ANNALS

OF THE FACULTY OF LAW IN BELGRADE

INTERNATIONAL EDITION

JOURNAL OF LEGAL AND SOCIAL SCIENCES
BELGRADE 2007

UDC 34/35 : ISSN 1452-6557

The Annals of the Faculty of Law in Belgrade

Year II, 2007, pp. 1-190

UDC 34/35 ISSN 1452–6557

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UDK 342.4(497.11)"2006"

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REPUBLIC OF SERBIA CONSTITUTION OF 2006 – A CRITICAL REVIEW*

Even though the new Constitution in Serbia had been under way for a long time, the draft Constitution that became the Constitution itself was drawn up in haste and unexpectedly, and the procedure of the adoption thereof was the fastest possible one. For all that, no formal legal breaches of the constitution adoption procedure, as specified by the 1990 Constitution, took place, but the objection that the new Constitution was part of the political compromise of the three largest parliamentary political parties, while the broader political and the entire professional community had been excluded, can hardly be ignored. There were two main reasons for such great haste. One was to pre-empt the decision, potentially adverse for Serbia, of the Security Council on Kosmet[1] status, which has been under international military and civil administration since 1999, in a way that the Constitution would state that Kosmet is „within the sovereign country of Serbia". Since the constitution is to be endorsed at the referendum by a majority of the total number of voters in the Republic of Serbia, this attitude would have the protection of the highest level of legitimacy. The other reason for the „lightning" quickness of the adoption of the Constitution is that Serbia, having become an independent and sovereign country after the secession of Montenegro from the state union of Serbia and Montenegro, which was, apparently, not expected to happen, should be given an appropriate constitution, which would express her new „country status".

That the new Constitution was not drawn up in a highly studious manner is best shown by its unacceptably numerous and inexplicable nomotechnical faults, a number of which will create problems in the enforcement of the Constitution. Moreover, Serbia, in its rich constitutional history, has never had a more illiterate

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* Due to the importance of the subject matter examined in this paper and the current interest it excites, as well as because of the impossibility to shorten it, in spite of the good will and readiness of the author, Prof. Ratko Marković, without jeopardizing the analysis performed and arguments presented, the editorial board decided that, in this case only, the departure from the standard length of articles published in "The Annals" should be allowed – Editor-in-Chief's note.

1 The author frequently uses the expression "Kosmet", which is short for Kosovo and Metohia (Translator's note).

Constitution, nomotechnically speaking. On the other hand, the basic concept of the Constitution, the scope of the constitutional subject matter, or the understanding of key constitutional institutes are not essentially different from the previous Constitution of Serbia, which undoubtedly failed to meet the underlying request that the new country needs a new constitution. Following the analysis of the entire content of the New Constitution, from the Preamble to the provisions on constitution creation process, the author concludes that the new Constitution is an improvement on the previous one, but that a new, better constitution has not been passed. The predominant political objective was for the old („Milošević's") constitution to cease to apply, and not to create a new, good constitution.

Key words: *Principles of the Constitution. – Human and minority rights. – Economic organization and public finances. – Government organization. – Territorial organization. – Constitutionality and legality. – Constitutional court. – Amendments to Constitution*.

The Republic of Serbia Constitution of 2006 has two main characteristics. The first one is that it can hardly be considered, although it is newly adopted, to be a new constitution, and the other characteristic is that it has a predominantly political purpose.

According to the scope and systematization of the constitution subject matter and the concept of basic constitutional institutes, as well as to the systematization, this is not a new constitution, but, for the most part, a corrected 1990 Constitution of the Republic Serbia, and according to the normative diction, it is a combination of the formulations of the Constitution of the Republic of Serbia of 1990, the Constitution of the Federal Republic of Yugoslavia of 1992, and the Charter of Human and Minority Rights and Civil Liberties of 2003. The wording not taken over from the said acts have been extremely poorly redacted. But even where the solutions are present here that were not present in the said constitutional acts, they are not novel, but already seen and familiar in comparative constitutional law – in the 1947 Constitution of Italy, the 1958 Constitution of France, the 1978 Constitution of Spain.

Since the Constitution is not novel, the question is why it was necessary. There are two reasons, both political. And that is, at the same time, the basic purpose of this Constitution. The first reason is to create a „distance", „disassociation", „separation", „detachment", with regard to the „Milošević's Constitution", or, more precisely, the Constitution that was passed at the time when Slobodan Milošević was the leading politician in the Republic of Serbia. This Constitution is believed to symbollize the times when Milošević held various public offices. Thus, one of the well-known keepers of Serbia, Javier Solana's spokesperson, Cristina Gallach, on the very next day following the adoption of this Constitution in the Parliament, considering this 'thing' with the Constitution over and done, regardless of the outcome of the referendum in the Republic, stated that it was „a positive thing that Serbia no longer has the Constitution

from S. Milošević's period". Another reason is that the Constitution was to serve as an „election tool", as the means to win the election, to attract votes at the imminent election for the two parliamentary parties whose draft texts served to create the Constitution, and, in general, to make those parties politically stronger. This was achieved by providing the Constitution with an unusual function. This Constitution is expected to preserve Kosmet in Serbia, to save it from being taken away from Serbia, since its final status was soon to be decided on in the UN. Two other parliamentary parties (Serbian Radical Party, SRS, and Socialist Party of Serbia, SPS) that participated in the preparation of the Constitution, by way of undoubtedly great political skills of the leaders of the DSS (Democratic Party of Serbia), which was in the background of the Government's draft of the Constitution, were brought into the activities only of the final redaction of the text not created by them, so the credit for the new Constitution and the benefit it should provide would not be attributed to them. In order to avoid that, the public was informed of the true author of the „most important" provisions in that Constitution.

The Constitution creators also provided their own version of the reason for the adoption of this Constitution. Thus the first reason was to preserve Kosmet permanently „within the sovereign state of Serbia", as „its integral part", which was stated in the Constitution without any mingling of words. And since the Constitution was to be finally adopted at the referendum, in this manner the citizens of Serbia would, in the most legitimate way, claim that Kosmet is an „integral part" of Serbia, i.e. its territory. It was interpreted that to vote for this Constitution at the referendum was the same as to be for Kosmet in Serbia, and vice versa. If in truth this had been so, this Constitution need not have been adopted at all, since the then applicable Constitution of 1990, Article 6, already reads that Kosmet „exists" in Serbia", and that „the territory of the Republic of Serbia is uniform and inalienable" (Article 4). The difference is that according to the 1990 Constitution, the Autonomous Province of Kosovo and Metohia is a form of territorial autonomy, while the 2006 Constitution provides for „substantial autonomy" in this province. Since the Kosmet status is be decided on by the UN, and not by the Republic of Serbia in its Constitution, certain media in the West saw this undertaking with the new constitution as „a fig leaf for losing Kosovo and Metohia". As for the other reason for the adoption of the Constitution, the constitution creators claimed the new „state status" of Serbia, now an independent and sovereign country. Since the change of the country status entails the changes of the constitution, Serbia needs a new Constitution, which would reflect its new country status, different from the one of 16 years before. This reason is well founded indeed, and of all the reasons mentioned was the only one which was objective and valid.

The claim that the 2006 Constitution is not novel as a legal creation may best be proved by studying its contents. Firstly, its organization is almost identical to the organization of the 1990 Constitution. Understandably, the 2006 Constitution does not contain the part „Relation to the Constitution of the Socialist Federal Republic of Yugoslavia", which was present in the Serbian 1990 Constitution, but Part Seven of that Constitution, under the heading „Guarantees of Constitutionality", including three subheadings („Constitutionality and Legality", „Constitutional Court", and „Amendments to the Constitution") was in three parts in the 2006 Constitution, where those parts have the same headings as the subheadings of part Seven of Serbian 1990 Constitution. As for the remaining part, when it comes to organization, the only differences between the two constitutions are in headings (for instance, instead of „bodies" and „organization", as in the Serbian 1990 Constitution, the 2006 Constitution reads „structure") of specific parts governing the same constitutional subject matter.

However, the most important thing connecting these two constitutions is the concept of fundamental constitutional institutes, which is, in most instances, identical. Sporadic corrections, which will be pointed out, result from understandable changes having occurred in the world and in the country creating the constitution during a decade and a half. Let us make use of Lowenstein's metaphor on the constitution as a suit – the same suit can hardly be made to fit sixteen years later. The content differences also result from intrusion of the 2006 Constitution into statutory subject matter, and even the subject matter of the Standing Orders of the Parliament, which is not appropriate for a constitution, and which a good constitution creator must stay away from.

Let us start with the Preamble. As in several constitutions in the world, the text of this Constitution as well is preceded by the Preamble (there are constitutions in the world without a preamble, and it was not present in old Serbian constitutions, nor in both constitutions of the Kingdom of Yugoslavia). A preamble is a kind of preface to the constitution. It should explain why the constitution is adopted and what its desired objective is. Therefore, the preamble is the story about the constitution, while the constitution is the legal norm. A preamble is not a legal norm and therefore its diction is free, sometimes even with a heightened pathos. The 2006 Constitution Preamble has the objective of achieving two things: the first one, the bottom-line of the Serbian 1990 Constitution, that Serbia is the creation of the Serbian people, but that in Serbia all its citizens, and all the national (the text reads: „ethnic") communities are equal, and the other one, to present a „patriotic overture" for the Constitution, to emphasize that the Autonomous Province (the text reads: „Province") Kosovo and Metohiaa is an integral part of the Re-

public of Serbia, that it has the status of „substantial autonomy“ in the sovereign state of Serbia, and „that from such status of the Province (redactor's mistake again, R.M.) of Kosovo and Metohia follow constitutional obligations of all state bodies to uphold and protect the state interests of Serbia in Kosovo and Metohia (an even more significant redactor's mistake, R.M.) in all internal and foreign political relations“. What is the purpose of mentioning Kosovo and Metohia three times in a brief preamble, when it is „within sovereign Serbia“? Since everything „within sovereign Serbia“ is „an integral part of the territory of Serbia“, and thus inseparable from Serbia. That is why this message, bearing in mind the current status of Kosovo and Metohia, is primarily intended for the international public, that Serbia has a constitutional obligation to preserve its territorial integrity and sovereignty in its entire territory, that Serbia has a right to Kosovo and Metohia. That message to the „international community“ may be understood on a national and patriotic basis, but it cannot have any legal effects. The same was stated also in the Serbian 1990 Constitution, even in its normative part, and the UN still exempted Kosovo and Metohia from the state competences of Serbia, although nominally it is still its integral part. Legally, the use of the term „substantial autonomy“ cannot be justified, since it does not possess an established meaning (autonomy may be full or incomplete, and on no account can it be substantial or insubstantial), and, moreover, it can have the opposite meaning from the one it had been intended to achieve. Since substantial autonomy may be the same as sovereignty, it is supreme, unrestricted power, independence. Thus it would turn out that Kosovo and Metohia has sovereign power.

The first part of the 2006 Constitution („Constitution Principles“, Articles 1–17) repeats those very same principles contained in the „General Provisions“, as well as certain Articles from other parts of the 1990 Serbian Constitution and the 1992 Constitution of the Federal Republic of Yugoslavia. Furthermore, the heading „General Provisions“ would be more suitable for the contents of the Articles of this part of the Constitution, since they contain also the provisions which are not principles at all. The constitutional principles are as follows: the principle of civil sovereignty (Article 2), stressed by the formula present in all French Republican constitutions: „No state body, political organization, group or individual may usurp the sovereignty from the citizens, nor establish government against freely expressed will of the citizens“; the rule of law principle (Article 3), which, unlike the Serbian Constitution of 1990, is not reduced to the rule of Constitution and the laws; the separation of powers principle, expressed in the traditional manner (Article 4), while an evident contradiction between paragraphs 3 and 4 of Article 4 is present. Thus, if the „relation between three branches of power shall be based on balance and mutual control“ (incidentally, such a

formulation is more suitable for a textbook on constitutional law than for the Constitution itself), as stated in paragraph 3, the judiciary can hardly be „independent", as stated in paragraph 4. Moreover, Article 145, paragraph 3 of the 2006 Constitution states that „court decisions ... may not be subject to extrajudicial control", while paragraph 4 of the same Article reads that „a court decision may only be reconsidered by an authorised court in a legal proceedings prescribed by the Law". Actually, the text should have read that the relation between legislative and executive powers is based on „balance and mutual control", and that the judiciary is independent; the principle of party pluralism (Article 5), covering all the constitutional regulations on political parties, which is not in line with the heading of that entire part; the principle of prohibition of conflict of interest (Article 6), which is present in the Serbian 1990 Constitution as incompatibility of specific offices and positions. The formulation of that principle in paragraph 2, Article 6 is an example of incomprehensible and inarticulate provisions, and what is meant by „state" and what is meant by „public" office remains unexplained in the Constitution; the principle of integrity and inviolability of the territory of the country (Article 8) is an old constitutional qualification of the state territory, whereas the 2006 Constitution, after the model of French constitutions, provides that the territory is also „indivisible". Should that word serve to indicate territorial wholeness, it is an appropriate, even though a redundant one, but it can, however, preclude internal territorial division of he country, which is not in accordance with the state of affairs, since Serbia, under that very same Constitution, is divided into municipalities, towns, the City of Belgrade and two Autonomous Provinces; the principle of secularism (laicity) of the state (Article 11) is expressed in a traditional manner and supplemented by a provision actually already contained in the meaning of the term of separation of the church and state: „No religion may be established as state or mandatory religion"; the principle of provincial autonomy and local self-government (Article 12) is emphasized by the provision on these two forms of territorial decentralization being subject „only to supervision of constitutionality and legality"; the principle of protection of nationals and Serbs abroad (Article 13) has been needlessly raised to the level of constitutional principle, instead of the protection of nationals being contained in the article on citizenship (Article 38), and the development of relations with Serbs living abroad in article on competences of the Republic of Serbia, since it is already in place (Article 97); the principle of equiparity of international and national law (Article 16) places at the same level the Constitution and the generally recognized rules of international law (the same is confirmed also in Article 167, paragraph 1, point 1), and states that the „generally accepted rules of international law and ratified international treaties shall be an integral part of the legal system in the Republic of Serbia and applied directly", but also that the „ratified international treaties must be in

accordance with the Constitution". The 1990 Serbian Constitution did not contain any such provision, since Serbia at the time of its adoption was not an independent sovereign country. The Constitutional Charter explicitly provided for (Article 16) primacy of international law: „Ratified international treaties and generally accepted rules of international law shall have primacy over the law of Serbia and Montenegro and the laws of the member states „.

Other constitutional provisions in this part are by no means constitutional principles. They provide for state insignia: the coat of arms (Serbia is said to have „its own" coat of arms, as if it were possible for it to have one not belonging to it), flag and anthem (Article 7), capital city (Article 9) and the language and script (Article 10). Three provisions belonging to the part on human and minority rights and liberties are also present here. Those are the provisions concerning the protection of national minorities (Article 14), gender equality (Article 15), and the status of foreign nationals (Article 17).

Prior to formulating the said principles of the Constitution, Article 1 provides a short constitutional „definition" of the state to be defined by these principles. It consists of determining the holders of sovereignty and fundamental values as basis for the state, as well as guidelines in its policies and legislation: „The Republic of Serbia is a state of Serbian people and all citizens who live in it, based on the rule of law and social justice, principles of civil democracy, human and minority rights and freedoms, and commitment to European principles and values". The creators of the Constitution thus have the duty of incorporating each of these values into the Constitution. This duty is not always observed. As for the meaning of these values, there is agreement on the subject to a lesser or higher degree, except for the „principle of civil democracy", which could have hardly been formulated in this form in any constitution. The question is: which democracy is „civil" democracy? Does that expression have an ideological meaning, in the sense of bourgeois democracy as a formal one, as opposed to socialist democracy, as a true one? Or is this the case of democracy enjoyed by all the citizens, i.e. the people. In the latter sense all democracy is civil. In any case, it is a purely political qualification to maintain in a constitution that the state is democratic, based on democracy, since it should result from the entirety of constitutional provisions, and not be presented before all the constitutional provisions. Furthermore, it is not quite clear either what those „European principles and values" are, or which act defines them and what the legal consequences of „commitment" to such principles and values are. In any case, the entire Article 1 is a political declaration which, except for psychological and emotional, has none other, and especially not any legal significance.

Part Two of the Constitution, under the heading „Human and Minority Rights“ (Articles 18–81), by the number of articles is almost equal to the current Constitution of the Fifth French Republic, which contains no provisions on human (and especially not on minority) rights, but only expresses commitment to rights of man „as defined by the Declaration of 1789, confirmed and amended by the Preamble to the 1946 Constitution“, and that only in its preamble. The 1789 Declaration of the Rights of Man and Citizen is a short text, made up only of a preamble and 17 short articles, while the Preamble to the French 1946 Constitution is even briefer, and yet no one claims that rights of man in France are restricted, and that France is not a democratic country. This part of the 2006 Constitution is, by its contents, the incorporation of the 2003 Charter on Human and Minority Rights and Civil Liberties and the relevant provisions of Serbian 1990 Constitution. That part of the Constitution is, normatively speaking, a failure. It is unnecessarily drawn out and detailed, and, it may freely be said, at odds with the nature and diction of constitutional regulations. At present there is no member country of the EU whose constitution contains so many words about human and minority tights, and were we to judge by the Constitution, it would seem that Serbia is a leading country in Europe by the number of human rights and concern for the protection thereof. That unnecessary narration in the Constitution can be avoided simply by listing and defining some basic human rights and minority rights in the constitution of a country, followed by stating that the constitution shall recognize and ensure all other human rights and minority rights recognized by international law, and then provide the sources where such rights have been defined. This is stated in this Constitution as well (Article 18, paragraph 2): „The Constitution shall guarantee, and as such, directly implement human and minority rights guaranteed by the generally accepted rules of international law, ratified international treaties and laws“. At the same time, this part of the Constitution contains most of the text which is non-normative, as well as long and confusing sentences bearing little semblance to legal norm (thus, in Article 20, paragraph 3, the word „restriction“ is used eight time in one short sentence!).

After the model of the Charter on Human and Minority Rights and Civil Liberties, this part of the Constitution is divided into three sections. Section One (Articles 18–22) contains „Fundamental Principles“, or, as is better formulated in the Charter, „General Provisions“. They define the purpose of constitutional guarantees for human and minority rights (Article 19), proclaim the general antidiscriminatory clause related to exercising all human and minority rights (Article 21), proclaim the principle of direct implementation of human and minority rights guaranteed by the Constitution (Article 18), proclaim the principle of judicial protection of liberties and rights guaranteed by the Constitution and the

right to address international institutions for that purpose (Article 22) and define the possibility of restricting human and minority rights (Article 20). All these provisions are present not only in the 1990 Constitution of Serbia, but they were also present in the two last constitutions of Serbia while it was a socialist republic of the Yugoslav federation.

Section Two (Articles 23–74) proclaims human rights in the four most important areas of individual's autonomy – physical integrity, participation in public life, economic and social security, cultural and educational standards. In other words, personal, political, economic and social, cultural and educational human rights are defined here. These provisions are mostly taken over from the Charter on Human and Minority Rights and Civil Liberties, although much improved in comparison to the provisions of the Charter, which often were literal translations from English to poor Serbian (non-legal terms were stricken out, „mammoth" articles and paragraphs were divided into two or more separate articles and paragraphs, and so on). The provisions of this Section, especially the ones concerning human rights, actually intruded into the statutory ground. For instance, a constitution should have no use for a provision like this: „A written decision of the court with explanation for reasons of detention shall be delivered to the detainee not later than 12 hours after pronouncing. The court shall decide on the appeal to decision detention and deliver it to the detainee within 48 hours" (Article 30, paragraph 3). Certain new rights have been proclaimed, like the legal capacity of a natural person (Article 37), right to respect diversity (Article 48), rights of child (Article 64), autonomy of university (Article 72); it is expressly stated that secondary education is free (since no education is free, as no health care is free, the Constitution should read „the expenses shall be borne by the state" or „from public revenue", as is stated in some articles). „Free" higher education has been drastically limited – the state provides it to „successful and talented students of lower property status" (Article 71, paragraph 3). Some of the traditional rights, as, for instance, right to citizenship (Article 38) omit one component of protection – that the national may not be extradited, contained by the 1990 Constitution of Serbia (Article 47, paragraph 2) and the Charter of Human and Minority Rights and Civil Liberties (Article 35, paragraph 2). The possibility was introduced (Article 44) that the Constitutional Court may, due to rather large number of reasons stated in the Constitution, ban a religious community. The guarantees for the freedom of press (Article 50) are more restrictive than the ones contained in the 1990 Constitution of Serbia (Article 46). Economic rights, like in the 1990 Constitution of Serbia, stem from property and work, while social rights and rights related to education were extended, through intruding into the subject matter of statutory acts.

Section Three (Articles 75–81) contains the renumbered articles of the Charter on Human and Minority Rights and Civil Liberties (Articles

47–56) defining the minority rights, with the new protection added by prohibition of „undertaking measures, which would cause artificial changes in ethnic structure of population in areas where members of national minorities live traditionally and in large numbers“ (Article 78, paragraph 3) as well as a broader scope of guarantees under the following: „When taking up employment in state bodies, public services, bodies of autonomous province and local self-government units, the ethnic structure of population and appropriate representation of members of national minorities shall be taken into consideration“ (Article 77, paragraph 2).

This part of the Constitution as well shows a profusion of redactor's mistakes and sloppiness. One should have an especially fine ear for subtlety in order to be able to discern the difference between the „freedom of thought“ (Article 43, paragraph 1) and „freedom to hold opinion“ (Article 46, paragraph 1), or to understand the provision that reads: „Everyone shall have the freedom to manifest their religion or religious beliefs ...“ (Article 43, paragraph 3). This part is the beginning (Article 58), and the next part will be the continuation (Articles 86 and 87) of the equality sign between the expressions denoting property and assets, differently defined in all the civil procedure textbooks.

Part Three of the Constitution („Economic System and Public Finances“, Articles 82–96), divided into two Sections (one being „Economic System“, and the other „Public Finances“), serves to show to what extent the provision from Article 1 of the Constitution, in accordance to which the Republic of Serbia is based, *inter alia*, on „social justice“, is just a formal, non-binding declaration. This Constitution takes no heed of social justice. That smallish part of the Constitution was purged of all the levers and mechanisms of social justice for the benefit of a liberal type market economy. It can easily be seen as early on as in the first article of that part (Article 82), which was drawn up after the model of Article 55 of the 1990 Serbian Constitution. The two principles of economic system present in the 1990 Constitution of Serbia are missing. They are: managing and acquiring based on property and work, and the rights of other citizens to social security. Instead, the 2006 Constitution reads: „The impact of the market economy on social and economic status of the employed shall be adjusted through (*sic*!) social dialogue between trade unions and employers“. And which party is the stronger one in such „social dialogue“ is well known in advance.

The essential novelty in this part, and at the same time, in the entire Constitution, is omission of social property as a form of property (although social property as a separate form of property was not mentioned in the 1992 Constitution of the Federal Republic of Yugoslavia either) and the introduction of the new, aggregate expression of public property,

covering state property, autonomous province property and local self-government unit property. Other two property forms are private and cooperative property. The Constitution openly favours private property. It mentions the „equality of private and other types of property“ (Article 82, paragraph 1), and according to it, „the existing social property shall become private property...“ (Article 86, paragraph 3). Therefore, the so-called transformation of social property is unidirectional. It should be mentioned that the 1990 Constitution of Serbia also provided for transformation of social property, but under market conditions. Article 59 of that Constitution reads: „Property rights and obligations concerning the socially– and state– owned property and the terms and conditions under which such property may be converted into other forms of property shall be regulated by the law. – The socially– and state– owned property shall be disposed of under market terms and conditions, in accordance with the law“. It is not clear also whether the 2006 Constitution places the equality sign between the „goods of public interest“ and the „goods in public use“, or whether it is the case of two different types of things, as would stem from Article 87, paragraphs 1 and 2. According to the lexicon definition (*Pravna enciklopedija, 1*, Beograd, 1985, p. 265), the term „goods of public interest“ is broader and includes also the „goods in public use“. The same position was also held by the 1974 Constitution of the Socialist Federal Republic of Yugoslavia (Article 85). The urban construction land is referred to in the 2006 Constitution as being in private property (according to the 1990 Constitution of Serbia it is state– or socially–owned), and the private property of forests and forested land is not subject to any legal restrictions (according to the 1990 Constitution of Serbia it could be „within the limits as specified by the law“). The novelty of the 2006 Constitution is also the proclaiming of consumer protection, whereby „activities directed against health, security and privacy of consumers, as well as all other dishonest activities on the market shall be strictly prohibited“ (Article 90, paragraph 2).

Section Two of this part, with the heading „Public Finances“ (Articles 91–96) is of rather scant contents, and it is not clear why it was excluded from Section One, entitled „Economic System“. In short, this section specifies the obligation of paying taxes which is general, and „based on economic power of taxpayers“ (Article 91), provides that the state and its territorial units shall have budgets (Article 92), and that „execution of all budgets shall be audited by the State Audit Institution“, and that the Republic of Serbia, autonomous provinces and local self-government units may incur debts (Article 93). The constitutional obligation of the Republic of Serbia shall be to „take care“ of „balanced and sustainable regional development“ (Article 94).

Part Four of the Constitution and its only article (Article 97) is absolutely redundant now that the Republic of Serbia has the character of

an independent sovereign country. Such an article in the constitution is typical for federal states (as a rule) or for federal units of a federal state (as an exception). In a unitary state, such as the Republic of Serbia, the only competences to be listed may be the competences of the territorial autonomy units (provinces, regions, etc.) and of the local self-government units (municipalities, districts, counties, etc.), while the competences of the state are presumed, not listed item by item (competences enumeration method). One such article in the 1990 Constitution of Serbia had a historical justification (the impending secession of certain republics from the Yugoslav federation), but even at that time it was an expression of troubled relations in the Federation, since the competences of the republic were defined by the general clause method in the Constitution of the SFRY. Only a federal constitution provides for the competences either of the federal state, whereby the competences of a federal unit are defined in a negative manner, by the general clause method (all the issues „not within the competences of the federation"), or of a federal unit within a federal state, whereby the competences of the federation are defined in a negative manner, by the general clause method (all the „issues not within the competences of federal units").

Still, the presence of this article entails a legal consequence. The Preamble and Article 182, paragraph 2 of the Constitution state that the Autonomous Province of Kosovo and Metohia should have the so-called substantial autonomy. The presence of Article 97 of the Constitution means that such substantial autonomy may not involve the issues under the competences of the Republic of Serbia specified in that article. However, since the law on substantial autonomy of the Autonomous Province Kosovo and Metohia „shall be adopted under the procedure provided for the amendments to the Constitution", it will have to, in case any of the issues listed in Article 97 of the Constitution are to be covered, amend that article of the Constitution or specify that the entire Article is no longer in force.

Part Five determines the holders of certain state authorities and organizes their relations, and that is why it was given the heading „Organisation of Government" (Articles 98–165). It is not clear for what reason the Constitutional Court is placed separately, in the next, Part Six of the Constitution, as if it were not part of the government, especially since the 2006 Constitution omits the part on „Guarantees of Constitutionality" from the 1990 Constitution of Serbia, or, rather, since that part was divided into three separate parts. The organization of government involves the following governmental organs: the National Assembly, the President of the Republic, the Government, the Public Administration, the Ombudsperson, the Army of Serbia, the courts, the High Judicial Council, the Public Prosecutor's Office, and the State

Prosecutors Council. Since the Constitutional Court, the National Bank of Serbia and the State Audit Institution are not mentioned here, it can be inferred that they are not, for the purposes of the Constitution, governmental organs.

The National Assembly was given the same qualification („holder of constitutional and legislative power“) as the one present in the 1990 Constitution of Serbia. It is still a unicameral representative body made up of 250 deputies. The new qualification, that it is „the supreme representative body“ is not correct, since the President of the Republic, being directly elected, is a representative body of the same level of legitimacy as the National Assembly. In line with the new state status of Serbia, the Assembly was granted some new activities as its competences – to adopt the defence strategy, supervise the work of security services, etc. Its electoral rights were broadened – it appoints and relieves of office the Ombudsperson, which was turned into a constitutional category, instead of being a statutory one.

Instead of by the President of the National Assembly, the election for the deputies is called by the President of the Republic, which is more logical, and, as was confirmed in practice, a better solution. Numerous constitutional provisions concerning the activities of the National Assembly are more of a Standing Orders character and it is not good that they were made part of the Constitution now, since in the future they may be amended under a more difficult, constitutional procedure, and not under the procedure for the amendment or adoption of the Standing Orders of the Assembly.

Certain correction and novelties were introduced into the general concept of the National Assembly from the 1990 Constitution of Serbia, mostly where there were uncertainties and confusions in the constitutionnal practice. In order to avoid a possible arbitration of the Constitutional Court in interpreting the Constitution, it was expressly stated that a deputy's term of office belongs to the political party proposing the said deputy: „Under the terms stipulated by the Law, a deputy shall be free to irrevocably put his/her term of office at disposal to the political party upon which proposal he or she has been elected a deputy“ (Article 102, paragraph 2). This provision, albeit a slightly hypocritical one (since in involves the freedom to waive a right), changed the character of the term of office of deputies. Instead of representing the voters (the people), the results of such a provision are that the deputy represents a party on whose list (by whose proposal) he was elected a deputy. Thus the deputy mandate, although formally and legally free, became imperative in a political sense (the mentioned constitutional solution introduces the possibility of party dismissal). The party may now replace a politically disobedient deputy by another one, since the party is the one disposing of the office.

This practically prejudices the system of distribution of mandates. The said constitutional solution is sensible only within the system of proportional representation, where a party has an election list, a „reservoir“ for replacing deputies from the list of candidates presented for the parliamentary election, and in the majority system it entails a risk of losing a deputy mandate, since the position of the deputy dismissed by the party may be taken by a deputy from the other party. By applying such constitutional provision, in the proportional representation system, a deputy mandate, even in case of dismissal by a party, remains with that party, but in the majority system, in that same case, it may go to another political party.

A novelty is also a very broad circle of offices incompatible with the office of a deputy (deputy „may not be a deputy in the Assembly of the autonomous province, nor an official in bodies of the executive branch of government and judiciary, nor may he or she perform other functions, affairs and duties, which represent a conflict of interest, according to the Law“ – Article 102, paragraph 3).

A new, differentiated manner of decision making was introduced in the National Assembly. The rule is that the National Assembly makes decision by the majority votes of the deputies at the session where the majority of deputies are present. However, in case of specified issues and laws the National Assembly shall decide by the majority votes of all deputies. In addition, the President and one or more Vice-Presidents of the National Assembly are elected by such majority as well. When this „list' is compared to the „list“ of competences of the National Assembly, the question is which of the manners of decision making is the rule, and which one is the exception to the rule.

The number of voters necessary for legislative initiative was increased (from 15,000 to 30,000), which weakened the democratic principle. The institute of dissolution of the National Assembly was further developed. In addition to the solution from the 1990 Constitution of Serbia, that the President of the Republic may dissolve the National Assembly upon the justified proposal of the Government, the solution from the 1992 Constitution of the FR Yugoslavia was added (Article 83, paragraph 2), according to which the Government may not propose the dissolution of the National Assembly if a proposal has been submitted for the vote of no confidence concerning the Government or if the Government has raised the issue of confidence. Moreover, the Government whose term of office has expired may not propose the dissolution of the National Assembly (Article 128, paragraph 5). The solution from 1992 Constitution of the FR Yugoslavia was used as well (Article 82, paragraph 1), according to which the National Assembly shall be „dissolved“ if it fails to elect the Government within 90 days from the day of its

constitution (Article 109, paragraph 3). This is a redactor's mistake. It is not the case of „dissolving" the National Assembly, but the termination of mandate by force of Constitution (*ex constitutione*). The President of the Republic shall issue a decree to dissolve the National Assembly and to call a new election in the following two cases specified by the Constitution: one, „if the National Assembly fails to elect the new Government within 30 days from the passing of a vote of no confidence" concerning the current Government (Article 130, paragraph 4) and the other, „if the National Assembly fails to elect the new Government within 30 days from the day of confirmation of the resignation of the Prime Minister" (Article 132, paragraph 5). And finally, the 2006 Constitution provided the solution that had long been called for, concerning the legal consequence of the dissolution of the National Assembly. The dissolved National Assembly does not cease to exist, it continues to „perform current or urgent tasks, stipulated by the Law. In case of declaration of the state of war or emergency, its full competence shall be re-established and last until the end of the state of war or emergency." (Article 109, paragraph 7). Thus the opinion that the dissolved Assembly is no longer in existence, relying on the reasoning of Slobodan Jovanović, was explicitly disposed of. Namely, relying on the 1921 Constitution of the Kingdom of Serbs, Croats and Slovenians (*Vidovdanski Ustav*), Slobodan Jovanović maintained: „The Assembly having been dissolved may no longer be in session, as well as the Assembly whose term of office has expired; the rule is that the Assembly which was dissolved no longer exists" (S. Jovanović, *Ustavno pravo Kraljevine Srba, Hrvata i Slovenaca*, Beograd, 1924, p. 156).

The President of the Republic was granted some new powers as his competences, stemming from the changed status of the Republic of Serbia. They are the following: appointing and dismissing, upon his/her decree, ambassadors of the Republic of Serbia, upon the proposal of the Government; receiving letters of credit and revocable letters of credit of foreign diplomatic representatives; in accordance with the law, commanding the Army and appointing, promoting and relieving officers of the Army of Serbia. The last mentioned is at the same time also the highest power held by the President of the Republic. The President of the Republic no longer holds independent authorities of that office which were held in the so-called situations of necessity according to the 1990 Constitution of Serbia. His acts are still not subject to the countersignatures of the competent Minister, the Prime Minister, or the entire Government.

The Constitution reformed (Article 113) the institute of a suspendsive legal veto, for the first time provided for in the 1990 Constitution of Serbia (Article 84). However, the constitutional formulation of the su-

spensive legal veto has been redacted so clumsily that it can be interpreted in two different manners. The Constitution reads that within a slightly extended deadline (from seven to 15 days of the day of passing of the law) the President of the Republic, with a written explanation (which was not a constitutional requirement previously), may return the law, submitted to him for promulgation, to the National Assembly „for reconsideration". And then: „If the National Assembly decides to vote again on the law, which has been returned for reconsideration by the President of the Republic, the law shall be adopted by the majority vote from the total number of deputies" (Article 113, paragraph 2). The question here concerns the meaning of the part of this sentence: „if the National Assembly decides to vote again on the law". Can it be that the National Assembly may decide not to vote again on the law, to give up on the law? Is it to decide to vote again on the law only where they fail to adopt the suggestions of the President of the Republic? What happens when all the suggestion of the President of the Republic are adopted by the National Assembly? When it comes to the repeated voting on the law in the National Assembly after a suspensive veto, for the laws which are to be adopted by a simple majority (majority vote of deputies) it is a more difficult procedure of re-adoption, and for the laws which are to be adopted by the majority of all deputies, it means achieving once again the majority already achieved. In any case, the application of this provision will give rise to serious problems and the question is what direction its interpretation will take. Nonetheless, the President of the Republic shall promulgate the law voted on again, as it is the case in the 1990 Constitution of Serbia; however, the 2006 Constitution reads: „if the President of the Republic fails to issue a decree on promulgation of the law within the deadline stipulated by the Constitution, the decree shall be issued by the President of the National Assembly" (Article 113, paragraph 4).

With regard to the election of the President of the Republic, the same solutions remain as the ones present in the 1990 Constitution. The text of the oath taken by the President of the Republic has been corrected in that that it is stated that the preservation of the sovereignty and integrity of the territory of the Republic of Serbia includes also Kosovo and Metohia as its constituent part, as if it had not been the case so far, and as if Kosovo and Metohia had become part of Serbia only as of this Constitution.

One of the grounds for the termination of term of office of the President of the Republic (the other is resignation) is no longer recall, but dismissal. The dismissal mechanism was taken over form the 1992 Constitution of Montenegro (Article 83, paragraph 2, and Article 87), but in the 2006 Constitution of Serbia the formulation of the relevant article

(Article 118) is so distorted and confusing that it cannot be seen that the National Assembly may dismiss the President of the Republic only when the Constitutional Court finds that he has violated the Constitution. Namely, the mechanism of this institute is as follows: the President of the Republic may be dismissed for the violation of the Constitution; the dismissal procedure may be instigated by the National Assembly upon the proposal of at least one third of the deputies; whether the Constitution has been violated shall be determined by the Constitutional Court within 45 days at the latest; the decision on dismissal may be made by the National Assembly by votes of at least two-thirds of the deputies. The essential objection to this mechanism is that the President of the Republic is dismissed by those who did not grant him his mandate, the ones who did not elect him to office. By making it easer to dismiss a President of the Republic than to elect him, and by narrowing the scope of his functions in comparison to the one provided by the 1990 Constitution of Serbia, this constitutional function has been made even more impotent than it was.

The 2006 Constitution, due to the situations we experienced, specifies that the President of the National Assembly may substitute for the President of the Republic for the period three months at the most.

In the part on government organization, the 2006 Constitution had the largest number of interventions, in comparison to the 1990 Constitution of the Republic of Serbia, concerning the Government itself. These interventions made parliamentarism in Serbia „tighter", or as the theory would say, „rationalized". The elements of this „rationalization" are as follows: 1) vote of no confidence to the Government or to a member of Government may be initiated by at least 60 deputies (according to the 1990 Constitution of Serbia, at least 20 deputies); 2) the proposal for the vote of no confidence to the Government or to a member of Government may be considered by the National Assembly five days following the submittal of the proposal at the earliest (according to the 1990 Constitution of Serbia, at least three days); 3) where the National Assembly fails to elect a new Government within 30 days of the voting of no confidence, the President of the Republic shall dissolve the National Assembly and call the parliamentary election (the 1990 Constitution of Serbia contained no such provision); 4) if the Government or a member of the Government is voted confidence, the signatories of the proposal may not submit a new motion for the vote of no confidence prior to the expiry of the time period of 180 days (the 1990 Constitution of Serbia contained no such provision); 5) interpellation (previously this was the category belonging to the parliament's Standing Orders) concerning the same issue may not be submitted prior to the expiry of the period 90 days from the submittal of the previous interpellation.

The 2006 Constitution performed the constitutionalization of interpellation – the interpellation was turned into a constitutional category instead of a Standing Orders one (Article 129). Now it is in immediate relation to the vote of no confidence to the Government or to a member of the Government, since in case the National Assembly should fail to endorse the response to the interpellation, the vote of no confidence to the Government or to a member of the Government shall take place, unless the Prime Minister, or a relevant member of the Government has resigned following the rejection of the response to the interpellation.

Individualized position of the Prime Minister migrated from the current Law on Government (2005) into the 2006 Constitution. The Article 12, paragraph 1 of the Law on Government became the provision of Article 125, paragraph 2 of the 2006 Constitution. It specifies the functions of the Prime Minister. The Ministers shall be accountable for their work and the situation within the competences of the Ministries not only to the Government and to the National Assembly, but to the Prime Minister as well (Article 125, paragraph 3). An expression of such a role of the Prime Minister is also the provision of the Constitution according to which „a member of the Government may tender his/her resignation to the Prime Minister" (Article 133, paragraph 1). According to the 1990 Constitution of Serbia, a member of the Government submitted his resignation to the National Assembly (Article 93, paragraph 8). The Prime Minister (not the Government) is granted special powers when the state of emergency or the state of war has been proclaimed, as well as when prescribing measures derogating from human and minority rights, prescribed by the Constitution when the National Assembly is unable to convene (Articles 200–201).

The 2006 Constitution provides for the public administration as a separate unit in Constitution systematization, within the part on the organization of the state, which means that the provisions referring to public administration are not present in the section on the Government (as was the case in the 1990 Constitution of Serbia). The Constitution does not list the activities of the public administration, but only defines who performs them („ministries and other public administration bodies, stipulated by the Law"). That the public administration is the holder of the same power (executive power) as the Government can be seen from the constitutional provisions specifying that the public administration shall be accountable for its work to the Government, which defines (as stated in a separate constitutional provision) the internal organization of Ministries and other public administration bodies and organizations.

The two state authorities referred to in the 2006 Constitution were not constitutional categories previously. They are the Ombudsperson (statutory category as of 2005) and the Army (which was the category of

the federal Constitution, and from 2003, of the Constitutional Charter). And while the constitutional provisions on the Ombudsperson provide orientation enough for the legislator to legally form this institution, the three existing short provisions on the Army of Serbia are extremely poor in content and insufficient to comprehend the concept of that institution. The function of the Army of Serbia was reduced to defending the country „from external armed threat" (Article 139). Furthermore, it is not usual that nowhere in the Constitution is the military service duty raised to the level of the constitutional obligation of the citizens.

Constitutional principles on courts remain unchanged in comparison to the 1990 Constitution. They are: autonomy and independence of courts; constitutionality and legality (the 2006 Constitution expands this principle, since the courts decide not only in accordance with „the Constitution, Law and other general acts", but also, pursuant Article 142, paragraph 2, in accordance with the „generally accepted rules of international law and ratified international treaties", only to be followed immediately afterwards, in Article 145, paragraph 2 by the omission of the „generally accepted rules of international law", since „court decisions are based on the Constitution and Law, the ratified international treaty and regulation passed on the grounds of the Law", and Article 149, paragraph 1, omits both the ratified international treaties and regulations adopted based on laws, since the judge, in performing his judicial office shall be „responsible only to the Constitution and the Law"); public character of the hearing before a court; court trials conducted by judge panels (collegiality of conducting trials); permanence of judicial office (but not in the absolute sense, as in the 1990 Constitution of Serbia, which is the weakening of constitutional guarantees for judicial independence; immovability („non-transferability", as expressed in the Constitution) of the judge (but then again not in an absolute form as in the 1990 Constitution); incompatibility of judicial office with other public offices, activities or private interests; judicial immunity; participation of judges and lay judges in conducting trials.

In this area the novelties in comparison to the 1990 Constitution of Serbia refer only to the appointment of judges, but there as well matters progressed only mid-way in emancipation from the influence of the political factor (the National Assembly) on the appointment. To be precise, the President of Supreme Court of Cassation (being „the highest Court in the Republic of Serbia"), upon the proposal of the High Judicial Council and having received the opinion of the general session of the Supreme Court of Cassation and the relevant committee of the National Assembly, shall be appointed by the National Assembly for the period of five years. Similarly, the National Assembly, on the proposal of the High Judicial Council, shall appoint for a judge a person elected for judicial

office for the first time, and, for that reason, his term of office shall be only three years. Under the same procedure (the proposal of the High Judicial Council and election in the National Assembly) the presidents of all courts are appointed (Article 99). It is hard to understand the logic whereby the president of the highest court in the country, the judge – high priest, as well as the first time judge, a judge – deacon, are appointed under almost identical procedures. All the other judges for permanent holding of judicial office, in the same or different court, shall be appointed by the High Judicial Council.

The 2006 Constitution recognizes the now uniform institute of the termination of judicial office, for the three groups of reasons: 1) at the request of the judge; 2) by occurrence of the „terms stipulated by the Law"; 3) by relieving of office for the „reasons stipulated by the Law". As expected, the term of office of the judge appointed for the first time for judicial office shall terminate if, upon the expiry of the three year terms, he is not appointed for the permanent judicial office. These solutions of the 2006 Constitution significantly weakened the guarantees of judicial permanence, and thus independence as well, since the prescription of conditions and grounds for relieving judges was left to the law, instead of, as was the case in the 1990 Constitution of Serbia, defining them here. The deconstitutionalization of the grounds for termination and for relieving from judicial office weakens the position of the judiciary as an independent branch of power in the system of governance. The decision on termination of a judicial official is made by the High Judicial Council, and the judge may appeal this decision to the Constitutional Court, and the lodged appeal precludes the right to lodge a constitutional complaint. Such a solution shows a lack of understanding of the „spirit" of the institution of the Constitutional Court. The dispute concerning termination of a judicial office is not a constitutional dispute, it does not concern the violation of the Constitution as is the case with the constitutional complaint, so the Constitutional Court should not be competent for deciding on that matter. By placing the decision on this dispute within the competence of the Constitutional Court, that Court is made into an instance court, which it can on no account be by its very nature. The decision on termination of the office of the President of the Supreme Court of Cassation shall be made by the National Assembly, where the decision on relieving from office is made upon the proposal by the High Judicial Council. The Constitution does not provide for the possibility of appealing against that decision, not does it specify who is to decide on the termination of office of the President of the Court.

Institutional companion of these solutions in relation to the appointment of judges and termination of judicial offices is the High Judicial Council, which became a constitutional category instead of a statutory

one. Its competences are almost exhausted in these issues. That is why it is difficult to agree with the thesis that the High Judicial Council is an authority of the judicial branch of power, as it is difficult to determine its legal nature. In addition, it is clearer what this body is, than what it is not. It is made up partly of members by office (the President of the Supreme Court of Cassation, the Minister in charge of the judiciary, and the President of the relevant committee of the National Assembly), partly of appointed members (six judges holding a permanent office, one of whom is from the territory of autonomous provinces, and the two „respected and prominent lawyers" /in all the dictionaries of the Serbian language the two words used are synonymous/ with at least 15 years of professional experience, one of which an attorney-at-law, the other a Professor of Law School). All the appointed members are appointed by the National Assembly (Article 153, paragraph 3), which is not listed in its competences (Article 99) within its „election rights", where it is even stated that it shall „appoint and dismiss other officials stipulated by the Law", but not by the Constitution! However, even if we were to leave aside these redactor's mistakes, it is difficult to agree with the solution that most members of the authority which is to serve as the guarantee of judicial independence are appointed by the representative body where decisions are made in accordance with the party affiliation. A member of the High Judicial Council is said to „enjoy immunity as a judge". And this, in relation to Article 151, paragraph 2 of the Constitution, means that the immunity of a member of the High Judicial Council is to be decided on by the High Judicial Council! In addition, an „appeal" may be lodged against a decision of the High Judicial Council with the Constitutional Court, which only deepens the dilemma on the legal nature of its acts and on it as an „independent and autonomous body". Furthermore, this solution provides the Constitutional Court with the completely inadequate character of an instance court, and it is entrusted with resolving a dispute which is on no account a constitutional dispute.

The activities of the Public Prosecutor's Office show no changes in the 2006 Constitution as compared to the 1990 Constitution. It is still an independent state authority prosecuting the perpetrators of criminal and other punishable offences, and undertaking activities for the protection of constitutionality and legality. The relations within the Public Prosecutor's Office are based on vertical centralization principle: public prosecutors are accountable for the activities of the public prosecutor's office and their work to the Republic Public Prosecutor and the National Assembly, and junior public prosecutors are accountable directly to the senior public prosecutor as well. Deputy public prosecutors are accountable for their work to the public prosecutor. Republic Public Prosecutor shall be accountable for the activities of the Public Prosecutor's Office and for his work to the National Assembly.

In comparison to the 1990 Constitution of Serbia, the principle of permanence of the public prosecution office was abandoned (the term of office of the Republic Public Prosecutor is six years, and he can be re-appointed to the same office), and a differentiated legal regime for the appointment to office, termination of office and the term of office of the public prosecutor, on the one hand, and the deputy public prosecutor, on the other, was introduced. In other words, the legal regime for the public prosecutor is different from the legal regime in for the deputy public prosecutor. The solution for the public prosecutors from the 1990 Constitution of Serbia was retained, that they are appointed by the National Assembly, but now it is further specified that it is to take place „on the Government proposal" (Article 159, paragraph 2). For the appointment of the Republic Public Prosecutor, carrying out the competences of the public prosecutor's office within the rights and duties of the Republic of Serbia, it is necessary also to obtain the opinion of the relevant committee of the National Assembly. As regards the termination of the term of office of the public prosecutor, procedurally the same rules as for the appointment of the public prosecutor apply. The decisions on the termination of office of the Republic Public Prosecutor and public prosecutors are made by the National Assembly, and the decision on dismissal is made by the National Assembly upon the proposal of the Government. The public prosecutor in question may lodge an appeal against it to the Constitutional Court, where the lodged appeal shall preclude the submittal of the constitutional complaint (once again here the sloppiness of the redactor may be seen, so a public prosecutor may „lodge", *uložiti,* an appeal with the Constitutional Court, and the appeal is „submitted", *izjavljena,* to the Constitutional Court...). These solutions open up issues of legal nature of the act on termination of public prosecution office. Nevertheless, the grounds for termination of the public prosecution office are, *mutatis mutandis*, the same as the grounds for termination of a judicial office. They are: 1) if he is not re-appointed (bearing in mind the specified term of office); 2) at his own request; 3) occurrence of „legally prescribed conditions"; 4) relief of office for „reasons stipulated by the Law". As in case of termination of a judge's office, the fact that the „conditions" and the „reasons" are prescribed by law, and not directly by the Constitution, may influence the independence of the holders of public prosecution office. Here as well the deconstitutionalization of these conditions and reasons has taken place. In any case, among the constitutional provisions concerning the public prosecutor's office there is no relevant provision (Article 149) which is present in the section on the court and reads as follows: „In performing his/her judicial function, a judge shall be independent and responsible only to the Constitution and the Law. – Any influence on a judge while performing his/her judicial function shall be prohibited." By the letter of the Constitution (which is doubtlessly a

grave redactor's mistake) the public prosecutor's office is not bound by the generally accepted rules of international law, since it „shall perform its function on the grounds of the Constitution, Law, ratified international treaty and regulation passed on the grounds of the Law" (Article 156, paragraph 2).

As for the deputy public prosecutor, different rules are in place when it comes to the appointment, termination of office and duration of term of office. In order to carry out the appointment and decide on the termination of the mandate of a deputy public prosecutor, the new constitutional body is established, called the State Prosecutors Council, whose competences are exclusively related to deputy public prosecutors. That is why it is not clear why this body is defined in the Constitution as „an autonomous body which shall provide for and guarantee the autonomy (it should probably read „independence", R.M.) of public prosecutors (according to the list of competences of that body as provided in Article 165 of the Constitution, public prosecutors are not within its scope, R.M.) and deputy public prosecutors..." (Article 164, paragraph 1). In analogy to the High Judicial Council, this body is made up of members by virtue of their office (Republic Public Prosecutor, the Minister competent for the judiciary, and the President of the relevant committee of the National Assembly) and eight appointed members (six public prosecutors or deputy public prosecutors with permanent office, one of whom is from the territory of an autonomous province, and two „respected and prominent" lawyers with at least 15 years of professional experience, one of whom is an attorney-at-law, and the other a Professor at Law School).

Regarding deputy public prosecutors, as well as is the case with judges, there is a difference between the procedure for appointing a first-time deputy public prosecutor and the procedure for appointing a deputy public prosecutor for permanent office in the same or other public prosecutor's office. The former is appointed by the National Assembly at the proposal by the State Prosecutors Council and the duration of term of office is three years, while the latter is appointed by the State Prosecutors Council and granted a permanent office of the deputy public prosecutor. Once again, it is somewhat of a paradox that the deputy public prosecutor is appointed to office for the first time, and for a relatively short period, under a more difficult procedure (the State Prosecutors Council only proposes him, and the National Assembly appoints him) than the one provided for the deputy public prosecutor appointed to permanently hold the office. The decision on termination of office for the deputy public prosecutor is made by the State Prosecutors Council on the same grounds as for the termination of office of the public prosecutor. The deputy public prosecutor may appeal against the decision to the Constitutional Court, which precludes the right to lodge a constitutional complaint.

Judiciary is the only branch of power whose institutional holder is not provided with a separate article by the Constitution, if we take the Supreme Court of Cassation as an embodiment of the judiciary. The provision concerning that court is contained in paragraph 4, Article 143, and reads: „The Supreme Court of Cassation shall be the highest Court in the Republic of Serbia".

Generally speaking, the provisions of the 2006 Constitution concerning the courts and public prosecutor's office do not contain clear-cut solutions in line with the principles, a large number of proven mechanisms for establishing judicial and prosecuting independence were weakened, the guarantees of independence deconstitutionalized, and, in addition, the redaction of the normative text is impermissibly poor.

The Constitutional Court may have undergone most changes in the 2006 Constitution as compared to the 1990 Constitution of Serbia (the 2006 Constitution, Part Six, Articles 166–175). First, its competences were expanded, at times even to the cases that are not constitutional disputes at all. Nonetheless, it is still the state organ whose primary function is to protect constitutionality and legality from violations by general legal acts, although the 2006 Constitution underlines, to a greater degree than was the case before, its function of the conflict court (the court for resolving conflicts of jurisdictions). Its subsidiary competence for resolving election disputes also remained present (it shall „decide on electoral disputes for which the court jurisdiction has not been specified by the Law").

Since the 2006 Constitution states that „generally accepted rules of international law and ratified international treaties shall be an integral part of the legal system in the Republic of Serbia" and that „ratified international treaties must be in accordance with the Constitution" (Article 16, paragraph 2), the Constitutional Court is to decide on the compliance of laws and other general acts with the Constitution, generally accepted rules of international law and ratified international treaties, as well as on the compliance of ratified international treaties with the Constitution. The legal system of the Republic of Serbia has the following structure. The Constitution and the generally accepted rules of international rules are at the top. Below them are ratified international treaties, below them the laws, and then implementing general acts, issued by various authorities, which must be in accordance with the Constitution and the law. The Constitutional Court is responsible for preserving and protecting such relations in the legal system of the state of Serbia, which are expressed as constitutionality and legality.

The Constitutional Court does not try individual natural and artificial persons, but legal acts, whether general or individual. Constitutionality and legality may be infringed by general, but also by individual

acts of state organs and holders of public offices, and even by their actions. In the latter case, where individual acts or actions infringe or abolish human and minority rights and liberties, a constitutional complaint may be lodged with the Constitutional Court „if other legal remedies for their protection have already been exhausted or not specified" (Article 170). With regard to constitutional complaint, two things are not clear: why it is, although a competence of the Constitutional Court, present in a separate Article of the Constitution, instead of being listed in the one determining the competences of the Constitutional Court (Article 167), and, also, who the holder of the right to a constitutional complaint is (is it only the person believing that his human or minority right guaranteed by the Constitution has been infringed, or any person). The latter should have been regulated by the Constitution and on no account was it to be left to legal regulation. A variation of the constitutional complaint is an appeal that the judge (the Constitution does not specify who the holder of the right to appeal is) may lodge with the Constitutional Court against the decision of the High Judicial Council (Article 155), as well as an appeal that a public prosecutor and a deputy public prosecutor may lodge with the Constitutional Court „against the decision on termination of their tenure of office" (Article 161, paragraph 4).

It is a rule that the Constitutional Court decides on the constitutionality and legality of the applicable laws and other general acts in force. However, under certain circumstances, it can decide also on the constitutionality and legality of regulations and other general acts no longer in effect, as well as on the constitutionality of the laws not yet in force. The former instance was regulated also in the 1990 Constitution of Serbia, while the latter, after the model of the 1958 Constitution of France, was introduced for the first time by the 2006 Constitution. Thus, the Constitutional Court may review the compliance of laws and other general acts with the Constitution, as well as the compliance of general acts with the laws, even following the cessation of their being in effect „if the proceedings of reviewing the constitutionality has been instituted within no more than six months since they ceased to be effective" (according to the 1990 Constitution of Serbia, within one year from ceasing to be effecttive). Moreover, the Constitutional Court may review the constitutionality of the law passed in the National Assembly, but not yet promulgated by a decree (the so-called preventive review of the constitutionality of laws, which we advocated during general debates concerning the necessity of changing the 1990 Constitution of Serbia). This preventive review of the constitutionality of laws is a powerful instrument in the hands of parliamentary opposition, since they, even when having lost to the votes of parliamentary majority (whose political interest may be the adoption of an unconstitutional law as well), have a means of preventing the coming into force of an unconstitutional law. The Constitutional Court has the

duty to examine the constitutionality of such law within seven days, at the request of at least one third of the deputies. If the Constitutional Court reaches a decision that the law in unconstitutional prior to its promulgation, the Constitution states that „that decision shall come into force on the day of promulgation of the law". However, if such law is promulgated prior to reaching a decision on constitutionality, the Constitutional Court is to continue acting on the request, in accordance with the regular procedure for the review of the constitutionality of laws. Where the Constitutional Court finds, prior to the promulgation of the law (the Constitution wrongly reads „prior to its coming into effect", since it promulgation and coming into effect are wrongly taken to be synonymous), that the law is in compliance with the Constitution, the procedure for reviewing the constitutionality of that law may no longer be undertaken.

The institute of preventive review of the constitutionality of laws in the 2006 Constitution (Article 169) was quite improperly founded. First of all, the time period of seven days from the adoption of the law in the National Assembly for the review of constitutionality is unrealistic, and it should be, as in France, at least a month. The Constitution does not provide for the beginning of this time period, but it would be logical to conclude that it should start on the day of the submission of the „request" by one third of the deputies to the Constitutional Court. The rationale for this institute is to prevent the promulgation of an unconstitutional provision of the law (or, potentially, the unconstitutional law in its entirety), so that the possibility provided by the Constitution, that the law is promulgated prior to deciding on its unconstitutionality, is unfamiliar to that institute. In France, the time period for the promulgation of the law ceases to run until the Constitutional Council reaches a decision on its constitutionality. Further indication of failure to understand this institute is also the provision pursuant to which the decision of the Constitutional Court on the unconstitutionality of the law prior to its promulgation is to come into effect on the day of the promulgation of the law. The essence of this entire institute is for the unconstitutional provision of the law (the entire law would be a rare case indeed) to be prevented from being promulgated, as is clearly stated in Article 62, paragraph 1 of the 1958 French Constitution: „The provision found to be unconstitutional may not be promulgated or applied". And, finally, the 2006 Constitution, providing that „the proceedings of review of the constitutionality may not be instituted against the law whose compliance with the Constitution was established prior to its coming into force" abolishes any potentially unconstitutional provision in the law subjected to preventive review of constitutionality for the duration of its being in force, since the entire law is made immune to the constitutionality review. However, the application of the law may show that a different provision, which was not subject to preventive review of constitutionality, is unconstitutional.

When concluding the competences of the Constitutional Court (in Article 167), the Constitution provides in paragraph 1, Article 167, that the Constitutional Court shall „perform other duties stipulated by the Constitution and the Law", only to provide in paragraph 3 of the same Article that „the Constitutional Court shall perform other duties stipulated by the Constitution". In one and the same Article, Regulating the issue in a different manner in one and the same Article could be seen only during practical nomotechnical work of unsuccessful freshmen at Law School. And now something like that exists in the highest legal act of the state of Serbia, in its Constitution.

It is not clear why the number of justices of the Constitutional Court was increased from nine to fifteen, when in the US, the federal Supreme Court, which serves as the Constitutional Court in addition to its regular judiciary activities, has only nine justices. Probably because the 'key' for the composition and appointment of the Constitutional Court justices was taken over from the 1947 Italian Constitution, where it is provided (Article 135) that the Constitutional Court has 15 justices. When appointing the justices the principle of three-branch separation of powers is observed. Each of the three branches, embodied in a state authority (the National Assembly, the President of the Republic, the Supreme Court of Cassation), appoints one third of the justices.

The Constitution also provided (Article 172, paragraph 3) how the authorities participating in the appointment of the Constitutional Court justices find the candidates for the appointments. Thus, the National Assembly shall „elect", „*bira*", five Constitutional Court justices from among the ten candidates proposed to it by the President of the Republic, the President of the Republic shall „appoint", „*imenuje*", five Constitutional Court justices from among the ten candidates proposed to him by the National Assembly, and the general session of the Supreme Court of Cassation shall „appoint", „*imenuje*", five Constitutional Court justices from among ten candidates proposed to it, at the joint session, by the High Judicial Council and the State Prosecutors Council. The third manner of nomination is disputable here. The candidates for the appointment of the Constitutional Court justices, to be carried out by the Supreme Court of Cassation (in general session), are to be determined by the High Judicial Council, the body „appointing judges for permanent judicial office", and, accordingly, the judges in the Supreme Court of Cassation as well, and the State Prosecutors Council, the body appointing „deputy public prosecutors for permanent office". There the role of the High Judicial Council is illogical, and the role of the State Prosecutors Council inappropriate. The High Judicial Council appointed the judges of the Supreme Court of Cassation; however, in that relationship it is but a party proposing the decision to be made by the body whose appointment it

carried out. The State Prosecutors Council decides on the appointment and status of deputy public prosecutors, and has nothing to do with the judiciary. A particularly arbitrary phrase is the „joint session“ of these two bodies with no links between them, where the ten candidates for the Constitutional Court justices are to be determined. The Italian model should have been consistently followed, and thus it should be provided for a third of the Constitutional Court justices to be appointed by highest regular and administrative judicial authorities (three justices are appointed by the Court of Cassation, and one each by the State Council, as the administrative supreme court, and the Court of Auditors).

The new solution, already applied in the 1992 Constitution of the FR Yugoslavia, is that the President of the Constitutional Court is elected by secret ballot of the Constitutional Court justices from their ranks, for the period of three years (the solution familiar from the Italian 1947 Constitution, Article 135, paragraph 3). For the first time since the introduction of constitutional judiciary into Serbia (1963), the Constitution prescribes the requirements for the appointment of the Constitutional Court justice: „A justice of the Constitutional Court shall be elected and appointed from among the prominent lawyers of at least 40 years of life and 15 years of relevant professional experience“ (Article 172, paragraph 5). The Italian Constitution (Article 135, paragraph 2), reads: „The justices of the Constitutional Court are elected from among active and retired judges of the highest regular and administrative courts, Full Professors of juridical subjects and attorneys-at-law having practiced the profession for twenty years“. This formulation is better, since it provides a more precise definition of who a „prominent lawyer“ is.

The term of office for the Constitutional Court justices is nine years, which means that the solution from the Serbian 1990 Constitution, providing for the permanency of office for the Constitutional Court justices, which had been, and quite rightly, criticized at the time, was abandoned, since the Constitutional Court justice is not a profession, like being a judge of the regular court. One person may be elected or appointed for the Constitutional Court justice two times at the most. The Constitutional Court justice may not hold any other public or professional office or be employed, except for being Professor at a Law School in the Republic of Serbia (this exception was not allowed by the 1990 Constitution of Serbia).

The issue of termination of office of the Constitutional Court justice was taken over, with slight corrections, from the 1990 Serbian Constitution. According to that solution, the Constitutional Court justice’s office shall terminate: 1) upon expiry of the time period for which he was elected or appointed; 2) at his request; 3) after meeting the requirements prescribed by law for age-related pension; 4) by being

relieved of office. The Constitutional Court justice is relieved of office: 1) if he violates the prohibition of the conflict of interests (incompatibility of the judicial office); 2) in case of permanent loss of capacity to perform duties of office of the Constitutional Court justice („which shall be determined by the Constitutional Court" should have been added here); 3) in case he is sentenced to imprisonment or for a punishable offence rendering him unworthy of office of the Constitutional Court justice. The determination of these grounds in the Constitution is a powerful guarantee of independence of the Constitutional Court justices in carrying out their primary duty – reviewing the constitutionality of the laws. Although the Constitutional Court justices are elected by three different authorities, the termination of their office is decided on by only one – the National Assembly, „on request of authorised initiators for election or appointment for election of a justice of the Constitutional Court" (Article 174, paragraph 3). The initiative for commencing a procedure for relieving of office may be taken for the Constitutional Court as well.

The remaining two issues concerning the Constitutional Court (the previous two are competences, and election and composition) – the initiation of proceedings and decision making and the effect thereof – were resolved on the same basis as in the 1990 Constitution of Serbia. The proceedings before the Constitutional Court are to be initiated by authorized initiators. They are: state organs, organs of „territorial" (once again a redactor's mistake, since the Constitution mentions „provincial autonomy" all the time) autonomy or of local self-government, as well as at least 25 deputies. The provision of the Constitution specifying the circle of initiators for triggering the proceedings before the Constitutional Court (Article 168, paragraph 1) results in authorities of territorial autonomy and local self-government being able to initiate the procedure for reviewing the constitutionality and legality of any law or other general act. However, Article 187, paragraph 1, provides that the authority designated by the statute of an autonomous province may do so only against such law or other general act that „obstructs performing the competences of the autonomous province", while the authority designated by the statute of municipality may do so only against the law or other general act that „violates the right to local self-government" (Article 193, provision 2). The provision specifying that even at least 25 deputies may initiate the proceedings before the Constitutional Court is another powerful means in the hands of the parliamentary opposition, which thus has a protector of its position in the Constitutional Court. The Constitutional Court may also initiate the proceedings.

The initiative for commencement of the proceedings may be submitted by any natural or artificial person. The initiation does not oblige the Constitutional Court to commence the proceedings, unlike the pro-

posal for initiating the proceeding of the initiator authorized by the Constitution. The Constitutional Court decides by majority vote of all justices; however, the decision for the Constitutional Court to decide on its own (the Constitution reads „autonomously“) to initiate the reviewing of the constitutionality and legality is made by two-third majority of votes of all justices. The decisions of the Constitutional Court are final, enforceable and generally binding. Where the Constitutional Court finds that the law or other general act is not in compliance with the Constitution, or that a general act is not in compliance with the law, the said law or general act is to cease to apply on the day of the publication of the decision of the Constitutional Court in the official journal. The 2006 Constitution preserved the institute of suspension of enforcement of the individual act or action „undertaken on the grounds of the Law or other general act whose constitutionality or legality it reviews“ until the final decision of the Constitutional Court is made (Article 168, paragraph 4), which used to be a statutory institute (Law on Procedure before the Constitutional Court and on Legal Effects of Its Decisions of 1991, Article 42).

The 2006 Constitution provides for the adoption of the law on the Constitutional Court in order to regulate the following: the organization of the Constitutional Court, the procedure before the Constitutional Court, and legal effects of its decision. This provision as well (Article 175, paragraph 3) results in the competences of the Constitutional Court not being subject to regulation by law. That court has as many competences as the Constitution provided it with.

Part Seven of the 2006 Constitution regulates the territorial organization of the Republic of Serbia (Articles 176–193), which was, prior to the change of the Constitution, believed to be the battlefield for parliamentary parties to fight over the most. However, the agreement, as can be seen from the 2006 Constitution, was reached in terms of repeating the territorial organization of the 1990 Serbian Constitution, which means asymmetric territorial autonomy (with autonomous provinces not in the entire country territory, but in the part of the country territory, where the autonomous provinces are of unequal status) and monotype organization of local self-government (with uniform type of municipality as a local self-government unit, while the towns and City of Belgrade perform the functions of a municipality). Therefore, according to the 2006 Constitution, Serbia is decentralized along the two lines, the line of territorial („provincial“) autonomy and the line of local self-government. The expression „provincial autonomy“ is not a generic one in the Constitution, but the one related to our terminology (there are countries where such a territorial unit is called „district“, or „autonomous community“, etc.). That is why a better expression to use is territorial

autonomy, since it is not derived from the name of the territorial unit enjoying autonomy. The 2006 Constitution has, quite unnecessarily, that part divided into three sections: 1) provincial autonomy and local self-government; 2) autonomous provinces; 3) local self-government. The first section is completely superfluous, since due to its presence the same matters are being considered twice, and, which is even worse, considered differently. So Section One, Article 177, paragraph 2, reads that the competences of autonomous provinces and local self-government units are to be specified by the law, while Section Two, Article 183 of the Constitution specifies the competences of autonomous provinces, and Section Three, Article 190 of the Constitution specifies also the competences of the municipality as the basic unit of local self-government, since the towns and City of Belgrade have the competences entrusted to the municipality by the Constitution. However, it is not wise, bearing in mind the advocates of broader autonomy for autonomous provinces, to formulate the common provisions on territorial autonomy and local self-government in the same Section, since they are thus given a strong argument for the claim that „provincial autonomy" has not gone far from local self-government in the Constitution.

Both types of territorial decentralization are provided with the possibility of being entrusted with the competences of the Republic of Serbia by the law. Its right to self-organization is prescribed, so an autonomous province, in accordance with the Constitution and its statute, is to „autonomously regulate the organisation and competences of its bodies and public services" (Article 179). This right is immediately infringed and also impaired a good deal by the next Article of the Constitution (Article 180, paragraph 1), which reads: „the Assembly shall be the supreme body of the autonomous province and a local self-government unit". By stating that „the Assembly shall be the supreme body" (no such formulation is present in the 1990 Serbian Constitution with regard to the organization of autonomous provinces and municipallities, nor in the current Law on Local Self-government, pursuant to which „the municipal assembly shall be a representative body", while in the previous Law on Local Self-government of 1999 it was stated that it is „the representative body of the citizens") the organization of autonomous provinces and municipalities was determined, their „organization" was prescribed, since all other bodies now must be accountable to the assembly. This is the so-called assembly system of governance, which is based on unity (not separation) of power for the benefit of the assembly, which was present in the time of the socialist Yugoslavia (1946–1992). Within that system all the bodies are appointed and dismissed by the Assembly, which, with regard to the municipality, is also stated in the Constitution in Article 191, paragraph 4. The last paragraph of the same Article reads: „Election of executive bodies of the town and the City of

Belgrade shall be regulated by the Law". The question that can be asked here is what kind of „local self-government system" this is, where the executive bodies of the municipality are elected in one, and the executive bodies of the towns and the City of Belgrade in another manner? Stating in the Constitution that the term of office of deputies (in autonomous province assemblies) and councillors (in municipal assemblies) is four years, that they are elected in direct elections and by secret ballot, the deputies in line with the decision of the Autonomous province Assembly, and the councillors in accordance with the law, as well as that the autonomous provinces and local self-government units with population of mixed ethnic composition are provided with „a proportional representtation of national minorities [...] in accordance with the Law" (Article 180, paragraph 4) is also narrowing the right to self-organize, and unnecessarily going into details.

With regard to autonomous provinces, the 2006 Constitution contains two considerable novelties. The one is that the establishment of new autonomous provinces or termination or merging of the existing ones is an open process. This is to be decided on under the procedure provided for the change of the Constitution, and the proposal is to be confirmed by the citizens at the referendum, in accordance with the law (Article 182, paragraph 3). In line with that principle is the following provision: „Territory of autonomous provinces and the terms under which borders between autonomous provinces may be altered shall be regulated (the singular verb used here[2] should have been a plural verb, R.M.) by the Law. Territory of autonomous provinces may not be altered without the consent of its citizens given in a referendum, in accordance with the Law" (Article 182, paragraph 4). The other novelty is that the two autonomous provinces do not have the same position. While one has a „substantial", the other has an „insubstantial" autonomy. Thus, in the Autonomous Province of Kosovo and Metohia there is a „substantial autonomy", which is yet to be regulated by „the special law which shall be adopted in accordance with the proceedings envisaged for amending the Constitution". Since Article 182, paragraph 1 states that „Autonomous provinces shall be autonomous territorial communities established by the Constitution, in which citizens exercise the right to the provincial autonomy", it means that in the Autonomous province of Kosovo and Metohia provincial autonomy is also realized, but it is a „substantial" one here. Provincial autonomy is either present or it is not. That term has its meaning in constitutional theory and practice, so the term „substantial autonomy" (unknown in constitutional and legal theory) should express

2 In the Serbian text a singular verb was wrongly used instead of a plural one (Translator's note).

the degree of autonomy superior to the meaning of provincial (territorial) autonomy. If substantial autonomy means full autonomy of three branches of power in a certain territory, it is no longer a provincial autonomy; such a degree of autonomy has an essence differing from territorial autonomy, the one characteristic of state sovereignty. Then again, for the other autonomous province, Vojvodina, the Constitution states that its budget „shall amount to at least 7% in relation to the budget of the Republic of Serbia, bearing in mind that three– sevenths of the budget of the Autonomous Province of Vojvodina shall be used for financing the capital expenditures" (Article 184, paragraph 4). This means that a new, potentially to be established, autonomous province would differ in its position from both Kosovo and Metohia and Vojvodina. It would have a third essence. In comparative constitutional law the instance of existence of two types of territorial autonomy is recognized. In Italy there are areas with regular (15 of them) and areas with specific position (five of them). But if a new autonomous province were to be established in Serbia, each of the provinces would have a *sui generis* position, each would have a different autonomous status.

The 2006 Constitution, by its provisions on the competences of the autonomous province, provides most details on its normative and financial functions, or autonomy. The normative autonomy includes autonomously regulating the issues of provincial significance, in accordance with the law, for the areas specified by the Constitution (Article 183, paragraph 2). The autonomous province makes decision and issues other general acts. The highest legal act of the autonomous province is the Statute, which, as in accordance with the 1990 Constitution of Serbia, is adopted by its Assembly, following the approval of the National Assembly. Financial autonomy involves the existence of direct revenues, which are to fund the competences of the autonomous province, independent creation of the budget and final accounts, as well as the existence of the property of the autonomous province, as a form of public property, and the managing thereof. That autonomy is restricted in a way that the „kind and amount of direct revenues" are specified by the law (Article 184, paragraph 2).

The autonomous province further ensures the „exercising (in case of municipalities, „protection and improvement of" is added, R.M.) human and minority rights, in accordance with the Law" (in case of municipalities, this „in accordance with the law" is not present, R.M.). It establishes the „symbols, as well as the manner in which they shall be put to use" (in case of municipalities, the text reads „as well as their use", R. M.).

The two new constitutional institutes concerning provincial autonomy are supervision over the activities of the autonomous province organs, and protection of provincial autonomy.

Since provincial autonomy is realized under the Constitution and the laws, the state through its organs carries out supervision of the constitutionality and legality of the activities of the autonomous province organs. For that purpose, state organs have at their disposal both regular and special powers, as the ones provided for in Article 186 of the Constitution. Specifically, the Government may initiate the procedure before the Constitutional Court for the review of constitutionality or legality of the decision of the autonomous province, prior to its coming into effect, and the Constitutional Court in that case may, until deciding, defer the coming into effect of the disputed decision of the autonomous province. This also is a form of preventive control of both constitutionality and legality as well. But here there is no provision specifying that the Government may not at a later time initiate the procedure before the Constitutional Court for reviewing the constitutionality and legality of the decision of the autonomous province whose compliance with the Constitution and law was reviewed prior to its coming into effect.

For the purpose of protecting provincial autonomy, the authority specified by the statute of the autonomous province is entitled to appeal to the Constitutional Court, if an individual act or action of a state authority or an authority of local self-government prevents the carrying out of the competences of the autonomous province (although the Constitution mentions a „complaint", from the definition of the conditions for lodging this complaint it is clearly a constitutional complaint). The other instrument for protecting provincial autonomy is, however, less definite. Article 187, paragraph 2, where this instrument is provided for, reads: „A body designated by the Statute of the autonomous province may institute the proceedings of assessing the constitutionality or legality of the law and other legal act of the Republic of Serbia or the legal act of the local self-government unit which violates the right to the provincial autonomy". It is not clear from this provision which body is the one before which the organ of the autonomous province may initiate the procedure of reviewing constitutionality and legality. Probably it is the Constitutional Court. If that is so, it is then not clear why this provision is present at all in the Constitution, when Article 168, paragraph 1 states that the procedure for reviewing the constitutionality and legality before the Constitutional Court may be initiated also by „bodies of territorial autonomy". The provision of Article 187, paragraph 2 of the Constitution withdraws the general authority of provincial autonomy bodies to initiate proceedings before the Constitutional Court for reviewing the constitutionality and legality granted by Article 168, paragraph 1 of the Constitution, and converts it into a special one, existing only where such bodies find that the law, or other general act of the Republic of Serbia authorities, or a general act of a local self-government unit, infringes the

right to provincial autonomy. Therefore, the same right granted by Article 168, paragraph 1 was withdrawn by Article 187, paragraph 2.

Local self-government did not, in terms of concepts, undergo any significant changes in the 2006 Constitution in comparison with the 1990 Constitution of Serbia. The same local self-government units remained (municipality, town and City of Belgrade), with town having the same competences as the ones entrusted to the municipality, while the City of Belgrade has competences entrusted to municipalities and towns by the Constitution, and the law on the capital city may provide also for other competences. Under the 1990 Constitution of Serbia, establishment of municipalities in the territory of towns was a constitutional obligation (Article 117), and in the 2006 Constitution (Article 189, paragraph 4) it is only a constitutional possibility: „It may be envisaged in the Statute of the town to establish two or more town municipalities on the territory of the town". The territory and the seat of local self-government units are defined by law, and the establishment, termination and change of the territory of the local self-government unit is preceded by a referendum in the territory of that local self-government unit. The highest legal act of the local self-government is still the statute of the municipality, issued by the municipal assembly. The competences of the municipality (Article 190) remained practically the same as under the 1990 Constitution of Serbia (Article 113). The funding sources are the same.

The two most significant novelties of the 2006 Constitution in this field are the establishment of municipal (and of towns and of the City of Belgrade) priperty as a form of public ownership, where the municipality independently manages the municipal property in accordance with the law (Article 190, paragraph 4), and, with regard to legislation, the modified relationship between the representative body, the municipal assembly, and executive bodies in the municipality, the relationship now based on the assembly system of governance. The Constitution still provides (Article 191, paragraph 5) for the possibility that the law may organize the relationship between the assembly and executive bodies in towns and in the City of Belgrade in line with different principles.

The constitutional regulations concerning the municipality were expanded to include the two issues that were previously subject to statutory regulations. They are the supervision of the activities of the municipality, and protection of the local self-government. The supervision over the activities of the municipality is carried out by the Government on behalf of the state. The Government is also „obliged to cancel the enforcement of the municipal general act which it considers to be in non-compliance with the Constitution or the Law, and institute the proceedings of reviewing its constitutionality or legality within five days" (Article 192, paragraph 1). Once again there is no mention of the fact that

these proceedings are instituted before the Constitutional Court. The Government also has a constitutional power (Article 192, paragraph 2) to dissolve the municipal assembly, where concurrently with the dissolution the Government is to appoint an interim body to carry out the activities within the competences of the municipal assembly, ensuring that the political and ethnic composition of the dissolved municipal assembly is taken into consideration and preserved.

As regards the protection of local self-government, it is carried out in the same manner as the protection of provincial autonomy – through a constitutional complaint (the Constitution reads only „complaint", but from the specified conditions for the lodging thereof it is clear that this is the case of a constitutional complaint) to the Constitutional Court, and by instigating a procedure before the Constitutional Court for reviewing the constitutionality and legality. Namely, the body specified by the statute of the municipality may initiate the procedure for reviewing the constitutionality and legality of the laws and other general acts of the Republic of Serbia or an autonomous province infringing the right to local self-government. This constitutional provision (Article 193, paragraph 2) is formulated in such a manner that it causes the same uncertainties as the Constitutional provision (Article 187, paragraph 2) concerning the protection of provincial autonomy rights.

Part Eight of the 2006 Constitution concerns the constitutionality and legality („Constitutionality and Legality", Articles 194–202) and contains, in addition to descriptions of the relations between the legal acts in the legal system of the Republic of Serbia, and to the description of „technology" of enforcing and implementing the laws on their adoption in the National Assembly and promulgation by the President of the Republic, also a novelty we advocated following the experiences of introducing the state of emergency in Serbia in 2003, namely the detailed prescribing of the legal system for the period of, at present, only two degrees of the state of necessity – the state of emergency and the state of war (according to the 1990 Constitution of Serbia there was a third degree as well between the two, the state of imminent-peril of war).

The legal system of the state of Serbia is uniform, which is achieved by harmonized relations between the legal acts constituting it. The Constitution is the highest legal act of the Republic of Serbia. Generally accepted rules of international law are of the same rank as the Constitution in their legal force. The ratified international treaties are below the Constitution, but above the laws. The laws and other general acts issued in the Republic of Serbia must be in compliance (owing to the redactor's mistake, the Constitution reads „must not be in contravention of", which is a phrase that had a special meaning in the SFRY 1974 Constitution, different from the meaning of the phrase „must be in com-

pliance“) with the generally accepted rules of international law and ratified international treaties. All the implementing general regulations, regardless of the issuer, must be in compliance with the law.

The publication of the laws and other general acts is regulated in more detail in the 2006 Constitution than in the Serbian 1990 Constitution, although with a rather high degree of inattention on the redactor's part. *Vacatio legis* and the prohibition of retroactive effect of the law are regulated in the same manner as in the Serbian 1990 Constitution. The provision on the legality of administration (Article 198), in paragraph one, aspiring to state the obligation of the holders of administrative power to act under the procedure prescribed by the law, actually fails to state the desired point (that the administration may act only in accordance the procedure prescribed by law), but states a rather banal thing – that individual acts need to based on the law (as if it had been forgotten that laws may be substantive and procedural). Paragraph two, instead of stating simply that final administrative acts shall be subject to the review of their legality in an administrative dispute before a competent court, contains a clumsy formulation that „legality of final individual acts deciding on a right, duty or legally grounded interest shall be subject to reassessing before the court in an administrative proceedings“. Which act is an administrative one should be stated in the law, not in the Constitution. Elements of legality are also everyone's right to use their language in the procedure deciding on his right or duty, and that the unfamiliarity with the language of the procedure must not be an impediment for the exercise and protection of human and minority rights.

In order for the state of emergency to avoid violating constitutionality and legality, which is a common side effect of that state, the 2006 Constitution prescribes (Article 200) the elements of legal regime of that degree of the state of necessity. That state is proclaimed by the National Assembly in situations where „the survival of the state or its citizens is threatened by a public danger“. As can be seen, the grounds for proclaiming the state of emergency are expressed by vague terms such as „public danger“ threatening „the survival of the state or its citizens“, which in itself provides room for potential abuse. The decision on the state of emergency is in effect for 90 days at the most, and after the expiry of that period the National Assembly may extend it, by majority vote of the total number of deputies, for another 90 days. This would mean that the state of emergency may last for half a year, which is definitely too long a period. A characteristic of the state of emergency is that while such a state is in effect, the National Assembly is in session without any special convening, and it may not be dissolved. However, there was no need to repeat the same thing in Article 200, paragraph 3, since it is already stated in Article 106, paragraph 4, and Article 109,

paragraph 4. On declaring the state of emergency, the National Assembly may decide on the measures derogating from human and minority rights guaranteed by the Constitution (derogatory measures). Derogation is permitted only to the extent which is necessary, and the derogatory measures may not lead to any differences based on race, gender, language, religion, national affiliation or social origin. They cease to apply on termination of the state of emergency or of war (since they can apply in the state of war as well). The Constitution provides for Articles guaranteeing human and minority rights in relation to which derogatory measures „shall by no means be permitted" (Article 202, paragraph 4).

The Constitution provides for a possibility that the state of emergency, in case the national Assembly cannot convene, may be proclaimed by the decision issued jointly by the President of the National Assembly, the president of the Republic, and the Prime Minister, under the same conditions as the National Assembly. Furthermore, where the National Assembly cannot convene, the derogatory measures may be specified by the Government by way of a decree, and with the co-signature of the President of the Republic. The National Assembly, in case the decision on the state of emergency was not issued by it, is under obligation to confirm that decision within 48 hours („*čas*" here; the Constitution uses the word „*sat*" for „hour", although in previous Articles, for instance in Article 30, the word „*čas*" was used, which is, once again, the redactor's mistake[3]) of issuing thereof, or immediately after it is able to convene. In case the decision is not confirmed, it shall cease to apply on the ending of the first session of the National Assembly after the proclamation of the state of emergency. Similarly, the derogatory measures not prescribed by the National Assembly but by the Government decree must be submitted for confirmation to the National Assembly within 48 hours (it reads „*sat*" here) from issuing thereof, or as soon as the National Assembly can convene. If not, the derogatory measures shall cease to exist 24 hours (it reads „*sat*" here) from the beginning of the first session of the National Assembly held after the state of emergency is proclaimed.

The derogatory measures concerning human and minority rights, regardless whether they were prescribed by the National Assembly by its decision, or the Government by its decree, may last for 90 days at the longest, and following the expiry of this period may be renewed under the same conditions.

The Constitutional rules to apply in case of the state of emergency also apply, *mutatis mutandis*, in case of the state of war. The state of war is also proclaimed by the National Assembly, and if it cannot convene,

3 In common use, Serbian has two different words for "hour", namely "*sat*" and "*čas*". It is recommended to use the word "*sat*" for this meaning (Translator's note).

the decision on proclaiming the state of war is issued jointly by the President of the National Assembly, the President of the Republic, and the Prime Minister. By the nature of things, the Constitution cannot, as in case of the duration of the state of emergency, prescribe the duration of the state of war. It is proper that the Constitution Article on the state of war (Article 201) does not state again that during the state of war the national Assembly convenes without a special call, and that it cannot be dissolved, since it was already provided for in Article 106, paragraph 4 and in Article 109, paragraph 4. Similarly, in case of declaring the state of war, the National Assembly may prescribe the derogatory measures concerning the human and minority rights guaranteed by the Constitution. Where the National Assembly is unable to convene, the derogatory measures concerning the human and minority rights guaranteed by the Constitution are to be determined jointly by the President of the National Assembly, the President of the Republic, and the Prime Minister. The difference between the state of emergency and the state of war can be seen here. In the same situation, and in case of the state of emergency, the derogatory measures may be prescribed by the Government decree, with the co-signature of the President of the Republic. It is difficult to discern why this difference was created. An especially large question mark can be used for the inclusion of the President of the National Assembly in deciding on the proclamation of both the state of emergency and the state of war, and in prescribing the derogatory measures in case of the state of war, since he is thus provided with the authority that he may independently exercise (without prior decision made in the National Assembly). The President of the National Assembly is not the same as the National Assembly, he is only the chairperson of a collegial body, and his attitude may even be different from the attitude of the majority in the Assembly. This is not the case with the Prime Minister, since he is, as office holder, the personification of the Government, while the President of the Republic is an individual authority.

The derogatory measures in case of the state of war, regardless of the authority prescribing them, are to be confirmed by the National Assembly, as soon as it is able to convene. Furthermore, during the states of emergency and war, the Constitution may not be changed (Article 204), as was attempted once before, during the state of emergency in Serbia in 2003.

Part Nine of the Constitution is entitled „Amending the Constitution“ (Articles 203–205) and it describes the revision procedure. Here the 2006 Constitution is fully emancipated, unlike the previous one. The distinction between the two phases in the reviewing procedure remains: the phase of submitting and adopting the proposal to amend the Constitution, and the phase of drafting and adoption of the act amending

the Constitution. However, the procedure for amending the Constitution is no longer uniform, but dual, depending on the parts of the Constitution to be amended. The difference between the two procedures lies in the phase two of the amending procedure, in the action of adoption of the act amending the Constitution.

The requirements for submitting the proposal to amend the Constitution were made stricter. Such a proposal may be submitted by: 1) at least one third of the total number of deputies (the number of deputies in the National Assembly is the same as under the 1990 Constitution of Serbia, but that Constitution required at least 50 deputies for proposing the amendment to the Constitution); 2) the President of the Republic; 3) the Government; 4) at least 150,000 voters (according to the 1990 Constitution of Serbia, the required number was at least 100,000 voters). Regardless of the way it was submitted, the proposal to amend the Constitution is to be adopted by a two-third majority of the total number of deputies. In case such a majority is not reached, the amendment of the Constitution concerning the issues contained in the proposal submitted which was not adopted, may not be undertaken in the period of one year to follow. The revision procedure in this phase is more demanding than the one provided for by the 1990 Serbian Constitution.

When the National Assembly adopts the proposal for amending the Constitution, the drafting of the act to amend the Constitution is to commence. The draft of such an act is drawn up by a supporting working group of the National Assembly provided for by its Standing Orders, and that is, as a rule, the constitutional committee of the National Assembly (Committee for Constitutional Issues).

The National Assembly, after the debate, adopts the act amending the Constitution by the two-third majority of the total number of deputies „and may decide to have it endorsed in the republic referendum by the citizens“ (Article 203, paragraph 6). The Constitution does not state by which decision the National Assembly decides on calling a Republic referendum. This is the case of a facultative constitutional referendum which, undoubtedly, after the adoption of the act on amending the Constitution by two-third majority of the deputies, requires a separate decision. If the National Assembly decides not to subject the act on amending the Constitution to the Republic referendum in order for it be endorsed, the amendment of the Constitution is adopted by voting in the National Assembly, and the act amending the Constitution comes into force on being promulgated by the National Assembly. Similarly, the Constitution fails to specify what happens if the proposed act on amending the Constitution fails to achieve the required majority. It would be logical to assume that the same prohibition in case of non-adoption of the proposal to amend the Constitution should apply: the amendment of

the Constitution concerning the issues referred to in the proposal of the act on amending the Constitution may not be considered during the year to follow.

However, a „tighter" procedure for amending the Constitution is also in place, under which the National Assembly has to call a constitutional referendum in order for the adopted proposal of the constitution amending act (adopted by two-third majority of all deputies) to be confirmed. This is the case of a mandatory referendum on amending the Constitution. Such referendum is mandatory if the Constitution amendment relates to the following: 1) the Constitution Preamble; 2) the Constitution principles; 3) human and minority rights and liberties; 4) governance system; 5) proclaiming the states of war and of emergency, as well as derogation from human and minority rights in states of war and of emergency; 6) procedure for amending the Constitution. When the act amending the Constitution is to be endorsed at the referendum, which is either initiated at the will of the National Assembly (facultative Constitutional referendum), or in order to meet the Constitutional requirement (mandatory Constitutional referendum), the citizens shall vote on the referendum within 60 days at the latest of the day of the adoption of the act demanding the Constitution. The Constitution amendment is deemed adopted if the majority of the voter turnout approves the amendment, regardless of the turnout numbers. The act amending the Constitution which has been endorsed at the Republic referendum comes into effect after the National Assembly promulgates it (by way of its decision). Unlike the law, the Constitution cones into force on the day of its promulgation, and for its implementation the Constitutional Law is to be adopted by two-third majority of the total number of deputies (Article 205). Since the Constitutional Law creates together with the Constitution a normative whole, the 1990 Serbian Constitution provided for (Article 134, paragraph 4) the Constitutional Law to „come into force concurrently with the amendment to the Constitution". The 2006 Constitution does not contain such a provision. In line with the described „tighter" procedure, a new Constitution is also adopted. Although the political and professional circles stressed as one of the basic advantages of the 2006 Constitution, in comparison with the 1990 Constitution of Serbia, the easier procedure of amending the Constitution, anybody who believes this procedure to be easy is gravely mistaken. In the Parliament where the deputy mandates are distributed by the method of proportional representation, achieving the two-third majority may be a Sisyphean task, which was soon demonstrated by attempts to change the 2006 Constitution, if for no other reason, than because of its nomotechnical faults which will prevent its implementation.

* * *

From the time of the adoption of the draft of the Constitution in the National Assembly until the time of the referendum on the Constitution, and in order to persuade citizens both to vote at the referendum and to vote for the desired outcome, what followed in certain political circles was an unprecedented disqualification of the 1990 Constitution of Serbia, as if it were the case of two conceptually opposed acts (it could have started no earlier, since even the deputies themselves saw the draft Constitution on the day of its adoption in the National Assembly). The President of the Republic, Boris Tadić, stated that his party had agreed to the new National Assembly, in spite of all its deficiencies, „in order to break up a blood clot in the heart of the state, and that is the old Milošević's Constitution". And, let us reiterate, there is no constitutional institution in the 2006 Constitution where that Constitution has a concept different from the concept of its model – the 1990 Constitution of Serbia. When we say that, we think of the same (only differently formulated) constitutional principles present in all the provisions of the Constitution. And indeed, the 2006 Constitution contains no new constitutional principle that was not already present in the 1990 Serbian Constitution.

The concept of horizontal government structure (the so-called semi-presidential, or mixed government system) is the same – the National Assembly with the same number of deputies and the same competences, the President of the Republic with the same method of election and powers, who is dismissed instead of recalled, the Government, created under the same concept, but with an additionally strengthened position due to now more difficult requirements for the vote of no confidence and non-deputy composition, the same constitutional principles concerning the courts and the same functions of the public prosecutor's office, with unnecessarily complicated appointment of judges, prosecutors and deputy prosecutors, and with guarantees for judicial and prosecuting independence significantly diminished, the Constitutional Court with the same competences (expanded by a constitutional complaint and deciding on violation of the Constitution by the President of the Republic), the same manner of instigating the procedures and the same mechanism of decision making (accompanied by the wrong implementation of the institute of preventive review of constitutionality of a law), but with a different number of justices and the manner of their appointment.

The concept of vertical system of government is also the same (decentralization along the lines of territorial autonomy and local self-government). The two autonomous units have different statuses, with the possibility of creating new autonomous units. The local self-government units remain the same, with the same concepts – municipality, town, City of Belgrade. Financial autonomy of all territorial units was strengthened

by constitutional guarantee of direct revenue; however, the type and amounts of such revenues are determined by the state through law. Material basis for financial autonomy is the autonomous province ownership and a local self-government unit property, which are forms of public property.

The same principle of the uniform legal system of the Republic of Serbia remained in force, based on which are the relations between different „layers" within that system, with the special protection of these principles at the times which are „dangerous" for constitutionality and legality (state of emergency and state of war), which should definitely be seen as a positive thing.

Is there in the 2006 Constitution anything different in concept and content from the 1990 Constitution of Serbia? There is, the following three matters. First, a different and much more comprehensive declaration of human and minority rights. The 1990 Serbian Constitution has a simple, but one more appropriate for a constitution, declaration of human (not of minority as well) rights. The 2006 Constitution has a buoyant, detailed compilation, a plagiarism in connection with relevant international legal documents, the declaration of human and minority rights. Even so, this declaration is not complete, since it would otherwise just represent a collection of international law documents on human and minority rights. As it is, the declaration is just a selection from these documents, so the question is what role this declaration plays, when the Constitution has the following provision: „Generally accepted rules of international law and ratified international treaties shall be an integral part of the legal system in the Republic of Serbia and applied directly" (Article 16, paragraph 2). This is the case of a kind of „decorating" the Constitution, without any essentially legal significance. The other matter is the property reform undertaken by the 2006 Constitution. Social property as a possible form of property, not a dominant form of property, as the general public was erroneously led to believe (such status was accorded to social property under the 1974 Constitution of the SFRY), was excluded by the 2006 Constitution. Public property was constituted, as a generic name for state property, autonomous province property and local self-government unit property. Private property and cooperative property were retained. At that, private property is openly favoured, although, ostensibly, „all types of property shall have equal legal protection" (Article 86, paragraph 2). Thus the economic system of Serbia is also based, *inter alia*, on „equality of private and other types of property" (Article 82, paragraph 1), and the social property will disappear unidirectionally, by being „appropriated in a manner and under the terms stipulated by the Law" (Article 86, paragraph 3). The third matter is the new legal mechanism for amending the Constitution, due to which the

Constitution of Serbia, instead of being a „strictly" inflexible Constitution (but not as inflexible as the 1974 Constitution of the SFRY, or the 1787 Constitution of the USA) became a „mildly" inflexible Constitution (with dual, different degrees of inflexibility). It seems that the optimum solution was created here. The procedure for amending an inflexible constitution should enable the changes in the country and in the outside world to be expressed in the Constitution, and should not allow for every change in the Parliament majority to result in amending the Constitution. That balance was established by the new revision procedure.

Taking all the mentioned issues into consideration, the 2006 Constitution may be regarded not as the new Constitution, but as the correction, more often for the better, but at times also for the worse, of the 1990 Constitution of Serbia. It is an improvement on the former one, but it does not mean that it is a new, better Constitution. The 2006 Constitution is a kind of an „overhaul" of the 1990 Constitution of Serbia, where life had overtaken it during the full 16 years of its application. It was adopted during the time when Serbia was a member of the „great" Yugoslav federation, and it was in force when Serbia was a member of the „reduced" Yugoslav federation, as well as in the times when it was a member of the bastard state union, and for even a half year from the time Serbia became an independent country. The only two other constitutions to be in force for a longer time were the so-called „Turkish" Constitution of 1838, and the Regent's (*Namesnički*) Constitution of 1869. However, turbulent changes during the period of its being in force negatively influenced the fate of that Constitution. The world had changed, an entire social formation had ceased to exist, surrounding countries had tied their fates to the European Union, Serbia had changed her country status thrice, the science of constitutional law and the related constitutional engineering had developed, and, as of mid-2006, the creator of the Constitution had had no act of greater legal power to curb him, so the creator of the Serbian Constitution was at full legal liberty to create a constitution at his will. That chance to bring something new was not taken advantage of by the Constitution creator. That is why no new constitutional era („age", as Slobodan Jovanović would say) will be deemed to have started in 2006. The development of constitutionality in Serbia failed to experience a „breakthrough" (it had not introduced a representtational government instead of an oligarchy, as the 1869 Constitution, or, instead of monarchical government, the parliamentary one, as the 1888 Constitution, or, instead of socialist self-management constitutionality with delegate parliamentary government, the liberal democratic constitutionality with parliamentary government based on a multi-party system, as the 1990 Serbian Constitution).

In the constitutional history of Serbia, the 2006 Constitution will still be remembered by an infamous characteristic. Until that Constitution

Serbia had never had a more illiterate constitution in terms of law and language, and, most probably, after the experience with this one, it never again will. Inattention, carelessness, and not infrequently ignorance as well, present in formulating the provisions in this Constitution, do not have a character of an inadvertent slip, but they simply represent the „style" of this Constitution, and that will result in its becoming a „case". The Constitution has the advantage over other legal acts, *inter alia*, by the „high sheen" of its provisions, some of which became well-known legal adages (like, for instance, the one referred to in Article 28 of the Declaration of the Rights of Man and Citizen from the French 1973 Constitution: „A people has always the right to review, to reform, and to alter its constitution. One generation cannot subject to its law the future generations."). The provisions of the Constitution are to be „polished" not only by first rate nomotechnics authorities (who are present in Serbia), but also by the best linguistic experts (who are present in Serbia in an even greater number). The linguistic redaction of the 1990 Constitution of Serbia was carried out by the Fellow of the Academy of Sciences and Arts, Mihailo Stevanović. From the standpoint of nomotechnics, the 2006 Constitution is a disgrace to constitution as a normative act.

In the raptures over the 2006 Constitution, which were artificially created, it was bestowed with the characteristics that it does not have and that are outside the field of law, especially constitutional law. Thus, it was pointed out that it was „the first post-communist Constitution" or „the first non-communist Constitution" in Serbia, and that Serbia was the last among the „former communist countries to adopt a Constitution". Let us not dwell on empty qualifications, voiced for political purposes only, that the Constitution is „modern", when it contains no institute less than fifty years old, that it is „democratic", when the minimum number of voters necessary for direct participation in certain functions of government power was increased everywhere, that it is „European", when many of its institutes are present in the Constitutions of African and Asian countries, etc. Anyway, we are quite notorious for easily, when carried away by political passions, conferring liberally the titles of „number one" and „primary", and so everything nowadays is thus: *the first* democratic election, *the first* democratic mayor of Belgrade, *the first* democratic Prime Minister, *the first* democratically elected President of the Republic (although the previous ones were elected under a more complicated procedure, and with a larger participation of voters). Therefore, this is *the first* post-communist Constitution, which is, in addition, *the first* Constitution in our history to have a „popular character", which renders it a „Constitution of the people" (under constitutional typology, each constitution is „of the people" if passed by citizens directly or through their representatives). Serbs, as they like to say

of themselves, much like and appreciate history, especially their own. It seems that, by way of such furnishing names to events and affairs, they are putting their foot in the mouth, since they appear to have no history at all. As soon as they find that they can avail themselves of the opportunity to decide on matters of public importance, Serbs count that as the moment when history begins.

Slobodan Marković

GLOBAL ADMINISTRATIVE CRISIS OF THE PATENT SYSTEM

Taking the global patent system into consideration from the aspect of administrative bodies deciding to grant patents for inventions, the author points out the constant tension between a very complicated granting procedure and constantly increasing number of patent applications, on one hand, and limited administrative capacities of patent administrations, on the other hand.

After an overview of main international arrangements for simplification of obtaining a patent for the same invention in several countries, the author explains the mechanisms that brought to spontaneous establishment of three patent administrations – European Patent Office (EPO), US Patent and Trademark Office (USPTO) and Japan Patent Office (JPO) – the so called Patent Trilateral – as informal pillars of the global patent system. Risks of current trends in these patent administrations, reflected in backlog of unexamined applications, the extension of the duration of pendency time and lowering quality of decisions, are explained. The conclusion suggests that the solution to the problems lies in operational collaboration between Trilateral members, but that full cooperation is currently not possible due to important differences in the procedural and substantive patent laws applied by these administrations. After the comparative analysis of main differences in the US, European and Japanese laws, the author expresses doubt that some serious harmonization of the comparative patent law will be achieved through mechanisms of World Intellectual Property Organization (WIPO). Instead, the author predicts unilateral but coordinated legal initiatives in this direction in the USA, Japan and Europe.

Key words: *Patent. – Patent Cooperation Treaty. – European Patent Convention. – US Patents and Trademarks Office. – Japan Patent Office. – Trilateral Cooperation. – International harmonisation of patent laws. – European Patent Network.*

1. INTRODUCTORY NOTES

In almost every country an inventor or his/her legal successor can, upon personal request, obtain from the competent state authority the

exclusive, territorially limited temporary right (patent) to exploit an invention fulfilling certain statutory conditions. The overall national and international regulations in this area, together with the social relations arranged by these regulations, are referred to as „patent system".

By granting legal protection to the inventor, the essence of the patent system is to provide economic incentive for technical development, as an important factor of social progress.

Ever since its inception and up to now, the patent system has been subject to debate. The social justification of commercial monopoly, making patent as subjective right[1], has been disputed or defended. However, in this essay we will not debate on patent content, but we will

1 The first patent law was adopted in the US in 1790. During the 19th century there was a severe debate in Europe regarding the justification of the patent system. On three occasions in the period 1851 – 1872 the UK Parliament organized special commissions whose task was to examine the justification of the then existing system of patent protection. In Holland there was even a complete abolition of the patent system from 1869 to 1910, whereas it was introduced in Switzerland only after several previously failed proposals in the Confederation Parliament and referendums in the period 1849 – 1887. (Verona, A, *Pravo industrijskog vlasnistva,* Zagreb, 1978, page 69.). Today's debate on the patent system is in the context of relations between developed countries (including the countries that are not developed but have political reasons to support developed countries) and developing countries. International forums where different arguments relating to this topic are presented are World Intellectual Property Organization and, especially, World Trade Organization. Current doctrine, inducted by developed countries, can boil down to the following: "Patent rights arise because inventing is an expensive process and costs must be recouped to provide incentives to invest. If others can cheaply appropriate an inventor's innovation, calling it their own without having invested time and energy in it, investments in innovation will not be made. Free market tends to underproduce innovation because of this appropriability problem, thus government intervenes into the market to provide a period of exclusive distribution rights as an incentive to invest in innovation." (Ryan, M. P. *Knowledge Diplomacy – Global Competition and the Politics of Intellectual Property.* Washington D.C. 1998, pages 21, 22). The doctrinary answer of developing countries is mostly the following: "The need to maintain incentives to encourage creative activity is limited, in many respects, to western market democracies. These democracies revolve, in large part, around individual autonomy and liberty, notwithstanding the greater social loss of nonmaterial value that individualism tends to breed. The successful commodification of intellectual goods can only be achieved in a society which embraces this sort of rugged individualism… For many of these societies (in the developing countries – observation by S.M) the difficulty in introducing western copyright principles is that these principles attempt to overturn social values that are centuries old. The laws protecting nonmaterial goods in these societies simply reflect fundamental notions on what the society considers the appropriate subject of exclusive ownership … The internationalization of intellectual property threatens to undermine, if not totally destroy, values that indigenous systems ascribe to intellectual property and the manner in which they allocate rights to intellectual goods" (Gana, R.L. *Has Creativity Died in the Third World? – Some Implications of the Internationalization of Intellectual Property*, Dinwoodie, Hennessey, Perlmutter: International Intellectual Property Law and Policy, Newark, 2001, pages 18, 19).

look at main problems of the procedure for its obtaining and administration. The reason for our interest in administrative side of modern patent system stems from the difficulties gradually accumulated in the past few years in the patent granting procedure, which threaten to endanger the overall system, i.e. to deprive it of capacity to achieve its social function.

The problem is a world issue because technology is universal and the commercial usage of patented inventions in the era of global economy knows no state borders.

In order to understand better the following essay, it is useful to clarify several important premises in the beginning:

Firstly, in the comparative law it is the state administration that is authorized for granting patents. The national body in charge of granting patents and maintaining the patent registry is administrative (office, bureau, institute, agency or alike). The patenting procedure is, according to this, an administrative procedure and the patent is granted by administrative decision. A patent as exclusive right represents a form of intellectual property considered today in the large part of the world to be an equal compound of the corpus of property rights for which there are special guarantees contained in national constitutions and international conventions[2]. This way we come to the main specialty of the patent granting procedure: the administrative body in the administrative procedure decides upon the constitution of property right, i.e. creates, abolishes and changes property right relations. In other words, the statutory competence of the administrative body in charge of granting patents (but also other industrial property rights) comprises the task which, according to its legal nature, belongs to the court[3]. Therefore, although the state has the

2 Article 1, Protocol 1, European Convention on Human Rights says: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions…." European Court for Human Rights in its practice considers indisputable that intellectual property (copyright, patent, trademark and other) represent a form of property: "…Stable Court practice is that the concept of "property" should have autonomous meaning not limited to property over physical goods and that is independent from classification in the national law...the Court…bears in mind that intellectual property as such is indisputably entitled to protection based on Article 1, Protocol 1" (from the decision of the European Court for Human Rights in case Anheuser-Bush Inc v. Portugal, no. 73049/02 of November 10, 2005).

3 Krabel, A: *Kommt das Patent durch staatlichen Verleihungsakt zustande?* (GRUR 1977, page 205, 206). One of the possible explanations of this situation is connected with the history of the patent system in Anglo-American Law. The precursor of modern patent law in England was the Statute of Monopolies (adopted in 1623) forbidding all commercial monopolies, except the time limited monopoly on invention. This allowed monopoly to be characterized as a privilege rather than property right, and the decision on its recognition was some kind of permission the state ruler granted to the

commitment to enable judicial control over legality of patent administration decisions[4], the patent administration, as the most skilled state body regarding patent area, bears great social responsibility.

Secondly, as with all other intellectual property rights, patent has its limitations. As a rule, it extends only to the territory of the country whose administration granted it by applying the law of that country[5]. This means that when one person wants a patent for a certain invention in several countries, this person must obtain individual patent for every country. This principle of territorial limitation of subjective right is called the principle of territoriality.

Thirdly, in comparative and international law, the most widely accepted conditions for patenting inventions are: novelty, inventive step and industrial applicability of the invention. Fulfilling these three conditions could be assessed from the aspect of objective and universal criteria regarding the concept of prior art (the overall sum of publicly known technical information relevant to novelty and inventive step of invention) and concept of industrial activity (relevant to applicability of the invention). When this is connected with the territoriality principle, it shows that every national patent administration (e.g. in Serbia, Germany, USA, South Korea) examining the patentability of the same invention (e.g. vaccine against aviary influenza), basically does the same job in order to determine whether it can grant a patent for the territory of its country. As such an exercise is unnecessarily wasteful in terms of the national administration resources, a significant number of countries to enter specific international arrangements enabling a more rational, cheaper and more efficient procedure for obtaining a patent for the same invention in several countries. Those are: Patent Cooperation Treaty from 1970, European Patent Convention from 1973, Agreement on the Creation of Industrial Property Organization for English-speaking Africa from 1976 (with Protocol on Patents and Industrial Designs from Harare,

individual. Therefore the modern administrative decision on granting patent as intellectual property right can be regarded as a relict from the history of patent system. (See more in Marković, S. *Patent Law*, Belgrade, 1997, pages 12 and 17). However, apart from its legal nature, the patent examination procedure is predominantly of a technical nature requiring narrowly specialized technical knowledge by state officers conducting the procedure. This circumstance can be regarded as one of the actual reasons to entrust granting of patents to the organ having technical expertise, and not to the court (whose knowledge and competence are limited to law only).

4 This commitment is stipulated in Article 41, point 4, Agreement on Trade Related Aspects of Intellectual Property Rights from 1994.

5 The exceptions to this rule are European patent, Euro-Asian patent and African patent that are granted in the procedure conducted by respective supranational (international) patent administrations formed by international conventions. Find more about this in further text.

1982), Agreement Relating to the Creation of African Intellectual Property Organization from 1977 and Euro-Asian Patent Convention from 1994[6].

For those readers who are less widely acquainted with the details of the patent law, we will limit ourselves to a very simplified overview of the Patent Cooperation Treaty and European Patent Convention, as the most relevant for the European affairs.

Patent Cooperation Treaty (hereinafter PCT) is a universal legal instrument establishing the system of applying for patent in several countries by filing a single international patent application. That international application is filed to the national patent authority of the PCT member country in which the applicant has the citizenship or domicile. Afterwards the application is officially forwarded to the International Bureau of WIPO in Geneva. Filing of a correct international application activates the fiction that in every PCT member country, that is designated in the application as the country in which the applicant requests a patent, a national patenting procedure has been initiated. However, each designated national patent administration is obliged not to take any administrative action in the first 30 months, but to wait for the completion of the so called international patenting phase.

International patenting phase has one compulsory and one optional part.

Compulsory part comprises international search of prior art relevant for estimation of novelty and inventive step of the filed invention and the drafting of an international search report. International search is conducted by one of 12 current international searching authorities and those are the already existing national or supranational patent administrations fulfilling special conditions stipulated by PCT[7]. The result of international search is a report containing a list of documents with technical information according to which it is possible to examine the novelty and inventive step of the filed invention. This report is also sent to International Bureau which will publish it together with international application within 18 months after the application has been filed.

The optional part of the international patenting phase is comprised of international preliminary examination by the authority for international

6 Apart from reducing the workload for national patent administration, these arrangements make it easier for inventors and their legal successors to apply for patenting, i.e. to obtain patent in several countries; subsequently they contribute to harmonization of national patent laws and, finally, unify the quality of granted patents on the territories of different countries.

7 Those are patent administrations of Austria, Australia, Canada, China, Spain, Finland, Japan, South Korea, Russia, Sweden, USA, as well as the European Patent Office

preliminary examination (which is the same entity as the international searching authority). The task of this authority is to examine and pass an opinion on whether the filed invention is novel and has inventive step, taking into account the already drafted international search report.

After the end of the international phase, the national patenting phase begins in every designated/elected PCT member country, based on international application, international search report with translation into the official language of that country and, optionally, report on international preliminary examination with translation. The point of the national phase is that the national patent administration of every designated/elected country[8], relying on non-binding but very reliable results of the international patenting phase, takes a decision to grant the patent or deny patent protection.

This system has made a very successful[9] compromise between territoriality principle (the patent is recognized by the national administrative authority for the territory of that country) and the need for rationalization of the procedure for obtaining a patent for the same invention in several countries. Namely, as a rule, the national patent administration relies on the results of the international patenting phase, thus significantly reducing its time and work involvement.

European Patent Convention (hereinafter EPC) is a regional legal instrument but it does not represent a part of the EU legal system. EPC defines the core of the unified substantive patent law, it establishes European patent administration – European Patent Office and determines procedural rules for granting a European patent. The essence of the system is that the entire procedure of patenting a certain invention in several designated EPC member countries (filing the application, publication of the application, prior art search, examination and final decision on granting a patent) is dealt with by one supranational organ (European Patent Office), but the patent granted has an independent validity on the territory of every designated EPC[10] member country.

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8 In 2003 every international patent application designated the average of 13.9 countries in which patent protection was requested. The PCT success is also evident by data that the average number of designated countries in 1999 was only 6.5 (Trilateral Statistical Report 2004, Worldwide Patenting Activity, http://www.Trilateral.net/tsr/tsr_2004/ch3/).

9 Undoubted evidence of PCT success is a membership of 132 countries (on May, 17, 2006). Serbia is a PCT member since 1997. Since the beginning of the PCT the number of international patent applications has average annual growth of around 17%. In 2005, 134.504 international PCT applications were filed (WIPO-PCT Statistical Indicators Reports 1978-2005, http://www.wipo.int/ipstats/en/statistics/patents/pdf/pct_yearly_report.pdf).

10 In 2003 an average number of EPC member countries where patent protection was obtained on the basis of one European patent application was 7 (Document

In comparison with PCT, it is obvious that EPC represents a step forward towards rationalization of the procedure of obtaining patent for the same invention in several countries (the entire patenting procedure has an international character) but it also does not abandon the territoriality principle (validity of every European patent is territorially limited for each designated EPC member country). Since the European system of granting patents entails that the member countries renounce their sovereign power to decide on granting patent on their territory, it requires a relatively high degree of harmonization of national patent laws and regulations with substantive patent law contained in EPC, as well as political will by member countries to achieve a relatively high degree of unity regarding the patent system[11].

Finally, regarding PCT and EPC, perhaps two more annotations are important. Firstly, both systems exist parallel with national patent systems of member countries, so that, e.g. Serbian citizen who wants a patent in Austria (PCT and EPC member state), can submit national application to Austrian patent administration, take the procedure (through Austrian representative) in Austria and obtain Austrian patent. Therefore, PCT and EPC do not entail the abolishment of national patent systems. Secondly, PCT and EPC are mutually adjusted: European Patent Office works as international searching authority and international preliminary examination authority within the PCT system; it is possible, based on international PCT application in which European Patent Office is designated, to apply for and obtain a patent for certain EPC member countries; the applicant of European patent can refer to the international priority right of the previously filed international PCT application, as well as vice-versa.

2. ELEMENTS OF ADMINISTRATIVE CRISIS OF PATENT SYSTEM

2.1. Limited administrative capacity of patent authorities versus increasing workload

On a general level, the situation that administrative bodies find themselves in a gap between the workload and their limited capacities is

CA/115/06, Patents Landscape in Europe, Japan and the US, from June 9, 2006, presented at the 106th EPO Administration Council Session, page 35).

11 Similar to PCT, the EPC was enormous success: today it has 31 member states. Five more countries should be added to this (including Serbia). Based on special Agreement on Cooperation and Extension, these extension-countries accept European patent system including the validity of European patent on their territory, although they are not EPC members. Serbia has this status as of November 1, 2004.

not typical only of patent administration. The intention to reduce or remove damaging consequences of such situations (time delays, lowering quality of decisions) is usually manifested in certain procedural improvements, on one hand, and reinforcement of institutional capacity of administrative bodies (increase and improvement of human resources, automation of work, etc), on the other hand.

What makes the patent administration so specific is the following:

Firstly, the actual informational era is marked by so-called global economy where results of human creativity (e.g. technical inventions, author's works, design) become the main commercial resource and the competitiveness factor of commercial subjects and national economies. This leads to unstoppable growth of the significance of the patent system as an instrument of legal appropriation of new technologies. Given that human creativity is an indefinite resource for inventions that become property of their creators and their investors through legal protection (patenting), it is logical that the number of demands for patent protection worldwide is constantly increasing, causing swelling pressure on patent administration[12].

Secondly, according to Paris Convention for the Protection of Industrial Property from 1883 (which today has 169 member countries), every member country is obliged to provide foreign person or legal entity protected by the Convention, with the same rights accorded to the nationals of that country[13]. This means that in Paris Convention member countries, both nationals and foreigners are equally present as patent applicants and patent owners.

Thirdly, the globalization of economic life, in combination with principles of territoriality and national treatment of foreigners in patent law, leads to more demand to obtain patents abroad[14]. Succinctly, an

12 In 2003, 17.052.023 patent applications were filed. In relation to 1999 when 7.451.674 patent applications were filed, an average annual growth of 23% is noticed (Trilateral Statistical Report 2004, Worldwide Patenting Activity, http://www.Trilateral.net/tsr/tsr_2004/ch3/).

13 It is about the principle of national treatment of foreigners, stipulated in Article 4 of the Paris Convention. Protected are persons who are nationals of another Paris Convention member state, or persons who have domicile or real and effective industrial or commercial establishment in such a state (Articles 2 and 3 of the Paris Convention). All international agreements regarding industrial property protection, concluded among Paris Convention member states, represent so called special agreements, in accordance with Article 19 of the Paris Convention, which means that these agreements cannot contravene the provisions of the Paris Convention. This also applies for agreements that are in focus of this essay: PCT and EPC.

14 In developing countries as well as in smaller developed countries that are not leaders in technological development, foreigners constitute the majority of patent

inventor or his/her legal successor today, in average, demands patent protection for the same invention in approximately 20 foreign countries[15].

Fourthly, the procedure to examine the fulfillment of conditions for granting patent protection is extremely complex. Patent application, regarding its prescribed form, is the most complex legal submission, and the examination of its formal aspect (including the conditions of „unity of invention" and „enabling disclosure" of the invention) requires time and expertise. However, more complex and more time demanding is the examination of novelty and inventive step of the invention (so called substantive examination of the application). Bearing in mind that the fulfillment of these two conditions is assessed in reference to the prior art, it is necessary that the patent administration first determines the state of prior art relevant for the patentability of every submitted invention. The prior art, essentially, comprises the overall technical information made available to the public anywhere in the world, in any way, and whenever until the day of filing i.e. the day of the priority of the application. Search of prior art is the most voluminous job of the patent administration since it comprises technology and knowledge to manage tens of millions of documents[16] world wide in various languages. Examination of novelty and, especially, inventive step of invention requires very professional team of experts with years of training.

Fifthly, the rapid technological advancement leads to more frequent patent applications for inventions in entirely new technical areas, for which patent administration must develop new and adequate examination methodologies („*learning by doing*"), which inevitably slows down the procedure and bears risk of destabilizing the decision quality level[17].

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applicants and patent owners. (See WIPO Statistics on Patents, http://www.wipo.int./ipstats/en/statistics/patents/source/summary_filed_table.csv .

15 In 1999 patent protection for the same invention was demanded in averagely 12.3 foreign countries, whereas those figures in 2002 were 19.4 (Trilateral Statistical Report, http://www.Trilateral.net/tsr/tsr_2004/ch3/). This speaks about rapid internationalization of patent activity.

16 The main source of information on the state of art is the so called patent documentation comprising all published patent applications and all patents in the world. We believe it possible to make a substantiated assumption that available world patent documentation today has over 50 million documents. This figure was achieved by "combining" two sources: one from 2004, mentioning around 45 million documents (Patlib Network, http://patlib.european-patent-office.org/welcome/pat_info/index.en.php), and one from 2005 saying that main electronic data base used by European Patent Office provides access to 53 million patent documents (EPO Annual Report 2005, http://annual-report.european-patent-office.org/2005/review/index.en.php). The second important information source on the state of art is the so called non-patent documentation such as scientific and professional magazines and books, text-books, encyclopaedia and similar.

17 For example, those are applications for inventions related to genetic engineering (gene sequences), nanotechnology and similar.

Bearing all this in mind, we return to the question: What makes the institutional capacity of patent administration chronically problematic in relation with other administrative bodies? The answer is: Rapid technological advancement in the last few decades has two consequences: a) constant increase in the number of applications for patent protection and b) exponential enlargement of prior art, which complicates and aggravates the procedure of substantive examination of patent applications. Working in synergy, these two consequences place the patent administration in the position to cope with bigger, more complicated and more responsible work without being able to see the end of that phenomenon[18].

We could use the following quotation to sum up the illustration of consequences of this situation. „Patent application filings have increased dramatically throughout the world. There are an estimated seven million pending applications in the world examination pipeline, and the annual workload growth rate in the previous decade was in the range of 20–30%. Technology has become increasingly complex, and demands from customers for higher quality product and services have escalated[19].“

18 This is not the first administrative crisis of the patent system. Previously, its peak was in the beginning of the seventies last century. In comparative laws it was solved by reforming the patenting procedure, more concretely, by making national patent administrations switch from the so called preliminary examination system to the so called deferred examination system. Preliminary examination system consisted of *ex officio* substantive examination of every patent application, and publication of only those inventions for which patent was granted. The drawbacks of that system were: (a) inability of patent administrations to grant patents in reasonable amount of time (7 to 10 years on average) due to workload, as well as (b) reduced informational effect of the patent system due to the fact that only patented (not all filed) inventions were published with delay causing their technological obsoleteness at the moment of their publication. Deferred examination system brought two enormous advantages: (a) all filed inventions are published within 18 months after the application was filed (therefore, patent system represents the biggest generator of new technical information on the state of art) and (b) the phase of substantive examination is only entered by those applications for which the applicant specifically requested this examination within 6 months from the publication of invention (failure of applicants to put such a request significantly cuts down the number of applications to be substantively examined). Having reduced the workload in this way, patent administrations in the beginning of the seventies and eighties of the 20th century managed to cope with the incoming applications. In SFRY the system of deferred examination of patent applications was introduced in 1981 by the Law on Protection of Inventions, Technical Improvements and Distinctive Signs (Official Gazette, SFRY, 34/81). It is an interesting fact that the US was the only country in the world that was persistent on the traditional system of preliminary examination until the reform of patent law in 1999. See more on the today's patent system in the US in further text.

19 USPTO – 21st Century Strategic Plan, http://www.uspto.gov/web/offices/com/strat21/stratplan_03feb2003.pdf .

2.2. Paradox of territoriality principle: Global patent system as dependent on three patent administrations (so-called Patent Trilateral)

As already pointed out, the intention to overcome the irrationalities of strict application of territoriality principle in the procedure to obtain patent protection, paved the way for international and supranational systems for filing patent applications and obtaining patents, such as PCT and EPC.

The birth of these two systems institutionalized a certain number of high quality national patent administrations as international centers for prior art search and substantive examination. In PCT system, those are international searching authorities and international preliminary examination authorities[20]. In the EPC system, it is the European Patent Office (hereinafter EPO), which is the administration conducting the entire procedure for granting a European patent. It is natural that these patent administrations, in taking on an enormous workload, have in turn reduced the workload of national patent administrations of other countries.

Subsequently, a certain number of countries that do not have the administrative capacity to establish and support „serious" patent administration conducting substantive examination of applications, established a national patent system that does not comprise the substantive examination of novelty and inventive step but is reduced only to formal examination of patent applications, their publication and maintenance of patent register. Such system can be referred to as „patent registration system" in which the rebuttable presumption exists that the invention meets the patentability criteria, and the patent is valid. The substantive examination is initiated only afterwards, within the time limit prescribed by the law or in case the validity had been disputed by a third party, or in case of a litigation due to patent infringement (in which the validity of the mentioned presumption is placed as preliminary question). The substantive examination is not conducted by the patent administration of that country but either (a) that job is given to one of the previously mentioned patent centers or (b) patent (foreign or European) that was granted in the meantime by one of these centers for the same invention, is considered as the proof of validity of the disputed patent as well[21].

Apart from these two ways that *de iure* lead to partial or complete transfer of the main part of the patent granting procedure from national patent administrations to previously mentioned international authorities, there is a process with the same effect, done *de facto*. It is a practice of certain number of national patent administrations to „save up" the job of prior art search and assessment of novelty and inventive step of the

20 See footnote 8.

21 See e.g. the Law on Industrial Property in Bosnia and Herzegovina from 2002, articles 42, 43.

invention that was applied for patent protection in other countries or with certain international patent administrations, by informally deferring the national procedure and waiting for the examination results from other national or international patent administrations, in order to use these results. In order to have reliable results, it is natural that the most frequently used results are those of EPO and those of national administrations acting as international authorities within the PCT system.

The selection of patent administrations that, through described ways, take over the burden of the increasing internationalization of patent activity depends on several factors, among which the most important ones are: the status of the international authority within the PCT system, the size of the geographical region gravitating to this administration and the official language of the administration. This way, three patents administrations have emerged in global terms, forming the so-called Patent Trilateral: European Patent Office[22], US Patent and Trademark Office and Japan Patent Office[23].

The power and significance of the Trilateral are visible on the basis of two statistical facts: First, out of all patents (5.625.000) valid in the world in 2003, 86% were granted by Trilateral patent administrations[24]. Second, according to the number of first application for the same invention, for decades the patent administrations of the Trilateral have been at the top. In 2003, of the total number of the first applications for the same invention in the world (826.191), around 81% was filed with the patent administrations of the Trilateral[25].

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22 European Patent Office is an international searching authority and international preliminary examination authority in the PCT system; the supranational organ conducting the entire formal and substantive examination procedure and granting the European patent with validity in 36 European countries; the organ representing a "link" between PCT system of international patent application and the European patent granting system. This institution has three working languages: English, German and French, which means that its services are available to the majority of world population, without language barriers.

23 US Patent and Trademark Office and Japan Patent Office have the status of international searching authority and international preliminary examination authority in the PCT system. Both offices only use the official language of their countries. What makes them part of "Trilateral" is the fact that they are national patent administrations of two leading technological development powers that annually receive the biggest number of patent applications and grant the biggest number of patents in the world. Their decisions have direct or indirect technological and economic consequences for the entire world.

24 Out of this, 37% (2.089.000) were granted by EPO, 30% (1.670.000) by US Patent and Trademark Office, 19% (1.101.000) by Japan Patent Office, while the remaining 14% (792.000) were granted by all other national and international patent administrations in the world. (Trilateral Statistical Report 2004, The Trilateral Offices, http://www.Trilateral.net/tsr/tsr_2004/ch2/)

25 Out of this, 43% (358.184) of first applications for the same inventions were filed to Japan Patent Office, 22% (184.758) to the US Patent and Trademark Office, 16%

The second mentioned data are of special significance and deserves a comment which, for a start, should clarify the notion of „first application for the same invention". Namely, it is understandable that one person wishing a patent for a specific invention in a large number of states, by definition is not able to submit the application to a large number of national and/or international patent administrations simultaneously, but is doing it successively. With this, the first submitted application (to the national patent administration of own or foreign state, or a specific international patent administration) bears a specific significance, because with this application, s/he constitutes the international priority right in accordance with the Article 4 of the Paris Convention. Based on that right, s/he can within 12 months submit the application for the same invention to a national patent administration of any other state or to any international patent administration, claiming the filing date of the first application as the priority date of any later application[26].The first application is referred to as „priority application", and all others are referred to as „secondary" applications. All applications for the same invention (irrespective of the patent administration they have been submitted to), carrying the same date of international priority, make the so-called family of patent applications, and the patents granted on the basis of those applications make the so-called patent family.

So, where does the responsibility of the Trilateral lie for the global patent system? It lies in the fact that, based on the priority application for a certain invention submitted to any patent administration of the Trilateral, a patent protection for the same invention is requested for at least 20 countries in the world through secondary applications within 12 months (a time limit for requesting the international priority right)[27]. In

(126.761) to the European Patent Office, whereas the remaining 19% (156.488) was filed to all other national and international patent administrations in the world. (Trilateral Statistical Report 2004, Worldwide Patenting Activity, http://www.Trilateral.net/tsr/tsr_2004/ch3/)

26 The idea behind the recognition of the international priority right is that during the substantive examination of any subsequent application for the same invention, the fulfillment of the conditions of novelty and the inventive step are assessed according to the state of art on the filing day of the first application. With this, of course, the chances to get a patent on the basis of subsequent applications are higher than if there were no international priority right.

27 It is the data for 2002, demanding more precision. The statistics says that one priority application for a certain invention, submitted anywhere in the world, produces on average 0,48 secondary applications. However, since these secondary applications are by definition international applications in the PCT system and/or European applications in the EPC system (the applications of the Euro-Asian or African patent are also not excluded) demanding patent protection for the territory of a number of states, it means that one priority application for a certain invention could result in seeking for patent protection for the same invention in 19,4 countries of the world. As around 81% of

this way, every patent administration of the Trilateral, acting as an international searching authority and an international preliminary examination authority within the system of Patent Cooperation Treaty (the European Patent Office also acting as a supranational patent administration of Europe), and as a national patent administration of the state, *de iure* and *de facto* becomes responsible (indirectly or directly) for the destiny of a whole family of patent applications in the world. In other words, the quality of work of the Trilateral patent administrations, expressed through reliability of the search report on the state of prior art and the assessment on whether the submitted invention fulfills the condition of novelty and inventive step, has impact on the patentability of the invention in the world. Apart from that, the speed of processing applications in the patent administrations of the Trilateral influences the speed of processing all applications from the same family, i.e. the time for obtaining patents for the same invention in the entire world.

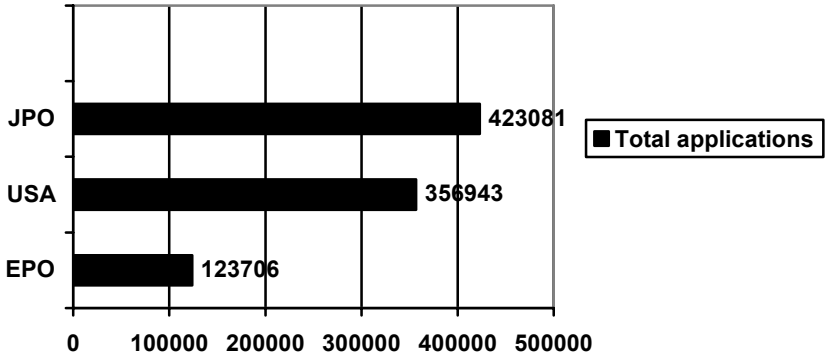
The idea that the global patent system has become dependant on the Trilateral implies a certain negative connotation. However, this idea has no stronghold in the abstract anti-globalism, but is based on the fact that each patent administration of the Trilateral is primarily loyal to its own mission as a national i.e. regional patent administration, and only secondarily loyal to its global mission. More specifically, the US Patent and Trademark Office and Japan Patent Office are an integral part of their countries' administration, and each one has its own intellectual property protection policy and its strategic technological and economic goals. The European Patent Office, though not a formal organ of the EU, is increasingly more involved in the EU policies and strategic goals. Thus all three patent administrations, each in its part of the planet, are torn between, on one hand, a national (regional) task to maintain full sovereignty in granting patents and, on the other hand, growing problems in satisfactory implementation of that task, that might have global consequences.

2.3. The situation in the patent administrations of the „Trilateral"

The source indicator for the workload of every patent administration is the annual number of patent applications. The chart shows a total number of applications (including the share of PCT international applications with the designation of the respective patent administration

priority applications in 2003 were submitted to the patent offices of the Trilateral, we can conclude that each priority application submitted to the Trilateral results in at least around 20 demands for patent protection for the same invention in the world. (Trilateral Statistical Report 2004, Worldwide Patenting Activity, http://www.Trilateral.net/tsr/tsr_2004/ch3/)

of the Trilateral) that was submitted to the patent administrations of the Trilateral in 2004[28].



Basically, for each patent administration's performance criteria, two are quantitative (number of final actions in regard to applications which are substantively examined, and the duration of procedure, that is total pendency time) and one qualitative (legal accuracy of decisions). Due to mutual differences in the patent procedure and inability to compare the data, the chart shows in a comparative way the indirect quantitative indicator of the performance – the number of granted patents in 2004[29].

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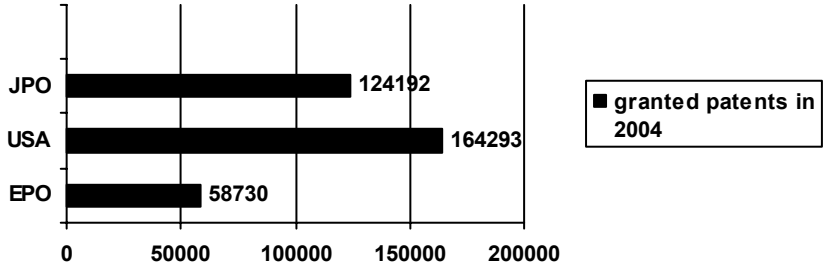
28 See the official annual reports for 2004 of the European Patent Office (http://annual-report.european-patent-office.org/2004/statistics/_pdf/tab_7_1.pdf) and Japan Patent Office (http://www.deux.jpo.go.jp/cgi/search.cgi?query=annual+report+2005&lang=en&root=short). For the US Patent and Trademark Office the statistical data from the World Intellectual Property Organization are used http://www.wipo.int/ipstats/en/statistics/patents/source/summary_filed_table.csv). In order to get the picture about the ratio, let us mention also that in 2004 the German Patent and Trademark Office received a total of 59.234 applications, and the Intellectual Property Office of Serbia (then Serbia and Montenegro) 1.307 applications. See also the report on the work of the Office for Patent and Trademark of FR Germany (http://www.dpma.de/veroeffentlichungen/jahresbericht04/dpma_jb_2004.pdf) and the Report on the work of the Intellectual Property Office of Serbia and Montenegro in 2004, The Intellectual Property Gazette Belgrade, 2005/2, p. 417.

29 See http://www.Trilateral.net/tsr/tsr_2004/ch2/ and http://annual-report.european-patent-office.org/2004/statistics/_pdf/tab_7_4.pdf . For the sake of comparison, the German Patent and Trademark Office in 2004 granted 16.661 patents, and the Intellectual Property Office of Serbia (then Serbia and Montenegro) 175 patents (disregarding 83 petty patents for which no substantive examination is being carried out). See WIPO – Patents Granted by Office 1982-2004, http://www.wipo.int/ipstats/en/statistics/patents/source/granted_national_table.csv .



The second quantitative criterion is the pendency time. As relevant and somewhat comparable time frames the following ones are taken: (a) the time flow from filing the request for the substantive examination of the application to the first administrative action related to such examination and (б) the time flow from filing the request for the substantive examination of the application until the final action related to examination. The table shows both time limits in months in patent administrations of the Trilateral in 2003 and 2004[30].

		2003	2004	2005
EPO	time limit (a)	24,9	21,7	
	time limit (b)	37,7	41,4	
JPO	time limit (a)	25,0	26,6	
	time limit (b)	31,1	31,6	
USA	time limit (a)	18,4	20,2	21,1
	time limit (b)	26,7	27,6	29,1

Generally speaking, the tendency to extend the time limit for the procedure (total pendency time) is visible. With this, the mentioned time limits not even closely reflect the total time that passes from filing the patent application till the final substantive decision of the administration. Namely, due to differences in patent procedure laws applied by the administrations of the Trilateral, a patent can be waited for from around 4 (European Patent Office) to almost 7 years (Japan Patent Office).

30 The document CA/115/06, Patents Landscape in Europe, Japan and the USA, од 9.6.2006, submitted on the 106th meeting of the Administrative Council EPO, p. 31. The data for the US Patent and Trademark Office for 2005 taken from «USPTO 2005 Performance and Accountability Report – Patent Performance» http://www.uspto.gov/web/offices/com/annual/2005/040201_patentperform.html .

Resources necessary for the functioning of the patent administrations of the Trilateral are enormous[31]. All of them are at a very high level of automation. In their work they use digital data bases and stimulate the electronic filing of applications[32].

Due to the lack of human resources and premises, the US Patent and Trademark Office and Japan Patent Office have for years outsourced specialized firms and institutes to carry out the search of prior art. Despite the planned growth of the number of employees[33], increased outsourcing is planned.

The predicted growth of the workload of the patent administrations of the Trilateral[34] raises the question of their ability to meet their tasks in the future. The tasks are primarily:

- Acceleration of the patent procedure,
- Reduction of patent costs, so that the advantages of the patent protection are widely available (especially to the individuals and small and medium sized enterprises),
- Improvement of the work quality in terms of the increase in reliability of the decisions.

31 European Patent Office in 2005 had 6118 employees, of which around 3500 examiners and the budget of around € 1.213.400.000, i.e. $ 1,56 bill (http://annual-report.european-patent-office.org/2005/financial_report/_images/income.gif); The US Patent and Trademark Office in 2005 had 7363 employees, of which 4258 examiners. (http://www.uspto.gov/web/offices/com/annual/2005/0401_mission_org.html) and the budget of around $ 1,5 bill (http://www.uspto.gov/web/offices/com/annual/2005/040601_budget_resreq.html); Japan Patent Office in 2005 has 2651 employees, of which 1358 examiners and the budget of 117.554.116.000 ¥, i.e. around $ 1,016 bill (http://www.jpo.go.jp/shiryou_e/toushin_e/kenkyukai_e/pdf/ar2005/ar2005_part05.pdf).

32 Japan Patent Office has come furthest in this regard, because in 2005 around 97% of patent applications were submitted electronically.

33 Japan Patent Office plans to employ 100 new examiners each year until 2008. (Trilateral Statistical Report 2004, The Trilateral Offices, http://www.Trilateral.net/tsr/tsr_2004/ch2/).

34 For example, the European Patent Office envisages the annual growth in the number of patent applications of around 5%, i.e. 10.000 to 11.000. This means that this Office in 2011 will receive around 256.000 applications. (Document CA/125/06, Future Workload, од 8.6.2006, submitted on the 106th meeting of the Administrative Council of EPO.) Japan Patent Office envisages that soon the number of unexamined applications will grow from approximately 606.000 to around 800.000 (http://www.jpo.go.jp/shiryou_e/toushin_e/kenkyukai_e/pdf/ar2005/ar2005_part01.pdf).

3. THE WAYS AND OBSTACLES TO OVERCOME THE CRISIS

3.1. Mutual operative collaboration of the patent administrations of the Trilateral

It is understood that each patent administration of the Trilateral has its own development plans, harmonized with the state government policy (USA, Japan), i.e. the Administrative Council of the European Patent Organization (steering the European Patent Office)[35]. However, from these plans it is obvious that all three patent administrations are aware that they cannot endlessly count on the increase in the number of employees, improvement of the documentary basis for the substantive examination of the patent applications, improvement of the automation, formal enhancement of the procedure etc.

The Trilateral collaboration, stated already at the end of the 1980's, deals officially with these issues ever since the „Trilateral Meeting for Workload Reduction of Offices and Associated Costs", held in Tokyo in 2001. Up until now and based on the thoughts on these issues, it has been implied that the key to the future of the global patent system is the operative collaboration within the Trilateral.

What especially encourages the Trilateral in the direction of mutual collaboration is a phenomenon of triad families of patent applications. Namely, according to the data for 2000, each patent administration of the Trilateral receives between 8,7% and 28,8% secondary applications filed on the basis of priority applications filed to every other patent administration of the Trilateral[36]. If the patent protection for the same invention is applied for with all three patent administrations of the Trilateral, while the priority application is filed to any of the three administrations, then we talk about the triad application family. In case when each patent administration of the Trilateral grants the patent for that invention, then we talk about a triad patent family[37]. The number of triad

35 In 2003, USA adopted "The 21st Century Strategic Plan" that begins with the sentence: "The US Patent and Trademark Office is under siege." (USPTO – The 21st Century Strategic Plan, http://www.uspto.gov/web/offices/com/strat21/stratplan_03feb 2003.pdf). Since 2005, the considerations of the Administrative Council of the European Patent Organization have been included under the name "The Strategic Debate". All documents on that topic can be found on http://ac.european-patent-office.org/strategy _debate/documentation/index.en.php .

36 The data are from 2000. The biggest "flow" is between the European Patent Office – The US Patent and Trademark Office (28,8%), and the smallest between Japan Patent Office – European Patent Office (8,7%). (Trilateral Statistical Report 2004, Worldwide Patenting Activity, http://www.Trilateral.net/tsr/tsr_2004/ch3/)

37 Triad families of patent applications have recently been taken by the OECD as a statistical indicator marking, by definition, patents of bigger technological and economic

patent families marks a constant growth – around 30.000 in 1991 to around 51.500 in 2002[38]. Since triad families of patent applications i.e. patents are the very core of a wider (global) family of patent applications, i.e. patents, it is evident that the speed and work quality of each patent administration of the Trilateral influences significantly not only the functioning of the global patent system, but also the wider technological and economic implications of the patent protection.

The above mentioned data determine the necessary contents of operative collaboration between patent administrations of the Trilateral. This involves **mutual usage of the results of substantive examination of priority applications submitted to one administration, for the needs of processing of secondary applications submitted to the other administrations of the Trilateral.** This usage can have several forms:

It would be ideal if the patent administration of the Trilateral, that receives a priority application for a certain invention, could be capable of completing the substantive examination within 12 months of international priority. The applicant could then, depending on the examination results, know whether s/he could count on the patent protection from secondary applications as well. The idea behind it is that there is no need for him/her to file secondary applications if it has been determined from the priority applications that the invention does not meet the patentability criteria. On the other hand, if it is determined from the priority application that the invention meets the patentability criteria, s/he would be motivated to file secondary applications too, believing that the patent administration in charge of any secondary applications will „take over" the examination results of the priority application.

Less ideal but more realistic scenario would involve that the patent administrations examining secondary applications „take over" the results of the patent administration processing the priority application, irrespective of the time consumed for examination of the priority application (the only thing important is that the substantive examination of the priority application must be completed before examination of the secondary applications begins).

Even less ideal but the most realistic form of operative collaboration of patent administrations of the Trilateral is that they mutually recognize only the reports on the search of prior of art (search reports)

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value, and which enables relatively objective insight into many important processes and features, such as intensity of technical creation in individual states, relation between investment into research and development vs. number of patents etc. For further study see a very useful web site of OECD – Measuring Science and Technology, http://www.oecd.org/statisticsdata/0,2643,en_2649_34451_1_119656_1_1_1,00.html .

38 http://www.oecd.org/dataoecd/60/24/8208325.pdf .

created in the procedure referring to any application making the Trilateral application family. This is the direction of the suggestions formulated by each patent administration of the Trilateral regarding possible forms of collaboration[39]. In a very limited and experimental form, this type of collaboration has already been started between Japan Patent Office and US Patent and Trademark Office.

3.2. Specific aspects of the European part of the Trilateral

The European Patent Office is a supranational regional patent administration serving 31 European countries. Irrespective of the European Patent Convention, all those countries continue to maintain their national patent legislation and national patent administration. Since obtaining a European patent is simpler and cheaper than obtaining a large number of national patents in Europe, the natural consequence of this parallelism is a decrease in number of applications filed in national patent administrations of European countries and the increase in number of European applications filed in the European Patent Office. In this way, the European Patent Office is in a situation to seek the relief from the increased workload not only within the Trilateral collaboration, but also within its coexistence with national patent administrations of the European countries. The so-called strategic debate, which has been lasting for few years in the Administrative Council of the European Patent Organization, has so far resulted in decision that, on experimental and limited basis, the patent administrations of Great Britain, Austria and Germany will be delegated to deliver to the EPO the search reports referring to national priority applications. When processing secondary European applications, the EPO would thus be able to use those search reports and in that way cut the pendency time for granting a European patent[40].

3.3. Basic obstacles for operative collaboration within the Trilateral

There are many obstacles to operative collaboration within the Trilateral, and we will look only at those of legal nature. Namely, the condition for each patent administration to recognize the examination results of any other patent administration of the Trilateral is to trust them. Ideally, if the EPO grants a patent based on a priority application, the

39 The European Patent Office drafting "New Route", Japan Patent Office drafting "Patent Prosecution Highway", US Patent and Trademark Office drafting "TRIWAY". See more details in a document CA/44/06, Trilateral Strategic Issues, on 12.6.2006, submitted on the 106th meeting of the Administrative Council of EPO, p. 3, 4.

40 The project is framed by a document "Project Initiation Document – Utilization Pilot Project (UPP)", CA/121/06, on 8.6.2006, submitted on the 106th meeting of the Administrative Council of EPO

Japan Patent Office and the US Patent and Trademark Office should, without additional substantive examination, grant patents based on secondary applications. In other words, each patent administration of the Trilateral should believe that it would reach the same examination results as those reached by and taken over from the other patent administration of the Trilateral. In order to achieve that, certain technical and legal presumptions need to be fulfilled.

At a technical level, this issue tackles the quality of documentary basis used to determine the state of prior art, examination methodology, quality of software tools used and expertise of the engineers-examiners. In that sphere, as already mentioned, certain forms of cooperation are already active. However, every higher form of collaboration encounters an obstacle difficult to overcome. This obstacle consists of discrepancies in patenting procedures and substantive patent laws practiced by patent administrations of the Trilateral.

In the further text, we will strive to provide a simplified comparative analysis of patenting procedure and substantive patent law, as provided for by EPC (hereinafter: European law)[41], US Patent Law[42] and Japan Patent Law[43], and point out the most significant differences.

3.3.1. Substantive Patent Law

Patents are granted for inventions in all three systems. However, there are significant differences in respect of the concept of „invention". While the European law still holds on to tradition that an invention must be in the domain of technology, strictly regulating that computer programs (as such) and mental processes are not inventions[44], the US law has, on the other hand, made a decisive step towards including computer programs and the so-called business methods in the notion of invention[45].

41 European Patent Convention, 1973.

42 Patent Law, 1952, amended last time in 2002.

43 Patent Law, 1959, amended tens of times – last time in 2003.

44 Art. 52, Para.1,2,3, EPC.

45 It is a result of a rather extensive and evolutionist interpretation of the Article 101 of the Patent Law, determining that an invention can refer to a process, machine, manufacture or composition of matter. Traceable through the court practice ever since the case *Gottschalk v. Benson* in 1968 (US Supreme Court), enormous pressure of the American software industry to patent its products resulted in success in the case *Diamond v. Diehr* in 1981 (US Supreme Court). Then in the case *State Street Bank v. Signature Financial Group* in 1991 the Federal Appellate Court assumed the attitude that there is a legal basis to recognize patents for the business methods because they are just a subgroup of the processes mentioned by the Article 101 of the Patent Law. This attitude was later assumed by Board of Patent Appeals and Interferences of the US Patent and Trademark Office in the case *Ex Parte Lundgren* in 2005.

The Japan law is somewhere in the middle, recognizing computer programs as patentable inventions, but still excluding business methods[46].

All three systems stipulate novelty as the first condition for patenting an invention. With this, the novelty concept is the same in the European and Japanese law (invention is new if it was not encompassed by the state of prior art on the day of application priority, i.e. was not available to the public in any way anywhere in the world)[47]. On the contrary, the US concept of novelty is extremely complicated. With regard to the European and Japanese system the main differences are, on one hand, the fact that the invention is regarded as new even though it has previously been publicly used abroad, while, on the other hand, the novelty is lost if the invention has been secretly used in the US[48]. As a reference moment to determine the novelty in the above mentioned cases in the US law, the day when the invention was made is taken (not the day of application priority, as it is regarded in Europe and Japan). The application priority day is however regarded as relevant to determine the novelty of the invention in the US in case that the invention is patented or described in printed publication in the US or abroad, or put into public use or on the US market more than a year ago[49]. So, in that latter case, the invention will not be new for the purpose of patenting procedure in the US. If less than one year has passed, the invention will be new, which implies a specific *grace period* when the mentioned activities (especially the description of the invention in printed publications and public usage of the invention) do not take away the novelty of the invention, although done before submitting the application.

After explaining the grace period in the US law, we notice that the European and Japanese law regulate the same institute differently. In the European law, the novelty will not be harmed if the invention is made public by unauthorized person or displayed by the applicant (or his/her legal predecessor) at an international exhibition in the period of 6 months before filing the European application[50]. In Japan the grace period is relatively widely determined: the novelty will not be destroyed if the invention is made public by the applicant (or his/her legal predecessor) in any way except for the commercial use; if the invention is made public by unauthorized person; and if the applicant (or his/her legal predecessor) displayed the invention at an officially recognized exhibition, and all that

46 Patent Law, Art. 2, Para.3 (since the amendment in 2002).

47 Art. 54, Para.1, 2, EPC; Art. 29, Japan Patent Law.

48 Art. 102, Para. a), Patent Law.

49 Art. 102,Para. b), Patent Law.

50 Art. 55, EPC

under the condition that the application for that invention is filed in a 6-month period after that event[51].

One of the most specific aspects of the US patent law refers to regulating the right to patent protection. This right, surely, belongs to the inventor, but unlike the rest of the world, in case of conflict between two *bona fide* inventors regarding the right to patent protection, the fact who was the first to file the application will not be decisive, but who first made the invention[52]. In other words, while in Europe, Japan and the rest of the world this conflict is solved by the *first-to-file principle*, the US applies the *first-to-invent principle*. This principle is deeply rooted into the US patent system and has its consequences in many issues, especially in regulating the patentability condition of novelty, and priority right.

Another interesting aspect of the US patent system refers to the principle regulating the priority right. In Europe, Japan and most of the world, the priority is gained by filing the application. However, if the priority and secondary applications for the same invention are filed in several member-countries of the Paris Convention for the Protection of Industrial Property, the priority will be counted in all countries starting from the filing day of the first (priority) application, provided that all the conditions for recognition of international priority right are met in accordance with the Paris Convention. The effect of the priority right is twofold: (a) the patentability of an invention is assessed with regard to the priority date, and (b) from the priority date, the invention disclosed in the application (if the application is published) prevents patenting the same invention contained in subsequently filed applications. In the US, this second effect of the priority right is consequently modified by the above explained first-to-invent principle. This means that the invention in the application, with the recognized priority right, prevents patenting the same invention that was later created by another person. With this, the effect is recognized only for priority applications submitted in the US. In case the priority application is submitted abroad, and the secondary one in the US, the mentioned effect is recognized for the secondary application from its filing date in the US, not the date of its international priority[53]. International PCT applications, submitted abroad (with US

51 Art. 30, Para.1, 2, 3, Patent Law.

52 When submitting an application in the US, the applicant must file a written oath that s/he believes to be the first and true inventor of the invention descclosed in the application (Art.115, Patent Law). When the US Patent and Trademark Office determines that two persons (independently of each other) submitted the application for the same invention in the US, it opens the so-called *interference procedure* which aim is to determine, using complicated rules, which one of them is the first and true inventor, in order to determine who has the right to the patent protection (Art.135, Patent Law).

53 Art. 102, Para. e), Patent Law.

designation) in English, have the mentioned effect from the date of their filing abroad, and not from the date of the possible international priority. Finally, all other secondary applications submitted in the US have that effect, based on priority applications submitted abroad in a language other than English, only from the date of their official publication (in English) in the US[54].

Already these few differences in the substantive patent laws of Europe, Japan and the US, suggest that in a large number of cases the same invention would not be patentable in opinion of each administration, even under a hypothesis that the patent administrations of the Trilateral optimally agreed on all technical aspects of the operative collaboration. In this way it is clear why the ideal form of the Trilateral operative collaboration – mutual recognition of the patentability assessment for the same invention, that is the case of the triad application family – will not be possible for a long time.

3.3.2. Law regulating patenting procedure

The key difference in the procedure for obtaining patent protection in the administrations of the Trilateral is that in the European Patent Office and Japan Patent Office, the patent is obtained in the procedure of the so-called deferred examination, whereas the system used in the US is a hybrid between the so-called preliminary examination and deferred examination. Also, there are significant differences between the European and Japanese system. More concretely, in the European Patent Office and Japan Patent Office, filing the patent application does not imply the request for substantive examination. Instead, the application is made public within 18 months from filing, and then the applicant is given a certain time limit in which s/he can make a request for substantive examination. Failure to file the request is considered to be the withdrawal of the application i.e. ending the procedure. While the European law gives the time limit of 6 months for filing the mentioned request[55], the Japanese law on the other hand leaves the 3-year time limit[56]. This drastic difference in the time limits practically makes the European Patent Office and the US Patent and Trademark Office unable to use the substantive

54 Art. 102, Para. e) and Art. 363, Patent Law.

55 Art. 94, Para.2, EPC.

56 Art. 48 of the Patent Law. This time limit in Japan up until 2001 amounted to even 7 years. A concrete consequence of such a specific time limit is that in Japan in 2004 even 2.105.255 patent applications "waited" for their applicants to make a request for substantive examination. On the other hand, the figure for the same year in the European Patent Office was only 20.171 (Trilateral Statistical Report 2004, Patent Activity at Trilateral Offices, http://www.Trilateral.net/tsr/tsr_2004/ch4/).

examination results produced by the Japan Office, because when the applicant in Japan makes the request for substantive examination, the European Patent Office and the US Patent and Trademark Office are already about to take a decision on patent grant, that is to finish the patenting procedure upon the secondary application for the same invention.

In the US, however, filing the application implies the request for its substantive examination so that the US Patent and Trademark Office *ex officio* enters that phase of the procedure, without waiting for the special action by the applicant[57]. By doing so, this patent administration is deprived of possibility to reduce the number of applications entering the phase of substantive examination due to abandonment by the applicant. Looking from that aspect, it could be said that the US apply the traditional system of preliminary examination. However, since 1999 this system has been modified by the institute of official publication of correctly filed applications within 18 months from filing[58], meaning that an important element of the system of deferred examination, applied worldwide, is adopted.

Regarding the institute of official publication, there is a specific aspect of the US Patent Law, which is completely incompatible with European and Japanese standards. If, based on priority application filed in the US, there was no secondary application filed abroad, the applicant can ask that his/her application in the US should not be published[59]. This compromises the European and Japanese concept of the state of prior art whose logic is based on early official publication of all patent applications filed anywhere in the world, so that the novelty of the invention, as a condition for patent grant, could have its full purpose in patent law.

Finally, from many specific procedural aspects of the US Patent Law, we will outline the institute of provisional patent application[60]. In the US there is a possibility of filing the application in which the invention was sufficiently disclosed but the application does not contain patent claims. Based on this application, it is possible to secure priority right but not to obtain patent. In order to request and possibly obtain patent, it is necessary to file a „normal“ application within 12 months. Such an application will be accorded the priority right from the filing date of the provisional application.

57 Art. 131, Patent Law.

58 Art. 122, Para. а), Patent Law.

59 Art. 122, Para. б), point 2, Patent Law.

60 Art. 135, Para. б), Patent Law.

This short selection of specific solutions in the patent procedure law applied by Trilateral patent administrations, already illustrates the seriousness of legal obstacles for substantive operational collaboration among those administrations.

3.4. Harmonization of patent laws

Despite a certain number of regional and universal conventions regulating the area of patent law, the fact is that the international harmonization in this area is still not on a satisfactory level. World Intellectual Property Organization in Geneva established in 1998 the Standing Committee on Patent Law that is still a world forum where a lively debate is taking place regarding those issues. As a relatively modest contribution of this expert body, the Patent Law Treaty was adopted in 2000 (came into force in 2005) regulating only certain formalities and details of the patenting procedure[61]. From 2001 the Standing Committee has been working on the Draft Treaty on Substantive Patent Law that should regulate the essential questions such as: the state of prior art, novelty, inventive step, sufficient disclosure of the invention in the application, application publication and other. This work is very difficult, not so much due to legal differences existing among Europe, Japan and the US, but also due to cultural and legal abyss dividing the developed from the developing world. Given the current state of the debate in World Intellectual Property Organization, the prognosis for the success of this process is rather pessimistic than optimistic.

It is more realistic that in Japan, and especially in the USA, under pressure from problems in the Trilateral, there will be coordinated unilateral interventions of the national legislator, in order to enable these patent systems to come closer regarding both material and procedure aspects[62].

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61 See the text of the Treaty and its Regulations, as well as the list of the member-states on the web site of the World Intellectual Property Organization http://www.wipo.int/patent/law/en/scp.htm). Serbia is still not a member of the Patent Law Treaty.

62 A draft Law on Patent Reform was submitted to the US Congress in 2005. According to its author, Congressman Lamar S. Smith, it represents the most comprehensive amendment of the US Patent Law ever since the Congress had passed the Patent Law in 1952. It is important that this draft is based on the results of the Report of Federal Trade Commission in 2003 and the Report of the National Science Academy in 2004. Among many things, the draft involves: adoption of the "first-to-file" principle i.e. abandoning of the "first-to-invent" principle and introduction of the obligation to formally publish all applications submitted in the US. See the text of the draft on the web site of the Congress library http://thomas.loc.gov/cgbin/query/z?c109:H.R.2795:/.

CONCLUSION

A technical invention, as an element of the global knowledge economy, has become one of the dominant economic resources. Appropriation of this resource, as a monopoly over its economic exploitation, is possible only provided it is a subject of patent protection. Since the patent protection is limited to the territory of the state granting the patent, our age is characterized not only with increasingly bigger number of inventions being applied for patent, but also with larger internationalization of the patent activity i.e. a phenomenon that one person or its legal successor seeks protection for the same invention in the increasingly larger number of states.

The attempt to rationalize the patenting procedure for the same invention in several states has resulted in a certain number of international conventions, among which the most important are the Patent Cooperation Treaty and the European Patent Convention. As a consequence of the role they have in the implementation of the mentioned conventions, but also due to the significance for national and regional economy, the US Patent and Trademark Office, Japan Patent Office and the European Patent Office have become the pillars of the global patent system of which *de iure* or *de facto*, directly or indirectly, depends patenting of an invention in a large number of states in the world. These patent administrations form the so-called patent Trilateral which is today facing a growing workload and increasing backlogs.

At the same time, the crises of administrative capacity of the Trilateral results in the administrative crisis of the global patent system, and the need to address it overcomes political, economic and technologic interests of individual states.

For now, the mutual cooperation of the patent administrations of the Trilateral is limited to certain technical aspects of improving preconditions for more efficient work. The essential collaboration which must aim to **the mutual recognition of the results of substantive examination of the patent applications** faces one big obstacle in terms of significant differences in substantive and procedural patent law, practiced by these patent administrations. In the substantive patent law the biggest problems come from the discrepancy between the first-to-file principle vs. the first-to-invent principle, and the inconsistencies in the concepts of the state of prior art, novelty of the invention and the so-called grace period; in the procedural patent law the biggest problems are: the Japanese law gives too long a time limit for the applicant to submit the request for substantive examination of the patent application, and the US law with its specificities regarding publishing the application and the institute of provisional application.

Harmonization of the patent laws of the US Patent and Trademark Office, Japan Patent Office and the European Patent Office is a condition without which the Trilateral crisis, and thus also the global administrative crisis of the patent system, cannot be solved. The current efforts of the World Intellectual Property Organization to prepare the international Treaty on Substantive Patent Law do not have good prospects for complete success in near future because, among the representatives of the developing countries, the negotiations are under doubt about the basics of the current patent system, as such.

We envisage that the US, Japan and European Patent Offices will, through unilateral but coordinated legislative actions, take steps towards further harmonization of the patent law within the Trilateral, and thus strengthen the presumptions for the essential operative collaboration.

Petar Opalić

INFORMAL AND FORMAL SOCIAL CONTROL OF MENTALLY ILL PERSONS

Forms of indirect social control of mentally ill persons are presented first, through the attitudes on normal and pathological mental state, as well as prevention and treatment of mental disorders.

Subsequently, the control of mentally ill patients by legal provisions is analysed, as well as the issue of mental incompetence from a legal, psychiatric and ethical perspective.

Legal provisions regulating involuntary hospitalization are specifically analysed.

The conclusion points to a series of unsolved social, professional, normative and political dilemmas related to social control and legal provisions regarding the social control of mentally ill persons.

Key words: *Social control of mentally ill persons. – Mental incompetence. – Law and psychiatry*

INTRODUCTION

Sociologists have been researching social control of mentally ill persons for over a century (Ross 1901, according to Horwitz 1982). On the principle, only those members of the society who violate social norms, namely those who are deviant in the broadest sense of the word, are subject to direct social control. Social control in those cases is established through either informal (education, public opinion or socialisation in the broadest sense), or formal mechanisms (regulations – written norms), that is, through social institutions (police, judiciary, health-care). Social control generally means that certain measures are undertaken against particular deviant phenomena – either negative (sanc-

tions), or positive ones related to providing support in various forms of conforming a deviant person to social norms.

Intensive research this subject dates back to 1950's, when a US couple Cumming (Cumming, Cumming 1957) initiated research of attitudes towards mentally ill persons, and was continued through famous studies of Hollinshead and Redlich (1958), and Goffman (1973) and Silverstein (1968), up to more recent works investigating social and other aspects of involuntary hospitalisation in a thorough manner (Bruns 1993). Historically speaking, the most severe aspect of control of mentally ill persons were the measures imposed in Germany during the Nazi regime (1933–1945), as they executed around 100,000 mentally ill persons or performed involuntary sterilisation of several hundreds of thousands of the mentally ill, mentally retarded and epileptics. Involuntary sterilisation of the mentally retarded, truthfully speaking, was being carried out in other countries as well. Until recently, the sterilisation of the mentally ill was being carried out in France – around 30,000 women and several thousand men were sterilised, and similar was happening in the USA during the 19th century, as well as in Scandinavian countries and Canada (Giami 1998). Sterilisation was performed with the intention of the society to biologically control unacceptable consequences in violating norms of sexual behaviour of mentally retarded persons (such as public masturbation, voyeurism, etc.), but also and not so rarely out of eugenic motives, namely, with the intention of preventing birth of mentally handicapped in a wider sense, which was, doubtlessly, being done with racist motives.

According to certain authors, the issue of social control of mentally ill persons is a matter of examining social conditions of getting and maintaining the label of mentally ill, even accepting treatment in the form of psychotherapy (Horwitz 1982).

We are of the opinion that social control of mentally ill persons has two key aspects. The former being informal, related to attitudes towards mental disorders, education and generally unwritten norms of behaviour. The latter being formal, namely legal, regulated by positive laws, and related to normative regulations of treatment of mentally ill persons, including the issues of statutory definition of mental incompetence. Informal control of mentally ill persons is unavoidable issue of psychiatric sociology, since it involves analysis of attitudes towards mentally ill persons and presentation of socio-genesis of mental disorders, and to a part it is an issue of sociology of psychiatric theory and practice, without which the contents of this subtype of sociology is unthinkable.

INDIRECT OR INFORMAL CONTROL OF MENTALLY ILL PERSONS

Explicit control of mental disorder or insanity in its lay sense begins with the Enlightenment, precisely speaking the epoch of Rationalism – the end of the 18th century. Rationalism strongly and in a versatile manner opposed insanity as non-reason, as an anti-thesis of the ideal advocated by the Enlightenment. Rationalism, on the other hand, valued predictability, measurability and objectivity of human behaviour. Separation of mentally ill persons from other marginal ones (criminals, prostitutes, the homeless, vagrants) in prison settings did not, as emphasised by D. Kecmanović in his latest book „Individual or Social Disorder" („Individualni ili društveni poremećaj, 2002), mean their liberation. It was in fact the beginning of 'locking' insanity into madhouses, later on named psychiatric or asylum institutions in the widest sense. Insanity managed to get rid of the unwanted grasp of poverty, immorality, laziness and crime, but was subjugated and isolated from everything rational in the society. It underwent total derationalisation, not only in a cognitive or social manner, but also in terms of its values. Truthfully speaking, any psychiatrist as a beginner very quickly learns that an insane person is ill only for a period of time, and in a limited sphere of his psychical life, but this is not generally accepted by a wider social public. This process was opposed by anti-psychiatrists. When failing to reform the society, which, in their view was responsible for creating insanity as a medical category, as a social myth (Szasz 1980) or overall metaphor of evil, including madhouse as its institutional expression (Goffman 1973), anti-psychiatrists declared insanity revolutionary, not only for an individual and his/her family (English anti-psychiatrists) (Laing 1977), but also for the society in general (so-called socialist collective of psychiatric patients from Heidelberg and certain Italian anti-psychiatrists) (Basaglia 1978).

Mentally ill person does not behave in a cooperative manner when speaking of respecting valid social norms – therefore the society has always felt invited to impose outer will upon it, namely, the rules of mutual communication. In fact, a mentally ill person offers to the society his reality as a generally valid one, beyond generally accepted categories of social usefulness, social regulation, general well-being, in a word, beyond the semantic frame of communication. Therefore, response of the society to such state of affairs in communication with a mentally ill person is manifold, and embraces various segments and aspects of social life of a mentally ill person. A. Hollinshead and F. Redlich in their publication „Social Class and Mental Illness" (1958), and some time later Srole L. et al, in their also frequently cited publication „Mental Health in a Metropolis" (1962) used sociological field findings to point to the indirect control of mentally disturbed by the society achieved through ignoring,

then segregation, and finally moving them to lower social strata, namely, central districts of megalopolises.

F. Basaglia (1978) believes that essentially punishment of the society in the social control of insanity is due to different behaviour and thinking. In a milder form it is manifested as informal despise, derision, nonverbal gesture of scorn carrying the message that somebody is 'lunatic', then it intensifies as more or less exerted pressure on a 'strange' man to undergo treatment, while in its most serious form social control is manifested in using physical force during hospitalisation and tying a patient in psychiatric hospitals.

The control of mentally ill persons also depends on their social status. Summarising the results of a research on the treatment of mentally ill in the US, Cockerham (2002) claims that the most severe social control, that is, the cruelest treatment of mentally ill persons, is applied with patients from lower social strata, especially if they are black or are very poor immigrants. Somewhat better treatment is provided to the patients from lower economic stratum of domicile population, while the best treatment is reserved for domicile population with better spending capacity. The latter ones are treated in a discrete way, either through psychotherapy in their household settings or at specialised highly-comfortable institutions. Social control is also somewhat less strict in situations in which both a therapist and his patient come from the same social stratum or the same cultural circle, since in such a case there are social prerequisites for development of empathy, trust and good cooperation between them.

Psychotherapy, beyond any doubt, poses a sort of social control of mentally ill persons, although far more discrete and subtle than other kinds of control, since psychotherapists in a way transmit the outer pressure of the society on an individual to adjust to the existing social order, especially the social distribution of power. Psychoanalysis, in its own way, paved a way towards creating a comprehension, or precisely speaking justified the attitude that violence, namely aggression, is a natural way of establishing social order, since it, beside sexual drive, brought to the front the explanations of human nature and origin of mental problems, aggressive instinct. According to psychoanalytical opinion, covert readiness for aggressive, even destructive reaction lies in every person (Thanatos instinct or death instinct). Finally, medicalisation in psychiatry is considered, especially in anti-psychiatric opinion, a method of biological, or so-called internal control of mental patients, being a perfidious or so-called invisible internal bonding of a mentally ill person.

The society performs indirect control over mentally ill persons in other ways that are more difficult to recognise. They are related to primary prevention of mental diseases through various institutions (for

example health-care centres) that prior to the appearance of disorder symptoms undertake certain measures aimed at making mental diseases remain socially invisible or masked (which is especially successfully done in higher social strata), or aimed at preventing the appearance of these symptoms as they be undesirable form of behaviour. It is related to social work or family treatment of various sorts, in which, through social setting of treatment or through the phenomenon of group pressure, conformation to general social rules of behaviour is attained, and not only alleviation and providing solutions to so-called life problems of people. This aspect of indirect social control is even more evident in sociotherapy, treatment of mental difficulties in large groups (consisting of more than 25 members), such as therapeutic community, clubs of chronically ill psychiatric patients. This aspect of indirect social control is also visible in other measures of so-called tertiary prevention of mental disorders.

The control of mental disorders is also realised through compulsory following-up of mental health of population (so-called follow-up projects) carried out through performing control check-up of persons suspected of having mental problems, the aim of which is on one side professional and therapeutic, and on the other socio-restrictive. The society defends itself in advance from unpredictable and mentally incompetent behaviour of a potentially mentally ill person by de jure preventing such behaviour, while de facto protecting its own integrity and functioning of some of its segments (Bowers 1998).

Indirect and invisible control of mentally ill persons is also relatively easily recognised in attitudes towards them. The expression 'madness' is quite often used as a verbal 'bludgeon' in public or private disputes of both anonymous and public persons. The expression 'madness' has a sad unconscious collective pre-history in the prosecution of mentally ill women as witches during the Dark Ages and confining political dissidents to psychiatric institutions in various totalitarian regimes on the pretext of their being mentally ill. Not only were political dissidents confined to such institutions, they also bore the label of being dangerous to the whole society. It is no wonder that psychiatry today, thirty years after the anti-psychiatric wave, is still being criticised to an extent and in a way that brings into question the whole purpose of its work, which has never been the case with any other discipline of medicine. In that respect, the ruling social elite (political, but also information and media elite, even cultural) still tacitly leaves to psychiatrists not only to help, but also to control mentally ill persons on its behalf (especially if mentally ill persons, beside being mentally ill, publicly oppose that elite). The elite members then, from time to time, hypocritically and publicly attack not only the asylum psychiatry, but also true enthusiasts in mental health protection, not to mention their derisive treatment of mentally ill persons

and frightening people with unpredictable aggressiveness and bizarreness of behaviour of mentally ill persons.

CONTROL OF MENTALLY ILL PERSONS THROUGH LEGAL NORMS

The control of mentally ill persons is more noticeable in regulations related to a range of relations of the society towards mentally ill. One of the most important is the issue of so-called general danger by the mentally ill, as well as the issue of regulating offences and possible criminal acts of mentally ill. Interest in this, legal, aspect of control of mentally ill persons has extremely increased in the last 15 years, and is, justifiably, as pointed out by Legemaate (1998) brought into connection with observing human rights as an aspect of the political trend of globalisation in the world.

The concept of defining social danger of mentally ill persons is related to its three basic dimensions: 1 – danger to his/her own self (self-injury, suicidal ideas and suicidal attempts), 2 – danger of a mentally ill person to others (homicidal ideas, threats and attempts), and 3 – danger to property. The listed dangers are variously defined by penal laws of various countries, and they define conditions under which involuntary imprisonment of mentally ill persons is performed if reasonable doubt exists that a certain act has been done by a mentally ill person. In such cases what is insisted on is objective and unambiguous evidence, less often on the formulation 'beyond sound mind' (as defined, for example, by the law of certain US states).

Countries with democratic political systems realise their need to define issues related to problems with mentally ill persons in three different ways. These include: 1 – legal definition of a mentally ill person as posing a danger to his/her own self, others or property (force in these instances is applied in the name of protection of civil rights of others); 2 – legislation of procedure and duration of process of forced confinement and treatment of mentally ill in closed in-patient wards; and 3 – precise normative definition of force as a measure of intervention over an ill person. As for the first aspect of the problem, researches have shown that making certain diagnoses to mentally ill persons such as sexual harassment or drug addiction significantly increases probability of legal prosecution and conviction. Therefore, opinions (Graf, Eichorn 2003) that psychiatric patients are over-criminalised – especially those treated under the diagnoses of 'Personality disorder' and 'Drug addiction' – are heard more and more often. In relation to this, the criticisers of normative stipulations related to the problem suggest that instead of the conviction

to mandatory treatment at closed-type institutions, intensive care of these people should be carried out in out-patient conditions (so-called out-patient commitment programme) (Hiday et al 2002).

Psychiatrists have a tendency of declaring a mentally ill person dangerous even if the person essentially isn't, claims the well-known US sociologist Cockerham (2000) referring to several sources. The concept of posing a danger to somebody else is difficult to define, since it involves mental danger (for example mental abuse). Therefore, for example, the new Family Law of Serbia that came into force in 2005 stipulates the possibility of a prompt, without additional checking, engagement of police in the protection of women who believe to be physically and mentally abused, which was not the case with the previous Family Law.

In the majority of the US states a mentally ill person is entitled to a lawyer, to remain silent, to bail, to trial, to damages by court etc. In Serbia, two years ago, an institution of so-called 'patient's lawyer' was introduced. This lawyer is appointed by the general manager of the mental institution (therefore, the Ministry of Health Care), and is to settle disputes of patients with doctors and other medical staff. I am, however, afraid that he is too far from a real patient's lawyer, for being in an unsolvable institutional collision, since he is to get engaged against those he depends on institutionally and psychologically, on behalf of those who are, on the other hand, completely dependant on him.

In his textbook of forensic psychiatry B. Krstić (1980) lists all areas of this issue regulated by law in Serbia. They include compulsory psychiatric treatment and confinement to a mental institution, including two-fold imprisonment, namely, measures of compulsory treatment at a prison psychiatric ward, compulsory psychiatric treatment at liberty, as well as involuntary treatment of alcoholics. Referring to the latest law provisions on this issue, A. Jovanović (2004) adds another three areas. These are: statutory regulation of the role of mental illness within marriage and family relations, than the issue of deprivation of business capacity and defining sanity of a mentally ill person, which are in Serbian law defined by different enactments. Serbian law excludes the possibility of getting married in cases of mental illness, while mental illness during a marriage is indicated as a possible reason for divorce. The above author considers this statutory solution anachronistic. In our opinion – justifiably, for several reasons – a mentally ill person is also entitled to marriage and parental happiness, and the loss of these rights every persons takes as existential breakdown and/or confirmation of civil discrimination. The above-mentioned measures, at least according to the laws in force in Serbia, can be both of temporary and permanent character. Compulsory psychiatric treatment and confinement to an institution is stipulated for persons who commit serious criminal offences (such as

murders) and who suffer from permanent or temporary mental illness. In other words, the offender was, according to legal assessor's findings, at the moment of committing the offence, partially or fully mentally incompetent.

Under the Criminal Code of Serbia, mental incompetence as a forensic and psychiatric category relates to persons who, at the time of committing criminal offence, could neither understand the meaning of their acts, nor control their own acts due to mental illness, temporary mental disorder, mental retardation or a more serious mental disorder, in the cases of which the origin of mental problems is of no importance (Stojanović 2006). The first part of the reasons for mental incompetence (mental disorder) is of psychiatric nature, while the second (retardation) is of psychological or even biological nature, since being related to certain hereditary diseases. The status of mental incompetence is determined by a judicial procedure, and it implies determining incapacity to understand the significance of consequences of one's own actions. This incapacity includes: 1 – cognitive inability of understanding the significance of incriminating act, for which examination of mental functions of memory, learning and observation is necessary, and 2 – inability to control one's own actions, which is related to hindrance in making decisions and performing voluntary actions. The latter is more related to the inability to control emotions, namely, it points to aggressiveness and impulsiveness of various origins, and need not be related to the former definition of mental incompetence, namely to inability of understanding the significance of one's own actions (Ignjatović 2005).

Presenting German laws regulating this issue (and Serbian laws were drafted on the model of German or Austro-Hungarian laws), Hartwich (1982) notes that mental incapacity relates to four categories of mental state, which to a degree or fully exculpate the perpetrator of the criminal act from responsibility. These include: 1 – serious mental disorder (schizophrenias, manic-depressive psychoses, organic psychoses); 2 – serious disorders of consciousness also comprising affective narrowing of consciousness. The diagnosis of affective narrowing of consciousness must, according to German laws, meet the following criteria: a) the interruption of continuity of meaningful action, b) the performed act is not typical of the perpetrator's personality, c) the amnesia for performed act is evident, and d) it is evident that the perpetrator is emotionally affected by his act when the narrowing of consciousness ceases. The remaining two categories of mental states that can be enough reason for declaring a person mentally incompetent are: 3 – a high degree of infirmity of mind (oligophrenia and dementia), and 4 – so-called other serious mental alterations (serious neurosis, psychopathies and unsocialised perversions).

It should be noted that from the psychiatric point of view, mental incompetence can be stated only if the following criteria related to mental status are met: 1 – presence of disturbed mental state (the above-mentioned illnesses), 2 – the absence of free will in making decision at the time of performing the criminal act or offence (most often due to the influence of pathologically changed mental functions), and 3 – pathologically changed mental state must be permanent. The exception to the third criterion are certain serious short-term mental disorders such as delirious states, the loss of consciousness for various reasons, epileptic and hysterical deranged states. All the listed diagnoses are also used in a judicial procedure as a legal basis for the defence of persons accused of crimes.

The US law also stipulates regulations related to 'mental illness' or 'mental defect'. The law known under the title 'The Insanity Defense Reform Act' from 1984 stipulated legal effect of the above-listed diagnoses for the purposes of defence only if the diagnose was valid at the time of performing criminal act, and if it is clearly for the purposes of defence, not prosecution (Cockerham 2000).

The circle of these issues, that is, the sphere of legal regulation of the treatment of mentally ill persons also comprises the issue of deprivation of business capacity in cases of mentally changed persons, which is regulated by the Law on Marriage and family relations. This law relates to adult person deprived of the right to responsibly defend his/her own and the interests of others, for being incapable of sound reasoning due to mental illness, mental retardation or some other reason. A guardian is to be determined for such a person, and the person can be, under the Serbian law, confined to a psychiatric institution for examination, for the period not exceeding three months.

STATUTORY REGULATION OF THE PROCEDURE OF INVOLUNTARY TREATMENT

It is almost impossible to imagine psychiatry as a profession, be it admitted by psychiatrists or not, without involuntary hospitalisation. It can follow after a criminal act or a more serious offence of a psychiatric patient, or, completely independently of the above, which is not so rare. Only the latter is involuntary hospitalisation in the narrow sense of the word, since each person in every country suspected of having committed a crime or a more serious offence on the basis of admissible evidence is arrested, independently of the state of his health. Therefore, there is almost no society that has not normatively regulated this issue.

In cases of realisation of involuntary hospitalisation without a crime committed, the US law used to stipulate the following, rather complex procedure: 1 – complaint submitted by three citizens, 2 – estimation of the reasons of complaint by a hospital psychiatrist, 3 – reconsideration of the complaint by two independent experts, one of which must be a psychiatrist – legal assessor, 4 – discussion of the court representative with the lawyer representing the patient, 5 – making a judicially valid decision on involuntary hospitalisation (Scheff 1964).

In Italy, legal enactments stipulate even more prominent role of individual citizens in making such a decision.

In Serbia, an integral law on mentally ill persons is to been enacted, and it is to regulate the area probably according to the standards of laws regulating the matter in the EU countries. In practice, a procedure similar to the US one is applied in Serbia – the court makes a decision on involuntary treatment, most often after the patient had already been involuntarily hospitalised with the support of police, when three signatures are provided on the referral to hospital treatment in which a possibility of application of force is noted.

It is interesting that forensic psychiatrist A. Jovanović (2004) is of the opinion that the authorities of the psychiatrist on duty should be even broader, counting on his good intentions (bona fide). We respect this argument, but still prefer a team to decide on involuntary hospitalisation not only for the sake of prevention of subjective mistakes made out of good intentions, but also due to neutralisation of possible outer social pressures on experts to decide on involuntary hospitalisation of a patient. A team of experts is not only more objective in assessing a need to apply force, it also more efficiently withstands para-expert social pressures (primarily the influence of socially powerful individuals and organisations).

In Serbia, involuntary hospitalisation is regulated by the Law on Non-litigious Business. The law stipulates that, if someone has been sent to involuntary hospitalisation against his/her own will, the health-care institution is to report the hospitalisation to the court on the territory of which the institution is located. The report consists of the statement by the authorised person of the institution and is to be made in the presence of two literate witnesses with business capacity who are neither employed with the institution, nor related/married to the involuntarily hospitalised person. Within a month, the court is to make a decision if the involuntarily hospitalised person is to be kept for treatment at the institution for an unspecified period of time, but not longer than a year or two years (Jovanović 2004).

In 1991 Austria enacted the law stipulating that the competent judge consent regarding involuntary hospitalisation must be obtained within four days. It is interesting that this regulation was at first taken by

psychiatrists as a bureaucratic burden, resulting in a drop of number of involuntary hospitalisation in the period of two years after the law had been passed, but the number later on rose to the level of involuntary hospitalisations prior to enacting the law (Haberfellner, Rittmannsberger 1996).

Italy has the most rigorous laws regulating the conditions of involuntary hospitalisations of mentally ill persons. The situation is similar in Great Britain, as the description 'dangerous to one's own self and others' is not enough for involuntary hospitalisation of the person qualified so by an expert.

INSTEAD OF A CONCLUSION

Concluding the issue of social control of mentally ill persons, it should be emphasised that psychiatry was given the task by the society to name subjective states, namely to attach them a connotation that implies the need for direct social control, not only by monitoring outer behaviour, but also by monitoring intimate world of people diagnosed as mentally ill or observed as dangerous to themselves or their surrounding. In this Focault saw a sort of social perversion, while Bruns (1993) saw pathologisation of all human life. The fact that the society defined by law details of this procedure, normative formulations and persons authorised to carry it out (legal assessors in Serbia must complete general professional education and must swear an oath), only determines precise details of, but does not cancel less obvious aspects of social control of mentally ill persons, especially those into which the society easily projects its own violence from other spheres of social life.

When the social control of mental disorders is concerned, regardless of how the motivation of the society to undertake it is explained, it is important to take into consideration its following aspects:

- First of all, it is carried out by means of knowledge, the general cultural and civilisation knowledge, according to which insanity negates the very rational essence of the society and relations within it understood as the common sense does. Such an attitude is passed on consciously through certain aspects of cultural heritage, and unconsciously through Super-ego of an individual, namely attitudes towards mentally ill persons acquired early in one's life, namely through identification of children with their parents at their pre-school age.
- Social control of mentally ill persons is most often carried out through professional – psychiatric, psychopathological and psy-

chotherapeutic knowledge. This professional knowledge refers to therapeutic and humane pretext related to the need to control those psychiatric patients who subjectively suffer and seek the help of professionals, and pose at the same time a potential danger to themselves and others.

- Social control of mentally ill is carried out through institutions of psychiatric character employing people with socially verified licence to diaglose, treat and limit certan social, professional, even political rights of mentally ill persons. It is forgotten that they, at the same time grant privileges to persons with mental problems (sick-leave, disability pensions and other rights ensuing from social welfare and health care), which is, according to some, a sort of more perfidious control of mentally ill persons.
- A drastic form of social control is carried out as a semi-involuntary or involuntary commitment of mentally ill persons to psychiatric institutions. This form of social control of mentally ill persons is, truthfully speaking, regulated by law throughout the world. Involuntary hospitalisation, assisted by police, can be realised only with the previously or subsequently obtained consent of experts and competent court to which under the law the 'case' is to be reported. However, numerous questions raised by this procedure remain unanswered.
- The continuity of social control of mentally ill persons is maintained by tying patients in literal sense (tying to bed with belts, or, formerly, by using a straight-jacket that were tied at the patient's back), and, more recently, by 'tying' patients in a different sense – by 'fixing' them with high doses of neuroleptics or anti-psychotics.
- The most drastic form of social control of mentally ill patients are found in the measures of compulsory treatment at prisons' psychiatric hospitals (the measure of compulsory treatment in confinement) where patients are monitored in a two-fold manner – both as criminals and mental patients – by creating a prison within a prison.
- Social hypocrisy, in which the visible aim of the treatment is reducing personal suffering, while the invisible is the control of social adjustment of clients, that is, patients in the society, is maintained through follow-up of patients in socio-therapeutic forms of treatment, through ordinary psychiatric check-ups, or by applying more sophisticated procedures. It should be remembered that the adaptation as the aim of therapy is also explicitly

marked in psychoanalysis and behaviourism, the most widely-spread and most developed psychotherapeutic modalities worldwide.

- The least researched and sociologically probably the most interesting form of control of mentally disturbed persons in a wider sense of the word is the control of personality features of socially unacceptable violent behaviour of certain social communities. Sociologists have directly taken part in this form of social control. T. Parsons (Gerhardt 1991) created the so-called programme of denazification of Germany, the aim of which was mitigation or elimination of paranoid features of Germans' characters. The programme was initiated by the USA at a political conference entitled 'Germany after the War', held after the Second World War. This gathering initiated a range of social actions, primarily in the sphere of education, but also in other areas of social life of Germany. They comprised a mixture of two types of measures, obviously in psychological sense devised after the well-know principle of 'stick and carrot'. The former (stick) is related to repressive measures, such as banning the activities and organisations with Nazi ideology, then elimination of Nazi contents from educational programmes, as well as removal of fascist-oriented teachers from schools. The latter (carrot) is related to measures of undertaking permissive actions, or actions of rewarding all forms of democratic behaviour and strengthening democratic institutions of the society in general. The question remains if the programme was related only to prevention of certain psychopathological features of population of a country (aggressiveness, paranoid and narcissistic behaviour), or to general manipulation of the society with certain democratic or some other political aims, wrapped in an ideology cloak. In other words, the question remains to what an extent the control of violence in one country was an expression of demonstration of power (bordering on violence) of another, much more powerful country.
- What remains to be done in Serbia is to enact laws that would amend negative experiences from the past psychiatric practice, and would enable mentally ill persons to exercise their right to refuse any sort of forced treatment, in accordance with their human rights, not only in a political, but also in a generally humane sense. This process has already begun in the legislation of many European countries (Netherlands, England, France, Austria, Greece and others) by defining legal and medical requirements in the procedure of solving such a sensitive issue.

Therefore, the law-making and mental health care professionals of our country are to creatively adjust the existing foreign experiences to the conditions in psychiatric service in Serbia.

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Vesna Klajn-Tatić

MEDICAL, ETHICAL AND LEGAL ISSUES OF INIDIVIDUAL AND GROUP GENETIC TESTING

Individual and group genetic testing is a set of procedures aimed at discovering real or potential genetic problems of an individual (patient) or his/her family. This paper primarily examines genetic testing for medical purposes, and goes on to investigate the most important ethical and legal issues concerning individual and group genetic testing. This is done both from the standpoint of legal theory and in terms of positive law, primarily the UNESCO Universal Declaration on the Human Genome and Human Rights, Council of Europe Convention on Human Rights and Biomedicine and the regulations of EU member states, USA and Japan. The first question examins is that of the content and significance of genetic information in general; the second one deals with the interests of individuals (probands) being tested, and the interests of his/her family members related to data obtained by genetic testing; the third question concerns genetic testing and labour relations; the fourth question is that of genetic testing and insurance; the fifth question considers state interests related to genetic information and genetic screening.

Key words: *Individual and group genetic testing. – Genetic personal data, i.e. genetic information. – „Right Not to Know". – Genetic privacy. – Interests related to data obtained by genetic testing.*

INTRODUCTION

In the context of progress in medicine and biology, legal protection of fundamental human values, such as life, physical integrity, human dignity and privacy, becomes more topical. Legal regulation of individual and group genetic testing, as one of bioethical domains, is a priority concern for several reasons: in order to identify values and interests the legal order wishes to protect; in order to prevent abuse and prescribe sanctions for violation or rules and in order to clearly regulate the doctor-patient relation regarding new biomedical technologies.[1]

1 See: A. Eser:" Humanity in Face of Modern Endangerments – New Challenges to Law and Ethics by Modern Biomedical Technique", a paper for international sympo-

Individual and group genetic testing (genetic testing and genetic screening) is a set of procedures aimed at discovering a real or potential genetic problem of an individual (patient) or his/her family.[2] The difference between genetic testing and genetic screening is in their *range*: diagnosis, that is, genetic testing, is focused on individuals; genetic screening is a routine check-up of a population or of possible identified subgroups of population, such as, for example, only men or only women, or ethnic groups under increased risk of certain genetic diseases. Social health is the objective and the central function of genetic testing and genetic counselling.

Even though today it is possible to diagnose approximately 95% of the most common genetic diseases, there are very few available remedies. There is no curative treatment for the majority of most serious genetic disorders. Consequently, the control of genetic disorders depends on prevention. As pointed out by the British House of Commons Science and Technology Committee: „Even though genetics probably transforms medicine, it calls for a certain period of time, possibly a very long one, before curative treatments based on genetic knowledge become available. In the short rune, the most common use of medical genetics will be, as it is now, in *diagnosis* and *screening*".[3]

Although individual and group genetic testing (except for prenatal diagnosis) has not yet gained full momentum in our country, it can be expected that in the future it will become an important diagnostic procedure. Legal regulations in this domain should determine the position of individuals subjected to such procedures, and the limits for its acceptability. That is the only way to protect the physical integrity and dignity of an individual, which is at ever growing risk of inadequate use of achievements in biotechnology.[4]

This paper will primarily examine genetic testing for medical purposes, and then investigate the most important ethical and legal issues regarding genetic testing and genetic screening, both from the standpoint of legal theory, and from the standpoint of positive law, primarily the

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sium „Tranpianti tra etica, diritto, economia), Triangulum V, Padova, 1995, 2 (quoted according to: Zorica Kandić-Popović: „Pravna zaštita osnovnih ljudskih vrednosti i moderna biomedicina – postojeće i buduće jugoslovensko pravo", *Pravni život*, vol. 1, No. 9, 1996, 219).

2 Sherman Elias, M.D. & George J. Annas, J.D.: *Reproductive Genetics and the Law,* Year Book Medical Publishers, INC, Chicago, London. Copyright, 1987, 34.

3 House of Commons Science and Technology Committee *Human Genetics: The Science and its Consequences* Third Report, 6 July 1995, pp. 36–37, paras 71, 72 (quoted according to: J.K. Mason, R. A. Mc Call Smith, G. T. Laurie: *Law and Medical Ethics,* Fifth Edition, Butterworths, London, Edinburgh, Dublin, 1999, 149.)

4 Compare: Z. Kandić-Popović, *op.cit*, 231.

UNESCO Universal Declaration on the Human Genome and Human Rights of 1997, *Council of Europe Convention on Human Rights and Biomedicine* from the same year, and the regulations of EU member states, USA and Japan. The first question is that of the content and significance of genetic information in general; the second one deals with the interests of individuals (probands) being tested, and the interests of his/her family members related to data obtained by genetic testing; the third question concerns genetic testing and labour relations; the fourth question is that of genetic testing and insurance; the fifth question considers state interests related to genetic information and genetic screening.

GENETIC TESTING FOR MEDICAL PURPOSES

Human genetics deals with the study of rules of inheriting human characteristics. The main unit bearing hereditary characteristics is a *gene*, whose chemical composition is made up of larger or smaller parts of macromolecular deoxyribonucleic acid (DNA). The total potential of hereditary characteristics (genetic information) of an organism, which is transferred to the offspring, is called a *genome*[5], and the genome, according to the scientist's latest estimates, contains 20,000–25,000 genes.[6] The collection of all hereditary characteristics one organism contains and which, under certain conditions, result in creation of a given individual (organism) is called a *genotype*. Each individual has a single, unalterable and specific genotype.[7] The visible properties of an individual (organism), that is, physical, biochemical and physiological properties, that are produced by the interaction of environment and the individual's genotype is called *phenotype.*[8]

So-called *predictive medicine* largely depends on genetic testing, that is, on gene analysis. This analysis comprises of decoding and isolating certain hereditary traits of a man and their molecular build-up.

5 Milan Vujaklija: *Leksikon stranih reči i izraza,* jubilee edition, Beograd 1996/97, 167 and 169.

6 Stanko Stojiljković: „Čovek s manje gena" and Vladimir Glišin: „Nije kao na papiru", *Politika* daily paper of October 24, 2004, column „Science and Technology" (quoted according to: Jakov Radišić: *Medicinsko pravo,* ed. Fakultet za poslovno pravo and „Nomos", Beograd 2004, 233).

7 M. Vujaklija, *op.cit.,* 169.

8 President's Commission for the Study of Ethical Problems in Medicine and Biomedicine and Behavioral Research, *Screening and Counselling for Genetics Conditions,* Appendix B (Basic Concepts) 109–115, (1983) in: Judith Areen, Patricia A. King, Steven Goldberg, Alexander Morgan Capron: *Law, Science and Medicine,* Minneola, New York, The Foundation Press, INC. 1984, 1335

This is achieved by *direct* and *indirect* procedure of proving hereditary characteristics. Direct proof is given by molecular-biological method, which allows DNA structure to be analysed, whilst the indirect method does not examine the gene itself but its product or even further derived traits.[9] *DNA analysis* (so-called „genetic test") *enables the identification of genes that cause hereditary diseases or that are responsible for predisposition for a disease.* In the latter case, it is possible to predict diseases that will, in a specific individual, manifest themselves in the future, such as malignant, cardio-vascular of psychological diseases.[10]

ON GENETIC PERSONAL DATA, THAT IS, GENETIC INFORMATION IN GENERAL

The progress in medical genetics over the last years enables the *so-called genetic personal data,* that is, *genetic information* to be obtained by genetic testing, relatively easily and cheaply, but, as a result, this possibility gives cause for concern regarding the access to and use of test results. Whilst the sensitivity of medical data is a general concern, which shall be considered in the context of confidentiality, it is particularly complicated in the context of genetics, due to particular characteristics specific for genetic personal data, that is, for genetic information. Genetic data encoded in a person's DNA is a form of personal „future diary".[11] Genetic testing may reveal a set of genetic personal data that is, as has been correctly observed[12], so delicate that even the person tested (the proband)[13] may wish not to learn it. This is understandable, since informing a person of his/her genetic predisposition for a disease may result in a change in self-perception and the change of attitude of the environment towards that person. This dimension of genetic data justifies legal pro-

9 Franziska Schneider, in Heinrich Honsell (editor) Hanbuch des Arztrechts, Zürich, 1992, 412 (quoted according to: J. Radišić, *op.cit.*, 234); Elias/Annas, *op.cit,* 99–100.

10 Zorica Kandić-Popović, in Radoslav Ninković and Zorica Kandić-Popović: *Medicinsko-pravni aspekti vantelesnog oplođenja,* Beograd 1995*, 121.*

11 G.J. Annas – S. Elias, cds: *Gene Mapping: Using Law and Ethics as Guides,* Oxford University Press, New York 1992, 9 (quoted according to Zorica Kandić-Popović: „Pravna zaštita osnovnih ljudskih vrednosti i moderna biomedicina – postojeće i buduće jugoslovensko pravo", *Pravni život,* vol. 1, No. 9, 1996, 229).

12 See. L.B. Andrews: „Genetic Privacy: From the Laboratory to the Legislature", *Genome Research,* 1995, 271 (quoted according to: Z. Kandić-Popović: *ibidem,* 232).

13 „Proband" (index case) – the subject, regardless of sex, owing to whom the family comes in sphere of interest of the researcher, see: Alan H. E. Emery: *Osnovi medicinske genetike,* ed. „Savremena administracija", Beograd, 1986, 296.

tection of a special value – denoted as *genetic privacy*.[14] On the other hand, the nature of genetic data is different when compared to other personal data. It is not so strictly personal, as other data concerning a person. Firstly, the test result bears consequences not only to an individual being tested but also to his/her blood relations who share the same gene pool. Secondly, this information is significant for future relatives, for, genetic diseases are transmitted vertically through generations. Consequently, genetic information directly affects reproductive decisions. Thirdly, genetic test results may reveal the probability of *future* disease of individuals who are presently in good health. Fourthly, since in majority of cases the testing is done by analysing an individual's DNA, which remains unchanged during his/her life, genetic testing may be performed at any age – from cradle to the grave, and indeed, beyond that. Thus, for example, a foetus may be tested *in utero* for conditions such as the Huntington's disease, which cannot be manifested until one reaches middle age.

All these factors underlay an apparent benefit that genetic testing may offer in terms of prediction (forecast, anticipation). There is a number of individuals or bodies that may have an interest in genetic test results. Relatives may wish to know whether they or their offspring will also be affected by the disease. Insurance companies always take family history as the risk index when assessing the insurance cover, but, now, genetic testing seems to offer more precise means, based on scientific prediction of probability. Similarly, employers may have an interest regarding future possibility of employing an individual who is likely to be affected by a hereditary disease. The state itself has unquestionable interest in promoting health of the population by reducing the incidence of genetic diseases. In the context of this series of interests, the possibility of conflict regarding access to and control of genetic personal data, that is, of genetic information, is irrefutable, and it is important to recognise that one may feel the influence of genetic test results on his/her life much before the disease beginns.[15]

The genetics' knowledge on human genome may be used for purposes adverse to individuals' interests, harmful to their freedom and dignity. In order to prevent that, certain limits have been set for examining the genome and genetic diagnostics. Many developed countries have passed special statutes, which determine the conditions under which genetic testing is permitted, whilst other is strictly forbidden. Examples

14 Compare: L.B. Andrews: *op.cit.,* 209 (according to: Z. Kandić-Popović: *ibidem,* 233).

15 See: Mason et al.. op.cit, 167–168.

of such statutes are Norwegian *Act on Medical Use of Biotechnology*[16] and Austrian Federal Genetic Technology Act (Gent G)[17]. These statutes establish various limits: medically indicated genetic testing is allowed only in specialised institutions and with the approval of the Ministry of Health; access to genetic data is restricted; patient's explicit written consent is required. In addition, this matter is regulated by adequate international instruments: *UNESCO Universal Declaration on the Human Genome and Human Rights* of 1997, *Council of Europe Convention on Human Rights and Biomedicine*, from the same year. The laws of mentioned countries and international regulations guarantee a certain balance between the freedom to examine the gene and its application, on the one hand, and the right to protection of human dignity, on the other.[18] Article 6 of the *UNESCO Declaration* expressly states that „No one shall be subjected to discrimination based on genetic characteristics that is intended to infringe or has the effect of infringing human rights, fundamental freedoms and human dignity".

INTERESTS OF PROBAND AND MEMBERS OF HIS/HER FAMILY RELATED TO DATA OBTAINED BY GENETIC TESTING

As mentioned before, there is a small number of medications for certain genetic conditions. Successful treatments for many genetic diseases still do not exist. Therefore, except in rare cases, genetic personal data, that is, genetic information, does not imply that the genetic disease will be avoided. This is an important notion, since it raises the question of motivation of those demanding access to genetic testing or test results. In the absence of treatment or therapy, it is often said that *readiness* is the justification for offering or seeking genetic testing. Adults and children can prepare for the beginning of the disease psychologically, or in other ways, and couples planning to start a family or expecting a child are able to make more informed reproductive choices based on all available facts. Such justification is, however, a „double-edged sward". It cannot be claimed that preventive knowledge regarding a future disease is necessarily „a good thing". Whilst there is evidence that this can be the case, there is also a growing number of facts

16 Law No. 56 of August 1994 on the Medical Use of Biotechnology (quoted according to Z. Kandić-Popović: *ibidem,* 229).

17 This statute was passed in 1994 (*Bundesgesetzblatt,* No. 510/1994) and has been amended in 2001 *(Bundesgesetzblatt,* No. 98/2001) (quoted according to: J. Radišić, *op.cit.,* 235*).*

18 Compare: Z. Kandić-Popović, *op.cit.* 229; J. Radišić, *ibidem,* 233.

suggesting that the psychological outcome of such knowledge can be negative. For example, *Andrews* notes that the suicide rate among young Caucasians who know that they have the gene responsible for Huntington's disease is four times larger than the national average for a comparable group in the USA.[19]

Right to know and right not to know. Unfavourable data regarding health obtained by genetic testing (gene analysis) can considerably burden the patient's (proband's) life, and if such data is learned by others, the patient is stigmatised by the society. This is particularly true when it comes to predispositions for serious hereditary diseases. Telling a man in advance that, based on his predisposition, he will become ill in the future, is sure to harm him. Lately, this situation has led to the recognition of the „right not to know", which is also denoted as the „right to self-determination in regard to information".[20] It protects a man from „inadmissible examination and disclosure of his genetic base". This right should protect a man from „having to look into his future".[21] In short, the right not to know one's genetic predisposition for a disease is protected by law, and is also supported by legal theory. Thus, for example, provisions of Article 10 (2) of the Council of Europe *Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine* recognise the interest of not knowing in relation to oneself, reading: „Everyone is entitled to know any information collected about his or her health. However, the wishes of individuals not to be so informed shall be observed".[22] Similarly, UNESCO *Declaration* states in Article 5c: „The right of each individual to decide whether or not to be informed of the results of genetic examination and the resulting consequences should be respected".

The basis of the „right not to know" does not lie either in autonomy or in confidentiality, but rather it lies in *privacy.* Formulation of legal regulations in the sphere of genetic privacy protection has started to take shape fairly recently. However, it can be noted that the concept of

19 A. Andrews: „Legal Aspects of Genetic Information" (1990) 64 *Yale J. Biol. Med*. (quoted according to> Mason et. al., *op.cit.,* 168–169).

20 Erwin Bernat: „Recht und Humangenetik – ein oesterreichischer Diskussionsbeitrag", in: *Festschfirt für Erich Steffen zum 65. Geburtstag,* Berlin 1995, (quoted according to: J. Radišić, *op.cit,* 235).

21 E. Bernat, *ibidem,* 43 (quoted according to: J. Radišić, *ibidem*)

22 Council of Europe *Convention for the Protection of Human Rights and Dignity of Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Medicine,* Oviedo, April 1997 (quoted according to: Mason et. al., *op.cit.,* 171).

legal protection of that value rests on the more general principles concerning the respect of integrity of person, respect of secrecy of personal data, as well as on prohibition of all forms of discrimination, including the base of a disease or genetic predisposition towards a disease. Respect of the right to integrity of person demands that all genetic tests must be an act of will (§ 65, para. 2. Gent G).[23] Privacy has two aspects: informational privacy or the right to privacy in the wider sense and spatial privacy or right to privacy in the narrow sense. *Informational privacy* is related to the control of personal information and preventing others from accessing such information. Violation of informational privacy takes place when any unauthorised disclosure of information occurs.[24] A close connection between informational privacy and professional secret (confidentiality) is essential, but it is formally derived from a number of international and national regulations. The right to informational privacy and secrecy of information on patients is usually regulated in a single article or the same group of articles. The connection between these two rights is clearly visible in Article 10 of the Council of Europe *Convention on Human Rights and Biomedicine* (1997): „Everyone has the right to respect for private life in relation to information about his or her health." *Spatial privacy* protects the individual's feeling of „oneself'. It recognises the interest everyone has in keeping the feeling of distance (separation) from others. The right to spatial privacy is an absolute subjective right of a natural person to independently decide on disclosing to third parties any manifestation of his/her existence. To that effect, right to privacy protects the totality of an individual's existence, that is, the privacy of all manifestations of the existence of an individual, for instance, his/her condition. Violation of individual's psychological privacy happens when unwanted information regarding oneself is received.[25]

Whilst an individual who requested genetic testing may prepare himself/herself to the possibility of learning bad news, there is an unresolved issue of his/her *family*, which may not be aware (does not doubt) that there might be a genetic disease in the family. Data that can be found in literature show that 85% of high-risk couples had no knowledge of their genetic condition.[26] However, the fact remains that in the family context, different individuals have valid requests to certain genetic information because, in essence, it concerns all of them. When an

23 See: Z. Kandić-Popović, *op.cit.* 233; J. Radišić, *op.cit,* 235.

24 Mason et. al., *op.cit.,* 170 – 171.

25 *Leksikon građanskog prava,* ed. „Nomos", Beograd 1996, 567–568; Mason et. al., *ibidem* 171

26 Mason et al., *ibidem*, 169.

effective treatment or therapy is available, it could be argued that family members should be protected from the risk of genetic disease; prevention of genetic disease may be perceived as excellent general medicine. However, the motivation to disclose a genetic disease in a family is particularly questionable in the absence of curative treatment. What should a doctor who is in possession of familiar genetic information do?

Even if the doctor is convinced that a relative would wish to be informed of the diagnosis or prognosis of genetic disease concerning him/her, the disclosure procedure is ethically conditioned by the fact that his patient (proband) objects to the disclosure. Should the doctor violate the obligation of confidentiality (professional secret) he ows to his patient, he can face civil action. In addition, parents who discover that relevant information was at disposal but was not disclosed may initiate civil action against the doctor for the birth of abnormal child that could have been prevented by timely disclosure of information (*wrongful birth action*).[27] Under such circumstances, the limitations imposed by present ethical and legal principles have been examined. Ethical and legal principle of respect of patient's confidentiality help the doctor to a certain degree, in as much as they establish one of his primary duties towards a patient – patient-doctor confidentiality. In spite of that, a doctor can *equally* justify the disclosure of information to relatives by invoking the *no crime (no harm) principle.* If the doctor sincerely believes that the infringement (damage) will be caused to relatives (or even to their offspring) by failure to disclose, *neither ethics nor the law require the doctor to consider the confidentiality principle absolute.*[28] Therefore, if avoiding damage (injury) or the no harm principle is a top consideration, then the prospect of damage (injury) for a relative, *who can be disturbed by disclosure of information* on possible development of genetic disease must also be taken into consideration. In other words, interest or the „right not to know" deserves recognition also when it comes to patient's (proband's) relatives. Since the principle of observance for individual's autonomy demands that the individual be seen as the „moral chooser", there are opinions in legal theory that the efficiency of basing the „right not to know" on *circumstances of the choice* is questionable. In order to make a profound choice, one must have complete information on a series of available options and consequences of any given choice. However, this paradigm is overturned in the context of one interest, that is, of the „right not to know" regarding genetic information. For, here the choice is

27 Compare: Mason et al., *ibidem*, 169 – 170.

28 C. Ngwena and R. Chadwick:" Genetic Diagnostic Information and the Duty of Confidentiality: Ethics and law", (1993) 1 *Med Law Internet* 73 at 77 (quoted according to: Mason et al., *ibidem*, 170).

related to the knowledge itself. The question is, therefore, *how to protect* the interest or the right not to know. In legal theory it is often established that the *concept (notion) of spatial privacy* – which requires that the degree of observance should *prima facie* be adverted to the state of separation of an individual or, in this case, to the state of „ignorance" – provides a feasible mechanism.[29]

Consequently, spatial privacy of the patient (*proband*) can be legitimately violated only if the doctor can provide valid reasons for doing so. When deciding on how to resolve the conflicting requests for genetic information in familiar context, the doctor should be guided by the following criteria:

- availability of treatment or therapy;
- gravity of the condition and probability of beginning of the genetic disease;
- nature of genetic disease;
- nature of any further tests that may be required;
- whether disclosure may promote a legitimate social interest;
- how the individual can be expected to react like if unsolicited information is offered to him/her, for example, whether some preliminary directives/instructions have been made.

It follows from the above said that, on the one hand, it may be justified for the doctor not to respect the wishes of his patient who refuses to inform the relatives of the test results when there is available therapy or effective treatment protecting the family from harm (damage). On the other hand, the doctor can be, justifiably, less inclined to disclose the information on a genetic condition that cannot be remedied or that shows relatively mild symptoms. This balanced approach could be complemented by taking into account the manner in which the testing has been performed among family members. Thus, for example, the need to test younger generation family members may be redundant if the older generation has undergone testing first. If younger generation family members are tested first and found to be positive, this will mean that one or more parents or progenitors also have the genetic disease in some form, even though these individuals are unaware of their condition or have chosen not to know. In one word, it is very difficult to keep the information flow within the family; the problem of control of communication between family members always remains an issue.[30]

29 G. T. Laurie: „Legal and Ethical Aspects of Genetic Privacy", Cambridge University Press (quoted according to: Mason et al., *op.cit*., 172).

30 Compare: Mason et al., *ibidem.*

INTERESTS OF OTHER PERSONS RELATED TO DATA OBTANIED BY GENETIC TESTING

Numerous third parties, outside the family context, show interest for access to genetic information, that is, to genetic personal data. These can be present and future employers, insurance companies and the state itself. What follows is a consideration of the nature of principles in question and an evaluation of their weight in regards to the interest of the proband and his/her family.

Genetic Testing and Employment (Labour Relations)

German legal theory has produced a standing that employees are under the risk of being damaged due to insufficiently controlled analysis of their genes. Even when genetic testing is performed with granted consent, this is not sufficient guarantee in case of first employment or change of job. Some workers who have a predisposition towards a serious genetic disease might lose their jobs. Such danger generates a need for more comprehensive legal protection from other persons.[31] In line with this idea, the Austrian *Federal Gene Technology Act* (§ 67) prescribes a ban for the employers on collecting, demanding, taking or otherwise using genetic data (gene analysis results) of their employees or those seeking employment. The legislator intended this ban to serve for the „protection of the socially weak in legal relations where there is economic dependence". „The objective of the protection in this regulation is individual's genetic private life".[32]

The attitude taken in British legal theory on the relation of genetic testing towards employment is not as clear and determined as the one in German and Austrian legal theory and Austrian and Norwegian legislation. In British legal theory it is pointed out that the employer may have two conflicting reasons for seeking access to genetic information on his employees. Firstly, there is a financial interest consideration when employing individuals who will probably become disabled due to a genetic disease, since this will influence the employer's profit on account of the work days lost. On the other hand, the employer may truly fear that the working environment might have a negative (adverse) effect on the employee's health, with possible deterioration of the existing genetic condition or provocation of symptoms in an otherwise asymptomatic individual. This fear is linked to the fact that an individual so endangered

31 Erwin Deutsch/Andreas Spickhoff: *Medizinrecht*, 2. Auflage, Berlin, 2003, 520 (quoted according to: J. Radišić, *op.cit,* 237).

32 E. Bernat, *op. cit*., 43 and 44 (quoted according to: J. Radišić, *ibidem*); in that sense also the Norwegian *Law on Medical Use of Biotechnology* (§ 6–7) (quoted according to: Z. Kandić-Popović, *op.cit.* 234).

might seek damages from the employer. British legal theory is on the standing that the appropriateness of allowing the employer or future employer to have access to genetic data must be discussed on a case-to-case basis, and not in principle. Access to genetic information may be granted either by virtue of existing test results or by making employment conditional on genetic testing. Moreover, the request for genetic information may be put forward either before or after employment.[33]

Genetic Testing and Insurance

Life and health insurance companies have a legitimate right to assess the risk being insured. It is therefore understandable why, upon concluding insurance contracts, they whish to be informed of the health condition and health prospects of the insured. Genetic information is clearly important for insurance in order to assess the risk of the foreseen cover in general and in order to determine the premium level if one insurance offer has been made. This interest is entirely of financial nature, and the insurance company has a legitimate right to demand that it be protected. In practice this means that any and all information having a bearing on risk assessment should be disclosed to the insurer, or otherwise the realisation of the contract might be avoided any time in the future. When it comes to more substantial sums for life insurance, the person insured must undergo medical examination, and shall be asked to provide data on how long his/her parents have lived and what was the cause of their death.[34]

However, Austrian law demands that care be taken of justified interests of the insured. In short, the insurance company cannot in any way use the results of the insured's genetic testing, nor to make the conclusion of insurance contract conditional on genetic testing of potential insured (§ 67 of the Austrian *Federal Gene Technology Act*). This also limits the insured's statutory obligation to inform the insurance company of all his/her illnesses he/she is aware of prior to concluding the insurance contract. Some Austrian lawyers find that in these provisions the legislator has exceeded the set objective to protect genetic information.[35]

In British legal literature, in the context of genetic information, it is pointed out that, in insurance, two possible ways are open. Primarily, he may demand that all genetic test results be disclosed. Secondly, the insu-

33 Read more on that in: Mason et al., *op.cit.,* 178–179.

34 Deutsch/Spickoff, *op.cit.*, 521 (quoted according to: J. Radišić, *op.cit,* 178–179).

35 E. Bernat, *op.cit.,* 46 and 47 (quoted according to: J. Radišić, *ibidem*).

rance company may require that the future insured undergo genetic testing. In the first case, one could say that there is no difference compared to any other form of medical history. Genetic test results should be disclosed in the same manner as one would disclose the removal of melanoma or familiar history of high blood pressure. However, the British *House of Commons Science and Technology Committee* has certain reservations regarding this interpretation. It says: „We accept that insurance industry collectively tries to deal with genetics in a reasonable manner; however we are concerned because there is real danger that people will decide to refuse genetic testing, even if such test would prove useful for them, because of possible consequences in terms of insurance".[36] In the second case, when the insurers actively demand that future clients undergo genetic testing, there is a concern that increased availability of tests will lead to „development and multiplication of predictable genetic testing". This would have serious consequences to (spatial) private interests of individuals who are asked to be tested and bear unacceptable degree of coercion which would repeal (distort) any „informed consent" to undergoing genetic testing.[37]

Council of Europe has published recommendations on protection of medical data subject to automated processing; genetic data is particularly included. It is on the position that medical data should, in principle, be collected only by health care professionals or their assistants. Genetic information should be used only for preventive treatment, diagnosis of treatment of a given individual or for scientific research, court proceedings or criminal investigation. The authors of recommenddation have made it clear that:"candidates for employment, insurance contract or other activities should not be forced to undergo genetic testing, making employment or insurance conditional on such an analysis, in as much as such conditionality is not expressly provided by national legislation or unless analysis is necessary in order to protect a certain individual or third person". [38]

State Interests Related to Genetic Information and Genetic Screening

Given that the state has a role in the protection and promotion of collective interests of the society as a whole, a question is imposed as to the degree to which it can demand the results of genetic tests or genetic testing.

36 Quoted according to: Mason et al., *op.cit.,* 175.

37 Mason et al., *ibidem.*

38 Quoted according to: Mason et al., *op.cit.,* 175–176.

One of the most obvious state interests concerning health protection is to insure social health. Even if little or nothing can be done for those individuals who are already affected by the genetic disease, disclosure of such fact may prevent the transfer of defective genes to future individuals (offspring). However, this would potentially violate the private interests that would be established by such practice. On the other hand, one could claim that the state has a positive interest to facilitate individual choices. Namely, the protective (*parens patria*) role of the state towards individuals (citizens) offers them information that helps them bring important life decisions, such as the decision whether to have a child or not, if, for instance, both parents are transmitters of cystic fibrosis. In such a way, not only are individuals made more independent as moral choosers, but also the desired social objective to prevent the spread of genetic diseases is realised. This standing was also supported by the *Royal College of Physicians of London*, whose report states that „as long as individuals have a right to decide for themselves whether to have children or not, such individuals should have access to the most complete information possible, including genetic, that is of significance for such decision and information should not therefore be withheld".[39]

This idea implies that, on order to facilitate choices to individuals (citizens), the state should provide comprehensive *screening programmes*, an abundance of genetic tests followed by adequate genetic counselling services and other support mechanisms, such as easy access to abortion. The risk of conflict of interests would almost entirely be eliminated if such programmes were to be offered free of coercive measures, that is, if they would be implemented on *voluntary basis.* In such a case, medical genetics would obtain a new dimension, where genetic diseases are understood as a matter of choice rather then destiny.[40]

Genetic screening or check-up is „searching within population" for individuals who have certain genotypes that are:

- already associated with a disease or susceptibility to a disease;
- may lead their descendants into disease or,
- may produce other variations for which it is not known whether they are associated with a disease.[41]

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39 D. Ball et al.: „Predictive Testing of Adults and Children", in: A. Clarke (ed).): *Genetic Counselling: Practice and Principles* (1994) at 77 refers to the Royal College of Physicians of London: *Ethical Issues in Clinical Genetics: A Report of the Working Group of the Royal College of Physicians' Committees on Ethical Issues in Medicine and Clinical Genetics* (1991) (quoted according to: Mason et al., *ibidem*, 182–183).

40 This opinion is represented by the British *Nuffield Council of Bioethics* (quoted according to: Mason et al., *ibidem*, 183).

41 Elias/Annas: *Reproductive Genetics and the Law,* Year Book Medical Publishers, INC, Chicago, London. Copyright, 1987, 53–54.

Individuals from the first category are recognised for treatment. The second group is also identified in such a manner that individuals in it can receive genetic counselling on their reproductive options and risks. The third group is identified for the purpose of scientific research, particularly to help determine the constitution of the population. It follows from what was said before that genetic screening has different meanings and contexts and may be ranked from testing only selected individuals to testing all individuals, regardless of age or clinical condition.[42] Justification of the request for genetic screening includes several important factors:

- frequency and severity of genetic condition;
- availability of therapy that has proven to be efficient;
- extent to which discovery by screening improves outcome;
- validity and safety of check-up test;
- sufficiency of resources ensuring effectiveness of check-up and follow-up;
- costs and
- social acceptability of screening programmes, including consumers and general practitioners.[43]

In Great Britain there are no screening programmes for adults. There is only routine screening of newborns, which relates to phenylketonuria, haemoglobin diseases and hypothyroidism.[44]

In American law, historically, there has been a lot of wandering when it comes to the issue of genetic screening and state policy. Screening tests are accepted in American society, even though they raise serious questions on autonomy, stigmatization, informed consent and efficiency. The past two decades witness of three waves of Genetic Screening of Newborns Act. Between 1963 and 1968, screening programme for phenylketonuria was introduced in 43 states in the USA, making them mandatory for all newborns. This legislation is characterised as „immature biomedical legislation". From 1971 to 1974 in 17 states laws have been passed to promote screening for sickle-cell anaemia, which was mandatory, and, as of 1986, 48 states and the District of Columbia have laws regulating the screening of newborns. Genetic screening can be carried out in the USA also over potential bearers of genetic diseases, foetuses and genetic donors.[45] It is pointed out in Ame-

42 Elias/Annas, *ibidem.*

43 Elias/Annas, *ibidem.*

44 Mason et al., *op.cit.,* 183.

45 Elias/Annas, *op.cit.,* 53; 77.

rican literature that mandatory screening programmes are more a result of historic coincidence than of reasoned political decision.[46] American legal theory holds the position that *voluntary programmes* should be used for as long as it is possible to obtain sufficient information on effectiveness of both the screening tests and planned interventions; *mandatory laws* should be passed only if there is reasonable medical certainty that the measures prescribed are necessary for social health and capable of achieving their legislative purpose.[47] Similarly, the USA *President's Bioethics Commission,* in its 1983 Report approves voluntary screening programmes, but notes that mandatory programmes „that require execution of low-risk procedures, that are minimally intrusive, may be justified if voluntary testing would fail to prevent serious damage to people – such as children – who are unable to protect themselves."[48]

In Japan, screening test for colour recognition has been carried out in half-coercive manner in schools for a long time. As a result of this screening, some schools have limited the chances of colour-blind individuals for higher education and free choice of subjects, whilst some companies have discriminated against the colour-blind through their employment policies. Because of that, Japanese Ophthalmologic Society has asked the government to abandon the colour recognition screening in schools. The Society has also requested that textbooks for primary school do not mention the hereditary nature of colour-blindness as an example for gender-related recessive inheritance. All medical and anthropological genetics in Japan oppose the idea on application of coercive and administrative genetic screening. They are in favour of voluntary counselling with doctors, for the protection of privacy and for social education and enlightenment on genetic diseases.[49]

The British *Advisory Committee on Genetic Testing* (*ACGT*) holds the position that the objectives of any screening programme should be clearly articulated by the state; all programmes should be subject to strict scrutiny on the part of the *National Screening Committee* and each programme should be followed by unbiased counselling before and after testing. Autonomous and private interests of each individual require

46 Elias/Annas, *ibidem,* 79–90.

47 Elias/Annas, *ibidem,* 77.

48 President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioural Research, *Screening and Counselling for Genetics Conditions.* US Government Printing Office, 1983 (quoted according to: Elias/Annas, *ibidem,* 81).

49 K. Takagi: „Genetic Screening – Policymaking Aspects", in: *Genetics, Ethics and Human Values: Human Genome Mapping, Genetic Screening and Gene Therapy,* Edited by Bankowski and A. M. Capron, CIOMS, Geneve, 1991, 118–119

prima faciae observance and this should be borne in mind when considering the introduction of genetic screening of a population. The moral grounds for introducing genetic screening programmes is inevitably questioned if no adequate medical intervention is possible in the presence of positive genetic testing result. If the state seeks to promote the interests of its individual citizens rather than those of society as a whole, there is a real possibility of a conflict of interest when future parents whish to know data on the genetic constitution of their relatives in order to make a more complete, informed reproductive choice. Namely, there is the question of whether the interest for genetic information for reproductive purposes is sufficient to justify the violation of private interests of the relatives. According to the opinion of the British *Advisory Committee on Genetic Testing,* it is very difficult to justify any screening programme for children and adults that are not followed by effective therapy or treatment. The strength of state interest in promoting social health is *per se* insufficient to justify the compromising of individual's interests in receiving or not receiving genetic information on themselves.[50]

50 Quoted according to: Mason et al., *op.cit.,* 183–184.

Violeta Beširević[1]

THE GODS MUST BE CRAZY: DOES CONSTITUTION SPEAK ABOUT BIOETHICS?

This paper addresses the issue of the relationship between a constitution and bioethics. I will define bioethics as a discipline that studies ethical issues in medicine, raised in the aftermath of biotechnological and human rights revolution. I will argue that many bioethical dilemmas have been resolved by invoking constitutional rights and freedoms. In the discussion about this tendency, the examples of abortion, euthanasia and human cloning will be used. Arguing that the notion of constitutional rights is a key to address biotical dilemmas, I will not deny that other legal strategies may bring about the same result. The absence of constitutional adjudication does not mean that a bioethical problem is not constitutional. If constitution is silent on certain issue, it might mean that the issue is premature for constitutional adjudication and therefore, should be left for future generations to address. In conclusion: which of the legal strategies is going to be chosen, depends on political, legal, cultural and religious tradition of each particular state as well as time distance in which law should provide an answer to a technological or social innovation.

Keywords: *Constitution. – Bioethics. – Human Rights. – Abortion. – Euthanasia. – Human Cloning* .

At one point, Professor Michael Shapiro had used the theme from a South African's movie – *The Gods Musty be Crazy* – to explain a technological or social innovation's apparent "lack of fit" within standard ways of 'thinking and feeling' in law or elsewhere.[2] In his opinion, as the Coke bottle questioned the Kalahari Bushmen's system of thought and beha-

1 I would like to thank the Center for Ethics and Law in Biomedicine of the Central European University Budapest, for providing me space and atmosphere for the research. The usual caveats apply.

2 *Michael H. Shapiro, Lawyers, Judges and Bioethics, (1997) 5 S. Cal. Interdisc. L. J. 113*

vior, similarly a technological or social innovation put on test traditional knowledge and experience of the members of modern societies.[3]

The reactions of a considerable number of Serbian citizens to the ban of human cloning in the new Constitution of the Republic of Serbia affirm Shapiro's comparation. In the absence of public deliberation on a draft Constitution, constitutional ban on human cloning for many in Serbia, appeared as if "coming from the sky", similar to the Coke bottle in the above mentioned movie. To clarify from the beginning: this is not an article about democratic legitimatization of the new Serbian Constitution. The constitutional ban on human cloning has inspired me to discuss in a comparative way the relationship between a constitution and bioethics. The main issue I want to discuss is whether a constitution speaks about bioethics. I will argue that the "bridge" between the two are human rights and to illustrate the point, the examples of the constitutional adjudication of abortion and euthanasia and the constitutional regulation of human cloning will be used.

1. THE PURPOSES OF THE CONSTITUTION AND REASONS FOR CONSTITUTIONALIZING RIGHTS

At the first sight, the purpose of a democratic constitution is to limit power. Thus, constitutions speak about power or more precisely about limited power. At the second sight, the purpose of the constitution is not only reduced to limiting power but also to constitute power, guide it towards socially desirable ends, and prevent social chaos and private oppression.[4] The constitution, as Stephen Holmes noted, is multifunctionnal – it prevents tyranny, corruption, anarchy, immobilism, unaccountability, instability as well as the ignorance and stupidity of politicians.[5] Finally, a democratic constitution seeks to entrench long-standing practices that seem to deserve special status, while at the same time, (a) leaves enough room for their critics and elimination and (b) points the way toward changes, both small and large.[6]

Apart from the fact that it determines state structure and enables the exercise of governmental power, a democratic constitution secures freedom.[7] Freedom (from autocratic or despotic rule) is guaranteed by a

3 Ibid., at 115.

4 *Stephen Holmes, Passions and Constraint: On the Theory of Liberal Democracy,* (*Chicago, London: The University of Chicago Press,* 1995) at p. 6.

5 Ibid.

6 *Cass Sunstein, Designing Democracy: What Constitutions Do*, (*Oxford, New York*: *Oxford University Press,* 2001) at p. 240.

7 See *András Sajó, Limiting Government*, (Budapest: *CEU Press*, 1999) at p. 245.

system of checks and balances, rule of law as well as by obliging the state to respect and protect human and minority rights. Having in mind that human rights are particularly instrumental to explain the central issue in this paper, I will now dwell a bit more on the reasons which motivate citizens to constitutionalize certain rights and freedoms and thus exclude them from ordinary politics .

In the first place, one may find that different reasons and ideas underlie the fact that certain rights are envisaged in a constitution. For instance, to justify self-appointed representatives, the American and French revolutionaries turned to the natural law and thus laid the foundations of their state constitutions.[8] In order to protect humanity and preclude social and political prejudices, some constitutions, including the German one, treat human dignity as a fundamental value and a source of all other rights.[9] While some rights are guaranteed independently from the principle of democracy, other actually derive from democracy. Thus, for example, the rights to private property, bodily integrity, the ban on torture or freedom from self-incrimination belong to the rights and freedoms that are constitutionally entrenched for reasons entirely independent of democracy – they are guaranteed regardless of what majority might think about them.[10] On the other hand, the right to freedom of speech or voting rights derives from democracy itself. Certain rights play the role of correctives of social inequality and as such enter into constitutional arrangement: The Constitution of South Africa, for example, creates minimum economic guarantees, including the right to housing, following the premise that ordinary politics cannot be trusted to protect the interests of those on the margins of society.[11] The socio-economic rights originated from the duties of the government towards the needy. The Mexican Constitution of 1917 and the Constitution of the Weimar Republic (1919) were among the first constitutions which envi-

8 Ibid. at p. 248. The introductory sentence of the American Declaration of Independence of 1776 emphasizes: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted…" The French Declaration of the Rights of Men and of the Citizen of 1789 declares that the rights to liberty, property, security and resistance to oppression are imprescriptible natural rights. In addition, the Declaration also proclaims the rights of political participation, procedural guarantees in criminal proceedings, as well as freedom of religion and expression.

9 Human dignity has been explicitly protected in the most of the post-communist countries as well as, for instance, in the South African, Finish and Portuguese constitutions.

10 *Sunstein*, *supra* note 6, at p. 97.

11 Ibid., at p. 98.

saged such social interventionism. After the Second World War, Germany committed itself to conduct reliable social policy via constitutional text. Yet, such rights came into blossom in emerging democracies, first in Spain and Portugal and then in the post-communist countries of the Central and Eastern Europe.[12] Some rights become constitutional despite the fact that they may endanger ordinary democratic processes – this is the case with the right to secede which has been used by some societies as a justification of political morality.[13] Finally, some constitutional rights follow as consequence of industrial and technological development, including, for instance, freedom of speech, the right to privacy, the right to healthy environment as well as the right to forgo pro-life treatment.

In the absence of public deliberation, I can only speculate why the ban on human cloning is entrenched in the new Serbian Constitution. First, it is possible that this ban has been motivated by unacceptable medical implications of genetic revolution as well as by the need to secure existing human rights. Second, it may well be that thereby Serbia has responded to the request addressed to states in some international treaties to ban human cloning (the UN Convention on Human Cloning, the Council of Europe Convention on Human Rights and Biomedicine and its Additional Protocol on the Prohibition of Cloning Human Beings). Third, I would not exclude the possibility that the Church influenced constitutionalization of this ban to preclude therapeutic cloning recently announced in Serbia.

2. THE RUDIMENTS OF BIOETHICS

There is no one single approach and one single understanding about bioethics. Some claim that the term was for the first time introduced in 1971 by Van Rensselaer Potter, a biochemist and oncologist, on the occasion of establishing an institute for the research in the field of reproductive medicine.[14] Since then, it has got different meanings, ranging from one that treats bioethics as professional ethics in medicine up to global bioethics and bioethics in terms of respect towards life.[15] To add to the pluralism and diversity of the opinions, I will offer

12 For more see *Wiktor Osiatynski, Introduction*, in *Re-thinking Socio-Economic Rights in an Insecure World*, ed. Nsongurua Udombana and Violeta Beširević, (Budapest: CEU Center for Human Rights, 2006) at pp. 16-17.

13 See *Sunstein, supra* note 6, at p. 114.

14 See Glasilo Hrvatskog društva medicinskih biokemičara, (2005) Vol. 9, No. 1-2, at pp. 8-9.

15 For more see Tom L. Beauchamp and James F. Childress, Principles of Biomedical Ethics, 4th edition (Oxford, New York: Oxford University Press, 1994).

here my understanding: it is an interdisciplinary study of ethical issues in medicine raised as a result of technological and scientific development as well as by recurrent concerns for human rights. In the core of bioethics there are issues which directly and indirectly relate to human life, starting from its very beginning to the very end, including, for example, the issues of artificial insemination, abortion, palliative care, euthanasia and organ transplantation.

Issues and dilemmas that bioethics faces with, do not only question a traditional understanding of human civilization, but also directly affect all members or institutions of one society – individuals, families, governments, health care institutions, physicians etc. This is also valid for law and lawyers who are supposed to provide answers to different sort of new problems including the following: to whom belongs a child carried out to the term by a surrogate mother, whether an embryo enjoys a legal protection or when the life ends. Modern biotechnology generates new interests of individuals, a family or even interest of new organisms. This, in turn, generates new conflicts – for instance, between women who claim to be real mothers, or between those who hold that life ends with a brain death and those who understand death as a permanent cessation of cardiopulmonary function.

At this point one can already get an idea that bioethical dilemmas question or ask for redefinitions of the fundamental values, all more or less subject to constitutional protection, including life, human dignity, personal liberty, bodily integrity, individual autonomy, privacy, equality, health, family life, education as well as scientific research. The responses of constitutional jurisprudence are different and depend on legal, cultural economic and religious tradition of each particular country.

The modern "medicalization" of a constitution started in the US when the Supreme Court proclaimed in *Griswold* a constitutional right to privacy and invalidated the Connecticut's "uncommonly sully law" which prohibited married couples to use contraceptives.[16] In the legal theory, the decisions of the US Supreme Court and the German Constitutional Court on abortion have been the most thoroughly analyzed and cited. While the American Supreme Court gave an unconditional support to a woman to decide on abortion in the first trimester of her pregnancy[17], the German Constitutional Court was not that decisive in its first decision on abortion. In spite of a strong rhetorical support given to an unborn, the Court acknowledged that the right to free development of one's personality allowed to a woman to control her life up to certain degree. Therefore, it left the conditions upon which abortion would be

16 *Griswold v. Connecticut*, 381 U.S. 479 (1965).

17 *Roe v. Wade*, 410 U.S. 113 (1973).

available to be determined in the political process.[18] It was only in its second decision from 1993 that the Court expressly concluded that a fetus enjoyed the constitutional protection and that the state was obliged to protect it.[19] The conclusion is also decisive for other bioethical dilemmas that the German legislature can face including, for example, a legal status of therapeutic cloning.

In the meantime, some other bioethical issues had become topics that affected constitutional courts. The Treaty establishing a Constitution for Europe, although not legally binding, can prove to be useful for selecting bioethical issues that could become a part of pre-constitutional arraignment and as such find themselves in constitutions which are drafting in contemporary times. Thus, according to Article II-63 (2), the right to physical and mental integrity requests that in the fields of medicine and biology, the following must be respected: the free and informed consent of the person concerned; the prohibition of eugenic practices, in particular those aiming at the selection of persons; the prohibition on making the human body and its parts as such a source of financial gain; the prohibition of the reproductive cloning of human beings.

Unlike decisions on abortion, which have been exploited in legal theory to a considerable extent, the constitutional jurisprudence on other bioethical topics, including euthanasia and human cloning, has been less often discussed. Therefore, I will concentrate further discussion in this article either on the constitutional jurisprudence or on constitutional texts related to dilemmas raised by the possibility of artificial prolongation of life as well by the possibility to conceive life in a laboratory.

3. EUTHANASIA AS A RIGHT TO DIE

While change in a woman's social position and human rights revolution mostly brought about the legalization of abortion, the technical achievements in modern medicine in 1960s was a main reason to open a new Pandora's Box *i.e.* to start recurrent debate on euthanasia. Before I present a detailed constitutional jurisprudence on euthanasia, I will first say more about its definition.

The term euthanasia derives form the Greek *eu* and *thanatos* and relates with "good" or "easy and good" death. For there is not a generally accepted definition related to this practice, a consensus of those who

18 39 BVerfGE I (1975).

19 88 BverfGE 203 (1993).

participate in the present debate finishes approximately at this point. Some, including myself, associate euthanasia with an action or omission undertaken with the intent of bringing about death of a terminally or incurably ill patient in order to end their pain and suffering. However, most of the scholars and commentators, make difference between so–called active euthanasia, where a physician, upon request of the patient, directly or indirectly causes their death, and so-called active euthanasia, which relates to omission of a treatment and "letting a patient die". The contemporary national legislation and judicial practice have also accepted the latter approach – passive euthanasia has mostly been legalized with a help of a legal fiction according to which (a) forgoing pro-life medical treatment is not a suicide and (b) a patient does not die as a result of the physician's action but from a "natural" death caused by a terminal illness or injury. Active euthanasia, *i.e.* mercy killing and physician-assisted, suicide has been forbidden in most jurisdictions, apart from the Netherlands, Belgium, the US state of Oregon, Colombia, Switzerland and Japan.[20]

When and how euthanasia became a constitutional issue? Soon after the initial fascination with the achievements of the modern medicine had passed, it became clear that the new technology did not only prolong life but the illness as well, and thereby, suffering and pains. The studies from that period had shown that continued survival in a long and irreversible coma required only basic care and tube feeding.[21] For instance,

20 In those countries, however, the legalization has not been achieved in the same manner. In the Netherlands, all forms of active euthanasia have been legalized via doctrinal principles of criminal law, according to which a physician is not a criminally responsible for active euthanasia if it was preformed following the statutory procedure. Belgium has adopted the law which does not precisely refer to particular forms of active euthanasia, and which empowers the physician to provide for this treatment upon the patient's request. In Belgium, the physician who performs active euthanasia is obliged to follow the statutory procedure, as well. The citizens of Oregon have only approved the legalization of physician-assisted suicide, but not mercy killing, which is still prohibited in this state. The Swiss Criminal Code of 1942 criminalizes only assisted dying committed due to greed, while any other motive, including mercy, does not make such act a criminal one. In Colombia, the High Court legalized active euthanasia but in the same time banned such an act in regard with the patients suffering from Alzheimer's Parkinson's or Lou Gehrig's diseases. Finally, in Japan, the lower courts have reached the consensus about legal permissibility of active euthanasia (see e.g. *Tokunaga* case and the explanation in *Danuta Mendelson and Timothy Stoltzfus Jost*, *A Comparative Study of the Law of Palliative Care and End-of-Life Treatment,* (2003) 31 *Journal of Law, Medicine and Ethics* 130).

21 Patients in permanent vegetative state are awake at times, although they show no awareness and do not respond to visual, auditory, tactile or noxious stimuli. Because the brain stem continues to function, the patients may retain gag, cough, sucking and swallow reflexes and may make spontaneous movements or noise. For more see *Roger S. Magnusson*, *The Sanctity Of Life and The Right To Die: Social and Jurisprudential*

several survivals of 18 and 20 years were recorded, one of 37 and one of 40 years.[22] Accordingly, it became inevitable to decide whether to initiate pro-life treatment or to discontinue one that had been already initiated. Beside a medical, this decision got a legal aspect as well, because it actually requested a decision to be made with regard to the right to life. The issue – who controlled the machine – a patient or a physician – had become the constitutional issue, first in the US and then in some other countries, as well.

The constitutional aspects of euthanasia have usually been defined with a help of the right to self-determination, which, *inter alia*, embraces the right to die or the right to forgo pro-life medical treatment. Since neither one of the valid constitutions do not explicitly protect these rights, new dilemmas have emerged: which constitutional right serves as *Muttergrundrecht* of the right to die *i.e*. the right to forgo pro-life medical treatment? Whether the right to bodily integrity, privacy, liberty or the right to human dignity could be a source of such rights? Alternatively, it may be that the right to die is an aspect of the right to life. If it is not – whether there is a duty to live? The modern medical technology has influenced also a debate about the constitutional prohibition of torture and degrading treatment. Thus, some hold that the prohibition of degrading treatment has been violated whenever one insists on a treatment that the patient opposes, regardless of the fact whether the treatment in question saves or prolongs the patient's life. Finally, a debate is going on about the constitutional protection of non-terminally ill patients who, on religious grounds, reject even an ordinary treatment like, for instance, a blood transfusion. The problem is reduced to the following: do such patients have a right to refuse life-saving treatment according to their religious convictions? The discussion about passive euthanasia has provoked the reactions of those who are of the opinion that active euthanasia should be legalized, as well. Unlike in the case of passive, the argument on active euthanasia has not been inspired by a technology but rather by a wish to protect human rights.[23]

Now, I will look more closely at the answers provided by the courts that faced some of the above-mentioned dilemmas.

Aspects of the Euthanasia Debate in Australia and the United States, (1997) 6 *Pacific Rim Law and Policy Journal* 1.

22 See Bryan Jennet, *Managing Patients in a Persistent Vegetative State since Airedale NHS Trust v. Bland*, in *Death, Dying and the Law*, ed. Sheila A.M. McLean (Hampshire: Dartmouth Publishing Company Limited, 1995), at pp. 19-28.

23 For a more detailed discussion see Violeta Beširević, *Euthanasia: Legal Principles and Policy Choices,* (Florence, Italy*: European Press Academic Publishing,* 2006).

3.1. The Rise and Fall of the Constitutional Right to Euthanasia

Although the US law had supported the right of a dying patient to forgo pro-life treatment already in 1960s, for a long time the American courts were not able to agree upon a constitutional source of the right to passive euthanasia. The initial approach was based on the common law: the common law rights to self-determination, bodily integrity and the right to consent to treatment served as foundation of the right to reject any recommended medical treatment even that of life saving or life prolonging. In the course of "due process revolution", the right to passive euthanasia for the first time was constitutionalized as an aspect of the right to privacy.

In *Quinlan,* the Supreme Court of New Jersey set the standards of death and dying law in many aspects, but for the purpose of this paper, the most important is the following conclusion:

The right to privacy articulated in *Griswold* was broad enough to encompass the right to refuse unwanted medical treatment under certain circumstances, in much the same way as it is broad enough to encompass a woman's decision to terminate pregnancy under certain conditions...[24]

The above-cited conclusion had been reaffirmed in a number of cases litigated in 1970s and 1980s, but nonetheless, the Americans became again divided into two groups - those pro-life and those pro-choice oriented. After it left enough time for the case law to develop, the US Supreme Court agreed to consider a case on passive euthanasia. However, its *Cruzan* decision, which is about the right to passive euthanasia, is not a groundbreaking, at least not in a way it is the *Roe* decision on abortion delivered by this court in early 1970s.[25] In *Cruzan*, the courts were asked to decide on the parents' request to remove artificial supports from the body of their twenty-five-year-old daughter, diagnosed with a "persistent vegetative state", and thus to "allow" her to die. For the purpose of this case, the US Supreme Court has assumed (but not explicitly concluded) that the US Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition, but at the same time, has significantly supported the State's interest in the preservation and protection of human life.[26]

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24 *In re Quinlan*, 70 N.J. 10, 41, 355 A 2d 647, at p. 651. The right to forgo pro-life treatment is not an absolute – it is limited by the state interests in preserving life, protecting the innocent third parties, preventing suicide and maintaining the ethical integrity of medical profession. Ibid, at pp. 663-664.

25 *Cruzan v. Director Missouri Department of Health*, 497 U.S. 261, 110 S.Ct.2841 (1990).

26 Ibid, at pp. 277, 279- 280.

Unlike the lower courts, which based the right to forgo pro-life treatment on the right to privacy, the Supreme Court ruled that the liberty interest protected by the Due Process Clause of the Fourteenth Amendment, justifies this presumptive right.[27]

After some time, the US Supreme Court also accepted to decide on the issue of active euthanasia. A request to uphold the constitutionality of this medical practice was articulated as (a) a liberty interest in committing suicide with assistance; and (b) an equal protection claim based on the fact that the ban on active euthanasia permitted patients to refuse pro-life treatment but did not allow the physicians to assist terminally ill patients to end life by prescribing lethal medication to them. Emphasizing that it assumed a constitutional protection of the right to forgo any kind of unwanted medical treatment on the traditionally protected individual's right to bodily integrity and self-determination, the US Supreme Court ruled against active euthanasia. Its decision revolves around tradition as the only source of the rights deriving from the constitutional concept of liberty.[28] The Court also rejected the claim that the Equal Protection Clause was violated by making a distinction between passive and active euthanasia: everyone, regardless of physical condition is entitled, if competent, to refuse unwanted lifesaving medical treatment and no one, the Court emphasized, is permitted to assist in suicide.[29]

Before I present the constitutional decisions on passive and active euthanasia delivered in some other countries, I will point at the additional American examples that connect bioethics with the constitution. To be exact, in the United States the problem of euthanasia has not only provoked a zealous discussion about the contents and reach of the constitutional rights, but recently has also lead to judicial decisions regarding on of the key constitutional principles – the separation of powers principle, and its effects both on horizontal and vertical level. I will take these examples in chronological order.

American State of Oregon is one of a few jurisdictions in the world that has legalized active euthanasia, although in a limited way. The Oregon's Death with Dignity Act is a product of grass roots law-making - it was adopted through a citizen initiative. However, as soon as it was confirmed at the referenda, a group of plaintiffs lodged a complaint arguing that it violated equal protection clause, since it failed to safeguard against suicide by mentally incompetent patients.[30] The appellate court

27 Ibid, at p. 278.

28 *Washington v. Glucksberg,* 117 S.Ct. 2258 (1997).

29 *Vacco v. Quill,* 117 S.Ct. 2293 (1997).

30 *Lee v. Oregon*, 891 F Supp. 1429 (D Or. 1994).

dismissed the constitutional challenge because the plaintiffs lacked standing to challenge the law. The US Supreme Court itself has recently resolved another constitutional dispute concerning this law. Thus, when the Oregon's Act went into effect in 1977, it became clear that the physicians in this state would prescribe federally controlled substances not only to treat patients (as envisaged by the federal law), but for assisted suicide purposes as well. Because the Controlled Substances Act did not mention assisted suicide, different interpretations were immediately offered. The constitutional dispute aroused when the Attorney General warned physicians that they would loose licenses to prescribe federally controlled drugs if they prescribed them for assisted suicide purposes. The competent court immediately said that this case was not about euthanasia but simply about the states' rights to decide on issues referred to them by the Constitution.[31] The Court ruled that the states have the exclusive right to control the practice of medicine within their borders and that the Oregon's decision to legalize physician-assisted suicide has to prevail over any federal view to the contrary, even with regard to determining the proper medical uses of federally controlled substances. The US Supreme Court affirmed the decision.[32]

It is hard that any other recent issue, apart maybe from the issue of fighting terrorism to promote democracy in Iraq, has so much provoked the American public and challenged the fundamental constitutional principles, as the issue of passive euthanasia did in *Schiavo* case. A short reminder follows: a personal tragedy of Tereze Schiavo, for ten years attached to life-sustaining procedures, turned to a family one when her parents stood against her husband's request to discontinue such treatment. Her husband petitioned the trail court to authorize termination of life prolonging treatment. The trial court found by clear and convincing evidence that Tereza would have authorize the termination of life prolonging procedure if she were competent to make a decision herself.[33] A national and constitutional drama started after the Governor of Florida, contrary to the valid and several times confirmed judicial decisions, issued executive order to stay the continued pro-life treatment. First, the Supreme Court of Florida declared the Governor's act unconstitutional because it represented an unlawful delegation of legislative authority and a violation of the right to privacy, and then, the US Supreme Court denied hearing the case. The case culminated when the President Bush, signed into law a bill authorizing the federal courts to review the case. President's signature came after both the Senate and the House of Represen-

31 *Gonzales, Attorney General, et. al., v. Oregon,* (2006) 126 S.Ct. 904.

32 Ibid.

33 *Bush v. Schiavo,* 885, So 2d 321 (2004 Fla.).

tatives approved the bill. After the courts reaffirmed all previous decisions, Tereza Schiavo finally was "allowed" to die. If the legislature with the assent of Governor could do what was attempted in the *Schiavo* case, not only the judicial branch would be subordinated to the final directives of the other branches, but also subordinated would be individual rights including the traditionally protected right to self-determination. To those who worry because of Bush administration, including the author of this text, the only comfort is a power of the American courts to reject pressure coming from the other governmental branches.

Although they have not been classified as top constitutional decisions, the decisions on euthanasia of the constitutional courts delivered in some other countries have attracted a public attention and become global references of any judicial dispute about euthanasia. For instance, the decision of the Supreme Court of Canada, handed down in 1993, to reject constitutional challenge of the blanket prohibition on assisted suicide as applied to the practice of active euthanasia, has influenced to a considerable extent the decision of the European Court of Human Rights, delivered almost 10 years later, that the prohibition of active euthanasia was not contrary to the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[34] In the above-mentioned Canadian decision, the Supreme Court considered the claim that the absolute prohibition on assisted suicide violated the right to liberty and security of the terminally ill patients who were incapable of terminating their own lives without anyone's assistance. Justice Sopinka, who wrote judgment for the majority, agreed with the appellant's allegation that the prohibition on assisted suicide deprives a physically incapable individual to commit suicide of autonomy over her person, causes her physical pain and psychological stress in a manner which invades the constitutional right to security of the person. Yet, the majority also stressed that the purpose of the blanket prohibition at stake is to protect the vulnerable, who might be induced in moments of weakness to commit suicide. Thus the terminally and incurable ill patients, physically incapable to commit suicide without assistance, have become scapegoats of the state interest to discourage suicide, which in itself is not a crime in a considerable number of countries. Mostly for the same reason – the need to prevent suicide – the European Court of Human Rights rejected

34 *Rodriguez v. British Columbia (Attorney General),* (1993) 3 S.C.R. 519. The Charter of Rights and Freedoms is a part of the Canadian Constitutional Act of 1982. According to this act, the Canadian courts, similarly to the American, are empowered to decide on the constitutionality of legal norms. For a detailed discussion on the constitution and rights, see e.g. *Jonathan L. Black-Branch, Entrenching Human Rights Legislation under Constitutional Law: The Canadian Charter of Rights and Freedoms,* E.H.R.L. 1998, 3, at pp. 312-331.

the allegation that the right to physician-assisted suicide is the right protected within the ambit of the privacy rights guaranteed in Article 8 of the European Convention on Human Rights.[35]

In the United Kingdom, the House of Lords discussed the issue of passive euthanasia with regard to incompetent patients.[36] While the Lords have unanimously ruled that the sanctity of life principle is not an absolute, they, however, have split on the issue of the constitutional principles that supposed to justify the right of a terminally ill incompetent patient to passive euthanasia.[37] Note that the majority of them were of the opinion that the termination of the patient's life might be in her best interest. The reasoning of Lord Mustill well illustrates this point: doctors have duty to act in the best interests of the patient; while the termination of the patient's life might not be in his best interest, his best interests in being kept alive have also disappeared; thus, the patient had no interest of any kind. Since his personality ceased to exist, the termination of life is ethically and legally permissible.[38]

The ruling of the Irish Supreme Court is of a particular interest for the purpose of this article.[39] The Court vindicated the view that the constitutional right to privacy justified the right of a competent terminally ill patient to refuse pro-life treatment.[40] On the other hand, it found that the right to self-determination and the right to privacy could not be applied to incompetents and that therefore their constitutional protection rest on different principles. When it comes to the incompetents, the Supreme Court of Ireland ruled that the source of their right to forgo pro-life treatment is the right to die a natural death which is an aspect of the constitutionally protected right to life.

The Constitutional Court of Germany has not yet directly considered a case on euthanasia, but it has expressed its views on this subject indirectly while considering an alleged violation of Jehovah Witnesses' rights.[41] The Court declared *in dictum* that the right to refuse

35 *Pretty v. the United Kingdom*, Judgment of April 29, 2002.

36 Having in mind that an authoritative constitutional text is largely missing in the UK, some may dispute the need to include in this presentation the decision of the British court. There is no doubt that this can be a subject of a separate discussion. In short, this decision has been discussed here because the decisions of the House of Lords are clearly of a constitutional importance.

37 See *Airedale NHS Trust v. Bland* (1993) AC 789, 1 All ER 821.

38 Ibid, at pp. 897-899.

39 The Supreme Court of Ireland is empowered to decide on the constitutional issues (see Article 34 of the Irish constitution).

40 *Ward of Court, Re a*, (1995) IESC, (1996) 2 IR 73, (1995), 2 ILRM 401.

41 32 *BVerfGE* 98(1971).

any kind of hospital treatment, including pro-life-treatment as well, is based on the constitutionally protected right to the free development of one's personality, which also implies freedom of action. However, the Court has not explicitly established that refusal of pro-life treatment claimed on religious convictions is an aspect of the freedom of religion. On this account, by far more explicit were the lower American courts when deliberated cases on religiously motivated refusal of life saving treatments. After initial hesitation, a considerable number of the American courts had supported the right of Jehovah Witnesses' to reject blood transfusions on the religious grounds, even if this represented a serious threat for their own lives.[42] It is interesting to notice that the courts have mainly grounded this right on the right to self-determination or the right to privacy, while only in a few cases they concluded that it derived from the First Amendment Free Exercise Clause.

Paradoxically, the High Court in Colombia has approved active euthanasia in a case brought by euthanasia opponents who sought to tighten Colombia's euthanasia law of 1980, which envisaged an imprisonment for six months to three years to anyone found guilty of assisting in a suicide. The Court ruled that no person should be held criminally responsible for taking life of a terminally ill patient who requested such an act.[43] The decision has been based on an individual's autonomy, which, according to the court, in some circumstances prevailed over the state duty to protect life.[44] Thus, Colombia became the first country whose court, empowered to decide on the constitutional issues, approved the practice of active euthanasia.

Finally, the last decision to be mentioned here is the decision of the Hungarian Constitutional Court that had been expected by the public for about ten years.[45] The decision of 2003 reflects the present state of art: passive euthanasia *i.e.* the right to forgo pro-life treatment derives from the right to self-determination, which is by itself an aspect of the constitutionally protected right to dignity. In contrast, active euthanasia cannot be treated to fall within the ambit of the right to self-determination because the cause of a patient's death is not limited only to the action of

42 See e.g. *In re Brooks*, 32Ill. 2d 361, N.E. 2d 345 (1965); *Winters v. Miller*, 446 F. 2d 65 (N.Y. 1971); *Guardianship of Dolores Phelps, County Court for Milwaukee County, Probate Divisions*, No. 459-207, (1972).

43 The decision was delivered in 1997.

44 For more see in Dorsen, N., Rosenfeld M., Sajó A., and Baer S., *Comparative Constitutionalism*, (Minnesota: West Group, 2003) at p. 568.

45 The case before the Court stemmed back to a 1993 manslaughter conviction of Gyorgyi Binder, who intentionally drowned her 11-year-old incurably ill daughter in bathtub. See the Decision no. 22/2003 (IV 28).

the patient but includes a physician's action as well, and therefore it should remain legally prohibited.

To conclude: the ideas of a "natural death" and omission serve to "sell" to the public passive euthanasia as the right to forgo any kind of medical treatment which in some countries acquired a status of the constitutional right. On the contrary, the standard constitutional arguments including human dignity, life (in the sense of non-existent duty to live), privacy, security, personal liberty, prohibition of degrading treatment and equality failed to convince courts to mandate the legalization of active euthanasia. In some countries, like for example in the Netherlands, the issue of active euthanasia has been pacified by the absence of the constitutional debate and resolved in the Parliament by applying the doctrinal principles of criminal law.

4. HUMAN CLONING: CONSTITUTION V. LABORATORY

Article 24 of the Serbian Constitution reads: cloning of human beings shall be prohibited. This formulation obviously derives from the previously short-valid constitutional text *i.e.* Article 11 of the Charter on Human and Minority Rights and Civil Liberties of Serbia and Montenegro.[46] Apart from the Serbian Constitution, the EU Constitution also speaks about cloning while the reaction to this topic has come from the Supreme Court of Costa Rica, as well. The EU Constitution is a more precise than the Constitution of Serbia – it prohibits human cloning for reproductive purposes, while the Supreme Court of Costa Rica has invalided the governmental decree on the techniques of artificial inseminations and thereby implicitly prohibited human cloning in therapeutic purposes.[47]

Now, it is not difficult to determine the mutual relation between a constitution and human cloning. Human cloning, as well as euthanasia and abortion, triggers the issues of constitutional rights and freedoms. Before I present in more details reasons that motivated the constitutional prohibition of human cloning, I will explain the rudiments of this process, necessary for its regulatory legitimacy.

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46 Official Gazette of Serbia and Montenegro, 1/2003.

47 See Rosario M. Isasi, Bartha M. Knoppers, Peter A. Singer, Abdallah S. Daar, *Legal and Ethical Approaches to Stem Cell and Cloning Research: A Comparative Analysis of Policies in Latin America, Asia, and Africa,* (2004) 32 *Journal of Law, Medicine and Ethics* 626, at. p. 630.

4.1. Risks of Definitions

In the scientific area, the term cloning is often used as shortcut for producing a copy of a biological entity – a gene, a cell, an organism. In molecular biology, so-called molecular cloning relates to cloning of DNK and it is used, for example, for the production of insulin or growth hormones.[48] Cloning of cells can happen naturally – monozygotic twins are clones that simultaneously sprang up from the same egg cell. Yet, in the most cases this term relates to a cell cloning in laboratory – first the embryo is artificially divided and than from thus divided parts two or more genetically identical organisms are developed.[49] The term cloning in the above-mentioned senses is not disputable.

As a rule, the problems occur when one endeavors to define human cloning *i.e*. cloning of human beings, which is the wording used in the Serbian Constitution. First there is reproductive and therapeutic cloning. Second, both relate to human cloning. Third, reproductive and therapeutic cloning has been treated differently in the scientific and legal discourse. On the one hand, the consensus has been made that reproducetive cloning is legally and ethically unacceptable. On the other hand, there is neither one voice about ethical permissibility of therapeutic cloning nor harmony among the countries about its legal permissibility. In the absence of a consistent scientific terminology, it is hard, however, to determine precisely the meanings of these terms as well as a line of their division. The current definitions can be reduced to the following:

Reproductive cloning relates to artificial production of embryos – a genetic copy of an existing individual, in order to accomplish an ultimate aim – to clone a human being. This imply: (a) nucleus substitution –an enucleated egg cell of an adult is fused with the nucleus from an adult somatic cell and then the egg is stimulated to divide and to format an embryo until it reaches the blastocyst stage; (b) once this stage has been reached, the embryo is transferred into the uterus of a female in order to be gestated to term.[50]

Therapeutic cloning implies the same process of nucleus substitution but not implantation of the created embryos into the uterus of a female. Instead, the process is limited to the development of the embryo

48 See *Bart Hansen, Embryonic Stem Cell Research: Terminological Ambiguity May Lead to Legal Obscurity,* (2004) 23 MEDLAW 19, at. pp. 20-21.

49 See Dubravka Šimonović i Ksenija Turković, *Pravna regulacija kloniranja u nas i u svijetu*, (2005) Zbornik PFZ, 55 (6) 1543-1574, at. p. 1544.

50 For a definition of reproductive cloning see e.g. Marc Stauch and Kay Wheat with John Tingle, *Text, Cases & Materials on Medical Law,* (New York: *Routledge-Cavendish,* 2006) at p. 368; see also the World Health Organization home page: http://www.who.int/ethics/topics/cloning/en/index.html

to the blastocyst stage in order to create embryonic cells that can be used to clone replacement organs and tissue or to treat causes of different diseases.[51]

Accordingly, the similarities between reproductive and therapeutic cloning are reduced to the procedure of somatic cell nuclear transfer (SCNT) while differences to – a final product, time frame to accomplish the final product, the purpose of cloning and its medical implications.

Some, however, argue that differences are insignificant, that what matters is the technique which is identical, and that the only difference is the fact that reproductive cloning is aimed at creating human beings, while therapeutic – at creating embryonic cells.[52] Slippery-slopes arguments are also offered: if SCNT is allowed, human coming for reproductive purposes cannot be avoided.[53] Further, it is claimed that by introducing a partial ban *i.e.* by allowing therapeutic cloning, a creation of human embryos aimed at their distortion would also be allowed, which in turn would imply the "instrumentalization" of human life.[54] Additionally, the distinction between these two types of cloning has been compounded by the interchangeable use of reproductive cloning with therapeutic cloning by those who hold that the therapeutic cloning embraces also a "therapeutic" treatment for infertility, which in medicine has been known as preimplantation genetic diagnosis (PGD).[55] Namely, a type of cell nuclear replacement could be used to treat infertility or avoid birth of a child with inherited genetic anomalies.[56] This procedure has been available in many countries including the United States, United Kingdom, Belgium, Israel but not Germany, because of the earlier mentioned approach of the German constitutional jurisprudence that the fetus enjoys constitutional protection, which in turn implies the prohibition of destroying or discarding embryos. Worth to be mentioned here is that the

51 See Stauch *et. al, supra* note 50, at p. 365. Human embryonic stem cells for the first time were separated in 1998. Today they can be obtained either from spare embryos from IVF treatment or from embryos created for the research purposes.

52 See http://www.who.int/ethics/topics/cloning/en/index.html

53 See A.M. Capron, *Placing a Moratorium on Research Cloning to Ensure Effective Control over Reproductive Cloning,* (2000) *Hastings Law Journal* 53, at p. 1057*;* S. Holm*, The Ethical Case Against Stem Cell Research*, (2003) *Cambridge Quarterly of Health Care Ethics* 12, at pp. 372-383.

54 See Šimonović and Turković*, supra* note 49, at p. 1553.

55 See Hansen, *supra* note 48, at pp. 23-24. See also John A. Robertson*, Reproductive Technology in Germany and the United States: An Essay in Comparative Law and Bioethics,* (2004) 43 *Columbia Journal of Transnational Law* 189, at pp.221-225.

56 Ibid.

world-known philosopher Jürgen Habermas had harshly criticized the practice of PGD as the harbinger of a renewed eugenics regime.[57]

The approach of the German law towards the constitutional protection of fetus turns me back to the questions of the legal protection of human life and its constitutional limits, which are important for a legal standpoint towards therapeutic cloning. Note that there is a dichotomy on both the state and international level when it comes to the legal definition of a human being. Moreover, international law is usually silent on this point. For example, the Additional Protocol to the European Convention on Human Rights and Biomedicine on the Prohibition of Cloning Human Beings leaves to the Member States to define the term "human being".

A good example about the perplexities even among experts is different reports of influential medical journals on the adoption of the Dutch Embryos Act of 2002: a prestigious British medical journal – the *Lancet* informed that the new legislation approved embryonic stem cell research and that researchers had only to use spare embryos from IVF treatment. By contrast, the *British Medical Journal* stated "the Netherlands voted in favor of therapeutic cloning and… that scientist would be allowed to create embryos either through *in vitro* fertilization techniques or by cell nuclear transfer (cloning)".[58] Many asked themselves what exactly the Dutch law allowed and prohibited.

4.2. Reasons for Constitutional Prohibition

Apart from the unwanted medical implications, the main reason to ban human cloning is the human rights protection. The Constitution of Serbia places this ban within the provisions relating to the right to life. The EU Constitution speaks about the prohibition of reproductive cloning within the protection of one's physical and mental integrity. Yet, the scope of the rights that human cloning may endanger is much broader: in addition to human dignity and personal identity, the most frequent reasons for the ban, the reproductive cloning is contrary to many other rights, as well. If one excludes imaginary ideas from science fiction movies that equal cloning with production of armed slaves specially trained for military and other tasks, it is possible to argue that reproductive cloning is contrary to the following constitutional rights and freedoms:

Human dignity and the right to life – these rights have been treated as the cornerstone of constitutional prohibition of cloning. Although human dignity has not be given one meaning, its concept implies that

57 For more about preimplantation genetic diagnosis see e.g. David DeGrazia, *Human Identity and Bioethics,* (New York: *Cambridge University Press,* 2005).

58 For more see Hansen, *supra* note 48.

every human being is worthy of honor and respect which in turn requires a prohibition of inhuman treatment and acts. The UNESCO Declaration on the Human Genome and Human Rights states that dignity makes it imperative not to reduce individuals to their genetic characteristics and to respect their uniqueness and diversity.

There are different opinions about implications related to the *right to life*. Some hold that genetic manipulations imply the arbitrary taking of life, which does not occur in the process of human cloning because the former is understood as the process of creating and not depriving of life.[59] Other, however, believe that all people have the right to be conceived, gestated, and born without genetic manipulation.[60] Yet, usually one speaks about the need to prohibit human in the contexts of the genomes and embryos protection, which, according to some, enjoy the right to life equally as already born human beings.

It is possible to assume that human cloning is contrary to the prohibition of torture, cruel, inhuman or degrading treatment. On the one hand, one can assert that physical and mental "abnormalities" resulting from human cloning constitute "cruel treatment", while on the other hand, it is possible to interpret that physical and mental conditions of a cloned individual make their life "cruel".[61]

In addition, there are different theories about human cloning in the context of the right to health. Although a unique understanding of the right to health is missing, the following approaches are currently debated: (a) a state obligation to respect the right to health requires from a state not to finance therapeutic cloning[62]; (b) if human cloning were to be allowed, instead of a woman's - the right to decide about reproduction would become physicians' and bioethicists' right, while at the same time, requests addressed to women to deliver "perfect babies" would become much stronger.[63]

Except for the rights that protect physical and metal integrity of an individual, it is alleged that the practice of human cloning, also violates

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59 See Stephen P. Marks, *Tying Prometheus Down: The International Law of Human Genetic Manipulation,* (2002) 3 *Chicago Journal of International Law* 115, at p. 126.

60 See the approach of the American NGO – *Council for Responsible Genetics*, defined in the Article 10 of its Model Law on Genetic Rights, (2000) 13 *GeneWatch* 3.

61 *Marks, supra* note 59, at p. 124.

62 Using contrary assumptions about the risks and moral implications, the same obligation could be invoked to engage the national health system and other organs of the state in tolerating, promoting, and practicing genetic manipulations. Ibid, at p. 129.

63 *Marcy Darnovsky, Human Germline Engineering and Cloning as Women's Issues,* (2001) 14 *GeneWatch* 1.

the rights regarding one's identity, autonomy, family relations and equality rights. Thus it is frequently argued that cloning threatens rights to personal identity, individuality, and uniqueness. In addition, it questions family relations – a clone would be both a sibling and a child of its "parent". Equality concerns are also present: since it would be possible to determine a particular genetic heritage of a clone, persons created in such a way may be discriminated in regard with others in the course of employment or insurance. Similar disputes have been already litigated in the United States because of the proceedings that relates to gene sequencing.[64]

This short presentation does not include the list of all rights involved by regulating reproductive human cloning. The process would radically challenge a traditional understanding about what it means to be a human being, what an individual's nature and a role in the society are, and thereby what rights he or she enjoys. Some hold that a "clone" by itself would not be in a possession of human rights.

4.3. The Reaches of the Constitutional Prohibition

The last issue that I want to discuss in this article relates to the reach of the constitutional prohibition of cloning set for in Article 24 of the Constitution of the Republic of Serbia. Suppose that, because of the unwanted medical implications and human rights protections, the drafters of the Constitutions envisaged this prohibition as an absolute one. No exceptions are permitted, similarly like in the case of torture. This intention I do not dispute. The issue is, whether the drafters stated what they actually wanted. The possible interpretations are the following:

First, having in mind that human cloning refers both to reproductive and therapeutic cloning, the above mentioned constitutional protection is of an absolute nature and stands against both types of cloning.

Second, the opponents of both types of cloning could point at Article 252 (2) of the Serbian Criminal Code which set out punishment for a person who engages in human cloning or in experiments aimed at human cloning, to argue that engaging in experiments aimed at cloning amounts to therapeutic cloning, which in turn helps to interpret the constitutional prohibition in absolute terms.

Third, having in mind that in the Serbian law the term "human being" relates to the born and not to the unborn[65], those who hold that reproductive cloning cannot in any sense equal with therapeutic cloning,

64 *Marks, supra* note 59, at p. 124.

65 See Nataša Mrvić-Petrović, Krivično pravo, (Beograd: Fakultet za poslovno pravo, 2005), at p. 226.

can assert that the constitutional prohibition relates only to reproductive and not to therapeutic cloning.

Yet, in the absence of public deliberation on a draft Constitution, one cannot firmly assert that the drafters intended to ban only reproductive and not therapeutic cloning, as well. If it is of any comfort, the fact is that regulation on human cloning is itself in embryonic phase both on international and national level.[66] A lot of information is still missing. Consider some troubles that emerged at international level.

The UNESCO Declaration on the Human Genome and Human Rights of 1997, explicitly prohibits reproductive cloning as a practice that stands contrary to human dignity. However, the opponents of any types of human cloning are inclined frequently to invoke a controversial Article 18 of the European Convention on Human Rights and Biomedicine which speaks about research on embryos *in vitro* in the following terms: (1) where the law allows research on embryos *in vitro*, it shall ensure adequate protection of the embryo; (2) the creation of human embryos for research purposes is prohibited. The Additional Protocol on the Prohibition of Cloning Human Beings, adopted in 2001, was aimed to clarify what left unspecified and regulate this area in more details. Thus, Article 1 of this Protocol establishes an absolute prohibition of any intervention seeking to create a human being genetically identical to another human being, whether living or dead. The same Article explains that the term human being "genetically identical" to another human being means a human being sharing with another the same nuclear gene set. This prohibition, according to the Explanatory Report, relates to cloning of human beings, either by utilising the techniques of embryo splitting or nuclear transfer. However, as remarked earlier, since the Protocol leaves to the Member States to define the term "human being", the reach of this prohibition is limited. In the jurisdictions where it is established that life begins at fertilization, like in Germany, it is prohibited to destroy or discard embryos and thereby to engage in cloning for therapeutic purposes, while in the Netherlands, for example, therapeutic cloning is permitted but only by using spare embryos from IVF treatment.

Neither EU regulations can treat the above-mentioned troubles. In its Resolution of 1997, the EU Parliament reached the conclusion that human cloning had to be banned[67]. The EC Directive on the Legal Protection of Biotechnological Inventions also speaks about human cloning and excludes unequivocally from patentability processes for modifying the germ line genetic identity of human beings, processes for cloning human beings and uses of human embryos for industrial or com-

66 For reports on different state regulations see http://www.glphr.org/

67 See EU Resolution on Cloning EP OJ C 115 of March 3, 1997.

mercial purposes.[68] In addition, the Directive specifies that the term "human being" relates to a human being for the embryonic stage. [69] Yet, the story of therapeutic cloning does not end-up here as far as the EU level is concerned. Although two years ago the EU Council of Ministers failed to decide whether or not to fund embryonic stem cell research[70], recently reported American research enabling the manipulation but non-destruction of embryos as well as the research in South Korea, has refreshed a debate on therapeutic cloning at the Union level.[71]

Finally, although legally non-binding, the UN Declaration on Human Cloning, adopted without a consensus in 2005, is the best example of a deep present divisions among scientists and countries in regard with the therapeutic cloning.[72] The Declaration invites countries to prohibit all forms of human cloning inasmuch as they are incompatible with human dignity and the protection of human life. There is no doubt that the prohibition includes reproductive cloning while as far as the therapeutic cloning is concerned, it is left for the countries to decide, in accordance with their national legislation, whether it stands contrary to human dignity and the right to life.

Coming back to the prohibition of human cloning in the Serbian Constitution, I hold that in the absence of a universal approach, laws that would regulate reproductive cloning, artificial insemination, protection of embryos and the uses of spare embryos, the constitutional prohibition should be interpreted in absolute terms for there is a great danger of misconduct.[73] On the other hand, rather careful and unbalanced approach of the international community, may testify that we have closed a debate on the therapeutic treatment too early, since the experts assert that it can be of enormous help in the treatment of serious illnesses as well as for the

68 See EU Directive 98/44/EC of July 6, 1998. para. 41.

69 See the Council of Ministers explanatory memorandum to the common position on the EU Directive on the legal protection of biotechnological inventions OJ C 110, 8.4.1998, p.30, point 35.

70 See *Noëlle Lenoir*, *Biotechnology, Bioethics and Law: Europe's 21st Century Challenge,* (2006) 69 (1) *The Modern Law Review* 1, at p. 5. A potential compromise on stem cell research was blocked by Germany, Italy, Austria, Spain and Portugal. See *Robertson, supra* note 55, at. p. 212-213.

71 See points 5.2.2. -5.2.3. of the Report of EU Commission on Development and Implications of Patent Law in the Field of Biotechnology and Genetic Engineering of October 7, 2002. See also *Lenoir, supra* note 70, at p. 5.

72 The UN Declaration no. A/59/516/Add.1 was adopted by a recorded vote of 84 in favor to 34 against, with 37 abstentions. Serbia and Montenegro was among the countries that abstained.

73 The existing administrative decree, which partially regulates this issue, cannot be treated as effective or sufficient protection against possible misconducts.

purposes of regenerative medicine. Yet, the issue of whether one generation has the right to decide about issues of the next generations, is a subject of some other discussions.

5. CONCLUSIONS

When some 40 years ago the first bioethical dilemmas appeared, many doubted that a key to address them might be the constitutional principles and standards. However, it turned out that the constitutional rights were a key to abridge the problems attached to the technological and social fascinations. The constitutional adjudication of abortion, euthanasia or the constitutional regulation of human cloning illustrates well the point.

Yet, I do not claim that the bioethical dilemmas can be resolved only by a constitutional adjudication. Which strategy is going to be chosen, depends on political, legal, cultural, economic and religious tradition of each particular state. It might appear that countries where the rights talk prevails in the legal discourse and countries that tend to remedy recent undemocratic past by creating new rights would opt for the solution deriving from the constitutional jurisprudence. Other countries, where religion does not play a significant role and whose citizens are traditionally tolerant and prone to achieve political compromise relatively easily, like for example the Netherlands, would choose a regular parliamentary procedure for resolving bioethical issues.

Time distance may also be significant in opting for a particular legal strategy or deciding whether any legal regulation is needed in the first place. For instance, the US Supreme Court granted certiorari to hear the case on passive euthanasia only after twenty years passed since the first cases had been litigated. The Americans, anyway prone to conduct constitutional disputes, have not initiated a significant constitutional debate on permissibility of human cloning or stem cell research. Instead, the president Bush established the President's Council on Bioethics with a task to develop a deep and comprehensive understanding of the issues that it considers. So far, the Council has issued four reports which are now subjects of a zealous public discussion.

Neither the citizens of Serbia can feel indifferent to bioethical dilemmas. Yet, there is no continued public debate due to general occupation with pre-political issues. Therefore, there is no wander why many were surprised with the constitutional prohibition of human cloning. The purpose of this article is to indicate that we are not the only society that has chosen to solve bioethics controversy via constitutional text. If we, however, have achieved what we wanted by this constitutional prohibition and if we have partially closed the doors to the idea of progress, still remains to be discussed.

Vladimir Milisavljević

THE STRUGGLE FOR RECOGNITION IN HEGEL'S JENA WRITINGS

This paper examines the status and the evolution of the concept of struggle for recognition in Hegel's „Jena system outlines" („Systementwürfe") prior to his Phenomenology of Spirit. Hegel's elaboration of this concept reflects his emancipation from his own earlier philosophical and political conception. The latter has often been described in terms of a „metaphysics of substance", in which the ontological priority of the state or of the people as an organic whole is established at the expense of the individual and its freedom. On the contrary, the principle of the struggle for recognition developed in the system outlines is the unlimited endeavour of the individual consciousness towards its complete realization, i.e. the very freedom of the consciousness. The struggle for recognition and the dialectics it brings into play allow us to interpret the state itself as a product of the activity of the individuals which constitute it.

Key words: *Consciousness. – Recognition. – Struggle. – Subjectivity. – Substance.*

In spite of numerous and convincing attempts to challenge it, the interpretation still prevails according to which Hegel is one of the philosophers who sacrificed the individual's right to the Moloch of the state. Indeed, many statements from Hegel's opus speak in favor of this interpretation. It is, for instance, indisputable that Hegel vigorously opposes those conceptions of the state that take the individual as its basic and ultimate purpose. In addition, according to Hegel's frequently quoted formulation, the state is nothing less than „the divine Idea as it exists on earth", and the individual possesses „objectivity, truth and ethical life only in being a member of it".[1] Consequently, one may say that Hegel believed that the state was the only independent ethical and political power, and that the individual in his view was nothing more than its subordinated „moment".

1 G.W.F. Hegel, Vorlesungen über die Philosophie der Geschichte (Hegel, Werke, Frankfurt am Main 1986, vol. 12), p. 57; Grundlinien der Philosophie des Rechts (Werke, vol. 7), p. 399.

With regard to the actual controversy between „liberalism“, which strives to limit the influence of the state by the rights of the individual, and „communitarianism“, which asserts that the very identity of the individual is constituted through its affiliation to a concrete community, such interpretation could lead us to the conclusion in terms of which Hegel's philosophy supports only the latter orientation. For example, while Rawls' theory of justice, which is the model of a „liberal“ orienttation, resulted in a restoration of Kantianism in ethics and political philosophy, many authors use to say that communitarians have covered a part of the road leading „from Kant to Hegel“. In fact, the communitarians question the philosophical foundations of liberalism in a manner that corresponds in a certain sense to Hegel's criticism of individualism or „atomism“ of Kant's theory of morality and politics.

However, this analogy between Hegel and the communitarians must not be stretched too far. State, by all means, is only one among different types of „communities“ the importance of which is emphasized by the communitarians, and one should not overestimate its importance in their theory. This is the reason why communitarians seldom refer to Hegel's theory of the state. On the other hand, it has to be noted that one of the basic motives of Hegel's philosophy of spirit has experienced its significant revival among the authors who belong to the opposed, „liberal“ tendency in political theory. Simultaneously with the growth of influence of political liberalism, a change of paradigms occurred in political theory, that may be defined as the shift of focus from the problem of management of resources and of elimination of social inequality, to the one of respect for the rights and the dignity of human person, i.e. as the change of orientation from the issue of the redistribution of social resources, typical of the period of ruling social-democracy, to the complex of questions related to the very category of „recognition“.[2] However, the concept of recognition is central precisely in the philosophy of Hegel.

The well-known book by Francis Fukuyama *The End of History and the Last Man,* which was published in the early nineties of the last century, is only a surface and ideological symptom of the reorientation mentioned above.[3] In this book the fall of socialism in the Soviet Union and Eastern Europe – countries marked, according to the author, by considerable deficiencies with regard to the respect of their own citizens – is understood as the result of the struggle of these citizens „for recognition“. Fukuyama refers directly to Hegel's concept of recognition

2 This description was first proposed by Nancy Fraser (cf. Axel Honneth, „Reconnaissance et justice“, in: Le passant ordinaire, No. 38, January-February 2002).

3 Francis Fukuyama, The End of History and the Last Man, 1992 (cited after the translation by B. Gligorić and S. Divjak, Kraj istorije i poslednji čovek, CID, Podgorica 1997).

and to his viewpoint of the struggle for recognition. To be true, he dos not re-examine the systematic foundations of that Hegelian concepts, but relies instead on the influential anthropological interpretation of Hegel's philosophy proposed by Alexandre Kojève.[4]

Fukuyama presents Hegelian „struggle for recognition" as a concept which can help us to surpass the shortcomings of Marxist „economism".[5] This is but one of the less intriguing features of his argumenttation. As a matter of fact, Fukuyama considers that this Hegelian motive constitutes a necessary corrective element of the liberal and utilitarian political philosophy as well. He starts from the thesis according to which this philosophy is based on an erroneous conception of man as a being who makes practical choices exclusively on the ground of cold estimate of advantages and disadvantages, having as the only goal the advancement of his own self-interest. According to Fukuyama, such conception fails to realize the importance of the „thymotic" part of human soul (according to the word *thymos* from Plato's *Republic,* which Fukuyama translates as „spiritedness", and which corresponds to our today's understanding of „pride" or „self-esteem"). The thymotic element of the soul, however, manifests itself in particular in man's readiness to sacrifice, in certain circumstances, even his life in a struggle for a non-utilitarian goal. In Fukuyama's interpretation, this human capacity is fully taken into account in Hegelian concept of „struggle for recognition".[6] Fukuyama therefore believes that Hegel's conception of man offers some advantages of crucial importance compared to the one of the traditional liberal or utilitarian theory. According to Fukuyama, Hegel proposed a more accurate conception of politics and a more sublime understanding of liberal democracy than Locke or Hume.[7]

Discussions over Fukuyama's book have become quiet some time ago. The book is certainly not significant because of its intrinsic qualities or because of the answers it gives, but it still stays interesting in that it treats some questions that are still open.[8] Criticism of Hegel by liberals

4 Alexandre Kojève, Introduction à la lecture de Hegel, Paris 1947.

5 It must be noted that this kind of objection is sometimes raised against Hegel as well. For example, A. Honneth, in spite of his own leftist background, criticizes Hegel for his neglect of the logic of recognition, which is allegedly the consequence of his predilection for the concepts of „labour" and „education"; cf. A. Honneth, Kampf um Anerkennung, Frankfurt 1994, p. 104.

6 F. Fukuyama, Kraj istorije..., p. 166 sqq.

7 Ibid, pp. 164–165, 216.

8 Besides Honneth's book (see above), cf. in this respect the studies by Jürgen Habermas, „Arbeit und Interaktion" (in J. Habermas, Technik und Wissenschaft als „Ideologie", Frankfurt a. M. 1968), Ludwig Siep, Anerkennung als Prinzip der praktischen Philosophie, Freiburg/München 1979, and Andreas Wildt, Autonomie und Anerkennung, Stuttgart 1982.

whose arguments, since Haym's book on Hegel and all the way up to Popper, remained the same, dismissed Hegelian philosophy as an apology of totalitarianism.[9] How then is it possible that an enterprise such as Fukuyama's, which understands itself as a radicalization of the liberal position, and which, moreover, could with some reason be described as an „eschatology" of liberalism – is carried out through massive borrowing from Hegel's conceptuality, and even from the interpretation of Hegel by Kojève, whose attitude toward liberalism was, to say the least, ambivalent?

The present text does not aspire to propose a final answer to this question. In addition to that, it deals only with the struggle for recognition in Hegel's Jena system outlines, and leaves entirely aside the elaboration of the concept of recognition in the *Phenomenology of Spirit.* Beginning with the origins of Hegel's theory of recognition, it tries to examine and explain the ambivalence of contemporary liberalism in its relation to Hegel. Hegel's elaboration of the struggle for recognition is understood here as an attempt to transgress the limits of the liberal conception of politics not through its correction from outside, but rather by developing its own internal assumptions, i.e. through deducing the final consequences out of the concept of free subjectivity that Hegel intended to place at the basis of his political theory, which he himself steadily considered as a „liberal" one.

1.

All his life long, Hegel was an enthusiastic admirer of the French Revolution and of the principle of freedom the Revolution had inaugurated.[10] The experience of that great event was decisive already for

9 See Rudolf Haym, Hegel und seine Zeit, Hildesheim/New York 1974 ([1]1857), especially Chapter 15, pp. 357–391. On the other hand, many authors (such as V. Cousin, J. Hyppolite, S. Avineri, J. Ritter, E. Weil, K. H. Ilting, M. Riedel) consider Hegel as a „liberal" political thinker (for further references, see Jean-Claude Pinson, Hegel, le droit et le libéralisme, Paris 1989, pp. 5–12). To the side of the statements quoted at the beginning of the present article, which express Hegel's view of the state as a „divinity", one could put the following sentence from the Philosophy of Right (Hegel, Grundlinien der Philosophie des Rechts, p. 407), which clearly demonstrates his intention to operate a synthesis of the standpoint of the individual and of the one of the state: „The principle of the modern states has this enormous strength and depth, in that it allows the principle of subjectivity to complete itself into an independent extreme of personal particularity, and yet at the same time brings it back into the substantive unity, and thus preserves this unity in that very extreme."

10 Hegel, Vorlesungen über die Philosophie der Geschichte, p. 529. Cf. Joachim Ritter, „Hegel und die französische Revolution", in: J. Ritter, Metaphysik und Politik. Studien zu Aristoteles und Hegel, Frankfurt a. M. 1969, p. 192 sqq., and J. Habermas,

the beginnings of Hegel's orientation in philosophy. As a young man, Hegel hoped that the Revolution would spread to Germany as well.[11] This attitude was challenged by general disappointment caused by further development of the situation in France, after the revolutionary power was established, especially by the execution of Louis XVI and the ensuing period of Jacobean dictatorship. As of many others among his contemporaries in Germany, some of whom actively took part in revolutionary events, it might be said of Hegel as well that he was closer to Girondism.[12]

However, the revolution was important for the way Hegel was to perceive the central problem of modern politics. According to Hegel, the main problem of modern times lies in the separation between the individual and the state. In modern conceptions of natural law as well, the two concepts are understood as opposed to one another. Even the revolution was not successful in overcoming this separation between the state and the sphere of particularity of the citizens. Hegel's enthusiasm for republican political ideal of the ancient times, as witnessed by his early writings, originates in this observation. Following Schiller, Hegel puts the ideal unity between the citizens and the polity, that existed in Antiquity, against the antagonism between private life and public or political existence, which is so characteristic of the modern age.

Hegel's political works written during the first half of his Jena period (1801–1803) may be understood as an attempt to overcome the antagonism between the state and the individual to the advantage of the latter. At this stage of Hegel's development, the state represents the totality of the ethical life (*Sittlichkeit*) that absorbs the individual into itself. This point of view is expressed with remarkable clarity in Hegel's article on „The Scientific Ways of Treating Natural Law", as well as in the unpublished manuscript to which Rosenkranz gave the title *System der Sittlichkeit* (*System of Ethical Life*).

This solution of the problem may be explained by the basic character of the philosophical conception adopted by Hegel at that time. On the threshold of the eighteenth century Hegel developed, under the influence of Schelling, a philosophy that could be described as a form of metaphysics of the unique and all-encompassing substance.[13] The abso-

„Hegels Kritik der Französischen Revolution", in: J. Habermas, Theorie und Praxis, Luchterhand 1963, p. 89.

11 Cf. Hegel's letter to Schelling of April 16, 1795, in: Briefe von und an Hegel, ed. by J. Hoffmeister, Hamburg 1952, p. 23 sqq. Cf. also J. Ritter, ibid., p. 16.

12 See the book by Jacques d'Hondt Hegel secret. Recherches sur les sources cachées de la pensée de Hegel, Paris 1968.

13 Cf. Hegel in Jena (ed. by Dieter Henrich and Klaus Düsing), Bonn 1980.

lute itself – i.e. the infinite affirmation, which is, according to Hegel, the principle of all reality – manifests itself in the sphere of the ethical life as the spirit of a people, which finds its ultimate expression in the state itself. The individual is here understood as the result of the „negation" of this ethical totality, in a way that reminds us of Spinozean metaphysics, in which every determination is conceived as a partial negation of the one and unique substance.

Hegel did not develop this philosophical conception directly through criticism of the representative protagonists of liberal political theory, but rather by means of settling accounts with Kant's and Fichte's transcendental idealism, which he described as the predominant form of contemporary „philosophy of subjectivity" or „philosophy of reflection". According to Hegel, Kant's and Fichte's endeavour to establish the self-conscious subjectivity as the sole principle of philosophy constitutes the basis for their viewpoint that the individual is the original concept of ethical and political theory. Hegel criticizes all the constructions that define the state starting from the individual, even if they are „idealistic" or based on the principle of pure will, characteristic of Kant's and Fichte's ethics.[14] This is why he objects that the transcendental position in moral philosophy represents nothing more than a variety of „eudemonism".[15] At first sight it may appear that this word can be applied only to a standpoint such as the one of Locke's moral philosophy or alike; its extension to Kant or Fichte seems to be contradicted by their own criticism of happiness as the principle of ethical theory. However, according to Hegel's interpretation, the element common to the liberal and to the idealistic position, which justifies their description in terms of „eudemonism", lies in the fact that they both resist the movement of absorption of the individual into the totality of the ethical life; all these positions remain attached solely to the moment of negativity that constitutes the being of particular things, and thus fail to reach the absolute as genuine „affirmation".

In contrast to individualistic theories of natural law, Hegel endeavours to grasp the state as the realm of the absolute ethical life, which is at the same time to be found „entirely in the act within the very interior of individuals, thus representing their essence".[16] Along these lines Hegel strives to restore the classical understanding of politics. Taking over the assertion from Aristotle's *Politics*, according to which

14 Cf. Manfred Riedel, „Hegels Kritik des Naturrechts", Hegel-Studien 4 (1967), p. 184 sqq.

15 Hegel, „Glauben und Wissen", in: Jenaer Schriften 1801–1807 (Hegel, Werke, vol. 2), p. 294.

16 Hegel, „Über die wissenschaftlichen Behandlungsarten des Naturrechts", ibid., p. 488.

„the *polis* by nature precedes the individual", Hegel develops, under the heading of the „natural ethical life", a model of „natural law" diametrically opposed to the modern tradition, which is centered on the idea that the rights of the individual are absolute and that they should be protected from the intervention of the state. Hegel obviously understands „natural" law in terms of Aristotle's conception of nature, not in terms of modern theory of natural rights of the individual. Besides, his concept of nature demonstrates features that are clearly teleological.[17] In support of his views Hegel invokes the classical Greek conception of priority of politics over individual morality.[18] He also defends the absolute right of the state to interfere in the private sphere by referring to the „Spinozean" argument according to which the affirmation has absolute logical and ontological priority over negation. This is the reason why the state is absolutely entitled to „negate the negation" which gives birth to the existence of the individual, thus re-establishing the infinite affirmation of the one ethical substance. With some justification, this theory could be described as „totalitarian", since no portion of individual life or private existence remains protected from the state as the „totality" of ethical life. Hegel even speaks of beneficial effects of wars: they bring the necessary unrest and destruction into the sphere of civil society, and thus demonstrate the limits of its principle – individual self-interest – as well as of its basic value – secure and comfortable life in abundance of material goods.

Hegel describes the organization of the state as class-based.[19] Two of the three estates in this description – peasantry and commercial *bourgeoisie* – have, according to Hegel, a merely relative existence: their purpose is some particular aspect of social life. Genuine political capacity belongs, however, to military aristocracy, whose basic virtue is courage, i.e. readiness to sacrifice their lives in the war for the state[20] – the act which, according to Hegel, completes the process of „putting an end to particularity". In regard to this, it can be stated that one of the essential elements of Hegel's future conception of „struggle for recognition" is already present in the article on natural law: it is the risk of violent death, accepted by the members of the military estate. Nevertheless, the concept

17 Cf. Riedel, ibid., p. 181.

18 Hegel, ibid, p. 505.

19 Already Rosenzweig pointed to the differences existing between the class-based state portrayed by Hegel in this article and its presumed Platonic model. According to his interpretation, Hegel's description of state corresponds rather to Prussia of Friedrich the Great than to the Greek polity (see Franz Rosenzweig, Hegel und der Staat, München/Berlin 1962, p. 135).

20 To a certain extent, Hegel assigns this virtue to the peasant class as well, which he of course subordinates to the leadership of the military estate; cf. ibid, p. 490.

of recognition is not yet incorporated in Hegel's theory. As it will turn out, this is the consequence of Hegel's failure to elaborate the concept of individuality, which is a prerequisite for the conception of struggle for recognition in the proper sense of the word. In terms of the article on natural law, the ultimate truth of the individual consists in its immediate negation or immediate transformation into the universal, i.e. in the death of the citizen for the purpose of the state.

The same is true for the *System of Ethical Life,* which can in some respects be understood as the systematic elaboration of the issues treated previously, in introductory fashion, in the article on natural law.[21] This manuscript was written only several months later, and the conception of politics exposed in the text is basically identical to the earlier one.

The concept of nature elaborated by Hegel in his article on natural law still plays the decisive role here. In the first part of the manuscript Hegel gives a further elaboration of the sphere of „natural ethical life". This development begins with the stage of the „individual", but it also covers the concepts or „potencies" (*Potenzen*; Hegel took over this expression from Schelling's philosophy of nature) that can no more be conceived as features of the isolated self, but constitute the elementary forms of intersubjective relations. Such are the forms of „labor", „language" and „family".[22] Different types of recognition are already effective in these first „potencies". However, between the first subdivision of the manuscript, dealing with the natural ethical life, and the one which treats of the state and politics, Hegel inserts, as an intermediate item, a potency of „negativity" (under the heading „The negative, or freedom, or crime"), which deals with the individual that seeks to emancipate itself from the former potencies of labor, language and family.[23] One of the main issues treated in this chapter of the *System of Ethical life* is the „struggle for honour", which suppresses the forms of „natural" recognition realized at the earlier stages.

In consequence, one may say that the *System of Ethical life* treats both of the concept of „struggle" – which appears, as the „struggle for honour", in the chapter on „negativity" – and of the one of „recognition". However, there is still no „struggle for recognition" in the genuine sense of the term. In a word, the „struggle for honour" emerges in this work only after, and only because, the recognition realized in the realm of the natural ethical life, whose model is still the polis of the Greeks, has been violated.

21 Cf. F. Rosenzweig, Hegel und der Staat, p. 155.

22 Hegel, „System der Sittlichkeit", in: Schriften und Entwürfe 1799–1808 (Hegel, Gesammelte Werke, vol. 5, Hamburg 1998), p. 281 sqq.

23 Ibid., pp. 309, 315–323.

Parallels to this concept can be found in earlier political theories. In Hegel's *System of Ethical life,* just as in Montesquieu's *Spirit of the Laws,* war of everyone against everyone, struggle and aggressiveness are not seen, like in Hobbes' theory, as characteristic of the original or „natural" condition of man, but as a product of the civil society. Nevertheless, according to Hegel's views, the „struggle" is not yet directed toward the recognition of the individual which would represent its positive achievement; it still has only the meaning of the pure „negation of the individual", which is carried out with the purpose of its absorption into the absolute ethical life of the state. Just as „courage" of the military estate from the article on natural law, „struggle for honour" from the *System of Ethical life* ends in destruction of particularity and individuality for the good of the state. Hegel is rather clear along these lines: „The singularity of the individual is not something primary – this is reserved for the energy of the ethical life, that divinity; regarding to its essence, the single individual is too poor to conceive its nature in its entire reality".[24]

2.

Beginning with 1803 – significantly, this term coincides with Schelling's departure from Jena – important changes can be observed regarding the very foundations of Hegel's philosophical conception. These changes may be resumed by the well-known programmatic statement from the *Phenomenology of Spirit,* according to which the truth should be grasped and expressed „not (only) as substance, but as subject as well."[25] In a way, this statement also describes the result of Hegel's own development during the last years he spent in Jena, marked by an ever more pronounced tendency of separation from Schelling's „philosophy of identity" and from Hegel's own former version of „metaphysics of substance".

The scope of these changes in the sphere of the theory of state becomes visible once the conception of „struggle for honour" exposed in the *System of Ethical Life*, is compared to the concept of „struggle for recognition" elaborated in the system outline Hegel wrote about one year later (*System of Speculative Philosophy*, 1803–04). In this manuscript Hegel elaborates for the first time the concept of the „struggle for recognition" in the proper sense of the term; in other words, the recognition is here understood as the very purpose of the struggle.[26] Its function, at least

24 Hegel, „System der Sittlichkeit", p. 334.

25 Hegel, Phänomenologie des Geistes (Hegel, Werke, vol. 3), p. 23.

26 Hegel, Jenaer Systementwürfe I (Hegel, Gesammelte Werke, vol. 6, Hamburg 1975), pp. 307–326.

formally, corresponds to the one Hobbes ascribed to the „war of everyone against everyone". In contrast to Hegel's earlier views, this struggle does not simply negate the recognition achieved at the earlier stages of the ethical life; on the contrary, the recognition is the result of the struggle.

The change in Hegel's philosophical conception affected the structure of his system as well. As a matter of fact, in his *System of Speculative Philosophy*, Hegel does not speech of „natural" ethical life any more. Generally speaking, the significance of the concept of „nature" is now restricted to the first part of the system, which gives an exposition of the „philosophy of nature". This part of the system precedes the „philosophy of spirit", which contains Hegel's theory of state. In spite of this, it is the concept of spirit that constitutes the true foundation of the system. The nature is here understood, just as in Hegel's system in its definitive form, as a mere anticipation of the spirit. This is the reason why the philosophy of spirit leaves no more space for the category of „natural" ethical life. The theory of the ethical life is placed in the framework of the philosophy of spirit, which presupposes the negation of the „natural" concept of nature. This new position of the concept of nature in Hegel's system is of the utmost importance for understanding the function of the risk of violent death taken by the individual in the struggle for recognition; that risk reflects the capacity of the individual subject to operate the abstraction or the „negation" of all its natural determinations and thus demonstrate its absolute freedom. In Hegel's earlier writings, this rather negative conception of nature was ascribed to the viewpoint of transcendental philosophy or to idealism. This is the reason why Hegel, simultaneously with departing from Schelling's philosophy of nature and from his „metaphysics of substance", started to redefine his interpretation of Kant's and Fichte's philosophy. Finally, he incorporated some crucial elements of the „philosophy of subjectivity", that he had previously criticized and rejected, into his own philosophical conception, and also came closer to the viewpoint of the modern theories of „natural law".

As a matter of fact, further development of Hegel's concept of recognition can be partially explained by his reinterpretation of the representatives of „philosophy of reflection". Fichte was the first author to elaborate, in his *Natural law* (1796), a theory of recognition. In this work Fichte seeks to explain the possibility and the structure of the self-conscious individual. However, as Fichte states it, this task confronts us with an aporia: the unity of subject and object which self-consciousness should only bring to evidence does not exist without self-consciousness itself; in order to render intelligible the genesis of self-consciousness, we must assume that it already exists.[27] Fichte believes that there is only one way

27 J. G. Fichte, Grundlage des Naturrechts, Hamburg 1960, p. 31 sqq.

of resolving this difficulty: the „subject“ and the „object“ in self-consciousness – or, to speak with Fichte, „self-determination“ and „determination“ – should be grasped within a single thought. According to Fichte, this can be achieved only if we place ourselves from the outset at the level of mutual relations between reasonable beings, where the „objective“ definite character of one self-consciousness, i.e. its determinateness, which comes from another being, can at the same time be understood as the incentive to its own self-determination or free action; due to this dependence on other self-consciousness, man is, as Fichte puts it, essentially a generic being.[28] From these considerations Fichte deduces further consequences.[29] The incentive to a free action, directed to one reasonable being by another one, presupposes in its turn the limitation of the arbitrariness of the will of that other reasonable being. On the other hand, the actualization of the possibility to execute a free action by the reasonable being to which the „incentive“ is directed, presupposes the limitation of the arbitrariness of its own free will. Following Fichte, we may arguably say that one's own freedom depends on the recognition of the freedom of the other; recognition is essentially mutual recognition. According to Fichte, „individuality“ itself is a concept that can be conceived only in relation to another being.[30]

As it can be seen from the development above, recognition, in Fichte's view, implies self-limitation – the concept which Hegel rejected, in his article on natural law, as contradictory and inappropriate to express the nature of absolute freedom.[31] Hegel therefore places the concept of recognition in a different perspective: he seeks to radicalize the demand for recognition into the „fight to the death“, the principle of which is not the self-limitation, but the negation of the other, which is carried out without any limits or restrictions.[32] However, this struggle for recognition originates from a position which in certain regards corresponds to the one described in Fichte's *Natural law*: from the situation where the freedom of one individual will is confronted with that of another one, and where both individual wills come out with the demand to be recognized as mutually exclusive „totalities“.

Changes in Hegel's conception may be established with regard to the description of the relationship between the individual and the state as

28 Ibid, p. 39.

29 Ibid, p. 40 sqq.

30 Ibid, p. 47.

31 Hegel, „Differenz des Fichteschen und Schellingschen Systems der Philosophie“, in: Hegel, Jenaer Schriften 1801–1807, pp. 66 sqq.

32 Cf. L. Siep, „Zur Dialektik der Anerkennung bei Hegel“, in: W. R. Beyer (ed.), Hegel-Jahrbuch 1974, Köln 1975, pp. 390 sqq.

well. To be true, the *System of Speculative Philosophy* describes, in a way that reminds us of the article on natural law, the suppression of the particular consciousness and the overcoming of the individuality of the citizen in the absolute ethical life of the state.[33] There is, however, an important difference between Hegel's earlier writings and the *System of Speculative Philosophy*, and it lies in the fact that the suppression of the individual consciousness in the *System* takes place without the intermediate stage of struggle *for* the state as the structure which encompasses the individual. In other words, the act of risking one's life in the struggle for recognition does not only „objectively" lead to the affirmation of the absolute freedom of the human subject in the ethical life of the state; it also originates from subjective reasons and motives that are immanent to the domain of freedom of the individual. The prevailing theme of the „struggle for recognition" is the very individual self as such. To be sure, this struggle is not directed against the state, but only against the freedom of other individuals, who stand out with the identical demand to be recognized. However, it is carried out according to a logic which is inherent to the standpoint of the individual consciousness. One could go so far as to say, somewhat paradoxically, that Hegel now achieves the „suppression of the individual" by means of a radicalization of the very moment of individual freedom.

Hegel exposes the dialectical sequence leading to mutual recognition of individuals in the framework of the idealistic „history of self-consciousness". This is yet another effect of his reception of transcendental philosophy.[34] According to Hegel, the individual consciousness as such can already be defined as the „concept of spirit", which is the negation of the entire sphere of being and objectivity. Consequently, the individual consciousness reduces the substance of the object to the relation of that object to itself. This act excludes every other consciousness from the relation to the object. However, the individual consciousness still has to prove its conviction that it constitutes the substance of the object. In order for this to happen, this relation of consciousness to its object has to be violated, and the struggle for recognition provoked by the violation has to take place.[35] In consequence, what we have here is not a case of violation of a „right" – which would presuppose that the mutual recognition of individuals already exists – but the one of violation of the very internal structure of the individual consciousness as a „being for itself" which seeks to preserve its complete independence.

33 Hegel, Jenaer Systementwürfe I, p. 312 sqq.

34 Cf. ibid, p. 307 sqq.

35 Ibid, p. 309.

In Hegel's description of the struggle for recognition, two consciousnesses are confronted with one another, and each one of them strives to be recognized as an exclusive „totality of particularity". Therefore, each one of the two consciousnesses understands any violation of its relation to the object by the other consciousness as its own total negation. If this violation actually happens, the consciousness that has been violated responds by challenging the other one to a fight until death.[36] However, in this struggle, the consciousness becomes aware that it is also exposed to the risk of the lost of its own life, which is the condition of its existence. On the other hand, if the struggle ends with the actual death of the rival, the recognition of the surviving consciousness is not achieved either. According to Hegel, there is only way to solve this dilemma. In order to be recognized, the individual consciousness – which represents an instance of the contradictory concept of „individual totality" – should be suppressed *as such*. However, if this consciousness actually is suppressed *as* individual totality, it becomes *nothing else but* the universal consciousness itself;[37] by this suppression, the individual consciousness transforms itself into the absolute consciousness, i.e. into the spirit of a people, which is „the ether, that has swallowed in it (*verschlungen*) all individual consciousnesses; the *absolute simple,* the living, *and the only* substance".[38]

It would be mistaken to interpret these words in the sense of the unrestrained affirmation of the universal spirit at the expense of the individual consciousness. As Hegel states it, the universal spirit „has to be the *active substance* as well". However, the activity of the universal spirit is accomplished by the individual consciousnesses themselves.[39] Indeed, Hegel defines the universal consciousness or spirit, without any further substantive determinations, as the very act of absolute negation which the individual consciousness performs on itself. According to Hegel, the spirit of a people is the creation of the individuals who belong to it: „they" are the ones who „produce" it, even if they „praise it as something that exists by itself".[40] Without the activity of the individuals, the „substance" of the universal spirit of a people would have no effectivity whatsoever.

This interpretation is confirmed by Hegel's subsequent work, the *Jenaer Realphilosophie* (1805–06). The exposition of the system of real philosophy that Hegel gives here does not end, like the one in the *System*

36 Ibid, p. 310 sqq.

37 Ibid, p. 311 sqq.

38 Ibid, p. 315.

39 Ibid.

40 Ibid, p. 316.

of Speculative Philosophy, with a theory of state or of the ethical life, but with a chapter on absolute knowledge, art and religion. This makes this conception of the system closer to the one developed in the later *Encyclopaedia of Philosophical Sciences,* which concludes with the theory of the „absolute spirit". Continuity with the earlier works is, however, demonstrated by the fact that Hegel still places his theory of the absolute in the chapter which treats of „Constitution" (*Konstitution*), which would clearly belong, in terms of the *Encyclopaedia,* to the sphere of „objecttive" spirit.

In the *Real Philosophy,* the „struggle for recognition" emerges at two different stages of development. This topic is first treated in a context which deals with the structures of individual or „subjective" spirit. It appears again in the chapter on „Effective spirit" (*Wirklicher Geist*), which occupies the intermediate position between the individual spirit and the state. This part of the system gives an exposition of different forms of organization of civil society and of its legal regulation, which presuppose mutual recognition between its members.[41] At this stage, the „struggle for recognition" is in fact understood as the struggle of the individual will against the law, or „crime". This case is interesting because it constitutes an exception: as far as I can see, this is the only instance where Hegel develops the concept of the struggle for recognition in terms of conflict between the „particular" and the „universal" will. However, only the first form of struggle is here of importance to us: the one that takes place, as in the *System of Speculative Philosophy*, between the individuals, and by which mutual recognition is established for the first time.

The first type of mutual „recognition" described in the *Real philosophy* is the one that happens in familial „love". However, according to Hegel, the concept of love is not „ethical" in the genuine sense of the word: love is, as Hegel states it, no more than the „element" or „presentiment" of the ethical life.[42] Since the individuals connected by feelings of love do not appear as conflicting free wills as well, their mutual recognition is only implicit and imperfect.[43] Genuine recognition is brought about only through the „struggle until death", which is the basic feature of the natural state. However, according to Hegel, this natural state is not the „original" state at the same time; quite to the contrary, it is itself generated by the suppression of love-based family relations. Civil society

41 Hegel, Jenaer Realphilosophie, Hamburg 1969, pp. 210 sqq., 221 sqq.; the title of the chapter on „Subjective spirit" was given by the editor, Johannes Hoffmeister.

42 Ibid, p. 202.

43 Cf. ibid, p. 209.

itself, which is the terrain of mutual recognition between individuals, is considered by Hegel as a result of the dissolution of the family.[44]

In Hegel's *Real philosophy,* just as in the *System of Speculative Philosophy,* the recognition is the purpose or the objective of the struggle. However, the concept of recognition that Hegel elaborates here differs from the earlier one in that it is founded on categories pertaining to the domain of subjective, i.e. individual spirit. These concepts are first of all the categories of „intelligence" and „will".[45] This fact demonstrates once again the influence of Kant's and Fichte's idealism on Hegel's thought. Following Kant, Hegel understands pure will as the capacity to suspend the influence of all natural motives of human action; risking one's own life for the sake of mere recognition is but an extreme consequence of this idealistic conception of will. Hegel takes yet another step that brings him further than Kant or Fichte when he seeks to demonstrate how the two categories of pure will and of intelligence become one in the concept of the „knowing will", which in its turn represents the starting point for his exposition of the struggle for recognition. In this context, he also emphasizes the etymological affinity between the terms „knowledge" or „cognition" (*Erkenntnis*) and „recognition" (*Anerkennung*).[46]

According to Hegel's description, in the struggle for recognition a *de facto* relationship to an object, i.e. its possession, is transformed into property. Here again Hegel states that violation or „negation" of possession by another individual constitutes a presupposition essential to the achievement of mutual recognition; the struggle for recognition is initiated by the very fact of violation. Of course, the immediate object of the act of violation is the thing possessed; however, this object is essentially related to the self-consciousness or to the „being for itself" of the individual who possesses it, and who, in that object, „knows" its own self.[47] As a matter of fact, the violation of possession affects the subject in its most intimate inner structure of self-conscious individuality.

The violation committed generates an asymmetric relation between the two individual wills. The individual who originally came into possession of the thing meant only to exclude from the relation to that thing all other individuals but itself; on the contrary, the action of the other individual, the one who committed the violation, was directed against one particular individual consciousness, i.e. against the possessor of the thing himself. According to Hegel, this asymmetry or inequality is resolved through the struggle in which the individual who has suffered

44 Ibid, p. 205.

45 Ibid, pp. 179 sqq., 194 sqq.

46 Ibid, p. 212.

47 Ibid, p. 210.

damage claims the recognition of its being for itself. This individual first aims at the death of the other; however, in doing so, it experiences that it exposes itself to the risk of violent death as well. Hegel therefore says that its aggressiveness has the character of a „suicide": in the struggle for recognition, the individual „looks at its own suppressed existence", or at its own suppressed natural being.[48] However, according to Hegel, this experience of death, of the „suppression of one's own most intimate being for itself", is of crucial importance: it places the self-consciousness in a position from which it is able to perceive its very otherness *as* itself.[49] This experience „brings back" (in this context, Hegel speaks of *Wiederherstellen,* „restitution") the self-consciousness into the very „abstraction of knowledge" that was initially violated. Moreover, one may say that this „restitution" brings *more* than the violation took away: it gives to the self-consciousness that has been harmed the pure abstraction of its „being in itself", that was not accomplished in it before the violation.

The struggle for recognition and the risk of violent death that it involves constitute an indispensable condition for the progress from a mere factual or „natural" relation to the stage of „pure self-consciousness" or spirit (accordingly to the *Phenomenology of spirit*, the concept of spirit is even synonymous with the reciprocity of recognition).[50] The motive of risking one's own life in the fight until death is a necessary moment in the systematic structure of Hegel's philosophy in a more general way as well. This may be stated against the attempts to minimize the importance of this motive or to criticize it for the sake of the intersubjective relations that seem to be more „harmonious". Hegel's concept of struggle for recognition has neither „existential" nor „anthropological" meaning that it could preserve regardless of the general context of Hegel's idealistic philosophy;[51] this concept is the result of Hegel's efforts to develop the conception of „pure will" in its ultimate consequences. Pure will, which implies the capacity of abstraction from all natural determination, also enables the individual to experience its fundamental identity with another individual subject: to raise to the level at which it is capable to „want the will of the other as its own will", which qualifies it to become a member of the legally regulated civil society.[52]

We may conclude that Hegel attempted to overcome the limits of the „liberal" standpoint not by restricting its basic assumptions, but rather

48 Ibid, p. 211.

49 Ibid, p. 212.

50 Hegel, Phänomenologie des Geistes, p. 144 sqq.

51 Cf. A. Honneth, Kampf um Anerkennung, p. 82.

52 Cf. L. Siep, „Der Kampf um Anerkennung", Hegel-Studien 9 (1974), p. 187.

by pushing to the extreme the principle of individual freedom or the very „negativity" that, according to his own interpretation, constitutes the basis of the modern „constructions" of natural law. From the second half of the „Jena period" on, Hegel's endeavour to overcome or, in his own terms, „negate" the standpoint of these constructions, does not aim only at their destruction, but also at their preservation: in the very fact of being „negated", the „negativity" – which is, in Hegel's view, the element of the concept of free subjectivity – comes back or is reflected only to itself. It is no accident that Hegel, precisely at the time when he was working on the problem of recognition, elaborated in detail the basic structure of the concept of subjectivity, which he conceived as a dialectical negation that is directed against itself, and which is for this reason identical to itself in its own negation.[53] This concept of double or self-referential negation constitutes, in the sphere of philosophy of right, the principle of deduction of all forms of ethical life that are superior to the standpoint of the individual will. This concept also allows Hegel to overcome the shortcomings of atomistic conceptions of the self, which are characteristic of modern natural law, without giving up its principle of freedom. However, Hegel's attempt to overcome the liberal theory by means of its radicallization is not just one among various applications of his new concept of self-referential negation. We could rather say that it was the origin, or the historical and practical paradigm, of Hegel's logical theory of negation, which was to become so important in the later development of his philosophy.[54]

By the end of Hegel's Jena years, this transformation of his philosophical position was only in its beginnings. This point must be emphasized in particular when it comes to Hegel's conception of relations between the individual and the state. In the third chapter of the Jena *Real Philosophy* Hegel portrays once again a concept of the state which is placed high above the individual and the sphere of its rights. In the same context, he praises Machiavelli's views on politics and emphasizes the importance of the „obedience" of citizens in a polity.[55] Nevertheless, there is no doubt that Hegel's views considerably changed during his Jena period. In particular, his practical philosophy evolved from a conception of the absolute ethical life which implies complete „destruction of the singularity", to a theory of state which is a result of an immanent critique of the principles of liberalism, and which therefore leaves more space for

53 Hegel, „Logik, Metaphysik, Naturphilosophie", in: Hegel, Jenaer Systementwuerfe II (Hegel, Gesammelte Werke, vol. 7, Hamburg 1971).

54 Cf. in particular the statements on the importance of the concept of negation in the Introduction to the Philosophy of Right (Hegel, Grundlinien der Philosophie des Rechts, pp. 52 sqq.).

55 Hegel, Jenaer Realphilosophie, p. 246.

individual freedom too. This is perhaps best witnessed by the change in Hegel's attitude to the classical concept of politics. In the Jena *Real Philosophy* Hegel gives for the first time a critique of Greek conception of politics, which remained constant in his later philosophy as well. In particular, he states that the „free spirit", which is the principle of modernity, was unknown to the ancient times. The Greeks lived „in an immediate unity of the universal and the particular"; however, they were not capable of attaining „the absolute self-knowledge of the singularity" and its „absolute being for itself". Hegel therefore characterizes the „Lacedaemonian republic", as well as Plato's ideal state, as the „disappearrance of the individuality that knows itself".[56] The fact that Hegel's philosophy still stays inspiring in the debates of our time may be explained by this effort to maintain the absolute right of the individual subjectivity even when dealing with those forms of „objective spirit" which seem to constitute its very opposite or its limit.

56 Ibid, p. 251.

Igor Vuković

APPLYING THE EQUIVALENCE THEORY IN CRIMINAL LAW – SOME ISSUES OF INTEREST

The present article is an elaboration of certain questions of equivalence theory – as the most important theory of causation in contemporary continental criminal law. The starting point of equivalence theory includes the principle according to which all conditions related to a given consequence that may not be rationally excluded, without, if they were, the ensuing consequence being materialized – are equivalent and, consequently, each one of these conditions represents a condition of the relevant consequence (so-called condicio sine qua non). The author considers hypothetical, cumulative and alternative causalities as well as other forms that are instrumental in the implementation of the theory.

Key words: *Causation – Equivalence theory – Hypothetical causation – Alternative causation – Cumulative causation*.

According to statutory descriptions of the consequential criminal offences, in addition to act committed by perpetrator, it is necessary that specific consequences specified by law take place which affect the object of the act. Since statutory descriptions relating only to particular criminal offences specify the consequence as their statutory characteristic, the causal connexion between the act and such consequence, and/or causation in terms of criminal law in general, represent a category to be examined, both in jurisprudential systematics and in considering a particular case, within the framework of elements provided for in the statute, and prior to considering the issue of wrongfulness and guilt. Such inquiry is to be done by establishing whether specific consequence that has taken place in the outside world is, in terms of *time, space* and *mode*, connected with the perpetrator's act. The ground of that finding is positioned in the empirical comprehension of the operation of natural laws.[1] One should, however,

1 What is causation – is not accessible to human knowledge. „If A pours into B's drink the cyanic acid and B dies after taking the drink, the very knowledge from experience speaks to us that B's death was a result of cyanic acid effect. In other words,

consider that causation, in terms of its criminal law meaning, has to be distinguished from its philosophical roots since it amounts to the ground of criminal liability. Causation is not viewed through the sum of all the conditions of consequence – the cause of a consequence is every single condition, although the observed outcome takes place through joint operation of causes.[2]

In Serbian criminal law, like in many other continental criminal law systems, considered as causal is such a condition (criminal law act) without which there would be no specific consequence at all, i.e. the one representing a *condicio sine qua non* of its materialization.[3] More precisely, according to an original formula articulated by Austrian procedural law specialist Glaser already around the middle of nineteenth century, and elaborated later on by von Buri – *every condition that cannot be neglected, without such neglect resulting in coming off of the consequence, shall be considered causal*. All conditions, without which no specific consequence would ensue, have to be considered as equally causal for its taking place, regardless of their significance or distance from the examined consequence. Due to equivalence of all conditions contributing to occurrence of the consequence, this theory is known as the equivalence theory or the theory of condition (lat. *aequus* – equal; *valere* – be worth). In its application, the *condicio*-formula is understood to mean a *sui generis* process of hypothetical rational elimination: we figure out whether a consequence would have taken place, with or without the condition under our inquiry. We exclude the perpetrator's act as the observed condition from the causal chain and try to find out whether the consequence would have taken place if there was no act. Should we conclude through hypothetical exclusion of the act that the consequence had taken place even without it, we would not consider the observed act as its cause. And *vice versa*, should the process demonstrate that there would be no consequence if there was no act – the act would be

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we do know that, until now, all people who have consumed a specific quantity of cyanic acid have died. Why is that so, remains a secret to us. To be sure, the chemist could explain to us that the contact between B's mucous membrane and the poison triggers specific processes that bring about the death. However, these judgments, too, as such, are based on the knowledge by experience. They say nothing about the 'subject-matter' of causation processes" (Gropp, Walter: *Strafrecht. Allgemeiner Teil*, second edition, Springer-Verlag, Heidelberg – New York, 2001, pp. 136 – 137).

2 Roxin, Claus: *Strafrecht. Allgemeiner Teil. Band I. Grundlagen. Der Aufbau der Verbrechenslehre*, third edition. C. H. Beck'sche Verlagsbuchhandlungen, München, 1997, p. 294.

3 See Srzentić (editor) and others: *Komentar Krivičnog zakona Socijalističke Federativne Republike Jugoslavije*, third edition, Savremena administracija, Belgrade, 1986, p. 48; Stojanović, Zoran, *Komentar Krivičnog zakonika*, Službeni glasnik, Belgrade, 2006, pp. 61 – 62.

causal for the consequence and, according to the *condicio*-formula, it would amount to its cause. Figuratively speaking, in the latter case we would address the perpetrator with the following words: „If only you did not do that, such thing would not have happened".[4] This is the way of establishing a *regressus ad infinitum* of a kind, i.e. an uninterrupted and endless causal chain whose links are composed by considerable number of human acts differing from one another in terms of time.

The first objection to the equivalence theory stems from the very procedure of establishing the causation effected by applying the *condicio*-formula. Although the phenomena are necessarily interconnected in reality by their sequence in terms of time, it is not possible, without empirical evidence, to claim the existence of causal relation between any human act and its supposed effect. As a matter of fact, in an attempt to establish what has created the observed consequence, we began with that very result. Already aware of the fact that A's act did result in B's death, we only intend to confirm that obvious regularity through logical statement as well.[5] The mental process in this case, in other words, starts with the assumption relating to the very issue that has to be established. Or, the *condicio*-formula may at best only ascertain an already visible causal relation.[6] In the contrary case, should we in fact be not aware of the mode of materialization of consequence, no formula whatsoever would help.

According to the above, in addition to acts directly connected with the consequence, a *condicio sine qua non* includes also rather distant acts that, even *prima facie*, are not appropriate to be considered in the process of establishing possible criminal liability. A's act of firing a pistol in an apartment that was followed by B's death is not the only condition without which there would be no death, although the causation related to A's act is logically the first thing to be considered; causal in terms of the equivalence theory is also the conception of A by his/her parents (as well as similar acts of all their ancestors, down to Adam and Eve, and/or monkeys), or, for instance, designing and constructing the facility that was the scene of the murder. All these are but the conditions without which there would be no given consequence. In applying the equivalence theory, one does not make the quality distinction between particular conditions. All conditions, both those close to the consequence and those

4 Kühl, Kristian: *Strafrecht. Allgemeine Teil*, fourth edition, Franz Vahlen, München, 2002, p. 26.

5 We do not challenge the extraordinary importance of logic in the sphere of law. Just the contrary, the application of the equivalence theory exactly confirms the importance of logic in legal education.

6 Along these lines, the Engisch's formula of the so-called „condition according to statute" deserves precedence (see footnote 38).

distant from it, are equivalent and instrumental for its emergence in the equal way. However, in concrete establishing of criminal liability for the consequence that has taken place, such distant conditions shall not be the subject of criminal law analysis. The first corrective in the above sense would be the statutory description of criminal offence and the very act of commission. Consequently, most of such distant acts in case of theft, for instance (Art. 203 of Penal Code), could not be classified as „taking away of another person's movable object".[7] Or, as the case may be, in the first mentioned example, even the most extensive interpretation of „taking one's life" could include into such consequentially determined act the act of conception that, in its essence, is something entirely contrary as a notion (creation of life).

The act relating to criminal offence becomes a corrective in yet another sense. The list of conditions of observed consequence is considerably affected by the adopted concept of the act of criminal character. Thus, according to Welzel's final teaching, the causing of a consequence by wrongful intention has to be introduced already in the notion of act,[8] so that some kind of subsequent evaluating and impartial inquiry of causation (which is otherwise presumed by the equivalence theory taken as a theory of equality of all conditions) would have no usual importance. The social teaching concerning the act does exclude from examining causation those acts that are not socially significant,[9] while a part of personal theories reduces the normative evaluation process exclusively to those acts that allow for managing the causal sequence.[10] Similar reduction is found also in Serbian criminal law theory.[11] However, such opi-

7 Along these lines as well, the condition without which there would be no consequence, would include, for instance, manufacturing the goods that were the subject of theft. If the goods were not manufactured, they subsequently would not have been stolen either. Manufacturing of goods, however, is by no means an act of deprivation of someone's property in terms of the defining elements of the offence of theft.

8 „In case of delicts characterised by wrongful intention, relevant for the definition of the offence is only the causal link that is directed by intent" (Welzel, Hans: *Das Deutsche Strafrecht. Eine systematische Darstellung,* eleventh edition, Walter de Gruyter & Co., Berlin, 1969, p. 45).

9 „An act is a socially significant human behavior" (Jescheck, Hans-Heinrich / Weigend, Thomas: *Lehrbuch des Strafrechts. Allgemeiner Teil*, fifth edition, Duncker & Humbolt, Berlin, 1996, p. 223).

10 This is, for instance, Arthur Kaufmann's personal theory. Personal theory of Roxin relating to act (act as „expression of personality"), on the other hand, is not a value judgment (Roxin, Claus: *op. cit.*, pp. 202 *et seq.*).

11 Thus, Stojanović's social-personal way of defining of act, for instance, results in excluding socially adequate behavior already at the level of act, although the exemption from criminal liability could be carried out at some subsequent stage (of causality, of permitted risk as the grounds of exemption from illegality or guilt). See Stojanović,

nion in our theory is an exception. Most of our authors do adopt the naturalist and classical notion of act that deprives it of any kind of normative contents (act as an intended bodily movement). The very causality in such discourse is reduced, in essence, to the application of the value-neutral equivalence theory, while the scope of conditions obtained through its application tends to become narrower – to the level of illegality and, particularly, of guilt. Thus, if A inflicts a minor injury to B, not being aware of the fact that B is a haemophiliac, so that B bleeds to death – the issue of A's criminal liability for the unwanted consequence may be reduced to the objective possibility that the perpetrator could have foreseen such consequence, as well as the causal chain. Although the reduction of possible causes may at the worst be done by the criminal court at the level of guilt as well – the comparative law and practice also apply the teaching of: adequate causality, theory of relevance, and the impartial reckoning in.[12] All these conceptions are attempts to narrow down, by applying the normative evaluation method, already in the field of the objective subject-matter of offence, the list of possible conditions which, through the *condicio sine qua non* formula, could be considered a *causa*. This is the way of reducing the task of equivalence theory to setting a relatively wide framework for distinguishing legally relevant facts necessary for the evaluation, while criminal liability and possible narrowing down would be carried out by reckoning the consequence in the objective subject-matter of criminal offence, or in the process of inquiring the wrongful intent and negligence.[13]

HYPOTHETICAL CAUSATION

In applying the *condicio*-formula to criminal offences involving an act of commission, one is not allowed to exclude the causal connexion on the ground of a hypothetical causation chain (the so-called „reserve cause").[14] Let us imagine that A kills B with a knife at the moment of

Zoran: *Krivično pravo. Opšti deo*, twelfth edition, Pravna knjiga, Belgrade, 2006, pp. 107 – 108.

12 The impartial reckoning in is a procedure according to which the existence of causal connexion between the act and the consequence, in the event of consequential criminal offences, is examined by applying a two-level treatment: at the first level, by applying the equivalence theory, we examine whether the perpetrator's act amounts to the cause provoking a consequence; at the second level, we attempt to find out whether the consequence may be attached in an impartial way to the perpetrator as his/her criminal offence.

13 Jescheck, Hans-Heinrich / Weigend, Thomas: *op. cit*., p. 284.

14 See, for instance, Wessels, Johannes/ Beulke, Werner: *Strafrecht, Allgemeiner Teil*, thirty second edition, C. F. Müller, Heidelberg, 2002, p. 53.

boarding a plane which crushed somewhat later during take off, killing all the passengers. If we ask, while inquiring in this case the matter of causation of A's act, while taking in consideration the subsequent air crash – whether death of the not-fated passenger would occur if he had not been stabbed – we would conclude that death would still occur even without A's act; it turns out that A's act is not the cause of B's death, although, by experience, there is no doubt that his/her act, as the most directly connected with the consequence, resulted in the given death. Consequently, the process of examining causation excludes the consideration of hypothetical causal connexion, even in the event of existing, as in the case mentioned above, of a considerable probability that B would be killed anyway in the subsequent air crash.[15] The hypothetical condition is excluded since being not really instrumental within the causal chain.[16] After all, such conclusion could be reached also on the ground of the *condicio sine qua non* formula, since some authors apply the conception of „falling off of the *concrete* consequence", and/or of non-materializing the consequence in the form of its concrete substance.[17] This addition to the formula is justified, so that every modification of consequence in terms of time, place or mode represents its condition. Consequently, *every condition that cannot be neglected without – if neglected – provoking the falling off of the consequence in its concrete substance, has to be causal.* In this way, if A kills a terminal patient B, the fact of shortening B's life would meet the causality condition, although death would ensue anyhow – as the very acceleration of death would suffice for the existence of the causal connexion. On the contrary, due to mortality of man, we would have to renounce the very existence of causal connexion in every case of one's death. Consequently, the correct application of the *condicio*-formula does not imply the question as to whether B's death would occur anyhow (and in any mode whatsoever).[18] Since in our case the death resulting from stabbing is not identical to death in air crash, so that without A's act there would be no B's death at that moment and in that manner – the causation of A's act cannot be questioned at all. Hypothetical

15 Similar examples: murder of a person entering into a vehicle with the bomb set by another, which would most probably be the cause of death as well; killing a person sentenced to death, immediately before his/her execution, by a member of the family of the one suffering damage, attending the execution.

16 The „air crash" event actually did happen, but after the completion of the causation chain under our inquiry. The process of establishing causation does not allow for any kind of guess-work as to what could have happened, if at all, if there was no stabbing. Perhaps, for the sake of an example, some telephone call a minute before the take off would dissuade the passenger from the intended flight, so that there would be no his/her „almost certain" death in the air crash.

17 See, for instance, Roxin, Claus: *op. cit.*, p. 302.

18 Wessels, Johannes / Beulke, Werner: *op. cit.,* pp. 53 – 54.

conditions are taken in consideration only exceptionally in the process of examining causation, i.e. acts that prevent the running of causal course, whose realization would mean that there would be no consequence at all,[19] as well as in case of *quasi* criminal offences of non-feasance (omission to act).[20]

INTERRUPTION OF CAUSATION AND THE SO-CALLED PROHIBITION OF RECOURSE

Since causation represents the examination of objective connexion and rules out the establishing of subjective orientation toward such outcome – the causation of a previous human act as an instrumental condition should not be negated by possible subsequent wrongful intention, negligence or incidental interference by third parties, by coming forth of unexpected natural phenomena or acts committed by a passive holder of right.[21] Consequently, should A injure B by stabbing him/her, but the subsequent death of B that came forth was a consequence of traffic accident on the road to hospital; a mentally disturbed nurse kills B in a hospital; a physician D, while performing surgery, was grossly negligent, and this was followed by fire in the hospital; considering himself an expert in folk medicine, B treats a wound with a vegetable preparation that causes serious infection and, finally, death of a person treated – in all these cases A's act remains causal.[22] It goes without

19 Consequently, should A prevent B to rescue a drowning person C, the A's act is causally connected with C's death after we have established that B would quite probably (and almost certainly) rescue C.

20 See Stojanović, Zoran: *op. cit.*, pp. 118 – 119.

21 „Causation as an objective connexion between man's act and a consequence does exist in the sphere of criminal law not only where incriminated act amounts to a direct requirement for taking place of the prohibited consequence, but also where such act, together with acts of other persons or requirements of other kinds, have contributed to materialization of the prohibited consequence, so that it emerged as its cause". (See the ruling of the Supreme Court of Yugoslavia Kž–36, of 17 June 1969, in: *Zbirka sudskih odluka*, Službeni list SFRJ, Belgrade, No. 3/1969, p. 134).

22 Contrary to that, our case law, as a rule, wrongly relates the notion of interruption of causal connexion to the operation of subsequent conditions. Serving as relevant example is the following segment of the assignment of reasons found in a court decision: „Should the death occur through interference of a new real cause (for instance, a third party actio or the effect of an Act of God) which, by its independent operation and in spite of the inflicted injury, leads up to death, then it might be considered that there was an interruption of the causal connexion betwee the act of the accused and the consequence that has taken place." (See the sentence of the Supreme Court of Bosnia and Herzegovina, Kž. of 12 December 1979, in: *Zbirka sudskih odluka*, No. 4/1979, p. 88). In case of an Act of God or an accountable act of a third party, there is no interruption of causality, but only

saying that this does not imply that consequence would be attached to a holder of right who is the actor of one of the previous acts. The corresponding reducing of criminal liability may be effected either at the level of objective reckoning in, or in terms of subjective reckoning in (of the guilt).

In the figurative sense, there would be interruption of the causal chain only after we conclude, by directly applying the formula to concrete case, that the observed condition is „outrun" (overwhelmed, surpassed) by the operation of subsequent condition.[23] In this case one does not speak of interruption in the true sense of the word, since, in fact, a subsequent act establishes an entirely new causal chain that, according to *condicio*-formula, has no connexion at all with the previous acts. Consequently, if A pours a slowly effective poison into B's drink in order to murder him/her, and B takes the drink, but C, who came to the scene, kills B by shooting him – the consistent application of the *condicio sine qua non* formula would mean that A's act is no more the condition of a given consequence.[24] B's act cannot be excluded from the analysis because it is not hypothetical but a really effective condition. This is the only situation where one might introduce, in terms of a wider context, the element of interruption of causation.

There shall be no interruption of causal connexion where another act characterised as wrongful intention interferes between perpetrator's act and the ensuing consequence. According to conception of so-called *prohibition of recourse*, particularly held by the older criminal law theory, this is viewed as the case of causal chain interruption of its kind. According to that conception, there shall be no *ex post facto* taking in

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the interruption in the process of allowing for the consequence into the objective subject-matter of the offence.

23 There are authors speaking about the so-called interrupted causation (see, for instance, Gropp, Walter, *op. cit.*, p. 139, according to whom the outrun causation is but just one of its subspecies), although this term is not the most adequate one since causation, as such, may not be interrupted – it does exist or does not exist. The topic of „outrun" causation is treated, for instance, also by Baumann, Juergen/ Weber, Ulrich/ Mitsch, Wolfgang: *Strafrecht. Allgemeiner Teil*, eleventh edition, Ernst und Werner Gieseking, Bielefeld, 2003, p. 239. Roxin and Kühl apply the term on an equal footing (see Roxin, Claus: *op. cit.*, p. 305; Kühl, Kristian: *op. cit.*, p. 32).

24 One might ask whether B's death, as the observed outcome, would occur even without A's act (pouring the poison into the drink). Since the death occurred even without A's act – his/her act is not the *condicio sine qua non* of the lethal outcome, so that A shall be responsible for an attempted murder only. Causation of A's act whould, however, still exist, if, for instance, due to the beginning of poisonous effect, B would become so weak as to be able to reach for help in the neighbourhood; in the meantime, however, C murders him/her on the road to the neighbour. If there was no pouring of poison by A, B would not be present at the place at that moment, so that A's act remains a causal factor.

consideration of conditions preceding (in terms of time) the wrongful intention offence, i.e. the causation is interrupted by such offence committed by another. Inacceptability of that conception derives already from the basic requirement imposed by the *condicio*-formula according to which the sphere of relevant analysis has to include all conditions without which there would be no consequence, regardless of subjective relationship between all participants in the chain. Normative evaluation and the subjective contents' analysis, naturally, would not be avoided at the level of impartial reckoning in, or that of the guilt, but such narrowing down should not be applied in the sphere of implementing the equivalence theory.

CUMULATIVE CAUSATION

As we have seen, instrumental in taking place of an adequate criminal law consequence, as a rule, is a number of different conditions. The equivalence theory, just as the natural and jurisprudential notions of causation, imply always a *sui generis* cumulation of conditions.[25] In its narrow sense, the term „cumulative causation", however, is understood to mean a synergetic effect of several independent conditions in occurring of consequence; every single condition in such process, however, is not sufficient to independently cause the given consequence, which takes place only through cumulative effect of all synergetic conditions. At the same time, quantitative „insufficiency" of a single condition is taken to be a circumstantial element and is not a result of some preceding deal between the perpetrators, since this would be the case of joint commission. In that case the consequence as well, would be considered as their joint result, so that it would be reckoned in to all co-perpetrators. Consequently, the cumulativeness in this case would imply examination of several independent and, if taken individually, inapt causes that, together, bring about the intended consequence. Let us take a school example of a cumulative causation: A and B, independently from one another, give to C a poison dose that, taken individually, is not sufficient as to cause C's death, but taken jointly, both doses, however, do cause the death. There is no doubt that, according to the *condicio sine qua non* furmula, both acts were causal, because it is not possible to rule them out individually without, at the same time, excluding C's death as a fact.

Cumulative causation does exist also in the case of majority decision-making in collective bodies where voting and, generally, the

25 Jakobs, Günther: *Strafrecht. Allgemeiner Teil. Die Grundlagen und die Zurechnungslehre*, second edition, Walter de Gruyter, Berlin – New York, 1993, p. 192.

decision-making process is not protected by substantive law institute of indemnity.[26] If, for example, judges or lay judges, while deliberating and deciding through voting on an unlawful decision in the sphere of criminal procedure, independently of one another and without making a joint plan, reach the majority vote of the bench members (Art. 151, paragraph 1 of the Criminal Procedure Law) – each and every act in voting process shall be causal in terms of equivalence theory.[27] In this example as well, the act of every individual bench member is not sufficient to form the necessary majority, so that consequence takes place only by cumulative effect of all acts. Cases of cumulative causation are also possible with criminal offences against environment, where violations or encroachments of the object of protection often occur through cumulating the effects of individual polluters.

Further deciding on perpetrators' criminal liability depends on whether the evaluation is done already at the level of objective subject-matter of offence (by applying so-called objective reckoning in), or only in the sphere of guilt (by applying subjective reckoning in), which depends upon the adopted jurisprudential approach, the court practice, and a series of other circumstances. Although such analysis is not in the focus of the present article, it is worth noting that cases of cumulative causation, in spite of not creating a problem in the field of examining the application of *condicio*-formula, do not, as a rule, lead to reckoning in of the consequence itself. Materialization of B's act (in our first example) in the process of inquiring into A's criminal liability (and *vice versa*) is but an unusual circumstance which, as a rule, may not be counted on, and/or which – from the aspect of guilt – cannot be foreseen, and furthermore, which results in punishing both A and B for an (inappropriate) attempt. Although we have concluded that our court practice engages in the correction of equivalence theory results only in the matter of guilt (which in this case we would negate due to lack of meeting the requirement of duty, and the possibility of foreseeing such an outcome and a possible mistake relating to causal connexion), an event may also be evaluated normatively from the standpoint of adequate causation theory.[28] Since the

26 See, for instance, Art. 77, paragraph 2 of the Constitution of the Republic of Serbia.

27 See the criminal offence of violating the law by a judge, a public prosecutor and his/her deputy (Art. 360 of the Penal Code of Serbia).

28 In order for an act to amount – according to the conception of adequate causation – to the cause of a consequence, it is necessary for the consequence as well, to be adequate, i.e. apt according to experience, to produce it. The ground of such conception is to be found in the idea of a criminal law norm as provided for to prevent launching only into those legally inacceptable risks which, as their outcome, have the materialization of consequences, where just these (and not any other) risks come to being

objectively-subsequent evaluation points at the fact that an impartial observer, found in the social position of perpetrator, because of insufficient quantity of poison used, could not be able to foresee that death would result – such consequence is a result of accident and not of perpetrators' acts, so that they have to be punished for the attempt.[29] Consequently, the unusual character of the event does not negate the causation of the relevant acts as such. The atypical character of causal course is reflected in the sphere of its normative evaluation.[30] A similar conclusion could be reached also by applying the principle of objective reckoning in, which begins from two assumptions: a perpetrator by his/her act has to create or increase the danger of producing a concrete consequence; i.e. the given consequence must be a direct realization of the very danger created by perpetrator's act.[31] Since consequence in the mentioned example does not amount to the realization of risk of a single act, but of the joint independent and unexpected combination of effect of all acts, the realization of B's act becomes an essential departure from the supposed causal course.[32] Consequently, these consequences, too, shall not objectively be reckoned in to the perpetrators.

(see Jescheck, Hans-Heinrich/ Weigend, Thomas: *op. cit.*, p. 285). In order for a consequence to be reckoned in to the perpetrator, it is indispensable, according to the probability criterion, that his/her behavior be adequately correspondent to the consequence that has come forth. Since such criterion is indefinite, the adequacy formula is appropriate in the sphere of criminal law to rule out the reckoning in of only extremely atypical and rather improbable causal lines, so that it was formulated in a negative form; i.e. the observed consequence may not be reckoned in to a perpetrator should it seem improbable that a given act migh result in its coming forth. This is why the adequate causation theory is a highly restricted correction tool of results of the equivalence theory.

29 Wessels, Johannes/ Beulke, Werner: *op. cit.*, p. 67.

30 As said above, the expression „atypical causal course" is understood to mean the cases where a consequence does not come forth as a result of the usual course of events and general everyday experience.

31 The objective reckoning in supposes that perpetrator's act has to be instrumental in the realization of danger, i.e. in direct materialization of wrongful risk resulting from his/her act. Therefore the consequence is not reckoned in, objectively, if it did not directly emanate from the danger created by perpetrator's act, but instead being in an accidental connexion with it. Thus, for instance, if A, intending to murder B, injures him/her seriously, so that B is transported to a hospital where he/she dies in the fire – the question arises as to whether A's act has increased, in a legally relevant way, the danger of A's death in the fire. Since staying in a hospital does not amount to a relevant danger – the objective reckoning in had to be negated, so that A would be responsible for an attempted murder only. The case would be different, naturally, should coming forth of the consequence amount to adequate realization of the danger created by perpetrator's act only, for instance, if death occurred due to infection of the wound or if the injured person, being unconscious, suffocated because of womitting.

32 *Ibid*.

ALTERNATIVE CAUSATION[33]

In contrast to cumulative causation, where the implementation of *condicio*-formula is not a particular problem, the difficulties in application do arise as far as so-called alternative causation is concerned. The alternative causation involves simultaneous and independent operation of several conditions, among which every single one is instrumental in independently producing the observed consequence.[34] In our classical example involving the acts of giving the poison, this would be the case with A and B who, independently from one another, give a poison dose to C.[35] Examining *condicio*-formula in its basic form yields problematic results. Had A failed to give his/her dose of poison, C's death would still occur, with the understanding that his/her act was not causal for ensuing death. Similar conclusion could be reached also regarding B's act, due to simultaneous existence of A's lethal act, which is not a hypothetical but a real *causa.* Consequently, it turns out that A and B, in spite of acting independently and in spite of materialization of C's death, would be responsible only for attempted murder, although they have carried out their aim. Most authors because of that,[36] while being unable to avoid mentioned lack of logic, supplement in a way the form of the formula by the following formulation: *among several conditions that, to be true, may be alternatively but not cumulatively eliminated, without at the same time*

33 In the part of relevant literature the alternative causation is called „twofold" (see, for instance, Baumann, Jürgen/ Weber, Ulrich/ Mitsch, Wolfgang: *op. cit.*, p. 242; Jakobs, Günther: *op. cit.*, p. 192; Kühl, Kristian: *op. cit.*, p. 31), and/or „varied" causation (Wessels, Johannes/ Beulke, Werner: *op. cit.*, p. 52).

34 In this case as well, the same requirement is the valid one: the operation (acts) of perpetrators has to be treated independently, since otherwise they would be treated as co-perpterators to whom the consequence would be reckoned in as a joint result.

35 Acts have to be simultaneous since otherwise, had one act preceded the other, the first one would be the cause of death, because it really had produced it. Subsequent act that, due to the time of its taking place, had not been actually effective, so that in such a case it would amount to a hypothetical condition, whose impact is ruled out in applying the *condicio*-formula. The problem, however, does arise should it become impossible to prove which of the two non-simultaneous conditions did actually produce the consequence. Thus, for example, if two persons, independently from one another, fire a lethal shot each (one, for instace, in the heart, and the other in the head) immediately one after the other, it should be necessary to establish which shot was the first, causing thus the death. Should that be impossible to prove, the causation relating to both A and B, according to the *in dubio pro reo* rule, cannot be confirmed, so that both persons would be accused for attempted murder only. This, however, is not a causation problem, but the one of pleading (see Triffterer, Otto: *Österreichische Strafrecht, Allgemeiner Teil*, second edition, Springer-Verlag, Wien – New York, 1994, p. 132; Jakobs, Günther: *op. cit.*, p. 192).

36 Wessels, Johannes / Beulke, Werner: *op. cit.*, p. 52; Baumann, Jürgen/ Weber, Ulrich/ Mitsch, Wolfgang: *op. cit.*, p. 242; Gropp, Walter: *op. cit.*, p. 141.

having to disregard the consequence in its concrete substance – each of these conditions is considered causal in relation to taking place of consequence.[37] Although some authors point out that such extension of formula makes impossible unified application of equivalence theory,[38] we do find that addition to the *condicio*-formula is appropriate. Causation is a legal notion and it is possible for legal order to legitimately shape the limits of causality and, as circumstances require, modify the basic formula as well, should there be risk of even theoretical inconsistencies in implementation of law.[39]

37 Kühl notes, at least relating to this classical example, that perhaps there is no need for supplementing the formula: if one considers only the really effective quantities of poison given by A and B which, taken together, have caused C's death – then the residuum of their quantities that were not effectively causal must be deemed hypothetical condition whose causation is not to be examined. In this way, this example would be identical to a cumulative causation case. In such a case, in course of examining causation of A's act, we would conclude that his/her act is the cause of C's death because his/her part in the total quantity of poison that produced death may not be disregarded without having death as a consequence to be ruled out. The same conclusion would be reached also regarding B's act (see Kühl, Kristian: *op. cit.*, p. 132). However, that conclusion would be possible only in situations where act may be broken down in an extended analysis to parts that are genuinely and effectively causal. In the case, for instance, of two simultaneous lethal shots, such approach could not be possible. However, another argument would help in this case should we want to confirm the superflousness of extending the formula. In other words, in conformity with basic formula, in order to have causal connexion, all that is necessary is to prove the fact that C's death was slightly speeded up through the observed dose of poison. This, in most cases of interweaving of effects of separate acts that can be imagined (which otherwise is rather hard to realize since these would mostly involve co-perpetrators), will lead up to establishing causation already according to the basic form of *condicio*-formula).

38 This is emphasized mainly by proponents of formula relating to the so-called „condition conformable to statute" (*Formel von der gesetzmässigen Bedingung*) which is more than acceptable alternative to the *condicio*-formula. According to that formula, causation in terms of equivalence theory implies the answer to the question as to whether an act is followed (in terms of time) by changes in the outside world which, according to well-known natural laws, are necessarily connected with it, and which amount to consequence conformable to the subject-matter of offence. Such cognition may be contributed only by professional opinion of an expert appointed by court, and not by the *condicio*-formula alone. (See Jescheck, Hans-Heinrich/ Weigend, Thomas: *op. cit.* p. 283; for the original form see Engisch, Karl: *Die Kausalität als Merkmal der strafrechtlichen Tatbestände,* Beiträge zur Strafrechtswissenschaft. Neue Folge, volume No. 1, Verlag von J. C. B. Mohr (Paul Siebeck), Tübingen, 1931, p. 21). Should chemical analysis in the example with poison demonstrate that both doses have contributed to lethal outcome – both doses would be causal relating to the completed murder. Consequently, this formula is a way to avoid the lack of logic in applying the *condicio*-formula to cases of alternative causation, which otherwise, according to some authors, is not successfully settled by the addition to *condicio*-formula itself . (For detailed argumentation see Roxin, Claus: *op. cit.*, p. 303).

39 Comp. Baumann, Jürgen/ Weber, Ulrich/ Mitsch, Wolfgang: *op. cit*., p. 242.

Marija Draškić

ON RELIGIOUS INSTRUCTION IN PUBLIC SCHOOLS, A SECOND TIME

This text represents a response to the polemic view written by Prof. Dr. Sima Avramovic that he had published in the first issue of this journal last year,[1] and which was the result of my article on the right of children to religious freedom in the school, also published in the „Annals of the Faculty of Law in Belgrade."[2]

Professor Avramovic begins his texts with the statement that „only legal arguments should be utilized" ... (by lawyers and professors of law who are expressing their opinion on such issues)...and that matters relating to the educational justification of religious instruction, significance of religion, philosophical problems of evolutionism and creationism, should be left up to other experts, and that unfounded value judgements should be particularly avoided."[3]

Regretfully, I must admit, that my thoughts on this matter are entirely contrary to his. Namely, the public school system is in fact an activity of public significance, and the intendment of public schools is to set the foundation of not only the education but the upbringing of future citizens. Therefore, the question of educational justification of all teaching content is inseparably tied to the values which are passed onto generations of young people by way of these contents. Therefore, a discussion on values can in no way be a „forbidden theme" for insight of the

1 See Avramovic, S., Pravo na versku nastavu u našem i uporednom evropskom pravu (Right to religious instruction in the Domestic and Comparative European Law), Anali Pravnog fakulteta u Beogradu, br. 1/2005, pp. 46–64.

2 See Draskic, M., Pravo deteta na slobodu veroispovesti u školi, (Right of children to religious freedom in the school), Anali Pravnog fakulteta u Beogradu, br. 1–4/2001, pp. 511–525

3 See Avramovic, S., op. cit. pp. 46–47.

general public. So that I am not reproached for giving „unfounded value judgements", I offer the reader the following thematically selected standpoints of the Serbian Orthodox Church, as an illustration of the preaching's of the most significant and influential religious community in Serbia:

a) On abortion

„Contrary to feminist political slogans, the aesthetics, and the spiritual and physical reality of abortion, debase everything. It takes the form of deadly medical destruction. It 'liberates' women and their babies in the same way Auschwitz 'liberated' the Jews. It does the same thing to women as pornography does – it uses, humiliates and reduces women to the level of sexual slaves, on the one hand, and to simple 'productive citizens' who protect their career, on the other. This transforms the birth-giving womb into a death chamber, where the mutilated, degraded and agonized child dies silently, with cries unheard."[4]

„Is there an analogy between Nazism and the modern pro-choice movement that favours the legalization of induced abortion? Of course there is."[5]

b) On Western culture

„Satanic forces – political, cultural, liberal, left-winged conspiracy forces – are the leaders of the New World Order, which is undoubtedly... inspired by Satan". The prime source of all evil is America „where there is a decline of moral and mental health." The whole Western culture is under the influence of „hell agents... a conspiracy against Christianity, an atheist culture"... „There will be no disturbed men walking among Serbs, who would want to infect us with this fatal disease of the Western culture. They'd better keep their progress to themselves." [6]

c) On New Belgrade:

„New Belgrade is the paramount satanic experiment, the culmination of Communist exhibitionism... a disaster per se, a spiritual gulag, a spiritual 'Goli otok'. City of the *new*... new city blocks, new sanctuaries, new schools, new nurseries, new shops, new student campus area, new sports hall, new free-way – for new children, new students,

4 See Abortus je ubistvo – stav Crkve pravoslavne o utrobnom čedomorstvu, EUO Eparhije žičke, 2000, pp. 14–15.

5 See Pravoslavlje, February 15, 2006, www.pravoslavlje.org.yu.

6 See Pravoslavlje, July 1, 2002, acc. to Popović-Obradović, O., Crkva, nacija država – Srpska pravoslavna crkva i tranzicija u Srbiji, Između autoritarizma i demokratije, book II, Belgrade, 2004, p. 139.

new people. A city in the desert, a city without churches, without history, a city of infidels, of the un-baptized, denationalized Serbs, a city of dead souls, of future 'Aryans'... a city where evil has been elevated to its greatest heights."[7]

d) On Orthodox upbringing of girls:

„The Orthodox girl is prepared from early childhood to become a housewife together with her mother, she serves the members of the household through her daily 'womanly' duties, well aware that her brothers' needs always come first. Her mother trustfully reveals to her that the pains of labour are the punishment for feminine sin and therefore something she should submit to... She tells her that women go through periods of uncleanness, which the Church considers a matter of outmost importance, and that her period is a feminine weakness and a human imperfection, which she must never talk about, since the very mention of it is in itself a sin... The mother also instructs her daughter how sinful thoughts that accompany falling in love must be confessed and that every sexual intercourse, including the marital one, is the greatest of sins, unless its aim is procreation. Sex education is the devil's invention; hence women have to give birth to as many children as they can as per God's wishes, thus expressing their patriotism."[8]

e) On religion in schools:

„The claim that „religious faith represents an individual's private orientation" and the „fear that introducing religious education into school curriculum... threatens to make church dogma the foundation of moral education", represents, in fact, the fear of Satan and his followers have had for six decades – manifested everywhere under the sky of the entire Earth, which only in its name represented everything that the notion of Serbia generally stands for."[9]

„As long as there is religious instruction, the apish shamelessness and satanic immorality will not be able to rein over human self-consciousness and become the measure of humanity and human dignity."[10]

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7 See Pravoslavlje, February 1, 2001, acc.to journal Danas, April 11, 2003, p. 17.

8 See Šta treba da zna svaka pravoslavna devojčica, The Archbishopric of Montenegro, 2000, acc. to weekly Vreme, June 28, 2001, p. 36.

9 See Novosti, Informative service of the Serbian Orthodox Church, November 24, 2000.

10 See Pravoslavlje, September 1, 2005, www.pravoslavlje.org.yu.

f) On atheist parents:

(Atheist parents)..."have thrust their own offspring onto roads of false happiness and pseudo freedom"... „they have ruined the lives of their children"...[11]

g) On reformation:

„Men keep talking about social reformation, attempting to create a 'new man'. By founding their reforms on the alteration of banal things and superficial adaptation to the animus of this century...they themselves become captives of nothingness and transience." [12]

Is there really a need for more examples? Would you want your child to be taught about these issues as a part of religious instruction? Are such arguments of the Church founded on love and tolerance, do they project a faithful image of reality, are they based on scientific knowledge and the experience of human existence? Do these arguments serve as a means of educating children as free and autonomous individuals? I think not. For the purpose of comparison, the Convention on the Rights of the Child proclaims that the child should be raised according to the ideals comprised in the Charter of the United Nations, especially in the spirit of peace, dignity, tolerance, freedom, equality and solidarity.[13]

1. SEPARATION OF THE CHURCH AND STATE

Professor Avramovic, in his text, under the same title, informs us that the constitutional principle on the separation of the Church and State does not have the same connotation as we always believed it had – separation of the domain of the State from the Church domain; neutrality of the State concerning religious issues; independence, autonomy and equal treatment of different religious beliefs; and most of all, restrictions on direct interference of religious communities in public life – but that in fact, the modern definition of the French term *laicité* means more than the mere notion of the separation of the Church and State. He backs up this interpretation by referring to two French professors, who have written two books relating to the controversies that have appeared in relation to the concept of *laicité* in France, as well as the lecture of a third professor,

11 Christmas Epistle of Patriarch Pavle for 2002, acc. to journal Danas, January 12–13, 2002, p. 15.

12 Easter Epistle of Patriarch Pavle for 2003, acc. to journal Danas, April 29, 2003. p. 3.

13 See Preamble to the Convention on the Rights of the Child (Official gazette of SFRY – International contracts, no. 15/1990).

who draws the concept of *laicité* down to two basic principles: the non-acceptance of any religion as the official religion and the guarantee of freedom of conscience.[14] From that he draws the conclusion that „having proclaimed the separation of Church and State, European legal systems regularly do not conceive a vast gap between the two, and an impossibility to perform common tasks and functions, nor does it assume absolute lack of any relation"; the examples that support this view can be seen in American practice (the proverb „*In God we trust"* imprinted on the dollar bill, the text of the American national anthem, taking religious oath on the Bible, etc.)

It is undisputable that in comparative law and practice there are various ways to organize the relation between Church and State, and that all of them – with understandable conditionality as a result of this separation – can be divided into two main categories.

The first group includes countries within which there is a more or less close connection between the State and Religion, however that relation may take on the form of either subordination or coordination.

The subordination model has two sub-models: when the Church is subordinated to the State (this can be seen in the relation between the English Crown and the Parliament over the question of internal issues of the Anglican church), or when the State is subordinated to a certain religion or religious faith (for example, the State of Vatican, which is under the rule of the Roman Pope; Polythea on Mount Athos, led by Orthodox monks; post-revolutionary Iran, mostly under the authority of Shiite religious leaders, etc.)[15]

On the other hand, the model of coordination introduces different forms of cooperation between the Church and the State (mono-confessionalism in Italy, for example), i.e. between the State and two churches (bi-confessionalism, developed in countries like Germany or Switzerland, where confessional conflicts are settled). Multi-confessionalism, at last, treats all religions in the same way and is considered the main guarantee of the freedom of religious faith.[16] However, multi-confessionalism, as a rule, tends towards complete separation of Church and State, but also towards the recognition and acceptance of the role that religion occupies in social life. Therefore, it can be argued that examples of religious

14 See Avramovic, S., op.cit, p. 48, foot note no. 5.

15 For detail, see Margiotta Broglio, F., Il fenomeno religioso nel sistema giuridico dell'Unione Europea, Bologna, 1997, pp. 115–116.

16 Moreover, Voltair regarded multi-confessionalism as freedom itself: „If there were one religion, its despotism would be terrible; if there were only two, they would destroy each other; but there are many, and therefore they live in peace and happiness. „Acc. to Willaime J-P., Etat, religion et éducation, Paris, 1990, p. 142.

symbolism in American culture, mentioned by Professor Avramovic, are proof that religion plays an important role in American society, but do not imply that the US are abandoning the pure *laicité* principle when it comes to the relationship they have with many religious communities that function autonomously and independently.[17]

The relationship between the church and the state can be regulated in three different ways:

a) Through a concordance system (Austria, Germany, Italy, Malta, Portugal, Spain and the French provinces of Alsace and Lorraine[18]), where the issue of religious education is resolved by one or more settlements with religious communities (for example, in Italy we have optional confessional religious education, with the study of ethics as an alternative subject; in Germany, the constitution foresees confessionalist religious instruction as part of the school curriculum[19], except in the province of Bremen and the city of Berlin, where students have the right to choose an alternative non-confessional subject; in Austria, religious education is an obligatory confessional subject, performed according to a special agreement with the Catholic church, etc.);

b) By defining a state church (for example, the Anglican tradition in Great Britain, where religious education is performed as non-confessional by teachers in schools; by 1997. Norway had Lutheran religious instruction with alternative confessional teaching in some other religion or a non-confessional teaching on theology and ethics. However, follo-

17 We can get examples, proving that this is the case, from the practice of the Supreme Court of the United States. There was a case where the court made a judgment that Champaign school had not followed the regulations on the separation of Church and State, for it allowed religious teaching (Protestant, Catholic or Jewish) in a public school. „The use of public buildings for spreading religious doctrines" was marked as an „act that leads to the disappearance of the separation of Church and State". The court, however, judged that having non-confessional religious instruction in public schools was in accordance with this principle. See McColum v. Board of Education, 333 U.S., p. 212, (1948). In another judgement, a law which provided students with the right to an organized minute of silence at the beginning of every school day – which they could use for a silent, prayer or meditation – was banished as anti-constitutional and pro-religious. See Wallace v. Jaffree, 466 U.S., p. 924, (1984). Again, in a third judgement, the court stated that: „It is not blasphemy or anti-religious behaviour to say that no public entity in this country can write or authorize an official prayer: this solely religious function must be given upon those individuals people address when in need of religious guidance". See Engel v. Vitale, 370 U.S., p. 435, (1962). Acc. to Kodelja, Z., Laic school, Belgrade, 2002, p. 308.

18 When France passed the famous Law on the Separation of the Church and State (La loi de séparation de l'Eglise et de l'Etat) in 1905, Alsace and Lorraine did not belong to France, which meant that the old German laws remained, according to which religious instruction in public schools was allowed.

19 See Article 7, item 3, Basic Law for the Federal Republic of Germany

wing school reform in 1997, there remained only one non-confessional – confessional subject. In Denmark, teachers of religious education teach a non-confessional subject; the same is in Sweden, where there is one non-confessional subject on theology and religious ethics.);

c) By defining a confessional state (Greece is a country where the bond between State and Church are very tight and religious instruction is confessional, without the possibility of choosing an alternative subject).[20]

This other group is represented by States which are separated from the Church, in the sense that both institutions are completely independent from one another and have clearly defined jurisdiction (France, USA and Slovenia). In these countries, separation is thoroughly carried out, which leaves no option for religious instruction or confessional teaching of a certain religion.[21]

This relatively abstract presentation of various solutions for the relation between State and Church shows that the separation of the two is not a universally accepted principle, as well as that their relation in countries that proclaim the principle of *laicité* may have many and various shapes. This was never a subject of dispute and the principle was never regarded as confrontation, or as state's negligence of the Church and everything that has to do with religion in general. My sole intention was to prove that formal existence of a relation between certain States and certain religions should not be classified as a system of separation of the Church and the State, regardless of the fact that these institutions are completely independent from each other and have clearly defined jurisdictions. They do cooperate on some issues (the very issue of religious instruction in public schools, for example), even though they do not belong to the category of state church or confessional state. My opinion on this is not a bad one, on the contrary, I think that Serbia should be compared with countries which completely and consistently implement the constitutional principle on the separation of the State and religious communities (France, USA and Slovenia) and not with countries where obligatory religious instruction of the confessional type is guaranteed by the Constitution (Germany, Belgium, Lichtenstein), or those where the Catholic church has great influence in planning and implementation of confessional teaching (Italy, Austria), regardless of the fact that these

20 For detail, see Kodelja, Z, op.cit., pp. 296–300.

21 These separations are not faultless, as we can see in the example of Holland, where the separation of church and state is conducted less obviously than in France and US. In Holland there is no confessional religious instruction in public schools, however, theology is included in the regular primary school curriculum, while studying of the Bible and spiritual life can also be included in the curriculum of high schools. Finally, religious instruction can be organized on school premises, but only outside normal school hours. Ibid.

countries directly refer to the principle of *laicité* in their relation to churches.[22]

2. THE RIGHT TO NON-DISCLOSURE OF RELIGIOUS CONVICTION

The right to privacy, i.e. the claim that no individual can be forced to disclose personal thoughts and convictions, is no whim of the *human rights* 'extremists', as Professor Avramovic states (the quotation marks are supposed to soften the sharpness of the term?), but a collective term used to recognize several seemingly heterogeneous rights (an individual's right to private and family life, right to sanctity of the home and correspondence, right to physical and moral integrity) which have become a natural segment of all international human rights conventions. By no means can it be said that such disclosure is the same as „opting for one language or another", or that „a similar problem is encountered when it comes to declaring ones religious belief in the census."[23] The first is the case of revealing something that under no circumstances can be considered an element of the right to privacy (the way this right is defined in international conventions and interpreted in judicial judgements and doctrine), while facts considering an individual's religious convictions are protected by absolute secrecy of collected data, which is the essence of privacy safeguard, therefore this does not represent 'disclosure'.

On the other hand, the fact that the European Court of Human Rights was never challenged to evaluate whether the duty of citizens to declare themselves on the matters of their private thoughts and convictions, within the context we are considering (opting for a religious or an alternative teaching in schools), represents a violation of the right to privacy or not, does not exclude the possibility that such an interpretation may occur in the future. Particularly, this court has showed cases of important exemptions in the interpretation of the European Convention

22 In that sense, professor Avramovic's reference to the organization of teaching in French primary schools, where one free day (excluding Sunday) is organized for religious education provided to the students' by their parents, is no argument in favour of the claim that even the most secular countries in the world organize religious instruction. On the contrary, the existence of this free day is an argument that shows the importance they give in France to the principle of separation of Church and State. The confirmation of the need for religious education is something else; this need is completely legitimate and, thus, undisputable, but not within the school building. Precisely because of that, public schools make this final effort in organizing the school calendar, so that everyone could have enough free time to attend to religious education one day per week (on a Wednesday or a Saturday). Cf. Avramovic, S., op. cit, p. 51.

23 See Avramovic, S., op. cit, p. 51.

on Human Rights, while never being accused of 'extremism'.[24] Since the European Court of Human Rights had not declared an opinion on the subject, the UN Committee on the Rights of the Child stated that a system which allows the child to be withdrawn from religious instruction in school, thus forcing the child to expose its religious beliefs, can represent a violation of the child's right to privacy.[25]

3. PROHIBITION OF IMPOSING RELIGIOUS CONVICTION

An interpretation of Article 18 of the International Covenant on Civil and Political Rights, which has already been given by a competent international body, such as is the Committee for Human Rights of the United Nations, shows the accepted viewpoint to be „...imposing of religion and belief is not allowed" and that „religious instruction in public schools may only relate to the subjects such as general history of religion and religious ethics, under the condition that they be taught in a neutral and objective manner." This part of the General Comment on Article 18 of the International Covenant on Civil and Political Rights is omitted by Prof. Avramovic, however he does reproach me for the fact that I did not literarily translate the text which follows: *The Committee notes that public education that includes instruction in a particular religion or belief is inconsistent with article 18.4...* (underlined by M.D.)". My translation, which states: ... „(The Committee is of opinion) ... that instruction of a particular religion or belief is inconsistent with the right to freedom of religion as it is defined in Article 18.4 of the International Covenant on Civil and Political Rights..... (underlined by M.D.)" and the translation given by Prof. Avramovic: „The Committee is of opinion that public education which includes instruction in a particular religion or belief is not in accordance with Article 18.4... (underlined by M.D.); differ, in my opinion, only in style, but not in their basic meaning.[26] Therefore, the

24 While we are waiting for a declaration from the European Court of Human Rights, I will present you with an authentic story from everyday life. A cousin of mine, who lives in a multi-national environment, gave me his account of the disclosure of religious education in his son's school: 'Parents were standing in line to give a written statement regarding religious education. I noticed that all of the parents who were members of religious minorities were holding the paper folded, while the ones from the majority who were applying for religious classes were holding the paper freely and opened'. I will leave all commentaries to readers.

25 See UN Doc CRC/C/15/Add. 23, par. 9.

26 In that same sense, and for the sole purpose of shortening the original text so as to allow for simpler examination of the specific issue which is at hand, there exist differences in style –but not in meaning– in further text of this citation as well. See Avramovic, S., op. cit, p 52 and Draskic, op. cit. p.514.

undoubted intention of the aforementioned interpretation which originates from the Committee for Human Rights is in the fact to draw the line between instruction on a particular religion („religion or belief" in other words „religious instruction for particular religion or beliefs") and instruction on religions in general, on history of religion and religious ethics, which the committee clearly underlines in the first part of the cited viewpoint. In other words, imposing religious conviction is incongruous with the right to freedom of religion, unless „non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians" are made available for those who are opposed."[27]

This brings us to the key element in this debate, and that is the question pertaining to the content that will be included in the instruction of a particular religion or belief, and in turn what values will children gain thru such instruction for the most part in most grades in Serbian schools. If we recall the citations given at the beginning of the text, I am afraid that we will not be able to conclude that Orthodox boys and girls shall be educated in the spirit of the values which are of universal character today, such as love, peace, equality, dignity, tolerance, respect for others and those that are different, solidarity.... The values promoted by the Serbian Orthodox Church on the contrary, are almost always fraught with anti-westernism, xenophobia, high intolerance, and even aggression. It is precisely for this reason– that I remain of the same opinion– that instead of religious instruction, children at public schools should be taught a subject which shall in a neutral in values, rational and critical manner acquaint the pupils with the general history of all religions and religious ethics. Such a subject would be formed by the Ministry of Education, forming a teaching plan and program, selecting text books and religious teachers who are qualified educators, and not official representatives of the religious community. This type of instruction would be attended by all pupils, regardless of their religion or if they have their own religious convictions. This type of well organized and prepared modern instruction on religion and spirituality, on their universal and eternal values, on their influence on history and art, on the development of personality and society would be most welcome. Taking into considera-

27 See Avramovic, S., op.cit. p.52. However, the question can be raised as to whether the solution offered by the domestic law can be considered as falling within the frameworks of „non-discriminatory exemptions or alternatives", seeing as the alternative is not the complete exemption from religion (that was treated as an „elective" in the Decree of the Government of the Republic of Serbia) but only a choice between religion and civic education (that are designated as „electives" in the legal texts). Compare the Decree on the organization and implementation of religious instruction and instruction of the alternative subject in elementary and secondary schools (Official Gazette of the Republic of Serbia, no. 46/2001) and the Law on the amendments to the Law on Elementary Schools Official, Gazette of the Republic of Serbia, no. 22/2002) and Law on Secondary Schools (Official Gazette of the Republic of Serbia, no. 23/2002).

tion, above all the character of our civilization, I think we can easily agree that objective and pluralistically intoned knowledge of the three monotheistic religions is necessary for understanding of philosophy, history, literature, painting, architecture and many other areas of human creativity and world tradition, and that they are all therefore a part of the general culture and civilization.

The second question initiated by Prof. Avramovic in this section of his text, pertains to my statement that throughout the last 56 years Yugoslavia was a secular State, and that during that time there was no religious instruction in public schools, and that introduction of religious instruction by way of a unexpected and at that moment illegitimate Act of the Government of the Republic of Serbia in 2001 represents an „imposition of religion", in a way such as it was described by the Committee for Human Rights of the United Nations in the General Comment of Article 18 of the International Covenant on Civil and Political Rights.[28]

28 Namely, it is extremely obvious that the Decree was flagrantly illegitimate at the time when it was adopted, and for the following reasons:

One, according to Article 20 of the Law on Elementary Schools and Article 24, Para 1 of the Law on High Schools the Minister of Education had exclusive competence to adopt teaching plan and programs, while according to Article 5, Para 2 of the Decree it was foreseen that the teaching plan and program for religious instruction be adopted with the mutual consent of the Minister of Education and Minister of Religion, on the jointly agreed upon proposal of traditional Churches and religious communities;

Two, according to Article 23 of the Law on Elementary Schools and Article 25 of the Law on High Schools the Minister of Education also had exclusive competence to approve the textbooks to be used, while according to Article 7, Para 1 of the Decree it was foreseen that the textbooks for religious instruction be approved by the Minister of Education at the jointly agreed upon proposal of traditional Churches and religious communities;

Three, according to Article 46, Para 5 of the Law on Elementary Schools and Article 48, Para 7 of the Law on High Schools exclusive competence for establishing the criteria and grading system is held by the Minister of Education, while in Article 11, Para 3 of the Decree that right is given to the Minister of Education, but only after he receives a joint proposal of the Minister of Religion and traditional Churches and religious communities;

Four, according to Article 67, Para 3 of the Law on Elementary Schools and Article 70, Para 7 of the Law on High School exclusive competence for establishing the level and type of educational background and qualifications of the instructors is held – once again – by the Minister of Education, while according to Article 8, item 2 of the Decree the Minister could only decide based upon the joint proposal of the Minister of Religion and traditional Churches and religious communities;

Fifth, according to Article 79, item 1 of the Law on Elementary Schools and Article 73, Para 1 of the Law on High School the instructor was selected by the director of the school based on a vacancy, whereas according to Article 8, Para 3 of the Decree the list of instructors for religious instruction was established by the Minister of Education at the proposal of traditional Churches and religious communities;

Prof. Avramovic supports his opinion with the argument that the „absence of religious instruction during the many decades of communist regime cannot be easily put in conformance with the general principles of justice and equity“ and that „coercive deprivation of certain rights, particularly one through which one of the basic human rights are manifested – right to religious freedom, shall in no way be allowed to be legalized by the democratic state.“[29] Such an argument however, represents a classical inversion of arguments, seeing as that strict adherence to the principle of separation of the Church and State is not a „discovery“ of communism, as was seen in the brief review of the various models of the relations between the State and religious communities in the world. Correct, of course is the fact, that believers during the communist regime were subjected to various type of discrimination (similar, after all, to other citizens who protested the governing authoritative system of thought), and that, even though the Constitution guarantees the freedom of religion, practicing of this human right in reality was shadowed by various, some smaller and some bigger obstacles.[30] Following the fall of the authoritative regime, on the contrary, there was no longer such obstacles and abuse. No longer are confessional communities prevented from organizing religious instruction at their own discretion, nor is there any danger of anyone banishing the believers who attend such instruction and in that way freely express their religious convictions – but outside the domain regulated by public law, to which the State and the public school system belong. Therefore, discontinuation of the secular State should not be pronounced a basic human right, because of the fact that freedom of religion and legal protection of all religions are the fundamental principles of all democratic secular States, nor can it be claimed that with religious ideologization of the State the injustice which was brought down on the believers during communism could be set straight! Any analogy with nationalization/denationalization of property is therefore completely inappropriate, [31] because the expropriated property could be returned to a certain extent, unlike the right to the freedom of religion,

Sixth, descriptive evaluation for religious instruction, established by Article 11, Para 1 of the Decree, was not recognized by the Law on High School. Compare the Decree on organizing and implementing religious instruction and instruction of alternative subjects in elementary and high schools (The Official Gazette of the Republic of Serbia, no. 46/2001), the Law on Elementary School (The Official Gazette of the Republic of Serbia, no.50/1992) and the Law on High School (The Official Gazette of the Republic of Serbia, no. 50/1992).

29 See Avramovic, S., op. cit, p. 52.

30 Truth be told, it should be said that those obstacles had decreased throughout the years and that they were never implemented with the same ardor in Slovenia and Croatia, as was the case in Serbia and Montenegro.

31 See Avramovic, S., op. cit, p. 52.

whose limitation at one time can in no way be compensated with the rejection of the constitutional principle on the separation of the Church and the State. After all, if there is anything by which the communist regime was similar to modern democratic institutions of a liberal State, that it is surely consistent perseverance on the valuably neutral relation toward different religious determinations of its citizens.

Finally, in reference to the statistical data relating to the number of believers in Serbia, the difference established by Prof. Avramovic is the result of the fact that I used the data from the Federal Bureau for Statistics, Population Census from 1991, which showed an estimate of the number of Albanians in Kosovo as residents of Serbia, whereas Prof. Avramovic uses the data on religion from the same census, however he obviously does not include Albanians from Kosovo.[32] Regardless of whether there are 80% (of those who are of Orthodox faith) or 66% (if we include the Albanian population), there is one other thing which is important here. Namely, at the time of the official population census, people are inclined to reply immediately to the question on their religious conviction with Orthodox, Catholic or Muslim,[33] even if they do not practice the religion, or they do so only in exceptional cases, traditionally, and not because they are really believers. For example, according to one study carried out by the agency „Faktor plus", only 7.1% of those questioned answered that they regularly go to Church, 40.3% that they go to Church only on major holidays, and 45.6% that they never go to Church. When asked if they believe in God, 38.6% of the population of Serbia answered that they do not, 39.8% replied that they „think they believe" and only 21.6% are certain that they believe in God.[34] The question of actual religiousness of the population of one State therefore must be observed by cross-referencing a number of various types of information.

On the other hand, a similar conclusion can be drawn from official data as well on the number of children which attend religious classes at Serbian schools. Namely, according to one such statistic for 2003, the number of children in elementary schools which choose religious instruction in the first year that the Decree of the Government of the Republic of Serbia (when religious instruction was an „optional" subject, which means that parents could choose for their children to attend religious classes or an alternative class, or neither), totalled 30,876. In the

32 The statistical almanac which I used gives an estimate of 1,647,000 Albanians, while in the data given by Prof. Avramovic the number of Islamic believers totals only 468,713. Compare Draskic, M., op.cit, p. 514 and Avramovic, S., op.cit. p. 53.

33 There is no more than 2% of the population in total that belongs to other religions, 1.95% declare themselves as being atheists, and 5.25% gave no reply. Ibid.

34 See Daily newspaper „Politika", 6–7 January 2004, p. A8.

following year, (when religious instruction became an „elective", and parents had to choose only between religious instruction and civic education) that number rose to 43,764 students (an increase of 41.7%). If that is not „imposing religious conviction", then it is like I have said nothing! On the other hand, this data also shows that of the total number of students enrolled in elementary schools in Serbia (50,299), which chose one of the two subjects in the first year that religious instruction was offered, 61.4% chose religious instruction (30,876), and 38.6% the alternative subject (19,423). In the following year, of the total number of first grade students enrolled in all elementary schools in Serbia (75,210), the number that chose religious instruction totalled 58.2% or 43,764, and 41.8% or 31.446 for civic education.[35] This data attests the fact that the number of students that opt for religious instruction (and which, I suppose, assumed to be religious) did not significantly exceed 60% in any of the observed years.

4. THE RIGHT OF PARENTS TO ENSURE THE RELIGIOUS EDUCATION OF THEIR CHILDREN IN ACCORDANCE WITH THEIR OWN RELIGIOUS AND PHILOSOPHICAL CONVICTIONS

The right of parents to provide for their children religious and moral education, according to their own beliefs, i.e. the obligation of the member states of major international human rights conventions to respect this right, cannot be interpreted the way it is done by Professor Avramovic, so that the „State has the obligation, and parents, as taxpayers, have the right to have their children receive an education in accordance with their own religious and philosophical beliefs, within the public schooling system. Taxpayers, who pay for their children's education, are not obliged to secure religious and philosophical (ethical) education for their children apart from their regular schooling, to pay for it separately or to non-expertly educate their children themselves."[36] Such a 'supplement' to what is stated in certain provisions of international conventions has no ground, whatsoever, in international law. Primarily, this is the result of a

35 The difference is more drastic when the data for particular regions are reviewed. For example, in the Rasina region 179 students chose religious instruction in the first year, and in the following a total of 1,526; in Belgrade in the first year 597 students chose religious instruction, and in the following 5,343 of them, etc. Similar is the data pertaining to high school students. In the first year, the number of students which selected religious instruction was 7,525, and in the following year that number was 33,633. See report of the Ministry of Education and Sports of the Government of the Republic of Serbia from June 23, 2003.

36 See Avramovic, S., op. cit. p. 57.

linguistical interpretation of these provisions, whence there is no mention of the state's obligation to organize „an education in accordance with the parents' religious and philosophical convictions", but only the fact that the State has to „respect the right of parents to provide religious and philosophical education for their children according to their own religious and philosophical beliefs."[37] In complete opposition to what Professor Avramovic is saying, this is not about the duty of the State to organize religious instruction, rather about its obligation to respect the right of parents to provide a religious education for their children according to their religious and philosophical beliefs. There is an enormous difference in meaning; therefore I advise Professor Avramovic to read legal texts more carefully.

The way in which parents provide an education for their child according to their religious beliefs is not subject to International Law; they might find religious education in public schools satisfying, hence they will regard their right satisfactorily safeguarded. However, the main point in understanding this particular provision of International Law is that this provision must never be interpreted as the state's obligation to go forth in meeting parents' demands in this situation. The state has a discretionary authorization to create its own educational content, according to certain general and commonly accepted values, which it wants to promote in the educational process. To say that the state is in a purely dependent position where „taxpayers can ask for the kind of school they want"[38] is rather frivolous. In other words, and as I have already stated, the point of this provision is not that member states of an international convention are obliged to provide a religious education for children which is in accordance with their parents' beliefs, but to respect the right which says that the State cannot enforce an education which is not in accordance with religious and philosophical beliefs of parents. Furthermore, a document which includes the preparation of the International Covenant on Civil and Political Rights, states that Article 18, para. 4 „only forces upon member states the obligation to respect any demands by parents; it does not force upon member states that they provide religious education according to particular needs of parents".[39]

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37 See Article. 2. of the First Protocol of the European Convention on Human Rights and Article 18. para. 4 of the International Covenant on Civil and Political Rights.

38 This opinion was confirmed in the practice of the European Court of Human Rights. Namely, the parents of an English boy with dyslexia could not prove that their right stated in Article 2 of the First Protocol was violated, when the local school board, against their will, sent the child to a special needs' school, although the parents considered that it would be better to send the child to a regular school. See Simpson v. UK, No. 14/668/89, December 4, 1989. Also see PD & LD v. UK, No. 14135/88, December 2, 1989.

39 See UN Doc A/C 3/SR 1024. All major authorities in the area of International Law on Children's Rights share this opinion. See, e.g. Van Bueren, G; International Law

On the other hand, in the practice of the European Court of Human Rights, which was called upon on several occasions for the purpose of interpreting Article 2 of the First Protocol of the European Convention on Human Rights, there was always the case that 'the State, when fulfilling its function within the education system, has to provide „an objective, critical and pluralistic way of passing knowledge included in the school curriculum" and that 'states are forbidden to use education as a means of indoctrination that does not respect religious and philosophical beliefs of parents."[40] Moreover, there was the question of a subject introduced into schools in Denmark titled 'sex education' and whether it violated the right of parents regulated by Article 2 of the First Protocol of the European Convention on Human Rights. First, the Court repeated that the State has to provide an objective, critical and pluralistic way of passing knowledge included in school curriculum, and then it continued with a detailed analysis of the sex education program in Danish primary schools, coming to a conclusion that the concept of the subject is such that it provides explanation to children that 'is regarded useful'... that the aim of this subject is to help children avoid insecurity and anxiety regarding sex issues, promote understanding of the correlation between sex life, love life and love relationships in general".... to „help students find a particular way of individual sexual experience which is in harmony with his or her personality'... to 'put an emphasis on the importance of sex issues"...[41] etc. I cannot help wondering what would be the results of such an analysis regarding 'objectivity, criticism and pluralism' with the opinions I cited at the beginning of this text, stated by the Serbian Orthodox Church?

5. THE RIGHT OF THE CHILD TO FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

In the section with this title, Professor Avramovic objects that: 'Nevertheless, in this context there is an emphasis on the right of a child to form religious beliefs which are contrary to those of its parents, which undoubtedly results from international standards, with the statement that religious education is a barrier toward the effectuation of this right and,

on the Rights of the Child, The Hague, 1998, p. 159, Kilkelly, U., The Child and the European Convention on Human Rights, Dartmouth, 1999, p. 64–67.

40 See Campbell and Cosans v.UK, No. 7511/76 and 7743/76, January 29, 1982 and February 21, 1983.

41 See Kjeldsen, Busk Madsen and Pedersen v. Denmark, No. 5093/71, 5920/72 and 5926/72, November 5, 1976.

consequently, unconstitutional".[42] This kind of a standpoint I have never taken. All I wrote was my view that International Law acknowledges the child's absolute right to freedom of thought, conscience and religion, as well as the fact that this right implies the child's freedom to adopt the religious belief of its parents or a religious belief of its own, seeing that freedom of religion is inconceivable without the right of an individual to change religious beliefs. I wrote, as well, that it is common practice to place reserves on provisions about the children's right to religion; a completely different practices used by secular and religious states show that there is still no common view of how the child can exercise the right to a religious belief which is contrary to of the will of the child's parents.[43]

Finally, I leave unattended a rather temperamental discussion on sects that Professor Avramovic is more than willing to promote, for this is a separate issue unrelated to the discussion we have led here. I cannot, however, not comment on the unacceptable 'supplement' to the meaning of an international document, once again by Professor Avramovic: „After all, European institutions sill do not recommend to its member states the passing of a law against sects, fearing that this act could threaten the religious rights of small religious groups. For this reason, as a basic model of protection against the real danger of aggressive religious groups' activities, European institutions suggest the so-called, positive measures: an increased engagement in education and informing of the young, increased financial control of religious groups and many other measures. Most importantly though, they propose, as a crucial measure, well-organized religious instruction.""[44] This last sentence written by Professor Avramovic says as follows in the Report (*Nastase Report*): „*Education should be aimed at adolescents in particular, and curricula should include information on the history of important schools of thought, with due regard for the neutrality of the State*".[45] If Professor Avramovic accepts that the cited part of the Report actually means „well-organized religious instruction", then the two of us have drawn our opinions considerably close and this polemic, in that case, has really been worthwhile.

42 See Avramovic, S., op. cit. p. 58.

43 See Draskic, M., op. cit. p. 518–519.

44 See Avramovic, S., op. cit. p. 59.

45 See Illegal Activities of sects, Report by M.A. Adrian Nastase, Doc. 8373, April 13, 1999, p. 8. Also in the recommendation of the Parliament Assembly of the European Council: 'The basic educational curriculum should include objective factual information which refers to the founding of religions and their main variants and the principles of comparative theology, as well as ethics, individual and social rights." See Recommendation 1178 (1992) on sects and new religious movements, February 5, 1992.

Sima Avramović

CONSTITUTIONALITY OF RELIGIOUS INSTRUCTIONS IN PUBLIC SCHOOLS – *RES IUDICATA*

In her response to my contribution on the constitutionality of religious instruction in public schools, as a part of the prolonged discussion on that topic in this journal,[1] Professor Marija Draskic has tried again to move the focus of the debate from a legal ground to the field of value judgments and, one may say, even rooted in an ideological basis. As I am of opinion that this kind of journal primarily requires legal argumentation, it was how I modeled my first response to her text. I will follow the same approach this time as well, including only a few indispensable and pertinent observations on a non-legal basis to the extent, which is necessary to avoid the impression of some of her arguments being left uncontested.

Already the very title of her second text in Serbian does not follow the normative and official terminology – religious instruction („verska nastava“).[2] Professor Draskic uses the colloquial term instead – „verona-uka“ (religious teaching) implying (at least in Serbian vocabulary), con-

1 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; S. Avramović, „Pravo na versku nastavu u našem i uporednom pravu“ (Right to religious instruction in in our and Comparative Law, Anali PFB 2005/1, 46–64; M. Draškić, „O veronauci u državnim školama, drugi put“ (On religious teaching in public schools, the second time“), Anali PFB 2006/1, 135 – 151. My reaction to the first text by M. Draškić was published with a considerable delay due to change of the journal editorial board and postponement in printing, althought the manuscript was accepted by the then editor-in-chief at the beginning of 2003.

2 Art. 9–12 and Art. 14 of the Act on amending the Act on Elementary School (Official Gazette of the Republic of Serbia, No. 22/2002 of April 26, 2002), as well as Art. 3–6 and Art. 10–11 of the Act on amending the Act on High School (Official Gazette of the Republic of Serbia, No. 23/2002 of May 9, 2002) use consequently the term „religious instruction“.

sciously or not, the character and content of its curriculum, devoid of any analysis of it.

Much more uncovered than that is the way in which her response is posted at the very beginning – not as a discussion with legal argumentation that I developed, but as an attempt of clash with the Serbian Orthodox Church (although religious instruction in public schools is organized for other six denominations as well), and as a discussion on its values, taking religious instruction as the battlefield.

Trying to prove the allegedly disastrous effects of introducing religious instruction in public schools, she opens her response by quoting extreme statements of several individuals, i.e. the authors of particular articles in the periodical *Pravoslavlje* (*Orthodoxy*) on abortion, Western culture, New Belgrade, Orthodox upbringing of girls, religious instruction in public schools, atheist parents, reformation.[3] Only a few quoted texts can be regarded as reflections of the official standpoint of the Serbian Orthodox Church, but some of them, e.g. the Christmas Epistle of Patriarch Pavle for 2002, are so artificially taken out of the context, that it is easily perceptible at first glance.[4]

Official standpoint of the Serbian Orthodox Church on abortion, children upbringing, or religious instruction, etc., is close to opinions of many other Christian churches, primarily of the Roman Catholic one. The disagreement on these issues is a matter of personal choice. But, the way that these viewpoints are presented by Professor Draskic leaves the impression of the Serbian Orthodox Church being anachronistic and fanatic as a whole,[5] from what it follows that its religious instruction must be the same. Her main concern in this discussion is the issue of the program and scope of religious instruction in the system of education with regard to the students' needs (p. 144), and not the question argued in my response, i.e., whether legislative introduction of religious instruction

3 No need to say that individual views in any periodical do not necessarily represent standing of the editorial board or of the founding institution. Would it mean that the editorial board of the Annals of the Faculty of Law in Belgrade, and the University of Belgrade Faculty of Law itself, share all opinions expressed in the Faculty's journal?

4 „(Atheist parents)... have thrust their own offspring onto roads of false happiness and pseudo freedom... they have ruined the lives of their children...", p. 138. By the way, the quotation is cited according to the daily newspaper Danas (as well as Christmas Epistle of Patriarch Pavle for 2003), although it is easy to reach the original text of the epistles in different ways, including the Internet official site of the Serbian Orthodox Church.

5 She is explicit on that issue later in her article: „The values promoted by the Serbian Orthodox Church on the contrary, are almost always fraught with anti-westernism, xenophobia, high intolerance, and even aggression", p. 144. One-sidedness and ideological colour of the statement is evident, and legal journal is definitely not the proper place to contest it.

in public schools is in compliance with the Constitution or not. I am of opinion that legal questions are to be treated primarily in a legal journal, while I would still leave a discussion on values to competent scholars of different profiles to examine more exhaustively and expertly the pedagogical, psychological, ethical, social, philosophical and other aspects of religious instruction.

However, a serious problem appears when she discusses the content of religious instruction. Professor Draskic does not consider relevant to examine at least one of the many manuals published on that topic to perform at least a short syllabus and content analysis, but she forms her standpoint upon superfluous individual press interviews, and through simplified and blanket statements and evaluation of the Serbian Orthodox Church ideology. In the same time she neglects a very important point: that religious instruction is, according to the law, organized and strictly controlled by the state authority – the Ministry of Education and Sports. She also neglects the provision that „*manuals and other teaching materials for religious instruction shall be approved by the Minister of Education upon unanimous proposal by traditional religious communities*".[6] It is evident that the character and the content of that subject are *ex lege* established in interaction of the state, churches and religious communities, and not exclusively by the Serbian Orthodox Church. The law stipulates that the Commission competent for proposals on religious instruction performance comprises representatives of all seven traditional churches and religious communities,[7] and that it is required to reach an absolute consensus on the syllabus and the content of the manuals. Not a single manual for religious instruction may be used by any confession with no consent of the other six denominations (and, of course, without the opinion of the state authority, based upon the estimation of experts from the Ministry of Education). Such a solution represents a unique democratic model of religious instruction set-up in comparative European legislation.

6 Art. 4 of the Act on amending the Act on High School. Also, Art. 9 of the Act on amending the Act on Elementary School prescribes quite similarly that „curriculum and syllabus of religious instruction shall be enacted in agreement of Minister of education and Minister of religion, upon unanimous proposal by traditional churches and religious communities" (Paragraph 1) and that „The Government of the Republic of Serbia shall form the Commission to harmonize proposals on syllabi on religious instruction of traditional churches and religious communities, proposals on manuals and other teaching materials, to give opinion to Minister of education on election of counselors for religious instruction and for religious instruction organization and performance follow-up" (Paragraph 2).

7 Serbian Orthodox Church, Roman Catholic Church, Islaamic Religious Community, Slovak Evangelical Church (a.c.), Christian Reformed Church, Evangelical Christian Church (a.c.) and Jewish Religious Community.

In this way, specifically on the religious instruction ground, the modern model of Church-State relations is confirmed in Serbian legislation, namely the so-called system of cooperative separation. However, speaking in her response on separation of State and Church issues, Professor Draskic recognizes only two traditional models, „two main categories": countries within which there is a more or less close connection between the State and Religion and, on the other hand, the system of State and Church separation (mentioning France, the U.S. and Slovenia). She evidently recognizes separation of State and Church only in these few countries. Completely wrongly she goes further on with her classifycation and includes in the first category (where there is „a more or less close connection between the State and Religion"), two „sub-models": model of subordination and model of coordination.[8] The classification could be considered as a contribution to theory of Ecclesiastical Law, if she has not ignored ample relevant literature on contemporary models of cooperation between Church and State (that I pointed to in my previous article). She could have easily understood the notorious fact that the model of cooperation (coordination) characterizes legal systems where the principle of separation of Church and State is applied, and that there are many more countries that recognize separation, out of France, the U.S. and Slovenia.[9] Exactly in those countries where constitutions accept the principle of state neutrality and separation of Church and State (including the Serbian Constitution), the cooperative model is affirmed. Due to its wide acceptance in many countries during recent years (Belgium, Germany, Austria, Spain, Italy, Portugal, etc.) authors usually consider it as the third, theoretically different system of Church-State relations, along with the standard two – the model of separation and the model of a State Church.[10]

I also have to draw attention to another inaccuracy and inconsistency. She claims that in secular countries, where separation is thoroughly carried out (France, the U.S., Slovenia) there is no space for religious instruction or confessional teaching of a certain religion.[11] However, in France, along with a specific form of religious assistance in all state

8 M. Draskic (2006), p. 139.

9 G. Robbers, State and Church in the European Union, Baden-Baden 1996, 324.

10 Contrary to usual views relations between State and Church are often closer in Protestant countries (and, of course, in Orthodox countries) rather than in predominantly Catholic ones. See details in J. Robert, „Religious Liberty and French Secularism", Brigham Young University Law Review, Provo 2/2003, 638. Those who want to judge about the systems of Church-State relations very instructive could be an article available also at the Internet, G. Robbers, Constitution and Religion, http://www.univ-tlse1.fr/publications/Constit/Robbers.html

11 M. Draskic (2006), p. 141

schools by the priests (*aumôniers, chaplains*), who may have a regular paid position in public schools upon the request of the parents, confessional religious instruction within general curriculum is regularly organized in provinces of Alsace and Lorraine.[12] It is true that it is a consequence of specific historical circumstances, and that religious instruction exists at the part of the French territory only. But, this clearly leads to inevitable conclusion that, even in a *par excellence* laic state like France is, the existence of religious instruction in public schools is not considered to be unconstitutional.

I feel no need to dispute to the same arguments that Professor Draskic repeats – that religious instruction in public schools violates the right to non-disclosure of religious conviction, prohibition of imposing religious conviction, the right of parents to ensure the religious education of their children in accordance with their own religious and philosophical convictions, the right of the child to freedom of thought, conscience and religion. I have already exposed strong legal and theoretical counterarguments on those issues in my previous response, but she did not challenge them on the same ground. Instead, she utilizes individual life-examples and the experience of her relative (p.142, n. 24); she points to a questionable „study" carried out by the agency „Faktor plus", reported by the daily newspaper „Politika", as an argument that people who declared themselves as believers in the census made such a statement „due to tradition, and not because they are really believers" (p.147); she considers the fact that the increased number of children who choose religious classes at Serbian schools, after the Decree on Religious Instruction was replaced with the Act on Amending the Act on Elementary and High School, to be the crucial argument for „imposing religious conviction", taking it for granted without regard to many other possible factors (p. 147); she admits that the European Court of Human Rights did not take position that religious instruction in public schools violates religious freedom, but she announces quite self-confidently its eventual future rule following her line of thinking. I leave to the readers to evaluate her and mine arguments.

How deep is the lack of understanding of contemporary development in Church-State relations, strongly confirms her reaction on my statement that it is possible to seek for a *sui generis* analogy between nationalization and abolition of religious instruction by the communists. I remain the opinion that the restitution of forcefully eradicated religious instructions in public schools is legitimate in the same way as denatio-

12 B. Basdevant-Gaudmet, „State and Church in France", State and Church in the European Union (ed. G. Robbers), Baden – Baden 1996, 132. The religious instruction is confessional, very similar to the German model.

nalization is. After all, most countries of the former socialist bloc took that position, excluding Slovenia and Albania. On the contrary, Professor Draskic claims that „if there is anything by which the communist regime was similar to modern democratic institutions of a liberal State, that it is surely consistent perseverance on the valuably neutral relation toward different religious determinations of its citizens" (p. 146). I would say that the relationship of communist regimes towards religious questions and churches cannot be so easily qualified as „neutral". Neutrality of contemporary State towards religion, its secularity and separation of Church and State in modern European legal practice and ecclesiastical law have a specific, completely different meaning than the communist „neutrality" has had. It seems that this conclusion is out of any dispute.

As to her criticism that I have to read laws and international documents more carefully, and not to „amend" them, I have to stress that the idea that the state has an obligation towards parents – tax payers considering organization of religious instruction in public schools, is in no way a consequence of my false comprehension of laws or international documents. It is only an acceptance of the statement of prestigious German scholar in public and ecclesiastical law, Professor Gerhard Robbers, what I have noted clearly in the appropriate footnote. In addition, she imputes that I want to promote temperamental discussion on sects,[13] with the statement that religious instruction is considered by European states and institutions as an important mechanism in handling harmful activities of the sects, that is as an alternative preventive measure instead of repressive ones. Not only the *Nastase Report* debate, but also many other opinions expressed in public by members of the Council of Europe Parliamentary Assembly,[14] its resolutions and recommendations speak of

13 I published long ago an article on that topic, promoting not a temperamental, but a very modern and balanced approach, which does not discriminate small religious communities, protecting in the same time society of possible abuse of religious freedom without legislative repression, S. Avramovic, „Verska sloboda i njena zloupotreba – istorijski i aktuelni pravni aspekti" (Religious Freedom and its Abuse – Historical and Contemporary Legal Aspects), Anali PFB 1998/4–6, 346.

14 Along with detailed discussions held on the Nastase Report preparation and many other interventions that stressed the necessity and usefulness of religious instruction, let me quote one of the latest interesting opinions on that issue, the one by René van der Linden, the President of the Council of Europe Parliamentary Assembly of April 28, 2005: „Given the many possible prejudices and stereotypes regarding religions, it is important to have structured, rational instruction in schools. That would help combat fanaticism, fundamentalism and xenophobia more effectively", http://assembly.coe.int/ASP/Search/PACEWebItemSearch_E.asp?search=religious+education. If religious instruction is set-up as in the Serbian legislation, with thorough supervision and cooperation of the State, all traditional churches and religious communities in modeling curricula, syllabi and manuals, than it is clear that such a school subject may foster building of bridges among different religions, and not their confrontation.

the need to study religious contents in public schools, as an important element of tolerant democratic society.[15]

To bring to a close, as for me, the whole prolonged discussion in this journal, I have to mention an additional matter that is not unimportant. A few years ago, the Constitutional Court of Serbia was examining the constitutionality of decrees and acts introducing religious instruction in public schools. Professor Draskic and I have participated in the public debate on that topic at the Court, among the other speakers. Many participants, along with Professor Draskic, were challenging a need for religious instruction introduction in public schools and its supposed content and social effects, even though it can be qualified to the best as a legal-political and pedagogical issue, which is irrelevant in a dispute on the constitutionality of a legal act. At the Session of November 4, 2003 the Constitutional Court of Serbia decided to refuse the initiative to declare unconstitutionality of the mentioned legislative acts.[16] After the promulgation of the decision in the Official Gazette of the Republic of Serbia, the issue whether religious instruction in public schools is in accordance with the Constitution or not is *res iudicata*, at least on formal legal ground, notwithstanding one likes it or not.

15 One of the latest examples is Recommendation No. 1720 of October 4, 2005, stressing in the Par. 11 as follows: „The Council of Europe assigns a key role to education in the construction of a democratic society, but study of religions in schools has not yet received special attention". The word is, of course, primarily about a cognitive approach to religious contents, but it still stresses the importance of education in schools for a proper understanding of religion. It was a matter of concern back before adoption the Recommendation No. 1178 of February 5, 1992 on sects and new religious movements. It might be a bit unpleasant for human rights „extremists" who usually cite France as one of countries with the best attitude towards religious freedom, but exactly that country was among the first who took more radical solutions in dealing with sects, rather than a preventive one through religious instruction. A particular inter-minister body was formed since 1996 with the aim to analyze, follow and search for adequate methods of reaction, including the „struggle" of the state against illegal sects activities (Mission interministérielle de lutte contre les sectes – „MILS"). France was in addition the first country to pass the Act (usually called About-Picard Law) prescribing criminal and illegal sects activities, treated as „the fraudulent abuse of the state of ignorance or weakness" of particularly vulnerable persons, mostly of children and young people. For more see reaction of the French Government on broad criticism of the Act, http://www.ambafrance-uk.org/asp/service.asp? SERVID=100&LNG=en& PAGID=240.

16 Official Gazette of the Republic of Serbia, No. 119/2003 of December 4, 2003.

ADDRESSES

Jasminka Hasanbegović

Ladies and Gentlemen,

Dear Guests and Colleagues,[*]

It is my honor to welcome you and present to you the first issue of the *Annals of the Law School in Belgrade* published in English.

It was about two years ago when the idea of *our Annals* in a foreign language was born. The than new Dean professor Vasiljević managed to persuade professor Basta to accept the position of Editor-in-Chief and that was the hardest part of the job.

Than professor Basta gathered a new Editorial Board. And one of the ideas we agreed upon at the very beginning was that one so called „international issue" should be published every year.

This so called „international" issue was meant to comprise everything published in the current or previous year which is relevant to the auditorium that does not read Serbian.

Why was this idea labeled as „one *international* issue a year"? Because we believed that the contributions to this issue shuold be multilingual: in English, French, German, Italian or Spanish. But than we realized that our noble intent collided in a most unpractical way with the grey reality of the hegemony of the English language and that we had to adjust to this reality. Thus has the idea on the „international" issue been transformed into the idea on the English one. And now the realisation of this idea is in front of you.

[*] Address of professor Jasminka Hasanbegović, member of the Editorial Board, on the occassion of presenting the first issue of the *Annals of the Law School in Belgrade* in English language, on September 26, 2006 on the ceremony dedicated to 165th anniversary of the Faculty of Law of the University of Belgrade

Ladies and Gentlemen, Dear Guests and Colleagues,

We have a saying here: Speak Serbian so that the whole world can understand you! But we in the Editorial Board do not believe so. And by this English issue of the *Annals of the Law School in Belgrade* we want to make that Serbian „whole" world, which is in fact only the whole Serbian speaking world, more open and much broader. Because we believe that the Serbian speaking world has something relevant or at least interesting to say to the Serbian non-speaking world, as the latter has something to say and may be interested in saying it to the former, knowing that this will be published also in English – the language of cultural domination.

I truly believe we all agree with Wittgenstein that the limits of my language means the limits of my world. That is why by this English issue of our *Annals* we strive to move the limits of our worlds and languages and contribute to a greater understanding of these worlds.

In the time that comes it is **you** who will judge how much we have succeeded in this, and we wish to read **you** as authors in the forthcoming issues of our *Annals* both in Serbian and in English.

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CIP – Каталогизација у публикацији
Народна библиотека Србије, Београд

34/35

ANNALS of the Faculty of Law in Belgrade : international edition : journal of legal and social sciences / editor-in-Chief Danilo N. Basta. – Year 1 (2006) – . – Belgrade : Faculty of Law, 2006 – (Belgrade : Dosije). – 24 cm

Godišnje. – Sa odabranim radovima koji su već objavljivani u srpskom izdanju

ISSN 1452-6557 = Annals of the Faculty of Law in Belgrade
COBISS.SR-ID 134066956