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TABLE OF CONTENTS

A NOTE FOR THE FIRST INTERNATIONAL ISSUE OF THE "ANNALS OF THE FACULTY OF LAW IN BELGRADE"

The year 2006 is of special significance for the Faculty of Law University of Belgrade. In this year it shall celebrate one hundred and sixty-five years of its existence – it was established in 1841 as the first faculty of this type in Serbia. It shall also mark the one-hundredth anniversary of its journal – in 1906 the Faculty began printing its scientific journal titled *Archive of Legal and Social Sciences* and at the beginning of the nineteen– fifties it also began to publish the *Annals of the Faculty of Law in Belgrade*.

These significant jubilees directly motivated the current editorial staff to, relying upon tradition and with prospect for the future, begin the publication of an annual edition of the *Annals* in the English language. It is with great pride and pleasure that it presents this first issue to the international scientific community. Our intention is to become involved in the universal scientific communication and broadest spiritual exchange in the field of legal and social studies, with a number of selected works which were formerly published in the *Annals* in the Serbian language. We aspire to break out of the local framework, open up, and always be prepared for international scientific collaboration, willing to contribute to the expansion of the culture of law at the essence of which lie justice, human rights and freedoms, dignity, peace and other mainstream legal values.

It is not said without reason that all beginnings are difficult. At the same time they are a challenge. We shall be thankful for all of your hearty support and words of encouragement. With the same gratitude we shall accept all good-natured criticisms and all worthy suggestions, because in that way we will be able to advance our aspirations and improve our work.

Editor in Chief

Sima Avramović

RIGHT TO RELIGIOUS INSTRUCTION IN PUBLIC SCHOOLS

The author contradicts current objections that introduction of religious instruction in public schools is unconstitutional and contrary to international legal documents. He analyses in detail the principle of state and church separation in comparative European law, pointing out that although legal systems in most countries recognize the principle of separation and religious neutrality, they have still established religious instruction in their public schools. He stresses in particular that different and more modern understanding of separation, including the idea of co-operative relation between state and church, marks a significant tendency in contemporary law in Europe. He analyses international documents and international court decisions in connection with the current legislation in Serbia, where religious instruction in public schools is taught as an optional subject together with civic education. Therefore he thoroughly argues why, in such a context, religious instruction in public schools does not violate any of the following principles: right not to manifest religious attitude, right that no one shall be subject to religious coercion, liberty of parents to ensure the religious and moral instruction of their children in conformity with their own convictions, and children's right to freedom of thought, conscience and religion. The author points to the comparative legislation of European countries, showing that religious instruction in public schools exists nearly everywhere, except in Albania, Slovenia and France (apart from its North-Eastern provinces). Existence of the religious instruction in legal systems of European countries is not considered as a violation of any national or international legal principles, including the principle of state neutrality towards religion. The author concludes that the introduction of religious instruction in public schools enacted in the current Serbian legislation is neither conservative nor unconstitutional, but a step towards full respect of religious freedom and harmonization of the national law with the one in European countries.

Keywords: *Religious instruction in public schools. – Separation of State and Church. – Rights of the child. – Rights of the parent.*

The last few years have been marked with heated debate on the introduction of religious instruction to public schools. The Government of the Republic of Serbia passed at first the *Decree on organization and*

realization of religious instruction and of an alternative subject in elementary and high schools in July 2001.[1] The Decree was used as an interim legislation to enable religious instruction in public schools to start in the 2001/2002 school year, relating to the first-year elementary school pupils and those of the first year in high schools. In 2002 two Acts were passed in the Parliament, regulating in a similar way religious instruction in public schools on a longer term basis.[2]

After many reactions with firm ideological background, often without serious argumentation, an academic article on religious instruction legislation finally appeared a few years ago.[3] The purpose of this contribution is to argue that solutions in both Decree and two Acts are not unconstitutional, as Draškić has claimed in her article, but that they are in accordance with existing international and internal legislation. This paper is basically an attempt to challenge a few important and sensitive topics raised by her, in connection with issues like separation of Church and State, the right not to be compelled to make a statement regarding one's religious conviction, the prohibition to impose religion or faith, the right of parents to ensure the education and teaching of their children in conformity with their own religious and philosophic convictions, and the right of children to freedom of thought, conviction and religion.

1. *Separation of Church and State* or neutrality of State in relation to religious communities is certainly one of the most important constitutional principles proclaimed explicitly by the Constitution.[4] The idea has been spread out all over the world, having been born during the

1 Official Gazette of the Republic of Serbia, No. 46/2001 of July 27, 2001. According to the Decree, parents and other legally recognized representatives decide whether their children will attend religious instruction in primary school or not. Pupils in secondary schools (starting with the age of 14 or 15) decide for themselves on religious instruction classes enrolment. Attendance is mandatory for the current school year. If the pupil does not attend religious education, he or she shall instead attend classes in a new subject named "civic education." Pupils may also opt out all together. Classes in religious instruction or civic education are scheduled only once per week. Pupils are not to be graded in the same way as they are for other subjects, but will be given only a descriptive mark that does not affect their final grade point average.

2 *Act on amending the Act on Elementary School* (Official Gazette of the Republic of Serbia, No. 22/2002 of April 26, 2002) and *Act on amending the Act on High School* (Official Gazette of the Republic of Serbia, No. 23/2002 of May 9, 2002). The main modification was that religious instruction and alternative subject are not completely optional anymore. One has to choose one of the two subjects but can not opt out all together.

3 M. Draškić, "Pravo deteta na slobodu veroispovesti u školi" (Right of children to religious freedom in the school), *Anali Pravnog fakulteta u Beogradu* 1–4/2001, 511–523.

4 Constitution of the Republic of Serbia of 1990, Art. 2: "Religious communities are separated from the State and are free in exercising religious activities and rites".

French revolution. In the same time a specific French concept of *laïcité* was formed, but it denotes today more than the separation of State and Church.[5] It is, of course, closely connected to the notion of secular State as well.[6] Concept of separation of Church and State is widely accepted by many European states, while only some of them have proclaimed the state religion or the sc. State Church system. However it does not mean, of course, that very existence of the state religion leads inevitably toward discrimination of all other religious communities in the country.

On the other hand, having proclaimed separation of Church and State, European legal systems regularly do not concieve a vast gap between the two, including hostility and suspicion. The separation does not mean an impossibility to perform common tasks and functions, and does not assume absolute lack of any relation. Contrary to modern comprehension of religious neutrality of State, in Serbian society an echo of the Marxist mantra that "religion is an opium for masses" is still very alive. This is why separation of Church and State is often interpreted in a form of strict division, so that goals and actions of the two can not be linked, combined and connected. In that view Church and State are not supposed to perform joint activities, and consequently any public or State function is not allowed to be in a slightest way connected with the Church. Solemn religious oath of State officials, invocation of God in the Constitution, beginning of parliamentary sessions with a pray or similar manifestation of the State – Church contact is still unimaginable in

5 Term *laïcité* derives from ancient Greek *laos* – people. Etymology and the concept of this French word encompasses today a basic idea that the State should act in the best interest of the whole people, in a common interest, without paying attention to any specific group particularly connected with specific religious conviction. However, in course of time the concept acquired different meanings, so that there is no consent on its practical effects today. Quite recently two important books have appeared revealing numerous controversies in France itself on that topic, see J.-P.Costa – G. Bedouelle, *Les laïcités à la française*, Paris, PUF (Presses Universitaires de France), 1998; Poulat, E., *La solution laïque et ses problèmes*, Paris (Berg international), 1997. See also J.-P.Durand, "Droit civil ecclésiastique français en 1997–1998" in *European Journal for Church and State Relations, Leuven* 5/1998, 61. A very interesting and accurate view of the *laïcité* in France today, see J. Robert, "Religious Liberty and French Secularism", *Brigham Young University Law Review, Provo* 2/2003, 637.

6 Term *secularization*, deriving from Latin *saeculum* – century, has also acquired different meanings. Historically it primarily denoted taking over Church property by the civil power, i.e. by the State, starting with the time of Charlemagne, and being more effective during Reformation and French Revolution. Secularization also started to denote diminishing influence of Church in a wider sense, then separation of Church and State competencies, while only quite lately it comprehended also lack of religious influence in education in schools. More in D. Martin, *A General Theory of Secularization*, Oxford 1978. See also J. Baubérot, "Secularization and Secularism from the View of Freedom of Religion", *Brigham Young University Law Review, Provo* 2/2003, 451.

Serbia. Such an idea would be immediately condemned as clerical, revolutionary and unconstitutional, as it allegedly violates the principle of State neutrality. On the contrary, neutrality is not comprehended like that in many legal systems that pioneered the principle of separation of Church and State, like in the USA.[7] A modern concept of neutrality is much more flexible and liberal than a part of Serbian political and academic community is still ready to face with and accept without prejudices.[8]

Many eminent scholars in modern ecclesiastical law[9] have argued during recent years that it is possible to distinguish not only two, but three basic types of Church and State relationships in comparative European legislations. At one hand there is a system of the established State Church with more or less strong mutual ties (Greece, England, Scotland, Denmark, Sweden,[10] Finland,[11] Norway), while on the other hand the strict separation is predominant in some States (France, Ireland, Holland to some extent). However, the system that might be called "coope-

7 One of the most secular countries in the world, the USA, offers many examples. It is not only that their national proverb "In God we trust" stands on the dollar banknote since 1865, as well as over the entrance to the Senate Chamber of Congress, but also their national anthem starts and ends with invocation of God. State officials, including the President of the USA, have to end their obligatory oath with famous wording "So help me God". Both houses of Congress have paid priests – chaplains, and they begin every parliamentary session with a prayer. Before sessions of the Supreme Court the clerk regularly invokes grace of God. And, of course, during the court trial witnesses have to take religious oath before giving their statements, putting their hand on the Bible. No one considers all those manifestations as violations of the secular tradition. I am grateful to Judge J.Clifford Wallace for enabling me to have and use his paper "The Framers' Establishing Clause: How High the Wall?", presented at the Conference *New Impulses in the Interaction of Law and Religion*, held on October 6–9, 2002 in Provo, Utah.

8 See an excellent contribution on neutrality issues by Reuter, H-R., "Neutralität – Religionsfreiheit – Parität", in: W. Lienemann – H-R. Reuter (eds.) *Das Recht der Religionsggemeinschaften in Mittel-, Ost– und Südosteuropa*, Nomos, Baden – Baden 2005, 15–31.

9 A specific scholarly discipline that studies relations between Church and State took its name from Greek – *Ecclesiastical Law*. Even more adequate English term would be *Civil Ecclesiastical Law* (like in French *droit civil ecclésiastique*, or in German *Staatskirchenrecht*). However, such a discipline in Serbia does not exist yet, and a term is often misunderstood by being comprehended as *Church Law*.

10 Although in 1999 a kind of formal separation of Church and State took place as a result of negotiations that lasted since 1995, nonetheless close connections between them remained in many aspects, being particularly apparent in State financing of the Church of Sweden.

11 Interestingly enough Finland recognizes two established State Churches: the first one is the Evangelical Lutheran Church on account of majority of followers, and the second is the Orthodox Church due to historical background, although it has less than 2% of followers in the country.

rative separation" is developing more and more in many countries: although Church and State are basically separate, they jointly undertake activities in the common interest, recognizing a multitude of common tasks, as some of those undertakings can not be properly realized without their cooperation (Germany, Austria, Belgium, Spain, Italy, Portugal, etc.).[12]

Along with that, a kind of gradual convergence can also be noticed: in systems where the State Church system is dominant, mutual interference of the two is in alleviation (like in England[13]), while in some cases the process led to formal separation, although close ties between Church and State were kept (Sweden). On the other side, in countries with vigorous separation of State and Church, in some issues separation is less strict than expected (example of France).[14] It leads to conclusion that an idea of separation of Church and State is dominant in most European legal systems, but in such a way that it comprises a certain kind of cooperation. This attitude is expressed most explicitly by S. Ferrari: "cooperation is the keynote to today's relationship between Church and State in the European Union and, after the fall of the communist regime, all over Europe".[15]

Shortly, contemporary theory and European legal practice do not conceive separation of Church and State as a mutual ignorance and avoidance of any contact, or even as a kind of confrontation of the two, as it had been in the former communist states. On the contrary, it comprehends a necessity of their cooperation in issues of common interest, like in Germany.[16] Religious instruction in public schools is an exemplary

12 More on that see in G. Robbers, *State and Church in the European Union*, Baden – Baden 1996, 324.

13 During the last decade a kind of separation of competencies can be noticed even there. The Church of England is basically still an established State Church with the Queen of England as its supreme governor who appoints the archbishops and bishops. There are 26 seats in the House of Lords of the Parliament still reserved for Anglican bishops (sc. spiritual lords). Internal autonomous law of the Anglican Church is formally reviewed by the Parliament, who can reject so-called "Measures" by the General Synod, as they have to pass through the Parliament (although Parliament rejects it very seldom, and has no power to amend the text of a Measure). However, General Synod is in certain cases more and more entitled to enact particular general legal norms, having as an effect a gradual partition of State and Church law.

14 The State is still financing renovation of Churches; it pays the teachers of religious instruction in public schools in Alsace-Lorraine, where religious education is part of the general curriculum, etc.

15 S. Ferrari, "The Pattern of Church and State Relations in Western Europe", *Fides et Libertas, The Journal of the International Religious Liberty Association,* Silver Spring, Maryland 2001, 59–60. See also

16 A. Frhr. v. Campenhausen, *Der heutige Verfassungsstaat und die Religion. Handbuch des Staatskirchenrechts der Bundesrepublik Deutchland I*, Berlin 1994, 47 – 84.

field of such cooperation. The joint action of State and Church is present in those matters all over Europe, both in organization, and often in financing of religion instruction in State schools.

The very existence of religious instruction in public schools in many European countries, including majority of the European Union members, and particularly its presence in legal systems where postulate of Church and State separation is strictly obeyed, clearly manifests that the principle of state neutrality is by itself in no contradiction with religious education in the state-run schools. Maybe the most striking example is France, often incorrectly quoted as a country without religious education in public schools. However, even the French legal system does not consider religious instruction unconstitutional: on the contrary, it allows a specific form of religious assistance in all state schools, including religious education in three Eastern departments of the country within the general curriculum.[17]

2. *Right not to be compelled to make a statement regarding one's religious conviction* is also mentioned as one violated both by the Decree and by the subsequent Acts adopted, as they have introduced religious instruction in public schools. Allegedly, those compel pupils to declare their religious conviction. Most of the European Union member states, who strictly enforce international standards of human rights, also recognize religious instruction in public schools, which it is not considered to be by itself in contradiction with the principle of non-statement regarding religious conviction. It is not so even when religious instruction is a mandatory subject, with a possibility to ask for exemption, as it is the case in some countries. If religious instruction is an elective subject in alternative with civic education, as regulated by the existing law in Serbia, such a solution seems not to be in opposition to the "non-statement principle" – the pupil may simply opt for another subject. Opting

17 Religious needs of pupils are officially recognized in France by the Act of October 28, 1882, stating that the state-run schools have to provide for a day during a week, except Sunday, to enable parents to organize religious education to their children. For decades the day was traditionally Wednesday (while Saturday was a working day). This Act is formally still in power, but since 1990 disputes aroused only on issue whether the free day should be Saturday instead of Wednesday. Also, everyday presence of priests (*aumôneries, chaplains*) in the state-run schools has to be provided if needed since the time of Napoleon. Spiritual assistance has to be offered anytime when a pupil or a group of pupils ask for it, while upon request of parents a permanent position for a priest in school can be established. Of course, along with that, worth remembering is that a system of private schools is very developed in France, having about 95% of them run as the Catholic ones, with important role of religious instruction in their curricula. Finally, as already mentioned, the most excessive example is that of Alsace-Lorraine, where religious instruction is regularly organized in public schools. All those appearances are not considered as to violate the dominant principle of Church and State separation.

for religious education or civic education, quite similarly as opting for this or that foreign language, does not automatically mean a pressure to make statement regarding religious conviction. It is a matter of choice, and it can depend on interests or other different motives. Simple choice of one of the two subjects does not necessarily represent a statement regarding religious belief.

Similar objection can be raised more plausibly in the census issues, when citizens are questioned about their religious affiliation. Human rights activists strongly claim that the right not to be compelled to make statements regarding one's religion, personal beliefs, or lack of belief, is violated by this question, as well as a right to privacy. However, after thorough argumentation and controversial discussions, most European states, having a reasonable need to possess data on religious demography of the country, have found a solution (the same one as in Serbian legislation) in including possibility for an interviewed citizen not to give any statement on that topic. As long as such an alternative exists, the right not to give statement on religious conviction is not violated. Analogy with alternatives in taking one of two subjects in state schools is quite apparent. The issue of pressure to make statement regarding religious conviction can only be raised if pupils are obliged to take mandatory lessons in religious instruction, while no alternative or optional subject exists, like in Greece.[18]

3. *Prohibition to impose religious conviction* is, according to Draškić, seriously endangered and jeopardized by the new Serbian legislation on religious instruction in state-run schools. She points to Item 6. of the General Comment 22. on Art. 18 of the International Covenant on Civil and Political Rights, brought by the Committee for Human Rights, that says: "*The Committee notes that public education that includes instruction in a particular religion or belief is inconsistent with article 18.4 unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians*".[19] She tries to depict that opinion of the Committee at few levels.

The first is "the fact that Yugoslavia was a secular State without any kind of religious instruction in State schools during last 56 years",

18 E.g. in Greece all pupils of public primary and secondary schools are obliged to attend classes of mandatory Orthodox religious instruction, while non-Orthodox pupils can only be exempt. However, in practice, many of them attend Orthodox religious instruction, as schools do not offer alternative subject or supervision during religious instruction classes. In that case the mentioned problem might appear more sharply.

19 The Right to Freedom of Thought, Conscience and Religion (Art. 18), 30/07/93 CCPR General comment 22.

while the introduction of religious instruction by new legislation imposes religion or faith, contrary to an idea of protection not only of theistic, but also of atheistic convictions.[20] An argument about continuity of religious instruction absence during many decades of communist regime has a clear connotation: secular communists did well by disallowing imposition of religious conviction through religious education! Further implication is that the current legislative change in Serbia is wrong, as it disrupts a long lasting good communist practice. Of course, such a statement can not be easily put in conformance with general principles of justice and equity. Coercive deprivation of certain rights, and in particularly of the right to religious freedom, is not expected to be legalized and fixed forever in a democratic society. According to the same approach and logic, no denationalization and restitution of the property taken over by communists would have been needed. Consequently, all illegitimate acts of the communist regime after the Second World War are to be accepted and confirmed, while the rights taken by force would not be necessarily given back, due to a long time flow. An important point in that context is that both the criticized Decree and Acts do not *introduce* religious instruction in public schools, but they *return* it back to life and legal system – as it has existed before. In that way the new legislation basically reaffirms the right to religious education that had been forcefully lost.

The second issue that Draškić mentions in connection with "imposing religion and belief" is statistical by nature. Besides, she erroneously connects religious conviction exclusively with nationality (by claiming that in Serbia 34% of population are non-Serbian). Even more wrongly she states that census statistics in Serbia have never taken into account the number of atheists and agnostics. Again, the connotation is clear: with the new legislation religious instruction in public schools will be imposed to an important part of population with non-Serbian (non-Orthodox) origin and to atheists. In fact, according to the census of 2002, the religious demography of Serbia is as follows (out of 7,498.001 inhabitants):

Orthodox Christians	6,371.584	–	84,97%
Catholics	410.976	–	5,48%
Muslims	239.658	–	3,19%
Protestants	80.837	–	1,07%
Jews	785	–	0,01%
Oriental cults	530	–	0,007%
Other religions	18.768	–	0,25%

20 M. Draškić, *op. cit.,* 514.

Believers of no confession	437	–	0,005%
Atheists	40.068	–	0,53%
Unanswered	197.031	–	2,62%
Unknown	137.291	–	1,83%

The fact that a certain religion includes considerable majority of followers in the country can not, of course, serve as an excuse to affect rights of other confessions believers. This is why both the Decree and Acts guarantee religious instruction in public schools not only for the Orthodox children. Six more traditional Churches and religious communities are encompassed, those who had had the right to religious education before the Second World War.[21] In that way religious education in public schools is available to nearly 95% of total population, in accordance with their religion or belief. Thus, the issue of religious conviction imposition through religious instruction in public schools appears to be practically marginal in Serbia.

Of course, the fact that religious education paid by the State is not organized for every single religious community, including the smallest one, may seem discriminatory. However, wider questions are reflected in that issue, including problems of equality and minority rights.[22] Equality of religious communities does not mean their identity, but adequate enjoyment of rights guaranteed by law.[23] If one insists on an absolute equality, one will be faced with actual impossibility to realize it with all consequences, what may deny an idea of equality itself. This is an old dilemma, and even some proverbs on that topic have remained, such as the one by Plinius – *Nihil est tam inaequale quam aequitas ipsa* (Nothing is so unequal as equality itself).[24] Equality in unequal circumstances leads to its own denial. A similar idea is reflected in Latin jurist saying *Summum ius, summa iniuria*. Consequently, equal legal position of religious communities means adequate use of all the rights in an equal way, along with differences deriving from common sense and within boundaries defined by law. In two papers devoted exclusively to that issue, one of the most prominent German authors convincingly shows that

21 Serbian Orthodox Church, Roman Catholic Church, Slovak Evangelical Church a.c., Reformed Christian Church, Evangelical Christian Church a.c., Islaamic Religious Comunity, Jewish Religious Comunity.

22 In the extensive literature worth mentioning on the topic might be W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights (Oxford Political Theory),* Oxford 1996.

23 G. Robbers, "Religious Minorities in Germany", *Legal Status of Religious Minorities in the Countries of European Union*, Milano 1994, 153.

24 Plinius Secundus, *Epist.* 2, 12, 5.

parity and equity guaranteed by constitutional and other norms do not mean absolute identity in enjoying religious rights.[25] Paradigm that guarantees full respect of religious freedom is equality, but not identity of rights.[26]

There are also practical reasons. The limited number of Churches and religious communities[27] whose religious instruction will be financed by the State is a consequence of impossibility and non-rationality to organize religious instruction for each and every person or the smallest religious group. Similar limitations exist in other European countries as well. At the same time one should keep in mind that the *ratio legis* of the Serbian legislator was a kind of *restitutio in integrum* – restoration of the right to religious instruction, lost due to communist deprivation. The ratio is that to those who had not exercised a certain right, the right can not be restored. Also, in reviewing that objection, it is worth noticing that the legislation opens possibility to all religious communities to organize religious instruction, although at their own expense.[28] The meaning of Art. 27 of the International Covenant on Civil and Political Rights is clear: "*In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language*". It does not impose an obligation to the State to support materially all of them, but just to enable all of them to enjoy their rights. Serbian legislators have adopted a similar approach like in many countries: Austria and Belgium also set forth a certain number of Churches

25 M. Heckel, *Die religioinsrechtliche Parität*, Handbuch des Staatskirchenrechts der Bundesrepublik Deutchland, I, Berlin 1994, 589–622; M. Heckel, *Das Gleichbehanlungsgebot im Hinblick auf die Religion*, Handbuch des Staatskirchenrechts der Bundesrepublik Deutchland, I, Berlin 1994, 623–650.

26 G. Robbers, "Religious Freedom in Germany", *Brigham Young University Law Review* 2/2001, 666: "To safeguard religious liberty, the correct paradigm is equal rights, not identical rights. The paradigm of identical rights cannot appreciate the societal function of a religion, its historical impact, or its cultural background. Identical rights would preclude a multitude of manifestations of positive religious freedom. For instance, if an identical right to sit on youth protection boards was granted to each and every religious denomination, any utility of these boards would be crushed by their enormity...".

27 It does not include a small, limited number of citizens covered with paid religious instruction. As already mentioned, about 95% of them belong to some of Churches who have had the state financed religious instruction before the Second World War.

28 A good example offers North Serbian multi-religious province Vojvodina, where smaller Churches and religious communities, e.g. the Methodist Church, have very successfully organized religious instruction in public schools for children of their followers.

and religious communities for whom the State organizes religious instruction, Germany and England specify a minimal number of pupils necessary for religious instruction to be organized in public schools, etc.

Above all, the crucial argument that religious instruction in public schools in Serbian legislation does not violate the ban to impose religious conviction is obvious: a part of population who does not wish to opt for religious instruction is free not to do it. They have the choice. It is evident that the very existence of the alternative subject absolutely meets the criteria from the General Comment, in accordance with it's wording "unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians".

4. *Right of parents to ensure the religious education of their children in conformity with their own religious and philosophical convictions* is confirmed in many international documents.[29] However, its interpretation offered by Draškić is one-sided: she stresses that it provides for the right of parents "to protect their children from ideological indoctrination by educational institutions". If that interpretation is considered as the only possible or the main meaning of the norm, not a single country which ratified those international documents would not have possibility to organize religious education in public schools, as it would have allegedly been in contradiction with the mentioned principle. The undeniable circumstance that most European countries do perform some kind of religious instruction in public schools is the most obvious attestation of conformity to those two standards. The real question is what kind of religious instruction is offered. Although it is not a legal issue, a peculiar characteristic of religious instruction in Serbia is worth mentioning. All textbooks for the subject, at all school levels and, for each of the seven denominations defined by the legislation, according to the law, have to be reviewed and accepted by the representatives of the remaining six Churches and religious communities, before they can be used by pupils of any confession. Quite unique in the comparative

29 To quote only Protocol 1, Art. 2 of the European Convention on Human Rights (1950): "*No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions*"; Art. 18, 4 of the International Covenant on Civil and Political Rights (1966): "*The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions*"; Art. 14, 2 of the Convention on the Rights of the Child (1989): "*States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child*".

European legislation! This is, by all means, formidable safeguard for preventing any kind of proselyte religious propaganda or domination which may lead to violation of the mentioned right of parents.

The problem with the cited interpretation by professor Draškić is that it stresses only negative aspects of that right, neglecting the positive ones, those that the norm is primarily directed to. Namely, the State has a certain obligation toward parents to protect the mentioned right. Parents, being taxpayers, have a right to expect that within the state-run schooling system their children will receive religious and moral instruction in accordance with their religious and philosophic conviction. Tax-payers, by participating in financing the expenditure for their children's schooling, ought therefore not to be forced to obtain an extra religious and philosophical (ethical) education for their children in some other way, out of the school, by financing it separately or by incompetently educating their children themselves. Taking over the responsibility concerning compulsory schooling of children, the State takes also the responsibility to perform it completely and universally.[30] Parents do bestow this form of education to the State and they pay for it.

Therefore there is no doubt that the parents have the right to control religious education of their children, and that the State is not allowed to impose any religious or philosophical attitude to them. An alternative subject in the curriculum enables parents to decide not to send their children to religious instruction classes at all, what completely disarms the suggested objection on violation of the mentioned parents' rights. Strict control that the State (and in Serbian case, other Churches and religious communities) performs over the religious education is a strong guarantee that such a parent's right will not be violated. The same or similar approach is held nearly all over Europe, and so it is in the Serbian new legislation on that topic.

5. *Right of children to freedom of thought, conviction and religion* is the last principle being allegedly endangered by the new Serbian legislation on religious instruction. The objection can be raised only for pupils of elementary schools, as according to the law, the high school pupils (persons older than 14 or 15 years) are to decide themselves whether they will take those classes or not.

In that context a heated international discussion took place on whether a child has independent right to form his own religious conviction, contrary to the ones of their parents. The claim that religious instruction in public schools may violate that right of the children depends on the answer to the question whether such a right, particularly in the case of

30 G. Robbers, "Religious Freedom in Germany", *Brigham Young University Law Review* 2/2001, 643.

younger minors, does really exist. The answer depends on the interpretation of a quite vague norm of Art. 14, 1 of the Convention on the Rights of the Child, stating "*States Parties shall respect the right of the child to freedom of thought, conscience and religion*". As the very wording has nothing to do with the issue of relation to the parents' conviction, there is no *communis opinio* on that topic.

In any case, at this point right of children is intertwined with the mentioned right of parents to educate their child in accordance with their own religious and philosophical convictions. It includes the right of parents to have the child protected from someone else who could impose or form the child's religious convictions independently of the parents' will. As for the school, such a danger does not exist, as religious instruction in public schools is organized under a strict control of competent State authorities (and supervision of a body consisting of representatives of all seven traditional Churches and religious communities). The crucial argument that eliminates that objection is that the parents have choice to decide whether their children will take religious classes or not. And it is applied to children younger than 14 or 15 years only, while the older ones, according to the law, make their own decision on religious instruction attendance. In that way the right of children to freedom of thought, conviction or religion is both protected and affirmed.

6. *Comparative overview of European legislation* on religious instruction in public schools clearly shows that its very existence is not unconstitutional and that it does not violate international legal standards, principles and documents. Of course, there are some differences in approach, although most countries have a certain form of religious instruction organization. They can be classified according to a few criteria.

Concerning the content there are States with confessional religious instruction (such as Germany, Austria, Denmark in elementary and first classes of high schools, Belgium, Luxembourg, Spain, Italy, Ireland, Bulgaria, Poland, Slovakia, Romania, Croatia, Republic of Srpska), some of them favor multi-confessional approach (Great Britain, Norway, Finland, Portugal, etc.), while there is also a quite developed model of non-confessional, cognitive religious instruction (e.g. Sweden, Denmark in final classes of high school, Russia, Check Republic, Lithuania, Estonia).

Concerning the financing there are basically two possibilities – religious instruction costs are either paid by the State or by the Churches and religious communities themselves (mostly in countries where the so-called Church tax exists). Although rarely, a kind of combined system can be met, where the State basically bares most of the financial burden, while Churches and religious communities participate a smaller propor-

tion. A criterion for classification may also be if religious instruction is provided to all or to some Churches and religious communities only. Nevertheless, even in the first case, most legislation delineate some limits, most frequently in accordance with a number of children required for organization of religious instruction classes in public school.

Concerning the degree of compulsion there are basically four models. The first one is where religious instruction in public schools is formally mandatory for all pupils, such as in Sweden, Norway, Finland, Denmark, Estonia, Ireland, Great Britain, Austria, Greece, Malta, Republic of Srpska. The second group is formed by countries where the choice between religious instruction and an alternative subject is compulsory – most often the second subject is ethics, morals or something similar like in Serbia (civic education): those are Germany, Belgium, Luxembourg, Netherlands, Spain, Poland, Moldova, Letonia, Latvia, Federation of Bosnia and Herzegovina, Croatia in high schools, schools for EU officer's children, etc. The third system comprises religious instruction as an optional, non-compulsory subject, like in Czech Republic, Slovakia, Russia, Ukraine, Bulgaria, Romania, Hungary, Croatia in elementary schools, as well as most ex-communist countries. To the same group formally belong Italy and Portugal, although in practice many students opt for the Catholic religious instructions. Finally, exceptionally small number of countries have no religious instruction: Albania, FYR of Macedonia, Slovenia and France – but not absolutely, as religious instruction in public schools exist in some departments[31].

Taking all this into consideration according to most of criteria analyzed, it follows that Serbian legislation has found a middle way in regulating religious instruction in public schools. There is nothing in Serbian legislation that does not exist elsewhere on the issue in Europe, including the European Union member states. In addition, there is a specific kind of cooperative control over religious education in public schools, performed both by the State and by the competent body formed of seven Churches and religious communities. Therefore, religious instruction in public schools is at least as constitutional and in accord with international standards, as it is in other European countries. Hence one may claim that introduction (restitution) of religious instruction to public schools by Serbian legislation, structured as an elective subject in alternative with civic education, is a step towards harmonization of the Serbian legal system with comparative European legislation and tradition.

31 See n.17. For more detailed overview of solutions in particular countries mentioned in the text, see Serbian version of the article, Avramović, S., "Pravo na versku nastavu u našem i uporednom evropskom pravu", *Annals of the Faculty of Law in Belgrade*, 1/2005, 46–64.

Alan Watson

LORD MANSFIELD; JUDICIAL INTEGRITY OR ITS LACK; *SOMERSET'S CASE*[*]

The author has analyzed perhaps the most famous english case, and presented the problem which lord Mansfield had to solve in all its complexity. The case was about the conflict of laws. It could be solved by applying Huber's axioms, which would ground one verdict of english law in roman law, by way of dutch and scottish law. That was the case which could have far-reaching consequences in all England. Maybe the most important issue here is the lord Mansfield's solution, inteligent and simple – he limited himself only to habeas corpus, instead of solving many problems that arose before him one by one.

Key words: *Conflict of laws. – Application of foreign law. – Lord Mansfield. – Sommerset vs. Stewart.*

I write this after rereading Steven M. Wise, *Though the Heavens May Fall*.[1] My argument, if convincing, undermines the basis of the book.

Probably the most famous decision in English law is that of Lord Mansfield in *Somerset v. Stewart*[2] in 1772. It is very short and very dramatic. Indeed, it is so theoretical that much of what is vital is overlooked. As it was meant to be.

Somerset was a slave of Stewart in Virginia and was brought to England by his owner. Somerset travelled extensively in the service of his master; to Bristol and Edinburgh, for example. But two years after they left America, Somerset left Stewart. Stewart was incensed by Somerset's ingratitude and advertised for his return. Somerset was captured by slave-catchers and, on Stewart's orders was put on the *Ann and Mary* bound for

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* The contribution is partialy presented as a lecture held on January 23, 2006 at the University of Belgrade Faculty of Law Club "*Forum Romanum*".

1 Cambridge, Mass. 2005)

2 *Lofft* 1, p. 499 ff, at p. 509

Jamaica. Virtually a death sentence for Somerset. On request from Somerset's friends, Long Mansfield issued a writ of *habeas corpus* to the ship's captain, and Somerset was removed from the ship and placed under the authority of the Court of King's Bench. The case of *Somerset v. Stewart* was heard in the Court of King's Bench before Mansfield on 14 May, 1772.

Mansfield opens his judgment: "The question is, if the owner has a right to detain the slave, for the sending him over to be sold in Jamaica." The issue as so expressed is a very narrow one. On the face of it, the issue is not whether Somerset is free or not. Even less is it a declaration that there can be no slaves in England. As Wise puts it: "*Somerset* was Mansfields' minimum antislavery position."[3] His decision was understood as meaning that in his view there could be no slaves in England. But in subsequent correspondence Mansfield wrote: "[N]othing more was then determined, than that there was no right in the master forcibly to take the slave and carry him abroad." Again he insisted that he had gone "no further than to determine the Master had no right to compel the slave to go into a foreign country."[4]

I believe that the correspondence – obfuscating as it is — gives his true position on the case. Mansfield is "hiding the ball." As he should! The opening statement of the action at the beginning of the case reads:

On return to an habeas corpus, requiring Captain Knowles to shew cause for the seizure and detainure of the complainant Somerset, a negro – the case appeared to be this –-

The second sentence of Mansfield's judgment reads: "In five or six cases of this nature, I have known it to be accommodated by agreement between the parties: on its first comming before me, I strongly recommended it here." Indeed he had. In this case also he ordered five separate hearings and he frequently urged Stewart to render the issue moot by freeing Somerset.[5]

But why? Mansfield continues: "But if the parties will have it decided, we must give our opinion. Compassion will not, on the one hand, nor inconvenience on the other, be to decide; but the law: in which the difficulty will be principally from the inconvenience on both sides." If Mansfield declared Somerset free, the main inconvenience would be the financial loss to the slave owners. "The setting 14,000 or 15,000 men at

3 Wise, *Though*, p. 211

4 For sources see Wise, *Though*, p. 209.

5 See, e.g. W.M. Wiececk, '*Somerset*: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World,' 42 *University of Chicago Law Review* (1976), pp. 86 ff. at p. 102.

once free loose by a solemn opinion, is much disagreeable in the effect it threatens." The figures of the number of slaves in England may not be wholly accurate, but they are Mansfield's figures, and that is what matters here. He reckons that £50 per slave would not be a high price, and so the owners' loss would be above £700,000. And this, he adds, does not include further loss to the owners by actions for slave wages or on slight coercion by the master. He continues: "Mr. Stewart may end the question, by discharging or giving freedom to the negro." If not, as Mansfield had said just before: "If the parties will have judgment, fiat justitia, ruat coelum,"[6] let justice be done whatever the consequences.

Mansfield does not want to decide the case, he is most reluctant to do so, but he will have to unless Stewart acts; and the consequence will be – though that is not what he is deciding – that all the slaves in England will be free. As Mansfield said earlier in his brief judgment: "The difficulty of adopting the relation, without adopting it in all its consequences, is indeed extreme; and yet, many of those consequences are absolutely contrary to the municipal law of England."

Mansfield's arguments for his own position convinced people then and scholars since. He would have to find for Somerset on the narrow issue thus framed but the consequence, he knew, would be the end of slavery with resulting financial catastrophe for many in England. And, as has frequently been pointed out, many of those who would lose financially were Mansfield's friends.

The problem for Mansfield is not quite as it seems. His superb rhetorical skill – and it is outstanding – conceals what is going on in his head. Yet, paradoxically, at the same time it reveals that all is not as it seems. Mansfield regrets that the economic consequences of his decision will be ruinous. But he trumpets them: "Let the heavens fall!" The case, of course, attracted much public attention, but it is Mansfield who spells out consequences that might – I say only might – have otherwise largely passed unnoticed. And, as we have just seen, he later removes himself from the consequences. His decision, as he says, was a narrow one. Mansfield, in fact, was in a quandry.

But then there is another immediate problem in Mansfield's judgment. He cites no legal precedent, statute or principle for his decision.[7] On what legal argument can the owner be barred from removing Somerset from England? I know of none. This absence of any known basis for Mansfield's judgment is remarkable and demands an explanation.

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6 "Let justice be done, though the sky fall."

7 In Scottish reported cases of the time judges seldom set out the reasons for their decision. But this is not a Scottish case.

For Mansfield's own approach to law, Somerset is, and should remain, a slave. For this, there can be no doubt. The issue, never stated but obvious, is one of conflict of laws. This was a subject on which Mansfield had wide experience.

This is largely a case on conflict of laws. The basic question in conflict of laws is what is to be done when a legal question involves the law of more than one state – in this issue Virginia and England — and the answer depends on the law of which state is to be recognized. Roman law had nothing on the issue, but for subsequent scholars when an answer had to be found then, in the absence of legislation, it was to be found in Roman law. And Roman law, to be useful, had to be fabricated. One theory, generally disregarded but vital here, was that of the Frisian, Ulrich Huber (1634–1694).

The factual position in the case was that Somerset was acquired as a slave by Stewart in Virginia. Virginia was a slave state and by the law of Virginia Somerset was the property of Stewart. But Somerset was in England, the lawsuit was raised in England. Which law, that of Virginia or that of England, was to apply? There were many approaches to the issue, but which approach was to be chosen? Oddly, fascinatingly, the question was not raised in the case, not even by the attorneys. But it had to be there. And Mansfield had made his career very largely on this question of conflict of laws. And his position on the subject was one hundred percent plain. He knew the issue, and the answer.

Mansfield had adopted the theory of Huber. Huber's views on conflict of laws were not well-known – they represented, after all, only one view among many on the subject. Naturally they were known in the Dutch Republic, but then so were many others.

But they were accepted in Scotland. Legal education was virtually non-existent in 17th century Scotland, English Universities were closed to the Scots so the ambitious flocked to the Universities, especially of Leiden and Utrecht, of the Dutch Republic, a fellow-Calvinist country. Naturally, students take home the books they bought for their classes, and Scotland – in contrast to England — has a fabulous number of 17th century Dutch law books. Among them is Ulrich Huber, *Praelectiones juris romani et hodierni* (Lectures on Roman and Contemporary Law) in three volumes, which was first published in 1689.[8]

England, for reasons relating to the jurisdiction of the various courts had no theories of conflict of laws, but in Scotland it was a "hot

8 See Alan Watson, *Joseph Story and the Comity of Errors* (Athens, GA., 1992), pp. 1 ff. and *passim*.

topic." There were several issues but one appears more obviously than any others – it is still a hot subject – marriage.

In Scotland of the time a woman could marry at the age of twelve, and parental consent was not needed. In England the marriage age for a woman was sixteen and the father's consent was needed until she was twenty-one. The resulting legal scenario is obvious. A Scottish rogue makes love to a young English heiress, runs off with her to Scotland and they marry at the first possible point, the blacksmith's shop at Gretna Green. (No religious ceremony was needed for marriage in Scotland). Was the marriage valid in England?

It is now time to set out Huber's approach to conflict of laws which, of course, in the nature of things had to be based on Roman law. There was nothing else that could be thought appropriate. But there was nothing to the point in Roman law, so the Roman sources had to be manipulated, as they so often were in so many contexts. Huber's solution is, as was to be expected, brilliant.[9]

Huber was very much a Frisian and during his teaching career – he was a judge for three years in Friesland – remained a faithful professor of the University of Franeker, twice rejecting professorships at Leiden. His reputation was enormous and extended well beyond Friesland, attracting many students from other places, especially from Holland, Germany, and Scotland. His main treatment of conflict of laws is in a few pages of the second volume of his *Praelectiones juris romani et hodierni* (Lectures on Roman and Contemporary Law; 2.1.3, which, like the first volume, was presumably written when he was a professor at Franeker. Volume 1 of the *Praelectiones* was devoted to Justinian's *Institutes*, and he turned to the *Digest* in volume 2. So his treatment of conflict of laws in 2.1.3. is right at the beginning of his commentary on the *Digest*. Very prominent and accessible. It would be well-known to students who make use of textbooks.

Huber claims in his section 1 that there is nothing on conflict of laws in Roman law, but that nonetheless the fundamental rules by which this system should be determined must be sought in Roman law, though the issue relates more to the *ius gentium* than the *ius civile.* These two terms had more than one meaning in the Roman legal sources, but Huber is using them in this context in the sense found in Justinian's *Institutes* 1.2.1. *Ius civile* is law which each people has established for itself and is particular to itself. *Ius gentium* is declared at this point in the *Institutes* to be law established by reason among all men and observed equally by all

9 What follows on Huber is an abridged and slightly modified version of my *Joseph Story*, pp. 3–13.

nations. In fact, for an institution to be characterized in this sense as belonging to the *ius gentium* it seems to be enough that it is accepted in Rome and other states. *Ius gentium* in this context is very much part of Roman private law. It should be stressed that Huber here is not using *ius gentium* in the sense of "law established between peoples," that is, international law. Though that was one meaning in Huber's own time, the term *ius gentium* was not so used in Roman law. Huber goes on: "In order to lay bare the subtlety of this particularly intricate question we will set out three axioms which being accepted, as undoubtedly in appears they must be, seem to make straightforward the way to the remaining issues." At the beginning of the first volume of his *Praelectiones*, Huber had explained what he meant by axioms. Budaeus, he declared, had not absurdly said that rules of law were handed down by *axiomata* or by *positiones*, terms that he said were taken from the usage of mathematicians. "For axioms are nothing other than statements that require no proof." Their correctness is thus self-evident.

Accordingly, conflict of laws as a system exists for Huber only if one accepts, as he feels and says we must, his three axioms (which significantly he prints in italics in section 2). As axioms they require no proof. The first two he expressly and reasonably – according to the approach of his time – bases on Roman law, on *Digest* 2.1.20 and *Digest* 48.22.7.10 respectively. The first axiom is, "*The laws of each sovereign authority have force within the boundaries of its state, and bind all subject to it, but not beyond."* The second reads: *"Those people are held to be subject to a sovereign authority who are found within its boundaries, whether they are there permanently or temporarily."* The third axiom is referred to no such authority but is Huber's own contribution. It must, for Huber, be treated like the other two as a binding rule, in order to have a systematic basis for conflict of laws. It reads: *The rulers of states so act from comity* (comiter) *that the rights of each people exercised within its own boundaries should retain their force everywhere, insofar as they do not prejudice the power or rights of another state or its citizens.*

The absence of stated authority for the third axiom does not mean that for Huber there was no authority for it. Indeed, he has already stated that the fundamental rules for the subject have to be sought in Roman law. The position for him is that by Roman law axiom 3 is part of the *ius gentium* – because it is accepted among all peoples – and so it need not be expressly set out in any particular jurisdiction – Rome, for instance – in order to be valid there. In fact, as we shall see, Huber goes on to claim in the same section of his work that no doubt has ever existed as to the validity of the third axiom. (This is not true except in a perverted sense, since Huber seems to be the architect of the scope of the axiom). Though

axiom 3 is not stated by Huber in a normative way, it is for him a rule of law and is normative. That is the very nature of an axiom.

This course of reasoning is entirely appropriate for Huber. He is attempting to set out the principles on which a particular branch of law, namely conflict of laws, is established. For this he does require authority. Roman law was looked to in all continental European countries to supply legal authority in general. Its status varied from jurisdiction to jurisdiction, though notoriously there had been a greater reception of Roman law in Friesland than elsewhere in the United Provinces. But Huber is not here concerned particularly with the law of Friesland. He is actually attempting to set out the principles which all states are bound to apply in conflicts situations. The only principles that could be binding, not in one territory alone but everywhere, had to be drawn from Roman law. There just was no other appropriate system. For the Romans, *ius gentium*, law that was accepted everywhere, was *ipso facto* part of Roman law. Therefore, if the validity of axiom 3 has not been doubted (as Huber claims), it is part of Roman private law; and it is as Roman law that it is authoritative. Huber is not out of line with other scholars in this approach. In exactly the same way, when Bartolus was earlier attempting to build up a system of conflicts law, he based (or purported to base) his propositions on Roman law.

Huber's axiom 3 was, of course, not found in Roman law. Nor, of course, were axioms 1 and 2 part of a system of conflicts law, but concerned issues of jurisdiction. Huber was well aware of this and did not hide the fact, since he had said in this very same paragraph that to use Roman law to build up new law unknown in the Romans was standard juristic practice. Indeed, in the absence of other authority, it was necessary if law was to grow. It is important to determine the precise meaning of axiom 3 for Huber. It is fully in accordance with this that he proceeds: "From this it is clear that this subject is to be sought not from the uncompounded civil law (*ius civile*) but from the benefits and tacit agreement of peoples: because just as the laws of one people cannot have direct force among another, so nothing could be more inconvenient than that what is valid by the law of a certain place be rendered invalid by a difference in law in another place. This is the reason for the third axiom on which hitherto there has been on doubt."

That Huber regarded the application of foreign law as binding becomes even clearer when we bring into account his earliest treatment of the subject in the second edition of his *De jure civitatis* (On the Law of the State), published in 1684 at 3.10.1: "Among the matters that different peoples reciprocally owe one another is properly included the observance of laws of other states in other realms. To which, even if they are not bound by agreement or the necessity of being subordinate, nonetheless,

the rationale of common intercourse between peoples demands mutual indulgence in this area." By *ius gentium* in its other, non-Roman, sense of "international law" – and that sense is also relevant for this passage – one state is bound to observe the law of another, first if it is subject to it, second if there is an agreement to that effect. That was well established. In addition, for Huber, one state is equally bound to observe the law of another on a further rationale which is, namely, comity. Comity is binding.

It is the application of axiom 3 as a binding rule of law that gives private law transnational force. The laws of a state do not directly apply outside the territory of the state, but the rulers of other states must apply them *comiter* even when their own rules are different.

There is admirable skillful sleight-of-hand in all this. Huber's axiom 3 did not exist in Roman law, and this he admits even though he bases his whole system supposedly on Roman law. But then he claims his axiom 3 has never been doubted and is part of the *ius gentium*, accepted everywhere. In an upside-down sense, the first part of his claim is perfectly accurate. Axiom 3 had never been expressed before and hence was never doubted! Other Dutch jurists such as Paulus Voet had a very different notion of *comitas*. Huber provides no evidence that *comitas* in his sense was part of the *ius gentium*, accepted everywhere. And, of course, he cannot provide such evidence because his view is novel. But he is not required to provide any evidence because he sets out his legal proposition in an axiom, and by definition an axiom is a rule that requires no proof because it is self-evident.

Huber's aim was to provide conflict of laws with a legal basis. Axiom 3 determines when and whether a state can raise an exception to recognizing that the law of another jurisdiction rules. It is not to be up to the individual court to be able to reject the foreign law because it finds it unpalatable or prefers its own rules.

Huber does not allow for free discretion in applying foreign law. At the beginning of the next section, 3, he writes, again with italics:

This proposition flows from the above: *All transactions and acts both in court and extrajudicial, whether in contemplation of death or inter vivos, properly executed according to the law of a particular place are valid even where a different law prevails, and where if they were performed as they were performed they would have been invalid.* And, on the other hand, transactions and acts executed in a particular place contrary to the laws of that place, since they are invalid from the beginning, cannot be valid anywhere.

Foreign law is binding. Of course, since it is binding only indirectly, whereas the law of the local jurisdiction is binding directly, foreign law would not prevail where it was expressly excluded by the

local law, say by statute. This is not stated by Huber, but it is implicit in the distinction he makes between axioms 1 and 2 on the one hand, and axiom 3 on the other.

This necessary recognition of foreign law is, of course, subject to the exception to axiom 3: transactions and acts elsewhere are recognized "insofar as they do not prejudice the power or rights of another state or its citizens." In keeping with the brevity of axioms, the practical meaning of the exception requires elucidation. Huber glosses it a little further on in section 3: "But it is subject to this exception: if the rulers of another people would thereby suffer a serious inconvenience they would not be bound to give effect to such acts and transactions, according to the limitation of the third axiom." The point deserves to be explained by examples. The examples he gives here and in another work, *Heedensdaegse Rechtsgeleertheyt* (Contemporary Jurisprudence, 1686), best clarify Huber's meaning. The situations mentioned as giving rise to the exception can be fitted into a very small number of distinct classes.

The basic rule for Huber is that the validity and rules of a contract depend upon the place where the contract was made. Likewise, if a marriage is lawful in the state where it was contracted and celebrated, it will be valid everywhere (subject to any exception in axiom 3). But this is dependent, as Huber notes in section 10, on a fiction of Roman law that is set out in *Digest* 44.7.21: "Everyone is considered to have contracted in that place in which he is bound to perform." Hence, for marriage, for instance, the place of a marriage contract is not where the marriage contract was entered into, but where the parties intend to conduct the marriage, which will be the normal residence of the parties. This case, of course, has an important effect on community of property and other property relations of the spouses, but the effect does not follow from the exception to axiom 3.

A first category within the exception is where persons subject to a jurisdiction take themselves out of the territory deliberately in order to avoid the jurisdiction. Most examples would amount to a *fraus legis*. The following instances occur in Huber. Where a Frisian, who is forbidden by law to marry his niece, goes with a niece deliberately to Brabant and marries her, the marriage will not be recognized in Friesland. (On the other hand, when someone from Brabant marries there within the prohibited degrees under a papal dispensation, and the spouses migrate to Friesland, the marriage that was valid in Brabant remains valid). Where young persons under guardianship in West Friesland go to East Friesland to marry, where consent of guardians is not required, and then immediately return to West Friesland, the marriage is void as a subversion of the law. Again, if goods are sold in one place for delivery in another

where they are prohibited, the buyer is not bound in the latter place because of the exception.

A second category for the exception is also of limited extent. If two or more contracts are made in different states and the rights of creditors would vary in different states according to the priority or value accorded to each contract, the sovereign need not, and indeed cannot, extend the law of the foreign territory to the prejudice of his own citizens. For instance, some states give validity to the pledge of property without delivery for a valid hypothec. If state A does not demand delivery, and a pledge is made there without delivery, and the issue comes somehow before the court of state B, state B in the ordinary case would recognize the hypothec as valid because it was valid in state A. But if the same hypothec is made in state A, a second hypothec with delivery is made in state B to a citizen of B, and the issue comes before the court of B, the court must decide the issue of priority according to its own law, because in the event of a straight conflict of rights, a court cannot extend the law of a foreign state to the detriment of its citizens. In such a case of conflict it is more reasonable, says Huber, to follow one's one law than a foreign law.

The limited scope of this category should be noticed. It exists only when there are at least two contracts, contracted in different territories with different laws, where these contracts have to be pitted against one another, and where one party is a citizen of the state where the case is heard. It should be stressed that even in this case Huber is not deciding against the validity of the contract made abroad. It is valid, but its ranking is postponed behind the contract made in the home territory. Huber gives another example. A marriage contract in Holland contains the private bargain, valid in Holland, that the wife will not be liable for debts subsequently contracted by the husband alone. Such an agreement if made in Friesland would be effective against subsequent creditors of the husband only if it was made public or if the creditors could be expected to have knowledge of it. If the husband subsequently contracted a debt in Friesland, the wife was sued for one-half of the debt, and she pled her marriage contract as a defense. The defense was disallowed in Friesland. By the same token, if the wife had been sued in Holland, the defense would have prevailed. This category for the exception exists only where they are contracts with different bases – though this time the contracts are at one remove from the basic act, the private bargain in the marriage contract – and superior ranking has to be granted to one.

A final category – which, as we shall see, is in theory not within the exception – has special significance within the context of this work. Not its sole significance for us is that Huber graces it with only a single example, in section 8 "Marriage also belongs to these rules. If it is lawful

in the place where it was contracted and celebrated, it is valid and effective everywhere, subject to this exception, that is does not prejudice others; to which one should add, unless it is too revolting an example. For instance, if a marriage in the second degree, incestuous according to the law of nations, happened to be allowed anywhere. This could scarcely ever be the case." We have already considered what was meant by "prejudice to others." Now we must consider the nonrecognition of foreign law on the ground that it is "too revolting". To judge from Huber's words in the example, this is permitted only when the foreign law is contrary to the law of nations. Moreover, according to Huber, this will scarcely ever be the case. Accordingly, only very rarely will a state be legally entitled to fail to give recognition to another's law on the basis that it is too revolting or immoral, and then the rejection will be on the basis that the rule is contrary to the law of nations. Since axiom 3 is part of the law of nations, and binding on that account, an act or transaction valid where it is made, but void by the *ius gentium*, will by the same *ius gentium* be given no recognition in another jurisdiction when it would have been void if made there. But it must be emphasized that the invalidity does not derive from the exception to axiom 3 but from the very legal basis of that axiom.

We must stress the very limited extent of the true exceptions to Huber's axiom 3. The axiom is a rule of law subject to exceptions. But in the axiom itself, the exceptions are stated so widely that they could swallow up the rule. This cannot be Huber's intention because he is adamant that an axiom contains a binding rule. He is also adamant that the scope of his exceptions is to be explained by the examples. Perhaps we should detect in Huber's broadness of language a sensitivity that, as we shall see, his view of the indirect binding nature of the rule of recognition of foreign law was stricter than that of his contemporaries. What should be stressed above all from Huber's examples is that, in comity, courts have no discretion in deciding whether to recognize foreign law or not: that issue is determined by the facts of the case. That the above mentioned categories are the only ones for the exception best appears in the context of the fuller treatment in Huber's *Heedenadaegse Rechtsgeleertheyt* 1.3.

To revert now to the marriage in Scotland of an English woman under twenty-one who did not have the consent of her father. The marriage would be valid even in England unless there was *fraus legis* in Huber's sense, i.e. when the couple intended to return and live in England.

Huber's was the position taken by Mansfield. The first reference to Huber in the English reports is by Lord Mansfield in 1750 in *Robinson v. Bland*. Yet it is plausible to suggest that Huber was cited in the English courts before this. He had been cited in Scottish cases with approval on comity from as early as *Goddart v. Sir John Swynton* in 1713, six years

after the union with England. That case then came before the House of Lords in 1715 on appeal, and though the report does not say so, it seems likely that Huber (and à Sande) were prominent in the written pleadings. Moreover, between 1736 and 1756 there were five reported cases from Scotland involving points of conflicts law before the House of Lords, and Mansfield (who became lord chief justice in the latter years) appeared as counsel in every one of them.[10] Mansfield's predilection for Huber in this area is one of the themes of this paper.

Somerset's case, as was emphasized by Mansfield, was decided on the narrow issue of the writ of *habeas corpus*, but in his judgment he makes it clear that he believes a consequence will be that all slaves in England will become free, and that this is something he wants to avoid.

Mansfield's dilemma is extreme. If the issue in front of him had been whether Somerset was free or a slave, then he would have had to decide, following Huber, that Somerset was a slave. The law to be applied, Mansfield following Huber, was that of Virginia. This emerges, in startling clarity, in an English case, *Holman v. Johnson*,[11] three years later, in 1775. Mansfield's approach in that case is all the more striking since it is given only very shortly after the Boston Tea Party of 1773. Mansfield cited Huber and followed his proposition of law. He said, "I entirely agree with him." The relevant passage in Huber is from his *Praelectiones* 2.1.3.5, which reads:

What we have said about wills also applies to *inter vivos* acts. Provided contracts are made in accordance with the law of the place in which they are entered into, they will be upheld everywhere, in court and out of court, even where, made in that way, they would not be valid. For example: in a certain place particular kinds of merchandise are prohibited. If they are sold there, the contract is void. But if the same merchandise is sold elsewhere where it is not forbidden, and an action is brought on that contract where the prohibition is in force, the purchaser will be condemned; because it would be contrary to the law and convenience of the state which prohibited the merchandise, in accordance with the limitation of the third axiom. On the other hand, if the merchandise were secretly sold in a place where they were prohibited, the sale would be void from the beginning, nor would it give rise to an action, in whatever place it was initiated, to compel delivery: for if, having got delivery, the buyer refused to pay the price he would be

10 See A.E. Anton, "The Introduction into English Practice of Continental Theories on the Conflict of Laws," 5 *International and Comparative Law Quarterly* (1956), pp. 534ff., at pp. 538f.

11 1 Cowp. R. 341

bound, not by the contract but by the fact of delivery insofar as he would be enriched by the loss of another.

At the root of *Holman v. Johnson* was the fact that in England the sale of tea on which duty was not paid was prohibited. Mansfield quote Huber's general case in his *Praelectiones* 2.1.3.5 and gave us a translation adopted to the particular case:

In England, tea, which has not paid duty, is prohibited; and if sold there the contract is null and void. But if sold and delivered at a place where it is not prohibited, as at Dunkirk, and an action is brought for the price of it in England, the buyer shall be condemned to pay the price; because the original contract was good and valid... .But if the goods were to be delivered in England, where they are prohibited; the contract is void, and the buyer shall not be liable in an action for the price, because it would be an inconvenience and prejudice to the State if such an action could be maintained.

And he held it to be irrelevant that the point of the transaction was that the tea was to be smuggled into England. The case is decided very much in accordance with Huber's axiom 3 and its exception.

This last point must be stressed. Huber said with regard to his exception: "If the rulers of another people would thereby suffer a serious inconvenience they would not be bound to give effect to such acts and transactions." This was, as we know, interpreted by him very strictly. And so it was by Mansfield. The rulers of England would suffer "a serious inconvenience," one might think, if duty was not paid on tea. And deliberate avoidance of paying duty on tea was at the root of the transaction. But for Huber, as for Mansfield, the contract was valid. Nothing could better illustrate Mansfield's complete adoption of Huber on comity. Thus, if Somerset's case had come before the court on the issue of whether Somerset was a slave, Mansfield, to be true to himself, would have to have held that Somerset was a slave.

A final issue must be mentioned. Neither the attorney speaking for the plaintiff nor that for the defence said anything about conflict of laws. Were they aware of this dimension? If the answer is Yes, then we must ask why they were silent. If the answer is No, then we must question further why Mansfield said nothing. Mansfield's strategy was so successful that even the latest commentator on the case, Steven M. Wise, fails to notice Mansfield's dilemma, and his deliberate – it must be — avoidance of the central question of conflict of laws.

Peter Koller

LAW, MORALITY, AND VIRTUE*

In recent times, the concept of virtue has regained a prominent role in public discourse and in academic ethics as well. However, it has not yet been dealt with very much in contemporary political theory and legal philosophy. This paper aims at clarifying the relationships between law and moral virtues in two respects. First of all, there is the question as to whether and to what extent the law may urge its addressees to be virtuous by enforcing or fostering the respective character dispositions. The second question is whether and to what extent a well-functioning legal order is dependent on moral virtues of the citizens. As to the first question, the paper defends the widely shared view that a legitimate legal system must not enforce virtues and may foster them only to a limited extent. This view results from considering the proper aims of the law: determining and enforcing the rights and duties that are based on fundamental moral obligations; establishing and enforcing arrangements of rights and duties that aim at the fulfillment of weak moral obligations that are not sufficiently realized by individual action without coordination; and establishing duties which are justified by generally acceptable policies, such as the provision of public goods. By contrast, the discussion of the second question leads to the result that a legal order will operate appropriately only if it is backed by supportive moral virtues of the citizens. In order to show this, it is argued that law would necessarily fail when its officials and addressees were pursuing nothing more than their self-interests. Particularly, virtues are necessary for strengthening the force of legal threats, making possible an effective enforcement of legal norms, preventing superior legal officials from corruption, submitting the exercise of legal powers to sufficient public control, and providing moral attitudes for an appropriate process of legislation. As a result, law does rely on civic virtues which it cannot produce by itself.

Key words: *Morality. – Virtue. – Aims of Law. – Rights and Obligations*.

In recent times, the concept of virtue has regained a prominent role in public discourse and in academic ethics as well, by contrast to previous decades in which this concept was widely deemed as old-fashioned and

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conservative. This turn does not only manifest in a huge proliferation of popular publications on virtues, but also in a renaissance of 'virtue ethics' in philosophy, i.e. ethical theories in which virtue plays a central or constitutive role (Chapman & Galston 1992; Crisp & Slote 1997; Stratman 1997). Even if this fact may mirror, to some degree, a trendy fashion in the cycle of intellectual tides, there are good reasons to believe that it also reflects a proper demand: the insight that virtue is an indispensable element of morality and good life.

In my view, virtues play a significant role in ethics because of their importance for moral practice, although I doubt that they can provide a sufficient ground for the justification of morality. I would like to demonstrate this with respect to the relationships between law, morality, and virtue. With this aim in view, I am going to proceed in three steps. First of all, I'll try to work out the notions of virtue and morality more precisely in order to illuminate the functions of virtue in morality. Secondly, I'll discuss the relationship between morality and law in regard to the question as to whether and to what extent the law may be used as a legitimate means of enforcing or fostering moral virtues. Thirdly, I'll deal with the problem whether and to what extent a well-functioning legal order itself is dependent on moral virtues of the side of its citizens and officials.

1. THE ROLE OF VIRTUE IN MORALITY

The concept of virtue refers to the *character traits of persons*, their practical attitudes or dispositions, which have some motivating force for their conduct. There are, however, lots of attitudes which are widely regarded as virtues, as well as there is a great number of dispositions that count as vices. As to virtues, I want to mention just the most prominent examples: prudence, courage, moderation, and justice (these are so-called cardinal virtues); reasonableness and truthfulness; honesty and sincerity; goodness and benevolence; helpfulness, generosity and politeness; open-mindedness and tolerance; fidelity and loyalty; reliability and punctuality; sensibleness and expertise; diligence and carefulness; humility and modesty; piousness, obedience, and the like. It seems obvious that it highly depends on the respective viewpoint and context, whether or not a certain disposition is deemed a virtue. Sometimes it is even possible that a human attitude may be regarded as a virtue in one context, whereas it appears as a vice in a different context.

In order to put this variety of possible virtues in a systematic order, it is helpful to make use of some traditional distinctions that enable us to

differentiate between different types of virtues. The most fundamental distinction is the one between *intellectual* and *practical* virtues (Aristotle NE: 1103 a 14 ff). Whereas the intellectual virtues, such as reasonableness and truthfulness, are aiming at correct theoretical insight or true knowledge, the practical virtues are directed to right conduct, for example justice, prudence, and reliability. In the present context, I am interested only in practical virtues which themselves can be divided up into two different sorts, namely *non-moral* and *moral* virtues (Höffe 1998: 47).

Non-moral virtues are character traits that motivate individuals to behave in a way that is good for themselves or fellow beings for whom they feel sympathy, such as diligence, modesty, and obedience. So these virtues are instrumental to the pursuit of particular interests of certain individuals or collectives. By contrast, *moral virtues* are directed to moral conduct, a conduct that seems desirable from a general and impartial point of view, such as justice, benevolence and honesty. There are, however, borderline cases which cannot be easily assigned to one category or may belong to both sorts. For instance, prudence, understood as the pursuit of one's reasonable self-interest, is a controversial case: Some authors advocate the view that its proper exercise is always in accordance with the basic demands of morality, while others think that it can also be directed to immoral ends. But this question is of no importance for the following considerations that will deal with moral virtues only.

A *moral virtue* can be conceived of as a character disposition that motivates to a certain way of conduct which, in the light of the accepted moral standards, appears desirable, be it approvable or even laudable. This definition, which is in accordance with the usual understanding of virtue from Aristotle (NE: 1105 b 19 ff) to Rawls (1971: 192), is sufficiently narrow in order to understand virtue as a specific aspect of moral life, and it is also wide enough in order to be compatible with different conceptions of morality. This leads to the question of the role of virtue in morality.

In order to decide whether a character disposition is a moral virtue, morally indifferent or a moral vice, we need a more fundamental conception of morality that tells us whether the corresponding conduct is morally laudable, approvable, permissible or unacceptable. Accordingly, it is impossible to reduce a sound conception of morality completely to the idea of virtue, as some advocates of virtue ethics believe, since, without any prior moral standards, we could neither identify moral virtues nor determine their content (Gert 1998: 277 ff). This insight is clearly manifest in most modern moral theories (e.g. by Hobbes, Locke, Hume, Kant, Mill, and Sidgwick), whose basic elements always consist in certain standards in the form of general principles on which all other moral notions depend. But this also applies to Aristotle's theory which

counts as the paradigm case of virtue ethics because of the central role that it attributes to virtues in achieving *eudaimonia*, a human life that is intrinsically good from the individual's viewpoint and the general perspective as well. For it is hardly possible to define the goodness of such a life completely in terms of virtues without any reference to additional features of *eudaimonia* that make it desirable both from an individual and a general viewpoint (Ackrill 1995: 39 ff). So a conception of moral virtues can never provide a complete account of morality, since it presupposes further normative standards that cannot be reduced to virtues.

This, however, does not imply that virtues are of minor significance in morality. To be sure, virtues are extremely important, because a moral practice can never rely on the insight in moral norms alone, but also requires appropriate human attitudes and dispositions that motivate people to behave according to those norms (Baier 1995: 7 ff, 89 ff). Nevertheless, the standards of morality, be they principles or rules, represent the primary elements of morality, since they are necessary to determine the content of moral attitudes. For delimiting moral standards from other practical standards, like those of prudence, social etiquette or law, I want to characterize them by three features (Koller 1997: 255 ff).

First of all, moral standards are *autonomous standards* in the sense that they have binding force only for those persons who accepted them freely and voluntarily. This feature distinguishes them from the heteronomous norms of law and social etiquette, but not from the standards of prudence and personal taste. Secondly, moral standards *claim universal validity* in the sense that people who accept them regard them as binding also for other people. This distinguishes those standards from personal desires, the recommendations of prudence and social habits, but not always from legal norms. And thirdly, moral standards have a *special weight* in the sense that they are deemed to be more important than other guidelines of human conduct, in some cases even so important that they take absolute priority over other guidelines, such as those of personal taste and prudence. On the basis of these features which leave room for a great variety of different conceptions of morality, it is possible to introduce two more specific concepts of morality, namely the concept of a *conventional* morality on the one hand, and the idea of a *rational* morality on the other (Körner 1976: 137 ff).

A *conventional morality* is a set of moral norms that have effective validity in a certain aggregate of people, be it a social group, a society, a culture, or even humankind in general, because they are acknowledged by a vast majority of its individual members as supreme standards of their conduct. Such moral norms create, within the respective social aggregate, a certain degree of social pressure which results from the interplay of the

individuals' positive or discouraging reactions to the behaviour of others. Consequently, a conventional morality, though it is based on autonomous individual moral attitudes, always develops some heteronomous force too, because its norms are connected with corresponding social sanctions that enforce them even vis-a-vis those people who do not accept them. Of course, the mere fact that moral norms are widely acknowledged by the members of a social aggregate leaves completely open the question as to the reasons of their recognition. Thus, a conventional morality may be more or less rational, arational, or even irrational. However, when people enter in a critical consideration of their received moral attitudes, they transcend conventional morality and engage in the enterprise of rational morality (Baier 1995: 214 ff).

A *rational morality* is a set of moral standards that are based on good reasons rather than mere convention or non-rational beliefs. Moral standards are based on good reasons, if there are sufficient reasons to assume that these standards should be unanimously acknowledged by all individuals possibly concerned as generally binding guidelines of human interaction from an impartial viewpoint and in consideration of all relevant information. And I suppose, without entering in a discussion of the various conceptions of moral justification, that this is the case, if the general observance of those standards, according to all available knowledge of the relevant facts, would result in outcomes that, regarded from an impartial point of view, accord to everyone's fundamental interests better than any alternative (Habermas 1996: 59 f).

Yet, we can never be completely certain whether or not a moral standard is rationally justified. This is true even of those moral standards which are commonly accepted for the best reasons we know, because it may be that there are reasons that question these standards. This fact, however, provides no reason for moral scepticism. For moral discourse is, like any other rational discourse, an ongoing enterprise in which we have to consider any moral standard in the light of all reasons for and against it, in order to accept those standards which seem to be based on the best reasons available. So the idea of a rational morality can play a very important role in moral life, since it provides a critical viewpoint for individual moral consideration and public moral discourse as well, a viewpoint which helps us to reflect on our individual moral attitudes and scrutinize the standards of conventional morality. Accordingly, the public moral discourse in a society can be understood as an ongoing interplay between its received conventional morality and the quest for a rational morality.

Now I want to turn to the various sorts of norms of which a morality usually makes use in order to guide human conduct. For a first approximation to this matter, it is helpful to recollect two well-known

distinctions that differentiate between moral norms according to their respective normative force.

The first distinction, which can already be found in the classical theories of natural law, but is better known from the works by Kant and Mill, differentiates between perfect and imperfect moral duties. *Perfect duties* are understood as strictly binding moral demands that have absolute normative force under certain circumstances and, therefore, ought to be complied with without exception under these circumstances. Paradigm examples are the widely accepted negative duties of not harming others. By contrast, *imperfect moral duties* are conceived of as moral demands that leave us a certain degree of discretion as to the circumstances and the extent of their fulfillment, and, therefore, are not strictly binding in the same way as perfect duties. According to common opinion, these duties include certain general duties to positive action which would ask too much of us, if we had to fulfill them in any particular case (Kersting 1989).

The second distinction is the differentiation between *moral duties* in the sense of compulsory moral demands and *supererogatory ideals* that exceed proper moral duties. Unlike moral duties, which include both perfect and imperfect moral duties, supererogatory ideals refer to ways of conduct that, from an impartial point of view, are valued as highly good or desirable, but do not appear morally obligatory, because their fulfillment would require sacrifices that cannot reasonably expected from everyone. When we face violations of moral duties, we are in the habit to respond with disapproval and censure, since we regard their fulfillment as a matter of course. In contrast, we do not blame people who fail to pursue supererogatory ideals, but rather praise and applaud those persons who distinguish themselves by acting in a commendable way.

By combining these two distinctions, which are partly overlapping, we come to a classification of *three kinds of moral guidelines* that differ in the degree of their normative force. I want to name them ‘strict moral demands’, ‘restricted moral demands’, and ‘commendable moral ends’.

(1) *Strict moral demands:* These demands express strict moral duties requiring a certain way of conduct under certain conditions, duties that have priority not only to considerations of prudence, but also to weaker moral guidelines. There are good reasons to assume that this sort of moral demands include the widely accepted moral duties of not harming other people, such as the duty not to kill or to hurt others, to refrain from deceiving others, to respect the property of others, and to keep promises. Furthermore, it appears reasonable to strengthen some of these demands by ascribing to each individual certain basic moral rights of non-interference, such as rights to life and physical integrity, to liberty and free movement.

(2) *Restricted moral demands:* These demands require a certain way of acting which is directed to a morally acceptable state of social affairs that can be achieved by a sort of moral division of labour only. Therefore, the individual duties cannot be determined completely for any particular case in advance, and must be restricted to the extent in which their fulfillment can be reasonably expected from an impartial perspective. It is widely agreed upon that this sort of demands contains most of those general moral duties that require positive action in favour of others to whom one has no special obligations, especially the duties of charity, such as the duty to help people in need; and some people seem to think that no further moral norms belong to that set. In my view, however, imperfect moral demands do also include all those moral requirements that result from a reasonable account of distributive social justice, since these requirements can only be met by a particular assignment of moral duties and rights to special people or institutions.

(3) *Commendable moral ends:* These are guidelines recommending ways of acting, the performance of which appears highly desirable, but cannot be generally required of individuals, because such a requirement does not appear rationally acceptable from an impartial point of view. Examples are beneficial activities for people in need that entail significant sacrifices, or heroic actions of political resistance against a despotic regime.

This classification of moral guidelines enables us to determine the function of virtues in moral life more precisely. Moral virtues, understood as character dispositions to morally guided human conduct, have, first of all, the *general function* to strengthen the weak motivating force of moral norms, which often compete with our self-interested preferences and, therefore, are highly susceptible to defection. By creating 'internal' sanctions, namely feelings of good or bad conscience, our internalized moral attitudes provide us with some additional, though often rather weak incentives to comply with acknowledged moral norms even in cases where external sanctions are insufficient or missing. In this way virtues contribute to the effectiveness of morality. Since such moral attitudes, however, will flourish only in a supportive social environment that is reinforcing and fostering them, it is necessary that we pay appropriate tribute to their appearance. That's why we are in the habit of acknowledging and praising persons of whom we learn that they have behaved or are still behaving in a morally desirable way beyond the degree that can be expected of average people as a matter of course.

When the general function of moral virtues is applied to the three sorts of moral rules mentioned previously, it can be differentiated in three *special functions*. (1) As to *strict moral demands*, which, in general, are not only rather clear, but also not very demanding, virtues have the

function to motivate individuals to a regular and lasting compliance with these rules. For although it may be regarded as a matter of course that one complies with one's strict moral duties in particular cases, it is certainly not a matter of course that one behavies in such a way all the time, even in cases where one could easily violate such duties without risking any social sanction. (2) In regard to *restricted moral demands*, which are even more susceptible to defection than strict moral duties, because, in general, they are more demanding and less precise, virtues can help to counteract the permanent and significant temptation to an insufficient compliance with the duties stated by these demands. So we may feel moral shame, when we are confronted with the social injustices and evils that result from the fact that the uncoordinated behaviour of individuals fails to achieve a morally acceptable state of social affairs, a moral shame which itself may lead us to contribute to social reform. (3) As far as *commendable moral ends* are concerned, moral virtues serve the purpose to motivate individuals to act in ways that exceed their moral duties, but are desirable from a general point of view (O'Neill 1993; Gert 1998: 285 ff).

So much about the role of virtues in the context of morality. Now, I turn to the relationships between law and virtue. In the next section, I want to deal with the question as to whether and to what extent the law may legitimately urge people to be virtuous by enforcing or fostering the respective character dispositions.

2. THE MORAL FUNCTIONS OF LAW

Morality and law have, essentially, the same object, namely the social interaction of people, and they serve a similar function, namely making a just and efficient social life possible. Yet, they refer to that object in different ways, and they fulfill this function with different means. In contrast to morality, law is a system of heteronomous norms which are based on authoritative enactment rather than voluntary acceptance and made effective by formal enforcement rather than informal social pressure. And this fact also explains why legal norms, in general, are mainly concerned with the external behaviour of people rather than their internal convictions and traits (Hart 1961: 163 ff).

In spite of these functional differences, any law is connected to morality in the sense that it requires a moral justification. It needs such a justification for two reasons. First of all, under social conditions where a conventional morality alone cannot secure a just and peaceful social order, establishing an appropriate system of law is itself a moral imperative that is directed to the ultimate aim of any law: namely to ensure

a just and generally advantageous social life. Insofar as the law demands strict obedience to its norms and threatens with the use of force in cases of their non-observance, it actually does claim moral legitimacy. Secondly, any law must take the moral convictions of its addressees into account in order to gain their acceptance without which it cannot achieve sufficient effectiveness. A legal system that deviates too far from the moral attitudes of its addressees drives them permanently into moral conflicts which will motivate many individuals to refuse not only the acceptance of legal norms, but also their obedience whenever they can.

Although every legal system claims moral bindingness and, consequently, needs moral justification, the legitimation of law differs from the rational justification of moral standards in several respects. First, the formal and organized force connected to the law makes its legitimation more complicated: Since the existence of this force not only represents a bad as such, but also includes significant dangers of misuse, its negative consequences and side-effects must always be balanced with its utility. Furthermore, the legitimation of legal norms is not only based on moral arguments alone, but must also take into consideration the viewpoints of efficiency and practicability, with the result that the consequences of such considerations often differ from moral justification.

These two features of legal legitimation explain why some strict moral demands, e.g. the duty of truthfulness, appear much less important within the law: The costs of the legal enforcement of these demands would heavily outweigh its utility. And they also explain why the law is not an appropriate means for enforcing inner convictions, attitudes and virtues: Using it for this purpose unavoidably would turn it into an instrument of terror. Notwithstanding, a legal system must enforce the most fundamental and well-founded rules of morality to a certain degree, so that it can claim moral legitimacy. Understood in this way, it is certainly not wrong to characterize the law as an 'ethical minimum' (Radbruch 1999: 47). This characterization, however, is not very illuminating, since it leaves the moral content of law too indeterminate. So it is necessary to investigate a bit further wherein the minimum of morality consists that the law ought to enforce.

A possible approach to this question is perhaps Kant's distinction between 'duties of right' (Rechtspflichten) and 'duties of virtue' (Tugendpflichten) which, in his view, is coincident with the previously mentioned differentiation between perfect and imperfect moral duties. According to Kant, *duties of right* are all those moral duties which may and must be enforced by the law, because other persons have a right to their fulfillment; and he was of the opinion that such duties could only be perfect moral duties. By contrast, he regarded *duties of virtue* as imperfect moral duties that are not connected to correlative rights, with

the result that their legal enforcement appears neither necessary nor permissible. Furthermore, Kant thought that duties of right are always negative duties commanding the omission of some acts, whereas all duties to positive acts are mere duties of virtue which could never justify the use of legal force. Consequently, his conclusion was that only negative duties would be capable of being enforced by the law (Kant 1968: 347 ff, 519 ff).

This conception, however, is not convincing. In view of the significant costs of organized legal force, it seems hardly plausible that all perfect moral duties ought to be enforced by the law, even if they are connected to correlative moral rights, e.g. the duty of not telling lies to others. Furthermore, it is not acceptable that all imperfect moral duties should be left legally unregulated, for the law provides an effective means for coping with the insufficiencies of such duties, as, for example, the duty to render help to people in need. Law can establish special institutions which are responsible for their fulfillment which cannot be achieved by the uncoordinated behaviour of individuals. Finally, the view that only duties of right, or perfect duties, may be legally enforced would also make it impossible to use the law in order to pursue *collective goals* that are in the common interest of the citizenry without being morally required, such as the provision of public goods like public roads, means of transport, parks, or museums. As a result, a legitimate legal order has many more aims than Kant would admit. I think that these aims are the following.

First of all, law has to determine and enforce those fundamental rights and duties of individuals which flow from well-founded and widely acknowledged *strict demands* of morality, insofar as their enforcement serves the protection of essential interests of people which outweigh the negative consequences of legal force; in my view, these rights and duties not only include the familiar *negative duties* of non-interference and their correlative rights, but also a few modest *positive duties*, such as the duty to render help in case of emergency, if such help can be reasonably expected. Secondly, a legal order should aim at establishing and enforcing an arrangement of individual rights and duties that makes possible the cooperative fulfillment of those *restricted moral demands* the realization of which is in the essential interest of individuals, but can only be achieved by coordinating their behaviour in an appropriate way; this is obviously true of those *positive rights* and their correlative duties that flow from the requirements of social justice, such as the rights to democratic participation, equal opportunity, and economic justice. And thirdly, law should issue and enforce individual rights and duties which are necessary for achieving *collective goals* that need cooperative interaction, if their pursuit has been decided on in an appropriate way, even

though these goals are not morally required in themselves; so law may establish rights and duties in order to provide public goods to the citizens' common benefit.

On the other hand, a legitimate legal order has *definite limits* that are also set by rational morality. First of all, law must not enforce eccentric moral ideals that are not aimed at the protection of essential human interests common to all people concerned. Secondly, it is not its function to enforce commendable moral ends that exceed the duties generally acceptable to all people concerned from an impartial point of view. And thirdly, law is also not a legitimate means of enforcing inner moral convictions or moral virtues.

That the law must not enforce *eccentric moral ideals*, such as the prohibition of soft drugs or the prevention of homosexual relationships, results immediately from its ultimate aim to guarantee a just and generally advantageous social order. The legal enforcement of such ideals creates significant costs to those individuals who do not share them without serving the realization of generally acceptable aims. But even when certain *commendable moral ends* may appear generally desirable, it is not the law's job to enforce them, if they exceed the moral duties the fulfillment of which can be reasonably expected of average individuals, such as donating a kidney to somebody who needs one for survival, or rescuing a person by risking one's life. By enforcing such commendable ways of conduct, a legal order would ask too much of its subjects and, thereby, create social affairs which appear even less desirable than the continued existence of the dangers that could possibly be diminished through the enforcement of those ways of conduct. Neither is legal force an appropriate means to bring forth *moral virtues*, since any attempt of achieving this goal unavoidably leads, at best, to public hypocrisy, or, even more likely, to a total repression of free thought.

This does not mean, however, that law cannot contribute to stimulating moral virtues at all. Quite the opposite: moral virtues will hardly flourish without a legal order that encourages them. Yet, its contribution consists in the *indirect support* rather than the direct enforcement of virtues. There are at least two options.

First of all, the legal system may contribute to the flourishing of moral virtues by setting a framework of conditions of social interaction under which moral conduct is beneficial to the individuals rather than to their disadvantage. This becomes particularly obvious when such a framework of conditions does not exist: In a state of social affairs which is dominated by corruption, lawlessness, and injustice, individuals have little incentive to develop moral dispositions, such as honesty, reliability, justice, trust, and benevolence, since these dispositions would be to their

detriment. Conversely, a legal order which, by and large, succeeds in preventing people from dishonesty, injustice, exploitation and the like will support the diffusion of moral virtues by making them beneficial to its subjects. Thus, a legitimate and functioning legal order is a necessary precondition of the emergence and continuing existence of moral virtues, even though it is not its job to enforce them.

Secondly, a legal order may foster moral virtues by providing appropriate *positive incentives* in order to support them. It can pursue this goal in various ways that include the application of suitable methods of education, the encouragement of desirable social activities, and the provision of special awards for people who distinguish themselves by laudable ways of conduct. So, for example, a legal order may support private activities of charity by the tax system, contribute to a climate of tolerance and solidarity through the regulation of public education, encourage public spirit and democratic commitment by a suitable arrangement of political decision procedures and and civil rights, and the like. It is true that the provision of such positive incentives also requires expenditures which must be raised from the members of the respective community by the use of legal force. As this legal force, however, takes a rather indirect and weak form, it can be justified by the argument that the moral virtues which it promotes have the character of a valuable public good that eventually is to the benefit of all members.

So much to the relationship between morality and law in general and the question as to whether and to what degree law may enforce or foster moral virtues in particular. As far as the enforcement of virtues is concerned, my conclusion is, not very surprisingly, *negative*. Now, I turn to the question of whether and to what degree a legal order needs moral virtues on the side of its officials and addressees in order to operate in a sufficient way.

3. THE SIGNIFICANCE OF VIRTUE IN LAW

An influential approach in modern social philosophy, an approach which can be traced back to Thomas Hobbes and today is represented by the so-called *Rational Choice Theory*, begins with the premise that human beings, in general, are rational egoists who pursue only their own self-interest and, therefore, always attempt to act in a way that maximizes their respective utility (Elster 1986).

If this approach is applied to the question of how to achieve a peaceful and well-ordered social coexistence among individuals, it recommends the view that such an order needs nothing more than a legal system which, by setting appropriate negative and positive sanctions in

the form of penalties and gratifications, induces its addressees to behave in their own self-interest in a way that leads to the desired result. In other words: A peaceful and well-ordered social order is possible if, and only if, the law provides framing conditions of human interaction which make it advantageous for any individual member to act in a way that contributes to bring about such an order. Consequently, a well-functioning legal system ought to be arranged to the effect that it is appropriate even for individuals who seek only their own benefit and have no moral scruples.

This view seems plausible to me, if it is understood in the sense that a legal order should not rely on the virtuousness of its subjects, but create framing conditions of social interaction that encourage individuals with regard to their own self-interest to behave in a way which leads to the desired social state of affairs. Understood in this sense, it is certainly expedient to reckon with the worst case and design legal rules and institutions in a way that they meet their goals even in the case when people usually pursue their own benefit without caring about morality.

Yet, the view mentioned above has been interpreted by many advocates of a strict rational choice approach – from Hobbes and Spinoza to Gary Becker and James Buchanan – in a much stronger sense, namely in the sense that a peaceful and advantageous social order may be guaranteed by the means of legal regulation alone without the support of corresponding moral attitudes of the individuals (Becker 1976; Buchanan 1975). Understood in this strong sense, the view implies not only the modest and highly plausible recommendation that, when designing the rules and institutions of law, one should reckon with the worst case, but rather the strong position that a well-functioning legal order could emerge and persist even then when all people concerned were mere egoists without any moral motivation. This position, however, seems completely wrong to me. I think, there are at least five objections that can be raised against it.

First of all, the sanctions that can be used by a legal system in order to influence the conduct of its subjects, especially its threats of force and punishment, are certainly not sufficient to provide the individuals with appropriate incentives to abide by the law, when everybody only pursues his or her self-interest. For whatever means of force the legal order may use, there will always remain many opportunities to violate its commands without risk, and the more means the law mobilizes in order to diminish such opportunities, the more restrictive its rules and the higher the costs of legal force become. If the fear of legal force were the only incentive of individuals to comply with the law, the enforcement of a legal order would not only be extremely weak and incomplete, but also so expensive that it would forfeit any legitimation. As a result, a

legal order cannot sufficiently function without the support of corresponding civil virtues of its subjects supplementing the legal threats, such as a sense of justice, fairness, honesty, and public spirit (Baurmann 1996: 261 ff; Höffe 1999: 195 ff).

Secondly, an effective and extensive enforcement of law requires that individuals are willing to cooperate with the law enforcing institutions, e.g. the police and the courts. But why should people do that? It is certainly true that, in many cases, some individuals are immediately interested in rendering such assistance, because the enforcement of legal rules serves their own benefit; and it may also be true that most people, even when they are not themselves immediately concerned, have an indirect self-interest in the existence of a well-functioning legal order, since such an order is also to their own benefit in the long run. The cooperation with legal institutions, however, causes some costs and disadvantages too: namely, in any case, a loss of time, often also certain financial costs, and sometimes even a danger to life and limb. Since these costs will frequently exceed an individual's expected utility of legal enforcement, which is especially probable in those cases in which one does not have an immediate interest in it, the question arises how legal persecution can work at all. This question cannot be answered satisfactorily on the assumption that all people actually pursue only their self-interest. Consequently, an effective legal enforcement can only be achieved, if there is a sufficient number of individuals who, at least in some cases, are willing to contribute to legal enforcement for the sake of justice rather than their own benefit (Pettit 1990).

Thirdly, any legal order stands or falls with the sense of justice of its highest office bearers, including the leading politicians, judges, and officials, since there is no way to induce these persons to comply with the law by means of legal threats alone. It is true that there is an appropriate method of diminishing the risk of misuse of legal power by distributing it among different independent institutions who control each other. Yet, this method can neither completely prevent any corruption of legal powers nor create an affirmative attitude of its bearers towards the existing legal order. Thus, a legal system will not function properly without the inclination of its rulers to comply with its principles and defend it against corruption (Hart 1961: 107 ff). And it is pretty obvious that this inclination does not flow from their self-interest alone, but must be backed by moral dispositions, since otherwise it could not be explained why, all other things being equal, some officials misuse their powers unscrupulously to their own profit, while others resist all temptations to corruption and strive to exercise their powers as correctly as possible. As a consequence, a legal order will operate in a proper way only under the provision that at least a part of its officials – judges, civil servants,

government members – are, to a certain extent, motivated by moral virtues, including loyalty to the law, justice, integrity, impartiality, correctness, and truthfulness.

Fourthly, a functioning legal order requires some organized authority which, in developed societies, takes the form of the state with a monopoly of power. This fact, however, creates significant dangers, particularly the danger of corruption of power which increases in proportion to the concentration of power that lies in the hands of that authority. In order to counteract this danger, there is need for an effective control of power which, to a certain extent, may be exercised by special legal institutions, but also requires the commitment of the citizenry (Baurmann 1996: 176 ff). Although one can assume that citizens have a rational self-interest in the public control of state power, this self-interest is hardly sufficient to lead them to appropriate activities, because, in most cases, the individual costs of such activities will override their individual utility. Consequently, people are confronted with a *cooperation problem* by which they unavoidably fall into a trap, if each of them is seeking only his or her individual utility. As a result, public control of power will not take place, unless there is a sufficient number of citizens who are lead not only by their self-interest alone, but at least to a certain degree by moral attitudes, such as political commitment, benevolence, truthfulness, and courage (Höffe 1999: 208 ff).

Finally, moral virtues are also necessary for a process of legal development that is directed to produce a just and efficient legal order. Such a process includes two elements: first, an appropriate procedure of legislation which itself must be accepted by most members of the legal community in order to guarantee the acceptance of its results, and second, an ongoing public debate in which citizens seek to form their opinion and reach an agreement on the legal regulation of their common affairs. Both the legislative procedure and the public debate, however, will lead to acceptable results only under the provision that participants are prepared to distance themselves from their particular interests to a certain degree, in order to consider the common interest of all people concerned (Habermas 1996: 277 ff). But this would certainly not be possible, if all individuals were always acting as pure egoists. Thus, a successful process of law-making also rests on the condition that the participants are capable of balancing their own interests with the interests of others in an impartial way and acknowledge legal regulations that are generally acceptable. And this requires that a sufficient number of citizens and politicians have internalized supportive moral attitudes, of which tolerance, fairness, public spirit, and devotion to the commonwealth are of particular importance (Höffe 1999: 199 ff).

If these considerations are, by and large, correct, then it follows that a well-functioning legal order requires the support of moral virtues on the side of its subjects and officials for several reasons. In summary, such virtues are required for the following aims: (1) for compensating the weak and insufficient incentives of legal sanctions, (2) for making possible an effective and complete enforcement of legal norms, (3) for leading legal officials to comply with the law, (4) for guaranteeing the necessary control of legal power, and (5) for enabling an appropriate process of legal development. So a legal order cannot function in a proper way without moral virtues of the individuals involved. This result raises some problems which I want to address very briefly at the end.

I have argued that a well-functioning legal order needs the support of moral virtues which, however, cannot be produced by means of legal force. So law is dependent on moral resources that must be provided by *civil society*, the social community of the people concerned. This somewhat paradoxical result leads to the question of how civil society may produce the moral virtues that are required in order to guarantee a well-functioning legal order. This is a very complex question which I cannot answer satisfyingly, if there is a satisfying answer at all. Yet, I want to mention three features which, in my view, are important for the formation of moral dispositions: moral empowerment, public discourse, and social solidarity.

By *moral empowerment* I mean the creation, encouragement and reinforcement of basic moral capacities through a supportive social practice rather than preaching moral values and norms. These capacities, that combine cognitive and emotional attitudes, mainly include the following: the inclination to empathize with other human individuals and sentient beings; the willingness to consider the interests of others and balance them with one's own desires from an impartial point of view; the capacity of acting on social rules and orders that appear generally acceptable; and last but not least, the habit to activate appropriate emotions vis-a-vis good and bad, such as, for example, satisfaction, guilt, shame, compassion, and indignation. These capacities are neither inborn nor emerging naturally. Rather, they develop and flourish preferably in social surroundings in which they are conveyed to individuals from birth through a loving and understanding guidance, and reinforced by an ongoing social practice (Rawls 1971: 453 ff).

Even if most members of a legal community have the basic moral capacities, it may be that they do not share a common conception of a just and efficient legal order. Such an order, however, requires a *public* morality, a set of widely shared fundamental moral standards. The only acceptable means to generate and renew a public morality is an ongoing process of *public discourse* that must be open to all people concerned and

sensitive to any intelligible concern. Such a discourse can foster a moral consensus because it does not only provide the participants with better information about the relevant facts and aspects of the issues under consideration, but also create a situation in which they must respect each other as equals and attempt to reach an agreement on the regulation of their common affairs. And to the degree in which such an agreement can be reached, the agreed on moral norms will gain increasing force, for it becomes more probable that their obeying or violation will cause appropriate social reactions, be they positive or negative (Habermas 1992: 399 ff).

The motivating force of moral norms, however, has its limits, too. In general, its strength depends on the extent of reciprocity of human interaction. Therefore, a public morality needs a social world in which individuals feel bound together by ties of *social solidarity*, a shared interest in mastering their problems of existence cooperatively, based upon an effective social practice. Without such an idea, we will hardly succeed in establishing a widely acknowledged political and legal order, since the voice of morality will not be strong enough to gain attention against the parties' selfish interests in their struggle for power and benefit. It is, therefore, an important task to create and preserve a climate of social solidarity in order to bring forth the moral virtues without which a well-functional legal order cannot exist.

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Vojislav Stanovčić

DEMOCRACY AND THE RULE OF LAW

In the first part of the article it is pointed how two ideas that have a long history – democracy and rule of law – in the modern European history have become a part of the Western Civilization foundations. And how it is searched for their appropriate institutionalization in political and legal systems. But, although the synthesis of the two has been persistently wished, there are also great contradictions between them. In the course of history the political will and power prevailed and treated law just as a means of commanding over subjects and obliging them to do what rulers expected of them, with little or no readiness or will on the side of rulers (with rare exceptions) to accept law as a limit of their power and to obey laws that they themselves proclaimed and codified. Judean and Western Civilizations, however, proclaimed superiority of laws over any political will or power."The Rule of Law, and not of Man", was among credos of constitutionalism as a doctrine and political movement aiming to limit every government to what is acceptable by reason of laws. One of the premises of this article is that it refers to the will of majority, i.e. to democracy, and that opens up many issues which are considered.

The second part surveys how great political and legal thinkers, have since ancient times until today, been skeptical and critical in regard to democracy if comprehended in the etymological sense as "Government of the People" or in a technical sense as a "Majority Rule". In fact, in democracies as in any other form of government, even for technical reasons, states were always ruled by minority. Therefore, even when democratic governments have very wide electoral support, it is necessary to limit the influence of ad hoc *political will and to oblige it to obey reasonable rules which are result of a wide consensus and in the form of a constitution and laws make a part of the rule of law. In such frames every branch of government would have constitutional and legal limits, which, in accordance with the thought of great legal and political thinkers should be determined by basic aims and values that governments among men are instituted for, including human rights and freedoms, as well as some principles of government organization (like separation of powers, check and balance) that secures autonomy of associations and moral autonomy of individuals. The rights of minorities are treated as a supplement to majority rule. Many examples and opinions of great thinkers are quoted, as well as their arguments that unlimited power of majority turns into tyranny of majority which could be the worse of forms of government.*

The third part deals with a number of difficulties that have to be overcome, specially in countries with the heavy burdens of authoritarian systems legacy and with present-day difficult situations and grave problems. Finally, it deals with institutional arrangements and accommodations that should be necessary to make in order to achieve a synthesis of the rule of law and in such frames the freedom, values, institutions and procedures which provide space for democratic participation and government.

Key words: *Foundations of Western Civilizations. – Political Will vs. Law. – Constitutionalism. – Tyranny of Majority. – Rights of Minorities. – Human Rights and Freedoms. – Separation of Power (Checks and Balance)*.

1. HOW COULD INTELLECT NORMS MODERATE THE RULE OF MAJORITY?

It is generally considered that the Western European civilization is one of the very few civilizations founded on the Rule of Law, although the idea itself goes a long way back. Also, it has been assumed that, perhaps the greatest and the most important invention of human kind is moral regulation, that is, sanctioned rule of behavior (contained in the meanings of Brahman' and Buddhist' *dharma* or Greek *nomos*)[1]. However, in the course of history, in a relationship between political will and law, political will was predominant, to the extent that it even used the law as a means to communicate the requirements (obligations, expectations) to its subjects. Only Hebrew and the Western European civilizations proclaimed the primacy of norms over every political will, i.e., of authorities/government. In effect, we hold this should also be applied to the will of majority, that is, democracy, but such a view launches a lot of questions. Therefore, this paper addresses several issues: 1. there is a tendency to oversimplify the assumption that democracy is "the rule of majority", and a priori good or absolutely and always the best form of regime; 2. there is an enormous importance attached to the idea of the rule of law (regulations) but not to the rule of law and not the rule of man, which represents one of the devices of constitutionalism as a doctrine and movement aiming to limit and reduce every authority/government within acceptable reasons of law; 3. therein exists an oversimplifying interpretation that the rule of law or Rechtsstaat (a state regulated by laws) consists of implementing a set of laws regardless of their contents; and 4.

1 I discussed this issue in the paper: "Улога норми и нормативних поредака у историји цивилизација"(The role of norms and normative orders in the history of civilizations), in *ГЛАС* CCCXCIV Department of Social Sciences, book 30, Belgrade SASA, 2005, pp. 139–161.

certain elements have to be developed in order to draw near the contents of the laws (regulation) and democracy itself, closer to a theoretical assumption on these issues, their meanings and forms.

Arnold Toynbee, in his well– known work *A Study of History* (1934–61), described around twenty or so civilizations[2]. So-called democratic civilization was supplemented to the number in 20th century[3]; today, the term usually assumes the Western European or North Atlantic civilization. This civilization, more than any pervious one, was founded on proclamations and efforts to establish the idea of the rule of law (in Anglo-Saxon theory and practice, and also Rechtsstaat, in German)[4]. The idea of the rule of law (regulations) and not the man was proclaimed in the Western European legal and political theory a long time before the idea of democracy came into picture. In fact, the idea of the rule of law was taken over from Old Testament, and the thought became incorporated into the Western civilization through Christianity. I have elsewhere discussed Plato, Aristotle and Cicero, as being the founders of the theory "the rule of law"[5]. Some other authors dealing with the rule of law, discussed Cicero alone, while completely omitting Plato and Aristotle. It is not clear why this was so[6]. Much later on, within the Western European

2 Arnold Toynbee, *A Study of History*, Oxford– London, Oxford University Press, 1934–61, 12 volumes.

3 Leslie Lipson, *The Democratic Civilization*, New York, Oxford University Press, 1964.

4 See: Danilo Basta (ed.), *Pravna država* – poreklo i budućnost jedne ideje (Rechtsstaat– origins and future of the idea), Belgrade, Pravni fakultet Beograd and Nemački kulturni centar, 1991; and Danilo Basta, *Neodoljiva privlačnost istorije (Irresistible attraction of the History)*, Belgrade, CUPS, 1999, especially "Šta nije pravna država"(What is NOT a Rechtsstaat) and "Slabosti demokratije"(Shortcomings of Democracy).

5 See more in the paper "Preteče ideje o vladavini prava: Platon – Aristotel – Ciceron" (The pioneer ideas on the rule of law: Plato, Aristotle, Cicero), *Arhiv za pravne i društvene nauke*, 1986, 3–4.

6 Influential authors, experts in the field of the German and Anglo– Saxon traditions and understandings of the rule of law and democracy, never research the idea fully, omitting thus Plato, Aristotle and "Five books" of Moses. Thus: Franz Neumann, *The Rule of Law*: *Political Theory and Legal System in Modern Society,* Heidelberg, Dover, 1986 (translated into Serbian language by: Slobodan Divjak: *Vladavina prava*, Beograd, Filip Višnjić, 2002); and Friedrich A. von Hayek, *The Constitution of Liberty* [1960], University of Chicago Press, Gateway Edition, 1972; translated into Serbian language with a foreword by Ilija Vujačić (Novi Sad, Global Book, 1998). Hayek makes a distinction between liberal and totalitarian democracy, we add that the idea of totalitarian democracy did not occur the first time after WW II (J. L. Talmon, *The Origins of Totalitarian Democracy*, London, 1952) but in 1930's ((H. O. Ziegler, *Autoritärer oder totaler Staat*, Tübingen, 1932),therefore, in spite of the great contribution of Hannah Arendt, her work on totalitarianism was overstated (Hannah Arendt, *The Burden of Our*

civilization, democracy was advocated for. This idea and its institutions have a long history, therefore its early development in Ancient Greece could not be omitted. When we want to apply the idea of democracy, we must pose the question: what would be the institutions that correspond to it? Today, this issue has to be seen in the light of the idea of the rule of the law, which is presumably more important than democracy for social development and human wellbeing in a society, although democracy, as a means to attain the same goals, is also very important.

Nowadays, democracy appears to be very popular, although that was not the case in the past. The popularity of democracy started to increase just before WWII, during and after the war; however, the understandings of what democracy really is diverged more and more, as the number of countries wanting to present their own regime as democratic increases[7]. Among the ideas that became much popularized, though mutually antagonistic, are the ideas of "western" and "eastern" democracies (see more in D. W. Brogan), classical pluralistic (multi-parties) and "people's" one-party, as well as procedural opposing the one with fundamental nature (aiming to achieve certain goals, corresponding since the 19th century, with economic, social and finally socialistic, and somewhere industrial democracy). On the other hand, the role of the U.S.A. has increased in European and world matters since the "Atlantic Charter" (1941) and WWII, resulting in omnipresent "American democracy" in literature.

It should be noted, though, that even in the U.S.A. democracy took on different forms than today. For example, in 1787, in Philadelphia, at American Constitutional Convention, an opening statement was given by Governor of Virginia, Edmund Randolph, who argued against democratic elements in constitutions of the American states. The Convention was made of 13 states (not every state had its representative though), and besides George Washington, one of the most influential deputes was Randolph. Even before the Revolution and the war for independence, there were, in North America, voices arguing for and advocating de-

Time, 1951; later editions of the work contain a different title: *The Origins of Totalitarianism*, New York, Harcourt and Brace) by claiming her pioneer role in claiming the term totalitarianism. In the paper F.A. Hayek, *Law, Legislation and Liberty*, A New Statement of the Liberal Principles of Justice and Political Economy; translated into Serbian by Branimir Gligorić: Beograd – Podgorica, Službeni list SRJ– CID, 2002; epilogue written by Ljubomir Madžar).

7 Many differences in the understanding of the term democracy have become even more profound after WW II, as a result of the cold war. The character and degree of the differences in the understandings of democracy is evident, see *Democracy in a World of Tensions*, ed. by R. McKeon, Chicago, 1951. Still, the problem of the meanings of the term remains, as well as conditions, environmental influences, institutional organization and the presence of democracy alone in practice.

mocracy (such as Thomas Jefferson, Thomas Paine, James Wilson). Later on, the president of the U.S.A. Andrew Jackson continued down this road. However, some influential intellectuals, such as Benjamin Franklin in Pennsylvania and John Adams in Massachusetts, were utterly critical toward democratic ideas, although both of them had signed "Declaration on Independence"; the declaration contained a proclamation of man's basic individual natural rights as well as a statement on "government by consent", with the right of the governed to rule out or cast off a government and establish one that would provide safety and happiness. It could be argued that this assumed democracy, but Franklin had, before the Revolution, considered it inappropriate to give the right to vote to those without any property. In addition, John Adams, while on his service in London as an ambassador, at the time the Constitution was comprised, wrote his 3-volume work *A Defense of the Constitution of Government of the United States of America,* where he fiercely argued against the idea that majority should control all three branches of government[8]. The "Father" of the American constitution, James Madison (1751–1836), a leader in the constitution founding and amendments that guaranteed human rights, wrote in *Federalist Paper*[9] on dangers of tyranny of the majority and thus revived disputes on a subject discussed by Aristotle. After Madison, the discussion was continued by Alexis de Tocqueville (1805–1859), John Stewart Mill (1806–1873) and many others[10]. Benjamin Constant, a liberal thinker, was also skeptical toward the rule of majority, assuming that it is equally difficult for a man to live under one tyrant, or under the tyranny of the social majority, the masses, the latter even being worse than the tyranny of one man.

8 John Adams, *A Defense of the Constitutions of Government of the United States of America* [first published in London, 1787–1788], reprint New York, Da Capo Press, 1971, vol. I-III. Adams considered that the consequence could be catastrophic and overestimated what could the majority do if allowed all the power. "General" right to vote for mature white men was introduced in the U.S.A. only before the civil war, in 1860.

9 See, Hamilton, Madison J, *Federal Notes* (1787–8), Belgrade Radnička štampa, 1981, translation and notes by Vojislav Kostunica; Foreword: О карактеру и политичким идејама *Федералистичких списа*" (pg. 7–189) (On character and political ideas of *Federal Notes*), by Vojislav Stanovcic.

10 See: Kosta Čavoški, *Mogućnosti slobode u demokratiji*, (A Possibility of Freedom in Democracy) Beograd, 1981; Војислав Коштуница, *Угрожена слобода (Endangered Freedom)*, Београд, Институт за филозофију и друштвену треорију and Филип Вишњић, 2002. In Democracy in America (vol I, 1835; vol. II, 1840) Tocqueville discussed the possibilities of freedom in democracy. J. Stuart Mill developed the idea further, discussing the differences between right and wrong democracy. Tocqueville stated that driving forces behind the American democracy are "equal conditions", corresponding to both freedom and restrictions. Out of these, a "mass society" developed, along with mediocrity under the pressure of the public opinion. These issues influenced Mill to search for possible solutions, see *О слободи* (1859) (On Liberty) и *Размотрања о представничкој влади* (*Considerations on Representative Government*) (1861).

Constitutional and liberal democracy, developed in political theory under the critical influence of Madison, Tocqueville and others, was not understood as an unlimited power either by itself or the majority. Within this kind of democracy, minority rights, even rights of political and ideological opposition and foes, are in fact, important means of correction of laws and the rule of majority (Madison already pointed to this). This kind of democracy is exercised in correspondence with fixed rules (constitutional) and serves to the interests of all, and not just to the ones who share and exercise the power. If these two requirements are not fulfilled, then this kind of rule of majority is called in pejorative terms– even before Tocqueville, great thinkers such as Aristotle and Hegel used the terms ochlocracy or mobocracy. Jefferson argued that this kind of system is in fact "elected despotism".

Bertrand Russell truthfully claimed that democracy became an important political force only after the American Revolution[11]. At the beginning of the American undertakings to establish a new form of government, there was a discussion on a form of government limited by constitution, usually termed "free government", and more frequently "republican government" (Roman res publica), meaning elected, representative, and Woodrow Wilson himself called it "Congress Government".

Today, forms labeled democratic appear very popular and are advocated for everywhere, especially after the U.S.A. has accepted the idea of democracy and after WWII. This question, however, should be discussed in relation to antagonistic tendencies between authoritarian form and democracy, and modern political movements and ideologies.

In fact, democracy was not as popular as it is today in the course of the foundation of the U.S.A.; from 1930's till WWII, other solutions were sought after to explain the character and nature of the American government. Roberta Dahl[12] states that before 1950 the democratic theory was not in the interest focus of political science worldwide and that the notion "democratic theory" did not exist. In addition, before WWII, there was no consensus and clear understanding on what it is that the democratic doctrine includes[13]; besides, some elements of social welfare, responsibility, and even control and wellbeing were accentuated and

11 B. Rasl, *Istorija zapadne filozofije (History of the Western Philosophy)*, Beograd, Kosmos, 1962, pg. 475 and 737.

12 Robert A. Dahl, *Democracy and Its Critics*, New Haven and London, Yale University Press, 1989.

13 Michael Oakeshott (*The Social and Political Doctrines of Contemporary Europe*, Cambridge University Press, 1939, see pg. . XV and 3) emphasized a doctrine of representative democracy, and claimed that many would question why democracy was included. He stated he was unfamiliar with works that provide a systematic teachings on democracy as a form of governing.

accepted as a goal of even liberal democracy. The conception of "Welfare State"[14] was first presented (Barbra Wooton) as opposition to fascist and national-socialis, as well as Stalin's glorification of the power state (Machtsstaat), and the understanding that one of the main goals of the state is to increase its own power.

In discussion on significance, conditions, assumptions, possibilities, ways, institutional forms, as well as difficulties and obstacles in establishing democracy, that is, the rule of law and democracy, a great importance should be attributed to some general principles and statements of classical and modern political and legal theories and philosophy. These are especially related to the attitudes and analyses on the nature and forms of political authority/power and among them, of democracy, relation between power/authority and citizens, character and real achievement of certain political, constitutional, legal and also social and economic and other institutions, as well as discussions on (pre)conditions for establishing and turning citizens' legal rights and freedoms[15] into reality and prosperous society. But, even more frequently, there is an emphasis on ideological rationalization or apology of a given government. As Klaus von Beyme argued, there is a strong tendency to treat democracy as a synonym for "good, beautiful and truthful in a society"[16]. Indeed, it looks though "democracy" is being called by everyone as everything one wants to support as a system of political values and institutions. This attitude often tends to omit or overlook some of those elements considered today by political or legal institutions as condition sine qua non of democracy. There exists no conference of political or legal institutions that could automatically provide "democracy" or "democratic government" in reality.

2. POLITICAL THEORY ON SOME SHORTCOMINGS OF DEMOCRACY

From the very beginning in the considerations on virtues and shortcomings of democracy as a political form[17], there were serious ob-

14 See.: Vojislav Stanovčić, "Izvori teorija o 'državi blagostanja'", (Theoretical sources on prosperity state) Beograd, Radnička štampa, 1975.

15 Коста Чавошки, *Право као умеће слободе*)(Law as the arts of freedom)(Оглед о владавини права), Београд, 1994 (and 2005).

16 Klaus von Beyme, *Suvremene političke teorije(Modern Political Theories)* (1972), Stvarnost, Zagreb, 1977, стр. 199.

17 For example *Херодотова Историја (Herodotus History)*, book. 3,. 80–82 (Матица српска, Нови Сад, 1959, pg.. 185–187).

jections to it. Some objections assumed that the decisive point in democracy is number, not quality[18]. Numerical relationship of majority-minority was treated as quantative, while the relationships made by decisions of the majority concern qualitative side of the relationship between parts that make one totality[19]. Plato harshly criticized democracy, but still considered that democracy could take a legal and violent form; he argued that democracy weakens the government by dispersion, therefore, democracy is capable neither of the good nor of the evil deeds[20]. Aristotle analyzed several forms of democracy, arguing that it could have a right or wrong form. In the first case, it is a free state (politeia) and in the second, ochlocracy, or as called afterwards, moboctacy. One of the basic criteria that distinguish right from wrong is whether a government aims to achieve common interests of all or serves to the particular interests of those in power, which is wrong even if they make the majority. The other criterion is existence or non-existence of some basic principles and rules which enjoy general consent to be valid, and the government obeys them (in short, it could be called the rule of reasonable and widely accepted laws), which is exactly the main topic of this paper. Aristotle writes about five forms of democracy, where one form is particularly labeled as wrong. That is the one where the rule of law does not exists, and masses force their own, immediate ad hoc will.

Aristotle was the first one to draw attention to a problem, later known as 'the problem of tyranny of the majority", which has already been mentioned due to its significance to our topic. Also, he laid out another idea, very similar to much more modern perspectives of Schumpeter, Lipset, Dahl, Aron and others that came to see democracy as a possibility for humans to choose between alternative elites, that is, minorities competent to govern.

Aristotle considered masses of people as neither wealthy nor educated, therefore should not be given power to rule. Still, he argued, it would be a potentially dangerous to totally exclude masses from the power, so he came up with a middle solution: masses should be allowed to elect representatives from a smaller group, capable of governing in a competent and responsible way. It is important to note that the Ancient Greek philosophers already recognized that it is the wrong form of government if a

18 The most respected Ancient Greek philosophers, such as Socrates, Plato and Aristotle, critically discussed democracy, especially since its advantage towards numbers, that is, quantity, and not quality.

19 This is also pointed out by Georg Jellinek discussing the rights of minorities ("before, it was measured, now we number") Ђорђе Јелинек, *Право мањина (Minority right)*, Београд, Državna štamparija Kraljevine Srbije, 1902).

20 Plato, *Statesman*, 303a. Compare with *The Republic*, Book VIII, x..

majority follows only its own interests (and, thus, excluding the interests of the remaining minority). It was Aristotle's postulate that democracies should be valued on how much they respect general rule, that is, the law. If they diverge from the law, they become ochlocracy[21].

Humanism in the Renaissance period was saturated with the elements of former Ancient Greek ideal, supported by poets and philosophers, even some statesmen, in order to facilitate a man's return to his true human political home[22]. Almost at the same time, "power states" were established and their apologies commenced (theories on "state reason", absolute sovereignty, fatherly or divine origin and unlimited power of kings). All tried to use the law, that is, legal regulations, as an efficient instrument to command and control punishable, desirable and allowable behaviors. This form reached its peak in totalitarian states in the 20th century. The rule of the law is exactly the opposite: it obligates state bodies and officials to act within the framework of the law and not against it, while respecting individual, that is, subjective human rights as parts of modern legal orders. This was not respected by totalitarian regimes, on the contrary: totalitarian and authoritarian regimes could be considered as regimes with "unjust laws" as Gustav Radbruh[23] termed it, even if such regimes had, in formal sense, laws which were adopted in a formal legislative procedure.

Great theoreticians of modern democracy, such as John Locke (1632–1704) and Jean–Jacques Rousseau (1712–1778), although arguing from very different standpoints (Locke was a liberal while Rousseau was more for a radical democracy), advocated a principle of the rule of majority. "When any number of Men – writes Locke – have so *consented to make one Community* or Government, they are thereby presently incorporated, and make one *Body Politck*, wherein the *Majority* have a Right to act and conclude the rest. For when any number of Men have, by the consent of every individual, made a *Community*, they have thereby made that *Community* one Body, with a Power to act as one Body, which is only by the will and determination of the *majority."*[24] Locke con-

21 Aristotle, *Politics,* 1292a. Aristotle critically treats "fifth kind of democracy", where the top power belongs to the masses and not to the law; this, he argues, is caused by demagogy, while this kind of democracy is the same as tyranny is to monarchy; thus, the main objection to this kind of democracy is that it is not a state arrangement.

22 See: Михаило Ђурић, *Хуманизам као политички идеал*: Оглед о грчкој култури (Humanism as Political Ideal), Београд, СКЗ, 1968, стр. 180–204.

23 Gustav Radbruh, *Filozofija prava* (Philosophy of Law) (1932), Beograd, Nolit, 1980; translated by Dušica Guteša; foreword in "Radbruhovo filozofskopravno stanovište" by Stevan Vračar, see especially "Додатак"(Addendum) (1945–1949).

24 John Locke, *Two Treatises of Government*, Cambridge University Press, 1960 (ed. by Peter Laslett). Translated by Коста Чавошки, adding "Letters on Toleration" and

sidered that "Whosoever therefore out of a state if Nature unite into a *Community*, must be understood to give up all the power, necessary to the ends for which they unite into Society, to the *majority* of the Community, unless they expressly agreed in any number greater than the majority."[25]

Lock held that a majority can legitimately decide or establish a government when there is a proportion of 50 percent plus one. He accepted this "thin" majority assuming that a society may breakdown, left with a possibility of not reaching a decision at all. Lock's comprehension of the law places a limitation on government; furthermore, he was aware of the importance of institutional guaranties in division of power/authorities. Lock he was surely inspired by his older contemporaries Harrington, who influenced Montesquieu (1689–1755) also[26].

Etymologically, the meaning of democracy is the government of the people. However, among "people", there could be different even confronting viewpoints and interests, therefore, democracy is usually defined as a "majority rule". Today, as it has always been the case, it is difficult, almost impossible, to include all people in the governing process, if because of nothing else, than for the technical reasons alone. That is the reason why, even in democracies, the largest number of tasks and decisions related to power exercise are managed through elected representatives and posted or chosen individuals. In effect, this mean that the actual ruling is always done by a minority; this ruling minority was once called oligarchy, without negative connotation. Based on historical and contemporary experiences, it is known that democracy could be oligarchy.

In present day countries with democracy, people participate in elections of representatives, that is, power-holders, and some state, through referendum and other similar declarative forms, decides on important issues. If a collective entity is to decide (people, assembly, congress, parliament, government, committee, etc.) but there is no consensus (for example, differences in approach, election of several different in-

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Robert Filmer's *Patriarcha: on the Natural power of Kings*. In the *Second Treatise*, paragr. 95 and 96 (Chapter VIII)

25 *Ibid.,* p. 99.

26 Montesquieu was aware of the difficulties of establishing and preserving freedoms, as well of necessities to provide freedoms with a particular political system in order to enable an efficient government functioning. Furthermore, he considered that "le pouvoir arrete le pouvoir", one power is limiting the other, thus all three branches of power (law, executive and courtly) should be posted in a way to limit one another, control and restrain. See *De l'Esprit des Lois*, livre XI, ch. iv (p. 169 editions: Paris, Ernest Flammarion, s.a., a text from the 1758 edition); in Serbian: Monteskje, *O duhu zakona*, I-II, Beograd, Filip Višnjić, 1989; translated by Aljoša Mimica; foreword "Monteskjeov *Duh zakona*" written by Aljoša Mimica and Veljko Vujačić).

dividuals, possibilities, decisions, options and alternatives) then the decision is reached by voting, that is, by majority of votes, if not anticipated differently by regulations. This is called democratic decision-making, and democracy is sometimes defined as the rule of the majority, whose decisions become obligatory for all.

Nevertheless, considering only one element of democracy, that is, the rule of the majority, as a synonym of modern democracy represents an overly oversimplifying. The 18th century brought about an understanding that democracy as the rule of majority should incorporate a necessity that the majority is obliged to guarantee some important rights to minorities. In further development of the Locke's idea on limitations of political power and consented government, and following declarations on rights by the U.S.A. and the French Revolutions at the end of 18th century, the rule of majority came to be regarded, more and more, with respect to guaranteed freedoms and rights of man and citizens. All these elements (the rule of law, minority protection, individual rights and freedoms), along with an emphasis on constitutional and institutional assumptions, foundations and guarantees, have caused the definition of democracy to be extended. Also, all these reflected upon the relationships of majority–minority. These relationships are much more complex than they could be given through a simple arithmetical relationship. Because of this, it is often required from "majority" to fulfill certain conditions, features, satisfy particular "qualifications" (so-called quorum and other forms of so-called qualified majority), but also, it is required that some minorities, if they fulfill certain special conditions, be determined by certain privileges, that is, responsibilities and as such, by a general structure of the relationship or to be protected by exceptional norms. If a decision has to be made on an important issue relating the character or even deciding on a fate of a given state, then such a decision has to be reached by a qualified majority, usually two-thirds or a majority made up of considerable majorities of all constitutional parts. After the first couple of years of the French Revolution, Rousseau's theory prevailed, although it did not assume elaborated institutional impediments and balance, nor corresponding actions. That was the radical Jacobin's conception of democracy, with deeper foundations in the teachings of Rousseau, which, some contemporary 20th century writers considered as totalitarian democracy[27]. I think that those who so radically interpreted and applied the conception, 'the disciples of immortal Rousseau" (the term Robespierre used to designate himself and his followers) actually brought the revolution to the dead-end; instead, they should have made constitutional the

27 J. L. Talmon, *The Origins of Totalitarian Democracy*, London, 1952.

great social turn-over that started in 1789[28]. Instead of establishing the rule of law, and especially "the rule of liberty" as Montesquieu called it, as well as a corresponding constitution, the French Revolution soon diverted in a direction that included political radicalism, emphasized exercise of political will and above all, justifications of the orientation. A number of constitutions, frequently following one another, contained legislations that made these constitutions very difficult to change and almost forever enduring, and each was changed "over night", subsequently following a prevalence of a different political will. This kind of development characterized also a majority of succeeding revolutions, including, especially the ones occurring in the 20th century, whose anatomy reveals a "blue-print" of the French Revolution[29]. In addition, a radicalization of an idea of peoples' sovereignty had enough attraction, force and power to provoke a number of alterations of political wills and playing around with constitutions in processes within which "revolution ate its own children".

In the course of the 19th century, democracy provoked certain warnings motivated by a fear from exceptionally egalitarian implications of the radical democracy. Tocqueville, in *Democracy in America*, warns against serious consequences of equalization (which is, perhaps, worth paying for the sake of freedom) and to a new possibility of "tyranny of majority". He wrote: "The very essence of democratic government consists of the absolute sovereignty of the majority; for there is nothing in

28 A very few of the 20th century revolutions managed to establish and make permanent some of their proclaimed aims, ideals and programs; see more in V. Stanovicic "'Конституционализација' револуција"(Constitutionalization of Revolutions), *Зборник Матице српске за друштвене науке*, бр. 96, 1994; стр. 41–72. One theoretician places the roots and foundations of the Western law tradition and political institutions in the framework of "right" and "revolution" (B. Harold J. Berman, *Law and Revolution*, The Formation of the Western Legal Tradition, Cambridge (Mass.) – London, Harvard University Press [1983], 10th edition 1999). The success of revolution depends on an ability to establish stable political and law institutions which maintain a relatively liberal conditions where people would be free to exercise the potentials, respecting at the same time, the rights of others to do the same. On how the ideas of Montesquieu and Rousseau affected the directions of the French Revolution and its participants see V. Stanovicic "Montesquieu, Rousseau i Francuska revolucija", u Eugen Pusić (ed.), *Francuska revolucija* – Ljudska prava i politička demokracija nakon dvjesto godina, Zagreb, JAZU – Globus, 1991, pg. 35 – 67.

29 Crane Brinton, *The Anatomy of Revolution* (1938, extended edition: New York, 1965); Theda Skocpol, *States & Social Revolutions* (1979, 6th edition: Cambridge University Press, 1984); and Hannah Arendt (1906–1975), *On Revolution* [New York, Viking, 1963], Penguin Books, 1965 (translated into Serbian: Hana Arent, *O revoluciji*, Odbrana javne slobode, Beograd, Filip Višnjić, 1991; epilogue "Hana Arent ili revolucija kao sloboda" written by Vojislav Koštunica).

democratic states that is capable of resisting it."[30] In his argument, he left out that democratic theory already pointed out to certain elements restricting the majority: the rule of law instead of solely majority, corpus of rights and freedoms of citizens independent from every government, including the democratic one, minority rights, pluralism (economic, political, religious, ideological etc.) and some procedural guarantees.

John Stewart Mill was also preoccupied with the problem of how to establish democracy that would not bring to a rule of mediocrity, but instead provide an especial place for knowledge and determined established interests. His main fear was related to leveled consequences of a radical democracy and problems related to tyranny of public opinion, forcing conformism and thus threatening a freedom of thinking. He considered that decisions brought by a majority do not have to be the wisest, and on the other hand, such decisions could also hurt interests (or feelings, identity) of a minority.

At the end of the 19th and beginning of the 20th century, several radical fractions, especially those left oriented, insisted that the absolute importance should be given to the principles of the rule of majority, since it is a basic criterion of democracy. This idea, following Jacobin's tradition, relates also to the concentration of power in political representation, and later on, to narrow-minded representative entity unless there is a nationally heterogeneous or federally structured state.

During the 20th century and resistance against fascism and cold war, democracy became a password and an important criteria for recognition, while today it serves as a synonym for the right direction and desirable political transformation. Again, some of the shortcomings of democracy are being overlooked, as well as necessary preconditions in order to make one potentially democratic institution a fruitful one.

3. SYNTHESIS OF THE RULE OF LAW AND DEMOCRACY

Whether the commands of one political will that are endorsed with enough force could be considered as the law, regardless the content of the

30 Alexis de Tocqueville, *De la Democratie en Amerique* (1835 i 1840); see. Alexis de Tocqueville, *Democracy in America*, New York, Alfred A. Knopf, Vintage Books, 1945 (vol. I-II); This was published in Belgrade: Алексис Токвиљ, *Демократија у Америци*, Београд, Државна штампарија, I (1872) и II (1874). There are contemporary editions today. The quotation is taken from the Vol. 1, p. 264 (Ch. XV – "Unlimited power of the majority in the United States, and its consequences"), Vintage Books, 1945 edition.

said commands, has been a disputed issue both among ancient and contemporary political and legal theoreticians. One of the simplified interpretations of the nature of the Rechtsstaat and the Rule of Law reads that the state of law stipulates the implementation of the valid laws, regardless the content. In fact, there are contradictory opinions about the character of the Rule of Law and about other categories that can be associated herewith.

Even though the political will is an important and indispensable element in the conception of law, it should not be ignored that the element that makes the law the foundation and the pillar of the civilization is far more important for the fundamental nature of the law. And the law becomes that by the level of the rationality in regulating inner-personal relations, as well as by "rightness" in its creation and execution. Finally, the rapport towards the law will not depend on the prescribed penalties but on the degree it allows for interpersonal relations and the circulation of people, goods, services and ideas to be conducted as liberally and under the most humane conditions. In order to be rational, the law has to become a framework large enough to accommodate the "legal circulation", which is just an expression of other forms of circulation i.e. trade among people.

John Locke is rightly considered the founder of the modern theory of democracy. The idea and the government, conceived as the rule by the consent of those over whom government rules, and that government has to be limited in its power – J. Locke closely linked with the notion of human natural and positive laws and with the idea of the Rule of Law. He presented the theory that the power and the governance are not the aims per se, but are in service of protection of human rights and creative potentials, and whose exercise human mind can accept and justify. Inspired by teachings of the school of natural law, he arrived to the conclusion that humans, gifted with reason, are capable to secure peace and tolerance only if they respect natural (i.e. reasonable and equal for all) rights on life, body, freedom and labor-acquired property. According to Locke, these natural rights belong to man by the mere fact that he is human and the peaceful enjoyment of these rights is the aim, raison d'être and the basis for establishing the government. Positive laws that are being introduced have to serve to the same cause and the government that adopts them can count on legitimacy and obedience. Locke assumed that the aims delegated by intelligent individuals would limit every government and that no body, no person and no assembly could attain unlimited power. This also limits the content of the laws; laws can not impose all that the government would wish for. The same conclusion was reached by Alcibiades and his protégée Pericles, as characters in the

dialog given by Xenophon in "Memories on Socrates"[31]. Later on, Rousseau considered it the opposite, in relation to the "general will"("*volonté general*"), that is conceived as absolutely independent and can decide on everything. It is true that throughout history the will of those powerful enough often prevailed. Whatever was desired could have been put into law.[32] In the name of human rights Locke had the thesis about freedom within the legal framework, but with intelligent laws whose characteristics he described in *Second discussion on government*: "The objective of the law is not to abolish or limit but to keep and augment freedom(...) where there is no law there is no freedom"[33]. According to him, positive laws have to fulfill certain conditions if to be considered as laws in the true sense. Locke mentions some very important characteristics of the sensible laws and the Rule of Law.[34]

The Rule of Law should not have a narrow interpretation, as being the implementation of the law (regulation) passed by one government. This misconception is deeply rooted not only among power-holders, who create the "law" they rule by, but also among those ruled by that law. Each government tends to present as "law" its orders (norms, regulations) that are deriving from its will and force. The implementation of such "law" is considered as establishment of the "legal state" (*Rechtsstaat*) or the Rule of Law. Still, from the point of view of legal philosophy, it can not be accepted that the law is any set of norms supported by the monopoly of the state force, even when it is done as a part of common proceedings. A critical distance towards the content of the positive law has to be taken. Only after examining the content of the law and norms and its aptness to be brought universal i.e. if the said law can be generalized (the law that becomes compulsory for all that are in the situations envisaged in broader terms by the mentioned law), it is possible to evaluate that it is the law in the sense of legal philosophy. Cicero and Aurelius Augustin and later on a number of jurists, including Gustav Radbruh, considered that some laws deserve to be called such to the same extent as rules of a band of criminals.

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31 Ksenofont, Memories on Socrates, Belgrade, BIGZ 1980,Milos N. Djuric translated from the original, "Introduction: Xenophon and the main sources of knowing the historically realistic Socrates", and wrote remarks and explanations.

32 Roman jurist Ulpianus concluded for the period of prinicpates in Rome that **"**Quidquid principi placuit legis habet vigorem". In France there was a saying "if the king wants it, the law will include it" the absolute King of France, Luis XIV is remembered by the saying "State, that is I". In XX century there was a phenomenon of the leader (duce, furer, caudillio, wise leader) who gained absolute power through non-constitutional factors, and each could say state or party is myself.

33 Locke, *Two Treatises of Government, Second Treatise*, ch. VI, p. 57.

34 Ditto, ch. XI, p. 135–142.

Emmanuel Kant, guided by a golden rule – not to do to the others what we don't want to be done to us, with his categorical imperative gave an important guiding principle to all lawmakers: to pass the laws that can be applied universally, which are reasonable and which will not be seriously objected to. This means that the passed regulation should be universally applicable and equal for all. Nevertheless, we often witness the situations when adopted rules can hardly be justified or the situations where one side or group is not willing to grant the same rights they enjoy to the other group and vice versa. It is contrary to the notion of the Rule of Law principle. The Rule of Law, among other, signifies the equal rights and obligations for all, which further means equal legal opportunities for all.

The Rule of Law and democracy can be considered as complementary. In most cases they are developed in parallel but if one has to choose, some great political theorists would advise that it is more important to establish the Rule of Law. It is due to the fact that the democracy without the Rule of Law, i.e. when not founded on constitutional limitations, becomes the mere expression of the will of majority or of those who can easily manipulate with the same[35]. Theory on the Rule of Law assumes that each power has to be limited, even the power of people. That is the essence of the Rule of Law. Also, the important thinkers stressed the great significance of the Rule of Law for economic and social prosperity, while democracy was not put on the same level of importance. David Hume for example considered that the democracy is not necessary for the successful market economy but that the Rule of Law is absolutely vital for it.

The development of the modern theory of democracy accentuated the thoughts that the principles of the Rule of Law include certain humanistic values, institutional setup and procedural guaranties, which eliminates absolutism and partiality as well as provide limited power, independent judiciary, appropriate status of individual within the system and especially towards governing bodies and courts. In addition, rights of

35 This situation is well illustrated in several papers presented on the conference held in the Serbian Academy of Science and Art (SASA) in 1996, with the topic *Establishing the modern democratic legal state in Serbia*. The conditions of constitutional and legal system were strongly criticized, and its lack of pre-conditions for creation of the legal state and the Rule of Law (although this principle was included in the Constitution from 1990). Presented papers were published: Miodrag Jovicic (editor) *Establishing the modern democratic legal state in Serbia,* Belgrade SASA. The publication accentuates in a well substantiated manner the importance and the need that the idea of the legal state is materialized as well as the great difficulties and obstacles on this road, both those related to authoritarian character of the existing constitutional solutions at the time as well as difficult situation caused by a lawless elements on a large scale, within the state.

minorities (political, religious, ideological and more recently ethnic) and the rights of individuals as humans and citizens, from XVII and XVIII cent. have gradually become a corrective measure for the rule of majority or a criteria for "good governance" and that dimension has to be secured by the Rule of Law, equally for all. Freedom of expression (for which the freedom of the press has later become almost as a synonym) and freedom to create associations complemented these conditions and became part of the modern conception of democracy. Majorization can be mentioned as a possible negative side of the principle of majority rule, if this principle is taken as exclusive, absolute and without limits.

It is possible that a group which is opposed to majorization in the wider community exercises the same on the local level. For that reason certain constitutional and legal solutions and limitations can be of a great importance. At any rate, it confirms the thought that the constitutional democracy is by definition such a democracy that does not give absolute power to majority[36].

During the development of post communist societies lots of old questions re-emerge, in regards to fundamental values, institutions, acts. In these societies there is a tendency to interpret democracy as a wide-spread support without taking into consideration the institutional framework and procedures. With this tendency the democracy is seen only as (unlimited) rule of majority, whose unacceptable character we already dealt with.

There is an important dilemma, dating from the ancient times, about the possible contradiction between what is reasonable and suitable to provide certain values and which have to be included in principles and structure of the system on one hand; and on the other hand what has a support from majority and thus becomes predominant, influential and the basis of power, which has to be limited, civilized and directed by the Rule of Law.

Constitutionalism restricts the government and regulates the relations between the citizens and the government by tying the functions of the latter to the consent of the former. It also regulates the institutional options and modalities the government is voted for, conducted and replaced. Valid (legitimate) title (titulus) acquired on elections is one element, and the other, more important is the lawful and rational exercise or use of power. As already mentioned, nowadays support by the majority is only compulsory but not a sufficient condition for one government to be legitimate and for its regulations to be considered laws in juro-philosophical sense.

36 Carl J. Friedrich, *Constitutional Government and Democracy* (1937), Waltham – London, Blaisdell, 1968. On Serbian: Podgorica, CID, 2005.

The Rule of Law placed the legal principle before "state interests" and we tend to interpret it before the state as a whole, under certain, normal circumstances. It also assumes the durability of rights and obligations, the idea of continuity and the respect of the acquired rights. The word democracy is often used these days in order to stress the model of a good government, although is does not correspond to the proper meaning of the word (demos and kratein-people and to rule). It would be more appropriate to use the term "constitutional democracy" or "constitutional government", which is in its nature a poliarchy, i.e. it is characterized by a certain dispersion of power in society (not only based on the division of power but also on mutual limitations deriving hereto and control mechanisms with participants outside of the governmental structures, like political parties, non governmental organizations, church, unions, professional and economic associations, important economic organizations etc), and also by division of power and distribution of authority within the government structure.

Writers like Carl Friedrich, who use terms "constitutional government" and "constitutional democracy" or Robert Dahl, who created the term "poliarchy" and deals especially with issues of procedural democracy, then Giovanni Sartori who analytically studies the role of parties in the democracy, Arend Lijphart, who more then any other author develops the ideas of so-called con-social democracy apt for multinational communities, Norberto Bobio, and the others show commitment to democracy while questioning different classical postulates.

Their ideas are very encouraging in every work on building democratic legal state, or as we prefer to call it –the Rule of Law– as well as on overcoming the obstacles, primarily of the political nature. This is the task of utmost importance in the long run and requires considerable period of time and great efforts to be invested.

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The Rule of Law and the rule of majority have to exist jointly, and the governing of people has to be limited and regulated by rules, constitutionalism, division of power and independent judiciary (especially by the role of the Constitutional Court).

The Rule of Law has to keep the rule of majority in the frame of civilized and regulated behavior, in line with regulations that are accepted by a general consent in the society. The rule of majority which governs by pure will or power, without foundations laid by the Rule of Law, would be a defective type of government.

At the same time, government that rules by the most rational regulations, but forced upon the majority, without its participation and

consent, could only be considered as "educated despotism", and could not be called democracy. Therefore, for one legitimate government the majority support, i.e. the power of majority is necessary but not a sufficient condition. The rule of majority, even in the interest of that majority, has to be moderate and encompassing the regulations which can endure critical theoretical analysis and practical verification**.**

Aleksandar Molnar

THE FRENCH REVOLUTION IN THE EARLY WORKS OF ERNST MORITZ ARNDT*

Today, Ernst Moritz Arndt is commonly considered to be one of the first German liberals, or more precisely, national liberals. Like other German liberals of his time, he was very concerned with the development of the political situation in France and devoted many of his works to explaining the events which took place in France from 1789 and onward. The ideas behind the French Revolution played an important role in the intellectual development of Ernst Moritz Arndt, even though he was never prepared to accept them without a large dose of criticism. In this paper, the author aims to give insights into Arndt's main political ideas from the early 19th century and to explain the contradictoriness of the influences, which the French Revolution had on them.

Key words: *French revolution. – People. – Estate. – Germany. – Nationalism.*

The French Revolution left a deep impression on a large number of Germans, amongst which is Ernst Moritz Arndt.[1] At the beginning of the 19th century Arndt's lectures at the University of Greifswald were filled with strong political tension, and they placed special emphasis – in the spirit of the ideas behind the French Revolution – on the social significance of individual liberties (Steffens, 1912: XXV). The lasting ardour with the ideas from 1789 was most likely a consequence of the still strong influence of Fichte's *Beiträge zur Berechtigung der Urteile des Publikums über die französische Revolution* from 1793 (Musebeck, 1914: 75). Namely, as emphasized by Ernst Musebeck, Arndt shall not, even when he enters the nationalist phase later on in his life, become an opponent of the French Revolution, because he always kept to his opinion

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1 Even though he denied it later on, at nineteen and a half years of age, Arndt welcomed the French revolution with great enthusiasm.

that the old monarchy had wronged its people to a great extent and that it provoked their rebellion. His serf descent told Arndt only too well that the French people had every right to do what they did and no doctrines or emotional reasons could wash away that thorough insight. This will, after all, be a significant element of Arndt's most liberal core idea, which obligated citizens to rebel against the monarch if he doesn't respect the divine order and imperils the civil liberties.

Except in that view, Arndt was a radical royalist. At one time he self-critically stated: "I have always been most likely an extreme monarchist" (Arndt, 1912b: 70). Arndt's extreme monarchism was to a great extent a consequence of his infatuation with the King of Sweden Gustav IV Adolf during his youth. This enlightened monarch served as an example, to Arndt, of a "real king" with whom no republican leader could have been compared. Driven by his love for the king, Arndt had become a principal royalist from an early age. That love, as is usually the case, went hand in hand with hate toward another object – (the long-gone) Louis XIV. Animosity toward this French King transfused to a great extent onto the French people, so that from an early age Arndt celebrated all of their defeats in war, regardless of who the enemy was. The shadow of that hate fell upon the French Revolution, but as already mentioned, it never made Arndt turn against it completely. In any case, it was not until 1806–1807 that Arndt's Francophobia grew into a blind anger toward the French, as a direct consequence of Napoleon's conquest of Prussia and Sweden.

All of this had a personal dimension in Arndt's life. Namely, toward the end of 1806 when the French, following their defeat of Prussia, began to warm up to Pomerenia, Arndt was forced to leave his post at the University of Greifswald and flee to Stockholm, because of his open anti-Napoleon ideas, where he was deeply disappointed in Sweden and its people. As it turned out, the Swedish were very partial toward the French and quite excited by Napoleon's arrival (to the extent that they dethroned Arndt's idol and great Francophobe Gustav IV Adolf),[2] which only confirmed Arndt's belief that they became an entirely "unhistorical" nation. If he had, during his travels through Europe between 1798 and 1799, continued to present himself (and certainly feel like) a Swedish, following 1806 when he fled from Pomerania to Stockholm, Arndt shall never do so again (Arndt, 1960: 75). For Arndt, identification with the Germans was inseparable from his belief that the Germans could only

2 Gustav IV Adolf was a deputy in German Reichstag based on the fact that he ruled over the Swedish part of Pomerania. As a sworn enemy of Napoleon, he strongly protested when the Emperor renounced his German throne in 1806 and turned to the Austrian empire.

overcome Napoleon if they united. The attractiveness of the Swedish political and all other identities had become obsolete and the only homeland worth living and fighting for was Germany. The trouble was however, the fact that Germany at that time was still only an imaginary entity. However, if there was no Germany that only meant that it had to be created. And it will in fact be Arndt who will literally give all he's got so as to "awaken" the German nation for a fight against the French and establish the foundation for the union of the German states. The hate toward the French, which had become constituent of the German identity of a large number of intellectuals of that time (Fichte, Kleist, Schleiermacher, etc.), had evolved into something else in Arndt –a planned propaganda of a popular war and national hatred (Kallscheuer and Legganie, 1994: 154).

Friedrich Sell was right, when he wrote in his study on the tragedy of German liberalism, that the French Revolution was for Arndt the last expression of (French) enlightenment, which had surely already belonged to the past (Sell, 1981: 62). Therefore, even though he never became a passionate adversary of the French Revolution (but only the French people), Arndt saw in it something that was characteristic of the "French being" and which the Germans should avoid in imitating. Of course, the Germans want freedom, as the French revolutionists did, but allegedly they did not want it through "wild revolutions of Mirabeau, Robespierre and Sieyès", because such insanity was not a "German trait" (Arndt, 1912l: 36). In addition, according to Arndt, the Germans should not strive toward anything universal; what they should effectuate are "old freedom, old virtue, old honour, old courage, old Germanic virtue" (Arndt, 1912e: 177). For this reason in 1813 he referred to the German people as follows: "You are a loyal, grateful, obedient and peaceful nation which does not like bloodshed without reason; and because of this you won't and cannot, even if you wanted, have all that is old be destroyed and crushed, as the rabid people of Paris did twenty and fifteen years ago" (Arndt, 1912e: 174).

The French Revolution was, therefore, an aspiration for radical changes, and in Arndt's opinion that could never yield anything good. During the first couple of years following the revolution, enthusiasm and sublime spirit reigned amongst the French people and a belief that from the chaos a new and improved government shall rise. However, soon France was wading in blood. In *L'Espirit des Lois*, Montesquieu noted that the French do serious things foolishly, and foolish things seriously. For this reason Arndt asked himself, what kind of miracle could at once turn such a nation of slaves into a free republican nation, and that through a revolution, which had devoured itself, until only murderers remained in power. From such chaos Napoleon had to be born. Arndt quotes Mon-

tesquieu again when he says that a free nation can only have a liberator, while an oppressed one can only acquire a new oppressor. The enslaved French nation sent Louis XVI to the guillotine, but only to make room for new despots: Robespierre and finally Napoleon. After the king, the aristocracy, the clergy, and finally the new constitutional government were ousted, "the spirit of evil" and the "mob" reigned. Such epochs, Arndt is to conclude, history does not explain, " Madness and reason, fanaticism and malice, chance and plan, heroism and low intentions, lay so close to one another that only God could pass judgement" (Arndt, 1912c: 159).

Nonetheless, Arndt was not always this reserved in his opinion of the French Revolution. At other times, he explicitly blamed humanism and rationalism for all of the evil it had created. It was precisely the idea of humanism that, as Arndt thought, through "free and mutual fraternization" of the people of Europe led to conquest, inhumanity and despotism. The French people were overcome by a type of enthusiasm which was purely of spiritual nature and believed that it was really achieving freedom and equality of all people in the world. Through a play on words and names there was an intent to regenerate the world. Even the peasants – "always the first part of the nation" – were more than ever willing to follow the goals of the new government, including going to war, as the shackles of feudalism were removed. In that way they were used for ideas of humanism which they otherwise do not accept and which are not typical of them. Still, the rationalism was not less the instigator of evil of the French Revolution than humanism was. Arndt identified its generator in the Third Estate of the old Parliament, where the greatest minds of the French nation sat. They created the National Assembly, which carried a great meaning in its name. That assembly was "in its talents and the disposition of the people frightening". However, with the work of this assembly, the entire nation was so "enlightened" that words lost all touch with reality and an escape had to be found in despotism. People wanted to consummate the philosophy of Rousseau and Montesquieu, which was only "devilry of transcendental spirit", that wants to create all from notions (Arndt, 1940: 172–174). In this way religion, through which man gets the possibility to advance within the frameworks of God's order was neglected. For this reason, Arndt proclaims the French Revolution the milestone marking the commencement of the third epoch of Christianity. The first epoch lasted until Luther and it was characterized by the attempts of spiritual reconciliation. Luther offered the world a "deep mind" and "high faith", but the world was not prepared for them, because reason was underdeveloped. Because of this in the next three centuries reason had to evolve. In that sense, the French were most dominant "as the most reasonable of all European people". However, that led the

French to the loss of faith, because everything had to be known, explained and understood. That was the triumph of reason over the mind. The French Revolution showed what limitations to reason as opposed to the mind meant, with which only the great godly truth can be perceived. Following (the failure of) the French Revolution, Arndt expected the period of the mind, which shall be based on faith, to set on, and during which reason shall be degraded into its servant (Arndt, 1912d: 138). In the irony of faith, that shall finally happen: nationalism can be defined as instrumental utilization of reason for awakening the blind and irrational faith into a new deity – the Nation – and its delegate on Earth – the nation's leader.

The basis of Arndt's understanding of people lies in the notion that people are not only an organism,[3] but a spiritual entity, a "character".[4] A character is something possessed not only by individuals, but also by things, plants and even a nation as a whole. According to Arndt two factors are important for the character of a nation. The first is geographic, and relates to the climate and environment in which a nation lives (Arndt, 1810: 69)[5]. The second, even more important factor for the origin and formation of a character and "spirit" of a nation is the language which its people use to speak and which, because of this, must be preserved and considered sacred (Arndt, a: 53–54). Even though he sets apart these two factors, Arndt is actually of opinion that there is a "strong union" between them (Arndt, 1805: 18–20). For example, the French language, as well as the French people, is a mixture of the north and the south and for this reason it cannot achieve a "full measure in the accent", so that certain tones are detained in the nose and throat. And for this reason it is entirely sensual. On the other hand, the German language reflects the north: in a cruel nature man turns to himself, to his heart and mind. The language is sharp, crude like soil, and exemplary of the spirit (Arndt, 1805: 38–40). Because the character of a nation is reflected in the language in this way, one should take the necessary precautions so that a child does not learn two or more languages, but only one, that being the one spoken by its nation (Arndt, 1940: 228). This is because every child, in the first five-six years of its life, in its "unconscious innocence" absorbs the language of

3 Arndt took over the notion from German romanticism about the organic unity of the estate, which he opposed to individualistic moral ideals of German enlightenment (Musebeck, 1921: XIV).

4 "The character of one object and one person is that which stays and which differs, it's what nature has planted so deep within that nothing can change or destroy it" (Arndt, 1810: 20).

5 The size of a nation was not an important factor of his existence: the Swedish are for example one nation although there is only three and a half million of them (Arndt, 1839: 6).

the nation to which it belongs and together with the language the "spirit of its nation" (Arndt, 1912f: 146). In that way, through language identical individual "characters" are formed which correspond to the collective type of a given nation.

In accordance with these two factors of national "character", all nations have linguistic and geographical ("natural") boundaries. In contrast to the "weight" which Arndt ascribes to the geographic and linguistic factor in the establishment of the "national character", he gives geographic boundaries priority over the linguistic, but immediately asserts that the (one nation) state in which both coincide is a happy one. This assumption was used by Arndt to describe the attempt of France to conquer all of Europe as "unnatural" (Arndt, 1940: 215) and even "godless". Because, against God are all those who strive toward one state, one religion, one people and one language. Arndt thought that God had created diversity in the world and that anyone who is trying to deny this is a "tyrant" (Arndt, a: 11). Here we can see a decisive turnaround in the criticism of tyranny in comparison to earlier (in particular eighteenth century) tradition: a tyrant is no longer one who violates the regulations of natural laws (social contract) and the universal human mind, but the one who violates the "natural" and "God given" pluralism of people in the world and (the geographical and linguistic) boundaries between them. Arndt still does not openly declare that he is against the ideals of citizenship of the world, but he noticeably changes their content as well. A real citizen of the world is now the one who is "ready to help" his people and "who is humane, righteous" and does not allow for his love toward man to scatter into "boundlessness" (Arndt, 1940: 157).

Soon enough Arndt shall sharply criticize the Germans who are still "slaves" of the old enlightened – now growingly considered as the French – ideal of citizenship of the world. No nation, according to him, had so zealously like the Germans accepted "Rousseau's ideas": enlightenment and cosmopolitanism. In cosmopolitan enlightenment the mind has entirely neglected the body and has made from nature a carcass which should be "anatomized". The idea that cosmopolitanism is more dignified than nationalism, and humanity sublime over the nation is still deeply rooted in the German people, but it is not the mind, but that which is the mind, concludes Arndt surpassing Hegel, is more than that which is real. The Germans "have become cosmopolite and despise the miserable vanity to be one nation: that is one fine, frivolous and enlightened group without a homeland, religion and anger, which only barbarians keep for something big" (Arndt, 1912d: 29). Except for being a "barbaric" value, cosmopolitanism is according to Arndt a dangerous mistake, because it disrupts the hierarchy of communities to which all people belong and imperils the basic postulate that above the people there is nothing better,

nor more important. “Without people there is no humanity, and without a free citizen there is no free man” (Arndt, 1912c: 107). The notion of “citizen”, which Arndt uses here is deprived of an ingredient of Kant’s universalism and already has a sense of “compatriot”, which within himself really only partially retains political connotation. Therefore, when he says that “higher humanity” must be achieved by becoming a “citizen”, that simply means that “our people and our homeland must be loved” more than humanity (Arndt, 1912d: 87). Of course, the question is only whether any love will remain for humanity (as well as communities smaller then the nation) from the hypertrophic patriotism.

Arndt’s fundamental political idea was that the state must be the nation – in other words it must allow for spontaneous development of a nation’s “life”. The state itself is for him “life”, and the best state is the one which allows the most liberal life for the nation. Moreover, the government of a state must be subordinate to its people, because “the people are not because of the princes, but rather the princes are because of the people” (Arndt, 1912m: 192). The task of serving the people the state can answer only if it is organic (that is a harmonic symbiosis of estate) and if it is ceased to be observed as a machine (Arndt, b: 30). Organic abandonment of the state as a machine represented a knotted point in which Arndt’s open attacks accumulated and not only on Prussian inheritance of the absolute monarchy, but at the same time on enlightenment, and as we will be able to see later on, liberalism as well.

In his works Arndt firmly kept to liberalism as a starting point according to which real political freedom is founded on the rule of law (to which the king himself should be subject to). At one time he will even conclude that the king must also be subjugated by the law, like every servant, because any deviation from this principle leads to (political) slavery (Arndt, 1912b: 195). The trouble with this concept lay in the fact that Arndt immediately made it relative by claiming that in a state there must remain, aside from (civil) law one higher (political) law, one *arcane imperii*, in which there will continue to be unlimited monarchical sovereignty. In that sense, Arndt continued to be very clear: “But this (political) law cannot be reduced to the notion of civil law and civil rights, without revoking all of the monarch’s strength and courage, and his acts of grandeur and highness” (Arndt, 1912d: 158). Aside from depriving civil law from its universality by endorsing political law, Arndt also renounces its positivism. This can be best seen in the fact that his concept of rule of law does not allow for “paper despotism” to govern over the state (Arndt, b: 33–35). Based on this it can be concluded that the law to which he refers is a mere moral law, which is not created, but perceived. In other words, it can be said that Arndt in his endorsement of

the rule of law did not take into consideration (at least not primarily) written civil laws (and even less so a constitution), but "an unwritten law in the heart of the people" (Musebeck, 1921: XII). Furthermore, the laws on which Arndt insisted were in no way the result of "the will of the people". It is good, of course, if laws originate "through the people", but that does not mean that the people give them to themselves (through the parliament), but that they accept them voluntarily (from their governor, monarch) and acknowledges them as valid (Arndt, 1949: 196 and 213). Finally, Arndt cuts all ties between the law and natural law. The latter for him amounts to meaningless words, because nature (or better said the natural state) does not precede the state, but coexists with it, and can therefore not represent any kind of criterion for assessing the latter. The state is part of nature, and not a contractual creation of an individual. Or as Arndt so poetically said, the state is an "unrestrained horse", which like any other "natural element", cannot be limited by "meaningless words". Only chaos can be an alternative to the state, while nature is an entire world order, in which states find their place without any natural law (Arndt, 1940: 188).

As he in essence accepted the liberalistic postulate of the rule of law, Arndt also supported the ideals of the French Revolution: equality and liberty (brotherhood was also incorporated into national unity). He openly stated that equality in society should be equality before the law and that liberty is the rule of law without any exceptions (Arndt, 1938c: 385). Also, ideas of equality and freedom, which are the foundation of law, for him, they were the product of "original equality of human desire for happiness and pleasure". On the other hand, he admitted that alongside this aspiration for equality (and freedom), people are prone to oppression and force, so that they could provide happiness and pleasure for themselves by inflicting harm to someone else. A glance at the modern nation provides Arndt with evidence of this: it could be said that amongst them there are two different types: those born as masters, and those born as servants. The most liberal traits are shown by Arndt's voice that denounces that conclusion and states that acknowledgement of inborn slavery means attribution of that which is the deed of man to destiny (Arndt, 1938a: 182). Therefore, what is created can be destroyed. And if slavery was created by man (by mistake?), then man can destroy it as well. At this point, Arndt's theory of political emancipation shows its best side and a deep influence of the ideologies behind the French Revolution.

One of Arndt's most serious accusations regarding the French Revolution was that the idea that land and other goods to be freely traded originated from it. From there, came forth the "true" Gallic, or French being (i.e. slavish Romanic spirit). Following the French, there were

many other modern nations, who all renounced the liberalistic legislation and adopted the principle of unlimited sale of real estate (which causes overpopulation, poverty, begging and crime) (Arndt, 1912b: 217). Because of this, what is referred to as "Manchester liberalism"is only one echo of the old lack of freedom, and not a true project of emancipation (Arndt, 1912b: 235–236). However, the main problem was not the distorted liberalism, but the fact that the orthodox conservatives were opposing it, pleading for the return to the old, imposing obedience and renewal of the estate system (Arndt, 1912b: 214). In this conflict, Arndt refuses to be classified into either side and pleads for the middle road between extreme liberalism and conservatism. That "third way" which was so abused later on was supposed to consist of a return to the past, but no longer into the old regime, but all the way back to the ancient Germanic traditions of liberal peasantry and the prohibition of the transfer of land by laws. The cornerstone of that tradition represented by regulation in which one half to two thirds of the total land of one state is in the ownership of the peasants, while only one third to one half is left in free trade. Arndt believes that this solution had formerly protected, and it is also possible now to protect the middle possession and the middle (peasant) class, on which rests the strength of one free nation (Arndt, 1912b: 229). This proposition had as an example Fichte's model of a closed commercial state, which Arndt wrote was entirely applicable in real life, even though Fichte examined it primarily from a moral perspective (Arndt, 1912b: 234). Arndt's contribution to this model was the emphasis on the role of peasants and traditional peasant economy in an autarchic national state.

It is interesting to mention Arndt's understanding of the "mob" from the perspective of the social content of a state. A part of the mob, most generally defined, is anyone who does not obey the laws (Arndt, b: 12). However, it is not so much about a group of ("professional") criminals, but a group of handicapped people, who are forced by their position (in "Manchester liberalism") to be excluded from all political and social events in the state. The mob accuses the government of its evil, while in fact each government "follows along, passively or actively, unintentionally and subconsciously, with the spirit and will of the entire nation" (Arndt, 1912g: 35), which means that the existence of a mob is actually the result of a concrete state of each individual nation. If the significance of peasantry in each state is taken into consideration (or in other words nation), then the existence and size of the mob shall depend on how (politically and socially) strong the peasantry is and how much it resists the course leads toward "Manchester liberalism". In the strengthening and restructuring of the peasant estate, Arndt saw "one

obstacle against the threat of turning of a large number of nations into rabble (*Verpöbelung*)" (Fahrner, 1937: 73).

This political program had one very serious defect. Namely, he relied on the enormous emancipated potential of the peasants, even though at the time the old regime was breaking apart it was precisely the former serfs (newly liberated peasants) that were politically most inexperienced and authoritative. The best evidence of this is in fact Arndt's investigation of current political conditions in Pomerania. The liberal population was made up of two classes up until 1806, including (aristocrats and the middle class) and the "mob", which did not want to earn its bread by working (Arndt, 1817: 16–17). Peasants did not have freedom and did not in any way participate in the state. When in 1806 serfdom was eliminated and Landtag (that in the Swedish sample had four classes: aristocrats, the middle-class, the clergy and peasants) was formed in Greifswald, the peasants were forced to step onto the political scene unprepared and basically overnight. For this reason, Arndt realistically observes that at that time they were still not in fact (really) free and independent so that they could equally participate in the activities of the Landtag, so they simply and always entirely authoritatively voted for the proposals made by the King, regardless of their content (Arndt, 1817: 25–26). Therefore, regardless of all heroic stories about the emancipative potential of peasantry "in general", a concrete problem with much higher priority arose: in which way, following the elimination of serfdom, should the peasants be reintegrated into the activities of the political organs, so that they would not "pour" into a mob and imperil "their own" state, instead of helping it. If strong peasantry was really the best medicine against "*Verpöbelung*" according to Arndt, it remained unclear how to prevent "*Verpöbelung*" of the peasants themselves when it is weak and that is, concretely, always the case, when they are, as a group, leaving the serf position. He shall never ask himself this question, and succeed in giving an adequate answer. His attention was occupied by completely different problem, so that in time the problem of peasantry itself and its emancipative roles were placed in their entirety put aside, so as to concentrate on the task of ethnic integration of Germans and escalation of national love and hate, as the most efficient integrative resources.

Dragan Milovanović

LEGALISTIC DEFINITION OF CRIME AND AN ALTERNATIVE VIEW

In the first part of the paper, the author addresses one of the most famous definititons of crime given almost half a century ago by American criminologist Tapan, and criticizes it for being restrictive and overtly formalistic. Tapan equals crime with criminal offence, understood as a legal category. In the seventies, Schwedingers defined crime as a breach of basic human rights and had laid a foundation stone for many alternative definitions of the crime. One of the most influential ones at present is the "constitutive definition" given by Stewart Henry and Dragan Milovanovic

According to this definition, there are two types of crime, depending on whether the injured person loses certain qualities important for its present status (reduction crimes) or is prevented from achieving desired position in the society (repression crimes). This definition of the crime enables to broaden the scope of criminology to all actions which injure somebody else, where 'injury' is understood in the broadest sense.

Keywords: *Crime. – Injury. – Reduction. – Repression. – Degradation. – Discrimination*.

INTRODUCTION

In a classic article, "Who is the Criminal?" written in 1947, Paul Tappan developed a definition of crime that has been called the legalistic definition of crime. His "juristic" view is:

"Crime is an intentional act in violation of the criminal law (statutory and case law), committed without defense or excuse, and penalized by the state as a felony or misdemeanor" (Tappan in Lanier and Henry, 2001: 31).

Over the years, a number of criticisms of his approach have been written. The most important criticism was that his definition of crime was too narrow. It only incorporated harms defined as so by the State. Furthermore, it reduced the development of theories of crime to only looking at those "legally" guilty. Thus "factually guilty" did not become phenomena that the criminologist could deal with in constructing theories of crime. An alternative was needed. The first major alternative was provided by Schwendinger and Schwendinger in 1970 (reproduced in Lanier and Henry, 2001), in their article "Defenders of Order? Or Guardians of Human Rights?" Several others have also appeared since this important article (see Lanier and Henry, 2001). In 1996, we (Henry and Milovanovic, 1996) developed a "constitutive definition" of harm. We recognized the limitations of Tappan's original work, and the importance of Schwendinger and Schwendinger's alternative. We wanted to develop a more sociological definition of harm that would incorporate all forms of harm. Thus, since 1996 we have co-authored several chapters and essays on an alternative definition of harm. This short paper will summarize some of the key elements of our theory.

We want to first go over the elements of the "legalistic definition of crime" in the context of the U.S. experience. We then briefly summarize the alternative by Schwendinger and Schwendinger (1970[2001]). Finally, we move to explaining the constitutive definition of harm.

LEGALISTIC DEFINITION

The legalistic definition of crime has been the pillar of conventional thought in criminology. It argues that "only those are criminals who have been adjudicated as such by the courts" (Tappan, 2001: 31). This is known as "legal guilt."[1] Of course, a person may have actually done the crime but may be found not guilty by the courts. This is known as "factual guilt." The criminologist who wants to study the criminal, who wants to develop a theory of criminal behavior is bound by the legal system's definition of crime. One is restricted to its definition of who the criminal is.

Let us look at the legalistic definition of crime in more detail. We will separate each component. Thus:

(1) "Crime is an intentional act...": In the US system of law, there is a distinction between *mens rea* and *actus reas*. To be convicted of crime the State must prove both. It has the burden of proving guilt

1 In the US experience, one must be found "guilty beyond a reasonable doubt," and it is the jury which will do this.

beyond a reasonable doubt. *Mens rea* deals with the state of mind. *Actus reas* stands for an act. In our system of law, one must have "intended" to commit a crime, and one must have committed some act to be found guilty of a crime. Normally, both must exist. Thus a person may intend to commit a crime (guilty thoughts) but may not do the act. This is not a crime. On the other hand, one may have done harm to another, but did not have "intent." This either diminishes responsibility for the act, or evaporates it, as in cases of insanity, duress, accident. In some cases, however, such as "possession of burglary tools," the act itself, by itself is a crime. And in some cases, where a person plans to do an act, and takes one step in furtherance of the crime, although short of completion, she or he can be prosecuted for a crime. Conspiracy cases are examples.

In the US experience, government police agencies have set up "sting operations" to control crime. Here, the police try and trap people in completing the crime. They might offer drugs for sale, disguised prostitutes, or offer stolen merchandise for sale and wait to see who will complete the criminal act.

(2) "or omission": Normally, if a citizen does not do anything to report a crime, even if he or she is observing it in progress, he or she cannot be charged with a crime. We do not have what are called "good Samaritan laws." One does not have an obligation to help another being assaulted by a criminal. There are exceptions. If one has a specific license to care – a doctor, a nursing home operator, a parent – and one does nothing when a dangerous situation arises or ones skills are required, then one can be charged with a crime when the person under their care is hurt. But generally, in the US system of law, one does not have to get involved in order to help a person being victimized. This is unlike many laws in European countries.

(3) "in violation of criminal law...": In the US system of law, before police try and make an arrest there must be some specific law written in the criminal codes by the State and Federal Government. Absent that, it is not a crime. One cannot reason that a particular act is similar to a crime listed in these codes. An act must be defined with all the elements that make it up. Thus, each criminal act is defined in terms of the elements needed to be proven. If for example a person kills another, if "intent" cannot be proven but the result is still death, perhaps one can try and show "negligence" (negligent homicide, or manslaughter). Here one is showing diminished responsibility.

(4) "(statutory or case law"): In the US system of law, "statutory law" means laws that have been passed by legislatures and placed in the state criminal code or federal criminal code. "Case law" stands for how judges interpret law. Once the law is interpreted it becomes the basis for

legal rulings in future cases. This is known as "stare decisis" (law based on precedents).

(5) "committed without defense or excuse": In the US legal system certain "defenses" or "excuses" are allowed. Such as the insanity defense and duress. "Ignorance of the law" is generally not an excuse. These defenses or excuses are arguments that say that the person did not have full intent, or in some cases, no intent at all to do the crime, even though the act was completed. In short, there was no "mens rea." One excuse, "entrapment," argues that the police were so excessive in their design to get some person to do the crime, that the court recognizes that the "design", the "intent" to do it cannot be attributed to the person who does it. In other words, it was the police who were over zealous. Interestingly, the US Supreme Court has said that having a previous criminal record can be considered by the jurors when considering whether the person was "entrapped."[2]

(6) "and penalized by the state as a felony or misdemeanor": In the US legal system an act can only be considered "criminal" after it has been defined as such by the legislators and has been placed in the criminal code as a prohibited act. A "felony" is anything punishable by a year or more and time spent will be in prison. A "misdemeanor" is anything punishable by less that a year and the time spent will be in a "jail."[3]

Jails are generally for those awaiting trial or awaiting to being sent to a prison. They are also places where one spends up to one year for some crime.

In short, the legalistic definition of crime provides the formal elements of a crime. Let me offer some brief critical commentary. First, it is a political process which defines the act as a crime. It is a political process that defines appropriate defenses or excuses. For example, in the extreme, consider trying to use "living in a ghetto" as an "excuse" to commit a crime.[4] Clearly, powerful elites will assure this would not take place. For if they were to take place, consider the questions that would

2 A defendant can also argue the "necessity defense," which over 2/3ds of the States allow. Here, if the judge allows the defense, the defendant must show that even though he or she did do the crime, they did it to stop some greater immanent harm.

3 Currently there are over 2.1 million inmates in US prisons and jails. Another 5 million are under some form of supervision (i.e., probation, parole).

4 Consider also the difference between criminal and civil proceedings. In civil proceedings the defendant (usually some large corporation) is asked "why is it not the case that you should be stopped in what you are doing?" And the defendant can file a "consent decree" which means "I will stop doing what you claim I am doing, but I do not agree that I am doing it." Imagine, for the moment, under principles of formal equality, that we allowed the lower class defendant the same legal privilege?

follow about the nature of the political economic order – job availabilities, discrimination, life chances, poor medical, school, and legal services for the poor, etc. In the extreme, consider if a dictatorship arose in a society and we as criminologists simply accepted the legalistic definition of crime from which to construct our theories of criminal behavior? Second, consider that most legislators are lawyers by formal training. The whole process of defining crime is legalistic. Sociological examinations are limited.

Even where evidence is presented that is overwhelming such as in the US Supreme Court decision death penalty case, *McCleskey v. Kemp* (1987), the court returns to legalistic arguments. Here the high Court was provided huge amounts of the very best statistical evidence (the Baldus study) that showed that black defendants were much more likely to be sentenced to death compared to white defendants even though the crime was the same. The US Supreme Court simply said, that even though the statistics show this pattern, in this particular case, the case of McCleskey's appeal, he had to show specifically that he was discriminated against. The courts, in short, follow legalistic arguments, not sociological.

CONSTITUTIVE DEFINITION

In 1996, Stuart Henry and I (1996) set out to provide an alternative definition of harm. We were unhappy with the limitations of the legalistic definition of crime. We needed new visions on how harm can be defined.

The Schwendinger and Schwendinger (2001) definition of harm was an improvement. It stated: "Any person, social system, or social relationship that denied or abrogated basic rights are criminal." Basic rights are distinguished by the right to racial, sexual, and economic equality." They are "basic" because "there is so much at stake in their fulfillment." Further, "individuals who deny these rights to others are criminal," and "likewise, social relationships and social systems which regularly cause the abrogation of these rights are also criminal" (Schwendinger and Schwendinger in Lanier and Henry, 2001, p. 88).[5] This definition, originally meant as an anti-Vietnam war statement when it was written,

5 As they further say, "all human being are to be provided the opportunity for the free development of their potentialities...All person must be guaranteed the fundamental prerequisites for well-being, including food, shelter, clothing, medical services, challenging work, and recreational experiences, as well as security from predatory individuals or repressive and imperialistic social elites" In short, "these material requirements, basic services, and enjoyable relationships are not to be regarded as rewards or privileges. They are rights!" (Schwendinger and Schwendinger in Lanier and Henry, 2001: 85).

quickly became the litmus test as to a willingness to engage in an alternative view. It greatly expanded the discussion. It called into question the legitimacy of the legalistic definition of crime. Criminologists who merely accepted it without questioning it, and who then devised theories based on it, without anything more, could then be accused of being lackeys of the State.

Let's now turn to our contribution in this debate.[6] At the outset, we need to define "harm" in a more comprehensive manner. Harm (crime) can be defined as "the expression of some agency's energy to make a difference to others and it is the exclusion of those others who in the instant are rendered powerless to maintain or express their humanity." In other words, harm revolves around imposing power on the other without being subject to any meaningful counter. By "agency we mean those who invest energy ["excessive investors"] in denying others through harms of reduction or repression." Agents (and agency) could be defined as a human being (or human beings), social identities (women, men), various groups (ethnic, racial, etc.), political parties, social and cultural institutions, agents of social control (i.e., police), the legal apparatus (the legal system and its laws), the state (and its various organs, etc.[7]

Two forms of harm can be identified: harms of reduction and harms of repression. (1) *Harms of reduction* "occur when an offended party experiences a loss of some quality relative to their present standing." They occur "when a person is reduced to one or more... dimensions, each of which itself is socially constituted and therefore subject to change over time, as well as culturally." In other words, harms of reduction occurs when a person is reduced in some way (i.e., from being a fully functioning human being to being something less than that, due to some crippling harm received; from an active agent to a passive agent; from the ability to say "no," to its inability; from being able to speak against the State, to being denied the ability to criticize, etc.).[8]

(2) *Harms of repression* "occurs when an offended party experiences a limit or restriction preventing them from achieving a desired

6 Excerpts from Henry and Milovanovic, *Constitutive Criminology* (1996); Milovanovic and Henry, "Constitutive Definitions of Crime," in Henry and Lanier, *What is Crime?* (2001).

7 More abstractly, they also include COREL sets, historical configurations of relatively autonomous coupled iterative loops that "vary in their effects in time, place, and manner." COREL sets, derived from chaos theory, stand for how various institutions in society find themselves interconnected, having differential and nonlinear effects on each other, in particular moments in history.

8 For more subtle forms of racism in the US which can be seen as harms or reduction, see Dragan Milovanovic and Katheryn Russell's (2001) study of "petit apartheid."

position or standing." "[T]hey diminish a person's or group's position, or deny them the opportunity to attain a position they desire, a position that does not deny another from attaining her or his or their own position." Consider, for example, Schwendinger and Schwendinger (2001) and Abraham Maslow's humanistic psychology and the idea of the drive for the fulfillment of potentialities (self actualization). If these are repressed because of persons, social systems, or social relationships, they can be seen as harms of repression. Consider, for example, racism, sexism, ageism, etc. In addition, if a capitalist system denies a high percentage of its citizens a decent wage and living condition, if it systematically maintains a high percentage of minorities in poverty, if it places impediments on certain groups in their ability to self actualize, it can be seen as engaging in harms of repression.

Consider, for example, Johnson and Leighton's (1995) careful examination of statistics indicating the system-wide repression of poor black men in the US. Their statistics, for example, demonstrate the disproportionate early death rates of young black men. Their study indicates a form of "black genocide" taking place in the US, even though it is not officially called that. If a practice of genocide can be shown, whether attributable to individuals, the State, or social systems, it can be seen as a harm of repression.

A harm rather than a mere change revolves around five factors: (1) "whether the entity suffering the change perceives it as a loss", (2) "whether the person or entity is fully free to object to the exercise of power responsible for imposing the reduction," (3) "whether they are free to resist it," (4) "whether their resistance is able to prevent the reduction occurring," and (5) whether "change...[is] coproduced through a process of conscious active participation by all of those affected by it."

Thus our conceptualization of crime:

"Harms, or 'crimes,' are expressions of the exercise by one or more agencies of power [excessive investors] over others, who in the instant of that expression, whether momentary or sustained over time, are rendered powerless to make a difference. Crime is thus a denial of the other's humanity. In the instance of its expression, the victim, therefore, is rendered a non person, a less complete human being, incapable of making a difference."

In short, our definition revolves around the capacity to make a difference. When power is inflicted on another and the other cannot make a difference, she or he is subject to harms or crimes. In this position, the person becomes a non person, a less complete human being, a person who cannot make a difference. "Crimes are nothing less than moments in the expression of power, such that those who are subjected to them are

denied their own contribution to the encounter and often to future encounters, they are denied their worth. Crime is the power to deny others their ability to make a difference."

The "criminal" (agent) is thus an "excessive investor" in power to dominate. He or she is an excessive investor in harms of reduction or harms of repression. In other words, an "excessive investor" in power over others is the essential element defining the "criminal" (agent, or agency). Implicit in our definition, of course, is a vision of a humane society where power is not distributed in ways where human beings remain subjugated.

CONCLUSION

To embrace the legalistic definition of crime is to be imprisoned in state, politically dictated, and legalistically dictated logic. A more sociological investigation would consider a broader understanding as to what in fact is "harm." The Schwendinger and Schwendinger (2001) analysis began this more comprehensive analysis. Our constitutive definition is offered as furthering this discussion so that we as criminologists do not limit ourselves to arbitrary categories in crime construction.

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Aleksandar A. Miljković

ŽIVOJIN M. PERIĆ ON ZADROUGA-FAMILIES IN SERBIA AS COMMUNIST INSTITUTIONS – critical remarks-

Živojin M. Perić became probably best known as a writer in the field of law thanks to his monumental work *The Law on Zadrouga-Families in the Civil Code of Serbia*[1]. However, apart from being known as the best expert in zadrouga-family law, he also possessed an enormous knowledge about the zadrouga-families and about the zadrouga-family life of Serbs and other South Slavs. That can easily be confirmed by every reader of his works on zadrouga-family law. His works represent a real wealth of data about our patriarchal zadrouga-families.[2] Because of that, Perić ranks among our most eminent experts, whose works on zadrouga-families may be considered as classical.

However, in this article, we do not deal with the overall contribution of Ž. Perić to the knowledge about zadrouga-families in our country. It is our intention to study critically his idea about zadrouga-families, i.e., how the zadrouga-families looked like in his eyes, at the basis of the Serbian Civil Code, and bearing in mind especially their "characteristic features".[3] We presented those Perić's ideas already in our

1 Further on: *Zadrouga-Family law.*

2 We presented a review of Perić's contribution to the understanding of zadrouga-family life in Serbia after the adoption of the Civil Code in 1844 in an article entitled *Contributions of Živojin Perić to the Knowledge about the Zadrouga-Ffamily life of Our People*, published in the magazine *Serbian Liberal Thought*, Belgrade, January-February 2003, pp. 439–462. Otherwise, we presented for the first time Perić's idea of zadrouga-family at a scientific conference devoted to the 150th anniversary of the Serbian Civil Code, held in the SASA in 1994.

3 This is Perić's term in his *Zadruga-Family Law*

article on his contribution to the understanding of zadrouga-families[4] but we did not indulge in critical analysis.

* * *

In the fourth chapter of his *Zadrouga-Family Law*[5], Perić defines the zadrouga--family as a communist institution, but it is "communist within the framework of an extended family". He based his really peculiar opinion on also peculiar the premise, , that "Communism means work", Perić explains, and there is no communism without work. He then remarks that it is not relevant "what kind of work" is in question: "agricultural, craftsmanship, commercial, industrial, banking". Where there is no work, there is no zadrouga-family either. He does not change his opinion in his book: "A Zadrouga-Family is the Place of Common Work on Collectivist Basis".[6]

However, according to Perić, a zadrouga-family is also a communist association because of the fact that all members of the zadrouga-family are equal owners of the property of the zadrouga, regardless of the inequalities in their shares. All of them are considered "equal", as if their shares were equal, or as if they worked in the framework of a collectivist property. "All of them have, during the existence of the zadrouga-family, the same duties to work and the same right to support", Perić states.

However, apart from this text on *Zadrouga-Family Law*, Perić wrote about zadrougas as socialist or communist institutions in a later article, *Petition to the Private Property Department of the Permanent Legislative Council of the Ministry of Justice*,[7] in which he presented some controversial issues which he encountered when working on the text of the Civil Code of the Kingdom of SCS, the preparation of which he was entrusted by the Ministry of Justice. In the part entitled *Zadrouga-Family Law* he wrote *:* "Nowadays, the question of zadrouga-family is put forward again; however, this time there are two conflicting currents which struggle for primacy and influence in the society, on the one hand, the individualism of the bourgeois democracy, and on the other the idea of solidarity and altruism expressed in socialism resp communism". According to Perić, if the legislators adopted the first idea, i. e. if they

4 See the bibliographical data on that article in footnote 2.

5 Belgrade, 1920, pp. 92–93. Let us mention here that Perić divided his *Zadrouga-Family Law* into "chapters", the first three "chapters" were published in a book, in the second, improved edition (Belgrade, 1924), while the fourth "chapter" represents a separate book of almost 430 pages (Belgrade, 1920), with the mark "IV" on the cover.

6 Ibid, IV, p. 26.

7 *Archives for Legal and Social Sciences*, November 25th, 1921, *Supplement to the Archives* pp. 330–333, Further on *Petition*

tried to develop "the individual bourgeois democracy", then it would not be necessary to adopt a special regulation about the zadrouga-families; the zadrouga-families should be left, like before the First World War, in the state in which they are, and that would result, "in not so distant future", in their "complete disappearance". "However, if we chose the way of solidarity and altruism, the ideas which are, as we said, the basis of the cooperatives, then the cooperatives should not be only kept, but their development and improvement should be favoured, by appropriate legal regulations". "To favour a family cooperative", means, according to Perić "to favour the idea of solidarity and altruism". Through zadrouga-families and similar institutions, the human spirit would be developed more and more in that direction, and that would mean evolving into such a social order in which the idea of altruism and solidarity would be dominant, instead of the idea of egoism, which is now, mainly, moving individuals and the human society". Of course, when talking about altruism and solidarity among members of zadrouga-families, about the predominance of the collectivist spirit in a zadrouga-family, Perić took the stand that it applied only to the relations inside the zadrouga-family, since the relations among zadrougas are not the same as the relations among the members of a zadrouga-family itself.

In his *Petition* Perić expressed his conviction that the development and strengthening of family cooperatives in the nation could result in a radical social reform. "Thanks to zadrouga-families and similar institutions, the human spirit would develop more and more" in the direction of socialism and communism. So, not only did Perić consider a zadrouga-family to be a basically socialist and communist institution on account of its "characteristic fearures"[8], but he was also convinced that it represented the lever which could radically change the ideas which were penetrating inexorably at that time the conscience of the people - the ideas of individualism, egoism and "bourgeois democracy". In that respect, he reminds us strongly of Svetozar Marković, who, in his book *Serbia in the East*, was also of the opinion that the socialist transformation of the Serbian society may be accomplished only by the revitalization and strengthening of zadrouga-families and zadrouga-family spirit.

Perić did not explain in detail his thesis about the zadrouga-family as a communist institution. In *Zadrouga-Family Law* he was involved mainly in commenting the provisions of the Serbian civil code concerning the zadrouga-families, as it is explicitly said in the sub-title of his work[9]. Therefore, there was no place,in his work for a systematic discussion about this primarily theoretical question. Therefore, he limited

8 This is Perić's expression in his *Zadrouga-Family Law*.

9 *Comments to Chapter XV of the Second Part of the Civil Code*

himself to indicate, just in a couple of sentences, his theoretical standpoint which comes down to the idea that the relations among the members in zadrouga-families are imbued with the spirit of solidarity and altruism, which gives the zadrouga-family the character of socialist "resp" (as he wrote) communist institution.

We do not know whether this theoretical idea of Perić was subject to special studies. But the equalizing of the cooperative with a communist institution represents a great challenge in the sphere of theory, and should not remain without comments (even when such comments are made after 80 years).

* * *

In his study of the conditions which must be fulfilled in order to consider a family community as a zadrouga, Peric puts forward four conditions. A zadrouga is "a community of two or more persons", "a community among relatives (community of relatives)", "a community in property (property community)" and "a community of life and work".[10] A community represents a zadrouga-family only when it satisfies those four conditions. However, Perić makes a difference between the zadrouga-family in Serbia after the adoption of the civil legislation, and the one described by Valtazar Bogišić. According to Perić, a single family in civic Serbia was not anymore the same thing as a zadrouga. For him, the term "single" means just one family, a father and his sons, while a zadrouga means a number of families living and working on the same estate".[11] Perić does not consider individuality, like Bogišić, as a zadrouga in statu latenti[12], but as a family which Bogišić termed an urban family. This is a non-zadrouga family, a family in the narrow sense of the word, a family consisting of parents and children only. He is also of the opinion that "a number of families which live and work on a common estate" represent a community which is also called a family. However, the element which is a characteristic of a zadrouga-family is the fact that all male members must be in kinship, and stem from a common ancestor (agnate community).[13] They represent a family both legally and factually, and their "common property" is a family property in the same way as the property of an individual family (i.e. non-zadrouga). But there is one

10 This was the view of others who studied zadrouga-families.

11 Ibid, IV, p. 89.

12 *On the Form Called Individualism (Inokoština) in Peasants' Families of Serbs and Croats, Legal Articles and Treaties,* Belgrade, 1927, p. 189. Further on: *On Individualism in Rural Families.*

13 But the "civic kinship" which he identified "with blood kinship" creates zadrouga-families, as well (*Zadrouga-Family Law,* Part One, p. 36.

thing which should be emphasized . After the adoption of civil legislation in Serbia, a zadrouga-family seems to cease to be a family community consisiting of several generations. If de cuius, after his death "left one or more male heirs, his relatives" they do not represent anymore, according to the law, a zadrouga-family. Namely, only if those inheritors do not divide the property and remain living and working on the estate inherited from de cuius[14], such a community was considered a zadrouga-family .[15] According to Perić, it seems that a zadrouga-family comes into being or is always recreated after the death of de cuius. It no longer seemed to represent a community of uninterrupted existence throughout generations, as it had been the situation before the adoption of the Civil Code of 1844, i. e. during the existence of the custromary law.

However, after the death of de cuius, even in those cases when the inheritors did not divide the property, but continued living together, that community did not necessarily represent a zadrouga-family in all cases, since the inheritors could decide to continue living in a community, called indivisio or partnership. In fact, only if the male inheritors decide to live in a zadrouga-family, their community was legally considered as a cooperative. It was not so important that in Serbia, which Perić had in mind in his *Zadrouga-Family Law*, the male blood relatives (agnates), who stayed to live and work on a non-divided estate, were not compelled to express "explicitly" their wish to live in a zadrouga-family.[16] If they stayed in a community, without determining what kind of community it was, then it was considered that they tacitly adopted, among themselves, the "zadrouga" relations, i. e., that they "concluded a tacit agreement on a zadrouga".[17]

This statement by Perić is very important for understanding his attitude, for it shows that, in his opinion, a zadrouga-family became a contractual institution in a civic state, and was practically at the same level with other contractual institutions. The only difference was that a tacit agreement was recognized by a zadrouga, while for other institutions an "explicit" statement of the contracting parties was necessary. That means that Perić applied to the zadrouga-families the principles valid for other institutions in the civil society, and by that assumed that the rules of inheritance which were in force during the customary laws were not valid

14 Ibid. IV, p. 5.

15 Of course, it goes without saying that it is the right of the inheritors to divide the property after the death of de cuius and to stay living in the zadrouga-family, i.e. to terminate the zadrouga-family.

16 However, they were bound to express themselves "explicitly" if they wanted to consider the community as a joint ownership of goods or a partnership".

17 Ibid. IV, p. 8.

in that case. A zadrouga-family did not exist in continuity anymore; it was based on the freely expressed will of the male inheritors of de cuius.

By putting the family cooperative at the same level with partnership, i. e. by considering it to be a contractual institution, it is normal to assume that zadrougas were the based on civil law, i. e. institutions established on the basis of an agreement – regardless of the fact that in this case the agreement was tacit. It is a well-known fact that a free will of an individual is, both factually and legally, a category which can hardly be identified with family duties and obligations when talking about a family community, and especially about a community of traditional type, i. e. a zadrouga-family. For example, in a traditional family , the parents are not free not to perform their parental duties[18] and the children are not free to be outside of parental control. In general, when talking about family obligations, individual freedom of choice can hardly exist, even if it results from civil norms. The family relations do not depend, and must not depend, on the free will of the members of a family, as a family represents an indivisible entity. Perić overlooked this compulsory character when talking about the members of a zadrouga-family, although it was considered that they expressed, after the death of de cuius, their free will to continue living in the cooperative.

So, let us state immediately that Perić assumed erroneously that the members of a zadrouga-family opted consciously and by their own free will to live in a zadrouga, for the members of a family do not opt to belong to a family, even in a civil society. However, according to Perić, it seems that life and work of the members of a zadrouga as well as their property did not have the family character only anymore. In his opinion, after the introduction of the civil legislation in Serbia, the members of cooperatives became "partners"[19]. "A zadrouga is a private legal institution" and "therefore", "it may result only from a free agreement, i.e., agreement of the partners". Consequently, Perić concluded that a zadrouga existed "when there is common life and work on a common estate". However, the "commoners-partners" in that community could be "male persons and relatives only"[20] but that did not change his opinion regarding the partnership character of a zadrouga.

Let us mention immediately that Perić's thesis on members of zadrougas as "commoners" could not be accepted at all. The members of a zadrouga are the father with his sons and grown-up grandsons, and his brothers with their grown-up sons and grandsons – all those who are in

18 They are not, at least in principle, in families in civic states, either.

19 Ibid. IV, p. 7.

20 Ibid, IV, p. 39.

blood kinship via males (agnates). Even in the cases when the state considers them to be partners, they could not feel as such, and they were not factually. This is simply due to the fact that the relation of kinship is more substantial than the contractual, partnership relations. It is the most substantial characteristic of a zadrouga.

Common work and life could not transform a zadrouga-family in the civic state into a communist institution, and the relations among the members of zadrougas did not become and could not become contractual. It is true that all the members of a zadrouga-family, as it was the case in all peasant households or farms, took up a job as soon as they were able to work, working especially in the house and for their household. Every member of a zadrouga had a job which was appropriate to their age, strength and capabilities. This applied to both male and female members. However, we would like to emphasize especially that the significance of such work was due to the fact that it was work for the family. Most importantly, that work provided the maintenance of the family household, its daily existence, and when it comes to rural households, the continuation of its existence. Every rural household (not only the zadrouga ones) tried consciously to proved the conditions for the children to take over the roles of the elder, so that the younger generation could take the place of the previous one, the place to be eventually inherited by the following generation.

Let us mention here that for Perić zadrouga-family meant primarily the family. He was convinced that "it is a fact that the members of a family which has become extended do not separate but continue to live together".[21] The sense of belonging to the family and mutual affection were the key factors of the stability of zadrouga-families, as it is the case with individual families.There is a place in his *Zadrouga-Family Law* where that is explicitly stated when he contemplates the issue of the division of newly acquired results of individual work done by zadrouga members as their contribution to their zadrouga. In Perić's opinion the mutual relations among the members of the zadrouga are based on feelings of solidarity and altruism. " Being relatives, they are by mutual affection, and as a result the members of zadrouga-families derive great satisfaction out of working for those they deeply care about; therefore, they will not examine whether each of them works as much as he or she could or should. This feeling of mutual affection among the members is the strongest basis of the zadrouga-family. Where there are no such feelings, there are no solid zadrougas either, and such communities soon disintegrate".[22] In this almost casual statement, Perić emphasized the family-oriented nature of the relations which prevailed in zadrouga-

21 *Zadrouga-Family Law* part one, p. 47.

22 Op. cit., IV, p. 243; see also our article (op. cit, p. 455).

families. They reveal the substance of a zadrouga as a family community, and they represented its strongest foundation. These are in fact, the same "characteristic features" which also make the families in the narrow sense, i.e. the non-zadrouga or single families, a strong family community. Therefore, some of the "characteristic features" which make a zadrouga-family a zadrouga[23], although they might be regarded as basic features without which there is no zadrouga-family at all, are valid only conditionally, i.e. only if, as the the conditio sine qua non, there are solid and lasting family relations among the members of the zadrouga, and, of course, if the members are fully aware of belonging to the family. For the zadrouga-family is primarily a "community of relatives", as Perić called it, i.e. a family community or, simply, a family.

In the historical sources, in chrisobullas (edicts with golden seals) and other medieval legal texts, there were no differences between zadrouga-families and individual families. The researchers who tried to ascertain subsequently which families were zadrouga and which were individual in the census which can be found in the chrisobullas of our medieval rulers, used as the criteria for this division the number of family members, and their kinship, if such data existed in the written documents. Stojan Novakovic, Oswald Balzer, Eugen Hammel and other researchers identified in the Dečani chrisobullas from 1330 and 1336 families with a large number of members or families in which, apart from fathers and sons, there were brothers and other members of families, as zadrouga-families. Based on this , it might be assumed that until the adoption of the Civil Code in Serbia, only one single term had been used for families, regardless of being zadrouga-families or not.

Valtazar Bogišić's opinion in regard to this issue is well-known in science. Namely, he was of the opinion that in the rural society of his time, there were no differences made between zadrouga-families and individual families. Both zadrouga-families and individual families were the same form of rural families. The example he mentions in his famous work *On individuality in rural families*, which he took from his *Anthology*[24]*,* confirms unequivocally, contrary to Perić's opinion, that in Serbia, even after 1844, the zadrouga-families were not different from those outside Serbia, which Bogišić had in mind in his research. In Serbia as well, "a son was a member of zadrouga-family with his father, and when there came the time to divide the property (...) the father took an equal part, as if the property was divided among brothers.[25] This

23 See op. cit, part one, Belgrade, 1924.

24 I.e. from *Collection of present legal customs of South Slavs,* Book 1, Zagreb, 1874.

25 *On Individualism in Rural Families, op. cit.* p. 187.

obviously confirms the assumption that for the people in Serbia, both in Bogišić's and Perić's time, zadrouga-families, where they existed, remained the same as they were at the time of the adoption of the Civil Code. The civil legislation did not change the internal order and the internal relations in zadrouga-families, although that is one of Perić's the main theses.[26] In fact, they changed when the entire lifestyle was changed in the Serbian state.

Here we would like to point out that the zadrouga-family, because of the fact that it never became a contractual community, as it appeared to Perić as a lawyer, could not be placed on the same level with any other legal or economic institution based on contracts. However, Perić does that when he considers the zadrouga-family a collectivist or communist institution. According to Perić, the zadrouga-family became an institution of "commoners", similar to partnership. Regardless of the fact that zadrouga-families continued to be family communities, it was, in his opinion, a community of work as well. The Civil Code introduced changes "in the customary law on zadrouga-families", he states in one place.[27] Now, a father with his sons, he says, does not represent a zadrouga-family anymore, provided that his sons do not have their shares in the property. "Each of the members of the zadrouga must have his property in the community"[28] as a precondition of the existance of a zadrouga-family. Also, "from the moment when a number of members of the zadrouga-family is reduced to less than two, there is no zadrouga-family anymore, regardless of the fact that "there could be more persons in the household".[29] However, in spite of the fact that it seemed to Perić that the zadrouga-families of his time, on the basis of the civil regulations in force, differed from the former ones which had existed before the adoption of the Civil Code, their substantial characteristics remained unchanged. In civil Serbia as well, members of zadrouga-families did not become members according to their free will, and the question of shares was never raised. For the members of a zadrouga-family, that question was not arranged by the provisions of the Civil Code, but still exclusively by customary law which was applied to zadrouga-families. That situation remained during the entire existence of zadrouga-families.

We have already mentioned that patriarchal zadrouga-families, especially those in rural areas, should not be understood as something

26 The sameness of the zadrouga-families and individual families, according to Bogišić's idea, which still existed in his time, was very concisely explained by Mihailo Konstantinović in his article on Valtazar Bogišić (*The Ideas of Valtazar Bogišić on popular and legal law, Sociological Review,* Book 1, Belgrade, 1938, p. 282.

27 Ibid, IV, p. 92.

28 Ibid. Part One, p. 52.

29 Ibid, IV, p. 94.

different from a peasants' family household or, if we consider the economic effect, from peasants' family farms. When it comes to peasants' family cooperatives, one can apply what was especially emphasized by Dragoljub Jovanović in his *Agrarian Policy*[30], when he wanted to explain the substance of a peasants' family farm. He called it "the mystery of peasants' farms", and in his opinion, "mystery" is the irrational effort aimed at the maintenance and improvement of family households, and the endeavors to enable the household to last throughout generations. "The only important thing is the preservation of the family", Dragoljub Jovanović wrote. That means also that a peasants' family household, as he wrote, "is not an enterprise", "but only the economic aspect of peasants' families".[31] It makes peasants' life. But even more importantly, it makes peasants stronger, more solid, more resilient against the external forces and pressures.

By analogy with this Jovanović's idea of the family farm, the basic function of a patriarchal zadrouga-family , like the function of the family household, would be to assure its existence and its continuity.

The only way to enable a zadrouga-family to fulfill its task, i.e. to exist as a family and to maintain its continuity, is to subordinate the individual interests and the individual will of every member of the family to that objective, i.e. to the common interests and to common will. Therefore, it would be a mistake to identify the common work, performed in the interest of the family and of its continuity, with the work performed in socialist "resp" communist associations, i.e. with the work with primarily economic and political objectives.

However, as it has already been pointed out, Perić did not put just the work in zadrouga-families, but the zadrouga-family property as well, on the same level with collectivist i.e. communist.

Many experts who studied zadrouga-families, from Valtazar Bogišić to Slobodan Jovanović[32] and others, wrote about zadrouga-family property. Živojin Perić himself devoted to that many pages of his *Zadrouga-family Law*. There is no denying that the property which belonged to the zadrouga-family was collective.[33] But what is much more

30 Belgrade, 1930, pp. 296–307. That chapter is entitled *The Substance of the Peasants' Family Farm.*

31 Ibid. p. 297.

32 As it is a well-known fact that Slobodan Jovanović, when studying Jovan Hadžić as legislator, had to face the problem of zadrouga-families. We dealt with these texts by Slobodan Jovanović for the first time in our work published in the *Review of the Ethnographic Institute of the SASA, and we presented it at the scientific conference in the SASA devoted to the person and work of Slobodan Jovanović.*

33 The term "collectivist" used sometimes for it by Perić, does not contribute to a clearer understanding of its characteristics and its functions.

important as determinant, in fact the only relevant determinant, is the fact that it is family property, it belongs to the family. This is the characteristic which was underlined by all those who wrote about cooperatives. The Serbian Civil Code introduced important changes regarding the zadrouga-family property[34]. Earlier, the zadrouga-family property was passed down "from generation to generation", which were, according to Peric, "only the beneficiaries of those properties". However, when the zadrouga-family property in Serbia, according to the law, lost its collective character and became individual, the zadrouga-family property remained for the members of the zadrouga-families the same as it was before, i. e. family property, but not common property. Perić was mistaken when he believed that the legislation which was in force in the new Serbian state changed the attitude of the members of zadrouga-families towards the zadrouga-family property inside the zadrouga-family. That legislation created the possibility for the members of zadrouga-families to handle that property in a way different from the one that was regulated by the customary law. However, if a family, in spite of all that, continued to live in a zadrouga, it existed only as a patriarchal zadrouga-family. The property community in zadrouga-families could be identified with collectivist property outside the zadrouga-family only from the standpoint of the civic state, i.e. from the legal standpoint. However, if the members of zadrouga-families did not perceive anymore the property as common, i.e. as family or zadrouga property, that was the sign that the zadrouga-family would soon disintegrate. But even in the case of the termination of a zadrouga-family, there are strong reasons to believe that it never happened that the zadrouga-family property in Serbia of the 19th century, until 1918, was transformed into collectivist, or communist property.

We know that Perić adopted in his *Zadruga-Family Law* the standpoint that it was not necessary for a zadruga-family to possess immovable property in order to be considered a zadrouga. Although the inheritable immovable property as a "characteristic feature" of a zadouga-family was obviously important[35] – the "pivot" or "patrimony" or any way that is was called, may be non-existent, while the cooperative would nevertheless exist. The family cooperative represented primarily a co-

34 Perić studies that question in detail, especially in the IV chapter of his *Zadrouga-Family Law* (IV, p. 91), in the entire second part, entitled *On the termination of a zadrouga-family.*

35 "A rural zadrouga-family" we read at one place in his *Zadrouga-Family Law*" (IV, p. 91) " with big immovable property, with zadrouga house and other buildings, with many members, with a big property in livestock and agricultural tools, etc. is the most prominent representative of that institution of ours".

mmunity of relatives, of the relatives who have a common male ancestor (agnate community). However, family communities, regardless of being cooperative or individual, can not exist without the consciousness of the belonging to the family, and without the will to belong to the family. This is by far the most important determinant of a zadrouga-family. And since, according to Perić as well, a zadrouga-family "does not necessarily include immovable property",[36] it would be a mistake to identify it with a communist institution, which necessarily assumes the existence of collectivist, i. e. common communist property.

* * *

The opinion of our great scholar and lawyer Theodor Taranovski is relevant to the issue which is being addressed here. Namely, in his brilliant study "*The History of Serbian Law in the Nemanjić State* [37], Taranovski opposed the thesis of some writers of that time that the Nemanjić state was a "zadrouga-family state". In his onion that thesis could not "be taken as something serious". "A zadrouga-family is a form of family, of household community", just as a simple family, and represents "small groups", as Taranovski calls them, while at the opposite side there are "big groups", the state and the tribe.[38] "The big group creates broader associations and it has public character, it is a political organization". According to Taranovski, each of these groups is limited to its domain, "and the organizational principles of one group do not apply to the other". "Zadrouga-families existed in the tribes and in various forms of states, but there were never zadrouga tribes, or zadrouga states, as there were no tribal or state zadrougas." When one says "zadrouga state", Taranovski had no doubt that there is no dilemma that "there is no legal construction in it, that it is just a figurative expression". So, from the legal standpoint as well, the difference between the institutions, if we classify them into small and big groups, represented, according to Taranovski, the difference between the institutions of private and of public law.

If we start from this original thinking of Th. Taranovski and link it to Perić's theoretical thinking about the zadrouga-family, the logical conclusion is that the terms which Perić used to explain the relations in a zadrouga-family (feelings of "solidarity" and "altruistic" feelings, and "collectivist" and "communist" property) are not appropriate. He simply

36 Op. cit. IV, p. 92.

37 Part One: *History of State Law*, Belgrade, 1931, p. 223.

38 Let us mention, by the way, that Taranovski does not mention the difference Ferdinand Toennies makes between two basic notions of "community" ("Gemeinschaft") and "society" ("Gesellschaft").

does not consider, or seemingly knows nothing about the fact that some characteristics which explain the relations in one kind of human communities may not be appropriate to explain the relations in a different kind of human communities. One must not "lump all those different categories together". If one can say for a state that it is, or that it is not, communist, because a state, according to Taranovski, belongs to big groups, it can not be said for the zadrouga-family, as family community, that it is a communist institution as it belongs, as being a family, to small groups. Taranovski is rightfully explicit in that. What is valid for a zadrouga-family is not valid and can not be valid for big groups, except if those terms were used as "figurative expressions" (as Taranovski said, quite pertinently).

In truth, we must say that in this respect, this Perić's, let us say, theoretical mistake did not result in some real consequences, as, likewise, the conviction of Svetozar Marković that the Serbian people in Serbia, thanks to the fact that there still existed a strong will to live in a zadrouga-family, would overcome all "horrors" of capitalism and enter directly into communism, as the most perfect form of economic and political order.[39] Perić remained isolated with his theory of a zadrouga-family as a collectivist and communist institution, even more so since the zadrouga-families – at least in their classical form – vanished completely, and, therefore, questions about them ceased to be topic.

* * *

At the end of this article, we may state that the assumption about the changes which took place in the substantial characteristics of zadrouga-families after the adoption of the Serbian Civil Code of 1844, and after the adoption of other regulations based on the Code, misled Perić into adopting a theoretical wrong attitude. He was convinced that the civic character of the legal provisions changed some substantial characteristics of zadrouga-families in Serbia, and the zadrouga-families as institutions were legally and factually forced to adapt themselves to civic norms. Perić was obviously mistaken when he assumed that the zadrouga-family in civic Serbia could even become "a communist institution", since it represented a community of life and work, and its property seemingly coincided to collectivist "resp" communist property.

39 In fact, Aćim Čumić wrote about the importance of zadrouga-families for the entire economic, political, state, spiritual and moral development of Serbian people in his *Suggestion to the Historical and Statehood Department of the Serbian Learned Society for the Study of the Serbian People* (Belgrade, 1871). We were recently reminded of that work by Mme Jelena Miljkovic – Matic, in her work *Aćim Čumić on the Problem of Tradition and Modernization of Serbia in the One Before Last Century (Political Review,* Belgrade, No. 1/2002, pp. 75–82).

However, his thesis is erroneous even more because the validity of the assumption that "communism means work" is challenged from the standpoint of social and economic theories.

However, the criticism of Perić's ideas about the zadrouga-family does not invalidate his total contribution to the discussion about the zadrouga-family law in the Serbian state after the establishment of civic legal order. On the contrary, this theory did not represent a hindrance to the thorough and brilliant study of the Serbian zadrouga-family law, which secured Perić a prominent place among the great thinkers of our legal science, and gave his Zadrouga-Family Law the significance of a monumental work in the field of legal and social sciences.

Translated by Nikola Čajkanović

Vladimir Pavić

COUNTERCLAIM AND SET-OFF IN INTERNATIONAL COMMERCIAL ARBITRATION*

Until recently, admissibility of counterclaims before international commercial arbitrations has been treated in accordance with a relatively simple formula – one had to ascertain the objective scope of the arbitration agreement. With regard to set-off defense, however, admissibility threshold was less clear and mostly dependent on the relation between the main claim and the claim used for purpose of set-off. The newly promulgated Swiss Arbitration Rules have, for the first time, enabled a potential broadening of arbitral jurisdiction over set-off claims, enabling Swiss tribunals to adjudicate even those set-offs already subject to another arbitration clause or forum selection clause. This might lead to a potentially dangerous situation, where such attraction of jurisdiction might lead to a conflict with another tribunal or court expressly designated as competent with regard to relations giving rise to a set-off. This triggers later dilemmas with regard to the reach of decisions on set-off and the possibility that the tribunal applies the lis pendens *rules in order to avoid conflicting decisions.*

Keywords: *Arbitration.* – *Counterclaim.* – *Set-off.* – *Jurisdiction.* – Lis pendens. – Res judicata.

It has been more than twenty years since Professor Poznić analyzed, in this very periodical, the problems posed by counterclaim in arbitral proceedings.[1] Ten years afterwards, he again addressed this issue, treating the objective scope of arbitration agreement.[2] Given the plethora of legal writing dealing with problems of arbitration and civil procedure, one is almost surprised at the scarcity of papers addressing these issues.

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1 Poznić B. "Protivtužba u arbitražnom sporu", Anali Pravnog fakulteta vol. 3–4, 421–425.

2 Poznić, B. "Granice arbitražnog sporazuma", Pravni život vol.11–12–1993, 1821–1840.

Now and then they are treated separately, or sporadically they are examined within the broader issue of objective reach of arbitration agreements. In any case, recent adoption of Swiss Arbitration Rules have spurred new interest with regard to admissibility and reach of counterclaim and set-off in international commercial arbitration.

This paper will try to analyze and, where possible, shed light on several issues. Firstly, the very notions of counterclaim and set-off, as well as their differentiation before international commercial arbitration. Secondly, the issue of objective scope of arbitration agreements with regard to counterclaims and set-offs. Finally, this paper will try to examine certain policy outcomes stemming from explicit treatment of set-offs and counterclaims (as has been done in newly adopted Swiss Arbitration Rules).

1. COUNTERCLAIM AND SET-OFF

1.1. Counterclaim and set-off in litigation

When facing a claim before an arbitral tribunal, the defendant has three options at his disposal. One is, naturally, to deny the claimant's allegations. The other, a more 'offensive' tactic, would be to submit a counterclaim, and the third, a 'defensive' option, to raise a set-off defense. The same is also applicable in litigation. Comparative systems of civil procedure clearly distinguish between the counterclaim (*Widerklage*, *demande reconventionelle*, *domanda riconvenzionale*) and the set-off defense (*Processaufrechnung* (*Verrechnung* in Switzerland), *compensation legale*, *eccezione di compensazione*).[3]

In domestic litigation, the defendant may submit a counterclaim until the conclusion of the main hearing; however, she may do so only if the counterclaim is related to the main claim. In addition, the two claims must either be capable of being compensated against each other, or, alternatively, the counterclaim has to be submitted in order to determine

3 European Court of Justice clearly distinguished between counterclaim and set-off in the case of Danvaern Production A/S v. Schuhfabriken Otterbeck GmbH & Co. C–341–93. Perhaps the only country where this distinction has been blurred is the United States, where set-off defence is omitted from the federal rules of procedure. However, this neither means that U.S. courts treat counterclaims and set-offs equally, nor that one may raise claims that have no connection whatsoever to the original cause of action. (Federal Rules of Civil Procedure, 13 (a-b), Wright, C., Miller A.: "Federal Practice and Procedure: Federal Rules of Civil Procedure Vol. 6", 2. ed, St. Paul, 1990, p. 1426.;, Inter-State National Bank v. Luther 221 F.2d 382 (10th Cir. 1955),with certain reservations with regard to subject-matter jurisdiction, Federman v. Empire Fire & Marine Insurance Co. 597 F.2d 798 (2nd Cir. 1979).

the (non)existence of a right or legal relationship vital for the outcome of the main claim.[4] Therefore, there are three types of counterclaims: connected (to the main claim of the claimant), compensatory (designed to compensate mutual obligations), and incidental (requesting that the judgment address a certain preliminary (incidental) issue).[5]

Set-off in litigation has the same objective – in most cases the defendant does not object the fact that the plaintiff's claim exists and is due, but, instead, alleges that it has been extinguished through compensation against the claim that he (the defendant) has against the plaintiff.[6] Things are further complicated due to the fact that civil law systems (including ours) treat set-off as a matter of substance, while the set-off defense is of procedural character.[7] Claims are extinguished *ex tunc*, as a result of debtor's unilateral expression of will, and there is no particular requirement of form with regard to this statement.[8] On the other hand, set-off defense is launched within litigation, and the claim is considered to be extinguished once the court declares it to be so, and not simply because the defendant claims that it is.[9] Set-off defense does not extinguish the claim. Instead, it enables the court to reach a constitutive decision with that effect[10] through applicable substantive law. [11]

4 Zakon o parničnom postupku (Law on Civil Procedure) Sl. Glasnik RS (Official Gazette of the Republic of Serbia) 125/04, Art. 192.

5 Poznić B., Rakić-Vodinelić V.: "Građansko procesno pravo", 15 ed., Beograd 1999., p. 352, Triva S.: "Građansko procesno pravo", 2. ed, Zagreb 1972, p. 354.

6 Alternatively, the defendant may raise the objection conditionally. While civil law compensation depends on admitting that the other side has a valid claim, procedural compensation may be conditional, i.e. it may exist as a 'reserve option' in the case where it is determined that claimant's claim against the defendant really exists. See Triva S., ibid., p. 352.

7 Rechberger W., –Simotta D. A., Grundriss des Oesterreichischen Zivilprocessrechts, Wien 1994, p. 482. Berger, K. P.: "Set-off in International Economic Arbitration", 15 Arbitration International 1999, 53–84, p 55. Although 'statutory set-off' is of procedural character in common law countries, its final effect on the main claim is similar to the effect given in the continental law. Coester-Waltjen D. ibid, p. 37, Aeberli, P.: "Abatements, Set-Offs and Counterclaims in Arbitration Proceedings", taken from www.aeberli.co.uk/articles/setoff.pdf, p. 4.

8 Law on Obligations, arts.. 336–338, with similar solutions in Germany, the Netherlands, Switzerland, Scandinavian countries, Japan and Korea. However, in Spain, Belgium and France consider compensation occurs *ipso iure*. See Berger, K.P., ibid., p. 56.

9 Poznić B., Rakić-Vodinelić V, ibid, p. 206, Triva S., ibid. p. 353.

10 Triva S,:, p. 351.

11 Heider M.: "Confidentiality of information in arbitral proceedings: Raising claims in arbitral proceedings for the purpose of set-off", conference papers '20 Years UNCITRAL Model Law on International Commercial Arbitration', Vienna 2005., p. 4.

However, the defendant's choice between counterclaim and set-off has very important consequences with regard to the threshold of court's scrutiny. Set-off is a defensive tool, a 'shield', and is always capped by the amount of the plaintiff's claim. [12] Therefore, set-off is examined only if the court finds that the plaintiff's claim exists (it is enough to determine that the alleged claim exists only partially). Any set-off would be awarded only up to the amount actually owned to the plaintiff, and if there is any exceeding portion of the defendant's claim, it could be examined only on the basis of a counterclaim, or in the course of another litigation.[13] In any case, set-off triggers the beginning of litigation with regard to that particular issue (which, in turn, might later bring in the rules of *lis pendens*), and the award on merits has to address the set-off defense.[14]

There are two situations where the difference between a counterclaim and set-off can be effectively weighed. One is where the court determines that the plaintiff's claim does not exist. Once such a determination is made, the court would still have to decide on the counterclaim, but would not have to deal with the set-off defense anymore. The other situation is the case where the defendant's claim exceeds that of the plaintiff. If such a claim has been raised in the counterclaim, the court would have to address it in its entirety. However, if the defendant's claim has been invoked for set-off purpose (and the court has determined that the plaintiff's claim actually exists), the exceeding portion of the claim would not be addressed.

1.2. Counterclaim and set-off in international commercial arbitration

1.2.1.Counterclaim and arbitration

However, a counterclaim may be raised in the course of arbitration only if it falls within reach of the arbitration clause.[15] This follows from the basic principle that arbitral jurisdiction is based on the will of the parties, and that arbitral tribunal may decide only on the issues which fall

12 Berger K.P., ibid. p. 60, Stooke v. Taylor (1880) 5 QBD 569.

13 Poznić B., Rakić-Vodinelić V, ibid, p. 206– 207, Triva S., ibid. 353. ICC 5971, Coester-Waltjen D.: "Die Aufrechnung im Internationalen Zivilprocessrecht" in Pruetting/Ruessmann (ed.) "Festschrift fuer Gerhard Lueke, Munich 1997, 35–49, p. 37; BGH 20. 12. 1956., p. 23.

14 According to Poznić B., Rakić-Vodinelić V, ibid, p. 206., Triva S. ibid. pp. 352–353. Of course, set-off defence is examined only if the plaintiff's main claim is found to exist.

15 Poznić B.: "Protivtužba u arbitražnom sporu", 421, Poznić: "Granice arbitražnog sporazuma", 1824 et seq., Knežević G.: "Međunarodna trgovačka arbitraža", Beograd 1999., p. 49, Jakšić A.: "Međunarodna trgovinska arbitraža", Beograd 2003, p. 269.

under the scope of the arbitration clause (or a subsequent arbitration agreement).[16]

Theory and practice are unanimous when it comes to counterclaims arising out of the same legal relationship as the original action.[17] Given the fact that arbitration agreements concluded *ex post* are by far fewer than arbitration clauses, and given that most of the arbitration clauses have a fairly wide scope, the objective reach of arbitration clauses will, in most cases, cover possible counterclaim and set-off defenses arising out of the same legal relationship. The issue of connexity should not pose significant problems, given the dubious nature of the very issue of connexity and the practical problems posed by applying such a standard.[18]

However, the issue of counterclaim admissibility may still become a bone of contention. For instance, if arbitration clause provides for jurisdiction of a tribunal (or institution) with a seat in the country of the respondent (so there are two potential fora and the final choice depends on 'who shoots first'), one might ask if the respondent has to raise a counterclaim in his own country, or to initiate another arbitration in the country of the claimant.[19] A significant number of institutional rules provide that jurisdiction over counterclaim exists whenever a counterclaim is based 'on the same agreement to arbitrate', or on the 'same relationship'.[20]

Therefore, if institutional rules expressly refer to the arbitration agreement provisions, a 'split' arbitration clause would preclude lodging of a counterclaim. However, if institutional rules only state that a counterclaim is allowed, one may wonder if such a provision may be derogated by arbitration agreement. This question may be answered only

16 Redfern A.-Hunter M.: "Law and Practice of International Commercial Arbitration", 4th ed., London 2004, p. 295;, Born G.: International Commercial Arbitration, 2nd ed.. Hague 2001, p. 298 et seq., Fouchard Gaillard Goldman on International Commercial Arbitration (ed. Gaillard E., Savage J.), The Hague 1999 (hereinafter 'Fouchard Gaillard Goldman'), p. 1222**.**

17 Lew J., Mistelis L., Kroll S.: "Comparative International Commercial Arbitration", Kluwer 2003, 153, Jakšić A. ibid. Similarly, UNCITRAL Arbitration Rules, Art. 19.

18 More on this Poznić B.: "Granice arbitražnog sporazuma", 1825.

19 Poznić B.: "Protivtužba u arbitražnom sporu", p. 423.

20 Article 23 of the Foreign Trade Court of Arbitration with the Chamber of Commerce and Industry of Serbia, Article 15 of the Permanent Court of Arbitration with the Croatian Chamber of Commerce, Article 3(2), International Arbitration Rules of the American Arbitration Association, Article 7a Rules of Arbitration and Conciliation of the Vienna Arbitration Centre, Article 19(1) Commercial Arbitration Rules of the Japan Commercial Arbitration Association. Similarly with regard to ICC arbitration Derains Y., Schwartz, E: "A Guide to the new ICC Rules of Arbitration", Kluwer 1998, p. 72.

after a thorough analysis of the arbitration institution rules in their entirety, and, accordingly, of *lex arbitri* provisions.[21]

1.2.2. Set-off defense before arbitration

The scope of arbitration clause represents a limiting factor when it comes to the effective use of the counterclaim. Although attack is often the best defense, should it become clear that the counterclaim, pursuant to arbitration agreement, does not lie within the competencies of the tribunal, the defendant may resort to a set-off defense. At this point, legal terminology becomes relatively uniform, which is doubtlessly the consequence of English being the *lingua franca* of international commercial arbitration.

However, an arbitration procedure, often without need to refer to national legal concepts and apply a particular set of national rules, frequently dims the distinction between counterclaim and set-off defense.[22] It is sometimes noted that the set-off has been carried out through a counterclaim,[23] and on other occasions a set-off defense is labeled as a 'counterclaim in disguise'.[24] Berger notes that the set-off and counterclaim are only 'a hair breadth's away' before international commercial arbitration, that they are often based on similar factual background (reciprocal debts of the parties), that the motivation and goals of their use are similar, and that they often result in similar decisions.[25]

Nevertheless, those similarities are deceptive. From the standpoint of the defendant, set-off is better since it does not raise the issue of the objective reach of an arbitration agreement.[26] Given that the declaration of set-off may have effects even without the arbitration, the tribunal's task is only to examine whether the plaintiff's claim has been extin-

21 Poznić B., "Protivtužba u arbitražnom sporu", pp. 423–424, and finally *in favorem compromissi* with regard to the Rules of Foreign Trade Court with the Yugoslav Chamber of Commerce which were in force at the time.

22 For detailed assessment of set-off treatment (or lack thereof) in rules and legislations worldwide, see Kee C.: "Set Off In International Arbitration – what can the Asian region learn?", Asian International Arbitration Journal, 1/2005, p. 141.

23 Hanotiau B., commenting on ICC case no. 5801 in "Problems Raised by Complex Arbitrations Involving Multiple Contracts – Parties – Issues" 18 Journal of International Arbitration (2001) 251–360, p. 286.

24 Berger K.P., ibid. p. 58.

25 Ibid., pp. 54–58.

26 However, Article 19(3) UNCITRAL Arbitration Rules envisages that a respondent may raise a counterclaim or set-off defense only if they arise out of the same contract. In this case, unilateral expression of will would give way to procedural prohibition of set-off – see Jakšić, ibid, p. 269, footnote 1113.

guished, if such issue is contentious. [27] The role of the law applicable to the set-off declaration is watered down, since arbitrations sometimes invoke the possibility of set-off as a general principle of international commercial law. [28]

On the other hand, the fact that the set-off is limited up to the amount requested by the plaintiff represents a serious limitation of its scope, rending the reach of set-off limited. If the sole goal of the defendant is procedural economy, raising the set-off has less sense if the defendant's claim exceeds that of the plaintiff. Namely, in such situations the defendant would have to seek the remaining portion of its claim before some other tribunal or before a court. Furthermore, even though the issue of connexity is seldom a problem in relation to set-off, the situation is less than clear when a set-off claim is subject to a forum selection clause, or arbitration clause pointing to a different arbitration institution (tribunal).

Finally, as distinguished from the fate of set-off defense in similar situations, the tribunal will decide on the counterclaim even when the main claim (action) has been revoked. Therefore, a counterclaim, unlike a set-off defense, has its independent legal destiny. Legal effectiveness of a counterclaim is tied to the success of the plaintiff's main claim.[29]

2. NEW SWISS ARBITRATION RULES

Given the fact that Switzerland represents one of favorite 'arbitration destinations', Swiss legal developments are being closely watched by lawyers all over the world. When it comes to arbitral jurisdiction over set-off claims, curiosity is more than justified. For quite some time, Swiss arbitrations offer quite a unique perspective on this matter.

Starting from January 2004, six Swiss arbitral institutions (Basel, Bern, Geneva, Lausanne, Lugano and Zurich) have adopted uniform rules

27 Poznić B. "Granice arbitražnog sporazuma", p. 1826.

28 Fouchard, Gaillard, Goldman, p. 834, invoking, *inter alia*, ICC case no. 3540. Berger, on the other hand, distinguishes between procedural admissibility of set-off, which he considers to be governed by *lex loci arbitri*, and the law applicable to the merits of the set-off defense, arguing that this issue should be governed by the law governing the main claim. See Berger K.P., ibid p. 63. Bertrams has reached the same conclusion somewhat earlier, rejecting so-called cumulative approach which would check admissibility of set-off defense against requirements of laws applicable to both claims. See Bertrams R.I.V.F.: "Set-off in Private International Law" in "Comparability and Evaluation: in Honour of Dimitra Kokkini-Iatridou", edited by Boele-Woelki, Grosheide F.W., Hondius E.H., Steenhoff G.J.W., The Hague 1994., pp. 153–165.

29 Berger K.P., ibid. p. 60.

with regard to international disputes. Previous rules remain in effect as regards internal (entirely Swiss) arbitrations. Therefore, when parties now choose one of the above mentioned six chambers to resolve their dispute, they in effect choose the Swiss Rules of International Arbitration (hereinafter Swiss Rules), to a great extent based on UNCITRAL Arbitration Rules.[30]

Uniformity is, however, often achieved by adopting a majority rule or principle. Such was the fate of one of the most controversial provisions to be found in the rules of the Swiss chambers. Namely, new Swiss Rules confirm that *'Le juge de l'action est le juge de l' exception"*[31] – the principle according to which the tribunal has to decide on all defenses raised against the main claim. This principle has been included in Article 21(5) of the Swiss Rules, which reads:

"The arbitral tribunal shall have jurisdiction to hear a set-off defence even when the relationship out of which this defence is said to arise is not within the scope of the arbitration clause or is the object of another arbitration agreement or forum selection clause."

Drafters of the Swiss Rules have obviously had procedural economy as their prime consideration. At first glance it appears that this has been done at the expense of the 'mother of all arbitration rules', stating that one has to respect the will of the parties, embodied in an arbitration agreement. Namely, Article 21(5) requests the tribunal to decide on set-off defenses arising out of relationships under the jurisdictional scope of another tribunal or a court. This raises several interesting questions: whether this rule requires the tribunal to establish jurisdiction, or merely *allows* it to do so; whether 'set-off defense' should be understood in its stricter or broader meaning and, finally, if situations where this rule is likely to create problems may already be identified.

2.1. Discretion and Article 21(5)

Even though a careful lawyer might instinctively want to curb the scope of such a 'brave' provision, several reasons speak for its mandatory application by the tribunal. Firstly, the very language of 21(5) suggests its imperative nature – *'shall have jurisdiction' and* not, e.g., *'may exercise'* or *'may decide on'*. Further, although the Swiss Rules are based on UNCITRAL Rules, they remain Swiss, and continental legal systems

30 Introductory part of Swiss Rules, point b).

31 BGHZ, 5. 5. 1959. Berger K.P., ibid. p. 72 lists arguments for this position: if the set-off defense is of substantive nature (Verrechnung, compensation legale, etc.), it represents a substantive defense (since it denies the very existence of the claim) and should, therefore, always be admissible.

generally do not allow its adjudicators to exercise jurisdiction at their own discretion. Therefore, there is room for application of the *forum non conveniens* doctrine, unless the seat of a Swiss Rules tribunal is located in a common law country. In such a case, one may imagine the *forum non conveniens* rule being incorporated into the *lex arbitri*. Thirdly, treating the 21(5) rule as discretionary may backfire – during procedures for setting award aside or its recognition, a court may find that non-application of 21(5) has resulted in a procedure not in accordance with the arbitration agreement.[32]

On the other hand, cautiousness calls for a slightly more reserved approach. The underlying reason is simple and very convincing – the wording of Article 21(5) explicitly expands into the scope of other arbitration clauses or forum selection clauses. Unconditional application of Article 21(5) may lead to potentially conflicting decisions of two arbitral tribunals, with adverse long-term consequences for the alleged object of protection – procedural economy.

If a set-off defense is raised before a Swiss tribunal, and the claim from which the set-off arises should exceed the claim of the plaintiff, the situation is further complicated in case the claim on which the set-off is based is covered by another arbitration agreement. One may imagine the situation whereby a Swiss tribunal determines that both claims exist. In such a case, the tribunal would declare a set-off, and the defendant would have to collect the remaining portion of his claim before the second arbitration tribunal.

The second tribunal has limited options. Given that no arbitration tribunal is bound by a decision of another tribunal,[33] the claimant (appearing as respondent before a Swiss arbitration) may invoke a Swiss award as *res judicata*. Since the arbitral tribunal can not decide on recognition as a preliminary matter, it would have to stay the procedure and await the end of the recognition process. Should the recognition procedure be completed successfully, the second tribunal would be bound by the holding of the Swiss tribunal (dealing with the existence and amount of the defendant's claim), effectively reducing the second tribunal to an 'extended arm' of the Swiss tribunal. Its task would be simply to rubberstamp the decision already reached. If the court should refuse to recognize the arbitral decision, the second arbitration might consider itself competent to decide on the entirety of the claim (ignoring the decision of a Swiss tribunal).

32 Article V (1) (d) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

33 Redfern A. – Hunter M. ibid., p. 460.

Matters get even more complicated if both tribunals are to decide on the counterclaim simultaneously . For instance, parallel to raising a set-off defense before a Swiss tribunal, the respondent commences another arbitration and requests it to determine the principal claim to be non-existent. Even if the tribunal would 'borrow' *lis pendens* rules of the *lex arbitri*, the outcome of invoking a *lis pendens* defense is uncertain. *Kompetenz-Kompetenz* principle enables the arbitration to assess its jurisdiction independently of the view taken on that issue by other courts (tribunals), but leaves open the possibility that such a perception may contradict the perception of other relevant bodies (courts or tribunals).

Exclusive jurisdiction of domestic judiciary represents a ground for rejecting a *lis pendens* defense. Arbitration agreements establish the exclusive competence of the prorogated tribunal. A *lis pendens* defense would, therefore, be rejected. However, this line of argument would be overtly simplified. Swiss tribunals also base their jurisdiction on an arbitration agreement. The difference lies in the fact that the jurisdiction is less clearly delineated, since Article 21(5), in a unique fashion, allows it to penetrate the jurisdiction sphere of other arbitral institutions and courts. One may wonder whether the subsequent prorogation of Swiss tribunal means that the parties have made peace with the possibility that Article 21(5) may supersede earlier arbitration clauses and forum selection clauses.

2.2. Back-door counterclaim?

Given that even the best of intentions do not necessarily result in improvement of procedural economy, it is worth exploring whether such an improvement may result from expanding the scope of Article 21(5) to include counterclaim as well. This may rest on the following reasoning: if there is a risk that two tribunals may arrive to conflicting decisions, the best way out is to decide on everything as early on as possible. If the respondent's claim should exceed that of the claimant, it will be better to prevent a subsequent collection of the 'remainder' before another tribunal, and possible complications later on. Therefore, the reasoning goes, a counterclaim should be allowed from the very start, even if it arises out of an unrelated relationship which is subject to another arbitration agreement.

There are obvious deficiencies to this approach. Firstly, Article 21(5) would have to be interpreted *contra legem*. The Swiss Rules clearly distinguish between a counterclaim and a set-off,[34] and both terms are explicitly mentioned in several articles. However, Article 21(5) mentions

34 E.g. articles 3(9), 3(10), 19(3) of the Swiss Arbitration Rules.

set-off only. Therefore, the Rules clearly avoid blurring the distinction between these two concepts.[35] Secondly, this provision represents an exception from the UNCITRAL rules, on which the Swiss Rules are based. The exception is deliberate, but it should be interpreted strictly.

Finally, those observing the process of creation of the Swiss Rules suggest that the drafters have clearly intended to underline the distinction between a purely defensive set off defense and counterclaim – the latter has to be covered by arbitration agreement. Although there were ideas for Article 21(5) to include a counterclaim, the final wording is the result of the wish to strike a balance between the right of respondents to defense, on the one hand, and respect of other arbitration clauses, on the other. [36]

Even if one were to ignore the above mentioned reasons, this idea would fail in purely practical aspects as well. Namely, extending the scope of Article 21(5) so as to cover counterclaims as well would be effective only in cases where a tribunal determines that both claims exist, and decides on both. In all other cases procedural economy would not be improved. However, a rather unpleasant side effect would be the perception of arbitration services customers that, although several arbitration agreements were concluded between the same parties, covering different contracts, the launch of one claim before a Swiss tribunal is enough to result in unforeseen attraction of jurisdiction. Last but not least, broad interpretation of Article 21(5) might open a possibility of attacking an award on grounds that it has been decided *extra petita*.[37]

2.3. Scope of Article 21(5)

As already submitted, Article 21(5) does not represent an absolute novelty in international commercial arbitration. However, what once was a procedural peculiarity before certain Swiss commercial chambers, has now entered the grand stand of unified rules. Does this unification further enhance the credibility of the idea for set-off jurisdiction to be formulated broadly? May one envisage situations in which this article will turn out to be more or less appropriate?

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35 However, in his paper, presented at 12th Croatian Arbitration Days (December 2004, unpublished), Pierre Karrer leaves open the possibility of applying Article 21(5) to counterclaims as well (Karrer P.: "Arbitration under the Swiss Rules of Arbitration in Switzerland and Elsewhere", p. 6.)

36 Peter W., ASA 22 Special Series (2004), p. 9.

37 Challenge against the award on grounds that the tribunal has decided in excess of competences granted to it by the parties (in this case, scope of competencies is also governed by Article 21(5) as part of the rules to which the parties have agreed upon). This should be distinguished from *ultra petita* decisions, where tribunal decides on issues falling outside the cause of action brought before it.

Firstly, if no prorogation of other arbitration or of a court is present, the possibility of conflict is lowered to a minimum. Two key factors increase the possibility of unwanted complications: one is the existence of forum selection or arbitration clause covering relationship out of which set-off arises. The additional complicating factor is the amount of the respondent's claim. If it is larger than the sum owed to the claimant, procedural economy argument seems pointless.

Two scenarios appear to be particularly illustrative. The first scenario covers a situation where a procedure is launched on the basis of another arbitration (forum selection clause) in order to collect the remainder of the sum owed to the respondent. The other situation sees both arbitral tribunals (or, alternatively, a tribunal and a court) deciding parallely on the sum owed to the respondent. Therefore, the problem boils down to *res judicata* effects of arbitral awards and *lis pendens* before international commercial arbitration.

2.3.1. Decision on set-off as res judicata

The *res judicata* doctrine exists in all legal systems. Admittedly, significant differences are present with regard to how the said systems distinguish among the so-called positive and negative aspects of *res judicata* and the role played in the procedure by this concept. In continental systems, *res judicata* usually encompasses only the holding, while the common law systems extend this effect to *ratio decidendi* as well.[38] In addition, common law systems recognize a doctrine of 'estoppel', i.e., a procedural preclusion which may apply to a cause of action (*cause of action estoppel*) or a factual or legal issue (*issue estoppel*). Estoppel prevents invocation or challenging of rights contrary to an already existing court decision. [39]

However, a foreign court decision may extend its *res judicata* effect only if it is successfully recognized. The scope of *res judicata* effects will depend on the law of the country of the recognition. In our case, foreign court decisions cannot be accorded more effect than domestic ones,[40] which in turn means that *res judicata* effect will be given only to holdings of foreign decisions.

38 But not to *obiter dictum*. However, in France, Switzerland, Belgium and the Netherlands *ratio decidendi* is considered necessary in order to understand the scope of the holding. For further details, see "Res Judicata and Arbitration", Interim Report, International Law Association, 2004 Berlin Conference, p. 15.

39 This also encompasses issues determined in *ratio decidendi*, but not those touched upon in *obiter dicta*., ibid, p. 7. See also Hanotiau B.: "The Res Judicata Effect of Arbitral Awards", ICC Bulletin 2003, p. 43.

40 Article 86 (1) of Serbian Private International Law; Varadi T., Bordaš B., Knežević G, "Međunarodno privatno pravo", Novi Sad 2001 . p. 531.

In case of arbitration, however, one may wonder whether a foreign decision has to undergo formal recognition process in the country of the seat of arbitration in order to represent *res judicata*. In addition, is a tribunal bound by the way in which *lex arbitri* interpretes *res judicata*? As for the recognition itself, regardless of the international character of arbitration, it has to be bound by decisions having successfully undergone recognition procedure in the country of its *situs*. Should such recognition not be present, the arbitration is not obliged to take into account the decision of another court, including its factual background and legal reasoning. With regard to the reach of *res judicata*, arbitral tribunals have occasionally applied standards of the country of their seat,[41] or of applicable substantive law[42], with regard to the scope of operation of another arbitral decision.

All this taken into account, a decision on set-off defense reached by a Swiss arbitration would bind another arbitration (which has to decide on the remainder of the sum owed) only if the Swiss award has been recognized in the country of the seat of the other tribunal. Holding of an arbitral award would normally contain a statement with regard to the existence and the amount of counterclaim. Therefore, the scope of *res judicata* will rarely present an additional problem.

2.3.2. Parallel deliberation on the set-off defense

Article 21(5) opens the possibility that two tribunals may parallely deliberate on the same counterclaim raised for the purpose of set-off (before two arbitrations, or before a Swiss arbitration and a court of another state). The most interesting situation is, of course, the one in which two arbitrations decide parallely, and one may wonder whether rules of *lis pendens* may be applied in arbitration procedure as well, or whether a tribunal's examination of its own jurisdiction is carried out without taking into account arbitrations already initiated elsewhere.

Recent practice of Swiss courts supports the view that an arbitral tribunal has to apply *lis pendens* rules of its *situs*.[43] The courts find en-

41 ICC case no. 2745/2762 (1977), in ICC Collection of Awards 1974–1985, Paris 1990, p. 326.

42 ICC case no. 3267 (1984).

43 Fomento de Construcciones y Contratas S.A. v. Colon Container Terminal S.A, decision of Swiss Supreme Court of May 14, 2001, English translation in ASA Bulletin 2001, p. 505 et seq. The Swiss Supreme Court held that an arbitral tribunal may not simply shield behind the existence of the arbitration agreement, and that *ordre public* mandates avoidance of parallel proceedings. It is rather bizarre to observe invocation of *ordre public* argument, given the fact that the *lis pendens* objection has to be raised by the parties, rather than *ex officio*.

couragement for such a position in the fact that the *res judicata* principle, having the same goals to a certain extent, already operates in arbitration.[44] The most interesting aspect of this analysis will always be the determination of indirect jurisdiction, i.e. the determination whether the other tribunal (court) has jurisdiction.

The conditions for assessing indirect jurisdiction vary: on the one hand, there is a system of bilateralisation,[45] on the other, a liberal position, according to which indirect jurisdiction always exists, unless the matter falls within the exclusive competence of domestic judiciary.[46] However, even if a tribunal subscribes to this methodology, i.e., borrows the *lis pendens* rules from the *lex arbitri*, should it treat its own jurisdiction, based on the arbitration agreement, as exclusive?[47] If a tribunal subscribes to such view, parallel procedures are inevitable.

The very logic of exclusive jurisdictions dictates that no regard should be given to the competence of another tribunal (be it court or arbitration). If a Swiss arbitration faces a court chosen by the parties, one should not expect the court to show any flexibility. If, on the other hand, it is faced with another arbitral tribunal, the conflict of their jurisdictions has to be solved.

A possible solution would be that both tribunals treat their competence as 'relatively exclusive' or 'concurrently exclusive'.[48] Although the expressions are to a certain extent *conradictio in adjecto*, the scope of Article 21(5) actually places both tribunals on equal footing, i.e. they are both exclusively competent from their own standpoint to decide on a counterclaim raised for the set-off purpose before a Swiss arbitration. Therefore, whoever is the first to raise a counterclaim (similarly to the 'split' arbitration clauses) would, in effect, determine the tribunal which would then be exclusively (without any reservations) competent to decide on that issue.

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44 Oetiker C.:"The Principle of Lis Pendens in International Arbitration: The Swiss Decision of Fomento v. Colon", 18 Arbitration International Vol. 2 (2002), p. 137–145, p. 139 et seq.; Geisinger E., Levy L.: "Lis Alibi Pendens in International Commercial Arbitration", ICC Bulletin 2003 p..53 et seq.

45 E.g. Article 26 of the Swiss Private International Law.

46 Article 89 of Serbian Private International Law, for comparative overview see Varadi T., Bordaš B., Knežević G, ibid., p. 533, listing Hungarian, Turkish and French laws in this group as well.

47 F. Perret lists such decision of an arbitral tribunal in "Parallel Actions Pending before an Arbitral Tribunal and a State Court: The Solution under Swiss Law", ASA Special Series No 15, 2001, p. 336.

48 This expression has been used in a slightly different manner in Varadi T., Bordaš B., Knežević G, ibid. p. 489.

The other solution would be to fall back on the view of arbitral jurisdiction as exclusive, but at the same time engage in analysis of the timeline in which arbitration clauses have been concluded, i.e. accord preference to the arbitral institution whose jurisdiction has been contracted for at a later point in time. This solution is overtly simplistic, since a later agreement on the Swiss arbitration jurisdiction does not derogate any earlier arbitration agreement. In a way, it only creates a possibility that their competences might overlap in the future.[49]

3. CONCLUSION

A counterclaim, especially when raised for the set-off purpose before an international commercial arbitration, operates in a way which differs from the way these procedural actions are handled before the court. The key difference is that the jurisdiction of an arbitral tribunal over a counterclaim and set-off is more difficult to establish, given that it always tests the objective reach of an arbitration agreement. While the jurisdiction of a court results in an attraction of procedures which one might have had started before other competent courts, attraction conditions are harder to reach in arbitration.

Under such circumstances, the introduction of the 'Swiss rule', according to which a tribunal may decide on a set-off defense even if it is subject to other arbitration agreements or forum selection agreements, seems to be a very risky move. When deciding on their own jurisdiction, tribunals rely on division of competences contained in arbitration agreements. Each arbitration will take into account only its own jurisdiction. If doubts arise as to the exact scope of that jurisdiction, the scopes of other arbitration agreements or forum selection clauses may represent an important indication of the point where jurisdictions border or overlap. However, Article 21(5) of the Swiss Rules commands that such an indication shall not be taken into account, and that a tribunal has to ignore the scope of other arbitration or forum selection clauses.

The improvement of procedural economy is the goal of such a solution. However, a Swiss tribunal will not enjoy any discretion in asserting jurisdiction over a set-off defense. The rule is firm, clear and inevitable. The proclaimed efficiency aim might, however, be endangered, especially if there is an arbitration agreement or a forum selection

49 Liebscher C.: "The Healthy Award", The Hague 200, p. 431, offers a critique of solutions hiding behind the 'implicit will of the parties'. However, and without elaborating further, Liebscher proposes to allow a set-off defense whenever it is made possible by 'applicable substantive law'.

agreement encompassing a counterclaim as well, and if the party against whom the set-off defense has been invoked uses all available means and arguments to move the issue before the tribunal explicitly designated to decide on it.

Although Article 21(5) does not represent an absolute novelty, its promotion in the new Swiss Arbitration Rules is not the most fortunate of developments. Despite the Swiss arbitration standing and importance, one can hardly expect to witness emulations of the rule in the future national legislation or rules of arbitral institutions.

Marija Karanikić

DEVELOPMENT RISKS

Our Code of Obligations was the first regulation in Europe to name and establish producers' strict liability for defective products as a separate institution. The solution endorsed in this Code consistently implements the theoretical concept of strict liability – a producer cannot be privileged from liability for damage caused by defective product by proving that the defect was undiscoverable while under producer's control.

On the other hand, the Directive on liability for defective products recommends to the EU member states to discharge from liability producers who prove that the defect was impossible to discover at the time when a product was placed into circulation, even with the implementation of the highest levels of scientific and technical knowledge.

Does the nature of a producer's liability change by assuming the question about what the producer could have known as legally relevant? What is the rationale of the rule suggested by the European legislator, which transfers the unforeseeable risk of damage from the producer to the damaged party? Are there convincing reasons for incorporating this rule in our law? Finally, which are the possible consequences of our adherence to the solution that differs from the one endorsed by the majority of European countries, in regard to liability for damage from undiscoverable defects?

Key words: *Strict liability – Liability for damage from defective products – Development risks – Undiscoverable defects.*

I
INTRODUCTION

A producer is strictly liable for damage deriving from defective product. This liability does not presuppose contractual relationship be-

tween the producer and the damaged party – it is, by its nature, an extra-contractual liability.[1]

A producer places a product in circulation and thus increases the risk of damage for others, while he obtains profit. In addition, it is far easier for a producer than for a consumer, to protect himself against the ultimate financial consequences of a prejudicial event (*l'événement dommageable*) – he may insure himself against liability or transfer the risk inherent in his activity to consumers by increasing the price of his product. Furthermore, a producer has at his disposal far more information about a product than its end user and it is therefore easier for him to forestall possible damage. For the said reasons, modern laws do not base a producer's liability on his fault, but on the fact that the producer creates or sustains increased risk of damage and profits from this fact.[2]

According to the Code of Obligations, a producer is liable for damage from defective products regardless of whether he was aware of the existence of the defect. The producer cannot be privileged from liability by proving that he is not at fault. In other words, the fact that a producer knew or could have known that a product was defective bears no legal significance.

On the other hand, the institution of development risks defense enables the producer to excuse himself from liability for damage from a defective product by proving that the defect was undetectable even by applying the highest level of scientific and technical knowledge at the time when the product was put into circulation. Although it cannot be disputed that the product had a certain defect at the time when it was placed in circulation, the producer is not liable for the damage that arises from it because it was objectively impossible to know about the defect.

Exoneration from liability by quoting development risks is often illustrated in literature by a case from Dutch court practice.[3] A patient received a blood transfusion during heart surgery, and the blood he

1 *Cf.* Marija Karanikić, *Odgovornost za štetu od proizvoda – u pravu Evropske unije i Sjedinjenih Američkih Država* (*Liability for Defective Products in the Laws of European Union and the United States of America*), Law Review *Pravni život*, vol. II, 2003, pp. 711–737.

2 Prior to enacting the Code of Obligations, our legal system had no specific regulations about extra-contractual liability for damage from defective products. What existed was the institution of contractual liability for the physical flaws in soled goods. *Cf.* §§459–493 of the Serbian Civil Code; §§922–933 of the Austrian Civil Code; usances 135–159 of the General Usances for Trade in Goods.

3 Hartman v. Stichting Sanquin Bloedvoorziening, Feb. 3, 1999, NJ 1994/621, according to Christopher Hodges, *Product Liability in Europe: Politics, Reform and Reality,* 27 *Willian Mitchell Law Review* 121, 2000, pp. 124–125.

received was contaminated with the HIV. The Dutch court considered the blood contaminated with a virus as a defective product. Still, the supplier of the blood succeeded in exempting himself from liability by proving that the presence of the virus in the blood could not have been discovered according to the state of scientific and technical knowledge at the time when the blood was delivered.

At the time of the ruling, in 1999, the Dutch court believed that *sound reasons had already existed for some time* for the Dutch public to expect that HIV was not present in blood used for transfusion. However, there were no grounds for such expectations in 1996, when the surgery took place. In the particular case, the blood was tested according to two methods (*HIV–1–2* and *HIV p24 antigen*) and both tests yielded negative results. The third method (*HIV–1 RNA)*, the one by which the presence of the virus in the blood was subsequently discovered, was still in the experimental phase and was not officially approved for use at the time of the testing. The court ruled that, although the supplier of the blood had behaved in accordance with the highest level of scientific and technical knowledge, it was practically impossible to discover the presence of the virus in the blood, and that the supplier was therefore not liable.

The Government's Draft Law on Product Liability entered summary proceeding in the Serbian Legislature in February 2005,[4] and the new Product Liability Act was enacted in November 2005.[5] The contents and numeration of the new Act fully correspond with the Serbian Government's Draft Law – that is to say, the Act was passed without any disputations or controversies among the members of the legislative body. By means of this Act, the institution of development risks is introduced into Serbian law.

II
LIABILITY FOR UNDISCOVERABLE DEFECTS UNDER THE SERBIAN CODE OF OBLIGATIONS

The strict liability for defective products was introduced in our law with the Code of Obligations. The existence of a contractual relationship between the producer and the damaged party is unimportant for the establishment of this kind of liability.[6] The Code attributes the producer's

4 Source: web-page of the Serbian Legislature – www.parlament.sr.gov.yu

5 Zakon o odgovornosti proizvođača stvari sa nedostatkom, Official Gazette of the Republic of Serbia, No. 101/05 of November 14, 2005.

6 Besides the extra-contractual liability of a producer for damage from defective products, the Code of Obligations also regulates the contractual liability of the retailer for

obligation to compensate for damage to the existence of a causal relationship between the defectiveness of the product, on the one hand, and the inflicted damage, on the other. In addition, the right to compensation of damage is held not only by the buyer of a defective product, but also by any third party who suffers damage as a result of a physical flaw in a certain product.

According to the Code of Obligations, the producer *can* be liable for damage caused by a physical flaw in a product if, at the time the product was placed in circulation, he *did not know* that the product was physically flawed:[7]

"Whoever shall place an item he has produced in circulation, which presents a risk to persons or property because it contains a defect that it was impossible for the producer to know about, shall be liable for the damage caused by that defect."

In this regard, the Code of Obligations does not differ from solutions proposed in the *Framework of the Code of Obligations and Contracts*.[8] However, Article 179 of the Code of Obligations contains another paragraph, covering cases in which a product has dangerous properties, which the producer knows about and which do not make this product defective. For example, petrol has certain inherent qualities that inevitably make it a dangerous product. These include inflammability and the fact that it poses a health hazard when swallowed or when its vapours are inhaled. Still, the mentioned properties do not make petrol a defective product, in spite of the fact that they increase the risk of damage. A producer who fails to do everything necessary to prevent damage from a known dangerous feature, by a warning, safe packaging or some other appropriate way, can only be liable for the damage he could have foreseen.[9]

Although it is not expressly mentioned in Article 179 of the Code of Obligations, the producer is also liable for damage caused by a

material flaws in sold goods (Articles 478–500 of the Code of Obligations), and the contractual liability of the retailer and producer based on the warranty for the correct functioning of the sold item (Articles 500–507 of the Code of Obligations).

7 Article 179, para. 1 of the Code of Obligations.

8 Article 179, para. 1 of the Code of Obligations is identical to Article 141 of the Framework of the Code of Obligations and Contracts (Skica za zakonik o obligacijama i ugovorima). *Cf.* Mihailo Konstantinović, *Obligacije i ugovori. Skica za zakonik o obligacijama i ugovorima*, Belgrade, Službeni list SRJ, 1996.

9 "A producer is also liable for the dangerous properties of a product if he fails to do everything necessary to prevent damage, which he could foresee, by a warning, safe packaging or some other appropriate measure." Article 179, para. 2 of the Code of Obligations.

physical defect he *did know* about at the time when he placed the product in circulation. The producer's *knowledge* of the dangerous flaw in product would mean that – by putting the product on the market – the producer acted with the intention to cause damage or with the gross negligence at least. However, the intention and the gross negligence are the degrees of fault that cannot be legally presumed in Serbian law.

Namely, in our law, the defendant's fault is arguably presumed as the condition and grounds for liability, if the damaged party (as the plaintiff) proves that damage which has been inflicted on him was caused by the defendant's behaviour, i.e. that he has suffered damage as a consequence of the defendants act or omission. However, this arguable legal presumption is in effect only for plain negligence – *culpa levis*. Unless presumption of a higher degree of fault is not explicitly envisaged by the law, the plaintiff who claims that damage was inflicted on him intentionally or through gross negligence, he must prove this claim.[10]

Therefore, our law does not presume that the producer knew about the existence of a defect. However, if the damaged party proves the existence of this knowledge, the producer's liability can be founded on fault. In other words, the fact that our law recognises the institution of the *strict liability* of the producer of a defective product does not exclude the possibility for grounding the producer's liability on fault. The Supreme Court of Serbia has ruled on this issue in the following fashion:[11]

"The Supreme Court finds premature the conclusion of the second-instance court, that the defendant is not liable in any aspect. This is because the producer who is not liable according to Article 179 of the Code of Obligations (regulating strict liability) may be liable according to Article 154 of the Code of Obligations, if the damage ensued as a result of his omissions. The liability of a producer who produces goods for the market is increased liability. According to Article 18 of the Code of Obligations, he must proceed with increased attention, i.e. with the attention of a reasonable man of business. Considering that his liability is

10 "According to the rule of presumed fault (Article 154, para. 1 of the Code of Obligations), only the lowest degree of fault of the perpetrator of damage (plain negligence – *culpa levis*) is presumed. A more serious degree of fault (gross negligence or intent to cause damage – *culpa lata* or *dolus*) is presumed only if such a presumption is explicitly prescribed by a legal regulation, or if it proceeds unequivocally from the meaning of the said legal rule. Barring such cases, the degree of fault is proved according to the general rules of procedure for the presentation of evidence." Conclusion of the XIV Joint Session of the Federal Court, the Republican and Provincial Supreme Courts and the Supreme Military Court, March 25 and 26, 1980.

11 Ruling of the Supreme Court of Serbia, Rev.368/96 of October 29, 1997, *Zbirka sudskih odluka* (A Collection of Court Decisions), Book 23, vol. I, Decision No. 102, 1999.

increased because he raises chickens for sale on the market, and he previously knew that his flock was suffering from Marek's disease, it was necessary to establish whether the defendant was liable based on fault."

Therefore, what is the meaning of the term *defect that the producer did not know about* in Article 179 of the Code of Obligations? In its nature, the producer's liability under Article 179 of the Code of Obligations is strict liability, i.e. liability regardless of fault. The interpretation according to which the legislator's words would actually mean that there is no liability in cases when a producer *knew* about a defect would have no grounds in logic. Namely, this would mean that exemption from strict liability exists in those very situations when the producer acts with the highest degree of fault. Besides, the rule that would exclude liability for intent or gross negligence would be against public policy (*ordre public*). Because of all the aforesaid reasons, the legislator's words cannot be taken as if the producer's unawareness of the defect represents the *conditio sine qua non* of the producer's liability for the damage arising from this defect.

It seems that the words the legislator used in Article 179 of the Code of Obligations – stating that a producer is liable for damage arising from *a defect he did not know about* – actually mean that the producer is liable for damage arising from the defect *regardless of whether he knew about the defect or not*. The law presumes that the producer did not know that he was putting a defective product into circulation. On the one hand, the producer has no interest in contesting this presumption, given that his knowledge of the defect would make him at fault and, on this basis, liable for the damage caused by the defect. On the other hand, for the damaged party, proving the producer's knowledge of the defect would mean a waste of resources, considering that the producer is liable for damage even if he did not know about the existence of the defect.

Furthermore, the provisions of the Code of Obligations do not attribute legal significance to the questions of whether or not a particular producer *could have known* about the defect that caused the damage, or whether the existence of the defect was at all accessible to human knowledge. The producer of the defective product cannot be absolved from liability by proving that, for some subjective reasons, he could not have known about the existence of the defect. Moreover, the producer cannot be freed of liability by proving that the existence of a certain defect was objectively undiscoverable. In other words, the producer is liable for damage caused by the defect, regardless of his knowledge of the product's defectiveness and regardless of whether it was possible, subjectively or objectively, to know of the existing flaws.[12]

12 No distinction is made in Article 179 of the Code of Obligations between discoverable or undiscoverable defects. *Cf.* Jakov Radišić, *Odgovornost proizvođača*

The conclusion of these previous considerations is the following: according to the Code of Obligations, the question of whether or not the producer *could have known* that the product was defective at the time when it was placed in circulation – can only be relevant regarding the establishment of the producer's fault, i.e. in the attempt to ascertain the producer's fault-based liability. Adversely, a producer is strictly liable for damage that arises from the undiscoverable defects in a product, i.e. from defects that could not have been discovered at the time of placing the product in circulation.

However, while assessing whether the damaged party has contributed by his own action to the aggravation of damage from the defective product,[13] the courts do take into consideration the knowledge the *damaged party* had or could have had about the existence of the defect. Thus, in a recent decision, the Supreme Court of Serbia reasoned as follows:[14]

"According to the findings and opinion of the expert witness, it is beyond doubt that the propane-butane gas leaked from the container and created an explosive mixture because the irreversible valve with the rubber seal was insufficiently screwed onto the outlet of the container, *which the user of the container could not have noticed* (underlined by M.K.). The explosive mixture of gas and air was most likely ignited by a spark or piece of char from the stove, which was located near the gas container onto which a gas burner, with the valve in good working order, was fitted in the proper fashion. Therefore, the gas explosion occurred because of a defect on the gas container, without any contribution by the plaintiff, as its user."

In this point, the question in principle arises on whether the producer's liability for damage from a defective product can remain *strict* in terms of its legal nature, if the dilemma about whether the producer could have known about the defect is sustained as legally relevant. In other words, does the question of what the producer could have known about the product bring the producer's liability closer to the institution of fault-based liability?

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stvari sa nedostatkom (Liability of the Producer of Defective Products), in: *Komentar Zakona o obligacionim odnosima* (Commentary on the Code of Obligations), Editor in Chief Slobodan Perović, Book I, Belgrade, Savremena administracija, 1995, p. 412.

13 "The damaged party, who contributed to causing the damage or causing it to be greater than it otherwise would have been, only has the right to proportionally reduced compensation." Article 192, para. 1 of the Code of Obligations.

14 Ruling of the Supreme Court of Serbia, Rev. 1660/00 of April 10, 2000, *Izbor sudske prakse* (Selection from Court Practice), No. 1/2002, Belgrade, Glosarijum, 2002.

III
THE INSTITUTION OF DEVELOPMENT RISKS

Modern law recognises solutions that envisage the possibility for considering, within the scope of establishing the *strict liability* of the producer, whether the producer of a defective product could have known about the flaws of the product and whether it was by any means possible to know of the existence of a defect.

The Directive on liability for defective products[15] introduced the institution of development risks in the EU law. Article 7(e) of the Directive provides that the producer shall not be liable as a result of the Directive if he proves that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered.

In other words, the Directive stipulates that a producer is freed from liability if he proves that the defect was undetectable at the time when the product was put into circulation even with the implementation of the highest scientific and technical knowledge (*development risk defense*). The Directive does not allow the producer to be released from liability by proving that the item was produced in accordance with the scientific and technical standards that are in effect (*state-of-the-art defense*).[16] In other words, a product can be defective even if the producer behaved as he should have – the fact that the producer respected the scientific and technical standards in effect does not rule out the possibility for the product to be defective. By proving that he respected the applicable scientific and technical standards in the production process, the producer actually proves that he behaved as he should have, i.e. that he is not at fault. This still does not mean that the produced item is free of defects that could cause damage, for which the producer may be strictly liable.

The question arises here as to which vital situation the aforesaid regulation of the Directive refers to, that is, which practical problem does the European legislator solve by allowing the producer to be exempted from liability for damage by proving that the defect that caused the damage was objectively undiscoverable at the time when the he placed it in circulation.

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15 Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products; amended by Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999 (hereinafter the Directive), source: www.europa.eu.int/eur-lex

16 Hans Claudius Taschner, *Harmonization of Product Liability Law in the European Community*, 34 *Texas International Law Journal* 21, 1999, p. 25 and further.

The development risks clause solves the following dilemma: who is liable for the damage inflicted in the period from the moment when a defective product was put into circulation till the moment when it is discovered that the product has a defect that creates a heightened risk of damage – and this in cases in which, bearing in mind the state of scientific and technical knowledge, the defect was impossible to discover at the time when the product was placed in circulation. In other words, who should bear the risk of the *subsequent* – and in terms of being able to prevent the damage, *belated* – knowledge about the existence of the defect in the product?

If a legal system allows the producer to be cleared of liability if he proves that the defect which caused the damage was impossible to know of, according to the state of scientific and technical knowledge at the time when the product was put into circulation, then the risk of changes in knowledge in the period from when the product was put into circulation till the manifestation of the damaging consequence, is born by the damaged party. If, however, the producer cannot be freed from liability in this way, then he alone is liable for unknown and unknowable risks – the risk of untimely knowledge of the possible cause of damage lies with him.[17]

Professional circles believe the development risks clause to be controversial, to say the least.[18] Some authors believe there is a contradiction between the possibility to clear the producer of liability by proving that he could not have known about the existence of the defect on the one hand, and grounding the producer's liability regardless of fault, on the other. In other words, these authors believe that discharge from liability by invoking development risks cannot survive in the system of strict liability.

Henderson and Twerski[19] also criticised the solution stipulated in the Directive as being obsolete because the Directive does not make a distinction between the three following types of defects in a product: 1. manufacturing defect – a defect caused in the manufacturing process, which means that the product is not what it should be according to the design; 2. design defect – a constructional defect or a flaw in the design,

17 The possible consequences of the adoption of either solution will be discussed later.

18 Simon Taylor, *L'harmonisation communautaire de la responsabilité du fait des produits défectueux. Etude comparative du droit anglais et du droit français*, Paris, Librairie Générale de Droit et de Jurisprudence, 1999, p. 67.

19 James A. Henderson, Aaron D. Twerski, *What Europe, Japan, and Other Countries Can Learn from the New American Restatement of Products Liability*, 34 *Texas International Law Journal* 1, 1999, pp. 13–14.

which occurs in the entire series of the product; 3. warning defect – the absence of adequate warning about the product's dangerous properties.[20]

The Directive leaves the possibility for the member states to deny the producer of the development risks defense through their national regulations. Luxembourg and Finland are the only countries to have fully used this possibility left open for the member states by Article 15 (1.b) of the Directive.[21] Therefore, according to the national regulations of Finland and Luxembourg, a producer cannot clear himself of liability by invoking development risks. In these states, a producer is liable for damage from an undiscoverable defect, regardless of the type of the product. In Spain, it is excluded that a producer can be cleared of liability by proving that it was impossible to know of a defect when damage originates from food or from pharmaceutical products. In other words, the producer is liable for the consequences of undiscoverable defects only when damage is caused by specific types of products. In France, producers are liable for damage from defects that they could not have known about only when damage is caused by products obtained from the human body – for instance, blood or blood plasma – and by those placed in circulation before May 1998, when France incorporated the provisions of the Directive into its national law. In German law a producer is liable for damage from undiscoverable defects only if damage is caused by pharmaceutical products and products obtained by genetic engineering.[22]

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20 According to the Restatements (Third) of Torts, a producer is strictly liable for damage caused by the first type of defect; in the other two cases, the producer can only be held accountable for negligence. *Ibidem,* pp 13–15. In Serbian law, the fault-based liability for damage caused by the warning defect is regulated separately in Article 179, para. 2 of the Code of Obligations.

21 "Each Member State may ... (1.b) by way of derogation from Article 7(e), maintain or, subject to the procedure set out in paragraph 2 of this Article, provide in this legislation that the producer shall be liable even if he proves that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of a defect to be discovered." Article 15 (1.b) of the Directive. *See also*: *Report on the Application of Directive 85/374 on Liability for Defective Products*, Commission of the European Communities, Brussels, 2001, COM(2000) 893 final, pp. 16–17; Christian von Bar, *The Common European Law of Torts*, Volume Two, New York, Oxford University Press, 2000, pp. 422–423; H.C. Taschner, *Harmonization of Product Liability Law in the European Community*, p. 32.

22 In the case when a recycled glass bottle exploded in the hands of a nine-year-old girl and injured her eye – the German Federal Supreme Court ruled that the explosion was the consequence of microscopic damage in the glass. The Court maintained that the producer could be privileged from liability by proving that the defect was objectively impossible to know only in the case of a design defect, not in the case of a defect that appeared in the production process. The Court found that the microscopic crack appeared during the production of the concrete bottle and not in the design of the entire series of the product, so it ruled that the producer in the said case was liable, regardless of the defect

To sum up, the producer's liability for defective products is defined more severely in Article 179 of our Code of Obligations than in the regulations of the majority of EU member states. According to the Code of Obligations, the producer is the bearer of liability for development risks, regardless of the type of product. Contrary to this, in the majority of western European legal systems, a producer can be freed of strict liability if he proves that, at the time when he placed the product in circulation, the state of scientific and technical knowledge was such that the existence of the defect could not have been discovered. Only in few EU state is the producer also liable for objectively undiscoverable defects. This goes for Finland and Luxembourg – regardless of the type of product, and for France, Germany and Spain – only when it comes to certain types of products.

IV
DEVELOPMENT RISKS DEFENSE UNDER NEW SERBIAN PRODUCT LIABILITY ACT

Our Code of Obligations was the first regulation in Europe that named and stipulated the strict liability of the producer as a separate institution.[23] It has been shown that, according to the Code of Obligations, a producer cannot be exempted from liability for defective product by proving that the defect was undiscoverable at the time when the product was put into circulation.

On February 16, 2005, the Draft Law on the Product Liability was submitted for procedure in the Legislature of the Republic of Serbia. The Government proposed the passage of this law in summary procedure, in order to fulfill the obligations stemming from the Action Plan for the harmonisation of regulations of the Republic of Serbia with those of the European Union. As the reason for this Draft, the government cited the need for bringing domestic legislation in line with the regulations of the

objectively being impossible to discover. BGH, 9 May 1995, VI ZR 158/94, quoted according to: Christian von Bar, *The Common European Law of Torts*, p. 424.

23 J. Radišić, *Odgovornost proizvođača stvari sa nedostatkom* (Liability of the Producer of Defective Products), p. 410. Concerning the inter-relationship of the institutions of fault-based liability and strict liability in our law, and concerning created and controlled risks as the grounds for liability, *cf.* Mihailo Konstantinović, *Osnov odgovornosti za prouzrokovanu štetu* (Grounds of Liability for Damage), Law Review *Pravni život*, 9–10/1992, pp. 1153–1163, (article first published in Law Review *Arhiv za pravne i društvene nauke*, No. 3/1952); Slobodan Perović, *Predgovor za zakon o obligacionim odnosima* (Preface to the Code of Obligations), Belgrade, Official Gazette, 1995, p. 45 and on.

Directive. In November 2005, the Serbian legislative body passed the new Product Liability Act without any amendments to the text drafted by the Government.[24]

According to Article 7 of the new Product Liability Act, *a producer is liable for damage from a defective product regardless of whether he knew about the defect*. This regulation is similar to Article 179 of the Code of Obligations to the extent that it explicitly stipulates that the producer's knowledge about a defect is legally irrelevant for grounds of liability for damage from the defective product. One should note that the article of the Directive, to which the mentioned article of the Draft corresponds, does not mention the knowledge of the producer, but simply prescribes that the producer shall be liable for damage from a defective product.[25]

However, according to Article 8 of the new Act, *the producer shall not be liable if he proves that the level of scientific and technical knowledge at the time of putting the product into circulation did not enable the discovery of the defect.* In other words, in spite of the fact that Article 7 of the new Act apparently adheres to the solution envisaged in the Code of Obligations, it is the stand of the Government and of the Legislator of the Republic of Serbia that development risks defense should be provided for in our positive law, regardless of the type of product. Sure enough, producers of certain types of products can be denied this chance for exoneration from liability with a future law.

In the Explanation of the Draft Law, Serbian Government estimated that *the implementation of proposed solutions would not introduce additional costs either for citizens or companies, including small and medium enterprises.*[26] When considering the accuracy of this claim, one should take into consideration the fact that the interests of producers and consumers, regarding liability for development risks, are conflicting. The new Act on Product Liability changes the consumers' position which existed under the Code of Obligations in a way that it makes it more difficult. The new Act transfers the risk of undiscoverable defects from the producer to the consumer and, in this regard, it changes the existing state of affairs by worsening it for the consumer. In other words, the *status quo* cannot be changed without *additional expense* to the party it favoured.

Therefore, without going into an evaluation of the new Serbian regulations at this point, one should note that the Government, as well as

24 *Cf.* footnotes 3 and 4.

25 "The producer shall be liable for damage caused by a defect in his product." Article 1 of the Directive.

26 Source: web-page of the Serbian Legislature – www.parlament.sr.gov.yu

the Legislator, of the Republic of Serbia opted for the development risks defense, although it was not a mandatory requirement for the harmonisation with the EU Law. There are some more indicators of the intention to favour the interests of producers.

According to Article 7 of the Directive, a producer may be cleared of liability if he proves that a product was not defective when it was placed in circulation.[27] The meaning of this rule is as follows: if the plaintiff proves that the product has a defect and that this defect was the cause of the damage, then it is presumed that the product was defective at the time it was put into circulation, and the producer is cleared of liability if he proves this presumption wrong. In other words, the burden of proof that the defect came into being later than presumed – i.e. at the time when the product was already in circulation – lies with the producer. The Directive leaves it up to the member states to determine the degree in which the court must be convinced that the product was not defective at the relevant moment. According to Article 8 of the Serbian Product Liability Act, it is sufficient for the producer to prove that the defect *probably did not exist* at the time when he put the product into circulation.[28]

The new Act alleviates the position of the producer inasmuch as it is at all possible when the burden of proving a certain circumstance lies with the producer. In order to clear himself of liability, the producer has to prove that it is *more probable* that the defect did not exist than that it did exist at the relevant moment. The position of the producer would certainly be more difficult if he were requested to prove that it was *certain* that the product was not defective, or that it was *beyond reasonable doubt* that the product was defective at the time of it being placed in circulation. Therefore, it is sufficient for the producer to prove

27 Article 7 of the Directive prescribes that the producer is absolved of liability if he proves either of the following: that he did not put the product into circulation; that the defect came into being after he put the product into circulation; that the product was not manufactured by him for sale or *any form of distribution for commercial purposes*; that the defect is due to compliance with *a mandatory regulation* issued by the public authorities; that the state of scientific and technical knowledge at the time when he placed the product in circulation was not such as to enable the existence of the defect to be discovered. (Underlined by M.K.)

28 Article 8 of the Product Liability Act prescribes that the producer is absolved of liability if he proves either of the following: that he did not put the product into circulation; that the defect *probably did not exist* at the time when he put the product into circulation, or appeared at a later time; that he did not manufacture the product for the purpose of sale and that the product was not produced within his regular activity; that the defect is due to compliance with *the prescribed norms*; that the state of scientific and technical knowledge at the time when the product was put into circulation was not such as to enable the existence of the defect to be discovered. (Underlined by M.K.)

that there is *a higher probability* (51%) that the defect came into being *after* the product was put into circulation than that the defect already existed at that moment.

Furthermore, Article 8 of the new Serbian Product Liability Act stipulates that the producer is absolved of liability if he proves that the defect is due to compliance with the *prescribed norms* – regardless of whether these norms are mandatory or not. In contrast to that, Article 7 of the Directive explicitly envisages that the producer is freed of liability if he proves that the defect is due to producer's compliance with *mandatory* legal regulations.

When the national regulation was passed in Luxembourg to implement the provisions of the Directive, the Luxembourg legislator was in the situation similar to ours. Namely, according to the national regulations at that time, producers were also considered liable for damages from objectively undiscoverable defects. And so, the Luxembourg legislator opted for keeping the existing rule, that is, not to deny consumers the protection they already enjoyed.[29] In other words, Luxembourg made use of the possibility provided by Article 15 (1.b) of the Directive and retained the existing solution, formulated by its own court practice, according to which the producer's liability was defined more strictly than recommended by the Directive. A report by the European Commission from 2001 asserted that there had been no problems regarding the step that Luxembourg opted for.[30]

On the other hand, neither was it maintained by the French courts that the producer might exonerate himself from the strict liability by proving that the cause of the damage was objectively undiscoverable.[31] Still, regardless of the rules that were accepted in court practice until then, the development risks defense was introduced into French law in 1998,[32] with the sole exception for the defective parts of the human body and defective products obtained from the human body.[33]

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29 Report on the Application of Directive 85/374 on Liability for Defective Products, Commission of the European Communities, Brussels, 2001, COM(2000) 893 final, p. 17.

30 *Ibidem*, p. 17.

31 Yvan Markovits, *La Directive C.E.E. du juillet 1985 sur la responsabilité du fait des produits défféctueux*, Paris, Librairie Générale de Droit et de Jurisprudence, 1990, p. 225.

32 On May 19, 1998, France passed a law that integrated the provisions of the Directive into its national legal system (Loi No. 98–389). The regulations of this law have become a part of the French Civil Code. *Cf.* François Terré, Philippe Simler, Yves Lequette, *Droit civil – Les obligations*, 8e édition, Paris, Dalloz, 2002, p. 937 and on.

33 "Le producteur est responsable de plein droit à moins qu'il ne prouve: ... (4°) Que l'état des connaissances scientifiques et techniques, au moment où il a mis le produit

Next, the Republic of Slovenia did not amend the provision on producer's liability in its Code of Obligation – it preserved the wording of Article 179 verbatim, the sole change being in the numeration.[34] However, by passing the Consumer Protection Act (*Zakon o varstvu potrošnikov*), Slovenian legislator provided for the development risks defense on behalf of the producer of defective product.[35] Therefore, the new Slovenian regulation on consumer protection equated undiscoverable defects, according to their legal significance, with *chance* or *force majeure* and worsened the consumers' position – in comparison with the position of the damaged party assured by the Slovenian Code of Obligations.

V
DEVELOPMENT RISKS IN THE EU LAW

Here, it is necessary to present and explain in more detail the contents of the legal solution the European legislator suggested to the EU member states. From our perspective, therefore, it is necessary to examine the scope of the rule adopted in the majority of European Union countries, and then to consider the policy behind this rule and what the possible consequences would be of retaining a solution that differs in terms of development risks from the one accepted by the majority.

Commission vs. United Kingdom is the most significant case before the Court of Justice of the European Communities that interprets Article 7(e) of the Directive.[36] In 1995, the Commission of the European

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en circulation, n'a pas permis de déceler l'existence du défaut." Article 1386–11, Code Civil (Article 12, Texte issu de la loi n° 98–389 du 19 mai 1999.)

"Leproducteur ne peut invoquer la cause d'exonération prévue au 4° de l'article 1386–11 lorsque le dommage a été causé par un élément du corps humain ou par les produits issus de celui-ci." Article 1386–12/1, Code Civil. (Article 13, Texte issu de la loi n° 98–389 du 19 mai 1999.)

34 "Odgovornost proizvajalca stvari z napako: (1) Kdor da v promet kakšno stvar, ki jo je izdelal, ki pa pomeni zaradi kakšne napake, škodno nevarnost za osebe ali stvari, odgovarja za škodo, ki nastane zaradi take napake. (2) Proizvajalec odgovarja tudi za nevarne lastnosti stvari, če ni ukrenil vsega, kar je potrebno, da škodo, ki jo je mogel pričakovati, prepreči z opozorilom, varno embalažo ali kakšnim drugim ustreznim ukrepom." člen 155, Obligacijski zakonik, Uradni list Republike Slovenije 83/2001, 32/2004.

35 "Proizvajalec ni odgovoren za škodo, če dokaže, da: ... – svetovna raven znanosti in tehničnega napredka v času, ko je dal izdelek v promet, ni bila takšna, da bi bilo možno napako na izdelku odkriti (npr. z znanimi metodami in analizami)." člen 10, Zakon o varstvu potrošnikov (uradno prečiščeno besedilo), Uradni list Republike Slovenije 98/2004.

36 Commission of the European Communities vs United Kingdom of Great Britain and Northern Ireland, C–300/95, European Court Reports 1997 Page I–02649. Source:

Communities applied for a declaration that, by failing to take all the measures necessary to implement the Directive on liability for defective products, the United Kingdom failed to fulfill its obligations under that directive and under the EC Treaty.

The controversial provision of the Consumer Protection Act – by which the United Kingdom intended to implement the development risks clause – prescribed that "in respect of a defect in a product, it shall be a defense for a producer to show that the state of scientific and technical knowledge at the relevant time was not such that *a producer of products of the same description as the product in question* might be expected to have discovered the defect if it had existed in his products while they were under his control."[37]

In procedure, the Commission submitted that the test in Article 7(e) of the Directive is objective given that it refers to a state of knowledge, and not to the capacity of the particular producer, or to the capacity of another producer of a product of the same description as the product in question, to discover the defect. In contrast to that, the controversial Section 4(1)(1) of the UK Consumer Protection Act presupposes a subjective assessment based on the behaviour of a reasonable producer. The Commission stated that "it was easier for the producer of a defective product to demonstrate, under section 4(1)(e), that neither he nor a producer of similar products could have identified the defect at the material time, provided that the standard precautions in the particular industry were taken and there was no negligence, than to show, under Article 7(e), that the state of scientific and technical knowledge was such that no-one would have been able to discover the defect."[38]

The European Court of Justice dismissed the Commission's application with the following explanation: the estimate of the adequacy of the domestic provision, whereby a particular member state implements a provision of *droit communautaire*, takes into account the manner in which the national courts of the member state interpret that domestic provision. The Court considered that the controversial provision of the UK Consumer Protection Act itself did not offer grounds for the interpretation which the Commission attributed to it, and that the Commission "has not referred in support of its application to any national judicial

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www.europa.eu.int/eur-lex. *Cf.* S. Taylor, *L'harmonisation communautaire de la responsabilité du fait des produits défectueux. Etude comparative du droit anglais et du droit français*, pp. 69–72.

37 Section 4(1)(e), Consumer Protection Act of 1987, which came into effect on March 1, 1988.

38 Commission vs. United Kingdom, C–300/95.

decision which, in its view, interprets the domestic provision at issue inconsistently with the Directive."[39]

Furthermore, the Court held that Article 7(e) was not specifically directed at the practices and safety standards in use in the industrial sector in which the producer was operating, but at the general state of scientific and technical knowledge, including the most advanced level of such knowledge, at the time when the product was put into circulation. Also, according to the Court's interpretation, "in order for the relevant scientific and technical knowledge to be successfully pleaded as against the producer, that knowledge must have been *accessible* at the time when the product in question was put into circulation."[40]

The court did not define the notion of the *accessibility* of information but left this to the courts of the member states. Nevertheless, it should be noted that in this context one can judge whether information was accessible only if it was published – that is to say, if it was expressed or made accessible in some way.[41] For instance, it is pointless to evaluate the accessibility of information written down in some scientist's notebook or computer if it has never been publicised, that is to say – publicly communicated. Such information is *a priori* inaccessible.

The accessibility of information is a matter of the national courts' evaluation. This evaluation does not focus on whether the information objectively belongs to the universal scientific and technical legacy. Namely, the information *is* part of that legacy by its very existence – regardless of whether it is accessible. This means that in appraising the accessibility of specific knowledge, the national courts will also deal with the question of *adequacy* of the producer's behaviour. In other words, courts will inevitably raise the question of whether there were any grounds for expecting the producer to possess knowledge of a particular nature, i.e. whether a reasonable and careful producer could obtain that knowledge.

For instance, information that is of importance for the timely discovery of a defect in a product was published in a scientific magazine in a foreign language. The question of the accessibility of that information in the court basically amounts to the question of whether the producer could be expected to keep track of scientific magazines in a foreign language. In this way, elements are introduced into the reasoning

39 *Ibidem*.

40 *Ibidem*.

41 *Cf.* Geraint G. Howells, Mark Mildred, *Is European Products Liability more protective than the Restatement (Third) of Torts Products Liability*, 65 *Tennessee Law Review* 985, 1998, p. 998–1015.

of the court, which are specific for the institution of fault-based liability, that is, precisely those elements the absence of which is characteristic of the institution of strict liability.[42] They certainly include the standard of reasonable expectations and the standard of a reasonable and careful man.

In any case, if the ability to know about the defect were to be considered in terms of existing scientific and technical knowledge regardless of their accessibility, the European producer would also be liable for those defects that could have been discovered on the basis of some information in a local newspaper in China. The example Jane Stapleton mentions is well-known: had, at the time when *Thalidomide* was placed on the European market, a doctor in Manchuria or Siberia announced in the local dialect or in the circle of his friends the idea of testing dog food in a particular way which would enable the discovery of the harmful effects of this medicine, his idea would have been the part of scientific and technical knowledge.[43]

Some authors criticise the structure of the Directive pointing out that in it, the provisions regulating the *conditions* of liability are unjustifiably separated from the provisions regulating the *defenses* (or, what the producer should prove in order to exempt himself from liability).[44] Apart from that, there is also criticism of the fact that theoretical concept which underpins the regime of strict liability is not applied in the Directive in its pure form.[45]

The conditions of the producer's liability are stipulated in Article 4 of the Directive, under which the damaged party should prove that he has suffered damage, that the product was defective, and that the very defect in product was the cause of the damage suffered. The producer's fault does not figure as the condition of his liability. On the other hand, Article 7 of the Directive prescribes that the producer is absolved of liability if he proves either of the following: that he did not put the product into circulation; that the defect came into being after he put the product into circulation; that the product was not manufactured by him for sale or any form of distribution for commercial purposes; that the defect is due to compliance with a mandatory regulation issued by the public authorities; that the state of scientific and technical knowledge at the time when he

42 *Cf.* Jane Stapleton, *Products Liability in the United Kingdom: The Myths of Reform*, 34 *Texas International Law Journal* 45, 1999, pp. 58–59.

43 *Ibidem*, p. 59.

44 Jane Stapleton, *International Torts: A Comparative Study: Restatement (Third) of Torts: Product liability, An Anglo-Australian Perspective*, 39 *Washburn Law Journal* 363, 2000, p. 368.

45 Y. Markovits, *La Directive C.E.E. du juillet 1985 sur la responsabilité du fait des produits déféctueux*, p. 227.

placed the product in circulation was not such as to enable the existence of the defect to be discovered.

The Serbian Code of Obligations also regulates the conditions of strict liability separately from the conditions under which the producer may absolve himself of liability. Article 173 of the Code of Obligations stipulates the following conditions of strict liability: the existence of damage and that of a causal relationship between dangerous proprieties of the item and damage inflicted. The existence of this causal relationship is arguably presumed if the damaged party proves that the dangerous object had a material role in the infliction of damage. Article 177 allows the holder of a dangerous item or the perpetrator of a dangerous activity to be acquitted of liability if he disproves this presumption. In other words, Article 177 corresponds in everything with Article 173; it does not introduce any new circumstance that the holder of the dangerous item could prove in order to acquit himself of liability that does not disprove any of the conditions for liability formulated in Article 173. Discharge from liability, therefore, boils down to proving that the conditions for liability have not been fulfilled, i.e. to disproving what the damaged party has proved or what has arguably been presumed as the condition of liability.

Adversely, Article 7 of the Directive introduces a new circumstance – the circumstance which has not been considered a condition of liability and which is even logically opposed to the regime of strict liability. Article 4 of the Directive stipulates the producer's liability regardless of his fault. Article 7 of the Directive enables the producer to evade liability for damage that arises from flaws *he could not have known about*. In other words, the producer who does not dispute that the product was defective is released from liability for the damage inflicted by that defect if he proves that there is no fault on his part.[46]

In modern civil law, there is a tendency towards objectifying the notion of fault as grounds for liability. The notion of fault is identified with the notion of erroneous behaviour, regardless of what the perpetrator had in mind or intended.[47] Fault is viewed as error, i.e. as behaviour that

46 *Ibidem*.

47 "One can say that anyone is at fault who did not behave in the manner that could be reasonably expected of him. This expectation need not be based on law, it is enough that it is based on custom, general habits. When I walk on the right side, as is the custom, I expect that the other person will walk on the right side, and thus avoid colliding with me. The person who does not do so, but walks on the left side and collides with me who am walking straight ahead, is liable for the damage that is consequently caused regardless of everything else – because I legitimately, and with reason, believed that he would walk on the right side, according to the custom of the city, like me. Fault interpreted in this way considerably widens the domain of fault based liability and

digresses from what can reasonably be expected from a reasonable and careful man. In spite of the trend of objectifying fault itself as grounds for liability, the Directive offers the possibility for the person whose liability is not based on fault to be acquitted of liability by proving that something could not have been known, i.e. *by invoking the absence of fault on his part.*

Some authors consider that the very essence of the institution of strict (product) liability lies precisely in the producer's liability for a defect that objectively he could have had no knowledge of.[48] They recollect that the development of the institution of product liability in Europe was significantly quickened due to the mass damages caused by the use of the medication known as *Thalidomide* – on this occasion the attention of European lawyers focused on the question of liability for defects that were not known at the time when the medication appeared on the market. For what reason then does the Directive suggest, and the member states of the European Union largely accept, that the producer can be cleared from strict liability by proving that at the time when the defective article was placed in circulation it was not possible to discover its defectiveness?

VI
ON ARGUMENTS THAT CORROBORATE OR CONTEST THE INSTITUTION OF DEVELOPMENT RISKS

The institution of strict liability for damage from a defective product should lead to the realisation of two social aims. The first aim is indemnification – compensation for damage that was caused by the defective product, i.e. placing the damaged party in the financial position in which he would have been if he had not suffered the damage. The second aim is deterrence – deterring producers from placing defective articles in circulation. The civil law sanction, which the producer of a defective article is exposed to, consists of the obligation to compensate for the damage that is the consequence of this defect.[49]

The European legislator stresses in the Preamble of the Directive that strict liability for damage from a defective article should ensure *a*

removes the grounds for some of the criticism of that theory." Mihailo Konstantinović, *Diskusija* (Discussion), in the collection of papers and discussions *Građanska odgovornost* (Civil Liability), Belgrade, *Institut društvenih nauka*, 1966, p. 332.

48 J. Stapleton, *International Torts: A Comparative Study: Restatement (Third) of Torts: Product liability, An Anglo-Australian Perspective*, p. 368.

49 G. Howells, M. Mildred, *Is European Products Liability more protective than the Restatement (Third) of Torts Products Liability*, p. 1026.

fair apportionment of risk in a society whose technological development is constantly accelerating. The risk that should be distributed is the threat of damages caused by defective products. In other words, the Directive was passed with the intention of it playing a particular role in the attainment of distributive justice in society so that the risk of the said type of damage would be attributed to the party who created that risk.

Still, it appears that development risks clause of the Directive intervenes in the distribution of risk from an entirely different angle. Here, the focus of the legislator's attention is no longer the risk which the end user of the defective product is exposed to – the threat of causing damage to the consumer. On the contrary, at this point, the legislator's attention focuses on the indirect risk to which the *producer* is exposed – the risk of being sued for damages from a defect he was unable to know anything about.[50]

The development risks clause constitutes an exception to the general rule that the producer shall be liable for damage caused by a defect in his product. Namely, with regard to the damage arising from those defects that could not be discovered in a timely manner, the moment of placing an article in circulation designates the transfer of the risk from the producer to the consumer. The circumstance that the defect was discovered *after* the article was placed in circulation does not alter the fact that a defective article *was* placed in circulation.[51] In other words, the defect existed even though it was impossible to know about its existence. The question that arises is the following: does the fact that it was impossible to discover the defect in the moment when the article was placed in circulation justify the transfer of risk from the producer to the consumer?[52]

The institution of development risks represents an attempt to make a compromise between two conflicting interests. On the one hand, there is the need to establish a system that encourages not only manufacturing but also scientific research and innovation in the function of improving production. On the other hand, there are the consumer's legitimate expec-

50 *Cf.* Y. Markovits, *La Directive C.E.E. du juillet 1985 sur la responsabilité du fait des produits défectueux*, p. 221.

51 According to Markovits, development risk itself represents a kind of flaw – development risk is a subsequent shortcoming in the safety of the product (*un manque a posteriori de sécurité*). Liability for a subsequent lack of safety should be borne by the producer because the lack of safety existed even in the time of placing the product in circulation, albeit it could not be discovered at that moment. *Cf.* Y. Markovits, *La Directive C.E.E. du juillet 1985 sur la responsabilité du fait des produits défectueux*, pp. 218–234.

52 *Ibidem*, p. 221.

tations concerning the safety of products that have been placed on the market.

The problem of development risks appear most often in the pharmaceutical, the chemical and the bio-chemical industries, in the production of food and genetically modified organisms – in other words, in those domains of production in which sensitive ethical questions, the application of high technology and the danger of mass damages are typical.[53]

There are numerous reasons that justify the institution of development risks, that is, arguments *substantiating* the claim that it is very important to acquit the producer of liability for damage from undiscoverable defects.

Usually, it is stressed that scientific and technical progress is advantageous to everyone, i.e. society as a whole profits from it. Therefore, the risk that inevitably accompanies scientific and technical progress should be distributed to all who enjoy the fruits of this progress.

It appears that the participants in the debate on development risks sometimes quote the arguments which otherwise they do not favour. For instance, the producers are unquestionably the stronger side in this relationship than the consumers. They are stronger in terms of economics and available information – the producers are the side whose interest, as a rule, is in minimising the legislator's intervention. Nevertheless, the producers are here seeking additional norms and quoting the general interest. In other words, in the debate on who should shoulder the development risk, one comes to an interesting turnabout: those interest groups which as a rule are not inclined to the idea of the state playing a role in the fair distribution of wealth in society, quote the need for a fair apportionment of risk or the need for an elaborate scheme of social insurance.

Next, it is claimed that the institution of development risks encourages innovation by way of reducing innovation-related risks. The repeal of this institution would impede scientific research by increasing the costs of each innovation in proportion to the price of insurance against liability for unknown risks. Apart from that, the abandonment of

53 On some of the cited arguments for and against the institution of development risks, *cf. Green Paper on liability for defective products*, Commission of the European Communities, Brussels, 1999, COM(1999) 396 final; *Report on the Application of Directive 85/374 on Liability for Defective Products*, Commission of the European Communities, Brussels, 2001, COM(2000) 893 final, p. 16–17; *Analysis of the Economic Impact of the Development Risk Clause as provided by Directive 85/374/EEC on Liability for Defective Products. Final Report. Study for the European Commission*, Fondazione Rosselli, Contract No. ETD/2002/B5, p. 34; Y. Markovits, *La Directive C.E.E. du juillet 1985 sur la responsabilité du fait des produits défectueux*, pp. 229–230.

the institution of development risks would lead to producers hesitating to place articles produced according to the latest technology in circulation.

Likewise, one should note that producers are often in the role of patrons of scientific research and that, as a rule, the latest scientific and technical knowledge is under their control. It is not in the interest of the producer to make the results of his research accessible if he can release himself from liability by proving that the defect could not be discovered, given the level of *accessible* scientific and technical knowledge.

Furthermore, it is claimed that it would be difficult for producers to obtain insurance in case of liability for damage from an undiscoverable defect and that the institution of development risks represents the key to stability on the *insurance-against-liability* market in European industry. In other words, the question arises as to whether, and at what price, insurers would be willing to provide insurance against *unknown* risks.

It is also indicated that the producer's liability for undiscoverable defects would lead to lowering standards in the production process, seeing that the producer could not privilege himself from liability by proving the implementation of the highest levels of scientific and technical knowledge. Bearing in mind that even so much as compliance with the highest scientific and technical knowledge *could not* protect him from liability, it would profit the producer to moderately lower the standards according to which he manufactures, i.e. to optimalise his investment in the safety of a product.

Next, it is stressed that the institution of liability ought to encourage producers to place products that are as safe as possible on the market, and not to place producers in the position of an insurer. The greatest encouragement that could be given to the producer to manufacture safe products is to discharge him from liability for damages that occurred in spite of the fact that he applied the highest level of scientific and technical knowledge.

Furthermore, the position of the producer in the proceedings is already made difficult enough by the requirement that the producer must prove a negative fact (that the defect *could not be discovered*) in order to be absolved of liability.[54]

54 The judge, who assesses whether a particular product has a defect, takes the consumer's justified expectations as his point of reference. This rule implies that there are certain risks which the consumer simply has to anticipate, i.e. that the consumer can justifiably expect a certain degree of safety from the product but not its absolute safety. The expectations which the consumer in question had are not relevant – it is solely *the legitimate* expectations that are relevant. *Cf.* Article 6 Directive. As one of the guidelines in establishing which expectations were legitimate, the courts consider the expectations of the public (and not the expectations of the average customer nor the expectations of the

Finally, it is argued that the institution of strict liability is not the best way to cope with mass damages. Compensation within the system of social insurance is proposed as a more appropriate solution; or the founding of special – public or private – funds, from which indemnities would be paid out. In many EU states, producers of medicines, vaccines and food have already created funds together with insurance associations that are active in the relevant branches of industry, from which indemnities for damages caused by certain types of defective products are paid out.[55]

On the other hand, the arguments presented *against* the institution of development risks are also numerous. The institution of development risks destroys the coherence of the regime of strict liability. It allows the producer to be released from liability by proving the absence of his own fault – within the system whose basic characteristic is that the producer's liability is not stipulated by the existence of his fault.

Apart from that, it is considered *not fair* for consumers to bear the risk of those dangerous activities from which the producer primarily has the advantage. Also, it would be economically effective for the costs of product's defectiveness to be borne by the person who creates those costs – and that is the producer. Next, it is the producer who has most of the information about the possible risks – in any case he knows more about the product than the average consumer.

The producer can shift the costs of increasing the product safety to the consumer. In the same way, the producer can also build the costs of insurance against liability into the price of the product. As for major producers, the shifting of the costs of insurance against liability to the consumer does not lead to a significant increase in the price of the product.[56]

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consumer in question) with regard to the degree of safety of a particular product. *Cf*. H. C. Taschner, *Harmonization of Product Liability Law in the European Community*, p. 30–31. In present-day American law, Restatements (Third) of Torts applies the test that gauges the convenience of a product, according to the risk which that product carries (risk utility test).

55 *Analysis of the Economic Impact of the Development Risk Clause as provided by Directive 85/374/EEC on Liability for Defective Products. Final Report. Study for the European Commission*, Fondazione Rosselli, Contract No. ETD/2002/B5, pp. 79–88.

56 In Finland, producers are liable for damage from objectively undiscoverable defects in a product. The Finnish government informed the European Commission that, in this connection, there was a negligible increase in liability insurance premiums. German and Dutch insurance companies stress that 90% of the cases dealing with liability for defective products are resolved in the out-of-court settlements. *Report on the Application of Directive 85/374 on Liability for Defective Products*, Commission of the European Communities, Brussels, 2001, COM(2000) 893 final, pp. 10–17.

Next, it is argued that no light has been shed on the link between the producer's liability for development risk and his readiness for innovation, that is, it has not been *proved* that the possibility of being liable for damages from undiscoverable defects would make producers reluctant to invest in scientific research. Yet, it appears that it is necessary to prove the claim which *prima facie* does not hold water, and in the concrete case it is the claim that producers would go in for innovations even when they were liable for all the unforeseeable consequences of those innovations.

Finally, the Directive permits member states to prescribe the financial cap on producer's liability. Namely, a member state may fix the highest amount of compensation for damages resulting from death or physical injury caused by a product with a particular defect, provided that this amount can be no less than 70 million euros.[57] So far, only three states – Germany, Portugal and Spain – have limited the amount of producer's total liability. In those three countries it has never happened that the amount of damage caused exceeds the prescribed limit of the producer's liability.[58]

In 2004, the European Commission engaged the *Fondazione Rosselli* to make a comprehensive analysis of the economic influence achieved by the institution of development risk.[59] This voluminous analysis considers that the participants in economic relations always adjust their conduct to the alterations in applicable rules and regulations. It points to the fact that the renouncement of the institutions of development risks would lead to the increase of partial and the decline of radical innovations. Namely, if they were to be deprived of the possibility of being privileged from liability for damage from defects that they could not discover even by applying the highest level of scientific and technical knowledge, the producers would direct their efforts to conventional and less risky research, investing in the safety and quality of that which

57 "Any Member State may provide that a producer's total liability for damage resulting from a death or personal injury and caused by identical items with the same defect shall be limited to an amount which may not be less than 70 million ECU." Article 16.1 of the Directive.

58 *Green Paper on liability for defective products*, European Commission, Brussels, 1999, COM(1999) 396 final. The new Serbian Product Liability Act does not prescribe the financial limit of the producer's liability.

59 *Analysis of the Economic Impact of the Development Risk Clause as provided by Directive 85/374/EEC on Liability for Defective Products. Final Report. Study for the European Commission*, Fondazione Rosselli, Contract No. ETD/2002/B5. The Fondazione Rosselli is an independent, non-profit, research institution in the domain of economic, political and other social sciences, established in Turin, in 1988. Source: www.europa.eu.int .

already exists. Besides, there would be a reduction in the number of radical innovations and pioneer scientific research, as well as a decline in the assortment of products on offer.

The Analysis emphasises that it is certain that annulling institution of development risks would lead to an increase in the costs of insurance and that producers would not be able to obtain insurance for certain types of development risks. Further, it is asserted that the repeal of this institution would lead to changes in the structure of the European market and to the concentration of companies. The Analysis predicts the creation of public and private compensation funds at the level of the European Union, from which compensation will be paid out for damage caused by undiscoverable defects; while in some branches of industry, the producers' participation in compensation funds will be mandatory.[60]

VII
LIMITING THE SCOPE OF THE INSTITUTION OF DEVELOPMENT RISKS

Although nearly all the EU states – with the exception of Finland and Luxembourg – accepted the solution suggested in the Directive and introduced development risks defense, the fact is that some of the biggest national economies in Europe made an exception in that respect in the very sectors of industry in which development risks occur the most frequently and where the likelihood is greater of raising sensitive, ethical issues. In French, German and Spanish law, producers *are* liable for risks that were beyond the range of contemporary knowledge for those very products where such risks are the greatest – in food, pharmaceutical products and products obtained from the human organism.

There are some more indicators of the intention to limit the scope of development risks defense. For instance, in the restrictive interpretation given by the courts in Germany, development risks clause refers exclusively to *design defects* – defects that occur in the construction and

60 The Analysis underlines the need for approximation (in keeping with Article 153 of the EC Treaty) of the member states' laws concerning development risks; as well as the need for harmonisation of the system of compensation provided in the Directive on liability for defective products with the system of administrative control prescribed by the Directive on general product safety. (Council Directive 92/59/EEC of 29 June 1992 on general product safety; amended by Directive 2001/95/EC of the European Parliament and of the Council, of 3 December 2001 on general product safety). *Cf.* Fondazione Rosselli, *Analysis of the Economic Impact of the Development Risk Clause as provided by Directive 85/374/EEC on Liability for Defective Products. Final Report. Study for the European Commission*, pp. 137–138.

design processes and affect a whole line of products. The producer cannot be absolved of liability if the defect occurred in the production of the concrete unit of a product, that is, in the case of a *manufacturing defect*[61].

Furthermore, in French law, the producer has the obligation to monitor the product in the period of ten years after placing it in circulation (*obligation de suivi*).[62] In the event that the defect was discovered within the period of ten years after the item was placed in circulation, the producer who did not undertake the appropriate measures to prevent the occurrence of the harmful consequences of that defect cannot be acquitted of extra-contractual liability by invoking development risk or his own constraint by mandatory regulations.[63]

In other words, only the producer who complied with the obligation of monitoring a product can be absolved of liability for damage by proving that the subsequently discovered defect is the consequence of his adherence to mandatory regulations which were in effect at the time when the item was placed in circulation; or that the state of scientific and technical knowledge at the time when he placed the item in circulation was such that the existence of this defect could not be discovered. According to the aforesaid clause of the French Civil Code, disregarding the obligation of monitoring a product is *not* an offence, but it prevents the producer from being absolved of liability under civil law.[64] The

61 *Cf.* footnote 22. Nevertheless, the position of pharmaceutical producers in Germany is made easier by the existence of the private underwriters fund *Pharmapool*, formed by the national insurance companies. Given that they fall within one of three prescribed risk categories, the pharmaceutical producers pay a percentage of their annual turnover into this fund. Damaged parties can sue neither the insurance companies nor *Pharmapool*, directly. The German legislator is resisting the demands of consumer protection organisations, who seek the establishment of a general compensation fund out of which compensation would be paid for damages caused by defective pharmaceutical products. Fondazione Rosselli, *Analysis of the Economic Impact of the Development Risk Clause as provided by Directive 85/374/EEC on Liability for Defective Products. Final Report*. *Study for the European Commission*, p. 111–112.

62 *L'obligation de suivi des produits* has already been sanctioned by the French courts as early as in 1979. Pascal Oudot, *Le risque de développement. Contribution au maintien du droit à réparation*, Dijon, Editions Universitaires de Dijon, 2005, p. 65. On *l'obligation de suivi*, see also: S. Taylor, *L'harmonisation communautaire de la responsabilité du fait des produits défectueux. Etude comparative du droit anglais et du droit français*, pp. 79–81.

63 "Le producteur ne peut invoquer les causes d'exonération prévues aux 4° et 5° de l'article 1386–11 si, en présence d'un défaut qui s'est révélé dans un délai de dix ans après la mise en circulation du produit, il n'a pas pris les dispositions propres à en prévenir les conséquences dommageables." Article 1386–12/2, Code Civil. (Article 13, Texte issu de la loi n° 98-389 du 19 mai 1999.)

64 The Directive on general product safety stipulates the obligation of the producer and the distributor to inform consumers adequately and effectively about a defect discovered after a product has already been placed in circulation, and to withdraw

producer will be considered *at fault* and therefore liable if, in the period of ten years after the product was placed in circulation, he does not undertake all the appropriate measures in order to prevent the consequences of that defect.

The idea that the producer should suffer the ultimate consequences of the defectiveness of his product is fairly old in French law – it originated as long ago as *Pothier*.[65] The rule that preceded the implementation of the provisions of the Directive was that, in order to absolve himself from liability, the producer of defective article had to prove that the cause of the damage was outside the article, i.e. that there was no causal relationship between the defectiveness of the article and the incurred damage.

The development risks defense was introduced in French law in 1998. It implicitly equates the undiscoverable defect in the product itself with those causes of damage that existed outside the product. In other words, according to this rule, the undiscoverable defect has the same legal significance as the causes of damage that exist outside the article.[66]

In summary, the great concession that France, Germany and Spain apparently made to their producers by introducing development risks defense is, in fact, quite limited. The right to quote development risks is denied to the producers of those very products where development risks are the greatest. Next, in German law, the said concession was additionally limited by the interpretation of the courts according to which the development risks defense was restricted to design defects. In addition, in French law, the seemingly extremely favourable position of the producer is aggravated by the extra-contractual obligation to monitor the product (*obligation de suivi*).

VIII
ON PROSPECTIVE AFTEREFFECTS OF INTRODUCING DEVELOPMENT RISKS DEFENSE IN SERBIAN LAW

The Code of Obligations proceeds from the position that defective product has features of a dangerous item. The Code prescribes the lia-

defective products from the market (from distribution or from the end-user) when this is necessary. To ignore this obligation is an offence punishable by the state and not a condition for establishing liability for damages. *Cf.* Article 5 (1.b) of the Council Directive 92/59/EEC of 29 June 1992 on general product safety; amended by Directive 2001/95/EC of the European Parliament and of the Council, of 3 December 2001 on general product safety.

65 Y. Markovits, Markovits, *La Directive C.E.E. du juillet 1985 sur la responsabilité du fait des produits déféctueux*, p. 227.

66 *Ibidem*.

bility of a producer in the section that refers to strict liability for dangerous item or dangerous activity, without distinguishing between discoverable and undiscoverable defects.[67]

For almost thirty years, the single statutory provision on liability for defective products in Serbian law was Article 179 of the Code of Obligations. This provision was broadly read by the courts and it practically outgrew itself through a vast number of court interpretations. According to these interpretations, the final producer, or the person who is designated as the producer on the product, is strictly liable for the damage from a defective product. The final producer is liable even if the defect existed in the raw material, semi-product or component part that was produced by someone else[68] – provided that the final producer who paid compensation to the damaged party can address the producer of the raw material, semi-product or component part for indemnification. The importer bears extra-contractual liability for damage from the imported defective product; and, in case that the identity of the importer was not indicated on the product, liability lies with the seller.

Article 2 of the new Serbian Product Liability Act defines *the producer* as the person who manufactures final products, raw materials or component parts. The producer is also considered to be the person who presents himself as the producer by placing his name, trademark or other marks on the product; or the person who imports a product intended for sale. At this point, Article 2 of the new Serbian Act departs from the provisions of the Directive. Namely, under Article 3 of the Directive, not only the person who imports a product intended for sale into the Community is considered the producer, but also the person who imports the product intended for hire, leasing or any form of distribution in the course of his business.[69]

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67 J. Radišić, *Odgovornost proizvođača stvari sa nedostatkom (Liability of the Producer of Defective Products)*, p. 412.

68 "In our earlier court practice, the viewpoint emerged according to which the final or primary producer was exclusively liable to the damaged party. However, such an interpretation of the law would be mistaken because it is more logical to leave it to the damaged party to decide whether he will also sue the manufacturer of the component part of the product which caused the damage. Apart from the genuine producer, a quasi-producer should also be liable, i.e. the person who presents himself as the producer by placing his own name, stamp or other distinguishing feature on someone else's product." J. Radišić, *Odgovornost proizvođača stvari sa nedostatkom (Liability of the Producer of Defective Products)*, p. 411.

69 "(1) *Producer* means the manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part and any person who, by putting his name, trade mark or other distinguishing feature on the product presents himself as its producer. (2) Without prejudice to the liability of the producer, any person who imports into the Community a product for sale, hire, leasing or any form of distribution in the

Furthermore, the new Serbian Act provides that, if the product does not contain data about the producer, the seller is in the position of the producer except if, within a reasonable period of time, he informs the damaged party about the identity of the producer, i.e. the person from whom he obtained the product. Next, if the imported article does not contain data about the importer, the seller is in the position of the producer even though the product contains data about the producer. Here also the new Serbian Act deviates from the Directive which stipulates liability not solely of the seller, but also that of every supplier of defective product.

According to the Directive, liability for damage lies with the person who imported a defective product into the European Union. With regard to this solution, it has been argued in literature that the interests of the consumer would be better served if *the importer to the plaintiff's EU member state* were to be liable for damage from a defective article and not *the importer to the Union*. That is because it is difficult for the consumer to identify and sue the person who imported the product in question into the Union when that person is located in some other EU member state.[70] Moreover, the regime of strict liability stipulated in the Directive does not refer to servicing companies or warehouse companies.[71]

In the context of keeping to the solution envisaged in the Code of Obligations, our importers, in the majority of cases, would be liable for damage from a product with a defect they knew nothing about without the right to indemnification from the European producer.[72] An exception would exist with regard to producers from Finland and Luxembourg, and with regard to German, French and Spanish producers of particular types of products – and they, as a rule, are food, products obtained from the human organism and pharmaceutical products. In other words, our importers could effectuate the right to indemnification only from European producers in those countries whose producers bear the development risk.

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course of his business shall be deemed to be a producer within the meaning of this Directive and shall be responsible as a producer. (3) Where the producer of the product cannot be identified, each supplier of the product shall be treated as its producer unless he informs the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the product. The same shall apply, in the case of an imported product, if this product does not indicate the identity of the importer referred to in paragraph 2, even if the name of the producer is indicated." Article 3 of the Directive.

70 J. Stapleton, *International Torts: A Comparative Study*, pp. 374-375.

71 Y. Markovits, Markovits, *La Directive C.E.E. du juillet 1985 sur la responsabilité du fait des produits défféctueux*, p. 153.

72 *Cf.* J. Radišić, *Odgovornost proizvođača stvari sa nedostatkom (Liability of the Producer of Defective Products)*, p. 412.

Furthermore, our domestic producers would be exposed to greater risk when they sell their products to domestic consumers than when they export to the European Union countries.[73]

It is possible that some of the aforesaid circumstances are taken into consideration by the Slovenian legislator, who has decided that the Consumer Protection Law *shall* make allowance for producers, which Slovenia's Code of Obligations does not – to quote development risks defense.

And so, acquitting the producer of liability for damage from undiscoverable defects in our law could ease the position of domestic producers and importers, compared to European producers. However, the *rationale* of the provision of the Code of Obligations does not concern the position of our producers on the European market, but the scope of protection that is offered to the damaged party. Under the Code of Obligations, the damaged party is fully protected from defects in a product, regardless of them being manifest or undiscoverable. The Code stipulates a solution based on a coherent theory – the one that consistently elaborates the concept of strict liability. According to this solution, the producer cannot be acquitted of strict liability by invoking the absence of his own fault, that is, by quoting the difficulties in discovering the defect that was the cause of the damage.

Without going into possible strategies whereby the participants in economic relations adjust to amendments to any rule and regulation, it seems that the new Serbian Product Liability Act strengthens the previously existed position of domestic importers in relation to European producers. However, the same Act also strengthens their position – the position of the domestic importer – in relation to the domestic consumer. In other words, the aforesaid clause reaches far beyond simply favouring domestic importers and producers in the European context. Thereby, the risk of all damages, which can arise from undiscoverable defects, is shifted to the damaged party as the economically weaker side with less information at his disposal.

On the other hand, the interests of domestic importers and producers can also be protected in other ways – with the establishment of public and private compensation funds of producers in particular industries, such as already exist in many countries of Europe, and whose establishment at the level of the European Union is envisaged in the aforesaid Analysis of the Fondazione Rosselli, which was made for the needs of the European Commission.

The aforesaid Analysis envisages as the consequence of the producer's liability for undiscoverable defects a decline in radical innovations and pioneer scientific research, as well as the re-orientation of

73 *Ibidem*.

producers to conventional and less risky research, chiefly in the aim of improving the safety and quality of what is already being produced. If our legislator wanted to adopt this argument as relevant for domestic circumstances, it was necessary beforehand to examine what the existing volume of radical innovations and pioneer scientific research was in our country, as well as how great the really positive effect would have been of introducing the development risks defense in our law in terms of these innovations and research.

Furthermore, the Analysis highlights the certainty that in the case of repealing the institution of development risks, it would lead to increasing the costs of insurance and producers would not be able to obtain insurance against particular types of development risks. It was necessary to examine whether, under the existing provision of the Code of Obligations, producers had complained about the difficulties of obtaining the insurance against liability for undiscoverable risks.

IX
INSTEAD OF A CONCLUSION

There is no better way of learning about something than to try to change it. However, to learn about something that does function through the attempt to change it can be very expensive. The implied provision of the Code of Obligations, concerning liability for undiscoverable defects, subsists for quite some time. It is logically ordered, based on a coherent theory and consistently rounded off. It does not contravene the Directive on liability for defective products. To be exact, the Directive explicitly leaves the possibility open to the member states to deny the producer the development risks defense – to maintain or to provide for in their national regulations that the producer *shall be liable* even if he proves that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of a defect to be discovered.

Moreover, this provision offers full protection to the damaged party, whereas it appears that there are no remarks in Serbian legal literature on the externalities of liability for undiscoverable risks on the business of domestic producers and importers. In other words, Article 179 of the Code of Obligations has not provoked so far any debate on difficulties producers might experience in obtaining the insurance against liability or in keeping on with the radical innovations. Therefore, it seems that the provision of the Code of Obligations – with regard to liability for undiscoverable defects – should not be changed without a thorough cost/benefit analysis.

AUTHORS

Ph.D. Danilo Basta, Full Professor, the Faculty of Law University of Belgrade.

Ph.D. Sima Avramović, Full Professor, the Faculty of Law University of Belgrade.

Ph.D. Alan Watson, Full Professor, the School of Law University of Georgia.

Ph.D. Peter Koller, Full Professor, the Faculty of Law, Graz.

Ph.D. Vojislav Stanovčić, Full Professor, the Faculty of Political Sciences University of Belgrade (retired).

Ph.D. Aleksandar Molnar, Full Professor ,the Faculty of Philosophy University of Belgrade.

Ph.D. Dragan Milovanović, Full Professor, Northeastern Illinois University Chicago.

Ph.D. Aleksandar A. Miljković, Scientific Associate, the Institute of Social Politcy (retired).

Ph.D. Vladimir Pavić, Assistant Professor, the Faculty of Law University of Belgrade.

M.A. Marija Karanikić, Research and Teaching Assistant, the Faculty of Law University of Belgrade.