funded schemes which provided for the funding of external experts that would fill the gap. The high number of expatriates willing to return to Serbia on a temporary basis, as long as the financial conditions were adequate, provided a good basis for the introduction of this kind of solution. Although this solution provided short-term benefits, it was unsustainable in the long run and became a part of the civil service problem rather than an opportunity for development.[4]

The Serbian Government soon recognized the need for in-depth reform of the civil service system in order to be able to recruit and retain staff of the right quality and to motivate them to produce the highest quality results. The initiation of comprehensive civil service reform was undertaken under the Kostunica Government (2004-2007), which initiated substantive legislative changes, preceded by adoption of the overall Public Administration Reform Strategy in 2004. This was followed by relatively quick preparation and adoption of the package of public administration reform laws: Law on Government,[5] Law on Public Agencies,[6] Law on State Administration,[7] Civil Service

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[2] Law on Labour Relations in State Organs, "Official Gazette of the Republic of Serbia" No. 48/91, 66/91, 39/2002.

[3] For example, although it contained rules on recruitment, the Law on Labour Relations in State Organs did not contain the rules on selection procedure to facilitate selection of the most competent candidates.

[4] DFID, World Bank, (2004), *Serbian Civil Service: Assessment of Pay and Benefit System*, (PricewaterhourseCoopers).

[5] Law on Government, "Official Gazette of the RS", No. 61/05.

[6] Law on Public Agencies, "Official Gazette of the RS" No. 18/05.

[7] Law on State Administration, "Official Gazette of the Republic of Serbia" No. 79/05.

Law,[8] all adopted in 2005, and the Law on Salaries of Civil Servants and Employees,[9] adopted in 2006.

Three years after the adoption of the new civil service legal framework there are a number of challenges in its implementation, since normative regulation itself cannot provide efficient and professional operation of the civil service system. The objective of this paper is to present key elements of the new civil service legal framework and point out its main implementation challenges. The paper shall analyse the alignment of new legislation with European principles and explore in more depth the following reform elements of the civil service system: attempts to depoliticise and professionalize senior civil service cadre, enhance effectiveness and impartiality of recruitment and selection process, and make the civil service a more attractive employer through reform of its remuneration system.

Changes of the civil service legal and institutional framework – towards the European principles

One of the key drivers for civil service reform in Serbia was the objective to meet the EU accession requirements. Although the EU legal system leaves autonomy to member states regarding their institutional and administrative organization, preparation for membership gradually worked as a factor and incentive to shape and develop structures and institutions capable of meeting the obligations and needs of EU membership.[10] Thus, the development of administrative capacity, which includes the requirement to establish professional and depoliticised civil service, become an important criterion for EU accession. Candidate countries have become obliged to comply with general European principles of public administration, which existed within the "European Administrative

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[8] Civil Service Law, "Official Gazette of the RS", No. 79/05, 81/05, 83/05, 64/07, 67/07.

[9] Law on Salaries of Civil Servants and Employees "Official Gazette of the RS", No. 62/06, 63/06, 115/06, 101/07.

[10] B. Lippert, G. Umbbach (2005), *The Pressure of Europeanisation – from post-communist state administrations to normal players in the EU system*, Institute for European policy, Berlin.

[11] These principles were developed by joint initiative of OECD and EU „SIGMA" programme in the 1990s. See: Sigma paper No 27 "European principles for Public Administration", Paris, OECD, 1998

Space".[11] The idea of "European Administrative Space" was that, in spite of the differences of institutional configurations of the EU-15, a degree of convergence existed among them at least at the level of general principles.[12] The creation of general European principles of public administration was further facilitated by the jurisprudence of the European Court of Justice[13] and by the constant interaction among civil servants from the Member States.

New Serbian civil service legislative framework comprises all key European public administration principles which should encourage creation of a professional, efficient and accountable civil service. For example, a new Civil Service Law contains and elaborates the following European principles: principles of legality (rule of law), impartiality and political neutrality of the civil service. Special attention has further been devoted to the principles of equality, protection of citizen's rights and of protection of public interest, accountability for results, transparency of operation, equal access to all posts under equal conditions, civil servants' promotion and professional development and legal protection of their civil service rights.

Serbian authorities have further followed the EU recommendation/ requirement to establish central civil service structures in change of the reform implementation. To this end, a new institution - the Human Resource Management Service of the Government of Serbia was formed in December 2005, as a central, professional body responsible for management and development of Serbian Government human resources. The Human Resource Management Service was granted the authority to guide and monitor implementation of new civil service legislation and is responsible for a number of important tasks: advertising all vacancies in the civil service, participation in competition commissions, record keeping, civil service training etc. The legislation also provided the basis for establishment of another central Government institution, High Civil Service Council, which is responsible for establishment and monitoring of civil service principles and has an important role to play in recruitment of senior officials.

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[12] SIGMA paper 44, prepared by J. M. Sahling, (2009), *Sustainability of Civil Service Reforms in Central and Eastern Europe Five Years after Accession*, OECD, Paris.

[13] J. Schwarze (1992), *European Administrative Law*, (Sweet and Maxwell), pp. 4-5.

Key European principles of professionalisation and depoliticisation of civil service, impartiality and objective recruitment of personnel, as well as competitiveness of civil service as an employer were addressed through various provisions of the new legislative package. We shall analyse the way these objectives were put in place in the new legislation and challenges which lie ahead in each of these areas for their effective implementation.

Depoliticisation of senior civil service – overly ambitious objective?

The issue of professionalisation and depoliticisation of the senior civil service has attracted significant attention of Serbian policy makers. It was understood that without a professional senior administrative layer it would be difficult to move the overall economic and social reform process forward and prepare the country for the EU accession. However, Serbian policy makers were also aware that an unstable political environment in the country would not allow for a too radical break with the exisiting overt politicisation practices. Therefore, instead of attempting to fully depoliticise senior civil service posts and provide them the same status as to career civil servants, other solutions were sought in order to provide sufficient flexibility for ministers to be able to establish good and confident working relationships with their top level officials.

The first step in attempting to reduce politicisation of high ladders of Serbian bureaucracy was to draw a line between political and administrative personnel. The Law on State Administration thus established a clear distinction between political posts and senior civil service posts. The positions of a Minister and a State Secretary (which used to be called Deputy Minister) are pure *political posts*. A State Secretary is appointed and dismissed by the Government on a Minister's proposal and his/her mandate terminates with the termination of a Minister's mandate.[14] A Secretary of Ministry position (which corresponds to some extent to the UK permanent Secretary) and Assistant Ministers posts (Heads of Sectors/Departments) are, in turn, envisaged to be senior *civil service* posts. The Law introduces mandatory recruitment by open and internal competition for these positions and establishes professional requirements that potential

[14] Article 24 of the Law on State Administration, "Official Gazette of the Republic of Serbia" No. 79/05.

candidates have to meet in order to apply for senior civil service posts: university education and at least 9 years of relevant work experience.[15]

It is important to note that senior civil servants do not have a permanent position, but are appointed by the Government for a period of 5 years,[16] which goes beyond the mandate of any individual Government and should thus reduce politicisation. Although this may not be a fully satisfactory solution, we are of the opinion that it constitutes an important improvement from the previous system in which posts of Secretary of Ministry and Assistant Minister were subject to simple Government appointment, often based solely on political grounds. In order to allow Ministers to get 'political advice' the Law on State Administration allows Ministers to appoint up to three special advisors,[17] which would form Ministerial Cabinets.

As expected, practice has shown that depoliticisation of senior civil service personnel has been one of the key challenges of the Serbian Government. As soon as Kostunica's majority Government was formed in May 2007 and the Cvetkovic's Government in July 2008, there was growing pressure from new coalition partners for making (political) appointments to senior positions without competition procedures. In order to find a compromise, coalition partners agreed to extend the deadline for the completion of competition procedures for senior officials until December 2009 and allow for temporary political appointments to senior positions (which are allowed under transitory provisions of the law). This compromise solution was expected to satisfy all interests and keep the current legislative framework in place, which is an achievement in itself, as full depoliticisation of the senior civil service cannot

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[15] The requirement of 9 years of relevant work experience has been criticised as too restrictive and negative as it ignores the fact that democratic changes in Serbia began only in 2000 and therefore ensures that most senior positions are obtained by personnel who gained their experience only under the Milosevic's regime (see CMI, Corruption in Serbia 2007: Overview of Problems and Status of Reforms, draft paper, 11 May 2007). However, we are of the opinion that this requirement needs to be looked at from a broader systematic perspective, as the intention to restrict placement of inexperienced political party personnel to these important positions and instead give better chances to current career civil servants to obtain these positions in the future. However, it would indeed be important that this provision is not used too restrictively in practice, especially in the first round of appointments made under the new Civil Service Law.

[16] Paragraph 3, Article 25 and paragraph 3 Article 26 of the Law on State Administration.

[17] Article 27 of the Law on State Administration.

be expected in a complex political environment such as the Serbian one. However, the deadline for competition-based senior civil service appointments has again been extended to December 2010, by the amendments of the Civil Service Law which are expected to be adopted by the Parliament in the near future. This demonstrates that depoliticisation is a highly sensitive issue which is difficult to sort out even during the mandate of a single Government and that the future Government changes and reshuffles will keep bringing this issue back to the center of the attention of both politicians and civil servants.

Recruitment and selection of candidates: increasing fairness v. reducing efficiency?

The new civil service legal framework has introduced an important degree of centralisation of the recruitment process, which represents an important novelty in the Serbian civil service management. Before initiation of reforms, the Serbian civil service system was highly decentralized, which suited the tradition of strong ministerial autonomy and weak center of Government institutions and had an adverse effect on the creation of a comprehensive civil service system. Centralisation tendencies of the recruitment process are exemplified in centralised announcement of all civil service vacancies by the newly established Human Resource Management Service and its involvement in carrying out and monitoring the recruitment process. However, it is important to emphasise that individual ministries/agencies still have an important role to play in the recruitment and selection process, and the final decision on employment still rests with the Minister or head of institution. It should also be noted that civil servants, including senior civil servants, are actually employed by sectoral ministries and not by the Government as a whole. Nevertheless, a high degree of centralisation of the recruitment process has taken away the freedom that ministries and other public bodies had before and brought about resentment towards institutions which are in charge of management of the civil service, as will be discussed later in this section.

The principle of professional civil service is underlined by the introduction of mandatory competition for all civil service posts, based on open or internal competition. Internal competition procedures must precede open competition, in order to facilitate horizontal mobility and creation of a career civil service system. The only exceptions are competition procedures for senior personnel, in which case open competition will precede internal competition only for the first round of competitions. This is a positive development, replacing the earlier practice where the Minister was able to decide whether to call an open com-

petition or not. In this way the principles of equal access to public administration posts and of political impartiality in the civil service are strongly emphasized.

Impartiality in the recruitment procedure is expected to be ensured through creation of special commissions to select and propose the candidates to be recruited, as requested by new legal framework. For most civil service posts (excluding the senior civil service posts) a recruitment commission comprises of a representative of the Human Resource Management Service, whose role is to ensure a consistency in the recruitment process, and another two members who are representatives of the institution which is filling the vacancy. As regards the senior appointments, centralisation of recruitment process is more apparent, as the head of the recruitment commission is always a member of the High Civil Service Council. The second member of the Commission is an external member, mainly from academia, while the third member is from a ministry/agency which is filling up the vacancy.

Furthermore, impartiality and objective selection of candidates is emphasised through detailed regulation of recruitment and selection procedure. The selection procedure includes evaluation of competences, knowledge and skills required for a certain post, with prior determined criteria for selection for a certain post. There are several recruitment/selection tools – a written test, interview or other means. The recruitment commission makes a list of candidates with best results and submits it to the manager of the organization who will make a final decision on the selection.

Although recruitment provisions are based on valid European principles, the general feeling in the civil service is that recruitment procedures have become overly time- consuming and formalistic. In contrast to previous, fairly quick recruitment practices, new recruitment procedures are now taking quite a long time (around 5-6 months), which is a source of frustration both for ministries and applicants. At times, recruitment provisions are interpreted in a fairly rigid way, which adds to existing dissatisfaction. By way of example, the Human Resource Management Service has been requesting all candidates to provide written confirmations from previous employers, which may be difficult or impossible to obtain, especially for civil servants who worked in the former federal Yugoslav administration that no longer exists. When the traditional autonomy of ministries (which used to be fully in charge of recruitment process) is further taken into account, there is a natural tendency to resist implementation of recruitment requirements and develop negative attitude towards institutions which are responsible for their implementation, such as the

Human Resource Management Service. At the same time, individual institutions are trying to find ways to circumvent the existing legal requirements. The most often found way to go around the civil service law provisions is to hire temporary personnel that have the same rights and responsibilities as permanent personnel, but just limited duration of their employment contract.[18]

The question which may be posed is whether the problem in implementation of recruitment provisions should be sought in the Government's lack of capacity or 'obedience' to implement them, or are there some other causes for encountered implementation challenges? Putting aside natural Government resentment to reducing the scope of its authorities, it may be argued that the way European principles of impartial and competitive recruitment are implemented in practice does not respond to the needs of the Serbian civil service. This is mainly due to fairly dynamic labour market conditions in Serbia, which are exemplified in a quite high turnover of civil servants, as a significant number of civil servants is still continuously leaving the civil service. High turnover of staff and competition with the private sector necessitates that the recruitment and selection process be carried out in an efficient and timely manner, in order to allow civil service institutions to replace civil servants who have left administration and quickly attract available qualified staff. Therefore it would be important to ensure that civil service recruitment and other HR procedures are able adequately to respond to the needs of the civil service bodies and perspective applicants otherwise their purpose will not be fulfilled and legally prescribed procedures will not be (fully) implemented in practice.

Reform of the civil service pay system and introduction of performance appraisal

Reform of the pay system was central to the civil service reform package. An inadequate civil service pay system was seen to be one of the major impediments to building a professional and stable civil service, especially to recruit and retain young and professional staff. In order to address this serious problem, a new Law on Salaries of Civil Servants and Employees was

[18] By way of example, Serbian Minister of Economy and Regional Development, Mladjan Dinkic, recently admitted that his Ministry has the same number of permanent and temporary employees, around 150 in each category (!). And he further argued that both categories of employees should have the same status during the planned reduction of the number of civil servants. This practice was later criticised in the first Regular Annual Report of the newly established State Audit Institution.

adopted in July 2006 and started being implemented in January 2007. It is a modern law, with the emphasis on performance in decisions on career and wage advancement, which constitutes a clear break with the traditional seniority based rewards model under the previous system. In order to be able to implement the Law, the Government has increased the civil service wage bill (which constitutes around 0.7 of the general government wage bill) by 41.2 percent, raising the general level of salaries for most civil servants and especially young university graduates. Furthermore, a common pay framework has for the first time been established throughout the civil service,[19] with the exception of the Ministry of Interior.

The new legislative framework has significantly increased the decompression ratio (the difference between the lowest and highest salary) from 1:4.9 to 1:9, which made a positive impact on the ability of the civil service to attract top civil service personnel. However, the practice has also shown that significant decompression of the civil service pay systems can be a "double edge sword", as senior civil servants, who are often politically affiliated, are the main beneficiaries of the salary decompression, while mid and lower level civil servants may feel that the level of their salaries is inappropriate in comparison with top level civil servants.

The new pay system relies on a new, position-based job classification system. It is important to note that a Serbian traditional career-based system has been reformed through introduction of principles of position-based systems, such as equal pay for equal work and performance appraisal.[20] In contrast to

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[19] This was done through inclusion of the Tax, Customs and Treasury Administration under the new pay system. These institutions had separate pay systems and paid higher salaries for equivalent jobs than the rest of the civil service. The new pay law integrated all these institutions under one common pay framework, which has provoked dissatisfaction in these institutions, as the level of their salaries for a number of positions was frozen. As there is no valid argument for these institutions to be under special pay regime, their integration in the common pay framework was considered to be a positive development. However, in 2009, the Tax Administration has, through separate legislation, provided the basis for creating a separate pay system again and it is expected that the Customs administration will follow their example in the near future.

[20] Extensive training sessions, assisted by the donor community, were held in mid 2006 to help Ministries and Special Organisations implement the new classification system, regulated primarily by the Government Decree on Job Descriptions and Classification of Posts. The process was successfully completed in June 2006 in order to allow for the new Civil Service Law to come into force on July 1, 2006 and new Law on Civil Servants Salaries on January 1, 2007.

a career-based systems, where promotion and pay is based on a system of grades attached to the individual rather than to a specific position, in position based systems promotion and pay are linked to positions and jobs rather than length of service with a focus on selecting the best-suited candidate for each position, whether by external recruitment or internal promotion or mobility.

A performance appraisal system has begun to be introduced gradually in order to motivate staff to show their best potential. The Government adopted a Decree on performance appraisal which contains modern principles of an individual's performance assessment and detailed guidance on the conduct of this process. The first performance appraisals were conducted and completed in early 2008 and the second were finalised in early 2009, with mixed results. Key, and fairly common challenge, with conducting performance appraisal is that in some institutions a high proportion of staff is awarded the highest performance marks, which significantly reduces effectiveness of performance appraisal as a human resource management instrument for staff motivation.

Another key issue was how to link pay with performance. Namely, experiences of other countries in the application of performance assessment systems have demonstrated that achieving the appropriate implementation of the procedure and an objective assessment of performance takes at least four to five years. It is therefore a usual practice that in the first couple of years of the implementation of a new performance assessment system a transitional regime of promotion to higher pay step within the pay level for the work post is applied. The Law on Salaries of Civil Servants and Employees also stipulates a transitional and simplified performance assessment regime based on the scope and the quality of work which will be applied from 2007 to 2011. Only from 2011 a new performance assessment framework is expected to be fully established and linked to pay. Due to effects of economic crises, no performance related pay increments were paid to civil servants in 2008 and 2009, which has, to some extent, made things easier in relation to introduction of performance related pay.

Although introduction of pay for performance may be a very attractive idea, experience from OECD countries shows that the transition to performance pay systems is not at all easy, as it implies much deeper changes in organizational and cultural values. A number of studies have indicated that pay for performance requires high levels of organizational trust, based on common or shared values and objectives between executives and employees and consensus about measures of both individual and organizational success, where the ability to link individual performance to organizational goals is strong.[21] In such an environment the focus is on continuous dialogue between executives and civil servants, infor-

mation sharing, negotiation, mutual respect and transparency.[22] It is also suggested that performance related pay requires a mature and well-established civil service culture and a stable political and policy environment.[23] This, of course, questions the effects that pay for performance schemes may have in Serbia and other countries in the region.

Despite significant improvement in reforming the civil service pay system and enhanced ability of the Serbian civil service to attract and retain personnel, effects of the economic crises have to some extent undermined the achieved reform results, as the level of salaries for higher paid positions was reduced by 10-15%. Furthermore, there are still systematic weaknesses that need to be addressed in order to make civil service pay system more effective. The main one relates to fixed seniority allowances in the calculation of total pay, which amounts to 0.4 per cent of salary for each year of service, subject to a maximum of 20 years, which puts civil servants with higher number of years in service in more advantageous position to younger personnel. Further action will also be required to remove remaining anomalies and track internal and external market pay rates to maintain competitiveness of civil service posts.

Conclusion

Over the past couple of years, Serbia has made an important progress in reforming the civil service and human resource management system. A comprehensive legislative framework has been adopted and its implementation is progressing, and a new institutional structure to support to implementation has been put in place. New regulations created the legal basis which should provide professional, efficient, effective and high quality work of state administration.

However, significant efforts still need to be invested in order to implement and sustain this ambitious reform programme. In order to effectively implement the reform, it is necessary to introduce management instruments which will fill in the gaps between formal rules and informal practice and build administrative capacities in Ministries and other civil service bodies, with special focus on newly

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[21] Ingraham P.W. (1993), "Of Pigs and Pokes and Policy Diffusion: Another Look at Pay-for-Performance", Public Administration Review, July/August 1993, Vol. 53, No 4, pp. 348-356; OECD, (2005), *Performance Related Pay Policies for Government Employees*, OECD, 2005.

[22] OECD, ibid.

[23] Ibid.

created human resource management units, which should be the leaders in HRM reform process.[24]

Similar to other South and East European countries, the Serbian experience has pointed out the unrealistic expectations of achieving major outcomes of depoliticisation simply through passing civil service legislation and setting up central HMR bodies. It looks that securing of outcomes from reform activities in this area requires much more than that: an establishment of specific alliance-building with political parties and interest groups to provide sufficient incentives for joint tackling of patronage and politicization.[25] In this sense, certain constraint of overly fragmented party systems and lessening of levels of polarization between political parties would be a desirable development, as it would provide a basis for building the trust between the rival parties, which should enable smoother political power succession and greater administrative stability.

The solution for now seems to be acceptance of reality and allowing of a certain level of moderate politicization, rather than to insist of the introduction of classical British model of full separation between the two key governance actors. It has been argued in the literature that the 'front door' politicization is better than 'back door' or covert politicization. The advantage of the more overt approach to political involvement is that it makes the role of political appointment of public servants clearer to the participants in the political process and to the public.[26] Furthermore, whereas there are numerous arguments to favour a more impartial and permanent civil service, it is not always the case that this form of governance does produce the most efficient direction of policy and programs. Allowing appointment of a limited number of politically affiliated personnel does not necessarily mean that the appointees will be incompetent, as the German and French civil services have been proving for some years. Indeed, the German system seems to provide a good balance between securing the interests of politicians and career civil servants, as there are opportunities for mandarins who are unsympathetic towards the new regime to take study leave or be moved to a variety of less politically sensitive roles.

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[24] HRMS of the Republic of Serbia (2006), *Capacity Analysis of HRM Units in State Administration Organs,* (report prepared by Zorica Vukasinovic and Slavica Kapetanovic), www.suk.gov.rs

[25] The World Bank (2003), *International Public Administration Reform: Implications for the Russian federation*, (the World Bank, Washinton DC).

[26] Peters, Vass, Verheijen (2005), *Coalitions of the Unwilling? Politicians and Civil Servants in Coalition Governments*, NISPAcee, Bratislava.

Bearing in mind the tradition of strong ministerial autonomy and weak center of Government in Serbia (and most South East European countries and other CEECs) it is to be expected that the Government Human Resource Management Service will be faced with a number of difficulties. We are of the opinion that keeping the centralized human resource structures, at least for a certain amount of time, is a good idea, as such structures do have a potential to enhance professionalism in the civil service in the course of its establishment as an institution. However, it is also important that the Human Resource Management Service demonstrates certain level of flexibility in its work, especially related to human resource management procedures, which include efficient recruitment and selection of personnel. Furthermore, it would be important for the Human Resource Management Service to focus much more on career development opportunities of civil servants and develop areas such as labour market research, career tracking and related issues. It seems that due to absence of these development functions, Human Resource Management Services in many Central and East European countries were perceived as overly administrative and conservative and found little support when politicians moved to abolish them.[27]

Although stability of employment is often cited as the one of the main advantages of working in the civil service and public sector in general, it looks that such incentive is no longer functioning well in competitive labour markets and that other elements, such as possibilities for career development and higher pay are becoming much more important. It is therefore important to insist on keeping the competitiveness of civil service as an employer and maintaining the civil service salaries at a competitive level with the private sector. In order to be successful, pay reform has to be properly linked to civil servants' career advancement and the overall process of human resource management, which has a substantial impact on the quality of staff to be attracted and retained. To the extent that the career advancement process is perceived as too slow, too inflexible, or based on factors other than merit, the most-talented and ambitious civil servants or candidates will most likely find alternative employment. One of the options in this respect is to consider 'fast track' programs, such as those applied in UK, which would enable qualified and highly motivated staff to assume additional responsibilities quickly and gain the recognition that goes with it.

Lastly, successful civil service reform requires an effective leadership and creation of trust and ongoing dialogue between civil servants and politicians,

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[27] The World Bank (2006), *EU 8 Administrative Capacity in the New Member States: the Limits of Innovation?*, (The World Bank).

information sharing, negotiation and mutual respect. The only way to allow civil servants to develop their full creative potential is to provide them with well-designed tasks and involve them in the decision making and policy process. This requires effective and participatory leadership both at senior and mid-management levels, which, unfortunately, is not so easily found in the Serbian traditional and transitional environment. Therefore, it seems that one of the greatest challenges for the Serbian civil service is to create an environment of trust, participation, shared values and objectives in which performance and talent will be fully recognized and appreciated.

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REFORMA JAVNE UPRAVE U SRBIJI –PREVAZILAŽENJE IZAZOVA IMPLEMENTACIJE

Slično kao i druge zemlje u regionu i Srbija je u nekoliko poslednjih godina započela proces sveobuhvatne reforme javne uprave. Razlog za to je bila potreba da se kapaciteti javne uprave ojačaju, da se smanji uticaj politike i poboljša efikasnost javne uprave. Sledeći vladinu strategiju razvoja javne uprave iz 2004. doneta su dva veoma važna zakona – Zakon o javnoj upravi i Zakon platama javnih službenika. Ti zakoni su usvojeni 2005 i 2006, a sa njihovom primenom se počelo se sredinom 2006. i početkom 2007. godine. U ovom članku se govori o tim zakonima, kao i o izazovima u njihovoj primeni

Ključne reči: reforma javne uprave; profesionalizacija, depolitizacija, evropski standardi

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LAW ON LOCAL SELF-GOVERNMENT IN SERBIA

The Law on Local Self-Government was adopted in December 2007 and is one of the four basic laws which regulate the legal framework of local self-government. Considering that the innovations introduced by the 2006 Constitution are not so numerous, the process of harmonising the Law on Local Self-Government with the constitutional changes was not difficult. The legislator used this opportunity to additionally modify some provisions, and practice will show whether all the new solutions have been successfully implemented. The most significant innovation introduced by this Law and based on the new Constitution is that the local self-government units have their own property and that it is managed independently by their respective bodies, which, as mentioned above, still awaits implementation.

Key words: Constitution, self-government; Serbia

I. Historical background of the local self-government

Local self-government in Serbia does not belong to recent historical heritage because certain forms appeared as early as during the Turkish rule over Serbia. Naturally, such local self-government is not a result of government decentralisation and is considerably different from the present meaning of that institution. In that period, the only authority in villages was knez (headman) and all major issues were settled at village assemblies. For an area of several villages (called kne?ina), kne?inski knez with executive and judicial power was elected by the people and with approval by the Turks. In exercising his authority, he was assisted by bulyubashas (captains) and major issues were discussed at the meeting of all knezes.

By obtaining certain autonomy from Turkey and by passing the first (1835) and second (1838) constitution, Serbia started creating a classical government structure and separating central from local government. The Law

on Organisation of Municipalities was passed in 1839 and presents the first piece of legislation regulating local self-government in Serbia. Under this law, there are rural and urban municipalities and they are supervised by the head of the district or sub-district ("srez"). By passing the Law on Municipalities (1889), a distinction was made between district, sub-district and municipal local self-government and the municipality had its own property, collected taxes and had its own bodies as well (court and council). Such an advanced status of municipality did not last long and a centralised model was introduced, whereby the municipality was placed under a direct supervision of sub-district and district authorities. With certain legislative changes, such a situation was characteristic of the Kingdom of Serbia, later of Serbia, Croatia and Slovenia, and Yugoslavia.

The period of socialism, which lasted until the complete break-up of the Socialist Federal Republic of Yugoslavia, is characterised by the establishment of federal system, which does not mean a true decentralisation of the country. The municipality as a territorial and political unit and later also as the basic socio-political community in which self-management is exercised had considerable competences on paper, but its status did not imply an actual development of local self-government. The real power at the central level as well as at the local level was exercised by the Communist Party, directly or through its bodies. By the 1974 Constitution, which presents the beginning of break-up of Yugoslavia, the republics and autonomous provinces were becoming increasingly independent from the central government, which was indirectly reflected on the similar status of municipalities as well. Such a situation reached its climax in the early 1990s when the Socialist Federal Republic of Yugoslavia disintegrated and Serbia remained within the Federal Republic of Yugoslavia and, finally, the State Union of Serbia and Montenegro.

The 1992 Constitution of the Federal Republic of Yugoslavia merely established the right to local self-government, while leaving to the republics the right to regulate this matter independently. Serbia established a largely centralist model of government, so the municipalities and towns remained deprived of many competencies that were characteristic of the neighbouring countries. By this Constitution, the property of local self-government was proclaimed to be state-owned, and the manner of its management was specified by a republic law, which enabled the adoption of the Law on Property of the Republic of Serbia in 1995. By this law property was taken away from local self-government units and transferred to the Republic, which caused a reduc-

tion in significant revenues and their impoverishment as well as a partial collapse of the system of local self-government.

With the change of regime in 2000 the attitude to the system of local self-government also changed, so in 2002 the Law on Local Self-Government was passed, significantly improving the status of municipalities and towns. First of all, the Law introduced the system of division of power instead of the system of unity of power applied until then, so the normative authority exercised by the municipal assembly was separated from the executive authority exercised by the mayor, assisted by municipal or town council. As one of the main innovations, this Law introduced the direct election of mayors.

The Law unfortunately keeps the single-type system of local self-government because it still does not make any significant distinction between municipalities and towns as local self-government units. This law made progress in the field of local government finance, regulating the types of local revenues and increasing the number of own revenues. Unfortunately, the influence of political parties is of crucial importance for the activities of local self-government units, which largely prevents a true and democratic development of local self-government and its institutions.

However, for the financial strengthening of local self-government units, it was necessary to wait until 2006 when the Law on Local Self-Government Financing was passed, whereas the problem of appropriated property was not legally regulated until the 2006 Constitution was adopted. Now it is up to the legislator to regulate legally the restitution of ownership authority to local self-government units, thus creating the conditions for its full functioning. As for the depoliticisation of local self-government units, for the time being this should not be expected to happen in the near future.

II. Constitutional principles of local self-government

The basic principles of local self-government in Serbia were established in the part seven of the Constitution of the Republic of Serbia, which was adopted by the National Assembly of the Republic of Serbia at a special session on 30 September 2006 and endorsed by referendum on 28 and 29 October 2006. Local self-government is well regulated by the Constitution of the Republic of Serbia compared to previous Serbian constitution from 1990, but still many institutions should be specified by laws and other legal acts. This leaves room for the legislator to better define the proper work of the municipalities, but also room for manipulation as was main characteristic of the last century's nineties.

In Serbia state power is restricted by the right of citizens to provincial autonomy and local self-government. The Constitution in the article 176 stipulates: "Citizens shall have the right to the provincial autonomy and local self-government, which they shall exercise directly or through their freely elected representatives". The local self-government is the right of citizens to govern themselves and their community, both directly and through their representatives.

There are different types of territorial units in the Serbia: the autonomous provinces as territorial unit of provincial autonomy, municipalities and towns as territorial units of self-government. The status of the City of Belgrade is somewhat specific because it is regulated by a separate Law on the Capital City.

The ownership's mandate is serious problem in Serbian parliamentary life, because Constitution in article 102 states "Under the terms stipulated by the Law, a deputy shall be free to irrevocably put his/her term of office at the disposal [of] a political party upon which proposal he or she has been elected a deputy". It seems that political parties' intent is to tie the deputy to the party position on all matters at all times. This is a serious violation of the freedom of a deputy to express his/her view on the merits of a proposal or action. It concentrates excessive power in the hands of the party leaderships[1].

Municipalities, towns and city of Belgrade are defined as territorial units in which citizens exercise self-government in affairs prescribed by the Constitution, laws and the statutes of the self-government units. Units of local self-government have their own competences but they can receive delegated competences from Republic or autonomous provinces. Local self-government units are competent in those matters which may be realised, in an effective way, within a local self-government unit. Also Republic and autonomous provinces can delegate particular matters within its competence to local self-government units and provide necessary resources to execute the delegated competences. According to the Constitution a municipality has the following competences:

- to regulate and provide for the performing and development of municipal activities;

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[1] See, , European Commission for Democracy through Law (Venice Commission), Opinion on the Constitution of Serbia adopted by the Commission at its 70th plenary session (Venice, 17-18 March 2007), p. 12.

- to regulate and provide for the use of urban construction sites and business premises;
- to be responsible for construction, reconstruction, maintenance and use of local network of roads and streets and other public facilities of municipal interest; regulate and provide for the local transport;
- to be responsible for meeting the needs of citizens in the field of education, culture, health care and social welfare, child welfare, sport and physical culture;
- to be responsible for development and improvement of tourism, craftsmanship, catering and commerce;
- to be responsible for environmental protection, protection against natural and other disasters; protection of cultural heritage of the municipal interest;
- protection, improvement and use of agricultural land;
- to perform other duties as stipulated by Law on local self-government

Supreme legal act of the municipality, town and capital city is statute. It is positive that the assemblies of LSG units have great freedom in drafting their statutes and are limited only by the fact that the statute must be in accordance with the Constitution and laws.

The Constitution only lists the sources of revenue but does not include any explicit guarantees for the financial autonomy of the local self-government units.

The Constitution proclaims the autonomy of municipalities in managing local affairs and restricts the supervision of the government to control over legality of the municipal general act and certain case dismissal of the Municipal Assembly. Also, the protection of the local self-government is guaranteed by the Constitutional Court of Serbia.

One of the best novelties of the new Constitution is guarantee for the local self-government units to the property and the free management of their own property. This provision of the Constitution is of outstanding significance for further development of local self-government However; the aforementioned provisions do not represent the state's obligation to return to the local authorities the property that were deprived by Law on Assets of the Republic of Serbia (1995). The law that will regulate local self-government title as well as what is meant by the property of local self-government units is yet to be adopted. The devolution of property is closely linked to the issue of restitution of property nationalised upon the establishment of communist Yugoslavia. The preparation of a comprehensive package of laws on property

and ownership rights should be one of the top priorities of the Serbia in order to enable the all units of local self-government to freely dispose of their property, within the limits of the law, in order to promote local development, especially in the context of pre-accession programmes of the EU.

It is stipulated that the election of executive bodies in municipalities be performed in municipal assemblies. This represents a positive solution, taking into account the non-functioning of some municipalities in the previous period because of poor cooperation of the municipal assembly as the legislative body and the mayor as the executive body of the municipality. However, the regulation of the election of municipal executive bodies by the Constitution is uncommon but it is left to the law.

The chance to create by the Constitution a multi-level character of local self-government and establish regions as forms of territorial decentralisation, of a government organisation level between the Republic and local self-government units, was missed. Introduction the regions will improve the capacity of public authorities to manage delegated competences more efficiently, as well as original competences.

The legislator should also change the single-type character of local self-government and make a true distinction between the municipality and town, which would be regulated in more detail by subsequent legal solutions. This is necessary step for recognition the difference between the municipality and the town.

III. General overview and main principles introduced or confirmed by the new Law on Local Self-Government

The Law on Local Self-Government was adopted in late December 2007 (Official Gazette of RS no. 129 dated 29 December 2007) and presents one of the four basic laws[2] which regulate the legal framework of LSG. The Constitutional Law for Implementation of the Constitution of Serbia prescribed that the elections for councillors in LSG unit assemblies had to be scheduled not later than 31 December 2007, which caused a prior adoption of a set of laws regulating LSG.

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[2] The other three laws are the Law on Local Elections, the Law on Territorial Organisation of the Republic of Serbia and the Law on the Capital City, published in the same issue of the Official Gazette of Serbia as the Law on Local Self-Government.

Considering that the innovations introduced by the 2008 Constitution are not so numerous, the process of harmonising the Law on Local Self-Government with the highest legal act in the country was not difficult. The legislator used the opportunity to introduce some new elements in the Law, in an effort to improve the inadequate legal provisions of the previous Law. Practice will show after a while whether it has succeeded in that.

The Law has the standard structure that the laws of similar content have and consists of 103 articles divided into nine sections. In addition to the basic provisions, the Law covers and regulates LSG units, direct participation of citizens in exercising LSG, community self-government, relations between the bodies of the Republic, territorial autonomy and bodies of LSG units, cooperation and association of LSG units, symbols and names of parts of settlements places in a LSG unit, protection of LSG and transitional and final provisions.

The most significant innovation introduced by this Law is the fact that the LSG units have their own property and that it is managed independently by their respective bodies. Now it is up to the legislator to "return the property" of the LSG units, by a law or other act, which the government appropriated by the Law on Assets of the Republic of Serbia in 1995.

The optional introduction of town municipalities in the territorial structure of towns and its completely free definition and organisation by the town statute presents an innovation in the legal framework of LSG. It is obviously a positive and democratic to leave each town the right to decide whether it will found town municipalities or not and in what manner it will regulate them. However, a framework organisation, the manner of establishment, change and abolition of town municipalities, which each town would elaborate and adapt to its needs by its statute, should have been established by the Law. Since this is not the case, primarily the newly created towns face big problems regarding the introduction of town municipalities, so the system of local communities is just transformed into a system of town municipalities, which is often not functional and necessary for the citizens. A special problem may appear if the towns opt for different town municipality solutions, which may create diversity throughout the territory of the Republic and possibly make more difficult some subsequent legal solutions in this field.

Observing the constitutional provision on the indirect election of municipal mayors[3], the Law also applied it to election of town mayors, which it was

[3] "The Municipal Assembly shall decide on the election of municipal executive bodies, in accordance with the Law and the Statute" (Constitution, Art. 191 paragraph 4).

not obliged to do[4]. The legislator's intention that the power division principle should be abandoned and that all the power that, until the adoption of this law, was shared between the assembly and the head of the municipality or town should go now to the municipal or town assembly was clear. This is, in a way, understandable and justified, taking into account certain problems in their cooperation, which affected the functioning of the municipality. However, the creation and simultaneous election of two executive bodies, in the form of the mayor and municipal or town council, is not completely justified. All the more so if taking into account a great impact of the mayor on the election and dissolution, as well as, after all, the entire operation of the municipal or town council.

A question arises as to why the legislator classified the municipal or town administration among municipal or town bodies. This is an administrative body (holder of administrative function), without the right to make decisions, whose main role is to execute the acts of the municipal or town assembly and executive bodies. It is even stranger why the administration head is responsible for his/her work to the municipal or town assembly and to the municipal or town council when only the municipal or town council elects and dismisses him/her. However, a positive thing is that the administration head is fortunately appointed based on a public advertisement, for a five-year period.

The Law introduces a new advisory institution of assistant mayor. Not all LSG units have the same need for this institution, in terms of the fields they would act in, as well as in terms of their number[5]. That is why it is good that complete freedom is given in the Law to the municipality or the town to prescribe by its statute for which fields the assistant mayors will be appointed. However, it is completely unclear why the legislator prescribed that assistant mayors are a part of the municipal or town administration and not of the cabinet or some similar body of the mayor when he/she elects and dismisses them. Does that mean that assistant mayors are responsible for their work to the head of municipal or town administration and what the consequences of that responsibility may be. The legislator would have to correct this provision when first amending this law.

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[4] "Election of executive bodies of the town and the City of Belgrade shall be regulated by the Law" (Constitution, Art. 191 paragraph 5).

[5] Only in Article 58 does the Law specify that maximum three assistant mayors may be appointed in municipalities and maximum 5 assistant mayors in towns.

Today, the 1991 Law on Labour Relations in Government Bodies, which applied to all employees in government bodies in the Republic of Serbia until the adoption of the Law on Civil Servants in 2006, analogously applies to local employees. "Currently, local government has a pronounced hierarchical structure, the emphasis is on regulation and procedures, discretionary powers of superiors over subordinates are considerable, and there is a pronounced influence of politics upon personnel issues. All this is largely possible because of the persisting complicated legal framework from the previous period regulating the status of local employees. This framework does not allow for consistent, clear and uniform solutions and proper foundation for the development of human resources at the local level"[6]. For that reason, the creation of a legal framework that would regulate the status of LSG unit employees is a priority. A question arises as to what government body is in charge of reforming the status of local employees.

When it comes to the direct participation of citizens in exercising LSG, the most significant innovation of this Law is the provision which stipulates that a decision made at a referendum is binding and, as such, may not be rescinded by the assembly nor may the assembly change its essence by any amendments. Also, the required number of voters' signatures for a citizens' initiative has been decreased from 10% to 5% of the voters. Also introduced is the obligation of bodies and services of LSG units to inform the citizens about their operation via the media and in other appropriate manner.

Unfortunately, the legislator did not change the mono-type character of LSG, so there is no formal distinction between the competences and structure of municipality and town. The issue about distinguishing the scope of competences of the two LSG units and expanding those of towns has been in the focus of discussions for some time. On the one hand, arguments have been presented that it would be better to make a clear legal distinction between municipality and town in their original competences and not to rely on sector laws that would delegate different activities from the competence of the Republic to municipality or town. This would empower towns to handle the higher responsibilities that they have anyway, particularly in the management and financing of services. On the other hand, such an approach might prove dangerous for smaller municipalities, which would be placed on an unequal standing with bigger municipalities and towns. The second opinion is in

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[6] Aleksandra Rabrenović, Zorica Urošević, Analysis of the legal status of local government employees, Beograd, 2007, p.3.

favour of encouraging the inter-municipal cooperation instead of "fuelling" towns as economic, cultural, educational, and political centres. It is also argued that this distinction is not really a priority for Serbia now and is not called for by the current administrative structure and level of development of LSGs. Supporters of that view insist that this is not an urgent issue, and more time should be given to assess the functioning of the current law before big amendments to it are proposed. Although the authors would favour more strongly the first opinion, we believe that, at this point, it is most important to attract the attention to the relevance and practical importance of this issue rather than to opt for a solution.

IV. Brief description of introduced changes[7]

Since the new Constitution provided for certain changes in the system of local self-government compared to the period of application of the previous 1990 Constitution and the 2002 Law on Local Self-Government, it is understandable that the new Law on Local Self-Government, which was passed in 2007, was primarily aimed at overcoming these differences. The legislator made an effort to improve legal solutions and hence the large number of legal-technical improvements that were included in the new Law. In the following text the most important changes in the new Law compared to the previous will be briefly indicated, without getting into a deeper analysis.

The field by which the manner of financing and the terms and procedure of borrowing by local self-government are prescribed is not covered by the 2007 Law on Local Self-Government but a separate Law on Local Self-Government Financing (Official Gazette of RS, no. 62/2006) was passed, which started to apply as of 1 January 2007. According to the previous 2002 Law on Local Self-Government, it was regulated that local self-government units were to be financed from own and allocated revenues, defined by law, as well as from shared revenues. Harmonising itself with the Constitution, the new Law stipulated that local self-government unit had its own property and managed it independently through the bodies of the local self-government unit, in accordance with the law. Certainly, enabling local self-government units to possess property and to manage it independently presents a great incentive in the process of strengthening local self-government. Although the local self-government would reduce direct dependence on funding from the republic (or province, when it

[7] For detailed analysis of this Law, see Miloš Petrović, Petar Vujadinović, Analysis of the new Law on local self-government (MSP project), Kraljevo 2008.

comes to shared revenues) by this constitutional and legal solution, that is still insufficient, because it is necessary to pass a certain number of laws and by-laws that would put this constitutional and legal solution into practice. Therefore, until the legislator passes, first of all, the law on property of local self-government, this solution remains with no direct application in practice.

When it comes to the establishment, abolition and territorial change of a local self-government unit, the new Law stipulated the prior holding of a consultative referendum in the territory of the local self-government unit concerned. Such a solution in the new Law presents significant progress in strengthening democracy as well as reinforcing direct participation of citizens in local public life. However, this does not mean that the previous law disregarded the opinions and desires of local population but that its regulated them in a different manner. The establishment and abolition of local self-government unit, the definition of its territory and seat, any changes of its boundaries and seat were prescribed by previous law, with before obtained opinions of citizens, assemblies of local self-government units concerned with these changes, as well as the body of Territorial Autonomy competent for the local self-government units in its territory.

The legal status of local self-government units is now explained in much more detail compared to the previous law. The municipality is no longer just the basic territorial unit where local self-government is exercised but its definition is supplemented by the requirement that it must have at least 10,000 inhabitants (exceptionally, when there are particular economic, geographic or historical reasons, a new municipality may be established with fewer than 10,000 inhabitants).

Regarding the competences of the municipality, the new law not only introduces four new areas of its activities but also supplements and improves some of the existing ones. The first innovation relates to the determination of the rate of municipality's own revenues as well as to the manner and standards for determining the level of local fees and charges. The second new competence of the municipality refers to the adoption of programmes and implementation of projects of local economic development and improvement of the general business framework in the local self-government unit. The municipal competence for establishing the institution in the field of social care and monitoring and providing its functioning existed in the previous law as well, but now it is explained in more detail. Another innovation is the municipality's assistance to persons with special needs as well as persons that are essentially in an unequal position to the other citizens. Partial changes in the municipality's competencies include the management of municipal property (according to the previous law, it was state-owned property), provision of funds for financing and co-financing pro-

grammes and projects in the field of culture that are of interest to the municipality and in the field of public information.

The previous law defined the town as a territorial local self-government unit that was determined by the law and in whose territory two or more town municipalities were established, while the present law defines the town as a local self-government unit which presents an economic, administrative, geographical and cultural centre of a wider area and has over 100,000 inhabitants (exceptionally, when there are special economic, geographic or historical reasons, it can be determined that the town is a territorial unit with fewer than 100,000 inhabitants). As for town municipalities, the previous law was much more precise in defining them than the current law. Today the law completely leaves to the town statute the freedom of deciding on the formation of the town municipality as well as the regulation of the bodies and the manner of electing the bodies of town municipalities. An innovation in the law is also the fact that the town establishes the communal police.

In addition to the municipal assembly, mayor and municipal council, the new Law for the first time includes municipal administration in the municipal bodies.

The municipal assembly is no longer just a representative body but, according to the new Law, presents the highest municipal body as well. For the municipal assembly to be constituted, it is necessary to fulfil two conditions - to elect the mayor and appoint the assembly secretary. The competencies of the municipal assembly and town assembly are also changed to a certain extent, so now, among other things, the assembly elects and dismisses the mayor. In addition to the statute, the highest municipal by-law, now the adoption of municipal budget and urban plans is also decided upon by the majority of votes of the total number of councillors. Naturally, there are other new legal solutions, mostly of procedural nature, but they are not presented in this analysis.

A mayor is a municipal or town body that has undergone the largest changes in the new Law. In contrast to the previous legal solution, which provided for a direct election of the mayor, now he/she is elected from among the councillors by the absolute majority of votes of councillors upon the proposal of the mayor. The issue of termination of the term of office of the mayor is now presented in much more detail and much more precisely. By electing him/her to the position of mayor, his/her term of office as a councillor is terminated, and an innovation is also that he/she must be employed full-time with the municipality or town. The mayor is also a member of the municipal council and its chairman. As regards the mayor's competencies, they are reduced significantly under the new law compared to the previous, so he/she is no longer in charge of a direct execu-

tion of decisions and other by-laws of the assembly, nor of delegated activities within the scope of rights and duties of the Republic or territorial autonomy, nor does he/she propose the appointment or dismissal of the head of municipal administration. From now on, the municipal or town council is in charge of exercising these competencies.

Under the new Law, the municipal or town council has got wider competencies concerning the proposing of the statute, budget and other decisions and by-laws of the assembly as well as making decisions on provisional financing in case the assembly fails to pass the budget before the start of the fiscal year. With the mayor's dismissal, the terms of office of the deputy mayor and of municipal council are also terminated.

The head of municipal administration and his/her deputy are no longer appointed by the municipal or town assembly upon the mayor's proposal; instead, it is done by the municipal or town council, based on public advertisement, for a five-year period. Hence it is logical that the head of the administration is responsible to the municipal or town assembly and to the municipal or town council and not, as previously, to the mayor. The possibility of appointing chief architect or manager, which presented an innovation in the previous Law, is no longer provided for by the present Law. Instead of them, assistants to the mayor may be appointed, maximum three of them for a municipality or five for a town. The Statute stipulates that the assistants may be appointed for economic development, urban planning, primary health care, environmental protection, agriculture and other fields.

The new Law on Local Self-Government also introduced certain changes in the part concerning the direct participation of citizens in exercising local self-government. Although all three forms of direct participation of citizens in exercising local self-government remained the same, there have been certain changes in some of them. For launching a citizens' initiative the number of citizens' signatures may not be lower than 5%, while under the previous Law it was 10% of the voters. The referendum is defined more precisely under the new Law, so, among other things, for a referendum to be scheduled it is necessary for the proposal to be submitted by minimum 10% of voters of the total electorate in the local self-government unit. Also, the decision made at the referendum is obligatory and may not be changed or invalidated for a one-year period. The obligation of the bodies and services of local self-government units to inform the public of their activities through the media is a complete novelty, which did not exist in the previous law.

In contrast to the previous Law which only gives a possibility, now local communities and other forms of community self-government are established

for the purpose of meeting the needs and interests of local population in villages. When forming or abolishing local communities and other forms of community self-government, under the new law, this is decided upon by the municipal or town assembly but with a previously obtained opinion of the citizens. The system of financing in the community self-government has been changed almost entirely, and an innovation is also the obligation of local communities to adopt a financial plan. The new law gives a possibility of organising the activities of municipal administration in local communities, which certainly presents a positive innovation.

Certainly, the relation between local self-government bodies and bodies of the Republic and territorial autonomy is always complex because the real independence of local self-government originates from it. The already existing relation between these bodies is defined more precisely by the new Law, emphasising that the legality of activities and by-laws of local self-government bodies are supervised by the bodies of the Republic and territorial autonomy, as well as that local self-government bodies are obliged to deliver required data, writings and documents to the bodies carrying out supervision while the mayor or the secretary of municipal assembly are responsible for the delivery. A significant innovation in the new Law is the obligation of the Government to suspend by its decision the implementation of the general by-law of a local self-government unit that it deems to be non-compliant with the Constitution or the Law. Such a decision ceases to apply unless the Government initiates the procedure for assessment of the constitutionality and legality of the disputed by-law within five days from the day of decision publication. In addition to the two already existing reasons for dissolving the assembly of a local self-government, the new Law has added the third reason: if the mayor and the municipal council are not elected within one month from the day of constitution of the assembly of local self-government unit or from the day of their dismissal or resignation. There has also been a change in the time limits for scheduling new elections after the dissolution of the assembly. A very significant innovation is the provision of the Law that specifies that the Government is to take into account the political and national composition of the dissolved assembly when appointing the mayor and members of the provisional body of the local self-government unit that performs activities until the assembly constitution and elections. Previously the provisional body reflected the identical picture of the Republic Government and not of the dissolved assembly of the local self-government unit.

In addition to the state symbols and the symbols of the local self-government unit, the innovation is that the symbols of the minorities whose language is in official use in the territory of the local self-government unit are also dis-

played. The display of the symbols of the autonomous province is regulated in accordance with the regulation of the autonomous province. An important innovation is that in the areas of local self-government units where a minority language is in official use, the opinion of the National Committee must be sought when changing the names of streets, squares, town quarters, hamlets and other parts of settlements.

The previous Law regulated the field of protection of local self-government more comprehensively and in more detail in procedural terms than the current Law, which does not go beyond the possibility of initiating the procedure for assessment of constitutionality or legality, and of lodging a complaint to the Constitutional Court. Compared to the previous Law on Local Self-Government, when the ombudsman was introduced for the first time as an optional body, the present Law, in addition to changing the name of this body (previously it was called citizen's counsel), slightly changes the formulation of its definition as well as provides for a possibility that two or more local self-government units may introduce a joint ombudsman. The Council for the Development and Protection of Local Self-Government, which was able to submit proposals to the assembly in connection with the improvement of local self-government and protection of constitutional and legal rights and duties of local self-government units, no longer exists under the new Law.

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ZAKON O LOKALNOJ SAMOUPRAVI U SRBIJI

Zakon o lokalnoj samoupravi je usvojen u decembru 2007. (Službeni glasnik RS br. 129/07) i jedan je od četiri osnovna zakona (ostala tri su Zakon o lokalnoj samoupravi, Zakon o izborima, Zakon o teritorijalnoj organizaciji RS i Zakon o glavnom gradu) koji uređuju pravni okvir lokalne samouprave. Obzirom da novine koje je uneo Ustav od 2008, nisu toliko brojne, proces usklađivanja Zakona o lokalnoj samoupravi sa najvišim pravnim aktom u zemlji nije bio težak. Zakonodavac je iskoristio priliku pa je u Zakon uneo neke nove elemente, u nastojanju da poboljša neadekvatna pravna rešenja

prethodnog Zakona a da li je u tome i uspeo, kroz izvesno vreme pokazaće praksa. Najznačajnija novina uvedena ovim Zakonom a na osnovu novog Ustava je pravo jedinica lokalne samouprave na svojinu kojom će nezavisno raspolagati pomoću odgovarajućih organa a što, kao što je ranije rečeno, još uvek nije sprovedeno.

U prvom delu članka, autor daje istorijiski prikaz lokalne samouprave u Srbiji, od njenih početaka pa do donošenja Ustava od 2006. godine, čime se uvodi u drugi koji govori o ustavnim načelima koji se odnose na lokalnu samoupravu. Treći deo je fokusiran na sažeti prikaz novog Zakona o lokalnoj samoupravi, pre svega na nove institute koji se njime uvode u pravni poredak Srbije. Četvrti i poslednji deo članka je ujedno nastavak dela koji obrađuje zakonska pitanja lokalne samouprave, samo u smislu komparativne analize u odnosu na predhodni zakon iz 2002. godine

Ključne reči: Ustav, lokalna samouprava; Srbija

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THE SERBIAN LABOR LAW BETWEEN THE ESTABLISHED LEGAL ORDER AND CHAOTIC SOCIAL REALITY

The author tries to determine most important transitional peculiarities of Serbian Labor Law. It isn't an exhaustive analysis of the entire legal text; the focus is only on basic concepts of Labor Law. Especially discussed are the definitions of employer and employee as main actors having to implement its provisions. Since the article has been written mainly for foreign readers, the extra-legal circumstances decisively influencing the form and content of rules contained in Labor Law are shortly described in its introductory part. An analysis of the fundamental rights and duties of parties to work contract is also carried out. The practical importance and transitional character of legal provisions relating to the surplus of employees are singled out in the text. Rules prohibiting discrimination at work or relating the work are analyzed in more details suggesting their modernization potential. In conclusion, the author shows that there is a need for more radical revision of the analyzed legal solutions that have to be made conformant with basic postulates of market economy and socially responsible State.

Keywords: Labor Law, employer, employee, discrimination.

The Extra-legal Introduction into Serbian Labor Law

Any study of Serbian Labor Law (if it is worth being called a legal analysis) has to take into account the distinction between the normative order and everyday life in the social and political community. This distinction is incorporated into the concept of legal rule itself: if a distance of legal order from the facts of empirical social life is non-existent, any rule becomes superfluous; if it is too great, legal provisions become ineffective and unworkable. But in Serbian case the gap separating the language of Labor Law from trends in the

labor market became wider in the last decade of 20th century's to the extent that it had been fathomless. Now, nine years after democratic changes and the inauguration of real transformation in economy and society, the gap referred to has remained as one of the most important and unsolvable problems facing the labor legislation in Serbia.

There are many and rather disparate reasons for such state of things. First of all, this is affected by the factors common to all Eastern European countries experiencing transition into open, market economy. At the legal level, transition means a massive deregulation of labor market, less restriction for employers and less protection for employed. It is not a geographically localized process; it rather includes even the most advanced Western countries, those in which the social partnership and welfare state have had a long tradition. But in the former Communist-led societies deregulation of labor market had gone far more and had more serious and harmful effects for the entire position of the employees than in the West. The break-up of Communist system is accompanied by demise of leftist ideology in general and far-reaching weakening of all working-class organizations. The trade unions had to wage an in advance lost struggle against a hostile public opinion; the workers themselves had assaulted headlong into a promised land of free market, not asking for price. And the price was by no means a little one: the newly-acquired freedom was bought by the increased insecurity of wages and jobs. There is more to win into the open labor market, but there is more to lose also. The joining of these countries to EU has simultaneously sharpened and mitigated the trends referred above. Competition into a pan-European market requires an increasingly higher productivity and rigorous reduction of all production costs. It led to the massive dismissal of employees' surplus, i.e. of those whose jobs had no economic justification. The Serbian Labor Law has acknowledged this category of employees by term of "technological surplus", although this phenomenon has nothing to do with technology, instead reflecting the changed economic conditions. In the period of steady economic growth these disadvantages were compensated by the rise of real wages and the decrease of unemployment rate after the initial transition shock. However, with current global financial crisis, the entire economic climate is worsened: the unfavorable aspects of deregulation come into a fore plane, and their stimulating effects vanish away. Serbia shares the mentioned features of her labor market with all other Eastern European countries.

Another set of factors affecting the Serbian Labor Law concerns the distinctiveness of Yugoslav Communist past; it stands in a direct relation to the

theory and practice of workers' self-management. Whatever we think on its economic effectiveness and/or ideological nature of its justification, there was a relatively high degree of the employees' participation in the decision-making processes, at least at the level of basic working units. The employees of course had never been collective owners of enterprise employing them; Communist state had always found a way to frustrate the free working of market forces, to suppress the independence of employees' bodies making formal decisions on company's business policy, and particularly to retain an absolute monopoly of the Communist Party at all levels of decision-making, either on purely political or business-related topics. Nevertheless, there was a widespread feeling – lacking in other Communist countries – that the workers indeed had their factories, that every employee had a share not only in profit but also in property of company employing him/her. This belief did not arise from a mere ideological trick, although the ideology had a prevalent part in its forming and maintaining. It had some support in daily workers' experiences, in their awareness that they could lose their jobs as a result of bad business moves taken by managers chosen by workers themselves. The economic system of socialist Yugoslavia, especially in last two decades of its existence, may therefore be termed as half-market economy. The natural path from thence to the normal market economy led through the workers' share-holding. This was a way of privatization preferred by Ante Marković, the last Prime Minister of SFRY. The history, for good or wrong, went on in other direction.

The self-management background equally affected all former Yugoslav republics; it stood behind one of the most successful (Slovenia) as well as the most troublesome transition processes in Eastern Europe (Serbia). The divergence of post-Communist development in spite of a common and largely unique past reminds that the interplay of causes and effects in transition into economic and social normality must be estimated and studied more carefully, with a more sensible insight into details of recent economic and social history of every newly-formed state in the region. The topic goes definitely beyond a scope of this article and it is mentioned here only to suggest a possible field of a promising research. This is true in an increased measure for Serbia, country in which the simple, logical, consistent, unambiguous and probable hypotheses explain nothing. Citizens of Serbia – employees not less than their employers, the supporters of an authoritarian regime not less than their opponents – turned resolutely a back to their Yugoslav legacy in everything save the repressive nature of political power. At the very beginning of

her real or feigned transition Serbia carried out a reform that can be termed as the second nationalization: so called social property – a form of public ownership in which the powers arising from property were divided between the state and employees – was transformed into a classical state ownership. Accordingly, a real-socialist curtain was inserted between Serbia's recent past and her then yet distant and enigmatic democratic future. The negative consequences of this reactionary act have been felt in Serbian Labor Law until now.

Finally, third set of factors influencing the labor market and shaping Serbian Labor Law have appeared and worked only in Serbia. At the very moment in which the state, and it means a central government in an over-centralized state, had become the only and exclusive possessor of everything, the state itself was beginning to disintegrate, to lose the most essential properties of statehood. It abandoned its fundamental task, the only serious reason for its existence - a care for general good as an irreplaceable foundation of modern state's concept. After 2000 democratic half-revolution it was said that other countries may have their own mafias, but in Serbia a mafia had its own state. A war environment and UN economic sanctions had only restricted and subordinated bearing on the labor market and Labor Law in comparison with this unprecedented implosion of the most important state functions. Serbia had become a realm of legal, as well as political, economic and social fictions. It was not only possible but usual to have a job without work or wage. Many state companies have had merely apparent, "paper" life, while the private firms in the real economy were doing their business activities with no legal control or regulations. There was at work not only an "economy of destruction"[1] but also a self-destructing legal order representing a complete negation of the idea of justice. Western exponents of a wholesale deregulation of labor market may in Serbia from nineties find the obvious evidence of the absurdity of their conceptions.

Somebody will say: that's history – a recent, it is true, but past and concluded series of occurrences with no real effect in contemporary legal order. But this briefly sketched chaos, untranslatable into language of any jurisprudence, casts a long shadow onto the present Serbia. As the pre-2000 regime was neither a dictatorship nor a defective democracy (a distinctive term *democrature* has been coined to describe it), the democratic takeover from that October was neither mere election victory nor a real revolution. Participants in these happenings and experts in political analysis have subsequently had widely divergent, sometimes wholly opposite accounts on extent, causes, effects and meaning of

[1] This is title of a book written by Mlađan Dinkić, published first in 1995.

the changes already effected and – more importantly – on nature, direction and speed of reforms needed in the future. A massive enthusiasm for changes and possible revolutionary momentum waned away having left only symbolic changes (a flag, an anthem, the national holidays). The prevalent opinion in Serbia was and yet is against the burning of all bridges with the past; rather, it favors the continuity of certain aims seen as vital interests of the nation, as well as joining the European Union. Whoever interprets the election results from 2000 onwards differently, he fails to understand the post-2000 politics in Serbia mistaking his own desires and hopes for hard facts of life.

One of the main deficiencies of entire contemporary Serbian legal order remains a significant weakness of distinct rule of law mechanisms and procedures. The Serbian legislature has adopted a number of more modern legal texts formed according to the model of EU legislative measures, but these laws were only implemented with more or less selection, discrimination and favoring various individual or group interests. In the field of Labor Law this situation is well illustrated by a persistent maintaining of a black labor market, massive breaches of legal and contractual obligations by employers, a partial and selective fulfillment of privatization conditions by new owners of privatized companies and a general disinterest and indifference of government (even if it is called a socially responsible one) regarding the actual unfavorable trends at the labor market. A few months ago the Ministry for Economy and Regional Development sent a recommendation to the courts of law asking them to postpone decision-making in current labor disputes in order to alleviate the employers' difficulties caused by recession. The move has indicated not only the modest place taken by the independence of judiciary and rule of law in a list of the Serbian governing coalition's priorities, but a systematic and purposeful neglect of the employees' needs in favor of the big business interests. On the other hand, the attempts to take positive measures to enhance the entire condition of Serbia's poorest citizens has led to an increasingly wide gap between the budget's expenditures and incomes, a policy contrary to the IMF demands and recommendations. It is characteristic of the degree of the Labor Law provisions' implementation that the strikers' demands in Serbia are mainly concerned with paying wages and contributions to the Social Insurance Fund at arrears, and not with the normal trade unions' demands for higher wages and better work conditions. Also present is the long-term inability of trade unions to be an active factor at labor market and an efficient participant in the collective bargaining processes provided by Labor Law, so that the prevailing majority of strikes are rather the spontaneous outbursts of workers' discontent and despair than the results of a well-

conceived and organized trade union action. All so far stated suggests that the provisions of Serbian Labor Law have to be seen from the perspective of far-reaching deficiencies in Serbia's rule of law. A neo-liberal ideological atmosphere in the post-Communist Europe lays a decisive stress at the essential lack of balance between the work and the capital at labor market, both at national and global level, but a neo-liberalism is neither only nor main cause of the workers' troubles in Serbia.

The Labor Law was adopted and amended by Republic of Serbia's National Assembly (Parliament), but these changes had never been encroached into its basic solutions. The positive cleared text of the Law is published in Republic of Serbia's Official Currier (RSOC), Nos. 24/2005, 61/2005 and 54/2009. The scope of this contribution allows no detailed account of all particular provisions contained in it; accordingly I shall consider only the basic legal institutes determining the nature of Labor Law as a special and specialized form of the Law of Contract and Torts (obligations law), as well as the legal tool for regulating the labor market.

The sources of Serbian Labor Law

The sources of Serbian Labor Law are defined in the Serbian Labor Law's Art. 1 as including:

a) international conventions on Work and Working relations ratified by Serbia:
b) the Labor Law regulating rights, duties and responsibilities from work and founded on work;
c) special laws adopted in accordance with provisions of the Labor Law:
d) collective agreements (contracts) concluded by empowered representatives of employers and employees;
e) individual work contracts concluded by an employer and an employee,
f) rules regulating the work adopted by an employer.

Collective agreements, individual work contracts and an employer's regulatory rules of work are legal sources only where expressly provided for by the Labor Law. So the State ensures a general legal framework for the rights and liabilities of employers and employees, the particulars of which are regulated by mutual agreement of contracting parties – represented either individually or collectively. But the Labor Law contains an important exception from this principle – regulatory rules of work are enacted only by an employer with no participation of employees. Indeed, this is only an accessory source of rights and liabilities founded on work and the Labor Law provides its application under

clearly specified and narrowly restricted conditions. These conditions are formulated in Art. 3 as follows:

1) if there is no trade union organization in the employer's company, or if no trade union organization complies with requirements for representative status of trade unions contained in the Labor Law, or if no agreement on combining of trade union organizations is concluded in accordance with the Labor Law;
2) if no party in a collective bargaining process takes an initiative for beginning the bargain for conclusion a collective agreement;
3) if the bargaining parties arrive at no agreement after 60 days from the beginning of bargaining process;
4) if the trade union fails to accept the employer's appeal for beginning of collective bargain after lapse of 15 days from receiving the appeal.

These provisions reflect a formally unequal position of employer and employees in the Serbian Labor Law. Employer can impose his will in certain degree, in certain circumstances and under certain conditions, while employee is never able to do the same. This deviation from the perfect symmetry of mutual rights and liabilities is unnecessary: employer would lose no essential right if his position is absolutely, geometrically equal to that of employee. Just stated deficiency concerns not the material content of a disputed legal rule, but a defective form the rule takes. The same effects are produced by a provision in the individual work contract stating that the employee will observe the regulatory rules issued by the employer. In this case the formal equality of contracting parties is maintained, since the foundation of the employee's liability lies in his/her own will, and not in the external coercion of the legal order.

The mutual relationships of this legal branch's various sources are determined by their own hierarchy. The succession of sources cited in Art. 1 displays a series established just on the hierarchical principle: the members of series contain the increasingly precise and concrete rules regulating work, but their scope of application and legal strength decrease. So the international conventions relating to the work at the upper end of series have the widest territorial validity and the utmost legal strength, but they contain the most abstract and general rules of behavior for employers and employees as well as for states adhering to them, the immediate application of which is in most cases impossible. The individual work contract at the lower end has the most precise and definite rights and liabilities of employer and employee signing it, but this contract concerns only them and nobody else. Its content depends on all other sources and must not be in contradiction with them; it has the least legal strength at all. Even

in this hierarchical succession of legal sources the place of regulatory rules of work issued by employer is a problematic one. The Serbian Labor Law puts it behind the individual work contract; following the logic of just described legal sources' hierarchical order, it would mean the individual contract has a greater legal strength than these rules – an obvious absurdity that cannot be the legislator's intention. But the legislator could not give a more legal weight to the unilateral statement of will by one of the contracting parties - and the regulatory rules of work issued by employer are just that – than to the contract as an agreed statement of both parties' will. Hence, the employer's rules play only a supplementary and accessory role in the legal sources' system of Serbian Labor Law – but not a less controversial one.

Some articles of the Serbian Labor law expressly treat the relations between various sources of law. Most attention is given to the collective agreements – a relatively novel institute in Serbian law, unknown to Communist Yugoslavia – and their relations to the legislative acts. So Art. 4 states that the General and Special collective agreements must be in harmony with laws. Acts by an individual employer – a collective agreement the employer concludes with empowered representatives of employees in his company, employer's general rules of work and individual work contracts, called in Labor Law by a common name of general acts - have also to be in accordance with the legislative acts as well as with the general and special collective agreements under conditions provided by Arts. 256 and 257 of the Labor Law. The general acts can contain no provision granting less rights to the employees or establishing the less favorable work conditions than the rights and conditions defined by legislative acts. If a general act provides the work conditions less favorable for employees than ones defined by law, the provisions contained in law will automatically be applied. Unfortunately, as already noted, the legislative acts are even more remote from real social life than the general employer's acts usually are; their bearing in social reality is the less, the more are ambitions of those adopting them. But same acts can always provide more rights for employees or work conditions more favorable for them than the ones defined by law. Particular provisions of an individual work contract giving less rights for employee or establishing the less favorable work conditions than ones defined by law are void. The competent court of law establishes and declares by its decision that the general act's particular provisions are void and null. The right to demand this decision never becomes an obsolete one (Art. 11). The same is true with provisions founded at misinforming of an employee on his rights by employer. So the state establishes a minimal level of the employees' protection leaving to social partners (trade

unions and the employers' associations) to define the real extent of rights and liabilities in accordance with the labor market condition. Also the special collective agreement cannot establish less favorable legal regime or work conditions than the general collective agreement does.

Basic subjects of the Serbian Labor Law

The Serbian Labor Law contains the formal definitions of an employee, employer as well as their respective empowered representatives in the so-called social dialogue. It is worth to retain one's attention onto these definitions for a while, since there is a perceptible background of a socialist legacy in their wording.

Labor Law defines an employee before an employer, although the logic of a free labor market demands a contrary approach. It is an employer who seeks to invest his/her funds, to organize a business and to offer a job to employees. It is possible to do business without any employee, but it is not possible to be employed without an employer. Examples of the liberal professions prove nothing, because a physician with his own practice, a barrister, a writer or an artist of any kind is rather an employer with no employees than an employer with no employer inasmuch his market position is identical with that of an employer and very different from the stance of an employee. We are not wrong if we see this preference of an employee to his/her employer as a residue of Marxist ideological viewpoint insisting on an advance guard role working class plays in the entire social development.

So an employee, in terms of Labor Law, is any natural person being in a working relation with an employer (Art. 5). On the other hand, an employer is any native or foreign person or corporation employing or engaging in work one or more persons. While the definition of an employer is in a large measure a tautological one (an employer employs an employee), the definition of an employee lacks any definite meaning because a working relation as its key constituent part remains yet unexplained. Besides, the term *working relation* effectively conceals the crucial fact that an employee sells his/her own working force in the labor market and an employer buys it on the same market. Speaking in a paradox, if the arrangement of the basic subjects' definitions reflects a thoroughly Marxist standpoint since the definitions themselves are couched in the insufficiently Marxist terms. This is a fair example of the conceptual and ideological confusion of a nation better knowing what it doesn't want than indeed desires.

The employees and employers may act in the labor market either individually, in their own name and account, or through their associations empowered to represent their interests as sellers and buyers of labor force. The Serbian Labor Law only rather imperfectly expresses this essential and determining feature of trade unions and their antagonists and partners from employers' ranks. Thus, Labor Law in Art. 6 provides that a trade union is an autonomous, democratic and independent organization of employees voluntarily joining it, in order to represent, advocate, promote and protect their own professional, working (relating a work), economic, social, cultural and other individual or collective interests. This cumbersome definition is too large to offer any sensible explanation of the defining term. It veils much more than it discloses. In its first part the superfluous adjectives with same or similar meaning are cast one upon another without contributing anything to the content of the concept to be defined. Even in the English translation the terms *autonomous* and *independent* are experienced as near-synonyms; in Serbian original this is even more pronounced shortcoming. But the main defects lie in the second part of definition leveling out all conceivable interests a human being can have. On such a jungle of the most various interests the trade union's distinctive role in the labor market in representing the working force's sellers is irretrievably lost. The definition includes a trade union and a factory sport team alike. The specific difference of the defined concept is non-existent.

The definition of an employers' association is a more adequate one. By this it is also meant an autonomous, democratic and independent organization of employers voluntarily joining it, in order to represent, advocate, promote and protect their own business interests in accordance with law (Art. 7). This statement is somewhat better from the preceding definition inasmuch as the term *business interests* has no such a limitless content as possible aims of trade union organizations provided by Labor Law. But the provision is yet an insufficiently precise one, since the business interests may or may not include the employers' interests in labor market. They may concern the questions unrelated to labor market, like various forms of technical cooperation or coordinated activities in the market of goods and services. The business chambers may deal with a wide range of matters relating the general economic policy, but they remain beyond a scope of Labor Law until they usher labor market and enter into the bargaining process with trade unions and state. And when they enter into such arrangements, they cease to be associations of a general business type, having become the bearers and representatives of the distinctively job-giving "class" interests on labor market. They are naturally antagonistic and supplementary

to the trade unions; the state task is to arrange this antagonism, not to suspend it. The same is true for trade unions; they may do everything (in Communism they sell pork-halves to their members), but the Labor Law's provisions may be applied to them only when they represent the employees' interests in labor market. The professional, working (relating a work), economic, social, cultural and other individual or collective interests, save just mentioned ones antagonistic and supplementary to the employers' demands, have nothing to do with Labor Law.

Basic employees' rights

Labor Law guarantees to an employee the following rights arising from his/her status of employed person:

a) right to an adequate wage;
b) general security, life and health protection in a job;
c) personal integrity protection;
d) other rights enjoyed during a disease, loss or lessening of work capability;
e) material support during a temporary unemployment and
f) other forms of protection in accordance with law and the general act (Art. 12).

These rights constitute a general legal regime applicable to all employees. Beside these, there are three added special levels of employees' protection:

1) special protection of employed woman during pregnancy and childbirth;
2) special protection of both parents for a childcare, and
3) special protection of employees under 18 years of age as well as of employees with disabilities.

Consequently, this system of rights and protective measures for employees has remained a dead letter for too many workers in Serbia. When an employee receives no wage at all for many months, all other rights arising from his/her employment must seem illusory.

In addition to the right to an adequate wage in accordance with work contract, Labor Law has constituted a right to a minimal wage as another level of employees' protection and an important instrument of government's economic and social policy. So an employee has a right to a minimal wage for standard work effect and full working hours or working hours equated with them (Art. 111). The amount of minimal wage is established by Social-economic Council formed for Serbia's territory. If this Council fails to take a decision establishing

a minimal wage within 10 days after negotiations' beginning, the Government of Serbia will establish this amount. Body establishing the amount of minimal wage has to take into account the living costs, the average amount of wages paid in Serbia, the existential and social needs of an employee and members of his/her family, the unemployment rate, the employment trends in labor market as well as the general level of Serbia's economic development. The factors influencing the amount of minimal wage are too numerous, disparate and unsuitable for mathematical modeling to be used as definite, exact and uncontestable parameters for its establishing. This legal provision leaves practically a free hand to Government in reconciling opposing demands of trade unions and employers' associations. This is only one of numerous examples illustrating the shameless verbalism of Serbian Labor Law and utter inapplicability a good deal of its provisions.

The following set of employees' rights is closely tied with the freedom of trade unions' organizing and activities. In that respect employees, immediately or through their representatives, have the right to:

- organize themselves;
- take part in bargaining for concluding collective agreements;
- participate in extra-judicial procedures for solving the individual and collective labor disputes;
- express their views on essential topics concerning the work, and
- to be informed and consulted on these topics (Art. 13).

The same Article also provides that an employee engaging in trade union activities cannot be called to account or put into a less favorable position regarding work conditions for these activities if he/she does them in accordance with law and collective agreement. The application of this provision in most cases depends on the empirical balance of power in particular companies because the state is not able or interested to implement its own courts of law's decisions. The rights guaranteed by this Article constitute classical trade union liberties gained by the organized workers in 19th and early 20th centuries, codified by ILO in a number of Conventions signed by Serbia and her legal predecessors, and most universally accepted in international community. In them there are no traces of Yugoslav socialism's self-management ideology. The weakness and disunity of the Serbian trade union movement are serious obstacles to their full implementation. Both are more permanent features of Serbian labor market, and not the circumstantial outcome of an unfavorable economic conjunction.

Finally, a work contract or an unilateral employer's decision may provide a share of employees into distribution of company's profit at the end of the business year. It is a mere possibility, by no means a liability on the part of an employer to accept the employees' demands relating it. In the troubled times of transition and the current economic depression there is a very few socially responsible employers voluntarily incurring this added expenditure to their business.

Duties of employees

Work contract gives to both parties their respective rights and imposes corresponding liabilities; the rights of one party are simultaneously the liabilities of the other one and *vice versa.* Nevertheless, the Serbian Labor Law prefers to provide the employer's rights in terms of employees' duties, having once again disrupted the ideal symmetry of the contractual relation. It seems as if that the legislator has shied of expressly recognizing the subjective rights of employer, rather formulating them as the employees' duties, their liabilities to an unnamed holder of property powers in economy. The result is that the employer's rights are strangely absent from Labor Law's texts; they have to be logically deduced from the legal provisions dealing with the employees' duties. This inconsistence reflects the official ideology of the former governing Serbia's Socialist Party when Labor Law had been firstly adopted by Parliament. This ideology had postulated the "property pluralism" in economic sphere including a substantial share of a "social", in fact a state property in the key economic branches, as a counterpart of "party-less pluralism" in the political sphere. Both ideological projects were soon renounced even by socialists themselves, but the property pluralism left a deep and hardly removable trace in Labor Law. This peculiarity has nothing to do with the real condition of employees: there is no difference if they are submitted to the arbitrary power of a private or state employer. Moreover, the state employer is far more dangerous for workers' rights, since it is the state employer that embodies a merge of economic and political might endangering implementation of fundamental human rights, and workers' ones among them.

So an employee has the following duties:

1) to do his/her job conscientiously and with responsibility:
2) to observe the working organization introduced by his/her employer, as well as the employer's conditions and rules relating to the implementation of contractual and other liabilities arising from work;

3) to inform his/her employer on the essential circumstances influencing the jobs, or on circumstances that may influence them and
4) to inform his/her employer on any potential danger for life and health of employees, and for the occurrence of the material damage (Art. 15).

The three last duties are couched in such terms that they clearly point to employer as their only user. The first duty, however, has no definite user. A formal interpretation of this provision without its legal and economic context leads to conclusion that an employee owes the conscientious and responsible doing of his/her jobs to the legislator, in other words to the state. This interpretation, although formally possible, has nothing to do with the economic realities behind work contract, but has with just mentioned ideological premises of Socialist Party from the early nineties. The work is due not only to a particular employer but also to a Nation, social community represented and replaced by the state.

If an employer has no rights, at least at the level of Labor Law's headings, he/she has a set of expressly formulated obligations. So he/she is due to:

1) pay a wage to an employee for a job done, in accordance with law, general act and work contract;
2) ensure adequate work conditions for an employee and to organize work in the manner by no means endangering the life and health of an employee, in accordance with law and other binding rules;
3) give an information to employee on work conditions and work organization, rules specified in the preceding point of this Article, and also on the rights and liabilities arising out of work rules and legal acts regulating the protection of workers' life and health;
4) secure for an employee the doing of jobs determined by work contract, as well as to
5) demand the opinion of trade union in cases determined by law. If there is no trade union organization in the company, the employer has to demand the opinion from a representative chosen by employees (Art. 16).

The employer's duties may be classified into three groups. His/her first and foremost liability is to pay the wage to an employee. Paying a wage is a legal foundation for the employer's right to demand a conscientious and responsible doing of jobs by an employee. It is already noted that employers may successfully escape this obligation for months due to the ineffectiveness of judicial decisions' implementing procedure. The employees too often have to secure themselves the implementation of enforceable judicial decisions with a passive bear-

ing of state officials in which jurisdiction an implementing procedure is, so that a strike is the only way to enforce the pay of wages at arrears. This is the most fundamental weakness of the Serbian Labor Law; it concerns not the relevant legal provisions, but an incompetent and corrupt state administration. Current economic depression offers an added justification, real or apparent, for continuance of this practice disruptive for a rule of law. Second set of the employer's duties belongs to the protection of an employee's life and health at a work. Measures necessary to be taken by employer are contained in special laws dealing with this matter, as well as in the directions, instructions and other sub-statutory acts. Implementing of these disparate rules is effected by Inspection of Work, incorporated in the Ministry of Work and Social Security Matters. The number of these inspectors is still insufficient and – what is more important – they lack the genuine support of other state administration bodies for a perceptible improving of work security. Third group of employer's duties is coextensive with the trade union rights and make the implementation and observance of these rights possible, probable and even peremptory. Degree of their enforceability depends on the entire strength of trade union movement, especially on its capability to impose itself as an essential and irreplaceable factor in labor market. Level of trade unions' unity in action and their effective power to exert a pressure on employers and government are yet not promising a successful struggle for workers' rights. The condition is evidenced by an absence or relative rarity of large-scale strikes and/or workers' street demonstrations. It is characteristic that a possible exception to this rule concerns the state employees, for example in education and health services. In Serbian economy's private sector the trade union movement is still underdeveloped and effectively suppressed by a continually high unemployment rate. Under these conditions employers may easily evade their legal obligations towards trade unions.

Surplus of employees

One of the typically transitional institutes of Serbian Labor Law is a set of provisions regulating various modes of solutions for an enormous number of unproductive and economically unjustifiable jobs inherited from the socialist economy. This is an economic problem having to be solved by structural transformation of an obsolete economy into a viable one conformed on a normal market pattern. It's a long-term process requiring a number of years. In the meantime, mass dismissal of employees, absolutely necessary for bringing about the economic transformation, is likely to produce a rate of unemployment unwanted on economic, unbearable on social and hardly acceptable on

political grounds. The task of this new legal institute, unknown both to a socialist and to a normal market economy, is to bridge a time gap between vanishing the state-run or at least state-controlled enterprises and arrival of a normal market economic structure. It must not be an end for its own sake; it is only to be a temporary means lessening negative economic and social effects of transition to market economy without slowing down the pace of economic transformation. This is a necessary but not a sufficient means; it has to be accompanied by more positive, stimulating measures enabling creation of new jobs for dismissed army of industrial workers forming the backbone of an over-industrialized, but insufficiently productive and competitive economy. It is hard to overestimate the importance of having as great a part of compensation received the dismissed employees as possible, invested into profitable and job-making small and medium-sized companies, instead into a personal consumption. All this stresses a secondary, accessory and palliative nature of provisions regulating the handling of a surplus of employees found in Serbian Labor Law. Nevertheless, they are too often seen as main, if not even exclusive item in collective bargaining processes engaging so-called social partners under the state's auspices. An importance accrued by Labor Law to this ephemeral legal institute is well illustrated by having it singled out into a Law's special chapter under its own title.

Approach to solving the problems arising out of surplus of employees, and to duties of employers in facing them in Serbian Labor Law is largely a formal and formalistic one. According to Art. 153, an employer has to adopt a program for solving a surplus of employees' problem if he/she establishes that the need for work of:

1) 10 employees if he/she employs for an indefinite time more than 20 but less than 100 employees;
2) 10% of employees if he/she employs for an indefinite time more than 100 but less than 300 employees;
3) 30 employees if he/she employs for an indefinite time more than 100 employees irrespective of the total number of employees

is to cease in the period of 30 days for cases under 1) and 2) or in the period of 90 days for cases under 3), due to the technological, economic or organizational changes. This provision offers an implicit and very broad surplus of employees' definition. The employer cannot arbitrarily determine whether the surplus of employees does exist in his/her enterprise, but the restrictions Labor Law has imposed to him/her are so few and broadly outlined that they are practically imperceptible. The technological, economic or organizational changes required by the cited provisions of Labor Law are so indefinite that it is hard to see what

occurrences relating company do not belong to them. In contrast to this limitless scope of terms used, the legislator is more than commonly definite and precise when he circumscribes the dismissed employees granting favorable status of being surplus. But Law's terms are only quantitative ones; if dismissed workers are too few to pose a serious threat to the established social order and election prospects of governing party or coalition, they are of no interest for legislative body, political elite and artificially induced public opinion – real or supposed engineers of Serbian transition. An employer, it is true, is obliged to take adequate measures in order to again employ the employees dismissed as a surplus; these measures have to be taken in cooperation with a trade union representative in employer's company and state body having the labor market in its competence.

Labor Law provides the following essential elements having to be included in a program for solving the surplus of employees' problem:

1) grounds for ceasing the need for employees' work;
2) total number of people employed by employer;
3) number of employees being a surplus, their respective professional qualifications and age, length of a period during which they have social insurance and jobs they have done;
4) criteria for determining the surplus of employees;
5) measures for new employment: removal of employees to new jobs; acquiring a new professional qualification; working shorter working hours but not shorter than half of full working hours; and other measures tending to help new employment;
6) means for improving the socio-economic condition of employees declared to be a surplus, as well as
7) the term work contracts are to be renounced.

An employer has to send a project of this program to the representative trade union in his/her company and organization competent for employment affairs at latest 8 days after the project has been determined. Final text of the program is adopted by managing board of employer's company after receiving an opinion of trade union and organization for employment affairs; if there is no such board, the program will be adopted by employer himself/herself. Trade union is bound to express its own opinion and suggestions on the projected program to the employer at latest 15 days after the project has been received. The organization competent for employment affairs is liable to send the projected measures to be taken in order to prevent the employees' dismissal or to reduce as far as possible the number of renounced work contracts to employer

at the same term. An employer cannot dismiss the surplus of employees without receiving the mentioned opinions and suggestions, but neither trade union nor organization competent for employment affairs can block this dismissal. The result is an increased amount of bureaucratic formalities with no real protection of employees. Namely, an employer is obliged to consider and take into account said opinions and suggestions (Art. 156), but not to comply with them. In contrast to this looseness of Labor Law's wording, the following article expressly states that the length of employees' absence from work for temporary prevention to work, pregnancy, childbirth, child care and special child care (if a child with developmental difficulties is in question) must not be taken as a criterion for determining the employees' surplus. This is an effective protection of certain specially endangered employees' categories, but only of them.

An employee being a surplus in Labor Law's sense is entitled to receive the compensation conformed to general act and work contract before the latter is renounced (Art. 157). This right has had a greater practical importance for employees than all measures the Serbian state takes to retard a rise of unemployment. This is so because it is accepted both by employees and employers as a kind of just price employer has to pay for a free disposal of labor force in his/her company. Main class conflicts in transitional Serbia are taking place over the amount of this generally accepted compensation rather than over uncertain and unprotected wage. This is recognized even by Labor Law determining its minimum amount: it cannot be lower than a sum of yearly wages' thirds for the first 10 years of employee's work plus the sum of yearly wages' quarters for all years over that. Preciseness and sophistication of this recently adopted legal provision is due to legislator's attempt to eliminate the main causes of conflicts and workers' dissatisfaction operating in past stages of privatization process. This is the hardest core of Serbian Labor Law's transitional and provisory capacity. There is no transition to a normal market economy until a compensation for dismissal has an overwhelming place in desires of employees and concerns of employers.

Non-discrimination principle in Serbian Labor Law

One of the attempts to modernize Serbian Labor Law is done with introducing and elaborating the non-discrimination principle. This principle is formulated in Art. 18 in the following manner: the direct and indirect discrimination of persons seeking employment, as well as employees, in relation to their sex, birth, language, race, complexion, age, pregnancy, health status or disability, ethnic affiliation, faith, marriage status, family commitments, sexual orien-

tation, political or other conviction, social origin, possession of movable or immovable property, membership in political organizations or trade unions and any other personal property is prohibited. The citing of prohibited reasons for discrimination is not an exhaustive one; discrimination in relation to any conceivable personal characteristic, even if it is not expressly mentioned in Art. 18, is prohibited by Labor Law. Then what is use of this numbering? The legislator has pointed to the most characteristic, frequent or socially dangerous reasons for discriminatory behavior. Nor all mentioned reasons have an equal weight in social reality: ethnic affiliation and reasons related to it (language, faith, the racial attributes), sex and reasons related to it (pregnancy, family commitments), disability and sexual determination, are far more important reasons for discrimination than other mentioned ones because they reflect the rooted prejudices and stereotypes towards parts of population defined by them – members of national, religious or sexual minorities, as well as women in a patriarchal cultural pattern. There are two groups of persons enjoying the protection of non-discrimination principle in Serbian Labor Law: the employees and persons seeking employment. This is the only case when persons who are neither employers nor employees make their appearance in Labor Law as the holders of certain rights. This matter, strictly speaking, belongs to Employment Act, and it is mentioned there because the employees and persons seeking employment are exposed to discriminatory measures of employers on the same unacceptable foundations.

An even more general and comprehensive definition of discrimination and discriminatory acts is found in 2009 Law Prohibiting Discrimination. It is any unjustified making a difference or unequal acting or failing to act (exclusion, restriction or giving a preference) regarding persons and groups, as well as their families' members and other persons intimate to them, in open or concealed way, founded in a race, complexion, ancestors, nationality, ethnic affiliation or ethnic origin, language, religious or political convictions, sex, gender identity, sexual orientation, possession of movable or immovable property or income level, birth, genetic peculiarities, health status disability, marriage and family status, fact of his/her condemnation, age, appearance, membership in political, trade union and other organizations and other real or supposed personal characteristics (Art 2). It is interesting to compare both lists of possible foundations for discrimination, since there is no exact correspondence between them although they are equally non-exhaustive. The list in the Law Prohibiting Discrimination is undoubtedly a more modern as well as a more recent one; it incorporates foundations related to new developments in bio-medical sciences

like genetic peculiarities, but there is no guarantee that this kind of elaborated casuistic is sensible in an evidently endless, non-exhaustive numbering. It is remarkable that this Law provides more foundations for discrimination relating to sexual life than the older legal texts did. This led to criticism and resistance of the more conservative part of Serbian public opinion feeling that the traditional family values are in jeopardy without really improving the sexual minorities' social position and legal protection. That a sexual (or any other) minority is expressly mentioned in an open, non-exhaustive listing of possible discrimination victims is of less relevance than their effective legal protection. The legal texts are not the most suitable means for raising consciousness and changing attitudes campaigns; legislative acts have no educative but protective social function. It is noteworthy that the list in question has failed to mention the pregnancy as a foundation for discriminatory acts. This failing is due to the fact that the positive social attitudes towards pregnancy and pregnant women tend to prevail in a nation facing a demographic decline. That is why a pregnant woman is not likely to be insulted, degraded or maltreated in public places. In contrast to this, a pregnant employee or pregnant woman seeking employment has against herself an employer's rational economic interest to cut down his/her costs by her dismissal or escaping to give her a job. In this respect a labor market condition cannot be identical with an entire social climate.

As already noted, there are two distinct forms of discrimination – a direct and indirect one. Direct discrimination is every act caused by just cited foundations of discriminatory behavior by which an employee as well as a person seeking employment is put into a less favorable position than other persons in a similar situation (Art 19). If certain seemingly neutral provision (or act) on the part of an employer practically put or might put an employee as well as a person seeking employment into a less favorable position than other persons in a similar situation, there is an indirect discrimination. Both forms are expressly prohibited by Serbian Labor Law. Basically same definitions exist in the Law Prohibiting Discrimination – Arts. 6 and 7.

The dividing line between permissible and unallowable act of an employer lies in the act's purpose. If employer employs a person with better qualifications for a given job or promotes an employee with higher working results, there is no discrimination even if the chosen or promoted persons do not belong to any group personal properties which might be a foundation for discrimination. In this case employer follows his/her own legally recognized and protected economic interest. However, when an employer chooses or promotes one not for one's working results and expected profit but for any personal property, he/she

abuses the work contract for a purpose not pertaining to it and makes a discrimination entering into the scope of Labor Law. In order to point out more strongly the difference between discriminatory acts and those being not so, the Serbian legislator expressly states that the exclusion or preferring employees for doing a job having features related to some of the foundations for discrimination specified in Art 18, but at the same time being a real and decisive condition for doing a job, and if intended purpose of job is justified, has not to be considered as discrimination (Art 22). This is unambiguously clear in theory, but it is hard to distinguish and prove employer's real intentions in a lawsuit. Whenever an employer acts disregarding his/her economic interest in the matter relating work contract, his/her behavior is subject to doubt for discriminatory conduct. Employer can display his/her devotion to non-profit ends only beyond work contract and labor market, beyond an economic sphere.

Law Prohibiting Discrimination similarly defines discriminatory behavior in labor sphere as any violation of equal opportunities for entering the work or enjoying all rights arising out of work under equal conditions (Art. 16). These rights, as Law explicitly states, includes:

- right to be employed (right to work in Law's terms);
- right to a free choice of profession;
- right to advance in a career;
- right to acquire added professional qualifications;
- right to professional rehabilitation;
- right to an equal reward for equally worth work;
- right to just and satisfying work conditions;
- right to absence from work;
- right to form a trade union and to join it, as well as
- right to protection from unemployment.

The principle of equal opportunities must be observed in using every of these rights. This is a more detailed set of particular rights being expressly ordered to be under a non-discrimination regime than one contained in Labor Law. Recent Serbian legal texts are more devoted to the strict respect for an entire body of human rights integral part of which is a non-discrimination principle.

In addition, the provisions of laws, general acts, or work contracts securing a special protection and support for certain groups of employees, particularly provisions protecting persons with disabilities, women during a childbirth absence and absence for childcare, as well as provisions containing special rights and benefits for parents and persons equaled with them, are not discriminato-

ry ones. Shortly speaking, it is not only permissible but desirable to make a positive discrimination of certain unprivileged social group members which are likely to be victims of discriminatory acts. Analogous provisions are also found in the Law Prohibiting Discrimination.

Discrimination in terms of Labor Law can make its appearance in any point of an employee's career. Consequently, discriminatory acts are prohibited especially if they are related to:

4) the employment conditions and selection of candidates for doing certain job;
5) work conditions and all rights arising from work;
6) education, making better qualifications and perfection in expertise;
7) promoting the professional career, as well as to
8) rescission of work contract (Art 20).

The provisions of work contract determining discrimination for any of foundations contained in Labor Law are null and void. Professional and sexual harassing is also prohibited. Professional harassing in terms of Labor Law is any undesirable behavior, due to any of foundations contained in Art 18. of Labor Law, having an aim to injure the dignity of a person seeking employment as well as an employee, and acts causing a fear or creating an inimical, degrading and offensive work environment (Art 21). Sexual harassing is similarly any verbal, wordless or physical behavior having an aim to injure the dignity of a person seeking employment as well as an employee in the sphere of sexual life, or any action causing fear or creating inimical, degrading and offensive work environment. There are two controversial points in these definitions. Firstly, it is a too little distinction separating the concept of harassing at work from sexual harassing at work: the latter is evidently a special case of the former, but in legal text these are distinct, parallel offences with largely coinciding definitions. That is a matter of clumsy legal technique. A more serious problem goes into essence. If the harassing – either common or sexual – is to be defined as an unwanted behavior, an act contrary to the victim's will, it implies that materially identical act with victim's consent would be permissible. This interpretation is of course a too extensive one, but the language of cited definitions seems supporting it.

Any discriminatory act entitles to require indemnification for the damage suffered – by employees or persons seeking employment. This can be a powerful weapon against a discriminating employer, unless the ensuing lawsuit is too long, costly and with an uncertain outcome.

A distinctively widespread form of discrimination is founded on the present or future family condition. The employers prefer to employ unmarried women, or at least women having no children and ready to commit themselves in having no children in a foreseeable future, rather than women with children.

The women seeking employment are openly asked if they have or intend to have an issue. Such behavior is in perfect harmony with employer's economic interests and his/her position in labor market, but it is quite opposite to the needs of an ageing society and to measures taken by a state facing demographical decline. Serbia has for years endeavored to find and apply a set of stimuli to counter the unfavorable demographic trends, particularly in rural and peripheral regions. This is a need rooted in reality, quite independently from right-wing lamentations over the fate of an extinguishing nation. But the level of Serbian labor market's regulation allows few active steps to be taken in preventing the employers' discriminatory acts towards women having or intending to have children. Thus, Labor Law provides that an employer cannot require from persons seeking employment the information on their marriage or family status as well as on their family planning (Art. 26). He/she cannot also make an insight into documents and other evidence having no direct importance for doing a job as a condition for entering it. For an actual situation in labor market it is very instructing that Labor Law explicitly states that an employer cannot condition employment of a woman with her submitting to a pregnancy test, except if she is to be employed in jobs being a substantial risk for woman's and child's health confirmed by competent health service body.

Conclusion

This article by no means pretends at exhaustiveness. It is not a general or practical review of Serbian Labor Law, however desiring and needed such review is for any foreign investor in Serbian economy. Task its author put before himself is simultaneously a more restricted and more profound one: to indicate main points in which Serbian Labor Law displays its transitional nature. This is neither mere exposition of legal provisions concomitant with suitable explanations of its sense, nor an excusing confession that a reality is more powerful from any law. Is this account overcritical? Perhaps, but I know no easy way to overcome or bypass the uncomfortable things related to transition, such as uncertain position in labor market and an ever increasing gap between haves and have-nots. This condition leaves an ample space for acting to the real Right and the real Left; Serbia lacks a well-regulated labor market with rules peremptory for all actors in it, but also a more efficient and practicably workable protection of employees' rights. We need more competition than one now existing, and more regulation in spheres where the competition is excluded by a social consensus. The mentioned urgent requirements, seemingly opposed to each other, meet in a point – rule of law. Legislative acts must be written with a frank

intention and persistent determination to be implemented. Copying or blind imitating of EU standards is helpful as little as a headstrong remaining at legal solutions from the nineties. It is time for Serbian Labor Law to be rewritten. This means a kind of a new Social Contract as an integral part of efforts in joining EU. Eagerness in achieving it must not be taken for granted. It is to be reached by patient collaboration of social partners and the State in rather narrow limits of economically possible solutions. Provisions failing to stand test of time must be altogether rejected, however they be ideologically attractive to certain political parties and/or social groups. A voice of jurisprudence must also be heard in order to eliminate the meaningless or impracticable laws.

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SRPSKO RADNO ZAKONODAVSTVO IZMEĐU PROKLAMOVANIH NORMI I HAOTIČNE DRUŠTVENE STVARNOST

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Ključne reči: Zakon o radu, poslodavac, zaposleni, diskriminacija

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PROCEDURAL MEASURES IN THE REORGANIZATION OF BANKRUPTCY DEBTOR IN SERBIAN LEGISLATION

Summary

The Proceedings of reorganization of the Bankruptcy Debtor represent a new start in this matter. After applying such proceedings, the Bankruptcy Debtor can continue his/her activities. The Reorganization Plan is the basic document of that Reorganization. The Bankruptcy Proceedings Act of the Republic of Serbia regulates many forms of Reorganization. Some of them are the main part of the Plan and include all possibilities for the continuation of the work of the Bankruptcy Debtor as well as solutions for payment of the Creditors' claims. Some of these forms include: keeping of all property of the Bankruptcy Debtor, sale of his/her property or transfer of the property for the settlement of the Creditors, closing some of the departments of the Bankruptcy Debtor or the change of Debtor's activities, etc. As a rule, the Reorganization Plan consists of several forms of Reorganization. The Creditors decide on the Reorganization Plan, but the application of the Plan depends also on the status of the Bankruptcy Debtor.

Key words: *Reorganization, Reorganization Plan, forms of Reorganization, Bankruptcy Debtor, Creditors.*

1. Introduction

The reorganization of Bankruptcy Debtor provides for the possibility of his business continuation, even after the commencing of bankruptcy Proceedingss against him. In the Reorganization Proceedings the Organizational or Bankruptcy Plan is submitted, as a principal act in this matter substantively decisive in answering the qustion whether the Bankruptcy Debtor will continue his work or the Bankruptcy Proceedingss against

him go on.[1] That decision is rendered by the Creditors. The Reorganization Plan gives a vast range of possibilities for defining Bankruptcy status of the Debtor, following the initiation of Bankruptcy Proceedingss if there is no possibility of the Debtor to sustain and where the Reorganization Proceedingss are successfully carried out. The possibility of Bankruptcy Debtor to sustain depends first of all on the Reorganization Plan provisions, i.e. on versatile reorganization measures (this term is used in domestic bankruptcy legislation), but they must be justified and an opportunity must exist for their realization in the Reorganization Proceedingss.

According to bankruptcy legislation of Serbia, the Reorganization Proceedings instituted against Bankruptcy Debtor are provided for, which is also the case with legislations of neighboring republics (Bosnia and Herzegovina,[2] Republic of Srpska[3] and Croatia)[4], so that this matter is being regulated in a significantly different manner. The biggest similarities of the Serbian Bankruptcy legislation when compared to mentioned legislations are the Measures regarding the Reorganization Plan. The Bankruptcy Proceedingss Act of Serbia (hereinafter referred to as BPA)[5] regulates the Reorganization Proceedings for the Bankruptcy Debtor, enabling him to continue his work and other activities, so that "erasing" from the Register can be avoided. The fact is that the basic purpose of these Proceedingss is settling of Creditors' claims. However, such a target can be achieved through the Reorganization Proceedingss and a proper and true identification of Measures or Reorganization Forms which means that in establishing the plan contents, one should pay attention to how the Bankruptcy Debtor will be able to respond to the Reorganization Plan and also to Creditors' claims and other Proceedingss' subjects.

In our Bankruptcy legislation as well as in that of the neighboring republics, the organization has a double meaning that refers to Debtor's work continuation and also to Creditors' settlement. When these two targets are at

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[1] Dika M., Insolvencijsko pravo, Zagreb 1998, p. 75.

[2] Zakon o stečajnom postupku Federacije BIH (Code on Bankruptcy Proceedings of Federation BiH, Sl. novine Federacije BiH no.29/2003).

[3] Zakon o stečajnom postupku Republike Srpske (Code on Bankruptcy Proceedingss of Republic of Srpska, Sl. glasnik R. Srpske no. 67/02,77/02,4/03,96/03).

[4] Stečajni zakon Republike Hrvatske (Bankruptcy Code of Republic Croatia, Narodne novine no. 44/96, 29/99, 129/2000).

[5] Zakon o stečajnom postupku Republike Srbije (Bankruptcy Proceedingss Act of Republic Serbia, Sl .glasnik R. Srbije no.84/2004).

issue, the approach of the German Bankruptcy reorganization legislation is different. In the first place, the Bankruptcy Plan opens more possibilities for the settlement of Creditors' claims, while the relations between Debtor and Creditors may be resolved in a coercive or in a voluntary manner. Practically, this means that the German Bankruptcy Plan offers two possibilites. However, beside the Bankruptcy Plan a Rehabilitation Plan is also provided specifying, at the first place, the possibility of Debtor to continues with his/her business, but also, the possibility of transfering his/her business to third persons (commercial entity) who can complete it in a successful manner and thus settle the Creditors.[6] The parties to the Proceedings decide which plan will be accepted.[7] Otherwise, the German Insolvency Act[8] provides for a three part Bankruptcy or Insolvency Plan, as the case is in our legislation and in the ones of the neighboring countries. The first part refers to the plan contents and Creditor's rights in the Reorganization Proceedings.[9] The second part refers to the acceptance and contents of plans[10], while the third covers their surveillance and application.[11] The measures or Forms being provided in the part relating to its foundation and whose acceptance and approval depends on Creditors are up to the Applicant.[12] The German Bankruptcy legislation has strongly influenced the Bankruptcy legislations of Croatia and BIH (R. Srpska). Also, if we compare the above stated provisions of Reorganization Proceedings in the German Insolvency Act, we see that its Reorganization Proceedings structure is similar to the Bankruptcy legislation of Serbia.

Reorganization Proceedings offer various possibilities for "healing" the Bankruptcy Debtor: this concerns the Measures or the Reorganization Forms which can be executed for the purpose of Debtor's work continuation and fulfilling his/her obligations. As we said, the term "measures" is used by the Bankruptcy Proceedings Act but we call them "Forms" for various reasons. The first refers to the basic act in the Reorganization Proceedings, which is Reorganization or Bankruptcy Plan that is a more acceptable term for the stated act. The

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[6] Fialski H, Insolvency Law in the Federal Republic of Germany, 1994., p. 27.

[7] Ibidem.

[8] Insolvenzordnung, 5.10.1994. (BGBI. I P. 2866), 22.3.2005 (BGBI. I P. 837, 01.4.2004.).

[9] Insolvenzordnung, p.217-234.

[10] Insolvenzordnung, p.235-253.

[11] Insolvenzordnung, p. 254-269.

[12] Luer H.J., The Insolvency Laws of Germany, Juris Publishing 2002., p. 80.

most difficult issue is to determine the legal nature of Bankruptcy Plan, since it can be defined as an agreement of intentions, i.e. a Contract, taking in consideration the participation of all parties to the Bankruptcy Proceedings. The second reason is connected to the first one in the aspect of freedom to accept or refuse the plan, while the term "Measures" implies the imperative norms that can not be modified. Finally, third cause relates to the possibility of challeging various Reorganization Forms with the purpose of Debtor's work continuation although the BPA does not precisely refer to it. Using the term "Reorganization Forms" instead of "Reorganization Measures" does not have to imply criticizing of the legislation, but refers to the character of the Reorganization Plan itself as it has been defined by the BPA.

2. Legislative Nature of Reorganization Plan and of Bankruptcy Proceedings Status

The Reorganization Proceedings of Bankruptcy Debtor should ensure not only the continuation of Debtor's work but also the settling of Creditors' claims. Thus, the Reorganization as well as the Bankruptcy have two basic purposes. However, in the Reorganization Proceedings some issues arise that require responses before analyzing not only the Reorganization Form but the Proceedingsas well. Such issues relate to the Reorganization Plan, i.e. to its legal nature, and also to the status of Bankruptcy Proceedings in the moment of acceptance of Reorganization Plan, and moreover the status of the Bankruptcy Proceedings after the completion of Reorganization Plan, when there is no more probability to institute the Bankruptcy Proceedings. The Reorganization Plan is a particular act which must be accepted by all the parties in the Proceedings as well as by the Bankruptcy Debtor and the Creditors.[13] The Bankruptcy Judge approves the plan, if the majority of Creditors have voted for it. On other hand, a possibility should exist that Bankruptcy Debtor executes the proposed Reorganization Forms. When deciding on qualifying the Reorganization Plan as a Contract or as Court act, we shall choose the first solution, since all the above mentioned parties have to acknowledge it positively. Although the Bankruptcy Judge is the master of the Reorganization Proceedings, the Reorganization Plan is not an act of Court.

As far as the Bankruptcy Proceedings are concerned, the legislator has not precisely determined its status in case of institutng the Reorganization Proceedings. After the acceptance and upon its acknowledgment by an absolute deci-

[13] Dika M., Insolvencijsko pravo, Zagreb 1998., p. 76.

sion, the Reorganization Proceedings may commence. The BPA has no precise stipulation in this respect, except for the duty of a company that by accepting the plan it does not have to indicate the words "In bankruptcy" in its appellation of Bankruptcy Debtor, i.e. in its business communication.[14] If we accept this stipulation, this would mean that the Bankruptcy Proceedings becomes closed or canceled. Such decision is not the most appropriate one, although the other mentioned Bankruptcy legislations define this issue in the same way. Regarding the carrying out of Reorganization Plan and if the Bankruptcy Debtor proceeds contrary to the plan contents, the Bankruptcy Judge can decide on starting new Bankruptcy Proceedings against such party. Such circumstances have been specified in the BPA[15] so the new Bankruptcy Proceedings have to be instituted due to failing to execute the Reorganization Plan. Pursuant to BPA provisions we can conclude that in case of acceptance of Reorganization Plan, the Bankruptcy Proceedings has to be cancelled or else, if the Reorganization Plan is not applied, new Bankruptcy Proceedings shall be instituted. If the Reorganization Plan is executed pursuant to the BPA and the plan's contents, the Debtor may definitely continue his/her work.

Here is a brif analysis of the Reorganization Forms and other parts of the Reorganization Proceedings. However, before that we shall review the previous solutions in our Bankruptcy legislation relating to the possibility of further functioning of Bankruptcy Debtor. The Settlement, Compounding, Bankruptcy and Liquidation Act (hereinafter referred to as SCBLA)[16] also provide for a possibility of further functioning of Bankruptcy Debtor through undertaking of some Proceedings that can result in settlement of Creditors without instituting the Bankruptcy Proceedings. This refers to compulsory settlement and to the possibility of Bankruptcy Debtor's sale, when the Bankruptcy Proceedings continues against the Bankruptcy estate, being formed from the sale price. Some Reorganization Forms, regulated by the BPA are somewhat similar to the stated solutions in former domesic Bankruptcy legislation. In its provisions on the framework of Bankruptcy Proceedings Reorganization, the BPA provides for personal management of entrepreneur[17] since this Act specifies the possibility to institute Bankruptcy Proceedings against the entrepreneur or against physical persons.

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[14] Art. 133 (6) CBP.

[15] Art. 139 CBP.

[16] Zakon o prinudnom poravnanju, stečaju i likvidaciji (Settlement Compounding, Bankruptcy and Liquidation Act, Sl. list SFRJ no.84/89, Sl. list SRJ nos. 37/93, 28/96).

[17] Art. 140.-144. BPA.

3. Reorganization Proceedings

Some attention will be paid to the Reorganization Proceedings and their basic characteristics in different phases in order to determine more precisely the nature of Reorganization or Bankruptcy Plan (we use the first term for the Plan as specified in the BPA). Beside this, the Reorganization Proceedings are arranged differently in Serbian Bankruptcy legislation when compared to the above mentioned legislations. This particularly refers to the Reorganization Plan structure, which is more clearly regulated in these legislations. Acceptance of Reorganization Plan depends on its contents or proposed Reorganization Forms. Three basic issues are set in this respect and they are interconnected with basic phases of Reorganization Proceedings. These issues are:

1) Who is to submit the Reorganization (Bankruptcy) Plan?
2) In which manner the Reorganization Plan is accepted?
3) In which manner the Reorganization Plan is executed?

Vital for the Reorganization Plan is that it can be submitted with a proposal for instituting Bankruptcy Proceedings in a precise deadline after the commencement of the Proceedings.[18] If the submitter of the Reorganization Plan deems as satisfactory for the Debtor the conditions for the execution of Reorganization Proceedings, he would provide all the evidence supporting it, including the Reorganization Forms to be undertaken in the Proceedings. We have said that the Reorganization Plan can be submitted with a proposal for instituting the Bankruptcy Proceedings. This means that we have to answer the question as to whether these Proceedingss are carried out alongside each other or the Bankruptcy Proceedings are suspended during the Reorganization Proceedings. We shall see later on that there is a particular inconsistence in the BPA relating to these two Proceedings. In the Reorganization Plan the Applicant must give all basic data on Bankruptcy Debtor and on the possibility for execution of Reorganization Proceedings; in other words on the parties who will take care in proceeding with the execution. The Legislator has specified the contents of the Reorganization Plan,[19] but did not separate significant points from the irrelevant ones, as done, for example, in the Bankruptcy legislation of Croatia or BIH (Republic of Srpska), where the Reorganization or Bankruptcy Plan is divided in two parts: the preparatory part and the basics of the execution (as the principal part).[20]

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[18] Ninety days. Art.127(2), Art.130 (1) BPA.

[19] Art. 127(3) CBP.

[20] Dika M., Insolvencijsko pravo, Zagreb 1998., p. 76.

The Reorganization Plan includes the following vital points: **a**) Information on Bankruptcy Debtor, accountancy as well as financial reports; **b**) Reorganization Forms; **c**) Pecuniary means being at the disposal of the Debtor which may be directly distributed to Creditors; **d**) Deadlines for execution of Reorganization Forms; **e**) Parties who will undertake the Reorganization Forms (i.e. experts in the field); **f**) Evaluating whether the Reorganization Proceedings will lead to the settlement of Creditors and to continuation of Debtor's work. Thus, all points are not of the same value since Reorganization Plan can be divided in two parts, which is the solution in the neighbouring republics.

Not going into detailed analysis of the Reorganization Proceedings, we mention only the basic phases and focal points of the Proceedings. The parties to Reorganization or Reorganization Plan are Bankruptcy Debtor and Bankruptcy Creditors, as well as all other parties of Proceedings, for whom the Debtor Plan is relevant. This includes various Creditors, the persons having shares in Bankruptcy Debtor's business, etc. Beside this, as the party to Reorganization Proceedings, the Bankruptcy Manager should be mentioned as well, considering that he too can submit the Bankruptcy Plan.[21] The plan is to be submitted to the Bankruptcy Judge. The discussion and voting on Reorganization Plan takes place at the hearing or hearings. Provisions of BPA are not clear whether these are particular hearings. The Bankruptcy Court sets the hearing for discussing and voting about the plan within 20 days from the date of plan receipt.[22] The hearing is to be announced.[23] The Creditors vote for the Reorganization Plan according to the amounts of their claims. Otherwise, the voting takes place by applying Creditors' classes and groups.[24] If approved, the plan is executed in accordance with the proposed Reorganization Forms. Reorganization Plan is valid for all partie to the Reorganization Proceedings.[25] The surveillance of Reorganization Plan execution is obligatory pursuant to the BPA and is done by the Bankruptcy Manager.[26] After the Bankruptcy Manager has fulfilled all obligations in accordance to the proposed Reorganization Plan, he will continue his work without any obstacles.

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[21] Art. 129(1) BPA.

[22] Art. 131 (1) BPA.

[23] Art. 131 (3) BPA.

[24] Art. 132 (4) BPA.

[25] Art. 133 (1) BPA.

[26] Art. 133 (5).

In case of socially- or state-owned capital, the property will be sold in accordance to the privatization rules.[27] Should the Bankruptcy Debtor fail to execute the Reorganization Plan, every person concerned, the Creditors first of all, can notify thereof the Court,.[28] which may order particular measures against the Bankruptcy Debtor, i.e. institute the Bankruptcy Proceedings should Bankruptcy Debtor acts contrary to the form specified by the Reorganization Plan, or contrary to the law, but also should he fail to cooperate with other parties to the Proceedings in the execution of the Plan.[29]

On the basis of the above we can answer the three stated elementary questions. The Reorganization Plan proposes three categories of the Bankruptcy Proceedings parties: the Bankruptcy Debtor, Bankruptcy Manager and Creditors of various groups. The Creditors decide on Reorganization Plan, while the Bankruptcy Debtor performs the plan under surveillance of the Bankruptcy Manager and upon Creditors' approval. Practically, it depends from these subjects whether the Bankruptcy Debtor will continue his work or whether objectives of these Proceedings will be reached to suit, above all, the Creditors.

4. Reorganization Forms

The Reorganization Forms, defined according to BPA, require explanations relating first of all to a possibility of their merging. Reorganization parties are provided with a choice of other Reorganization Forms not being specified by the BPA. This means that the Reorganization Plan Applicants are not limited by forms specified by the BPA, but may propose other ones which, however, is less probable since the Legislator provided for twenty one forms which may be appropriately combined. Now, we shall analyze only the forms specified in the BPA. However, for practical reasons, it is not recommended to individually analyze in detail every form precisely because of the possibility of their combining. The fact is that it is not possible to propose in the plan only one Reorganization Form since this can not accommodate in every case both Bankruptcy Debtor and Creditors. Here is the list of Reorganization Forms[30] and a short evaluation of each one of them by which we analyze the possibility of application of the forms, whether independent or not.

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[27] Art. 137.

[28] Art. 138 (1).

[29] Art. 138 (2).

[30] Art. 128.

Following are the Reorganization Forms specified by the BPA:

a) Holding up the whole property of the Bankruptcy Debtor or part of the Bankruptcy estate. The first Reorganization Form refers to the possibility of leaving to the Debtor a part or the whole property for his work continuation. However, while applying this form, the Creditors must be convinced to be able to obtain payment of their own claims in the most efficient manner. By this Reorganization Form it is possible to leave a part of property to the Debtor with which he could continue his activity. Although it is not defined how it will be dealt with the remaining part of Debtor's property, most probably it will be sold so that the obtained means would be distributed to Creditors or divided directly among them. Application of this form depends mostly on the Creditors. This means that these are in fact two Reorganization Forms since we can not treat as identical the situation when the whole property remains with the Debtor for his business continuation, and the one when only a part remains with him/her, so that the Creditors can be partially paid.

b) Sale of Bankruptcy Debtor's property (with or without pledge right), i.e. transfer of his/her property for settling claims. The question here relates to the significance of this form. As mentioned, the SCBLA specifies the sale of Bankruptcy Debtor so that the Bankruptcy Proceedings would still be applied against the Bankruptcy estate to be formed out of the sale price obtained. The Bankruptcy Debtor would continue to perform his activity, meaning that he would not be erased from the Economic Entities Register. However, pursuant to the BPA, while defining this Reorganization Form one can not conclude that the legislator had in mind the modeling of Bankruptcy estate against which the Bankruptcy Proceedings would be applied. This form could be interpreted in a manner so that the money obtained from sale of the part of Bankruptcy Debtor property would be used for further continuation of Bankruptcy Debtor business. However, this form provides also the possibility of sale of the whole property. We believe that this form of the Reorganization or Bankruptcy Plan must be combined with some other form defined by BPA, or with some of the forms the application of which may be set by these parties to the Proceedings.

c) Termination or closing down of the part of Debtor's non-profitable facilities or changing of Debtor's activity. With the approval of the Creditors, the closing down of production or other parts of Bankruptcy Debtor shall be imposed since their further existence would only create expenses. In deciding on modification of activities, the attention is to be paid to those that are prof-

itable. Of course, this Reorganization Form must be followed by an appropriate plan, regardless of whether a Bankruptcy Debtor's part will be closed down or the activity modified. In other words, this plan must prove the probability that further continuation of Debtor's work would lead to the repayment of Creditors. This means that this form is not the closing down of the party (entity), but only reducing of his productiion and dismissal of employees, so that this form is to be combined with other ones.

d) Revision (modification) or cancelling of Contracts not favorable for the Debtor. Practically, this Reorganization Form represents a Bankruptcy Proceedings phase, after their instituting. The Bankruptcy Manager decides which contract of Bankruptcy Debtor should remain in force. Modification of contract can take place during the Reorganization Proceedings if impeding the proper execution of obligations provided. This form is not independent in the application but requires defining the status of other contracting party status, i.e. its compensation rights.

e) Repayment of debts in installments and postponement of payment. This measure represents a compulsory settlement, but the debt reduction is not provided. It is the same as the one of compulsory settlement enabling the continuation of Debtor's work with the payment of debts when the debt reduction does not take place. In case of compulsory settlement, the relevant conditions and presumptions for its taking place could be defined in following manner: **a**) the party is not able to complete its obligations or is insolvent; **b**) there is a proposition for instituting the Proceedings for applying compulsory settlements; **c**) reaching accord of the qualified Creditor's majority on settlement agreement, and **d**) the settlement has to be confirmed by the competent Court. These elementary characteristics of compulsory settlement can be indicated when defining this reorganization form, but fractional claims' reduction may not be applied. This form can also be combined with the first ones stated in point 1 (of 3).

f) Modifications of the maturity deadlines, of interests or other conditions relating to debts or credits. This Reorganization Form is "leaned" to the previous one, since it represents its partial modification. Conditions of payment and of interest rates are modified with Creditors' approval so that the Bankruptcy Debtor is thus enabled to pay off the claims in an easier way. Probably the forms given under points 5) and 6) should have been defined as one. This means that this measure is but another element of the compulsory settlement, since such elements relate to the reduction of Bankruptcy Debtor' debts and their payment when due.

g) **Writing off (exoneration) of debts of the Bankruptcy Debtor.** This form as well should be combined with other ones, since primarily the Creditors' interest must be considered and settled by claims repayment or in another way. The fact that exoneration of Bankruptcy Debtor's debts is unavoidable, some other form should be introduced that can relate either to the shares issuance of the Bankruptcy Debtor to Creditors, or that may transfer the whole or a part of Debtor's property to them. In any case, we can not speak of application of only one Reorganization Forms.

h) **Modification or execution of the pledge right**. The modifications connected to the pledge right of the Debtor, as well as their execution, depend on other parties in this relation and on the status of Debtor's property.

i) **Transformation of unsecured credit into the secured one.** First of all, in case of this form the Legislator has not defined whether the credits have been given or have been taken by the Bankruptcy Debtor. The case of Bankruptcy Debtor being a credit donor would be more appropriate. If the Debtor is the beneficiary of the credit the question is whether he is capable to undertake such Reorganization Form. The Bankruptcy Debtor must prove his ability to ensure the credit given to a third person, which would of course depend from this person's solvency.

j) **Giving in pledge the debt-free property if owned by the Bankruptcy Debtor.** As to be able to pay off the Creditors faster and in a more efficient manner, the Bankruptcy Debtor can pledge his debt-free property in order to obtain the payment means. Of course, the conditions have to be satisfacory as far as obtaining means from third persons is concerned. Otherwise, the creditors themselves do not have to appreciate this reorganization form if they can, by applying other forms, be paid off with higher amounts and more efficiently. This form is more convenient to the Bankruptcy Debtor than to the Creditors.

k) **Transformation of debts into shares or into stock capital**. Here we have new issuance of shares if Debtor's capital increases, if position of new stock holders must be defined as well as the relation of the Debtor against whom the Bankruptcy Proceedings were addressed, with these new shareholders. The capital enlargement can be considered only if it suits the Creditors, since the basic purpose of issuing new shares is the proper settlement of Creditors. This measure by itself does not have to represent a "new beginning" for the Debtor.

l) **Taking another (new) credit.** For this form it is not clear whether the claims transformation or Debtor's obligations are transformed into credit or

not. Namely, while transforming obligations into credit, the warranty issue is posed or that of guaranty for the execution of Debtor's obligations.[31] The pledge undertaken has not been formally provided as a particular Reorganization right, but it is indispensable that these two forms be simultaneously applied in order to protect first of all the Creditors.

m) **Obtaining new investment**. This Reorganization Form is close to the form under point 11) but only in respect of capital increase through share issuance. But, the acceptance of new investment can be done in another manner. As we see, this form requires other parties' participation if the obtaining a new investment is not considered as credit, which is not to be understood as the same thing. If any of the existing solvent parties intends to invest in the Bankruptcy Debtor, he would have to propose an investment program, which is a decision to be taken by the Creditors. In a way, a part of the Bankruptcy property is thus sold although this form can also be applied together with some other form.

n) **Cancelling or objecting of legally faulty claims by Creditors for the Bankruptcy Debtor.** While examining the Creditors' claims in the Bankruptcy Proceedings, the above action takes place relating to their objecting or cancelling. In the Reorganization Proceedings this form when combined with other ones is reasonable as Debtor's intention is to reduce his obligations.

o) **Settling the claims due.** This form requires additional explanations of the BPA. Namely, in the Bankruptcy Proceedings the matured and not matured claims have to be settled. This is a basic rule. However, in the Reorganization Proceedings it is not very clear what this form refers to. Does it refer only to the payment of due claims with fulfillment of particular conditions, or to the priority payment of all claims, so that those not due would in the majority of instituted reorganization proceedings be paid by applying some other Reorganization Form? Of course, and first of all, the Creditors will decide on this form too.

p) **Cancelling of Employment Contracts with the Bankruptcy Debtor.** This form represents also one of the actions undertaken in the Bankruptcy Proceedings, where the Bankruptcy Manager decides about employees whose employment contract have to be cancelled. If the Applicant of the Reorganization Plan evaluates that this form would enhace Debtor's continuation of work and if the Creditors agree, this may be possible with the combined application of some other Reorganization Form.

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[31] Eraković A., Stečajni zakon s komentarom i primjerima, Zagreb 1997., p. 143.

q) **Concession of not indebted property as the way of settlement of claims.** The not indebted property of the Debtor and property not pledged or inscribed as a guaranty for any other debt can be given for the claim settlement. The term "concession" may lead to some confusion. The problem is not about temporary concessions nor about claims warranty, but about the transfer of the Debtor's property part not being indebted by third person's rights or by other Creditors.

r) **Modifications and additions to the Statute and other acts of Bankruptcy Debtor, relating to incorporation and management.** If among other things in the Reorganization Proceedings the status of the Bankruptcy Debtor is changed, that shall lead to modification of the incorporation act and of other acts of Debtor. It is necessary to define every status modification since many forms in fact relate precisely to the stated matter. This is particularly true in the case of closing down of not profitable parts or facilities of Bankruptcy Debtor or in case of transfer of the whole or the parts of Debtor's property, the appearance of new parties to whom Debtors' property would be transferred, the new share issuance, etc.

s) **Merging or joining of Bankruptcy Debtor with other legal entities or natural persons.** In this measure it has not been defined when a new legal entity is formed, nor the rights of suche entity, or when the merging (joining) with the existing legal entty is taking place. Of course, here one should define precisely the execution of obligations due by legal entities to the Creditors and also the consequences of non-execution.

t) **Transfer of the whole or a part of the Bankruptcy Debtor's property to one or several existing or newly formed legal entities or commercial companies.** One of the Reorganization Forms refers also to the transfers of part or the whole property of the Debtor to one or several existing or newly founded legal entities, according to the BPA. One should specify this form, since it can create some misunderstandings, considering that such property transfer could lead to termination of business of the Bankruptcy Debtor. The property transfer can not be seen only as a transfer of means but also as transfer of all rights and obligations of the Bankruptcy Debtor. Other legal entities to whom the stated property (in the given sense) is transferred should create conditions for settling of Creditors' claims. However, this Reorganization Form provides as well that property part can be transferred. Therefor it should be defined which obligations have to be assumed by mentioned other legal entities and which have to stay with the Bankruptcy Debtor.[32]

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[32] Ibidem.

u) **Issuance of new stock values or cancelling of stocks already issued by the issuers – Bankruptcy Debtors to one or more existing or newly formed legal entities – commercial companies.** This form can create misunderstandings too, or cause the question as to whether the Debtor's rights and obligations are transferred in order to settle Creditors' claims, or some other disposition is at issue. If we accept the first point, we can not claim that transfer of all Debtor's rights and obligations is at issue. On the other hand, when applying this form, if other person is an already existing legal entity, then question of his warranty is posed. However, we shall treat it as utilization by Bankruptcy Debtor of his property.

v) **Resorting to other Reorganization Forms**. The Legislator has provided also the possibility of resorting to other Reorganization Forms to be proposed by the person in of reorganization plan. This means that several forms can be combined underlining the autonomy of intentions in the Reorganization Plan. However, one should be cautious, when choosing particular reorganization form, due to unified participation of Creditors in the plan acceptance and in its realization. A question can be posed about the reorganization forms that can be provided by the applicant of the Reorganization Plan that have not been already provided by the Legislator. This can figure only as an addition to other forms and would depend on the Bankruptcy Debtor or on his/her status and particularities.

The stated Reorganization Forms, as defined in the BPA, and those that the parties themselves can propose during the Proceedings must represent a basis for the realization of the Reorganization Proceedings. We believe that the Legislator has precisely defined the most of the existing Reorganization Forms. On the other hand, however, that could be done in a simpler manner, by defining a smaller number of forms or by suppressing several forms into one for their easier implementation. The Reorganization Forms are much more clearly regulated in the Bankruptcy legislation of Croatia which provides the possibility for the Proceedings parties or the plan Applicant to propose yet another form not specified by the Legislator. It has to be said that Reorganization Forms proposed by the plan depend on the nature of claims or debts and not only on the Bankruptcy Debtor (his status, form, activity, etc.) and on the Creditors' decision motivated mainly by the possibility of claims settlement.

5. Conclusions

The Debtor Reorganization Proceedings depend on forms being undertaken, i.e. on the content of the Reorganization Plan. The parties to the Proceedings prefer that the Debtor continues his work, although the Bankruptcy

Proceedings are instituted against him.[33] The Reorganization Proceedings are specific because they are carried out even during the Bankruptcy Proceedings. The Reorganization Proceedings of the Bankruptcy Debtor are a new institution, both in our legal science and in Serbian Bankruptcy legislation, intended to replace in a more efficient manner the institution of compulsory settlement.[34] The Reorganization Forms are various and some of them provide for a right to separate settlements of Creditors. However, all Reorganization Forms could be (even though the BPA specifies twenty one of them, not counting the possibility of proposing others as well) grouped in several sets, such as: transfer of Debtor's property to Creditors, sale to Creditors, postponement of claims payment, joining of Debtor with other newly formed and existing entities, and also property transfer to these entities. These forms are the basis of all stated ones. Other forms represent their additions and modifications without which the above stated ones could not be realized and without which the Reorganization Proceedings would not be efficient.

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PROCESNE MERE U REORGANIZACIJI STEČAJNOG DUŽNIKA U SRPSKOM ZAKONODAVSTVU

Procesi reorganizacije stečajnog dužnika predstavljaju novi početak za stečajnog dužnika. U vezi sa tim otvaraju se mnoga pitanja budućeg funkcionisanja stečajnog dužnika, kao i njegovog odnosa sa poveriocem, a isto tako i u vezi sa planom reorganizacije. O svemu tome, autor raspravlja u ovom članku, predstavljajući odgovarajuća rešenja iz srpskog zakonodavstva.

Ključne reči: reorganizacija, plan reorganizacije, stečaj, dužnik, poverilac, Srbija

[33] Dika M., Insolvencijsko pravo, Zagreb 1998., p. 75.

[34] Ibidem.

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CONTROL OF CONCENTRATION IN THE REPUBLIC OF SERBIA

This article deals with the existing provisions of the Law on Protection of Competition of 2009 concerning to the control of concentrations. Control of concentrations is relatively new feature of Serbian competition law since it was introduced in 2005 by adopting the previous Law on Protection of Competition. The basic principles of the previous regime have been maintained in the new Law, but with come changes from a procedural point of view.

Prior control of concentrations is based on compulsory notification of concentrations before they are implemented, provided that such concentrations meet the specified thresholds of income. The notification requirements cover mergers, acquisitions of control and certain joint ventures.

Concentrations are permissible, unless the Commission for protection of competition decides that they would prevent, restrict or distort competition on the relevant market. During the appraissal procedure, the Commission for protection of competition has a broad powers of investigation, as well as powers of directly imposing sanctions for distortions of competition and infringements of the Law.

Keywords: *control of concentrations, merger control, competiton law, protection of competition*

Introduction

Competition law of the Republic of Serbia is based on the Law on Protection of Competition (Zakon o zaštiti konkurencije, *Službeni glasnik Republike Srbije*, no. 50/09, hereinafter: the Law), which generally mirrors the provisions of competition law of the European Union. The Law replaced the previous Law on Protection of Competition of 2005 (*Službeni glasnik RS*, no.

79/05), which was adopted with a view to harmonize Serbian competition law with EU law and to ensure there is healthy competition in the market which will benefit to Serbian economy and consumers. The adoption of current Law was a new step to further harmonization, representing the legislator's intention to ensure more effective, fair and transparent competition Law system.

The new Law is designed to protect competition from harmful restrictions, with a goal of economic development and welfare of the society, particularly to the benefit of the consumers. It aims to do this by preventing anticompetitive practice and dominant positions by undertakings in Serbian market. For these reasons, the Law regulates restrictions of competition by restrictive agreements, abuse of a dominant position and concentrations of undertakings.

The Law applies to practices and acts conducted in the territory of the Republic of Serbia, as well as to practices and acts conducted outside its territory which affect or could affect the competition in the territory of the Republic of Serbia (Art.2). Accordingly, the Law adopts effects doctrine[1] and applies to all economic activities performed by undertakings which have effect of distorting competition in Serbian market (foreign undertakings may come under scrutiny of Serbian Commission for protection of competition (as the competent authority) if their activities take places in Serbia or affect competition in its territory).

Regarding the personal scope of application, the Law applies to all legal and natural persons that are engaged, directly or indirectly, permanently, occasionally or one-off, in trade of goods or services, regardless of their legal status, form of ownership, nationality or state affiliation, including:

1) domestic and foreign companies and entrepreneurs;
2) governments bodies, institutions for regional authonomy and local self-governments;
3) other natural and legal persons and associations (unions, business associations, sports organizations, institutions, cooperatives, holders of intellectual property rights, etc);

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[1] Radovan D. Vukadinović: "Some Critical Remarks Concerning the Act on the Protection of Competition of the Republic of Serbia", in: Wolrad Prinz zu Waldeck und Pyrmont et al. (ed.): *Patents and Technological Progress in a Globalized World*, Berlin/Heidelberg, Springer, 2009, p. 733.

4) public entreprises, companies, entrepreneurs and other undertakings, engaged in activities of public interest, as well as institutions entrusted with fiscal monopoly, unles the application of the Law would obstruct the performance of activities of public interest, i.e. entrusted activities (Art. 3).

Preventive control

Control of concentrations of undertakings (merger control) was introduced into Serbian Law in 2005, as a third component of system of competition law and important instrument for the maintenance of a competitive market structure. By replacing the Law of 2005, the new Law also deals with concentrations and contains specific provisions on their control. It retains the general schema of the previous regime (except for some changes to rules of procedure) which purpose is to prevent the creation (or expected abuse) of market power by undertakings and to maintain a market structure that is capable of delivering the benefits from competition in Serbian market.

The legislator recognized the economic importance of concentrations and the need for their regulation, since concentrations can have a significant impact of competition – the combined economic strenght of merged undertakings, or the cooperation between them, may produce a distortion of competition that is detrimental to the effective functioning of market. Due to this fact, it is very important to ensure that the restructuring of undertakings does not result in the creation of market power which may significantly impede competition and to review such activities before they take place. For this purpose, the Law provides mandatory control of concentrations and their notification to the Commission for protection of competition which is determined by specific income thresholds. This means that all concentrations with income above the thresholds defined in the Law are subject to prior control – such concentrations must be notified before their implementation and permission of Commission is required for each of them. Accordingly, the aim of control of concentrations under the Law is to enable the Commission to prevent undesirable market structure (by regulating changes in market structure) and to protect competition without the need to control directly possible abuses of market power.

The effectiveness of preventive control also demands that a concentration which is subject to control should not be implemented, so the undertakings must terminate its implementation until the issuance of the Commission's

decision (*suspension of concentration*).[2] The only exception from the obligation of termination relates to implementation of takeover notified to the compentent authority pursuant to the law regulating takeover of joint-stock companies or to the law regulating privatization, provided that the concentration is notified on time, that the acquirer does not exercise its managing rights based on the acquired rights or does so only to maintain the full value of investments based on a special approval of the Commission (Art. 64).

Concept of concentration

In order to cover all "operations bringing about a lasting change in the control of the undertakings concerned and therefore in the structure of the market"[3], the Law accepts a definition of concept of concentration which is in the line with the Article 3 of the EC Merger Regulation.[4] Pursuant to the Law, a concentration of undertakings shall mean:

1) the merger and other status change in which undertakings merge, pursuant to the law regulating commercial companies;
2) direct and indirect acquisition of control of other undertaking by one or more undertakings;
3) the joint venture with its aim to create a new undertaking or to acquire joint control of an existing undertaking performing on a lasting basis and with all the functions of an independent undertaking (Art. 17(1)).

According to this definition, the concept of control is its necessary element which essence is question whether previously independent undertakings have come or will come under common control. Pursuant to the Law,

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[2] Breach of the obligation of termination of concentration is sanctioned by the penalty according to the Art. 68 - if undertakings implement the intented concentration, the Commission will impose the measure for protection of competition in the form of an obligation to pay a monetary fee in the amount of not more than 10% of the total annual income,.

[3] This principle is presented in the Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation - O.J., no. L. 24/2004), Recital 20.

[4] The EC Merger Regulation adopts a concept of concentration which contains three elements: temporal element (permanent nature of the change), element of change (the need for structural change) and substantive element (legal and economic authonomy of the new business structure). See Edurne Navarro Varona et al.: *Merger Control in the European Union* - Law, Economics and Practice, Oxford, Oxford University Press, 2005, pp. 8-12.

control represents the possibility of exercising decisive influence on bussiness activity of an undertaking, in particular:

1) if the controlling undertaking, alone or acting jointly with another undertaking, has the characteristic of a controlling (parent) company or controlling member or shareholder, within the meaning of affiliated companies rules, pursuant to the law regulating commercial companies;
2) on the basis of ownership or other property rights over a whole or part of the property of another undertakings;
3) on the basis of rights deriving from a contract, an agreement or securities;
4) on the basis of claims or claims securing instruments or on the basis of the business practice determined by the controlling undertaking. [5]

The Law expressly excludes certain types of operations from its scope, considering they do not constitute a concentration pursuant to the Law and do not have to follow the notification procedure. The Law provides that concentration shall not be deemed to arise when:

1) the bank or other financial institutions or insurance companies temporarily acquire shares or stakes for resale, provided that they sell them within one year of the date of acquisition and they do not use them with a view to influence the undertakings business decisions that concern its market behaviour;[6]
2) the investment fund management company or investment fund acquires holding in undertaking, provided that the rights in respect of the holding exercises only to maintain the full value of those investments and not to influence the competititve behaviour of this undertaking;
3) the joint venture has its object the coordination of market activities of undertakings that remain legaly independent, whereby such joint venture shall be appraised in accordance with the provisions on restrictive agreements;

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[5] It is helpful to note that the Law does not draw a distinction between the horizontal, vertical and conglomerate concentrations and their effects. This distinction is important, because the Commission for protection of competition should take into account different factors in appraisal of different types of concentrations, due to the fact that horizontal concentrations are potentially the most damaging to the competitive process (in the same way that horizontal agreements are treated more strictly than vertical agreements).

[6] Commission may extend the set period at acquirer's request, provided that the acquirer proves that the resale of shares or stakes was not reasonably possible within the set period, but no longer than additional six months (Art. 18(2)).

4) the bankruptcy administrator acquires control of undertaking (Art. 18(1)).

In order to determine whether an concentration falls within the scope the Law, the Law provides the criteria for determing those concentrations that can be investigated. Their purpose is to separate out those large concentrations that can be only impemented upon approval issued by the Commission, assuming that they can have a detrimental effect on competition. These criteria are purely quantitative and based on income of undertakings, focusing on the size of the undertakings and not on their market power.[7] In that way, undertakings are enabled to determine with reasonable certainty whether they are under an obligation to notify - if these criteria were based on market power (which would require a prior determination of the relevant market), this would introduce considerable uncertainty.[8] Only exception is provided to concentrations that are implemented by takeover bid, pursuant to the regulations governing the takeover of joint-stock companies. According to the Law, those concentrations have to be notified regardless of meeting specific thresholds of income (Art. 61(3)).

According to the Law, concentration shall be notified to the Commission when:

1) the aggregate annual income of all undertakings concerned realized in world market in the previous financial year is more than EUR 100 milion, whereby at least one undertaking in the market of the Republic of Serbia has income over EUR 10 milion;
2) the aggregate annual income of at least two undertakings concerned realized in the market of the Republic of Serbia in the previous financial year is more than EUR 20 milion, whereby each of at least two undertakings in the market of the Republic of Serbia have annual income over EUR 1 milion in the same period (Art. 61(1)).[9]

In comparison with the previous regime, the new Law sets new, higher thresholds for the notification of concentration, which is an important change brought in by the Law. The thresholds in the Law of 2005 were very low, so the significant number of concentrations met the threshold and had to be notified to the Commission, even they could not affect competition. This was considered as unnecessary burden for the undertakings and for the work of

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[7] These criteria can also be based on the value of assets acquired or on market share.

[8] Richard Whish: *Competition Law*, Oxford, Oxford University Press, 2005, p.812.

[9] Income is calculated in accordance with Art. 7 of the Law.

the Commission,[10] and which was confirmed by the fact that the vast majority of the concentrations notified have obtained clearance.[11] By setting higher thresholds, the new Law now enables the Commission to focus on restrictive agreements and abuses of dominant position and to use its recources to deal with the most important concentrations, considering that it is very hard to asses such concentrations and to predict their effects on competition because of their complexity, size and geographical reach.

The Commission may, upon becoming aware of implementation of a concentration, investigate such concentration *ex officio* if it determines that the joint market share of the undertakings concerned in the Republic of Serbia amounts to at least 40%, or it reasonably assumes that such concentration would significantly prevent, restrict or distort competition (pursuant to the permissibility conditions according to the Art. 19), as well as in the case of any other concentration that is not approved according to this Law (investigation of concentration *ex officio* – Art. 62).

Notification

Concentrations, which fall within the scope of the Law, must be notified to the Commission within the period of 15 days as of the date of the conclusion of an agreement or a contract; announcement of the public invitation or bid, or closing of the public offer; or acquisition of control. That period shall begin when the first of those events occurs (Art. 63(1)). Unlike the EC Merger Regulation, the Law requires the undertakings to notify the concentrations within the specific term (the 7 days deadline has been extended to 15 days)

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[10] Radovan Vukadinović, *op.cit.,* p.741. See also Alexandr Svetlicinii: "Efficiency Defence in the Merger Control Regimes of EC and Republic of Serbia – A Comparative Perspective", *Pravni život,* no 14/2007, p. 250.

[11] During the period between 2006 and 2008, the Commission has dealth with a very large number of cases that required an investigation and analysis and the vast of majority of these cases related to concentrations (50,46% in 2006, 63,73% in 2007, about 85% in 2008). In the year 2006, there were 56 notifications which of 40 were approved (36 notifications were appproved in summary proceedings); in 2007, there were 125 notifications which of 105 were approved (100 notifications were approved in summary proceedings); and in 2008, there were 137 notifications which of 133 were approved (131 notifications were approved in summary proceedings). During this period only one concentration was prohibited (in 2006). See Annual reports of the Commission for protection of competition of 2006, 2007, 2008 (Godišnji izveštaji o radu Komisije za zaštitu konkurencije za 2006, 2007. i 2008. godinu), available at http://www.kzk.org.yu/?link=106&lang=0 , 13 November 2008).

and thereby failure to notify within that period may attract a fine.[12] The Commission will impose on undertakings periodic penalty payments (mesaure of payments of the procedural penalty) of from EU 500 to 5 000 for each day of acting in breach of the order of the Commission issued during the proceedings or failure to act in compliance with such order, under the conditions specified in Art. 57 (wich regulates administrative measures imposed by the Commission), whereby the procedural penalty may not exceed 10% of the total annual income (Art. 70).

Notification can also be based on the "good faith intention" to conclude a binding agreement or announce a bid: notification may be made when undertakings show a serious intentions of conclusion of the agreement by signing the letter of intention, by announcing its intention to make a bid, or in any other manner preceding the action that makes obligation to notify concentration (Art. 63(2)). This provision is designed to introduce more flexibility into process of control by allowing the undertakings the time necessary to prepare and file a complete notification, and to seek approval for concentration at an early stage in their negotiations.

In the case where control over whole or parts of one or more undertakings is acquired by another undertaking, concentration shall be notified by the undertaking acquiring control, while in the case of a joint venture notification shall be submitted jointly by all undertakings.

In orrder to regulate in detail the content and manner of notification of concentration, the Government of the Republic of Serbia adopted the Regulation on the Content and Method of Filing the Notification of Concentration (Uredba o sadržini i načinu podnošenja prijave koncentracije, *Službeni glasnik RS*, no. 89/2009).[13] The Regulation requires the notifying parties to provide all substantial information and documents that are necessary for an adequate examination of the proposed concentration, allowing the partes to submit other data and enclosures that they consider relevant for the assessment of proposed concentration (Art. 2).

Such information and documents relates to following:

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[12] The EC Merger Regulation (Art. 4(1)) only requires that undertakings notify the concentrations prior to their implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest.

[13] This Regulation replaced the previous Regulation on the Content and Method of Submittal of Request for Issuing of Approval for Proposed Concentration (Uredba o sadržini i načinu podnošenja zahteva za izdavanje odobrenja za sprovođenje koncentracije, *Službeni glasnik RS*, no. 94/2005) which was adopted under the previous Law.

- information about the applicant, all parties involved in concentration and representative or proxy of the applicant;
- detailed description of the form of concentration;
- copy of the act on concentration;
- detailed financial and other reports giving an insight into the financial position of the parties to concentration;
- total annual income of each party involved in concentration;
- data of the number of employees of the parties to concentration;
- list of five main suppliers and buyers of the relevant product of each party involved in concentration;
- data concerning value and volume of production and sale;
- definition of applicant of relevant market in which the parties operate as well as estimates of their market shares, prior and upon the concentration has been put into effect;
- list and estimates of market shares of the main market competitors of parties in the relevant market;
- all available analyses, studies, presentations or any other reports necessary for the parties, dealing with the estimation and analysis of concentration;
- graphic presentation (diagram) of the organizational structure of the parties and related undertakings;
- ownership structure over shares or stakes in the undertaking over which a control is acquired, prior and upon the implementation of concentration;
- list of other undertaking in the relevant market in which the parties solely or jointly hold 10% or more stakes or shares with voting rights, accompanied by a brief description of their prevailing business activities;
- list of all undertakings in which the members of the management or supervisory board of the parties to concentration are at the same time the members of the management or supervisory board of those undertakings;
- decisions of other authorities competent for assessment of concentration which have been submitted the request for assessment such concentration;
- detailed description of the distribution and retail network of the goods or services;

- description of the realized or intended research and development investments;
- description and detailed argumentation of the resulting benefits for the parties to concentration and consumers deriving from the implementation of concentration.

In the case when the notification does not contain certain information and suporting documents, the Commission will request the applicant to supply information necessary for the appraisal of concentration.[14]

The scope of information requirements set forth in the Reguation is generally consistent with the information under the Form CO pursuant to the Commission Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (O.J., L. 133/2004). But, unlike the Commission Regulation 802/2004, the Law and Government's Regulation do not introduce a simplified procedure for concentrations that are notifiable, but can not be expected to give rise competition concerns by stipulating a short-form for the notification.[15]

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[14] The request has to be submitted in Serbian language (using the Cyrillic alphabet) in one copy, in writing on an A4-sheet of paper accompanied by the electronic version.

[15] Pursuant to the Regulation 802/2004 (Anex II), concentration with Community dimension may be notified using the Short Form notification instead of Form CO when:

1) the joint venture has no, or negligible, actual or foreseen activities within the territory of the European Economic Area (EEA). Such cases occur where:
   a) the turnover of the joint venture and/or the turnover of the contributed activities is less than EUR 100 milion in the EEA territory; and
   b) the total value of the assets transferred to the joint venture is less than EUR 100 milion in the EEA territory;
2) none of the parties to the concentration are engaged in business activities in the same relevant product and geographic market (no horizontal overlap), or in a market which is upstream or downstream of a market in which another party to the concentration is engaged (no vertical relationship);
3) two or more of the parties to the concentration are engaged in business activities in the same relevant product and geographic market (horizontal relationships), provided that their combined market share is less than 15%; and/or one or more of the parties to the concentration are engaged in business activities in a product market which is upstream or downstream of a product market in which any other party to the concentration is engaged (vertical relationships), and provided that none of their individual or combined market shares at either level is 25% or more; or
4) a party is to acquire sole control of an undertaking over which it already has joint control.

The European Commission allowed a simplified procedure because its experience has shown that certain categories of notified concentrations are normally cleared without having raised any substantive doubts, provided that there were no special circumstances.[16] In such cases, the undertakings are reqired to provide less information[17] and the European Commission usually adopts a short-form decision declaring a concentration compatible with the common market. Those decisions are very short and often issued in less than 25 working day.[18]

Introducing a simplified procedure into Serbian competition law and simplification of the notification would be very practical for undertakings who must produce a considerable amount of information. That would not be so expensive and destimulating for them, so as to a limitation the level of required information would be useful for further removing regulatory burden from undertakings' transactions.

This improvement would be also in the interests of procedural efficiency, because it will reduce investigations of concentrations that are harmless to competition and enable the Commission to focus its recources on those cases that require more attention.

Appraisal of concentrations

The new Law retained the test for the substantive appraisal of the competitive impact of the concentrations (which was adopted in the previous Law) and stipulated that concentrations are permissible, except if they would significantly prevent, restrict or distort competition in the market of the Republic of Serbia or its part, in particular if such prevention, restriction or distortion is a result of the creation or strengthening of a dominant position (Art. 19). This means that concentrations are not *per se* prohibited and the Commission must approve them, unless it concludes that a concentration would have such an effect.

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[16] See Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004 (O.J., no. C. 56/2005), para.1.

[17] See Annex II of the Comission Regulation 802/2004.

[18] The European Commission has to adopt a short-form clearance decision within 25 working days from the date of notification (para.2 of the Commission Notice on a simplified procedure).

In fact, the Law adopted the SIEC test (*significant impediment to effective competition test*) which is accepted in the EC Merger Regulation and based on competition (structural market) considerations and not in terms of industrial policy or other similar policies.[19] According to the Art. 2(3) of the EC Merger Regulation, a concentration with a community dimension which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.

The SIEC test was introduced into EC merger control as a result of a long debate as to whether the dominance test contained in the Council Regulation 4064/89 should be changed and replaced by the SLC test (*the substantial lessening of competition test*) which is used in some other jurisdictions.[20] During this debate, the central question was whether the concept of dominance and dominance test was flexible enough to apply to unilateral effects in oligopoly markets and to close what some perceived to be a gap in the Regulation 4064/89.[21] Namely, the practical experience has shown that the Regulation 4064/89 could not apply to certain concentrations having anticompetitive effects, but not resulting in the creation or strengthening of a dominant position and that European Commission could not prohibit such concentrations.

For these reasons, the purpose of the SIEC test is to include concentrations that do create additional market power but that do not quite reach the threshold of a dominant position yet,[22] covering in that way all anticompetitive concentrations, even they do not create or strengthen a dominant posi-

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[19] Edurne Navarro Varona et al., *op.cit.* p.143.

[20] Pursuant to the Art. 2(3) of the Council Regulation (EEC) No 4064/89 on the control of Concentrations between undertakings (O.J., no. L. 395/1989, as last amended by Regulation (EC) No 1310/97 (O.J., L. 180/1997)), a concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market shall be declared incompatible with the common market.

[21] See Giorgio Monti: "The New Substantive Test in the EC Merger Regulation – Bridging the Gap Between Economics and Law?", *Law, Society and Economy Working Paper*, no. 10/2008, London School of Economics and Political Science – Law Department, available at: http://ssrn.com/abstract=1153661, pp.2-4; Edurne Navarro Varona et al., *op.cit.*, pp.144-147; Alistair Lindsay: *The EC Merger Regulation: Substantive Issues*, London, Sweet and Maxwell, 2006, pp.43-48.

[22] Stefan Voigt, André Schmidt: "The Commission's Guidelines on Horizontal Mergers: Improvement or Deterioration?", *Common Market Law Review*, no. 41/2004, p. 1585.

tion. Therefore, the SIEC test covers and concentrations with non co-ordinated effect which arise in oligopoly markets, regardless of that they are rare.[23]

According to the test, the concentration will be prohibited if it significantly impedes competition (even if no dominant position is created or strengthened). This means that a concentration will be prohibited only if it materially harms consumers.[24] Therefore, the concentration will be approved if sufficent competition remains after the concentrations to bring benefits to consumers, such as low prices, high quality products, a wide selection of goods and services, and innovation.[25]

In order to determine whether the concentration should be approved, the Law provides that the permissibility of concentration shall be determined in respect of the structure of the relevant market; actual and potential competitors; the market position of the parties to the concentration and their economic and financial power; possibilities of choosing the suppliers and the consumers; legal or other barriers to entry on the relevant market; the level of competitiveness of the parties concerned; trends of supply and demand of relevant goods or services; trends of technical and economic development; and consumers interests (Art. 19(2)).

By including the "trends of technical and economic development" (among the factors which the Commission is required to take into account in assessment of concentrations), the Law leaves the scope for taking into

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[23] Creating and strengthening of a dominant position is still an important indication for finding a significant impediment to competition, considering that relatively few concentrations fall within the SIEC test, without also creation and strengthening a dominant position. The Law introduces a new definition of the concept of dominant position that is similar to definition from German law. Pursuant to the Law (Art. 15), dominant position has an undertaking which has no competition or competition is insignificant, or which has a significantly better position in comparison with the competitors considering market shares, economic and financial power, access to supply and distribution markets, as well as legal or factual barriers to acces of other undertakings to the market. A single undertaking is presumed to be dominant if its market share is 40% or more. A group of undertakings is presumed to be dominant if aggregate market share of those undertakings is 50% or more provided that there is no significant competition between them (collective dominance). Unlike the Law, the EC Merger Regulation does not contain a legal definition because this concept is defined and developed by the Court of Justice and European Commission in the context of the application of Art. 82 of the Treaty of Rome. A dominant position is defined in terms of undertaking economic strength and their ability to act indepedently on the market.

[24] Alistair Lindsay, *op.cit.*, p.49.

[25] For a critical assessments of the SIEC test see Giorgio Monti, *op.cit.*, pp.2-21.

account considerations of efficiencies that may result from concentrations. It allows the Commission to take into account such considerations, but does not explicitly allow balancing the efficiencies generated by a concentration against its anticompetitive effects (*the efficiency defence*). The efficiency defence should make it possible to compare the costs and benefits from concentrations and to reject those concentrations for which the anticompetitive effects are stronger than the efficiency gains.[26] This means that treatment of efficiency gains in such a way is dealt only in the case where the competent authority may adopt a prohibition deficion.

Unlike the Serbian Law, the EC Merger Regulation explicitly (recital 29) introduced the efficiency defence into merger control by stipulating that the efficiencies argument put forward by the parties could be taken into account in the overall assessment of a concentration and that the European Commission might approve a concentration because of the efficiency benefits following from it, despite the significant impediment to competition.[27] By considering any substained efficiency claim and in the cases where the efficiencies brought about by the concentration counteract the effects on competition, and in particular the potential harm to consumers, that it might otherwise have, the European Commission may decide that there are no grounds for declaring the concentration incompatible with the common market.

Pursuant to the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (O.J., C. 31 2004),[28] the European Commission may issue such

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[26] Fabienne Ilzkovitz, Roderick Meiklejohn: "European merger control: do we need an efficiency defence?", in: Fabienne Ilzkovitz, Roderick Meiklejohn (ed.): *European merger control : do we need an efficiency defence?*, Cheltenham/Northampton, Edward Elgar, 2006, p. 76.

[27] The Regulation 4064/89 was traditionally interpreted as requiring concentrations to be judged on the basis of their anticompetitive effects alone and does not allow efficiency gains to be used to justify concentrations which would otherwise be unacceptable. *Ibid*., p. 43. Art. 2(1)(b) has been provided that the European Commission should take into account (among the other factors) the developent of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition. This provision is retained in the current Merger Regulation (Art. 2(1)(b)).

[28] These Guidelines are published in order to provide the conditions under which the European Commission may take efficiencies into account in the overall assessment of the concentrations. The Guidelines formally introduced the possibility for notifying undertakings to argue that a proposed concentration will generate efficiencies. This means that the burden of proof rests with the notifying parties.

decision in the case when it is in a position to conclude on the basis of sufficient evidence that the efficiencies generated by the concentration are likely to enhance the ability and incentive of the merged entity to act pro-competitively for the benefit of consumers, thereby counteracting the adverse effects on competition which the concentration might otherwise have (para. 77). The European Commission will take into account efficiencies claims only if efficiencies benefit consumers, are merger specific and are verifiable (para. 78-88).

By introducing the efficiency defence into EC Merger control policy, the Council and European Commission have accepted an increased role for economic analysis under the EC Merger Regulation, although the proper role of efficiencies in determing the impact of a concentration on competition has been the most controversial topic in the history of the EC Merger Regulation.[29] The real question in that debate was whether, and if so to what extent, the generation of efficiency gains should be taken into account by the Commission as a factor weighing in favour of approving the concentration,[30] i.e. whether a concentration that impedes competition, but which would lead to gain in efficiency should be approved.

There are many economic and political reasons justifying the introduction of an efficiency deffence in merger control.[31] Economic reasons relate to efficiencies that concentrations generate and which are the basis for treating concentrations more benignly than cartels, notwithstanding that both eliminate price competition between previously independent companies.[32] Concentrations can yield efficiency gains in several ways,[33] contributing in that way to achieving the goals of an antitrust system - whether promoting consumer welfare, total welfare or efficiency – and therefore provide a genuine benefit to society.[34] Political reasons relate to considerations of transparency and to importance of the international competitiveness of enterprises, espe-

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[29] Alistair Lindsay, *op.cit.*, p.511.

[30] *Loc.cit.*

[31] Fabienne Ilzkovitz, *op.cit.*, p.44.

[32] Alistair Lindsay, *op.cit.*, p.512.

[33] These ways are following: by allowing a better exploitation of economies of scale, economies of scope and learning economies; by enhancing technological progress; by increasing the bargaining power of the merging firms; and by improving the efficiency of management. See Fabienne Ilzkovitz, *op.cit.*, pp. 47-50.

[34] Alistair Lindsay, *op.cit.*, p.512.

cially given the globalization of markets.[35] It is considered that efficiencies which increase competition in the market are unambiguously to be encouraged.[36]

Considering that Serbian Law does not contain express provision for an efficiency defence, the Commission should follow these principles and criteria in balancing alleged efficiency and potential harm within its overal appraisal. It should also publish the guidelines on how should efficiencies be treated in concentration appraisal, because it is not clear how Commission in practice consider the efficiency claims. This would be useful for undertakings, because they should be able to predict with reasonable certainty whether a concentration that might imdede competition could be approved on the basis of their efficiency claims in defence of such concentration.

Although there is no express provision for an efficiency defence, the Law still allows the notifying parties to put forward their efficiency claims in defence of a 'problematic concentration', that is consequent upon the Art. 19(2) which provides that 'trends of technical and economic development' and 'consumers interests' should be taken into account in assessing of concentration. Therefore, it could be said that Serbian Law accepted an implicit efficiency defence which contains two elements: private and public.[37]

Private element relates to benefits for the consumers deriving from the implementation of the concentration, in particular to decrease in prices, increase in quality and selection and range of goods or services, and introduction of innovations. Namely, the notifying parties are required to submit description and detailed argumentation of the resulting such benefits, as a mandatory element of its notification (Art. 2(1)(23) of the Regulation), including and other data relevant for the assessment that they may submit. Public element relates to trends of technical and economic development, because parties claiming that the proposed concentration will lead to the increase in economic efficiency have to demonstrate the effects of such increase on the economy of the Republic of Serbia (Art. 6 of the Regulation).[38]

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[35] See Fabienne Ilzkovitz, *op.cit.*, pp.51-53.

[36] Alistair Lindsay, *op.cit.*, p.512.

[37] Alexandr Svetlicinii, *op.cit.*, p.251.

[38] See *loc.cit.* Form CO also contains a section that relates to efficiency gains (section 9.3).

As a consequence of the lack of clear methodology in economic assessment, the Commission might allow an efficiency defence only in those exceptional circumstances where the efficiencies are likely to be passed on to consumers and if it finds that a concentration will not signifilanty impede competition at all.[39]

Relevant market

An important part of the assessment of probable impact of a concentration on competition involves determination of the relevant market. Namely, in making this assessment it is first necessary to define the relevant market in geographical and product terms, which often has a decisive influence on the assessment by the Commission. In order to prescribe detailed criteria for defining the relevant market, the Government adopted the Regulation on Criteria in Defining the Relevant Market (Uredba o kriterijumima za utvrđivanje relevantnog tržišta, *Službeni glasnik RS*, no. 89/2009).[40] The Law and Regulation contains the same definition of the relevant market which involves analysing demand-size substitution and supply-side substitution (in terms of either product and geographical market).

Pursuant to the Law and Regulation, the relevant market is the market involving the relevant product market in the relevant geographic market. The relevant product market is the set of goods or services that the consumers and other undertakings consider substitutable for each other considering their quality, normal use and price. If certain goods or service does not have a substitute, the relevant product market is such goods or service. Substitutability of the set of goods or services will be determined on the basis of the possibility of buyers to switch to purchase of other goods or services (demand substitution). Exceptionally, the substitutability will be determined on the basis

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[39] There is an opinion that Serbian Commission should consider with great caution adoption of the concept of efficiency defence, because its incorporation in the merger assessment requires a great degree of complexity and without developed methodology and legal standards can negatively affect legal certainty and predictability of the merger assessment process. See *ibid.*, p. 256.

[40] The European Commission adopted Notice on the definition of relevant market for the purposes of Community competition law (O.J., C. 372/1997) which purpose is to provide guidance as to how the Commission applies the concept of relevant product and geographic market in its ongoing enforcement of Community competition law. According to this Notice, the purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face (para. 2).

of the possibility of other undertakings to switch to supply of the relevant product or service in the short time without incurring significant additional costs (supply substitution). The relevant geographic market is the territory in which the undertakings participate in supply or demant and in which the competition conditions are equal or comparable, as well as significantly different from the competition conditions in the neighbourging territories. It will be determined on the basis of the possibility of buyers to purchase of goods or services in other geographic areas (demand substitution) and on the basis of the possibility of undertakings from other geographic areas to supply the goods or service (supply substitution).

In practice, the Comission had determined relevant market in a large number of cases, which of the most were related to the cases in control of concentrations. In some cases the Commission has had to deal with undertakings' complaints who were in fundamental disagreement with the Commission over its determination of the product and geographical market. Those complaints have been related to manner in which the Commission determined the relevant market and to lack of serious economic analysis in its decisions, in particular to the application of hypothetical monopolist test which was accepted in the previous Regulation on Criteria in Defining the Relevant Market (Uredba o kriterijumima za utvrđivanje relevantnog tržišta, *Službeni glasnik RS*, no. 94/2005).[41] Pursuant to the previous Regulation the relevant market was defined by application of SSNIP test (small but significant non-transitory increase in prices by the hypothetical monopolist – *hypothetical monopolist test*). This test requires the definition of the specific market for particular products or services where the hypothetical monopolist could profitably introduce small, but significant and permanent increase in price.[42]

The new Regulation deos not provide application of SSNIP test and precisely provides that if it is not possible to determinate the range of products which are sufficiently close substitutes to form part of the same product market, the relevant product market is the goods and service that does not have a substitute. This practically means that the SSNIP test is now just one example of methods that Commission can use for defining the relevant market.

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[41] The Regulation of 2009 replaced the previous Regulation of 2005 which was adopted under the previous Law.

[42] Small but significant increase in price is increase in price in the range of 5% to 10%, while more permanent increase in price is a price rise of up to one year.

Procedure

Concentration assessment procedure established by the Law is administrative in nature, considering that the general administrative procedure rules shall apply to the procedure before the Commission unless otherwise regulated by the Law (although the Commission has a broad investigation powers). As an investigation and decision making body, the Commission has a strengthened powers of investigation and issuing mesaures for protection of competition that are improved by adopting new Law. Those improvements are made in order to contribute the effectiveness of the control procedure and to align the Commission's powers with those under the EC Merger Regulation. In the field of procedure, the previous system of control of concentration was considered unsatisfactory and ineffective, so the new Law would benefit current procedure and consequently protection of competition.

The formal procedure starts with notification of concentration that must be considered by the Commission in a precise deadlines. On receipt of notification, the Commission has a period of one month to issue a decision in summary proceedings or to issue a resolution on institution of investigation proceedings.[43] If the Commission institutes investigation proceedings, it must issue a decision in a period of three months.

Considering the importance of these deadlines and legal certainty in proceedings, the new Law explicitly provides that if the Commission does not issue a decision in these deadlines (one and three months), the concentration shall be deemed approved (Art. 65(2)).[44]

Commission may issue a decision directly, without performing the inquire proceedings, if in the proceedings insituted upon the notification, on the bassis of submitted evidence and other facts known to the Commission, it may be reasonably assumed that the concentration fulfils the permissibility conditions pursuant to the Law, i.e. that concentration would not significantly prevent, restrict or distort competition in the relevant market (*summary proceedings* – Art. 37).[45] But, if Commission determines that it is necessary to investigate concentration *ex officio*, it must continue *ex officio* the process of

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[43] This means that the investigation proceedings is split into two phases – summary proceedings and *ex officio* investigation of concentration.

[44] If concentration does not fall within the scope of the Law, the Commission will dismiss the notification of concentration.

[45] Consequently, the Commission may only approve such concentration in summary proceedings.

investigation based on the resolution on institution of investigation concentration *ex officio*.[46]

The Commission will investigate concentration *ex officio* if it reasonably assumes that a concentration does not fulfil the permissibility conditions, i.e. that concentration could significantly prevent, restrict or distort competition. These are the cases that require further investigation because the Commission has a reasonable doubts as to whether it should approve such concentration. If the Commission decides to further investigate, it must within three months of issuing resolution on institution of investigation *ex officio* either approve the concentration or prohibit it.[47]

If the Commission determines that there are no grounds for approval decision, it shall inform the notifying party on the important facts, evidence and other element on which it will base its decision and invite applicant to make a statement in a set time limit. In its statement, the applicant may propose special conditions that he is willing to accept in orther that implementation of concentration fulfils the permissibility conditions. Having in mind the proposed conditions, the Commission shall approve such concentration by determining special conditions and time limit for their fulfilment, as well as the manner of control of their fulfilment, provided that Commission judges that proposed conditions are suitable for fulfilling permissibility conditions (*conditional clearance of concentration* – Art. 66). This provision allows the undertakings to seek to modify the concentration that raises competition concerns in order to resolve the competition concerns and thereby gain clearance of their concentration.

During the inquire procedure, the Commission has two types of investigation powers to enable it to investigate the case: the powers to request information and the power to carry out inspections of undertakings and third persons.

The Commission may require (by resolution) the parties in the procedure to provide or to make available for inspection the relevant data held in written, electronic or other form, documents, objects containing data as well

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[46] The resolution on institution of proceedings *ex officio* shall be published in the *Official Gazette of the Republic of Serbia (Službeni glasnik Republike Srbije)* and on the internet site of the Commission, unless the President of the Commission estimates that such publishing would jeopardize performing the proceedings (Art.40).

[47] Unlike the EC Merger Regulation, the Law does not provide that a concentration which is approved shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration.

as other objects which may be subject to evidence, which the party is obliged to possess or it is reasonably assumed that party possess them (Art. 44). If it is reasonably assumed that the requested data, objects or documents are possessed by third person, the Commission shall issue a request for their providing or making them available for inspection (Art. 48).[48] The Commission may also require the other government bodies and organizations to cooperate with the Commission and to provide data, documents and other requested evidence that are at their disposal or to give a reasoned statement on the subject of the request in a set time limit. This obligation particulary refers to authorities and organizations competent for statistics, tax authorities, institutions for local self-government, chambers of commerce and other organizations entrusted with public competencies (Art. 49). Upon the Commission's request, the police shall assist during particular procedural activities, particularly in the case of investigation and temporary confiscation of objects, according to the law governing the police (Art. 50).[49]

In order to carry out all necessary inspections of undertakings and third persons, the Law grants the Commission a broad powers to conduct these activities. The Official who carries out the inspection may:

1) enter and check business premises, vehicles, land and other premises at the seat of the party and other places where the party or a third person performs business and other activities;
2) examine business and other documents, regardless of manner in which such documents are stored;
3) confiscate, copy or scan the business documentation, and if it is not possible due to the technical reasons, the official may confiscate the business documentation and keep it for as long as it is necessary in order to make copies of this documentation;
4) seal all business premises and business documents during the inspection;

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[48] If undertakings and third persons fail to act upon the Commission's request for providing requested data or if they provide incorrect, incomplete or false data, the Commission shall impose the measure of payment of the procedural penalty ranging from EUR 500 to 5000 for each day of acting in breach of this request or failure to act in compliance with it (Art. 70(1)).

[49] The party has a right to inspect the files and to copy certain parts of the files, except the minutes on discussing and voting, official reports and draft resolutions, files designated as confidential or protected data.

5) take oral and written statements from representative of the party or its employees, as well as the documents on the facts that are subject of the inspection, and if a written statement is necessary, the authorized person shall set the date until which this statement has to be delivered;
6) perform other actions in accordance with the aim of the proceedings (Art. 52).

If there is a reasonable doubt regarding existence of a danger of removing or altering the evidence in possession of the party or third person, an unannounced inspection may be ordered. Unannounced inspection is performed by a sudden control of premises or data, documents and objects that are to be found at such place, on which the party or the holder of premises and objects shall be informed at the moment of the inspection at the place of inspection (Art. 53).

If it is necessary to carry out the inspection in the premises of the party or a third person, the official of the Commission carrying out the inspection may enter the premises according to the resolution on carrying out of the inspection in those premises. If the owner or the holder of the premises objects to investigation, the forced entry may be performed with police assistance. If it is necessary to carry out the inspection in the apartement or other premises having equal, similar or related purpose, and the owner or holder of the premises objects, the President of the Commission shall immediately demand in writing an appropriate court order (Art. 54). If the documents, objects or objects containg data or other objects relevant for deciding in the procedings are found during the inspection, their temporary confiscation may be ordered, until the determination of all relevant data and facts contained in those documents or objects, but not later until ending of the proceedings (Art. 55).

If there is a risk of irrecoverable damages to persons that are directly subject to the actions or acts carrying out in proceedings, the Commission may by resolution order suspension certain actions or implementation of acts or to order the obligation of taking measures for prevention or elimination of their effects (*interim measures*). The interim measures may be in effect until issuing Commission's decision on permissibility of concentration (Art. 56).

In comparison with the previous Law, the most important change in the field of procedure concerns to Commission's ability to directly impose on undertakings penalities for distortions of competition and infringements of the Law. When the Commission determines such infringements, it will

impose a measure of protection of competition, measure of elimination of competition distortion or another measure presribed by the Law.

Under the previous Law, the Commission was entitled only to submit request for initation of misdemeanour proceedings (before competent misdemeanour court) against undertakings who prevent, restrict or distort competition (Art. 70(1)). This provision posed additional problem about the competence of misdemeanour courts to impose very high fines, because these courts are more used to adjudicate traffic offences and have their own criteria for independent decision-making.[50] Another shortcomings of the Law of 2005 were concerned to lack of measures of de-concentration and sanctions against undertakings who refuse to cooperate during the proceedings.[51]

Concerning to control of concentration, the Commission may impose following measures pursuant to the Law: measures of de-concentrations, measures for protection of competition and meaures of procedural penalty.[52]

Measures of de-concentration may be imposed if the Commission determines that a concentration has already been implemented without authorization or that are not fulfilled conditions and obligations in the case of conditional clearance. The Commission shall by decision impose on parties to the concentration measures that are necessary for establishing and preserving competition on the relevant market or other measures in order to set up the situation before the implementation of the concentration, in particular the division of commercial companies, disposal of the shares or stakes, or breaking the contract (Art. 67).

Measures for protection of competition shall be imposed on udertakings if they do not fulfil or implement a mesure of de-concentration (Art. 68(3)) or if they implement a concentration in breach of the obligation of its termination or implement a concentration that was not approved (Art. 68(4)). The Commission shall impose by decision fines not exceeding 10% of the total annual income, whereby this fines may not be imposed or enforced upon the expiration of three years as of the date of the performance of the activity or failure to fulfilling obligation.

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[50] See Radovan D.Vukadinović, *op.cit.*, p.746; Nebojša Jovanović, Dijana Marković-Bajalović: "Osvrt na Zakon o zaštiti konkurencije", *Pravo i privreda*, no. 9-12/2005, pp.45-46.

[51] See Radovan D.Vukadinović, *op.cit.*, p.745 and 746; Nebojša Jovanović, Dijana Marković-Bajalović, *op.cit.*, pp.34-35.

[52] Some of this measures have already been mentioned.

Measures of procedural penalty shall be imposed on undertakings if they do not provide to the Commission requested data or they provide incorrect, incomplete or false data; if they do not comply with the interim measures or notify concentration within set time limit (Art. 70(1)). The Commission shall impose periodic penalty payments of from EUR 500 to 5 000 for each day of acting in breach of the order of the Commission or failure to act in compliance with such order, whereby the procedural penalty may not exceed 10% of the total annual income. These fines may not be imposed or enforced upon the expiration of one year as of the date of failure to perform activities specified in Art. 70(1).[53]

Judicial review

The legality of final decision of the Commission can be reviewed by the Administrative Court according to the law regulating administrative disputes, unless otherwise regulated by the Law.[54] A lawsuit against the decision of the Commission may be filed by the party within 30 days from receipt of decision.

The filing of a lawsuit does not have suspensory effect considering that the filing will postpone the execution of the decision. The Commission may upon request of the claimant, suspend the execution of the decision, if such execution would cause irrecoverable damage for the claimant, particularly if it would probably lead to bankruptcy or termination of business of the claimant, provided that it is not contrary to the public interest. Request for suspension is made in a separate document and accompanied by the evidence of a filed lawsuit. Decision upon request shall be issue within the set time for payment which is determined in the decision.

If the court determines that the decision of the Commission is unlawful only in the part relating to the amount of the fines, it shall determine the decision in that respect, under the conditions prescribed by the law regulating administrative disputes.

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[53] If undertakings do not pay the pecuniary amounts of the imposed measures within set time period, enforced payment will be performed by tax administration according to the rules of enforced tax collection (Art. 57(7)).

[54] Decisions of the Commission will be subject to review by the Higher Commercial Court until the Administrative Court becomes operational pursuant to the law regulating courts. Under the previous Law, decisions of the Commission have been reviewed by the Supreme Court of Serbia.

The Commission for protection of competition

The Commission for protection of competition has been set up, pursuant to the Law, as an independent and autonomous organization with the status of a legal entity entrusted with public authorities pursuant to the Law. The Commission is responsible for its work to the National Assembly and shall submit to it its annual report of the activities.

The bodies of the Commission are the Council of the Commission and the President of the Commission, whereby the Council consists of the President and four members. The Council is responsible for making all decisions and acts within the competency of the Commission according to the Law and the Statute.[55] The President represents the Commission, makes decisions and perfoms other activities according to the Law and Statute.[56]

The President and the members of the Council are elected among prominent experts within the legal and economic field with at least ten years of relevant work experience, who have produced significant papers or practice in the relevant area, particularly in the field of competition protection and European law and who are respected as objective and impartial persons. They are appointed and relieved by the National Assembly on the proposals of the competent committee for trade activities, and for a five year term of office with the possibility of reappointement.

During their term in the Commission, the President and mebmers of the Council may not have any other public function or perform other professional activity, and perform any other public and private business, including consultant services and advices, except scientific activites, teaching activity at university and activities related to professional development. They are considered as public officials pursuant to the law regulating conflict of interest while performing public function. The President and members of the Council whose membership expired may not be representatives in proceedings before the Commission for at least two years following the end of their membership or employment.

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[55] The Statute regulates in detail the internal organization, manner of work and of conducting proceedings before the Commission, as well as the authorities for issuing other acts of the Commission. The Council issues the Statute upon prior consent of the Government.

[56] The Technical Service performs professional activtiies within the competence of the Commission pursuant to the Law, Statute and other acts of the Commission.

The funds necessary for the activities of the Commission are provided out of the incomes generated from the activities of the Commission. Financing of the Commission is made according to the financial plan prepared by the Commission for each year and submitted to the Government for approval. If annual calculation of incomes and expenditures of the Commission shows that total realized incomes of the Commission exceeds total expenditures, surplus in incomes will be paid to the budget of the Republic of Serbia. If functioning of the Commission would be jeopardized due to unsufficant income, the Commission will inform the Government and provide measures from its competence with the purpose of balancing incomes and expenditures, which includes the possibility of covering such expenditures by the budget of the Republic of Serbia. Financial activity of the Commission is subject to the annual auditing by the State Audit Institution.

Regarding to the functioning of the Commission, it can be noted that the (financial) independence could be limited due to the fact that the financial plan has to be confirmed by the Government. This could negatively affect the Commission, because it might come under certain pressures that could influence on its functioning and decision-making process.[57]

Conclusion

Concentrations offer a number of benefits for undertakings and for Serbian economy, because they facilitate undertaking restructuring and consolidation, improve the quality of management and undertaking performance, discipline management and enable undertakings to compete effectively on (world) market. Nevertheless, concentrations may negatively affect market and impede competition to the detriment of consumers, even though other aspect of the concentrations can yield efficiency gains. Considering those anticompetitive effects of concentrations it is necessary to regulate concentrations in proper way.

The adoption of the Law on Protection of Competition of 2009 is an important step in the development of Serbian competition law and therefore in the control of concentrations, since the experience with the previ-

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[57] See also Radovan D.Vukadinović, *op.cit.*, p.742; Nebojša Jovanović, Dijana Marković-Bajalović, *op.cit.*, pp.39-40.

ous Law has shown serious problems regarding to substantial and procedural rules. The new Law is adopted as result of social and economic necessity and in order to be fully compatible with EU competition law, since Serbian integration into EU is political aim.

Control of concentrations plays a critical role in the development of Serbian competition law and has a great publicity, because the Commission has been focused on the cases in concentration field since its establishment. Thereby, the Law contains important provisions that should improve the quality of decision-making process and consequently protect and develop competition in Serbian market. At the same time, the Law sets relatively high thresholds for notification and frees certain undertakings from the need to notify to the Commission, allowing them to rectructure and consolidate their place in Serbian market. Those undertakings now have possibility to reorganize in accordance whith their needs, while the larges one must fulfil the obligation of notification, although it is undesireble for them to be subject to control. Such facilitation of undertaking reorganization will stimulate market behaviour and investors who are interested to invest in Serbian undertakings and economy.

The explicitly stipulating the efficiency defence would be meant further facilitation, although the Commission has already the possibility to take into account the considerations of efficiencies that may result from concentrations. Considering the lack of criteria for treatment efficiencies in concentration appraisal, the Commission should follow the criteria prescribed in EU law. Competition law is an area where economics plays an important role, so it could be expected that the Commission accepts an increased role for economic analysing in its delicate deciding whether to approve the concentration that impedes competition, but which would lead to gain in efficiency.

Regarding the Commission's authorities during the appraisal proceedings, the strengthening its powers will contribute to the effectiveness of the control of concentrations and competition protection. In order to achieving this effectiveness, the Commission is given authority to prohibit all anticompetitive concentrations, as well as adequate powers to investigate concentrations and impose sanctions and measures by which it can operate to make the control of concentrations more effective and powerful.

Having in mind all provisions regulating control of concentrations, it can be concluded that the Law can be seen as good basis for better protection of competition and adoption of *acquis communautaire*, since the Law

is strongly based on EU competition law. Nevertheless, the effectiveness of the control of concentrations will depend on practical application of the Law and on Commission's decisional practice. The application of the Law's provisions on concentrations will be certainly difficult, since the control of concentrations is relatively new feature of Serbian competition law and requires highly specialised and detailed knowledge.

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KONTROLA KONCENTRACIJA U REPUBLICI SRBIJI

U ovom članku se daje prikaz odredbi novog Zakona o zaštiti konkurencije kojima se reguliše kontrola koncentracija u Republici Srbiji. Kontrola koncentracija je uvedena u srpsko pravo konkurencije donošenjem Zakona o zaštiti konkurencije iz 2005. u cilju zaštite konkurencije na srpskom tržištu i u cilju usklađivanja srpskog prava sa pravom Evropske unije. Novi zakon je zadržao osnovne principe iz prethodnog zakona, uz određene izmene proceduralne prirode koje se, između ostalih, odnose na povećanje pragova za notifikaciju i na proširivanje ovlašćenja Komisije za zaštitu konkurencije u postupku kontrole.

Kontrola se zasniva na obaveznom prijavljivanju koncentracija (notifikaciji) pre njihovog sprovođenja, pod uslovom da podležu kontroli, odnosno da prelaze pragove za notifikaciju. Kontroli podležu spajanja tržišnih učesnika, preuzimanja kontrole i određeni oblici zajedničkog ulaganja.

Koncentracije su dozvoljene, osim ako Komisija ne odluči da bi značajno ograničile, narušile ili sprečile konkurenciju na tržištu Republike Srbije. U postupku kontrole Komisija ima značajna istražna ovlašćenja, kao i ovlašćenje da određuje mere zaštite konkurencije protiv učesnika na tržištu koji postupaju protivno odredbama Zakona.

Ključne reči: *kontrola koncentracija, pravo konkurencije, Zakon o zaštiti konkurencije*

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THE CONSEQUENCES OF APPROACHING THE ECONOMIC SYSTEM OF THE REPUBLIC OF SERBIA TO THE MARKET ECONOMY CONDITIONS – INTRODUCING THE INSTITUTE OF NUPTIAL AGREE MENT INTO THE SERBIAN FAMILY LAW

Abstract

Family Law of the Republic of Serbia from 2005 introduces the possibility of closing nuptial agreements. Those agreements represent a novelty in the Serbian law. Before this law was passed, nuptial agreements had not been permitted, i.e. there had been no possibility to change the legal property regime. Joint property regime had been a compulsory property regime. The author of this article analyzes Art. 188. of the Family Law of the Republic of Serbia, which introduces the possibility for spouses or future spouses to regulate their property relations based on the existing or future property, in a way that suits their needs and interests, and she also examines at what extent is this agreement applied in Serbia.

Key words: Family Law/ Prenuptial agreement/ Postnuptial agreement

1. Introduction

Marriage, as well as extramarital union, is a personal relation. One could say that it is a rather distinctive legal relation of mostly personal nature. However, both marriage and extramarital union[1] result in property relations between spouses, or extramarital partners. In case of divorce or cessation of

[1] According to Art.191, par.2. of the Family Law of the Republic of Serbia, *Official Gazette of the Republic of Serbia* no.18, dated Feb. 24, 2005, property relations between extramarital partners are regulated by the provisions of this law referring to property relations between spouses.

cohabitation in extramarital union, the solution to those relations between former spouses or extramarital partners, regretfully, come down to court proceedings, which usually last long, and it often happens that, after they end, none of the parties end up satisfied.

That is exactly the reason why the Republic of Serbia's Family Law[2] introduced the possibility of closing a nuptial agreement.

The previous legal solution in the domestic law did not permit nuptial agreements; in other terms, it was not permitted to change legal property regime. The regime of joint property was a forced property regime. "Spouses may mutually close all sorts of agreements, and base all rights and obligations on them. They cannot mutually close only those agreements that change the property regime set by the law, as well as the agreements with which they renounce in advance the rights they are entitled to according to this law (for example, legal alimentation, share in joint property, etc.)."[3]

2. Nuptial property regimes – regime of joint property and regime of separate property

Before beginning to analyze nuptial agreement, regulated by the Republic of Serbia's Family Law, let's take a look at the types of property regimes.

In general, there are three nuptial property regimes: joint property regime, separate property regime, as well as a combination of the two.[4]

Just like in most contemporary legal systems, the Republic of Serbia considers legal nuptial property regime to be a combination of joint property regime and separate property regime.

Therefore, apart from separate property, which is the one obtained by a spouse either before marriage or during the marriage, through division of joint property, by inheriting, receiving as a gift or, by means of other legal affair which only provides rights[5], spouses also gain joint property through

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[2] Family Law of the Republic of Serbia, *Official Gazette of the Republic of Serbia,* no. 18, dated from Feb. 24, 2005.

[3] Art.326 of the Law on Marriage and Family Relations, *Official Gazette of the Federal Republic of Serbia* no.22/80 and 11/88, and *Official Gazette of the Republic of Serbia* no.. 22/93, 25/93, 35/94, 46/95 and 29/01).

[4] Prenuptial agreements, http://www.brand-co.net/zzrp/pdf/3_publikacije/publikacije_zavoda/predbracni_ugovori.pdf, pg. 1, dated 09. 10. 2009.

[5] Art. 168 of the Family Law of the Republic of Serbia, *Official Gazette of the Republic of Serbia,* no. 18, dated Feb. 24, 2005.

their work during the marriage.[6] The notion of joint property also encompasses the property gained in games of chance throughout the course of the marriage (unless a spouse who won the prize can prove that they invested separate property into the game), as well as the property obtained by exploiting intellectual property rights during the marriage.[7] However, for the property gained through work during the course of the marriage, or the property gained in games of chance or by exploiting intellectual property rights throughout the marriage to be qualified as joint property, it is necessary to prove that the marriage is not just a formal one, but that the spouses live in a union.[8]

Each spouse independently disposes and administers separate property.[9] Yet, if one spouse's separate property slightly increased during the marriage cohabitation, the other spouse is entitled to claim the amount of money that corresponds to their contribution, and if one spouse's separate property experienced significant increase during the marriage cohabitation, the other spouse is entitled to a share in the property, in the amount of their contribution.[10]

Spouses administer and dispose with joint property together and in agreement with each other, so it is assumed that a spouse will always perform regular administration affairs with another spouse's consent. In accordance with that, a spouse cannot dispose with their share in joint property, nor can they burden it with a legal affair between the living.[11] If joint property increased after the cessation of marriage cohabitation , every spouse has right to claim the amount of money or a share in the increased value, proportional to their contribution.[12]

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[6] Art. 171 of the Family Law of the Republic of Serbia, *Official Gazette of the Republic of Serbia,* no. 18, dated Feb. 24, 2005.

[7] Art. 172 and 173 of the Family Law of the Republic of Serbia, *Official Gazette of the Republic of Serbia,* no. 18, dated Feb. 24, 2005.

[8] In line with Art. 171, par. 1, of the Family Law of the Republic of Serbia, *Official Gazette of the Republic of Serbia,* no. 18, dated Feb. 24, 2005.

[9] Art. 169 of the Family Law of the Republic of Serbia, *Official Gazette of the Republic of Serbia,* no. 18, dated Feb. 24, 2005.

[10] Art 170 of the Family Law of the Republic of Serbia, *Official Gazette of the Republic of Serbia,* no. 18, dated Feb. 24, 2005.

[11] Art. 174 of the Family Law of the Republic of Serbia, *Official Gazette of the Republic of Serbia,* no. 18, dated Feb. 24, 2005.

[12] Art 175 of the Family Law of the Republic of Serbia, *Official Gazette of the Republic of Serbia,* no. 18, dated Feb. 24, 2005.

It was already mentioned that, until the Family Law entered into force in 2005, the regime of joint property in the domestic family law was an imperative legal property regime.

Such solution was not a random one. Namely, regulation of spouses' property relations by introducing a regime that differs from the legal property regime was prohibited after the World War II in all European countries where multiparty system, market economy, and private property were replaced by a single-party system, directed economy, and state and public property.[13]

Such regulations certainly do not correspond to the economic conditions of real market economy, so approaching the Serbian economic system to the conditions of this economy, as well as democratization of family relations caused such a rigid norm to be abandoned. The Family Law of the Republic of Serbia from 2005 enabled spouses to close legal affairs in accordance with their needs, in order to regulate property relations in marriage, including the possibility of spouses or future spouses regulating their property relations based on the existing or future property in a way that answers their needs and interests.[14] Therefore, having in mind that the joint property regime is no longer a compulsory one, spouses can close not only all legal affairs related to their separate property (for example, a sale contract or a gift contract), but also all contracts referring to the joint property regime (for example a contract on administration and disposal with joint property, or a nuptial agreement).[15]

3. Nuptial agreement in the Serbian law

Nuptial agreement is a novelty in the Serbian family law, and it has attracted great attention not only in court practice and legal theory, but also in the wider public.

Therefore, we will see how the Family Law of the Republic of Serbia regulates this agreement.

According to Art.188 of the Law:

"(1) Spouses or future spouses may use an agreement to regulate their property relations based on the existing or future property (nuptial agreement).

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[13] Bojan Pajtić, "Nuptial Agreement in the Serbian Family Law", Legal Life - Year 57, book 520, no. 10 (2008), pg. 341.

[14] Prenuptial agreements, http://www.brand-co.net/zzrp/pdf/3_publikacije/publikacije_zavoda/predbracni_ugovori.pdf, pg. 3, dated Oct. 9, 2009

[15] Marija Draškić, "Nuptial agreement", Public Notary Law, Belgrade, 2006, pg. 391.

(2) Nuptial agreement must be closed in written form, and it has to be verified by a judge, who is obliged to read the agreement to the spouses before verifying it, and warn them that it excludes the legal regime of joint property.

(3) Nuptial agreement referring to real property is entered into the public register of rights over real property."

The institute of nuptial agreement has been introduced into the Serbia law in order to provide spouses with a possibility to regulate their property-legal relations differently than the dispositive norms of the Family Law do. [16] Using nuptial agreement, as a sui generis agreement, spouses may revise marital property regime set by Art.168-187 of the Family Law, by regulating property rights and manner of administration over separate and joint property, acquired before or during the marriage. They may close this agreement when they are getting married, or during the marriage, on their own free will, and in a way that suits them best. Therefore, in the Serbian law, nuptial agreement can be closed between spouses who already got married, and by future spouses. Nuptial agreement closed by future spouses (i.e. persons who have not gotten married yet, but they are expressing their will to do so), will become legally effective only if the marriage is actually closed.

There is a question whether extramarital partners may close a nuptial agreement. Although the Family Law does not explicitly state that extramarital partners are potential contractual parties in nuptial agreement, the fact that the Law equals marital and extramarital union in terms of the effects they produce, implies that extramarital partners can also be subjects of such legal affair. Perhaps, when it comes to extramarital partners, this agreement should be called an agreement between extramarital partners, as is the case in the German law, which makes a difference between nuptial agreements closed by persons willing to get married, or persons who are already married (Ehevertrag), and an agreement of the same purpose, closed by extramarital partners (Lebenspartnerschaftsvertrag).

The Law defines the subject of a nuptial agreement as contracting of a property regime that deviates from lawful marital property regime.[17] Yet,

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[16] Bojan Pajtić, op. cit., pg. 344.

[17] A good example of agreeing on property regime by means of a nuptial agreement, which deviates from the legal marital regime would, for example, look like this: In case of divorce between Marija and Petar Petrovic, Marija will get a half of the apartment, a washing machine, a bedroom, and a car, which are wedding presents, and a monthly allowance of RSD30,000 if she is unemployed. Peter will receive the second half of the apartment, along with the rest of movables and immovables obtained during the marriage.

apart from this basic subject, which is the only one specified by the law, nuptial agreements may cover a number of subjects, such as division of joint property; agreement on temporary renunciation of a right to demand division of property; determination of different shares in the property obtained during marriage, setting a manner of exploitation of an apartment; agreement on a manner of property administration and disposal; setting the right to privileged purchase for a certain object, etc.[18]

When it comes to the form of this agreement, the Law states the form of a public document as a compulsory one, which means that those agreements are closed in written form, and they have to be authorized by a competent judge, but if real estate forms the subject of an agreement, it has to be entered into the public registry of real property rights.

Limitations of the freedom of agreeing in case of nuptial-property agreements, can be divided into general and special ones. General limitations are envisaged by Art. 10 of the Law on Obligations.[19]

Special limitations are derived from the significance of marriage and family, which is a basic cell of the society. That is why family relations are dominantly regulated by imperative norms, so subjects of family relations are greatly limited when it comes to disposal with their will in case of mutual closure of legal affairs. Spouses cannot mutually close an agreement contrary to the nature of marriage (i.e. their personal and property relations).[20] Thereby, according to the Family Law, renunciation of alimentation rights has no legal effect.[21] Property relations are regulated by the Family Law, and it can also be done by means of an agreement, provided that the agreement is in line with the law.[22] Apart from that, the Family Law proscribes that spouses may regulate their property relations by a nuptial agreement, which, again, has to abide by the law.[23]

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[18] Bojan Pajtić, op. cit., pg. 345.

[19] Art. 10, Law on Obligations: "Parties in obligations are free to regulate their relations in their own free will, within the limits of compulsory regulations, public order and good customs"

[20] Pajtić, op. cit., pg. 347.

[21] Art. 8, Family Law of the Republic of Serbia, *Official Gazette of the Republic of Serbia,* no. 18, dated Feb. 24, 2005.

[22] Art 9, Family Law of the Republic of Serbia, *Official Gazette of the Republic of Serbia,* no. 18, dated Feb. 24, 2005.

[23] Art. 29, Family Law of the Republic of Serbia, *Official Gazette of the Republic of Serbia,* no. 18, dated Feb. 24, 2005.

We can conclude that nuptial agreement is valid in the Serbian law if spouses or future spouses, who are closing the agreement, have ability to work, if the statement aiming at closure of this agreement is made freely and seriously at the moment of its closure , if the agreement is closed in a form proscribed by law, and if it is not contrary to compulsory regulations, public order and good customs.

4. Arguments in favor and against nuptial agreements

The institute of nuptial agreement in Serbia, as well as in the world (with the exception of Anglo-Saxon countries) seems to be somewhat controversial. Therefore, we will take a look at the arguments speaking in favor of nuptial agreement, and at those against it.

4.1. Arguments in favor of nuptial agreement:

1. Closing a nuptial agreement does not mean that spouses or future spouses are anticipating a divorce.
2. The question of finances will certainly be made at a certain point.
3. Nuptial agreements may preserve family relations and inheritance.
4. Financial benefit of children from prior marriage can be protected by this agreement.
5. In case of divorce, nuptial agreements eliminate conflicts on property and finances.
6. Nuptial agreement states in advance the property a spouse wants to allocate to children or other family members in case of death.

4.2. Arguments against nuptial agreement:

1. Nuptial agreements are not romantic.
2. Nuptial agreements make an impression that there is a lack of trust between spouses or future spouses.
3. Nuptial agreements may cause indignation between spouses, or future spouses.
4. Nuptial agreements may cause an impression that one spouse (or future spouse) lacks life devotion to the other spouse.[24]

Despite different interpretations, you will agree (as well as advocates and opponents of those agreements) that the existence of choice is a good thing.

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[24] http://marriage.about.com/cs/agreements/a/loveormoney.htm, dated Sept. 16, 2009.

5. Instead of a conclusion

Even though it represents a novelty in the Serbian law, the institute of nuptial agreement has been well-known in other countries laws for decades, especially in Anglo-Saxon countries and Western European countries.

The U.S. make difference between prenuptial agreement, closed before getting married, mostly in order to regulate the question of alimentation and division of property in case of divorce or spouse's death[25] and postnuptial agreement, which is closed after two people get married, in order to define spouses' property rights in case of death or divorce.[26]

Great Britain is also familiar with those agreements, but they are called settlement, which may be closed before or after partners get married - antenuptial settlement i postnuptial settlement. Their purpose is to provide alimentation to one spouse or children, at the same time preserving the other spouse's capital. Yet, in case of separation, divorce or marriage annulment, court may decide to allocate the property belonging to one spouse in favor of the other spouse and children, or to change the conditions of any existing antenuptial or postnuptial settlement. [27]

A predominant legal property regime in Western European countries is a system of spouses' separate property. In Germany and Austria, nuptial agreement mostly serves to determine either acquirement union or joint property.[28]

It can be stated that this agreement still has not taken roots in Serbia, which can be explained by the fact that the possibility of closing a nuptial agreement was introduced only in 2005, and that the citizens are not well-informed about what this agreement actually implies. We have only several dozens of prenuptial agreements per 39 thousand of marriages closed per annum. Prenuptial agreements are mostly closed between older, wealthier spouses, who were either already married, or have established social positions and bigger assets. In Belgrade municipalities Stari Grad and Palilula, seven prenuptial agreements were closed in 2006, one in 2007, and none in 2008.[29]

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[25] Black`s Law Dictionary, West Group, St. Paul, Minn., 2001, pg. 546.

[26] Black`s Law Dictionary, West Group, St. Paul, Minn., 2001, pg. 540.

[27] Oxford Dictionary of Law, Oxford University Press, 1997, pg. 285.

[28] Bojan Pajtić, op. cit., pg. 349.

[29] http://petarj.blogspot.com/2008/04/malo-predbranih-ugovora.html, dated Sept. 16, 2009.

One of the reasons for the small number of nuptial agreements in Serbia is economic situation of future spouses. A number of young people getting married do not own real estate. What is well-known is that nuptial agreement regulates division of the existing property, but it is unknown that the law offers a possibility to regulate the division of future property.

Those who close nuptial agreements at first seem overly rational. And love which is or should serve as basis for marriage is not rational. On the other hand, marriage, as well as life in extramarital union, necessarily creates property relations that can become tangly if it comes to a divorce or cessation of extramarital union. The choice: to close, or not to close a nuptial agreement, certainly lies upon those who are to step before a registrar and say "Yes," as well as on those who have already done so.

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POSLEDICE PRIBLIŽAVANJA EKONOMSKOG UREĐENJA REPUBLIKE SRBIJE USLOVIMA TRŽIŠNE PRIVREDE-UVOĐENJE INSTITUTA BRAČNOG UGOVORA U SRPSKO PORODIČNO PRAVO

Abstrakt

Porodični zakon Republike Srbije iz 2005. godine, uvodi mogućnost zaključenja bračnog ugovora. Ovi ugovori predstavljaju novinu u srpskom pravu. Pre donošenja ovog zakona, bračni ugovori nisu bili dozvoljeni, odnosno nije postojala mogućnost izmene zakonskog imovinskog režima. Režim zajedničke imovine bio je prinudni imovinski režim. Autor ovog članka analizira član 188. Porodičnog zakona Republike Srbije koji uvodi mogućnost da supružnici, odnosno budući supružnici urede svoje imovinske odnose na postojećoj ili budućoj imovini na način koji odgovara njihovim potrebama i interesima i razmatra u kojoj je meri ovaj ugovor u Srbiji zaživeo.

Ključne reči: Porodično pravo-Bračni ugovor-Predbračni ugovor

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REFORM OF LEGAL FRAMEWORK REGULATING SPORTS IN THE REPUBLIC OF SERBIA

Summary

Within the ongoing Sports System reform process, The Republic of Serbia is faced with a new legal challenge that is both demanding and complex. This challenge can be viewed as a necessity to reorganize, modernize and strengthen the sports system and to adjust it to new legal and technical standards arising from modern sports practice, rules of international sports associations, Council of Europe conventions and relevant European Union regulations. Besides that, forthcoming privatization of sports organizations, public enterprises and sports facilities that are currently stately owned is a very specific and highly demanding legal and managerial problem. Legal ground for resolution of that problem should be provided by the provisions of the future law on sports which is currently being drafted.

Generally speaking, legal framework regulating sports system and sports activities in the Republic of Serbia is a very interesting research topic, because of the variety of legal, organizational and financial problems that have to be solved in the forthcoming years, in order to organize and establish effective and efficient sports system which would support further development of sports in Serbia and recognize sports activities, not only as a fun and joy, but also as the branch of the economy of the country. Law on Sport which is currently in effect in Serbia is very obsolete, based on a concept of sport system established during the last decades of the 20th century. Because of that, in recent years, Government of the Republic of Serbia tried to draft a new Law on Sport, but the job has never been finished. For Serbia, at the moment of choosing the model for the sports system reform and the reform of legal framework regulating sports system and sports activities, the factor that must be, above all, taken into account is the constitu-

tional/legal concept of the state itself and the experience of other countries in the region, as well as the best legal practice of the Western European countries in that field. New Law on Sport and other sports regulations in Serbia need to be brought into accord with European standards to pave the way for the country's eventual integration into the European Union and the example of other transitional countries could be a clue for success.

Key words: *sport, regulatory reform, legal framework, privatization, sports organizations.*

* * *

Serbia has quite a long history of legislative regulation of sports.[1] The importance of sports as socially beneficial activities, as well as the need for their being governed legislatively, are also pointed by the provision of the Republic of Serbia Constitution, according to which the Republic should govern and secure the system in the field of sports (Article 97).[2] This means that legal ground exists for the establishment of a mechanism for the protection of sports and activities associated with them, as well as the possibility of providing legal protection for the fundamental principles of fair play and democratic values promoted by sports. By that constitutional provision, Serbia recognized the public interest in the field of sport. That is absolutely in line with comparative legal practice in Europe where constitutional provisions dealing with sports issues vary in their form and content.[3]

Furthermore, the Serbian Constitution prescribes that the autonomous provinces should deal, in conformity with law, with matters of provincial importance in the field of sport (Article 183) and that municipalities should see to the satisfaction of citizen's needs in the field of sports and physical culture, in cinformity with law (Article 190). Theoretically, these types of constitutional provisions could ensure a greater right of access to sport.[4]

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[1] Before the adoption of the Sports Law in 1996, sports activities were regulated by provisions of the Physical Culture Law (RS Official Gazette, No. 5/90) and other laws that were its predecessors.

[2] RS Official Gazette, No. 98/2006.

[3] For example, constitutions of Hungary, Switzerland, Portugal, Spain, Croatia, Romania and Lithuania contain provisions that open the door to state intervention for support and promotion of sport. Besides that, in some countries, constitutional norms provide a right to sport and physical activity.

[4] Andre-Noel Chaker, Study on national sports legislation in Europe (1999), Strasbourg: Council of Europe Publishing, p 5.

The question of setting the modality and scope of regulation of sports, as well as the question of establishing the mechanism for legal protection of sports and protection of legal relations occurring in sports and in connection with sports, were posed with the inclusion of sports in the Constitution of the Republic of Serbia. In that respect, there is a need for identifying many other segments of the legal system, which should make a contribution to the development and protection of sports in our country (regulations dealing with labor, social security, taxation laws, regulations dealing with building construction and urban planning …).

Serbia has been at a standstill for the last ten years, when it comes to the reform of legal framework that regulates the sports. Though there is widespread agreement that the present legal framework regulating sports in Serbia is badly in need of overhaul, it has been remarkably resilient. Despite political upheavals in 2000, which had the outward appearance of a revolution, nine years later the basic structures of the state apparatus and sports movement apparatus (NGO Sports Sector) that served the Milosevic regime and its communist predecessors were still in place due to the fact that obsolete Law on Sports that was enacted in 1996 have not been replaced by new, modern and liberal Law on Sports. Because of that, it appeared that political discontinuity had been followed by institutional and legislative continuity in Serbian sport system.

After the Ministry of Youth and Sport of the Government of the Republic of Serbia was established, it set as one of the most important objectives to be achieved, the enactment of the new Law on the sport which should identify, analyze, adopt and regulate all new changes in the society that are reflected in the sport (changes such as privatization, termination of the federal state, the new Constitution). Daily talks about the new Law on sports resulted at the end of April 2009, when it came out that the Ministry of Youth and Sport restrictively discussed about the Draft Law on Sports that has been presented to public and widely criticized by experts during the summer 2009. The second – amended and hopefully improved – version of the Draft Law on Sports is expected to be presented in late November 2009. Meanwhile, the only reform activity in the field of sport that was brought to the end was adoption of the Sports Development Strategy in the Republic of Serbia for the 2009-2013 period. It was adopted by the Serbian Government at its 27 November 2008 session. The adopted strategy also includes a chapter dealing with the performance of legislative reform in the field of sports.

The 1996 Law on Sports and its Application

The 1996 Law on sports is fundamental, so-called umbrella law, which should deal all-inclusively with sport-related matters in the Republic of Serbia. At the time of its adoption, many of its provisions were a novelty and a step further in dealing with the legal relations occurring in or in connection with sports. However, because of the many political, economic, legislative and organizational changes made over the past thirteen years, many provisions of this law have become obsolete, ineffective and imprecise.

Furthermore, the provisions of that law are largely out of keeping with the European Union legal standards, the expansion of which particularly speeded up over the last ten years. However, it biggest fault was not to do with the contents of its provisions, but with its bad, irregular, unequal and selective application.

A specific problem was and still is posed by the fact that in the system of regulations of the Republic there isn't a large number of bylaws and regulations in particular. Of altogether sixteen regulations that should be enacted in compliance with provisions of the Law on sports, only seven were enacted and their application in practice was inconsistent and almost symbolic.[5]

The terminological disharmony of Law on Sports and inconsistency of its norms were made even greater with the adoption of the new Serbian Constitution. The best example in that respect is Article 26 in which the term "socially-owned capital" is used,[6] which is no longer existent in the Serbian legal system. Moreover the provisions dealing with the existence of some governmental agencies, bodies and institutions which are responsible for certain matters in the field of sports, are no longer in keeping with the current Serbian civil service system and the rules prescribed by State Administration Act[7], Civil Servants Act[8] and Public Agencies Act[9].

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[5] Dejan Šuput, Sports in Serbia (2009), in: Survey Republic of Serbia No. 1, p 77.

[6] The use of the term "socially-owned capital" was problematic even before adoption of the new Constitution, i.e., while the 1990 Serbian Constitution was still valid, because the term "social property" was used in it, not the term "socially-owned capital".

[7] RS Official Gazette, No. 79/2005.

[8] RS Official Gazette, No. 79/2006, 81/2005 - correction, 83/2005 – correction, 64/2007, 67/2007 – correction and 116/2008.

[9] RS Official Gazette, No. 18/2005 and 81/2005.

The Law on Sports is also without provisions which would be conducive to the institution of a mechanism for the protection of sport buildings and facilities which would be more effective than the existing one, as well as those which would provide for development and quicker construction of new sport buildings and facilities. Furthermore, sport activities have not been defined clearly and exhaustively enough. What are also lacking are clear requirements for engagement in sporting activities, as well as the requirements to be met by individuals and legal persons wishing to deal with technical and managerial matters in the field of sports. Neither does the Law on Sports provide a system of licensing of legal persons and individuals pursuing lines of business associated with sports (e.g., licensing of sport buildings, fitness centers, coaches, sports physicians, sports medicine establishments…).

What is also wrong with this law is that it does not deal properly with the possibility of establishing sport joint-stock companies, like those which have been operating in the European Union countries for quite a number of years now.

A special problem is also posed by the fact that the standing Law on Sports does not include the rules of privatization of sport organizations, including the privatization of the state-owned sport buildings and facilities. Even so, Article 26 of this law provides the rules that make up a friendly legislative environment for the misuse and factual privatization of sport organizations which are using and managing socially owned capital and are registered as sports associations (non-governmental organizations). According to Article 26, paragraph 1, of the Law on Sports, the socially-owned capital in a sport organization having the status of an association should be managed by its members on equal terms. According to paragraph 2 of the mentioned article, the bylaws of a sport organization may make provisions for certain management rights to be transferred to an individual or legal person who/which brings into it funds in the amount specified in the sport organization's bylaws.

The mentioned provisions make it possible for the management of socially-owned or actually state-owned property of substantial value to be entrusted to an individual who does not thereby becomes the owner of that property *de iure*, but who manages it *de facto* as its owner and earns high revenues in the process, on the basis of the transferred right of management. The provisions of Article 26, paragraph 3, of the Law – according to which the individual (natural person) or legal person to whom/which the right to manage a sport organization has been transferred pursuant to paragraph 2 of the men-

tioned article, is liable for all commitments arising from the activity of the sports organization concerned with his/its entire assets – is only a formal guarantee which was easily avoidable in practice, because more often than not, the individuals who had acquired the right to manage a sport organization had no property registered in their names.

Under such legal circumstances, many of the sport organizations which were registered as associations and were managing socially-owned capital got poor in the 1990s, while the individuals to whom the right to manage them was transferred got rich. The sport societies and sport clubs which were registered as associations of citizens are still everybody's and nobody's, like in the past, which also goes for their assets, which formally speaking, belongs to associations, i.e., to all members of associations, who manage it collectively.[10] In reality, such property is not managed by all members of associations, but by powerful individuals instead. Such "application" of the obsolete legal framework is spoiling the reputation of sport and causing the sport to be perceived as a source of crime, not as a socially beneficial activity.[11]

In contrast to the obvious obsoleteness of the Law on Sports as the main source of sports law in the Republic of Serbia, the Law on Counteraction of Violence and Unbecoming Conduct at Sport Events[12] and the Law on Prevention of Doping in Sport[13] are a good example of regulations which are fully up to international standards and make it possible for government agen-

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[10] Sports organizations (sports clubs, sports societies and sports unions) till the summer 2009, were operating in accordance with the self-management system rules, i.e., in accordance with the provisions of the Law on Associations of Citizens and Social Organizations of 1982. After the enactment of the Law on Associations (RS Official Gazette, No. 51/2009.) in July 2009, which replaced the Law on Associations of Citizens and Social Organizations of 1982, the new legal ground has been placed for the establishment and work of sports organizations registered in the form of associations of citizens. On the other hand, the Law on Associations prescribed by its Article 2, paragraph 2, that the establishment, registration and work of sports organizations and associations should be regulated by special law regulating sports and that the rules of Law on Associations should be applied to sports organizations legal status unless otherwise has been prescribed by another law.

[11] Way back in November 2007, the Government of the Republic of Serbia handed over the Proposal of Sports Law to National Assembly for adoption. The fall of the Serbian Government in March 2008 caused the Proposal Sports Law to be withdrawn from the parliamentary legislative procedure which was already under way. The caretaker government could not adopt the Draft National Sports Development Strategy for the same reason.

[12] RS Official Gazette, No. 67/2003, 101/2005, 90/2007 and 72/2009.

[13] RS Official Gazette, No. 101/2005.

cies and others to act appropriately in connection with sports. This is also owed to the fact that they were adopted between 2003 and 2005, when the legal framework reforms were strongly under way.

Other Laws and Regulations in the Field of Sports

In addition to the Law on Sports, there are also five other laws, one ordinance and nine bylaws dealing with issues associated with sports in the Republic of Serbia.

Table 1 – List of laws, ordinances and bylaws regulating sport in Serbia

No.	NAME OF REGULATION	YEAR OF ENACTMENT	YEAR OF AMENDMENT
1.	Law on Sports	1996	2005
2.	Law on Counteraction of Violence and Unbecoming Conduct at Sport Events	2003	2005, 2007 and 2009
3.	Law on Prevention of Doping in Sport	2005	/
4.	Law on Public Skiing Courses	2006	/
5.	Law ratifying Council of Europe Anti-doping Convention	1991	/
6.	Law ratifying Council of Europe Convention on Spectator Violence and Misbehavior at Sports Events and in particular at Football Matches	1990	/
7.	Ordinance for National Acknowledgements and Prizes for the Special Contribution to the Development and Establishment of Sports	2006	2007 and 2009
8.	Bylaw on the Criteria for Establishing Public Interest in the Field of Sports	2006	/
9.	Bylaw on the Criteria and Requirements for Granting Scholarships to Top athletes and Pecuniary Aid to Top Athletes	2000	2009
10.	Bylaw on Doping Control in and out of Competitions	2007	2008
11.	Bylaw on the Supervision over Specialist Work in the Field of Sports	2000	/
12.	Bylaw on the Nomenclature of Sport Occupations	1999	/
13.	Bylaw on the Registration of Sport Organizations as Associations, Sport Societies and Unions	2006	/
14.	Bylaw on the Requirements for Engagement in Sport Activities and Business	1999	/
15.	Bylaw on List of Prohibited Doping Substances	2008	/
16.	Bylaw on List of Prohibited Doping Substances for Horses	2007	/

The Law on Counteraction of Violence and Unbecoming Conduct at Sport Events took effect in July 2003. That law deals comprehensively with the prevention of violence and unbecoming conduct at sports events, so that

it is regarded as a systemic law in that field. Its provisions include a wide variety of both preventive and repressive measures, as well as sanctions for the acts of violence committed at sports events. This law was amended in late September 2007[14], whereby the faults of the 2003 law were made good to a large extent. The legislators' intention was to make new provisions which would make this law more effective. New duties and responsibilities have been assigned to the organizers of sports events and to the participants of sports events, as well as corresponding penal provisions have been introduced by amendments of that law.

The Law on Prevention of Doping in Sport was adopted on 14 November 2005. With its adoption, the Republic of Serbia fulfilled its international legal obligation assumed on 28 February 2001, when the Socialist Federal Republic of Yugoslavia[15] ratified the Council of Europe Convention against Doping in Sport.[16] Compared with the majority of European states, that law was adopted after a long delay. It prescribes three criminal acts and a large number of offences associated with doping in sports.

The Law on Public Skiing Courses[17] was adopted in 2006 and it deals with the requirements for the arrangement, maintenance and equipment of public skiing courses, provision of services at skiing courses, marking of and putting up signaling devices on skiing courses, use of the means of transport on skiing courses and other matters of importance for the use of skiing courses. The prevailing opinion of the professional community is that such an isolated and specific piece of legislation, which partially deals with the use of public skiing courses, as only one of the existing forms of public sport grounds, rises the question of the need for adopting other similar regulations dealing with, for example, use of public swimming pools and the other public sport facilities in Serbia.

The Ordinance for National Acknowledgements and Prizes for the Special Contribution to the Development and Establishment of Sports[18] was adopted by the Government of the Republic of Serbia on 2 April 2009, thus

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[14] RS Official Gazette, No. 90/2007.

[15] Serbia is the legal successor to the Socialist Federal Republic of Yugoslavia, United Republic of Yugoslavia and State Union of Serbia and Montenegro.

[16] This Convention was ratified by the Socialist Federal Republic of Yugoslavia (SFRY Official Gazette)

[17] RS Official Gazette, No. 46/2006.

[18] RS Official Gazette, No. 24/2009.

replacing the ordinance of the same title[19] which was adopted in 2006 and amended in 2007. It prescribes the existence of national acknowledgements and prizes for special contributions made to the development and establishment of sports and the criteria for awarding them, as well as the amounts payable on a monthly basis for life to the athletes who had scored top results in international contests. The new ordinance explains more exhaustively the meaning of some of the terms and expressions used in it and it sets the detailed criteria for the award of prizes and national acknowledgements, in order to avoid the problems encountered in the application of the previous ordinance.[20]

The Bylaw on the Criteria for Establishing Public Interest in the Field of Sports[21] was enacted in 2006 by the Ministry of Education and Sports pursuant to Article 72, paragraphs 2 and 3 of the Law on Sports. It deals in greater detail with the criteria for establishing public interest realized with the means programmes implemented by sport organizations, criteria for funding the top sport creativity and criteria for funding the construction, equipment and maintenance of sport buildings of interest to the Republic of Serbia.

The Bylaw on the Criteria and Requirements for Granting Scholarships to Top Athletes and Pecuniary Aid to Top Athletes[22] was enacted in 2000 pursuant to Article 71, paragraph 1 of the Law on Sports. In February 2009, the Ministry of Youth and Sport enacted the Bylaw Amending the Bylaw on the Criteria and Requirements for Granting Scholarships to Top Athletes and Pecuniary Aid to Top Athletes, with provisions concerning the granting of scholarships to top athletes for advanced training in sports and pecuniary aid to the particularly meritorious top athletes.

On 12 September 2008, Steering Committee of the Anti-doping Agency of the Republic of Serbia amended the Bylaw on Doping Control in and out of Competitions[23] that was previously enacted in 2007. In addition to providing for the doping control to be conducted in and out of competitions, it pre-

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[19] RS Official Gazette, No. 65/2006 and 6/2007.

[20] The national acknowledgement is awarded in the form of a diploma and monthly pays for life amounting from one to three average monthly pays in the Republic of Serbia in December of the previous year, depending on the rating of international competition and the results scored. This right may be exercised by the athletes who had reached the age of 40.

[21] RS Official Gazette, No. 39/2006.

[22] RS Official Gazette, No. 18/2000 and 12/2009.

[23] RS Official Gazette, No. 32/2007 and 88/2008.

scribes the appearance of the identity cards of anti-doping inspectors and officers of the Anti-doping Agency of the Republic of Serbia.

The Bylaw on the Supervision over Specialist Work in the Field of Sports[24] was adopted in 2000 and it deals with the procedure for supervision over specialist work, measures for eliminating the identified faults and other matters of importance for supervision over specialist work in the field of sport. From its adoption to date, its application has been sporadic and uneven from one case to another.

The Bylaw on the Nomenclature of Sport Occupations[25] was adopted in 1999 pursuant to Article 62, paragraph 2, of the Law on Sports. According to this bylaw, the sport occupations are the following: 1) sports instructor, 2) coach, 3) sport and recreational guide, 4) recreation instructor, 5) sports business operator, 6) sport manager, 7) sport mediator, 8) sport referee, 9) sport guide, 10) rescuer, 11) professional athlete, 12) sport documentarist, 13) sport journalist, 14) sport propagandist and 15) sport counselor.

The Bylaw on the Registration of Sport Organizations as Associations, Sport Societies and Unions was adopted in 2006 pursuant to Article 27, paragraph 1 and Article 34, paragraph 2 of the Law on Sports. It prescribes the contents and way of keeping the register of sports organizations as associations, sport societies and unions. It replaced previous ordinance of the same title[26] which was adopted in 1997.

The Bylaw on the Requirements for Engagement in Sport Activities and Business[27] was adopted in 1999 and it sets the legal requirements in connection with space and/or buildings, equipment, specialist workers and safety of athletes, depending on the kind of sport involved, which have to be met by sport business organizations and sport organizations established as enterprises and institutions, in order to pursue their activities or business.

On 17 December 2008, Steering Committee of the Anti-doping Agency of the Republic of Serbia enacted the Bylaw on List of Prohibited Doping Substances[28]. That Bylaw was enacted pursuant to Article 31, paragraph 1 and Article 34, paragraph 1 of the Law on Prevention of Doping in Sport. It prescribes the list of prohibited doping substances comprising various pharma-

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[24] RS Official Gazette, No. 18/2000.

[25] RS Official Gazette, No. 30/99.

[26] RS Official Gazette, No. 8/97.

[27] RS Official Gazette, No. 30/99.

[28] RS Official Gazette, No. 118/2008.

cological classes of doping agents such as: stimulants, narcotic analgesics, beta-blockers, diuretics, peptide hormones and analogues. Furthermore, Steering Committee of the Anti-doping Agency of the Republic of Serbia enacted the Bylaw on List of Prohibited Doping Substances for Horses[29] in March 2007 pursuant to Article 5, paragraph 3 and Article 31, paragraph 1 of the Law on Prevention of Doping in Sport.

Besides all above listed laws and regulations enacted and applied by state organs and bodies, there are many regulations of sport organizations (sport unions, sport societies and sport clubs) that were enacted by their internal bodies in the form of rules and bylaws, which can also be treated and observed as sources of sport law in Serbia. Regulations enacted by Serbian national sports organizations/associations are all harmonized with the rules of the International Olympic Committee (IOC) and the international sports federations. In that sense a *sui generis* international sports legal order is formed, which is followed by national sports federations and is thus imposed within a country, by incorporating such rules into domestic sports law so that they are applied without further ado and prevail over national law.[30]

Problem of Physical Education Legislation in Serbia

Serbian regulations do not contain the definition of physical education notion, although the legal definition would significantly make easier regulating and developing of this activity. That is especially important problem because of significant role of physical education in the overall process of development of sports system in the country.[31] Because of that, some countries regulate physical education within the laws that regulate sports, which is not the case in Serbia. Besides that, there is a possibility for Serbia to define a physical education notion in the frame of some future law which regulates the field of education. However, for inclusion of such legal definition in the reg-

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[29] RS Official Gazette, No. 118/2007.

[30] Dimitrios Panagiotopoulos, Theoretical Foundation of Sports Law (2004), in: Sports Law in the world, Athens: Ant. N. Sakkoulas Publishers, p 43.

[31] Legal documents regulating Physical education can be observed as a part of the Sports Law of any country (legal source of the Sports Law), having in mind that science widely accepted approach that Sports Law consists of: a) rules of law for sports activities affecting special issues of sports life, b) rules of institutional autonomy of private sports activities, c) rules of law for the regulation of more general issues concerning sports and Physical education.

ulations' text, the Republic of Serbia should choose one of the existing physical education definitions determined by science.

In domestic technical and legal literature there is a confusion of terms, i.e. the usage of a large number of similar terms for the same phenomenon - physical education. Particular problem lies with confining of notions such as sport, physical culture and physical education, because the terms are not in synch and the notions overlap in this country's regulations and there are myriads of expert analyses as a result of heterogeneous and inconsistent usage of some terms in the domain of sport in media, professional debates and textbooks.

An obvious example of the confusion in terminology is the fact that many journalists, when writing articles or reporting sport events for radio and TV, use the terms physical culture, physical education and sport as synonyms, though they are different notions. On the other hand, an enormous number of citizens use the terms physical culture or recreation for sport and teachers and pupils at schools call the same activity physical instruction or physical education.[32] In this situation a legislator has a difficult task, to choose one from the three terms (physical instruction, sport training, sport education), which are almost equally used in a number of professional papers, textbooks and monographies. The answer to the question which term is more appropriate, physical education or sport education, science should offer and a legislator shall accept the final academic approach and include it as a legal norm. Apparently, many authors define terms physical instruction and physical education and there are more definitions of physical instruction and physical education and in spite that fact, there is not a generally accepted definition of these terms.

Law on Sports as fundamental – umbrella law that regulates the subject of sport in the Republic of Serbia contains the legal definition (notion) of sport, but does not contain a legal definition of physical instruction which is mentioned in the regulations' text twice, in articles 52 and 55 of this law. According to article 2 of Law on Sports, sport is defined as: "sport education (education in physical instruction, development of physical capability and acquirement of sport habits); competitive sport (sport activities aimed at sport results); recreational sport (sport activities aimed at recreation, performed independently or in sport or some other organizations); scholar competitions in sport (sport competitions for pupils and students)". On the basis of Article 2, we may conclude that the Law on Sports, perfectly and properly, has no ambition to solve these "theoretical dilemmas" concerning the notion

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[32] Slavoljub Radovanović, The Right to Sport (2002), Belgrade: Dosije, p 28.

of sport, just to describe the fields (topics) contained in the notion of sport in terms of the needs of the Law itself.[33] If we consider the contents of articles 52[34] and 55[35] of the Law on Sports, we can clearly see that the legislator, this term sport education, which is an integral part of the notion of sport defined accordingly to article 2 of the Law, does not use as a synonym for physical instruction. When regulating the meaning of a word sport in terms of the Law, legislator defined the notion of sport, among other things, including sport education which is physical training instruction, development of physical capability and acquiring sport habits. It is possible and perfectly justifiable to defend thesis that the purpose and contents of physical instruction is identical to the contents of sport education regulated by the Law on Sports, i.e., the essence of physical instruction is training in physical practice, development in physical capability and acquirement of sport habits. This comprehension leads to the conclusion that the terms sport education and physical instruction coincide.

Law on Sports, as it is, does not include a definition of physical instruction, although its norms use the term and article 52 of the Law on Sports regulates curriculums of physical instruction in elementary and secondary schools, as well as some parts of instructive and educational curriculums concerning physical training at pre-school institutions; because of these facts, they are issued by previously obtained opinion of the ministry in charge of sport management pointing to the fact that primary legal authority for regulating the subject matter of physical instruction is entrusted to the ministry in charge of education and rules which regulate education and instruction in the Republic of Serbia. However, the Law on Basic Educational and Instructive System[36] does not mention, in any of its articles, physical instruction and

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[33] Nenad Đurđević, Commentary on the Law on Sports (1997), Kragujevac: Institute of Legal and Political Sciences of Law School in Kragujevac, p 5.

[34] Article 52 of the Law on Sports says: "Physical training curriculums in elementary and secondary schools, as well as parts of training and educational curriculum concerning physical training at pre-school institutions are to be issued by previously obtained opinion of the ministry in charge of sport management".

[35] Article 55 of the Law on Sports says: "The part of the school, i.e., faculty, intended to implement curriculum and physical training programmes of pupils, i.e., students, is regarded as sport building in terms of the article 5 of this law".

[36] RS Official Gazette, No. 62/2003, 64/2003 - correction, 58/2004, 62/2004 - correction, 101/2005 – second law, 79/2005– second law, 81/2005 – correction of second law and 83/2005 - correction of second law.

thus does not contain a legal definition of the physical instruction notion. It seems logical that such law should, at least mention physical instruction notion, as it does not define it. Contrary to the Law on Basic Educational and Instructive System, the Elementary School Act[37] and Secondary School Act[38] use the term physical instruction.

The Elementary School Act mentions physical instruction within the norms regulating organization of educational-instructive management. Article 25, paragraph 2 of the Elementary School Act regulates: "For third and fourth grade pupils the instruction can be organized in the two of the following three subjects at the most: art, music and physical education". Such formulation clearly points to the previously mentioned Article of Law that the Elementary School Act treats physical instruction as one of the curriculum's subjects. Article 45 of the Elementary School Act prescribes that a pupil can be exempt, temporarily or during the entire school year, from physical instruction, on the whole or partly, as well as that the school council make a decision to exempt a pupil from physical training on the basis of a physician's suggestion. The Secondary School Act has a similar approach to legal regulation of that issue; it treats physical instruction as one of curriculum's subjects and by article 50[39] limits itself only to those regulations/legal norms concerning reasons why a pupil can be exempt from physical instruction.

In addition to the laws regulating elementary and secondary school activities, where the subject matter of physical education or instruction is only sporadically and partially regulated, the ministry in charge of education management also issued the two professional instructions significant in the field of physical instruction. Those professional instructions are the following:

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[37] RS Official Gazette, No. 50/92, 53/93, 67/93, 48/94, 66/94 - decision of USRS, 22/2002, 62/2003 - second law, 64/2003 - correction of second law and 101/2005 – second law.

[38] RS Official Gazette, No. 50/92, 53/93, 67/93, 48/94, 24/96, 23/2002, 25/2002 – correction, 62/2003 - second law, 64/2003 - correction of second law and 101/2005 – second law.

[39] Article 50 of the Secondary School Act prescribes: "A pupil can be temporarily or during the entire school year exempt from physical training/instruction, on the whole or partly, on account of illness or some physical defect. The school council makes a decision to exempt a pupil from physical training/instruction and to grade him or her on the basis of physician's suggestion".

- Professional instruction for organizing sport activities in elementary schools[40];
- Professional instruction for the process of exemption of an elementary or secondary school pupil from physical training[41].

On the basis of the whole legal framework content analysis, whose norms regulate physical instruction in the Republic of Serbia, we can take impression that physical training as an activity which includes both educational and sport function, is not systematically regulated, in spite of the fact that the huge number of regulations, very partially, regulate some of the issues concerning physical training. Such situation is partly the result of the fact that the departments of the ministries in charge of education and sport are separated; because of that, general legal acts which regulate sport are compulsory separated from general legal acts regulating educational and instruction system and the physical training too. Because of that, the legal acts whose legal norms mention physical training, do not recognize this form of training as a separate – wider category, but only as one of numerous school subjects, which is not a good solution. At the same time the creators of these legal acts did not have in mind that for persons involved in physical instruction special requirements should be regulated in terms of their education and level of skills in order to provide high quality and secure training for children and youth.

Practice of the most European countries points to the fact that education and sport are compatible activities which are not to be strictly separated, especially regarding educational and instructive function of sport and recreation in educational system for children and youth. Thus the future Serbian regulations should be drafted and enacted in compliance with that practice.

Recognizing the legal framework which regulates physical instruction in the Republic of Serbia, we must also discuss the solutions proposed within the Draft Law on Sports of November 2007[42] and define whether legislator tried to create a basis for a more precise physical instruction legal definition. Draft Law on Sports, in legislative procedure since the end of 2007, was withdrawn

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[40] Professional Instruction issued by the Ministry of Education, no. 110-00-449-05/02 of 22 June 2005.

[41] Professional Instruction issued by the Ministry of Education, no. 610-00-45/93-01 of 26 April 1993.

[42] The Draft Law on Sports of November 2007 has never been enacted as a law in the Parliament and it has been replaced by another Draft Law on Sports of 2009. The new Draft Law on Sports is still in legislative procedure and is not expected to be enacted before 2010.

from the Serbian Parliament because of parliamentary election's schedule. In the following period, since forming the new Government of the Republic of Serbia (July 2008), the Draft was not debated in the Parliament, whose members, together with the Government decided to start with drafting a new version of the Draft Law on Sports. The nature of legislator's decision on regulating physical instruction in a new (future) Law on Sports, whose drafting is still in progress, shall show itself in the following couple of months, but we can surely conclude that the solution formulated and offered within the text of the Draft Law on Sports did not contribute to the clarification of terminology confusion.

Draft Law on Sports of November 2007 according to Article 2, defined sport as an activity of special importance for the Republic of Serbia and did not deal with physical instruction definitions. As a legal category, physical instruction was mentioned only once in that Draft, in Article 130, according to which school sport was organized as extracurricular sport activity in the field of physical instruction, including school tournaments, carried out through school system, according to the curriculum. By such legislator's approach, the notion and role of physical instruction are additionally confusing, which is used as a category in defining the notion of school sport. The concept that "school sport is organized as extracurricular activity in the field of physical instruction, including sport tournaments at school, carried out through school system, according to the curriculum", could only bring in additional confusion in defining the importance and role of physical instruction within educational system of Serbia.

Conclusions

As mentioned above, Serbian legal framework regulating sport is both obsolete and confusingly extensive. A need for urgent legislative reform in that field is obvious, but there are varieties of problems causing delays of the performance of reform measures and activities. The main problem is the absence of a modern and European standards oriented Law on Sports.

Besides that, since 2000, one of the imposed and in many ways the central issue in the field of sports has become the privatization. Bearing in mind that privatization in sport as a term is left undefined even in drafts of Law on Sports presented so far, many citizens and among them, many athletes are not able to understand and to learn about this problem. Answer to the question what is a privatization in sport above all is expected from the Ministry of Youth and Sport, but so far it didn't give any.

In addition to the above explained problem, a legal obligation of determining the share of social property in the existing sport organizations is not conducted, and that prevents fair and transparent transformation/change of property rights in the field of sport. Confusion created in the public due to the lack of publicly reported response to the previous questions and defined legal position on privatization in sport, leaves room for bringing unreal expectations of all those who are currently "in the power" of sport organizations.

A large number of lobby groups gathered primarily around the largest and the most influential sport organizations in Serbia that include national sport associations, sports societies (Red Star, Partizan and the others) the Olympic Committee of Serbia, state their views and wishes about how privatization in sport should look like and how new Law on Sports should look like. In short, views of these lobby groups could be described as the expectation of gift from the state in the form of transfer of property rights on sport facilities without any material benefit, and without taking any other obligation to the state and society. Because of that, before drafting of any new version of Draft Law on Sports, it is necessary to take into account the assumptions which were the bases of the solutions of the positive Serbian Law on Sports considering eventual new legal solutions. Those were the following assumptions: engaging in sports activities is voluntary and equally accessible to all citizens, regardless of race, gender, birth, stature, language, nationality, citizenship, religion, political or other opinions, education, social origin, social status, financial position, degree of eventual disability, level of physical abilities, or other personal characteristic; elemental goals in area of sport are quality improvement of lives of citizens, stimulating sports creation and raising the level of general culture of citizens; realization of elemental goals trough stimulating physical progress, raising and keeping physical abilities of citizens, preservation and improvement of health of citizens, promote of social relations of citizens, humanization of free time (leisure) and achievement of high level of sports accomplishments; goals and duties in sports area defined in that way permit getting to see the interest of state in that area trough increase of number of sportsmen, improvement of quality of engaging in sports activities, increase of effects of engaging in sports activities, affirmation of state at the international level and trough general economic effects which emerge from sports and supporting activities and efforts.

For the Republic of Serbia, at the moment of choosing the model for the sports system reform and the reform of legal framework regulating sports system and performance of sports activities, the factor that must be, above all, taken into account is the constitutional/legal concept of the state itself and

experience of the other countries in the region, as well as the best legal practice of the Western European countries in that field. New Law on Sports and other sports regulations in Serbia need to be made in conformity with European standards to pave the way for the country's eventual integration into the European Union and the example of other transitional countries could be a clue for success.

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REFORMA ZAKONSKOG OKVIRA ZA REGULISANJE SPORTA U REPUBLICI SRBIJI

Republika Srbija se u poslednjih nekoliko godina suočila sa reformom sportskog sistema. Izazov te reforme sastojao se u potrebi reorganizacije, modernizacije i jačanja čitavog sportskog sistema u Srbiji. Zbog toga je Vlada Republike Srbije u poslednjih nekoliko godina pokušavala da izradi nacrt jedinstvenog zakonskog okvira kojim bi se ova oblast regulisala na inovativan i sveobuhvatan način. Ali, u tome se nije uspelo, tako da ovo pitanje i dalje ostaje otvoreno.

Ključne reči: sport; reforma zakonske regulative; zakonski okvir; privatizacija

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REFORM OF MILITARY LAW IN SERBIA

Defense system in Serbia has developed significantly over the last decade. Transition and democratic change affected its very foundations, and it is reshaping into efficient and modern defense structure. Legislative changes are very important in this area – closer look at laws and proposed but never adopted acts during this process will show how hard is "to teach a bear to dance".[1] *New legislative framework over last three years made a qualitative difference between the old army system and emerging shapes of the new one. Hence, the analyzed normative solutions will give a clear look at the modern military law concept in Serbia, and answer the question: how far did Serbia get on Euro-Atlantic path?*

Key words: military law, legal reform of defense system, Euro-Atlantic integration process, international military cooperation, human rights of military personnel.

1. Politization of Defense: Situation prior to 2000

Most important normative acts regulating the defense system of the FR of Y Yugoslavia and the State Union Serbia and Montenegro were the Yugoslav Army Act (hereinafter: YA Act) and Defense Act.[2] Prior to their adoption, military law in SFRY was regulated by five different statutes. After breakdown of SFRY and a year after the FRY was officially formed, these acts were derogated with provisional legal instruments, finally resolving this unlawful situation by adopting two new statutes in the Federal Assembly.

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[1] Mark Hauben, Učenje medveda da igra – neke generalizacije o transformaciji oružanih snaga u Evropi od 1989. i implikacije za uključivanje SRJ u Evro-atlantsku zajednicu bezbednosti, Vojno delo 4-5/2002.

[2] Both acts were published in the FRY Official Gazette 43/94, with subsequent amendments.

Makers of new legislation were acting in order to make Milošević's regime stronger. Therefore, instead of five statutes new military legislation rested on only two acts, significantly smaller in volume. This was intentional: by extracting several important areas of military law and defense system regulation, legislators opened the backdoor to give priority to the executive power, much more under the influence of the dictator than that of the Federal Assembly.

Numerous ordinances and secondary acts of Federal Government and Ministry of Defense were brought to life in the few months after statutes were adopted; these enabled control of military by the executive power beyond any control. Ordinances were in fact "quasi-laws", regulating matters that in true democracies could only be regulated by legislative power. Furthermore, these prerogatives of the executive power over the military were often incompatible with some of basic human rights. E.g. Article 161 of the YA Act envisaged verbal offence for a military official, outside service, declared against constitutional order or measures for defense and security of the country. It was a weapon for total political devotion of senior army officers to the regime. Article 18 of the YA Act envisaged secret mobilization, but this institute was not further elaborated in any statutory or secondary act, hence leaving the legislator's intention unclear and subject to abuse. Furthermore, provisions considering material obligation were derogating the right to property in a manner which permitted to military personnel abuses of high scales, as it was the case during NATO bombing of Serbia and Montenegro in 1999. All these examples are just a tip of the iceberg – in a word, new democratic government inherited in 2000 a huge, semi-communist, conservative system, with "faulty" legislation and numerous secondary acts made for the repressive regime of Slobodan Milošević.

2. Legal Reform as a Starting Point of Defense System Reforms – Legal Reform Action Plan of ICL

Following theoretical assumption that legal reform is the first step in general reform of defense system of Serbia, the Institute of Comparative Law made in 2003 the *Proposal of the action plan for Serbia and Montenegro defense system legal reform*.[3] It included proposals for a thorough legal reform based on the following fundamental principles:

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[3] Action plan was published in Serbian and English language in: Jovan Ćirić, *et* alia, Pravni aspekti reforme sistema odbrane, Beograd, 2004.

1) supremacy of international law over the law of Serbia and Montenegro,
2) right of every state to independently regulate its defense system,
3) harmonization with the standards of Helsinki final Act and other documents of the OSCE, Council of Europe and European Union,
4) inviolability of security of all UN member-states and respect of their sovereignty, territorial integrity and political independence,
5) promotion of good neighbor relations, stability and development of the Western Balkans,
6) prevention of conflict and peaceful dispute resolution,
7) cherishing of democracy, political pluralism and market economy,
8) elaboration of strategic determinations expressed in the Defense Strategy,
9) participation of Serbia and Montenegro in security integrations,
10) harmonization of regulations governing the defense system with the Constitutional Charter of the State Union of Serbia and Montenegro and further elaboration of principles relating to competence and powers of the State Union institutions regarding the country's defense,
11) provision of democratic and civil control of the defense system,
12) transparency of the process of planning and budgetary financing of the defense system,
13) respect of human and minority rights in the realization of rights and performing obligations in country's defense,
14) professional and efficient management and command of the Army,
15) clear division of competences of Serbia and Montenegro institutions in relation to the Army, security services and other relevant institutions,
16) increased interoperability of the Army,
17) opening the possibilities for development of a professional Army,
18) distinction between the use and engagement of the Army,
19) defining the management of Army and its relationship with the command and regulation of commanding over the Army and in the Army,
20) efficient and more rational management of material and financial resources, including the transformation of capital shares in military-income institutions and military industry,

21) improvement of working conditions and standard of living of professional soldiers and civilians serving in the Army,
22) improvement of the standards of soldiers, pupils of military secondary schools and Military Academy cadets,
23) building of military co-operation with neighboring countries, members of the Partnership for Peace and NATO,
24) harmonization of military educational system with the civilian educational system,
25) specification of special rights and obligations of persons employed in the Ministry of Defense given the specific treats of their jobs.

Proposed legal reform included all areas significant for Serbian (Serbia and Montenegro) defense system: the basis of defense and civil defense, Serbia and Montenegro Army, military education system and military science and research institutions, military security services, participation in peace-keeping operations and other activities abroad, security integrations of Serbia and Montenegro, military-income institutions, military industry, as well as other areas and institutions significant for the Serbia and Montenegro defense system.[4]

ICL's Action plan never became official document of the Ministry of Defense, but it had a great influence on the subsequent efforts in legal reform, especially those made in few recent years. Concept of having several legal acts instead of defective compilation, introducing new dimension of civil defense, and several other proposals were used as a starting point of new legislation enacted in 2007-2009. Although State Union of Serbia and Montenegro had fallen apart and Serbia regained its sovereignty, the basic principles set in the Action plan survived and attained their purpose – which was logical, because they have universal meaning and represent global values and ideas of a modern society and the basis for democratic civil control of defense system of any state built up on democratic foundations. First result of the Action plan was new regulation – the Act on participation of SM Army in peace-keeping missions abroad[5], as well as formal application for membership in Partnership for Peace Program (PfP) in 2003 and amendments to the Prescription Service Ordinance which enabled civil service for the first time in Serbia[6].

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[4] Introduction to Action plan, ibid.

[5] Official Gazette of SM 61/2004.

[6] Official Gazette of SM (Serbia and Montenegro) 25/03 .

3. Stumbling on the Reform Path: Proposed and Adopted Legal Acts 2003 – 2007

The following period (2004-2005) was marked by total ignorance of Ministry of Defense for proposals for defense system reform made by NGOs and other state and non-state civilian institutions. Even though all experts on military reform advised that reforming armed force from within was never accompanied by success, Ministry of Defense acted on its own. Failure of the idea of self-reform became obvious when few draft laws emerged on so-called "public debate" in 2005, which only reminded civil society of dark years of previous regime. New draft laws on defense, military and military intelligence services were actually old documents, very similar to the ones in force since 1994, with few "make-up" corrections. Authors of these drafts were exclusively army officers, and civil society was cut off from any chance of changing them. Draft acts were obviously written by "the old school", officers who blindly carried out commands of previous regime and had dreams about large, expensive military force similar to one SFRY had in 1970s and 1980s, with little knowledge on modern trends in defense system evolution, and human rights protection:[7]

- Military obligation was included in the Defense Act. The legislator justified that by the fact that this subject matter was a part of citizens' rights and duties in country's defense, thus pertaining to a legislative text dealing with this matter. However, this argument could not be fully accepted, since the military obligation was organically related to the subject matter of the Army Act to the same extent as it was related to the Defense Act. Moreover, before the passing of a single Yugoslav Army Act in 1994, the matter of military service had had always followed the destiny of other statutes regulating the army, never having touch with the statutes governing the general defense issues. In addition, the separation was done in a rather "bureaucratic" manner, by simply removing a chapter from the Army Act, whereby some provisions that regulated military obligation, but were included in other chapters, remained in the new Army Act (e.g. provisions on leaves of conscripts), thus further complicating regulation of the given subject matter.

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[7] Detailed analysis of these documents is available in English: M.Reljanović, D.Prlja, V.Cvijan, Legal Comments on New Defense Legislation of Serbia and Montenegro, Yugoslav Law 1/2005, Belgrade, 2005.

- Defense Act envisaged the passing of a separate Act on Civil Serving of Mandatory Military Service. Primarily, the very title was unacceptable, as was the name of the institute itself "civil serving of mandatory military service", which was quite absurd. In addition, the Act did not envisage the competences or the time limits for the passing of such Act, which would, once the new Army Act and Defense Act were adopted, result in deregulation of the given matter. The solution envisaged might, by rigid application of regulations and bureaucratic logic, lead to a standstill in the execution of the right of conscientious objectors, whereby Serbia and Montenegro would pass a serious precedent and violate its international obligations.
- Defense Act, following the structure according to which there was a separate Army Act, includes no provisions on Serbia and Montenegro Army. It was unacceptable that major legal document on defense "ignored" the existence of the principal military force in the country.
- Provisions on so-called "state of alert measures" which ought to be passed by the Council of Ministers "in case of danger from armed violation of country's security, were inadequate. It remained unclear what these measures included. Their definition could not be found in either this legislative text or any other relevant legal act, and it was hence reasonable to ask whether "state of alert measures" perhaps provided the back-door introduction of "imminent war danger".
- New regulations provided that in case of suppressing of an armed rebellion targeted to violent change of state borders the police could be engaged beside the engagement of the Army! This was an utterly militant solution. Although the task of the Army is to oppose all military threats, and armed rebellion is certainly within that scope, usage of special police forces should be the rule, not the exception, and *vice versa*. Besides, rather imprecise terminology was being used considering (non)respecting the international humanitarian law, although it was a common fact that the Geneva Conventions system regulates the problem of the internal conflicts, which applies also to the practice of the International Criminal Tribunal for Rwanda which showed that humanitarian law (specially Additional Protocol II to the Geneva Conventions) was very applicable to them.
- There was a provision on the use of Army "in accordance with Article 51 of the UN Charter, based on international law principles that regulate the use of force". Firstly, the citing of this Article was unneces-

sary. It sufficed to use the formulation included in numerous foreign and international statutes and agreements "in accordance with UN Charter". Citing only Article 51 was counter-productive – was a remainder of the UN Charter relevant at all? Secondly, the existing formulation that "YA members are obliged in every situation to adhere to rules of international military law and other rules of humane treatment with the wounded and prisoners and protection of population" had been stricken out. This literally stroked off the obligation to observe international humanitarian law. That was unacceptable.

- New legislative solution preserved secret mobilization, also present in the 1994 Defense Act. Secret mobilization was characterized by the fact that the mobilization call, which was handed to the person obliged, was a military secret. Given that the person who received such call was under the obligation to keep the military secret (failing to do so was subject to criminal prosecution),[8] the following situation could have taken place: Person received the call for secret mobilization and became acquainted with its content, together with the fact that the call was a military secret. In such a situation, having in mind the nature of secret mobilization, the person was obliged to report immediately to the place designated in the Mobilization Plan, he/she left his/her house (or the place where the call was received), while being strictly prohibited to inform even his/her family as to where he/she was going. The Mobilization Ordinance did not prescribe the duration of secret mobilization, and the Ordinance (and the Defense Act) did not envisage when such mobilization might be carried out (which means that it might be carried out even in time of peace).[9] Such solution opened the possibility for grand scale abuse (for understandable reasons, it was never confirmed whether such provisions had been applied during the Milošević regime). On the other hand, there was no rational justification for keeping this institute. It was naďve to expect that secret mobi-

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[8] Article 224 of the General Criminal Act (SFRY Official Gazette no. 44/76 with subsequent amendments, RS Official Gazette 39/2003) prescribed a criminal offence of revealing a military secret, threatened with the minimum sentence of from three months to five years of imprisonment. If the act was committed from avarice, the minimum sentence was one year of imprisonment, and if it was committed in negligence, up to three years of imprisonment.

[9] Articles 4, 26 and 27 of the Mobilization Ordinance (Official Gazette 35/97) covers te matter of secret mobilization.

lization might put under war regime a large group that could efficiently confront possible aggression.

- Destiny of civil protection was unclear. Acts simply "had forgotten" about it, providing that Civil Protection Act should be drafted, but without envisaging the competence, let alone the time limit for its passing. This was especially significant since there was misunderstanding at the time, between State Union and member states, which of these had the competence over civil protection.
- There was no democratic civil control of defense system. There were no efforts to improve any kind of efficient system of control, which was especially obvious in the case of military intelligence services.
- "Military secret closed circle" preserved from the valid legislation. It was a combination of legal institutes which practically prevented the public from learning any information on the work of military services. The only control executed was parliamentary, which was burdened with a series of omissions and open issues rendering it virtually useless, which was in direct collision with considerable and significant powers of the services, that were even increased according to the proposed solutions in the draft laws.
- Services were authorised to collect information by applying means and methods for data collection which could temporarily limit the human rights and freedoms established by Constitutional Charter and laws of member states.
- Service managers were appointed and resolved by the Council of Ministers, at the proposal of the Supreme Defense Council. Council of Ministers obtained the opinion of the Commission for Serbia and Montenegro Security Services Control, but its influence on the election of candidates was not mentioned, leading to only one possible conclusion – it was of consultative nature. An important provision of the Federal Intelligence Services Act that was valid at the time, had been erased from the proposal – i.e. stating that a person who was a member of political party might not be elected as manager and deputy manager. Criteria for the election of service manager were not defined at all.

These proposals were withdrawn after the exceptionally strong protests of NGO and civil society. Ministry of Defense refused to change them on the basis of experts' recommendations and they were never put back into legislative adoption procedure.

Things rapidly began to change for the better in late 2005 and during 2006. Serbia became a member of PfP and signed the SOFA agreement with USA. International cooperation increased, and ongoing reforms were put into realistic framework, rather than unplanned and uncoordinated efforts with destructive effects on military readiness and moral. Also, after separation of Montenegro, the defense system was no longer on the federal level – thus, Serbian Government started investment projects in several areas which improved overall working conditions in the Army.

4. New Beginning: Modern Legal Framework 2007 – 2009

After personal changes in the Ministry of Defense in 2006, new legal framework of military law became one of the two highest priorities (second was restructure of military personnel in order to fulfill the goal of full professionalization of the Army until 2012). Serbia became independent again, and adopted a new Constitution in 2006.[10] This Constitution provided that defense system should be regulated on new foundations. It meant before all, that acts of 1994 were to be replaced with new laws on defense and Serbian Army. Ministry of Defense also produced most important political framework documents, such as National Security Strategy and Defense Strategy.[11]

In late 2007, three new laws were adopted in the National Assembly: Law on Defense[12], Law on Army of Serbia[13] and Law on Basis of Organization of Intelligence Services of the Republic of Serbia[14].

Law on Defense introduced many new solutions in Serbian defense system, trying to make basic preconditions for its modernization and professionalization. Collective defense, UN peace-keeping forces and Euro-Atlantic integrations have a more significant position in the new concept[15], and Serbian defense system has been clearly defined for the first time, as well as all

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[10] Official Gazette 98/2006.

[11] At the time of writing this paper, new National Security Strategy and Defense Strategy were in parliamentary procedure for adoption, as well as all legal acts analysed in part 5 of this paper.

[12] Official Gazette 116/07.

[13] Official Gazette 116/07.

[14] Official Gazette 116/07.

[15] It is also worth mentioning Articles 22 and 23 of Law on Defense, regulating international cooperation in this field.

major military and non-military threats and challenges to state security.[16] Secret mobilization, so-called alert measures, and similar controversial legal institutes are no longer mentioned, and it seems that this Act has established a modern and sustainable defense system, appropriate for the security challenges Serbia will face in the following years.[17] Shifting focus to non-military threats is a great step forward for Serbia's military forces, burdened with the heritage of 1990s' violence and warfare. Even more, with solution specified in Article 76 of this Act, the military has made efforts to open itself to civil society and perform joint projects and actions in the area of security and defense.[18] General Command has been officially encompassed by the Ministry of Defense, so Chief of General Staff is now under direct command of President and Minister of defense. Furthermore, provision on respecting international law, especially rules of humanitarian law, has been fully developed and shows deep and serious commitment of civil authorities to overcome the authoritarian past.[19]

Few details nevertheless deserve concern, and should be changed in near future:

- There are no provisions on mechanisms that could provide efficient democratic civil control of defense system, although there is a declaratory norm that democratic civil control exists through the specialized Parliamentary body, competent of supervision over all military, police and intelligence services work. This provision is not sufficient, especially having in mind the practice so far. As mentioned, military structure has been completely inserted into the chain of command with the President and the Minister of defense as two civilian organs at its top – that is also significant step in the right direction, but insufficient to provide control in the field and in military barracks, where human rights are being violated and power abuses are most likely to happen. Law establishes new form of military inspection, but comparative

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[16] Article 4 of the Law on Defense.

[17] These challenges will be mostly on non-military nature (possibility of rebellion, terrorist attacks, natural or industrial disasters, etc). Serbian Army in these situations would have only subsidiary role, and primate in resolving non-military problems would be on Serbian police.

[18] According to Article 76, it is even possible that Ministry of Defense finances scientific and operational projects it considers significant for its work.

[19] Article 8 of Law on Defense.

practice shows that it hasn't always been the best solution for non-military areas (as democratic civil control and respect of human right certainly are), or areas where appropriate forms of civilian inspection exist (e.g. financial or budgetary inspection).[20] Although civil organizations and NGOs proposed the introduction of military ombudsman in the Law on Defense, that area was covered by existing ombudsman of general competence.

- Civil protection is not mentioned in the Law on Defense, except for four articles of Chapter VII. These provide (descriptive) definition of civil protection but provide no answers for many important questions regarding its current and future functioning. This is a continuation of unsolved position of civil protection in the legal system and institutional structure. There were few options before the authors of the Law on Defense: to create special governmental agency for civil defense, or even a special ministry with this competence; to leave the whole field to be regulated by Ministry of Interior – therefore, to give up the whole civil defense system, currently divided between police and military, to police institutions; to leave the whole problem aside and try to regulate it by special regulations in near future. Last approach was considered best, although it left lots of unsolved questions. It is to be expected that Ministry of Defense and Ministry of Interior will jointly propose a new act on civil defense, ending this the ongoing period of its deterioration and deregulation.

Law on Army of Serbia has been adopted simultaneously with other two laws mentioned above, so that it is fully compatible with them and expresses same tendencies in making a modern structure of defense system. It introduces several new solutions, and probably the most intriguing is that it considers full professionalization of the Army in near future. Army itself has been positioned as ideologically and politically neutral.[21] Any political activity of professional servicemen and servicewomen[22] is forbidden, but professional soldiers have the right to form their own syndicates.[23] Although they haven't used it by the time this paper has been written, this solution is important because it represents an example of the spirit of new legislation – profession-

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[20] In Serbia, the civilian inspection is competent to check military institutions as well.

[21] Article 12 of Law on Army of Serbia.

[22] Article 11 emphasizes the gender equality in the Army of Serbia.

[23] Article 14 of Law on Army of Serbia.

al soldiers have been, as much as it is possible considering social and economical conditions in Serbia, put in the position of German concept of "citizens in uniform". Some other rights emphasize that concept even more: all Army members are allowed to practice their religious services in their barracks.[24]

Some questions deserving more attention, but partly omitted from the Law on Army of Serbia, are the following:

- Civil democratic control is mentioned only in one Article, and all that has been said about this problem in the present analysis of the Law on Defense can be applied to this legal text as well.
- The matter of conscientious objectors has been raised in new Constitution of Serbia to the level of human right that cannot be revoked in any circumstances. It is once more recognized by Law on Defense, but it does not deal with it in much details either. Instead, it is expected that this matter will be regulated by the act on civil service. According to NGOs there should be a separate law on conscientious objectors to be drafted by the Ministry of Labor, but the idea was not supported by the Ministry of Defense. Because of this, military will arrange "civil service of conscripts". Practice so far in this sort of arrangements has shown that alternative service is the waste of time for young people spending nine months in a wide range of state institutions, usually doing manual labor duties. High percentage of conscientious objectors has faculty degrees, but so far their potential in real community services has not been used at all. This solution will probably preserve their chaotic and senseless status, until Army is fully professionalized.
- Social insurance system of military personnel has not been encompassed with this Act. Therefore, until new act that regulates this matter is adopted, old Law on Yugoslav Army – Chapters XV, XVI and XVII, dealing with social insurance, will apply in practice. This is surely not the best solution for professional soldiers and civilians in the Army, considering many problems they face in the realization of their basic rights – right to pension, to health insurance, etc.

Finally, third law in the package of acts adopted in 2007 is most controversial – the Law on the Basis of Organization of Intelligence Services of Republic of Serbia. Authors of the Law justified its adoption by the need to put all intelligence services in Serbia – both civilian and military – under joint

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[24] According to Articles 25 and 26, the Government of Serbia will adopt adequate ordinances to make this possibility operable.

control of civilian institutions. That is basically what content of this Act does. Brief text introduces fundamental principles of work of intelligence services, and identifies two military and one civilian service. Military services are part of the Ministry of Defense, while civilian intelligence service is a special governmental organization. National Security Council (NSC) has the competence of supervision of their work. Members of NSC are President, Prime minister, Minister of defense, Minister of interior, Minister of justice, directors of intelligence services and Chief of General Staff.[25] Besides NSC, the Law established Coordination Bureau, as a way of support to intelligence services.

Finally, the Law deals with the matter of civil democratic control of services. At the centre of this problem it puts a relevant Parliamentary board, and regulates its functioning in some details. It is inevitable impression, however, that this kind of control, as it is described above, is only declaratory and there are no essential restrictions to vast powers of intelligence services. Proven links of these organizations to organized crime and war criminals in the recent past in Serbia, should be the reason enough to introduce a more efficient control from outside of military and police system, with significant powers and competences. Without that, this Law is not needed in the legal system and it will often seem as it is just a political proclamation without real purpose.

5. Missing Parts of the Puzzle: Next Few Steps to 2012

Although it is obvious that things are moving in the right direction since 2007, lots of work is still to be done to complete the legal reform of defense system in Serbia. Political documents predicted the end of third – and final – phase of professionalization for 2012. It is now clear that these predictions are too optimistic, but it is possible that 2012 could be the year of completion of legal reforms in defense system and of accomplishing of all preconditions for successful realization of the professionalization process.

There are several laws in parliamentary procedure, waiting to be adopted. Following is a brief overview of most important legal solutions they will introduce to Serbian defense system:[26]

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[25] Article 6 of Law on the Basis of Organization of Intelligence Services of Republic of Serbia.

[26] Comments have been given according to texts at the web presentation of National Assembly (http://www.parliament.sr.gov.yu). These texts could be changed by amendments during the procedure of their adoption in the Parliament.

- *Law Amending the Law on Defense*. This Act will not significantly change the valid Law on Defense; it rather introduces some technical clarifications and harmonizes the existing terminology with other legal and political documents. However, Article 1 that amends Article 4 of the Law on Defense introduces differentiation between "civil protection" and "civil defense". According to laws adopted in 1994, Yugoslavia was the only state in the world that had two separate services in the field of civil protection. Civil defense was a relic of so-called territorial defense. Provisions of civil defense were in violation of the Geneva conventions, since they introduced a category having a term "civil" in its name, its members had its uniforms, there was a chain of command, and the authority to carry and use personal weapon – therefore, they met all three conditions set up in Geneva conventions to consider someone a fighting soldier. After the changes made by the Law on Defense in 2007, civil defense was left out and term civil protection encompassed both. It is unclear why this solution, so characteristic of communist bureaucracy that produced numerous services with similar or same competences, creating chaotic and unreasonably large apparatus, is favorable in times when there are numerous cuts announced in state administration. These moves are, in our opinion, really more a sign that regressive military currents in the Ministry of Defense still has something to say.
- *Law Amending the Law on Army of Serbia*. Same as the previous Act, this proposed law is mostly about the harmonization of terminology and clarification of some legal institutes in more details. There are just few things that are worth mentioning, in the sense of introduction of new legal solutions in some areas of functioning of the Army. Most significant novelty is that there will be specialized inspector for military police. It is a good thing that military police will have an organ that will overview its activities, since its competences regarding the Army personnel are significant. However, it is unlikely that a specialized inspector will improve the quality of conduct of military police in respecting the human rights, since it is just a mechanism of internal control; in practice, internal control of military conduct deals only with the quality of performing duties and results achieved, not in the control of legality of actions taken, when it comes to the rights of individuals.

- *Law on Military Obligation, Working and Material Obligations*. This is a new law in Serbian legal system and it regulates this field with specialized acts, as was the case in 1980s. Furthermore, for the first time three obligations of citizens regarding defense of the country are assembled in a single legal act. When it comes to military obligation, it establishes the well-known system of recruit obligation, regular army service and service in military reserve. It is important to perceive that civil service is also considered as a way of fulfillment of regular service obligation, which is a rigid solution and contradictory to the nature of conscientious objection. On the other hand, it is positive that system of military departments has finally been abandoned and military records are in the competence of special divisions of Ministry of Defense at every municipality.[27] Working and material obligation are reserved only for state of emergency or state of war; unlike previous propositions, they do not exist in state of peace. Troubling solution is when an object of material obligation is damaged or destroyed by military while in use. Neither previous nor this proposal pays much attention to this problem, because military commissions are competent to establish all relevant facts and propose the amount of money and way of payment of compensation to the owner of damaged or destroyed object. Furthermore, the Law does not provide court protection in the case an owner is not satisfied with decision of such military commission.[28] Having in mind considerable abuses of this military authority, it would be a much better solution to provide sufficient protection of individual property. Otherwise, practice could easily lead to violation of Article 1 of Protocol 1 to the European Convention of Human Rights.
- *Law on Civil Service*. Much needed over past few years, this legal Act has to resolve some very specific and delicate matters regarding the realization of one of the basic human rights, right to conscientious objection. As already mentioned, this Act as well as others regarding military obligation, considers the civil service as a form of military obligation, which is a solution that does not make any sense, since conscientious objectors are trying to separate themselves from the

[27] Previous solutions anticipated parallel existence of both types of organs, which was both unnecessary and inefficient.

[28] Good thing is that it does not exclude it either, so owner can address to court anyway.

military and from the use of weapons. There are many other remarks that this approach consequently creates. For instance, civil service is allowed only in state organs and institutions, although community work can be done through NGOs, other private movements and organizations, international organizations, humanitarian movements, private scientific and scholar institutions, etc. Furthermore, right to conscientious objection has been completely connected with non-usage of firearms, including possession of trophy weapons. According to this Law, an individual who had a firearm or license to hold one *at any point of his life* can not have the right to conscientious objection.[29] That is certainly a way to diminish the purpose of such human right and clear distortion of its existence. It is even more illogical solution that a person who has served in the military will have the right to conscientious objection after a period of four years! This is a clear case of discrimination between recruits and individuals in military reserve. There is even more: after the completion of civil service, objector will be noted into special military reserve, which can be called upon both into units of civilian protection and "other institutions of defense system".[30] There are many other points in this future legal act, which lead to one conclusion only: a law on civil service cannot be written and executed by army organs and institutions, because it will lose its main purpose and the whole legal institute of conscientious objection will be transformed into an obstacle in individual's life. Let us not forget that this is a human right that, by the Constitution of Serbia, cannot be suspended in any circumstances, and thus falls under one of the basic human rights in Serbian legal system. If this Act would be adopted, the only "chance" of conscientious objectors to exercise their constitutional right would be to wait for professionalization of the Army. It would also be interesting to hear the opinion of Constitutional Court of Serbia about constitutionality of this proposal.

- *Law on Secret Information*. This is one more legal Act that is missing in Serbian legal system for decades. It provides new mechanisms of making, protecting and revealing secret data, also considering the question of civilian control and internal and external control of data. There are new levels of secrecy of classified data, and authors did

[29] Article 5 of Draft Law on Conscientious Objection.

[30] Article 17 of Draft Law on Civil Service. The same matter is in its entirety included in Chapter V, which deals with military reserve status of conscientious objectors– another terminological and logical nonsense in this Act.

everything possible to harmonize this Act with uniform comparative solutions and international standards.

- *Law on Military Intelligence Services*. This Law establishes two agencies (Military Security Agency and Military Intelligence Agency) that are active today, so there are no great exceptions comparing to current legislation. They are organized as administrative units within the Ministry of Defense, and therefore under direct command of the Minister. MSA has the powers of applying special measures and techniques in gathering information needed for their work. These measures are the same the police and civil intelligence agency use in their operational tasks. It seems though that Article 22 of the draft law contains too vast and vague measures at the disposal of MSA, which may be easily abused for criminal activities, as it often happened in the past.[31] On the other hand, there are measures of control over these agencies. As anyone can see by reading this Act, these two are imprecise – control is vague and weak, almost non-existent. Proclamation of parliamentary control is declaratory only – National Assembly and its specialized Board for defense do not have any operational instruments to examine the work of MSA and MIA, and often are paralyzed by political dissensions of Board members. Governmental control is executed over the Minister of Defense – the practice has shown that Minister cannot fulfill this duty on his own, but only at the level the intelligence agencies find it suitable. Finally, there is Inspector General, announced as a new and efficient tool of internal control of agencies. Although it remains to be seen how will he act in practice, the draft law does not provide enough arguments for its optimism. Quite the opposite: the law gives him significant competences, but not a single instrument to implement them. Furthermore, even if he performs his duty as planned, there are no instruments for preventing or sanctioning unlawful behavior, but reports to Minister of Defense. That is not by far enough to declare these solutions as effective civil democratic control over the military intelligence agencies.
- *Law on Multinational Operations Abroad*. Serbia (State Union of Serbia and Montenegro) adopted the first law regulating this area in

[31] It is the same with measures of MIA in Article 27. It is unclear why MSA should have the authority to establish any kind of legal entity, with tax payers money, and conceal its purpose and operation. This is an ideal model for money laundering enterprises, and should be under special surveillance of civil authorities, which is not the case according to the proposed legal text.

2004. Authors of the new Act introduced it as a step forward and a modern regulation that should replace the 2004 Act, in order to broaden the possibilities for international cooperation and international engagement of all parts of the security system. The Law indeed has some interesting new concepts that correspond with its basic goal. However, there are few things that cannot be considered as modern or progressive. First of all, it still embraces old and abandoned concept that peace-keeping missions are, before all, of military-police character. Modern multinational operations are executed in complex surroundings, with goals to build post-conflict institutions of the failed states, not to act as forces of physical separation of belligerent sides. Furthermore, the procedure set up is unclear and voluntary factor – which is of most importance – has been minimized. Once a person finishes training for multinational operation, he/she is obliged to participate, without any possibility of changing his/her mind. This concept is untenable. Finally, there is existing Centre for peace-keeping operation within the General Staff that has been completely left out of this draft law. The reason is unclear, but it seems that there is no valid reason, and that this "oversight" will only cost Serbia more money to implement this act then it should.

6. Conclusions

All countries of Central and Eastern Europe "taught a bear to dance". Serbia cannot be exception in that matter. Experiences are different, and yet similar in many points. These "outsider's wisdoms", or in other words, "comparative analysis of what went wrong and how could we prevent the same happening to us", did not help to Serbian Government. That is because Serbia did not use it. As Istvan Gyarmati said, greatest mistake of all is to let the Army "reform" itself.[32] Serbia not only did that, but is still doing it. The whole generation of senior officers needed to be changed, for the idea of democratization of defense system to find a fertile soil. Things have changed last few years, and there is a clear political will for changing them. On the

[32] Istvan Gyarmati, Defense System Reform and Global International Relations in Transition, lecture at international conference: Defense System Reform in Southeastern Europe, Geneva, October 28, 2004.

other hand, not everything that comes out of Ministry of Defense is as modern and democratic as one may think.

Some essential problems persist. Civil democratic control over defense institutions, especially the intelligence services, is weak and diminished in clashing with interests of those same services to keep the darkness of conspiracy over their affairs. More problems do arise. Re-introducing civil defense – why a shift back to 1990s? Civil service guided exclusively by the military – what is that all about? Furthermore, forced sending of servicemen and servicewomen to military missions abroad? Is that the message the authors of this important Act wanted to send to public in Serbia?

From the legal expert perspective, lots of things that have been done have been conducted poorly – simply because it has been impossible to find people within the defense system who would do this job like they should have. Making the Law on Secret Information shows that mixed commissions are a best solution for this situation.

If we need to give an overall evaluation of the efforts described, we ought to say that they have been significant, but not sufficient. Normatively speaking, Serbia has not yet established complete harmonization with the leading trends in defense legislation of NATO countries, necessary for functioning of future Euro-Atlantic integrations.

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REFORMA VOJNOG ZAKONODAVSTVA U SRBIJI

Sistem odbrane se u Srbiji u nekoliko poslednjih godina značajno razvijao. Tranzicija i demokratske promene imale su velikog uticaja na promene u ovoj oblasti Novi zakonski okviri su u poslednje tri godine napravile kvalitativnu razliku u odnosu na stari sistem. Autor u ovom članku pokušava i da odgovori na pitanje koliko je daleko Srbija odmakla u evro-atlantskim integracijama.

Ključne reči: Zakon o vojsci; reforma zakonodavstva sistema odbrane; procesi Evro-Atlantskih integracija, međunarodna vojna saradnja

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ON THE WAY TO THE LAW ON TAX ADVISORS OF THE REPUBLIC OF SERBIA: SOLUTIONS APLIED IN REPUBLIKA SRPSKA, THE REPUBLIC OF CROATIA AND THE REPUBLIC OF MONTENEGRO AS GUIDELINES

Abstract

Tax adviser's profession is presented by the Law on Tax Procedure and Tax Administration in 2002. The same law envisages that all specific questions from the domain of tax adviser's profession will be regulated in detail by a special law. Unfortunately, such law has not been passed to this day. The aim of this work is to present and briefly comment in crucial places on the legislative solutions from this field, adopted by Republika Srpska, the Republic of Croatia and the Republic of Montenegro, which could also serve as a relevant guideline on the way to the Law on Tax Advisers of the Republic of Serbia.

Key words: Tax advisor / Tax advisory / Law on Tax Advisers

1. Introduction

In the long-gone 2002, the Republic of Serbia used Art. 17 of the Law on Tax Procedure and Tax Administration[1] to set foundations for independent profession of tax advisor. Par. 1 of the given Art. 17 defines tax advisor as "a person who performs tax advisory in tax procedure." The same article envisages that all detailed questions from the domain of tax advisory will be regulated by a special law. Regretfully, such law has not been passed to this day.

The Confédération Fiscale Européenne, which advocates introduction and improvement of tax advisers' profession in European countries, in

[1] Law on Tax Procedure and Tax Administration, "Official Gazette of the Republic of Serbia", no. 80/02 , 84/02 , 23/03 , 70/03 , 55/04 , 61/05, 85/05, 62/06 , 61/07 and 20/09.

September 2009 celebrated its 50th anniversary. This jubilee served as a motive to the author to point out again the necessity to promptly regulate independent profession of tax advisers in the Republic of Serbia, taking into account all its specific traits. Valuable guidelines on this way could be provided by legal solutions applied in Republika Srpska, Croatia, and Montenegro, whose description and a brief comment represent the subject of the article.

2. About justified existence of independent profession of tax adviser

Numerous reasons speak in favor of constitution of a special, legally regulated tax advisers' profession. The specificity and complexity of tax-legal matter require professional and qualified advisory of commercial subjects. To them, tax advisers first of all represent a guarantee of timely fulfillment of obligations in line with the law. Apart from that, tax advisory is a necessary element of optimal planning of future commercial and investment ventures. Tax adviser's creativity in the sphere of multi-national companies' operations can result in significant savings on the level of global tax obligation.

Ever since it was founded, Tax Administration has been striving to build up reputation of a „tax payers' service." Its officers have to treat tax payers with respect and appreciation. Every tax payer is entitled to free info about tax regulations that proscribe its tax obligation, and if they are laymen, then they should also receive legal aid in order to pay tax in compliance with the regulations. If a tax payer addresses Tax Administration in written form, they will receive a written answer to the question related to their tax situation.[2] However, even if we leave aside basic implacability between tax payer's and Tax Administration's interests, which is an obstacle on the way to establishment of their sincere partnership relation, we must not forget about the significant costs the state covers in an attempt to present itself as a "tax payer's service." Mediating in communication between tax payers and Tax Administration, tax advisers could make significant savings for the state, at the same time increasing security when charging public revenues. Because, bound by law and legislation, tax advisers also act as keepers of state finances.

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[2] See Art. 24 par. 1 points 1-3 of the Law on Tax Procedure and Tax Administration.

Finally, one should not neglect the fact that tax advisers' profession is widespread throughout the European continent. The above mentioned Confédération Fiscale Européenne today gathers tax advisers' organizations from over 30 European countries.

3. Conditions for acquisiton of tax adviser's profession

The given significance of tax adviser's profession and the responsibility it implies require proscription of strict regulations a person has to fulfill to become a tax adviser. Only natural persons who are authorized and registered can do tax advisory. Therefore, the Law on Tax Advisers of the Republic of Montenegro[3] (in further text: Montenegrin Law) and the Law on Tax Advisory of the Republic of Croatia[4](in further text: Croatian Law) proscribe general and special conditions for conducting tax adviser's affairs. The Montenegrin Law states that general conditions a tax adviser has to comply with are: Montenegrin citizenship, work and health ability, no conviction for a crime that makes the person inadequate for tax adviser's job (criminal act against: property, money transfers and commercial operations, state bodies, judiciary and official duty).[5] Instead of the citizenship the Croatian Law poscribes an obligation for tax advisers to reside in the Croatian territory, as well as to use Croatian language and Latin script, i.e. official language and script used in the area where tax adviser works.[6] As for special condition, the Montenegrin Law proscribes that tax advisers should have a degree (it does not specify the profession), at least 5 years of work experience on preparation and implementation of tax, customs, and accounting regulations[7]; a certificate for tax advisers and work authorization.[8] The Croatian Law envisages almost equal special conditions. Yet, unlike the Montenegrin one, the Croatian Law specifies the profession, stating that only people with a degree in economy or law can act as tax advisers. Apart from that, in terms of work experience, the Croatian Law

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[3] Law on Tax Advisers, "Official Gazette of the Republic of Montenegro", no. 26/07 and 34/07.

[4] Law on Tax Advisory "Official Gazette of the Republic of Croatia", no. 127/00.

[5] See Art. 4, par. 2 of the Montenegrin Law on Tax Advisers.

[6] See Art. 8, par. 2 of the Croatian Law on Tax Advisory.

[7] It is interesting that this is a difference in tax and customs regulations, since customs are actually taxes in their characteristics.

[8] See Art. 5 of the Montenegrin Law on Tax Advisers.

implies work on implementation of tax or accounting regulations.[9] The Republika Srpska Law on Tax Advisory[10] (in further text: Republika Srpska Law) envisages conditions equal to the special conditions given in the Croatian Law, except that it does not contain a more specific definition of what "experience in the domain of tax system" implies.[11] The general conditions are not given in a separate category.

When it comes to general conditions, one could criticize the Montenegrin solution, which conditions the persons who want to be tax advisers by Montenegrin citizenship. The other two laws do not do so, whereby the Republika Srpska Law conditions foreign citizens who aim to deal with tax advisory with reciprocity.[12] Also, the conditioning with citizenship is not good from the aspect of basic freedoms of common European market. Concerning the special conditions, it is necessary to specify that people with a degree in economy or law can act as tax advisers. The five-year long work experience seems too long, even if one takes into consideration tax adviser's profession and specificity of the matter they have to master. Although it is insufficiently precise, the formulation of the Republika Srpska Law, which determines work experience as an „experience in the field of tax system," is more acceptable than the other two, because it doesn't reserve the exam for tax advisers only for practitioners. There is no reason why, for example, tax law theoreticians should be denied the right to take the exam, moreover because by passing the exam they prove themselves ready to practise tax advisory. Apart from that, the solution offered by the Croatian and Montenegrin Law envisages that the exam commission can include experts from tax *theory* and practice[13], i.e. experts from the domain of economy and law,[14] and the very same experts are not allowed to take the exam, considering that they lack *practical* work experience.

3.1 Exam for tax advisers and work license

A special place among the condition for acquisition of tax adviser's profession is occupied by exam for tax advisers. By passing the exam, a candidate shows a necessary degree of expertise for practising tax advisory. The exam is justified by the importance and seriousness of tax adviser's calling, as well as by

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[10] Law on Tax Advisory, "Official Gazette of Republika Srpska", no. 17/2008.

[11] See Art. 8, par. 1 in relation to Art. 11 of the Republika Srpska Law on Tax Advisory.

[12] See Art. 3, par. 3 of the Republika Srpska Law on Tax Advisory.

[13] See Art. 10, par. 2 of the Croatian Law on Tax Advisory.

[14] See Art. 5, par. 3 of the Montenegrin Law on Tax Advisers.

the specificity of the matter they have to master.[15] The exam is taken before a commission. Based on the Croatian solution, the commission consists of at least five members appointed by finance minister, at least half of which are people from state tax bodies, and the remaining members are experts from economic, legal and tax theory and practice.[16] The Montenegrin Law contains almost the same provision.[17] The Republika Srpska Law proscribes that the exam is to be taken before a commission, whereby it does not state the number of the commission members or their profile.[18] No solution envisages compulsory presence of tax advisers in the exam commission. Thereby they avoid difficulties that might occur at the constitution of the first commission.

The Croatian Law states that the chamber has a central role in the organization and conducting of the exam. The Chamber passes an exam taking program, which, though, has to be approved by finance minister; it also proscribes the manner and procedure of taking the exam, and proposes the commission members. The Finance Ministry conducts professional monitoring and monitoring of the legality of exam organization and conducting.[19] The Montenegrin Law here allocates a central role to the Finance Ministry which appoints the commission, approves that candidates who comply with law-proscribed conditions may take the exam, and sets the program and manner of taking the exam. The Republika Srpska Law establishes finance ministry's jurisdiction over passing a code of conduct and a program for the exam, and appointing the commission.[20] The Croatian legislator's solution requires a special regime in the interim period, until the chamber is established.[21] The absence of the special regime would create unsurpassable difficulties in an attempt to realize it.

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[15] Apart from legal provisions from tax (tax material and procedural law) and related fields (for example, administrative and commercial law), tax adviser has to be well familiar with economic disciplines (accounting), as well as with economic categories. Thereby, persons dealing with advocacy or providing accountancy services do not dispose with necessary knowledge corpus for quality performance of tax adviser's profession.

[16] See Art. 10, par. 2 of the Croatian Law on Tax Advisory.

[17] See Art. 5, par. 3 of the Montenegrin Law on Tax Advisers.

[18] See Art. 9, par. 3 of the Republika Srpska Law on Tax Advisory.

[19] See Art. 10 of the Croatian Law on Tax Advisory.

[20] See Art. 5 and 6 of the Montenegrin Law on Tax Advisers and Art. 7 and 9 of the Republika Srpska Law on Tax Advisory.

[21] According to Art. 32, par. 1 of the Croatian Law on Tax Advisory, finance minister passes a code on how to take and pass the exam, also appointing a commission which will act until tax advisers' chamber is formed.

According to the Montenegrin Law, within six months since its enforcement, the Finance Ministry may issue up to five licenses without an exam, based on work experience and professional competence of the applicant. The issued licenses will be taken away if the persons who received them do not pass the exam within two years since they received the lincense.[22] The Croatian and Republika Srpska Law do not contain any similar provisions. Opening space for performing the job of tax adviser without passsing the exam, even if for a limited time period, hides numerous dangers. First of all, it is disputable which categories of people deserve with their "expertise and work experience" to be exempt from the regular regime.[23] If some of the people who deal with a certain type of tax counseling were enabled to continue practising this profession without passing the exam, and the rest of them were denied such possibility, that would create a resistance to the proposed law that contains such a provision. Besides, making an exceptional regime is not necessary, since the presence of tax advisers in the exam commission is not compulsory. Therefore, there is nothing on the way to implementation of a consequent polisy toward all candidates. And finally, the Montenegrin legislator's provision also enables potentially amateurish persons to temporarily act as tax advisers. If someone is granted to act as tax adviser based on "expertise and work experience," without taking the exam, one should be consistent and completely exempt such a person from the regular regime.

After the exam is passed, the tax advisers' chamber[24], or the minister[25] issue work license. According to the Montenegrin Law, the chamber *can* deprive an adviser of his license if the described general and special conditions cease to exist, or if the adviser does not abide to the principle of legitimacy, conscience, expertise, and ethical codex for tax advisers. In this place, the Croatian Law is more rigid, envisaging that tax adviser's status *ex lege* stops when the proscribed conditions for acting as tax adviser are

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[22] See Art. 24 of the Montenegrin Law on Tax Advisers.

[23] Are those teachers of tax law, managers in Tax Administration and Finance Ministry, or attorneys with a multiannual experience in tax affairs, accountants, auditors, etc? It is logical to ask why would a person with multiannual expertise and work experience in the field of tax advisory fear that they might fail in the exam?

[24] See Art. 11 of the Croatian Law on Tax Advisory, and Art. 7 of the Montenegrin Law on Tax Advisers.

[25] See Art. 11, par. 2 of the Republika Srpska Law on Tax Advisory.

lost, when they make a written request, then based on prohibition to renew the practise,[26] and in case of death. A declaratory act on cessation of acting as tax adviser is passed by the Chamber. The reasons for deprival of license in the Republika Srpska Law are: conducting actions incompatible with the calling of a tax adviser, loss of business ability and failure to pay premium for compulsory insurance against responsibility. Minister is to execute the deprival of license. Also, the license validity ceases in case of death. While the Republika Srpska Law states that persons deprived of the license may reobtain it if the reasons why it was withdrawn cease to exist, the remaining two laws do not contain such provision.

The Croatian solution seems most complete. According to it, the cessation of existence of general and special conditions (for example, loss of business ability, the fact that tax adviser conducted a fraud or bribery in order to take the exam, etc) automatically leads to the cessation of the status of tax adviser. Apart from that, if it is established that tax adviser acts contrary to the Law provisions (for example, they do not pay for proscribed insurance against responsibility, they perform their duty contrary to the tax law, unconsciously, incompetently, etc.), the chamber will prohibit them to operate as tax adviser, which also includes losing work license. By stating the cases which cause deprival of license, the Republika Srpska legislator actually envisaged a rough provision whose implementation is disputable for other cases which definitely deserve to be treated equally. The range of the Montenegrin legislator's solution is wider that the Republika Srpska's, but it also appears unfinished and subject to different interpretations. First of all, it is disputable, which is why the chamber is allowed to assess whether it will take away adviser's license or not, when they no longer fulfill general and special conditions. Such case must lead to a loss of work license. Also, does the chamber assess whether it will cancel a license if it is established that an adviser does not comply with the principle of legitimacy, conscience, expertise, and ethical codex, or does its assessment on (non) withdrawal of license actually result from the process of determination of whether an adviser broke the given principles or not.

The chamber keeps a register of tax advisers and tax advisory associations. The data entered into the register is public.[27]

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[26] In accordance with Art. 22 of the Croatian Law on Tax Advisory, the chamber can prohibit an adviser who does not comply with the Law to operate, which, in line with Art. 19, par. 2 leads to a loss of work license

[27] See Art. 25 of the Croatian Law on Tax Advisory.

3.2 Tax advisory associations

Tax advisory can also be performed by tax advisory associations. The Croatian and Republika Srpska Laws envisage that a tax advisory association has to be formed as an association of persons.[28] The Montenegrin Law does not specify the form of commercial association for tax advisory.[29] The Republika Srpska Law conditions licensing of a tax advisory association by a requirement that founders (owners) *or* director have to be tax advisers, whereas the other two laws state that all association members have to be tax advisers.[30] An association is entered into a register of professional chamber, which monitors its work.

4.Tax adviser's profession

It is tax adviser's task to take care of tax payer's tax affairs in a timely manner, and in line with tax and other regulations. The range of their services is very broad, but there is an intial difference between three types of services – advisory in tax affairs (advisory in tax determination, strategic planning of reduction of tax obligation within the law provisions, provision of professional opinions, etc.), preparation of tax documentation (tax returns, tax balances, and other taxation-relevant registers), and tax representation before relevant state bodies. Avisory affairs may exceed the framework of national tax legislation.

Tax advisers are obliged to perform their duty independently consciously and professionally.[31] The Croatian Law says that tax adviser is obliged to comply with the principle of legality, consciousness and expertise in relations with a party.[32] The same Law stresses in a number of places that tax adviser's profession is independent.[33] It cannot be performed by persons employed by someone else. If a tax adviser gets an employment, their profession is at a standstill.[34]

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[28] See Art. 17 of the Croatian Law on Tax Advisory, and Art. 15 of the Republika Srpska Law on Tax Advisory.

[29] See Art. 13 of the Montenegrin Law on Tax Advisers.

[30] See Art. 16 of the Republika Srpska Law on Tax Advisory, and Art. 17 of the Croatian Law on Tax Advisory and Art. 13 of the Montenegrin Law on Tax Advisers.

[31]See Art. 22, par. 1 of the Republika Srpska Law on Tax Advisory.

[32] See Art. 24 of the Croatian Law on Tax Advisory.

[33] See Art. 1 and 6 of the Croatian Law on Tax Advisory.

[34] See Art. 13, par. 1 of the Croatian Law on Tax Advisory.

Independence is a precondition of autonomous performance of duties of tax adviser.[35] Apart from that, independence stimulates competition which is positively reflected on the quality of offered services.

The Croatian law defines tax adviser's profession as a profession of advisory on tax issues, representation in tax procedures before tax bodies and in tax disputes before courts, as well as drafting of tax returns and other documents tax payers need to draft and submit in the process of taxation. Apart from the given affairs, tax advisers may work on accounting, draft financial reports, and perform related services. They can also provide expertise affairs based on a decision of a tax body.[36] The Montenegrin Law almost takes over the Croatian definition. It also primarily distinguishes three types of affairs – advisory affairs, tax documentation drafting, and representation affairs. Within the first group of affairs, the Montenegrin Law again makes a difference between advisory in tax and customs issues, which has already been assessed as unnecessary, since customs is already a type of tax in its character. When it comes to the second group of affairs, the Montenegrin Law applies the following formulation: "drafting tax forms, tax balances, and other tax-relevant documents." In the field of representation, the Montenegrin legislator speaks about "representation before administrative and court bodies in tax procedures." Tax adviser can also perform related jobs like accounting and drafting financial reports.[37] The Republika Srpska Law determines tax adviser's field of work in a similar way.[38] Using a formulation: "representation in tax affairs before relevant bodies" the legislator is insufficiently precise, compared to the Croatian and Montenegrin solution.

It is certain that the definition of the profession should encompass all three types of affairs. Advisory affairs should have the widest definition, which is done in all three laws. Apart from advisory in national tax legislation affairs, it is also possible to authorise tax adviser to provide advisory in affairs referring to foreign countries' tax law.[39] Considering the diversity of tax doc-

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[35] Therefore, tax advisory associations can also be organized solely as associations of persons, see Art. 17, par. 1 of the Croatian Law on Tax Advisory. Tax advisory association can only have tax advisers for members. The Law provisions (including those that envisage tax adviser's independence) are applied to every individual member, see Art. 17, par. 3 and 4 of the Croatian Law on Tax Advisory.

[36] See Art. 2 and 4 of the Croatian Law on Tax Advisory.

[37] See Art. 4 of the Montenegrin Law on Tax Advisers.

[38] See Art. 1 and 5 of the Republika Srpska Law on Tax Advisory.

[39] See Art. 3, par. 2 of the Republika Srpska Law on Tax Advisory.

umentation tax payers are obliged to draft, it is adequate to apply a wide formulation, as that in the Croatian and Montenegrin Law. A definition of tax representation requires most caution. Tax adviser's authority to represent their client before tax administrative bodies is not disputable. However, when determining the representation rights, it is necessary to pay attention to the proscribed legitimation for representation before a relevant court. Even if we accept the arguments that within their education tax advisers must master certan fields of law, and that tax matter is rather specific, we cannot deny the fact that tax advisers who are not also lawyers may lack necessary procedural knowledge and routine for successful conduct of a proceeding. Tax advisers may work on accounting, compose financial reports, and provide similar services, but they are not allowed to provide auditing services to their clients at the same time.

When it comes to tax adviser's important obligations, derived from the activities they perform, accent should be put on the obligation to keep a professional secret, obligation to insure against responsibility, and obligation to restrain from performing actions contrary to tax adviser's profession. Doing the job of tax adviser requires insight into data whose revealing could cause damage to a client. The protection of their interest assumes determination of obligation to keep business secret, as is done in all three laws.[40] The same obligation also refers to tax adviser's co-workers. Apart from revealing a business secret, damage to a client can also be caused by tax adviser's incompetent actions in a concrete case. Client's security requires proscription of a compulsory insurance against responsibility, which may emerge from tax adviser's profession. This also protects the very adviser, since the complexity of the contemporary tax legislation keeps numerous risks related to adequacy of advice in a concrete case. A fear that such obligation could lead to a more unconscious approach cannot be accepted, because *independent* tax advisers will strive to maintain their reputation on a high level. All three laws envisage obligation of insurance against responsibility.[41] According to the Republika Srpska and the Republic of Croatia Laws, concrete insurance conditions are set in agreement between the Tax Advisers' Chamber and insurance companies, or

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[40] See Art. 15 of the Montenegrin Law on Tax Advisers, Art. 20 of the Croatian Law on Tax Advisory and Art. 22 of the Republika Srpska Law on tax Advisory.

[41] See Art. 14 of the Montenegrin Law on Tax Advisers, Art. 23 of the Croatian Law on Tax Advisory, and Art. 24 of the Republika Srpska Law on Tax Advisory.

between Tax Advisers' Chamber, Finance Ministry, and insurance companies.[42] The Croatian and Montenegrin Laws also proscribe the minimum insurance amount.[43] Tax advisers are obliged to extend insurance against responsibility in a timely manner. Unpaid proscribed premiums may serve as grounds for withdrawal of work license. The Republika Srpska Law has an interesting provision which envisages that exam application may be rejected if a candidate does not provide necessary insurance for compensation of damage which could emerge from tax adviser's work. A proof about paid premium can only be a condition for issuing work license, but not for taking the exam in case of persons whose practise of the profession directly depends on previously passed exam. Tax adviser must not perform actions adverse to their profession.[44] Adverse actions imply above all work in tax administration, state bodies, performing audits for the same client, and other cases which may cause a conflict of interests. For example, the Montenegrin Law envisages that tax adviser who in the past three years before applying for a work license worked in a tax or customs institution, whose range of work encompassed decision-making in tax or customs affairs, has to restrain for one year since the license issuing from closing a contract with a party whose case they solved or decided on. [45]

A normative expression of the described obligations imposes itself as necessary, considering their importance in the protection of client, state, and the adviser themself.

5. Professional organization

Tax advisers may associate into a chamber. What's more, foundation of a chamber and obligation that its membership consists of tax advisers is desireable for a number of clear reasons. The chamber, as a professional,

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[42] See Art. 24 of the Republika Srpska Law on Tax Advisory and Art. 23 of the Croatian Law on tax Advisory.

[43] It is interesting that there is a great difference in the proscribed amounts. Therefore, the Croatian legislator proscribes a minimum insurance amount of almost EUR30,000, whereas the Montenegrin legislator envisages ten times lower amount, see Art. 23, par. 7 of the Croatian Law on Tax Advisory, and Art. 14, par. 4 of the Montenegrin Law on Tax Advisers.

[44] See Art. 22, par. 2 of the Republika Srpska Law on Tax Advisory.

[45] See Art. 7, par. 3 of the Montenegrin Law on Tax Advisers. Also, the Croatian Law on Tax Advisory in Art. 14, par. 5.

independent organization can be by far more successful in defense of tax advisers' interests and promotion of their profession than individuals. Such chamber's action justifies compulsory membeship, because out of the chamber, advisers would make a direct profit without paying a part of the costs for the chamber funding. Then, the chamber may guarantee high quality of tax advisory. Dynamics of development of tax law requires continuous improvement of tax adviser's knowledge.[46] It is the chamber's task to organize both voluntary and compulsory professional courses for their training. Apart from that, the chamber may help a quality production of new staff by organizing preparation for tax advisory exam. By proscribing an ethical codex, monitoring tax adviser's professional actions[47], forming a court of honor, mediating in conflicts between tax advisers or tax advisers and clients, etc., the chamber preserves the reputation of tax adviser's profession. Finally, by following the new features in the field of tax system, the chamber can initiate its changes in the interest of tax payers and the state.

The chamber has a character of a legal person.[48] Most of its funding comes from membership fees and fees for services it offers, such as issuing licenses, organizing exam for tax advisers, providing data from its registers, etc., but also from donations, sponsorships, gifts and other sources. Issues relevant for the chamber's work are regulated by a statute.

The Republika Srpska Law does not envisage the obligation to form a professional chamber, or an obligatory membership in it.[49] On the contrary, the Croatian law explicitely states *compulsory* associating of tax

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[46] The importance of this question in the field of tax advisory is best described in Art. 7, par. 4 of the Montenegrin Law on Tax Advisers, which sets an obligation that tax adviser has to re-take the exam if he does not deal in the profession for more than three years. An exemption from this regime is the case of temporary standstill in the profession.

[47] Therefore, according to Art. 29 of the Croatian Law on Tax Advisory, the Chamber reports to the Finance Ministry about the situation, problems and measures for improvement of tax adviser's work. The Finance Ministry follows and studies the work of tax advisers, and in that respect, the Chamber may be asked to provide information and data, considering tax adviser's autonomy and independence.

[48] See Art. 25of the Croatian Law on Tax Advisery and Art. 17 of the Montenegrin Law on Tax Advisers.

[49] See Art. 25 and 26 of the Republika Srpska Law on Tax Advisory.

advisers into a chamber.[50] Having in mind the significance the chamber's actions have for tax adviser's profession, the Croatian legislator's approach in this matter seems more adequate.

6. Conclusion

Tax adviser's profession has to be regulated by a law. Such a measure is obligatory, not only because of its importance, but also because of the provisions of the existing Law on Tax Procedure and Tax Administration. The described legislative solutions from the region could serve as a good guideline on the way. Their analysis leads to a few crucial conclusions:

1. *Strict conditions have to be proscribed for the work of tax advisers.* A degree in law or economy, multiannual experience in the field of tax system, exam certificate and work license are the minimum conditions for a tax adviser to be allowed to work. In their work, tax advisers are obliged to pay attention to their legal obligations (for example, to regularly renew insurance from responsibility, to restrain from perfoming incompatible actions, etc.). If the proscribed conditions cease to exist, and if a tax adviser acts contrary to the legal provisions, the awarded license is to be cancelled.

2. *Tax adviser's profession must be broadly defined.* It is tax advisers' duty to conduct their profession independently, consciously, and professionally, in line with the rule of legitimacy. Three groups of affairs constitute tax adviser's profession – advisory affairs, tax documentation drafting, and representation affairs. Tax adviser is obliged to preserve the data he obtains while performing his duties as a business secret, to be insured from responsibility, and to restrain from performing incompatible actions.

3. *Tax advisers have to have their professional organization.* Monitoring the conduct of tax adviser's profession, promotion of their interests, and care about the profession's reputation are some of the most important of many tasks the Tax Adviser's Chamber has. Therefore, membership in the Chamber cannot be a matter of free choice.

The question of passing a Law on Tax Advisers of the Republic of Serbia deserves to promptly find its place on our government's list of priori-

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[50] See Art. 25 of the Croatian Law on Tax Advisory. It can also be seen in the Montenegrin Law that tax advisers are obliged to associate in a chamber, see Art. 17 of the Montenegrin Law on Tax Advisers.

ties, especially within its current efforts to reduce the existing budget deficit. As yet another clear expression of care for the state finances, such a step would certainly reflect positively on the Republic of Serbia's rating before the relevant international subjects, on whose financial aid we, unfortunately, mostly depend.

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NA PUTU KA ZAKONU O PORESKIM SAVETNICIMA REPUBLIKE SRBIJE: REŠENJA REPUBLIKE SRPSKE, REPUBLIKE HRVATSKE I REPUBLIKE CRNE GORE KAO PUTOKAZ

Abstrakt

Profesija poreskog savetnika predstavljena je Zakonom o poreskom postupku i poreskoj administraciji 2002. godine. Istim zakonom predviđeno je da će sva bliža pitanja iz domena delatnosti poreskog savetovanja biti bliže uređena posebnim zakonom. Do danas, nažalost, ovakav zakon nije donet. Zadatak je predstojećeg rada da predstavi i na ključnim mestima ukratko prokomentariše zakonodavna rešenja Republike Srpske, Republike Hrvatske i Republike Crne Gore iz ove oblasti, koja bi ujedno mogla biti i relevantan putokaz na putu ka Zakonu o poreskim savetnicima Republike Srbije.

Ključne reči: Poreski savetnik- Poresko savetovanje- Zakon o poreskim savetnicima

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SUPPRESSING TAX EMBEZZLEMENT IN THE REPUBLIC OF SERBIA

Summary: *Since ancient times and up to the present, the matter of securing an orderly, lawful, well-timed and flawless functioning of the system of public revenues and expenditures has been rather significant for the State. Its basis is rooted in the fiscal system. As a matter of fact, the fiscal system and its orderly, well-timed, complete and flawless realization has a great impact on existence, survival and even development of the State itself. Consequently, it is understandable how important and necessary for the State is to oppose, by applying a wide range of various measures, means and ways as well as procedures, at all levels, the various kinds and types of failing to pay, concealing, failing to report or avoiding the payment of taxes, contributions and other dues that make the system of public tributes, i.e. public revenues.*

Violating the regulations in the fiscal system area may entail various damaging consequences. Depending on the kind of violation and/or damage caused in terms of its scope and intensity, or putting in danger of protected social values, the law has provided different sanctions while distinguishing between criminal offences or certain other kinds of violation. The most dangerous and most serious forms of transgressing tax laws, apt to inflict most serious consequences, i.e. considerable damage to the society as a whole, make the category of tax criminal offences, or criminal offences in the area of taxes. Specific among these offences in terms of its significance, scope and characteristics is the act of tax embezzlement as the most serious form of expression of tax evasion threatened in criminal legislation by prescribed penalties and other criminal sanctions. Consequently, the present article is dedicated to elaboration of the criminal offence of tax embezzlement and description of efforts of the Republic of Serbia aimed at efficient suppression of various forms and types of that criminal offence.

Key words: taxation system, taxes, evasion, criminal offence, liability, sanction.

1. INTRODUCTORY CONSIDERATIONS

Criminal offences and more particularly tax embezzlement[1] (*evasion, fraude fiscal, omesso versamento di imposte, steuerbetrug*) amounts to exceptionally serious unlawful and dangerous conduct committed by individuals or groups and/or legal entities (companies, institutions or other organizations) by which, through violation of regulations, financial interests of the entire social community are put in danger, which is primarily expressed in inflicting considerable damage to the fiscal system and the public revenues system in general,[2] including also direct or indirect losses to all budgetary beneficiaries. These unlawful acts make a particular kind of commercial criminal offences,[3] that may be classified as a sub-group of offences against public, i.e. State finances.[4] Such offences are often also called financial criminal offences.[5]

Considering the enormous significance of fiscal system, its orderly, well-timed, complete and efficient realization for the existence, survival and even development of the State and/or society, it is perfectly clear that it has to oppose, through various institutions at all levels and by applying wide range of various measures, ways and procedures, all forms and kinds of failure to pay, concealing, failure to report or avoiding of payment of taxes, contributions and other prescribed dues that make the system of public tributes and/or public revenues.[6]

It goes without saying that the violation of regulations in the area of fiscal system[7] may entail various damaging consequences. Depending on the kind of violation and/or damage caused in terms of scope and intensity or

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[1] B. Matković, Utaja poreza, računovodstvo, revizija i financije, Zagreb, no.11/2007, pp. 115 – 117.

[2] More on this topic: M. Anđelković, D. Jovašević, Izbegavanje plaćanja poreza, Niš, 2006, pp. 101- 121.

[3] B. Pavišić, V. Grozdanić, P. Veić, Komentar Kaznenog zakona, Zagreb, pp. 636 – 637.

[4] P. Novoselav, Gospodarska kaznena djela, Zbornik radova, Aktuelna pitanja kaznenog zakonodavstva, Zagreb, 2001, pp. 3 – 31.

[5] J. Kovačević-Čolović, Kaznenopravne sankcije za financijska krivična djela. Hrvatska gospodarska revija, Zagreb, no. 4/1999, pp. 446 – 453.

[6] M. Hadžimusić, Odgovornost i sankcionisanje subjekata zbog neizvršenja poreskih obaveza, Pravna misao, Sarajevo, no. 1-2/2005, pp. 51 – 53.

[7] B. Đerek, Kaznena odgovornost za povrede poreznih zakona, Financijska teorija i praksa, Zagreb, no. 1/2003, pp. 83 – 112.

endangering the protected social values, the law provides various sanctions that depend on the type of offence or unlawful act committed in a particular case.[8] The most dangerous and serious forms of violating the tax laws, by which serious consequences are entailed and/or extreme damage inflicted against the society as a whole, are the criminal offences in the area of taxes.[9]

2. FORMS OF EXPRESSION OF TAX EVASION

The ground of criminal offences in the area of taxes,[10] regardless of the form of their expression in the specific case, is found in various kinds of tax evasion, particularly considering the fact that such evasion is at the same time one of the most frequent forms of black market. Such kind of market may take place practically in rather different areas of activity, such as: manufacturing and trade of goods and services, labor market and employment relations, building industry, housing and municipal services, real estate, etc.[11]

However, most important in the optics of interest of the State are those black market forms of that are particularly manifested in the sphere of disturbing, putting in danger or violating the fiscal (taxation) system.[12] Evasion or various forms and types, i.e. ways of avoiding reports and deciding on the amount of prescribed taxes and other dues and of their collection, amount to a damaging, unlawful and dangerous activity on the part of individuals and groups, by which fundamental fiscal interest of society are jeopardized.[13]

The fact is that tax payers experience the tax as a specific expenditure which only makes worse their material situation, because payment of taxes and other dues has a direct impact on decreasing their economic power and purchasing capacity. Consequently, they avoid the payment of taxes or avoid

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[8] I. Kovčo Vukadin, Gospodarski kriminalitet – kriminološka obilježja, Hrvatski ljetopis za kazneno pravo i praksu, Zagreb, no. 2/2007, pp. 435 – 493.

[9] D. Jovašević, T. Hašimbegović, Sistem poreskih delikata, Beograd, 2004, pp. 68 – 81.

[10] D. Jovašević, M. Gajić Glamočlija, Poreska utaja – oblici ispoljavanja i mere zaštite, 2008, pp. 189 – 216.

[11] Z. Pogarčić, Nova kaznena djela iz područja gospodarskog poslovanja, Računovodstvo, revizija i financije, Zagreb, no. 12/2003, pp. 141 – 147.

[12] D. Kos, Kaznenopravna odgovornost za krivična djela gospodarskog kriminaliteta, Hrvatski ljetopis za kazneno pravo i praksu, Zagreb, no.2/2000, pp. 381 – 398.

[13] B. Gačić, Neki novi pojavni oblici privrednog kriminaliteta, Pravna misao, Sarajevo, no. 9-10/1981, pp. 39 – 41.

it in various degrees, or at least try to do that in an attempt to make easier that burden. All these forms of payment avoidance amount in fact only to most serious and dangerous forms and types of expressing the tax evasion.[14]Particular form of such evasion is the avoidance of income tax levied on unlawful activities.[15]

Inclination of tax payers to completely of partially avoid payment of taxes and other dues depends primarily on the intensity of resistance toward such payment. This resistance intensity, on its part, depends on several elements that may classified in the following manner: 1) the amount of tax burden, 2) the purpose of spending resources obtained through tax, 3) tax form, 4) public opinion regarding the justification of tax.[16] Consequently, one may distinguish between two forms of tax evasion – the lawful and the unlawful one. The lawful evasion exists where individual tax payers in fact respect the frameworks set on the ground of law or other general regulations in the area of fiscal or tax system, but still attempt, in various ways, to avoid totally or partially the payment of taxes and other prescribed dues.

Practically speaking, at issue here are various forms of use of tax incentives (in the form of exemption or tax relief in fixing the amount of taxes, tax assessing of payment of taxes). These forms include also using a gap in the law in tax or other laws and regulations, which is enhanced by the high degree of abstract notions, imprecision and generality of wording applied by the lawmaker. This is particularly the case in those systems where, due to speedy and abrupt changes in the economic sphere in the country and abroad, the very tax regulations had to be amended rather often in order to adapt to new social, legal and economic frameworks.[17]

Furthermore, the lawful or – as some authors call it – permitted tax evasion,[18] includes procedures resorted to by tax payers in order to totally or partially avoid the payment of taxes in one of the following ways: 1) change of stay or residence, 2) reducing or giving up the consumption of taxed products or services, and 3) finding the gaps in the law. The very moment of

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[14] M. Matković, Utaja poreza, Računovodstvo, revizija i financije, Zagreb, no. 11/2007, pp. 115 -117.

[15] D. Gnjatović, Finansije i finansijsko pravo, Beograd, 1999, p. 139.

[16] D. Popović, Nauka o porezima i poresko pravo, Beograd, 1997, pp. 450 – 451.

[17] T. Najamšić, Kaznena djela porezne naravi, Pravni vjesnik, Zagreb, no. 9/1999, pp. 33 – 41.

[18] B. Jelčić, Nauka o finansijama i finansijsko pravo, Zagreb, 1990, pp. 183 – 184.

maturity means that the tax payer comes into debtor's delay regarding the payment of his/her tax debt, while this maturity means the feature of the tax debt according to which it has become due in terms of law. Missing the deadline for fulfillment of the relevant obligation materializes the fact of damaging and unlawful conduct.[19]

The second form of tax evasion concerns an unlawful or prohibited evasion. Unlawful evasion means that an individual as a tax payer becomes exposed to the severity of law and penal repression. In this case the regulations are violated in various degrees of intensity. This again means inflicting direct damage to social community. Such illegal acts are, as already said, aimed against the tax, i.e. fiscal system of the country. This unlawful evasion may take two forms which otherwise are most characteristic of modern legal and social systems.[20]

The first mentioned form of avoidance of tax payment included tax evasion, tax embezzlement, i.e. avoiding of payment of taxes and other dues – which is the topic to be considered later on in this text. The second form of tax evasion is smuggling or cross-border contraband of various goods, products or services involving a single or several countries. These types of unlawful tax evasion are rarely undertaken independently from other illegal activities of their perpetrators. Most often they are but a stage in committing other punishable acts done on a permanent basis by individuals or, as the case may be, groups, which acts are otherwise specified as criminal offence, commercial violations or misdemeanors.[21]

Unlawful evasion includes various steps of law violation, taken by tax payers aimed at avoiding the payment of taxes. In order to evade the payment in an non-permitted way, the tax payers conceal , totally or partially their property subject to taxes. The aim of such embezzlement is to decrease the tax debt, and in this respect, depending on the object involved in the unlawful act, the theory knows of complete or incomplete embezzlement. Unlawful evasion of these types is punishable. All contemporary states as well as the states in the past have always taken various measures to oppose such punishable activities. Various preventive but also repressive measures are applied in this process in order to strengthen tax discipline. Considerable role in the pre-

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[19] O. Buehler, G. Strickdrodt, Band I, Allgemeiner Steuerrecht, Wiesbaden, 1960, p. 365.

[20] B. Škof, Utaja poreza na dodanu vrijednost i njezino kažnjavanje, Financijska praksa, Zagreb, no. 4/1996, pp. 426 – 431.

[21]

vention of unlawful tax evasion relates also to the reducing of tax burden into reasonable frameworks helping to attenuate the factors that contribute to higher intensity of resistance against payment of taxes.[22] According to some authors, the unlawful tax evasion[23] is one of the key causes of existence of the black market. Indeed, this concept includes all illegal commercial activities aimed at acquiring economic gains for an individual and at the detriment of the State and persons engaged in lawful commercial activities. The former illegal activities are effected by avoiding or violating of relevant regulations. Some authors call this black market economy also – non-taxed, informal, underground, black, informal or unofficial economy. But, regardless of the variety of terms, almost all authors do agree in looking at these unlawful activities as improper or as the ones imprecisely or wrongly interpreted in the media.[24]

3. CHARACTERISTIC OF THE CRIMINAL OFFENCE OF EMBEZZLEMENT

Criminal offences in the area of taxation are distinguished from other criminal offences by their nature and character. There are several kinds of such offences. The basic one of the kind is tax evasion specified in art. 229 of the Criminal Code of the Republic of Serbia.[25] This was the way, after entering into force of this Law on 1 January 2006, of replacing the offence ''Avoidance of tax payment'' formerly provided for in art. 172 of the Law on Tax Procedure and Tax Administration (which abolished on 1 January 2003 the provision of article 154 of the Criminal Law of the Republic of Serbia covering the act of embezzlement). The mentioned Law on Tax Procedure and Tax Administration, as a secondary law in this matter, still includes certain other offences in the sphere of taxes.

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[22] International Bureau of Fiscal Documentation: Intenational Tax Avoidance and Evasion, Amsterdam, 1981, p. 21.

[23] S. Madžarević Šujster, Procjena porezne evazije u Hrvatskoj, Financijska teorija i praksa, Zagreb, no. 1/2002, pp. 117 – 144.

[24] W. Begeer, W.H.K. Tuinen, The Statistical Representation of the Informal Economy, Quarterly Journal of the Central Bureau of Statistics, Vol. 1, no. 3/1986, p. 77.

[25] Official Gazette of the RS, nos. 85/2005, 88/2005, 107/2005 and 72/2009. More on this topic – D. Jovašević, Kivični zakonik Republike Srbije sa uvodnim komentarom, Beograd, 2007, p. 87.

As already said, avoiding of legal duty of payment of specific amounts of money to the benefit of the State, is an act of damaging the interest of society, entailing also negative consequences for the social security funds and institutions, hampering as well the functioning of all budgetary institutions and affairs.[26] However, only where such avoidance amounts to a wider scope or assumes more serious forms, one may speak of taking place of the criminal offence in the area of taxes. All other less important and different cases of lack of tax discipline and tax embezzlement, although certainly unlawful and punishable conduct, belong to the category of commercial violations and/or misdeamenors.[27]

3.1. The Concept of Criminal Offence of Embezzlement

The basic criminal offence in the legal system of the Republic of Serbia is the tax embezzlement. In some legal systems this offence goes under the term ''tax evasion'' or ''tax and other dues evasion'', and the like. In our system it is provided for, after 1 January 2006, in article 229 of the Criminal Code of the Republic of Serbia. Its elements include disclosing of false information on one's legally acquired revenues, objects of property or other facts relevant in assessing the tax duty, or the failure to report these where submission of tax form is prescribed, as well as concealing of data important in assessing the tax duty with the aim of totally or partially avoiding the payment of taxes and other prescribed dues and contributions for oneself or for others, where the amount of avoided obligation exceeds 150,000 RSD.[28] The title of this offence derives from its element expressed in committing an unlawful acquisition by the perpetrator of that amount of dues whose payment is avoided by such an act.[29] In this way the mentioned criminal offence formerly specified in article 172 of the Law on Tax Procedure and Tax Administration has ceased to exist.[30]

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[26] M. Kesner Škreb, Izbjegavanje i utaja poreza, Financijska praksa, Zagreb, no. 3/1995, pp. 267 – 268..

[27] M. Demirović, Krivično delo poreske utaje, Pravna misao, Beograd, no. 9-10/1989, pp. 37 – 39.

[28] D. Miloš, Krivično delo poreske utaje, Pravna misao, Sarajevo, no. 9-10/1981, pp. 49 – 63.

[29] M. Radovanović, M. Đorđević, Krivično pravo, Posebni deo, Beograd, 1975, pp. 250 – 251.

[30] Official Gazette of the RS, nos. 80/2002, 84/2002, 23/2003, 72/2003 and 55/2004.

3.2. The Object of Protection

According to statutory description of the criminal offence of embezzlement one may conclude that this is an offence of a *sui generis* nature. However, according to some authors, this is a specific form of criminal offence of fraud, although, to be true, the one inflicting damage to the society as a whole.[31] This offence is characterized also by the blank disposition, meaning that completing its content depends on other regulations in the area of fiscal and tax systems that have to determine the concept, the kind and the content of individual taxes and other public dues (contributions and public duties), the tax payers of these duties as well as the payment time limits.[32] Such kind of disposition allows that the nature and content of fiscal duties, in terms of the object of protection by this criminal offence, be determined on the ground of regulations outside of the criminal law sphere.[33]

The object of protection by prescribing this criminal offence is the fiscal system, the public revenues system that makes the foundation of the economic order of the country. There are also conceptions[34] in the theory according to which the object of protection in this case is the duty of payment of taxes, contributions and other dues. Public duties include taxes, customs duties, fees and contributions. The object protected is determined in an alternative way. It may include the following categories: taxes, contributions and other duties specified by law and included in public revenues. The treatment is the same regardless of whether these duties refer to natural persons or legal entities. It is a matter of factual case to determine, according to relevant regulations, the kind of fiscal duty.[35]

Since our fiscal system acknowledges several kinds of taxes, this conception includes in any case the part of income or property taken by the social community from natural persons and legal entities (companies, institutions, and other organizations) and/or entrepreneurs to cover the corresponding public expenditures without giving to tax payers any direct counter favor or counter service. The State in fact does the above by taking a part of income

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[31] Z. Stojanović, O. Perić, Krivično pravo, Posebni deo, Beograd, 2000, p. 244.

[32] D. Ocvirk, Skriveni transferi dobiti, Porezni vjesnik, Zagreb, no. 3/20001, pp. 53 – 62.

[33] Lj. Jovanović, V. Đurđić, D. Jovašević, Krivično pravo, Posebni deo, Beograd, 2006, pp. 256 – 258.

[34] B. Pavišić, V. Grozdanić, P. Veić, Komentar kaznenog zakona, op. cit., p. 636.

[35] Lj. Lazarević, Krivično pravo, Posebni deo, Beograd, 1993, p. 229.

or property from its citizens on the ground of government authority without countering with some direct counter action. Consequently, taxes are a rather important category from several points of view,[36] since they serve as an instrument of realization of further and higher objectives in the name and for the satisfaction of needs of the entire social community and at the same time represents a strongly efficient mechanism of social policy.[37] On the other hand, taxes may be defined also as prestation in terms of money, or revenue to be calculated from the income of tax payers which is used for covering determined public expenditures. Taxes thus are the part of property or income taken from natural persons and legal entities with the purpose covering the expenses of social and political community.[38]

Similar is the function and role of contributions and other prescribed dues which fall also in the category of revenue in our legal system. These prestations as well serve for satisfying common and general social needs.[39] Contributions[40] are also prestations to be effected in conformity with law and other regulations from the income of natural persons or legal entities and/or entrepreneurs. Their purpose, too, is meeting the needs of various social institutions and services in the following areas: social security for children and other categories of population, health care, education, culture, science, temporary unemployment or inability for work, etc. According to some authors, contribution may also be treated as pecuniary prestations to be paid to compensate for specific services or in order to exercise certain rights.[41] They may also be a category of prestations to be levied on the ground of law and other regulations from personal incomes, in order to cover the common needs in various areas of social activity.[42]

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[36] R. Sučević, Uloga poreza i drugih davanja, Pravo i porezi, Zagreb, no. 3/1997, pp. 52 – 55.

[37] B. Škof, Utaja poreza na dodatu vrijednost i njezino kažnjavanje, Financijska praksa, Zagreb, no. 4/1996, pp. 425 – 431.

[38] Lj. Lazarević, B. Vučković, V. Vučković, Komentar Krivičnog zakonika Crne Gore, Cetinje, 2004., p. 660.

[39] Z. Stojanović, O. Perić, Krivično pravo, Posebni deo, op. cit., p. 224.

[40] Contributions are all kinds of duties toward social sommunity. Verdict of the Supreme Court of Serbia, Kž. No. 32/78.

[41] B. Pavišić, V. Grozdanić, P. Veić. Komentar Kaznenog zakona, op. cit., p. 636.

[42] See footnote 38.

[43] See footnote 36.

Especially conspicuous in the present practice are social security contributions. One has to note that the failure to pay them is a criminal offence, which (in terms of protected object applies also to other dues entering in the sphere of public revenues. This very fact is a basis of the claim that in this case it is possible to speak of blank subject-matter of the criminal offence. Such formulation of blank disposition characteristic of the criminal offence of embezzlement has been introduced in our legislation as well during the legislative reform in 1977.[43] However, at that time the concept of contribution, in terms of the object of protection, included numerous and different public dues, in addition to those in the sphere of social insurance – which is the case in the present legislation. After the introduction of new fiscal system in our Republic in 1992, the concept of contributions includes only those social security contributions that, together with taxes and other dues representing public revenues category. Consequently, avoiding of payment of other public revenues, such as fees, customs duties, dues related to various other purposes, do not amount to the object of protection in terms of this criminal offence, so that, in a concrete case, depending on the action taken by the perpetrator and other relevant circumstances, another criminal offence may be at issue or another kind of unlawful conduct (commercial violation or misdemeanors).[44]

The court practice supports the above mentioned conception,[45] meaning that the concept of other prescribed contributions includes all kinds of duties toward social community. According to another standpoint of the Supreme Court of Serbia,[46] in deciding on arraignment due to a criminal offence of tax embezzlement it is not necessary that the amount of the embezzled tax be determined in advance by the tax authority in the administrative proceedings.

The area of fiscal law and the public revenues law informs us on the plurality of statutory substantive law provisions serving in determination of individual types and forms of taxes and other public prestations depending on the kind of activity and/or other type of taxation source as well as on the status of the tax payer.[47] In any case it is important to particularly point out that

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[43] See footnote 36.

[44] G. Mršić, Kaznena djela utaje poreza i drugih davanaja – poseban osvrt na slučajeve iz prakse, Radno pravo, Zagreb, no. 9/2207, pp. 61 – 68.

[45] Verdict of the Supreme Court of Serbia, Kž. No. I 32/78.

[46] Verdict Kž. No. I 1815/73.

[47] See footnote 23.

correct application of the criminal law provisions and the qualification of the concrete state of facts are much helped also by the decision of the Supreme Court of Serbia according to which there is no criminal offence of tax embezzlement where the administrative agency in charge of taxes was in possession of valid data at the moment of rendering the decision, which information indicated the falsity of data reported in the tax return submitted by the tax payer, but in spite of that still founds its decision on such (false) tax return.[49]

3.3. The Action of Perpetration of Criminal Offence

According to statutory definition of the criminal offence of embezzlement that offence may appear in two forms. These are the basic and the serious, i.e. qualified form. The basic form of this criminal offence, depending on the criminal action taken, may appear in three separate kinds.[50] These include: 1) disclosing of false revenue data , 2) failure to report revenues in case the report is compulsory, and 3) concealment of data in some other way.[51] Since at issue here is a specific form of criminal offence of fraud,[52] according to some authors the unlawful action in the case of this offence, generally speaking, may be said to be the fraudulent activity. In its becoming concrete, it may be manifested in two ways alternatively: as an active and positive act – *delicta commissiva*, and as a passive, i.e. negative act (failure to act, missing of one's duty) – *delicta omissiva*. In this respect, disclosing false data regarding the revenues is considered as a positive action of perpetration of this criminal offence, while failure to report – as a passive activity committed by the perpetrator, while the action of concealment may be undertaken both by acting or failure to act.[54]

a) Disclosing of false data on lawfully acquired revenue, objects of property or other facts relevant in assessing tax duties exists as an offence if facts regarding the lawfully acquired revenues, objects of property and other facts

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[49] G. Mršić, Kaznena djela protiv sigurnosti platnog prometa i poslovanja – poseban osvrt na kazneno djelo utaje poreza i druguh davanja, Hrvstska pravna revija, Zagreb, no. 10/2006, pp. 89 – 96.

[50] D. Jovašević, Komentar Krivičnog zakona SR Jugoslavie, Beograd, 2002, pp. 34 – 37.

[51] V. Đurđić, D. Jovašević, Krivično pravo, Posebni deo, Beograd, 2006, pp. 237 – 239.

[52] D. Jovašević, Leksikon krivičnog prava, Beograd, 2006, p. 689.

[54] D.Jovašević, Komentr Krivičnog zakona Republike Srbije sa sudskom praksom, Beograd, 2003, p. 556.

have been untruly and incorrectly reported as compared to the really existing state of affairs; it is essential here that these have to be data concerning revenues or objects of property that are acquired in lawful way.[55] In case of this form of criminal offence, to be true, the perpetrator formally acts according to prescribed requirements for disclosing the facts that are important in assessing the amount of duty, but he still fails to respect the substantive law requirements by failing to report the facts as they really are.[56] This criminal offence does exist regardless of whether the amount of the embezzled tax has been previously assessed in the administrative proceedings conducted by competent tax authority.[57]

Other elements of unlawful action in this offence include the following: reporting revenues in amounts lower than they really are, i.e. reporting the lesser value or lesser scope of objects of property for the tax reporting period, or reporting incorrectly and untruly other facts and data relevant for assessing the amount of legally prescribed taxes, social security contributions or other prescribed contributions (these other facts and data may refer to the failure to report the exact number of employed persons or the number of family members, or the number of school children as well as the fact of employment status of the spouse, and all that at the time of maturity and place of effecting a given tax duty, and the like.[58] The ways of such false reporting of relevant facts may be rather different in real life.[59] Thus, it is possible to reduce in the tax return the revenues realized in their totality or partially, or to report only some items of the revenues or those from some of the sources or, as the case may be, those realized in a certain period and at a certain place or in another geographic area; financial results may also be reported in smaller amount, while business expenditure may be raised contrary to the real state of affairs, and the like. It is essential that this false disclosing of data, as far as the action of perpetrating the criminal offence of tax embezzlement is concerned, involves decisive facts that are significant in assessing the amount of tax and other duties. Disclosing of false data regarding the facts

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[55] B. Petrović, D. Jovašević, Krivično (kazneno) pravo, Posebni dio, Sarajevo, 2005, pp. 189 – 190.

[56] Lj. Lazarević, Krivino pravo, Posebni deo, Beograd, 1993, p. 229.

[57] Verdict of the Supreme Court of Serbia, Kž. 1815/73.

[58] M. Jerković, Kaznena odgovornost za povrede poreznih propisa, Porezni vjesnik, Zagreb, no. 5/2000.

[59] See footnote 49.

having no relevance in assessing the tax duty or its amount, and/or in determining other prescribed dues or contributions or their amounts, is not qualified as unlawful action in committing this criminal offence.[60]

The way and form of submitting to the tax authority the tax return with falsely reported data and facts are totally irrelevant for this offence to take place.[61] Such tax return may be submitted either orally or in writing (which is a more frequent case), but this may be done also by just presenting for inspection to the tax authority relevant documents, accountancy records and other documentation related to business activity, which documents are false, purposely changed, forged, etc., regardless of whether they are presented for inspection to tax authorities at their request or at the initiative of the tax payer.[62]

There shall be a criminal offence of tax embezzlement also should false data be presented, either at the request by tax authorities or at the tax payer's initiative, only subsequently as a supplement to an already submitted tax return, or, as the case may be, [63] in the revenue of controlling procedure (regular or extraordinary inspection), or even if these false data and facts are presented as a supplement to the enclosed documentation that has to be submitted together with the tax return. There shall be no criminal offence of tax embezzlement[64] where the administration agency in charge of social revenues, at the moment of rendering the decision on assessing tax duty has been in possession of reliable data that indicated the falsity of such data in the tax return submitted by the tax payer, while in spite of that the agency founds its decision on such tax return.[65]

A tax enbezzelment[66] may be committed only by disclosing false data regarding the acquired revenues and objects of property, meaning that a person failing to submit a tax return to report revenues originating from committing criminal offences, commercial violations, misdemeanors or other

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[60] I. Simić, M. Petrović, Krivični zakon Republike Srbije – praktična primena, Beograd, 2002, pp. 154 – 156.

[61] See footnote 21.

[62] See footnote 23.

[63] A group of authors, Komentar Krivičnog zakona Republike Srbije, Savremena administracija, Beograd, 1995, p. 553.

[64] Z. Vukšić, Porezna utaja, Hrvatska pravna revija, Zagreb, no. 10/2003, pp. 56 – 65..

[65] Verdict of the Supreme Court of Serbia, Kž. I 1196/85.

[66] Lj. Jovanović, D. Jovašević, Krivično pravo, Posebni deo, Beograd, 2002,p. 212.

unlawful acts (for instance, engaging in independent business activity by a person without permission issued by competent agency, working in the sphere of black market, etc.) does not commit this criminal offence.[67] Failing to report revenues acquired in illegal, unlawful ways is not treated as the ground for taking place of criminal offence of embezzlement[68] since according to currently accepted conception in our judicial practice such persons should report themselves in such a situation as perpetrators of some of the mentioned criminal offences – which is even not required by law itself. Moreover, even several perpetrators of a criminal offence are entitled, through their right to defense, to conceal or in some other way avoid determination of their liability for criminal offences they have committed.[69]

Similar line of deciding has been accepted also at the joint session of criminal departments of the Supreme Court of Yugoslavia, Supreme Military Court and supreme courts of the republics and provinces held on 9 December 1965. According to that conception, a citizen found as committing criminal offences and violations and/or unauthorized performance of certain commercial activity, and then called to file a tax return covering revenues realized by him/her in such activity, shall not be liable for criminal offence of embezzlement by failing to appear at court, or failing to submit the tax return, or, as the case may be, by disclosing false facts in the tax return. In such cases, namely, the duty to submit a tax return and/or true and complete tax forms with all accompanying and true data and facts relevant in assessing and levying of tax and other prescribed contributions or duties, in fact does not amount to the obligation of the perpetrator to incriminate himself/herself for the criminal offence, commercial violation or commercial misdemeanor committed.[70]

b)The second kind of action expressed in committing this criminal offence relates to failing to report to competent State tax authorities a lawfully acquired revenue, object of property and/or facts relevant in assessing the tax,[71] and/or the failure of the perpetrator to carry out his/her obligation of reporting otherwise specified in the regulations in force.[72]

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[67] Verdict of the Supreme Court of Serbia, Kž. I 44/98.

[68] Z. Stojanović, O. Perić, Krivično ravo, Posebni deo, op. cit., p.246.

[69] Verdict of the Supreme Court of Serbia, Kž. I 1384/73 and Kž. I 196/83.

[70] D. Miloš, Krivično delo poreske utaje, Pravna misao, Sarajevo, no. 9-10/1981, pp. 49 – 63.

[71] See footnote 44.

[72] B. Čejović, V.Miladinović, Krivično pravo, Posebni deo, op. cit., p. 296.

This offence does exist if a person, having a lawful income or acquiring legally an object of property subject to taxation, fails to file the tax return where there us such an obligation, or fails to report in that tax return some of the sources of his/her income making the component of taxation ground, or their amount as well as other facts relevant in assessing the duties toward social community.[73] Consequently, the criminal offence of embezzlement does exist in that form only where the statute provides for the duty to report specific income or other facts, and within the prescribed deadline, and if the tax payer fails to meet that legal duty – which failure is indeed the taking place of the act of commission.[74] In terms of the kind of the act undertaken, this offence may be committed in three ways:

1) by failing to file within the prescribed deadline the tax return reporting the leally acquired income, objects of property or other facts relevant in assessing the amount of tax duty on the part of person who is otherwise bound to do that under the law or any bylaw, and
2) by failing to report in the tax return filed on time some o the sources of taxable income or its amount.[76]

Consequently, with this second type of manifesting of the criminal offence under consideration, the perpetrator is the person who failing completely to file a tax return, although bound to do that, or, as the case may be, who reports in the filed return the data relative to the specific taxation ground or assessing the contribution (for instance, failing to indicate in the tax return that he/she filed all the sources of income, or failing to indicate the period of time this income is realized in, which applies also to the missed information regarding the amount of individual incomes, while some of them are omitted or decreased).[77] There shall be no such form of this criminal offence where the perpetrator fails to report some of the facts having no relevance for assessing the tax or other prescribed public duties, or where he/she reports, while filing that tax return, false data which in the meantime are not apt to have a bearing on the decrease or increase of his/her obligations.[78] Unlawfully acquired income as well, may not be the object of such reporting because no one is bound to report his/her unlawful business activity.[79]

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[73] M. Kriletić, Novosti u Kaznenom zakoniku u svezi sa pranjem novca i dr., Računovodstvo, revizija i financije, Zagreb, no. 6/1996, pp. 68 – 70.

[74] See footnote 29, op. cit., p.251.

[76] See footnote 52, op. cit., p. 687.

[77] See footnote 49.

[78] Lj. Lazarević, Krivično pravo, Posebni deo, op. cit., p. 230.

[79] See footnote 38, op. cit., p.661.

In contrast to the previously presented criminal offence that is committed by a positive action, i.e. by doing something, in this case the action is effected exactly by failing to respect the duty of acting as provided for by the statute or some other regulations, by a negative and passive conduct.[80] Essential requirement for the existence of that criminal offence is the statutory duty of the perpetrator to file the prescribed tax return, but by proceeding as said above, he/she in fact fails to act accordingly.[81] In the current domestic judicial practice there are many examples of specific manifestation of these forms and types commission of the criminal offence of tax embezzlement, regardless of whether at issue is reporting of false data concerning the income, or failing to report the taxable income which has to be appropriately filed with the tax authorities.[82] Following are some details concerning direct judicial practice:[83]

''Following are the concrete actions by which a perpetrator may commit the criminal offence of embezzlement: failure by the tax debtor to report to tax authorities his engagement in an activity giving rise to a tax duty; failure to report income to tax authorities or reporting only a part of it, and not complete income; claiming deductions on the ground of non-existent expenditures or expenditures that are lower than the reported amounts as well as claiming deductions on the ground of expenditures whose purpose fails to match the reported amounts (for instance, representing in the tax return the expenses for purchasing a car for his/her own use as business operation expenses); claiming deductions from the tax basis on non-existent grounds (for instance, using standard deduction allowed for child he/she is not maintaining, amortization expenses for non-existent equipment and facilities and the like).; failure to calculate, suspend and collect, totally or partially, the tax after the deduction, and failure t pay the assessed amount on time, etc.''

3) The last type of manifestation of the act of commission of the criminal act of tax embezzlement consists of concealing in some other way the data

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[80] See footnote 9, op. cit., pp. 45 – 69.

[81] Š. Pavlović, Kaznena odgovornost za poreznu utaju, Pravo i porezi, Zagreb, no. 10/2003, pp. 13 – 16.

[82] D. Jovašević, Obeležja krivičnog dela poreske utaje, Pravo, teorija i praksa, Novi Sad, no. 1/2002, pp. 7 – 22.

[83] M. Kljajević, Poreska utaja, Bilten Okružnog suda u Beogradu, no. 50/1999, p. 7 and subsequet pages.

relevant in assessing the duty of payment of taxes and other prescribed contributions and dues.

Here too, the act o commission is concealment, failing to report, making unavailable the data that would indicate the existence, the number, the values or kind of objects of property and other taxable incomes, by which one is preventing the tax authorities to determine the existence of this duty, totally or partially.[84] Such kind of acts may be undertaken in the sphere of various activities and they are indeed creating a situation of totally impeding the tax authorities to have an insight into the data indicating the existence, the kind and the size of income and/or into other legally prescribed facts or, as the case may be, into all other relevant facts such as the time and place of earning income, etc.

3.4. Remaining Features of the Criminal Offence of Tax Embezzlement

In addition to the act undertaken for its commission, the existence of the criminal offence of tax embezzlement depends on fulfillment of several other cumulatively prescribed reqirements.[85]

Firstly, any of the legally prescribed acts of commission must be undertaken only regarding the income and objects of property that are acquired in a lawful way. This is only logical, since unlawfully and illegally acquired property or other objects and/or income may not be taxed.[86]

Secondly, in undertaking his/her act of commission of offence, the perpetrator must proceed with specific subjective element, meaning that he must intend, totally or partially to free himself or some other person from payment of taxes, contributions or other prescribed duties.[87] Consequently, there must be a deliberate attitude as a subjective element on the part of the perpetrator at the time of undertaking the act of commission which, of course, involves the person reporting false data in the tax return or failing to file the tax return on time, failing to complete the tax return in terms of necessary data and facts relevant in correct, legal and complete assessing of the amount of tax duty

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[84] J. Juranić, Kazneno djelo poreske utaje, Zagreb, 1965, pp. 78 – 92.

[85] See footnote 7.

[86] M. Đorđević, Đ. Đorđević, Krivično pravo, Beograd, 2005, pp. 230 – 231.

[87] See footnote 73.

and/or other dues in the sphere of public revenues, or, as the case may be, concealing the data that have a bearing for determining the tax duty.[88]

Finally, the third requirement for the existence of this criminal offence is that the amount of avoided tax duty must exceed 150,000 RSD. Consequently, there must be a causal and consequential relation between that avoided duty at the amount determined, or more than the determined, on the one hand, and the act undertaken in committing this criminal offence, on the other. The amount of avoided duty under the one specified by law is qualified as tax violation,[89] which is threatened by infraction penalties and protective measures to be imposed in the infraction procedure by the administrative agency in charge of public revenues matters.[90]

This furthermore means that the tax duty avoided in this way represents an objective requirement for the incrimination and/or legislative motive for punishment. Without meeting this requirement there is no criminal offence under consideration, but only some other type of punishable acts, such as commercial infraction or violation. On the other hand, the amount of the embezzled tax itself and embezzlement of other prescribed dues and contributions may be relevant not only for the individualization of punishment by the court (in assessing the kind and the severity of penalty) but also for the very qualification of the criminal offence. In other words, it is necessary that the reported amount of the tax or other contributions embezzled equals to the amount in one calendar year (and also in one business and/or taxation year), although it has to be noted that the amount of embezzled tax or contributions, broken down in single payment documents, is irrelevant in this respect.[91]

However, there are approaches in the criminal law theory according to which[92] the criminal offence of tax embezzlement may take place only if the amount of duty whose payment is avoided exceeds the legally specified amount. The statutory wording ''whose payment is avoided'' suggests that for taking place of this offence there is no need that the perpetrator succeeded in his/her intention to avoid the payment of tax or other prescribed duty.[93] Con-

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[88] See footnote 44.

[89] D. Jovašević, Poreski prekršaji, Ekonomika, Beograd, no. 4-5/2001, pp. 124 – 128.

[90] Lj. Jovanović, D. Jovašević, Krivično pravo, Posebni deo, Beograd, 1945, p. 292; D. Jovašević, Leksikon krivičnog prava, op. cit., p. 469.

[91] Verdict of the Supreme Court of Yugoslavia, Kž. 68/66.

[92] Group of authors, Komentar Krivinog zakona Republike Srbije, o.cit., p. 554.

[93] Z. Vukšić, Porezna utaja, Hrvatska pravna revija, Zagreb, no. 10/2003, pp. 56 – 65.

sequently, this criminal offence shall exist if the intention of avoiding the payment of taxes, contributions and other dues in the sphere of public revenues was expressed by the perpetrator regardless of whether the payment of these duties has been avoided or not, so that the circumstance that it has been avoided is not decisive for taking place of the criminal offence.[94]

However, the circumstance that payment of taxes, contributions and other dues in the sphere of public revenues is avoided, as well as the amount avoided or of the less paid duty may be relevant in assessing the seriousness of this criminal offence, influencing in such a way the meting out of the punishment.[95] At the same time it is irrelevant which of mentioned duties is being avoided and whether the committed act is intended to avoid payment of just one or more dues specified in the law or other regulations.[96] The embezzled amount of tax in prosecuting for the criminal offence of tax embezzlement may not be considered as damage caused through commission of the criminal offence, nor the accused may be ordered by the court to repay the embezzled tax on the ground of the property law claim motioned by the municipal assembly.[97]

The consequence of the criminal offence of tax embezzlement consists, according to one conception, of causing damage to institutions, services and affairs that are in the interest of the entire social community, because timely, efficient and complete collection of taxes, contributions and other prescribed dues which make the public revenues are the essential sources of financing of these institutions and services.[98] According to another view, the consequence of this offence consist in the very failure of payment on time and in legally specified amount of taxes, contributions and other prescribed public duties for the benefit of social community.[99]

The offence is deemed completed with effecting of the act of reporting false data regarding the facts, or with concealing of data at the time the decision of the competent public revenue agency on assessing the tax or contribution has become final.[100] Until that moment there is just an attempt which,

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[94] See footnote 82.

[95] See footnote 73.

[96] B. Jelčić, B, Đerek, Z. Šeparović, Kaznena odgovornost za povrede poreznih propisa, Zagreb, 1984, pp. 65 – 79.

[97] Verdict of the Supreme Court of Serbia Kž., I 901/73.

[98] See footnote 17.

[99] See footnote 72.

[100] See footnote 64.

depending on the amount of the penalty threatened for the basic criminal offence, may be not punishable. However, there is a conception in legal theory according to which this offence is deemed completed by disclosing false data and/or by failing to file the tax return or, as the case may be, by omitting to indicate in the tax return of all legally relevant data, including the concealment of specific facts.[101]

In case of taxes and contributions to be collected after deduction, the offence is deemed completed at the moment of maturity of the tax debt, while in case of taxes for which the law itself specifies the payment time limit, the offence is completed with the expiration of the legally specified deadline. Where this offence is committed by omitting to file the tax return, it is deemed completed after the competent tax authority, within the time limit prescribed for assessing the given kind of taxes, has failed to render the corresponding decision.

As far as answering the question of completion of criminal offence of tax embezzlement is concerned, one finds in the criminal law literature different standpoints as well.[102] According to some authors, namely, this offence is deemed completed after the perpetrator has reported false data regarding his/her lawfully acquired income, objects of property and other facts and/or after he/she failed to report the lawfully acquired income, objects of property and other facts within the prescribed time limit.[103] Consequently, in this case it is not required that the perpetrator has avoided (completely or partially) the payment of taxes and other corresponding contributions. Therefore, the facts that the competent tax authority, not believing in authenticity of the filed tax return, finds for itself the real situation on the ground of such finding assesses the tax, are not apt to have a bearing on individualization of penalty as well as on the existence of the criminal offence. On the other hand, this criminal offence may not exist where the agency in charge, at the moment of rendering decision on assessing the tax or other duty, was in possession of reliable data and, in spite of that, founds its decision on the untrue tax return filed by the tax payer.[104]

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[101] See footnote 35, op. cit, p. 230.

[102] Z. Stojanović, O. Perić, Komentar Krivičnog zakona, op. cit., p. 245.

[103] D. Jovašević, Poreska evazija i poreska krivična dela, Bezbednost, Beograd, no. 4/2005, pp. 541 – 561.

[104] See footnote 96.

The perpetrator of the criminal offence of tax embezzlement is any person who reports false data or conceals such data and/or fails to file on time the tax return, while being bound by law to act accordingly. This role is most frequently taken by the tax payer, but by other persons as well; these may be: legal representative or proxy of such person or the person filing the tax return on his/her behalf and for his/her account, a person in charge of accountancy and other documentation, the one making final and preliminary balances of payment of an enterprise, or another legal entity.[105] This may also be a person who only formally, and under another person's name, is engaged in some business activity imposing on him/her the duty of filing tax returns and of payment of corresponding contributions to the social community. But in committing this criminal offence characterized by specific form of taking the act of commission, it is possible that the perpetrator is not only a direct actor engaged in one or several activities specified by law, but other persons as well who take part in these activities by rendering help to such person or making some other contribution to him/her, creating in this way favorable conditions to completely realize his/her intention, or realize it as soon as possible, more efficiently and in a simpler way.[106]

If we have a situation in which a legal entity (an enterprise, company, institution or other organization), by way of an activity effected by its responsible or official person, is successful in avoiding the payment of taxes or other prescribed contributions – meaning that requirements are met for this criminal offence to be materialized – such legal entity shall be liable for the commercial infraction committed (entailing the imposition of fines and protective measures), while the person in charge or the official person appear as the concrete perpetrator of the offence of tax embezzlement.

An owner of a private company (enterprise) purchasing and putting in market various goods without prescribed documentation and, doing that, fails to pay in the retail sale tax – if this is done with the aim of avoiding the payment of taxes due – commits the criminal offence of tax embezzlement.[107]

As far as criminal liability is concerned, the law requires the existence of direct criminal intent on the part of the perpetrator of the criminal offence.[108]

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[105] M. Đorđević, Đ. Đorđević, Krivično pravo, op. cit., p. 231.

[106] M. Kesner Škreb, Izbjegavanje i utaja poreza, Financijska praksa, Zagreb, no. 3/1995, pp. 267 – 268.

[107] Verdict of the District Court in Belgrade, Kž. 2226/95.

[108] Š. Pavlović, Kaznena odgovornost za poreznu utaju, Pravo i porezi, Zagreb, no. 10/2003, pp. 13 – 16.

Such criminal intent includes the following elements: 1) the awareness of the perpetrator that he/she gives false data or conceals real data and/or the awareness of his/her failure to file the tax return within the prescribed time limit; 2) volition to undertake concretely these positive or, as the case may be, negative activities; 3) intention of the perpetrator to avoid in this way, for him or some other person, entirely or partially, the payment of taxes and other prescribed duties.[109]

This criminal offence is threatened by a cumulative penalty of from six months to five years of imprisonment and a fine. This is an exception from the rule according to which the law-maker prescribes for each particular criminal offence alternatively one or several penalties.[110] In addition to punishments, some other criminal sanctions may be imposed against the perpetrator;[111] these are: security measure of ban on being engaged in a specific profession, activity and duty (specified in article 85 of the Criminal Code of the Republic of Serbia), and 3) property law measure in terms of articles 91 through 93 of the Criminal Code of the Republic of Serbia, enabling the imposition penalty of confiscation of property benefit that is acquired through the commission of a criminal offence (this is a *sui generis* criminal law measure).[112]

4. MORE SERIOUS FORM OF MANIFESTATION OF TAX EMBEZZLEMENT

In addition to basic types of the criminal offence of tax embezzlement, the law-maker has provided for a more serious, i.e. qualified offence. This offence is specified in article 229, paragraphs 1 and 2 of the Criminal Code of the Republic of Serbia. This more serious offence, threatened by law with stricter punishment, may appear in two forms:

The first more serious form of this criminal offence, threatened by the penalty of from one to eight years of imprisonment and, cumulatively by a

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[109] See footnote 100.

[110] D. Jovašević, Sitem kazni u novom krivičnom zakonodavstvu Republike Srbije, Pravo, teorija i praksa, Novi Sad, no. 2/2007, pp. 99 – 117.

[111] J. Šimović, T. Rogić Jugarić, S. Cindori, Utaja poreza u Republici Hrvatskoj i mjere zanjezino sprječavanje, Hrvatski ljetopis za kazneno pravo i praksu, Zagreb, no. 2/2007, pp. 591 – 617.

[112] D. Jovašević, Krivično pravo, Opšti deo, Beograd, 2006, pp. 289 – 291.

fine,[113] exists where the amount of tax duty to be paid, in terms of laws covering specific business activities, exceeds 1.500,000 RSD.

The most serious criminal offence exists if the perpetrator, by any kind of his activity or activities, is successful in avoiding the payment of taxes in the amount exceeding 7.500,000 RSD. This offence is threatened by the penalty of from two to ten years of imprisonment and by a fine.[114]

The qualifying circumstance for taking place of this more serious form of criminal offence of tax embezzlement concerns the amount of avoided duty and/or the amount of damage inflicted to agencies and services that are financed out of collected public revenues. The relevant value must be determined by taking into account the time of undertaking the act of commission of the basic form of the criminal offence under consideration and this value has to be in causal and consequential relation with the concrete act of commission. And finally, that qualifying circumstance must be included in the criminal intent of the perpetrator.[115] In other words, since at issue here is a criminal offence qualified by a more serious consequence, its existence must depend on the fact that the perpetrator is aware that his/her action is aimed at embezzlement of tax and other duties in large amount. There is, however, no requirement that he/she is entirely aware of some specific amount of the tax embezzled, which applies also to other contributions and dues entering in the area of public revenues.[116]

We have to say that, in addition to mentioned conception, there is still no complete agreement in the criminal law theory regarding the issue of determination of the nature and character of the criminal offence of tax embezzlement. Thus, according to one conception, this is a criminal offence qualified by a particular circumstance (as already elaborated in this text). The perpetrator, namely, has to be aware of his committing a large-size tax embezzlement, but in a concrete case it is not required that he/she is aware of the exact amount of tax to be avoided in this way. However, we still claim that at issue here is an offence qual-

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[113] D. Jovašević, Sistem imovinskih krivičnih sankcija u jugoslovenskom krivičnom pravu, Nauka, bezbednost, policija, Beograd, no. 2/2002, pp. 59 – 73.

[114] D. Jovašević, Novčana kazna u jugoslovenskom krivičnom pravu, Pravni zbornik, Podgorica, no. 1-2/2001, pp. 230 – 248.

[115] I. Kovčo Vukadin, Gospodarski kriminalitet – kriminološka obilježja, Hrvatski ljetopis za kazneno pravo i praksu, Zagreb, no. 2/2007, pp. 435 – 493.

[116] B. Đerek, Kaznena odgovornost za povrede poreznih zakona, Financijska teorija i praksa, Zagreb, no. 1/2003, pp. 83 – 112; Z. Vukšić, Porezna utaja, Hrvatska pravna revija, Zagreb, no. 10/2003, pp. 56 – 65.

ified with a more serious consequence, because the amount of the avoided tax is a decisive factor for indicating the scope and intensity of the consequence damaging public finances, and/or the system of regular, unimpeded and legal financing of budgetary beneficiaries and other public services.

On the other hand, the court practice regarding this qualification of unlawful conduct of the perpetrator has not always been uniform. At the beginning, it has hesitated with its approach, while in recent years the conception has taken root according to which there is no genuine difference between the basic and the qualified form of the offence of tax embezzlement, since both forms indeed include identical characteristics of its subject-matter. The difference between these two forms of this offence is found, in fact, in the sphere of quantity, i.e. in the amount of the tax and other kinds of prescribed dues and contributions embezzlement.

At the symposium of judges of criminal chambers of the Supreme Court of Yugoslavia and the representatives of criminal chambers of republic supreme courts, held in Belgrade on 7th through 9th December 1965, the opinions were divided regarding determination of difference between the basic and the qualified form of this criminal offence.[117] Later on, as already stated, the courts have accepted the conception according to which there was no qualitative difference between the basic and the qualified criminal offence of tax embezzlement. The point at issue here is that both forms of this criminal offence include one and the same statutory definition as well as all relevant identical elements, so that the only difference is a quantitative one (expressed in the amount of avoided duty of payment), and not of the qualitative nature. Such conception has also been accepted at the symposium of judges of criminal chambers of the Supreme Court of Yugoslavia and representatives of republic supreme courts, held also in Belgrade on 26th and 27th December 1968.

Court practice as well as legal theory engaged in discussing the matter of qualification of the serious form of offence of tax embezzlement seriously consider whether this offence may exist if the perpetrator is committing tax embezzlement in course of several years by the same or various activities. In other words, whether individually avoided payment amounts for every tax year determine each particular yearly qualification of the criminal offence of tax embezzlement so that in this case it would be appropriate, depending on the amount of

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[117] D. Popović, Problemi krivičnog dela poreske utaje kroz podatke Saveznog tužilaštva i nekih sudova u Beogradu, Zagreb, neobjavljen magistarski rad, 1964, pp. 76 – 89.

totally avoided tax, contributions or other dues prescribed, to qualify this offence as a serious form of tax embezzlement.

The issue is even more complex if considered from the aspect of whether in mentioned cases the continuing tax embezzlement (for many years), involving also avoiding of payment of contributions and other dues prescribed by law, may be qualified as an extended criminal offence (that is committed within a given period of time in the same manner, by the same means and/or by applying the same permanent relationship, situation or circumstance and with the single intention and the same form of guilt), or as a real cumulation. In answering this question both legal theory and court practice[118] are in favor of the conception in terms of which it is possible to apply the construction of extended criminal offence, but with applying in every concrete instance the statutory requirements provided for the existence of the tax embezzlement (and more particularly the one regarding the amount of avoided tax as an objective condition for incrimination).[119]

5. CONCLUSIONS

Even from ancient times and up to the present it has been particularly important for every State to ensure an orderly, efficient, lawful, well-timed and flawless functioning of the public revenues and expenditures system. Its foundation is the country's fiscal system. Indeed, the fiscal system, i.e. its flawless, well-timed, complete and efficient realization has an impact on the existence, survival and even development of the State itself. It is therefore understandable how important is for the State to apply a whole spectrum of measures, means, ways and procedures at all levels in order to resist various forms and types of concealment, failure to report and avoidance of payment of taxes, contributions and other prescribed duties which represent public tributes and/or public revenues.

Violating of regulations in the area of fiscal system may entail various consequences. Depending on the kind of violation, and/or ensued consequences in terms of the scope and intensity of endangering of protected social values, the law-maker has provided various sanctions as well, distinguishing in his approach between criminal offences and other kinds of unlawful act. The most dangerous and most serious forms of violating tax laws, apt to entail most serious conse-

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[118] Verdict of the Supreme Court of Serbia, Kž. 2082/73.

[119] I. Simić, M. Petrović, Krivični zakon Republike Srbije – praktična primena, op. cit., p. 156.

quences and/or inflict considerable damage to social community, are the criminal offences in the area of taxes. Conspicuous among them due to its significance, scope, characteristics, nature and effect, is the tax embezzlement as the most serious manifestation of tax evasion which is threatened in criminal legislation with prescribed penalties and other kinds of criminal sanctions.

The basic fiscal criminal offence in the legal system of the Republic of Serbia is at present the tax embezzlement specified in article 229 of the Criminal Code of the Republic of Serbia. In some legal systems this offence is called also – "tax evasion" or "evasion of taxes and other dues", and the like. Otherwise, this offences consists of reporting false data on one's lawfully acquired income, objects of property or other facts relevant in assessing of duties, or in the failure to report these where reporting is an obligation, or, as the case may be, it consists of concealing of data regarding assessment of tax duty with the purpose of avoiding, totally or partially, for oneself or others, the payment of taxes, contributions and other prescribed dues, where the amount of the avoided duty exceeds 150,000 RSD. This offence owes its name to the fact of committing, on the part of perpetrator, an unlawful acquisition of that amount of dues the payment of which is avoided in this way, and/or which remains in possession of the perpetrator.

This criminal offence – which may take place in three different types and in two serious forms – is threatened by the Criminal Code with cumulative penalties: penalty of imprisonment and fine. However, in addition and parallel to penalties, the court may impose against the perpetrator of the offence other criminal sanctions as well. These include: security measures and the measure of confiscation of property benefit obtained by committing the criminal offence.

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SUZBIJANJE PORESKE UTAJE U REPUBLICI SRBIJI

Za svaku državu od najstarijih vremena, pa do danas, od posebnog je značaja obezbedjenje urednog, efikasnog, zakonitog, blagovremenog i kvalitetnog funkcionisanja sistema javnih prihoda i rashoda. U njegovoj se

osnovi nalazi fiskalni sistem. Zapravo fiskalni sistem - njegovo uredno, blagovremeno, potpuno i kvalitetno ostvarenje utiče na postojanje, održanje, pa i razvoj same države. Stoga je razumljivo od kolike je važnosti da se država širokom lepezom različitih mera, sredstava, načina i postupaka na svim nivoima suprotstavi različitim oblicima i vidovima neplaćanja, prikrivanja, neprijavljivanja ili izbegavanja plaćanja poreza, doprinosa i drugih propisanih obaveza koje predstavljaju javne dažbine,odnosno javni prihod.

Kršenjem propisa u oblasti fiskalnog sistema mogu da se prouzrokuju i različite posledice. Zavisno od vrste povrede, odnosno prouzrokovane posledice u pogledu obima i intenziteta povrede ili ugrožavanja zaštićenih društvenih vrednosti, zakon je predvideo i različite sankcije razlikujući pri tome krivična dela ili neke druge vrste delikata. Najopasniji i najteži oblici kršenja poreskih zakona kojima se i nanose najteže posledice, odnosno najveće štete društvenoj zajednici predstavljaju poreska krivična dela. Medju njima se po svom značaju, obimu, karakteristikama, prirodi i dejstvu izdvaja poreska utaja kao najteži oblik ispoljavanja poreske evazije za koju su u krivičnom zakonodavstvu propisane kazne i druge vrste krivičnih snakcija. Upravo o ovom krivičnom delu i nastojanjima Republike Srbije da se efikasno suprotstavi različitim oblicima i vidovima poreske utaje govori ovaj rad.

KLJUČNE REČI : poreski sistem, porezi, izbegavanje, evazija, krivično delo, odgovonost, sankcija

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SOME CAUSES OF CORRUPTION IN SERBIA

In this article, the author considers the different causes of corruption in Serbia. These causes may be divided in three groups. The first might be called: „Crisis of morality and basic social values in times of transition". The second: „Distrust in the judiciary and the other government and basic social institutions", and the third – „The state of necessity in times of war and the sanctions and blockade by the UN". It is evident that the general public and especially mass media, in the last decade have emphasised some negative social heroes much more than heroes and values of the past.. In that sense, money and publicity became the basic values, no matter how they were achieved. That has caused excessive individualism and selfishness among the people, spoiling thus the social morality especially among the young generation – the biggest consumers of new mass media in Serbia. On the other hand, the so-called trials by media also became something rather common nowadays in Serbia and while the collective sense of justice is not properly satisfied, people usually think that the judiciary is corrupted. The perception of the corruption, generally speaking, in Serbia is overwhelming and it leads to the real corruption. It also has to be mentioned the third group of causes of corruption. The author treats the topic also from the aspect of the nineties when UN sanctions rather directly caused shortage of important goods, first of all gasoline, medicines and even food. In such circumstances for persons breaking the rules of law and the sanctions was not experienced in a negative sense. Some corruptive behaviour and the way of thinking were tolerated openly, since the survival of the nation was at stake. These negative ways of behaviour and thinking even obtained some kind of a legality in the moral sense.

***Key words**: crisis of morality; distrust in the judiciary; UN sanctions and blockade; corruption; Serbia.*

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In Serbia, but not only in Serbia, rather much was written lately about the corruption, but it seems primarily from two points of view. One purely juridical, describing the measures to be taken, and particularly which laws should be enacted in order to minimize corruption, and the other sociological, focusing on the research into documented public opinion, such as the general public's views concerning the spread of corruption, the sectors the public perceives to be most susceptible to corruption. There are also economic analyses of the relevant consequences. However, it appears that despite a plethora of written texts attempting to analyze corruption from a general morality point of view, the essence of defining corruption is missed. There are no studies attempting to illustrate the way the general climate of the times and the moral crisis affect not only the spread of corruption, but also vice versa.[1] Consequently, it seems that more adequate attention should be paid to these issues. Starting from that point, we are going to make more relevant comments on the topic of corruption, considering that changes of value and moral orientations, especially among the young ones, have contributed significantly to the rise of corruption in Serbia.

Corruption is certainly a phenomenon with more significance concerning the graduation of its dispersion in one society and does not depend solely on what is written in the laws, but above all it is the way these laws are applied, and that depends on many extra-legal factors: For example not only the history and tradition within a society, but also the level of confidence, i.e. lack of confidence of citizens in the state and its laws, and in that sense serious concern regarding the leadership, i.e. the fear that one could be held responsible and even punished in case of disobeying the laws. If the citizens generally are not afraid of being punished, and if they do not have any confidence in the state and the laws, and in addition, if they consider those laws to be unjust and the state, together with its institutions, to be corrupt, then all that of course creates very favourable climate for the spread of corruption within a society.[2] Given also the fact that those same citizens have largely leaned towards moral principles, which are based on

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[1] However, we should have in mind the book that was published in 1995 in Belgrade Institute for pedagogic research. "Moralnost i društvena kriza" (Morality and Social Crisis).

[2] See Mikloš Biro; - "Stavovi prema zakonitosti u tranzicionoj Srbiji"; in the book „Pet godina tranzicije u Srbiji II", edited by S. Mihajlović; - Beograd, 2006. pp. 228-238.

widely spoken materialistic-individualistic values, then under such conditions, corruption simply must thrive. We continue by considering some of the above problems.

I CHANGE OF VALUES

In writing on morality and moral crisis, the topic discussed was primarily the problems amongst the younger generation. Practically, already since Tacitus[3] and maybe even before him, it was almost a rule that the older generation criticized the younger generation, alleging that there was a crisis of moral values amongst the younger ones. Also some of the narratives and critical remarks which are directed nowadays towards the younger generation in Serbia and their (new) moral standards, were self-evident in that sense. However, some of the texts supported by concrete data, appeared to provide persuasive proof that really dramatic moral changes have taken place in Serbia, both at the end of previous and in the beginning of this century. They have influenced or at least could have an influence on the general state of mind and on concrete anti-social behaviour and not only amongst the young. Thus, in spite of the adage that the older generation is always critical of the younger one, it seems that much research into the moral values and orientations amongst the young as well as research carried out in the last few years should be highlighted in this context.

Thus for example the results of such research that included also high school students in Serbia, show that even up to 94% of young people consider an extremely materialistic and/or individualistic approach to life's reality as very attractive. Namely, the respondents were required to answer the questions formulated as 8 different choices of life-style. The following description of the social situation, life-style and imaginary social ideal, won by a large margin: "to be involved in a well-paid job which would provide me with a lot of money as well as material wealth; to ensure for myself a rich and comfortable life." All the other suggested values, which concerned either: religious principles, the pro-social activism, an altruistic commitment or any other activity which did not correspond too closely towards the materialistic-hedonistic attitude, remained as a very distant and almost non-existent choice.[4]

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[3] Kornelije Tacit; - Anali; - (translated to Serbian) – Beograd, 1970, p. 385.

[4] That is a research of the Belgrade Centre for researching alternatives, published in 2003 in the book „Mladi zagubljeni u tranziciji" (Youngs Lost in Transitions) – the article of Zlatko Šram „Vrednost i devijantno ponašanje mladih". pp 65 -95 – to be found on web site: www.karaburma.info/akcija/biblioteka/drustvo/mladi_zagubljeni_u_tranziciji

Of course, in this context such comment can also concern the negative influence of the media on the propagation of such a view of the world and its life styles. Even a completely cursory and even a somewhat deeper analytical approach to the editorials and reporting of the media at the end of the previous as well as in the first years of the new millennium, demonstrates that the media has contributed heavily to the creation of a new type of social hero, desirable role model and successful human being.. Some research has shown that the electronic media became a significant factor in uniting young people in their attitudes, expectations, values. As one of the results of that unification, other factors which mainly involve the family, school (level of education) and place of residence, have become of rather little significance.[5] Amongst the youngest people, there is a desire which tends heavily towards material-hedonistic values and orientations; a desire to be exposed to risks and a need for social power and popularity.[6]

In another research into the value-orientations of the young, similar results also show up. Thus, for example, in an article written by Snežana Joksimović, differences into the research value-orientations – carried out in 1994 and 2000 – are analyzed. Changes in the increased tendency towards the acquisition of material goods as well as a more hedonistic life-style can be identified, whilst the acceptance of pro-social values is of less importance.[7] The same author points out in another text that pupils appear to be less inclined to care about other individuals and their well-being and are least attracted by the realisation of socially important ideals and aims. The older the pupils, the more they are attracted by the prospects of a hedonistic life-style.[8]

In other research[9] something similar is also reported. Simply stated, the examinees were asked to choose from five tendered values, which were:

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[5] Ibid.

[6] Olivera Pavićević – „Negativni društveni junak“ , not published Ph.D. thesis, Faculty of political science in Belgrade, April 2008. pp. 227. The author shows how, through media promotion, a new type of negative social hero has created an example for others, especially for young people, and how that type of negative social hero and the spirit of new time has influenced the spreading of criminal behaviour among youth. It is true that the author specially points out violent types of crime, but problems of morality is generally pertinent, too.

[7] Snežana Joksimović; - Struktura i korelati vrednosnih orijetacija srednjoškolskih učenika; in the review: „Zbornik Instituta za pedagoška istraživanja“ – 2001, pp 20.

[8] Snežana Joksimović; - „Odnos učenika prema pojedinim načinima života kao pokazatelj njihovih vrednosti i orijentacija“; the review „Psihologija“, No. 2/1992.

[9] Nenad Havelka; - Vrednosne orijentacije adolescenata: vrednosti i kontekst; the review„Psihologija“, 4/1998.

"independence", "personal improvement", "safety", "collaboration with others" and "coziness": They were asked to choose three of the most important values from the 5 and to rate them in either first, second or third place. "Safety" dominated with 60,3% and was followed by "comfort" with 47,4%. These choices were followed by "personal improvement" – 40.7%; "independence" – 24.2% and trailing at the bottom was "collaboration with others" with only 19%. These results suggest a significant materialistic-hedonistic orientation amongst the Serbian youth, clearly demonstrating an utterly individualistic orientation,[10] especially when given the fact that the "collaboration" (with others), which is primarily a pro-social, collectivist value and orientation, has been so overwhelmingly placed at the bottom of the list.

In other words, to an average young man (and woman) in Serbia it is far more important to be personally (in the material and any other sense) secure, together with a feel-good factor, rather than how, or in which way, he will successfully collaborate with other people and ultimately helping them.[11]

Dragomir Pantić also points at changes in the value-orientations of juveniles in Serbia, based on the premise that the orientation towards individual and individualistic values is seemingly more popular, when compared to the collectivist ones, collectivist approach towards social values, in a more or less positive sense. But he considers this as an indication a strengthening of most important preconditions for the establishment of Western-style democracy within Serbian society.[12] But irrespective of that, if we contemplate the strengthening of individualism at the expense of collectivism and refer to it in a positive light as an important precondition for the establishment of Western values and Western style democracy, we can conclude with the majority of authors in Serbia that in the last 20 years there were changes in the value-orientations of the young people in the above sense at the expense of the previously dominant collectivist approach which presided, for many years during the epoch of socialism.

According to some authors, the key words could be ''spirit of the time", which is not only underlying the direct spreading of corruption, but also the

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[10] Especially if we have in mind that "safety" is very muvh experienced in a materialistic way.

[11] About scarifying for others we can not talk at all.

[12].. Dragomir Pantić; - „Promene vrednosti i razvoj demokratije u zemljama tranzicije", in the book of the Institute of Social Sciences „Procesi demokratizacije u zemljama tranzicije", Beograd, 2000, pp .93-116.

broadening of the perception of corruption, and then it continues with the old maxim that "when everyone else can do it, then why should I not do it as well."[13]

Bearing all this in mind, we also have to mention those criminologists who argue that a very strong and emphatic domination of the prospect for individualism in the world as well as its domination compared to the collectivist attitude towards moral values, rather enhance, or at least, precede the beginning of criminal behaviour. It is also pointed out that foreigners who come to Serbia are surprised by the fact that the individual is put on first place, ahead of the general, mutual and the collectivistic.[14] In general, the Serbian population often consider and interpret that a truly individualistic approach is the most dominant characteristic of most Western societies. Of course, all this shows that it is not necessary to point out how much that perception influences certain forms of criminality. This is especially so in case of corruption, when sometimes it occurs where it cannot be determined at first glance as to who is a direct victim. In the case of corruption, the direct victim is often not easily evident, so that the perpetrator of the act that is likely to corrupt does not experience that in a specially negative sense: it is the society as a whole, the collective entity, which suffer the damage, and not an individually identified person. It is hardly surprising then that personal well-being and comfort are rated far more highly.

Consequently, all in all, the victory of Mammon, i.e. of lust, and accumulation of material and materialistic values, are dominant amongst juveniles in Serbia at the end of the previous and at the beginning of this century.[15] This is, at the same time, closely linked to the growing perception of corruption everywhere and at any place, especially given the general conviction that each institution is more or less corrupt.[16] Although of course those notions and perceptions are generally exaggerated, they certainly have a negative effect on the previously mentioned general morals of the time, which places material-

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[13] Srećko Mihajlović; - Poreklo i priroda korupcije – pobede Mamona i Levijatana; in the book of the Institute of Social Sciences „Pomeramo granice", Beograd, 2007. pp. 217-245.

[14] Đorđe Ignjatović; - Prevencija kriminaliteta kao svrha krivičnog zakonodavstva; in the book of the Institute for Criminological and Sociological Research, - „Kazneno zakonodavstvo i prevencija kriminaliteta", Beograd, 2008. pp. 17.

[15] Srećko Mihajlović; -op. cit..

[16] Mirjana Vasović; - Predstave o korupciji 2001-2006: efekat politizacije; the review „Sociološki pregled" 2/2007, pp. .221-250.

istic values above everything else, especially given the fact that in the end there is always more corruption. It also seems that it is not completely false saying that too much talk about corruption is going to give rise to the increase of corruption itself.[17] In other words, if everybody (the majority) especially amongst juveniles reports and considers that everything and everybody is (can be) corrupt, i.e. bought at a certain price, then that, within itself must have certain consequences in suppressing corruption. Simply stated, if the "morals of the time" says that everything and everybody can be corrupted, then the number of those who will try to corrupt others, will necessarily grow as well.

Therefore it can not be disputed that drastic and, we would say, dramatic changes in the value-orientations have manifested themselves in the youngest generation in Serbia. This was confirmed by research referred to. Still the question remains as to whether or not that change among juveniles has had its influence and how much it has affected the changes in the behaviour and value-orientations of decision-makers vulnerable to corruption. That comes down to the generation of fathers of the current younger generations. This is arguably the very generation that has created that new, materialistic-hedonistic "moral of the times". It seems that the generation of fathers of the current youth has to accept, in an indirect or direct way, this new moral way of thinking, in order to do everything in preventing various transgressions and frustrations from manifesting themselves in their children.

People speak about better health protection, or better marks at school, or at the university, or bout different administrative permits for their children. On top of all that; combined with the "moral of the (new) times", media-pressure intervenes by presenting (the perpetuation of a consumer's life-style) the individual and the material, i.e. instant satisfaction of those materialistic-hedonistic values, and thus actually creating within itself various prototypes of heroes of the new era and a "morals of the (new) times".[18]

Consequently, in Serbia, primarily amongst the juveniles and secondly amongst the wider population, individualism has been wrongly understood as a positive characteristic of Western civilization so that the balance between individualism and collectivism has nowadays been completely overturned in favour of individualism, which completely contrasts the situation in the peri-

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[17] Nemanja Nenadić; - Pojam i uzroci korupcije; in the publication „ Korupcije, osnovni pojmovi i mehanizmi za borbu", edited by Goran Ilić; - Beograd, 2007. pp. 15.

[18] Olivera Pavićević;- op. cit.

od of collective socialism. We have gone from one extreme to another, understanding and misinterpreting the values of Western civilization. That is something which is characteristic not only of this context, but also of many other fields, and thus, for example, also in the field of free public speech. For example, nowadays many people consider that, after years of censorship and a general stranglehold on freedom of speech, we have gone to the other extreme in perpetuating the hate speech in which almost everything is completely allowed.[19]

II LACK OF TRUST IN THE JUDICIARY

A factor which can also have a rather strong influence on the growth of corruption is also the level of confidence; alternatively lack of confidence in the adequacy of social institutions, or more precisely within the administration of justice. The main concern is not only about the major lack of confidence in the judiciary which could indicate the presence of corruption within that branch, but also about the fact that if in a society there is no confidence, then the judiciary will not be able to work normally and in a peaceful way, without too much commotion and far away from indirect or direct pressures which try to impair its objectivity and impartiality.[20] Thus, in order for the judiciary to be truly objective and impartial, we must have a wide social consensus, i.e. a significant display of confidence in its activity.[21] If we take the English system as an example, we can fully understand how much in reality a general confidence in the judiciary means. Most certainly there are also in England, from time to time, examples indicating that even English judges are not always completely impartial and objective; nevertheless, that was never a general presumption; quite the contrary, their independence, impartiality, objectivity and un-corruptibility was always the starting point, which enabled English judges to do their job peacefully.[22]

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[19] See Vladimir Vodinelić, Sukob ličnih prava i sloboda mišljenja; the review „Pravni život“ 11-12/1992. pp. 2039-2040, which illustrates a paradigmatic situation in Serbia – going from one extreme to the opposite extreme.

[20] Tihomir Vasiljević; - Ogled o sudijskoj nezavisnosti - in the publication “Zbornik Pravnog fakulteta u Novom Sadu” , Novi Sad 1976. pp 275.

[21] See Slobodan Vuković; - Problemi poverenja u pravosuđe; the review „Sociološki pregled“ 2/2007 pp. 491-507.

[22] See Zorica Mršević; - Organizacija redovnih sudova i položaj sudija u Engleskoj; the review „Arhiv za pravne i društvene nauke“, 3-4/1990.

The situation in Serbia is, however, completely different: Firstly, there is traditionally a rather considerable lack of confidence in the work of courts, and secondly, especially more recently, indirect media pressure on the courts is more and more present. Here are some additional comments.

Certainly, apart from public opinion, research concerning confidence and trust in the administration of justice on should be considered regardless of the relative character of each research. Thus, for example, in one such case [23] it was revealed that in 1995 only 38% of examinees had confidence in the work of courts, while 54% denied any confidence. In 1997 that ratio was even worse: 36-57, but in 1999 the situation improves to a ratio of 42-49. In 2000 the confidence drops again to 39-47, and after the so-called democratic changes in 2003 the result was again similar to the one in 1995 i.e. 33-58. Consequently, practically almost nothing has changed, so that, with such belief, the people are prone to take many non-institutional, essentially corruptive steps and mechanisms in order to realize aims of their own i.e. certain rights or even spiritual rights.

According to another research in 2002, the courts have fared just a shade better than the perception of custom's officers, policemen, lawyers and taxation officers, but nevertheless worse than many others i.e. doctors, professors and ministers. Between them 43% had little or no confidence in the courts, which is really a bad result.[24]

One of the most important issues in this respect concerns the influence of the degree of lack of confidence in the judicial system. To a greater extent, those issues were caused by frequent declarations of Serbian politicians and representatives of the government; namely that according to which Serbian judiciary is corrupt, slow and incompetent as well as that it has to be transparent. The threats of transparency, purification of the judiciary, was aimed at readjusting the judiciary towards a new ideological concept.[25] Thus, for instance, minister Mlađan Dinkić, has recently criticised certain verdicts of

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[23] The research of the group of authors „Korupcija u pravosuđu" (Corruption in Judiciary), edited by Centre for liberal democratic studies, Beograd, 2004.

[24] S.Mihajlović, op. cit. pp. 239.

[25] From time to time, Serbian politicians insist on new elections for judges. They try to get obedient judges or to revenge to those who were not so "good". Anyway, after all political-media manipulations about the corruption in judiciary and after all threats that every judge has to be reelected, the principle of judicial independence is really endangered and the judicial independence is very important in the fight against the corruption. See Slobodan Antonić, „Nova čistka za sudije?", article in the newspaper „Politika", 06.11.2008, p. 11.

the Supreme Court. Also, the former minister of justice - Vladan Batić, frequently suggested in 2001, 2002 and 2003 the need for transparency and cleansing the Serbian judiciary from corruption. Another high-ranking politician, commenting a decision of the Constitutional Court of Yugoslavia (a decision he and his political allies did not like) stated that decisions of that Court do not necessarily have to be respected at all."[26] In that message, the reverence and the authority of the judiciary in general were flawed, but at the same time the citizens were called to account for disobedience towards the state and its institutions in this field. In the last few years Serbian politicians have gained the broadest nation-wide publicity through the media. The biggest impact of their interventions and rhetoric was to remove the distinction between the courts and the judges, alleging that the judiciary is corrupt.[27] Such meddling by politicians was, as a rule, supported by the media and this had a significant reverberation amongst the general public. It also showed that general public in high percentage had no more any confidence in the courts, their honesty and independence. On top of all that is the fact that very often the so-called court proceedings via the media („trial by media“) were taking place. These proceedings were conducted in such a way as to show a principal suspect in hand-cuffs and aired footage of the event during preliminary investigation in order to provide the biggest possible impact on the public. This was done in the case of a judge, of one former football-player, then a professor of the University and many others. The accused had to be sentenced in advance but, after they were finally freed from accusation, where judicial proceedings lasted too long in the opinion of the general public, the media coverage gave the impression that the courts work slowly, incompetently and corruptly.[28] In addition to all the foregoing, the state was often forced to pay significant indemnities to those who were accused and deprived of freedom.[29] However, in most cases the media effect of such spectacular arrests

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[26] Because that court was not legitimate in his opinion.

[27] The excellent collection of such statements of Serbian politicians may be can find in the book of Slobodan Vuković „Korupcija i vladavina prava“, Beograd, 2003. The Minister of Justice said, besides everything else “ I do not want to comment that verdict, but every judge has to pass through the re-election.”

[28] Vuković says that after such convictions by media experts, every decission of the court loses the authority, like the whole judiciary. (S.Vuković, Problemi poverenja u pravosuđe; op. cit. pp. 499).

[29] Nataša Mrvić-Petrović; Zdravko Petrović, ‘’Naknada štete zbog neosnovanog lišenja slobode ili neosnovane osude’’; Beograd, 2008.

was extremely unfavourable regarding the perception of the respect and authority of the courts.[30]

The practicing lawyers too have contributed to the negative image of the Serbian judiciary by spreading stories to their gullible clients that judges were indeed corruptible. By that they were either justifying their own misgivings or extorting from their unsuspecting clients additional money on the pretext that it has to be used to corrupt the judges. It is interesting that this parallel is also very characteristic of certain other countries in transition. A good example is Hungary, where several times the Lawyers' Chamber condemned certain behaviour of its members whose plan was to create the impression that corruption was thriving in the judiciary.[31]

In earlier times, during the Communist era, the pressures on the work of the courts by politicians were happening privately; namely via telephone calls and interventions for individual decisions. Today this is different and done in a somewhat more direct way, above all via the media. Politicians are often criticising the courts' work in general but also addressed their objections at individual decisions. Indeed, this approach can be more efficient and effective, not only in the sense of severe disruptions to the courts and their independence, but also of undermining the revered image of judges as a profession.[32]

All in all, there is no doubt that in Serbia there is a significant lack of confidence in the judiciary, in its competence, independence and its non-corrupt image. But, instead of doing as much as possible to depict such an image and such an impression as untrue and unfounded or at least as an exaggeration, in reality the complete opposite is taking place. Without entering into details, it is a fact that in Serbia the media and the politicians, but on occasion also the lawyers themselves, repackage and reinforce this lack of confidence, either by commenting on individual court decisions they do not like, or by unfavourably commenting on the work of the courts as a whole. This certainly has negative consequences for further spread of corruption in Serbia. If the greatest number of ordinary people in Serbia considers that the judiciary is

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[30] Jovan Ćirić, ''Pravosuđe i mediji''; the publication "Kriminalitet u tranziciji: fenomenologija, prevencija i državna reakcija", edited by Institute of Criminological and Sociological Research, Beograd 2007 pp. 219-238.

[31] See also the book „Monitoring the EU Accession Process: Corruption and Anti-corruption Policy" – Open Society Institute – EU Accession Program, Budapest, 2002. pp. 202-204.

[32] Jovan Ćirić; ''Društveni uticaji na kaznenu politiku sudova'' - Beograd, 2001.

corrupt and for as long as the media and politicians continue to expand on such a point, then the greatest number of those people will have absolutely no respect towards any court decision, and will then resort to methods of establishing "their own justice" through various forms of corruption. These actions then give way to further corruptive pressure and challenges for strengthening of independence and impartiality of the courts. Of those who are convinced that the judiciary is corrupt, and those people are almost in the majority here in Serbia, will themselves also try to resolve their problems through corruption in the courts. "If everybody declares and considers that in the court everything can be resolved with the help of corruptive measures, then naturally that represents for me also a challenge and sufficient reason to embrace corruption and corruptive activities, respectively to try to corrupt the court." Furthermore, as much as corruption continues, however unsuccessfully, there will of course be further corruption.

III CHAOS OF WAR AND SOCIAL ANOMY

The beginning of the nineties was characterized by the tragic events concerning the dissolution of former Yugoslavia and the war on its territory. This fact is strongly related to the coming out of certain groups and actors who changed from criminals into national heroes and defenders of endangered national interests. That is the problem pointed out while considering the topic of the new negative social hero.[33] This was also the time when both regular and paramilitary units on the territory of former Yugoslavia became heavily armed,[34] particularly in the republics that had declared their separation from the SFRY, which until then did not have their own armed forces and weapons. These republics found different ways to obtain adequate weapons and ammunition, which implies the establishing of various illegal outside channels, the use of the services of domestic and foreign mafia, including foreign mercenaries, the so-called war dogs. Tough guys and controversial businessmen, which were euphemistic term for criminals, became very useful for the realization of political and war objectives, particularly for the parties at war in former Yugoslavia. There was, therefore, no longer a tactical and indirect, but an

[33] The role of mass media was really considerable and we referred to that in the first part of the present work.

[34] These paramilitary units were most often only a different name for criminal organizations.

open and direct understanding between state and political power in former Yugoslav republics, on the one hand, and mafia structures on the other. To complete the paradox, mafia structure and organisations in different sides at war, despite heavy verbal, nationalistic rhetoric, had an intense cooperation in the field of trade in drugs, weapons, oil and other goods that were in deficit.[35]

Wide-spread chaos of war and social anomies, favoured the appearance and strengthening of organised crime, which was additionally emphasized in Serbia by the introduction of UN economic sanctions, which implied the impossibility of normal and legal supply of oil, but also of medical supplies and other goods. This created a social and psychological atmosphere where everyone who managed to smuggle goods from abroad and to break the UN blockade was perceived as a person who realised positive and eligible social goals, and not as someone engaging in illegal business, so that nobody was warned about the danger from the strengthening of organised crime.[36] Moreover, in an atmosphere of general disappointment and discontent about difficult living conditions brought about by the sanctions of the countries of Western Europe and USA, there was no wonder that these countries were perceived as the enemies of Serbia by a majority of its citizens, and hence everyone who managed to break the sanctions and the blockade was treated in extremely positive terms, as a hero.[37]

Mass media of every side that was involved in the war conflict did very much on the promotion of those heroes and these new (negative) values. That agreed with the general change of values that has happened in the heads of young people. Mass-media advertised everything that was done by those new heroes, everything that in some other circumstances would be experienced in

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[35] It seems that the situation did not improve when the peace forces were deployed in Bosnia and Kosovo, since their arrival resulted in the appearance of prostitution and trafficking in women from Eastern Europe, primarily Moldova and Ukraine. (More about the cooperation between the parties in war and their mafia operations in Kurt Kerpuner's book, ''Putovanje u zemlju ratova – doživljaji jednog stranca u Jugoslaviji, translated from German, Novi Sad 2003. pp.181-188, and also in Vinko Pandurević's book – "Rat u Bosni i paravojne formacije", Beograd 2004, pp. 61-67.

[36] For more in the paper by Zorica Mršević – ''Embargo kao factor organizovanog kriminala'', report at the Symposium of the Serbian Criminal Law Association on organized crime and corruption, Kopaonik 1996, pp. 85-86 .

[37] It is interesting that the same rhetoric was used by Milorad Ulemek, the first accused for the murder of Serbain prime minister Zoran Đinđić.

a negative sense. But we must admit that sometimes those new heroes really did something good and socially acceptable.

Thus for example, in the war zone in a hospital there were several newborn babies, but without necessary equipment and medicines. The hospital was not only under the blockade of military and paramilitary groups, but also of that of the UN and the question was how to help these babies. At one side, there was a danger of a death of the babies and at the other, the help of groups of organised criminals that generally used corruption as a method.[38] The solution that was accepted by the state of Serbia was to organise informal and illegal groups who could smuggle medicines and not only medicines.[39] The state authorities were faced by the dilemma: blockade and possibilities offered by the groups of organised crime. So, we could speak about the state of necessity in which were all citizens in Serbia.[40]

There are situations in which one has to make a compromise with the principles of legality, or rather to do something not so legal but still saves the goods that are more important or seems to be more important. Times of war are such times and that was the situation in the nineties in former Yugoslavia.

It is, therefore, not only the case of the state tolerating groups engaged in criminal activities, but of the state inciting such groups. In any case, these groups experienced full social affirmation. The coupling of the state and criminal establishment grew ever stronger and more apparent, and it was just a question of time when such groups would get out of control.

In any case, the import of gasoline, medicines and even food, was forbidden to Serbia and in those circumstances, the corruption of people responsible for the blockade (the UN officials), was the only way to have normal life, both for the state and the ordinary people. If you wanted to import some goods, you had to play a game with the members of the UN. Everyone has participated in that game: the state, the criminals, but also those who in some other circumstances were honest.

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[38] It is interesting, but the truth is that soldiers and members of the UN troops were also corrupted and accepted money for giving free passage to everyone who gave them enough money. In one way, the corruption was imported in Serbia, by general circumstances and UN personnel.

[39] Smuggling sometimes was very ridiculous, because everyone knew what it is all about, including the so-called international community and UN troops. Still everyone pretended not to see the reality, and what was in fact going on.

[40] More in the book „The Fight Against organised Crime in Serba“, UNICRI, Institue of Comparative Law in Belgrade, Faculty of Law in Florence; Belgrade, 2008. pp 45-50.

Everyone has lived in a situation of excessive hyper-inflation that was the main product of war, sanctions and the UN blockade. For example, in terms of criminal law illegal trade of foreign currency is an offence. But it was the only way to survive for the honest people in Serbia. So, everyone has participated in that illegal trade of money and other illegal business to obtain goods that were necessary. Everyone, judges, prosecutors, policemen, have participated and everyone has pretended that everything is completely legal and that nothing was wrong.

So, breaking the law has become the normal and the common way of life for ordinary people. Nobody has seen anything wrong and thanks to that the people and the state have survived, but after al that, groups of organised crime have stayed in Serbia and also the spirit of breaking the law has stayed as a something common and normal.[41] It is very difficult to say that something is regular up to one date, and that the same thing is not regular any more.[42] It is not only the issue of corruption, generally speaking, but also of financing the political parties. As we know, many political parties and the whole opposition were financed from abroad in the period of Milošević.[43] It was quite a normal thing in that period and nobody, including people from abroad has seen anything morally and legally wrong. But after that it is very hard to explain that financing political parties from abroad is illegal. In one sense it could be said that international community played very important negative role in establishing corruptive way of thinking in Serbia. It was a situation of the blockade and sanctions, but also of the financing the anti-Milošević opposition from abroad.

The same thing that now is prescribed as illegal, few years ago was allowed as a quite a normal thing. It brought about a big moral confusion to Serbia and to people in Serbia, especially young people. Yesterday the rule was "do it" and today the rule is "do not do it". It breaks every consistence and morality. And the consistence is very important for the morality. Sometimes

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[41] Slobodan Vuković, "Pravo, moral i korupcija", Beograd, 2005. pp. 23-69.

[42] Jovan Ćirić, "Kriminalitet u Srbiji – spoljni faktori i prevencija", in the book published by the Institue of Criminological and Sociological Research – „Kazneno zakonodavstvo i prevencija kriminaliteta", Beograd, 2008, pp. 67-86.

[43] See the text of Elizabeth Becker: " US Quietly Resuming Aid for Some Anti-Milosevic Groups" – on the web-site http://query.nytimes.com/gst/fullpage.html?res=9AO3EEDA133EF937A15754CDA96F

it is the most important thing for the morality. In concluding, we want to emphasise that there was no consistence in the last few years in Serbia and that this is the third main socio-psychological reason for the growing up of corruption in Serbia.

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NEKI UZROCI KORUPCIJE U SRBIJI

U ovom članku autor govori o različiti uzrocima korupcije u Srbiji. Prvu grupu uzroka autor označava kao "Kriza morala i osnovnih društvenih vrednosti u vremenima tranzicije"; druga je "Nepoverenje u pravosuđe i druge osnovne društvene institucije". Treća grupa je, prema ovom autoru "Krajnja nužda u uslovima rata, sankcija i blokade UN". To su osnovni uzroci koji su doveli do rasta korupcije u Srbiji.

Ključne reči: kriza morala, nepoverenje u sudstvo; sankcije UN, korupcija, Srbija

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THE COMPATIBILITY OF THE SERBIAN ANTI-CORRUPTION LEGAL FRAMEWORK WITH THE REGIONAL AND INTERNATIONAL STANDARDS

The paper examines the measures that have been adopted to combat corruption on the road of Serbian transition and EU integration process with a particular emphasis placed on the most recent legislative and institutional developments in the fields of the public procurement, the corporate criminal liability, the Anti-Corruption Agency as well as other issues regulated by the Law on the Anti-Corruption Agency.

The paper also deals with the key players setting forth relevant anticorruption standards as well as with their respective monitoring mechanisms. The Serbian involvement in these mechanisms is discussed as well.

However, the progress Serbia made in the course of the anticorruption reform will be predominantly assessed in the light of the Serbian compliance with the GRECO recommendations, as GRECO has the most developed and effective monitoring mechanism thus far.

Key words: *Anti-Corruption Agency, GRECO, Serbian National Strategy for Combating Corruption, anti-corruption reform, public procurement, corporate criminal liability, Transparency International Corruption Perception Index.*

1. Introduction

Corruption is a manifestation equally damaging in all societies irrespective of their level of development. The problem of corruption in societies making a transition towards democracy is bigger and more serious, as new

demands dictate numerous tasks while the funds and means for their realization are still undeveloped or insufficient[1].

The period of isolation and political instability in Serbia has adversely affected adequate functioning of key institutions of the Government. A high level of corruption was one of the major causes that gave rise to the malfunctioning of governmental institutions. Although there have been major advances in a range of development areas in Serbia since the political changes in 2000, progress with respect to mitigating corruption has been partial and rather slow. Actually, corruption remains prevalent in many areas and continues to be a serious problem.

According to the Transparency International Corruption Perception Index (hereinafter "TI CPI") for 2009, Serbia was ranked 83 out of 180, with a rating score "3.5" on a scale of 0 to 10.[2] However, the trend of progress is evident considering that TI CPI ratings for Serbia from 2000 onwards[3] were significantly less favorable comparing to 2009 results. For instance, Serbian rating score in 2000 was 1.3, (having been ranked 89 out of 90), while in 2003 the rating score was 2.3 (being ranked 106 out of 133).

In addition, a number of polls conducted in Serbia indicate that in the past several years citizens consider corruption as the fourth most important problem in the society, after poverty, unemployment and general crime.[4]

However, the exact extent of the corruption cannot be precisely determined due to the immanent shortcomings of each given method.

For instance, when it comes to the Corruption Perceptions Index, it is worth mentioning that it has drawn increasing criticism in the decade since its launch, leading to calls for the index to be abandoned.[5]

Since 1995, Transparency International has published an annual Corruption Perceptions Index ranking the countries of the world according to "the

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[1] Serbian National Strategy for Combating Corruption ("Official Gazette of the Republic of Serbia", No. 109/05 from 9 December 2005), (Introduction).

[2] A rating score "0" represents a perception of rampant corruption and "10" represents a perception of no corruption at all. A higher score marks less perceived corruption.

[3] It is important to note that for the years 2002-2005 are presented data for Serbia and Montenegro.

[4] Serbian National Strategy for Combating Corruption, *supra* note 1, at 5.

[5] Galtung, Fredrik (2006). "Measuring the Immeasurable: Boundaries and Functions of (Macro) Corruption Indices," in *Measuring Corruption*, Charles Sampford, Arthur Shacklock, Carmel Connors, and Fredrik Galtung, Eds. (Ashgate): 101-130, available at: http://report.globalintegrity.org/methodology/readings.cfm

degree to which corruption is perceived to exist among public officials and politicians", as determined by expert assessments and opinion surveys. The organization defines corruption as "the abuse of entrusted power for private gain".[6]

The lack of standardization and precision in these surveys has been main cause for concern. The criticism has been also directed at the limited scope of the survey covered by the Index.

Firstly, the CPI's sample and methodology are variable making even basic international comparisons and tracking year-to-year changes in the individual countries difficult. The only reliable way to compare a country's score over time is to go back to individual survey sources, each of which can reflect a change in assessment." [7]

Furthermore, it is impossible to directly measure a corruption as a willfully hidden phenomenon, what further leads to unreliable and imprecise data base on an eclectic mix of opinion surveys and expert assessments.

The scope of the CPI's survey as limited to the public sector domain constitutes a source of criticism as well. More specifically, the CPI focuses on corruption in the public sector defining the corruption as the abuse of public office for private gain. In doing so, it does not coincide with the notion of corruption as defined in the Serbian National Strategy for Combating Corruption and in the Serbian Law on the Anti-Corruption Agency. Actually, unlike the existing definition of corruption under the recently adopted Serbian law,[8] the CPI does not include the private dimension of the corruption, thus neglecting all forms of corruptions such as the small and medium sized businesses as well as other sectors that are not linked to public resources.

However, the critical assessment of the existing corruption indicators as well as the exact extent of the corruption in Serbia will not be subject to review within the scope of this article. The article will examine the measures that have been adopted and taken to combat corruption on the road of Serbian transition and EU integration process with a particular emphasis placed

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[6] http://www.transparency.org/news_room/faq/corruption_faq.

[7] Nathaniel Heller, "Hey Experts: Stop Abusing the CPI", Global Integrity, available at http://commons.globalintegrity.org/2009/02/hey-experts-stop-abusing-corruption.html.

[8] Article 2 of the Law on Anti Corruption Agency defines "corruption" as a relation based on abuse of office or social status and influence, in the public or private sector, with the aim of acquiring personal benefits for oneself or another. The Law on the Anti-Corruption Agency ("Official Gazette of the Republic of Serbia", No. 97/08), unofficial translation made by the OSCE Mission to Serbia.

on some of the most recent legislative, institutional and technical developments achieved in this area. It will also point out the areas and sectors where the progress in combating corruption is not so evident and transparent. The article will also review relevant documents and standards set up by the key players at the international level in fight against corruption and the compliance of the Serbian legislation and practice with the set up criteria.

2. Key players at the international level and their respective monitoring mechanisms

The key international and regional standard-setters in the field of combating corruption are *inter alia* the United Nations, the Organisation for Economic Cooperation and Development (hereinafter "OECD"), the World Customs Organization, the Council of Europe, the European Union, the Organization of American States (hereinafter "OAS"), the African Union and the League of Arab States.[9] In the text that follows will be discussed some of the mechanisms that are of key importance for the progress of the Serbian anti-corruption reform.

2.1. United Nations

The United Nations Convention against Corruption of 2003 (hereinafter "UNCAC") is the first global instrument to harmonize anti-corruption efforts worldwide. It is widely recognized as the most promising initiative to curb the scourge of corruption. This convention is unique not only in its worldwide coverage but also in the extensiveness and detail of its provisions.[10] It complements the anti-corruption conventions of the OAS, the African Union and the CoE, the SADC Protocol against Corruption and the OECD Convention on combating bribery of foreign public officials in international business transactions,. Serbia ratified the UN Convention against Corruption in 2005.[11]

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[9] In addition, several non-governmental organizations were either founded to combat corruption or they focused their activities on anti-corruption strategies. The most significant are Transparency International and Open Society Institute.

[10] http://www.transparency.org/global_priorities/international_conventions/projects_conventions/uncac.

[11] Published in" Official Gazette of the State Union of SaM- International agreements", No. 12/05.

However, the monitoring process is still not fully developed since the state parties have taken different positions regarding the transparency of the review mechanism under the UNCAC and it prevails to be the burning issue.[12]

Although the publication of country reports is consistent with the spirit and letter of UNCAC, as it is based on transparency, some state parties still call it into the question arguing that the publishing country reports may politicize the review process. It is also worth noting that publication of country reports and recommendations is a standard practice in monitoring anti-corruption and anti-money laundering standards and documents of the OECD, the CoE as well as other aforementioned regional bodies. The outcome on this issue is of major importance to the credibility of the review process and of the UN Convention itself.[13]

2.2. OECD

The OECD has been also actively involved in setting and promoting anti-corruption standards and principles. Actually, fighting corruption is one of the priorities of the OECD. The OECD Anti-Bribery Convention of 1997[14] establishes legally binding standards to criminalize bribery of foreign public officials in international business transactions and provides for a host of related measures that make this effective.[15] As it has been mentioned above, the Convention itself establishes a transparent, open-ended, peer-driven monitoring mechanism to ensure the thorough implementation of the international obligations that countries have taken on under the Convention. This monitoring is carried out by the OECD

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[12] http://www.transparency.org/global_priorities/international_conventions/projects_conventions/uncac.

[13] See "Transparency is Key in the UNCAC Review Mechanism", Policy Note, #01/09, available at www.uncaccoalition.org/index.php?option=com). In preparation for the next Conference of States Parties in Doha on 9–13 November 2009, governments are in the final stages of negotiating the components of a review mechanism for the UNCAC. This policy note addresses some of the key concerns and issues on the discussion table..

[14] The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 1997.

[15] See http://www.oecd.org/document/21/0,3343,en_2649_34859_2017813_1_1_1_1,00.html.

Working Group on Bribery, which is composed of members of all State Parties. Serbia as non member country to the OECD has not joined this instrument.[16]

2.3. GRECO

The Group of States against Corruption (GRECO) was established in 1999 by the CoE to monitor States' compliance with the organization's anti-corruption standards. [17]

The GRECO objective is to improve the capacity of its members to fight corruption by monitoring their compliance with the CoE anti-corruption standards. It helps to identify deficiencies in national anti-corruption policies, prompting the necessary legislative, institutional and practical reforms. GRECO also provides a platform for the sharing of best practice in the prevention and detection of corruption.

The GRECO was conceived as a flexible, efficient and transparent follow-up mechanism, called to monitor, through a process of mutual evaluation and peer pressure, the observance of the Guiding Principles in the Fight against Corruption and the implementation of international legal instruments adopted in pursuance of the CoE Programme of Action against Corruption.[18] The State Union of Serbia and Montenegro joined GRECO on 1

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[16] Besides the 30 OECD's member countries, there are eight non member countries - Argentina, Brazil, Bulgaria, Chile, Estonia, Israel, the Slovenia and South Africa that have joined this Convention However, it was argued that the fact that Serbia did not join this instrument does not present a problem as the provisions of the OECD Convention largely coincide with the provisions of other conventions that have been ratified by Serbia. See Nenadić, Nemanja, "Korupcija kao problem na putu pristupanja EU i pristupanje kao podsticaj za suzbijanje korupcije u Srbiji", Izazovi evropskih integracija: časopis za pravo i ekonomiju evropskih integracija, 2008/2, Beograd, 2008, p. 37.

[17] GRECO was established on 1 May 1999, by a Resolution adopted by 17 CoE states, following a 1998 Council of Ministers Resolution authorizing its creation. See more: Ćirić, Jovan, "GRECO u borbi protiv korupcije", Strani pravni život, 1/3, 2006, Beograd, p. 247.

[18] The GRECO currently has 44 member states and monitors the following instruments: Twenty Guiding Principles in the Fight against Corruption (1997), Council of Europe Criminal Law Convention (1999), Additional Protocol to the Criminal Law Convention on Corruption, Council of Europe Civil Law Convention (1999), Recommendation on Codes of Conduct for Public Officials (2000) and Recommendation on Common Rules against Corruption in the Funding of Political Parties. See http://www.coe.int/t/dghl/monitoring/greco/general/3.%20What%20is%20GRECO_en.asp

April 2003, i.e. after the close of First Evaluation Round. Serbia thus far ratified the CoE Criminal Law Convention on Corruption of 1999[19] and Additional Protocol thereto of 2003,[20] as well as the CoE Civil Law Convention on Corruption of 1999.[21]

2.4. European Union

When it comes to the EU integrations it is noteworthy to mention that the Council Decision 2008/213/EC of 18 February 2008 on European Partnership with Serbia defines the fight against corruption as one of priorities in the process of the EU integrations.

The Communication on a Comprehensive EU Policy against Corruption is also of great relevance in this context. In order to promote anti-corruption policies in the new EU Member States, candidate countries and potential candidate countries, the Commission has drawn up ten general principles, which are annexed to the Communication.[22]

This Communication is also important as it underlines that the implementation of the existing anti-corruption instruments should be closely monitored and strengthened. More specifically, the concerned Communication points to the lack of a proper follow-up or evaluation mechanism comparable to GRECO.[23]

As part of the EU accession process, the Commission has scrutinized corruption in the framework of its regular evaluations of the progress of each of the candidate and potential candidate countries towards fulfillment of the so-called "Copenhagen criteria" (political and economic criteria as well as the ability to take on the obligations of the membership - *acquis communautaire*).

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[19] "Official Gazette of the FRY –International agreements" No. 2/02. and "Official Gazette the SaM – International agreements", No. 18/05

[20] "Official Gazette of the RS"- International agreements", No. 102/07.

[21] "Official Gazette of the RS- International agreements", No. 102/07.

[22] Nemanja Nenadic explored the level of compliance of Serbian anti-corruption policy with the given principles, supra note 17, p. 33.

[23] However, it should bear in mind that the European Anti-Fraud Office was set up in 1999 with a view to expanding the scope and enhancing the effectiveness of action to combat fraud and other illegal activities detrimental to the Community's interests. It is established as a part of the EC with a special independent status for conducting anti-fraud investigations. It collaborates with the international organizations and non-governmental institutions involved in the fight against corruption such as GRECO.

Accordingly, the Serbian EC progress reports[24] do include sections on anti-corruption policy within the chapter on political criteria as well as there is information contained in other sections of the report. Still, unlike the GRECO reporting methodology, the EC progress reports do not provide information in a precisely systematized and comprehensive manner. Some authors do recommend that when it comes to evaluation of countries' progress in the fight against corruption, EU should take into account more concrete indicators, developed on the basis of its ten principles as well as to organize permanent monitoring to cover all crucial topics involved. [25]

Owing to the fact that the EU at this stage is not in favor of upgrading evaluation mechanism as well as that the UN monitoring mechanisms is still not fully operational, this paper will assess the course of the Serbian anticorruption reform in the light of its compliance with GRECO recommendations, as it has the effective monitoring mechanism, which is the most developed thus far.

3. Compliance of the Serbian Anti-Corruption Framework with the GRECO Recommendations

Like any country that joined GRECO after the close of its Second Evaluation Round, Serbia was subject to a Joint First and Second Round Evaluation which covered the whole range of issues examined during the first two rounds. This comprehensive approach is considered indispensable both for the sake of equal treatment of all members and to gain a clear and accurate picture of the anti-corruption regulatory framework and policies of new Member States.[26]

GRECO is currently well into its Third Evaluation Round, with evaluation reports having been adopted in respect of ten member states, while others are underway.[27] Serbia should get prepared for the Third Evaluation Round, even though the Third Evaluation Round shall not start before the adoption of the Addenda to the Joint First and Second Evaluation Round, which is supposed to

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[24] See Serbia 2009 Progress Report, supra note 2 as well as for years (2006- 2008).

[25] Nemanja Nenadic, *supra* note 17, p. 45.

[26] Ninth General Activity Report of GRECO, Independent Monitoring of Party Funding, adopted by GRECO, February 2009, available at: http://www.coe.int/t/dghl/monitoring/greco/documents/2009/Greco(2009)1_ActRep2008_EN.pdf

[27] See Reports having been adopted for: Estonia, Finland, Iceland, Latvia, Luxembourg, Netherlands, Poland, the Slovak Republic, Slovenia and the United Kingdom. Reports are underway for Albania, Belgium, Denmark, France, Spain, Sweden and Norway.

take place in the first half of 2010. The GRECO Third Evaluation Round reflects virtually the full range of issues and practices regarding the transparency of party funding,[28] as well as it relates to transposition into domestic law of the corruption offences established by the reference instruments[29].

In the text that follows will be assessed Serbian progress made over the transition period with regard to Serbian compliance with some of the recommendations of the Joint First and Second Evaluation Round. According to GRECO Report from June 2008 on the compliance of the Republic of Serbia for the Joint First and Second Evaluation Rounds, Serbia complied with twelve out of twenty five recommendations. Within the scope of this paper a particular emphasis will be placed on the recommendations pertaining to public procurement matters, criminal corporate liability and the Anti-Corruption Agency.

3.1. Public Procurement Framework

3.1.1. Three Stages of the Public Procurement Reform

The Law on Public Procurement of 2002[30] was the first adopted anti-corruption law by the Serbian Parliament. It is interesting to note that public procurements were regulated for the first time after the Second World War by this law in Serbia.[31]

Although this new piece of legislation proved to be controversial,[32] the transparency of public procurement is significantly improved comparing to 1990s, when there was no institutional framework in place. It was argued that

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[28] As understood by reference to Recommendation Rec(2003)4 of the Committee of Ministers on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns.

[29] See the Criminal Law Convention on Corruption (ETS no 173), its Additional Protocol (ETS no 191) and Guiding Principle 2 (Resolution (97) 24).

[30] Law on Public Procurement ("RS Official Gazette" No. 39/2002, 43/2003, 55/2004, 101/2005, 116/08).

[31] Jovanovic, Predrag, Transparency in and external control over public procurement processes in Serbia, available at: http://www.antikorupcija-savet.sr.gov.yu/download/9-Predrag-Jovanovic-eng.doc.

[32] Public procurement was not regulated in the best manner for the following reasons: the legislation has been amended to offer the advantage to domestic suppliers and the police procurements have been exempted from the provision of the Low on Public Procurement by a Government of Serbia Decree. See Hiber, D, Begovic, B, "EU Democratic Rule of Law Promotion: The Case of Serbia", 2006, p.22.

the total lack of public procurement framework was a common feature of all Central and Eastern European countries in transition in early nineties as well.[33]

Similarly to other Central and Eastern European countries in transition, Serbia entered the second stage of reform of public procurement system as soon as it adopted the law regulating public procurement in 2002. On the other hand, opposite to those countries, Serbia entered to the second stage, approximately one decade after other concerned transitional countries. Blomberg designates this second stage of reform as "[phase] towards European integrations", while the third stage of public procurement reform, which is the final one, starts when state becomes member of the EU. It was stated that the reform in Serbia turned to be successful and that Serbia achieved the reform-related goals in a few years while it took other concerned transitional countries ten years to accomplish the same results (1990-2000).[34]

3.1.2. GRECO Recommendation on Enhancing the Implementation of the Public Procurement Law

In 2006, the GRECO also positively evaluated the Law on Public Procurement, although having done so in inexplicit manner. Actually, the GRECO only recommended enhancing the implementation of the public procurement law, without proposing any changes to the law itself. In its compliance report of 2008, GRECO concludes that recommendation i has been dealt with in a satisfactory manner.

Nevertheless that the GRECO recommendation was particularly focus on the strengthening implementation of the existing law, the Serbian authorities, meanwhile, went far beyond the given recommendation. Actually, besides strengthening implementation through anticipated trainings, the Public Procurement Law has been amended in order to further increase the independence, transparency and effectiveness of the procurement process.

3.1.3. Positive Developments

In doing so, institutional independence of the public procurement bodies, notably the Public Procurement Office and the Commission for

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[33] See P. Blomberg "Lessons Learned on the basis of Ten Years of Reform of the Systems *of* Public Procurement in Central and Eastern Europe" SIGMA report, Ohrid, 2004, cited in: Predrag Jovanović,"Javne nabavke u Srbiji, Decenija za dve i po godine", p.1. available at: http://www.transparentnost.org.yu/dokumenti/dokument4.pdf.

[34] Predrag Jovanovic, *supra* note 34, p. 3.

the Protection of Bidders' Rights in public procurement matters was ensured. Actually, these amendments empower the National Assembly to elect the President and members of the Commission for the protection of rights instead of the executive branch as it was the case before.

The transparency of the public procurement procedures have been increased by narrowing down and exhaustively listing exceptions requiring confidential procedures, so-called "confidential procurements." Nevertheless that the GRECO welcomed the envisaged amendments directed towards the increasing transparency,[35] the Serbia 2009 EC Progress Report indicates following shortcomings in the new legislation that may undermine the anti-corruption reform: the definition of public bodies, the scope of exemptions and excluded contracts and the conditions for use of the restricted procedure.

One of the key changes of the amended law is the enhanced specialization in public procurement matters through professional training and certification of those civil servants employed in the purchasing entities. Most importantly, the anticorruption clauses had been introduced.

Although, when it comes to the public procurement framework, significant progress had been made what was also acknowledged by the GRECO,[36] Serbia still has to undertake above stated actions towards full alignment with the *acquis* in the public procurement domain. Apparently, this will further strengthen the anti-corruption reform.

In addition, the Serbia 2009 EC Progress Report reads that in order to ensure full implementation of the new law, the sufficient financial resources should be ensured for the independent regulatory institutions (the Public Procurement Office and the Commission for the Protection of Bidders' Rights) as to overcome difficulties they face in carrying out their mandates. Also, it is important to strengthen the administrative capacity and coordination mechanisms of the main stakeholders in the public procurement system in particular to reduce the scope for corruption.

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[35] One of ten EU principles is in also favor of enhancing the transparency, Nenadic, Nemanja, *supra* note 17. p. 39.

[36] See Joint First and Second Evaluation Rounds Compliance Report on the Republic of Serbia, adopted by GRECO at its 38th Plenary Meeting, June 2008, available at: http://www.mpravde.sr.gov.yu/images/Report_GRECOeng.pdf.

3.2. Liability of Legal Persons for Offences of Corruption

3.2.1 GRECO Recommendation on the Introduction of the Corporate Criminal Liability

The Law on the Liability of Legal Entities for Criminal Offences has been enacted by the National Assembly of the RS in 2008.[37] Out of all former Yugoslav countries, Serbia was the last country to introduce the law pertaining to the criminal responsibility of legal entities.[38]

In its report of 2006[39], the GRECO had recommended authorities to adopt the necessary legislation to speedily implement liability of legal persons for offences of corruption providing for adequate sanctions, in accordance with the Criminal Law Convention on Corruption. We find that some parts of the Recommendation No. R (88) 18 of the Committee of Ministers to Member States concerning Liability of Enterprises having Legal Personality for Offences Committed in the Exercise of their Activities are also of key importance for the anticorruption reform in Serbia and as such will be subject to review later in the text.[40]

The GRECO already noted the intention of the authorities to introduce corporate criminal liability for corruption offences and welcomed the draft law, which had been prepared to this end.[41] Although the concerned draft law, which was adopted meanwhile, does not directly regulate offences of corruption, it is

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[37] Law on the Liability of Legal Entities for Criminal Offences, ("Official Gazette of the RS" No. 97/2008).

[38] Vrhovšek, M, „Uloga Zakona o krivičnoj odgovornosti pravnog lica u suzbijanju korupcije", Izazovi evropskih integracija: časopis za pravo i ekonomiju evropskih integracija, 2008/2, Beograd, 2008, p. 31.

[39] Joint First and Second Evaluation Round Report on the Republic of Serbia, adopted by GRECO at its 29th Plenary Meeting, June 2006, available at: http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoEval1-2(2005)1rev_Serbia_EN.pdf

[40] Besides the given Recommendation and the Criminal Law Convention on Corruption the following instruments require Member States to regulate criminal liability of the enterprises for offences committed in the exercise of their activities: CoE Convention on the Protection of the Environment through Criminal Law Strasbourg of 1998, CoE Recommendation Rec. No. R (96) 8 concerning crime policy in Europe in a time of change, Programme of Action against Corruption, adopted in 1996 by the Committee of Ministers of the CoE, Convention on the Protection of the European Communities' Financial Interests of 1995.

[41] Joint First and Second Round Evaluation Report on the Republic of Serbia, *supra* note 37.

also applicable on corruption offences as it states that a legal entity shall be liable for any criminal offences constituted under a special part of the Criminal Code or under other laws, if the conditions governing the corporate liability as laid down in this Law were met.[42]

However, GRECO concluded that the concerned recommendation had been only partly implemented and it urged the state authorities to pursue this matter more vigorously through the adoption and implementation of the respective draft law as to bridge the important legal gap.[43]

Yet, it remains to be seen whether the adoption and implementation of the given law will be considered in the upcoming GRECO report as sufficient to achieve full compliance with the given recommendation.

3.2.2. Narrowly Defined Legal Ground of the Corporate Criminal Liability

Although the coming into force of the law pertaining to the corporate criminal liability constitutes a positive development, we find that the given law quite narrowly determines the legal ground of the corporate criminal liability, what may adversely affect the course of the anticorruption reform in Serbia.

Actually, like the aforementioned CoE documents[44], the recently adopted law is based on the *alter ego* theory of liability, which indicates that there is such unity between the corporation and the individual that the separateness of the corporation has ceased and holding only the corporation liable would be unjust.[45] Although, both, the recently adopted Serbian law and the CoE instruments state that the imposition of liability upon the enterprise shall not exclude a responsibility of the alleged physical perpetuator, they set forth different terms and conditions for the criminal liability of the natural person implicated in the offence. Actually, while the Recommendation[46] and the

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[42] Article 2 of the Law, *supra* note 31.

[43] See Recommendation xxiii of the Joint First and Second Round Evaluation Report on the Republic of Serbia, *supra* note 37.

[44] Recommendation No. R (88) 18 of the Committee of Ministers to Member States concerning Liability of Enterprises having Legal Personality for Offences Committed in the Exercise of their Activities and the CoE Criminal Law Convention on Corruption.

[45] See http://www.houston-opinions.com/law-alter-ego-piercing-corporate-veil.html.

[46] See point I.5 of the Recommendation No. R (88) 18, *supra* note 45: "The imposition of liability upon the enterprise should not exonerate from liability a natural person implicated in the offence. In particular, *persons performing managerial functions* should be made liable for breaches of duties which conduce to the commission of an offence."

Convention[47] has been interpreted as finding that the corporate criminal liability derives from the criminal liability of the natural person which is implicated in the offence, (whether he is the responsible person or other person performing managerial functions), the recently adopted Law, stipulates that liability of legal entities shall be only based upon culpability of the responsible person.[48] In other words, according to Serbian legislation, the legal person shall not be held accountable for criminal offences committed by the natural persons performing managerial functions within the enterprise other than responsible person. This limitation, inherent to identification doctrine, which has been accepted by the Serbian lawmakers,[49] will have negative impact on combating corruption and as such shall be amended.

3.2.3. Correlation between Responsibility for Commercial Offences and Corporate Criminal Responsibility

Arguably, this narrowly defined category of corporate criminal liability within Serbian legal framework is strongly influenced by the inherited concept of liability for commercial offences, which is deeply rooted in this region.

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[47] See Article 18, paragraph 1 of the Criminal Law Convention " […] legal persons can be held liable for the criminal offences of active bribery, trading in influence and money laundering established in accordance with this Convention, committed for their benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:

- a power of representation of the legal person; or
- an authority to take decisions on behalf of the legal person; or
- an authority to exercise control within the legal person[…]"

[48] See Article 6 of the Law on the Liability of Legal Entities for Criminal Offences: "A legal person shall be held accountable for criminal offences which have been committed […] by a responsible person within the remit, that is, powers thereof.[…]." In addition Article 7, paragraph 1 of the concerned law finds that the liability of legal entities shall be based upon culpability of the responsible person.

[49] The traditional method by which companies are held criminally responsible in English law is under the identification doctrine. If an individual who is sufficiently senior within the corporate structure as to represent metaphorically the "mind" of the company commits a crime within the course of his or her employment, that act and *mens rea* can be attributed to the company. The company can be "identified" with these acts and held directly accountable. The identification theory, has been criticized as too narrow in that only the actions of high-level managers with decision-making authority over corporate policy trigger liability in the corporation, while a company cannot be identified with a crime committed by a person lower down in the corporate hierarchy. See http://webjcli.ncl.ac.uk/1998/issue2/clarkson2.html#Heading8 and Vrhovšek, *supra* note 39, p. 25.

Namely, in comparison with most European countries, criminal responsibility of legal persons in Serbia is not a brand-new category, mostly due to the fact that domestic legal system recognized for years responsibility of legal persons for commercial offences.[50]

The concept itself had been introduced for the first time in the legal framework of the Federal People's Republic of Yugoslavia, while the subsequently adopted and amended Law on Commercial Offences of 1977,[51] is still in force in Serbia. The need to modify or repeal the given law has been stressed lately in Serbia by various authors as to be in compliance with the new set of laws including the law regulating corporate criminal liability.[52]

The Law on Commercial Offences defines a "commercial offence" as a "violation of rules on commercial and financial business committed by legal person and responsible person within the legal person, which has caused or could have caused severe consequences and which in the provisions issued by the authorized body is specified as a commercial offence."[53]

The responsibility of legal entities for commercial offences has been regulated as *sui generis* penal responsibility.[54] The term may be misleading, and for that reason it is important to note that responsibility for commercial offences is usually characterized as steering a middle course between criminal and penal responsibility, having combined features of both forms. Consequently, as it was explained earlier in the text, the adoption of the law on strict criminal responsibility of legal persons does present a positive development.[55]

However, the new law takes almost the same position as the previous one when it comes to determination of physical perpetuators, whose actions are supposed to lead to the corporate criminal liability. In other words, the new law failed to make sharp turn towards widening the ground of the corporate criminal liability. Similarly to the Law on Commercial Offences that had

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[50] *Ibidem.*

[51] Law on Commercial Offences ("Official Gazette of the SFRY" No. 4/1977, "Official Gazette of the SRY" No. 27/92, 16/93, 31/93, 41/93, 50/93, 24/94, 28/96, 64/2001, and "Official Gazette of the RS" No. 101/2005).

[52] Vrhovšek, Miroslav, Kritički prikaz Zakona o izmenama i dopunama Zakona o javnom informisanju sa aspekta usaglašenosti sa Zakonom o privrednim prestupima, Pravni informator, available at: www.informator.co.yu/tekstovi/kritički-prikaz 1009.htm.

[53] Article 2, paragraph 1 of the Law on Commercial Offences, *supra* note 52.

[54] Vrhovšek, Miroslav, *supra* note 39, p. 31

[55] Vrhovšek, Miroslav, *supra* note 39, p. 27.

determined legal person and responsible person as sole supposed perpetuators, the Law on the Liability of Legal Entities for Criminal Offences has stated that responsible person is only possible physical perpetuator of the crime. In having done so, apparently, it failed to fully comply with the wording of Recommendation No. R (88) 18 concerning Liability of Enterprises having Legal Personality for Offences Committed in the Exercise of their Activities and Criminal Law Convention on Corruption.

Besides the presented shortcomings of the recently adopted law pertaining to corporate criminal responsibility it is worth mentioning that, in its compliance report of 2008, GRECO also recalled that there are no provisions establishing civil or/and administrative liability of legal persons for corruption or corruption-related offences exist. (No progress has been observed meanwhile in this regard.)

3.3. Law on the Anti-Corruption Agency[56]

The Law on Anti-Corruption Agency, adopted in November 2008, has been deemed as one of the key priorities of the Serbian Government in the EU accession process. Also, this Law has advanced the implementation of the Serbian commitments under the UNCAC, particularly one related to the existence of an appropriate independent body or bodies within the respective States Parties in charge of preventing corruption.[57] Furthermore, this law is of great significance when it comes to achieving compliance of Serbian framework with a number of GRECO recommendations. This law will be assessed in the light of meeting the GRECO recommendations.

The Law on Anti-Corruption Agency is advanced since it establishes the Anti-Corruption Agency as well as it provides the definition of corruption within the Serbian legal framework. Pursuant to this law, the Anti-Corruption Agency, as an anticorruption institutional cornerstone, shall become fully operational on January 1, 2010, while up to that time, the Ministry of Justice is competent for implementation of the National Strategy for the Fight against Corruption and its Action Plan.[58]

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[56] Law on the Anti-Corruption Agency, *supra* note 9.

[57] See Article 6 of the UNCAC.

[58] According to the Law, the AC Agency is to monitor the implementation of the Serbian National Strategy for Combating Corruption, and its Action Plan, coordinate the work of the state institutions in fighting corruption, suggest changes of current laws and recommend new laws which are of importance to fight corruption.

3.3.1 GRECO Recommendation on the Effective Monitoring of the Implementation of the Action Plan to the Strategy for Combating Corruption

The GRECO *inter alia* recommended that the Action Plan for the Implementation of the National Anti-Corruption Strategy should be adopted and that an efficient monitoring of its implementation should be ensured.[59] The GRECO later concludes that recommendation xiii had been implemented satisfactorily as the Law on Anti-Corruption Agency entrusted the Anti-Corruption Agency with the monitoring of the Anti-Corruption Strategy and its Action Plan (meanwhile adopted in 2006).[60] However, GRECO, in its compliance report, further expressed hopefulness that the Anti-Corruption Agency, which would be responsible for, *inter alia*, monitoring the implementation of the Anti-Corruption Strategy and its Action Plan, would be vested with sufficient authority and resources to effectively complete its oversight task.

We find that Agency's accountability to the National Assembly to whom it has to report annually concerning progress in implementation[61] as well as structure of Agency's Management Board involving a broad range of stakeholders coming from both governmental and nongovernmental sectors[62] ensures a sufficient level of independence in order to effectively fulfill its monitoring tasks.

When it comes to Agency's competencies, the given law entitles the Agency to monitor the implementation of the National Anti-Corruption Strategy and its Action Plan, as well as to coordinate the work of the state institutions in fighting corruption, to suggest changes of current Laws and recommend new Laws which are of importance to fight corruption.

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[59] Joint First and Second Evaluation Round Report on the Republic of Serbia, adopted by GRECO at its 29th Plenary Meeting, June 2006, *supra* note 40.

[60] The Joint First and Second Round Evaluation Report on the Republic of Serbia, *supra* note 37.

[61] See Article 3 of the Law on the Anti-Corruption Agency. In addition it is worth noting that opposite to the Anti-Corruption Agency, the Anti-Corruption Council, founded in 2001, has been limited to advising the government and as governmental advisory authority, having the status of the governmental "working group", has not been provided with a sufficient level of independence.

[62] Articles 8 and 9 of the Law on the Anti-Corruption Agency.

However, it should be kept in mind that there is a common problem of the implemetation of laws in Serbia due to the lack of human, financial and technical resources to adequately carry out respective mandates.[63] In May 2008 six independent State bodies (the Ombudsman, the State Audit Institution, the Commissioner for Free Access to Public Information, the Committee for the Suppression of Conflicts of Interest, the Public Procurement Commission and the Commission for the Protection of Bidders' Rights) expressed concerns about the difficulties they face in carrying out their duties, In particular, they complained about inadequate working conditions due to the lack of resources (staff and funding) that undermine their independence.[64]

In 2009, the Anti-Corruption Agency was already allocated premises, budgetary resources and initial technical and administrative assistance as well as its executive board was elected.

However, it will be equally important and challenging for the Serbian authorities to provide long term resources for the Anti-Corruption Agency performance. The brief comparative overview demonstrates that the sustainability of some of the EU Member States anti-corruption agencies, such as those from Slovenia and Italy, has been significantly undermined lately.[65]

3.3.2. GRECO Recommendation on Expansion of the Application of the Law on the Prevention of Conflicts of Interest in the Discharge of Public Office

The inclusion of broad definition of the term "public official" in the Law on the Anti-Corruption Agency contributes towards achieving the compliance with the GRECO recommendation xvii. Actually, GRECO recommendation xvii refers to expansion of the application of the Law on the Prevention of Conflicts of Interest in the Discharge of Public Office (hereinafter "Law on the Prevention of Conflict of Interest") so that it would include all public officials who perform public administration functions without excluding those

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[63] "The Fight against Corruption in Serbia: An Institutional Framework Overview", UNDP Serbia, Independent report, April 2008, http://europeandcis.undp.org/anticorruption/show/05788DCA-F203-1EE9-B164C824E7DA18D7.

[64] Commission Staff Working Document (Commission of the European Communities), Serbia 2008 Progress Report accompanying the Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2008-2009. In addition the Serbia 2009 Progress Report has similar findings, *supra* note 2.

[65] Nenadic, Nemanja, *supra* note 17, p. 43.

indicated in Article 2 of the concerned Law (i.e. judges and public prosecutors[66] as well as officials appointed to organs of institutions and other organizations whose founder is the Republic of Serbia, the autonomous province, the municipalities, the towns and the City of Belgrade)[67]

Actually, in comparison with the definitions contained in Article 2 of the Law on Civil Servants[68] and Article 2 of the Law on the Prevention of Conflicts of Interest, the Law on the Anti-Corruption Agency includes a wider definition of public official as to allow for the applicability of the measures provided for by the Law on the Prevention of Conflicts of Interest to all public officials who perform public administration functions, in line with the recommendation. In particular, the notion of public official under the Law on the Anti-Corruption Agency covers any person elected, appointed or nominated to the bodies of the Republic of Serbia, autonomous province, local self-government unit, bodies of public enterprises, institutions and other organizations established by the RS, autonomous province, local self-government unit and other person elected by the National Assembly.[69]

Despite this extended concept of public officials that had been incorporated in the Law on the Anti-Corruption Agency, the GRECO, in its compliance report, concluded that recommendation xvii had been only partly implemented and it looked forward to receiving additional information on establishment of this unequivocal framework. However, in interpreting this conclusion, it shall be taken into account that at time of the completion of the GRECO compliance report, the Law on the Anti-Corruption Agency was still not adopted.

3.3.3. GRECO Recommendation on the Introduction of the Post-Service Restrictions

The Law on the Anti-Corruption Agency is also pertinent in assessing Serbian compliance with GRECO recommendations, as it introduces restrictions and control of post-employment business activities in line with the Rec-

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[66] See Article 2, paragraph 2 of the Law on the Prevention of Conflicts of Interest in the Discharge of Public Office, ("Official Gazette of the RS" No. 43/04).

[67] Article 2, paragraph 3 of the Law on the Prevention of Conflicts of Interest, *supra* note 67.

[68] Law on Civil Servants („Official Gazette of the RS", No. 79/05, 81/05, 83/05, 64/07, 67/07 and 116/08).

[69] Article 2 of the Law on the Anti-Corruption Agency.

ommendation xviii. The given recommendation xviii refers to *pantouflage* or in other words, it recommends to clearly regulate the situations where public officials move to the private sector *("pantouflage")* in order to avoid situations of conflicts of interest. In this regard is relevant Article 38 of the given law pertaining to prohibition of other employment or business relations following termination of public office as it sets forth two-year "cooling-off" period. The GRECO, in its compliance report, founded that recommendation xviii had been only partly implemented as at the time of completion of the report the Law on the Anti-Corruption Agency was still not adopted. In that regard, the GRECO having welcomed the ongoing reform process encouraged the authorities to proceed swiftly with the adoption of the given draft.

3.3.4. GRECO Recommendation on the Lowering the Value of Gifts that May be Accepted by Public Officials

The draft Law on the Anti-Corruption Agency includes specific provisions with a view to meeting recommendation xix on lowering the value of gifts that may be accepted by public officials.[70] More specifically, GRECO recommended lowering the value of any gifts that might be accepted by public officials (i.e gifts whose value does not exceed half the average monthly salary) to levels that clearly do not raise concerns regarding bribes or other forms of undue advantage.[71]

The GRECO concluded that recommendation xix has been only partly implemented. Although a general ban on the acceptance gifts in public service had been laid down in the draft Law on the Anti-Corruption Agency, GRECO found that exceptions to this general ban should be further regulated, i.e. concerning protocol/appropriate presents. Namely, the GRECO remarked, that provisions as regards handing over protocol gifts to specialized agency responsible for managing public property should be modified as to get regulated in unambiguous manner. GRECO, *inter alia*, noted that certain gifts, i.e. so- called "appropriate" gifts, may be accepted by public officials if its value does not exceed 5% of the average net monthly salary in the RS. However, the GRECO further stated that while the maximum acceptable value for the so called "appropriate" gifts was established in the draft Law on the Anti-Corruption Agency, the law failed to determine criteria on their "appropriateness".

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[70] Chapter IV of the Law on the Anti-Corruption Agency (Article 39-43).

[71] Joint First and Second Evaluation Round Report on the Republic of Serbia, adopted by GRECO at its 29th Plenary Meeting, June 2006, *supra* note 40.

3.3.5. GRECO Recommendation on the Protection of Whistleblowers

The Law on the Anti-Corruption Agency in conjunction with the Law on Civil Servants and the Law on the Prevention of Conflicts of Interests contributes towards achieving compliance with the GRECO recommendation xxi on whistleblowers' protection. More specifically, the GRECO recommended that should be ensured that civil servants who reported suspicions of corruption in public administration in good faith (whistleblowers) were adequately protected from retaliation when they reported their suspicions. Besides legal amendments of the Law on Civil Service and the Law on Free Access to Information of Public Importance incorporating the appeal mechanism, confidentiality applications and similar measures tailored for the protection of the whistleblowers, the Law on the Anti-Corruption Agency also contains specific provision aimed to ensure adequate protection of whistleblowers.

Namely, Article 56 of the Law on the Anti-Corruption Agency reads that the person whose report was used to initiate the proceedings or other person who gives a statement in the proceedings referred to in article 50 hereof may not suffer consequences. The GRECO concluded that recommendation xxi had been only partly implemented having placed particular emphasis on the need for the strengthening adequate implementation mechanism in this regard. As it has been explained earlier in the text, it is noteworthy that at the time of completion of the compliance report, the Law on the Anti-Corruption Agency was still not adopted.

4. Conclusion

The unfavorable Serbian TI CPI for 2009 clearly proves that problems of corruption in transitional countries are usually quite serious, especially in countries such as Serbia, which entered the transition from a disadvantageous position of political, economic and social isolation and instability it faced before political changes in 2000.

Although Serbia have made progress in the combating corruption, within the scope of this analysis have been identified certain areas and sectors, where the achieved progress is not so evident and transparent. For that reason these areas require further improvements.

From the legislative standpoint, it might be concluded that the Law on Anti-Corruption Agency does present a positive development. This law is

of great significance when it comes to achieving compliance of Serbian framework with a number of GRECO recommendations that have been discussed earlier in the text. More specifically, the Law on the Anti-Corruption Agency is very advanced since it establishes the Anti-Corruption Agency as independent monitoring body, includes provision on the whistleblowers' protection, as well as it sets forth restrictions concerning the post employment business activities and restrictions on the acceptance of gifts in public service. In addition, it is noteworthy that this piece of legislation provides the all-encompassing definition of the corruption as well as the extended definition of the term public official.

The trend of law reform progress is also apparent when it comes to the public procurement matters. Actually, the Public Procurement Law ensures institutional independence of the public procurement bodies as well as it increases the transparency of the public procurement procedures. Furthermore, it enhances specialization in public procurement matters as well as it introduces the anticorruption clauses. However, further improvements of the public procurement legislation are necessary as regards the scope of exemptions and excluded contracts, as well as the conditions for use of the restricted procedure.

The recently adopted Law on the Liability of Legal Persons for Criminal Offences is quite advanced as it introduces corporate criminal liability that is *inter alia* applicable on perpetuators of corruption offences. However, the undergone review demonstrates that the given law narrowly determines the legal ground of the corporate criminal liability, what may adversely affect the course of the anticorruption reform in Serbia. This narrowly defined category of corporate criminal liability within Serbian legal framework is not in compliance with the wording of Recommendation No. R (88) 18 concerning Liability of Enterprises having Legal Personality for Offences Committed in the Exercise of their Activities and Criminal Law Convention on Corruption. Actually, the envisaged limited legal ground of the corporate criminal liability implies that only actions of the responsible persons are supposed to lead to the corporate criminal liability. This limitation, inherent to identification doctrine, which has been accepted by the Serbian lawmakers,[72] will have negative impact on combating corruption unless it is going to be amended.

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[72] The identification doctrine has been presented earlier in the text, *supra* note 50.

In a nutshell, we conclude that state authorities need to equally reinforce legislative, institutional and technical mechanisms for combating corruption, set up in line with international standards in an effective, transparent and efficient way in order to continue to promote and strength prevention and fight against corruption.

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KOMPATIBILNOST SRPSKOG ANTI-KORUPCIJSKOG ZAKONODAVSTVA SA REGIONALNIM I MEĐUNARODNIM STANDARDIMA

Rezime

Rad analizira zakonodavne i institucionalne mere u oblasti borbe protiv korupcije s posebnim osvrtom na javne nabavke, krivičnu odgovornost pravnih lica, kao i Agenciju za borbu protiv korupcije.

Napredak koji je Srbija ostvarila u suzbijanju korupcije se pre svega ocenjuje u svetlu ispunjenosti pojedinih preporuka GREC0-a.

Ključne reči: *Agencija za borbu protiv korupcije, GRECO, Nacionalna strategija za borbu protiv korupcije, javne nabavke, krivična odgovornost pravnih lica, Indeks percepije korupcije.*

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SUPPRESSING THE MISUSE OF NARCOTICS NEW DIMENSIONS IN NARCOTICS CONTROL

Summary

Misuse of narcotics is more and more our reality and its explicit tendency is increasingly destructive against the existing state of affairs. More precisely, negative consequences of use of narcotics as well as of crimes connected to them, and particularly the organized crime, are spreading around the globe assuming disastrous dimensions. In spite of the fact that international community has reacted to the situation with a determined strategy applying coordinated instruments in the struggle against the misuse of narcotics, the negative trend still continues. There is no doubt that states invest considerable efforts and enormous resources to put under control this negative social phenomenon. Approaches in that respect differ from country to country due to numerous and variable factors (economic, social, cultural…). The question is: repressive or liberal methods? Special attention in the present paper is paid to the explanation, i.e. monitoring and evaluation of appropriate modalities in preventing and suppressing that negative phenomenon. The optics used are, in a way, the September 2009 Law on amending the Criminal Law, and several more important concept innovations (or those implicitly based on a theoretical conception) as well as criticism of certain new incriminations specified in that Law.

Key words: *misuse of narcotics, organized crime, unauthorized manufacture and trade, possession of narcotics for personal use, criminal liability, sanctions.*

1. Introduction

In fateful contrast to the tendency of continuous and dynamic rise, greater freedom, the whole array of life styles, it has become clear that due to exceptionally complex nature of this specific phenomenon and conspicuous

sophistication of the ways of its expression, contemporary society is moving in a vicious circle. There is no dispute about that. But it is also true that the existing reality seems to us as an insurmountable elementary power, as a substantial phenomenon creating a high degree of destruction, alienation, aggression, etc. Perspectives change depending on where and when a specific solution should be applied.

And everything has become a matter of political calculation. Paradoxically, this World of ours, as an environment of all kinds of possibilities, is in the process of dreadful manipulations and misuses. The life "in the net" slowly but surely loses every value and the reality becomes discouraging and transformed into a "para-reality". Rosy, virtual, black, faceless but always callous! Within that nightmare in which the use of narcotics demonstrates all its deadliness, wide horizons appear where conspicuous disproportions are functioning, including well-known stories, with "directors" of bad movies leading this civilization towards a tragic end. From that place, from that point, everyone of us thus becomes a "spectator" of all total and blow-up shots, ready to see and to anticipate the end. Narcotics misuse has been and still is the follower of the epoch we live in. As a mortal infection, the illness is not located at a single place, in a single country or region, spreading instead across all the states of the world.

That phenomenon has become global and transgresses the state borders without recognizing state sovereignty.

In a permanent expansion and with frightening consequences we are witnessing here one of the biggest problems for all countries in the world, a "planetary pestilence" that undermines the very foundations of social values. At present 185 million people are using the narcotics. According to official UN data, the majority of them are inhabitants of developing countries. That this illicit use is drastically increased is probably best evidenced by the report of International Agency for Narcotics Control in terms of which this phenomenon assumed, only in 1986 the proportion of epidemics, so that with more than 48 million of drug addicts, the situation has become alarming.

At the beginning of eighties, some 50 million, at the end of the first decade of the present century – three times more! And more than that!

According to some indicators, at the end of 2000, more than 700 billion dollars was the value of world trade in narcotics. Enormous financial force and assuming a merging of all smugglers into a single multination-

al company that would be a third corporation in the world, between Ford and Standard Oil.[1]

According to a recent research of the European Center for Supervising Drugs and dependency from drugs (EMCDA), there exist at present in the EU countries between 1.2 and 2.1 million of drug consumers, among which between 850,000 and 1.300,000 intravenous users. Furthermore, 1.500,000 persons in the entire territory of Europe consume cocaine within a single month, while another 12 million – cannabis. Abuse of drugs is particularly spread among the young ones, in some countries even up to 8 percent. Recently, a phenomenon of mixing various kinds of narcotics is also noticed, most often with alcohol and medical pills ("e-poly drug use"). In addition, the number of those infected with AIDS and hepatitis has increased in some of the countries of the region, which is especially true for 2005, with the figure around 26,000 persons.[2]

In spite of intensive police activities in preventing the manufacture and dealing with narcotics, according to Interpol assessment, only 5 to 10% of illicit trade in drugs has been discovered and confiscated. Worth of attention is also the information disclosed by International Organization of Criminal Police according to which even where six sevenths of drug is seized, the whole "business" is still remunerative.[3] Even in our country this exceptionally dangerous form of criminality is deeply infiltrated into every cell of the "system of living", ruining thus in a direct way the health, psycho-social, economic and cultural spheres of society. Geographic position of our country on the shortest continental connection between Asia and Europe, but also the civil war and the sanctions in the 1990s, resulted in the increase of an already large market of its consumers. In spite of a dense network on that road with the accompanying infrastructure, it is almost useless to warn that in a transitional and post-war

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[1] Quoted from: M. Nicović, Povezanost opojnih droga i organizovanog kriminala. Organizovani kriminalitet i korupcija (Organized crime and corruption), Kopaonik, March 1996, 81.

[2] EMCDDA (2005b) Thematic papers – illicit drug use in the EU: legislative approaches. htpp://www.emcdda.eu.int.index.cmf?fuseaction=public.content&nnadied=70798slanguageiso=EN

[3] V. Rakočević, Krivično delo neovlašćene proizvodnje i stavljanja u promet opojnih droga, problemi u praksi i zakonodavna rešenja, Krivično zakonodavstvo Srbije i Crne Gore, 2003, 124.

Serbia, burdened by considerable political and social problems, remain large quantities of these drugs.[4] Consequently, it is no wonder that in that "small" Serbia there is now three times more drug addicts than ten years ago. In addition, one should note that 95% of heroine from Turkey, Bulgaria, Albania and Kosovo traverses through Serbia and that in 2006 some 700 kg. of heroine was confiscated in this country, while in 2004, 2005 and 2006, that figure was 1.5 ton – most often at the Gradina border crossing. Particularly interesting is the information that 100.000,000 EUR is spent every month in Serbia for buying drugs – a really frightening amount.

Unfortunately, such extremely unfavorable state of affairs remains constant. Hiding behind important efforts to set some limits to such kind of conduct, is a befogged view. Although a drug story has been told long time ago and although everything was already known and clear, so that there was nothing new to be said, it seemed that the discussion of the problem was always at the start and that it was indispensable to begin its deciphering as soon as possible. As for now, there is no conjurer's wand yet that would at least accelerate the positive trends and eventually halt, prevent and absolutely eliminate all these misfortunes. But with a more responsible approach along that line and with enormous efforts and resources, narcotics could be placed under control to a considerable degree, with the aim of preventing and beating back in such a way their misuse.

2. Approaching the Problem

It is impossible and superfluous to consider in this text the specific ways of reacting and suppressing this modality of socially dangerous conduct. Instead, we are going to discern the space of crossing measures of regulations

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[4] According to Ministry of Interior of the Republic of Serbia and Montenegro, in addition to 700 kg. of heroin, mostly of Afghan origin, 13 kg. of cocaine , 60 kg. of hashish and 19,000 ecstasy pills have been confiscated in 2006.. Almost 90% of these quantities continues to the West, while the rest stays for drug-addicts population in our country. Cocaine mainly comes from South America, synthetic drugs from Holland and Belgium, while marihuana is a "specialty" of this region. In 2006 only, 2 tons of that drug has been confiscated as well as a total of 6,300 kg. of all narcotics in the entire state. To all that one should add that only in course of that year The Customs Administration of Serbia managed to confiscate drugs valued at some 4.500,000 EUR. The problem of abuse of narcotics is a serious problem in all EU member states, particularly due to the fact that their manufacture and trade are in the hands of well organized criminal groups. Quoted from: M. Reljanović, Pojavni oblici organizovanog kriminala, trgovina drogom, Borba protiv organizovanog kriminala u Srbiji, Institut za uporedno pravo, Beograd, 2008, 81.

and control of the (mis)use of narcotics in order to remind the reader about several actual forms of the endeavour of checking that enormous problem through its two faces: practical activities of mere defense against such criminality, i.e. the real state of affairs and the dreadful paradox and contradiction between needs and possibilities for eliminating such crimes.

The problem of regulation and control of the use of drugs may be viewed from two levels: preventive, as clearly a useful approach, and the other – repression, which still remains in contemporary society a prevailing instrument of struggle. In fact, each one of these two ways of reaction has both positive and negative features, although often their mutual relation becomes forgotten. We opt for strengthening of prevention, in spite of this being a slow and difficult process. Naturally, some forms of conduct in this sphere are so full of problems, that no prevention or control would help without being coupled with repression.

A rising complexity in understanding this phenomenon combined with explanation that the problem focuses on the inefficiency of legal and judicial control has strategic importance for future actions. To be true, the present situation, with all the confusion and uncertainty is not a good climate to settle the drugs problem. New approaches are necessary and possible instead, although the unacceptable, the absurd and the unripe ideas in this respect should by all means be rejected. Consequently, by abandoning the former basic principle of generally preventive effects of punishment and the criminal law enforcement, with all its institutions, new framework should be established, but with a changed and reasonable content, and always paying attention to avoid extreme approaches. The emphasis should be on the coordinated action of all social factors and the multidisciplinary approach, including certain specific instruments and measures to be invented in accordance to the problem at issue.

This is roughly the leading idea in determining the content and the essence of future way of reaction which should also consider the need for guaranteeing human rights in combination with preventing their abuse. It goes without saying that this line of activity may not be realized either in the short-run or easily.

3. Criminal offences implying narcotics and their punishment

Our Criminal Law (CL) specifies (chapter XXIII) a group of two criminal offences of drug abuse under the title" Criminal offences against human health". The terms used are "unauthorized manufacture, possession and

trade of narcotics (art. 246) and "making available the use of narcotics" (art. 247).

However, the September 2009 Law on amending the CL of Serbia, this "group" indicated the change to some degree of these offences. Introduction of a new offence of "unauthorized possession of narcotics" through art. 246a has extended the part of Law which specifies the criminal liability for that kind of criminal offences. But is this provision new or old? That question also implies another one: what is happening with arts. 246 and 247, i.e. is the change only terminological or the one of conception of that group of offences? Namely, are the changes formal or substantial?

Let us consider the very essence of all three offences, beginning with determining the sense and the very nature of these incriminations and with defining their general notion, context and grounds. This is to be followed by considering some theoretical and practical dilemmas and problems relating to the offence of unauthorized manufacture and trade of narcotics as well as the offered solutions and proposals for efficient elimination of that most destructive form of criminality.

* * *

3. I "Unauthorized manufacture of and trade of narcotics"

Article 246

"(1) Whoever without authorization manufactures, processes, sells or offers to sell or who, for the purpose of sale, purchases, possesses or mediates in purchasing and selling, or in some other way puts in circulation the substances or preparations that are proclaimed as narcotics, shall be punished by imprisonment of from three to twelve years.

(2) Whoever without authorization grows poppy or psycho-active hemp or other plants, shall be punished by imprisonment of from six months to five years.

(3) Should the offence specified in para. 1 of the present article be committed by a group, or should the perpetrator of this offence organize a network of resellers or mediators, he shall be punished by imprisonment of from five to twelve years.

(4) Should the offence specified in para. 1 of the present article be committed by an organized criminal group, the perpetrator shall be punished by imprisonment up to ten years, at the minimum.

(5) A perpetrator of the offence specified in paras. 1 through 4 of the present article who uncovers the one he obtained the narcotics from, may be exempted from punishment.

(6) Whoever without authorization makes, procures, possesses or makes available the equipment, material or substances, knowing that these are intended for the manufacture of narcotics, shall be punished by imprisonment of from six months to five years.

(7) Narcotics and means for their manufacture and processing shall be confiscated."

As far as previous formulation of that criminal offence specified in the CL of Serbia is concerned, it is possible to conclude that the provision of article 246 of the Law amending the CL is rather similar with that one, and thus also with the formulation of the offence specified in article 245 of the General Criminal Law (GCL). But still, some differences of substantive character do exist. It is obvious that amendments have intervened in several areas: paragraph 1, for instance, is almost identical in all three legislative texts, except for the heading and the prescribed penalties. Thus, the amending Law defines paragraph 1 in the same way, and the only change refers to the amount of penalty. In art. 246 the threatened penalty is raised from two to three years. Consequently, the GCL, although identical in terms of terminology and essence of the offence, differs regarding the amount of penalty and is, therefore, stricter (the minimum penalty is 5 years of imprisonment). The lawmaker incriminates that offence with a special minimum of threatened penalty, while in the other case the amendments have raised that minimum for another year, while meting out the penalty along the range between 3 and 12 years.

Paras. 2 through 4 are significantly modified, since para. 2 is the new one, reading: "whoever grows poppy or psycho-active hemp or other plants…", while specifying the range of penalties of from six months to five years of imprisonment. So, there is a difference in relation to art. 245 of the GCL as well as in relation to art. 246 of the CL of Serbia. Furthermore, paras. 3 and 4 provide for more serious forms and include situations of acts of commission by a group or a perpetrator who organized a network of resellers or mediators with the aim of committing that offence, while in para. 4 another qualifying circumstance was added should the offence be committed by an organized criminal group. In para. 3 previous formulation is omitted, i.e. that the persons involved have associated in order to commit criminal offences, but the threatened penalty remained the same. With such penalty and/or frame-

work for its imposing, the Law has accepted the solution existing in the CL as adequate.

Let us look now this solution in a wider context, suggesting that a better one, in contemporary conditions, would be the solution specified in the GCL. Relevant in this respect is the fact that comparative law unfortunately reveals the picture of rather different approaches and conceptions that, although offering some improvement, often are transformed into mere façade or apparently ideal solutions. The essence of regulation has in fact remained the same: strictness and prescribing a wide range of penalties deemed as sufficient way of suppressing this exceptionally dangerous phenomenon. There is no convincing argument that would shake that construction in the struggle against that type of collective criminality or favor some other solution. By enacting the CL of Serbia and the Law amending the CL, these and other provisions became genuinely modern and more appropriate to respond to radical changes in our society. However, some objections still could be raised: inclination towards the perpetrators engaged in an organized way in manufacturing and distribution of narcotics by keeping the lower limit of the possible penalty. Consequently – why that minimum is 5 years and how to justify the range of 5 – 15 years, having in mind the criminal policy in assessment of offences and the need for their punishment? In this case the decisive element should be the extreme seriousness of committing offences in the group and the degree of danger for society. This is especially true in the case of a modern code, which should include strict penalties and norms otherwise provided in international acts.

Para. 4, however, considerably sets aside that objection. Obviously, in the first and the second case, less strict forms and lower number of group members (loose association, short period of criminal activity, etc.) are at issue here. Committing the basic offence in an organized group is threatened by imprisonment of ten years at least, meaning that the law-maker considered that offence as a more serious and more dangerous one than the previous two. In addition to providing the incrimination of "group" and "organized network", the law-maker specified yet another form – "organized criminal group", considering it as particularly dangerous form belonging to the most severe offences. The appropriate court practice should make more precise that legal standard in practical implementation. Moreover, that solution appears more logical because following the corresponding international documents.

The provision of article 5 specifies the possibility of exemption from punishment of a perpetrator who reports the person he procured the drugs from.

This is a motivation for prospective perpetrators to reveal the other ones, usually more dangerous perpetrators in the process.

Consequently, having in mind the seriousness of the offence, the danger for society and damaging effects in term of health, at the one hand, and enormous difficulties in discovering that criminal offence and supplying evidence at court, the Law provides for specific benefits. So, the introduction of a "special institute" of exemption from criminal liability is fully justified as an instrument of shaking the existing and planned ways of discretion in the chain of sale and distribution of narcotics. However, isn't that solution appropriate only if looked as a specific case of perpetrators of such serious offence? Although rather efficient in the sphere of collecting evidence, this measure of exempting only one perpetrator in the chain who wants to cooperate, is at least not along the lines of proportionality in punishing while considering the whole perspective of the situation. Such objections are justified if one has in mind the implied indefiniteness which makes possible arbitrary court decisions (and thus a possible abuse of that legislative solution). The aggravating circumstance here is that usually drug sellers do not know the identity of their supplier or do not want to risk their lives in becoming informants.[5]

Consequently, the amending Law did not succeed to improve the situation and establish clearer indicators that would at least attenuate uncertainty and inequality in this matter. And one idea more: a too favorable attitude towards perpetrators willing to cooperate should rather be corrected by court's possibility only to "decrease" the penalty (to impose a minimum or a half of the penalty…).

This specific parallelogram of the GCL (General Criminal Law) and CL of the Republic of Serbia solutions shows that the identical para. 3 in these texts does not exist in the Law amending the CL, which applies also to the place of para. 4 of the CL. However, para. 4 of the GCL and para. 5 show that the formulation of these provisions "moves" along the identical line of proceeding and that there was no need to change anything in the light of the reform that has been carried out.

* * *

3. II In the Law on Amending the Criminal Law, after article 246, a new article 246a is added reading: "*Unauthorized possession of narcotics*"

"(1) Whoever without authorization possesses small quantities for his own use of substances or preparations that are proclaimed as narcotics, shall

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[5] M. Reljanović, op. cit., 84.

be punished by a fine or imprisonment of up to three years, and may be exempted from punishment.

(2) A perpetrator of the offence specified in para. 1 of the present article who discloses the one he procured the narcotics from may be exempted from punishment.

(3) The narcotics shall be confiscated."

It has already been noted that crimes relating to narcotics represent, in terms of their size and way of committing, a great danger for society. Adding to that are ever more organized forms, specialization and professional approach present these days in the sphere of such crimes. All in all, the whole problem is more and more complicated through various elements which have a considerable impact on the choice of most adequate solutions.

The heart of the matter is in the whole atmosphere of the society dismembered by egotistic attitude, cold indifference, difficult general atmosphere permeating our lives, establishing selfish and limitless interests and excessive appetites full of anomalies, deviations and at the same time becoming dominant and normal style of living for many "other people". In the series of other reasons for such extremely bad situation, this form of organized crime looks like a game of chance with adjusted mechanism. The only winners are those on top of the pyramid, highly placed on the ladder of drugs middlemen, while all the rest are but losers. An individual consuming the drug becomes a mere puppet in the hands of his supplier, passively aware that "things are as they are" and that he can do noting about them. Simply said, such way of his life is like a high wall before his face, becoming the only way he knows and the one he can not change. And here we come again to the complexities of the problem aggravated by parallel damaging processes and obstacles to attempts at searching for adequate solutions. In this way that social and individual phenomenon is transformed into unsolvable puzzle at the detriment of both private and social interests. A realistic look into the future brings about immediately the dark menaces and warnings about possible disastrous consequences.

The next topic we discuss concerns the incrimination of the offence of possessing narcotics (art. 246a).

Since a more definite answer to the question posed in relation to that article is not possible, it suffices to present various conceptions and possible connections characteristic of this criminal offence. The "new" legislative solution restores the "old idea in new appearance" and/or the "old-new" form of the offence expressed in incrimination of the very possession of narcotics. We

have said that the amending Law fails to bring about new conceptions. The CL, namely keeps the incriminations that existed in the current criminal legislation and that are "verified". However, the nature of that offence is characterized by specific circumstances which, as such, determine the less serious and privileged form of its perpetration.

And again the same question: repressive approach or liberal methods?

The following answers will help us: what is the quantity to be considered for personal use only (5, 10 or 15 grams, or 100 grams of marihuana in 80 packages, or 10-20 grams of heroine hidden in perpetrator's house This might be a key point and the peak of indefiniteness of a given criminal offence, giving ground for abuses in the sphere of meting out the penalty. On the other hand, such solution should not be entirely disregarded due to a rather wide range of actual possibilities: court interpretation anyhow faces in all other cases almost the same problem of indefiniteness of the regulated matter.

So, the debate is conducted along two opposing tracks, each with its own *pro et contra* arguments. Nevertheless, our legislation succeeded to produce a provision defining this criminal offence. Although there are no justified criminal law policy reasons for a conspicuously repressive public attitude regarding the misuse of narcotics in general, supported by some international documents (adopted after intensive pressure by the U.S.A.) as well as by court practice etc., it was sufficient to again actualize the punishment of the very act of procuring and possessing of drugs for personal use.[6] We say "again" since the same wording has been introduced in the 2003 Amendments. This new form is unknown to CL.

3. II 1) Historical Retrospective

A summary historical review of the complicated problems we are discussing in the present paper is quite necessary to confirm the above view. Contemporary solutions in the struggle against the abuse of narcotics were preceded by centuries of considering that specific social phenomenon in all of its important and in many respect insufficiently known aspects. Dilemmas are numerous, complex and aggravated by dramatic consequences of that controversial behavior which never lose their actuality.

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[6] Z. Stojanović, Nove tendencije u savremenoj nauci krivičnog prava i neka pitanja našeg materijalnog krivičnog zakonodavstva, Symposium on new trends in our criminal theory and legislation, Zlatibor Mountain, 2005, 36.

According to relevant literature, first recorded drug addicts in our country appeared in 1965, although their number was insignificant. They were mostly those using medicines containing narcotics (preludin and centradin). The first opium addicts were confirmed only in 1968-69. In 1978 we had first users of heroin – that most lethal present-day drug.[7] Only 10 years later the number of drug addicts has been drastically augmented, which applies also to the number of those who passed away due to complications caused by drugs.

As a consequence, the law-maker's approach began to change as well. The most early code (1929) provides for the incrimination relating to narcotics, although even before that time the legislation of the Kingdom of Yugoslavia followed the activities of an international organization in that field (it ratified the 1912 Hague Convention), but there was no special law regulating such offences.[8] The 1951 Criminal Code, too, included an article specifying liability for illicit possession of poisons and narcotics, i.e. the first offence of unauthorized manufacture, processing and selling of narcotics and poisons (article 208). In the Criminal Code of the SFRY and in the 1959 Amendments that offence has remained mainly unchanged. However, the 1973 SFRY Code has widely expanded the existing incrimination, introducing new alternatives of the basic form of the offence (para. 1), in fact a new basic form (para. 2) and two more qualified forms (para. 3). The 1977 SFRY Code introduced two new incriminations in XXII chapter, under the heading "Criminal offences against other social values": unauthorized manufacture and putting in circulation of narcotics (art. 245) and making possible the use of narcotics (246). The law-maker thus distinguishes in that article the act of inciting to use and the enabling of use of narcotics. Many years later, in 1999, these two articles were amended and their provisions became of a blank character. Relevant in this respect are the Law on manufacture and trade of narcotics,[9] and the Book of Rules covering the substance and way of recording, reporting and the time limits for disclosing the data in connection with manufacture and trade of narcotics.[10] Particularly important for the problem of regulation of misuse of narcotics are also other pieces of legislation (social security and health-care), and especially the Law on the trade of poisons, the Law on putting in circulation of medicines, the Law on manufacture and trade of medi-

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[7] D. Nikolić,Narkomanija – zločin ili kazna, Belgrade, 2001, 10-11.

[8] Ibid.

[9] Official Gzette of the SFRY, 13/19.

[10] Ibid., 54/79.

cines, and the Social Security Law.[11] In the meantime the State Union ceased to exist but the legislation in the matter of drug abuse remained the same. We have already treated the provisions of articles 245 and 246 of the GCL as well as articles 246 and 247 of the CL, so that we will now summarily review the developments which preceded them and have decisively influenced the introduction of criminal offence of "unauthorized possession of narcotics".

According to the Draft CL of the SR of Yugoslavia published in 1998, the incrimination was expanded of the offence of unauthorized manufacture and trade of narcotics, so that it now may be committed even by the one "who without authorization possesses substances or preparations that are proclaimed as narcotics", while the penalty threatened is the three year imprisonment. At the same time there is an alternative as well – the act exists only in case of sizeable quantity of drugs. Consequently, the Draft provided that the possession of drugs is an offence distinguished as separate.

According to the 1988 UN Convention against illicit trade of narcotics and psychotropic substances, where possession and purchasing of narcotics is effected for personal use only, the states may, in addition to penalty, cumulatively impose "measures of medical treatment and correction, care after medical treatment, rehabilitation or social integration of the perpetrator (art. 3, para. .4, d). Our Draft proposed only the penalty of imprisonment of from 3 months to 3 years, without the possibility of ordering mentioned measures as well, separately or jointly with the penalty (that would be more useful and more effective). In the 1996 Law on manufacture and trade of narcotics the corresponding infraction includes only the manufacture and trade and not the possession. However, according to the former, 1991 Law, the infraction has been punishable by a fine or 60 day imprisonment in case of the "one who possesses the narcotics without permission" (art. 43). In that case as well, it was no provision of applying the mentioned medical care and other measures, although a protective measure of compulsory medical treatment of alcoholics and drug addicts was possible, coupled with specific conditions.[12]

Along the same lines, the 2002 Draft Law on amending the CL of the SRY (art. 48) changed the heading above article 245, i.e.: "Unauthorized manufacture, possession and putting in circulation of narcotics", the wording of para. 3 of the same article now reading: "whoever without authorization possesses

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[11] Quoted from: I. Deljkić, Suprotstavljanje zloupotrebi opojnih droga: Bosna i Hercegovina i Evropska unija, Sarajevo, 2009, 92.

[12] Official Gazette of the SRY, no. 46/1996; same source, no. 13/1991.

narcotics shall be punished by imprisonment of from 3 months to 3 years. The paragraph following it prescribes the possibility of exemption from penalty if the perpetrator discloses the one he has procured the drugs from.

In terms of conception, incriminating the possession of narcotics is preceded by the formulation of that offence introduced already by the 2003 Amendments.

In spite of many controversial issues in the process of designing the provisions on narcotics, the final result is the introduction of the criminal offence of unauthorized possession of narcotics specified in article 246a of the Criminal Law (CL). Debates over the (non)punishment for procuring narcotics for personal use, unfortunately, at present have shown firm benevolence of the law-maker in formulating that offence.

To conclude, the formulation of mentioned provision which, even at first sight, in all this confusion, does not impress one as "a right solution", was under the impact of interaction of specific circumstances. For those who do not belong to that group it will be sufficient to find a solution that would, if only a bit, look like the right approach. Consequently, "another way" has to be found in order to settle the problem. For the start it suffices not to touch anything. Unfortunately, our law-maker, although aware of all the facts, intends to adopt a more rigid penal policy in the attempts of suppressing the criminal activity of organized groups in that area, so that he made separate that offence through such more rigid way. To be true, that solution has been somewhat corrected through the introduction of facultative ground for exemption from punishment where narcotics possessed are in small quantity for personal use. This is a concept that obviously serves in the protection of basic human rights as well as of the general goods that function in their realization, so that incrimination at issue shows itself as illegitimate (*Schuenemann*). Instead of real care about every citizens – which is only a form of false humaneness – the right to individual freedom must genuinely imply the right to a free choice in its realization. Is this the case here? On the other hand, the incrimination of procuring and possessing drugs for personal use (first of all cannabis) amounts just to an incomprehensible repetition of making difference between cannabis, alcohol and tobacco, not only in terms of direct negative consequences for health by also in terms of addiction.[13]

3. II 2) Possessing of narcotics for personal use according to foreign legislation and court practice

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[13] Z. Stojanović, op. cit., 36-37.

It is certain that contemporary criminal law, in regulating this kind of conduct, differs from country to country. Already a summary view on some criminal codes reveals the differences in accepted solutions, some of them rather contradictory; on the other hand, there exist similar conception, in some cases even identical. The following comparative review is inspired by the intention to search for best available solutions, in spite of obvious risk of such attempt. In fact, the only way the insight of this complex of problems could be encompassed as an entirety is to discern some other relevant approaches and solutions.

Our research in the field of most adequate normative regulation of this kind of conduct begins with reviewing various legislative solutions. What is the degree of making relative the fact of "small quantity of drugs", of possessing them "in a public place", of possessing all kinds of drugs or consuming "only" cannabis, of habitual perpetration within a single year, of the first, the second or the third perpetration? Perhaps, however, as the preceding one, the question: is not the noted phenomenon the issue of freedom of an individual and the one of choice of one's own way of life, but of an individual belonging to the "relation of the network"?! And here again, we are at the beginning. So, how to draw a line between the strict legal principles and the practice approaching human life as one's own matter motivated "exclusively" and "sincerely" by reasons of humaneness and purposefulness?

To be true, the problems with this offence in almost every country are solved in "their own way". This is rather important since it does always provoke thinking. Different opinions and starting points result in rather different solutions. That still does not mean that there is no respect for the difference!

Legislative solutions for the offence of procuring and possessing drugs for personal use distinguish between the consumption of drugs as such (so-called common use) and/or possessing (holding) them. In France, Greece, Finland, Sweden, Norway, Luxemburg (except for cannabis) as well as in Cyprus, the "common use of drugs" is considered a criminal offence. In Estonia, Spain, Portugal and Latvia such use is treated as infraction only. Some other states do not directly ban the consumption, but do that only indirectly by prohibiting "preparation acts preceding the use of drugs". This particularly concerns the act of possession. The conception of "possessing small quantities of drugs", consequently, includes not only the idea of individual use but also the preparation acts. Speaking of illicit possession, these acts are expressly banned in the Czech Republic, Ireland, Spain, Italy, Spain, Belgium and Luxemburg. The sanctions are various, but where there are no aggravating circumstances

– as the case is also with possessing small quantities of drugs for personal use – the law excludes imprisonment as a penalty. And conversely, with aggravating circumstances and recidivism, the law provides the imprisonment. In Luxemburg, Belgium and Ireland this refers to cannabis only, while in Spain, Italy, Portugal and Czech Republic this includes all dangerous drugs.

Entirely contrary, the courts in China may order execution against anyone possessing 50 grams of heroine, while smaller quantities entail the sentence for life. In Malaysia the danger for society is graded on the ground of the basic criterion: the kind and quantity of drugs found at the perpetrator.

According to the 1952 Dangerous Drugs Act, the offence does exist after finding at the perpetrator less than 2 grams of heroine, morphine, MAM etc., while the penalty provided is 5 year imprisonment or a fine amounting to 100,000 rignits, or both these penalties. For a more serious form (exceeding 2 grams and less than 5 grams of cannabis or 15 grams of cocaine, etc.), the minimum imprisonment is 2 years and the maximum – 5 years, as well as the additional penalty – 3 to 5 lashes. The most serious forms entail even death penalty.

Most criminal codes in continental Europe distinguish between possession and use, and there is no imprisonment for the use.

We continue with submitting the assignment of reasons for solutions applied to this form of offence. In Italy, for instance, possessing drugs for personal use (which includes their purchase and importation), the sanction includes taking away of perpetrator's driver's license for a period of from 1 to 3 months (for cannabis) and 2 – 4 months for other dangerous drugs. These measures include also taking away of permit to carry arms, passport and sojourn permit (in case of foreign citizens). The first-time perpetrator with small quantity of drugs may be only warned by the court (reprimand).[14]

The Austrian 1998 Drugs Act simplifies the whole procedure in the case of cannabis by eliminating the requirement of having an opinion of health care agencies which does not apply in the case of other dangerous drugs In the case of small quantities, the specified penalty is imprisonment of up to 6 months or a fine. Otherwise this Act provides for more freedom to public prosecutor not to plead for punishment for purchasing or possession of small quantities of drugs for personal use.[15]

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[14] *Codice penale… Giudici del Tribunale Milano,* 1952. *Compendio di Diritto penale, Parte generale e spciale*2004; Marino R. Gatti G., *Codice penale e leggi complementari, Napoli,* 1992.

[15] htpp://www.emcdda.eu.int

Consuming and possessing of drugs for personal use in a public place, as well as if there exist aggravating circumstances (consuming during driving the car, leaving the used needle at the public place), in Spain entails a fine.[16]

In Belgium (2003) and Luxemburg (2001) consumption of cannabis (as well as purchase, transporting and possessing it for personal use) entails a fine for the perpetrator. In Luxemburg, more concretely, should such consumption be treated as "dangerous for others" (e.g. at work post or in the school) still requires the penalty of imprisonment of from 8 days to 6 months, and up to 2 years should the drugs be consumed in the presence of one or several under-age persons. Otherwise, in prescribing sanctions, this Law makes no distinction between different kinds of other drugs. In addition, if the cannabis consumer creates no problem, i.e. does not commit new infractions, and if there is no indication of his being addicted, there shall be no criminal prosecution. First transgression is punishable by fine only and its amount is to be increased within a year after pronouncing the first penalty should the perpetrator commit another offence. Such perpetrators are also subject to imprisonment of from 8 days to 1 month, coupled with the fine. In this case the Law distinguishes between "problematic consumption" and "disorder in a public place", the latter threatened by stricter punishments, e.g. imprisonment of from 3 months to 1 year combined with the fine (although with the alternate application of only one of these). For those using a minimal quantity of cannabis, i.e. 3 grams, sufficient according to Law for 24 hours, the prescribed measure is only to be entered into police records.[17]

According to the Dutch 1996 Opium Act, the possession of all kinds of drugs is punishable. In terms of art. 11 (5) there shall be no punishment should the quantity of marihuana or hashish for personal use fail to exceed 5 grams. Sale, possession and consumption of cannabis in coffee shops is not prosecuted if following conditions specified by so-called AHOJ-G criterion are met:

A) Prohibited drugs must not be advertised;

H) "Hard" drugs must not be sold;

O) Coffee shops must not create problems in the public;

J) Drugs must not be sold to under-age persons (under 18), who otherwise are not admitted to such shops;

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[16] Ibid.

[17] Ibid.

G) Maximum quantity of drugs permitted to be sold and kept is limited to 5 grams per person.[18]

The implementation of this Act is entrusted to prosecutors and the police who are bound to follow only the purposefulness principle and the general guidelines of the Prosecutors' Board.

The similar liberal approach regarding cannabis consumers is applied in France and Denmark.

According to the existing Law in Germany, as amended in 1998, the public prosecutor decides to refrain from punishment in the cases of "minor" transgressions, if criminal prosecution is not in public interest and if someone "cultivates, imports, exports or purchases drugs for personal use only", i.e. in minimum quantities. Illustrative of this point is the 1994 verdict of the Karlsruhe Federal Constitutional Court where the emphasis in a cannabis case was placed on the "ban on excessively strict penalties".[19]

According to the British 1971 Drugs Abuse Act, all psycho-active substances are classified into three categories – A, B, and C, on the ground of their respective levels of danger. Cannabis was in the B group in 2002, but the government decided to put it in C group since it represented a lesser danger. However, the police is still authorized to confiscate that substance and notify the prosecutor accordingly should there be no aggravating circumstances. If these are present, the punishment threatened is the imprisonment of up to 2 years. After the new Act entered into force in 2005, special law enforcement "agencies" are empowered to test the arrested persons for coke and heroin; aggravating circumstances are also provided for cases of selling drugs near schools or using children as couriers.[20]

In Hungary in the 1999 – 2003 period the drug consumption has been punishable as criminal offence. But under the new Criminal Code enacted in March 2003, this is no more the case, so that punishments may not be imposed against drug addicts.[21]

In Lithuania, Estonia and Latvia possessing of small quantities of drugs is not treated as criminal offence. However, such "offence" as well is threatened by "a sanction" of home custody of 15, 30 or 45 days.[22]

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[18] http: //www.emcdda.eu.int.index.ctfm?fuseaction=public.content&nnodeid=70798 slanguageiso=EN

[19] http: //www..emcdda.eu.int

[20] Ibid.

[21] Ibid.

[22] Ibid.

An interesting solution in the form of gradual penalties for habitual offenders is provided in the 1977 Irish Drugs Abuse Act. The first time cannabis offender, for instance, is fined by 63 EUR; the second infraction entails the fine of 127 EUR, while the third one – of up to 317. In some cases this penalty – at court's discretion – may include imprisonment. This progressive penalty system, however, does not apply in case of possessing other kinds of drugs where the punishment may be a combination of fine at the amount of 317 EUR and imprisonment of up to 12 months. [23]

Possession of drugs in the U.S.A territory is not permitted and is treated as infraction. Since this matter is not regulated by federal law, there exist various laws at the states' level. In addition to differences, they have some identical solutions as well. The requirement for criminal liability is the need of proving "criminal intent". Distinguishing between "simple possession of drugs" and "possession with the aim of distributing" is crucial. In the first case "the prosecution must prove actual possession or constructive possession, together with awareness about the presence and character of the given substance". This is a rather widely accepted rule in the states' legislation, where the law specifies the quantities to be considered [24] as possessed only, i.e. without intent to be distributed.

Insisting on special explanation of offered solutions in fact means insisting on the need for a thorough insight into different legislative and judicial solutions, especially enhanced by the interest to discern new possibilities in approaching our problem. One, however, has to admit that the heterogeneity in this area is suppressed by a different, and first of all, more liberal strategy.

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3. III "Making possible the use of narcotics"

Article 247

"(1) whoever incites another to use narcotics or provides him with narcotics in order to use them for himself or by another person, or makes available an accommodation for the purpose of using narcotics, or in some other way makes possible to another the use of narcotics, shall be punished by imprisonment of from six months to five years.

(2) If the offence specified in paragraph 1 of the present article is committed against a minor person or against several persons, or entails particu-

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[23] Ibid.

[24] S. Champman, Narcotics and Crime Control, Springfield, Illinois, 1988, 109.

larly serious consequences, the perpetrator shall be punished by imprisonment of from two to ten years.

(3) Should due to commission of the offence specified in paragraph 1 of the present article cause the death of a person, the perpetrators shall be punished by imprisonment of from three to fifteen years.

(4) There shall be no punishment for the offence specified in paragraphs 1 and 2 of the present article of a medical worker who makes possible the use of narcotics in course of extending medical assistance.

(5) Narcotics shall be confiscated."

The changes in relation to article 247 of the CL are those introduced by two new paragraphs, while the basic formulation of the offence remains the same, i.e. as in its more serious form. The existing incrimination now provides for yet another qualifying circumstance – death of a passive subject, caused by making available the use of narcotics, while the former qualifying circumstance involved a minor victim or several persons, or should the offence entail serious consequences (para. 2). The Law amending the CL introduced new form of incrimination (para. 3), with the sanction being imprisonment of from 3 to 5 years.

This comment applies also to the provision of article 246 of the GCL, although, as already said, these two legislative texts differ regarding the amount of specified penalties – imprisonment of from 1 to 10 years according to GCL (para. 1) and/or 3 years as the minimum in case of serious form (para. 2), while the CL reduces the penalty down to imprisonment of from 6 months to 5 years. On the other hand, opting for that amount of punishment opens up the possibility of imposing, on the ground of article 66, paras. 1 and 2 of the CL, a parole sentence against a perpetrator of the basic offence.[25]

Justification of that legislative solution in terms of criminal policy is clear since such conduct by its nature may not be compared with those of manufacturing and distributing of substances considered as narcotics. But, immediately, a counter-argument: one of the basic characteristics of drug addiction now is the rise in the number of addicts induced by various forms of making drugs available. On the other hand, due to the importance of the offence, i.e. numerous negative consequences, both for the individual and the society, the law-maker attempted to find "a golden mean" by bringing closer all relevant circumstances.

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[25] M. Reljanović, op. cit., 84.

We might here repeat that the reduction of possible penalties in no way complies with an efficient suppression of the manufacture and trade of drugs and the strategy of opposing this form of organized crime. However, already making precise the essence of that offence (in its title, too) as well as of the offence specified in article 246 which relate to the phenomenon of drugs abuse, while still distinguished by their essential definition, is absolutely sufficient to explain law-maker's attitude in defining the given incrimination: persons whose activity does not amount to direct sale of drugs but "only" indirectly influences the expansion of the circle of their users.[26]

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The matter of imposing of criminal sanctions for offences specified in articles 246 and 247 of the Criminal Law of the Republic of Serbia (Central Serbia and Vojvodina) is here illustrated by statistics, first of all regarding the number of accused and convicted persons in the 2004 – 2008 period. It is particularly interesting to pay attention to the number of perpetrators committing the offences specified in the group aimed against the human health in that period.

Table I. indicates a drastic rise both in the number of these offences and of their perpetrators who have been the subject of police investigation. The other subsequent tables show furthermore that (as expected) the offences connected with dangerous drugs were first, as the most frequent, on the list of the above mentioned group of offences as well as the most significant ones. In fact, the data presented lead to the conclusion that the number of offences of unauthorized manufacture and trade of drugs is constantly rising as well as that such criminal offences dominate in the group of those against human health.

I) Number of accused and convicted adult persons in the Republic of Serbia according to criminal offences committed against human health (chapter XXIII) in the 2004 – 2008 period

Year	2004	2005	2006	2007	2008
Accused	1527 3,4%	2087 4,4%	2564 4,6%	3345 6,8%	4152 7,8%
Convicted	1426 4,2%	1926 5,2%	2378 5,7%	3139 8,1%	3929 9,3%

[26] Ibid.

II) Number of accused and convicted minors in the Republic of Serbia according to criminal offences committed against human health (chapter XXIII) in the 2004 – 2008 period

Year	2004	2005	2006	2007	2008
Accused	73 2,7%	94 2,9%	141 6,2%	117 4,7%	142 5,0%
Convicted	56 2,8%	67 3,0%	94 6,0%	93 4,7%	106 4,8%

IIIa) Reported and charged persons according to criminal offences against human health in 2003

Criminal offences against human health	REPORTED			CHAR		
	Total	Central Serbia	Vojvodina	Total	Central Serbia	Vojvodina
Total	2053	1625	428	889	635	264
1.Environmental pollution	30	20	10	5	3	2
2.Unauthorized manufacture and trade of drugs	1765	1413	352	722	517	205
3. Making available the use of drugs	150	101	49	128	95	33
4. Other criminal offences	108	91	17	34	20	14

IIIb) Convicted adult persons according to criminal offences against human health and imposed sanctions in 2003

CENTRAL SERBIA								
Criminal offences against human health	Total	Imprisonment	Fine	Suspended sentences		Court's reprimand	Correctional measures	Found guilty and exempted from punshment
				Imprisonment	Fine			
Total	792	590	14	185	3	-	-	-
1.Environmental pollution	4	2	-	-	2	-	-	-
2. Unauthorized manufacture and trade fo drugs	663	510	11	142	-	-	-	-
3. Making available the use of drugs	114	77	-	37	-	-	-	-
4. Other criminal offences	11	1	3	6	1	-	-	-

VOJVODINA								
Criminal offences against human health	Total	Imprisonment	Fine	Suspended sentences		Court's reprimand	Correctional measures	Found guilty and exempted from punshment
				Imprisonment	Fine			
Total	229	158	3	67	1	-	-	-
1.Environmental pollution	1	-	-	-	-	-	-	-
2. Unauthorized manufacture and trade fo drugs	195	142	-	53	-	-	-	-
3. Making available the use of drugs	29	15	-	14	-	-	-	-
4. Other criminal offences	4	1	3	-	-	-	-	-

IIIc) Reported and accused minors according to criminal offences against human health in 2003

Criminal offences against human health	REPORTED			ACCUSED		
	Total	Central Serbia	Vojvodina	Total	Central Serbia	Vojvodina
Total	70	47	23	41	26	12
1.Unauthorized manufacture and trade of drugs	63	41	22	30	18	12
2.Making available the use of drugs	7	6	1	11	11	-
3.Other criminal offences	-	-	-	-	-	-

Tables III a, b and c present the breakdown of data releting to the cirminal offence of unauthorized manufacture and trade of narcotics as well as that of making available their use, compared with criminal offences against human health. Also presented are the data concerning the criminal sanctions imposed in 2003. The ratio between threatened and imposed criminal sanctions against the perpetrators of these offences is presented at the level of the Republic of Serbia broken down to Central Serbia and Vojvodina Province for 2008 (Tables IV, V, VI and VII). Statistics relating to the Republic of Serbia, othwerwise officially published, provide much information about this extremely dangerous criminal activity and about perpetrators in their „roles“

of accused and convicted, taking in consderation the ratio betwen the threatened and the imposed sanctions. The results of the above reaseacrh are presented without comments, purposefully avoiding to burden the readers with data relating to monitoring the legally provided penalties in the 2003 – 2008 period, and assuming that already these data as such would suffice to make adequate conclusions. Enclosed statistics for that period provide a fair insight into the problems we discuss in this paper, by supporting them with numerous indicators otherwise published in the official editions of the Republic of Serbia, while at the same time not to be transformed here into mere „bulletins and tables".

Finally, our conclusion remains always the same: the misuse and trade of narcotics are constantly in the rise and thus represent an ever more increasing problem.

Conclusion

One thing is sure, however: all those who consider in one or other way the matter of specific exposition of the manufacture and trade of narcotics cannot help but to experience a series of dark pressures and disgust as well as a terrible sense of repugnance and anxiety. Here is then the occasion for a wide range of academic disciplines to thoroughly grasp this problem – the phenomenon which in these difficult times full of evil makes us feeling bound, burdened and discouraged...

But at that very point the hesitation begins. Judging by the former practice, many questions remain unanswered. Unfortunately, it seems that this time again the outcome might not be the one we expect. Genuine answers may entail various interpetations, numerous messages and a hill of comments. However, should one begin with such ideas, one reaches the end of the end even before making the first step, i.e. before efficiently starting to settle the problem we consider. But our intention was quite contrary.

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SUPROTSTAVLJANJE ZLOUPOTREBI OPOJNIH DROGA - - NOVE DIMENZIJE U KONTROLI OPOJNIH DROGA-

Zloupotreba opojnih droga je sve više nova realnost, njena eksplicitna tendencija je sve više rušilačka prema postojećem. Naglasimo, negativne posledice zloupotrebe droga, kao i kriminaliteta vezanog za droge, posebno organizovanog, se šire globusom, poprimajući enormne razmere i razarajući sve pred sobom. Temeljno pitanje - šta dalje? Umesto odgovora - nagađanja. Sumorna, teška, upozoravajuća. No, iako je na ovaj problem Međunarodna zajednica odgovorila odlučnom globalnom strategijom, kroz zajedničke instrumente u borbi protiv zloupotrebe opojnih droga, nastavlja se trend širenja te negativne društvene pojave. Nema sumnje, da države sa svoje strane ulažu ogromne napore i resurse kako bi se (zlo)upotreba opojnih droga stavila pod kontrolu. U tom pravcu, razne države imaju različite pristupe ovom problemu što je uslovljeno mnogobrojnim i veoma raznovrsnim faktorima (ekonomski, socijalni, kulturološki...) Represivni ili liberalni metodi? Posebna pažnja u radu je posvećena, upravo objašnjavanju, tj. praćenju i vrednovanju odgovarajućih modaliteta u sprečavanju i suzbijanju ove negativne pojave. U tom smislu Autor je iz optike - Zakona o izmenama i dopunama KZ (septembar 2009), ukazao na nekoliko važnijih novina koje imaju izvestan koncepcijski značaj (ili iza kojih implicitno stoji određena teorijska koncepcija), i istovremeno doveo u sumnju opravdanost propisivanja neke od ovih inkriminacija.

Ključne reči: *zloupotreba opojnih droga, organizovani kriminalitet, neovlašćena proizvodnja i promet, posedovanje droge za ličnu upotrebu, krivična odgovornost, sankcije*

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PROBLEMS OF PRIVATE SECURITY IN SERBIA

In Serbia there is no legal regulation concerning private security system. On the other hand there are many private organizations which deal with the private security. So, there are many problems in that field, including problems of conflict of interests. The author is talking about that in this article.

Key Words: private security, legal framework, Serbia

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The processes of political and economc transition in Serbia have brought about also the changes in the sphere of private security in general, and more particularly in the segment of securing persons, property and business activities. In the last two decades primarily due to property transformation and considerable expansion of private ownership, the private security sector developed from the secondary into one of the key factors of protection of persons and property. Such situation has imposed the need for professionalism and standardization, but first of all for complete and efficient normative regulation of this area. That would be the way of creating basic prerequisites for a successful organization and functioning of entrepreneurs, internal security services and specialized companies (agencies) for providing the safety of persons, property and business, including also the overall protection of society against theft, damage and other detrimental events.

Finally, having in mind the need for an ever wider protection of mentioned values and the concrete specifics of process of work, the contemporary commercial entities should be provided a reliable normative and operational system of protection that would guarantee an adequate level of security. This applies to all entities in the sphere of economy and in non-economic complex, but primarily refers to those collectives that encompass almost all segments of work and an exceptionally large number of technological processes. In

addition, such collectives are right in insisting on rigorously effective protection service, especially as far as vitally important public enterprises are concerned, responsible for functioning of State and society as a whole.

Private security as the most significant segment of private security sector in Serbia is, in essence, a component part of the organization of labor and work process. It encompasses several mutually connected and complementary sub-systems of physical and technical safeguarding and, at the same time, the most conspicuous segment of an integrated, so-called corporate security that includes fire protection and anti-diversion protection, safety and protection of health at work as well as other relevant components. Legislative and secondary regulations figures in this respect as the basis of efficiency, but also as the limit of activity of internal security services and that of the security agencies. Finally, the standards specified by law motivate these entities to achieve high professional level and specialization of personnel, and/or standardization and modernization of equipment instrumental in the protection of persons and property.

Connected to the above is the problem of defining the activity of private security service and/or private security sector in its entirety. It is now considered that contemporary State, while acknowledging the need to delegate its former inalienable rights of applying force and compulsion to other factors within the system of national security service, permits the free and economically reasonable choice in this sphere to individuals or companies in order to provide all citizens a higher degree of security than the one otherwise available through government services.[1] Consequently, the private security services are not included in police or other State security structures, meaning that through their activity the level of safety of persons, property and business is raised above the one otherwise provided by the State.

It is known, namely, that the private security sector, by the quantity and quality of its activities surpasses the security standards traditionally guaranteed by the State to all natural and legal persons. Contemporary society needs sophisticated forms of protection against unlawful acts which the State may not (or does not want) to provide. Viewed through such optics, private security is but a supplement in this field of activities otherwise provided by competent State authorities. At the same time the scope and jurisdiction of both

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[1] Anđelković S., Potreba uređenja privatnog sektora bezbednosti, Revija za bezbednost, no. 4/2009, p. 34.

private and governmental security sectors have to be precisely specified and demarcated.[2]

Private security may be defined as analyzing, discovering and preventing possible dangers and illegal acts that disturb the dignity and jeopardize the life and physical integrity of persons or decrease the value of property that is the subject of protection. Along these lines, it is indispensable that protection and/or self-protection should represent an activity that is performed through physical and various kinds of technical security ("the system of physical-technical security") as an essential sub-system of not only private security but also of the entire sector of security. Moreover, this system represents in contemporary conditions an exceptionally important factor of successful functioning of economic and other collectives. In that sense it may be possible to conclude that the area of protective and/or self-protective activity may be qualified as an economic category, although in contrast to protection of security and health at work it has no direct impact on the productivity of labor.

Yet another segment is present in the area of private security, i.e. the one entrusted to private entrepreneurs and agencies. In other words, actual practice and the need of private property holders has given rise to creation and development of private detective activity as an independent profession whose general objective covers the discovery and the need of private property holders has given rise to creation and development of private detective activity as an independent profession whose general objective covers detecting and prevention of damaging phenomena and unlawful acts that disturb the dignity and jeopardize the life and physical integrity of natural persons or decrease the value of property that is the subject of protection. This activity includes the affairs of collecting and providing information in the area of private security, and its categories are: lost person search, private investigation activity, serving in shopping centers and the activity of insurance agents.

Consequently, the area of private security in Serbia encompasses the protection and/or self-protection activity, at the one hand, and the detective activity, at the other. This area includes a series of normative, operational, informative and educational acts and measures instrumental in establishing: the organization of jobs of business and physical-technical security; functioning of the service and the system of physical-technical security; personnel system of the physical-technical security; the necessary equipment and means level; education and professional training of those performing the physical-technical security.

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[2] Ostojić A., Zakon o privatnoj zaštiti sa komentarom, IPROZ, Zagreb, 2003, p. 7.

The system of physical-technical security implies the engagement of specialized workers in the area of security, competent for the affairs of carrying out and professional supervision of protection of safety, implementation of special measures of storing and keeping safe of arms and ammunition as well as valuable objects ("management of values"),[3] physical and technical protection of facilities, and more particularly the business premises housing vitally important production units and installations, the system of technical safeguarding of buildings and spaces, issuing official identity cards and permission to pass documents, etc. More concretely, the system of physical-technical safeguarding consists primarily of physical protection encompassing facilities, persons and public meetings. This equally applies to technical protection which implies the use of internal television (so-called closed circuit system), use of anti-burglary and warning systems, special X-ray devices and detectors for indicating arms and explosives, maintenance of special-purpose networks (by telephone and radio), satellite monitoring of vehicles (GPS), etc.

The specific area of personal protection and protection of property and business activities in terms of corporate security includes fire protection implying a system of measures and activities to be taken preventively in order to alleviate the risk of fire (systems of fire emergency warning, use of isolation materials etc.), but also measures and actions aimed at elimination of consequences of fires and explosions (making complete fire equipment and devices, professional education, etc.). It is to be noted that, in practice, these two systems are mutually connected and interrelated.

Technical security is divided into mechanical one, implying the implementation of equipment and devices for protecting specific facility, and the electronic intended for early warning or prevention of admittance into closed premises, including the management effected from a control center.[4] Howev-

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[3] Following are the categories of the management of values: tansport of values, Cash Center (safe place for depositing, protection, processing and distribution of cash in circulation in the market for business banks and the National Bank of Serbia); handling of bancomats for financial institutions and trade units as well as information and communication system for the cash management.

[4] That type of management is defined as organised monitoring from far-away locations and managing alarms coming from alarm systems incorporated into stationary and/or mobile facilities or fixed to persons as well as the organisation of interventions after an alarm by using the patrolling team in coordination with competent public services. Its categories include: the control center management through safeguarding of stationary facilities, mobile facilities and mobile intervention teams operations.

er, the executors of technical safeguarding operations regularly use equipment and devices of fire protection (e.g. early fir warning systems). On the other hand, practically speaking, most operations of this sort (fire and explosion prevention) are performed by workers in company trained specifically for this job.

Safeguarding and security jobs done by specialized commercial entities and enterprises, but also those in the area of property and business security performed for own needs (self-protection), may be done effectively only after meeting the requirements of personnel, ergonomic and other material nature, such as technical prerequisites, adequate training, etc. Such approach makes possible an ever more efficient system of security of persons and property, otherwise guaranteed by constitution as the freedoms and rights of citizens that make the foundation of contemporary societies. It goes without saying that the primary requirement for the above is a legislative institutionalization of work of relevant agencies and/or security services.

This coincides with the trend of states, corporations, international and NGO organizations, but also of individuals, to rely more and more on the private sector to do the job. According to data of the Confederation of European Security Companies (CoESS) there exist even 27,318 private security agencies in 23 member countries (EU and Turkey) with over 1.200,000 employees. The trend is similar in South East Europe, including Serbia, where the current process is one of the most intensive ones in the world.[5]

Two important points exist at present in looking at the issue of private security sector in Serbia. The first is the lack of legislative framework for an all-encompassing regulation of this specific activity. Serbia is the only country in the region that did not provide such legislation although the specific nature of security companies requires a separate law to cover their activities. Otherwise, these firms are entities in the world of business acting according to market rules 9n the security sector. As such, they are able to contribute in raising the level of security of citizens and the same time respecting the minimum standards and guaranteed human rights.[6]

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[5] Compare: Petrović P., Privatizacija bezbednosti u Srbiji, Bezbednost Zapadnog Balkana, no. 4/2007, p. 13; Page M., Rynn S. et. al., SALW and Private Security Companies in South Eastern Europe: A cause of effect of insecurity?, SEESAC, s.l. 2005, p. 3.

[6] Maravić D., O potrebi zakonskog regulisanja privatnog sektora bezbednosti u Srbiji, Srpska pravna revija, no. 8/2008, p. 81.

The former (1986) Law on Social Self-protection ceased to be valid in 1993, which applies also to the 1988 Book of Rules covering the matter of personal arms kept by persons engaged in the job of direct physical protection in organizations of associated labor. Since them the key matters in this area remained unsettled by law, except for the part relating to owning, and keeping of personal arms and ammunition. The attempts to fill the lacunae through some prohibitive provisions of the Personal Work Law were neutralized by subsequent amendments of that Law.

The problem is intensified due to the fact that 3,241 legal entities were engaged in Serbia (according to the Ministry of Interior) in the activity of securing of property, including the services of physical-technical security of large companies as well as private agencies in this field. The number of those engaged in the same period was 32,457 and they were armed with 26,245 pieces of various arms – mostly pistols: 17,276. Frequent cases of misuse in their work did take place, otherwise characteristic of this kind of activity, while police officers in dealing with them had no specific powers to intervene, except for the regular ones when dealing with all other citizens.

Special concern relates to the fact that considerable number of companies has recorded as supplementary the service of forcible collecting of debts, which obviously has nothing to do with physical and technical security of protected facilities and persons. Also frequent were the cases of gross overstepping of authority which gained wide publicity in Serbia, so that this area was often referred to as a "grey zone of security", reminding one on the 1990s characterized by criminalization (participation in robberies by the security team members, negative selection of personnel and, particularly, domination of specific firms on the ground of political connections).[7]

In the meantime these problems were mainly overcome owing to efforts State agencies, NGOs and professional associations (particularly Private Security Association of the Chamber of Commerce of Serbia). Detailed records are now being kept on permissions issued and on fire arms used by relevant legal entities, i.e. services.[8] The Standardization Institution has recently adopted a national Serbian standard for private security services that is classified in the

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[7] Keković Z., Milašinović S., Privatna bezbednost u Srbiji – stanje i perspektive, u istoimenom Zborniku radova, Novi Sad, 2008, p. 79.

[8] According to data of the Ministry of Interior 2,527 official permissions have been issued in Serbia in the 2006 – 2008 period for acquiring firearms by legal entities engaged in security activities involving 3,957 pieces.

SRPS A:L2.001 Standard. The use of that standard helps to these organizations in establishing and checking the quality of the processes of providing their services. This standard provides basic elements and indicates requirements to be met by service providers, both when entering into relevant contracts and in stipulating conditions of evaluation of risk of the other party intending to be protected. However, private security service in Serbia still operates in a legal vacuum, entailing all negative consequences, and in an atmosphere of selective implementation of the existing standards.

These consequences are negative in many an aspect. Most are expressed in various misuses, disrespect of human rights and freedoms, rendering of services incompatible with the nature of providing security, then in insufficient powers of government authorities in the prevention of such shortcomings. The picture of this state of affairs is completed by the lack of impartial evaluation of this sector of activity, so that omitting this important part of professionalism brings the things down to a lower standard of performance. The providers of high quality services, on the other hand, loose thus the race with unfair competition in the market in terms of lower prices and low standards in the security sector. Consequently, in addition to a law, a better organization is also required in this sector as well as years of reassessment in order to reach a uniform standard, which would hopefully be in the interest of everyone. The first step in that direction is the prompt enactment of the special law that would be appropriate to the legal system of the Republic of Serbia and a measure of introducing stricter control by State authorities, i.e. the police. This is equally true for secondary legislation, and particularly for the books of rules covering the following areas: ways of carrying out physical and technical security jobs; ways and means of professional training and passing examination; forms, content and way of recording the activities of personal and property security, content and form of identity cards for performers; conditions of performing the job of safe transport of money, securities and valuable objects, and the like.

All the above is a necessity and a prerequisite for efficient performance of the entire economic sector of the country and the realization of equality of all participants in the market activities. As such, it is in the interest of the Republic of Serbia and, finally, another reason for legislative intervention is to have a unified and consistent regime of supervision in this significant area of work conditions, permit issuing and evidencing the properties of persons engaged directly in the security jobs, and the like.

The matter of legislative regulation is unjustifiably neglected in Serbia, especially when the draft law prepared by the Ministry of Interior was taken off the Parliament agenda in 2003. Such attitude of leaving these matters to general regulations and professional organizations[9] would probably be natural for democratic countries with strict mechanisms and adequate legal frameworks covering market competition, countries with tradition of pluralism of political life and market economy. Along these lines, the future law on private security should incorporate solutions existing in the countries of the region, some being also EU full members (Slovenia, Rumania, Bulgaria), but also those of more developed countries with highest standards, such as the United Kingdom, Germany, Spain).[10]

Also necessary is to bring into accord the future law with international law standards in the area of private security existing in: the UN Convention against transnational organized crime; UN Action Program of prevention, fighting against and uprooting of illegal trade in light and small-caliber armaments; the UN Program with same title, including the parts of firearms; the UN Protocol against illegal trade and smuggling of firearms, their parts and components and ammunition; Regional Book of Rules on micro disarmament for South Eastern Europe (RMDS), etc.

Consequently, the solutions of the future law must be in conformity with domestic legislation and particularly with the Criminal Code, the Law on arms and ammunition, etc.) as well as with standards of the developed European countries and experiences of domestic and international practice. Thus, for instance, there is a standard adopted in international documents of supplying only a half of necessary firearms for the existing number of servicemen in a company; since the work is done in shifts this would not be an impediment in our country as well.

In principle, a special legal act at statutory level for regulating the matter of private security sector would be a best solution and best framework for its operation. Also important is the professional association able to supply additional elements of that framework in order to advance and make possible dynamic development as well as professional ethics and responsibility. The State must clearly take stand as to whether to entrust to the professional asso-

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[9] Maravić, op. cit., p. 98.

[10] For more details on these three countries see: Milošević M., Normativna (ne)uređenost privatnog obezbeđenja lica i imovine u Republici Srbiji, Reforma sektora bezbednosti u Srbiji – dostignuća i perspektive (collection of works), Belgrade, 2007, p. 135 – 137.

ciation or keep for itself the matters of issuing licenses, performing security tests, supervision, regular control, the annual report system, settlement of complaints and the like. One might add to the above the need for developing a training system and determining the types and quantities of firearms that may be licensed, the establishment of clear relations with the public security sector and first of all the police, but with the ombudsman and other democratic institutions as well. Strict and clear rules must also be a prerequisite for respecting of human rights and freedoms that could be jeopardized through the activity of security companies

Finally, due to unquestionable influence of private security services in the field of efficiency of the economy and the market, including the climate for foreign investment, this field should be covered with new and modern secondary regulations, now quite obsolete. This conclusion refers, for instance, to the following book of rules concerning the areas of protection from tree branches of telephone and telegraph lines and overhead power lines (enacted in 1965); requirements to be met by work organizations in branding and marking of hand firearms and ammunition (1969); setting and maintenance of postal, telegraphic and safety signals, installations and equipment on spaces and facilities in social ownership and owned by citizens (1970), etc.

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PROBLEMI PRIVATNE BEZBEDNOSTI U SRBIJI

U Srbiji ne postoji zakonska regulativa po pitanju privatne bezbednosti Sa druge strane, ima veoma mnogo privatnih organizacija koje se bave pitanjima privatnog obezbeđenja. U tom smislu, postoje mnogi problemi u ovoj oblasti, o kojima autor govori u ovom tekstu:

Ključne reči: privatno obezbeđenje, zakonski okvir, Srbija

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NEW BORDER SECURITY CONCEPT OF THE REPUBLIC OF SERBIA – MEETING EUROPEAN STANDARDS OF NATIONAL AND INTERNATIONAL SECURITY

Summary

Instability and poor security conditions marked the last decade of 20th century, including political, normative, economic, social and moral crisis of society, as well as the geographical position and international transport routes, which go across its territory, made Serbia a very important factor of global criminal network.

It proved to be that the traditional military security concept of state border with military patrols and checkpoints is not efficient. Therefore, it was replaced by the "European model" of integrated management of state border performed by several subjects of security.

Implementing the proper high standards of outside border control of European Union, the Republic of Serbia shows readiness for implementing the Agreement of Security and Integration. Also, it is ready for improving the regional security and for reliable partnership with European Union in border control. That is the investment in future membership with EU, but also in the security of our citizens, international transport and international exchange of goods and services. At the same time, that is very important for national security of the Republic of Serbia, which will more efficiently deal with transnational security threats and contribute to international security.

The thesis in the present text considers the position of Serbia relating to actual transnational security threats, as well as the principles of organizing, sub-

jects, constitutional law and political and strategic basis of the new security border concept of the RS.

KEY WORDS: state border security, Republic of Serbia, European Union, national security, international security, transnational security threats.

Introduction

At the beginning of 20th century economically developed countries, which established the European Union, became "prestigious" destination for many legal and illegal economic migrants, but also for actual and potential criminals. The World War I and economic depression imposed to the economically developed countries the duty of protection of national industries. The result of that was a strict migration control. Hereby, the number of illegal migrations increased. After the World War II, the rapid industrial development of some countries caused shortage of workers, while there was a surplus of capital, and it all led to numerous migrations, with the decrease of illegal migrations. There was a great wave of migrations in Europe at the end of 1960s and at the beginning of 1970s. In terms of size, the migrations set a record in the countries of Northeast, West and Middle Europe. The main reasons were differences in demographic, economic and technological potentials of European countries. So, the migrations were directed toward some developed, but scarcely inhabited countries. Regarding the interdependence of world economy, which was increasing, and regarding the need for migratory workers, the International Labor Organization tended to define a new international economic system. The system was established in order to solve economic and migratory problems that turned into serious political and security concerns.[1]

Because of the poverty globalization, people started moving abroad in a very large number. That caused a *global migratory crisis*, i.e. a very complicated situation for the host countries and their inability to absorb all foreign migrants.[2] Searching for better living and working conditions prompted the emigration of people from Central Eurasia and Southeast Europe to Western

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[1]Grečić,V. *Migracija i integracija stranog stanovništava* – Procesi u zemljama severne, zapadne i srednje Evrope, Institut za međunarodnu politiku i privredu, Beograd, 1989, pp. 7-39.

[2]Kegli,Ć.V., Vitkof, J.R. – *Svetska politika – trend i transformacija*, Centar za studije Jugoistočne Evrope, Fakultet političkih nauka Univerziteta u Beogradu i Diplomatska akademija Ministarstva spoljnih poslova Srbije i Crne Gore, Beograd, 2006. p.432.

European countries. However, not everyone could choose his/her job, so that most migrants were engaged in hard and badly paid jobs, except in case of branches with existing vacancies (engineering, automobile industry, building, mines and public works).

At the same time, the immigration policy of the Western European countries reasonably became more restrictive. They established a positive (so-called *white*) and a negative (so-called *black*) list of countries subject to different visa regime of entry into the territories of EU members (with an exception of Ireland and Great Britain).

Due to the above-mentioned reasons, people from poor countries opt for illegal migration to Western countries. They prefer to be engaged in the "grey" or "black" economy, and that is their way to avoid vacancies in heavy industry, or they think they will become rich performing criminal acts. Thus, they become an integral part of organized transnational crime.

At the same time, they are led by the thought that they will illegally find a well-paid job in bars, nightclubs, doing housework and baby-sitting. In order to enter the desired territory and discouraged by restrictive visa regimes, potential migrants ask for help the organized criminal groups. Criminals smuggle them using illegal ways. Thus, they become "clients" or victims of transnational organized crime[3] engaged in smuggling of migrants or human trafficking.

At the same time, there is a globalization of security problems such as crime before all. That is the way to make an external influence on the state stability. Obviously, the problems have evolved so that at the beginning of the 21st century, they are characterized by networking of their protagonists within the national borders – so-called *criminal cooperation*.

There is an increase of criminal activities by some protagonists who jeopardize security, as well as the broadening of their network from national to international level. It is the so-called *criminal activity internationalization*. Establishing partnership between criminal groups and a network in one country with criminal groups and networks that operate in the territory of other countries is the so-called *criminal cooperation internationalization*. Also, there is the formation of some transnational (criminal) markets, so-called *market crime globalization* and an increasing destruction of values and interests of individual, the society, state and international community.

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[3]Wijers, M.P, Lap, C.L. *Trafficking in Women, Forced Labour and Slavery-like Practices (in Marriage, Domestic Labour and Prostitution*), FATW and GAATW, Utrecth, 1997, p.206.

Besides the operations within wider geographical borders, there is a prominent problem, common to many national security systems, known as criminal associations and organizations, which limit their activities only to certain "businesses". Previous *specialization* for certain crimes has been changed by "doing" all kinds of things, i.e. a possibility to get or order more different kinds of illegal goods or services at one place.

Some new kinds of crime are noticeable on transnational security territory, such as illegal trade of red quick silver, nuclear material and waste, biological agents, genetic material, human tissue and organs, presence of hi-tech crime etc. At the same time, there was a restitution of some ways of security risks that were considered as surpassed, eradicated and forgotten long ago, such as human trafficking.

State borders used to be a serious barrier of transnational crime. However, there are no borders within EU. The most serious obstacles are outer borders of EU that are protected by all members of the Union and their neighbours.

1. The Republic of Serbia at the Crossroad of Transnational Security Threats

More often modern security threats have an international extent. This equally refers to threats of natural, human or technical-technological origin. There are serious human threats, especially in the sphere of international crime. Because of its geographical position and international transport routes, the Republic of Serbia has always been an interesting place for international crime. Instability and poor security conditions to a great deal contributed to that. It was known in the last decade of 20th century by its political, normative, economic, social and moral crisis. Consequently, Serbia is faced with many challenges, security risks and threats, among which the most expressed ones are international crime and terrorism.

No country is protected from crime. It is present especially in poor countries and in those where the process of transition is ongoing. Impoverishment and decay of social programs brought to society the criminalization in the countries of transition. Crime is present even in political parties, courts of justice and state institutions. The expansion of crime made it the 4th sector of the world economy whose gross revenue amounts to 20% of the global trade value.[4]

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[4] Markovic, S. *Moćniji od CIA,* Institut za geopolitičke studije, Beograd, 2002 p.56.

At the same time, terrorism is the second serious security risk. It threatens the world stability and peace, and is a real national danger to Serbia, too. According to world terrorism phenomenology, Islamic terrorism is rather significant. It is motivated by religious extremism and fanaticism, shown through "spectacular" attacks, resulting in numerous victims. Serbia (Kosovo and Metohija, Raška Region, Preševo Valley) and all its neighbours (Bosnia and Herzegovina, Republic Srpska, Montenegro, Macedonia, Albania) are faced with the same security threats. The matter is more serious because the presence of Al-Qaeda was proved in Bosnia and Herzegovina.

As an integrated part of international community and with the tendencies of rapid integrations, our country shares the destiny of modern civilization, faced with challenges of terrorism in our region and global framework. That means that all relevant security subjects in Serbia have and will have a great responsibility in the field of antiterrorism, and not only within national, but also within international borders.

The level of social danger is obvious because of interaction and coincidence of many crimes, legal offences and economic offences, where individuals, groups, legal entities and even officials of state bodies and international organizations are involved. Security threats are mostly connected, intersected and in (direct) correlation: e.g. in smuggling stolen cars, weapons, drugs and people, too. Terrorist organizations are funded in that way. Among criminals, there are some officers of intelligence and various humanitarian organizations.[5] Thereby, organized crime is more and more a "transmissional" factor of the interrelation of different security threats.

The aspects of transnational crime are numerous. Among them there are some distinctive ones, such as: terrorism, economic and corporate crime, drug mafia, weapon smugglers, human trafficking, smuggling of migrants, "sex mafia" (prostitution, porno-mafia), auto mafia, stealing and smuggling antiquities and works of art, gambling mafia, city planning and building mafia, transplant mafia, baby mafia, pharmaco-mafia, mortuary mafia, forgery of money and paper valuables, blackmail, robbery, criminal military structures, educational mafia, road mafia, insolvent-estate mafia, customs mafia, tobacco mafia, oil mafia, electricity mafia and many others.

Finally, the transnational crime is often a basis and logistics to the domestic and foreign intelligences. They send information about "dirty" jobs. The

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[5] Arnaudovski, Lj., *Meguslovnost i meguzavisnost na terorizmot i organizovanot kriminalitet* – Godišnik na fakultetot na bezbednost, Skopje, 2002, p. 92.

support can be usual information gathering, illegal entries, and ways out of the countries, for the intelligence members and associates. This also includes obtaining false documents, connection concession and past, many criminals had "official IDs and badges of the secret police".[6] It is rather clear that there is a connection between organized and political crime, especially terrorism, and the most prominent example is the drug-terrorism in Kosovo and Metohija.

Why does the Republic of Serbia have to resist the international security threats powerfully? The effects of transnational threats to the security of citizens and the state, but also, threats to the international security have at least three dimensions. *Human*, refers to the disrespect of human rights of their direct or indirect victims. *Economic*, refers to the effects of transnational crime, which additionally deepen the negative factors of economic transition, and they are the cause and condition of their emergence. *Security*, refers to jeopardy of national security slowing down the process of democratization, i.e. "transitional societies" which support democratic institutions and the rule of law, and making numerous socio-economic problems.[7]

In the field of foreign policy, transnational crime can indirectly inspire disintegration, interruption or termination of the state integrations into specific institutions and organizations, establishing penal sanctions, the intervention of the international community or big powers. In that way the state integrity is jeopardized and there is the condemnation of the international community because of government's inability to resist the crime, or maybe the government does not want to resist or even supports it. That was confirmed by the US State Department. Every year they write reports about human trafficking and openly threaten the countries whose governments do not make any effort to solve the problem of human trafficking. A few years ago there was a similar problem in Serbia, too. The security state consequences are equal to the political and economic consequences.[8]

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[6] This quotation proves the assassination of the Serbian Prime Minister dr Zoran Djindjic on 12 March 2003. The assassination was committed by a criminal group whose members were the commander and the deputy of the Special Operations Unit of the Security-Informational Agency of RS. This event has led to abolition and dismissal of the Unit.

[7] Mijalkovic, S.: *Trgovina ljudima*, Beosing, Beograd, 2005, p. 247-248.

[8] *Trafficking in Persons, Report 2003, 2004, 2005, 2006, 2007, 2008.* The official site of the USA Government: www.state.gov. See in: Mijalkovic, S., *Suprotstavljanje trgovini ljudima i krijumčarenju migranata – mogucnosti unapredjenja bezbednosno-kriminalističke prakse nacionalnog sistema bezbednosti,* Sluzbeni glasnik i Institut za uporedno pravo, Beograd, 2009, pp. 151-156.

2. New Border Security Concept of the Republic of Serbia

2.1. Political and strategic concept of the state border security

Legal elements of the new border security are implemented in many systematic and functional national regulations and documents of super-legal forces, legal forces of political-strategic nature and sub-legal forces.

The border of RS was traditionally secured by military methods (border military patrols and checkpoints), while the control of crossing the state border (human movement, goods and services trade) was the competence of the police, customs and state inspections. However, the development of regional security, reliable partnership and the interest of EU integration require a redefining the state border model according to high EU standards of border control. Firstly, this refers to the European Commission instructions for integrated management of borders for the West Balkan countries, Schengen Catalogue, Schengen legal heritage, as well as formal international conventions in the field of human rights protection and the rights of migrants and refugees.[9]

The need to make a proper legal framework founded on international standards, resulted in the concept of the *National Strategy of managing the services for security and control of crossing the state border of the Republic of Serbia* and the *Strategy of integrated border management of the Republic of Serbia.* According to these strategies other strategy documents have been developed. At the same time, there are some other complementary strategic documents that are devoted to solving other national problems.

The reform of the practice and of the security organization of state border started at the end of October in 2002 by signing the *London Statement: How to defeat organized crime in Southeastern Europe*. By that document, southeastern countries and EU countries claimed their readiness to resist the international (organized) crime. That resistance appears at the initial point, during its transit and at the target point. All that should be done by applying EU standards, with the public support and the improvement of regional cooperation. At the same time, Serbian *National Strategy* for the Accession of Serbia (and Montenegro) to the *European Union* was adopted.[10] This Strate-

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[9] It is about a detailed material that will not be presented here due to objective reasons. These standards were considered during the conception of the Strategy of integrated border in RS. Details about the above-mentioned standards in *Evropsko pravo na pograničnu policiju,* Westfal – Stopa, Libek, 2003.

[10] The Government of RS, the EU Integration Office, Belgrade, June 2005.

gy promotes the idea of reforming the sector of justice and interior, and the protection of human rights and human freedom, first of all, freedom of movement of migrant workers. Cooperation promotion is especially important in the field of police, visas, asylum, migrations, border control, and the implementation of Schengen system and even in the field of criminal conviction policy.

National Strategy of managing the services of security and control of crossing the state border of the Republic of Serbia obviously is one of the most important ones. A commission has been formed which is in charge to prepare the National Strategy for security and control of approaching state borders of RS. Also, it should prepare a declaration about law drafts and bylaws, according to which many regulations in the field of security and control of approaching state borders will be enacted. Participation in preparation and procedure in project realization must be done under the conditions of taking over the duties relating to state border security from the Military competence into the Police and other services competence. An initiative has been submitted for adjusting legislative documents and bylaws with the standards of EU and the regulations of Schengen Agreement, suggesting measures to be taken for developing the integrated management of border service. Proposing measures that should be done for establishing other acts, evaluations and methodology of the organs that are in charge for border interests is yet another duty of the Commission. Furthermore, cooperation should be established with the authorized EU representatives as well as with other competent international and foreign organs and organizations.

This Commission includes representatives and members who are nominated by the Government of RS. They come from: the Ministry of Interior – Border Police Directorate for foreigners and administrative affairs, Ministry of Finance, Ministry of Justice, Ministry of Public Administration and Local Self-Government, Ministry of Agriculture, Forestry and Water Management, Ministry of Energy and Mining, Ministry of Capital Investments, Ministry of Trade, Tourism and Services, Ministry of Foreign Economic Cooperation, Ministry of Labour and Social Policy, Ministry of Science and Environment, Ministry of Health, Ministry of Foreign Affairs, Republic Secretariat for Legislation, Statistical Office in the Republic of Serbia, Republic Geodetic Authority, Republic Directorate for Properties, and Computer Science and Internet Office in the Republic of Ser-

bia. All the expert, technical and administrative affairs for the Commission are done by the Ministry of Interior.[11]

The Strategy of integrated border management in RS[12] is undoubtedly very important for eliminating transnational security threats. The main idea of the Strategy is accepting the standards (principles) of EU regarding the development of the system of state border control and management. The point is in *open borders* for trade and human movement with the full respect of human rights and human freedom. Another point is in *closed borders* for all criminal and other activities which jeopardize the regional stability, involving weapon smugglers, drug dealers, illegal migrations, terrorism and organized crime.

Thus, the Republic of Serbia is making efforts to establish an adequate policy in this field trying to establish the framework for creating consistent and synchronized sector strategies and plans for their implementation. It is also trying to define the roles and responsibilities of state authorities in border management. It is important to identify the strategic goals, and set up the main course of actions in the process of establishing and accomplishing a sustainable system of stability of border management. The Strategy also defines the framework for jurisdiction of main and subsidiary services.

The Strategy of National Security of RS [13] defines some dominant challenges, risks and threats to our country, as well as the international security problems (global and regional) which jeopardize Serbian state stability, other countries' stability and the whole region. The most prominent non-military threats is the international terrorism transnational and organized crime. Illegal migrations and human trafficking, especially in Kosovo and Metohija, are considered the most dangerous ways of organized crime and a serious threat to national security of RS.

The National Strategy for the campaign against the organized crime[14] illustrates the decision of RS to develop national capacities and potentials for effi-

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[11] Decision about forming a Commission for preparation and organization of National Strategy for Service Management for control, security and approach to the state border of RS. The Official Gazette, no, 113/2004. Some of the above-mentioned departments in the meanwhile have changed their names. The content of the Decision is in the original format.

[12] The Government of RS, 05 no. 28-402/2006, 26 January 2006.

[13] See chapter I – *Security Area* and chapter II *Challenges, Risks and Security Threats.* The Strategy was established in the first quarter of 2009 and is available on the official site of RS Government: www.srbija.gov.rs

[14] The Strategy was established in the first quarter of 2009 and it is available at the above mentioned official site of RS Government.

cient suppressing of every kind of organized crime, especially different kinds of corruptive connections and the influence that they have on some structures in the government. The idea is to do that with the help of international community. It is based on three principles: applying and developing preventive activities, repressive activities and property confiscation where it was purchased by committing criminal acts. Developing good cooperation with our citizens and developing confidence is very important. With this Strategy, the Government wants to establish an efficient system of suppression of organized crime. It defines strategic goals, roles and responsibility of government institutions and the framework for making plans of implementation. The Strategy also promotes a more efficient integration of RS into regional, European and world concept of campaign against organized crime.

At the same time, it is in a strong conceptual and functional connection with other specific strategies in RS, which refer to different fields: campaign against corruption, money laundering and funding terrorism, human trafficking, illegal drug trade, illegal migrations and integrated border management.

The Strategy of resisting human trafficking, comprises a set of main instructions, that include long-term state actions, national security system, and a campaign for combating human trafficking and a campaign for animal protection and help. The Republic of Serbia adopted (in December 2006) the *Strategy for combating human trafficking in RS*[15]. That strategy defines the national system of resisting human trafficking: prevention and control of this crime, as well as protection, help and support of victims of modern slavery. The main roles pertain to state border security staff and, above all, the Border Police.

Furthermore, in the first quarter of 2009 the Government adopted the *Strategy for combating illegal migrations in RS for the 2009-2014 period*[16]. This is the first document of that kind made in our country. It defines the criteria for the reform of the national security system in order to comply with the EU standards of migratory policy. i.e. visa issuing system (treating the foreigners – legal migrants). The strategy also provides measures of treating the foreigners who committed crimes, victims of human trafficking, including the establishment of new state bodies to deal with those problems.

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[15] *The Official Gazette of RS*, no. 111/2006.

[16] The Strategy is available on the official site of RS Government: www.srbija.gov.rs

Besides these, a numerous other strategies are very important for the state border security (poverty reducing strategy, strategy of economic development, strategy for combating corruption, local development strategy etc.).

2.2. Constitutional Framework

Constitution of the Republic of Serbia (article 97) specifies that the Republic shall organize and provide for: sovereignty, independence, territorial integrity and security of the Republic of Serbia, its international status and relations with other countries and international organizations, the system of crossing the border and control of the trade in goods, services and passenger traffic over border crossing; status of foreigners and foreign legal entities. This is the ground further legislation.

Law on Police[17] defines police affairs, organization of police, police commission, control of police affairs, cooperation with other security instances and authorization for enacting bylaws. Important provisions in the Law define the police as a state border security authority, then as the institution in charge of crime prevention and border crime repression and of providing security of foreigners.

Law on Organization and Competence of the State Bodies in Repression of Organized Crime[18] defines the qualifying criteria for organized crime, organization and competence of the state bodies in their repression, as well as their duties and specific powers of the above-mentioned organs in repression of crimes. This Law is supplemented by many other regulations (Law on criminal procedure[19], Law on juvenile crime committers and crime and legal protection of juveniles[20], Law on the program of protection of perpetrators[21], Law on organization and competence of state bodies for the repression of the high-technological crime[22] etc.).

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[17] *The Official Gazette of RS*, no. 101/2005.

[18] *The Official Gazette of RS*, no. 42/2002 with subsequent amendments.

[19] *The Official Gazette of FRY*, no. 70/2001 with amendmernts.

[20] *The Official Gazette of RS*, no 85/2005.

[21] *The Official Gazette of RS*, no 85/2005.

[22] *The Official Gazette of RS*, no. 61/2005; our country adopted this Law after signing the 2003 European Council Convention on Cyber-crime. The content of this Convention is available at the official European Council site: (www.coe.int) conventions.coe.int/Treaty/EN/Reports/Html/185.htm.

Law on Foundations of Security Service of the Republic of Serbia[23] defines the principles of organization and functions of the security and intelligence system of RS, and guiding and harmonizing work of the security services in RS, including the inspection service. The Law is important because of the duties of some services and their powers in repressing the organized crime (Security-Information Agency and Military-Security Agency). Article 22 provides that the security services will be organized by separate laws. Until these laws come into force, provisions of the *Law on security services of Federal Republic of Yugoslavia*[24] and the *Law on Security-Information Agency* shall apply*y*[25]. They are not antithetic to the principles of Law on Foundations of the security service.

Law on state border protection [26] defines a normative framework of the organizing and functioning of national border security system. The enacting of this Law is one more step that Serbia makes toward EU. *Border protection* means the control of passing the state border and state border protection in order to provide state border inviolability as well as the suppression of crime and detection of criminal acts and criminals. It includes protection of lives and people's health and their environment and combating illegal migrations (article 1).

Border control means control of people and their passports, control of vehicles, control of possessions and goods. The control is performed at the border crossing or just after crossing the state border; it includes other controls, such as: control of people, goods, services, vehicles, animals, plants etc.

State border security includes a set of regulations, acts and permissions that are specific of the state border regime, at the part of state border between the border crossings and at the border crossing after the working hours.

Moreover, some principles of integrated border management are elaborated in the Law. The principles are defined by the *Strategy of state border management of the Republic of Serbia.* Included are also the powers of the security officers defined in the strategy, the way of crossing state border and types of border crossings, the rules of border control and border security.

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[23] *The Official Gazette of RS*, no 116/2007.

[24] *The Official Gazette of FRY*, no. 37/2002 and *The Official Journal* of Serbia and Montenegro, no. 17/2004.

[25] *The Official Gazette of RS*, no. 42/2002.

[26] *The Official Gazette of RS*, no. 97/2008.

Marking and regulation of the state border are also defined, as well as international border cooperation, record keeping and penal regulations.

Law on Foreigners[27] governs the requirements for entry into, movement and stay of foreigners in the Republic of Serbia. The provisions of this Law apply to all foreigners, except those who seek protection from the Republic of Serbia in accordance with the Law on Asylum and Temporary Protection, unless otherwise provided by this Law. Provisions of this law do not apply to all foreigners who enjoy privileges and immunities according to the international law, where the application of this Law is contrary to the international obligations undertaken as well as to the principle of reciprocity.

The Law requires the possession of valid travel documents with all necessary details regarding the period of stay, return and transit. The Government may regulate the following matters: limiting or prohibiting illegal stay, coercive estrangement, confiscation of identity documents, stay, and residence of foreigners and collecting personal data, requirements for foreigners' movements in uniforms, records and data bases, inspection and penalties.

Law on Asylum[28] defines principles, requirements and procedure for obtaining and termination of asylum, as well as position, rights and duties of the people who seek asylum and those already holders of the right to asylum in RS.

During the border control at the entry of RS or inside its territory, a foreigner can claim asylum with the officer of the Ministry for Interior in verbal or written form. During the process of making decision about the claim, authorized state bodies are obliged to adhere to the principles of the ban of deportation or return against applicant's will to a territory where his/her life or freedom would be threatened due to race, religion or nationality, membership of a social group or political opinion. Then, there is obligation to proceed without discrimination regarding applicant's race, sex, nationality, social status, birth, religion, political opinion, income scale, culture, language, age or mental or physical disability. Another obligation includes adherence to the principles of non-punishment for illegal entry and stay in RS, family unity, informing and legal aid, free interpreting service, free admission to the UNHCR, personal delivery of all letters, genetic equality, care about persons with special needs, representing unaccompanied underage persons and persons unable to work. All data about the asylum-applicants are confidential.

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[27] *The Official Gazette of RS*, no. 97/2008.

[28] *The Official Gazette of RS*, no. 109/2007.

Application for asylum or termination of that right, is initially proceeded, and all decisions are made, by the unit of the Ministry for Interior – Office for Asylum.

The second instance authority which decides on appeals lodged against decisions of the Office for Asylum is the Commission for Asylum which includes the president and eight members that are appointed by the Government for the period of four years. Until the final decision about the asylum claim is rendered, accommodation and other basic conditions have to be provided to applicants in the Asylum Centre.

Office for Asylum renders the decision on foreigner's right to asylum, who is then provided with subsidiary protection after it is proved that the asylum applicant fulfills the conditions for obtaining the asylum rights or for subsidiary protection and there are no reasons for denial. Office for Asylum decides to deny the claim after finding that the application is unfounded or that there are legal grounds for such denial.

During the procedure, asylum applicant has the right to stay in the Republic of Serbia and, if necessary, to obtain accommodation in the Asylum Centre. Beside the accommodation, some other living conditions are provided, such as: clothes, food, money aid and other conditions according to special principles and rules of asylum procedure. Also, some other things are provided: health care in conformity with regulations and principles of health care for foreigners, the right to have free primary and secondary education, right to social security aid, right to protect one's intellectual property, free access to the courts of justice, legal aid, to be free of paying juridical and other expenses and taxes and free to express religious views.

Law on Confirming Readmission Agreement between EU and Serbia on Illegal Migrants[29] is intended to improve cooperation in the field of combating illegal migrations. It defines efficient procedure of identification, secure and regular return of persons who do not fulfill the conditions for stay or settle in the territory of RS or any other member of EU, as well as of facilitating transit of these persons. Almost the same procedures are defined in the *Law on Confirming the Agreement between the Ministries Council of Serbia and Montenegro and the Government of the Republic of France on Deportation of persons finding themselves in irregular situation, with the Proceeding Agreement Application between the Ministries Council of Serbia and Montenegro and the*

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[29] *The Official Gazette of RS*, no. 103/2007.

Government of the Republic of France on sheltering people finding themselves in irregular situation.[30]

In addition, there are many other documents that are important for state border security.

2.3. Border Service

Pursuant to the Strategy of integrated border management in the Republic of Serbia, the jurisdiction of the Border Services has been modified and precisely defined by subsequent regulations. Integrated border management is a large set of international activities. They are directed to solving strategic and practical challenges of border management. Because of that the European Border Security Concept is based on three levels of border services cooperation:

- *Cooperation among particular services* at different administrative levels, from the Ministry level to the unit level, which are engaged at the border, and cooperation among particular border crossings or control stations inside the country.
- *Cooperation among different services*, that includes coordinate actions and harmonized work of border services pursuant to clearly defined jurisdiction and procedures, as well as the integration of information system that covers the border security.

o *International cooperation* that is effected as: local cooperation of border services from both border sides; bilateral cooperation of neighbouring countries according to assigning the checkpoint status, coordination of border patrols, forming joint patrols, opening joint liaison offices and exchange of information and solving the infrastructure problems and possibility of creating joint mechanism of control. *Multilateral cooperation* is directed to border management, exchange of information, and it can be broaden to joint operational cooperation and forming joint investigation teams. It contributes to the efficient enforcement on border crime.

Enforcement and control of transnational security threats is in the competence of the *main border services*: Border Police, Ministry of Interior, Customs Directorate which is in the competence of Ministry of Finance and Veterinary and Phytosanitary Inspections which is in the competence of Ministry of Agriculture, Forestry and Water Management.

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[30] *The Official Gazette of RS*, no. 103/2007.

The tasks of Border Police include implementation of provisions of the Law on surveillance and state border crossing control, prevention, detection and investigation of the criminal acts – especially illegal migrations, human trafficking, drug smuggling, weapons smuggling, forbidden substances, and using false ID cards. The tasks include also crime-intelligence work on gathering and analyzing data about cross-border crime, detection, movement observation and apprehension of international criminals and terrorists, control of movement and stay of foreigners, granting asylum, legal affairs, legality control of regional organizational units, logistics and others affairs according to law.

Customs Service is in charge of custom control of goods, custom procedures, payment of prescribed customs duties, duties on import, value added tax, payment of excise tax for imported goods, performing of preventive and additional checks based on the principles of selectivity and risk analysis. It performs legal and administrative procedures in order to suppress customs legal offences and crimes, deals with foreign currency control, entry and exit of money (RSD and foreign currency) in international, travel and border transport. It controls the import and export of goods to which the special regulations do apply because of security, human health protection and environment protection, preserved plants and animals, waste, national treasure that has historical value, protection of intellectual properties etc. Also, it performs statistical controlling the data on import and export and deals with other affairs as prescribed by law.

Veterinary Inspection (Veterinary Directorate) executes the legally set

jurisdiction and in accordance with the operative activities manages the system of health protection and well-being of animals, inspects export and import, respectively, of animals, raw materials, litter, and products of animal origin, animal food and protection of human health. Veterinary-sanitary inspection carries out control on border crossing, control of import, transit and export of animals, animal products, food of animal origin, animal food, veterinary medicines and medical supplies and equipment, as well as other affairs pursuant to law.

Phyto-sanitary Inspection (Plant Protection Directorate) executes the legally set jurisdiction and, in accordance with the operative activities, manages the phyto-sanitary system of RS. It performs risk assessment from intake, occurrence and spread of harmful microorganisms, development of system for *fast warning* against risks and threats, plans the control and inspection, controls and inspects plant products, performs inspection of plant pro-

tection products and plant nourishing matters in export, import or transit with reloading. It performs inspection of production, transit and usage of seeds, seedlings, protection of nourishing matters, as well as other affairs pursuant to law.

Performing affairs of border security control depends to a great deal on the definition of geographical characteristics i.e. green (land) border and blue (waterway) border, as well as on the types and number of border crossings. *Border crossing* is a place assigned for crossing the state border in road, railway, air and water transport where the border control is performed *permanently, seasonally, temporarily*. They can be open for international and regional transport.[31]

Border crossing for *international transport* is a place assigned for crossing the state border of the Serbian and foreign citizens. They may be located at the border line, i.e. in its immediate vicinity, or inside the country, such as border crossing in Apatin (waterway transport), Novi Sad (waterway transport), Belgrade (waterway transport and airport), Niš (airport) and Priština (airport).

Border crossing for *regional transport* is a place where the citizens of RS pass the border in order to stay in a neighbouring country, or the citizens of a neighbouring country pass the border in order to stay in Serbia on the ground of an international agreement.

Temporary border crossing is defined by a decree of the Minister for Interior in accordance with the Ministers for Finance and Foreign Affairs and the authorities of a neighbouring country, if necessary for performing short-term activities: cultural, scientific, sports, religious, touristic, and other activities that are regulated by an international treaty. Temporary border crossing is provided as well if there is a natural disaster to be prevented as well as in the case of redirection of transport across the border.

The systematic support to the main border services is provided by the following authorities:

- Ministry of Foreign Affairs which via diplomatic representative office issue residential and transit visas too;
- Ministry of Human and Minority Rights makes efforts to guarantee human rights and freedom to all citizens, and minority rights guaranteed by the Constitution, laws and international civil rights prescriptions, refugee rights specified in multilateral and bilateral treaties, rights connected to extradition and legal aid, concluding international agreements in the field of readmission, etc.

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[31] Law on State Border Protection, articles 13 through 15.

- Ministry for Capital Investments (now Ministry of Infrastructure) and the Waterway Sector control the international transport and shipping security via port authorities. The Road Transport Sector and Air Transport Sector via their inspection organs control the passenger and goods transport at the border crossings.
- Ministry of Public Administration and Local Self-Government provides inspection and observes the work in all state bodies.
- Ministry of Justice provides improvement at bilateral, regional and international levels and controls the implementation of relevant bilateral and multilateral conventions.
- Ministry of Labour, Employment and Social Policy deals with affairs relating to employment of foreigners, issuing working licenses, implementation of international conventions and other international documents in the field of migrations, etc.
- The EU Integration Office which as a state body deals with affairs related to European integrations and offers expert aid to the Government, Ministries and special organizations in order to bring domestic regulations into accord with the EU regulations.
- Statistical Office performs gathering, processing and publishing of statistic data relating information important for state border security.
- Directorate for Properties, and Computer Science and Internet Office in the Republic deals with affairs of improvement and development of information systems of state bodies.
- Civil Aviation Directorate determines the security-restrictive zones in cooperation with other organs and airport administrations and performs inspection and manages the entry control of passengers, crew and vehicles in these zones.

Developing a uniform policy of asylum, migrations and visas, as well as of ways of their processing, is a very important sector of the European model. There are many regulations in this respect the Republic of Serbia has to enact, first of all regarding the EU visa regime list and the harmonization of visa regime in accordance with EU recommendations, Schengen Agreement and "black" and "white" EU list.

Redefining of state border security model requires active cooperation between Serbia and EU. Firstly, this concerns the advancement of regional cooperation in this field, free trade, and free human movement, free movement of goods and capital and freedom of settlement. Regional cooperation is very important, especially in the field of justice and interior, and in all areas

that jeopardize regional stability and security. Suppression of organized crime, terrorism, illegal migrations and human trafficking are major problems in this respect that should be solved in the region and especially at the border crossings.

Regular state border security is directed to people, transport vehicles and goods. That means checks at the border crossings and restriction of their uncontrolled entry into the country. Also, it is related to asylum and dealing with arrested people without IDs according to international law. Beside that, problems of border control management are not solved at the border only, but throughout the whole state territory, whereby the role of the government is crucial.

Finally, the implementation of European border security model requires a set of other activities and their normative regulation. This includes cooperation and coordination between national services, international cooperation of border and other services, harmonization of national law with EU regulations. Also significant are organizing and managing and proceeding implied in the border service activities, human recourses management, organizing the system of communication and informational and technological systems, innovation of infrastructure and equipment, and budgeting.

CONCLUSIONS

Global flows of criminal activities also go through the Republic of Serbia. The situation is not much different in the neighbouring countries that have been integrated into EU (Hungary, Bulgaria, and Rumania). Even if expected that the most of them would avoid Serbian territory on their way to the final destination, that did not happen.

Adopting the "European model" of state border security is an innovation in our security system. This means leaving the traditional – military concept of state border security in favour of integrated border management. That job is done by many security entities.

By implementing adequate regulations according to high standards of EU border control, the Republic of Serbia demonstrates its readiness for processing the Strategy of Stabilization and Implementation, for the security advancement in the region and for reliable partnership between RS and EU in the border control. That would be an investment for future integration of RS into EU, but also for the security of our citizens, international transport and international exchange of goods and services.

The importance of the "European model" of border security is crucially significant for the security of RS. At the same time, the government officials have strong determination to give their own contribution to the intentions that they promote. Introducing the rules, conclusions, suggestions, standards of international initiative, programs and documents of political and legal character into the national legislation and other national documents is a proof that the entities of the national security system are obliged to try to eliminate the transnational security threats.

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NOVI KONCEPT OBEZBEĐENJA GRANICA REPUBLIKE SRBIJE – EVROPSKI STANDARDI NACIONALNE I MEĐUNARODNE BEZBEDNOSTI

Republika Srbija je u poslednjih nekoliko godina primenila visoke standarde spoljne kontrole granica EU. Vlada Republike Srbije je takođe unapredila različite oblike regionalne saradnje na uspostavljanju bezbednosti u regionu. Za Srbiju su ova pitanja veoma važna i zbog njene unutrašnje bezbednosti, kao i ibog njenog budućeg članstva u EU.

Ključne reči:bezbednost granica; Republika Srbija; EU; nacionalna bezbednost, međunarodna bezbednost

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FORMS OF INTERNATIONAL POLICE CO-OPERATION IN THE TERMS OF TRANSITION IN THE WESTERN BALKANS

In this paper authors are trying to present transitional problems and boosts in the international police cooperation. In this endeavor they are giving at large presentations of key figures in this field, as like INTERPOL, EUROPOL, SECI center with a specific connection in two specific areas. Those are trafficking in human beings and sexual exploitation of children, especially in the field of abusing internet resources. With representation of resources of mentioned organizations, and their special forces in the named field, the authors are trying to connect some loose ends, existing in our courtyard displayed in the Serbian legislation in the matter. In this project they are giving some directions presented by key organizations in the field, and what is very interesting the one can see the discrepancies in acting by this directions. The bottom line is that we have to engage much more action in reflecting these directions, and to become one working wheel in this type of the machine for combating the crime.

Keywords: transitional processes, police co-operation, trafficking in human beings, child sexual abuse, INTERPOL, EUROPOL, cyber child pornography.

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It is pretty obvious that political and economical transitional processes targeting the Western Balkans region have caused changes in the structures of the Penal Codes and the Penal Proceedings Codes, just as in the ways of running the international police co-operation. Having its geo-strategic position in the Western Balkans, the Republic of Serbia is facing changes through getting new solutions within criminal legislative framework and Law Enforcement possibilities. Thanks to that, the organized criminal activities are not going to challenge that hard the stability of the region, as it used to be so far. Perspective times require perspective ideas and perspective doings. European integration stream relates to enabling more efficient and faster Law Enforcement international collaboration and considers creating pragmatic patterns of defining criminal offences and optimizing the criminal proceedings.

Let us make an overview of actual issues on the international police co-operation and the new criminal legislative approaches, mainly focused, in combating Child Pornography and High-Tech Crime in the Western Balkans and the Republic of Serbia, in particular.

2. International police co-operation

Having on mind various types of nowadays criminal activities including tradition in police *post delictum* repressive reaction and its pro-active nature just as an exception, we stress out the role of INTERPOL, EUROPOL and SECI as existing examples of international organizations being leading subjects of international criminal police co-operation in the worldwide, continental and regional sense.

2.1. INTERPOL[1]

INTERPOL is the world's largest international police organization, with 188 member countries. Created in 1923, it facilitates cross-border police co-operation, and supports and assists all organizations, authorities and services whose mission is to prevent or combat international crime.

INTERPOL aims to facilitate international police co-operation even where diplomatic relations do not exist between particular countries. Action is taken within the limits of existing laws in different countries and in the spir-

[1] http://www.interpol.int/public/ccf/Regles.asp last accessed on 14.11.2009.

it of the Universal Declaration of Human Rights. INTERPOL's constitution prohibits 'any intervention or activities of a political, military, religious or racial character.'

As defined in Article 5 of its Constitution, INTERPOL (whose correct full name is 'The International Criminal Police Organization – INTERPOL') comprises the following:

- General Assembly
- Executive Committee
- General Secretariat
- National Central Bureaus
- Advisers
- The Commission for the Control of INTERPOL's Files

The General Assembly and the Executive Committee form the organization's Governance.

General Assembly - INTERPOL's supreme governing body, it meets annually and comprises delegates appointed by each member country. The assembly takes all important decisions related to policy, resources, working methods, finances, activities and programmes.

Executive Committee – this 13-member committee is elected by the General Assembly, and comprises the president, three vice-presidents and nine delegates covering the four regions.

General Secretariat - located in Lyon, France, the General Secretariat operates 24 hours a day, 365 days a year and is run by the Secretary General. Officials from more than 80 countries work side-by-side in any of the Organization's four official languages: Arabic, English, French and Spanish. The Secretariat has seven regional offices across the world; in Argentina, Cameroon, Côte d'Ivoire, El Salvador, Kenya, Thailand and Zimbabwe, along with Special Representatives at the United Nations in New York and at the European Union in Brussels.

National Central Bureaus (NCB) - Each INTERPOL member country maintains a National Central Bureau staffed by national law enforcement officers. The NCB is the designated contact point for the General Secretariat, regional offices and other member countries requiring assistance with overseas investigations and the location and apprehension of fugitives.

Advisers – these are experts in a purely advisory capacity, who may be appointed by the Executive Committee and confirmed by the General Assembly.

Commission for the Control of INTERPOL's Files[2] (CCF) – this is an independent body whose mandate is threefold: (1) to ensure that the processing of personal information by INTERPOL complies with the Organization's regulations, (2) to advise INTERPOL on any project, operation, set of rules or other matter involving the processing of personal information and (3) to process requests concerning the information contained in INTERPOL's files.

INTERPOL aims to end the abuse and exploitation of human beings for financial gain. Women from developing countries and young children all over the world are especially vulnerable to trafficking, smuggling or sexual exploitation.

Trafficking in women for sexual exploitation is a multi-billion-dollar business which involves citizens of most countries and helps sustain organized crime. A violation of human rights, it destroys the lives of its victims.

Human trafficking is distinct from people smuggling in that it involves the exploitation of the migrant, often for purposes of forced labour and prostitution.

People smuggling implies the procurement, for financial or material gain, of the illegal entry into a state of which that person is neither a citizen nor a permanent resident. Criminal networks which smuggle and traffic in human beings for financial gain increasingly control the flow of migrants across borders.

Child sexual exploitation on the Internet ranges from posed photos to visual recordings of brutal sexual crimes. One of INTERPOL's main tools for helping police fight this type of crime is the INTERPOL Child Abuse Image Database (ICAID)[3].

Created in 2001, it contains hundreds of thousands of images of child sexual abuse submitted by member countries, thereby facilitating the sharing of images and information to assist law enforcement agencies with the identification of new victims.

Trafficking in human beings is a sophisticated crime that requires international law enforcement co-operation. INTERPOL organizes regional and international meetings, offers technical assistance and training, facilitates the exchange of intelligence, and provides other services for investigating and prosecuting criminals involved in such activity.

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[2] http://www.interpol.int/public/ICPO/speeches/SGChildren20070117.asp last accessed on 14.11.2009.

[3] http://www.interpol.int/Public/Children/Default.asp last accessed on 14.11.2009.

The INTERPOL Expert Working Group on Trafficking in Human Beings meets annually to raise awareness of emerging issues, promote prevention programmes and initiate specialized training. Its manual of best practice for law enforcement investigators includes information on how to investigate trafficking for sexual exploitation, trafficking for forced labor, trafficking for domestic servitude and trafficking for organ removal.

A recent INTERPOL initiative, Project Childhood[4], addresses the issue of sex tourism, aiming to develop partnerships with police authorities and other stakeholders in order to promote the prosecution of abusers and the rescue of victims.

INTERPOL also operates a Notices and Diffusions[5] system allowing global co-operation between its member countries in tracking criminals and suspects, as well as locating missing persons or collecting information. Especially relevant for the fight against child sexual exploitation is the Green Notice – through which countries can warn other member states if a known child-sex offender is travelling to their territory or region.

INTERPOL has developed additional tools which can facilitate the exchange of information among law enforcement agencies in member countries. The Human Smuggling and Trafficking message[6] (HST) provides a standardized format for reporting cases of trafficking between member countries and to INTERPOL's database. MIND/FIND technical solutions enable frontline law enforcement agencies dealing with people smuggling, such as border police or immigration authorities, to receive instant responses for queries on stolen or lost travel documents, stolen motor vehicles and wanted criminals. These databases are accessible to authorized users of INTERPOL's I-24/7 global police communications system and are useful in detecting cases of trafficking in human beings at the early stage of entry into a country.

International co-ordination

INTERPOL works closely with other key bodies involved in the fight against human trafficking, including Eurojust, EUROPOL, and the International Organization for Migration, the International Labor Organization, the

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[4] http://www.interpol.int/Public/Notices/default.asp last accessed on 14.11.2009.

[5] http://www.interpol.int/public/News/2006/THB20060421.asp last accessed 14.11.2009.

[6] This Convention could be found in Arabic, Chinese, English, French, Russian and Spanish on the site: http://www.unodc.org/unodc/en/treaties/CTOC/index.html last accessed 14.11.2009.

Organization for Security and Co-operation in Europe, the Southeast European Cooperative Initiative, the United Nations Office on Drugs and Crime, as well as NGOs active in this field.

In the field of trafficking there is fore mentioned The Palermo Protocol (Protocol to the UN Convention against Transnational Organized Crime, Palermo 2000.)[7]

The term 'trafficking' was first formally defined within the terms of Article 3 of the Protocol that was adopted by the United Nations General Assembly at Palermo, Sicily in December 2000 but it is helpful to first consider the terms of Article 2 because they set the tone for the remainder of the Protocol.

States that ratify the Palermo Protocol are **obliged** to:

1. Prevent and combat trafficking;
2. Protect and assist victims;

Promote co-operation between States.

Article 2 clearly shows the victim-centred, human rights based approach that was intended by the international jurists that drafted the treaty. It states that the overall purpose of the Protocol is to:

- Prevent and combat trafficking in persons, paying particular attention to women and children.
- Protect and assist the victims of trafficking, with full respect for their human rights.
- Promote co-operation amongst States in order to meet these two objectives.

It is also important to realise that the Palermo Protocol is an international treaty. This means that it is a legally binding instrument that creates obligations for all States that ratify or accede to it.

The key obligations on States created by the Palermo Protocol are as follows:

- To criminalise trafficking.
- For countries of origin to facilitate and accept, without undue or unreasonable delay, the preferably voluntary return of their trafficked nationals and those who have a right of permanent residence within their territories, with due regard to the safety of those persons.
- For countries of destination to ensure that such return is with due regard both for the safety of the trafficked person and the status of any legal proceedings relating to the fact of that person being a victim of trafficking

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[7] http://www.un.org/womenwatch/daw/cedaw/ last accessed 14.11.2009.

- To co-operate through information exchanges aimed at identifying perpetrators or victims of trafficking, as well as methods and means employed by traffickers.
- To provide or strengthen training for law enforcement, immigration and other relevant personnel aimed at preventing trafficking as well as prosecuting traffickers and protecting the rights of victims. Training is to include a focus on methods to protect the rights of victims. It should take into account the need to consider human rights, children and gender sensitive issues and encourage co-operation with NGOs as well as other relevant organisations and elements of civil society.
- To strengthen border controls as necessary to detect and prevent trafficking; take legislative or other appropriate measures to prevent commercial transport from being used in the trafficking process and to penalise such involvement; and take steps to ensure the integrity of travel documents issued on their behalf and to prevent their fraudulent use.
- To establish policies, programmes and other measures aimed at preventing trafficking and protecting trafficked persons from re-victimisation.
- To endeavor to undertake additional measures including information campaigns and social and economic initiatives to prevent trafficking; these measures should include co-operation with NGOs, relevant organizations and other elements of civil society.

Other Relevant International Definitions

1.3.1 Sexual Exploitation

The prohibition on forced prostitution and exploitation of prostitution of others has been incorporated into the Convention on the Elimination of All Forms of Discrimination against Women[8] (CEDAW). The Convention obliges State parties to take all appropriate legislative action and other measures to suppress all forms of traffic in women and exploitation of the prostitution of others.

1.3.2 Slavery and Labour Exploitation

In the past, too much emphasis has been placed upon trafficking for sexual exploitation and too little has been focused on slavery and labour exploitation. As knowledge of the modus operandi of the crime at the global level has

[8] http://www2.ohchr.org/english/law/pdf/slavery.pdf last accessed 14.11.2009.

developed, the scale of trafficking for non-sexual forms of trafficking has become more apparent and it is necessary to review the international legal standards in relation to various forms of labour exploitation.

1.3.3 Prohibition of Slavery

International law prohibits slavery and the slave trade and is especially relevant in the context of trafficking because there are many proven case histories with a modus operandi that includes the purchase, sale, transportation and imprisonment of victims and which fully meet the elements of the definition of enslavement.

This prohibition is part of customary international law which means that it applies to all States, irrespective of whether they have ratified the various international treaties which prohibit slavery. Slavery and the slave trade are defined in international law under Article 1 of the Slavery Convention of 1926[9] as being:

'Slavery' means the status or condition of a person over whom any or all of the powers attaching to the rights of ownership are exercised and 'slave' means a person in such condition or status.

'Slave trade' means and includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a person acquired with a view to being sold or exchanged; and, in general, every act of trade or transport in slaves by whatever means of conveyance.

1.3.4 Prohibition of Forced Labour

Forced labour is a consistent feature of the modus operandi of many forms of trafficking, particularly in areas such as agriculture, mining, sweatshops, domestic service etc. It is prohibited under international law except under very strict conditions (military service or normal civic obligations). Forced labour is defined under Article 2 of the Forced Labour Convention of 1930 [10]as being:

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[9] http://www.ilo.org/ilolex/cgi-lex/convde.pl?C029 last accessed 14.11.2009.

[10] http://www.ilo.org/ilolex/cgi-lex/convde.pl?C105 last accessed 14.11.2009.

Forced or compulsory labor shall mean all work or service that is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.

1.3.5 Prohibition on Debt Bondage

In many regions of the world, debt bondage (also referred to as "bonded labour") is the principal method by which the traffickers impose coercive control over their victims and maintain their exploitation of them.

Debt bondage is illegal under international law and is defined in Article 1(a) of the Slavery Convention of 1957 [11]as being:

The status or condition arising from a pledge by a debtor of his personal services or those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined.

It is also important to note that any contacts that recognise debt bondage are also illegal.

1.3.6 Prohibition of Forced Marriage

Within various cultures and locations, forced marriage is a typical and often hidden exploitative purpose of trafficking. Forced marriage is prohibited under international law and is defined under the terms of Article 1(c) (i) of the Slavery Convention of 1957 as being:

Any institution or practice whereby a woman, without any right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group.

The Convention also prohibits the "transfer of a woman to another person for value received or otherwise" and the prohibition is underpinned by the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage[12] and by the International Covenant on Civil and Political Rights[13].

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[11] http://www2.ohchr.org/english/law/convention.htm last accessed 14.11.2009.

[12] http://www2.ohchr.org/english/law/ccpr.htm last accessed 14.11.2009.

[13] http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=164&CL=ENG last accessed 14.11.2009

1.3.7 Prohibition of Trafficking in Organs

The international legal situation is less clear in respect of organ removals and transplants and criminal responsibility rarely features within the articles of domestic Penal Codes. Guidance on key areas of the subject can be found within the terms of the Council of Europe 1997 Convention on Human Rights and Biomedicine [14]and the 2002 Additional Protocol[15] to the 1997 Convention. The material areas of the Convention are as follows:

Article 5 - General Rule on Consent:

An intervention in the health field may only be carried out after the person concerned has given free and fully informed consent to it. The person shall beforehand be given appropriate information as to the purpose and nature of the intervention as well as on its consequences and risks.

This article is important because current knowledge shows that kidney donors cannot give free and informed consent to it because they were never told for example that although they may be paid anywhere between 2,000 to 10,000 US dollars for the organ, they were never told that the recipient would be charged between 100,000 to 200,000 US dollars for it. The donors are also not given information on the risks that they are likely to face after the donation and that there is a serious likelihood that they will subsequently forced to depend on dialysis or need a transplant themselves.

Article 21 - Prohibition on financial gain:

The human body and its parts shall not, as such, give rise to financial gain.

This prohibition is highly relevant because all current case analysis shows that the growth of organ trafficking cases is based upon the very high levels of financial profit that can be gained by the brokers, intermediaries, medical and laboratory staff that are involved in the illegal transplant procedures.

Other Violations of the Human Rights of Trafficked Victims

The modus operandi of trafficking means that the traffickers will repeatedly violate the fundamental human rights of their victims.

In addition to the specific prohibitions outlined above, the modus operandi of trafficking repeatedly involves violations of the fundamental human rights of victims. These include:

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[14] http://www.isciii.es/htdocs/terapia/documentos/Protocol_Biomedical_research.pdf last accessed 14.11.2009

[15] http://www.europol.europa.eu/ Last accessed on the 14.11.2009.

Denial or restrictions on freedom of movement - violates the individual's right to liberty and security of the person and freedom of movement.

Inhuman and degrading treatment - many forms of trafficking routinely involve physical, sexual and psychological abuse that clearly constitutes inhuman and degrading treatment.

Denial or restrictions on right to freedom of expression, information and association - most trafficked victims are denied these rights as an integral part of the coercive control mechanisms by which the traffickers sustain their exploitation of them.

Denial or restrictions on the right to private and family life - in many cases, the victims have been forcibly or deceptively removed from their families and are denied any access to privacy or family.

Denial or restrictions on the rights to standards of living, including adequate food, clothing and housing - in many instances, especially involving various forms of labour exploitation, victims are routinely denied adequate levels of nourishment or accommodation and are often detained in cramped and dangerous living conditions.

Denial or restrictions on the right to standards of health - the vast majority of victims are exploited in ways that are inherently dangerous to their health, such as the provision of un-protected sexual services or working in unsafe mines, factories etc. and are additionally denied access to health care for the wide range of serious injuries and illnesses that they suffer as a direct consequence of their exploitation as trafficked victims.

Restriction on the right to education - many child and teenage victims of trafficking are removed away from their family situations and denied access to any form of education.

Child Victims of Trafficking

There are a number of international standards relating to the exploitation and treatment of child victims and these are fully explored in Chapter 5 of this manual.

1.5 What is the difference between human trafficking and migrant smuggling?

One of the most difficult challenges facing law enforcement officers working in this area over the last decade has been the problem of distinguishing between the two similar but separate crimes of human trafficking and people smuggling.

Parts of the modus operandi of trafficking and smuggling are very similar - which makes it harder for law enforcement officers to separate the two types of crime.

The first key point to note is that in many instances, it may not be possible to make the distinction between the two crimes until the movement phase has been concluded and the exploitation phase has begun.

It is very difficult to detect trafficking in transit and at border points; in many cases, it may not be possible to distinguish between trafficking and smuggling until the transportation phase has ended and the exploitation phase has begun.

Prior to this, there may be little perceptible difference between a group of trafficked persons and a group of smuggled migrants; in fact, one 'shipment' of individuals could include persons destined for exploitation (victims of trafficking) and persons who are being moved from one country to another for financial or material benefit (smuggled migrants).

This lack of clarity is aggravated by the fact that some components of the modus operandi of both crimes can be very similar and difficult to separate - movement of individuals from one place to another; use of clandestine methods of movement; use of forged, stolen or bogus identity documents; illegal crossing of borders - and by the lack of knowledge and co-operation on the part of the potential victims. In many trafficking cases, the individuals themselves will not be aware until the exploitation phase begins that they are in the process of becoming victims of trafficking and will therefore continue to co-operate with and adhere to the instructions of the traffickers during the recruitment and transportation phases of the crime.

Notwithstanding these difficulties, careful analysis of the contrasts between the international legal definition of the two types of crime and of the key differences in the modus operandi of the two can help to simplify the process of distinguishing between them.

2.2. EUROPOL[16]

Mission

EUROPOL is the European Union law enforcement organization that handles criminal intelligence. Its aim is to improve the effectiveness and cooperation between the competent authorities of the member states in preventing and combating serious international organized crime and terrorism.

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[16] http://www.secicenter.org/ last accessed on the 14.11.2009

The mission of EUROPOL is to make a significant contribution to the European Union's law enforcement action against organized crime and terrorism, with an emphasis on targeting criminal organizations.

EUROPOL Vision Statement

"EUROPOL will be a world-class centre of excellence to support the EU member states' fight against all forms of serious international crime and terrorism."

EUROPOL Values are: Leadership and common approach; Integrity; Dynamic and proactive; Professional and results oriented; Credibility and reliability; Dialogue based cooperation; Engagement and commitment.

History of EUROPOL

The establishment of EUROPOL was agreed in the Treaty on European Union of 7 February 1992. Based in The Hague, Netherlands, EUROPOL started limited operations on 3 January 1994 in the form of the EUROPOL Drugs Unit (EDU) fighting against drug-related crimes. The EUROPOL Convention was ratified by all EU member states and came into force on 1 October 1998. Following a number of legal acts related to the Convention, EUROPOL commenced its full activities on 1 July 1999. Progressively, other important areas of criminality were added. On 1 January 2002, the mandate of EUROPOL was extended to deal with all serious forms of international crime as listed in the annex to the EUROPOL Convention.

In its meeting in Luxembourg 06 April 2009 the Council of the European Union, Justice and Home Affairs, adopted a decision transforming EUROPOL into an EU agency from 01 January 2010. Within the new legal framework changes can be introduced more rapidly in response to trends in crime since decisions can be taken by majority of two thirds of the Member States. EUROPOL's current direct Member State funding will be replaced by funding via the general budget of the EU. This will make EUROPOL become a full EU body subject to the Financial Regulation and the Staff Regulations of the European Communities.

Mandate

EUROPOL supports the law enforcement activities of the member states mainly against: Illicit drug trafficking; Illicit immigration networks; Terrorism; Forgery of money (counterfeiting of the euro) and other means of payment; Trafficking in human beings (including child pornography); Illicit vehicle trafficking; Money laundering.

In addition, other main priorities for EUROPOL include combating crimes against persons, financial crime and cybercrime. EUROPOL comes

into action when an organized criminal structure is involved and two or more member states are affected. From 1 January 2010 the operational possibilities will be enhanced by the extension of the mandate so that EUROPOL may support Member States investigations into serious crime that is not necessarily thought to be carried out by organized groups e.g. a serial killer operating cross border.

EUROPOL supports member states by:

Facilitating the exchange of information, in accordance with national law, between EUROPOL liaison officers (ELOs). ELOs are seconded to EUROPOL by the member states as representatives of their national law enforcement agencies;

Providing operational analysis in support of operations;

Generating strategic reports (e.g. threat assessments) and crime analysis on the basis of information and intelligence supplied by member states and third parties;

Providing expertise and technical support for investigations and operations carried out within the EU, under the supervision and the legal responsibility of the member states concerned.

EUROPOL is also active in promoting crime analysis and harmonization of investigative techniques within the member states.

Computerized System of Collected Information

The EUROPOL Convention states that EUROPOL shall establish and maintain a computerized system to allow the input, access and analysis of data. The Convention also provides the legal framework for the management of these systems, in particular as regards data protection, confidentiality and external supervision. The EUROPOL computerized system has three principal components:

An information system; an analysis system; an index system.

In addition to the above systems aimed at processing of personal data EUROPOL is developing and managing many more information products and services, either as part of or in support of its core business.

Finance

EUROPOL is funded by contributions from the member states according to their GNP. Budget 2009: EUR 65.4 million.

The Financial Controller is appointed by the Management Board, acting unanimously, and is responsible for monitoring the commitment and disbursement of expenditure as well as the establishment and collection of the income of EUROPOL.

The annual accounts of EUROPOL are subject to an audit. This is carried out by the Joint Audit Committee, which is composed of three members appointed by the Court of Auditors of the European Communities.

Personnel

The Directorate of EUROPOL is appointed by the Council of the European Union (Ministers for Justice and Home Affairs). It currently consists of Director Rob Wainwright (United Kingdom) and the Deputy Directors Mariano Simancas (Spain), Michel Quillé (France) and Eugenio Orlandi (Italy).

There are approximately 625 people working at the EUROPOL premises. Of these, approximately 120 are EUROPOL liaison officers (ELOs) representing a variety of law enforcement agencies, such as police, customs, gendarmerie, immigration services and others.

Management and Control

EUROPOL is accountable to the Council of Ministers for Justice and Home Affairs. The Council is responsible for the guidance and control of EUROPOL. It appoints the Director and the Deputy Directors and approves the budget.

The Council of Ministers contains representatives from all member states, and the requirement for unanimous decisions helps ensure a democratic control of EUROPOL.

The EUROPOL Management Board comprises one representative from each member state and has the overall task of supervising the activities of the organization.

The Joint Supervisory Body, comprising two data protection experts from each member state, monitors the content and use of all personal data held by EUROPOL.

International cooperation

In order to fight international organized crime effectively, EUROPOL cooperates with a number of third countries and organizations as follows (in alphabetical order): Albania, Australia, Bosnia and Herzegowina, Canada, CEPOL (European Police College), Colombia, Croatia, EUROJUST, European Central Bank, European Commission, European Monitoring Centre for Drugs and Drug Addiction, Former Yugoslav Republic of Macedonia, FRONTEX, Iceland, INTERPOL, Moldova, Norway, OLAF (European Anti-Fraud Office), Russian Federation, Serbia, Switzerland, SITCEN (EU Joint Situation Centre), Turkey, United Nations Office on Drugs and Crime, USA, World Customs Organization.

This is done on the basis of cooperation agreements concluded in accordance with the EUROPOL Convention. The EUROPOL External Strategy defines the framework within which EUROPOL is to develop its activities with regard to third partners.

24/7 Service

The EUROPOL liaison officers, together with the EUROPOL officers, analysts and other experts, provide an effective, fast and multilingual service 24 hours a day, 7 days a week.

2.3. SECI[17]

Southeast European Co-operative Initiative at first was lunched as an idea among the Euro-Atlantic cooperation in May 1995 in Vienna. Member States of the SECI are: Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Greece, Hungary, F.Y.R. of Macedonia, Moldova, Montenegro, Romania, Serbia, Slovenia, Turkey. Uniqueness of the SECI Center is made from following:

- Customs and Police work together in direct cooperation within a mutual Project;
- The Project does not overlap with any other initiatives, because it is not political co-operation, but a real operative collaboration;
- It works under the guidance and counsel of recommendations and directives of the INTERPOL and WCO

The Mission of the SECI is as following. Organization assembles the power of 12 nations' law enforcement agencies and adds the value of experts, thus building together a strong weapon against criminality. It commits its resources in order to sustain the Southeast European countries' declared war against organized crime and to strengthen the law enforcement capabilities for countering organized crime.

Advantages of the SECI Center are:

- Uniqueness - The SECI Center is the only international law enforcement organization which brings together police and customs representatives
- Efficiency - The 12 member countries representatives meet each other daily in the same working place
- Competence - The use of SECI Center speeds up the exchange of information process. Statistics prove that the time is reduced up to 80 percents than in bilateral cases

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[17] http://www.secicenter.org/ last accessed on the 14.11.2009

- Facility – The SECI Agreement ensures the necessary legal framework for all types of cooperation in the law enforcement area
- Cooperation – The SECI Center works as a platform for experience sharing and common trainings
- Expertise – The member countries take advantages of the SECI Center's know-how on countering organized crime in the South-east Europe
- Security – The SECI Center's communication system is a fast, high encrypted and cost-effective communication tool
- Assistance – The SECI Center provides logistical support for joint investigations.

Objectives of the organization are:

- Setting-up a mechanism based on enhanced law enforcement cooperation at national level to be used by the Parties in order to assist one each other, in preventing detecting, investigating, prosecuting and repressing trans-border crime.
- Support the field activities of the law enforcement officers
- Provide assistance to the Parties in order to harmonize their law enforcement legislation in respect to the EU requirements.
- Support national efforts in order to improve domestic cooperation between law enforcement agencies.
- Support the specialized "Task Forces":

TF on Human Trafficking and Migrant Smuggling; Anti Drugs Trafficking TF; Anti Fraud and Anti Smuggling TF; Financial and Computer Crime TF; TF on Stolen Vehicles; Anti Terrorism TF; Container Security TF.

The Southeast Europe Cooperative Initiative Regional Center for Combating Trans-border Crime, the SECI Center, is a unique operational organization which *facilitates the rapid exchange of information* between law enforcement agencies from different countries regarding trans-border criminal cases. The SECI Center *coordinates regional operations*, putting together the resources of the 13 SEE member countries in order to dismantle organized crime networks. The SECI Center operational activities are conducted within the frames of *seven fore mentioned Task Forces,* all addressing issues of drugs and human beings trafficking, stolen vehicles, smuggling and customs fraud, financial and computer crime, terrorism and container security. The SECI Center *performs analysis and reports* on specific areas targeting organized crime, and *organizes trainings* for member countries' law enforcement representatives.

The SECI Center's network is composed of the Liaison Officers of Police and Customs Authorities from the member countries, supported by 13 National Focal Points established in each member state. The NFP representatives stay in permanent contact with the liaison officers in the headquarters and keep close relationships with the police and customs authority in the host country.

The National Focal Points assure the rapid information flow, by collecting and distributing the information requests and answers from and to the law enforcement agencies and the headquarters liaison officers.

Brief history of SECI is: It started in April 15, 1998, Geneva – the SECI Agenda Committee approved the Romanian delegation's proposal project "Prevention and Combating Trans-border Crime" as part of the Trade and Transport Facilitation Program.

Legal framework of the organization is made of following. May 26, 1999 Albania, Bosnia and Herzegovina, Bulgaria, Greece, Hungary, Former Yugoslav Republic of Macedonia, Moldova, Romania and Turkey signed the Agreement on Cooperation to Prevent and Combat Trans-border Crime. Croatia signed the document on November 13, 1999 and Slovenia has acceded to the SECI Agreement on August 29, 2000. February 1, 2000, the SECI Agreement has entered into force. All the signatory states have ratified the SECI Agreement, which has as enclosed part the Charter of Organization and Operation of the SECI Center. October 2, 2000, Romania and the SECI Center had signed the Head Quarters Agreement between the SECI Center and Romania, which has entered into force on April 4, 2001.

Additional Complementary regulations have been adopted in order to ensure the proper implementation of the legal framework: Rules of Procedure of the Joint Cooperation Committee, Rules of Organization and Operation of the SECI Center, Financial Rules, General Standards and Procedures for the Processing of the Information and the Internal Rules of the SECI Center.

Implementation of the Legal Framework

February 11-12, 2000 took place the first meeting of the Joint Cooperation Committee (the highest body of the SECI Center) November 1, 2000 the SECI Center became operational.

Fore mentioned Task Forces emerged in following: On the May 15-17, 2000 the Task Force on Illegal Human Beings Trafficking has been set-up, for the first time. July 24-25, 2000 has been organized the first meeting of the Task Force on Illegal Drugs Trafficking; February 19-20, 2001 has been created the Task Force on Commercial Fraud

3. Tendencies in criminal legislative frameworks through the view of Serbia

The transitional processes in South East Europe (SEE), and Western Balkans (WB), inevetably are bringing transitional law changes in various areas. Those changes are very rapid and usually they are with little or even without efect to the cose that was reason for the change. Law changes are followed with tranzitional changes in institutions, often done with little, or no, strategic visions. The institutions of which we are talking here are usually the most important in their fields, and when you look at this kind of structure all togeather one can't shake the impression of conspiracy theory in praxis. Ofcourse this processes aren't forever running, they stop eventualy. After stopping what emerges is ruined institutions fueled with immoral and low demands for the citizens, like bribery and corruption in all forms. It is very hard for any individual to engage in resolving of this kind of problems, so that must be a task for the whole society. This task is going to be a challenge for every country in the SEE (or the WB) cause they are not all in the same stadium, every one of them had its own road through the trasition, and each one has to take unique measures in dealing with actual problems.

In legal aproach that, special, path for Serbia could be determined through changes and stadiums in rapid and, very often, changes in critical areas. Those critical areas for the most of countries are in the field of freedoms and human rights especially in restricting those with actions of administrative or judicial officials. Interesting course of events was happening in the field of Criminal and Criminal procedure laws, also in the specific subarea of Hi-tech crime. In the field of Criminal law changes firstly were made within the existing laws of Social Federative Republic of Yugoslavia so existing Criminal law of SFRJ was adopted and changed (just slightly) in FRY (existing from 1992 untill 2003, and then changed in State union of Serbia and Montenegro, untill 2006, when two states split and continued indipendent). Those changes were made in 1992 ("Službeni list SRJ", br.35/92), 1993 (three times "Službeni list SRJ", br.16/93, 31/93, 37/93), 1993 (24/94) and in 2001 (61/2001,), and after that in 2003 ("Službeni glasnik RS", br. 39/2003), in between emerged specialised laws such as Law on organization and jurisdiction of Government Authorities in supression organized crime (which itself suffered masive changes in short notices "Službeni glasnik RS", br. 42/2002, 27/2003, 39/2003, 67/2003, 29/2004, 58/2004, 45/2005, 61/2005, 72/09), Law on organization and jurisdiction of Government Authorities in processing war crimes ("Službeni glasnik RS", br. 67/2003, 135/2004, 61/2005) and finaly Law on

organization and jurisdiction of Government Authorities in supression of hi-tech crime ("Službeni glasnik RS", br. 61/2005). All those acts were changed in course of social and life conditions, special events (Such as assasination of Prime minister dr Zoran Đinđić) and as a result they weren't in accordination with crucial conventions of relevant field.

One fine example is Law on organization and jurisdiction of Government Authorities in supression of hi-tech crime, which was adopted in 2005 (7/4/2005 SU SCG) after Serbia signing the Convention on Cybercrime (adopted in Budapest, 23.XI.2001 The convention entered into force in 2004). This law has tried to make specialized organs for dealing with this type of a crime, but it took almost three years for all institutions created by this law to constitute. Just after constitution of agencies there were emerging more and more problems, such as funds and separate facilities, special equipment for those kinds of Government Authorities. But those aren't only problems in this field. Besides organizational and technical problems (paradox for itself) there are problems in law coordination with the Convention on Cybercrime. Those problems emerged soon after the adoption of this Act (Law on organization and jurisdiction of Government Authorities in supression of hi-tech crime), some crucial measures defined in the Convention were not implemented in this act nor were they in the Criminal procedure act. This situation then looks like giving a child a spoon to fight with heavy armored knight, and someone has to think itself who could do this kind of stuff intentionally? We had to wait for four years for government to change this Act, which is in parliament procedure. Exclusivity comes from the fact that Convention on Cybercrime was ratified by Serbian parliament in 2009, (14/4/2009), and it came into force in august of that year. We have a similar situation in the field of criminal law.

4. Conclusion

In this paper the authors have tried to connect the pieces of the existing puzzle in police coordination and cooperation on the territory of SEE and WB. The distinguished gentlemen as they are hadn't tried to show off everything that is emerging in the region, but the gleams that are shown in this article are a lot for the one who is searching for usable material in this field. Allowing inferring from the paper they are asking the question with partially given answer, Forms of cooperation are these, the legislation reforms and transitions are as followed the problems are these, so, what to do? Ok so we are here, and what next, but these are not only the questions, they are the

answers also. How, well if you analyze everything displayed you could open-mindedly conclude that only the unwilling are to play games around unfinished job. In the fact besides this number of agencies, and international organizations engaged around same problem there should be better result. But now and there anybody could find a break or a disruption in any level, if it isn't in the police (of one nation) it is in the judiciary, or maybe prosecutor's office, maybe even in the parliament. How could you stop it, nobody knows, but everybody in any position must fight against it without any doubt, and that is only vision.

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OBLICI MEĐUNARODNE POLICIJSKE SARADNJE U USLOVIMA TRANZICIJE NA ZAPADNOM BALKANU

U ovom članku autori pokušaju da ukažu na probleme međunarodne policijske saradnje u vremenima tranzicije U tom smislu, oni posebnu pažnju poklanjaju delatnostima i aktivnostima organizacija kao što su INTERPOL, EUROPOL, SECI, posebno analizirajući probleme u vezi sa trgovinom ljudima i zloupotrebama interneta.U tom smislu, autori daju neke preporuke kako poboljšati rad u ovim oblastima, na sprečavanju ovih negativnih društvenih pojava.

Ključne reči: procesi tranzicije; policijska saradnja; trgovina ljudima, seksualna zloupotreba dece, INTERPOL, EUROPOL.

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TRIGGER EVENTS – VASA MISKIN STREET, MARKALE, RACHAK

This article is a part of one big study – monography that was written by Slobodan Vuković : „The Ethics of the Western Media". In that book the Anti-Serbian propaganda and the hate speech against Serbs, that were charactersisticof the preceding two decades, are analyzed. But, someone could ask why this text is here and what is the connection between the transition and the Anti-Serbian propaganda that was dominant in the Western world and in the Western media. We think that for the Serbian transition not only wars, criminality, corruption, suicides, social anomy, chaotic social reality, unemployment, depression of the people, new laws are characteristic, but also the negative image of Serbs constructed in the Western media. That negative image had and still has a big and important influence on our transition, on our social reality, on the psychology of those who have contacts with Serbs and on the psychology of Serbs also. Due to that negative false image, Serbia was bombarded ten years ago and that had many other negative social, legal and psychological consequences, such as the criminality, „Vietnam syndrom", suicides and many other things. In some way, thanks to that fabricated negative image, Serbia is more distant from Europe than other countries of the region.That negative image also had an impact on the foreign investments. So, consequently, we decided to include this text in this book about the Serbian law in transition.

Key words: media; anti-serbian propaganda; negative image;

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The topic of the present paper is the way of media presentation of several "trigger events" planned in advance or those whose media content has changed and was adapted to momentary political needs of those who ordered them, and after which NATO military machinery has been moved against

Serbs for their, again planned, punishment. Many Western high official have taken part in producing these events, or in ordering them directly or indirectly. All accusations of Euro-American officials against Serbs and supported by media, or *vice versa*, were in course of 90s designed to bring them to the dock and to punish them and/or to find an effective justification before their general public for their former and future steps. These accusations and staged events obtained unprecedented media attention, especially in the sphere of political decision-making even at the highest level that are taken on the ground of information found in the media, or ordered for the purpose. Naturally, there were situations of media "exerting pressure" on the ground of agreed paradigm on these officials to take specific measures. Consequently, depending on the need and the case itself – and not only in Yugoslav case but also in other ones – sometimes media were the ones to be first, and in other cases the role was taken by the officials. For the purpose of using these cases – which is the topic in this paper – special method applied involved mass killings committed by Moslems and imputed to Serbs which, as a rule, happened in crucial moments and/or when "international community" had to render some important decisions against Serbs. Almost identical was the case with Kosovo and Metohija after they came to the agenda.

It has been always known that all these mass killings, and particularly those in Bosnia and Herzegovina (Vasa Miskin street and the first and second Markala market crime) that provoked unprecedented fuss and after which Serbs have been punished, was staged by Moslems as a show for the media. That fact has been known to US Administration from the very beginning (1992), but it kept its silence. The following facts confirm that conclusion. According to the analysis of the Terrorism Board of the Republican Research Committe of the U.S. House of Representatives (for a long time unavailable to the public) "it is clear that Iran and its allies use violence in B&H as a springboard for launching Djihad in Europe" and/or that Moslems in B&H have since long ago been considered the initiators of penetration of militant Islam into Europe; moreover, there exists a strong cooperation between Moslem Government in Sarajevo and the official Teheran.In addition, events in Sarajevo (sufferings of civilians) were, according to the same Commission, organised by Moslems. More precisely, many of these Moslem fighters were trained "in Islamic terrorist organizations and started to commit crimes, inluding some of the worst bloodsheds against Moslem civilians in Sarejevo". All the killings and explosions were "in fact shows for Western media organised by Moslems themseles in order to dramatise the situation in the town and obtain

sympathy and milirary intervention". An example is also included: "Serbian forces have taken prisoners of a Moslem platoon, on 20th June and wearing Serbian uniforms, on their way to attack Muslim positions from Serbian lines". The Americans also knew that Bosnian forces were armed from Iran (via Zagreb).[1] Similarly, General Phillipe Morillon stated to a *Le Mond* lady journalist that "Bosnian Presidency here deliberately maintains the conflicts (…) which has a priority in calling attention of the world public".[2] But no one of the key Euro-American officials in B&H did not pay attention to that statement. It goes without saying that mostr of the free media in Europe and U.S.A did the same.

Most conspicuous of these crimes and the ones received unprecedented media coverage, implied to Serbs, relate to the staged mass murders in Sarajevo, in the Vasa Miskin street on 27 May 1992, which were immediately suspicious as explanation.[3] Here, too, is the "canon bombing" at the time of Douglas Hurd's visit on 17 July, then also the "grave e xplosion" (4th August) and the killing of ABC producer David Kaplan on 13 August 1992.[4] In all these case Serbian artillery was out of reach, and the arms used against the victims were not the ones reported by Bosnian authorities and Western media to have been applied. In all three cases, according to admission by Americans themselves, the crimes were committed by the Moslems.[5]

At the masasacre at the Markale market on 5 February 1994, 58 people where killed and 142 wounded. First statement of General Rouse on 5th February was that he "believed" that shells (in plural) were shot from Serbian positions. The day after he stated that "the analyses were completed but that

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[1] "Iranska odskočna daska za Evropu" (Iran's European Springboard), *Nova srpska politička misao* vol. XIV, no. 1-2, 335-377. Task Force on Terrorism and Unconventional Warfare, Republican Research Committee. U.S. House of Representatives, Washington, D.C. 20515, Sept. 1992.

[2] *Le Mond,* 4th February 1993, quoted from: Merlino Ž. (1994), *Istine o Jugoslaviji nisu sve za priču,* Kontekst, Beograd, 106 (Merlino J., 1993, *Les verites yougoslaves ne sont pas toutes bonne a dire.* Ed. Albin Michel, S.A. Paris.

[3] D. Doyl, *Independent*, August 28, 1992.

[4] These cases involved: on August 4th during the funeral of two children there was explosion and shooting; a member of the team following the then Prime Minister of SR Yugoslavia – Milan Panic, David Caplan, journalist was killed. World media announced that Serbs were responsible for the killings and masacre at the graveyard; although knowing the truth, U.S. Administration did not deny the news.

[5] See footnote 1.

it was impossible to say who shot a shell" (single one!). This was confirmed the same day in the official statement of the UN Secretary General. Serbs requested establishment of an independent commission to examine the case, but a State Department representative declared that "it was clear that Bosnian Serbs, by requesting a commission, intend to divert the attention of the international community from the strategy in Sarajevo,[6] which otrherwise has been a frequent formulation of American officials whenever rights of the Serbs were undermined. According to the official UNPROFOR statement, there was no reliable evidence as to which of the belligerent parties has committed the crime, although there existed a secret report indicating the Moslems were the culprits. The whole thing was repeated on the model applied in the case of organising the Markale market explosion on 27 August 1995[7] and in both cases the crime was committed by Bosnian Government because the basic characteristic of fighting by Bosnian Moslems was to slander the Serbs, and this, according to Edward S. Herman, stemmed from their final goal "to have NATO coming to help them with bombs". To achieve that goal, they were ready "to kill their own people", as clearly evidenced "in brutal bombing of Sarajevo civilians in three cases of massacre: in 1992 with people waiting in line for bread, in 1994 at Markale market, and in 1995 at the second mass killing at the market".[8]

World media announced, on the ground of the established paradigm and at the hint by State Department, to all the world that Serbs were the guilty ones behaving as criminals who use to kill peaceful citizens waiting for bread, in spite of the fact that all available data, at that time and subsequently, indicated the contrary. Moreover, most influential American media tried to hush up the whole thing after immediately expressed doubts as to information according to whih Serbs had to be blamed.[9] Hushing up of these crimes, as

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[6] Koljević N. (2008), *Stvaranje Republike Srpske*, vol. I, 425.

[7] I. Ramonet, *Le Mond diplomatique*, March 1994; Beham M. (1995), "Mediji kao izazivači požara", in: *Srbija mora umreti*, Filip Višnjić, Belgrade, 101-102; Gregory C. (1995), Joint U.S. Muslim War against Serbs – U.N. as Puppet, *Strategic Policy*, nos. 7-8.

[8] Herman S. E. (2006), The Approved Narrative of the Srebrenica Massacre, *International Journal for the Semiotics of Law*, vol. 19, no. 4, p. 417.

[9] David Binder was not able to publish his article in the *New York Times*, instead publishing it under the title "The Balkan Tragedy: Anatomy of Massacre" in the *Foreign Policy* quarterly, no. 97, Winter, 1994-95; D.Binder, "Bosnia's Bombers", the *Nation,* October 2, 1995.

well as many other ones, will continue and not one of them was proceeded by B&H and Croatian courts out of fear to have those liable discovered.

The confusing point in this case, as in many others, is the very thought that "it was possible to presume that Moslem rulers could kill their own people only to gain political benefits" although the facts undoubtedly lead to that direction. Naturally, the suspicion might have been provoked already by the fact that the "massacres were rather favorably prepared in terms of time in order to have an impact on NATO and the UN to interevene more decisively in helping the Bosnian Moslems". But more important was the fact that many UN officials and high-ranking Western Army officers have claimed that there existed reliable proofs that in all three case the actions were planned and carried out by Bosnian Moslems.[10] The whole matter was known to everybody, but it did not help – in all three cases Serbs had been punished.

In another case the *Herald Tribune* announced that, according to a report of a UN unit, "Bosnian Army sniped at own people",[11] but no one paid any attention – as always before. Should Serbs were at issue, almost all Euro-American media would immediately report the case, adding something as well. It was clear to everybody that these Moslem crimes against own people happened, as a rule, before negotiations or after failed peace talks conferences. Their function was to exert pressure against Serbs and they were carried out in agreement with Western governments and with considerable assistance of their intelligence services. They also enjoyed the support of Western media. Such kind of crimes were rather numerous. Denials and subsequent discovering of principal culprits did not interest either the Western officials or their media, so that they remained a dead letter on the paper.

This is evidenced by the fact that Bil Clinton rushed to accuse Serbs for the second Markale massacre in order to justify the oncoming punishing of Serbs, although he was informed by American and English intelligence services that the crimes were committed by Moslems. This was proved also by U.S. officer John E. Sray, who was present at that time in Bosnia as a member

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[10] Herman S.E. (2006), p. 417. A fair summary review of these "self-provoked crimes" in: *Senate Staff Report of January 1997* on "Clinton Approved Iranian Arms Transfers Help Turn Bosnia into Militant Islamic Base". http://senate.gov%7erpc/releases/1997/iran.htm#top; see also Ce-es Wiebes, *Intelligence and War in Bosnia, 1992 – 1995*,Lit Verlag, London, 2003, pp. 68-69.

[11] Mice O'Conor, "Bosnian Army Sniped at own People", UN unit says", *Herald Tribune,* August 2, 1995.

of the intelligence department of the U.S.A. in Sarajevo. He, namely, indirectly made known that high officials of Bosnian Moslems have taken part in the incident.[12] But this, too, was not acknowledged by anyone since the indictment has already been written.

Immediately after these accusations coming from "international community" and/or mighty powers of the West, SR of Yugoslavia, and thus the entire Serbian people were subjected to political, economic, scientific and sports sanctions that were followed by military actions of the NATO Alliance. Nothing has prevented the realization of their plans, not even denials such as the one published in the influential *Sunday Times* under the heading "Serbs are not guilty, UN experts warn that the shell was Bosnian".[13]

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To the mentioned media manipulations one should add the usage of passing over in silence or – even should something be admitted – lowering the number of Serbian victims in Srebrenic, Bratunac and Birtcha area, and/or hiding the organised crime committed against Serbs by regular (Moslem) army of Bosnia and Herzegovina under the command of Naser Orić which means – Moslem Government in Sarajevo. Only from May 1992 to January 1993 in course of operations of Moslem troops in villages of the Srebrenica Region over 1,300 Serbs have been killed,[14] out of which only in Srebrenica and Bratunac municipalities 960 civilians – old men and women. 21 and respectively 22 villages in these municipalities were put on fire and plundered. In the village of Radovčići, on May 5, 1992, an old teacher (Vasa Palančanin) in wheel-chair was burned alive.[15] Some of these Moslem raids are described by Ibran Mustafić[16] who tried

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[12] Sray E.J. (1995). „Selling the Bosnian Myth to America"; see Beware B. (1995), *Foreign Military Studies,* Fort Leavenworth, Kansas, October (http://leav-www.army.mil/fmso/documents/bosnia2.htm)

[13] *Sunday Times*, October 1, 1995.

[14] *Genocid počinjen nad srpskim narodom na području subregije Srebrenica 1992. godine,* Documentation Center of the Republic of Srpska for war crimes research, Banja Luka (http://-/www.dcrs.org)

[15] Ibid.

[16] He declared in discussions about decision concerning the referendum on independence of B&H: "I like Novi Pazar and Istambul thousand times more than Drvar and Bosansko Grahovo (towns populated by Serbs). – Mustafić I. (2008), *Planirani haos 1990 – 1996*, Sarajevo, p. 129.

to subsequently find justification for the above mentioned crimes. He also tried a subsequent justification for Moslem troops claiming that they had to supply food for the enclave (bu pillage!).[17] The truth is that Moslems have pillaged in the Srebrenica Region everything they could,[18] while the rest they put on fire, killing the people and often massacring them. As a result, Orić with his troops stationed in Srebrenica managed to control over 95% of that municipality and the half of the Bratunac municipality,[19] raiding from them the surrounding Serbian villages, continuing that even after proclaiming Srebrenica a protected zone. This fact is confirmed by statistcs: in 1991 there were 9,390 Serbs in Srebrenica, while after the Moslemo offensive only 860 of them remained, i.e. 9%.[20]

After Srebenica was declared a protected zone under the UN control, according to quoted I. M – one of the leaders of Moslem party SDA in that town – continued their attacks against Serbian positions,[21] as well as slaughters of Serbian population in the surrounding villages. In the 1992 – 1995 period 3,287 Serbs have perished in these activities, out og whom 2,383 were civilians.[22] Crimes were committed mostly by raids of Moslem army from the "demilitarised" and protected Srebrenica zone.[23] Consequently, "there is no doubt that politicians in Sarajevo have used the enclaves in eastern Bosnia as an instrument of pressure on the international community.[24]

Systematic silence about sufferings of Serbs has been continuing more than a decade, since it suits to certain Western governments, as the case is with another UN protected zone as well – the Srpska Krajina Republic which was completely cleansed from Serbs by Croatian forces. The fact that the town of Srebrenica has been demilitarised was confirmed by the UNPROFOR

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[17] I. M. (2008), *Planirani haos 1990 – 1996*, p. 129.

[18] Plundered were 7,200 head of cattle, 16,000 sheeps and enormous quanities of other food. ' Ivanišević M., *Dokle ćutati?* (interview), *Nova Zora*, nos 18-19, pp. 50-62.

[19] Honig V.J., Bot N. (1997), *Srebrenica: svedočanstvo o jednom ratnom zločinu,* B 92 Radio station, Beograd, 113. (Honig J.W. & Both N. (1996), *Srebrenic:record of a war crime,* Penguin, London).

[20] Ivanišević M., op. cit., footnote 18, pp. 50-2.

[21] Mustafić I. (2008), op. cit., footnote 17.

[22] Ivanišević M. (2007), *Srebrenica jul 1995 – traganje za istinom*, Hrišćanska misao, Beograd, 19, 69-143.

[23] Mustafić I. (2008), op. cit., footnote 17.

[24] Honig J.W, Both N., op. cit., footnote 19.

commander General Lars-Eric Wahlgren, five days after that act.[25] Here one may find a reasons the Netherlands opposes the European integrations of Serbia: after taking over the service of protection from the Sweedish battallion, Dutch units were responsible for the security in Srebrenica but still permitted the concentration of Moslem troops in the town, numbering between 3,000 and 4,000 armed soldiers, and subsequently had nothing against their raiding the surrounding unprotected Serbian villages.[26] Accordingly, Srebrenica was not a demilitarised zone at all but, first of all – as Edward Herman says – a protected Moslem (Bosnian) base used for eliminating Serbian population.[27] This is also a key reason of hiding by the West the Serbian victims in the Srebrenica Region.

On the other hand, the Euro-American media and officials pass over in silence the inter-Moslem conflicts in Srebrenica[28] (the resulting victimns were also subsequently imputed to Serbs) and the town of Bihać as well as losses of Moslem troops (fighting against Serbian forces) trying to break through the woods to reach Tuzla (the facts mentioned also by Mustafić). Relevant in this respect is also the internal Moslem fighting in course of Srebrenica fall – confirmed by members of the Dutch blue helmet units: they have seen "the fighting in two places between those (Moslems) who wanted to stay in the town and those (also Moslems) who intended to leave".[29] Subsequently, they perished there in continuous fierce fightings atound Srebrenice during the entire war. Special problem was the faulty DNA identification due to non-professional handling of bodies.[30] One might add to the above the exaggerations and mythical approach of Euro-American officials and mass media[31]to the crimes of army of the Bosnian Serbs committed against the Srebrenica Moslems, which are not to be contested. In other words, the ground for such apoproach was the role of victims given in the Western media, from the beginning of the conflict, to perished Moslems. Sre-

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[25] Honig J.V., Both N., op. cit., preceding footnote, p. 113.

[26] "Bosnia: The Great Betrayal", *New York Review of Books*, March 1998.

[27] Herman S.E., "Serbs Demonization as Propaganda Coup", *Global Research,* April 9, 2009.

[28] Mustafić I. (2008), *Planirani haos*, various pages.

[29] Elsaesser J., (2001), *Kriegsverbrechen. Die toedlichen Luegen der Nato und ihre Opfer im Kosovo-Konflikt,* Konkret, Hamburg.

[30] Herman S.E., footnote 27.

[31] Elsaesser J., op. cit.

brenica massacre, acording to E. Herman, "is the biggest triumph of propaganda connected to Balkan wars. The media became fellow-fighters in the 1991 war so that we have witnessed servility towards Bosnian Moslems and anti-Serb attitudes as well as disappearance of all impartiality stabdards."[32]

In other words, according to Herman, three points direct one to serious questions about Srebrenica that were not raised at the time of massacre and immediately after. The first is that it has completely suited the political needs of Clinton's Administration, Bosnian Moslems and Croats. Secondly, after Srebrenica there were talks about a series of extermination actions taken by Serbs which were timed perfectly well to coincide witrh strategic moments to meet the need of public support for violent interventions of the U.S. and NATO forces. And the third point: the evidence of the massacre indicating alleged 8,000 killed has been, to say the least, problematic;[33] guessing about and increasing of Srebrenica victims has been a topic from the very beginning only to be actualised at the time of NATO bombing as one way of justification of the aggression.[34]

The figure of 10,000 missing persons was first mentioned by the International Red Cross official Gaultier, with the qualification that many of them have been recorded twice.[35] Two weeks later, *The New York Times* has launched, without any qualification, the news about 8,000 missing persons from Srebrenica,[36] who were subsequently changed into killed in many reports. Increasing the number of victims of Srebrenica Moslems may be put in the following context: in 1995 Clinton was under political pressure of media and Bob Dole to take severe measures in favor of Bosnian Moslems,[37] so that he had to find justification for his more aggressive policy,[38] and satisfy his hawks.

Participating in planting of evidence and deceiving the public were even the highest American officials. On 10 August 1995 Madlein Olbright, for instance, showed at the Security Cuncil closed session some satellite photos

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[32] Herman S.E., (2006), "The Approved Narrative of the Srebrenica Massacre", p. 431.

[33] Herman S.E., op. cit., footnote 32, p. 411.

[34] See footnote 31.

[35] *Junge Welt*, 30 August 1995; quoted from Elsaesser, op. cit.

[36] September 15, 1995 edition.

[37] Ivo Pukanić, ''Uloga SAD u Oluji. Oduševljen operacijom Bljesak, predsednik Klinton je dao odobrenje za operaciju Oluja'', *Nacional,* Zagreb, 24. maj 2005.

[38] Herman S.E. (2006), footnote 32, p. 411.

with the purpose to denounce the Serbs. Showed at a photo is a group of people on a stadium, allegedly Bosnian Moslems in Srebrenica, while at the next one, allegedly taken immediately after the first, one sees the contour of a mass grave. These photos have never been published or verified on the spot, in spite of the Hague Court's claiming "conciderable efforts of Serbs to hide the bodies".[39] The media did ask questions about the matter, although Allbright has promised "to follow the developments".[40] Two months later (in October 1995), David Rohde, the *Christian Science Monitor* correspondent, reports his visit to the place of alleged mass grave near Srebrenica, for which he was granted in April 1996 the Pulitzer Prize for journalism.[41] This only confirms that there was a wide agreement in American society that Serbs were the only ones to be blamed for all the events in the territory of second Yugoslavia because every report, even if false, has been received as true.

In fact, the alleged claims were not apt to be proved because they were challenged before Olbright had them submitted. A whole month before, an American official has admitted that "nothing has been established by sattelites".[42] The point of the "symulacrum news" was to make such kind of presentation serving for turning the attention from the massacre and persecution of Serbs in Krajina

Increasing the number of Srebrenica Moslem victims should be viewed from yet another aspect. "Bosnian Moslem officials, namely, claimed that Alija Izetbegović, their leader, has told them that Clinton stated to him that U.S. intervention mightht be possible only should Serbs kill at least 5,000 people in Srebrenica. The Moslem leader subsequently denied this statement.[43] However, Hakija Meholjić, former chief of police declared that he, together with seven others, may confirm the statement on

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[39] ICTY, Amended Joinder Indictment, May 22, 2002, Par. 51; http://www.un.org/indictment/english/nik-ai020527c.htm

[40] Steven Lee Meyers, "Making Sure War Crimes Aren't Forgotten", *The New York Times*, September 22, 1997.

[41] Johnston D. (2002), *Fools' Crusade,* Monthly Review Press, New York & Pluto Press, London.

[42] Paul Quinn-Judge, "Reports of Atrocities Unconfirmed So Far: US Aerial Surveillance Reveals Little", *Boston Globe*, July 27, 1995.

[43] Herman S.E. (2006), p. 412, quoted from *The Fall of Srebrenica* (A/54/549), Report of the Secretary General pursuant to General Assembly Resolution 53/55, November 1, 1999, para. 115 (http://www.haverford.edu.relg/sels/reports/UNsrebrenicareport.htm)

Clinton's advice.[44] Srebrenica massacre happened between 10th and 19th July and the majority of perished Moslems were fighters and not civilians, because Bosnian Serbs have sent women and children to a safe place.[45] Many Moslems also found refuge from Srebrenica in the Moslem part of B&H or Yugoslavia (between 11th and 13th July some nine hundred of them swam across Drina River to SRY, i.e. almost an entire brigade of Moslem army. Accordidng to a Red Cross report, Yugoslav authorities have taken care of all of them.[46]

Most recent incomplete reasearch (their number to rise in the future) shows that in the Memorial Center and Mezarje at the Potochari graveyard 914 names out of 2,442, identified and burried until 11th July 2006, are still controversial (their names were found in the final electoral roll in 1996). In addition, there exists evidence that names of 175 allegedly burried Moslems (Bosnian) are found in that Center although they have perished or died before or after July 1995.[47] Consequently, a series of question may be raised: how many Moslems have perished in the breakthrough to Tuzla (presumably 2,000 soldiers) and how many were burried at the Memorial Center and Mezarje. Furthermore, it is known that 2,082 bodies of Moslems were exhumated in the vicinity of Srebrenica. How many of them perished in the fightings with Serbian forces and what is the numer of perished in their own internal fighting. These and many other questions are not raised by Western official and media in order not to disturb the established paradigm / that Serbs are the Evil, and Moslems innocent Victims.

Mythologising of Srebrenica and considerable multiplication of the number of victims are done rather skilfully in order:

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[44] Hakija Meholjić (interview), "5000 muslimanskih glava za vojnu intervenciju", *Dani*, 22 June 1998: http://cdsp.neu.edu/info/students/marko/dani2.html

[45] Herman S.E., (2006), p. 412.

[46] Quoted from: *Prosecutor to Miloshevic,* IT-02-54, Trial transcripts, December 10th, 2003, page 30340, line 17, to page 30341.

[47] The first list of names relates to persons for which it was judicially confirmed (on the ground of Moslem recors) that they have died at another time or place. The second list, with 88 names, relates to those for which there was evidence that they were burried at other places, meaning that they have perished before July 1995. Ivanišević M. (2007), *Srebrenica jul 1995 – traganje za istinom*, Beograd, 147-166.

(1) to provide yet another argument for justifying the participation of Western governments in dismembering the second Yugoslavia, while the consequence of that dismembering has been the war.

(2) to justify morally and politically both earlier and subsequent moves of the "international community" against Serbs and Serbia (sanctions, bombardment, separation of Kosovo and Metohija).

(3) to have, whenever needed, the argument against the Republic of Srpska and for its subjugation to the Moslem-Croatian coallition coined already at the time of Ustashi Independent State of Croatia.

(4) to obtain yet antoher proof to serve for a constant pressure on Serbia, and/or to hush it should it become "disobedient according to their assessment, as well as to put it finally under control of the West. This is why at the time of annual memorial services all Euro-American media blow large trumpets announcing again sufferings of the Moslems, while totally ignoring those of the Serbs

(5) to hide or minimize the role of blue helmets, meaning of the mighty states of the West associated in NATO, both in perishing of Serbs in the Srebrenica Region but also in persishing of Moslems.

(6) to forget the fact that Croatian authorities have welcomed the claims on Srebrenica massacre, "because this was the way of diverting the attention from their ethnic cleansing of Serbs and western Bosnia Moslems (almost completely neglected by Western media), as well as to provide the mask for the already planned ethnic cleansing of several hundred thousend of Serbs in Kninska Krajina".[48]

(7) to make relative Croatian crimes or, in a better case, make equal Serbian and Croatian crimes (Jasenovac and other places of execution in Lika, Kordun, Banija and Herzegovina) in the Second World War, i.e. to do everything possible in order to say: Croats are not the only criminals, since Serbs are, too.

Continuous repetition of stories of suffering of Moslems in Srebrenica (which must not be forgotten) and increasing the number of victims, parallel to ignoring Serbian victims by various NGOs in Serbia is but a justification, or repayment (otherwise disguised in many ways) for the money received from various international sponsors, participants or supporters of dismembering of the second Yugoslavia, its bombardment and demonizing of Serbs and Serbia.

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[48] Herman S.E. (2006), p. 412.

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In this and many other cases, the accusations by world powerful ones and publis opinion creators opposing Serbs have regularly gained asistance from "neutral" international observers or peace-makers who are nothing else but outposts of their governments who primarily care about their rewards or their employers' interests. Their most often false reports are advertised all over, and the Euro-American officials and media give them full legitimacy. At one instance they would ignore real culprits (Markale, Vasa Miskin street),[49] in other instances they hide reports, while in still other ones they were direct accomplices (William Walker – the case of Rachak), and/or provider of "trigger events" indispensable for justifying the commencemnt of bombardment of Serbia. In many occasions they supplied "evidence" against the official enemy by inventing new reasons and staging new events.[50]

According to a report by the Republican Party Committee in the American Congress, dated 12th August 1998, before the Rambouillet "negotiations": "Plans for the NATO intervention under the leadership of the United States are mainly completed. The only thing missing is a stormy event with precise and detailed media coverage, which would politically initiate the intervention."[51] This, as it is known, was the care of Clinton's Administration by recognising the KLA (Kosovo "liberation" army) and by staging the Rachak case. Christopher Layne and Benjamin Schwarz prove that right that Administration was responsible both for "the Kosovo humanitarian crisis and the recogniciton of KLA as a dominant force in Kosovo.[52] In the course of bomb-

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[49] "First investigation of the bomb crater at Markale", according to British general Michael Rose, the commander of UN forces in B&H, "has shown that it has been shot from the Bosnian side" – particularly if one has in mind that Moslems have " taken away some parts of the shell before the UN forces have come to the spot". But this was never disclosed. – Rouz, *Misija u Bosni,* Tetra MG, Beograd, 66-69 (Rose, General Sir Michael (1998) *Fighting for Piece,* The Harvill Press, London).

[50] *Berliner Zeitung*, 14th March 2000; also *Il Manifesto,* "OSCE lied about Racak". April 9, 2000; Peter Bein, „Why we must not trust NATO...", International Conference against Depleted Uranium Weapons, Manchester, 4-5 November 2000, quoted from: Vlajki E. (2001), *Demonizacija Srba*, N. Pašić, 307-313 (Vlajki E. (2001), *Demonization of Serbs: the Western Imperialism and Media War Criminal*, Revolt, Ottawa-Ontario-Canada).

[51] Olševski M. (2001), *Rat za Kosovo*, 62.

[52] Laxne C. And Schwarz B., „For the Record", *The National Interest*, fol. 1999, p. 9, quoted from: Avramov S., *Genocid u Jugoslaviji 1941-1945, 1991...*, vol. II, Academy for Diplomacy and Security, IGAM, Belgrade, 148.

ing the SR of Yugoslavia the reasons for NATO intervention were altered (the same was subsequently done in Iraque as well). The new name was: humanitarian catastrophe in Kodsovo and Metohija as a result of American ultimatum manacing the occupation of Serbia and bombardment, after which the propaganda approach used the above slogan. This was entirely supported by all Western media; contrary to such claims, Albanians began to leave the Province only after the commencement of bombardment. Several reasons were behind that move: the ones escaped "because of the risk of NATO attack" and/or out of fear from bombs, while others "under the KLA advice and not due to Serbian deportations"[53]; still others – only after the NATO call to leave the Province,[54] and finally certain number of Albanians left the Province due to intensified fghtings between Serbian forces and the KLA as well as because of amplified Serbian reaction due to logistic support rendered by KLA to help NATO air strikes[55] because they were combined with its military activities.[56] Escaping of Albanians from Kosovo and Metohija is a constant topic of Westren media, while they completely ignore Serbian refugees. At the time of that Albanian "compulsory" emigration there was a widespread hunt across temporary refugee camps in Macedonia and Albania for video shots of Serbian atrocities offered to be paid 20 or 30 thousand dollars each.[57]

Prior to the discussion on Rachak case, after which the West bombed SR of Yugosavia, it is indispensable to add (although this is a well-known fact) that the United States have out of strategic reasons decided to overthrow the authorities in Belgrade,[58] and therefore have established cooperation with the KLA,[59] although before that Americans have proclaimed it a terrorist organ-

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[53] *Sunday Times*, March 30, 1999; *The Guardian, June 30, 1999, quoted from: Hemond F. (2000), Rat trećeg puta:Novi laburisti, britanski mediji i Kosovo*, u *Dirigovana moć: mediji i kosovska kriza,*ed. By F. Hemond and E. Herman, Plato, Belgrade, 204-05 (same editors, 2000, *Degraded Capability:Tthe Media and the Kosovo Crisis*, Pluto Press, London).

[54] *Le Figaro*, 20th April 1999.

[55] Walker T. and Laverty A., "CIA Aided Kosovo Guerilla Army", *Sunday Times,* March 13, 2000.

[56] Gauen P. (2001), "Rat i njegove posledice", in: *Degradirana moć*, 71-96.

[57] Olševski M. (2001), *Rat za Kosovo: novi boj Srbije na Kosovu.* Prometej, Novi Sad. 156; same author (1999), *Der Krieg am Kosovo: Serbiens neue Schlacht am Amsefeld,* Nidda Verlag, GmbH.

[58] *Newsweek*, April 4, 1999, quoted from: Olševski M. (2001), *Rat za Kosovo*, 47.

[59] American envoy Christofer Hill met in Dragoljub village with the principal KLA leaders – Ram Buja, Jakub Krasnići and Hašim Tači. – Olševski M., op. cit, 48, 49.

ization.[60] William Walker, retired US general and chief of the Kosovo Verification Mission,[61] did not deny his alignment with KLA.[62] As American ambassador in El Salvador, he was known as organiser of domestic government's suppression of rebellion and as a man who had a similar role in Nicaragua. It is entirely clear that, according to a high official, the United States have "deliberately raised the barrier in Rambouillet so high that it was impossible for Serbs to adapt; they should have some bombardment, and this is what they will get."[63]

The American part of the OSCE Verification Commiassion was provided by a private agency *Dyn Corps.*[64] Participating in inventing the Rachak case with Walker were the German minister of defense Rudolf Scharping, Madlein Olbright and othe Western high officials. They will be joined, at the EU and OSCE orders, to provide "impartiality" and legitimacy, the head of the Finish team, Helena Ranta, forensic stomatologist. At the first news conference (Finish patologists refused to sign the joint report by Finish, Bela Rus and Serbian experts of 29th January 1999 under the pretext that it was too early) held in Pristina on 17th March 1999, she declared that "there were no indications that these people were anything else but unarmed civilians". She also emhasised that this was "her own" view.[65] So, a crime has been committed in Rachak. She in fact only confirmed the previously launched accusations by William Walker who stated, at the 15th January 1999 news conference, that, although not being a practicing lawyer, "on the ground of his own insight (…) he held that this was a massacre rather close to a crime against humanity (…), and that he accused Yugoslav security forces for that crime.". He added that this

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[60] "The Kosovo Liberation Army: Does Clinton Policy Support Group with Terror and Dryg Ties", U.S. Senate, Republican Opolicy Committe (www.kosovo.com/rpc.html).

[61] According to Tim Judah, otherwise protagonist of American interventionism and supporter of the bombarding of Yugoslavia, the majority of Commission's members were active or retired army officers, althoug they official worked for OSCE, and presumably were connected to intelligence services of their home countries. (Judah T., 2000, Kosovo: war and revenge, Yale Univesity Press, New Haven, London).

[62] Olševski M. (2001), op. cit., 54.

[63] *Nation,* June 14, 1999, quoted from: Norkas Dž. and Ekerman S. (2001), Ćprema scenariju Vašingtona: američki mediji i KosovoĆ, in: *Degradirana moć,* 166-167; alsoČ Kon M. (2000), "Ne-humanitarna oružana intervencija Sjedinjenih Država i NATO-a", 326.

[64] Huč J.F., "Plaćenici komandovali Olujom" (interview), *NIN* , 21 Oct. 2004.

[65] Simić I. (2006), *Istina o Račku*, Čigoja, Beograd, 498-504.

was "a frightening and a rather serious event, looking as an execution committed by people who do not respect human lives". He also siad that the event "surpassed everything he has formely seen".[66]

All this has been immediately announced without any qualification by all world media, and transmitted day by day by radio and TV stations. Mathias Rueb of *Frankfurter Allgemeine Zeitung*, sticking to his usual practice of accusing the Serbs, has listed a lie after lie in his desription of the event: "Many victims were, in addition, disfigured, with smashed heads, faces riddled with shots, eyes taken out… One man was without head."[67] The whole presentation was accepted as absolute truth by most of the media. Some news reports, however, abandoned the pattern, expressing doubts in such way of standard presentation, suggesting that something was wrong (starting with the place itself, the number of the perished, their gender and age, lack of blood traces and traces of shots on the surrounding rocks, etc.). Other, although rarely, such as the *Le Mond* reporter Christophe Chatelot, were straight in believing that this was Albanian propaganda only and that Walker's (oral) report at the news conference was incorrect. He wrote that most probably the bodies of Albanians who perished in fighting with police were collected from many places in order to be presented to media reporters as a picture of horror that would certainly have a terrible impact on the public opinion.[68] Renault Girard, on his part, reported that the victims were most probably fighters, since there wer no civilians at all in Rachak.[69] After that report Reanult said that his friend – an American – told hims "that he was a drunken trash".[70] Somewhat later, *Berliner Zeitung* as well writes the following: "High European OSCE representatives have (…) information according to which 45 Albanians found in January in the Kosovo village of Rachak did not perish as victims of Serbian massacre of civilians."[71]

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[66] Beta news agency, 15th January 1999m Tanjug, 16th January 1999.

[67] Rueb M. (1999), *Kosovo. Ursachen und Folgen eines Krieges in Europa*. Muenchen, p. 121, quoted from: Elzeser, *Ratne laži. Od kosovskog sukoba do procesa Miloševiću,* Jasen, Bgd, 75. (Elsaesser J. (2004), *Kriegsluegen. Vom Kosovokonflikt zum Milosevic-Process,* Kai Homilius Verlag, Berlin).

[68] Chatelot Ch., „Massacre du venredi 15 janvier 1999 1999. Les morts de Racak ont-ils vraiment ete masacres froidement?" *Le Mond,* 21 janvier 1999,

[69] *Le Figaro*, 20 janvier 1999.

[70] Krnjc S., Movie *Racak,* shown at the Serbian TV on 23rd March 2009.

[71] *Berliner Zeitung, 13 March 1999, quoted from: Elzeser J. (2004), Ratne laži. Od kosovskog sukoba do procesa Miloševiću,* 74-86.

The truth about Rachak entierely differs from the one presented by Walker. This was indirectly confirmed by Helena Ranta. Investigation agencies of the Republic of Serbia found that the victims were KLA fighters perished in fightings on 15th January, from 03.00 fo 10.00 a.m. with police forces, when 15 of the were killed and their bodies have subsequently been brought to Rachak. Fightings continued on 17th January when the rest of Albanian fighters have perished. They belonged to the "Sadik Shalja 121th batallion of the KLA and the action was announced in advance to international observers. That the action against terrorist was at issue was confirmed by photos of the Rachak area with a visible system of trenches around the village, where there was also the KLA headquarters.

Finish pathologist did not want the take stand regarding the circumstances of perishing of Albanians in Rachak. The report of that team of experts could not at all be the ground for concluding that these people were "unarmed civilians", because such conclusion requires entirely different criminalistic and judicial investigation. In addition, Bela Rus and Serbian pthologists have inspected 16 bodies, while the Finish, Serbian and Bela Rus together – 24 (Finish team was late seven day in coming to the spot, but they had no objection against the procedure of their colleagues). According to these reports "there were no traces of gunpowder explosion in the entering wounds",[72] meaning that wound were inflicted from distance (in fighting). Among 40 victims, 37 were identified, while 3 of them were not and also were not circumcised, which is otherwise Albanian custom.[73] In all probability these were foreign instructors or mercenaries, who are all the time a tabu theme. There was also a young woman among the victims (daughter of the KLA unit commander) and her hands were covered by gunpowder. Later on, after the bombardment of Serbia and occupation of Kosovo and Metohija, professor Klaus Pueshel, director of the Medical Institute of the Hamburg University, confirmed on the ground of the analysis of Finish pathologists that the victims were not shot from vicinity.[74]

According to journalists and members of the of the monitoring team. "the area was under the KLA control and that KLA was alone on the spot during the night, so that is seems that dead bodies put on top of the hill were araranged. Probably some of the deads were dressed subsequently as civil-

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[72] Simić I. (2006), *Istina o Račku,* Čigoja, Bgd, 322-403.

[73] Krnjc S., op. cit., footnote 70.

[74] *Il Manifesto,* "OSCE lied about Racak". April 9, 2000.

ians.[75] In short, Western officials, crisis producers, did not believe to Serbian and Bela Rus pathologists, international observers and Serbian investigaion authorities. No one paid any attention to gross and obvious controversies.[76]

Subsequently, Helena Ranta declared: "There were of course various pressures… In principle, all the time of my stay in Rachak I received instructions from German Ministry of Foreign Affairs (Germany presided the EU). Ambassador Christian Pauls briefed me just before the conference… and the whole situation has been delicate."[77] Somewhat later on, in the emission "Monitor" of the German ARD Channel, Ranta stated the following: "I am aware that the whole scene was staged… Even first investigation we took pointed to that direction… I always avoided to call it massacre… Rachak was a KLA stronghold and it was possible that many of its members were killed that day."[78] Once again Helena Ranta, this time in an interview to the *Berliner Zeitung*, tried to wash herself, as many other actors in the Yugoslav crisis did after leaving the scene. She said, namely, that instrumental in hiding the truth about Rachak were, in addition to W. Walker, who dominated at the press conference, a Finish diplomat she did not identify, and that time German ambassador in Belgrade – Wolfried Gruber, who, as she said, left her in the lurch. She also admitted that Rachak was the case of perished terrorists and not of civilians, also stating that there were fierce fighting in the critical night between Serbian and KLA forces.[79] Franz-Joseph Hutsch, journalist and former German army major, declared that the group of journalists were brought by Walker, and the journalist have moved the bodies, hamering in this way with evidence, but without being warned by Walker and other OSCE Mission members. The scene of crime was not secured and it was strange that no shells were visible.[80] This as every other case of accusing the Serbs was never investigated by any impartial commission.

Just is many other cases, the truth was to be found only later and gradually, step by step. H. Ranta declared to Russian authors Jevgenij Barnov and Aleksandar Yamislov in a documentary *TheEnd – convicted to exile,* that the retired

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[75] Olševski, op. cit., 64-65.

[76] Ibid.

[77] *Jungle World*, quoted from: Elzeser J. (2000), *Ratni zločini*, 54.

[78] *Jungle World,* op. cit.

[79] *Berliner Zeitung*, 17th January 2004.

[80] See B 92 TV station, 12th Oct. 2004; *Novosti*, 13 Oct. 2004. Later on Hutsch will declare that the OSCE observers' patrol in Rachak was entirely American. Hutsch's interview to NIN magazine (in Serbian language), 21 Oct. 2004.

U.S. general – W. Walker (that time chief of the OSCE Kosovo and Metohija Mission) was appalled by the investigation results, but that she was not ready to oppose him. On that occasion too, she said that hese were bodies of terrorist, Serbian soldiers and villagers. In her memoirs she would disclose that the unidentified Finish diplomat was Pertti Torstila, that time department head in the Foreign Affairs Ministry. She also confirmed that Walker pressed her even hitting her with a pencil he broke for the purpose.[81] In spite of the above, the original of the Finish patologists' report on Rachak is still treated as classified document.

According to Branislav Tapušković, defense lawyer of Slobodan Milošević in the Hague, not one of the OSCE Verification Commission was a witness at the trial.[82] The Hague Tribunal finally calls off the indictments against Serbian officials for the Rachak case. And, at the very end, it becomes entirely clear that the whole matter was staged, but Western officials did not call off the acusation against Serbs, because this would entail some other unpleasant implications for them.

Reporting of Western media about Rachak case is similar to the one on other cases in the Yugoslav crisis, and was to quite a degree just a reflection of the attitudes of their political class: i.e. Serbs are liable for everything. French political and cultural elite was not entirely in agreement with the decision to bomb Belgrade (although many supported it) – as it has been to quite a degree for accusing Belgrade for the Bosnian-Herzegovinian civil and religous war. This applies also to disonant tones in case of journalists to whom it was clear that that the Rachak case was necessary as „a trigger event", i.e. for starting with the bombs. Two leading French papers (with their journalists in the field) disclosed serious doubts as to Walker's report and villagers' statements. But after the first days of bombardment such and similar doubts in French press almost disappeared. Contrary to that, according to Elzeser, only the *Berliner Zeitung* expressed doubt about Walker's oral report and Albanian propaganda, because the German political elite was unanimous that Germany bombs Belgrade for the third time in the 20th century (this time as a NATO member). American media had no doubt at all and all supported Walker's story, because at issue here was the Other One, and every argument of that Other One is only his propaganda. Since it was known that the Rachak case was invented in order to make an ultimatum to Serbia and start an undeclared war against it there was

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[81] *Politika*, 22 Oct. 2008.

[82] Krnjc, op. cit, footnote 73.

a need for the cause and justification. And since, as Herman said, the NATO war was based on lies, these lies became larger and larger with an ever more intensive bombing, with the purpose of providing moral support for air raids[83] and of subjugating Serbia.[84]

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ULICA VASE MISKINA, MARKALE; RAČAK – DOGAĐAJI SA OKIDAČEM

Ovaj članak je deo jedne velike studije – monografije dr Slobodana Vukovića – „Etika zapadnih medija" U toj su knjizi analizirani anti-srpska propaganda i govor mržnje prema Srbima, što je bilo karakteristično za zapadne medije u poslednje dve decenije. Neko bi u tom smislu možda mogao postaviti pitanje da li je jednom ovakvom tekstu mesto u jednom ovakvom zborniku radova o srpskoj tranziciji. Mi međutim mislimo da srpska tranzicija ne obuhvata samo ratove, kriminalitet, korupciju, samoubistva, društvenu anomiju, haotičnu društvenu stvarnost, nezaposlenost, depresiju građana, nove zakone, već isto tako i negativan imidž o Srbima koji je konstruisan u zapadnim medijima. Takav lažan, negativan imidž imao je vrlo velikog uticaja na tranziciju, na društvenu realnost, na psihologiju onih koji su kontaktirali sa Srbima, kao i na psihologiju samih Srba. Zahvaljući tome, Srbija je i bila bombardovana pre deset godina, što je naravno imalo negativnih posledica na pravnom, ekonomskom, društvenom planu, kao što su pojava kriminaliteta, „Vijetnamskog sindroma", samoubistva, itd. U krajnjoj liniji zahvaljujući tom negativnom imidžu, Srbija je danas u daljenija od Evrope.

Ključne reči: mediji, anti-srpska propaganda, negativni imidž, društvene posledice

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[83] Such "moral" support to NATO raids will be given also by Vaclav Havel whose arguments were that NATO intervention confirmed the priority of human rights over the right of State. – Havel V., "Kosovo and the End of the Nation State", *The New York Review of Books*, June 10, 1999, p. 6.

[84] Herman DS.E., "The NATO-media Lie Machine: 'Genocide' in Kosovo?" *Z Magazine*, May 1, 2000 (http://www.mag.org/zmag/zmagabout.htm)

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EUROPEAN LEVEL OF SERBIAN MEDIEVAL LEGISLATION - The 1349 (1354) Tsar Stephan Dushan's Code* -

Summary

A legislative Act and the most significant legal monument of Serbian medieval history – Code of Tsar Stephan Dushan was enacted in 1349 and amended in 1954. Its original has never been found, but some twenty five transcriptions in different editions were by now known to our history of law. The oldest ones are the Struga and Prizren copies. For decades this monument has been and still is the subject of research both in the country and abroad. Emperor Stephan Dushan was probably the most powerful rulers in Europe of his time, with real prospects of taking Constantinople and inheriting thus the declining Byzantine Empire. This position involved also his imperial duty to introduce peace and order in ethnically and religiously different countries under his rule. This had to be achieved by legal unification on the grand model of Byzantine law which has in this way definitely introduced in the foundations of Serbian medieval law.

The Code is a complementary act completing and refining the existing system, providing a unified basis for regulation. Its content is a genuine indication of high level of legal and general culture of Serbian medieval State, reflecting also

* The 14th century Code of Tsar Stephan Dushan is an extraordinary evidence of high-level development of Serbian medieval legal and general culture. Unique in its kind in Europe, both in terms of time and legal regulation, it was a genuine constitution of Serbian State containing many provisions which, interpreted in modern terms, makes one to recognize contemporary principles of rule of law and even human rights. Unfortunately, the present day Serbia has to engage, again and again, in providing evidence about tenets of its centuries-long legality and peaceful role in the turbulent region of the Balkans.

economic conditions and developed relations of Dushan's Empire in all aspects of life. In a way it is a written proof of the rise of State which, unfortunately, did not continue due to sudden death of Stephan Dushan in 1355.

Included in the Code are the following matters: position of Church as a crucial factor of State order with provisions of constitutional character, rights and obligations of feudal aristocracy and dependent layers of population, State order and economy, inheritance and particularly, system of penalties, procedure and administration of justice emphasizing the rule of law in most modern sense of the word, civil law matters, etc.

***Key words**: medieval Serbian law, high level of legal development, unification, rights and duties of population strata, Byzantine law, sources of law.*

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The year of 2009 marks the 660th anniversary of the Code of Serbian tsar Stephan Dushan (1308 - 1355) – king of Serbs (1331 – 1345*) and emperor of Serbs and Greeks (1345 – 1355). This Code is one of the most important sources of Serbian legal and cultural history in the Middle Ages. Its original has never been found, but the subsequent transcripts from 14th until 18th centuries served as a basis of modern research into its origins, sources, contents and implications for the history of peoples of Central Balkans.

Emperor Stephan Dushan was probably the most powerful ruler in Europe of his times, with real prospects of taking Constantinople and inheriting thus the declining Byzantine Empire. This position involved also his imperial duty to introduce peace and order in ethnically and religiously different countries under his rule. This had to be achieved by legal unification on the ground of the grand model of Byzantine law which has been thus definitely introduced in the very foundations of Serbian medieval law.

The middle of the 14th century was characterized by two fateful events – the pest or "black death" in Europe 1348, and the Turkish attacks in Europe. The latter historical event prompted Dushan to alert the West on the menace and to attempt to form an adequate alliance, but his efforts were not fruitful since that great danger was never properly understood by the West.

Within such historical background and after making necessary preparations, the details of which are not directly known to our historiography, the enactment of the Code took place on 21st May 1349, at the State Assembly in the town of Skoplje (the present-day capital city of Macedonia). But regardless of the significance of its own, the Code was not an isolated legal act since it was incorporated in the composite system of Byzantine legal sources which were translat-

ed into Serbian-Slavic language, but at the same time modified, both in terms of choice and systematization, according to the needs of Serbian State and Serbian Orthodox Church. This relates primarily to the collection of rules – the *Nomokanon* of one of the greatest figures of Serbian Middle Ages, Saint Sava, known in literature as the Law of Holy Ancestors, then the Code of Justinian, and the *Syntagm* of Mathew Vlastar – a collection of Byzantine law.

Abundant literature which is the result of almost two centuries of studies of Dushan's Code by South-Slav (particularly Serbian) and foreign scholars justifies the following conclusion: the legislation of emperor Dushan is a condensed expression of the level of development of statehood and of the legal system of the fourteen century Serbia as well as of the need to replace its legal customs (i.e. unwritten law) by the general and more sophisticated written, statutory law and thus bring these customs into accord with Byzantine law – that served as a model. But by no means was this a simple reception of a foreign law system.

The Code itself is a complementary legislative act. It has in fact completed and refined the existing system of law and legal sources, and provided a unified basis of regulation for the entire wide State. This in itself is a genuine contribution to State organization and to legal and general culture, and an act of unification which deserves every attention, the more so since similar attempts in the rest of Europe were not so successful. This is illustrated by the failure of Charles IV whose codification *Majestas Carolina* (1349) was met by decisive resistance of Czech nobility.

The content of the Code of Tsar Dushan is in itself a genuine indication of the level of legal and general development and culture of Serbian medieval State. It also reflects the favorable economic conditions, the developed relations in the Empire and other aspects of life. It is, in a way, a written proof of the rise of a State which, unfortunately, did not continue due to sudden death of Tsar Dushan in 1355.

The articles of Dushan's Code contain a relatively small number of provisions referring to the Church and to related matters. Also small in number are these covering the civil law matters, while those pertaining to criminal law and governmental matters as well as to court procedure by far outnumber the former provisions. An entirety of its own is the first and basic part which was enacted in 1349, containing 135 articles (130 in some transcripts) – which are more or less systematically ordered. Thus, the first group of articles deals with Church matters and their purpose is to provide for the purity of faith and the regulation of corresponding social relations. They include provisions relating to judicial powers of the Church, the general duty of all people to comply with religious wedding ceremony, as well as to measures and sanctions against the Latin and other heresies. Provisions dealing with the organization of the Church and par-

ticularly of monasteries reaffirm the principle of somewhat neglected previous Saint Sava legislation in these religious entities. According to the Code, the Church is vested with considerable social and economic prerogatives and immunities but, at the same time, its charitable role has been stressed in corresponding articles. There is almost always a visible attempt to balance the rights and duties, especially of those powerful institutions – a principle not always present even in modern legislations.

Rights and obligations of the feudal nobility as well as those of the peasants are regulated by quite a number of articles, forming thus the substance of the second large section of the Code. The feudal State order and social and economic relations have found in that section their highest legal articulation. Each and every class of society is defined in terms of rights, privileges and obligations in the spheres of status, economy, criminal matters and court procedure. These provisions may therefore be qualified as constitutional by their importance. Their spirit reflects also the idea of legal continuity within the incorporated Greek and other regions, which implied that all the rights and privileges acquired previously from the Byzantine emperors by the towns and the regions have fully remained in force under the new ruler as well.

The institute of hereditament (*bashtina*) is the central one in this group of articles, together with another feudal right – the feudal estate or revenue enjoyed for life against a duty to serve in Tsar's Army at one's own expense (*pronyia*) whose origins date back into thirteenth century, i.e. before King Milutin.

Feudal differences are rather conspicuous in the Code, which indicates a formal beak from the Greek model (i.e. *Syntagm*), in which a traditional although fictitious equality between individuals has been expressed in the spirit of Roman law. Dushan's Code, on the contrary, confirms in open legal terms the real inequality between the classes and layers of population. This is particularly the case with the criminal law and procedure articles, but in other matters as well. On the other hand, the privileged status of nobility did not leave space for their arbitrariness either, since in addition to considerable obligations and burdens towards the State, namely Emperor, its members had to comply rather strictly with the decisions of courts and with the provisions of law.

The second social layer – the *meropsee* – meaning dependent serfs or peasants, were, at least formally, protected against violations and injustices committed by their masters. But in concordance with the system and organization of society they were strictly bound to the estate – the land they worked at. Penalties for their disobedience and rebellion were thus extremely brutal – which, however, was but a common characteristic of the times.

As mentioned above, the Codes dose not include many civil law provisions since the principal ones are to be found in the *Syntagm*, which contains all important institutes of Byzantine law in this wide field. This applies also to the older sources, such as Saint Sava's *Nomokanon* or the Town Law.

Procedural matters are regulated by means of many provisions to form the third group of articles in the Code, dealing with rural disputes over possession of land, estate boundaries, grazing rights, etc. Following these are the criminal law provisions which brought about a thorough revision and replacement of former customary law rules in this significant sphere. In such a way Dushan's Code has established for the entire Serbian criminal law field the principle of formal, namely statutorily prescribed ground for unlawfulness. In other words, it reaffirms the principle of legality. Moreover, the offences are treated not only as violations of the existing law but also of the morality.

Even greater novelties are introduced, however, in the system of penalties, since the Code has realized a definite and creative reception of the Byzantine system of public law punishment, bringing in such a way an end to the former – thirteen century Serbian law, which has treated the essence of criminal offence as a damage to material or spiritual value which should be compensated only in terms of property – amercement or forfeit. These public law kind of punishments were rather severe – which again was the characteristic of the epoch. The punishments included capital punishment by burning at the stake or hanging, mutilation, stigmatizing, cutting off the hands of culprits, chastisement, dungeon, proscription, etc. There remained, however, some specificities which were the result of a compromise between the Byzantine law and the Serbian customary law, such as the fine for murder or serious harm to body called *vrazdha*. Severity of Byzantine criminal law in this case has been attenuated not only by the right of asylum found in a church and the in Emperor's or Patriarch's palace – which actually did exist in the Byzantine Empire as well, but also by the possibility of obtaining Emperor's pardon by direct implementation of Byzantine provisions provided for in the *Syntagm*.

Separate group is formed of articles in the 1349 Dushan's Code which cover the social and legal relations between towns, their citizens and, particularly, tradesmen. They deal with various important privileges for tradesmen in Serbia and Greek townships, while the jurisdiction of the Emperor's law is extended also over the town area and its population.

The Amendments to the Code adopted in 1354 concern its Second Part, namely articles 136 to 201 (this enumeration varies according to different transcripts), and are the result of dynamic development of society that has taken

place in only a few years after the enactment in 1349. Thus, in the field of procedure law, the provisions were restored of the times of King Milutin, which in fact made possible the implementation of Serbian customary law provisions. Severe punishments were also introduced against brigandage, which was an evil not only in Dushan's State but in the entire fourteen century Europe as well. In addition, many relations were regulated by means of these new provisions that reaffirmed the principle of legality. However, although many institutes have left space for applying the rules of unwritten law – as was the case with the institute of jury – the very spirit of the entire legislation has reduced the significance of custom as a source of law. This was also a trend followed in the rest of Europe, too, naturally with significant local variations.

Moreover, the principle that the law was above the Tsar was accepted in the Code long before the modern concept of the rule of law has been invented, since in case of conflict between his decision (i.e. *prostagm*) and a Code provision, the Tsar's decision was not valid, and had no legal effect. And still another prophesy regarding the fact that priority was always at the side of written law, i.e. the Code: the rule of law is also guaranteed in the provision according to which every *meropah* (feudal serf) is entitled to sue not only his own master (which in itself is a human rights achievement not expected at all in a feudal State – so, still another prophesy stretched into our times) but also the emperor, the empress, the Church, or a member of the gentry – or anyone for that matter – as the wording of Article 139 goes.

In implementing the law, every judge, including the Emperor as the supreme judge in the country, is bound to follow not only the existing legislation but also to found his decision on justice (here we think immediately also on the famous Common Law term *equity*, expanded to mean that judges have to apply the rules of law in an equal and non-discriminatory manner to all people – efficiently and promptly – which, even as a mere formulation in a legislative text, is but another achievement for a fourteenth century State. And here is appropriate to mention the most quoted article of the Code (167 in the Bistritza transcript), expressing the high standard of legality in any sense, and I quote:

"On Justice…should the Tsar write a writ either from anger or from love, or by grace for someone, and that writ violates the Code, and is not according to justice and the law, as written in the Law, the judges shall not believe that writ, but shall only judge and proceed according to justice".

Altogether, Dushan's Code may undoubtedly be qualified as a supreme historical monument of medieval Serbian law. It has been studied for almost two centuries and widely analyzed by Serbian and other South-Slav scholars as well

as by other foreign authors, including Russian, Rumanian, German, Czech, Polish, Greek. The world history of law treats it, and justly so, as a genuine constitution of medieval Serbian State and a true picture of Serbian legal culture in the times of its highest level of development which was interrupted for centuries by the unfortunate Ottoman penetration into the Balkans. Among other important features of this valuable piece of European medieval legislation, and in addition to many institutes which deserve attention of all those studying deeper roots of Serbian statehood and law and ideas and conceptions, the Tsar Dushan's 1349 Code represents also the best evidence of a specific and genuine reception of Byzantine law and Byzantine governnance and legal philosophy and ideology in Serbia. Consequently, the Serbian Emperor Dushan may be treated as a lawmaker just as Justinian, Leo VI the Wise, and Basil I – following in his way the spirit and tradition of the Romano-Byzantine law. This reception, however, as we tried to point out, was not a superficial or artificial one: a Byzantine legal provision enacted formerly by the Byzantine Emperor was transformed into a Serbian legal provision only after certain adapting or supplementing. The Serbian customary law as well as the law found in the charters and the international agreements of Serbian rulers, have thus been incorporated in Dushan's Code whenever this has been more suitable to the specific relations of the Serbian feudal society. The provisions relating to commerce and trade, for instance, find their origin in the agreements between Serbia and Dubrovnik entered into in the thirteenth and fourteenth centuries.

The sources of the Code of Stephan Dushan therefore are not only Byzantine, although the very ideology of the legal order is Byzantine. The codification carried out by Dushan in the above way had to unify, as mentioned, the law of all the countries of the wide regions of his Empire, but the necessary reception of law was creative and a qualified one. There was no automatic reception, although it did take place before Dushan in Saint Sava's time. By this Code the Byzantine system of creation and control of legal norms was accepted in Serbia – and this very fact should be taken as the highest achievement in the process of Byzantinization of the medieval Serbian State.

A thorough analysis of Dushan's Code makes possible many conclusions as to its general characteristics. First of all, the very fact of its creation shows the high level of cultural development of Serbian people in the fourteenth century. Unfortunately, this development did not continue due to unfavorable historical conditions mentioned briefly above. Furthermore, in the time of its enactment, the Code was the most humane high-level legislative act of its kind in the entire world – naturally, in terms of the standards of the epoch, and within the frame-

work of prevailing moral and other norms as well as social order in general. Thus, for instance, considerable legal protection was extended to underprivileged layers of population, while the privileged ones, including the Church, were specifically restricted. Law and justice were the main principles in the court and no exception in some instances was allowed even regarding the autocrat and his Court. Specific protection was also provided to women and the poor.

At the same time the Code is a monument of Serbian language and a valuable source for studying social and economic relations of its time. In the course of centuries which followed its enactment, mostly under Turkish occupation of the country, the transcripts of the Code have served in some cases also as practical sources of law in many regions of South Slav countries, but even in other surrounding countries such as Rumania (the case of the 1776 Rumanian transcript kept at the Rumanian Academy of Sciences, and until recently unknown to our legal scholars). Some provisions of the Code entered the subsequently developed customary law rules created by ways and means the ordinary people handled their relations, and this has helped in preserving the national culture and national spirit during the dark centuries of Turkish oppression. It is also worth mentioning that the credit for making and preserving for the present times the Code transcripts goes mostly to the centers of national culture and religion, i.e. to Orthodox monasteries in the Balkans, including those famous ones in the Kosovo and Metohija province – the pillars of Serbian statehood at the time.

All these qualities of Dushan's Code were noticed also by foreign scholars, mostly historians, such as the German writer Engel J. Chr. According to whom "Hungary and other countries can not praise themselves with such an early code". Engel's study is the first one written about Dushan's Code in the world, while he has translated it into German language as well already in 1801. Another German author – Rues Fr. – writes in 1816 that "noblest and gentlest spirit is visible in this medieval monument", after which it was no more easy to write about Serbs (as the case was with many other German and Hungarian scholars) as eternal and ruthless warriors and wanderers. The French author A. Boue (1840), a translator of the Code in his language, points at the fact that a State which has such legal monument would have had a splendid development – were it not for the centuries long Turkish domination. His book was translated into German (1889) and his comments of the Code are full of expressions praising its positive ethical, legal and political elements. The great interest for Dushan's Code and Serbian medieval history in the nineteenth century was revived also in the twentieth, when many doctoral dissertations were published on that topic. Among many authors writing about the Code, one should mention but a few, i.e.: Stojan

Novaković, Valtazar Bogišić, Pavle Šafarik, Aleksandar Solovjev, Teodor Taranovski, Marko Kostrenčić.

More recent foreign publications about the Code in English language include also the one containing a controversial translation of its text into English done by Malcolm Burr in the "Slavonic and East European Review" (1949 and 1950).

The present translation into English, however, is the first made by a Serbian historian of law (the author of the present article), originally published by the Serbian Academy of Sciences and Arts in 1981 as an acitivity of the Academy's Board for Sources of Serbian Law at the initiative of Mehmed Begović, member of the Academy.

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EVROPSKI NIVO SRPSKOG SREDNJOVEKOVNOG ZAKONODAVSTVA – DUŠANOV ZAKONIK IZ 1346.

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Ključne reči: srpsko srednjovekovno pravo, evropski nivo srpskog prava, Dušanov zakonik

CIP - Каталогизација у публикацији
Народна библиотека Србије, Београд

34(497.11)(082)
340.137(4-672EU:497.11)(082)
316.422(497.11)(082)

SERBIAN Law in Transition : changes and challenges / edited by Monika Miloљevic. - Belgrade : Institute of comparative law, 2009 (Beograd : Gorograf). - 365 str. : graf. prikazi : 24 cm

Tiraћ 300. - Editor's Foreword: str. 9-10. - Napomene i bibliografske reference uz tekst. - Bibliografija uz pojedine radove. - Apstrakti.

ISBN 978-86-80059-66-2

a) Правни систем - Србија - Зборници b) Право - Хармонизација - Европска унија - Србија - Зборници c) Србија - Транзиција - Зборници
COBISS.SR-ID 172060172