
# Annals

## of the Faculty of Law in Belgrade

# Belgrade Law Review

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# Анали

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# TOWARDS A NEW PERCEPTION OF SUCCESSION OF STATES IN RESPECT OF MULTILATERAL TREATIES

*The author analyzes the very complex issue of succession of States in respect of human rights multilateral treaties by challenging the automatic succession rule. The analysis focuses on both theoretical perceptions of the automatic succession and its application in practice. In that regard, the article provides for a detailed analysis of not only the relevant jurisprudence of the International Court of Justice and its predecessor the Permanent Court of International Justice, but also the practice of States as regards the rule embodied in Article 34 of the Convention on Succession of States in Respect of Treaties. He devotes proper attention to events relating to the dissolution of the USSR, Czechoslovakia and the former Socialist Federal Republic of Yugoslavia. The article further examines the relationship between automatic suc cession and notification of succession since the two concepts seem to be mutually exclusive. However, it also questions the most important argument in favour of the automatic succession rule the claim that its absence would undermine stability and certainty in the international community.*

Key words: *Succession of States in respect of multilateral treaties. Automatic succession. Successor State. International Court of Justice. No tification of succession.*

The paramount importance of multilateral treaties, especially human rights treaties within the international legal system, has generated extensive discussions on the impact of territorial changes on their validity *vis*-à-*vis* successor States.

The discussion was concentrated on *pro et contra* the automatic succession principle, as alleged by the only legal means of ensuring stability and certainty in treaty relations. It appears that such approach was

simplistic, based on the specific perception of the succession of multilateral treaties.

A different perception of the essence of succession offers scope for the construction which safeguards the application of substantive provisions of general multilateral treaties expressing interests of the international community as a whole, on the one hand, and protects the interests as well as practice of the successor States, on the other, outside the framework of automatic succession.

## 1. THEORETICAL VIEWS

The theory of automatic succession of treaties is not new. It is basically a *ratione materiae* narrowed projection of the oldest theories of succession of States, based on the strict analogy with the notion of inheritance in civil law and the concept of legal succession (substitution + continuation) according to which "(d)er Nachfolger des Volkerrechts aber tritt im Rechte und Pflichten seines Vorgängers so ein als wären es seine eigenen.[1]

In a new, modified form it emerges in the pronouncements of various UN human rights bodies during the 1990ies of the last century. *Exempli causa*, the Human Rights Committee at its session in March/April 1993 declared that "all peoples within the territory of a former State party to the Covenant (International Covenant on Civil and Political Rights – M.K.) remained entitled to the guarantees of the Covenant and that, in particular, Armenia, Georgia, Kazakhstan, Kyrgyzstan, Tajikistan, the former Yugoslav Republic of Macedonia, Turkmenistan and Uzbekistan were bound by the obligations of the Covenant as from the dates of their independence".[2] Similar terms were couched in a declaration with regard to Bosnia and Herzegovina, Croatia and the Federal Republic of Yugoslavia.[3] Kamminga, one of the protagonists of automatic succession of human rights treaties says, trying to explain the special position of human rights treaties, says: "From policy point of view, its importance lies in the fact that massive human rights violations often occur precisely during the period of political instability which tends to accompany State succession. In such circumstances there is an urgent need to know the precise extent of the international obligations which are incumbent on the successor State".[4]

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[1] H.M. Huber, *Beiträge zu einer Lehre von der Staatensuccession*, Berlin 1897, 14.

[2] UN Doc. A/49/40, para 39.

[3] *Ibid.*, para 48.

[4] M. Kamminga, "State Succession in Respect of Human Rights Treaties", *Euro pean Journal of International Law* (*EJIL*) 7/1996, 470.

These and similar declarations and considerations are rather a statement of policy [5] or a plea for the establishment of automatic succession as regards human rights treaties, than a legal argument supporting its existence in terms of positive international law.

The argument that possesses some credibility in legal terms seems to be a doctrine of acquired rights, according to which "rights granted under human rights treaties are not affected by state succession..."[6] For "As a matter of fact private rights may consist not only of property rights..."[7], and the doctrine of acquired rights "applies *a fortiori* with respect to human rights".[8]

The only legal means by which the principle of acquired rights might be extended to human rights is an analogy, for, as Kamminga correctly states, private rights may consist not only of property rights "as a matter of fact". Not as a matter of law as it stands.

Analogy *in concreto* involves reference to the opinion of the Permanent Court of International Justice in the case of German Settlers in Poland. In its advisory opinion the Court stated *inter alia*: "Private rights acquired under existing law do not cease on a change of sovereignty. No one denies the German civil law, both substantive and adjective, has continued without interruption to operate in the territory in question. It can hardly be maintained that although the law survives, private rights acquired under it perished..."[9]

The extension of the opinion of the Court as regards acquired rights to human rights appears to be a complicated matter.

Apart from inherent controversies of the very notion of acquired rights[10] some intrinsic requirements needed to be met for the application

[5] In that regard it should be noted that after the presentation of her report the President of the Human Rights Committee, Professor Rosalyn Higgins, drew attention to the fact that the mere presence of the Bosnian delegation was a proof in itself, indepen dently of any formal notification of succession, that Bosnia and Herzegovina was auto matically bound by the Covenant from the date of its independence. CCPR/C/SR.1200, 9 November 1992, 5, s. 14). In fact, Bosnia and Herzegovina issued subsequently, on 1 September 1993, notification of succession as regards the Covenant on Civil and Political rights. Even more importantly, notifications of succession of Bosnia and Herzegovina were not couched in terms of automatic succession. In its notification of succession of 29 September 1992, Bosnia and Herzegovina stated: "The Government of the Republic of Bosnia and Herzegovina having considered the Convention on the Prevention and Punish ment of the Crime of Genocide...wishes to succeed in the same and undertakes faithfully to perform and carry out all the stipulations contained therein with effect from 6 March 1992..." Memorial of Bosnia and Herzegovina, 3.52, 75 76.

[6] M. Kamminga, 472.

[7] *Ibid*.

[8] R. Mullerson, *International Law, Rights and Politics*: *Developments in Eastern Europe and the CIS (The New International Relations),* Routledge, 1994, 154 157.

[9] PCIJ, *German Settlers in Poland Case,* Series B, No 6, 36.

[10] See Second Report on Succession in respect of matters other than treaties by M. Bedjaoui, Special Rapporteur, Doc. A/CN.4/216/Rev. 1, YILC 1969, vol. II.

of analogy. Two of them are of special relevance in this particular matter. *Primo*, the facts surrounding the issue of acquired rights in German Settlers case must be identical or substantially similar to those relating to human rights.[11] Further, the issue was considered outside the context of succession of States.[12] Finally it appears that the real issue the Court dealt with was the principle of equality of nationals stipulated by the Minorities Treaty. For, as the Court stated: "By the Minorities Treaty Poland has agreed that all Polish nationals shall enjoy the same civil and political rights and the same treatment and security in law as well as in fact. The action taken by the Polish authorities under the Law of July 14th, 1920, and particularly under Article 5 is undoubtedly a virtual annulment of the rights which the settlers acquired under their contracts and therefore an infraction of the obligation concerning their civil rights. It is contrary to the principle of equality in that it subjects the Settlers to a discriminating and injurious treatment to which other citizens holding contracts of sale or lease are not subject. [13]

*Secundo*, temporal element must be taken into account in the application of analogy. The purpose of using the analogy lies in filling *lacunae* in law in the judicial process or in the construction of *de lege ferenda* in theoretical considerations.

Hence, the importance of the state of affairs in the law of succession with respect to multilateral treaties, including human rights, in a given moment. Do *lacunae* exist in that regard?

If, as it seems from the consistent[14] practice of the successor States in the last decade of the 20th century, accepted by members of the international community, the customary rule is inconsistent with the doctrine of automatic succession emerged, then *lacunae* and the use of analogy in judicial process have no place. The analogy with acquired rights in this

[11] "It is not easy to equate acquired rights with human rights. The acquired rights, in contrast to human rights, derived from the contracts or national law. In its advisory opinion the Court dealt with acquired rights in a specific way dictated by the circum stances surrounding the issue." For that reason the Court did not consider the question "whether and under what circumstances a State may modify or cancel private rights by its sovereign legislative power". PCIJ, Series B, No 6, para 88.

[12] "The Court is here dealing with private rights under specific provisions of law and of treaty, and it suffices for the purposes of the present opinion to say that even those who contest the existence in international law of a general principle of State succession do not go so far as to maintain that private rights including those acquired from the State as the owner of the property are invalid as against a successor in sovereignty". *Ibid.*, para 89.

[13] *Ibid.*, para 90.

[14] Discussing the formation of a new rule of customary international law, the Court stated: "...an indispensable requirement woud be that within the period in question, short though it might be, State practice including that of States whose interests are spe cially affected, shoud have been both extensive and virtually uniform", I.C.J. Reports 1969, *North Sea Continental Shelf*, 1969, 43.

case is possible on a theoretical level, as a basis for the construction of a new rule of succession in respect of human rights treaties in terms of automatic succession.

## 2. JURISPRUDENCE OF THE INTERNATIONAL COURT OF JUSTICE

The Jurisprudence of the International Court of Justice regarding automatic succession of multilateral treaties seems to be unclear and confusing, dictated by the specific circumstances of the cases the Court dealt with.

The issue of automatic succession of human rights treaties was raised in the Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Former Republic of Yugoslavia).

In its Memorial Bosnia and Herzegovina asserted, *inter alia*, that "automatic continuity clearly is, in any case, the prevailing rule of international law, applying to succession of multilateral conventions on human rights, like the Genocide Convention".[15] In the view of Bosnia and Herzegovina, the rule of automatic succession is a part of customary law.[16]

The Third Preliminary Objection, raised by Yugoslavia, has been based on the view that the rule of automatic succession of multilateral treaties embodied in Article 34 of the Convention on Succession of States is not applicable as a rule of customary international law, for it has been in the Convention not as a result of codification but as a result of progressive development.[17]

In its Judgment on Preliminary Objections, the Court refrained from giving answer to the controversy. It found that: "Without prejudice as to whether or not the principle of "automatic succession" applies in the case of certain types of international treaties or conventions the Court does not consider it necessary, in order to decide on its jurisdiction in this case, to make a determination on the legal issues concerning State succession in respect to treaties which have been raised by the Parties. Whether Bosnia and Herzegovina automatically became party to the Genocide Convention on the date of its accession to independence on 6 March 1992, or whether it became a party as a result – retroactive or not of its Notice of Succession of 29 December 1992, at all events it was a party to

[15] Memorial of the Government of the Republic of Bosnia and Herzegovina, 3.33, 65.

[16] *Ibid*, 3.34, 66.

[17] Preliminary Objections B. 1.4.1., 118.

it on the date of the filing of its Application on 20 March 1993. These matters might, at the most, possess a certain relevance with respect to the determination of the scope *ratione temporis* of the jurisdiction of the Court "[18]

But, the Court did not completely exclude the possibility to apply the principle of automatic succession of multilateral treaties of humanitarian nature. Moreover, the wording of successive decisions on the matter gives an impression that the Court, in a shy and indirect way, alluded to such a possibility. First, in its Order on provisional measures of April 1993[19] as well as in 1996 Judgment, the Court stated that the proceedings instituted before the Court "are between two States whose territories are located within the former SFR of Yugoslavia. That Republic signed the Genocide Convention on 11 December 1948 and deposited its instrument of ratification, without reservation, on 29 August 1950".[20] The formulation "whose territories...", being a factual not a legal one, is basically unnecessary, but can act in conjunction with virtually identical wording of para 1 of Article 34 of the Convention.

Further, the Court tacitly accepted the Bosnia-Herzegovina's characterization of the Genocide Convention as a human rights or humanitarian treaty, although it is rather a convention of international criminal law.

Finally, the Court essentially declared retroactive effect as regards parties to the dispute of the Genocide Convention, finding that "the Genocide Convention – and in particular Article IX – does not contain any clause or object or effect of which is to limit... the scope of its jurisdiction *ratione temporis*..."[21]

However, the issue of automatic succession of human rights treaties, and especially of the Genocide Convention, was extensively discussed in the separate opinions of Judges Weeramantry, Shahabuddeen and Parra – Aranguren.

Judge Weeramantry strongly advocated the principle of automatic succession of the Genocide Convention as well as human rights treaties, considering that if the principle is not clearly recognized " the international legal system would be endorsing the curious result that people living under guarantees that genocide will not be committed against them, will suddenly be deprived of that guarantee, precisely at the time they need it most– when there is instability in their State. The anomaly of a

[18] I.C.J. Reports*, Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, ICJ Reports 1996, para 23.

[19] I.C.J. Reports 1993, para 21.

[20] I.C.J. Reports 1996, para 17. Emphasis added.

[21] *Ibid.,* para 34.

grant followed by a withdrawal of the benefits, of such a Covenant as the International Covenant on Civil and Political Rights, becomes compounded in the case of the Genocide Convention, and the result is one which, in my view, international law does not recognize or endorse at the present stage of its development".[22]

In fact, Judge Weeramantry elaborated ten "Reasons favouring the view of automatic succession to the Genocide Convention".[23] But, paradoxically, the two reasons that from a legal point of view are the most promising – "The obligations imposed by the Convention exist independently of conventional obligations" and "It (Genocide Convention M.K.) embodies the rules of customary international law" – do not work in favour of automatic succession. For, if the obligations embodied in the Genocide Convention are customary by nature or exist independently of conventional obligations, then it is unclear why automatic succession to the Convention is vitally necessary?

Judge Shahabuddeen's opinion was that in order to "effectuate its object and purpose, the Convention would fall to be construed as implying the expression of a unilateral undertaking by each party to the Convention to treat successor States as continuing as from independence any status which the predecessor State had as a party to the Convention. The necessary consensual bond is completed when the successor State decides to avail itself of the undertaking by regarding itself as a party to the treaty. It is not in dispute that, one way or another, Yugoslavia is a party to the Convention. Yugoslavia has therefore to be regarded as bound by a unilateral undertaking to treat Bosnia and Herzegovina (being a successor State) as having been a party to the Convention as from the date of its independence.".[24]

It must be admitted that the interpretation of Judge Shahabuddeen is highly creative. As extensive, extratextual one, it exceeds the permissible interpretative framework, especially in relation to the provisions of the Convention as a whole. In addition, it places the successor States in an unequal position in relation to other Contracting Parties, depriving them of the right of choice stipulated by the Convention as regards some of its provisions (for instance, the right to make a reservation on Art. IX of the Convention).

True, Judge Shahabuddeen intended to make a construction that suffices "to answer the question in the case of the Genocide Convention in the light of specific features of this particular instrument".[25] But, based

[22] I.C.J. Reports 1996, Separate Opinion of Judge Weeramantry, 650.

[23] *Ibid.,* 645 653.

[24] *Ibid.,* Separate Opinion of Judge Shahabuddeen, 636.

[25] *Ibid.*

on the judicial presumptions[26] it could not resist further developments in the Genocide case, as regards the status of the FR of Yugoslavia/Serbia in the United Nations and its status *vis*-à-*vis* the Genocide Convention.[27] Last but not least, the basic element of the construction implying "the expression of a unilateral undertaking by each party to the Convention to treat successor States as continuing as from independence any status which the predecessor State had ..." has virtually no support in state practice.[28] Moreover, the practice went in the opposite direction. That practice seems to be in accordance with Article XIII of the Convention, as well as the rule embodied in Article 24(3) of the Convention on the Law of Treaties.

In his separate opinion Judge Parra-Aranguren endorsed the importance of maintaining the application of conventions of a humanitarian character, including the Genocide Convention. To that effect he relied primarily on the Court's position taken in the Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia notwithstanding Security Council Resolution 276 (1970), according to which: "With respect to existing bilateral treaties, member States must abstain from invoking or applying those treaties or provisions of treaties concluded by South Africa, on behalf of, or concerning Namibia which involve active intergovernmental cooperation. With respect to multilateral treaties, however, the same rule cannot be applied to certain general conventions, such as those of a humanitarian character, the

[26] On juridical presumption in the Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia) and other cases in which Yugoslavia/Serbia was involved, see *Ibid.,* Separate Opinion of Judge *ad hoc* Kreća, 658 et seq.

[27] Following the admission of FR of Yugoslavia in the United Nations as a successor State, on 1 November 2000, the Legal Counsel of the United Nations sent, on 8 December 2000, a letter addressed to the Minister of Foreign Affairs of the FRY, expressing, *inter alia*, that "the Federal Republic of Yugoslavia should now undertake treaty actions, as appropriate, in relation to the treaties concerned, if its intention is to assume the relevant legal rights and obligations as a successor State". On that basis the FRY sent a notification of accession to the Secretary General of the United Nations as its depositary on 6 March 2001, United Nations Doc. CN.945.2006.TREATIES 2 (Depositary Notification). In a Note dated 21 March 2001 the Secretary General took note of the instrument *Ibid.* The important element in the reasoning of Judge Shahabuddeen is the position of Yugoslavia taken in Preliminary Objections phase as regards its status to the Genocide Convention for, "If, as no one disputes, Yugoslavia is correct in regarding itself as having always been a party to the Convention, this by parity of reasoning applies equally to the case of Bosnia and Herzegovina" I.C.J. Reports 1996, Separate Opinion of Judge Shahabuddeen, 636. The statement resembles the justification of the failure of the Court to decide meritoriously upon two interdependent issues in the circumstances surrounding the case the status of FR Yugoslavia in the United Nations in terms of state continuity and its status *vis* à *vis* Genocide Convention. What the party or parties consider as the basis of jurisdiction of the Court is one thing and the basis of jurisdiction of the Court is another.

[28] See, supra p. 10 et seq.

non-performance of which may adversely affect the people of Namibia".[29]

The advice of the Court however, cannot be taken as relevant as regards the issue of automatic succession in respect of multilateral treaties, for it has nothing to do with. It only represents an advice regarding those dealings with the Government of South Africa which, under the Charter of the United Nations and general international law, should have been considered as inconsistent with Resolution 276 (1970), because they might imply recognizing South Africa's presence in Namibia as legal.[30]

In the Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), the Court in its Judgment on Preliminary Objections put the Declaration of 27 April 1992 in a broader context of the succession in respect of treaties. Basically, the Court treated it as a notification of succession. The reasoning of the Court, as regards the succession in respect of multilateral treaties, is coloured by the logic of automatic succession.

The Court found that:" In the case of succession or continuation on the other hand, the act of will of the State relates to an already existing set of circumstances, and amounts to a recognition by that State of certain legal consequences following from those circumstances, so that any document issued by the State concerned, being essentially confirmatory, may be subject to less rigid requirements of form.".[31]

And, further, that the idea is reflected in: "Article 2(*g)* of the 1978 Vienna Convention on Succession of States in Respect of Treaties...defining a 'notification of succession' as meaning 'in relation to a multilateral treaty, *any notification, however framed or named*, made by a successor State expressing its consent to be considered as bound by the treaty'".[32]

The Court interpreted "being...confirmatory"[33] in the context of "an already existing set of circumstances... (amounting) to a recognition by that State of certain legal consequences following from those circumstances".[34] Further, that the 1992 Declaration referred "to a class of instruments which was perfectly ascertainable... the treaty 'commitments'... the Genocide Convention was one of these 'commitments'".[35]

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[29] I.C.J. Reports, *Legal Consequences for States of the Continued Presence of South Africa in Namibia,*1971, 55; I.C.J. Reports 1996, 657.

[30] I.C.J. Reports 1971, paras, 117 127, 133.

[31] I.C.J. Reports, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia), Preliminary Objections, Judgment Judg ment, 2008, para 109. Emphasis added.

[32] *Ibid.* Emphasis added.

[33] *Ibid.*

[34] *Ibid.*

[35] *Ibid*., para. 108.

It appears that the Court proceeded from the perception of notification of succession as confirmation that Serbia was bound by a "perfectly ascertainable"[36] class of instruments, which includes the Genocide Convention on the basis of law. Such an understanding might correspond to the grammatical meaning of Article 34 of the Convention on Succession of States in Respect of Treaties.[37]

## 3. LEGAL NATURE OF THE RULE EMBODIED IN ARTICLE 34 OF THE CONVENTION

The crucial question is: what is the legal nature of the rule embodied in Art. 34 of the Convention in terms of dichotomy *lex lata / lex ferenda*?

It seems indisputable that at the time of the adoption of the Convention on Succession of States in respect of treaties, the automatic succession rule was *lex ferenda.*

As an Expert Consultant of the Conference, Sir Francis Vallet, emhpasized:

"The rule (in Article 2 – Succession of States in cases of separation of parts of a State – corresponding to Article 34) was not based either on established practice or on precedent, it was a matter of the progressive development of international law rather than of codification".[38]

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[36] *Ibid.*

[37] Such understanding of the 1992 Declaration seems to be an attempt of the Court to reconcile its interpretation of the Declaration with the dictum in an Armed Activities case. In that case, the Court, dealing with Rwanda's argument that the statement by its Minister of Justice could not have any implications for the Court's jurisdiction since it did refer explicitly to the reservation made by Rwanda to Article IX of the Genocide Conven tion, took a precise and unequivocal position. The Court found that "the statement by the Rwandan Minister of Justice was not made in sufficiently specific terms in relation to the particular question of the withdrawal of reservations. Given the general nature of its word ing, the statement cannot therefore be considered as confirmation by Rwanda of a previ ous decision to withdraw its reservation to Article IX of the Genocide Convention, or as any sort of unilateral commitment on its part having legal effects in regard to such with drawal; at most, it can be interpreted as a declaration of intent, very general in scope". I.C.J. Reports, *Armed Activities on the Territory of the Congo* (New Application: 2002), DR of the Congo v. Rwanda, Jurisdiction and Admissibility, Judgment 2006, para 52; Emphasis added. As a mode of reconciliation should serve, in the approach of the Court, the distinction between "the legal nature of ratification or accession to a treaty, on the one hand, and on the other, the process by which a State becomes bound by a treaty as a suc cessor State..." ICJ Reports 2008, para 109. The difference makes sense in the case of the existence of specific rules of succession in respect of multilateral treaties, *in concreto* automatic succession rule. Otherwise, treaty succession rule as a matter of treaty law.

[38] Summary Records, Committee of the Whole, 48th meeting, 8 August 1978, Doc. A/CONF. 80/16/Add. 1, 105, para 10.

Whether the rule *tractu temporis* became part of general international law throughout customary law or is on the way to becoming?

The State practice following the adoption of the Convention gives a negative answer to this question.

The Minsk Accords of 8 December 1991, signed by Russia, Belarus and Ukraine, providing for the unconditional commitment to honour treaty obligations of the USSR, appeared to lay conventional foundations for universal succession of the treaties of the former USSR. However, the subsequent Alma-Ata Accords modified the commitment to fulfil the treaty obligations of the former Soviet Union to the extent that such continuation was "in accordance with constitutional procedures" of the successor State.[39] Acting on that basis, the Baltic republics opted to accede to the conventions of the USSR in their own right,[40] while Moldova, Uzbekistan and Turkmenistan explicitly adopted the clean State model.[41] Turkmenistan, Kazakhstan, Kyrgyzstan and Tajikistan issued notifications of succession in their own right, without any reference to reservations and declarations made by the Soviet Union as a predecessor State[42] .Consequently, the former Soviet republics widely practised accession, as a means of binding themselves by multilateral treaties to which the USSR was a party.

The practice of the Czech and the Slovak Republics is also not free from inconsistency, although these two States notified the Secretary-General of the United Nations that they consider themselves bound by the multilateral treaties, to which the former Czechoslovakia was a party. Inconsistency is reflected not only in the fact that they consider themselves bound as from different dates (the Czech Republic as from 1 January 1993 and Slovakia as from 31 December 1992), but also because, in spite of confirmatory notifications relating to the multilateral treaties to which Czechoslovakia was a party, they also issued notifications on succession in respect of particular treaties, while they acceded to some others. Thus the Czech Republic became a party to the 1985 International Convention against Apartheid in Sports by succession, whereas Slovakia did not. Also, whereas Slovakia succeeded to most treaties on the date of general

[39] P.R. Wiliams, "The Treaty Obligations of the Successor States of the Former Soviet Union, Yugoslavia and Czechoslovakia: Do They Continue in Force?" *Denver Journal of International Law and Policy* 23(1)/1994 1995, 22 23; see also R. Mullerson, "The Continuity and Succession of States by Reference to the Former USSR and Yugosla via", 42 *International and Comparative Law Quarterly* 42/1993, 479.

[40] J. Klabbers, "State Succession and Reservations to Treaties", *Essays on the Law of Treaties*, (eds. J. Klabbers, R. Lefeber), Martinus Nijhoff Publishers 1998, 111.

[41] B. Stern "Rapport préliminaire sur la succession d'états en matiére de traités", Report submitted to the International Law Associations's Committee on Aspects of the Law of States Succession for the 1996 Helsinki Conference, 675.

[42] J. Klabbers, 113.

notification, the Czech Republic, in a number of cases, succeeded on the basis of notification of succession which followed on a later date.[43] As regards some multilateral conventions, the Czech Republic bound itself in the form of accession, although in question were conventions to which the former Czechoslovakia was a party such as, for example, the Convention on International Civil Aviation.[44]

The legal situation as regards the former Yugoslav republics is much more contradictory. At first, while the FRY stuck to the continuity claim until 2000, Slovenia, Croatia, Bosnia and Herzegovina and Macedonia *ab initio* considered themselves as successor States and were recognized as such by the international community. Further, although declaratively favouring automatic succession in respect of multilateral treaties to which the SFRY was a party, in particular, Bosnia and Herzegovina and Croatia in proceedings before the Court, they did not apply the automatic succession pattern of treaty action in practice. Thus, for instance, Bosnia and Herzegovina designed its notification on succession to the Genocide Convention in terms of a "wish" to succeed to same, which fits in with the concept of succession in its own right, rather than automatic succession. Particularly illustrative is the case of the 1989 Convention on the Rights of the Child. Bosnia and Herzegovina is listed as having succeeded on 1 September 1993, Croatia succeeded on 12 October 1992, Slovenia succeeded on 6 Jul 1992 and Macedonia did so on 2 December 1993.[45] None of these dates corresponds to the dates upon which those republics succeeded the SFRY according to the generally accepted opinion of the Badinter Arbitration Commission.[46] The Commission established the following dates in that regard: 8 October 1991 in the case of the Republic of Croatia and the Republic of Slovenia; 17 November 1991 in the case of the former Yugoslav Republic of Macedonia; 6 March 1992 in the case of the Republic of Bosnia and Herzegovina. Finally, this contradictory practice seems to be nothing more than the expression of a confused and ambivalent attitude towards the automatic succession rule. For example, at a meeting of Legal Advisers on International Public Law convened by the Committee of Ministers of the Council of Europe on 14–15 September 1992, the representative of Croatia noted that Croatia would respect all the treaties of the SFRY unless they conflicted with the Croatian Constitution.[47] Slovenia, as stated by its representative "had been invited to

[43] *Ibid*.,117 118.

[44] P.R. Williams, 41.

[45] *Multilateral Treaties Deposited with the Secretary General, Status as at 31 December 1993*, United Nations Doc. ST/Leg/Ser.E/11 12, 193 194.

[46] *International Legal Materials,* 32/1993, 1587 1589.

[47] Committee of Legal Advisers on International Public Law for the Council of Europe, 4th meeting 14 15 September 1992, 3.

accede to some conventions to which former Yugoslavia had been a party and would like to be invited to accede to other conventions which had been ratified by the former federation".[48]

It comes out that the rule contained in Article 34 of the Convention on Succession of States in Respect of Treaties did not generate the rule of general international law on *ipso jure* transfer of the treaty rights and obligations from the predecessor State to the successor State.

Moreover, before the Convention entered into force in 1996, the automatic succession rule provided in Article 34 was modified by the practice of successor States, followed by acceptance of that practice by existing States. It is important to note that the Convention entered into force with a minimal number of fifteen expressions of consent to be bound almost eighteen years after its adoption, on one side and due to the consent of successor States FYR of Macedonia, Bosnia and Herzegovina, Croatia, Estonia, Slovakia, Slovenia, Ukraine which in their practice after gaining independence did not follow the spirit and the wording of Article 34 of the Convention, on the other.

None of the successor States applied the practice of confirmatory notification in a generalized form, which alone perfectly corresponds with the conception of the *ipso jure* transfer of the rights and obligations from the predecessor State to the successor State(s), but declared themselves bound by the treaties of their predecessor State in their own name, applying different modalities. Besides, universal succession implies not only *ipso jure* transfer of treaty rights and obligations, but transfer *uno ictu* comprising *all* the treaty rights and obligations of the predecessor State, together with the reservations made, excluding boundary treaties or territorial settlement. The fact that the modalities applied have, or may have, the effect of a *continuum* of treaty rights and obligations does not mean automatic succession – although it is implied – because that *continuum* is created not by the operation of the rule of international law (*ipso jure*) but by the will of the successor State It is difficult, *exempli causa*, to qualify the notification of succession of Bosnia and Herzegovina of 29 December 1992 in terms of automatic succession if it states that "*having considered* the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 to which the former SFRY was a party, *wishes to succeed* to the same."[49] Successor States, most of them being at the same time Contracting Parties to the Convention on Succession of States in respect of Treaties, treated the continuity rule provided in its Article 34 "only as the main and general flexible rule covering everything that has

[48] *Ibid.*

[49] Communication from the Secretary General of the United Nations dated 18 March 1993 (ref. C.N. 451 1992, Treaties 5 (Depositary Notification) entitled "Succes sion by Bosnia and Herzegovina". Emphasis added.

emerged in the region involving State succession".[50] The residual and *jus dispositivium* nature of the rules on succession on the one hand, and the general notion of succession of States given in Article 2, paragraph 1 (*b),* of the Convention, leaving aside any connotation of inheritance of rights and obligations on the occurrence of change of sovereignty, on the other, give supportive force to such practice of successor States.

## 4. RELATIONSHIP BETWEEN NOTIFICATION OF SUCCESSION AND AUTOMATIC SUCCESSION

In the light of commonsense and legal consideration, it seems clear that "automatic succession" and "notification of succession" are mutually exclusive. The effect of automatic succession would consist of the automatic, *ipso iure* transfer of treaty rights and obligations from the predecessor State to the successor State. In that case, therefore, the succession does not occur as a result of the will of the successor but on the basis of the norm of international law which stipulates the transfer of treaty rights and obligations as a consequence of the replacement of one State by another, in the responsibility for the international relations of a territory. "Notification of succession" has a rational and legal justification only in cases in which the transfer of treaty rights and obligations or the modalities of that transfer, depend on the will of the successor since, *ex definitione*, it represents "any notification, however phrased or named, made by a successor State *expressing its consent to be considered as bound by the treaty"*. In other words, it is applied in cases when the successor State is not bound by the norms of objective international law, to continue to apply the treaties of its predecessor to its territory after the succession of States but is entitled to consider itself as a party to the treaties in its own name.

Misunderstanding stem from the broad use of the expression "notification of succession".

In United Nations practice such notifications are called – "declarations".[51] "Notification" of a function is a rather loose qualification of the practice of States, in the form of a "note" without the suffix of succession"[52] to declare themselves bound uninterruptedly by multilateral

[50] H. Bokor Szego, "Questions of State Identity and State Succession in Eastern and Central Europe", *Succession of States*, (ed.M. Mrak), Martinus Nijhoff Publishers, 1999, 104 105.

[51] Introduction to the Multilateral Treaties Deposited with the Secretary General, Status as at 31 December 1991 and cited by the International Court of Justice para 6 of the Order of 6 April 1993, note 4.

[52] See, UN Legislative Series, Materials on succession of States (ST/LEG/SER.B/14) 1967, 225 228.

treaties concluded on their behalf by the parent State before the new State emerged to full sovereignty or to deposit their own instruments of acceptance of such treaties, effective from the date of deposit of the new instrument. It would therefore be more opportune to speak of a "declaration of entry into the treaty". Furthermore, the mentioned "notes", as a rule, represented a form of realization of conventional obligations assumed by "devolution agreements".

The true meaning of the expression might be established within the frame of the law of treaties. For, as the special reporter on the law on Succession of States in respect of treaties H. Waldock made it clear: "The Commission could not do otherwise than examine the topic of succession with respect to treaties within the general framework of the law of treaties... the principles and rules of the law of treaties seemed to provide a surer guide to the problems of succession with respect to treaties than any general theories of succession.[53]

The Convention on the Law of Treaties (1969) stipulates in Article 11 (Means of expressing consent to be bound by a treaty): "The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed".

The formulation of Article 11 of the Convention on the Law of Treaties does not exclude the *possibility* of notification of succession being understood as a means of expressing approval to be bound by a treaty. The operationalization of this possibility implies, however, the agreement of the parties for, in the light of treaty law as expressed in Article 11 of the Convention, "notification of succession" undoubtedly comes under *"any other means"* of expressing consent to be bound by a treaty but is conditioned by the phrase "if so agreed". From this viewpoint, *"notification of succession" as a unilateral act of the State*, *constitutes a basis for a collateral agreement in simplified form between the new State and the individual parties to its predecessor's treaties.* Thus "notification of succession" actually represents an abstract, generalized form of the new State's consent to be bound by the treaties of the predecessor State – a form of consent which is, in each particular case, realized in conformity with the general rule of the law of treaties on expression of consent to be bound by a treaty contained in Article 11 if the Convention on the Law of Treaties and prescribed by provisions of the concrete Treaty.

The practice of the Secretary-General as a depositary of Multilateral Treaties confirms such consideration. "The deposit of an instrument

[53] *Yearbook of the International Law Comission* 1968, II, 131, para 53. Also, O'Conell: "The effect of change of sovereignty on treaties is not a manifestation of some general principle or rule of State succession, but rather a matter of treaty law and interpre tation. D.P.O'Conell, *The Law of State Succession,* Cambridge University Press 1956, 15.

of succession results in having the succeeding State become *bound, in its own name, by the treaty to which the succession applies, with exactly the same rights and obligations as if that State had ratified or acceded to, or otherwise accepted, the treaty.* Consequently, it has always been the position of the Secretary-General, in his capacity as depositary, to record a succeeding State as a party to a given treaty solely on the basis of a formal document similar to instruments of ratification, accession, etc., that is, a notification emanating from the Head of State, the Head of Government or the Minister for Foreign Affairs, which should specify the treaty or treaties by which the State concerned recognizes itself to be bound.[54]

## 5. DOES THE ABSENCE OF AUTOMATIC SUCCESSION RULE UNDERMINE STABILITY AND CERTAINTY?

The most important argument in favour of the automatic succession rule is that, in the absence of *ipso iure* transfer of rights and obligations, there appears a time gap or, even termination in the application of the general multilateral treaties expressing the interests of the international community as a whole.[55]

Judge Weeramantry expressed the thesis in following terms: "Without automatic succession to such a Convention (Genocide Convention – M.K.), we would have a situation where the worldwide system of human rights protection continually generates gaps in the most vital part of its framework, which open up and close, depending on the break up of the old political authorities and the emergence of the new".[56]

Such understanding of the effects of automatic succession in respect of multilateral treaties and treaties in general, is a clear demonstration of a specific perception of succession which may prove to be misleading. In that regard the very expression "succession in respect of treaties" is in its brevity imprecise and abstract, and as such can create confusion.

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[54] Summary of Practice of the Secretary General as Depositary of Multilateral Treaties, Doc. ST/LEG/7/Rev. 1, paras 303 305 (footnote omitted, Emphasis added).

[55] Judge Weeramantry observes that "without automatic succession to such Con vention (Genocide Convention M.K.), we would have a situation where the worldwide system of human rights protection continually generates gaps in the most vital part of its framework..." ICJ Reports 1996, Separate Opinion of Judge Weeramantry, 654 655. In similar terms also, Kamminga, 470; I. Brownlie, *Principles of Public International Law*, 1990, 670; M. Bedjaoui, "Problèmes récent de succession d'Etats dans les Etats nou veaux*"*, *Recueil des cours* 1970 II 130, 526; Judge Shahabuddeen in his separate opinion in Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina v. Yugoslavia), I.C.J. Reports 1996, 635.

[56] I.C.J. Reports 1996, Separate Opinion of Judge Weeramantry, 654 655.

*Sedes materiae* of the issue lies in the question – what is the object of the succession of States in respect of treaties? Whether it is treaty qua treaty or rights and obligations that it creates?

The answer seems clear. For, a treaty as a legal act is not law *per se*, but a source of law consisting of rights and obligations. The rights and obligations created by it are the very substance and *raison d'être* of a treaty as a legal act. Without the rights and obligations contained in it, the treaty is an empty form deprived of any legal significance.

This fact should be taken as a starting point in considering the true and genuine meaning of the expression "succession of treaties". In this approach the focus shifts from the continuity of the treaty to the continuity of stipulated rights and obligations, opening up an entirely different perspective on the issues of succession in respect of multilateral treaties. Of particular importance is the fact that such perception of succession does not affect stability and certainty, but on the contrary, maintains in force the provisions of multilateral treaties expressing fundamental interests of the international community as a whole.

All the treaties, including general multilateral treaties, are composed of substantive provisions and procedural provisions.

In contrast to the procedural provisions, the substantive provisions of the general multilateral treaties adopted in the interests of the international community as a whole, being part of the *corpus juris cogentis*, bind any successor State, regardless of whether it is, or is not, a Contracting Party to the treaty. The rules of *jus cogens* as peremptory, absolutely binding rules, bind *a priori* every State, being a successor or predecessor State, "even without any conventional obligation".[57]

In that regard, to speak about the automatic succession of substantive rules contained in universal treaties or general multilateral treaties adopted in the interests of the international community as a whole, is either superfluous or a wrong way of expressing, for those rules are *ab initio et suo vigore* binding on any successor State, regardless of the law on succession of States in respect of treaties.

The different position of the substantive and the procedural provisions of universal treaties or general multilateral treaties which express the interests of the international community as a whole is not contradicting the legal nature of succession in respect of treaties, either.

Substantive obligations in universal treaties being "the obligations of a State toward the international community as a whole"[58] are the obli-

[57] I.C.J. Reports, *Reservations to the Convention on the Prevention and Punish ment of the Crime of Genocide,* Advisory Opinion*,* 1951, 23.

[58] I.C.J. Reports, *Barcelona Traction, Light and Power Company, Limited (Bel gium v. Spain),* Second Phase, Judgment, 1970, 32, para 33.

gations of "a State", regardless of its legal position in terms of whether it is a new State or the existing one. Opposite to them stand procedural provisions of such treaties, including provisions such as those of Article IX of the Genocide Convention, which are not "obligations toward the international community as a whole", but obligations *intuitu personae* which are not binding upon the successor State without its consent.

Apart from these considerations, of the utmost importance is the fact that the practice of successor States acting in their own name, as regards succession in respect of multilateral treaties to which their predecessor States were parties, demonstrates that basically they did not jeopardized the stability of treaty relations. As a rule they decided to be bound, either in the form of notification of succession or in the form of accession, from the date of gaining independence or a slightly different later date. The choice of a later date of commitment, which in itself does not affect the validity of the obligations appertaining to *corpus iuris cogentis*, is primarily a demonstration of the sovereignty to which that successor State is especially sensitive of.

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# ROMAN COMEDY-IN-LAW

*Expositors and translators of the lively Latin comedies of Plautus (250s ca.184 BC) are often too little informed of rules and terms of Roman Law. Sometimes this deficiency leaves readers or, in performance, audiences unaware of amusing irony and clever joking. They find a bland bit of dialogue or unremarkable circum stance where the playwright included, in plays loosely modeled after Greek ones, not only Roman references but Roman humor. Comparison of translations with the Latin behind them shows how much may missed if one does not understand contemporary law pertaining (for example) to personal status and contract, some of it recently de veloped by the Praetores Urbani. Related texts show the richness of Plautus' legal jocular scripts.*

Key words: *Roman law. Roman comedy. Plautus. Stipulatio. Patria po testas.*

## 1. INTRODUCTION

*Nemo censetur ignorare legem* is well known as a principle in Roman jurisprudence, "No one is deemed to be ignorant of a law". Unfortunately such ignorance is common among translators and interpreters of Latin literary texts, with the result that much of importance is lost in translation.

This is true for every genre to some extent, up to the most sublime and majestic. Even the monumental *Aeneid* of Virgil is typically misunderstood at key points, especially when modern readers assess dealings between widower Aeneas and his would-be "wife" widow Dido, who wants him to be her *coniunx*, "husband", by *coniugium*, "marriage" (as

does the Goddess of Marriage Juno), whereas he has intended no such relationship. By rules of the Roman institution *liberum matrimonium* they were never married! Aeneas loves and leaves her, as duty demands. Anachronistic censure of a deserting husband prompts a simplistic reading, since the "she says" is certainly more compelling to us today than the "he says" here. Well-read and perceptive, stylish and lively translators neither suggest in their versions nor acknowledge in their introductions or commentaries what, to a Roman reader, were obvious characteristics of such a personal relationship, and its legal non-consequence.

In Roman comedy not only do features of overall action and particular circumstance have important legal dimension, but also, where a comedy is comical, details of dialogue and of stage action literally play with rules and terms of Roman law.[1] Basic principles of two great divisions of *ius civile* are often involved, from "Law of Persons" constantly, at key moments from "Law of Things". They are usually overlooked. This may be soin part because of our modern distaste for ancient social facts, for associated obsolete and (for us) immoral rules about slaves and women. Many today who admire ancient Roman achievements, among which law is invariably named, know little about it.

Roman comedies, *fabulae palliatae* or "plays in Greek attire", had non-Roman models, mainly from Athenian New Comedy of the 4th and 3rd centuries. Romanization of selected Greek plays for performance before Latin-speaking audiences entailed not only translation, but also adaptation to the different social and legal milieu of Rome. Much alteration is not humorous *per se*, but merely makes what is going on accessible to culturally different, less sophisticated spectators. There is a broad consensus that, unless the dialogue explains an institution or specific rule as Greek, the socio-legal context is Roman. "A decision was made around the turn of the [20th] century that the law in Plautus is pure Roman law".[2]

The first duty of modern expositors of Roman *comedy* is to make a new audience laugh. However, it is the nature of much comic humor, like humor in general, to be contextual. Context must be somehow described to audience who do not live it, and we "barbarians" of the 21st century certainly do not live a Roman life of circa 200 BC.

Some theorists of the risible postulate that laughter is provoked by mixture of [A] surprise and incongruity, which we appreciate from the

[1] A survey of legal aspects of Plautus' comedies, as embodied in lively rhymed translations that the author provides, appeared in L. Estavan, "Roman Law in Plautus", *Stanford Law Review* 5/1966, 873 909. An exemplary treatment in detail of how quite a list of diverse elements of Roman law are involved in a single play, *Aulularia* (Molière's model for *L'Avare*), is B. Compton, "Roman Law [in Plautus]", at *http://vroma.org/~plautus/lawcompton.html.*

[2] L. Estavan, 874.

standpoint of what we expect and know, with [B] a feeling of superiority over someone else, which delights and reassures us. Whenever we do not bring information enough to a joke, or do not feel that we belong to the world that it inhabits, ithas little impact. We may nod, yes, and smile, agreeing that this or that could be funny in some formal sense, yet we do not laugh as heartily or sincerely as a first audience must have done. *Incongruous* and *alien* are not the same quality, any more than their respective effects – *laughter* and *puzzlement*.

Interpreters of comedy from "long ago and far away" have a difficult task indeed.

## 2. PLAUTUS THE ROMAN

It is not hard to adduce instances of under– or unperceived and therefore missed legal incongruity from the great comic writer T. Maccius Plautus (250s-ca. 184 BC). In English translations by the late E. F. Watlingin the widely used Penguin paperback series, let us examine examples from three plays by Plautus that will bemy principal texts for further treatment later: *Miles Gloriosus*, in which marriage-and-property are centrally important; *Mostellaria*, where other rules about ownership and family law are amusingly in play; and the author's late masterpiece *Pseudolus*, where the vivacious humor gains from understanding status and contract law.[3]

### 2.1. *Mostellaria*: *Fides* of His Father?

In *Mostellaria*, "Ghost Story", a son has turned his urban home into a party center while his father was abroad. To steer the suddenly returned old man Theopropides away from the scene of the debauchery a quick thinking slave—Tranio, the protagonist of Plautus' farce—tells him that the place is haunted. Furthermore, in order to buy and free his slave-girlfriend the errant lad has also borrowed a significant sum of money from the nasty money-lender Misargyrides. Tranio tricks the old master into promising to repay it! (We treat the promise itself later.) The amount that the money-lender demands of him, Tranio hastily explains, is part down payment on a replacement dwelling. In fact, this is the next door neighbor Simo's house, as Tranio, further improvising, leads Theopropides to believe:

[3] E. F. Watling, translator, *Plautus: The Rope and Other Plays* (containing *Mostellaria*), Penguin Books, Harmondsworth 1964; and *Plautus: The Pot of Gold and Other Plays*, Penguin Books, Harmondsworth 1965. Both frequently reprinted. In fact, these versions, though perhaps more British than American in colloquialism, are otherwise quite praiseworthy, and still come across well nearly half a century after they first appeared.

Theopropides: Have you remembered yet? [scil., what house my son bought]

Tranio [aside] I wish he'd drop dead. . . .Yes, sir, of course I remember now ... this house next door is the one your son has bought.

Theopropides: Really? No joking?

Tranio [aside]: It'll be no joke if you don't give us the money – a good joke if you do.

The Latin reads this way:

TH. Quid igitur? iam commentu's?

TR. Di istum perduint— (immo istunc potius) de vicino hoc proximo tuos emit aedis filius.

TH. Bona fide?

TR. Siquidem tu argentum reddituru's, tum bona si redditurus non es, non emit bona. (*Most*. 667–672)

Law of *emptio-venditio*, "buying and selling" is an essential feature of the Roman context, but here also the fundamental legal-moral standard of *bona fides* comes in. The joke here is not about joking at all, as in the translation, but rather about the "good faith" of an enforceable promise to pay, however bad the ground: the money-lender himself is not party to a deception and money *is* owed in payment of a debt, never mind that Theopropides supposes his slave refers to an (entirely fictitious) purchase that, he thinks, he is supporting by the promised payment.

### 2.2. *Miles gloriosus*: tell it to the judge!

*Miles Gloriosus*, "Braggart Soldier", is titled after one of its author's grandest blocking figures.[4] Mercenary captain Pyrgopolynices of Ephesus has gotten possession of Philocomasium, girlfriend of Pleusicles of Athens. She was evidently poor but free. The soldier can lawfully *own* her *in Ephesus*, however, since she was captured, "fair and square", by pirates at sea. Her lover Pleusicles has arrived and is staying with Periplectomenus, an old family friend who lives next door. Pleusicles' clever slave Palaestrio also came into the captain's possession and now serves in his household.

Sceledrus, another slave of the soldier, has seen the girl kissing her Athenian lover in the neighbor's courtyard, which she secretly enters through a hole in a party wall. Sceledrus is reluctantly persuaded, never quite convinced, that he only saw the girl's fictitious twin sister. Then he

[4] Viz., persons who impede the happy union of lovers in a romantic comedy. The only ones of comparable roguish grandeur are the pimp Ballio, whom we shall soon meet, and Euclio in *Aulularia*, model for Molière's grand miser Harpagon.

sees Philocomasium in front of Periplectomenus' house. Although she claims to be the twin, he reverts to his initial (and correct) accusation. He seizes her, with Palaestrio looking on:

Philocomasium [struggling]: Are you going to let me go?

Sceledrus: No. You come quietly, or I'll drag you home by force whether you like it or not.

Philocomasium: My home is in Athens and so is my master.[5] This house is where I am a guest. I don't know what home you are talking about; I don't know either of you and I've never seen you before.

Sceledrus: You can have the law on us then. I'm not letting you go, unless you promise on your honor you'll go back home – in there. [Indicating the Captain's house.]

Philocomasium: Well, you're too strong for me, whoever you are. Very well, I'll promise, if you'll let me go, I'll go home as you tell me.

Sceledrus [releasing her]: There, then you're free.

Philocomasium: Thank you; now I'm free, and now I'll go.

[She pops back into Periplectomenus' house.]

Sceledrus: Trust a woman!

The Latin text:

PH. Mittis me an non mittis?

SC. Immo vi atque invitam ingratiis, nisi voluntate ibis, rapiam te domum.

PH. Hosticum hoc mihi domicilium est, Athenis domus est Atticis; ego istam domum neque moror neque vos qui homines sitis novi neque scio.

SC. Lege agito: te nusquam mittam, nisi das firmatam fidem, te huc, si omisero, intro ituram.

PH. Vi me cogis, quisquis es. do fidem, si omittis, isto me intro ituram quo iubes.

SC. Ecce omitto.

PH. At ego abeo missa.

SC. Muliebri fecit fide. (*M.G.* 449–456)

*Fides* is again involved, here in "give solemn assurance"; furthermore, the bitter jibe about woman's lack of "trust" comes nicely through in the English. However, there's another a joke of a kind that goes back to Aristophanes, centuries before, and abides today. It lies in the words *Lege agito*: "Go ahead and sue me!" or, closer to the conciseness of the

[5] "Master" is wrong and not in the Latin. Philocomasium is poor and fatherless, and has been prostituted by her mother; but she is free as I understand lines 100 112 of this play, a delayed prologue spoken by Palaestrio.

script, "Sue me!" Watling's translation: "You can have the law on us then" is neither accurate nor funny. It is especially funny because here a slave taunts another slave, neither of whom could have any standing in a Roman court.

Two American translations do better justice to the Latin, but still miss the incongruity. Poet Philip Roche proposes: "Take it to court, then", while late great expositor of comedy Erich Segal has it right: "Go and sue me!"[6]

### 2.3. *Pseudolus*: Watch What You Promise!

The most brilliant of Plautine clever slaves gives his name to the play *Pseudolus*. Here the enemy is a spectacularly wicked slave owner-pimp, from whom the title character must somehow acquire a slave girl whom his young master loves. The shameless, super-confident trickster has warned both his old master Simo and the pimp Ballio that from one of them he is going to exact the girl's purchase price, which a rich soldier had promised.

The captain's orderly delivers the cash with a letter of instruction: Ballio is to turn the girl over to this representative. Pseudolus, however, claiming to be the pimp's agent, intercepts the letter, then dresses up an accomplice as a soldier. *He* presents the letter and receives the girl from Ballio, who thinks the girl is safely on her way to the captain, with the payment soon to follow. So confident is he that he has defeated Pseudolus, that this conversation takes place:

> Ballio: Congratulations, Simo! Come, give me the hand of a lucky man.
>
> Simo: Why, what –-
>
> Ballio: It's all over.
>
> Simo: What's all over?
>
> Ballio: You have nothing more to fear.
>
> Simo: Has Pseudolus been to see you?
>
> Ballio: No.
>
> Simo: Then what are you so joyful about?
>
> Ballio: That money's quite safe – the two thousand drachmas that Pseudolus wagered he'd get out of you – it's safe and sound.

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[6] P. Roche, translator, *Three Plays by Plautus,* New American Library, New York 1968, 141; and E. Segal, translator, *Plautus: Four Comedies*, Oxford University Press, Oxford 1996, 24. Segal's note (226 n 24) to this says, "though this sounds like modern slang, the phrase literally translates Plautus' *lege agito*". Even Segal,however, misses the *bona fides* humor at *Most*. 670, translating "I can't believe it's true!" (162). His book*Roman Laughter: The Comedy of Plautus*, Oxford University Press, Oxford and New York 1987[2] remains perhaps the best English study of the author.

Simo: Well, I hope it is, by Jove.

Ballio: You can touch me for two thousand if he gets possession of that girl today and hands her over to your son as he has undertaken to do. Go on, ask me to promise it; please do; I'm longing to promise it to you, to convince you that you're in the clear. I'll give you a woman too, if you like.

Simo: All right, on those terms I can't see that it can do me any harm to clinch your bargain. You'll give me two thousand.

Ballio: Two thousand I will give you.

Simo: I look like doing pretty well out of this ...

Plautus' actual, equally lively dialogue is the following in Latin:

BAL. O fortunate, cedo fortunatam manum,

SIM. Quid est?

BAL. Iam.

SIM. Quid iam?

BAL. Nihil est quod metuas.

SIM. Quid est? venitne homo ad te?

BAL. Non.

SIM. Quid est igitur boni?

BAL. Minae viginti sanae et salvae sunt tibi, hodie quas aps te est instipulatus Pseudolus.

SIM. Velim quidem hercle.

BAL. Roga me viginti minas, si ille hodie illa sit potitus muliere sive eam tuo gnato hodie, ut promisit, dabit, [roga opsecro hercle, gestio promittere.][7] omnibus modis tibi esse rem ut salvam scias; atque etiam habeto mulierem dono tibi.

SIM. Nullum periclumst, quod sciam, stipularier, ut concepisti verba: viginti minas dabit?

BAL. Dabuntur.

SIM. Hoc quidem actumst hau male. (Ps. 1065–1078)

These are the first occurrences of the Latin deponent verbs *instipulari* and *stipulari*, which are technical terminology for binding, enforceable verbal promise. "Stipulating" required a question and corresponding answer between authorized, competent parties.[8] Variations from that re-

[7] Some editors reject this line, as the square brackets indicate. However, Watling translates it rightly. It is too good a joke for an interpolator to have added and consistent with Plautus' play with the contract *verbis* elsewhere in the script.

[8] See W. W. Buckland, revised by P. Stein, *A Text Book of Roman Law from Au gustus to Justinian*, Cambridge University Press, Cambridge 1963[3], 434 442. This is the chief authority for my understanding of Roman law, even two centuries *before* Augustus,

quirement can be comical, and we shall see some of these later. One is referred to here, looking back to a playful conversation between Simo and his own slave Pseudolus that Itreat later. The problem with the English version, here and in those other instances of stipulatory dialogue, is that the seriousness of such a promise is not conveyed, at least when, as here, all the requirements are satisfied. Even the conditional clause "if he gets", etc., is realized, because Ballio has put the girl into the hands of an cohort of Pseudolus, and the young master Calidorus, Simo's son, is already enjoying her company![9]

## 3. PLAYING LAYWER

As already noted, Roman comedies had non-Roman models, mainly from Athenian New Comedy. Sometimes the Roman comedians who based their plays, however loosely, upon such "originals" had to explain the different customs and law of Athens or some other Hellenic or Hellenized state to their audience (for example, Athenian rules about kinsmen's responsibilities toward an orphaned heiress, in the *Epidicus* of Plautus and the younger poet Terence's *Phormio*).

Not every Roman, of course, knew all there was to know about Roman law (*ius*), Roman laws (*leges*), and equitable procedure (praetorian *edictum perpetuum*). A gentleman *patronus* who knew enough of it might well get caught up in tangled legal affairs of a dependent and perhaps miscreant *cliens*, as happens to Menaechmus of Epidamnus in Plautus' "comedy of errors" play *Menaechmi* (571–595).[10] Moreover, although jokes at the expense of lawyers, jurors, and the like are as old as Attic Old Comedy in the 5th century BC, one of the finest occurs in the aforementioned *Phormio* of Terence. It seems thoroughly un-Greek, through and through Roman: A father whose son has married during the old man's absence abroad wants him to divorce his young wife and to marry someone else. (The hilarious Greek plot actually makes both one and the same girl—but that does not concern us here.) Normally the famous and potent Roman *patria potestas*—with a much weaker Athenian counterpart or

since it offer much on unfortunately undatable evolution of the law from the time of the XII Tables (mid 5th century BC) to the later Republic. The plays of Plautus might even be used, with caution, to give this or that innovation a rough *terminus ante quem*.

[9] Lionel Casson's non verse version gets it almost right. Ballio says, "let's make it official". Simo complies: "All right do you hereby agree to give me five thousand dollars on those terms?" Ballio answers, "I do hereby agree". L. Casson, *Plautus: The Menaexhmus Twins and Two Other Plays*, New York, W. W. Norton, 1961, 136 137.

[10] L. Estavan, 907f, offers a couple of briefer examples, but surprisingly overlooks this amusingly angry complaint about an entire day wasted in the Forum. In Shakespeare's *Comedy of Errors* Antiphilus of Ephesus has "some business in the town" and is later himself arrested; but there is no counterpart to Menaechmus' plight.

without—would permit the father to compel both actions; however, a court had commanded the son to marry the girl because of Athenian rules about orphaned heiresses. The father summons to advise him, and on to stage for us to overhear, three *advocati* as legal counselors. They bear names of Greek philosophers from competing schools and give three different pieces of advice. "Sue to reverse the court decree!", "You cannot sue to reverse the decree!", "We need to deliberate further!" *Quot homines, tot sententiae*, grumbles the old man, no better off than before: "As many opinions as fellows". The entire scene seems Terence's invention, a rare bit of socio-legal satire to make analien rule more (and laughably) Roman.

Let us return to our three plays and their broader legal issues, with which Plautus and his audience have some fun.

### 3.1. *Miles Gloriosus*: 'To Have and to Hold'?

In *Miles Gloriosus* the defeat of the military braggart depends upon his willingness to free and send away the Athenian girl he now owns—and with her, clever slave Palaestrio. He will do this in order to marry a beautiful married woman named Acroteleutium (in fact, an elegant prostitute) who supposedly adores him, and to take possession of the fine house next to his, said to be part of her dowry. (It actually belongs to her patron, old bachelor Periplectomenus who is helping Pleusicles to extricate his girl from the soldier's ownership). The story given to Pyrgopolynices is that the beautiful woman has already ejected her husband, and awaits him in "her" house. There the neighbor will arrest him for trespass and, claiming to be Acroteleutium's husband, for flagrant intention of adultery. The house is, of course, his; and if he and the prostitute wish for an hour or two to be married—they are! The soldier is threatened with a beating and, through some coarse word-play on *testes* and cognates (which refer to witnesses required for assorted legal transactions), with castration.

Roman law of civil marriage, *justum matrimonium*, developed to a point where a legitimate union existed from the moment the eligible man and woman wished to be husband and wife. It ended as soon as either ceased so to wish. (Whether a formal, witnessed "repudiation" was necessary is not clear.) Other, archaic, more binding forms of marriage gradually obsolesced, while this one proliferated. Known by the jurists as *liberum matrimonium*, this if anything understates the tenuousness of what can hardly be called "wedlock"! No rites, no witnesses were required for marrying; and for divorcing, no court decre.[11] There were, of

[11] L. Estavan, 883 888, in his long discussion of marriage, is better in his shrewd and generous selection of texts than in description of the institution itself and more ac curate on dowry (884 86) than on much else.

course, external signs—wedding celebrations, movement of one spouse, usually the bride, to the other's home—and financial pacts, especially ones defining the wife's dowry, assets of which a husband had full use but no share of ownership. These would show the world that a couple were indeed married. However, if each party was not in a father's power but *sui juris*, their bare intention was sufficient. A number of Plautus' plays include an implicit *repudium* or (if only threatened) the explicit rejection of a wife. In *Menaechmi*, for example, an unnamed wife hopes to break a marriage that her unnamed father tries to save (Act V, sc. ii)—and that her husband the local Menaechmus twin brusquely ends. For as he exits to live with his bother in their native Syracuse he puts up for auction, under the hammer of his brother's newly manumitted freedman Messenio, all of his property, including even his wife "if any purchaser comes forward" (*Men*. 1160: *venibit uxor quoque etiam, si quis emptor venerit*). However, one may well wonder whether there isn't a jest here about the archaic form of "*manus* marriage", which certain upper-class families then still used, and in which the husband acquired his wife in full *dominium ex jure Quiritium* (citizen's ownership) by a ritual purchase!

Divorce could be a serious matter. In the mythological comedy *Amphitruo* the title character correctly accuses his wife of adultery. (Subjectively she is innocent, having been seduced by the god Jupiter in Amphitruo's guise, whereas objectively she is guilty—and pregnant with Hercules!) The outraged husband threatens much harsher punishment than quiet separation; indeed the play is at one point more melodramatic than comic. (Ordinary adultery on a wife's part was no laughing matter in comedy Greek or Roman.)

In *Miles Gloriosus*, in contrast, as we have seen the intrigue resupposes that a wife might eject her husband from her dotal house and from her life. Here is how the *meretrix* Acroteleutium confirms her role in the planned deception of the soldier:

> ACROTELEUTIUM. Nempe ut adsimulem me amore istius differri.
>
> PALAESTRIO. Tenes.
>
> ACR. Quasique istius causa amoris ex hoc matrimonio abierim, cupiens istius nuptiarum.
>
> PAL. Omne ordine. nisi modo unum hoc: hasce esse aedis dicas dotalis tuas, hinc senem aps te abiisse, postquam feceris divortium: ne ille mox vereatur intro ire in alienam domum.

My translation:

> Acroteleutium: Clearly I'm to pretend that I'm distraught with love for him?
>
> Palaestrio: You've got it!

Acroteleutium: As if, for sake of this love, I've gotten out of my marriage, desiring to wed him?

Palaestrio: Everything exactly! Except only this: you should say that this house here is part of your dowry, that the old man parted with you after you effected a divorce, so that the soldier doesn't begin to fear entering another man's home.

In fact, as we have seen, a cruel ambush is planned for him inside. Like others of Plautus' plays, this one ends with mayhem enacted and even more threatened. Such sadism seems mostly, even entirely to be his own invention, more to Roman taste than Greek—or to ours. In any case, it depends on Roman legal language and laws. Before witnesses (*testes*) and to defend his endangered sex (*testes*), Pyrgopolyneices swears an enforceable oath not to attempt any action at law against those who have tricked him.[12] He will not try to recover the Philocomasium, or all the valuable clothing and jewelry he had bought for her, or the slave Palaestrio who he has freed and dismissed. He will take no action against those who gave him a thrashing.

### 3.2. *Mostellaria*: *cavebat emptor!*

(This buyer *did* beware!)

Roman rules about debt, about sale, and about lawful contractual capacity for either, come into play in *Mostellaria*. A son like Theopropides' Philolaches, who is evidently *in potestate patria* (as a Roman audience would infer), could neither stipulate nor make a valid contract incurring liability of any kind without his father's authorization. He might, on the other hand, acquire a right to another's payment, delivery, or performance under certain circumstances if his *negotium*, "act of business", was subsequently ratified by the father. The rule prevented an unscrupulous person from taking advantage of a naïve son's appetites, his gullibility, or merely his poor financial judgment. This would certainly apply to a major purchase of real estate. In the *Mostellaria* case, *bona fides* required that if a son incurred a potential obligation (here: remainder of the agreed purchase price of a house suspensively "bought" by a down payment), his father had to discharge it in order to benefit from the deal. A son, as appears to eager Theopropides, might have found a bargain to seize upon. Alternatively a father could walk away from the sale; and if he did, he could recover any down payment that his son had advanced. Under the circumstances in this play, he would still owe what he had unconditionally stipulated to the money-lender, but could recover that amount from his neighbor, vendor Simo, who supposedly received it. So he cannot

[12] This should be understood as a *pactum de non petendo,* both *in rem* and *in personam*; see W. W. Buckland, 573f.

lose—he thinks! In fact, he is bound by his debt *verbis*, and can rescind no actual sale to recover never-paid money. (For a happier ending, a rich friend of his son will discharge that debt for him. And he gets their *un*-haunted house back!)

### 3.3. *Pseudolus*: As Good As His Word!

Finally, we may look into variations on stipulation in the play *Pseudolus*.

Three questions in chronology of Roman law concern (1) how early other language than the prescribed archaic question-and-answer *spondesne? Spondeo* was recognized for enforceable verbal contract; (2) how early a timed condition could be inserted which, if it failed, voided the obligation; and even (3) how early *stipulatio* and the verb from which it derives were applied to this contract *verbis*.[13] Plautus' *Pseudolus* suggests that the answer to all three is "by the 190s BC". One also receives the impression that, although the probably slightly earlier *Mostellaria* is evidence for (1), playfulness here with (2) and (3) suggests this all may be fairly new. As elsewhere, Plautus's humor satirizes a novelty.[14] The answer may well be "not long before 192 BC", since there appears to be a running joke about the principle in this play.

We have already treated one late scene (1065–78) that leads to the dastard Ballio's comic catastrophe, when he realizes that he has lost the girl, owes Simo a great deal of money (and has to pay the soldier back!)--that on every front he has been defeated by his archenemy Pseudolus. However, no fewer than three earlier passages embody stipulatory phrasing: *Ps*. 112–120; 256–60; and 530–556.

> PSEUDOLUS Servus. Satin est, si hanc hodie mulierem efficio tibi tua ut sit, aut si tibi do viginti minas?
>
> CALIDORUS Adulescens. Satis, si futurumst.
>
> PS. *Roga me viginti minas*, ut me effecturum tibi quod promisi scias. roga, opsecro hercle. gestio *promittere*.
>
> CAL. *Dabisne argenti mi hodie viginti minas?*
>
> PS. *Dabo.* molestus nunciam ne sis mihi. atque hoc, ne dictum tibi neges, dico prius: si neminem alium potero, tuom tangam patrem. (112–120)

[13] On history and operation of stipulation see W. W. Buckland, loc. cit. A related problem, which I cannot address, is how early the term *sponsio* was applied more nar rowly to promises by sureties/guarantors.

[14] For Plautus' satirical reference to datable political events and approximately dated legislation see C.H. Buck, Jr., *A Chronology of the Plays of Plautus*, Baltimore, Johns Hop kins Press, 1940. Some. However, of his speculations are probably untenable. W. B. Sedg wick, "Plautine Chronology", *American Journal of Philology* 70/1949, 376 383, adds to and amends some of Buck's findings, which in turn had amended some of Sedgwick's.

Translation:

Pseudolus: Is it enough if I bring it about that this girl today is yours, or if I give you twenty minae?

Calidorus: Enough, if it will happen.

Pseudolus: Ask me for twenty minae, so you know that I'll bring about what I've promised you.

Calidorus: Will you give me twenty minae today?

Pseudolus: I will give it. Don't bother me anymore about it. And so you don't say I didn't tell you, I'm telling you in advance: if I can't touch anyone else for it, I'll do so to your father.

Here the humor is in a quasi-stipulation[15] between two persons, a slave and a son "in power", neither of whom may obligate the other to any such payment. That Pseudolus's master = Calidorus' father is an alternative target—and the eventual one, though only Ballio actually loses money – adds to the slave's insouciance and effrontery.

In a subsequent long scene we meet the shameless pimp. Here is part:

CALIDORUS. Dedi dum fuit.

BALLIO. Leno. *Non peto quod dedisti*.

CAL. Dabo quando erit.

BAL. Ducito quando habebis.

CAL. Eheu, quam ego malis perdidi modis quod tibi detuli et quod dedi.

BAL. Mortua verba re nunc facis; stultus es, *rem actam agis*. (256–260)

Translation:

Calidorus: I gave when there was money

Ballio: I'm not asking for what you have given.

Calidorus: I will give when there is some.

Ballio: You take her when you have it.

Calidorus: Alas, how badly I've lost what I promised you and gave you.

Ballio: The business is over and done, and you're wasting words. You are a fool, you're opening a shut case.

Besides the language of promising and giving, in which Ballio duly avoids making Calidorus' empty promise into a stipulation by not asking for any specified thing or amount of cash, in this exchange smug Ballio gives the young man a brief lesson in law, i.e., likening his decision to sell and deliver Phoenicium elsewhere to the finality of a *res acta.*

[15] Indicated in italic, as will be other technical legal language or its approximation in Latin quoted further below.

Later we overhear this:

PS. Effectum hoc hodie reddam utrumque ad vesperum.

SIMO SENEX. Siquidem istaec opera, ut praedicas, perfeceris, virtute regi Agathocli antecesseris. sed si non faxis, numquid causaest, ilico quin te in pistrinum condam?

PS. Non unum in diem [modo], verum hercle in omnis, quantumst; sed si effecero, *dabin mi argentum, quod dem lenoni, ilico, tua vol untate*?

CALLIPHO SENEX. Ius bonum orat Pseudolus; *dabo* inque.

SIM. At enim scin quid mihi in mentem venit? quid si hisce inter se consenserunt, Callipho, aut *de compecto* faciunt consutis dolis, qui me argento intervertant?

PS. Quis me audacior sit, si istuc facinus audeam? immo sic, Simo: si *sumus compecti* seu consilium umquam iniimus [de istac re] aut si de ea re umquam inter nos convenimus, [quasi in libro cum scribuntur calamo litterae] stilis me totum usque ulmeis conscribito.

SIM. Indice ludos nunciam, quando lubet.

PS. Da in hunc diem operam, Callipho, quaeso mihi, ne quo te ad aliud occupes negotium.

CAL. Quin rus ut irem iam heri mecum statueram.

PS. At nunc disturba quas statuisti machinas.

CAL. Nunc non abire certum est istac gratia; lubidost ludos tuos spectare, Pseudole. *et si hunc videbo non dare argentum tibi, quod dixit, potius quam id non fiat, ego dabo.*

SIM. *Non demutabo*.

PS. Namque edepol, *si non dabis, clamore magno et multo flagitabere.* (530–556)

Translation:

Pseudolus: I shall complete both things [= obtaining your son's girl for him and getting the money from you] by evening.

Simo: If you do accomplish these things as you predict, you will exceed King Agathocles in prowess: but if you don't do it, there's no reason, is there, why I shouldn't consign you straight to the mill?

Pseudolus: No just for one day, but for as many days as I have. But if I do accomplish it, will you give me promptly, voluntarily, the money to give to the pimp?

Callipho (Simo's neighbor): He's making a just request. Say "I will give it".

Simo: But do you know what's just occurred to me? What if they all have plotted together, Callipho, or are acting by agreement with carefully devised trickery to separate me from the money?

Pseudolus: Who would be more daring that I than I if I should dare such a misdeed! Rather, Simo, if we have made a plot, have entered into a secret plan, or have conferred in any way on this business, have me "written" all over with "pens" of elm branches.

Simo: Start your game, whenever you like.

Pseudolus: Please give me your support, Callipho, this one day, so no other business takes you elsewhere.

Callipho: Yesterday I had decided to go to my country estate today...

Pseudolus: Just cancel the plans you carefully decided!

Callipho: Then it's resolved that I won't go anywhere for your sake. In fact, I've a great desire to be entertained by your game. And if I see that he's not paying you the money he has said he would, I will pay it.

Simo: I won't refuse.

Pseudolus: Indeed, by gosh, if you do not pay, you will hear a big and loud public outcry.

Much is going on here. "Old man" Callipho, Simo's neighbor and fellow citizen who is not otherwise involved in the action, is likely added here by Plautus. A conditional promise is guaranteed. The entire scene is comical because Callipho is present to witness what would ordinarily be a *de jure* unenforceable contract between a master and his brash slave; moreover, the amused *senex* even plays co-promissor/sponsor to the stipulation that Pseudolus cajoles from wary Simo. A lawyer, of course, might find formal defects in the language; but do these matter under the circumstances? The slave is *de facto* obligating the master, who later in the play acknowledges an *obligatio naturalis* and *bona fides* debt and pays up— with Ballio's money— to avoid the *flagitium* or public dunning with which Pseudolus threatens him. (The twenty minae may well go to pay Calidorus' debts; however, Simo has not lost an obol, and his son has gotten a pricy concubine for free!)

## 4. CONCLUDING REMARKS

Space does not permit close examination of other rules concerning slaves. However, Lawrence Estavan's article does fair justice to them— literally.[16] In fact, he shows how a comic effect depends up the rules for

[16] L. Estavan, 874 879, although he is in error about a *patronus'* right of life and death over a freedman. A duly freed ex slave was a Roman citizen, and could not be put to death by anyone without a magistrate's authority and after appeal to the people.

Unfortunately the book length study of R. Stewart, *Plautus and Roman Slavery*, Malden, Massachusetts and Oxford, Wiley Blackwell 2012, appeared too late for me to make use of it it. That author carefully surveys much of what has been gathered about law

manumission as they (do not) apply in *Menaechmi*, where one twin Menaechmus gratefully "frees" the other twin's slave Messenio, who, to the former'sastonishment, has claimed to be his (and therefore his to free).

Nevertheless, I may sound a final note of freedom. In *Miles Gloriosus*, as we saw, Pyrgopolynices frees Palaestrio who, under local and international law, is his property. This would not free such a slave from his Athenian master, however, when they both return to Athens, as they will do; under Roman law, on the other hand, Palaestrio could be "vindicated for freedom", when, as we might expect, the grateful girl Philocomasium holds his master and her lover Pleusicles to a *bona fides* ratification at home—not at Athens but in Plautus' virtual Rome. In fact, the star of the show Palaestrio must exit wearing a freedom cap on a second mask that no longer has a slave's long hair. Would Pleusicles dare to tear it off at home? And buy him a hairy wig?! If all this occurs to *us*, construing circumstances twenty two centuries later, it must have been so much the more obvious to spectators who included ex-slaves and likely (beside their masters!) slaves way back then. And amusing.

Those audiences had plenty to laugh at, and we can try to understand what that was. Humor in any comedy is alive, or once lived. What we soberly dissect today from centuries or millennia ago may either be dead at the outset or die under our knife. Complete revival is impossible. On the other hand, partial resuscitation should be achievable, with understanding, imagination, and indeed readiness to laugh. Some of the understanding must come from Roman Law.

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of slaves, her Introduction and Chapters 1 on "Human Property" (21 47) and 4 on "Re lease from Slavery" (117 155). On the whole, this study contributes more to social his tory and sociology than literary appreciation, though her final Chapter 5, "The Problem of Action", adduces much slave humor (some of it rather brutal),treats trickster slaves, and touches further upon slaves' legal disability and vulnerability but not any the comical play with current law. Stipulation is referred to only in two footnotes (pp. 24 n.12 and 176 n.68), and where Plautus' Roman addition to a Greek model is at issue, not his humor; discussion of law of sale is limited to sale *of slaves*.

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# THE SO-CALLED EDICT OF MILAN AND CONSTANTINIAN POLICY

*The focus of the paper is on the so called Edict of Milan in light of its 1700th anniversary that is being celebrated in 2013. Author reflects on the historical, reli gious and political implications surrounding the "Edict of Tolerance", its specific character and underlying legal context as well as its historical significance in the proclamation of religious tolerance. The particular emphasis is given to the analysis of the influence of the predating Edict of Galerius on formation of the Edict of Milan, the general interconnectedness between the politics and religion of the time and the legal and cultural interplay of these documents in the religious policy of the Roman Empire.*

Key words: *Edict of Milan. Constantinian policy. Edict of Galerius. Reli gious tolerance*.

The year 2013 witnesses the 1700th anniversary of the so-called Edict of Milan, sometimes also called the Edict of Tolerance, promulgated by the emperors Constantine and Licinius in the year 313 AD. The characterisation of the edict as a proclamation of tolerance is however strongly contested. A widely used German-language historical dictionary has the following to say about it: "The Edict of Tolerance of Milan (*Mailänder Religionsedikt*), a constitution proclaimed by the Roman emperors Constantine the Great (306–337) and Licinius (308–324) that granted freedom of worship to Christians and any other cult and restored church property. The designation as Edict of Tolerance is imprecise since from a legal point of view it is not an Edict at all, but a delineation of spheres of influence and a proclamation of general religious tolerance."[1]

[1] Fuchs, Konrad, Raab, Heribert (ed.): DTV Wörterbuch Geschichte, s.v. Toleran zedikt, München[11] 1998, 794 795: "Das Toleranzedikt von Mailand (Mailänder Religi

This slight emendation as to the edictal character of the accord between two emperors must be fully supported: more than strictly religious matters, the agreement also settled political differences.

## 1. THE PROVISIONS OF THE MILANESE CONVENTION (313)

Our main sources for the agreement between the tetrarchic emperors Licinius and Constantine, so often mislabelled as the Edict of Milan, are Eusebius and Lactantius. The official bulletin distributed by Licinius in the eastern part of the Roman Empire after his defeat of Maximinius Daia has sometimes been called the Nicomedian Rescript, the Rescript of Licinius or the *litterae Licinii*.[2] This missive comprised several innovations, or rather clarifications as compared to the Edict of Tolerance issued by Galerius in 311: for one, the emperors now proclaim a policy of universal tolerance, that is to say the unhindered practice of any and all cults, not only the Christian religion. Still further, the church was now recognised as an institution under public law. Consequently, the properties and assets of the church, previously confiscated during the persecutions of Diocletian and Maximinus Daia, could now be restored directly to individual communities and need no longer pass through the bishops as trustees. The church itself, as a public corporation, could now directly inherit and bequeath property, a capability that was to contribute enormously to its growing influence and power over the next centuries. Both these innovations are worth citing in full, before we begin to analyse their importance.

On the matter of religious tolerance, the so-called Edict of Milan, as cited by Lactantius, has the following to say:

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onsedikt), eine 313 n. Chr. von den römischen Kaisern Konstantin dem Großen (306 337) und Licinius (308 324) erlassene Konstitution, wonach den Christen die gleiche gottes dienstliche Freiheit wie allen übrigen Kulten eingeräumt sowie das Kirchenvermögen der Christen zurückgegeben wurde. Die Bezeichnung Toleranzedikt ist ungenau, da es sich staatsrechtlich hierbei nicht um ein Edikt, sondern um eine Abgrenzung der Einflusssphä ren und die Proklamierung einer allgemeinen Religionsfreiheit handelte".

[2] For the historical tradition see Keil, Volkmar (ed., transl.): Quellensammlung zur Religionspolitik Konstantins des Großen, Darmstadt 1989 (Texte zur Forschung 54), 58/9; Doerries, Heinrich: Das Selbstzeugnis Konstantins des Großen, Göttingen 1954, 228 232; for older research see Herrmann, Elisabeth: Ecclesia in Re Publica. Die Ent wicklung der Kirche von pseudostaatlicher zu staatlich inkorporierter Existenz. Frankfurt 1980, 201 Anm.155, for more recent studies Kuhoff, Wolfgang: Diokletian und die Epo che der Tetrarchie. Das römische Reich zwischen Krisenbewältigung und Neuaufbau (284 313 n. Chr.), Frankfurt 2001, 926 928 Anm. 1700 / 1701. The bulletin, recorded by Lactantius (mort. pers. 48), was addressed to the governor of Bithynia and publicly dis played on the 13th June 313 in Nicomedia. The same missive is found in Eusebius (HE 10,5,1 14), here addressed to the governor of Palestine. Some textual differences notwith standing, the individual stipulations are identical. On these see further Nesselhauf, Her bert: Das Toleranzgesetz des Licinius, in: Historisches Jahrbuch 74 (1955) 44 61.

> "When I, Constantine Augustus, and I, Licinius Augustus, happily met at Milan and had under consideration all matters which concerned the public advantage and safety, we thought that, among all the other things that we saw would benefit the majority of men, the arrangements which above all needed to be made were those which ensured reverence for the Divinity, so that we might grant both to Christians and to all men freedom to follow whatever religion each one wished, in order that whatever divinity there is in the seat of heaven may be appeased and made propitious towards us and towards all who have been set under our power. We thought therefore that in accordance with salutary and most correct reasoning we ought to follow the policy of regarding this opportunity as one not to be denied to anyone at all, whether he wished to give his mind to the observances of the Christians or to that religion which he felt was most fitting to himself, so that the supreme Divinity, whose religion we obey with free minds, may be able to show in all matters His accustomed favour and benevolence towards us."[3]

Concerning the new corporate right of the church, the Milanese accords include a lengthy description of various properties to be restored, and then specify:

> "And since these same Christians are known to have possessed not only the places in which they had the habit of assembling but other property too which belongs by right to their body – that is, to the churches not to individuals – you will order all this property, in accordance with the law which we have explained above, to be given back without any equivocation or dispute at all to these same Christians, that is to their body and assemblies, preserving always the principle stated above, that those who restore this same property as we have enjoined without receiving a price for it may hope to secure indemnity from our benevolence. In all these matters you will be bound to offer the aforesaid body of Christians your most effective support so that our instructions can be the more rapidly carried out and the interests of public tranquillity thereby served in this matter too by our clemency."[4]

[3] Lact. mort. pers. 48, 2 3: (2)cum feliciter tam ego Constantinus Augustus quam etiam ego Licinius Augustus apud Mediolanum convenissemus atque universa, quae ad commoda et securitatem publicam pertinerent, in tractatu haberemus, haec inter cetera, quae videbamus pluribus hominibus profutura, vel in primis ordinanda esse credidimus, quibus divinitatis reverentia continebatur, ut daremus et Christianis et omnibus liberam potestatem sequendi religionem quam quisque voluisset, quo, quicquid <est> divinitatis in sede caelesti, nobis atque omnibus qui sub potestate nostra sunt constituti, placatum ac propitium possit existere. (3) Itaque hoc consilium salubri ac rectissima ratione ineundum esse credidimus, ut nulli omnino facultatem abnegandam putaremus, qui vel observationi Christianorum vel ei religionem mentem suam dederat, quam ipse sibi aptissimam esse sentiret, ut nobis summa divinitas, cuius religioni liberis mentibus obsequimur, in omni bus solitum favorem suum benivolentiamque praestare. Translated by J. L. Creed. In: Lactantius. De mortibus persecutorum. Edited and translated by J. L. Creed. Oxford 1984 (Oxford Early Christian Texts, ed. Henry Chadwick). See also Eusebius *HE* 10,5,3 5.

[4] Lact. mort. pers. 48,9 10: (9) et quoniam idem Christiani non [in] ea loca tan tum, ad quae convenire consuerunt, sed alia etiam habuisse noscuntur ad ius corporis eo

The agreements concluded in Milan in 313 are hotly contested in modern research. Some see in them a compromise between both emperors, who supposedly had to agree to the toleration of all religious cults, although Constantine had originally only planned to grant this toleration to the Christian faith, whose primacy he intended to impose on the Roman religious landscape. In this view, the so-called Edict of Milan must seem no more than the smallest common denominator between both emperors.[5] But this is to fundamentally misunderstand the importance of the Milanese convention and does no justice to the historical significance of the proclamation of religious tolerance. To fully appreciate this, it is necessary to first consider the Edict of Galerius, which laid the foundations for the later Constantinian and Licinian understanding.

## 2. THE EDICT OF GALERIUS (311)

The great persecutions of Diocletian (303–311) ended in complete disaster for a number of reasons. One contributing factor indubitably was the fact, that the Edicts of Persecution were not uniformly and systematically applied throughout the whole empire.[6] Other important factors were political differences between individual tetrarchs and the unwillingness of parts of the civil service and the populace to participate in the violent persecution of Christians with whom they had peacefully coexisted up to that point. The determined resistance of Christians also did its part by

rum, id est ecclesiarum, non hominum singulorum, pertinentia, ea omnia lege quam super ius comprehendimus, citra ullam prorsus ambiguitatem vel controversiam isdem Christianis id est corpori et conventiculis eorum reddi iubebis, supra dicta scilicet ratione servata, ut ii, qui eadem sine pretio sicut diximus restituant, indemnitaten de nostra benivolentia sperent. (10) in quibus omnibus supra dicto corpori Christianorum intercessionem tuam efficacissimam exhibere debebis, ut praeceptum nostrum quantocius conpleatur, quo etiam in hoc per clementiam nostram quieti publicae consulatur. Translated by J. L. Creed. See also Eusebius HE 10, 5,10 11.

[5] Brandt, Hartwin: Konstantin der Große. Der erste christliche Kaiser. Eine Bio graphie, München[2] 2007, 70 71; Girardet, Klaus Martin: Die Konstantinische Wende. Voraussetzungen und geistige Grundlagen der Religionspolitik Konstantins des Großen, Darmstadt 2006, 99 105, especially 104. Recent source books tend to include only the Edict of Galerius, though this intransigent bias does not apply to church historians. The last source book to include the Edict of Milan as featured both in Lactantius and Eusebius was that of Volkmar Keil (1989).

[6] Eusebius mart. Pal. 13: "But the countries beyond these, all Italy and Sicily and Gaul, and the regions toward the settings sun, in Spain, Mauritania, and Africa, suffered the war of persecution during less than two years, and were deemed worthy of a speedier divine visitation and peace [...]." Translated by Arther Cushman McGiffert. In vol. 1 (ser. II) of The Nicene and Post Nicene Fathers, Second Series, eds. Philip Schaff and Henry Wallace, New York 1908.

evoking admiration as well as distaste.[7] In addition, ever since the abdication of Diocletian and his co-Augustus Maximianus Herculius in 305, the empire had suffered a period of near-constant political upheaval that culminated in the crisis of 311, with Galerius terminally ill.[8] In the face of renewed power struggles after his death, Galerius proclaimed the following edict in his name and those of his co-rulers Licinius, Constantine, and Maximinius Daia, in the hope of restoring peace among the populace and concord with the Gods:

> "When finally our order was published that they should betake themselves to the practices of the ancients, many were subjected to danger, many too were struck down. Very many, however, persisted in their determination and we saw that these same people were neither offering worship and due religious observance to the gods nor practising the worship of the god of the Christians. Bearing in mind therefore our own most gentle clemency and our perpetual habit of showing indulgent pardon to all men, we have taken the view that in the case of these people too we should extend our speediest indulgence, so that once more they may be Christians and put together their meeting-places, provided they do nothing to disturb good order. [...] Consequently, in accordance with this indulgence of ours, it will be their duty to pray to their god for our safety and for that of the state and themselves, so that from every side the state may be kept unharmed and they may be able to live free of care in their own homes."[9]

What was the point of this proclamation that has been interpreted by some historians as a proclamation of tolerance and by others as a reluctant acceptance of the failure of the Diocletianic persecutions and their

[7] Liebs, Detlev: Umwidmung. Nutzung der Justiz zur Werbung für die Sache ih rer Opfer in den Märtyrerprozessen der frühen Christen, in: Ameling, Walter (ed.), Märty rer und Märtyrerakten, Stuttgart 2002, 19 46.

[8] A first climax had been reached with the conference at Carnuntum: here, a total of four legitimate tetrarchs as well as three usurpers struggled with each other for power and the imperial retiree Diocletian tried in vain to prop up the system he had designed. On this see in detail Kuhoff, Diokletian, 826 840. On the illness of Galerius see Lact. mort. pers. 33. Clauss, Manfred: Konstantin der Große und seine Zeit, München 2010[3], 33 rightly rejects the interpretation of Galerius' Edict of Tolerance as the capitulation of a terminally ill man.

[9] Lact. mort. pers. 34,3 5:denique cum eiusmodi nostra iussio extitisset, ut ad veterum se instituta conferrent, multi periculo subiugati, multi etiam deturbati sunt. Atque cum plurimi in proposito perseverarent ac videremus nec diis eosdem cultum ac reli gionem debitam exhibere nec Christianorum deum observare, contemplationem mitissi mae nostrae clementiae intuentes et consuetudinem sempiternam, qua solemus cunctis hominibus veniam indulgere, promptissimam in his quoque indulgentiam nostram credi dimus porrigendam, ut denuo sint Christiani et conventicula sua componant, ita ut ne quid contra disciplinam agant....Unde iuxta hanc indulgentiam nostram debebunt deum suum orare pro salute nostra et rei publicae ac sua, ut undique versum res publica perstet[ur] incolumis et securi vivere in sedibus suis possint. Translation by J. L. Creed.

termination? Some scholars see it as a restoration of the status quo ante, while others recognise in it the approval of Christianity and its church and the intent to integrate the Christian faith into the state structure. To arrive at a valid explanation, it is necessary to closely examine the wording of the decree.[10]

This analysis has to be based on the incontrovertible interconnectedness of politics and religion in antiquity, as evident for instance in the fact that all four *Augusti* styled themselves *Pontifices Maximi* and thus regarded themselves as having final say in all matters of religious cult and the correct worship of the gods.[11] Especially the latter aspect had lately been a growing problem. Ever since the start of the Great Persecution of Diocletian, Christians had neither worshipped the official Roman gods nor the Christian God. They had in fact become godless, *atheoi*, a state of mind that, for ancient Romans, spelled doom and chaos. For that reason alone, if Christians could not be convinced to return to traditional worship, they at least had to be allowed worship of their own God according to their own rites, so that they might entreat him with prayers for the salvation of the emperor and the empire, as well as their own. In allowing this, Galerius had implemented what Christian apologists had been offering for a long time: saying prayers for the emperor as an alternative to imperial and traditional worship.[12] So as to ensure this Christian worship they were now permitted again to congregate freely and to rebuild their ruined and confiscated churches. Galerius did not concern himself with the modalities of this restoration, but left this thorny issue to his successors.

As a precondition for the Christian faith and for prayers offered in support of the emperor gaining acceptance from the state, the legal and judicial condition of Christianity had to be fundamentally changed. This, Galerius did by the simple turn of phrase that Christians should "again be Christians" (*denuo sint Christiani*).[13] This statement has been an intense-

[10] A discussion of older scholarship can be found in Kuhoff: Diokletian, 876/7 Anm. 1651. Recently, the political aspects of the decree have been stressed. Girardet, Klaus Martin: Der Kaiser und sein Gott. Das Christentum im Denken und in der Religion spolitik Konstantins des Großen, Berlin 2010, (Millenium Studien 27), 28 30 sees in the edict of Galerius both the restitution of a status quo ante and the recognition of the inferi ority of traditional gods, and Sol invictus especially, as opposed to the Christian God.

[11] Herrmann Otto, Elisabeth: Konstantin der Große. Darmstadt$^2$ 2009, 59 93.

[12] For prayer on behalf of the emperor see Instinsky, Hans Ulrich: Die alte Kirche und das Heil des Staates, München 1963; Tertullian apol. 30 34, especially 32 and on this Guyot, Peter/Klein, Richard: (eds.): Das frühe Christentum bis zum Ende der Verfolgun gen. I: Die Christen im heidnischen Staat, Darmstadt 3. unveränderter Nachdruck d. Son derausgabe von 1997, 2006, B Nr.2f, commentary: 426 428 and B Nr. 2c e on other apologists such as Justin, Athenagoras and Theophilus, who offered Christian prayer for Roman political supremacy, imperial justice and prudence.

[13] Lact. mort. pers. 34,4; Eusebius *HE* 8,17,9.

ly controversial issue in modern scholarship. Some historians have put forward the notion that Christianity had in fact been legalised by a decree of Gallienus in 260 and that Galerius, by annulling the Diocletianic edicts, did nothing more than restore the status quo ante.[14] This is unacceptable. What Gallienus did was to restore goods previously confiscated by his father Valerianus *ad personas* to Egyptian bishops after they had petitioned him to do so. Recurring usurpations across the empire led him try to remedy the political and social upheavals caused by his father's persecution of Christians. The restoration of cemeteries and community centres to bishops not only in Egypt but across the whole of the empire must therefore not be misunderstood as a universal proclamation of toleration in the sense of accepting Christianity as a *religio licita*. It was simply the cancellation of a now obsolete sanction and the return to the previous status quo.[15]There followed a period of relative peace for the church that was to last 40 years until the beginnings of the Diocletianic persecutions.[16] Individual Christians however were still liable to be indicted on the basis of Trajans famous rescript that criminalised the *nomen Christianum* as such and made it subject to capital punishment.[17] There is today no clear consensus on why the Christian name was punishable. Various reasons might be adduced, political (such as suspicions of treason and conspiracies being plotted under the guise of the Christian faith or the Roman view of Christians as followers of a traitor and criminal) or religious, such as the accusation of superstition (*superstitio*), general hatred of humankind (*odium humani generis*), crimes associated with the *nomen Christianum* (*flagitia cohaerentia nomini*) or the refusal to give sacrifice

[14] On Christianity as *religio licita* see among other Kuhoff, Diokletian, 253 who sees the Christian faith as a *religio licita* not in anyway preferred to other religions but further remarks: "Vielmehr blieb der Vorbehalt des Loyalitätserweises seiner Anhänger für den Staat und seine Lenker weiterhin bestehen." (*ibid.* 253 254 Anm. 696 with a sur vey of recent scholarship) A similar argument is to be found in Girardet: Der Kaiser und sein Gott, 28: "...den Status einer erlaubten Religion (*religio licita*) wiedergewonnen, der ihm in den Jahrzehnten zwischen Kaiser Gallienus (253/60 268) und dem Beginn der letzten großen Christenverfolgung (303) eigen gewesen war."

[15] Eusebius *HE* 7,13,2. Kippenberg, Hans G.: Christliche Gemeinden im römis chen Reich: collegium licitum oder illicitum?, in: Hurtler, Manfred u.a. (eds.): Hairesis, Festschrift K. Hoheisel, Münster 2002, 172 183, esp. 182 183 asserts that Christian *col legia*, while operating without official permit as *collegia illicita* (and therefore practice their religious faith as a *religio illicita*), nevertheless were tacitly seen as having corporate rights. According to this view, we are dealing with a legal grey area, in which Christians in the Roman Empire could live in peace, as long as they did nothing to undermine public order or became involved in conflict with other population groups.

[16] Eusebius *HE* 8,1,1 2.

[17] Plin. ep. 10,96/97. Still essential on this point: Freudenberger, Rudolf: Das Ver halten der römischen Behörden gegen die Christen im 2. Jahrhundert, dargestellt am Brief des Plinius an Trajan und den Reskripten Trajans und Hadrians, München$^2$ 1969 (Mün chener Beiträge zur Papyrusforschung und Antiken Rechtsgeschichte 52).

to the gods or the emperor.[18] But let us now return to the year 313 and the agreement between Constantine and Licinius.

## 3. CONSTANTINIAN POLICY AND THE MILANESE CONVENTION

The so-called Edict of Milan traces back to the same Christian proposition as the provisions of the Edict of Galerius, namely the proposal of Christian faithful to offer prayers to their God on behalf of the Roman Empire. Christian apologists such as the northern African cleric Tertullian had been offering this alternative to traditional and imperial worship for centuries. Tertullian himself in 197 AD had written:

> "For see that you do not give further ground for the charge of irreligion, by taking away religious liberty, and forbidding free choice of deity, so that I may no longer worship according to my inclination, but am compelled to worship against it."[19]

Lactantius, a former teacher of rhetoric at the court of Diocletian in Nicomedia who originally hailed from North Africa and was later to be educator to the sons of Constantine in Trier, warns:

> "But it is religion alone in which freedom has placed its dwelling. For it is a matter which is voluntary above all others, nor can necessity be imposed upon any, so as to worship that which he does not wish to worship." [20]

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[18] Hausammann, Susanne: Alte Kirche. Zur Geschichte und Theologie in den er sten vier Jahrhunderten. Bd. 2: Verfolgungs und Wendezeit der Kirche: Gemeindeleben in der Zeit der Christenverfolgungen und Konstantinische Wende. Neukirchen Vluyn 2001, 9 11. For an overview of accusations against Christians see Molthagen, Joachim: "Cognitionibus de Christianis interfui numquam." Das Nichtwissen des Plinius und die Anfänge der Christenprozesse, in: Molthagen, Joachim: Christen in der nichtchristlichen Welt des römischen Reiches der Kaiserzeit (1. 3. Jahrhundert n.Chr.), St. Katharinen 2005 (Pharos 19), 116 145.

[19] Tertullian, apol. 24,6: videte enim, ne et hoc ad irreligiositatis elogium concur rat, adimmere libertatem religionis et interdicere optionem divinitatis, ut non liceat mihi colere quem velim, sed cogar colere quem nolim. Translated by Peter Holmes and Sydney Thelwall in vol. 3 of The Ante Nicene Fathers, ed. A. Cleveland Coxe, Alexander Rob erts, and James Donaldson. American reprint of the Edinburgh Edition, New York 1918.

[20] Lact. div. inst. epit. 44,1 2: at quin religio sola est in qua libertas domicilium conlocavit. Res est enim praeter ceteras voluntaria nec inponi cuiquam necessitas est. ut colat, quod non vult. Translated in: The Ante Nicene Fathers, ed. A. Cleveland Coxe, Al exander Roberts, and James Donaldson. American reprint of the Edinburgh Edition, vol. 3, Vol. 7. Fathers of the third and Fourth Centuries: Lactantius, Venantius, Asterius, Vic torinus, Dionysius, Apostolic Teaching and Constitutions, Homily, and Liturgies, New York 1918.

Universal toleration or freedom of religion not only meant that each and every person should be able to choose his own religion according to his free will. Freedom of religion also meant that each and every faith should be accorded the same attentions and privileges within the Roman Empire. The previously outlawed Christian community could only be said to be really 'free' and of equal position to other cults, if the corporate character of the church was to be acknowledged. This included legal privileges for clerics analogous to those of the pagan clergy, i.e. tax exemption, and the grant of monies to rebuild places of worship and/or imperial largesse to support a proper building programme.[21] Only thus could the proper forms of worship on behalf of emperor and empire be maintained, responsibility for which fell under the oversight of the emperors as *Pontifices Maximi*.

As sole ruler, Constantine would continue to adhere to the principles of religious freedom. In the year 324 he wrote to the inhabitants of the eastern provinces:

> "However let no one use what he has received by inner conviction as a means to harm his neighbour. What each has seen and understood, he must use, if possible, to help the other; but if that is impossible, the matter should be dropped. It is one thing to take on willingly the contest for immortality, quite another to enforce it with sanctions."[22]

Apart from some notable exceptions, neither were pagan cults prohibited by Constantine, as later claimed by Eusebius and his own son, nor did the emperor force the Donatists back into the catholic faith or restrict

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[21] Tax exemption (immunity) of Christian clergy: Soc. *HE* 1,7; *CTh* 16,2,1 (313); *CTh* 16,2,5 (323); *CTh* 16,2,7 (330); Sozom. 1,15 (pagan clergy); *CTh* 16,8,2 (330); 16,8,4 (331) (Jews); financial grants: Eusebius *HE* 10,7,2 Keil Nr. 4c Kraft, Brief 3 Doerries 18/19 Maier 13. The letter must be dated to march, since Anullinus' response is dated to April 15th 313. For a Christian building programme see Klein, Richard: Das Kirchenbauverständnis Constantins d. Gr. in Rom und in den östlichen Provinzen, in: Börker, Christoph, Donderer, Michael (eds.): Das antike Rom und der Osten. Festschrift K. Parlasca zum 65. Geburtstag, Erlangen 1990, 77 101, esp. 80, and Weber, Winfried: "... dass man auf ihren Bau alle Sorgfalt verwende." Die Trierer Kirchenanlage und das konstantinische Kirchenbauprogramm, in: Fiedrowicz, Michael, Krieger, Gerhard, Weber, Winfried (eds.): Konstantin der Große. Der Kaiser und die Christen. Die Christen und der Kaiser, Trier 2009, 69 96, esp. 71 73; 77; 85, and Brandenburg, Hugo: Die frühchristlichen Kirchen Roms vom 4. bis zum 7. Jh. Der Beginn der abendländischen Kirchenbaukunst, Darmstadt 2004, 20.

[22] Eusebius, *vit. Const.* 2,60. Translated by Averil Cameron and Stuart G. Hall in: Eusebius. Life of Constantine. Translated and with introduction and commentary by Averil Cameron and Stuart G. Hall, Oxford 1999. On this see Fiedrowicz, Michael: "Freiwillig um Unsterblichkeit kämpfen". Christliche Einflüsse in der Religionspolitik Konstantins, in: Fiedrowicz, Michael, Krieger, Gerhard, Weber, Winfried (Hg.): Konstantin der Große. Der Kaiser und die Christen. Die Christen und der Kaiser, Trier 2006, 11 30, who stresses the influence of Lactantius, not of Eusebius, on Constantine in this matter.

the privileges of the Jews.[23]He did however exclude heretics from all privileges.[24] The experiences of the Diocletianic persecution had impressed on the emperor the insight that brute force seldom led to positive results in religious matters.

It is true that, with time, the equal treatment of Christianity gradually evolved into a preferential treatment, as e.g. with the recognition of episcopal jurisdiction (*episcopalis audientia*), ecclesiastic manumission (*manumission in ecclesia*), imperial promotion of ecclesiastical public welfare programmes for the poor, widows and orphans, and other groups on the margins of society, and the transferral of civic and urban monitoring functions to bishops, as concerned, for instance, municipal elections or the management of urban prisons.[25] This favouritism apart, Christianity remained a religion among others, that people could accept or reject of their own free will.

It was not only equal footing in religious or cultic matters that accelerated the spread of Christianity. The granting of corporate status to the church in the Milanese convention created financial opportunities that enabled the church to develop considerable power. In the long run, this would lead to the church being able to rival the state itself, and, after the latters demise in the West, to replace it. The church not only called prestigious and magnificent ecclesiastical buildings and estates its own, but could also claim the distinction of being the largest slaveholder after the emperors themselves.[26] It may therefore rightly be said, that the Milanese convention created the foundation for the later temporal power of the church, by first facilitating the incorporation into state structures of the pseudo-official church organisation and then their instrumentalisation by the emperors in service of the well-being of the Roman Empire.[27] Its historical importance cannot be overstated.

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[23] *CTh* 9,16,2 (319): permission of pagan sacrifice; *CTh* 16,10,1 (320): reference to the *haruspices*; ILS 705 (cult of the *gens Flavia* in Hispellum); *CTh* 12,5,2 (337): privileges of pagan clergy; Eusebius, *vit. Const*. 2,45,1 and *CTh* 16,10,2 (341): alleged prohibition of sacrifice by Constantine; on this as well as on the closing of temples to Aphrodite or Asclepius see Herrmann Otto: Konstantin, 170 172, 244 25; Girardet: Der Kaiser und sein Gott, 98 103.

[24] Noethlichs, Karl Leo: Die gesetzgeberischen Maßnahmen der christlichen Kai ser des vierten Jahrhunderts gegen Häretiker, Heiden und Juden, Köln 1971.

[25] For all privileges see Herrmann: Ecclesia in Re Publica, 207 260; 290 348; Herrmann Otto: Konstantin, 164 169.

[26] Grieser, Heike: Sklaverei im spätantiken und frühmittelalterlichen Gallien (5. 7. Jh.). Das Zeugnis der christlichen Quellen. Stuttgart 1997 (FAS 28); Harper, Kyle: Slav ery in the Late Roman World, AD 275 425. Cambridge 2011.

[27] On this see extensively Herrmann: Ecclesia in Re Publica.

## 4. OUTLOOK

From 313 AD onwards, the agreement struck in Milan has often been seen as an 'Edict' of tolerance, as starting point for the acceptance of the Christian faith by the Roman state. This is an eschatological point of view first put forward by the court historian Eusebius and is not completely congruent with historical fact, though under the impact of the ultimate success of the Christian church, this view did gain almost universal credence. A specifically political importance was seldom accorded to the agreement between emperors, unlike the fictitious Donation of Constantine of later times.[28] The salvific aspect the so-called Constantinian shift (*Konstantinische Wende*) was commemorated a century ago, on the 1.600th anniversary of the so-called Edict. Constantine and his actions providing a template and role-model for both the church and the modern state, both institutions contributed to the festivities: Wilhelm II., emperor of the German Empire of 1870–1918, ordered a reconstruction of the Constantinian *labarum* and then presented it to the Pope. The latter publicly displayed it in the basilica erected to commemorate Constantine's victory over Maxentius in the vicinity of the Milvian bridge.[29]

Thankfully, both church and state of today distance themselves from such historicising triumphalism. The political vision of Constantine, who, after the failure of the Diocletianic persecutions, undertook to integrate the already powerful church organisation into the Roman state and, in continuation of the deathbed-policy of Galerius, to allow the inhabitants of the empire free choice of religion, is nowadays soberly acknowledged.[30] A general toleration and acceptance was commensurate with previously exercised imperial policy and had been the mainstay of relations with different peoples and exotic religions for centuries. It had also, in the minds of the Romans, helped to ensure the prosperity and safety of the empire – by winning the favour of each and every god.

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[28] Quednau, Rolf: Silvesterlegende und konstantinische Schenkung, in: Demandt, Alexander, Engemann, Josef (ed.): Imperator Caesar Flavius Constantinus, Konstantin der Große, Ausstellungskatalog, Darmstadt 2007, 445 447; Miethke, Jürgen: Die konstanti nische Schenkung in der mittelalterlichen Diskussion. Ausgewählte Kapitel einer ver schlungenen Rezeptionsgeschichte, in: Goltz, Andreas, Schlange Schöningen, Heinrich (ed.): Konstantin der Große. Das Bild des Kaisers im Wandel der Zeiten, Köln 2008, 35 108.

[29] Schlange Schöningen, Heinrich: "Der Bösewicht im Räuberstaat". Grundzüge der neuzeitlichen Wirkungsgeschichte Konstantins des Großen, in: Goltz, Andreas, Schlange Schöningen, Heinrich (ed.): Konstantin der Große. Das Bild des Kaisers im Wandel der Zeiten, Köln 2008, 211 262, speziell: 243 247.

[30] Kranjc, Janez: Die religiöse Toleranz und die Glaubensfreiheit das Beispiel des Edikts von Nikomedia und des Mailänder Edikts, in: Felber, Anneliese, Groen, Basi lius J., Sohn Kronthaler, Michaela (ed.): Toleranz und Religionsfreiheit 311 2011, Hildes heim 2012, 57 75.

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# RECONCILING DUE PROCESS AND EFFICIENCY IN INTERNATIONAL ARBITRATION THE ARBITRATOR'S TASK OF ACHIEVING THE ONE WITHOUT SACRIFICING THE OTHER*

*Reconciling efficiency and due process has never been an easy task for arbi trators. This task has in recent years even become more challenging as arbitration rules, arbitral institutions and practitioners in the field of international arbitration in general nowadays attach increased significance to conducting arbitrations in a time and cost efficient manner. The tool arbitrators are given to fulfil their task of balanc ing due process and efficiency is their wide discretion with regard to the conduct of the arbitral proceedings. Arbitrators should not give in to the temptation of granting each and every of the parties' requests for additional submissions, additional produc tion of evidence and extensive oral pleadings. Rather, due process should be under stood in a more qualitative way. Proactive case management and an early involvement of the arbitral tribunal not only in the procedural but also in the substantive issues of a given case can enable the arbitral tribunal to give the parties the maximum oppor tunity to present their case without at the same time sacrificing efficiency.*

Key words: *International Arbitration. Due process. Efficiency. Proactive case management*.

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## 1. INTRODUCTION

It is the general understanding that, in international arbitration, due process and efficiency of the arbitral proceedings are antagonists. From the arbitrator's perspective, it seems hard to guarantee the one without, at least partially, sacrificing the other. Arbitrators are thus faced with the difficult task of reconciling due process and efficiency in each individual arbitration. This has been called the *"never ending battle between efficiency and due process"*.[1]

Fighting this battle, *i.e.* striking the right balance between due process and efficiency is much more an issue in arbitration than in litigation. Unlike judges, arbitrators are bestowed with what is generally called a wide discretion with regard to the procedure to be employed in a given arbitration.[2] This, of course, creates opportunities and will ideally result in proceedings tailored to the particular needs of each individual case. The lack of a rigid procedural framework does, however, also entail several risks. A violation of due process will in almost any jurisdiction have the consequence that the respective award will be set aside or will be denied recognition and enforcement. Apart from the fact that arbitrators are obliged to render an award that is enforceable[3] (and not susceptible to annulment) each decision of national courts in that regard will become publically known. Obviously, arbitrators are against this background usually very keen to stay clear of any violation, or even allegation of the violation of the due process guarantee. The motivation to render an award that is "absolutely waterproof" will thus often induce arbitral tribunals to comply with each and every request of the parties for additional submissions, the admission of additional evidence or very extensive oral hearings. This aggravates the inherent conflict between due process and procedural efficiency.

## 2. BALANCING DUE PROCESS AND EFFICIENCY IN INTERNATIONAL ARBITRATION

Efficiency of the arbitral process is generally understood as efficiency of time and, as a consequence, costs. It has repeatedly been stated

[1] L.Y. Fortier, "The Minimum Requirements of Due Process in Taking Measures Against Dilatory Tactics: Arbitral Discretion in International Commercial Arbitration 'A few Plain Rules and a Few Strong Instincts' ", in: A.J. van den Berg (ed), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, *ICCA Congress Series Volume 9*, Kluwer Law International, Alphen aan den Rijn 1999, 397.

[2] *Cf.* Article 19 (2) UNCITRAL Model Law on International Commercial Arbi tration.

[3] *Cf.* G.J. Horvath, "The Duty of the Tribunal to Render an Enforceable Award", *Journal of International Arbitration* 2/2001, 136 138.

that time is of the essence in any legal proceedings. In international arbitration, this "need for speed"[4] has been discussed extensively in the last several years. The reason for this is twofold. It has, first, not gone unnoticed that arbitrations have over the years become more lengthy and more costly. This can, inter alia, be attributed to factors that directly relate to due process, such as extensive document production or extensive and very expensive oral hearings[5]. There is, second, increasing competition in the market for alternative dispute resolution, and practitioners fear that an arbitral process that is lengthy, complicated and expensive might lose ground to other methods of dispute resolution such as mediation or conciliation.[6]

The most prominent results of the discussion of efficiency-related issues are the revisions of the ICC Rules of Arbitration and the IBA Rules for the Taking of Evidence in International Arbitration. Article 22 (1) ICC Rules now expressly stipulates that the arbitral tribunal as well as the parties are under a duty to conduct the proceedings efficiently and it is emphasized that efficiency always has to be seen in the context of the complexity and value of the dispute. The ICC Rules now also put a strong emphasis on case management. Pursuant to Article 24 (1) ICC Rules, the arbitral tribunal is obliged to conduct a case management conference at a very early stage of the proceedings and to draw up a procedural timetable. The purpose of this new provision is to make sure that the procedure adopted is tailored to the particularities of the case brought before the arbitral tribunal. Arbitrators shall be encouraged to draw up the procedure for each case individually instead of using out of the box boilerplate procedures that might not be suited for the dispute at hand.[7] Likewise a new provision promoting efficiency has been introduced in the course of the 2010 revision of the IBA Rules on the Taking of Evidence in International Arbitration. Article 2 of the IBA Rules now provides that the arbitral tribunal shall consult the parties at the earliest appropriate time in the arbitral proceedings with a view to agreeing on an efficient and fair process for the taking of evidence.

While the term of efficiency is clear cut, the concept of due process turns out to be rather elusive. It can of course be concluded from Article V (1) (b) of the New York Convention and from Article 34 (2) (a) (ii) of the UNCITRAL Model Law that due process, in very general terms,

[4] K.P. Berger, "The Need for Speed in International Arbitration", *Journal of International Arbitration* 5/2008, 595.

[5] S. Elsing, "Procedural Efficiency in International Arbitration: Choosing the Best of Both Legal Worlds", *SchiedsVZ* 3/2011, 115.

[6] *Ibid.*

[7] J. Frey, S. Greenberg, F. Mazza, *The Secretariat's Guide to ICC Arbitration*, ICC Publishing, Paris 2012, 260 261.

means procedural fairness, equal treatment and, especially, the parties' right to be heard. Any attempt of a more specific definition is in effect thwarted by the fact that the only reliable guideline in the arbitration context can be drawn from the judicature of national courts in annulment and enforcement cases. But an award will be annulled or denied recognition and enforcement on the grounds of a violation of due process in the most exceptional circumstances only.

It is thus on the arbitral tribunal to define what due process in a given case actually means. Likewise, the task of reconciling due process with efficiency falls on the arbitrator. The tool that arbitrators are given to that effect is their extensive discretion with regard to conducting the proceedings. There are, however, limits. First and foremost, arbitrators, as a general rule, have to respect the will of the parties and thus usually cannot deviate from procedural agreements. This raises several problems that shall be addressed in turn. Furthermore, the case law of the national courts of the seat and of the likely place of enforcement constitutes an absolute boundary of the arbitrator's discretion.

## 3. THE ABSOLUTE BOUNDARIES OF THE ARBITRATOR'S DISCRETION

### 3.1. The Boundaries Imposed on the Arbitrators' Discretion by National Courts at the Seat or Place of Enforcement

The minimum requirements of due process that have to be met in any constellation and regardless of (in-) efficiency are set by the case law of the national courts of the seat at the arbitration and the likely places of enforcement. As a general observation, violations of due process are frequently asserted by the losing party in an arbitration but successful in the most exceptional circumstances only.[8]

In almost all successful annulment cases and challenges to enforcement the violation of due process had been quite obvious and it rather goes without saying that the arbitration should not have been conducted in the way that actually led to the challenge. In our context this means that, for the arbitrator confronted with the task of reconciling due process and efficiency, the case law of national courts serves as the utmost boundary of his or her discretion or, so to say, as a kind of reality check.

[8] S. Kröll, "Setting aside proceedings in Model Law jurisdictions selected pro cedural and substantive questions from the case law", *International Arbitration Law Re view* 2005, 176; A. Jana, A. Armer, J.K. Kranenberg in: H. Kronke *et al*. (eds.), Recogni tion and Enforcement of Foreign Arbitral Awards, Kluwer Law International, Alphen aan den Rijn 2010, 233.

The constellations where national courts have actually found a violation of due process can be grouped into several categories.[9] The parties are thus, absent any agreement to the contrary, entitled to an oral hearing.[10] Each party must be given the opportunity to comment on evidence submitted by the opposing side, regardless of whether such evidence was submitted directly or indirectly (as, for example, an exhibit to the report of a party appointed expert).[11] The same applies with regard to any evidence introduced to the arbitration by the arbitral tribunal *sua sponte*.[12] Finally, an arbitral tribunal shall not render so called surprise decisions, *i.e.* decisions based on legal or factual considerations it has not previously brought to the attention of the parties.[13]

Notably, it is generally not required that each party be given the opportunity to present and submit all evidence it considers relevant.[14] In particular, the principle of due process is not violated by an arbitral tribunal's decision not to grant disclosure.[15] The guarantee of equal treatment does not demand that in an oral hearing each party be granted an identical amount of time to present its case.[16] This is already a strong indication in favour of our proposition that the concept of due process is qualitative rather than merely quantitative.

### 3.2. The Boundaries Imposed on the Arbitrators' Discretion by Agreements of the Parties

Within the boundaries of the mandatory provisions of the *lex arbiti* and the law of the likely places of enforcement, the parties are free to agree on the procedural rules that shall govern their arbitration. Such

[9] See the overview given by A. Jana, A. Armer, J.K. Kranenberg, 246 251; G. Born, International Commercial Arbitration, Volume II, Kluwer Law International, Alphen aan den Rijn 2009, 2580 2593 and 2746 2760.

[10] G. Born, 1831 1832; *cf.* Article 27(1) UNCITRAL Model Law.

[11] See for example Paklito Investment Limited v. Klockner East Asia Limited, Supreme Court of Hong Kong, Case number MP 2219, 15 January 1993, *Yearbook Commercial Arbitration Volume XIX*, 1994, 671 672; Rice Trading (Guyana) Ltd. V. Nidear Handelscompagnie BV, Gerechtshof, The Hague, 28 April 1998; *Yearbook Commercial Arbitration Volume XXIII*, 1998, 733; a good overview of further cases is given by M. Scherer in: Wolff, *Commentary on the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, Beck, Munich 2012, 306 307.

[12] M. Scherer, 307.

[13] See the overview given by G. Born, 2589; M. Scherer, 307 308.

[14] Robert Fayez Mouawad (Lebanon), Triple M. Mouawad Management & Marketing SAL (Lebanon) and others v. Henco Heneine Construction & Development Co. SARL (Lebanon), Cour d'Appel Paris, 10 January 2008, *Yearbook Commercial Arbitration Volume XXXIII*, 2008, 483.

[15] M. Scherer, 300.

[16] G. Born, 2581.

agreements can already be part of the arbitration agreement, the most pertinent example here being the agreement on institutional rules. But the parties are also free to agree on the procedure after the commencement of the arbitration. Common examples of party agreements that have an impact on the efficiency of the proceedings are agreements on the number, sequence and timing of submissions, the necessity and duration of an oral hearing or the forms of the appointment of experts and the ways in which experts will be examined by the arbitral tribunal.[17] The parties also have the power to agree that an arbitral award has to be handed down within a prescribed period of time.[18]

As a general rule, arbitrators have to respect any procedural agreements by the parties. An arbitral award that disregards such agreements will be set aside and denied recognition and enforcement, respectively, *cf.* Article 34 (2) (a) (iv) of the UNCITRAL Model Law and Article V (1) (d) of the New York Convention. An arbitral tribunal will even have to adhere to the will of the parties where the respective agreement is highly unreasonable and will lead to lengthy and inefficient proceedings.[19] Good examples are party agreements to prolong submission deadlines for a considerable amount of time or to schedule oral hearings that last for several weeks.[20] The arbitral tribunal may in such cases well voice the firm opinion that the intended agreement does not further the cause of efficient proceedings and may in fact defeat the purpose of choosing arbitration in the first place.[21] The persuasive power of the arbitral tribunal is, of course considerable and parties will in most cases give in to any reservations voiced by the arbitrators. But where the parties choose to ignore such advice and to hold on to their agreement, the arbitral tribunal in most cases[22] has no choice but to comply.[23]

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[17] C. Chatterjee, "The Reality of The Party Autonomy Rule In International Arbi tration", *Journal of International Arbitration*, 6/2003, 551.

[18] M. Pryles, "Limits to Party Autonomy in Arbitral Procedure", *Journal of Inter national Arbitration* 3/2007, 328; E. Gaillard, J. Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration*, Kluwer Law International, Alphen aan den Rijn 1999, 681.

[19] G. Wagner, M. Bülau, "Procedural Orders by Arbitral Tribunals: In the Stays of Party Agreement", SchiedsVZ 1/2013, 11.

[20] M. Pryles, 327; G. Born, 1756.

[21] G. Born, 1757.

[22] Arbitrators are not bound by party agreements that violate provisions of manda tory law; *Ibid*. Notably, this includes the general notions of due process. A party agree ment giving, for example, only one party the opportunity to be heard by the arbitral tribu nal will likely be considered invalid by the courts at the seat or the place of enforcement; N. Blackaby *et al.*, *Redfern and Hunter on International Arbitration*, Oxford University Press, Oxford 2009[5], 366; M. Pryles, 329.

[23] Where the arbitrator considers the agreement to be oppressive, unreasonable or improper, the only choice that is left to him or her is to resign, see G. Born, *International*

Arbitral tribunals are, on the other hand, usually very keen to achieve consensus on questions of procedure. Such consensus raises the acceptance of any decision rendered by the arbitral tribunal at a later point in time. Furthermore, consulting with the parties will often increase the quality of the arbitral tribunal's (procedural) decision. It is usually the parties who know their dispute and commercial needs best and their input can thus prove to be very valuable.[24] As has already been mentioned, this insight has recently been reflected in provisions such as Article 24 (1) of the new ICC Rules or Article 2 of the IBA Rules on the Taking of Evidence in International Arbitration that foresee case management conferences and consultations between the parties and the arbitral tribunal at an early stage of the arbitration.

Problems arise where the nature of a case changes during the proceedings. It is, in particular, not uncommon that a dispute starts off relatively simple and in the course of the arbitration turns out to be very complex. Did the parties at the outset of the arbitration already agree on very tight procedural deadlines this might then later create problems with regard to the right to be heard.[25] The arbitral tribunal in such constellations finds itself in a very unfavourable position. It cannot override the original party agreement since doing so would render any ensuing award susceptible to challenges before the national courts. Unless the agreement itself is contrary to provisions of mandatory law, the tribunal will have no choice but to knowingly curtail at least one of the parties' rights to present its case.[26] Remedy can only come from the parties themselves who are of course free to alter the original agreement at any time during the proceedings. But this is not very likely to happen once the proceedings have progressed to a more advanced stage. Due to the adversarial nature of arbitration, one of the parties may well see an advantage in keeping the status quo even in constellations where the old agreement is clearly inadequate and the parties did obviously not consider the change in circumstances that had occurred.[27]

A related question is to what extent arbitral tribunals are bound by their own procedural orders. The underlying problem is more or less the same as above: circumstances change and the procedure envisaged at the beginning of the arbitral process turns out to be inadequate. The general rule here is that the broad discretion that arbitrators enjoy with regard to the conduct of the proceedings also encompasses the right to alter their

*Commercial Arbitration, Volume II*, Kluwer Law International, Alphen aan den Rijn 2009, 1757.

[24] G. Wagner, M. Bülau, 7.

[25] *Cf. Ibid.*, 9.

[26] *Cf.* G. Born, 1757.

[27] G. Wagner, M. Bülau, 9 10.

procedural decisions subsequently.[28] But things get more difficult once the parties get directly involved in the process of drafting the respective procedural order. In Germany, the Higher Regional Court (Oberlandesgericht) of Frankfurt in a decision from 2012[29] has qualified a procedural order as an agreement of the parties because the arbitral tribunal in that case had circulated a draft of the respective order among the parties, discussed the draft with the parties and incorporated the changes suggested by the parties. Finally, the tribunal had included an introductory sentence into the procedural order which stated that the order reflects the agreement of the parties with regard to certain issues. The arbitral tribunal had later on deviated from the stipulations made in the procedural order and the award had as a consequence been set aside. The decision has been confirmed on appeal, albeit with the reservation that the circumstances of the case had been very special and the reasoning of the Higher Regional Court defies generalization.[30]

While the overall impact of the decision of the Frankfurt court will thus be rather limited, the decision shows what can happen if arbitrators are overzealous to make the parties agree on each and every procedural aspect. It is suggested that decisions especially on issues such as the timing of the proceedings and the scope and admissibility of evidence should not be framed as party agreements. This way the arbitral tribunal retains its flexibility to react to unforeseen developments throughout the arbitral process. It is worth mentioning in this context that this strategy fails with regard to the Terms of Reference pursuant to Article 23 of the ICC Rules. The ICC Terms of Reference, which have to be signed by the parties, arguably constitute an agreement by the parties in the meaning of Article 34 (2) (a) (iv) of the UNCITRAL Model Law and Article V (1) (d) of the New York Convention.[31] Arbitrators are against this background well advised not to set out the procedural framework of the arbitration in the Terms of Reference but to rather issue a distinct procedural order for that purpose.[32]

## 4. CRITERIA FOR RECONCILING DUE PROCESS AND EFFICIENCY WITHIN THE BOUNDARIES SET BY THE NATIONAL COURTS AND BY PARTY AGREEMENT

While it is important to know the absolute boundaries of procedural discretion, the arbitrator's task does not end where it has been as-

[28] *Ibid.*, 7.

[29] Oberlandesgericht Frankfurt, 26. Zivilsenat, Case No. 26 Sch 13/10, 17 Febru ary 2011, SchiedsVZ 1/2013, 49 62.

[30] *Cf.* G. Wagner, M. Bülau, 9.

[31] M.W. Bühler, T.H. Webster, *Handbook of ICC Arbitration*, Sweet & Maxwell, London 2008[2], 259; E. Gaillard, J. Savage, 672.

[32] E. Gaillard, J. Savage, 680.

certained that neither the agreement of the parties nor the mandatory requirements under the law of the seat and the likely place of enforcement will be violated. Or in other words: the procedural discretion accorded to arbitrators by most arbitration laws does not mean that arbitrators can do whatever they can want or, rather, whatever they can get away with. The English Arbitration Act 1996 makes that very clear. In Section 33 (b) it is expressly stated that an arbitral tribunal shall

*"adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined."*

Redfern and Hunter have called this *"the arbitrator's duty to act judicially"*.[33] The content of such duty highly depends on the individual case and the scope of possible scenarios is tremendous. The subject matter therefore defies rigid guidelines or checklists. There are, however, some aspects that an arbitrator should always consider when faced with the task of reconciling due process and efficiency.

Naturally, the complexity of the matter needs to be taken into account. The more complex a case, the more time the parties will need to prepare their submissions and the more time will, as a rule, be required for an oral hearing that gives each party sufficient opportunity to present its case. This is particularly true for fact– and expert-driven cases, such as, for example, in the sphere of construction. Conversely, in the admittedly rare cases where the decision of the arbitral tribunal depends on questions of law only, less effort will, as a rule of thumb, be required. It might in these rare constellations even be conceivable to dispense with an expensive and time consuming oral hearing altogether and to rather decide the case exclusively on the basis of written submissions and documentary evidence. Such a documents only arbitration would, however, under most arbitration laws presuppose the consent of the parties.[34]

The complexity of the case always has to be seen in the context of the significance of the dispute for the parties. While the amount in dispute clearly is the most relevant aspect here, other factors have to be considered as well. An arbitration with comparatively small stakes will thus justify disproportionately high expenditures with regard to costs and time where, for example, the economic existence of one or both of the parties or the contestants' reputation in the marketplace depends on the outcome. Likewise, while the idea to hold an extra hearing on the allocation of costs seems to be fallacious in most constellations, such a hearing could actually make sense where the issues involved are intricate and the stakes

[33] N. Blackaby *et al.*, 335.

[34] *Cf.* Article 24 (1) UNCITRAL Model Law on International Commercial Arbi tration.

are sufficiently high. Particularly the latter is not uncommon in complex arbitrations where costs can easily pile up to several millions.

Another aspect that arbitrators should bear in mind when weighing due process and efficiency is the expectations of the parties. Such expectations depend heavily on the legal background of the participants in the arbitration. While, to state the most prominent example, parties (and legal counsel, for that matter) from a common law background will usually expect some kind of document production (and especially parties with a US background might often even expect full-fledged discovery), parties from a civil law background have traditionally been reluctant to accept any duty of the opposing side to produce evidence that could support their opponent's case.[35] These different expectations should be reflected in the procedure. It might still be perfectly reasonable for the arbitral tribunal to, for example, order document production in an arbitration between parties from Austria and from Germany. Such a constellation might however call for a more detailed discussion of the issue with the parties and a more thorough explanation of the rationale underlying the respective order. This will ultimately increase the acceptance of the measure in question and, as a consequence, of the proceedings as a whole.

## 5. OBTAINING THE ONE WITHOUT SACRIFICING THE OTHER PROACTIVE CASE MANAGEMENT AS A MEANS OF ACHIEVING QUALITATIVE DUE PROCESS

Due process and efficiency need not always be antagonists. There are many situations conceivable in which both can be achieved at the same time. The key factor here is good communication between all participants in the arbitral process and proactive case management by the arbitral tribunal.

It will be the initial view of most parties that their right to be heard and to present their case will increase proportionately with the amount of submissions they are allowed to make, the amount of evidence they are allowed to submit and, finally, the amount of "airtime" they will be granted in an oral hearing. What really matters, however, is not the mere quantity of what a party has said. The dispute will rather exclusively be decided on the basis of what the arbitral tribunal has actually understood.

The key to qualitative due process thus is effective communication between the participants in the arbitration. This starts with the submissions of the parties. The parties and their legal counsel are well advised

[35] G. Kaufmann Kohler, P. Bärtsch, "Discovery in international arbitration: How much is too much?", *SchiedsVZ* 1/2004, 14 17, who also provide a brief overview over evidentiary rules in key jurisdictions.

to focus their submissions on what is really relevant and not to bury the decisive facts and legal arguments in a heap of unnecessary information.[36] Concise submissions will not only save legal costs but will in particular facilitate an early involvement of the arbitral tribunal. Such early involvement should not be confined to setting out the procedural rules of the game in an early case management conference as it is now expressly foreseen in Article 24 (1) of the new ICC Rules. Rather, it is crucial that the arbitrators consider the relevant issues of law and of fact as early as possible, ideally after the first or second round of submissions, but in any case well in advance of the oral hearing.[37]

Such an early involvement of the arbitral tribunal will have two major advantages. First, most procedural decisions can only properly be made in the light of the underlying substantive issues. This is particularly true with regard to procedural decisions that are supposed to enhance the time and cost effectiveness of the arbitration. An arbitral tribunal that has not thoroughly analysed the case and maybe has not even yet read the parties' submissions[38] will, to give an example, be very reluctant to exclude evidence on the grounds that such evidence, in the language of the 2010 IBA Rules on the Taking of Evidence in International Arbitration, is not relevant to the case and not material to its outcome.[39] Likewise, bifurcation of the proceedings (into, for example, a jurisdictional and a merits phase) will only enhance efficiency if it is at least conceivable that the arbitration will come to an end after the first stage and where the issues that are relevant in the context of phase one do not again arise in the ensuing phase two.[40] Otherwise, the only effect of bifurcation may well be the multiplication of costs and the unnecessary prolongation of the proceedings. An arbitral tribunal can therefore only decide on bifurcation after it has at least obtained a general understanding of the key issues of the case. Second, and most important, an arbitral tribunal that considers the key procedural and substantive issues of the case early is in a position to start a proactive discussion with the parties early which in turn facilitates an optimal preparation of the oral hearing.

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[36] *Cf.* B. Legum, "The Ten Commandments of Written Advocacy in International Arbitration", *Arbitration International*, 1/2013, 1.

[37] *Cf.* S. Elsing, 117.

[38] This is, unfortunately, not unusual given some arbitrators' heavy workload, *cf.* B. Legum, 1.

[39] Articles 3.7 and 9.2 (a) IBA Rules on the Taking of Evidence in International Arbitration. Evidence will be relevant where a clear line can be established between a given piece of evidence and the contention it is intended to prove. Materiality, on the other hand, presupposes that the contention itself will have a bearing on the final outcome of the case and, therefore, the arbitral award rendered; N.D. O'Malley, *Rules of Evidence in International Arbitration An Annotated Guide*, Informa, London 2012, 55 58.

[40] L. Greenwood, Does Bifurcation Really Promote Efficiency?, *Journal of International Arbitration* 2/2011, 110.

The oral hearing is of particular significance in the perception of the parties. It is the parties' day in court, and the way the hearing is conducted will often have a great impact on how the parties perceive the arbitral process as a whole and on whether they accept its final outcome in the form of the arbitral award.[41] The oral examination of witnesses and experts is of course an indispensable part of almost every hearing. But apart from that, another important purpose of the hearing should be to enter into a discussion between the arbitrators and the parties about what is relevant in the given case. Such a discussion presupposes, as has just been mentioned, that the arbitrators already have a clear understanding of the case at the beginning of the hearing. The arbitral tribunal may even give concrete guidelines in advance on the topics it wants to discuss, including the order of discussion and instructions on which side should speak first on which issue. It has, with regard to a specific hearing, namely in the Aminoil case, been observed that "*this positive intervention by the arbitral tribunal led to a significant saving in time and money for both parties – and, in the end, to an outcome that both parties agreed as fair.*"[42]

In contrast, allowing the parties to hold seemingly endless opening statements or other oral pleadings will, as a general rule, neither further the cause of due process nor increase procedural efficiency. The arbitral tribunal's role during such extensive pleadings is merely passive and there is no compelling reason while the argument of the parties should not already have been made in the written submissions.[43] Short and concise opening statements delivered by a skilled oral advocate can be an asset as they serve as a great introduction to the hearing and often sum up the key aspects of the dispute in a way that would not have been possible in the written submissions. Any further monologue of the parties or their representatives, respectively, will usually merely waste the arbitrators' attention and other valuable resources such as time and money.[44]

Another pitfall that arbitrators need to avoid during the oral hearing is predisposition. Especially the arbitrator who comes to the hearing well prepared and with a distinct opinion with regard to the issues at dispute will often tell the parties that he or she has read and understood every-

[41] D. J. A. Cairns, "Oral Advocacy and time Control in International Arbitration" in: A.J. van den Berg (ed), *Arbitration Advocacy in Changing Times*, *ICCA Congress Series Volume 15*, Kluwer Law International, Alphen aan den Rijn 2011, 185.

[42] N. Blackaby *et al.*, 377.

[43] A different rationale applies where parties deviate from what can now be called international best practice and agree that the traditional "common law model" be applied, *i.e.* that the facts of the case are primarily established during the oral hearing. In such a case, insisting on several rounds of written submission in addition to the extensive hearing would merely duplicate the parties' efforts and lead to inefficiency; D.J.A. Cairns, 192.

[44] D. J. A. Cairns, 185 186.

thing and that there is consequently no need to discuss the parties' case in detail. This would be the approach prevalent in the national courts of several civil law jurisdictions such as Germany and it is therefore not surprising that arbitrators from a civil law background are particularly prone to falling into this type of pitfall. But even a thorough analysis of the case can never be a substitute for a well prepared discussion with the parties. Even the most experienced arbitrators will often learn new things and discover new aspects of a case that previously seemed to them crystal clear. Apart from that, predisposition will almost always leave the parties with the impression that they were factually deprived of their day in court. Unnecessary challenges before the national courts will often ensue.

## 6. Conclusion

The key to reconciling due process and efficiency thus lies in proactive case management. Arbitrators who are familiar with the case and its key issues will be in a much better position to actually deny the parties' requests for extensive pleadings and extensive production of evidence. Particularly in an international context, arbitrators should always keep an eye on the expectations of the parties with regard to the conduct of the arbitrations since such expectations can differ greatly depending on the legal background of the participants of the arbitral process. Finally, there are a few pitfalls to watch out for. While discussing procedural issues with the parties is always recommendable, making the parties agree on certain procedures entails the risk that all participants will later be bound by such agreements even in constellation where the case evolved in a manner that had not been anticipated when the respective agreement was concluded. Furthermore, arbitrators should always listen to the arguments and concerns of the parties regardless of how thoroughly they have studied the case. It is the parties' dispute after all.

The arbitrator's task in this context is to facilitate a discussion between all participants of the arbitral process. Ideally, the result will be that the arbitral tribunal at the end of the hearing has fully understood the case before it which in turn enables it to render an award that touches on all important aspects and will finally find acceptance even with the losing party.

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# CONTRACTUAL PENALTY CLAUSES IN RECENT SERBIAN ARBITRATION PRACTICE*

*The focus of the paper is on the analysis of different approaches to situation when the parties are allowed to agree on sums payable in the event of breach of ob ligations, issues pertaining to contractual penalties in general as well as practical and doctrinal differences in their compensatory and penal goal. The authors reflect on some of the acute issues raised in recent arbitral practice with respect to the topic of contractual penalties, particularly in the sphere of privatization agreements. One of the problems analyzed relates to characterization of the secured obligations in privatizations, reductions of penalties as well as the issue of combining contrac tual penalties with bank guarantees and with the prohibition of restitution contained in the Law on Privatization of the Republic of Serbia.*

Key words: *Contractual penalties. Privatization Agreements. Non perfor mance. Delay. Proportionality principle.*

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## 1. ON CONTRACTUAL PENALTY CLAUSES IN GENERAL

Contractual penalty clause represents a *legal remedy*[1] frequently agreed upon for breach of contractual obligations. The variety of terms used to describe it (*legal remedy*, *contractual penalty*, *agreed sum*) reflects its polyvalent and difficult to define legal nature.[2]

Scholarly writing often highlights the variety of *functions* this institute has (or ought to have) across various legal traditions and systems. The attempts to describe legal nature of the penalty clauses thus often end up intertwined with its functional analysis.

It is often submitted that the contractual penalty serves to secure performance of an obligation.[3] However, it is seldom listed as one of the means employed to secure one's claims,[4] be they *in rem*[5] or in *perso-*

[1] See: Mihailo Konstantinović, "Priroda ugovorne kazne Smanjenje od strane suda", Anali Pravnog fakulteta Univerziteta u Beogradu 2/1953, re published in 3 4/1982, 523 524 (page references are given by the 1982 edition). For contemporary practice in Serbia cf. Gordana Ajnšpiler Popović, "Ugovorna kazna", *Pravni informator* 3/2006, 3. For "the major role in practice" in Swiss law see e.g. Pierre Tercier, *Le droit des obliga tions*, Schulthess Verlag, Zurich 2009[4], 281. For French and Belgian practice see Patrick Wéry, "La clause pénale", *Les clauses applicables en cas d`inexécution des obligations contractuelles* (ed. Patrick Wéry), La Charte, Brusels 2001, 1, to the extent that the con tractual penalty clauses represent "a standard feature of commercial contracts in all areas of business, which gives them great practical importance" see Pascal Hachem, *Agreed Sums Payable upon Breach of an Obligation, Rethinking Penalty and Liquidated Dam ages Clauses,* Eleven International Publishing, Den Haag 2010, 18. The author bases this remark on comparative analysis. See also Petar Miladin, "Odnos između ugovorne kazne i srodnih klauzula", *Zbornik Pravnog fakulteta u Zagrebu* 56/2006, 1762 1763. The au thor invokes the Report of the Working Group *Contrats internationaux* within the UNCI TRAL. See also Milena Đorđević, *Obim naknade štete zbog povrede ugovora o međunarodnoj prodaji robe*, doctoral thesis, Belgrade 2012, 259 with numerous refer ences cited therein.

[2] P. Wéry, 1; Hachem, 18.

[3] See Denis Mazeaud, *La notion de clause pénale*, LGDJ, Paris, 1992, 87. Cf. Philippe Malinvaud, *Droit des obligations,* Litec, Paris 2007[10], 311, for contractual pen alty as a means of securing the performance of an obligation (as well). "Contractual pen alty represent a means of securing the performance and of execution of a contract " Su preme Court of Serbia, Rev. 1482/92. Cf. Art. 272(1) of the Law on Contracts and Torts: "A penalty clause shall share the legal fate of the obligation it *secures*."

[4] Cf. P. Hachem, 43 44, stating that Roman Law treated agreed sum payable upon breach of obligation as a means of securing performance and that it is not just Code Civil, but other codifications as well (at least implicitly) take the same position, putting economic pressure on debtor to perform obligation..

[5] Contractual penalty is not *in rem* means of securing performance since it does not establish "*in rem* right which will empower the creditor to encash its obligation out of the value of the object of property" (see Nikola Gavella, *Stvarno pravo,* Narodne novine, Zagreb 2007[II], vol. 2, 10), it does not "allow creditor to encash its claim out of a particu lar object of property in case debtor fails to settle the debt out of its general property" (see Andreja Gams, *Stvarno pravo,* Naučna knjiga, Belgrade 1971[VI], 179). With respect to the

*nam*[6]. This is because contractual penalty pressures debtor to stay true to the obligations it has undertaken. Given that it is due only if there was no performance or performance was late, it performs its function as a means of security in an indirect manner. [7]

Its analysis inevitably starts with its statutory definitions. Contractual penalty clause represents an agreed upon sum or another material benefit a debtor owes to the creditor if he fails to fulfill his obligation or is late in fulfilling it.[8]

This general notion highlights its following elements and functions:

(1) although usually physically inserted in the contract, agreement on contractual penalty clause represents a separate agreement, its validity is examined separately from the validity of the contract in which it is contained;[9]

(2) at the same time, this is an accessory agreement, and it shares legal fate of the obligation it is supposed to secure.[10] Article

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amount or the good which forms the object of contractual penalty, the creditor does not have the right of priority nor *droit de suite*.

[6] See in that sense e.g. Jakov Radišić, Obligaciono pravo, opšti deo [Law of obligations, general part], Nomos, Belgrade 2004[7], 318. See *contra*, for exclusion of contractual penalty from the scope of *in personam* means of securing the performance Michel Cabrillac, Christian Mouly, Séverine Cabrillac, Philippe Pétel, *Droit des sûretés,* Litec, Paris 2010[9], 37 39. Unlike the usual *in personam* means of securing obligation, contractual penalty does not involve other actors (as providing a bank guarantee or suretyship does).

[7] See D. Mazeaud, 87. It always serves to "discipline" the debtor, as stated by Stojan Cigoj, *Komentar obligacijskih razmerij,* Uradni List SRS, Ljubljana,1984, vol. II, 966. for securing the performance by pressure in Swiss law see P. Tercier, 281. Cf. Henri Mazeaud, Léon Mazeaud, Jean Mazeaud, François Chabas, *Leçons de droit civil,* tome II, premier volume, Montchrestien, Paris 1978[VI], 991 1000.

[8] See Art. 270(1) of the Serbian Law on Contracts and Torts (hereinafter: LCT). Cf. § 339 345 of the German Civil Code (hereinafter: BGB), Arts. 160 163 of the Swiss Law on Obligations, Art. 1152 of the French Civil Code (hereinafter: CC), Art. 333 of the Civil Code of the Russian Federation, § 1382 of the Italian Civil Code. International sources of unified or harmonized contract law also contain provisions on contractual penalty. See e.g. Art. 7.4.13 of the UNIDROIT Principles of International Commercial Contracts, 2010, Art. 9:509 of the Principles of European Contract Law, 2002.

[9] See P. Wéry, 4, Dragan Pavić, "Sudska kontrola ugovorne kazne, *Pravni život* 10/2000, 396. It does not matter whether it is a separate agreement or a clause inserted into the main contract.

[10] See Art. 272(1) LCT. Cf. S. Cigoj, 969 970. See also P. Tercier, 280. Cf. for the relative effect of the rules on accessory character, D. Mazeaud, 13 et seq. See also D. Pavić, 396 397, stressing that the accessory character is not contradictory with the position that its validity is examined separately. Consequently, it does not represent a non essential element of the contract within the meaning of Art. 32(2) LCT and can not therefore be later regulated by court. See for the contradicting conceptions on the scope of Art. 32(2) in Serbian

220 of the Draft of the Code of Contracts and Obligations[11] provided for so-called *independent penal promise*[12], i.e. independent promise to pay a sum of money if the 'promissor does something or fails to do something'. This was omitted from the Law on Contracts and Torts (hereinafter: LCT). Pursuant to the principle of the freedom of contracting, such promise may still be stipulated, but will be subject to the legal regime applicable to the contractual penalty clause;

(3) it has to be agreed upon in advance, for possible future breach of contractual obligation. If that is not the case, the parties are actually agreeing on liquidating damages which have already occurred[13]. Commentators seldom highlight this, as it is presumed that the parties can fix or limit damages *in advance*.[14]

(4) contractual penalty is stipulated for cases when debtor fails to act in accordance with his contractual obligation, either because he fails to perform it on time, or fails to perform it altogether. Pursuant to LCT, penalty clause is presumed to have been stipulated for cases of late performance, unless it explicitly covers non-performance.[15]

Penalties are due for non-performance or for defective performance.[16] Serbian law provides for evidently different solutions on certain issues when it comes to contractual penalties for non-performance, on one hand, and late performance, on the other. For instance, cumulating performance and penalty sum is possible when it comes to late performance, but not when it comes to non-performance.[17] However, potentially different

legal doctrine, Miloš Živković, *Obim saglasnosti neophodan za zaključenje ugovora*, Bel grade 2006, 184 186. See also Guenter Heinz Treitel, *Remedies for Breach of Contract, a comparative account,* Oxford University Press, Oxford 1988, 213 214.

[11] Mihailo Konstantinović, *Obligacije i ugovori skica za zakonik o obligacijama i ugovorima*, Belgrade 1969, Art. 220, Cf. § 343(2) BGB.

[12] See P. Miladin, 1763. Cf. G.H. Treitel, 209 210, uses the term *independent penal promise*.

[13] See S. Cigoj, 965.

[14] See D. Mazeaud, 297, Philippe Delebecque, Frédéric Jérôme Pansier, *Droit des obligations, Contrat et quasi contrat,* Litec, Paris 2010[5], 310.

[15] See Art. 270(1) and (2) LCT.

[16] General usages for trade of goods, *Official Gazette of the Federal People's Re public of Yugoslavia* 15/54, in Art. 245, provided for contractual penalty for non perfor mance or defective performance, as well e.g. as Art. 339 BGB and Art. 160 of the Swiss Code of Obligations. Code civil, Art. 1382 refers to non performance. For a possible dis tinction between the two notions, see S. Cigoj, 973, Zvonimir Slakoper, Vilim Gorenc, *Obvezno pravo*, *opći dio*, Novi informator, Zagreb 2009, 253.

[17] See Art. 273 LCT.

terms and expressions used in comparative legislation do not necessarily result in divergent scope of application of this legal institution.

Admittedly, it is possible to distinguish between non-performance (where a debtor does not perform at all) from a defective or late performance of a contractual obligation. However, the notion of a 'contractual obligation' is a complex one. A contract often burdens each of the parties with more than one obligation to fulfill. Sometimes, they are not interrelated, on other occasions they are – and performance of one is dependent on performance of another. Non-performance usually means that a party has failed to perform its principal obligation, or several of such principal obligations, as may be the case. French law refers to this situation as *inexécution grave*[18]. However, non-performance might also occur where a party only *partially* fulfills an obligation of *fundamental* importance. In other words, 'non-performance' represents a notion that might cover even situations where there has been a performance – a defective one.

The general notion of 'legal remedy' and the above listed elements represent a starting point for analysis of two of its essential functions: compensatory[19] and penal.

Contractual penalty clause is usually regarded as a vehicle for a creditor to be reimbursed for damages he suffered due to non-performance, late or defective performance. Agreeing upon a sum to be paid in advance strengthens the position of the creditor, as it relieves him of the burden of proving the existence of damages or its extent.[20] This is why scholars insist on drawing a distinction between a contractual penalty clause and a clause limiting one's liability.[21] This compensatory function is often a reference point around which national legislation develops its position on whether and to what extent contractual penalty might be collected alongside contractual damages.[22]

On the other hand, where a penalty clause is agreed upon in order to put pressure on debtor, 'disciplining' him and securing performance[23],

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[18] See Philippe Malaurie, Laurent Aynès, Philippe Stoffel Munck, *Drot civil, Les Obligations,* L.G.D.J., Paris 2009[4], 457 458.

[19] On contractual penalty as predominantly means to agree in advance upon con tractual damages see P. Malaurie, L. Aynès, P. Stoffel Munck, 540, P. Malinvaud, 527, P. Delebecque, F J Pansier, 310. For a somewhat different position, on difference between contractual penalties and the the agreement on contractual damages in advance, see D. Mazaud, 141 et seq.

[20] See M. Konstantinović (1982), 524, who adds that the burden of proof is allo cated in such way as to require from the debtor to prove that the penalty is excessive if he wants to be granted reduction of the penalty. See also P. Hachem, 45.

[21] See D. Mazeaud, 143 144 and references cited therein, P. Hachem, 47.

[22] See G. H. Treitel, 217 219.

[23] See S. Cigoj, 966. See also P. Tercier, 281.

it loses most of its compensatory function and acquires penal characteristics. Doctrine often regards penalty for late performance as one having predominantly penal character, unlike penalty clause for non-performance which is predominantly of compensatory nature.[24] Penal nature of the clause often invokes comparisons to common law treatment of 'penalties' judge-made *clause d'astreinte* in French law.[25]

Interplay and distinction between compensatory and penal functions is also reflected in the distinction common law makes between liquidated damages and penalties.[26] It is also possible to distinguish subfunctions within two main functions.[27] Irrespective of such nuances, contractual penalty clauses owe their popularity to their perceived usefulness, and consequently often find their way into contracts.[28] At the same time, their sweeping scope opens the door not only for use, but also for abuse,[29] and it may be deployed as a screen for loan sharks, or exploitation of debtor's pressing needs, poor judgment or inexperience.[30] Abuses are normally curbed through general principles of contract law. However,

[24] See D. Pavić, 397, S. Cigoj, 965. With respect to the possibility of cumulating the performance and the penalty for delay see P. Malaurie, L. Aynès, P. Stoffel Munck, 540. For comparison of systems see P. Hachem, 35 38.

[25] See D. Mazeaud, 342 348 who points out the difference with respect to con tractual penalty that stems from the fact that the latter has (also) the compensatory car acter. In the similar sense see P. Delebecque, F J Pansier, 310. See also D. Pavić, 297. Pavić compares this kind of contractual penalty to the penalties referred to in Art. 294 LCT. For *clause d'astreinte* and the difference with respect to contractual penalty, i.e. the difference between contractual penalty and penalties see P. Malinvaud, 527.

[26] See S. Cigoj, 965. Cf. Mirko Vasiljević, *Poslovno pravo*, Udruženje pravnik au privredi SRJ, Belgrade 2001, 651 652. this author compares the concept of contractual penalty (as codified by Special usages for construction business, *Official Gazette of the Socialist Federal Republic of Yugoslavia* 18/77) with the compromise between the Civil and common law divide reflected in 1983 UNCITRAL Uniform Rules on Contract Clau ses for an Agreed Sum Due upon failure of Performance. On the notion of liquidated damages (distinguished from penalties) see Michael P. Furmston, *Cheshire, Fifoot and Furmston's Law of Contract,* Oxford University Press, Oxford 2001[14], 688 et seq, Guent er Heinz Treitel, *The Law of Contract,* Swet and Maxwell, London 1991[8], 883 et seq. Common law jurisdictions clearly distinguish between penal and compensatory mecha nisms for breach of contractual obligation, while the civil law systems usually combine the two.

[27] See D. Pavić, 397 398. The author addresses four different types of agreement which fall under the generic notion of 'contractual penalty'. In Serbian legal doctrine see Adam Vass, "Ugovorna (konvencionalna) kazna", *Glasnik advokatske komore Vojvodine,* 7 8/1979, 29. S. Cigoj, 965, who makes a distinction between the penalty due no matter whether the creditor suffered damage, and the penalty aimed at liquidating damages. For a triple legal nature of penalty see P. Malaurie, L. Aynès, P. Stoffel Munck, 540.

[28] See M. Konstantinović (1982), 523 524.

[29] For prevention of abuse see D. Pavić, 394. and references cited therein. For abuse of economic position when contracting see P. Malinvaud, 223.

[30] See M. Konstantinović (1982), 524.

many legal systems considered them to be inadequate and introduced specific mechanisms[31] as protection from abusive contractual penalties: fixing or limiting their value,[32] or allowing the court to reduce the excessive sum on its own motion or at the request of the debtor.[33]

Popularity and frequent use of contractual penalties in commercial practice raise important and numerous issues, value of the agreed sum being just one of them. Some issues have frequently arisen in Serbian arbitral practice, especially in the context of privatization agreements. Given the paucity of reports of arbitral practice in general, and Serbian arbitral practice in particular, analyzing and publicizing recent arbitral practice on penalty clauses might be of interest, and not only to arbitration practitioners. Classification of the issues analyzed is relatively loose and does not necessarily adhere to precise systematization – this was to a certain extent an inevitable consequence of the heterogeneous nature of the issues which had arisen.

## 2. BREACH OF CONTRACT, THE RIGHT TO CONTRACTUAL PENALTY AND OTHER LEGAL REMEDIES IN CASE OF NON-PERFORMANCE

As outlined above, contractual penalties might be agreed to cover late performance or non-performance (including partial or defective performance). The agreement has to specify the breach covered. In Serbian law, absent such specification it will be assumed that the penalty was agreed for late performance.[34]

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[31] For the so called *clauses abusives* and protection therefrom, see P. Malinvaud, 223 et seq.

[32] See P. Hachem, 55 56, listing certain jurisdictions in South America (Brazil, Mexico, Bolivia, etc.) and Europe (Portugal). In Serbian law, see Special usages for con struction business, M. Vasiljević, 651 652. See also S. Cigoj, 968. For the possibility of application of Art. 601(a) of the 1844 Serbian Civil Code (which limits all sorts of penal ties ("*hasna*"), irrespective of their name) to contractual penalty, see Radmila Rakočević, *Ugovorna kazna u poslovima prometa robe i usluga*, master thesis, unpublished, Faculty of Law, University of Belgrade, 1981.

[33] See Art. 274 LCT. Swiss Code of Obligations in Art. 163(3) provides that the court "may reduce penalties that it considers excessive". Art. 343 BGB requires from the court to take into consideration every interest of a creditor's and not just the pecuniary one, when reducing the amount of the penalty. Art. 1152 CC in its 1985 version autho rizes the judge to modify the amount of the penalty even in absence of a motion from the parties, and the 1975 version provided for modification if the agreed upon sum was exces sively high or excessively low. National legislation does not clarify what is to be com pared with the agreed upon sum when deciding on reduction, see G..H. Treitel (1988), 224.

[34] See Art. 270(1) LCT.

### 2.1. Non-performance and penalty clause

It is worth repeating that a contract often gives rise to several different and possibly interrelated obligations. Where the penalty has been agreed for breaching only some (or one) of them, penalty will be due only if the actual breach qualifies as the type of breach (non-performance, late performance) envisaged in the penalty clause. This gives rise to the problem of qualification (characterization), especially in the context of late or partial performance.

The parties might also provide different penalties to secure different obligations. Arbitration practice provides examples of such approach, especially in the context of privatization agreements. The tribunals were unison in finding that, in order to claim the penalty it is sufficient (and necessary, at the same time) that a particular obligation was breached. They also held that cumulation of penalties is possible where several obligations were breached.[35] On the other hand, it was held that penalty is not due where it does not cover a particular (breached) obligation in question,[36] even though it covers other similar obligations.

Tribunals did not have to directly address whether partial non-performance triggers obligation to pay the penalty, or whether the fact that it is partial is to be regarded in the context of reducing the agreed sum.[37]

### 2.2. Debtor's fault

The cases analyzed seldom turned on the legal notion of non-performance. Instead, the parties usually disputed whether the breach occurred as a matter of fact. However, in certain cases the issue was whether debtor's fault (in failing to perform or performing late) is of relevance. Namely, the respondents argued that the breach was not due to any fault on their side.[38]

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[35] FTCA Final Award in the case no T 12/10 of 19 September 2012, FTCA Award in the case no T 14/11 of 13 March 2013, FTCA Final Award in the case no T 7/09 of 27 April 2012, FTCA Final Award in the case no T 9/10 of 10 October 2011.

[36] In one of the cases the tribunal refused to order payment of penalties for breach of obligations which was not explicitly secured by penalties, and rejected claimant's 'sys tematic interpretation of the contract', observing that 'had the parties wished to do so, they could have done so clearly just like they did with respect to certain other contractual provisions" FTCA Award in the case no T 14/11 of 13 March 2013.

[37] See Art. 253 of General Usages, which provides that the contractual penalty is to be calculated against the entire value of the obligation until such time that it is per formed partially, and after the time of the partial performance only for the value of the yet unfulfilled part of the obligation. If there is more than one obligation secured by penalty, it is calculated for each of them separately and proportionally to their value.

[38] FTCA Award in the case no T 14/11 of 13 March 2013, FTCA Final Award in the case no T 9/10 of 10 October 2011, FTCA Final Award in the case no T 12/10 of 19 September 2012.

LCT provides that the penalty clause ceases to have effect if non-performance or delay is a consequence of something for which the debtor is not liable.[39] However, the purpose of this provision is not to introduce fault of the debtor as a prerequisite for its obligation to pay contractual penalty. "Debtor's default is sufficient to entitle creditor to contractual penalty."[40]

It should be also borne in mind that Serbian law adheres to objective notion of default – debtor's fault is not a necessary precondition for default.[41] Reasons for non-performance or late performance might become relevant only in context of certain consequences of default: liability for damages and the risk for subsequent impossibility to perform.[42] This is a key for understanding the wording used by the legislator when referring to "something for which the debtor is not liable": LCT absolves debtor from its liability for damages if the non-performance is due to event that it could not have prevented, overcome or avoid[43] or if failure to perform is due to creditor's fault[44].

Only in one of the analyzed cases debtor claimed that non-performance was due to workers' strike in the privatized company, and qualified that the labor strike amounted to *vis maior*. The tribunal rejected this argument, stating that Serbian courts are almost unison in their view that labor strikes cannot be considered *vis maior*.[45]

More often, the debtors (respondents) have argued that it was not them, but the creditors (claimants) who were at fault, that they have rescinded contracts without the proper cause (non-performance)[46] and claimed that this entitles them (debtors) to compensation for damages.[47] Privatization buyers regularly claimed that the presented data of the companies was incomplete and incorrect, [48] and argued that this made sellers' performance faulty, both substantively and legally. These arguments were

[39] See Art. 272(2) LCT. When stating this precondition, the domestic doctrine does not focus on its meaning and scope.

[40] See M. Konstantinović (1982), 521.

[41] See Art. 324 LCT.

[42] See J. Radišić, 330 332.

[43] See Art. 263 LCT.

[44] See Art. 265 LCT. Both cases refer to preconditions which do not exclude the obligation to compensate for the contractual damage, which reminds of the predominantly reparatory character of contractual penalty.

[45] FTCA Final Award in the case no T 9/10 of 10 October 2011

[46] FTCA Award in the case no T 14/11 of 13 March 2013, FTCA Final Award in the case no T 9/10 of 10 October 2011, FTCA Final Award in the case no T 12/10 of 19 September 2012.

[47] FTCA Final Award in the case no T 9/10 of 10 October 2011

[48] FTCA Final Award in the case no T 9/10 of 10 October 2011, FTCA Final Award in the case no T 12/10 of 19 September 2012.

rejected in all cases, since all of the buyers have failed to raise these points on time, and given that said shortcomings *affected contract conclusion, rather than its performance*, or any fault of the seller thereof.

Less often, debtors claimed that sellers' actions after conclusion of the caused non-performance. The usual argument was that a seller failed to perform one of his obligations and that this had, in turn, made debtor's performance impossible or at least significantly more difficult. Given that those allegations were either not supported by the facts, or not firmly based in the contract, the tribunals did not have to delve into their legal aspect.[49]

### 2.3. Delay (late performance)

Although seemingly non-controversial, the notion of delay became less so in the context of contractual penalty in one of the cases.[50] Delay represents a period of time passed since the default, in which the debtor has failed to perform its obligation. Contractual penalty is also agreed as a certain sum (or percentage of the contracted price) per unit of time.[51] Since the delay starts running at the time of the default, and ceases to run at the time of the performance, its length will be unquestionable only after the obligation is performed. Delay is therefore a *period* between those two points in time.

If delay is indeed a period between defaulting and performing, one could argue that there has to be eventual performance in order to distinguish delay from non-performance (complete failure to perform). This would suggest that a creditor cannot claim penalty for delay if debtor has not yet performed. In such case, there has been no performance, rather than late performance. Also, if creditor avoids the contract, it will lose the right to seek contractual penalty for delay.[52]

It is possible to approach this issue in a different way. Namely, although the primary function of the penalty for delay is to press debtor into performing on time (or, at least, to incite it to keep the delay as short as possible), it is also of compensatory nature. Collecting what is due on the basis of delay, while still expecting the contract to be performed would

[49] In one of the analyzed cases, the debtor claimed that, although the State offered it a loan with below market interest rate to settle its obligations, it was also asked for a collateral it (the debtor) did not deem suitable (!) (FTCA Award in the case no T 14/11 of 13 March 2013); in another the debtor claimed that the State did provide benefits that would have been appropriate in the light of the worldwide economic crisis, pursuant to the conclusions and adopted by the Government (FTCA Final Award in the case no T 12/10 of 19 September 2012). In the third case, it was established that the creditor did what is was expected to do, and cooperated with the debtor with respect to debtor's fulfillment of its contractual obligations (Ad hoc Final Award of 1 April 2013).

[50] Ad hoc Final Award of 1 April 2013.

[51] See Art. 271(1) LCT.

[52] This is confirmed in case law. See G. Ajnšpiler Popović, 12.

therefore be possible, subject to certain limitations. In one of the analyzed awards contractual penalty for delay was given although there was no performance until that point in time.[53] Penalty for delay was set as a fixed sum per time unit. Debtor defaulted and the creditor sought penalty for the period that has elapsed since the default, but also for any future delay, until performance. The beginning of the period for penalty calculation (time of default) was not contested, nor did the parties contest that the debtor would perform its obligation at some future point in time. The tribunal held that the creditor was entitled to penalty for the period that had already elapsed, but that it was, at the time, not entitled to penalty for delay that might occur in the future (after the date of the award). To hold otherwise would mean that the tribunal would not be able to apply the principle of proportionality, and would be prevented from contemplating reduction of the amount of penalty. Both of those actions presuppose that the tribunal already knows the exact sum due pursuant to the contracted calculation, and no such certainty exists for future, open-ended period of delay.[54]

### 2.4. Avoidance, certain consequences of avoidance and the obligation to pay contractual penalty

Where both parties owe something pursuant to the contract, and it is certain that the contract will not be performed, one can expect the contract to be avoided. LCT provides that "avoidance releases both parties from their obligations, save for obligation to compensate the other party for subsequent loss."[55] Arbitral practice was confronted with the issue of whether 'release from obligations' also meant releasing from an obligation to pay contractual penalty.

Creditor who has avoided the contract should certainly be able to collect the penalty agreed upon for the case of *non-performance*. Contractual penalty is also of compensatory nature. Creditor is entitled to be compensated for damages suffered, and to benefit from not having to prove damages if they do not exceed the amount of penalty.

If it were otherwise, creditor would face a choice: either to avoid and forfeit all the benefits of the contractual penalty clause, or collect the

[53] See Dragor Hiber, "Ugovorna kazna I buduće zadocnjenje u izvršenju obaveze", *Razvoj pravnog sistema Srbije I harmonizacija sa pravom EU* (eds. Radmila Vasić, Ivana Krstić), Pravni fakultet Univerziteta u Beogradu, Belgrade 2013, 341 356.

[54] This particular issue sheds a new light on the earlier discussions over the word ing of the LCT in doctrine. When laying out potential triggers for contractual penalty, LCT distinguishes between non performance (failure to perform) and delay. On the other hand, General usages on trade in goods provided for non performance or defective perfor mance (*neuredno ispunjenje*) as triggers (this was the solution supported by Cigoj, 967. The use of 'defective performance' would encompass delay as well, but would make it clear that, when not contracted for case of non performance, contractual penalty could be claimed only if there *was* actual performance.

[55] See Art. 132(1) LCT.

clause and forfeit what he would be due as a consequence of avoidance (e.g. restitution, cessation of his own obligation towards debtor, etc.). This outcome would be illogical and impractical.

If one can avoid the contract *and* still be entitled to penalty, this still leaves open issues concerning the availability of other rights parties have in case of avoidance. Two of such issues arose in the analyzed awards.

One stemmed from a particular provision of Serbian Privatization Law. Art. 51a of this Law deprives buyer from his rights in case of restitution – if the contract is avoided a buyer will not be returned purchase price. Three tribunals addressed this provision, and its interplay with contractual penalty clauses. [56]

In one of the cases the debtor argued that the said provision is incompatible with the contractual penalty, since both lead to the same outcome. The tribunal, however, held that there are significant differences between the two. Excluding or limiting restitution is used at times, primarily to prevent a party acting in bad faith to profit from termination of contractual obligations. *Nemo auditur propriam turpitudinem allegans* maxim and its progeny *(e.g Art. 104(2) LCT)* have much the same goal.[57] The only possible overlap with contractual penalty might be the provision of the LCT clarifying that one cannot claim *both* a contractual penalty and a "penalty, contractual penalty or the like" provided by the statute itself.[58] The tribunal held that prohibition of restitution is not of penal character, and that it does not oblige debtor to give anything to creditor.[59] Consequently, it was held that seller can collect contractual penalty, pursuant to contract, and keep the contractual price, pursuant to the Law on Privatization.

Another controversial issue was the relationship between contractual penalty and first demand bank guarantee. Debtors submitted that one cannot claim payment pursuant to both at the same time, and that one may request return of the sum paid under guarantee if the contract was terminated or if the contractual penalty has been collected.

Bank guarantees and contractual penalties often serve to strengthen the position of creditor.[60] Failure to perform as agreed entitles creditor to

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[56] FTCA Final Award in the case no T 9/10 of 10 October 2011, FTCA Award in the case no T 14/11 of 13 March 2013, FTCA Final Award in the case no T 12/10 of 19 September 2012.

[57] See Slobodan Perović, *Obligaciono pravo*, Službeni list SFRJ, Belgrade 1990[7], 457 and 468. For immoral contracts see P. Malinvaud, 197 198.

[58] See Art. 276 LCT.

[59] FTCA Final Award in the case no T 9/10 of 10 October 2011.

[60] See fn 1 above. For the history of extension of application of bank guarantees in modern law, see Branko Vukmir, "Razlozi za obustavu isplate bankarskih garancija na

compensation out of bank guarantee (in which case the payment will be effected by the bank) or pursuant to contractual penalty clause (lump sum agreed upon in advance). Just like contractual penalty, bank guarantee is also open to abuse: "a first demand bank guarantee can (...) be turned into a merciless weapon, leading to unjust results"[61] .

The analyzed awards often allowed for cumulation of sums pursuant to bank guarantees and contractual penalties, and the matter was normally not raised by any of the parties. When the matter was finally raised by the parties, the outcome was the same.[62] (It is interesting to note, however, that the creditor relied on previous arbitral practice in Serbia, arguing that the legal issue is evidently regarded as settled.[63]) Awards to the contrary have been reported in other jurisdictions, although it is unclear whether they have rejected cumulation as a matter of principle, or on the basis of particular facts.[64]

Where a penalty clause provides for lump sum (*fr. forfaitaire*) compensation, its compensatory function can overlap or mirror that of the bank guarantee. Bank guarantee, even one on first demand, is ultimately a form of suretyship, and presupposes two obligations owed by the debtor: the primary one, and the secondary obligation to compensate for damages arising from the breach of the primary obligation.[65] On the other hand, bank's obligation is abstract and independent,[66] and this overshadows the existence of obligation between the beneficiary of the guarantee and the bank: all creditor has to do is make it probable that the cause for which the guarantee was issued has been met, and the grounds on which payment may be refused are very limited.[67] The issue of cumulation may also arise later, in an entirely different context, where debtor requests the

poziv", *Liber amicorum Jakša Barbić* (eds. Zoran Parać et al.)*,* Pravni fakultet Sveučilišta u Zagrebu, Zagreb 2006, 238 239.

[61] See Henri Capitant, François Terré,Yves Lequette, *Les grands arrêts de la juris prudence civile,* Dalloz, Paris 2008[12], 859.

[62] FTCA Award in the case no T 14/11 of 13 March 2013.

[63] (FTCA Award in the case no T 14/11 of 13 March 2013). Claimant relied on previous practice in cases decided before the FTCA tribunals. The tribunal reached a split decision, the majority found that the parties expressly provided in their agreement for pos sible cumulation of the sums under the contractual penalty and the bank guarantee. Refer ence to this award throughout this article will represent a reference to the opinion of the majority in the tribunal.

[64] ICC case no 5634/1988 as cited by Dominique Hacher, *Collection of ICC Arbi tral Awards 1991 1995*, Paris, New York, 533, ICC 5721/1990. One additional, unre ported, Serbian award ICC case no 13798/ 2007 also took this position.

[65] See P. Miladin, 1774 1775.

[66] See M. Cabrillac, C. Mouly, S. Cabrillac, P. Petel, 350 360 and 376 379.

[67] See Roeland. I.V.F. Bertrams, *Bank Guarantees in International Trade,* Kluwer Law International, 2004[3], 48 50. See also the judgment of the Higher Commercial Court in Belgrade, Pž. no. 3520/95.

return of the guarantee. Bank's relationship towards beneficiary and debtor's relationship with the bank are both abstract and independent. Bank cannot invoke objections that a debtor might have against beneficiary, objections stemming from their mutual relationship. Likewise, debtor lacks leverage to prevent the bank from paying out once the mechanism has been set in motion. That is why a debtor can ultimately seek from creditor (beneficiary of the bank guarantee) what he would not have been entitled to collect under the guarantee had the bank been entitled to invoke objections stemming from the contract between the debtor and the creditor.[68]

The tribunal was split on this issue. The majority held that, pursuant to Art 1087 (3) LCT it was up to the debtor to prove that was no claim secured by the guarantee. Dissenting arbitrator opined that, although the objection was raised by the debtor, the burden of proof was on the beneficiary (creditor).

In any event, the tribunal held that, although abstract, bank guarantee loses such quality in a relationship between creditor (beneficiary of the guarantee) and debtor: "If one could collect pursuant to guarantee irrespective of whether any damages were suffered and what their extent was, or irrespective of the amount of some other claim stemming from the breach of contract, bank guarantee would cease to secure obligation and would instead acquire a penal character, or become an abstract obligation. Respondent/Counterclaimant is, therefore, correct when asserting that encashment of a bank guarantee presupposes existence of creditor's claim (...)."[69] Given that Serbian law allows for a limited cumulation of contractual penalty and compensation for damages, one could also combine sums due to contractual penalty with sums due pursuant to bank guarantee, for the amount of damages exceeding the sum of contractual penalties.[70]

## 3. AMOUNT DUE AND THE PRINCIPLE OF PROPORTIONALITY (APPROPRIATENESS)

The issue which arose most frequently in practice was reduction of the penalty sum.

[68] See Art. 1087 LCT. The assets received on the basis of a guarantee have the character of a deposit (see H. Capitant, F. Terré, Y. Lequette, 860), which precedes the determination of the amount, either by court or by the parties themselves, to be given to the beneficiary in conformity with the amount claimed. See Michel Cabrillac, Christian Mouly, *Droit des sûretés,* Litec, Paris 1999[5], 348 (this reference to an earlier edition of the book referred to in fn. 6 is cited here on the basis of reference provided in the opinion of the dissenting arbitrator).

[69] Excerpt from the award. The opinion of the panel and the dissenting opinion differ with respect to the question of whether the damage has been proved.

[70] *Ibid.*

Contractual penalty is often compared to interest running on pecuniary obligations.[71] Both can be contracted for in order to obfuscate debtor's predicament, inexperience or lack of viable alternatives.[72] This can, of course, be curbed through application of regular tools of contract law – fraud, mistake, public policy, etc.[73] EU member states have also devoted attention to controlling contractual penalty clauses in adhesion and boilerplate contracts, mostly through refining rules on consumer protection.[74]

However, when it comes to contractual penalty, the most important control mechanism is discretion of the courts to reduce penalty they consider exorbitant, either on their own motion or at the request of a party.[75] Less frequently, legislation prescribes the amounts or sets its cap. [76]

In all of the analyzed awards tribunals applied Serbian law.[77] Serbian law contains one regulation which puts a cap on the amount of con-

[71] The comparison is self imposing but not entirely correct. It is based on the fact that Art. 270(3) LCT explicitly provides that "contractual penalty may not be stipulated for pecuniary (monetary) obligations", which is then related to the pecuniary obligations "secured by the right to claim interest". See in that sense J. Radišić, 319 and Z. Slakoper, V. Gorenc, 253. The issue of whether a particular obligation is monetary (pecuniary) arose in arbitration practice as well. Privatization buyers regularly promise the seller (Agency for Privatization) that they will ensure, within the framework of the employees' welfare package, regular payment of employees' salaries for certain period of time after the con clusion of the contract. In one of the cases analyzed, breach of this obligation triggered contractual penalties (FTCA Final Award in the case no T 9/10 of 10 October 2011). Debtor claimed that the obligation in question is monetary, and that consequently the contractual penalty clause was null and void. The tribunal held that this is not so, and drew the following distinction: while an employee's claim for salary vis à vis the em ployer is a monetary one, privatization buyer does not owe money to Agency, instead it owes it a different obligation to ensure (*obligation de résultat*) to pay salaries to the employees. Agency cannot request privatization buyer to carry this obligation out by pay ing it (i.e. the Agency) a sum of money. Consequently, the obligation is not monetary.

[72] See M. Konstantinović (1982), 524.

[73] For *argumentum a contrario* see M. Konstantinović (1982), 522. The author states that this kind of conract cannot be reviewed if it is otherwise conforming to manda tory provisions.

[74] On Council Directive 93/13/EEC on unfair contract terms see Radovan Vukadinović, "Perspektive Evropskog građanskog zakonika", *Pravni život* 12/1996, 883. These are the so called *clauses abusives* or *unfair terms*. See D. Pavić, 394 and references cited therein. For the abuse of economic position when contracting the amount of contrac tual penalty, see the section discussing *clauses abusives* in consumer contracts, P. Malin vaud, 223.

[75] For the legislative history of the provision see M. Konstantinović (1982), 522 533. For comparative law see G. H. Treitel (1988), 221 233. See also P. Malinvaud, 227 228.

[76] M. Vasiljević, 651 652.

[77] For the application of the CISG as a part of domestic law see M. Đorđević, 258 et seq.

tractual penalties for delay at 5% of the contracted price for the works.[78]. Given that said regulation is applied only when contracted for[79] its application is limited. However, in one of the analyzed cases they were invoked by the tribunal as an indicator that there have to be limits to the sum of the agreed penalty.[80]

Serbian law provides that a court will exercise its control over the sum of the penalty due only if so requested by a party.[81] Just like the courts,[82] tribunals have interpreted the notion of 'debtor's request' very broadly: any opposition to the right of the creditor to collect the penalty will, at the same time, be understood as opposition to the amount requested.[83] Consequently, even in absence of explicit request for reduction award will be not *plus petitio.* It is not difficult to find justification for this position: nullity of the contracts is to be observed ex officio, and stipulation of exorbitant sum would be contrary to public policy and *contra bonos mores*, and consequently invalid.[84] That is why the debtor need not specify the extent of reduction or the sum it considers appropriate.[85] (It is worth noting that a consistent adherence to this principle would suggest legislative approach taken by Code Civil, which empowers courts to reduce sum ex officio, even absent any request of a party).

The criteria for reduction are not easy to implement. LCT provides that the penalty will be reduced if it found to be *excessively high compared to the value and significance of the subject of the obligation*[86]. The

[78] See Art. 43(2) of the Special usages for construction business, *Official Gazette of the Socialist Federal Republic of Yugoslavia* 18/77.

[79] See Vladimir Vodinelić, *Građansko pravo, Uvod u građansko pravo i Opšti deo građanskog prava,* Pravni fakultet Univerziteta Union, Belgrade 2012, 109.

[80] Ad hoc Final Award of 1 April 2013. See also D. Hiber, 350.

[81] See Art. 274 LCT. For the evolution of the possibility to reduce the amount of penalty since the principle of *pacta sunt servanda*, the reduction upon request from a party and the reduction *ex officio* see D. Hiber 354.

[82] See the judgment of the Supreme Court of Serbia No. 591/95. See also G. Ajnšpiler Popović, 9; D. Pavić, 399 400 and case law cited therein.

[83] FTCA Final Award in the case no T 12/10 of 19 September 2012.

[84] Cf. art. 141(3) LCT.

[85] This has been confirmed in arbitral practice. In FTCA Final Award in the case no T 9/10 of 10 October 2011), rejecting claimant's position that the respondent had to specify the exact sum for which the penaty should be reduced, the tribunal held that the debtor is not obliged to do so and that, if requested even in general terms, the reduction may be carried out in accordance with parameters set in the law.

[86] See Art. 524 LCT. *Disproportionateness* represents a prerequisite for introduc tion of reduction mechanism. Not every excessive sum will meet this threshold, only such excessive sum which is particularly disproportionate, "much higher than the damages" see G. Ajnšpiler Popović, 9. Cf. M. Konstantinović (1982), 524, who discusses the issue of contractual penalty the amount of which is excessively higher than the amount that the

quantitative criterion ('excessively high') is easier to interpret than the reference to 'value and significance of the subject of the obligation'.

LCT is not the only national statute offering somewhat vague guidelines for reduction of contractual penalty. Art 163(3) of the Swiss Code of Obligations simply provides that "At its discretion, the court may reduce penalties that it considers excessive". BGB sec 343 provides that "In judging the appropriateness, every legitimate interest of the obligee, not merely his financial interest, must be taken into account." Art. 1152 of the Code Civil empowers the court to reduce penalty even when the party has not requested reduction; 1975 amendment introduced opportunity to adjust it if it is excessively high *or* excessively low. It has been observed that the desire to regulate precisely and in detail might actually introduce uncertainty, a simple reference instead to penalty being 'excessively high' might suffice as a yardstick.[87]

The wording of the yardstick has, however, changed over time in Serbian (Yugoslav) legislation. General usages on trade in goods provided that the penalty may be reduced if it is excessively high. [88] Draft code on contracts and obligations linked reduction to comparison of the penalty to "creditor's damages".[89] LCT settled for the above mentioned reference to value and significance of the subject of the obligation (General usages refer to value of the subject matter only in the context of computation of the amount of penalty due).[90]After LCT had entered into force, court practice used actual damages suffered by the creditor as the reference point.[91] This is consistent with the prevailing view of predominantly compensatory nature of the contractual penalties.[92]

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creditor would have been entitled to had the court examined the value of damages caused.

[87] See M. Konstantinović (1982), 525 526. This advice, which has never been entirely applied in the Draft of the Code of Obligations and Contracts, seems to have suc cessfully resonated more than half a century later. The Draft Civil Code of Serbia contains an alternative solution pursuant to which a reduction may be granted if it is established that the contractual penalty is excessively high. See *Civil Codes of Serbia*, Draft, book II, *Obligations*, 2009, 109.

[88] See Art. 252 of the General Usages for Trade in Goods.

[89] See Art. 219(2) of the Draft Code on Obligations and Contracts.

[90] See Arts. 253 and 254 of the General Usages for Trade in Goods.

[91] See G. Ajnšpiler Popović, 9. For examples of that practice see M. Konstantinović (1982), 524 526. Cf. D. Pavić, 400 402.

[92] D. Pavić, 395. G. H. Treitel (1988), 224 225, who remarks that legislators omit to state precisely what the agreed upon sum is to be compared to. He assumes that the comparator is the value of damage, but he opens the question of the type of damage, stat ing that, absent an explicit provision containing a different solution, the comparator should be the value of real damage.

Where tribunals went beyond simple restatement of the applicable legislative provisions, they have, at least indirectly, tended to refer to this compensatory function and damages suffered.

For instance, in one of the cases the debtor (privatization buyer) breached its obligation not to dispose of certain assets.[93] The tribunal found that, on the facts of that particular case, penalty clause was excessive (it amounted to one half of the purchase price) and reduced it to the sum equal to the value of the disposed asset (and thus indirectly to the perceived damages resulting from the breach). The tribunal observed that the penalty is of compensatory nature as the penal aspect was reflected in the provision of the Law on Privatization prohibiting restitution. When deciding on the sum of the penalties due for breach of obligation to pay salaries to the employees, the same tribunal took the total unpaid sum as the main reference point.

Another interesting case of indirect reliance on the value of damages suffered occurred in a case where, for breach of several contractual obligations, the claimant sought penalties in the exorbitant sum of over 70 million EUR.[94] Buyer was obliged to refrain from disposing of certain real estate, and the breach of that obligation was subject to contractual penalty. Buyer disposed of it, however, in order to settle its tax debt, handing the real estate over to the tax authorities, and the authorities set off its tax debt for one third of the estimated price of the real estate, in accordance with law. [95] When deciding on the reduction of the contractual penalty, the tribunal took the value of the real estate as reference point – triple the sum of the debt settled, i.e. what the real estate was actually worth.[96]

Arbitration tribunals have, therefore, to a significant degree, aligned with the courts when deciding on reduction of contractual penalty. This is evident although, at times, the justifications given departed slightly from the line taken by the courts – the underlying reference (damages in light of particular circumstances of the case) remained the same.

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[93] FTCA Final Award in the case no T 9/10 of 10 October 2011.

[94] FTCA Final Award in the case no T 12/10 of 19 September 2012.

[95] Art. 110 of the Law on Tax Procedure and Tax Administration (Official Gazette of the Republic of Serbia 80/2002 and 20/2009) provides that if a real estate, which is the object of enforcement, cannot be sold by public auction, nor by direct agreement within six months from the day of issuance of the ruling on its sale, such real estate shall be considered to have been sold to the Republic of Serbia at the value equal to one third of the determined initial value.

[96] FTCA Final Award in the case no T 12/10 of 19 September 2012. Similarly, the calculation of the maximum penalty for delay in performance (construction of an object) in the Ad hoc Final Award of 1 April 2013 revolved around the value of the obligation (i.e. object to be construed) which was late (i.e. not yet performed as of the time of the dis pute).

## 4. CONCLUDING REMARKS

National legislators take different approaches to whether and in what manner the parties may agree on sums payable in the event of breach of obligations. Being a Civil Law country, Serbia allows for contracting for contractual penalties. They potentially serve not only compensatory, but penal goals as well. Despite their frequent use and fairly rich court practice and doctrine, they consistently present problems in practical application, and did so particularly acutely in several arbitral decisions which dealt with privatization agreements. Arbitral practice is normally not reported, thus depriving local legal community from valuable insight into specific issues and approaches that have arisen away from the eyes of the public.

Privatization context involved not only problem of characterization of the secured obligations, but also the potential issues of combining contractual penalties with bank guarantees and with the prohibition of restitution contained in the Law on Privatization. In all those circumstances, although it was necessary for them to adhere to the established practice of the Serbian and ex-Yugoslav courts, the tribunals took the well-established path, although they had to apply it in a context not normally encountered in the court decisions.

Even outside of the privatization context, tribunals were confronted with controversial issues, such as e.g. the issue of whether a contractual penalty for delay may be collected even before the secured obligation is eventually enforced. To this day there has been no comparable court case reported on the matter.

Finally, on issue of reduction of the contractual penalties the tribunals applied seemingly the same methodology of the courts. In doing so, they did not treat contractual penalties as a substitute for the regular process and methodology of compensating damages. Nevertheless, every case in which reduction took place demonstrated tribunals' effort to decide on reduction only after it has anchored itself around some reference number which could potentially be relevant in the context of the calculation of damages. As always when it comes to discretion and numbers, 'proportionality' and 'appropriateness' are standards which are in the eye of a beholder.

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# NATURE, IMPORTANCE AND LIMITS OF FINDING THE TRUTH IN CRIMINAL PROCEEDINGS

*The paper analyzes reasonable possibilities of finding the truth in modern criminal proceedings. Instead of the often uncritical, and sometimes even populist referring to the so called principle of "material truth" as the main objective of crim inal proceedings in continental legal tradition, the authors point out that the nature, importance and limits of finding the truth in criminal proceedings must be perceived in relation to other values included in the modern procedure, such as the presumption of innocence, adversary principle, equality of arms, the rules in dubio pro reo etc. Therefore, in a brief overview of the relevant philosophical movements, the authors first point out that the very notion of truth, which is inevitably philosophical, is inac cessible and enigmatic. It is highlighted that referring to the truth as an objective which should be reached in criminal proceedings is often a specific alibi for many open issues inherent to the system of criminal justice coercion. It is specifically high lighted that due to its "normative" nature, judicial truth inevitably differs from sci entific, philosophical, ethical or aesthetic truth, and that under the modern circum stances it also has a number of "rivals" in the form of the value of criminal proce dure it must be harmonized with. The authors believe that modern criminal procedure is most appropriately demonstrated in the so called "adversary" model of process which is a unique mixture of solutions taken from the two major legal systems. In stead of insisting on pure solutions taken from the continental or Anglo American*

*legal heritage, the authors propose a formula which includes adequate solutions of both systems. The obligation of the prosecutor to prove the allegations of indictment in discussion with the defense, together with the judicial restraint in the search for evidence supporting the indictment and the possibility to introduce evidence ex offi cio in favour of the defense could eliminate the most significant objections raised in both systems. Thus, adversary proceeding would be spared from the complaints re garding its lack of efficiency when it comes to the accused without the professional support, while the inquisitorial procedure would cease to be a mechanism in which the court, searching for truth, could call into question its own impartiality and the presumption of innocence of the accused.*

Key words: *Truth. Evidence. Objective of criminal proceedings. Inquisito rial proceedings. Adversarial proceedings. Equity. Equality of arms. In dubio pro reo.*

## 1. INTRODUCTION

The increase in the number of criminal cases which is not supported by an adequate increase in the number of judges and prosecutors, the occurrence of serious crimes with a supranational character, excessive formalism with a view to providing a better defense of the accused, hypertrophy of criminal incriminations, the need to bring criminal matters to justice etc.,[1] are just some of the difficulties faced by the criminal justice system of continental Europe. In an attempt to find satisfactory solutions. classical procedural principles are reexamined, sharp differences between civil and criminal proceedings are blurred and the basic procedural concepts are brought into question.[2] When it comes to the principles of criminal procedure law, special attention is devoted to the inquisitorial principle, the principle of judicial responsibility and in particular the principle of examination of the so-called "material" truth. They are the principles that delienate the role of the court in determining the facts in criminal proceedings, which is one of the significant differences between the approaches of continental and Anglo-American models.

There is a widespread belief that any deviation from the above principles means abandoning the mixed (i.e. inquisitorial) model and acceptance of the accusatory type of criminal proceedings. Moreover, legal experts generally believe that adversarial proceedings imply abolishing the traditional role of investigative judges, but not abolishing the investigative monopoly of state officers which would be required in a consistent implementation of adversarial procedural concept.[3] In other words, advo-

[1] Jean Pradel, *Droit pénal comparé*, Dalloz, Paris 2002[2], 603.

[2] Mirjan Damaška, "Napomene o sporazumima u kaznenom postupku", *Hrvatski ljetopis za kazneno pravo i praksu* 1/2004, 4.

[3] Mirjan Damaška, "O nekim učincima stranački oblikovanog pripremnog postupka", *Hrvatski ljetopis za kazneno pravo i praksu* 1/2007, 5.

cates of investigation led by the prosecutor believe that the court should retain the leadership role at the main hearing (after all, this stand is also supported by defenders of judicial investigation), which is a deviation from the traditional role of judges in the Anglo-American procedure.

In the discussion conducted among legal experts regarding the solutions contained in the Serbian Criminal Procedure Code as of 2011[4] special emphasis is put on the need to determine the truth in criminal proceedings. Since the debate among "truth defenders" showed significant overtones of populism, an average Serbian citizen could have an impression that the methods applied by the medieval Inquisition were much more appropriate to determine the truth from those included in the new Serbian Criminal Procedure Code. There was even a claim of unconstitutionality of the new procedural solution, as Article 32, paragraph 1 of the Constitution of the Republic of Serbia[5] guarantees to the accused the right to public hearing about grounds for suspicion resulting in initiated procedure, and accusations brought against him, while the Criminal Procedure Code stipulates that the grounds of criminal charges shall be discussed *before* the court. "Truth defenders" neglect the fact that Article 6 of the ECHR contains the wording almost identical to the one included in the domestic Constitution, which recognizes the right to " ... public hearing ... by an independent and impartial tribunal ... ". However, the Convention gives full freedom to the member states when it comes to the choice of the type of criminal procedure, as it (rightfully) does not find the phrase "hearing by court" to necessarily imply the inquisitorial type of proceedings.

In this regard, it can be noted that advocates of the truth which would be determined by the court *ex officio* in criminal proceedings overlook that their conclusions regarding unconstitutionality of the new solutions are probably based on inaccurate translation of the original text of the specified provision of the ECHR which guarantees the hearing *by* an independent and impartial tribunal established by law (*par* un tribunal indépendat et impartial, établi par la loi). The very warranties contained in the right to a fair trial prescribed in Article 6, paragraph 1 of the ECHR (and also in Article 32, paragraph 1 of the Constitution), should contribute to overcoming the old dispute between supporters of accusatory and inquisitorial model in favour of "adversarial" model which is, according to the opinion of certain authors,[6] a future European model of criminal

[4] Criminal Procedure Code the CPC, *RS Official Gazette* N$^{os}$72/11, 101/11, 121/12, 32/13 and 45/13.

[8] Constitution of the Republic of Serbia, *Official Gazette* N$^{o}$ 98/06.

[6] Mireille Delmas Marty, "Introduction", *Procédures pénales d'Europe (Alle magne, Angleterre et pays de Galles, Belgique, France, Italie)* (sous la dir. de M. Delmas Marty), coll. "Thémis", Presses Universitaires de France, Paris 1995, 38. Delmas Marty highlights that, as a result of atrocities and destruction committed in the Second World

proceedings. Accordingly, Article 15, paragraph 4 of the CPC stipulates that the court may order a party to propose additional evidence, or, exceptionally, order such evidence to be examined, if it finds that the evidence that has been examined is contradictory or unclear, and finds such action necessary in order to comprehensively examine the subject of the evidentiary action. Therefore we could say that the *limits of determining the truth in criminal proceedings are defined by guarantees contained in adversarial model of criminal proceedings*.

As the debate about truth among Serbian legal experts was chiefly biased, shallow and, considering the nature of the stated arguments, outdated, further analysis of the real reach of determination of the truth in criminal proceedings is justified and reasonable. In other words, the nature, importance and reach of truth determined by the court in criminal proceedings should be further considered.

## 2. ON (IM)POSSIBILITY OF DEFINING THE NOTION OF TRUTH

It would be difficult to find a notion that has historically caused more difficulties to those who tried to define it and thus mentally "tame" it, than the notion of truth. Dozens of philosophers have experienced the extent to which this notion, which is so commonly used in everyday conversation, is inaccessible and enigmatic. But it is not only philosophers who have always been attracted to the notion of truth. As noted, this deceptive notion has been a matter of interest to all those who desire to know about anything whatsoever.[7] As the absence of a satisfactory result is common to numerous approaches and attempts to define the notion of truth, it is not surprising that many authors question the justification of made efforts. "All that I can conclude now, as I concluded when I first encountered those theories, is that I have no idea how to define the truth" says Finkelstein,[8] while Vardy states that "more than ever the search for truth seems to b e folly".[9] For some, truth is "an indefinable con-

War, the liberal ideology regarding the state limited by law gave way to the concept of the state of law based on the existence of basic freedoms and rights. It is based on the aware ness that the law could violate the core principles of respect and dignity of each human being, so the state must be protected not only *by* laws, but also *from* laws, and even from itself. Mireille Delmas Marty, "Introduction", *Libertés et droits fondamentaux Introduc tion, textes et commentaires* (sous la dir. de M. Delmas Marty, C. Lucas de Leyssac), coll. "Points Essais", Le Seuil, Paris 2002[2], 10.

[7] Lawrence E. Johnson, *Focusing on Truth*, Routledge, London 1992, 1.

[8] Ray Finkelstein, "The Adversarial System and the Search for Truth", *Monash University Law Review* 1/2011, 135.

[9] Peter Vardy, *What is Truth?*, UNSW Press, Sydney 1999, 179.

cept",[10] and there are other extreme views that defining truth is meaningless and that truth is dead.[11]

The extent to which all that is related to the definition of the notion of truth is tinged with controversy is perhaps best illustrated by the fact that there are disagreements even regarding the number of theories about this notion. According to Vardy there are "two basic theories of truth" – realism and anti-realism.[12] Schantz refers to three "substantive" theories of truth –correspondence, coherence, and pragmatic.[13] The Fontana Dictionary of Modern Thought refers to four not necessarily identical groups.[14] Although the scope of this paper does not allow any deeper analysis of various theories of truth, in order to facilitate following the discussion and the basic theses which will be presented, it is necessary to briefly outline the key ways of thinking about this notion.

According to classical realist theory, and the perception which is most frequently expressed in philosophy as well as in other areas of knowledge, truth is realized as simply a matter of correspondence between statements or sentences and the world or parts of the world (correspondence theory).[15] In a nutshell, according to classical theory as well as the widespread amateur view, "a statement is true just in case it corresponds to a fact, and false just in case it does not correspond to a fact".[16] For traditionalists, truth in no way depends on our beliefs, or on whether we are able to grasp it or not. Truth is objective and hinges only on the way the world is,[17] it is like a "hidden piece of gold", waiting to be discovered and brought to light.[18]

Nevertheless, although apparently simple and easy to accept, the mentioned view actually reveals little about the notion of truth. Here, an abstract notion such as truth is explained by other abstract notions which must be clarified as well. Classical theory does not provide an answer to

[10] Donald Davidson, "The Folly of Trying to Define Truth", *Journal of Philoso phy* 6/1996, 263, 265.

[8] See Bill Kovach, Tom Rosenstiel, *The Elements of Journalism*, Crown Publish ing Group, New York 2001, 40.

[12] P. Vardy, 28.

[13] Richard Schantz (edited by), *What is Truth?*, Walter de Gruyter, Berlin, New York 2002, 5.

[14] Alan Bullock et al. (editors), *The Fontana Dictionary of Modern Thought*, Fon tana, London 1988[2], 876.

[15] Jeff Malpas, "Speaking the Truth", *Economy and society* 2/1996, 158.

[16] R. Schantz, 1.

[17] *Ibid*., 2.

[18] See Thomas Weigend, "Should We Search for the Truth, and Who Should Do it?", *North Carolina Journal of International Law and Commercial Regulation* 2/2011, 395.

the question what truth is if there are no clear concepts about the meaning of notions such as correspondence, reality and fact. Thus, criticisms claiming that classical theory contains a certain amount of tautology are justified, as their advocates do not provide a clear distinction between the notions used in determination, such as facts, and the very notion which is determined (the truth).[19] Nevertheless, perhaps the most important problem which the classical theory has failed to resolve is the view that it is possible to examine pure facts from the outside world without the restrictions imposed by the language and beliefs, i.e. that it is possible to compare the incomparable – statements to facts, bearing in mind that they are different categories. Therefore critics of the classical theory point out that statements and beliefs may be compared with other statements or beliefs to see if they harmonize with each other but we can never compare or confront statements or beliefs with the facts or with reality.[20]

Deficiencies of the classical correspondence theory caused the development of a number anti-realistic theories, the most characteristic of which is coherence theory of truth. The basis of this view is the negation of the stand according to which true facts exist *a priori*.[21] According to these theories, truth is what reasonable people agree upon after a complete and fair discourse.[22] Contrary to the classical theory, the stand of the correspondence theory is that "statements are compared with statements, not with "experiences", not with a "world" nor with anything else".[23] In that regard, "each new statement is confronted with the totality of existing statements that have already been harmonized with each other. A statement is called correct if it can be incorporated in this totality. What cannot be incorporated is rejected as incorrect... There can be no other "concept of truth" for science". In other words, instead of the view that truth is a statement which corresponds to the facts in the outside world,

[19] Horwich underlines: "But this idea, in the absence of elucidating accounts of "correspondence", "fitting", "reality", and "fact", seems more to relocate the issue than to settle it. Even worse, it may well be that some of these allegedly defining notions should themselves be explained in terms of "truth", rather than the other way around. For ex ample, it is not implausible that our conception of a "fact" is simply that of a "true propo sition"." Paul Horwich, *Truth Meaning Reality,* Oxford University Press, New York 2010, 3. Much the same, Schantz states that the traditional theory is a "bad metaphysical theory because the central concepts it invokes possess no explanatory value at all". R. Schantz, 2.

[20] *Ibidem*.

[21] T. Weigend, 395.

[22] Jacqueline S. Hodgson, "Conceptions of the Trial in Inquisitorial and Adver sarial Procedure", *Judgment and Calling to Account* (eds. A. Duff et al.), Hart Publishing, Oxford 2006, 223, 225.

[23] See Wolfgang Künne, *Conceptions of Truth*, Oxford University Press, New York 2003, 381.

coherence theory points out that truth is the property of belonging to a harmonious system of beliefs.[24]

The mentioned philosophical and cognitive theories regarding the notion of truth have influenced major criminal procedure systems. In general, the correspondence theory has found its place primarily in the inquisitorial procedure of the continental legal heritage, while the adversarial procedural model, adopted in Anglo-American law, relies on coherence theory of truth in realization of the notion of truth.[25] In this case, as well as in other comparisons between the two major procedural systems, it is necessary to avoid stereotypes and simplified generalizations. Caution is much needed nowadays when mutual influences are obvious, while assuming certain solutions has become common, so it is becoming increasingly difficult to establish clear boundaries between the continental and Anglo-American model of criminal proceedings. Moreover, it is doubtless that determination of truth is one of the basic goals of criminal proceedings in both procedural systems.[26] Nevertheless, the ways of reaching this goal significantly differ.

The relationship of the continental type of criminal proceedings towards the determination truth has its roots in medieval law. Its origins are related to 12th century and the "Roman-canonical proceeding", which was a combination of certain elements of the secular and church law. Although Roman criminal proceedings were generally accusatory, new proceedings arose which were conducted against offenders who committed crimes so severe that they violated *Res publica*, i.e. public interest.[27] In such case, the state authorities were entitled to undertake criminal prosecution, i.e. to *ex officio* initiate the proceedings whose essence was the investigation (*inquisitio*) led by the judge. In late 12th and early 13th century, inquisitorial proceedings were accepted by the church as well, but only as one of the three forms of criminal proceedings. Over time, inquisitorial proceedings completely displaced accusatory type of proceedings from the church law, which had a decisive influence on the proceedings conducted before secular courts.[28]

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[24] Paul Horwich, *Truth*, Blackwell, Oxford 1998[2], 9.

[25] See T. Weigend, 396.

[26] Lord Denning says that, in English criminal proceedings, the judge sits to hear and determine the issues raised by the parties, not to conduct the investigation on behalf of society at large. Even in England, however, the judge is not a mere umpire to answer the question: "How's that?", but his ultimate object is to find the truth and to do justice according to law. John Spencer, "La preuve", *Procédures pénales d'Europe (Allemagne, Angleterre et pays de Galles, Belgique, France, Italie)* (sous la dir. de M. Delmas Marty), "Thémis", Presses Universitaires de France, Paris 1995, 548, 549.

[27] See Jean Marie Carbasse, *Introduction historique au droit*, coll. "Droit fonda mental", Presse Universitaires de France, Paris 1998, 174, 175.

[28] In its original form, inquisitorial proceedings conducted before ecclesiastical courts did not know of torture. It appeared only after the introduction of a special kind of

Since inquisitorial proceedings were based on the principle that the public interest requires that severe crimes do not remain unpunished (*Interest rei publica not Maleficia remaneant impunita*),[29] one of its main characteristics is establishing the truth in the public interest. The very proceedings which included deciding about such an important bet had to be objective and stern, so it is logical that the truth was distinguished by objective character. This implied the existence of certain evidentiary rules whose objective was to eliminate the judge's self-will in assessing the evidence.[30] Therefore, such truth was named "formal", and after the introduction of free evaluation of evidence by the judge it was named "material" (informal) truth.[31] Although material truth is also objective in its character and determined in the public interest, evaluation of evidence is done according to the judicial discretion. Regardless of whether the truth in criminal proceedings is determined through the legal value of certain evidence or judicial discretion, the common denominator is the perception of the possibility of finding the truth in compliance with the correspondence theory.[32]

As opposed to inquisitorial principle of determining the truth, in jurisdictions of the common law legal tradition the truth in criminal proceedings was determined by a different method. It is based on the assumption that the presentation of different versions of "truth" by the opposing parties and their discussion of the introduced evidence brings to the surface untrue claims of the parties, which further results in reaching real knowledge about the historical event discussed before the court.[33]

As a contrast to the continental perception of the primary role of governmental authorities (prosecutor's office and the court) in the process of determining the truth, the adversarial system, leaving evidentiary initiative to the parties, grants to the court a generally passive role when it comes to searching for the truth. Accordingly, the judge's role is prima-

such proceedings (*inquisitio haereticae pravitatis*), which were conducted before special inquisitorial courts to suppress heresy. See Vladimir Bayer, *Kazneno postupovno pravno Prva knjiga Poviestni razvoj*, Knjižara Zlatko Streitenberger, Zagreb 1943, 49 58.

[29] In church law, it was the interest to preserve the purity of faith, i.e. to fight heresy.

[30] J. M. Carbasse, 176.

[31] V. Bayer, 351.

[32] As for European countries which went through a period of socialism, the pre dominant Marxist doctrine had a specific importance in modeling their procedural sys tems. This, then officially accepted philosophy, promoted pure correspondence theory of truth, amended by certain ideological determinants. See George Ginsburgs, "Objective Truth and the Judicial Process in Post Stalinist Soviet Jurisprudence", *The American Journal of Comparative Law* 1 2/1961, 54, 55.

[33] See Keith A. Findley, "Adversarial Inquisitions: Rethinking the Search for the Truth", *New York Law School Law Review* 3/2011 2012, 914.

rily to hold the balance between the contending parties without himself taking part in their disputations. It is not an inquisitorial role in which he seeks himself to remedy the deficiencies of the case on either side.[34] The very nature of the adversarial system, with special emphasis placed on the principle of judicial impartiality, cannot be easily connected to the inquisitorial powers which would be granted to the court. Nevertheless, it does not mean that the judge would be completely deprived of the possibility to intervene in exceptional cases during the trial. Lord Denning says that the judge's role is to ask questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points the advocates are making; and at the end to make up his mind where the truth lies.[35] Although in the English law the judge rarely takes evidentiary initiative, his power to interrogate witnesses not proposed by the parties is doubtless. In that regard, it is important to underline that the judge can and must act in this way when it is necessary to *ensure a fair trial to the defense*.[36]

Like various philosophical and cognitive theories of truth, various criminal procedural systems have certain advantages and deficiencies, which means they cannot be *a priori* considered absolutely correct or wrong. The fact that pure models are not adequate for the present moment is supported by a very strong influence of adversary solutions on the continental law in the previous decades,[37] while on the other hand, there are increasingly vocal demands that the traditional common law systems take over certain solutions typical for inquisitorial proceedings, especially those related to a more active role of the court in rules of evidence. Con-

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[34] *R v Whitborn* (1983) 152 CLR 657, 682 (Dawson J), *in* Joseph M. Fernandez, "An Exploration of the Meaning of Truth in Philosophy and Law", *The University of Notre Dame Australia Law Review* 4/2009, 70.

[35] *Jones v. National Coal Board [1957] 2 QB 55 at 64, in* Mike McConville, Geoffrey Wilson (ed. by), *The Handbook of the Criminal Justice Process*, Oxford Univer sity Press, Oxford 2002, 339, 340.

[36] *R. v. Wellingborough Magistrates' Court, ex pte François (1994) 158 J.P.* 158J, *in* Spencer, 541.

[37] Significant influence which in particular American criminal justice system and procedural law had in other parts of the world, including continental Europe, has led many authors to name this process simply "Americanization of European criminal proceedings". Thus, Wiegand compares "Americanization" of modern European systems with reception of the *ius commune* in the Middle Ages in that continent. Wolfgang Wiegand, "The Re ception of American Law in Europe", *American Journal of Comparative Law* 2/1991, 246 248. Even the legal systems such as German, Italian and French could not resist the impact of adversary procedural institute. See Máximo Langer, "From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure", *Harvard International Law Journal* 1/2004, 1 3.

sequently, it is now much more difficult to define a system as a purely adversarial or inquisitorial model of criminal proceedings. The reality is such that it highlights an increasing number of mixed systems which combine positive solutions of "both sides".

Before the views about the solutions of inquisitorial and adversarial models which should be used in the search for truth in criminal proceedings are presented, it is necessary to discuss the problem of truth in the light of the limits which exist in respect of its determination in the court proceedings.

## 3. SPECIFICITIES OF DETERMINATION OF TRUTH IN CRIMINAL PROCEEDINGS

As specified above, regardless of any differences in the method and the position of determination of truth on the scale of values, both the inquisitorial and adversarial procedure underline finding the truth as one of their priorities. Is the truth really the main objective of modern criminal proceedings or is it an overestimated idea without any reasonable justification? And, is it justified to remember that truth, like all other good things, may be loved unwisely – may be pursued too keenly – may cost too much?[38]

Although justice is inconceivable without it, the truth reached in the criminal proceedings has certain specific features which distinguish it from scientific, philosophical, ethical or aesthetic truth. Volk claims that judicial truth is limited, distorted and formalized.[39] Limits of judicial truth is a consequence of the existence of such provisions of the criminal law which prescribe the elements of criminal offence (*premisa maior*), which is, according to Župančić, a too "raw" framework relative to numerous concrete factual (*premisa minor*) manifestations in real life.[40] Besides, the judge's acts are limited by the request of the authorized prosecutor, which is a consequence of the accusatory principle whose consistent application would order that the court be deprived of the initiative to introduce evidence by its own motion.[41] Although certain deviations from the court's wholly passive role in introducing evidence are present in the

[38] See J. M. Fernandez, 69.

[39] Klaus Volk, "Quelques vérités sur la vérité, la réalité et la justice", *Déviance et société* 1/2000, 103.

[40] In this regard, he denies applicability of syllogistic logic in law, finding that here premises are not given but have yet to be created. See Boštjan M. Zupančič, "Pravo na ne samooptuživanje kao ljudsko pravo", *Primena međunarodnih krivičnih standarda u nacionalnim zakonodavstvima* (red. Z. Stojanović et al.), Tara 2004, 53.

[41] V. Bayer, 339.

English law as well, the main problem which arises in this regard relates to the ability of the court to introduce evidence within the limits of the indictment[42] not only in favour, but also to the detriment of the accused. The initiative of the court to introduce evidence to the detriment of the accused cannot be easily "reconciled" with the presumption of innocence, which is further discussed below.

One of the specific features of judicial truth is that, as a contrast to scientific truth which includes judgments about the reality, it refers to *normative* conclusions which are partially based on *factual* conclusions, and therefore it cannot be identified with the scientific, philosophical, ethical or aesthetic truth. Moreover, the conclusions reached in criminal proceedings are limited by the fact that none of them is characterized by purely determinative nature, but the authority of a judged matter gives it a partially "normative" nature.[43] Therefore, the *determinative dimension* of the conclusions forming the basis of the court judgment can be assessed in the light of truth understood in scientific sense, which justifies, at least partially, attributing the presumption of truthfulness to the judged matter.[44] On the other hand, its *normative dimension* does not allow for assessment within the boundaries of truth, unless this term is given another meaning which links it to values such as authority, validity, justice and legitimacy.

By introducing the concept of judicial discretion, finding the truth in criminal proceedings is made dependent on a subjective factor which plays an important role in determining the facts relevant to the adjudication of a criminal matter. That is why truth should not be seen as the ultimate objective of criminal proceedings, but rather as the concept of transfer, i.e. as a transitional stage between the reality, its normative boundaries and fair adjudication.[45] Therefore, the decision of the judge is one of the core factors in normative legitimacy of truth.[46] Also, the very process

[42] As a reminder, in German criminal proceedings, the court is authorized to make a judgment for criminal offense specified in the indictment which results from the main hearing, which is justified by the necessity of determining a "material" truth. Such cross ing the boundaries of the indictment raises the question of the extent to which the function of criminal prosecution is performed by the prosecutor, and the extent to which it is per formed by the court, i.e. what remains of accusatory principle and the initiative of the prosecutor without which the court does not act (*nemo iudex sine actore*) and does not cross the determined limits of the indictment (*iudex ne eat ultra petitum*).

[43] Michel van de Kerchove, "La vérité judiciaire: quelle vérité, rien que la vérité, toute la vérité", *Déviance et société* 1/2000, 95, 96.

[44] *Ibid.*, 96.

[45] K. Volk, 107.

[46] Grubiša correctly highlights subjective limitation in the determination of truth which is the result of the judge's prejudice and his relation to certain phenomena in life, susceptibility to pressure from public opinion and leniency towards various external influ

of deciding in criminal proceedings is characterized by a specific type of conclusions based on argumentation. Its "adversarial" character and "dialogue" or dialectical structure of the proceedings are undoubtedly one of the best guarantees for determining the truth in criminal proceedings.[47] It is one of key differences in comparison to criminal proceedings of inquisitorial type, which insist on a model of a monologue, binding the court to determine the truth in criminal proceedings *ex officio*.[48]

Another consequence of adversarial structure of criminal proceedings is the existence of certain rules on exclusion of illegally obtained evidence.[49] Regardless of the particular system of unlawful evidence,[50] the existence of rules of evidentiary exclusion is a guarantee that the criminal proceedings include the possibility of control and discussion of introduced evidence.[51] Thus, according to the motto *ex iniuria ius non oritur*, the government limits itself in its repressive activity, which gives legitimacy to the moral power of criminal conviction, and also protects the presumption of innocence during the criminal proceedings.[52]

The existence of the presumption of innocence, as well as other elements of the right to a fair trial such as judicial impartiality, adversarity between the parties and equality of arms, relieves the criminal proceedings of unnecessary forms which were a goal in and of themselves and introduces the legality and guarantee into ethics of responsibility, rather than into ethics of forms which caused inefficiency of criminal proceedings.[53] Therefore, when it comes to the court's relation to the de-

ences. Mladen Grubiša, *Činjenično stanje u krivičnom postupku*, Informator, Zagreb 1980[2], 26.

[47] M. van de Kerchove, 96.

[48] Sergio Moccia, "Vérité substatielle et vérité du procès", *Déviance et société* 1/2000, 111.

[49] Geneviève Guidicelli Delage (dir.), *Synthèse Les transformations de l'admini stration de la preuve pénale: perspectives comparées. Allemagne, Belgique, Espagne, Etats Unis, France, Italie, Portugal, Royaume Uni*, Mission de recherche Droit et Justice, décembre 2003, 3 (*http://www.gip recherche justice.fr/catalogue/PDF/syntheses/107 preuve penale.pdf*)

[50] The system of unlawful evidence depends on the very structure of the criminal proceedings (adversarial or inquisitorial, i.e. mixed), the relationship between the major criminal justice tendencies (for effective criminal prosecution on the one hand, and for protection of human rights and freedoms, on the other), the regime of determining unlaw fulness of evidence (*ex lege* and *ex iudicio*) and the degree of court's discretion in assess ing the lawfulness of evidence. See Igor Bojanić, Zlata Đurđević, "Dopuštenost uporabe dokaza pribavljenih kršenjem temeljnih ljudskih pava", *Hrvatski ljetopis za kazneno pra vo i praksu* 2/2008, 974.

[51] S. Moccia, 112.

[52] See Davor Krapac, "Nezakoniti dokazi u kaznenom postupku prema praksi Eu ropskog suda za ljudska prava", *Zbornik Pravnog fakulteta u Zagrebu* 3/2010, 1208.

[53] S. Moccia, 110.

termination of truth, the tension between the request for impartiality of the court and the presumption of innocence of the accused on one hand, and inquisitorial authorities of the court to introduce evidence in order to determine truth on the other hand comes to the forefront.[54] Namely, the investigative and judicial roles are fundamentally opposed in character, as to investigate means, according to Leclerc, to "heat up" the hypotheses, to believe in them, to strive to maintain them and to abandon them only when they fail. On the other hand, to judge means to doubt, to criticize hypotheses and not to accept them before they become doubtless.[55] In each of these cases, the concern for legitimacy overpowers a mere desire for truth, which may result in non-acceptance of the proposal which could lead to the determination of truth, or to acceptance of the proposals which will not have any impact on decision of the judge.[56]

In criminal proceedings, unlimited search for truth is abandoned also because a just outcome of the proceedings may be more important in public than the discovery of the whole truth. Such perception to some extent also governs the courts, which "recognize a greater competing public interest – the public interest in a just outcome – rather than the public interest in the discovery of the truth".[57] On the other hand, modern criminal proceedings also require cost efficiency of the procedure, which also prevents the unlimited search for the facts. Today, the excessive duration of proceedings, regardless of the fact that it may have been led by the efforts to fully establish the facts, is no longer considered acceptable in compliance with the well-known motto "justice delayed is justice denied". In addition to the above, there are other objectives which are competitors to determination of the truth in criminal proceedings. Thus, among other things, the alleged "rivals of the truth" in the proceedings are maintaining confidence in the legal system, creating a sense of its predictability and developing acceptable social values.[58]

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[54] The stand of the European Court of Human Rights ECHR is that the existence of the presumption of innocence requires that members of the court in the exercise of their functions do not start from the prejudice that the accused committed the crime, that *onus probandi* rests on the prosecutor, and that doubt is in favour of the accused. Moreover, the prosecutor is obliged to provide sufficient evidence to form the basis for the conviction (ECHR, *Barberà*, *Messegué and Jabardo v. Spain*, 6 December 1988, § 77).

[55] Henri Leclerc, *Un combat pour la justice*, La découverte, Paris 1994, 271.

[56] M. van de Kerchove, 98.

[57] J. M. Fernandez, 72.

[58] Weinstein says: "Trials in our judicial system are intended to do more than merely determine what happened. Adjudication is a practical enterprise serving a variety of functions. Among the goals in addition to truth finding which the rules of procedure and evidence ... have sought to satisfy are economizing of resources, inspiring confidence, supporting independent social policies, permitting ease in prediction and application, add ing to the efficiency of the entire legal system and tranquilising disputants." Jack B. Wein

One of the procedural rules which come into "conflict" with the determination of truth in criminal proceedings which should be mentioned is the case of the acquittal for lack of evidence. The existence of this basis for acquittal shows that the truth about the event which is the subject matter of the trial shall therefore not be undoubtedly determined. Were the question of truth indeed central in the criminal proceedings, acquittal in this case would be possible only if it were indisputably established in the criminal proceedings that the accused did not commit the crime.[59]

The above leads to the conclusion that, in addition to the "social construction of reality", there is also its legal construction which arises in criminal proceedings.[60] It is reached through the discussion focused, in Kelsen's words, on the problem of attributability, i.e. finding or creating by the legal norms meaningful connections between a certain person and his behavior.[61] Moreover, the historic event which is the subject matter of the discussion in criminal proceedings is as a rule, by the very factual description contained in the indictment, reduced to elementary presentation of extremely rich, multidimensional events (metaphorically speaking, factual simplification of reality in criminal proceedings resembles the recomposition of a symphony for a mobile ringtone). In an effort to determine what really happened in the past, the judge moves within the framework of acceptability of the event set forth in the indictment, and if he assesses it as such, he considers it to be truthful.[62] Having satisfied him-

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stein, "Some difficulties in Devising Rules for Determining Truth in Judicial Trials", *Co lumbia Law Review* 2/1966, 223, 241.

[59] It is obvious that in most procedural systems there is a certain logical inconsis tency when it comes to acquittal for lack of evidence. Namely, if it is not proven that the accused committed the crime, he is not declared innocent, but there remains a doubt re garding his guilt with the statement that there was not enough evidence for any other deci sion. Such approach can be doubtful if we keep in mind that throughout the proceedings the accused enjoyed the presumption of innocence, and that it is justified to confirm such presumption by the court decision at the end of the proceedings, if not proven otherwise. Such solution can be explained by the fact that most of the mechanisms for determining the truth emerged in the inquisitorial model which was above all designed to determine the truth about guilt.

[60] K. Volk, 106.

[61] Jacques Michel, "Procès du doute et vérité judiciaire", *Carrefours sciences so ciales et psychanalyse* (sous la dir. de B. Doray et de J. M. Rennes), L'Harmattan, Paris 1995, 4.

[62] One of the main problems in determination of the truth in criminal proceedings is that the whole concept in the continental legal tradition is based on a realistic under standing of truth, while on the other hand, the methods used in the proceedings are typical of the anti realistic conception. Thus, for example, in continental legal tradition which is inclined to realistic understanding and *correspondance theory of truth*, it is hard to imag ine that the court, even if such claim were true, would believe the defendant that he took someone else's wallet in the tram without the intention to achieve benefit, but just to see whether he is able to do it without being caught, and that he was ready to return it to the

self that the entire event, i.e. sequence of facts must be considered "real", the judge also considers separate facts included in such event to be accurate. It is, therefore, the narrative structure of reality in the determination of which the conviction of the judge plays an important role.[63]

The question of truth in criminal proceedings is paid much more attention in theoretical debates than in practice. Serious analysis definitely shows that truth in court practice does not have the importance attached to it by the doctrine. Besides the above difficulties on the way to determining truth in criminal proceedings, the courts face a relatively small number of cases in which the outcome of the proceedings essentially depends on resolving a certain factual mystery. Contrary to amateur understanding that the regular activity of the court includes discovering whether a person is "a killer or a thief", the reality is quite different. In a large number of cases which occur in practice, instead of determination of truth based on the facts, the court's attention is focused on purely legal questions in which beliefs rather than facts are of utmost importance.

Having all this in mind, why does truth still often stand out as the most important objective of criminal procedure, even in legal systems which are not founded on inquisitorial bases? It seems that the reasons are partially due to the need that, by underlining noble goals such as truth, the very proceedings in question be further justified, and those who carry them out reassured that they are doing the right thing.[64] On the other hand, the conclusion that truth as one of the objectives of criminal proceedings should be completely abandoned would not be correct This will be further discussed below.

## 4. TRUTH AND ADVERSARIAL MODEL OF CRIMINAL PROCEEDINGS

Zupančič rightly reminds us that "whenever in the history of criminal law there was a political desire for increasingly repressive punishment, it was ... done in the name of achieving greater efficiency in deter-

owner. Judicial understanding of the truth in such cases, regardless of the heritage of *cor respondance theory* is deeply connected to the existing cultural pattern and the belief that certain events always develop under a specific matrix.

[63] Therefore Volk underlines that, contrary to the belief of advocates of the *cor respondence theory*, in court proceedings "reality follows the truth" ("la réalité suit la vérité"). K. Volk, 106.

[64] Thus, Davidson metaphorically says: "We know many things, and will learn more; what we will never know for certain is which of the things we believe are true. Since it is neither visible as a target, nor recognizable when achieved, there is no point in calling truth a goal. Truth is not a value, so the "pursuit of truth" is an empty enterprise unless it means only that it is often worthwhile to increase our confidence in our beliefs, by collecting further evidence or checking our calculations." Donald Davidson, "Truth Rehabilitated", *Rorty and His Critics* (ed. R. B. Brandon), Blackwell, Oxford 2000, 67.

mining the truth", so that the determination of truth was, "after all, the central premise of the existence of the entire Inquisition – and it is still declarative procedural purpose of many dictatorial regimes on the planet".[65] However, contingency on the social context and the restrictions imposed by the criminal procedure itself should not lead to the belief that determination of truth should be completely abandoned.[66] Therefore, it is necessary to determine its place in the criminal proceedings where, as mentioned above, the limits of determination of truth should be understood from the aspect of guarantees included in the right to a fair trial.

Observation of the U.S. Supreme Court Justice Warren Burger, who metaphorically points to differences between adversarial and continental view of criminal proceedings and the place of truth in it, as well as to the consequences that arise from that can serve as a guideline for finding a satisfactory answer. Justice Burger once remarked that if he were innocent he would prefer to be tried by a civil law court, but if he were guilty he would prefer to be tried by a common law court.[67] Although it does not contain a developed theory about the desirable place of truth in criminal proceedings, the mentioned observation leads to the conclusion that this problem should be considered in the light of the presumption of innocence. It is the one of the key elements of legal certainty in the criminal law, and consequently in the guarantee associated with a fair trial.[68] The field in which it is primarily applied is the law of evidence, in particular the rules on burden of proof, but equally the field of assessment of introduced evidence.[69]

In this regard, Beljanski underlines[70] that in the interest of law and justice, the status of the accused, until proved guilty of an offense by final

[65] B. M. Zupančič, 57. For the challenges faced today by human rights in criminal proceedings in various parts of the world see also: Miodrag A. Jovanović, Ivana Krstić, "Ljudska prava u XXI veku: između krize i novog početka", *Anali Pravnog fakulteta u Beogradu* 4/2009, 3 13.

[66] Thus, Damaška states "although the truth we seek in legal proceedings is de pendent on social context contingent rather than absolute this does not imply that our as piration to objective knowledge is misconceived, or quixotic". Mirjan Damaška, "Truth in Adjudication", *Hastings Law Journal* vol. 49/1998, 297.

[67] Wayne A. Petherick, Brent E. Turvey, Claire E. Ferguson (ed. by), *Forensic Criminology*, Elsevier Academic Press, Burlington 2010, 55.

[68] For various views on the presumption of innocence see Renée Koering Joulin, "La présomption d'innocence, un droit fondamental ?", *La présomption d'innocence en droit comparé* (colloque organisé par le Centre français de droit comparé et le ministère de la Justice), Paris 1998, 19 26; Jacqueline Décamps, *La présomption d'innocence: en tre vérité et culpabilité*, Thèse, Pau et pays de l'Adour, 2009; Rinat Kitai, "Presuming Innocence", *Oklahoma Law Review* 2/2002, 257 295.

[69] Pierre Bolze, *Le droit à la preuve contraire en procédure pénale*, Thèse, Uni versité Nancy 2, Nancy 2010, 23.

[70] Goran P. Ilić, Miodrag Majić, Slobodan Beljanski, Aleksandar Trešnjev, *Ko mentar Zakonika o krivičnom postupku*, Službeni glasnik, Beograd 2012, 61, 62.

and enforceable decision of the court, should be the status *quo ante*, i.e. the status in which the relationship between him and the offense he is charged with is not determined to his detriment. The fact that he is actually subordinated to coercion of the criminal proceedings does not change such legal position: the accused retains the extent of his abstract legal freedom. In the course of its validity, which is limited by the end rather than the beginning of its duration, presumption of innocence has its independent and undeniable meaning. Its practical and general importance is manifold. First, it excludes the relation towards the offense as to *crimina privata* and does not allow determination of guilt and labeling the offender only within the limits of *crimina publica*, after the final and enforceable completion of the proceedings before the court and under the legally prescribed procedure. On the other hand, it continuously actualizes the argument that burden of proof rests on the prosecutor and that in general, without real expression of the prosecutor's obligation resulting from this argument, all evidentiary initiatives of the remaining two procedural subjects are either unnecessary – when it comes to the accused, or unlawful – when it comes to the court.

In terms of burden of proof and procedural role of the court which can be established in that regard, we can distinguish two situations. First, when the prosecutor after the carried out rules of evidence, fails to refute the presumption of innocence and thus prove the guilt of the accused. In such case the court, consistently protecting the presumption of innocence, would have to remain restrained when it comes to introducing additional evidence, even if it were convinced that there is other evidence in support of the guilt of the accused which is not proposed by the prosecutor.[71] Such court's passive role in introducing evidence by its own motion results from the rule *actore non probante reus absolvitur* which imposes on the prosecutor, as the holder of the burden of proof, the obligation to persuade the court of certainty of the allegations of indictment, as otherwise the court acts *in favorem defensionis* and decides in favour of the accused. Any other solution would put the court into the position of an "auxiliary" subject of evidentiary initiative in favour of the indictment, which is incompatible with the court's impartiality as an element of the right to a fair trial.[72]

The situation if quite different if the prosecutor's role to introduce evidence would point out the possibility of refuting the presumption of innocence, where the court is satisfied that the parties failed to propose all

[71] Damaška believes that due to the absence of legal authority to introduce evi dence by its own motion by which unjustified acquittal would be avoided, the judge could feel a moral discomfort. It also raises the question of protecting the interests of victims of criminal offenses. Mirjan Damaška, "Hrvatski dokazni postupak u poredbenopravnom sv jetlu", *Hrvatski ljetopis za kazneno pravo i praksu* 2/2010, 825.

[72] G. P. Ilić (et al.), 249.

the evidence in favour of the accused. Contrary to the general adversarial restraint when it comes to introducing of evidence by its own motion, here the court not only could, but would be obliged to act in compliance with the observation of Justice Burger, i.e. with the stand expressed in the mentioned decision *R. v. Wellingborough Magistrates' Court, ex pte François* (1994) 158 J.P. 158J, about its obligation to provide the defense with a fair trial.[73]

Acting of the court in the mentioned situations would be also based on the principle *in dubio pro reo* which is one of the derived consequences of the presumption of innocence.[74] Consequently, the facts against the accused would have to be proven with certainty, so that any doubt regarding their existence would lead to the conclusion that they do not exist. On the other hand, if the court cannot with certainty exclude the doubt regarding the existence of the fact in favour of the accused, it shall be considered that such fact exists.[75]

Therefore, it can be concluded that proving would imply the obligation of the prosecutor to try to prove the allegations of indictment through the discussion with the defense, where the court would be reserved in looking for evidence in favour of the indictment, but it could *ex officio* introduce evidence in favour of the defense. Thus, adversary proceeding would be spared from the objections regarding its lack of efficiency when it comes to the accused without professional support, while the inquisitorial procedure would cease to be a mechanism in which the court, searching for truth, could call into question its own impartiality and the presumption of innocence of the accused.

Last, but not least, the above discussion leads to a conclusion that in legal systems of inquisitorial heritage, a special attention should be paid to the importance of evidence and development of evidentiary rules. In contrast to natural sciences, court proceedings discuss solely historical events which cannot be repeated and which consequently cannot be tested experimentally.[76] Court decisions necessarily rely on evidence, the only mediator between the one who decides and that what is decided. Therefore, instead of the dilemma whether material, formal or any other truth has been determined in the particular case, the fundamental question of

[73] A disputable question can be raised here how to proceed when the court intro duces certain evidence in the belief that it will be beneficial for the defense, but something quite opposite happens. In such case, the conviction should not be based on such evi dence, since that would be in breach of the principle that the burden of proving the indict ment rests of the prosecutor. Grubiša similarly interprets the possibility that the court, in light of the prohibition of *reformation in peius,* introduce evidence and determine the facts on the repeated main hearing. See M. Grubiša, 216, 217.

[74] P. Bolze, 26.

[75] M. Grubiša, 65.

[76] B. M. Zupančič, 54.

criminal proceedings should be whether the prosecutor has provided sufficient evidence that in the particular case the fundamental principle of criminal proceedings – that every man is presumed innocent until the contrary appears, can be refuted.

## 5. CLOSING REMARKS

Underlining truth as the objective of criminal proceedings was in various legal systems a kind of alibi for many open questions inherent to the system of criminal justice coercion. Thus, claiming that punishment is done "in the name of truth" similarly as that it is done "in the name of God", made "the hangman's hands shake less".

A more realistic approach to this problem reveals a somewhat different picture of the truth. Fist of all, it can be noticed that an easy motion for finding unconditional truth, to which the representatives of Serbian doctrine are generally prone, can hardly find its justification. It is undisputed that judicial truth has a number of "competitors" with which it comes into conflict, so it would be reasonable to ask whether nowadays it can be considered the "ultimate goal" of criminal proceedings. As the human rights standards require that each criminal procedure must provide, as basic aspects of the right to a fair trial, adversarity and "equality of arms" between the prosecution and the defense, [77] it is clear that truth should in a way be "harmonized" with these values.

In this sense, this paper tries to find a suitable place for truth in criminal proceedings. Although in the proposed approach adversarial model of establishing the truth would prevail, it would not be deprived of inquisitorial powers of the court. The fundamental role of the court in the proposed model would include ensuring that the prosecutor has an opportunity to prove his claims through adversarity and "equality of arms" of parties. Each failure in this area, i.e. any doubt about the allegations of indictment, would result in an outcome in favour of the accused. In exceptional cases, as a result of the obligation to provide the defense with a fair trial, the court would undertake evidentiary initiative if it believes that there is evidence which could also call into question the accuracy of the prosecutor's allegations. The objective of introducing such evidence would not be establishing the innocence of the accused with certainty, but raising doubts regarding the allegations of the prosecution, on the basis of which the court would, according to motto *in dubio pro reo*, decide whether the accused could be convicted.

[77] ECHR, *Row and Davis v. United Kingdom*, 16 February 2000, § 60.

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# DOCTRINAL RECEPTION OF EUROPEAN (ROMAN) LAW TRADITION IN POST-OTTOMAN SERBIA*

*After the liberation from long Turkish occupation during XIX century, and some temporary influence of Sharia law, Serbia was able to turn again towards its European roots, and especially towards its rich legal tradition. The "normative" re ception of the Roman law tradition could have been obtained in Serbia only upon reaching higher level of economic standards and basic legal education. Thereof, the "doctrinal" reception which included establishing certain educational institutions, language standardization, and, especially, the existence of the corresponding legal terminology, had to come first. Legal subjects at the Belgrade Higher School (estab lished in 1808) and Lyceum (1838), was gradually developed into the "Legal depart ment", that would grow into the Faculty of Law. But, the other centers that influ enced the general development of Serbian culture were out of borders of Serbia, in Vienna, Pest, and especially in Vojvodina (Sremski Karlovci, Novi Sad). The ideology of the new born Serbian bourgeoisie, based on Roman law principles of inviolability of private proprety, was opposite to the old patriarchal mentality, based on collective ownership and mutual solidarity. Anyway, so called " original accumulation of capi tal" was protected by regulations of the Serbian Civil Code (1844). Parallely, at the accademic level, Roman Law was established as a separate subject in 1853 and was headed by professor Rajko Lešjanin. He had completed his legal studies at prestig ious West European universities, like many other Serbian romanists in the XIX cen turies (Mihajlo Radovanović, Dragiša Mijušković, Giga Geršić, Živko Milosavljević et al.). Apart from strong spiritual and religious connection between the Serbian and*

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*Russian people, Serbian intellectuals obtained not only high education, but they also brought liberal and democratic ideas in the Serbian Principality from the West.*

Key words: *Roman Law tradition. Belgrade Higher School. Lyceum Rajko Lešjanin. Serbian Civil Code.*

It is well known that the reception of Roman law is based upon money-for-goods economic exchange, liberal market economy and private property. However, regardless of whether the reception has occurred *via facti* (in Italy, France, Holland etc.) or *via lege* (in the German states), a doctrinary shaping of certain institutions taken from antiquity, i.e. their adjustment to concrete social circumstances, takes place as a prerequisite for the reception, sometimes even a bit before a full development of the economic preconditions. It is up to jurisprudence and educational institutions to provide law professionals capable of applying a rich heritage of Roman law tradition in modern legal practice. When there were certain social and economical pre-conditions, it was necessary to become familiar with the legal system that one state wanted to implement (expert, doctrinal reception), and after that its principles could be applied in the practice (practical, normative reception).[1]

The principle was also the same for medieval reception of Roman law in the European countries:

- firstly, commodity-cash economy was developed in them, based on private property (contrary to feudal separate ownership, and natural exchange), and after that they needed the laws to regulate those relations successfully;
- the fact that Roman law represented the best response to feudal legal particularism was reached at universities by the interpretation of Justinian's Code (doctrinal reception);
- then the various law schools adjusted that law (*ius commune*), through systematic analysis, to the needs of life and it could become valid, positive law of some areas or states (normative reception).

The rule that *doctrinal* reception had to be obtained before *normative* is confirmed by legal development of modern, post-Ottoman Serbia. Namely, by expulsion of the Turkish feudal rulers, the domestic merchants and newly created landowners strengthened, and origins of the Serbian civil class were formed. This social group wanted to protect their

[1] In broader sense "reception" means taking old Roman legal concepts, that are the result of a long term Roman jurist elaboration, and applying them through medieval reception in various legal systems. Ž. Bujuklić, *Rimsko privatno pravo* [Roman Private Law], Beograd 2013, 103 104.

private property and security of its legal trade, endangered by Prince's self-will. That could be obtained by issuing constitutions and laws, and especially by regulations of the Serbian Civil Code (1844). However, in order for the new legal system (based on the reception of the Austrian Civil Code) to be applied in practice, it was first necessary to find educated experts for it. By founding the Department of Law at the Higher School, especially by implementing the Roman law courses this pre-condition was satisfied.

As far as Serbia was concerned, the process of reception (firstly doctrinal, and then normative) started rather late, and was hampered by many reasons of economic, political and cultural kind. Study of Roman law in Serbia, in fact, coincides with the history of the Faculty of Law in Belgrade, and this in turn is directly connected to the general socio-economic, political and cultural development of the Serbian nation and the painstaking process of restoration of its statehood in the last two centuries.

The same year when Napoleon promulgated the *Civil Code* (1804), Serbia merely started an uprising against Turkish occupation which lasted for centuries. During that long period of time, the rich Serbian-Byzantine legal tradition was largely abandoned and forgotten. However, the Serbian Orthodox Church inherited over time and was transferring the idea of the Serbian state and law, and in the minds of ordinary people it grew up into an epic consciousness of belonging to a powerful medieval state, especially tzar Dušan's Empire of the XIV century. However, it was not enough to bridge the deep gap created by the loss of national independence and the disappearance of the intellectual elite, personified in the Serbian nobility. Dušan's famous legal Code from XIV century and many others developed medieval Serbian legal texts which were copied in the monasteries, but very few truly understood what was written in them. The discontinuity in the cultural development of the Serbian people was a natural consequence of the loss of national independence. Therefore, after the XIX century, liberation movements had to start anew.

## 1. RESISTANCE TO THE RECEPTION

The primary goal during the establishing of a modern Serbian state was its inclusion into the European civilization processes. By dethroning Muslim Turkish authority, the reborn state started to turn towards the Christian West, but even the Orthodox East was not spiritually as far as it was geographically. The leading idea of the rebellions was the liberation from the long-term enslavement, and when they were deciding which Empire they would be inclined to, they paid attention to which of them

supported their leading idea. Therefore, the issue of legal influences, in other words, of foreign law reception, was connected to concrete help to the participants of the uprising.

To show the loyalty to "mother Russia" the uprising leaders asked for implementation of Russian laws in 1809.[2] However, when the uprising was in crisis, and the expected help did not come from that side, others were asked. In order to be worth the support of big European forces, they firstly turned to Austria and started translating Austrian laws and regulations. Realizing that this help would not come, they turned to powerful Napoleon next year (1810). When they bought a copy of *Code Civil* in Ljubljana (in a way that local province governor knew that), they sent a signal that this Code would be applied in Serbia, of course, if they got political and military help from France.[3] After many changes in the political orientation, Serbia finally defers to the Austrian Empire and its laws, particularly under the influence of Serbian educated jurists from Monarchy. The Austrian Civil Code is based on Roman legal tradition, and getting familiar with that was crucial for understanding and applying the Serbian Civil Code.[4] Thereof, the more serious development of the romanistic science in Serbia would begin in the mid of the 19th century.[5]

However, in the spiritual sphere of the established Serbian Principality, there were rejections which were the result of not being familiar with that law, and the result of the conscience that followed those big changes in socio-economic relations. Therefore, fixed legal property and family relations were torn down, in other words, the existing tradition was abandoned.

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[2] That year, a Serbian representative was sent to the tzar with the order to ask for the books that have Russian law in order to find and use those appropriate for them ("ište knjige u kojima se soderžavaju zakoni Rosijski, da bi i mi izdvojili one zakone koji su za nas prilični, i po njima vladati se mogli"). That idea was supported by Konstantin Rod ofinikin, a Russian consul in Serbia (1807 1809), but his draft about the state structure in the tradition of Russian provinces (*gubernije)*, was undoubtedly rejected by Karađorđe. R. Ljušić, *Vožd Karađorđe* [Leader Karđorđe], Beograd 2005, 189 ss.

[3] M. Pavlović, *Srpska pravna istorija* [Serbian Legal History], Kragujevac 2005, 242.

[4] J. Danilović, "Srpski građanski zakonik i rimsko pravo", *Sto pedeset godina od donošenja Srpskog građanskog zakonika* [Serbian Civil Code and Roman Law, A hundred and fifty years since the enactment of the Serbian Civil Code, 1844 1994], SANU, XVIII (Odeljenje društvenih nauka), Beograd 1996, 49 65; D. Knežić Popović, "Udeo izvornog rimskog prava u Srpskom građanskom zakoniku". *Sto pedeset godina od donošenja Srp skog građanskog zakonika* [The share of the original Roman Law at the Serbian Civil Code, A hundred and fifty years since the enactment of the Serbian Civil Code], 67 78.

[5] See S. Petrović, "Nastava rimskog prava na Liceju, Velikoj školi i univerzitetu do 1941. godine", *Univerzitet u Beogradu 1838 1988* [Roman Law at Lyceum, Higher School and University until 1941, The University of Belgrade 1838 1988], Beograd 1988, 629 644; V. Cvetković, *Razvoj romanistike kod Srba od sredine XIX veka do sredine XX veka (neobjavljena teza)* [Development of Romanistic science among the Serbs from the middle of 19th until the middle of 20th century (unpublished dissertation)], Beograd 2009, 114.

It is not strange that the dominant opinion in Serbia was stated by a professor of the Higher School, Vladimir Karić: " When Hungarian and Austrian jurists came to Serbia, upon its becoming a semi-dependent state, they brought with themselves all the misconceptions of Roman law, which was very harmful for our people also in Austria and Hungary, because the laws contrary to the people's spirit and the level of education. Those jurists also brought those laws which started destroying the existing old traditional family, and the notion of uniqueness". He said for the Serbian Code that "it was not anything more but a translation of the Austrian Civil Code, which rooted out legal terms on family and property of our people, inherited during the centuries. This abrupt transplantation of something foreign, to the Serbian spirit incomprehensive of legislature, was shown through long series of consequences, to affect the state even today. At the time when it was recommendable to collect all people's forces in order to strenghten the state issues, which Serbia received by its resurrection after uprising, some people's started destroying the basis of our traditional ogranization, family, and property, by foreign legislature. If the above mentioned were preserved, it would result in the most lucrative economic outcome and moral gain".[6] In those ideas, it is not difficult to recognize the repulsive attitude of Savigny's Historical school to the implementation of Justinian's law into modern legislature, and pleading for the evolutionary development of the genuine "national law" (*Volksrecht*).

However, a professor at Lyceum Stojan Veljković, pointed out in his opening speech, that Roman law had great significance for beginners, because it provided students with getting familiar with the principles of the existing law regulations, and discovering the inner relation between some legal terms. According to him, the biggest merit of Roman law is " clarity, order, and virtue of its legal regulations and rules".[7] Gligorije (Giga) Geršić had the similar attitude. In his opening speech at the Higher School he pointed out that legal system is not just a bunch of laws and regulations, but it had to become "a logical organism of legal institutions and terms"[8] Thereof, he criticized studying at Natural law school, which

[6] V. Karić, *Srbija: opis zemlje, naroda i države* [Serbia: the description of Coun try, People, and State], Beograd 1887, 553 554. Cfr. M. Pavlović, *Srpska pravna istorija*, 324.

[7] S. Veljkoviæ, *Beseda kojom je Stojan Veljkoviæ, doktor prava i privremeni pro fesor Rimskog i Kriminalnog prava u Liceju Kneževine Srbije svoje predavanje otvorio* [Oration which Stojan Veljkoviæ, doctor of law and temporary professor of Roman and Criminal Law of the Lyceum of the Principality of Serbia, opened his lecture], Beograd 1856. Cfr. V. Cvetkoviæ, 42 44. However, in his voluminous work *Objašnjenju trgov aèkog zakonika* [Explication of the Commercal Code] published in 1866, he clearly points out that some Roman principles (for examlple contract on partnership, *societas quaestus*) are not applicable to modern commercal societes (129 130).

[8] G. Geršiæ, "Nešto o pravništvu uopšte i o potrebi rimskog prava po svesno pravništvo" [Something about the law in general and about the need of Roman Law for

proclaimed that the law could be truly obtained only on the basis of common sense. Geršic, on the contrary, considered that innate law cognition did not exist, and that reason served that an individual became "a mindful jurist" through his hard work. That kind of jurist would be the one who realized three precepts: that the legal system represented the organic whole, that it carried within itself the characteristics of the people who created it ("national principle"), and that together with them, could be changed ("historical principle"), and finally that the theory of legal system and its applying should have been in accordance – all those precepts could be found in Roman law. Also, Geršić quotes Montesquieu: "I feel that I am strong at principles, when Romans are with me".[9] Speaking about the greatness of Rome, he saw the sources of those high achievements in establishing the state and legal system, in the expansionist mentality, based on the selfish need to overcome other nations. It was not "pedant selfishness" based on low moral and intellectual urges, but "great selfishness" that led to reaching the highest aims. Because of that, Roman law is "the religion of selfishness" which made the most perfect legal organism in the human history.[10]

The ideology of the new-born Serbian bourgeoisie, somewhat spoken through the statements of one educated professor at Lyceum, was told two decades after the issuing of the Serbian Civil Code. It put its liberal egoism opposite the up-to-then patriarchal mentality, based on collective ownership and mutual solidarity. The historical sequence of events in the development of Serbia seemed to have reached its wanted aim: the *vernacular language* became standard, the *nation* started forming, *state* received independent status recognized by the big European forces (Berlin Congress 1878) and the newly created *legal system* served to implement the order and protect those who did manage to find economic security through that big historical turnover. Their priviledged position, based on so-called "primal accumulation of capital" should have been protected by regulations in the Civil Code, based on Roman law regulations and untouchable private ownership. Educated jurists and romanists got special significance through that work. At the beginning, they would acquire their knowledge only beyond the borders of their states, and during the time on newly established Serbian high-education institutions.

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lawyers] *"Vila", List za zabavu, književnost i nauku*, Beograd 1866, 695 699, 712 717, 727 733.

[9] G. Geršiæ, 727 730; V. Cvetkoviæ, 44 ss; S. Avramoviæ, "Gligorije Giga Geršiæ, profesor pravnièkog fakulteta i klasièar" [Gligorije Giga Geršiæ, a Professor of the Faculty of Law and the Classicist], *Zbornik Matice srpske za klasične studije* 1/1998, 73 78.

[10] About this V. Cvetković, 47.

## 2. BEGINNINGS OF THE ROMANISTIC SCIENCE AMONG SERBS

At the Higher School a number of legal subjects were taught together with Natural Law, which included the elements of Roman law. However, since the school policy was motivated by the desire that students learn primarily positive law, immediately after the said promulgation of the Civil Code, it was ordered to replace studying of the ancient Roman law with the modern civil law. Hence, the teaching of this matter as a separate subject (called Justinian's *Institutiones* and shortened *Pandecta*) will begin not before 1849/50 school year: for the *Institutiones* three classes per week in the first and the second year, and for *Pandecta* six classes per week, which made a total fund of even 12 classes. The Lyceum curricula reform of 1853/54 abolished the Natural Law, and the study of parts of Justinian *Corpus Iuris Civilis* merged in a single subject – Roman Law.[11]

Newly established chair for Roman Law in Belgrade was headed by Rajko Lešjanin, professor who had completed his legal studies in Heidelberg and Paris.[12] He was appointed at the age of only 25, but with his education, organizational and other skills, he quickly gained compassion of his colleagues and the reputation leading to his election, after only three years, to the position of a Rector of the Lyceum. Among many duties he had assumed, he wrote the first textbook of Roman Law in Serbia, printed in 1857 under the name of *Institutes of Justinian Roman Law.* As the title implies, this work was based on Justinian's codification, but his exposure was not reduced to a simple retelling of the ancient model mentioned, but this author provided more general considerations based on the latest literature of the day (Savigny, Puchta, Vangerow, Hugo, Niebuhr, Keller et al.). Lešjanin especially refers to Hegel's fundamental book *The Basic Features of Philosophy of Law* (*Grundlinien der Philosophie des Rechts*, Berlin 1840) and behaves as a follower of his ideas.[13] Thereof,

[11] Interestingly, in the same school year the subject with the identical name was taught in Zagreb for the first time, which was then within the Habsburg monarchy, eco nomically and culturally in a far more developed area than the Ottoman Empire. Cfr. M. Apostolova Marševelska, "Znanstvena obrada i nastava Rimskog prava na Pravnom fakultetu u Zagrebu" [Scientific Studying and Teaching of Roman Law at the Faculty of Law in Zagreb], *Zbornik Pravnog fakulteta u Zagrebu* 1/1997, 73 100, spec. 79.

[12] M. D.Simić, "Filozofsko pravna misao prof. Liceja Rajka Lešjanina" [Philo sophical legal Thought of Professor at Lyceum Rajko Lešjanin], *Naučno nasleđe*, Beograd 1994, 74 81

[13] Jovan Sterija Popović was a supporter of natural law studies at Lyceum, the first professor of that subject, a Dimitrije Matić implemented Hegel's philosophy by his work *Načela umnog državnog prava* [Prinzipien des Vernüftigen Staatsrechts] from 1851, and by his paper: *Kratki pregled istoričnog razvitka načela prava, morala i države od najstarijih vremena do naših dana* [The Short Review on Historical Development of Prin

Lešjanin's textbook also includes the features which, strictly speaking, are in the field of theoretical aspect of law. That approach is based on the statement that the science of law is directly connected to the philosophy of law, which has to give an answer on the core question: what is actually the right idea of law? Only after that can the legal science (as positive-legal discipline) explain what exists in one state as a "law" (*legal dogmatics*), how it has developed during the time (*legal history*), and Philosophy of law gives the answer whether it has become "wise". Contrary to the Historical school, that totally rejects the philosophical concept, Lešjanin considers that an educated jurist must also have this more complex view on the existing law, having in mind that laws are not *self-sufficient* units, but the part of one "bigger organism". Lešjanin rejects to use term "natural law" (defined in very different ways by some authors) and pleads for "umno pravo" (literary: law of reason, Vernünftrecht). It is *statical* and universal– because it belongs to the mankind, while positive law is *dynamic* and national, because it is connected to certain nation. Therefore, judges must stick to the positive laws, and not to natural law, because it does not deal with the external differences. If there are no corresponding principles, the sentence must be reached using the analogy, and not using "rational law". Lešjanin is closer to the ideas of Historical school because he holds the attitude that positive ("položitelno") and natural ("umno") law do not have to coincide completely. It is confirmed by his attitude that the source of law is people's general legal consciousness about the necessity of certain way of behaving ("the law is external expression of the people's internal legal conviction"). It is, perhaps, possible to find the explanation for this eclectic, and, to some point contradictory attitude towards the phenomenon of law, in the historical and political circumstances at the time. Lešjanin acquired modern ideas from European legal-philosophical heritage, but, by accepting national peculiarities, he expressed his unwillingness to accept the existing normative practice. Namely, Turkey "gave" the Constitution from 1838 to Serbia, and after that Serbia adopted features from foreign legislation (Austrian Civil Code, Prussian Penal Code, etc).[14] Thereof, Lešjanin sees the pristine idea of liberty in the original people's feeling about what is *equity* and what is *imposed compulsion* by those who govern them, especially when they are foreign occupiers. According to him, it is necessary to equalize the *law* itself with *people's liberty*.[15]

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ciples of Law, Moral, and State, from the Ancient Times until Today], *Glasnik Društva srpske slovesnosti* 3/1851, 63 130. Cfr. R. Lukić, "Jovan Sterija Popović Professor of Natural Law at Lyceum", *Anali Pravnog fakulteta u Beogradu* 1/1957, 1 14; B. Marković, *Dimitrije Matić lik jednog pravnika [Dimitrije Matić a Character of One Jurist]*, SANU, Beograd 1977, 39 42; M. D. Simić, 80.

[14] M. D. Simić, 81.

[15] *Ibid.*

Lešjanin's manual contained the *General introduction,* where he set out the main principles and basic concepts of human rights and freedoms, and the reasons for studying this matter: "The importance of this subject, as the science of teaching and learning, would be superfluous to discuss. It has not only historical but also its intrinsic value and virtue. It was already acknowledged by the entire educated world; for there is almost no Higher Law School in Europe today where Roman law is not taught or learned". Lešjanin pointed out that "our Civil Code for the most part consists of Roman law; and it adopted, like all other European civil codes, the principles and basis of Roman law, and by studying it and its history we learned to know and understand our own laws". In his lectures Lešjanin devoted far more space to *Institutiones* than to *Pandecta,* which forced a school inspector into to a sharp reproach: "For the third year in a row professor Lešjanin exposed a part of the Roman law, and does he think that only part of a science may be called a science?"[16] He justified it by the same practice at the German, London and Budapest universities. But, it seems rather, that he was forced into this practice by the fact that *Pandecta* contained as many as fifty books and Justinian's manual only four.[17] The educational level of the students at that time should not be overlooked, as they would hardly be able to keep track of such lectures – due to fair knowledge of Latin, scarce literature and appropriate manual that covers the entire matter. Lešjanin's texbook was used in the next quarter of the century, until it was replaced by Geršić's *System of Roman Private Law* (1882).

Rajko Lešjanin's role in the establishment and consolidation of Roman Law as an independent subject, at a time when Serbia has just formed its own academic institution, is invaluable. Unfortunately, he did not stay long at the Higher School. Due to his exceptional ability, he was soon appointed Secretary of the State Council and later Minister of Justice. Even from those positions he took care of the fate of Roman Law and sharply criticized the draft curriculum, which anticipated the abolition of the subject. His attitude undoubtedly had a decisive influence on the decision by the authorities to reject the proposed reform of higher education. It would be just the first battle won for the survival of this legal discipline in Serbia, but there would be many new challenges in the future.

The next significant step in bringing the Roman legal sources closer to a wider range of scholars was made by Mihailo Radovanović, who in 1864 published a translation of Justinian's *Institutiones*.[18] This is actu-

[16] From the letter of Chief school inspector (Platon Simonović) to Council of Ly ceum. Cfr. S. Petrović, "Nastava rimskog prava", 630

[17] *Ibid.*

[18] O. Stanojević, "O jednom zaboravljenom prevodu Justinijanovih Institucija" [About One Forgotten Translation of Justinian's Institutions]*, Glasnik Pravnog fakulteta u Kragujevcu* 1980, 275 281; O. Stanojević, "Justinijanove Institucije prvi put kod Srba",

ally a textbook supplementing Lešjanin's and enabling students to become directly acquainted with the contents of this integral source – though only in Serbian language. The decision reflected the difficult economic conditions, that made the publisher accept the most inexpensive variant. That might be an explanation why the translation was not accompanied by register of the notions, which greatly hindered the reader's convenience.

The preface summarized history of Roman codifications with special reference to Justinian's time. Translator explicitly noted that his comments were based on the works of Ortolan and Lagrange. Under their influence and at the time the dominant legal understanding of the Historical School, Radovanović had a negative attitude towards interpolations of Justinian compilers, characterizing their work as "mutilation" of classical texts, arguing that "haste does harm to the work". At that time Bluhme's explanation of how Justinian's Commission actually compiled the text of *Digesta* (sc. *Massentheorie*) was not widely accepted.[19]

Radovanović's translation was reviewed and approved by the School Committee, which means that both books could be officially used in the education of students. Both manuals were printed in the local printing house at a high technical level, which at the time represented a remarkable publishing endeavor. The editors were confronted with a very difficult task, because the text appears alongside the old Serbian Church Slavonic, Cyrillic, Latin, Gothic, and sometimes the Greek alphabet. The importance of this enterprise can be understood if one bears in mind that the Serbs won the right to print books only after waging their uprisings. As previously stated, the Serb literary language at this time started moving towards its official formulation and codification by Vuk Karadžić (1847), with the sharpest intellectual conflict and dispute. Rich medieval Serbian-Byzantine legal tradition was abandoned and almost forgotten, a new professional terminology has not yet been created, as indeed in other areas of spiritual life that was cut sharply by centuries of Ottoman occupation. As a result, legal writers were forced to re-invent and create the most appropriate solutions.

In this regard the contribution of Lešjanin and Radovanović was great, indeed. Many language solutions that they offered have remained until today in the usage, although many Serbian lawyers, and even the

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Antičke studije kod Srba [Justinians Institutions for the First Time with the Serbs, Serbian classical studies], SANU, Beograd 1989, 227 237; S. Mirčov, "Pravnik Mihajlo M. Radovanović i Justinijanove Institucije", *Antička kultura, evropsko i srpsko nasleđe* [Jurist Mihajlo M. Radovanović and Justinijan's Institutions, Ancient culture, European and Serbian heritage], Beograd 2010, 332 338.

[19] Zeitschrift der Savigny Stiftung für geschichtliche Rechtswissenschaft 4/1820, 257 472.

Romanists, do not know who their creators were. Moreover, their pioneering work was completely forgotten amidst us, and modern legal reference books and bibliographical works do not even mention their names. It was due to the fact that the *Institutiones* of Justinian appeared in modernized Serbian language some fifty years later (1912) thanks to Lujo Bakotić's effort, and that translation (for the first time accompanied by the original Latin text) completely cancelled the previous one. Bakotić was a lawyer educated in Vienna and Graz, lexicographer and diplomat. Thanks to his classical education and excellent knowledge of Latin, the translation is of high quality.

## 3. SERBIAN NATIONAL AWAKENING

Since 1863 the legal studies have been taking place in the restored Higher School that in 1905 will be transformed officially into the University of Belgrade. This is a period of strong national awakening of the Serbian people in which the moral and spiritual support was mostly sought in orthodox Russia and the ideas of pan-Slavonic unity. Not rarely, there were considerations along the line "whether it is good that legal life of the cultural people still rests on Roman foundations, and that these people in legal terms have not been able to stand completely on their feet, to emancipate and do away with an outdated rule of law thousand years old".[20] Teaching of the modern Historical school was sometimes used only to uncover *Volksgeist* of the certain nation, rather than to grasp the common values of human spirit, including those that lie down in the legal sphere.

However, the impact of Western science and education at the Belgrade Faculty of Law predominated at that time. It was accomplished through teachers trained with state scholarships abroad, through individual meetings at professional conferences, as well as through the scientific literature initially purchased independently by individual professors, and later provided by the state. During this period, Roman Law was strengthened as an autonomous legal discipline and this statement about the general progress is valuable even for it. The Law School library was enriched by the works of German, Austrian and French authors, as most of the Serbian teachers gained their legal education in those countries.[21]

[20] O. Stanojević, " O jednom zaboravljenom prevodu Justinijanovih *Institucija*", 278.

[21] Many of them had a personal contact with the most distinguished people of the European legal thought. That indicates numerous dedications of recognized world authors, written in some books that were gifts for Belgrade professors, and that are kept today at the Library of the Faculty of Law.

The Serbian translations of most important books in Roman Law started appearing: Arndts, Salkowski, De Coulanges, Willems, Dernburg, etc.[22] The biggest project was publishing and translating four volumes of *Pandects* of Arndts. The extraordinary extent of this book (around 1500 pages) testifies the seriousness of studying Roman law at Higher School at the end of 19th century. Karl Ludwig Arndts von Arnesberg published this extraordinary book for the first time in 1852, and during his life, there were even nine editions. After he died (1878) next editions were supplemented and adjusted by the professors of the University of Vienna (Pfaff and Hofmann), and that was pointed out in the subtitle of Serbian translation in 1890. It was published after the Czech and Italian version, which showed how widely this book was accepted in the European scientific circles. On the basis of the 13th edition, the Serbian translation was made by professors at Higher School Andra Đorđević (the first book) and Dragiša Mijušković (the other three). The last volume was published in 1896: I – *Introduction and General Part*, II –*Law of Things*, III – *Law of Obligation and Pledge*, IV –*Family and Inheritance Law*.

The scientific discussion connected to this translation gives a lot of data from that period. Fierce criticism came from the University of Zagreb, published in the distinguished legal magazine *Mjesečnik pravničkog društva u Zagrebu* (2–3/1897): Mijatović L., *A Supplement to Legal Terms within the Serbs and Croats, and the Evaluation of Serbian Translation of Pandects of Arndts*. A rapid response issued on more than one hundred pages: Mijušković, D.T. *Pandects of Arndts in the Serbian Translation and Their Critic – Dr Luka Mijatović, a Professor of Ecclesiastical Law in Zagreb*, Belgrade 1897.

Mijatović was a professor in Zagreb who got his doctorate in Vienna and taught in Zagreb Austrian civil law and Ecclesiastical Law. He was a Dean at Faculty of Law and later Rector of University of Zagreb. In the mentioned review, Mijatović gave numerous objections concerning Serbian translation of *Pandects*, but also paid most attention to differences between the Serbs and Croats in the field of legal terms (what he pointed out in the title of his article). At the very beginning of the text, and without first presenting the arguments, he reached his final judgement: "until now, we Croats, have translated better, especially when we compare Serbian translation to ours". As an example of that he stated Baron's and Serafini's *Institutions of Roman Law* (translated by A.

[22] L. Arndts, *Pandekte ili današnje rimsko pravo* [Pandects or Today's Roman Law], I IV, Beograd 1890, 1479 (transl. A. Đorđević and D. T. Mijušković), K. Salkovski, *Institucije s istorijom Rimskog privatnog prava* [Institutions with the History of Roman Privae Law], Beograd 1894, 636 (transl. A. Đorđević i M. Đ. Milovanović), F. De Kulanž, *Država Staroga veka* [The Ancient State], Beograd 1895, 400 (transl. B. A. Prokić i Ž. M. Milosavljević), P. Vilems, *Rimsko javno pravo* [Roman Public Law], Beograd 1898, 701 (transl. Ž. M. Milosavljević), H. Dernburg, *Pandekte* [Pandects], vol. I, Zagreb 1900, 806 (transl. L. Kostić).

Trumbić and J. Smodlaka, respectively M. Šrepel). Mijatović doubted the value of legal terminology used by Serbian professors, and in twenty pages he wrote about "alphabetic register of errors in the translation" (p. 94). He cited a hudred German terms with Serbian translation, together with numerous exclamation and question marks by which Mijatović showed his disapproval of the given solutions. For him this translation is full of "neologisms, new words, and awkwardly translated words" (p. 92) and therefore the translators themselves "should be sorry for putting an effort in it" (p.160). Mijatović also said that he was not sure if the authors were familiar with Bogišić's contribution to legal terminology issues, and the achievements of the Croatian legal science, as well. According to him, they did not respect that knowledge, and worked "on their own" (p. 88). When it came to the point if the terminology from this period coincided with the Croatian, and could it be useful, Mijatović ascertained decisively: "I have to give a negative response to it" and thereof this translation "should be *a limine* rejected"" (p. 92, 160).

The above conclusions were especially offensive for the main translator, professor Mijušković.[23] He found in them malicious thesis about spiritual dominance of Croats over the Serbs, and, according to him, this was more appropriate to supporters of Croat chauvinistic ideology of Starčević and Frank, and not to a university professor. Also, for a Catholic theologian *sacramentum veritatis* had to be sanctity (p. 5–6). Unfortunately, it was once again proved how the language dispute could be only a motive for pointing out allegedly deep civilization differences between these two ethnically similar nations.

Anyway, from one century historical distance, we have to well appreciate this translation, not only because of its volume, but also because of the important role of those project in Serbia at that time. Mijušković spoke thoroughly about this in his Preface, where he pointed out that Arndts in his *Pandects* exposed the law involved in the Austrian Civil Code, and, through its reception, in Serbian Code as well. He indicated that foreign manuals still had to be present in the Serbia for a long time, but with translating them they became available to a greater number of users. It was usefull for all scientific fields, because the modern knowledge is more convinient for acquisition and later on for implementation in

[23] Andra Đorđević was forced to give up further translation, and teaching at High er School, because he took an active part in politics, and became a minister. Dragiša Mijušković studied the history of law in Munich, Paris, Warsaw and Prague (in the class of a famous professor Zigelj) where he got a title of doctorate. At the Faculty of Law he became the first professor of History of Slavonic Law (1887 1903), and published in the field of medieval Serbian history, where one is especially prominent: "O sistemu Dušanovog zakonika" [About the System of Dušan's Code], *Srpski pregled* 4, 5, 6 /1895. He also translated Salkovski's *Institutions* (under the supervision of Andra Đorđević) and manual *Enciklopedija prava* [Encyclopedia of Law] by Pasquale del Giudice. Cfr. Lj. Kandić, J. Danilović, *Istorija Pravnog fakulteta*, 331 332.

everyday practice. In the field of law, for insance, he considered that the innovation was Austin's positive law philosophy (John Austin, *La philosophie du droit positif*, Paris, 1894). According to Mijušković, Russian, and especially Hungarian scientific editions also passed through the phase of planned translation of the most important scientific works, always under the supervision of the special department of their Academy of Sciences. He emphasized that it would be a good example for future Serbia. From that initial phase, it was easier to make people skillful in order to start creating original books in their own language. That higher level was reached easier if the appropriate scientific terminology was established by translating (p. IV–VI).

In his *Preface* Mijušković cited a dozen of his new words, modeled in accordance with Vuk's *Dictionary* (1852) or Daničic's *Dictionary (Rječnik iz književnih starina srpskih,*1863). He himself said that those were only suggestions "whose existence life will decide" but many of them are not used today (*societas*: "ugovor skupštinstva", *hypotheca*: "podava", *legatum*: "narečenje", *emphyteusis*: "zirat" itd.). On the other hand, among the terms that he rejected as foreign (used by Demeter and his critic Mijatović), it is possibe to notice some expressions that found their place in Serbian contemporary legal terminology (uknjižba, dospela menica, dostavnica, dražba, opoziv oporuka, ostavina, ostavinska rasprava, plenidba, počinitelj, podnesak, pravni lek, punomoć, zatezna kamata itd). Generally speaking, a contemporary reader can follow Mijušković's translation easily, because the language is contemporary, based on vernacular language tradition (like Vuk), along with making new legal expressions on the same basis (like Bogišić). The archaic, Church-Slavonic language did not find its place in that transalation, because he managed to impose basic linguistic ideas of Vuk Karadžić. In some way, Mijušković's translation itself represents some kind of posthumous homage to that distinguished Serbian linguists.[24]

Several decades after the appearance of Lešjanin's textbook, new original manuals of Serbian professors came to light: Gligorije (Giga) Geršić*, System of Roman Private Law – Institution* (1882)[25] and Živko

[24] Mijušković in his Preface (p. IV) emphasizes an important thing, that under his supervision Milovanović translated famous Ligenthal's *History of Roman Byzantine Law* (Zachariae von Ligenthal, *Geschichte des griechisch römischen Rechts*, Berlin 1877) and that the text was even ready for printing. Unfortunately, its further faith is not at all known. He also informs readers that in the field of History of Roman law it was proposed the work of Guido Padelleti (*Storia del Diritto Romano*, Roma 1878) to be translated, but from the German version, prepared and published by eminent Romanist Holzendorff (*En cyclopädie der Rechtswissenschaft* and *Rechts Lexicon*). However, this proposal was not accepted.

[25] Only the first book, that obtained Statutory law, was published. During twenty years of teaching at Higher School, he wrote texts from various fields of law, and from time to time he was engaged in politics. However, it remained opaque, why his textbook

Milosavljević *Roman Private Law* (1899, 1900).[26] They were forced under the legal rule promulgated in 1853 (renewed 1880) which obliged professors to prepare their lectures in print because "dictating" to students was strictly prohibited. Due to a small number of students, printing of textbooks was not profitable, so obviously this practice initially established itself as normal. In fact, during the first decade of the Higher School (1862–1872) about 300 students graduated from the Law School. For Serbia at the time, this was still a large number of lawyers, because it covered the territory of Belgrade Pashaluk slightly enlarged. It was not until the Congress of Berlin (1878) that Serbia expanded to some areas that belonged to the Serbian state corpus, centuries before the Ottoman occupation.

Geršić also published the *Encyclopedia of Law*, where he stated a modern attitude about anthropological foundation of the law, which was a big step forward in the Serbian juristic bibliography at the time.[27] Starting with the fact that the core of the legal system is in the biological and social nature of a human being, he considered that the global social order was conditioned by intellectual and cultural development of its very members.[28] Thereof, there are two types of facts that influence the legal system. Those are its real, "material roots" (which obtain social and biological reality), and there is an ideal, "psychological root", which is based on a man as a conscious being. It explains why behaviour regulations can be found only with people. Since the man is a social being, in the Aristo-

remained unfinished. There he elaborated legal institutions modeled on *pandectist system*, and not on *tripartite system* represented in *Instititiones*, which was completely accepted in *Code Napoleon*.

[26] In the opening speech, that Milosavljević had at Higher School, at the occasion of taking over a department from his professor Geršić (1889), it could be seen that he was a supporter of Savigny's teaching, although he was a French student. According to him, law is the "expression of people's conscience" that during the course of time changed, "and not some constant and unchangeable system created once and *a priori* for all times and all nations". Thereof, law transformed itself from religious and customary regulations to the so called "juristic law". See: *Rimsko privatno pravo i njegov uticaj na evropsko zakonodavstvo i pravničko obrazovanje uopšte pristupno predavanje* [Roman Private Law and its Influence on the European Legislature and Legal Education in General Ad mission Lecture], Beograd 1890, 25. Geršić taught other subjects apart from Roman law for two decades, and Milosavljević was the first professor who was chosen exclusively for Roman law and he would stay there for ten years. His early death prevented him from contributing more to Serbian romanistics. His textbook remained unfinished, and there is only the first book (Statutory and Family law) and the third (Inheritance law). V. Cvetković, 25, 105.

[27] G. Geršić, *Enciklopedija prava* (predgovor M. D. Simić) [Encyclopedia of Law (preface by M. D. Simić)], Niš 1995, I XI; Cfr.. J. Hasanbegović, *O jednom antropološkom utemeljenju prava u našoj pravnoteorijskoj baštini Gligorije Giga Geršić*, Naučno nasleđe *[About One Anthropological Law Foundation in Our Legal and Theoretical lega cy Gligorije Giga Geršić]*, Beograd 1994, 112 118.

[28] G.Geršić, *Enciklopedija prava*, 52.

tle's meaning of that term (*zoon politikon*), where there is a community of people, necessarily, there is a need for some type of law (*Ubi societas, ibi ius*). And this is the primordial, ethnological and social root of law.[29] It influences shaping the legal system, and language, culture, art, economy, science and state, as well.[30] By this attitude for the first time in the Serbian legal thought, Lešjanin implemented the idea that we need sociological method for studying the law, promoted by Auguste Conte, a philosopher of positivistic orientation.[31] In that way, Lešjanin corrected the German historical school concept in studying the phenomenon of law, and Roman law, as well. He pleaded that the subject of the legal science was exclusively the positive law, and not the one present in the human mind, like "ideal", and forever given. When he criticized the studying at Natural-law school, he quoted Jhering: "The legal system equal for all nations would be the same as general presription for all illnesses. This is the everlasting search for the stone of wisdom, which was not sought by wise people, but by fools".[32]

On the other hand, in the preface of his textbook he pointed out certain illogical issues in Savigny's theory. Considering the phenomenon of the Roman law medieval reception, Geršić reproached this school that it allowed one foreign (Roman) legal system to become the property of people whose spirit was not its origin, therefore it did not reflect the nature of that nation.[33] He did not accept the explanation that, during the time, Roman law "assimilated with the national character, that it became property of the people who received it". On the contrary, Geršić insisted that the implemented Roman law was "a foreigner" or "an intruder", and that people let it "come into their lives, and put them under its power". Finally, he concludes that Historical school "from its too subjective point of view", could not give a satisfying response, and that it was a puzzle unsolvable for the science even today.[34] But, this is not Geršić's criticism of the very Roman law, but of the methodological approach to its studying. How much he appreciated the legal inheritance of old Rome, showed the praise that he pointed out later, and it sounded so contemporary: "For sure, there is some big strength in that Roman law, it has to obtain some really universal legal elements, some omni applicable legal logic, when it apart from being strongly opposed, paved its way to the legal life of so many cultural nations until this century. No matter how Roman law was judged, no matter how little it was appreciated, not even the most fierce

[29] *Ibid*., 28.

[30] *Ibid*., 38.

[31] D. Basta, *Pravo i sloboda* [Law and Liberty], Novi Sad 1994, 163 168.

[32] G.Geršić, *Enciklopedija prava*, 58.

[33] G.Geršić, *Sistem Rimskoga privatnoga prava* [The System of Roman Private Law], Beograd 1882, VII.

[34] *Ibid.*, VIII.

of it's opponents cannot avoid admitting, that it has the richest history ever, that it was the only system that had such a strong influence beyond the borders of its nation, and according to this, Roman law is the unique phenomenon among all the legal systems. It would be interesting for any jurist to read it, to meet it, to find something instructive in it, to find out something peculiar and valuable, which is hidden in it".[35]

## CONCLUSION

Only upon the liberation from long Turkish occupation, Serbia could again turn towards its European roots, and especially towards its rich legal tradition. In the medieval period, Serbia was not only incorporated in it, but also contributed to the legal tradition by its legislature. Centuries-long Nemanjić's state, terminated by tzar Dušan's Empire and his famous legal Code of 1349 and 1354, represented a part of rich Byzantine culture. Under the invasion of the Ottoman Empire, the proud representatives of the Serbian medieval nobility were executed, or violently turned into Islam, and the rest formed the crowd of refugees that were escaped across the rivers Sava and Danube. Successful uprisings at the beginning of the 19th century resulted in re-establishing the Serbian state, independent Church, and Serbs started to re-build own educational and cultural institutions. Thus, Serbia joined again the Christian culture circle. Its efforts to achieve state independency included the process of adopting European legal standards and acquiring its normative solutions.

However, the *normative* reception could have been obtained in Serbia only upon reaching the certain level of general legal culture. Thereof, the *doctrinal* reception which included establishing certain educational institutions, language standardization, and, especially, the existence of the corresponding legal terminology, had to come first. The greatest obstacle to this process was illiteracy. It marked common people, but also their leaders, and the Prince himself. The personnel chosen for positions in the state institutions, that is in the newly-established administrative and judical bodies, were educated abroad and included learned Serbs from Austria. Legal education at the Higher School (established in 1808) and Lyceum (1838), was not sufficient, although it was gradually developed into the "Legal department", that would grow into the Faculty of Law. That evolution path would be finished by establishing the University of Belgrade out of these high-educational institutions in 1905.

In that process of establishing cultural and educational institutions, and legal institutions, as well, during the 19th century the decisive influence was reserved for the West-European culture, and not for the Ortho-

[35] *Ibid.*,VIII IX.

dox East. Apart from strong spiritual and religious connection between the Serbian and Russian people, Serbian intellectuals obtained not only high education, but they also brought liberal and democratic ideas in the Serbian Principality by studying in the West. Those ideas overflowed Europe in the 19th century. This was especially noticeable in the legal science, which received philosophical concepts of Hegel, positivism of Auguste Comte, thoughts of Natural law school and of German historical school, which Serbian intellectuals tried to implement together with the ideas of Panslavism and enlightenment movement of "small nations' awakening". The wide range of these different ideas is strongly manifested through the reception of Roman legal tradition. It firstly took the form of *doctrinal* reception (through establishing the separate Law Department within the Lyceum, publishing original textbooks, translating foreign manuals, forming legal terminology, etc.), and only later in the *normative* reception (by issuing *Serbian Civil Code* in 1844).The pro-Western spirit has caused Serbia's most important legal code to be influenced by the *Austrian Civil Code*. However, the other legal fields were also standardized according to foreign models: *Criminal Code* (1860) according to the Prussian Code, *Commercial Code* (1860) according to the French Code, and *The Law on Criminal Court Procedure* (1865) according to the Austrian model.

Economic strength and capable intellectual elite were the decisive factor in precious exchange of different spiritual values. It was particularly manifested in the dynamic development of legal practice, in the existing normative documents, but also in the state institutions functioning, introducing political democracy and rule of law. Post-Ottoman Serbia had to pass its way of emancipation again throughout the 19th century, but even today there are numerous new challenges. Lessons from the past could be a valuable road– mark for Serbia how to approach European integrations, having in mind importance of the crucial intellectual, and particularly governing elite role.

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# THE EUROPEAN OMBUDSMAN THE CHAMPION OF TRANSPARENCY WITHIN BRUSSELS BUREAUCRACY*

*The European Ombudsman investigates complaints about maladministration in the activities of the EU institutions, bodies, offices or agencies, with the exception of the Court of Justice of the EU acting in its judicial role. Cases of maladministra tion related to the transparency issues are the most common in the European Om budsman's practice. Therefore, the main goal of this paper is to analyze the role and contribution of Ombudsman in this area, as well as challenges and difficulties which lie ahead in his work. The analysis is largely based on case studies (cases brought by complaints, as well as the Ombudsman's own initiative inquiries), and on the inter pretation of EU legal documents enacted in this area. The principle of transparency is violated when institutions unreasonably refuse to provide information or docu ments, when they provide misleading or wrong information, and further still when without reasonable explanations they exclude the public from their meetings or con sultation process. These issues have been analyzed separately in the paper, due to the complexity of the principle of transparency and a better understanding of its various aspects. The main conclusion of this paper is that, despite numerous difficulties, the European Ombudsman has become a true champion of the principle of transparency within the EU, contributing to the reduction of its democratic deficit and strengthen ing the legitimacy of its institutions.*

Key words: *European Ombudsman. Transparency. Maladministration. Access to information and documents.*

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## INTRODUCTION

The European Ombudsman (hereinafter: Ombudsman) was established by the Maastricht Treaty, and the first incumbent was elected in 1995. The Ombudsman investigates complaints about maladministration in the activities of EU institutions, bodies, offices or agencies, with the exception of the Court of Justice of the European Union acting in its judicial role. The Ombudsman defines that "maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it".[1] This term obviously includes, but also extends beyond the concept of legality.

Cases of maladministration related to the transparency issues are the most common in the Ombudsman's practice. They make up for more than one-third of all cases that he has investigated.[2] According to him, transparency is not an end in itself, but a means to an end, which is reflected in the strengthening of the rule of law and democratic principles within the EU.[3]

The importance the EU attaches to the principle of transparency has been demonstrated in introductory articles of the Treaty on European Union (hereinafter: TEU), which states that "decisions shall be taken as openly and as closely as possible to the citizen."[4] Furthermore, the Treaty on the functioning of the EU (hereinafter: TFEU) underlines that "Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible."[5]

Despite the importance the EU attaches to this issue, a large number of citizens are not satisfied with the transparency of its institutions.[6] The principle of transparency is violated when institutions unreasonably refuse to provide information or documents, when they provide wrong informa-

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[1] European Ombudsman Annual Report (hereinafter: EOAR) 1997, 23.

[2] See speech of N. Diamandouros: *Keynote speech at the Conference on "The European Transparency Initiative and Ethics in Lobbying"*, Brussels, 5 November 2008, *http://www.ombudsman.europa.eu/en/activities/speech.faces/en/5434/html.bookmark*, last visited 30 August 2013.

[3] See speech of N. Diamandouros: *Building Trust in Times of Crisis*, Utrecht, 8 June 2012, *http://www.ombudsman.europa.eu/en/activities/speech.faces/en/11664/html.bookmark*, last visited 30 August 2013.

[4] Art. 10 par. 3 of the TEU.

[5] Art. 15 par. 1 of the TFEU.

[6] According to the Eurobarometer survey, which was conducted between Febru ary and March 2011 on a sample of 27 000 respondents in all EU member states, as many as 42% of them declared that they are not satisfied with the transparency of the EU insti tutions, while only 9% were satisfied. See: EOAR 2011, 5 6; *http://www.ombudsman.europa.eu/press/release.faces/en/10666/html.bookmark*; *http://www.ombudsman.europa.eu/en/press/statistics.faces*, last visited 30 August 2013.

tion, and further still when they without reasonable explanations exclude the public from their meetings or consultation process.

These issues will be analyzed separately in the paper, due to the complexity of the principle of transparency and a better understanding of its various aspects. We have to emphasize that this classification is not found in the Ombudsman's reports, papers or speeches, but was the result of our analysis and clustering of many cases that are related to the principle of transparency.

## 1. DIALOGUE WITH CITIZENS AND ORGANIZATIONS, THEIR PARTICIPATION IN THE CONSULTATION PROCESS AND THE TRANSPARENCY OF THE MEETINGS OF THE EU INSTITUTIONS

These aspects of the transparency principle enable the public to learn what institutions and bodies do, why they make certain decisions and what actions they intend to take in the future. The responsibility of institutions is provided on the basis of this information, while individuals and companies are enabled to exercise their rights more easily, and to take an active stance in the political debate on various issues. For these reasons, the principle of transparency is a necessary precondition for any democratic system.[7]

The Lisbon Treaty recognizes the importance of a permanent dialogue between the EU institutions and citizens and their organizations. In that sense, TEU emphasized that "institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society",[8] and the TFEU pointed out that the Union shall maintain an open, transparent and regular dialogue with churches, religious associations, philosophical and non-confessional organizations.[9]

The above provisions were the subject of the proceeding in the case 2097/2011/RA before Ombudsman, in which the European Humanist Federation addressed the Commission with a request for the organization of seminar on protection of the atheists' rights. The Commission rejected this request stating that the organization of seminars on the proposed topic is not in its jurisdiction. The European Humanist Federation

[7] See more: J. Söderman, *The Early Years of the European Ombudsman*, in The European Ombudsman, Origins, Establishment, Evolution, Office for Official Publica tions of the European Communities, Luxembourg, 2005, 95; *What can the European Om budsman do for you?, The European Ombudsman, A guide for citizens,* European Com munities, 2002, 15.

[8] Art. 11 par. 2 of the TEU.

[9] Art. 17 par. 3 of the TFEU.

subsequently contacted the Ombudsman. On the basis of his inquiry into complaint, the Ombudsman closed the case with the critical remark. He emphasized that the Commission failed properly to implement Article 17(3) TFEU by rejecting the complainant's proposal for a dialogue seminar, which constitutes an instance of maladministration. The Ombudsman added that the Commission should clarify its practices and rules in this area.[10]

The Treaty of Lisbon has given special importance to the citizens and their organizations in the process of the adoption of general and individual acts in the EU. As we already mentioned, the TEU states that "decisions shall be taken as openly and as closely as possible to the citizen."[11] This article has been concretized by provisions under which the "Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent".[12]

In relation to those provisions, a Spanish citizen addressed the Ombudsman in the case 640/2011/AN, noting that the Commission published a document intended for consultation process in relation to the tax legislation, only in English. The Ombudsman's investigation found that this example is not an isolated case, and that the Commission has very rarely published consultation papers in all official EU languages. The Commission agreed with the view that the language barrier may prevent a large number of citizens to participate in the consultation process, but pointed out that it is often forced to this solution due to limited time and resources. In his draft recommendation, the Ombudsman noted that the above procedure is a case of maladministration and called on the Commission to publish its consultation documents in all official EU languages, or to provide a translation at the request of interested parties. The Ombudsman added that "the Commission should draft clear, objective and reasonable guidelines concerning the use of the Treaty languages in its public consultations, bearing in mind that any restriction to the principles of democratic citizen participation in the decision-making process and of broad consultation by the Commission, enshrined in Articles 10(3) and 11(3) TEU, must be justified and proportionate. These guidelines should be public and easily accessible".[13]

The Commission has not acted on the recommendation of the Ombudsman, and he concluded the case with a critical remark. The sole reason that the Ombudsman did not submit a special report (which might

[10] More on this case: *http://www.ombudsman.europa.eu/cases/decision.faces/en/49026/html.bookmark*, last visited 30 August 2013.

[11] Art. 10 par. 3 of the TEU.

[12] Art. 11 par. 3 of the TEU.

[13] See the draft recommendation: *http://www.ombudsman.europa.eu/cases/draftrecommendation.faces/en/11043/html.bookmark,* last visited 30 August 2013.

have been expected given the importance of the issue), is the fact that the Parliament in June 2012 adopted a Resolution entitled "Public consultations and their availability in all EU languages", [14] which confirmed the position of the Ombudsman.[15]

Finally, the transparency of the meetings of the EU institutions was the reason several complaints were filed to the Ombudsman. In case 2395/2003/GG complainant challenged the legislative procedure before the Council of EU, arguing that it is inconsistent with the TEU, which stipulates that decisions shall be taken as openly as possible. The Council, in its reply stated that the degree of openness within its meetings is a political choice of the institution itself. The Ombudsman did not agree with this opinion, due to the fact that the Council did not give valid reasons why the public should not have access to its meetings. In this regard, the Ombudsman made a draft recommendation, and subsequently submitted a special report to the Parliament in which he recommended to the Council to abstain from this practice.[16] The Parliament accepted the special report in its Resolution and endorsed the Ombudsman's recommendations.[17] In order to prevent such situations in the future, the provision has been entered in the TFEU by which the Council is obliged to provide the openness of its meetings when considering and voting on a draft legislative act.[18]

In some cases, the failure of institutions is related to the nonexistence or improper conduct of the minutes of a meeting. In the most famous case of this kind, the microprocessor producer Intel filed a complaint against the Commission, due to its failure to make a minutes of a meeting held in August 2006, with the senior official from the computers manufacturing company – Dell. The meeting was organized under investigation of Intel operations, in connection with the possible abuse of its dominant position. The Ombudsman concluded that the Commission's conduct constituted maladministration, and made the critical remark that by failing to make a proper written note of the meeting, the Commission infringed upon principles of good administration.[19]

Analyzed aspects of the principle of transparency are important for the trust of citizens and organizations in the EU institutions, especially in

[14] See the text of the Resolution: *http://www.europarl.europa.eu/sides/getDoc.do?type MOTION&reference B7 2012 316&language EN*, last visited 30 August 2013.

[15] See the summary of the decision: *http://www.ombudsman.europa.eu/en/cases/summary.faces/en/48744/html.bookmark*, last visited 30 August 2013; EOAR 2012, 33.

[16] See: EOAR 2005, 105.

[17] See the Resolution of 4th of April 2006: *http://www.europarl.europa.eu/sides/getDoc.do?pubRef //EP//TEXT+TA+P6 TA 2006 0121+0+DOC+XML+V0//EN*, last visited 30 August 2013.

[18] See: Art. 15 par. 2 of the TFEU.

[19] See case: 1935/2008/FOR (Confidential), EOAR 2009, 46.

times of crisis and questioning of the basic values on which the Union is based.[20]

## 2. WITHHOLDING OR REFUSAL OF THE REQUESTED INFORMATION

Each institution publishes a range of information because it is obliged to do so or because it believes that it is necessary and useful. On the other hand, certain information must be kept out of reach of the public, for reasons of confidentiality and secrecy. However, most information does not fall into any of these categories and they are made available at the request of interested persons. It's understandable, given that institutions cannot, for practical reasons, publish all information in its possession, but it is important that information is made available to anyone who timely submits a request.[21] In this way, the public is able to monitor and evaluate the performance of institutions and bodies.[22]

Withholding or refusal of the information occurs when the EU institutions do not respond to a request for obtaining information, or when such a request is refused. In these situations, the call of the Ombudsman's office is often sufficient, for the institution concerned to quickly and accurately respond to the question at hand. This form of maladministration often occurs when the institution refuses to provide the requested information about the recruitment procedure.[23]

A large number of complaints related to the transparency of the Commission's recruitment procedure, resulted in the Ombudsman's inquiry opened on his own initiative in 1997. During the inquiry, the Commission accepted the Ombudsman's suggestions that after written exams allow candidates to take the questions with them, to indicate on the applicant's request the evaluation criteria, as well as the names of the mem-

[20] See speech of N. Diamandouros: *Open dialogue between institutions and citi zens the way forward,* Brussels, 14 March 2012, *http://www.ombudsman.europa.eu/en/activities/speech.faces/en/11330/html.bookmark,* last visited 30 August 2013.

[21] See: I. Harden, *Citizenship and Information*, European Public Law, Vol. 7, Issue 2, June 2001, 174 175.

[22] European Code of Good Administrative Behavior also envisages the obligation of the institution to provide the requested information to the members of the public. See: Art. 22 of European Code of Good Administrative Behavior. See the whole text of the Code: *http://www.ombudsman.europa.eu/en/resources/code.faces*, last visited 30 August 2013.

[23] In interesting case 884/2010/VIK, at the request of an unsuccessful applicant for additional information about the criteria on which the selection had been made, the official of the Commission wrote: "See you in court." Following the intervention of the Ombudsman, the Commission apologized to the complainant for inappropriate behavior of its official and provided him with the requested information. EOAR 2011, 55.

bers of the Selection Board. However, the Commission continued to refuse to grant candidates access to their marked examinations papers (despite the Ombudsman's draft recommendation), claiming that its internal rules prevent such practice. In this regard, the Ombudsman submitted a special report to the European Parliament in October 1999, in which he recommended to the Commission to make available evaluated works, on the request of the candidates. After a few months, the former President of the European Commission Romano Prodi informed the Ombudsman that this institution accepted his recommendations and proposed the necessary legal and organizational arrangements to give candidates access to their own marked examination papers, upon request. The Committee on Petitions endorsed the Ombudsman's special report and drafted a resolution, which was adopted at the plenary session of the European Parliament in November 2000. The Resolution supported the Ombudsman's recommendation, and invited all other EU institutions and bodies to follow the example of the European Commission. The Ombudsman pointed out that the outcome of this inquiry was a critical step in the improvement of transparency in the EU's recruitment procedures. He also praised the cooperative behavior of the European Commission and the support he has received from the European Parliament.[24]

With the aim to enable the standardization of activities in the field of EU recruitment procedures, the European Personnel Selection Office (hereinafter: EPSO) was established in 2002. As a result, most of the complaints about the recruitment procedures and open competitions have been related to the activities of EPSO. The Ombudsman opened an own-initiative inquiry into the work of the Office in 2005. In 2008, he made a draft recommendation, calling on EPSO to disclose to candidates, at their request, the evaluation criteria, as well as the detailed breakdown of their marks. The Office accepted this recommendation and was praised by the Ombudsman for its positive response.[25]

Two years later, the Ombudsman launched a new inquiry into the work of the EPSO, this time on the possibility of unsuccessful candidates to have access to the questions and answers they gave in computer based tests. EPSO refused to provide the requested information, explaining its position with administrative and financial constraints, emphasizing the fact that such practices would prevent it to use the same questions in fu-

[24] See: 1004/97/(PD)/GG, EOAR 1999, 26; EOAR 2000, 206 207; See also case 25/2000/IP, in which the European Parliament allowed the candidates to have access to their marked examination papers. EOAR 2001, 191 193; The Council adopted the same practice in connection with cases 2097/2002/GG and 2059/2002/IP, EOAR 2003, 176 181.

[25] OI/5/2005/PB, EOAR 2008, 51, 63; EPSO allowed all applicants (not just un successful) to have access to their marks on tests. This was a result of complaint that successful candidates cannot find out the marks they received on the test. See case: 2346/2007/JMA, EOAR 2009, 48.

ture tests. On the other hand, the Ombudsman pointed out that the principle of transparency must hold precedence over the reasons given by the Office. Taking into account that a large number of individuals challenged this practice before the Court of Justice of the EU, the Ombudsman closed the case with a critical remark.[26]

Withholding or refusal of the requested information is also common in areas of tender or grant award procedures, organized and implemented by the EU institutions.[27]

Sometimes the reason for the refusal of information cannot be found in the secrecy, negligence or inefficiency of the EU institution, but in the inadequacy of its organization and lack of communication between different units. In cases 69/16.08.95/WDR/PD/D-de and 70/16.08.95/SF/PD-D-de two German journalists contacted the Ombudsman, claiming that the Commission's official did not want to give them a statement regarding the topic on which they were making a TV report. The Commission asserted in its reply that the official was not authorized to give any answers to journalists, since it was the responsibility of the special services for public relations. However, the Commission recognized that the journalists had to be referred to the appropriate units and services, and also had taken measures in order to avoid such misunderstandings in the future. The Ombudsman found the Commission's actions satisfactory, and closed the case. [28]

Finally, in 2011 the Ombudsman made procedural improvements in cases related to this aspect of the transparency principle. In the previous period, he considered the case to be concluded after the institution sent the requested information to the complainant. However, in order to prevent any additional complaints if citizens are not satisfied with the substance of the reply, the Ombudsman now invites them to make further observations. Only in the case of a positive response of complainants, the Ombudsman will close the case.[29]

## 3. PROVIDING MISLEADING OR FALSE INFORMATION

Cases of maladministration may be related to misleading or wrong information, found mostly on the institutions' websites, which may mislead and confuse citizens and companies.

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[26] See: OI/4/2007/(ID)MHZ, EOAR 2008, 64; EOAR 2009, 63.

[27] See, for instance, cases: 3346/2005/MHZ, EOAR 2008, 58; 1683/2011/TN, EOAR 2012, 46.

[28] EOAR 1996, 27 28; See, also: 1128/31.12.96/MH/L/(VK)OV, EOAR 1998, 140 142.

[29] See: EOAR 2011, 8.

In the most famous case of this kind, the Commission published on different websites a variety of information related to flights that were canceled or delayed due to the large volcanic eruption in Iceland in April 2010. The European Regions Airline Association contacted the Commission and pointed out that documents wrongly implied that passengers had an automatic right to compensation in all cases involving delayed luggage. The Commission needed two weeks to admit that relevant information in the document was really misleading, and more than a month to remove it from the website. The Ombudsman criticized the Commission due to inaccurate information that was published, and because of the time it needed to correct such information.[30]

In addition, claims of misleading information can be the consequence of different questions posed to EU institutions, and of requests for information in various fields. Thus, in 1996 a Belgian citizen complained to the Ombudsman, claiming that the Commission had given him incorrect information about the competition for a development project in Latin America. The Commission, in its reply, stated that the same information had been transmitted to the other candidates, so any possible mistake would therefore prejudice all the candidates. Considering that in this way the Commission had recognized its mistake, the applicant was not insisting on further investigation, and the Ombudsman closed the case.[31]

Finally, false and misleading information was given in various documents of the EU institutions, such as procurement procedures documentation,[32] the guidelines for a scholarship program,[33] the guidelines on the Union Citizenship Directive,[34] as well as in other materials and brochures.[35]

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[30] In this case, as in many other situations, there were also present some other forms of maladministration, such as negligence or avoidable delay besides the main issue (transparency). See: 1301/2010/GG, EOAR 2011, 32; See also cases: 2403/2006/(WP) BEH (confusing information on the website of the Commission's Directorate General for Enterprise and Industry), EOAR 2007, 56 57; 1220/2010/BEH (incorrect information on the EPSO's online application form), EOAR 2011, 53 54.

[31] EOAR 1997, 168 169; See also case 1694/2007/(WP)BEH, which concerned allegation that the Commission had given insufficient and incorrect replies to a request for information regarding a certain legislative procedure. EOAR 2009, 52.

[32] 920/2010/VIK, EOAR 2011, 47.

[33] 1574/2010/MMN, EOAR 2011, 47; 3031/2007/VL, EOAR 2011, 55 56.

[34] 1451/2011/BEH, EOAR 2012, 42.

[35] 1475/2005/(IP)GG and 1476/2005/(BB)GG (inaccurate and misleading information contained in Commission's leaflets, posters, fact sheets, and a video presentation on air passenger rights), EOAR, 2007, 21 22, 82.

## 4. PUBLIC ACCESS TO DOCUMENTS HELD BY THE EU INSTITUTIONS

The Ombudsman has made a significant impact in terms of access to documents in the possession of the EU institutions, as one of the most important elements of transparency principle. At the inter-governmental conference that led to the signing of the Treaty of Maastricht in 1992, efforts to enter into the Treaty provisions on the access to documents were unsuccessful. Instead, the Treaty was amended in the Annex by the Declaration 17 where it was emphasized that "the transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in administration."[36] Such a declaration had motivated the Commission and the Council of EU to adopt a common Code of Conduct[37] in 1993, which served as a basis for each of these institutions to adopt a separate decision on the availability of documents in their possession.[38] These acts, among other things, provide the right of the person who is not being allowed access to requested documents, to refer his/her case to the EU courts and the Ombudsman.

In June 1996, the Ombudsman initiated an inquiry on his own initiative (the first of this kind), in order to determine whether the other institutions and bodies (in total 15) have adopted the rules on the access to documents in their possession. The reason for investigation was a large number of complaints received by the Ombudsman, which related to the issue of transparency in the work of the EU institutions and bodies. The starting point in the inquiry was the position of the Court of Justice, formulated in its judgment in *Netherlands v Council*, in which it emphasized the following: "So long as the Community legislature has not adopted general rules on the right of public access to documents held by the Community institutions, the institutions must take measures as to the processing of such requests by virtue of their power of internal organization (...)."[39] In other words, in the absence of general rules, the Court identified the obligation of institutions to adopt internal rules on access to documents.

From responses received during an investigation, the Ombudsman found that most of the institutions and bodies failed to adopt such rules, but that they had an intention of doing so. In this regard, the Ombudsman made a draft recommendation, followed by a special report (also, the first

[36] Declaration on the Right of Access to Information, annexed to the Final Act of the Maastricht Treaty.

[37] Code of Conduct concerning public access to Council and Commission docu ments, Official Journal 1993 L340, 41.

[38] Council Decision 93/731 of 20 December 1993 on public access to Council documents, Official Journal 1993 L340, 43; Commission Decision 94/90 of 8 February 1994 on public access to Commission documents, Official Journal 1994 L 46, 58.

[39] C 58/94, *Netherlands v Council*, European Court Reports 1996, par. 37.

of its kind), in which it was stated that most of the EU institutions and bodies, subsequently adopted the said rules.[40] This report was accepted by the resolution of the European Parliament in July 1998, on the basis of the report that was previously submitted by the Committee on petitions.[41]

In April 1999, the Ombudsman has initiated a new inquiry, which included four bodies, established after the completion of the previous investigation.[42] Three of them adopted the rules on access to documents after the intervention of the Ombudsman, whilst he made a draft recommendation with regard to Europol, leaving this body three months to make a statement on this issue.[43] The director of Europol soon informed the Ombudsman that he fully accepts the draft recommendation, and that he will take appropriate measures for its implementation.[44] That means that most of the EU institutions and bodies adopted and published rules on access to documents in its possession, as a result of the inquiries of the Ombudsman.

Finally, the European Parliament and the Council of EU adopted Regulation no. 1049/2001 on the access to documents in 2001, which relates to the two mentioned institutions and the European Commission.[45] Regarding other EU institutions and bodies, the internal rules on the access of documents, adopted on the recommendation of the Ombudsman, remained in force, but they were also complemented by the principles contained in the said Regulation.[46]

This arrangement is also envisaged in the European Code of Good Administrative Behavior, adopted by the Parliament on the initiative of the Ombudsman, in which it was emphasized that "the official shall deal with requests for access to documents in accordance with the rules adopted by the Institution and in accordance with the general principles and limits laid down in Regulation (EC) No 1049/2001."[47] In this way, the

[40] Compare: 616/PUBAC/F/IJH, EOAR 1996, 81 87; EOAR 1997, 276 277.

[41] Report on the Special Report by the European Ombudsman to the European Parliament following his own initiative inquiry into public access to documents (A4 0265/1998); Committee on Petitions; Rapporteur: Mrs Astrid Thors; Compare: EOAR 1998, 28, 278.

[42] This inquiry included, among other bodies, the Europol and the European Cen tral Bank. See: EOAR 1999, 246.

[43] See in detail: OI/1/99/IJH, EOAR 1999, 245 259.

[44] See: EOAR 2000, 194 195.

[45] See: Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, Official Journal 2001 L 145, 43.

[46] Compare: J. Söderman, 97 98.

[47] Art. 23 par. 1 of the European Code of Good Administrative Behavior; The right of access to documents of any EU institution is also guaranteed by Article 42 of the Char

Regulation exceeded the framework of the three institutions concerned and has become the most important document in the area of access to documents in the EU.[48] As it was emphasized by the Ombudsman, the adoption of the Regulation was a turning point in the transparency of the EU institutions, since its application led to a situation where transparency has become the rule, and secrecy and confidentiality exceptions (as opposed to the previous period).[49] However, the way of thinking and a common practice within institutions change slower and harder than regulations.[50]

EU citizens, whose request for access to documents is rejected, have a possibility to bring an action before the General Court or to address the Ombudsman.[51] The advantage of the first option is reflected in the fact that the Court will mostly set aside the decision of the EU institution on rejection (because it is not sufficiently reasoned), but it will not prevent the institution to issue a new decision with the same content (this time with detailed reasoning). On the other hand, complaint to the Ombudsman (due to his specific competencies) provides change in the conduct of the institution.[52] The Ombudsman will seek to determine whether the refusal represents a case of maladministration, which is a broader notion than the concept of illegality. This will undoubtedly be the case if the institution did not act in accordance with the internal rules on the access

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ter of Fundamental Rights of the EU, which reads: "Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium."

48 On 30 April 2008 the Commission made available the Proposal to amend Regu lation no. 1049/2001, which provoked a vivid debate amongst the institutions and public. See the text of the Proposal: *http://eur lex.europa.eu/LexUriServ/LexUriServ.do?uri CO M:2008:0229:FIN:EN:PDF*; The Commission adopted another proposal to amend Regu lation 1049/2001 in March 2011, with the only aim to adapt the Regulation to the require ments of the new Article 15 TFEU, leaving the 2008 proposal unchanged. More on this process: M. Augustyn, C. Monda, *Transparency and Access to Documents in the EU: Ten Years on from the Adoption of Regulation 1049/2001*, EIPA Maastricht, 2011; See the text of the new proposal: *http://www.statewatch.org/news/2011/mar/eu com access reg 1049 proposal.pdf,* last visited 30 August 2013.

49 See the speech of N. Diamandouros: *Experiences of investigating complaints about maladministration in the EU institutions, especially regarding access to documents*, Stockholm, 8 September 2009, *http://www.ombudsman.europa.eu/en/activities/speech. faces/en/4256/html.bookmark*, last visited 30 August 2013.

50 See the speech of N. Diamandouros: *Making the EU accountable to its citizens,* Dublin, 24 February 2011, *http://www.ombudsman.europa.eu/en/activities/speech.faces/ en/10188/html.bookmark,* last visited 30 August 2013.

51 See the complete text of the Regulation: *www.europarl.europa.eu/register/pdf/ r1049 en.pdf*, last visited 30 August 2013.

52 See: K. Heede, *European Ombudsman, redress and control at Union level*, Klu wer Law International, The Hague, London, Boston, 2000, 232.

of documents, as well as with the principles contained in the Regulation no. 1049/2001.[53]

It is understood that the access of documents is limited and excluded in certain situations (e.g. concerning public security, military affairs, international relations, financial, monetary and economic policies of the EU and the member states, the right to privacy, commercial interests, threat to judicial, investigative and audit procedures, as well as decision-making procedures within the institution itself), but it is important that these exceptions are interpreted restrictively. [54]

A large number of cases which concerns access of documents is quickly resolved after the intervention of the Ombudsman. However, often delays of the Commission and other EU institutions regarding requests for access to documents eventually became a systemic problem, whose solution requires an adequate and innovative approach. In this regard, the Ombudsman called for a pro-active method, which implies taking into account issues of access to documents even in the early stage of its drafting and preparation. Concretely, if a document has to contain confidential information, it should be designed in a way that would allow its partial access. Thus, confidential information should be concentrated in a separate section, which would be followed by an explanation of why that part cannot be made public.[55]

Transparency of the EU institutions has been reinforced after the Ombudsman's investigative powers have been strengthened and specified, as a consequence of the amendments of his Statute and Implementing provisions in 2008. The Ombudsman now has full access during his inquiries to documents held by the EU institutions and bodies, and they can no longer refuse to disclose them on "duly substantiated grounds of

[53] Compare: EOAR 1998, 30.

[54] See: Art. 4. of Regulation no. 1049/2001; EOAR 2006, 83; In the case 2560/2007/BEH the European Medicines Agency refused access to clinical study reports on the grounds that disclosure would undermine commercial interests of a drug producer. EOAR 2010, 41; See also the case 3106/2007/FOR in which the same agency initially refused to make available the report on the adverse effects of a drug (because of the pro tection of personal data). EOAR 2011, 42; See also cases: 1039/2008/FOR (protection of the purpose of investigation), EOAR 2010, 39; 355/2007/FOR and 1195/2010/OV (threat to decision making process), EOAR 2010, 40 41; 2219/2008/MHZ (protection of com mercial interests and economic policy), EOAR 2010, 40; 523/2009/TS and 944/2008/OV (protection of public interest with regards to international relations), EOAR 2010, 41; 2016/2011/AN (protection of monetary and economic policies of the EU), EOAR 2012, 36; 3136/2008/EIS and 682/2010/TN (protection of personal data), EOAR 2012, 41.

[55] See the speeches given by N. Diamandouros: *Remarks of the European Om budsman on Reform of Regulation 1049/2001 Access to EU Documents after the Lisbon Treaty*, Brussels, 29 September 2010, *http://www.ombudsman.europa.eu/en/activities/speech.faces/en/5360/html.bookmark*; A *more pro active approach towards transparency for the EU*, Brussels, 28 September 2011, *http://www.ombudsman.europa.eu/en/activities/speech.faces/en/10959/html.bookmark*, last visited 30 August 2013.

secrecy". In addition, EU officials who give evidence to the Ombudsman are no longer required to speak "on behalf of and in accordance with instructions from their administrations".[56] Of course, there is a provision of the Statute that imposing special conditions on the Ombudsman when he uses the information and documents protected as classified (secret, confidential, sensitive).[57] All those changes provided the following: the complainant can be sure that the Ombudsman will have access to all documents and information related to the inquiry, while the institution can be assured that any information or document presented to the Ombudsman, and which is protected as classified, will not be made available to the complainant, or the general public.[58] However, some of these powers are not frequently used by the Ombudsman, and there is space for improvement in this area.[59]

Furthermore, the Ombudsman has made a significant contribution in the conduct of official records of documents held by the EU institutions. If such records do not exist, citizens will not be aware of the existence of particular document. These records are a prerequisite of efficiency of each institution, because they allow a rapid and accurate finding of relevant documents.[60] Thus, in the case 633/97/PD complainant contacted the Ombudsman stressing that the lack of registers on documents in the possession of the Commission, significantly restricts the right of citizens to have access to its acts. The Ombudsman found that this failure of the Commission constitutes maladministration and in his draft recommendation urged this institution to establish a record of documents which are in its possession. In its opinion, the Commission has fully accepted the Ombudsman's recommendation, but also pointed to the existence of practical problems that must be resolved before the establishment of such registers. Although the complainant was not satisfied with the position of the Com-

[56] See: EOAR 2008, 34.

[57] Art. 3. par. 2. of the Statute of the European Ombudsman.

[58] See: EOAR 2008, 25 26; A good illustration of the relationships that were created after the amendment of the Statute and Implementing provisions is case 523/2009/TS, in which the complainant asked the Council to disclose the document on allegations that the U.S. Central Intelligence Agency (CIA) used territory and objects of European countries to transport and illegally detain prisoners. The Council refused this request, arguing that the disclosure of the document would jeopardize diplomatic relations between the EU and the U.S. Furthermore, the Council noted that in this case it was not possible to allow partial access to the document, because the information contained therein constitute an inseparable whole. After inspecting the document, the Ombudsman concluded that the Council acted correctly and that there was no case of maladministration in its work. See: EOAR 2010, 29.

[59] Ending with 2012, the Ombudsman has used his power to hear witnesses only in 8 cases, while he inspected institution's files in 221 cases. See: EOAR 2006, 43; EOAR 2007, 39; EOAR 2008, 34; EOAR 2009, 30; EOAR 2010, 18; EOAR 2011, 18; EOAR 2012, 17.

[60] I. Harden, 176.

mission, the Ombudsman concluded that this institution needs some time in order to fulfill this task, and closed the case.[61]

The efforts of the Ombudsman in this area are crowned with the adoption of the already mentioned Regulation no. 1049/2001 on access to documents, which provides an obligation for all EU institutions to keep records of official documents in their possession.[62]

The Ombudsman also emphasized that even in areas where there are still no complete and systematized records, the EU institutions are required to provide, at the request of citizens, a rough list of documents that are in their possession, regardless of difficulties and expenses that such preparation implies.[63]

Finally, the Ombudsman has advocated the establishment of electronic registers, wherever possible, through which citizens could directly come into the possession of the relevant documents. This approach would make application for access to documents unnecessary, which would significantly reduce the obligations of the EU institutions, and relieve the Ombudsman due to a smaller number of complaints.[64] In this situation, all three parties in this process would be better off.

## CONCLUSION

Cases of maladministration related to the transparency issues are the most common in the European Ombudsman's practice. Violation of the principle of transparency occurs when the institution unreasonably refuses to provide information or documents, when they provide misleading or wrong information, and when no good reasons are given for exclusion of the public from its meetings or consultation process.

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[61] EOAR 1999, 234 238; See also the cases: 1055/25.11.96/STATEWATCH/UK/IJH, EOAR 1998, 256 259 and EOAR 1999, 232 233; 917/2000/GG, EOAR 2001, 225; 1764/2003/ELB, EOAR 2006, 79 80; 3072/2009/MHZ, EOAR 2011, 36.

[62] See the speech of N. Diamandouros: *Freedom of Information: a European Per spective*, Manchester, 23 May 2006, *http://www.ombudsman.europa.eu/speeches/en/2006 05 23.htm,* last visited 30 August 2013; The obligation of institutions to maintain official records is confirmed by Art. 24 of the European Code of Good Administrative Behavior. However, some institutions still haven't established registers of documents in their posses sion. Thus, in the case 3208/2006/GG Ombudsman ordered Commission to establish such register, and views of the Ombudsman are confirmed by the Parliament's resolution. See: EOAR 2008, 54.

[63] See the case: 2350/2005/GG, EOAR 2007, 81.

[64] See the speeches given by N. Diamandouros: *Remarks of the European Om budsman on Reform of Regulation 1049/2001 Access to EU Documents after the Lisbon Treaty*, Brussels, 29 September 2010, *http://www.ombudsman.europa.eu/en/activities/speech.faces/en/5360/html.bookmark*; *EU rules on access to documents: The European Ombudsman's perspective*, León, Spain, 27 April 2011, *http://www.ombudsman.europa.eu/en/activities/speech.faces/en/10310/html.bookmark*, last visited 30 August 2013.

Transparency enables the public to monitor and evaluate the performance of authorities, to learn the motives and reasons behind their decisions and to predict their actions in the future. The information provided ensures the responsibility of the institutions, but also allows citizens and companies to exercise their rights and take an active stance in the political debate on various issues. For these reasons, the principle of transparency is a necessary precondition for any democratic system.

Lack of transparency frequently occurs when institutions do not answer a question or provide a person with the wrong information, especially in the area of recruitment, or tender procedures organized by the EU institutions.

Furthermore, the Ombudsman has made a significant impact in terms of availability of documents in the possession of the institutions and bodies of the EU. As a result of the inquiries conducted by the Ombudsman (in 1996 and 1999) almost all EU institutions and bodies adopted and published rules on public access to documents in their possession. In addition, the Ombudsman actively participated in the debate leading to the adoption of Regulation 1049/2001, regarding the public access to documents in the possession of European Parliament, Council and Commission. This Regulation was a milestone in the development of transparency at the EU level, since it established openness as a rule, and secrecy and confidentiality as the exception. It exceeded the framework of the three institutions concerned and has become the most important document in the area of access to documents in the EU.

In addition, the Ombudsman has advocated a proactive approach regarding access to documents. This implies that EU institutions should proactively identify what information the public needs and then disseminate that information, as well as to take into account issues of access to documents even in the early stage of its drafting and preparation. Such an approach would also prevent many cases of maladministration in the practice of EU institutions.

The analysis indicates that the Ombudsman undoubtedly made a significant contribution to the transparency of the EU institutions. In accomplishing this task, he mostly did not seek to form his own soft law (non-binding rules), but has motivated institutions to adopt their regulations that will be followed in daily contact with citizens and companies. This approach has proved to be successful in this field. Despite numerous difficulties, the Ombudsman has become a true champion of the principle of transparency within the EU, contributing to the reduction of its democratic deficit and strengthening the legitimacy of its institutions. This role further gains in importance, especially in times of social and economic crisis and questioning the basic values on which the EU is based.

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# ADMINISTRATIVE REFORM AND DEBATES OVER PUBLIC AGENCIES' ROLE IN SERBIA*

*Over the past 10 years, there has been a proliferation of agencies in the Serbian public sector with varying degrees of independence and delegation by the government. Agencification in Serbia has been rarely discussed in scholarship, and in most recent public debates it is often criticized as being "an unnecessary budgetary burden", a "grave threat to democracy" and the "party based atomization of state administra tion". In the context in which Serbia is in need of a larger government in order to consolidate democracy, improve respect for human rights and enhance economic devel opment, the agencies have also become collateral public damage from the mantra of the 'requirement to save'. Having in mind that Serbian economic and political develop ment over the past decades has been more than troublesome, this article looks into the public perception of agencification and related political debates, including some policy proposals. The article offers preliminary explanations of possible causes of the specific perception of agencies in the Serbian public, as well as an account of the consequenc es of current perceptions of agencification. Special emphasis is put on the de legitimi zation of the authority of scientific knowledge in society.*

Keywords: *Public agencies. Administrative law. European integration. An thropology of state. Public perception of law.*

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## 1. INTRODUCTION

The establishment of public agencies in Serbia over the past decade has attracted a lot of public interest. However, little is known in the public about agencies and the process of agencification, and these have rarely been topics in the academic discourse. The Serbian general public—gripped by the 'fateful' issues (primarily the disastrous territorial, demographic and economic outcomes of the disintegration of Yugoslavia), popular notions about the egalitarian character of democracy, a conceptualization of sovereignty reminiscent of the nineteenth century rather than the twenty-first, as well as the deeply rooted belief that all important state functions are just party-, regional-, kinship– or interest-based sinecures—has been informed about agencies, the purpose of their establishment and their role in the contemporary transformation of public administration in the context of pre-election party conflicts. Entangled in the dynamics of the election fever, the discourse on agencies has been focused on narratives that generally instigate negative connotations of the agencies, the scope of their work and their competencies. The demonization of agencies in public discourse has reached such an extent and penetrated so deeply that, in Serbia, public agencies have almost become synonymous with corruption.

In this article, we examine: 1. the complementing of a democratically elected government with expert regulatory bodies; 2. the broadening of the agencification process, and the difference between the causal relationship and the coincidence of agencies' appearance alongside the democratization and Europeanization of the Serbian public administration; and 3. the proliferation of agencies and similar independent bodies in the context of particracy. In addition, we present general narratives on agencies in the Serbian public, which give us grounds to believe that in further research it will be possible to follow the formation of cultural perceptions of the state, democracy, human rights, expertise and so on, and even the very authority of science *of* and *in* society. In taking perspectives from administrative law, socio-legal studies, the anthropology of science and the anthropology of public policy, we offer preliminary explanations of the possible causes of the specific perception of agencies in the Serbian public, as well as explanations for the possible consequences of such perceptions of agencification, putting special emphasis on the de-legitimization of the authority of scientific knowledge.

The transformation of Serbian administration has been influenced by two major intertwined processes. The first is the transformation to the modern market economy; the second is integration into the European Union. Due to the extent and pace of reforms implemented for accession to the European Union, the process of reforms is, in the public (both expert and general), often equated with the process of the country's integration

in the EU. After the disintegration of the Socialist Federal Republic of Yugoslavia, during the union with Montenegro,[1] Serbia underwent a problematic and slow process of social and legal changes, including market reforms and a privatization process, which took place in the midst of the regional wars and UN sanctions. For this reason, Serbia was to a great extent lagging behind other transition countries in Eastern and Central Europe regarding the implementation of reforms. In that context, the Serbian transition is usually referred to as "delayed" or even "failed". [2]

The European Union's integration of Serbia includes the transformation of the country's legal system to a great extent. Therefore, an adequate core of civil servants is required for both the harmonization with the EU *acquis communautaire* and the implementation of newly established standards and procedures. The growing number of tasks in both developed and developing countries are increasingly performed by public agencies as bodies with varying institutional settings and competences. Public agencies,[3] however, have only been widely introduced into the Serbian legal system fairly recently, after the political change in 2000. In this paper, we will not go into details of the position or role of any single agency in Serbia. Primarily, we shall analyze the general regime set for the foundation and operation of agencies, as well as the different ways they have been created in Serbia and the generated interpretations of their role. As was argued by the Sigma assessment in 2009, the organization of administration in Serbia lacks clarity and accountability. The assessment specifically outlined that:

> Agencies, as specific ad hoc organisational forms of administrative technical services, appeared in Serbia after 2000, allegedly as an answer to the need for harmonising national legislation with that of the EU. In practice they were a political attempt to create a parallel state administration, which would be free of Milosevic's affiliates. Now it has become a maze of administrative agencies without clear accountability lines, which complicates significantly the state administrative organization.[4]

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[1] First as the Federal Republic of Yugoslavia (1992 2003) and later as the State Union of Serbia and Montenegro (2003 2006).

[2] N. Miller, "A Failed Transition: The Case of Serbia", *Politics, Power, and the Struggle for Democracy in South East Europe,*(eds. Dawisha Karen and Parrott Bruce) 146 188. Cambridge, New York: Cambridge University Press 1997; F. Bieber, "The Ser bian Opposition and Civil Society: Roots of the Delayed Transition in Serbia", *Interna tional Journal of Politics, Culture, and Society*, 1/2003, 73 90

[3] We have opted to use the term 'public agencies', bearing in mind that terms such as government agencies and administrative agencies are also comparatively used for bodies of public law performing a variety of administrative and regulatory tasks. We have done so predominantly to reflect the terminology used by the Serbian legislation.

[4] Sigma, Serbia Administrative Legal Framework Assessment May 2009, Paris 2009, 3 4.

With this in mind, we offer a general overview of the current trend of agencification in Serbia, and contemplate some impediments for this part of the administrative reform.

## 2. AGENCIFICATION AND ADMINISTRATIVE REFORM

The agency model of administrative organization is not a recent one. Agencies and other independent institutions were employed to perform a number of tasks in the United Kingdom as early as the eighteenth century, and this model was later transferred to the United States.[5] However, there has been a notable increase in the establishment of agencies since the 1980s. Over the past 30 years and across jurisdictions, a broad redefinition of both the organization and functions of public administration has taken place.[6] These were predominantly the result of changing relation between the state and the economy and the widespread processes of privatization, deregulation and re-regulation and the new functions that the state was to perform.[7] An important aspect of the administrative reform is the widespread use of public agencies as a model of administrative organization that is used to perform an increasing number of tasks requiring a high level of specialized knowledge.

It is often referred to in the literature as the process of *agencification* of public administration, both at national and supranational levels. Public agencies have been characterized in the literature as "the forth branch of Government" [8], potential "hierarchy beaters"[9], "one of the main features of a rising regulatory state"[10]; this comes alongside thorough analyses of the main features of their organizational setting, power delegation, control, and the democratic deficit attached to non-elected decision-making bodies. When considering the benefits and risks of employing agency models in the context of reforms in transition countries, Laking pointed to several lines of criticism directed toward agencies: the "loss of control of agency operations; abrogation of political accountabil-

[5] M. Everson, "Independent Agencies: Hierarchy Beaters?" *European Law Jour nal*, 1/1995, 182.

[6] C. Pollitt, *et.al.* "Agency Fever? Analysis of an International Policy Fashion", *Journal of Comparative Policy Analysis: Research and Practice*, 3/2001, 271 290.

[7] G. Majone, "The rise of regulatory state in Europe", West European Politics, 3/1994.

[8] [9] P. Strauss, "The place of agencies in government: separation of powers and the fourth branch", *Columbia Law Review*, 3/1984,573 633 .

[9] M. Everson, 180 204.

[10] F. Gilardi, "Policy Credibility and Delegation to Independent Regulatory Agen cies: a Comparative Empirical Analysis",. *Journal of European Public Policy*, 6/2002, 873 893.

ity; evasion of general rules for staffing and budgets; exposure of government to financial and employment risks; opportunities for political patronage and corruption".[11] As we will point out in our analysis, all of these criticisms have been associated with the development of agencies in Serbia and have dominated the public discourse, gravely endangering their reputation.

There is no unified agency model on a national and supranational level. Agencies differ in their independence (relations to government, core public administration, parliament) and the number and nature of conferred tasks. Diversity of institutional design and the extent of competencies become even greater in supranational structures such as the European Union. Intensifying the integration within the European Union, member states have transferred a significant number of their competencies to the EU—which, on one hand, resulted in a greater number of tasks, and on the other hand, created a need for personnel enlargement in the EU administration.

Motives for establishing agencies at the national level have also been widely considered in the literature.[12] These include the establishment of specialized bodies with sufficient levels of expertise in technical, scientific, economic and other fields to command a growing number of regulatory and information tasks. Agencies are deployed to deal with a mounting burden of tasks regarding individual decision-making, issuing permits, certificates and the provision of other services for citizens. In addition to the aforementioned motives, the Serbian context is also characterized by a growing number of qualitatively new tasks that its public administration faces in the context of European integration—not just the usual challenges, brought about by globalization, but the liberalization of numerous markets and new kinds of regulation and supervision by independent bodies. Therefore, transition countries have an additional motivation to establish more public agencies and other independent organizations. Consequently, the public agency model has become "widely diffused" in countries of Central and Eastern Europe, and Peters argues that "selecting the agency format for governing represents a now common choice for structural reform, but it is not always certain that it can produce all the benefits that often are ascribed to it".[13] Following this thesis, we shall proceed to a further analysis of the agency model in Serbia.

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[11] Laking, "Agencies: Their Benefits and Risks", *OECD Journal on Budgeting*, 4/2005, 8.

[12] Everson, 1995; Pollitt, et al. 2001; Giraldi, 2002; D. Geradin, Laking, 2005. N. Petit, *The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform*. BYU School of law: Jean Monnet Working Paper 01/04.

[13] B. G. Peters, "The politics and management of agencies", *Transylvanian Re view of Administrative Sciences*, 2011, Special Issue, 8.

## 3. PUBLIC ADMINISTRATION REFORM AND THE INTRODUCTION OF THE AGENCY MODEL IN SERBIA

The agency model was fully introduced in Serbia only relatively recently (since 2000),[14] as public administration reform was hampered by the wars and sanctions of 1990s, the legacy of both a planned and self-managed economy and a one-party regime, and the absence of a developed civil society and democratic traditions. Over the past 10 years, there has been a proliferation of agencies in the Serbian public sector with varying degrees of independence and delegation by the government. *Agencification* in Serbia has rarely been discussed in the scholarship, and in most recent political debates it is often criticized as being "an unnecessary budgetary burden", a "grave threat to democracy" and the "party-based atomization of state administration".

With the fall of Milosevic's regime and inclusion of Serbia in transnational integration processes, it was necessary to introduce a number of modern institutions able to facilitate economic, legal and societal change.[15] Societal and political change in Serbia, alongside public agencies, incorporated the introduction of a number of independent regulatory and control bodies, which include the Ombudsperson, the Commissioner for access to public information and personal data protection, the Anti-discrimination commissioner, the Anti-monopoly commission, and the State audit institution, etc. These were new bodies for the Serbian political sphere; thus the start-up of their work was more than challenging, and it was necessary to negotiate many budgetary obstacles and the lack of political will (predominantly from the government's side) to enable the smooth enactment of activities. The challenges included finding appropriate office space, hiring qualified personnel and, later on, ensuring the implementation of decisions made by these bodies.[16]

Agencies, as specific administrative organizations, were widely instituted in the Serbian system from the very start of the reforms in 2001. As administrative legislation of that time did not provide for the establishment of public agencies, it was done by the government's Decree on

[14] However, there were examples of two administrative organizations set up as agencies in the early 1990s for the purposes of privatization the Agency for Foreign Investments, Property and Production Transformation, which was later succeeded by the Agency for the Evaluation of Capital Value (before ceasing to exist in 1997).

[15] M. Milenković, "The Adoption of European Standards in the Sphere of Eco nomic Law and (Anticipated) Cultural Change in Serbia", *Issues in Ethnology and An thropology*, 1/2010, 111 135 (in Serbian).

[16] See further: USAid (n.d.), Background information about Serbia's Independent Agencies, 1 3; available at:*http://serbia.usaid.gov/upload/documents/jrga/Background %20information%20about%20Independent%20Agencies.pdf* Last visited 19 March 2013.

the General Secretariat and Other Services of the Government.[17] The establishment of several agencies as government services through bylaws was much criticized by the political opponents of the government at the time; the legal basis for their establishment, and the legal nature of the newly founded entities[18] were also partly debated in the literature. In our opinion, introducing a new form of administrative organization in 2001 in such a way and in a country that had barely come out of international isolation in fact facilitated the negative perception of public agencies from the very beginning.

In 2004, the Public Administration Reform Strategy was adopted to facilitate the depolitization, decentralization, professionalization, rationalization and modernization of Serbian public administration, coupled with regulatory reform.[19] Only in 2005, and with a number of public agencies already in operation, was the Law on Public Agencies passed, which defined the basic structure for the establishment, operation and control of agencies. However, it does not constitute any single agency but rather introduces a general framework that might still be altered by other laws when establishing any new agency.

The Constitution of Serbia provides that public administration affairs shall be performed by ministries and other public administration bodies stipulated by the law, and that particular public powers may also be delegated to specific bodies to perform regulatory functions in particular fields or affairs.[20]

In accordance with the Law on Public Agencies,[21] these bodies are established for "developmental, expert and other regulatory tasks" if they act and fulfill their purpose in a relatively autonomous social field that does not require continuous and direct political supervision through the ministry and the government. The body establishing public agencies must be entrusted to do so by the law (passed by the Serbian Parliament) (Art. 2). This is especially important as a substantial number of agencies are still established through government decisions, but after the critique of

[17] Governmnent of Serbia, Decree on the General Secretariat and Other Services of the Government. *Official Gazette of the Republic of Serbia*, no. 21/2001.

[18] A. Martinović, Reform of the state administration in the process of state's po litical and economic transition. *Zbornik radova Pravnog fakulteta*, 2006, vol. 40, no. 2: 155 76 (in Serbian).

[19] Government of Serbia, *Public administration reform strategy*. Belgrade 2004 (in Serbian).

[20] Articles 136 and 137 of the Constitution of Republic of Serbia (National As sembly of the Republic of Serbia, Constitution of the Republic of Serbia, *Official Gazette of the Republic of Serbia*, no. 83/2006).

[21] National Assembly of the Republic of Serbia, Law on Public Agencies, *Official Gazette of the Republic of Serbia*, no. 18/2005, 81/200

public and legal scholars and the enactment of the Law on Public Agencies, this would only occur if provided for in the relevant legislation. Public agencies may be entrusted with the following tasks: 1. enacting bylaws for the implementation of laws and other general acts of the parliament and government; 2. individual decision-making; and 3. issuing public certificates and keeping records (Art. 3). They are independent in their operations and their work cannot be directed by or coordinated with the work of government (Art. 4). Public agencies have legal personality, and they are financed from the services they provide and through the central budget, donations, sponsorships and other sources as prescribed by law (Art. 5–6). Clearly, it was envisaged that a number of agencies be established and partially run with the foreign aid received in the reform process. Finally, the law stipulates that the legal framework put in place in connection with the legality of conduct, political impartiality, education and skill of civil servants will apply to the employees of public agencies (Art. 7). However, it does not envisage for this general framework for public administration to be applied to the salaries in public agencies, which will be discussed in some more detail later on. The law also details the process of establishing agencies by the government, regional authorities and local municipalities; the management of public agencies and their tasks, the protection of the public's interest in agency conduct, relations between agencies and the users of their services, and the financing and termination of agencies.[22] However, many agencies were established by the relevant legislation passed in parliament and, therefore, their organizational structure and relationship with the government varies.

There are several classifications of agencies in Serbian legal scholarship. Lilić categorizes them as follows: 1. public agencies (in the narrow sense); 2. agencies (public agencies in the broad sense); and 3. state agencies. This differentiation designates the first and second categories as being those bodies that have public authorization to perform professional developmental, regulatory and administrative tasks, whereas state agencies primarily perform the tasks of state administration conferred upon them.[23] Tomić distinguishes between 1. administrative (state) agencies (having an administrative and executive character, and being part of state administration); and 2. public agencies as expert public bodies outside the state administrative apparatus, conducting certain tasks of public interest (However, part of wider public administration, albeit mostly distinguished

[22] For a detailed overview of the Law on Public Agencies, see Z. Balinovac, Over view of the Public Agencies Act, *The government and state administration system in the Republic of Serbia compilation of laws and explanatory articles*, (eds. Z. Balinovac and J. Damjanović), Belgrade 2006, Dial, Grafolik.

[23] S. Lilić, "Javne agencije i upravna reforma", Razvoj pravnog sistema Srbije i harmonizacija sa pravom EU, (ed. S. Taboroši), Belgrade 2010, University of Belgrade, Faculty of Law (in Serbian).

by their status).[24] Finally, in analyzing different types of existing agencies in Serbia, Dimitrijević finds that they:

> ...can be divided into four or five groups: non-state public agencies as entities with public authoritative functions—public services (e.g., Agency for Privatization), public agencies as other organizations with special status outside a state administration (e.g., Agency for Telecommunications), public agencies as state agencies, and the "professional government services"—government agencies (e.g., Agency for Improvement of Public Administration), public agencies as a separate public (state's) administrative organizations within the government administrative system (e.g., Security Information Agency) and, at the end, agencies that may not fall into any of these four groups—agencies *sui generis* (i.e., Agency for Deposits Insurance, Bankruptcy and Liquidation of Banks).[25]

From the above theoretical classifications, a conclusion can be drawn that abundant legislative activity of several successive governments has created a complex network of different public entities. This intricate structure is not problematic in itself, since different forms of organization are usually a manifestation of the complexity of administration. Nevertheless, the way in which many of these agencies are organized has created a problematic public perception of agencies and laid fertile ground for various complaints to be made about them (in addition to standard objections, such as political parties' abuse of agency powers, money squandering and so on). However, the greatest damage thus generated lies in the *impossibility of building trust in the expertise itself*.

Competencies covered by the agencies in Serbia now range from health care (the Agency for Accreditation of Health Care Institutions in Serbia, the Medicines and Medical Devices Agency of Serbia) to those in the field of transport (the Road Traffic Safety Agency, the Civil Aviation Directorate), to telecommunications (the Republic Broadcasting Agency) and energy (the Serbian Energy Agency), to name just a few.[26] Comparatively, agencies are sometimes used to facilitate time-limited processes. The example of such an institution in Serbia is the Agency for Privatization, which was established in 2001 to facilitate the time-limited process

[24] Z. Tomić, Upravne i javne agencije u Srbiji. *Pravo i privreda*, 2008, vol. 45, no. 5 8: 413 426 (in Serbian).

[25] P. Dimitrijević, Public agencies in Serbia, TED conference, 1 3 February, Bu dapest. 2012, *http://ted dialogues.org/wp content/uploads/2012/01/dimitrijevic ShortProp. pdf* Last visited 19 March 2013.

[26] The number of governmental agencies (entities actually holding the term "agen cy" in their names) in Serbia has been a topic of much speculation in the media and is estimated to be over 130, coupled with many other offices, bureaus and directorates that perform administrative tasks. See B92, Serbia is a record holder in a number of agencies, 2011: *http://www.b92.net/biz/vesti/srbija.php?yyyy 2011&mm 12&dd 17&nav id 566 448* (in Serbian) Last visited 19 March 2013.

of privatization in Serbia by 2005. However, 11 years later, the process has not been finalized and the agency is still operational.[27]

There are several dominant motives for the continuous establishment of new agencies in Serbia: 1. the generation of new state functions, which mostly arise as a consequence of harmonization with the European Union, but also from other forms of international integration; 2. requirements to unify expert capacities (existing and new) to perform specific regulatory and other professional tasks; however, in accordance with the analyzed discourses, we also point to 3. party-based employment of staff in the public sector/administration; and 4. requirements to attain salaries that are higher than the usual level in the 'central administration'.

The Serbian public administration (and the public sector in general) is facing great challenges in confronting demands. The first demand is to reform and introduce a number of institutions and processes. Another is to reduce public spending, which has often been stipulated by international institutions such as International Monetary Fund, putting additional pressure on the transitional government. It is a widespread public perception/narrative that a crucial social and economic problem is the excessive number of employees in public administration; this falsely adds to agencies' negative connotations in Serbia. It is indeed public services and enterprises (still largely owned and subsidized by the state), and not public administration bodies, that have the highest level of excessive hiring.

As mentioned above, there is a difference between the salary system of core state administration/civil servants and those employed in public agencies and other independent bodies. The first is done in line with the Law on Salaries of Civil Servants and Employees and the latter in line with the Law on Salaries in Public Agencies and Public Services.[28] While not going into detail on the civil servants' system of advancement and pay in Serbia, discrepancies created among salaries in different parts of civil administration are seriously endangering the very idea of independent bodies. It creates a rivalry in the public administration and among different parts of the civil core that should be cooperating for the common good. Even though some of these discrepancies are actually created in order to keep those with specialized knowledge in the public service (for example, experts in telecommunications, finance and so on), the high level of 'partization' of employment in the public sector does not allow for this to be properly comprehended by the public.

[27] As it was argued by the Sigma assessment: "public agencies in general are pro ducing poor results and are in practice unaccountable to the government, as the account ability mechanisms established in the legislation are rarely applied in practice" See: Sig ma, 3.

[28] Recruitment and salary systems for Serbian civil servants are analyzed in detail in: A. Rabrenović and Z. Vukašinović Radojčić Civil service reform in Serbia overcom ing implementation challenges., *Serbian law in transition changes and challenges* (ed. M. Milošević), Belgrade 2009, Institute of Comparative Law.

To conclude, there is a trend of establishing new agencies each time a minor or major field is to be regulated, when a new system of supervision or certification is to be introduced, or when Serbia is to be included in an international program. There is no doubt that each of these tasks requires the engagement of professional staff and, above all, of additional personnel who could perform new tasks in public administration. However, there is a serious question to which there is no simple answer: is it appropriate to set up new administrative organizational structures for a large number of particular administrative tasks, which would all require necessary management, administrative and technical structures in order to be functional themselves? This fashion of *ad hoc* establishment of agencies casts doubt on the process of reform itself, and consequently on Serbia's European integration as well. In this way, the modernization, democratization and Europeanization of Serbian society are pushed into the background in public discourse, which is heavily burdened with party and ideological divisions, and in that context reforms have become perceived as pointless.

## 4. PERCEPTION OF AGENCIES IN SERBIAN PUBLIC DISCOURSE

In 'critically' inclined social sciences, the culture of expertise is usually connoted in a negative way as a model on which global transnational neocolonialism is established.[29] According to this type of interpretation, a new colonial order has been globally established by soft domination that uses economics, law, popular culture and expert knowledge instead of war, and which is run by the "transnational managerial class".[30] Globalization is viewed as a process that executes the objectives of colonialism with greater efficiency and rationality than classical forms of colonialism.[31] The establishment of such a global order, the story goes, is often achieved through political reforms, including the reform of public administration through international assistance for economic, political and legal institution-building—typical of the EU.[32] It is based on the im-

[29] R. D. Holmes, E. G. Marcus, Cultures of Expertise and the Management of Globalization: Toward the Re Functioning of Ethnography, *Global Assemblages: Technol ogy, Politics, and Ethics as Anthropological Problems*, (eds. A. Ong and S. J. Collier), Oxford 2008, Blackwell Publishing, Ltd.

[30] M. Boas, D. McNeill, *Global Institutions and Development: Framing the World?* London 2004, Routledge.

[31] S. B. Banerjee, S. Linstead, Globalization, Multiculturalism and Other Fictions: Colonialism for the New Millennium? *Organization*, 2001, vol. 8, no. 4: 683 722.

[32] P. Holden, *In Search of Structural Power: EU Aid Policy as a Global Political Instrument*. Farnham 2009, Ashgate Publishing.

posed logic of 'development' that shaped the worldviews in many cultures of the 'third world' in a way that diminished local traditions and helped 'developers' control the lives of 'developed'.[33] This type of criticism is aimed at the supposed consequences of the 'expertise' imported from the West for entities in the Third and the Fourth Worlds—devastation of the economy and social security system, regression of educational systems, the underdevelopment of science and technology, and so on.[34] Acceptance or refusal of reforms induced by international organizations and 'Western' outsiders is studied in the critical social sciences as an antagonistic process of defining and redefining of identities, based on which insight can be gained indirectly about what a certain population thinks of itself and others, and its culturally defined, folk concepts of the state, law, economy and, administration. Research on the reform of public policies and the state itself has become, over time, a special field of research in which anthropology of the state and anthropology of policy intertwine so as to investigate both the cultural background and cultural responses to the idea that all life can be "managed" by "experts".[35] It was also referred to by a renowned sociologist as "state capture".[36]

Without entering into a discussion of whether the culture of expertise actually causes poverty among non-Western populations (which is the dominant narrative of 'anti-globalization') or if it rather coincides with attempts to simultaneously diagnose and cure the causes of poverty, we focus on a case in which it is evident that the consequences of agencification are positive, yet they are perceived as if they were not.

In contemporary Serbia, where expert agencies generally have negative connotations in the public (which sees agencies as an instrument of domination and corruption), criticism of the culture of expertise would not be any different from the global average. In Serbia, however, there is another twist to this—experts are not only criticized as arrogant reformers, servants of tycoons or heapers of budgetary funds, but also as fake specialists and impostors. In this article we use the agencification process to open a debate on the misunderstanding of scientific authority and professional expertise in times of social change. We fear that in a period of global re-traditionalization, in a time when we are hearing calls to 'end capitalism' and make a new 'global social revolution', the victims of such

[33] A. Escobar, *Encountering Development: The Making and Unmaking of the Third World*. Princeton, NJ 1995, Princeton University Press.

[34] S. Razack, *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms.* Toronto 1998, University of Toronto Press.

[35] D. Mosse, "Anti social anthropology? Objectivity, objection, and the ethnogra phy of public policy and professional communities", *Journal of the Royal Anthropological Institute*, 4/2007, 935 956.

[36] V. Pešić, "State Capture and Widespread Corruption in Serbia", CEPS Working Documents, 2007, no. 262. *aei.pitt.edu/11664/1/1478.pdf* Last visited 7 December 2012.

a revolution would not only be capitalism, human rights and democracy, but also, we postulate, the very authority of science *in* and *of* the society would likewise suffer significant consequences. In Serbia, both by overemphasizing and underestimating the incorporation of expert knowledge in public administration is widely used to manipulate the democratic system, especially in election years. Narratives stating that agencies pose a 'grave threat to democracy', 'an unnecessary budgetary burden and duplication of institutional structures' within 'party-based atomization of state administration and corruption, like employment of political parties' activists' have colonized the public discource and thus the popular perception of agencies in recent years. These narratives of the worthlessness, uselessness and corruption of agencies are a continuation of a somewhat older *general anti-expert narrative* that was typical of the early 2000s. Instead of being seen as knowledgeable, creative, efficient, intelligent, motivated, industrious or simply competent in a given area of expertise, an 'expert' has become a public figure that is mocked and denunciated, serving as a punching bag for public disillusionment with democratic reforms.

This fertile ground, well prepared by anti-expert narratives, has been further cultivated by public narratives stating that agencies are superfluous. Creators of anti-agency narratives manipulated public opinion by offering a 'commonsense' and (intuitively) 'evident' solution, which postures that if the agencies do not serve to apply expert knowledge in order to improve state administration, they must serve some other purpose—which must be to provide posts for party-based personnel. In this formula of rhetoric manipulation (or logical fallacy?), *the anti-expert narrative is paired with the anti-democratic narrative* (political parties do not serve to articulate the interests of citizens, their associations or groups in democratic systems, but rather simply provide employment through the state, as the biggest employer, in the context of an economic crisis). In the context of a general lack of trust in yet unbuilt institutions of a classical democratic system, the introduction of new types of administrative bodies simply did not stand a chance.

We come to the conclusion that it is a matter of confusing cause with coincidence (which is dangerous for the fragile Serbian democracy, at least as much as confusing causality with conditionality, which we have already written about.[37] In this confusion, agencification, which is coincidental with the 'crisis', has been publicly held to be its (partial) cause. In the public, crisis is not taken to mean concern about the relatively high level of corruption, an unsatisfying level of respect for human rights, the regression of the educational system, health care and social

[37] M. Milenković, M. Milenković, Serbia and the European Union: is 'culturaliza tion' of accession criteria on the way? *EU Enlargement Current Challenges and Strategic Choices,* (ed. F. Laursen), Brussels, 2013, P.I.E. Lang (forthcoming).

security, and other processes that could be assumed to be of concern for responsible politicians. The 'crisis' is actually taken to mean the economic crisis (in the context of the long-lasting trend to reduce politics to economy), while the causes of the economic crisis are sought in the 'oversized' public administration. So, in the context in which Serbia is in need of a *larger* government in order to consolidate democracy, improve respect for human rights and develop economically, the agencies have become collateral public damage of the mantric 'requirement to save', according to the interpretation that economic crisis will be resolved though the 'reduction of administration' (and not, for instance, through an appropriate conceptualization and proper implementation of reforms, or by opening the market, maximizing comparative advantages and increasing productivity).

There is an intriguing trend in Serbia in which agencies are predominantly perceived as an instrument of *reduction* and not as an increase of expertise in administration. Although they are formally expert institutions that should provide continuity of scientific authority in the administrative system (interrupted by democratic decision-making and the permanent change of political actors in democracy), agencies are perceived in a negative way. Why? How is it possible that the agency model—which was conceived to *strengthen* the role of expert knowledge in democratic systems vulnerable to the constant change of actors in charge of issues that require expertise—is perceived in Serbia as a *weakening* of the state and a *decline* in the quality of public services? We searched for the answer to this question in the dominant public perceptions of the state, political parties, democracy, as well as the 'expertise' itself. When the analysis characteristic of administrative law and socio-legal studies is complemented with the analysis characteristic of the anthropology of the state and the anthropology of policy, along with the existing knowledge in the anthropology of science, we discover that the agency model is *simultaneously perceived in accordance with and grafted onto* the traditional model of employment 'through connections'.[38] Accordingly, the very status of 'expert' has been called into question. From contesting the results of 'expert teams' that controlled privatization after 2000 (which caused additional economic harm in Serbia after the atrocities in the 1990s and led to the pauperization of a huge percentage of the population) to contesting the requirement for expertise in order to perform presidential functions, the status of knowledge itself is disputable. Knowledge and expertise have been discredited, lost their authority in the society, and we interpret this loss as a stable indicator of re-traditionalization.

[38] Once following kinship and ancestry, and nowadays party based, 'connections' are perceived as and often indeed are the primary model of gaining access to employment in an economy in which the state is the biggest and, in many parts of devastated country, the only reliable employer.

Alternatively, it is possible to interpret anti-agency narratives as an *epiphenomenon of democratic surplus*. In the past few decades, successful resolution of the problem of expertise deficit in democracy has led to the creation of a new problem—that of democratic deficit of independent agencies. At the moment, however, a new process is taking place: resolving the problem of democratic deficit has resulted in the problem of *democratic surplus* (political parties that won the elections and thus gained control over administration 'stroked back' and once again placed expert decision-making on issues that require expert knowledge under their control). This process has so far remained unnoticed due to the fact that expertise deficit, democratic deficit and democratic surplus appeared practically at the same time (after 2000 in Serbia). This interpretation differs from the usual interpretation of democratic surplus, which points to the fact that, relatively speaking, in comparison to other systems, the legal and political system of the EU can be seen as an entity characterized not by democratic deficit but by "democratic surplus".[39] We use the term 'surplus' of democracy to negatively connote the fact that political parties see public administration as an inseparable element of the electoral system, and not as a stable system relatively independent of party changes, even though it was proclaimed as such in Serbia's strategic and legal documents.[40] In such a constellation, public agencies and the tasks they implement become captured by yes/no electoral dynamics similar to the one in which a referendum boils down an issue into a single question that is amenable to a yes or no answer. This reduces preferences to dichotomous choices, and in doing so, divorces the issue from its context. Referendums conceive choice—for example, to join the EU, or not; to have a Constitutional Treaty, or not—as isolated from other choices that governments must make. This places a serious burden on the information that citizens have on the particular issue.[41]

In Serbia, this process is even more complicated because dominant actors tend to attribute a referendum-like character to any regular elections, so the very process of the consolidation of democracy is threatened by the development of democracy itself (understood in electoralist terms and in the atmosphere of a referendum).

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[39] A. Moravcsik, "In Defence of the 'Democratic Deficit': Reassessing Legitima cy in the European Union", *Journal of Common Market Studies*, 4/2002, 603 624.

[40] Including the Government Strategy of Reform of Public Administration (Gov ernment of Serbia, 2004) and Law on Civil Servants (*Official Gazette of the Republic of Serbia*, no. 79/2005, 81/2005 cor., 83/2005 cor., 64/2007, 67/2007 cor., 116/2008, 104/2009).

[41] G. Marks, "The EU's Direct Democratic Surplus", *EUSA Review*, 4/2008, 11.

## 5. POLICY SUGGESTIONS

It would be prudent to thoroughly reconsider the position and role of agencies in the Serbian administration system, since popular perceptions entrenched in democratic surplus result in a referendum-like atmosphere and particracy, and these two factors discredit both the aims of public service and the role of expertise in it. In that sense, we suggest a reconsideration of some of the existing agencies that can be either unified with others depending on their competencies or have their powers conferred to respective ministries. With regard to new or emerging tasks, these should be either conferred to ministries, or to existing agencies, with establishment of new agencies as a last resort.

In a context in which Europeanization and modernization are inseparably connected with the democratization of society, as in the case of Serbia, leaving the agencies open to frequent changes of governments eager for the 'partization' of institutions would have unpredictable consequences. On a global scale, this problem, both on a theoretical level and in practice, will arise not only in those societies where administration is spared from trends related to changes of the ruling political parties (where there are professionally appointed civil servants independent of political parties, and the general development of society is not seen as a matter of choice or even referendum, but rather as a stable structure not subject to party-based interpretations). Wherever it is not so, as in the case of Serbia, agencification done in a temporary fashion endangers, or even discredits, the very notion of agencification, so this highly advanced model of management can very quickly appear to be a historical relic, even before it could catch on, thus leaving the idea of the incorporation of expert knowledge into public administration without an institutional foundation.

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# AN EARLY CRITIQUE OF KELSEN`S PURE THEORY OF LAW: SLOBODAN JOVANOVIĆ ON THE BASIC NORM AND PRIMACY OF INETRNATIONAL LAW

*The keystone of Kelsen's Pure Theory of Law is his doctrine of the basic norm. The basic norm is therefore the subject of Jovanović's critique of Kelsen's en tire theory. According to Kelsen, the basic norm precedes the authority of a state, since it is positioned between the factual social force, which establishes the authority of the state, and the state. According to Jovanović, there is neither the law without a state, nor a state without the law; hence neither can Kelsenian legal norm, perceived as a norm prior to the state, be a positive legal norm, but an abstract, natural law norm. Jovanović discusses and criticizes Kelsen's solution to the problem of the rela tionship between national and international law, which depends on the establishment of the basic norm.*

Key words: *Basic norm. Sovereignty. International law. State law. Pure Theory of Law. Philosophy of Law.*

## 1. INTRODUCTION

Slobodan Jovanović devoted his attention primarily to the criticism of Kelsen's notion of the basic norm (*Grundnorm*).[1] He focused on the

[1] Slobodan Jovanović (1869 1958) was a renowned Serbian scholar and states man, lawyer, legal and political philosopher, historian, literary critic and writer, professor of public and constitutional law. He was president of the Royal Serbian Academy, rector of Belgrade University, dean of Belgrade University's Law School, president of the Ser bian Cultural Club. He served as prime minister and deputy prime minister of the King dom of Yugoslavia. He died in 1958 in London, where he had acted as prime minister of

position and meaning of this basic, primary presupposition, that the entire Kelsen's system has been derived from.[2] Although Jovanović's critique of Kelsen's legal theory refers only to Kelsen's works published between the two world wars, the arguments of this criticism are neither outdated nor obsolete.[3] The analysis of Jovanović's criticism of Kelsen's pure theory shall evince that his arguments are still current.

## 2. THE BASIS OF KELSEN'S PURE THEORY OF LAW

Revival of interest in Kant's philosophy of the second half of the nineteenth century left a significant mark on the General Theory of State

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the Yugoslav government in exile during the Second World War. In post war Yugoslavia, in a political trial held in 1946, he was sentenced to twenty years' hard labour. He was rehabilitated in Serbia in 2007, as a victim of post war communist judiciary. On Slobodan Jovanović, see Aleksandar Pavković, *Slobodan Jovanović: An Unsentimental Approach to Politics*, (New York: Columbia University Press, 1993); Boris Milosavljević, "Liberal and Conservative Political Thought in Nineteenth century Serbia: Vladimir Jovanović and Slobodan Jovanović", *Balcanica* XXXIX 2010, 131 153; Dimitrije Djordjević, "Histori ans in politics: Slobodan Jovanović", *Journal of Contemporary History* 3:1 (January 1973), 2 40; M. B. Petrovich, "Slobodan Jovanović (1869 1958): The career and fate of a Serbian historian", *Serbian Studies* 3:1/2 (1984/85), 3 26).

[2] Jovanović, "Kelsen", vol. 9 of *Sabrana dela Slobodana Jovanovića* (hereafter *SD*) [*The Collected Works of Slobodan Jovanović]*, ed. R. Samardžić and Ž. Stojković (Belgrade: BIGZ, Jugoslavijapublik and SKZ, 1991), 366, remarks that Kelsen had previ ously published larger and more systematic work, *Hauptprobleme der Staatsrechtslehre* (1911), but it was not taken into consideration since, according to Kelsen's own words, there were certain vantage points that differed from the ideas presented in later published *Das Problem der Souveränität und die Theorie des Völkerrechts* (1920).

[3] In the second edition of his book on the state (*Osnovi pravne teorije o državi*, Belgrade: Kon, 1914), Jovanović analyses Kelsen's *Über Grenzen zwischen juristischer und soziologischer Methode* (Tübingen: Mohr, 1911). Jovanović's critical review of Kelsen's *Das Problem der Souveränität und die Theorie des Völkerrechts: Beitragzu euin er reinen Rechtslehre* (Tübingen: Mohr, 1920) was published in *Društveni život*, [*Social life*] 2 (1920), 218 228. Critique of normativism has been presented in the third edition of Jovanović's book on the state (*O državi, osnovi jedne pravne teorije*, Belgrade: Kon, 1922), which was used as a textbook at The Faculty of Law in Belgrade. Jovanović held a doctoral course titled "Dr Kelsen's theory of state" at the University of Belgrade, Fac ulty of Law. In the fourth edition of *The State* (*Država*, Belgrade: Kon, 1936), he takes into consideration Kelsen's *Allgemeine Staatslehre* (Berlin: Springer, 1925) and in his study on Marx (1935), Kelsen's *Sozialismus und Staat*. *Eine Untersuchung der politischen Theorie des Marxismus* (Leipzig: C. L. Hirschfeld, 1920). See S. Jovanović, chap. "Kel sen", in "Marks" [*Marx*], *SD* 9, 300 306; "Kelsen`s Criticism of Marxism", *Arhiv za pravne i društvene nauke* XXIX 1 2 (1934), 1 7; Danilo Basta "Slobodan Jovanović i Hans Kelsen" [*Slobodan Jovanović and Hans Kelsen*]. *Anali Pravnog fakulteta u Be ogradu* 49 (2001), 28 29. Normativism has also been analysed in Jovanović`s "Dr. Leo nid Pitamic: *Država* [*The State*], 1927, založila Družba sv. Mohorja, *Arhiv za pravne i društvene nauke* XVIII (1928), 142 159.

(*Allgemeine Staatslehre*) and Philosophy of Law.[4] Just as Kant employed critique of pure reason, Kelsen employs critique of pure law, reestablishing the entire law on neo-Kantian basis.[5]

According to Kelsen, state power could occur only after legal order (*Rechtsordnung*), which recognized that power as an authority. However, there is a question of how that legal order has been constituted. Kelsen believes that constitution of the legal order is not a legal process, but a social one, since it has been constituted by social facts that had factual power."[6] Both authority and norm sprung directly from social life. The authority which established basic norm was not legal authority, but the factual situation of power.

Jovanović points out that Kelsen's originality lies in his assumption that in the course of transformation from social into legal, legal norm appeared first, and only then did the state authority appear: "The basic norm established certain authority, which in turn vest norm-creating power in some other authorities".[7] Kelsen believes that it is impossible to understand authority which has no legal basis, for the authority which has not be justified by norm, is not authority in legal sense, but a factual situation of power. However, it is equally impossible to legally understand a norm existing before organized state authority. Jovanović argues that the separation of the state and the law inevitably leads to contradictions: "In that manner, Kelsen reverts to the question of which came first, the state or law. It is quite unnecessary to discuss whether the state preceded law or *vice versa*".[8] Law, which is a command of the state's authority, could not be established before that authority. On the other hand, authority, as a right to command, could not have existed before its right to command was legally authorized. Jovanović argues that (during the twenties of the twentieth century), jurists often attempted to exclude the notion of author-

[4] On General Theory of State see Thomas Fleiner, Lidija R. Basta Fleiner, *Allge meine Staatslehre, Über die konstitutionelle Demokratie in einer multikulturellen und glo balisierten Welt*, Springer, Berlin Heidelberg N. York 2004.

[5] Kelsen does not adhere to Kant's *Critique of Pure Reason*, as much as he does to Hermann Cohen`s interpretation of that work. See G. Edel, "The Hypothesis of the Basic Norm: Hans Kelsen and Hermann Cohen", *Normativity and Norms: Critical Per spectives on Kelsenian Themes*, S. L. Paulson and B. Litschewski Paulson (eds), Oxford: Clarendon Press Oxford, 1998, (hereafter *Normativity and Norms*), 199. On neo Kantian pure method [*Reinheit der Methode*] of Marburg school and pure law see M. Jestaedt, "Hans Kelsens Reine Rechtslehre", in: H. Kelsen, *Reine Rechtslehre: Einleitung in die rechtswissenschaftliche Problematik*, [1934], Herausgegeben von Matthias Jestaedt, Mohr Siebeck, 2008, 35.

[6] C.f. H. Kelsen, *General Theory of Law and State*, transl. A. Wedberg, [Harvard University Press 1945] The Lawbook Exchange, Ltd, Clark, New Jersey 2009, 116.

[7] Jovanović, *Država*, [*The State*] *SD* 8, 107.

[8] *Ibid.*, 106.

ity from their theories of the state, thus attempting to base everything on norms.[9]

## 3. NORM AND AUTHORITY

Jovanović gives historical overview of norm – authority relationship.[10] At the time of absolute monarchies, the absolutist theory was a governing one and the basic notion of the state law was authority. Starting with the seventeenth century, there was a reaction to the absolutist theory and the ideas of natural laws emerged; therefore the norm became the basic notion of the state law. The natural law theory has gradually converted in the theory of popular sovereignty. Within a short time, the idea of natural rights was abandoned and the only one recognized was the idea of positive law, i. e. of the law constituted by the state authority. Thus the notion of authority again becomes the basic notion of the public or the state law (*Staatsrecht*). However, it was followed by a theory of legal state (*Rechtstaat*): "In its first form, this theory is very modest and aims at bringing executive power within the boundaries of law. Gradually, the supremacy of law over the government has been converted into the supremacy of the norm as such, over the authority as such, — which resulted in the theories such as Kelsen's, according to which only norm, and under no circumstance authority, might be a basic notion of the state law".[11]

To understand Jovanović's critique of Kelsen's normativism it is necessary to examine philosophical foundations of the pure theory of law (*Reine Rechtslehre*). Kelsen criticizes, as he says, "conservative", "metaphysical", "transcendent" natural law theories from the vantage point of "the pure theory of law, whose ultimate consequences were derived from the philosophy and legal theory of the 19th century, which were originally hostile to the ideology and based on the theory of positive law; therefore it strongly opposed those disproving Kant's transcendental philosophy and legal positivism".[12] By employing neo-Kantian model for Kelsen's establishment of law, all ***theories*** of ***transcendence*** which ***sought to provide grounding*** in transcendent – God or nature, should be overcome. By using the model of Kant's critical reestablishment of the philosophy (*Critique of Pure Reason*), Kelsen intended to "***purify***" ***law***. For Kelsen, it is not about transcendent, but transcendental (synthetic *a priori*

[9] See Joseph Raz, *The Authority of Law*, 2nd ed. (Oxford UP: Oxford, New York 2009), 3 and further.

[10] Jovanović, "Kelsen" [1920, 1935] *SD* 9, 374.

[11] *Ibid.*, 375.

[12] H. Kelsen, *Reine Rechtslehre*, 37.

judgments).[13] Kelsen's pure theory of law would be a transcendental theory of legal cognition.

As Kant is followed by Hegel, neo-Kantians, including Kelsen, are followed by Hegelian dialectics.[14] It turns out that Kelsen's positive normative law, critical of natural law, in an unexpected dialectical shift, finds its basis in a seemingly opposite principle of natural law. Although Kelsen implies that Kant's categories are presented in such a manner that it might be said that they are metaphysical data, a reference to Kant does not diminish the argument regarding natural law status of the first norm.[15] Kelsen fails to solve the problem of the first norm "purity". He only succeeds in pointing out that, for Kant, there are *a priori* data.[16]

Though Kelsen, as a positivistic jurist, rejects natural law theories, by separating the legal norm from the state authority and treating the legal norm as something that preceded the state power, in fact, he gives priority to the law that precedes the state.[17] Thus, Kelsen trespasses into the natural law theory.[18]

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[13] For Kant, owing to pure forms of sensibility time and space, synthetic a priori judgments are possible, which unlike analytic, basically mathematical judgments, allow a priori, non analytical, i.e. experiential, synthetic cognition (with the help of the power of *imagination* [*Einbildungskraft*]). It is on the Kantian notion of *imagination*, which sup ports the entire system, that Heidegger based his critique of neo Kantians. M. Heidegger, *Kant und das Problem der Metaphysik*. Herausgegeben von Friedrich Wilhelm v. Herr mann. 6. Auflage, Frankrut am Main: Vittorio Klostermann, 1998, 127 and further. On neo Kantian influence on Kelsen see: S. Hammer, "A Neo Kantian Theory of Legal Knowledge in Kelsen`s Pure Theory of Law?", *Normativity and Norms*, 176 194; G. Edel, "The Hypothesis of the Basic Norm: Hans Kelsen and Hermann Cohen", *Normativ ity and Norms*,195 220.

[14] According to Hegel's well known metaphor (*Lectures on the History of Philos phy* 3, 428; *Encyclopedia* § 412, 66), Kant is trying to learn to swim before entering the water. It is impossible to have law out of, or before the authority.

[15] Kelsen, *General Theory of Law and State*, 437, later defends his opinion, refer ring to Kant: "If one wishes to regard it [i.e. the basic norm] as an element of a natural law doctrine [...] very little objection can be raised just as little, in fact, as against calling the categories of Kant`s transcendental philosophy metaphysics because they are not data of experience, but conditions of experience. What is involved is simply the minimum [. . .] of natural law without which neither cognition of nature nor of law is possible." C. f. Joseph Raz, "Kelsen`s Theory of the Basic Norm", *The American Journal of Jurispru dence*, 19 (1974), 94 111; Andreas Kalyvas, "The basic norm and democracy in Hans Kelsen's legal and political theory", *Philosophy & Social Criticism*, 32/5 (2006), 574.

[16] Up. Danilo Zolo, "Hans Kelsen: International Peace through International Law", *European Journal of International Law*, 9 (1998), 323: "On the plane of the epistemology of legal knowledge, Kelsen's monistic assumption stands or falls with the neo Kantian philosophy from which it derives".

[17] On pre state law, that is pre state legal community [*vorstaatliche Rechtsgemein schaft*] see H. Kelsen, *Reine Rechtslehre: Einleitung in die rechtswissenschaftliche Pro blematik*, [1934], Herausgegeben von Matthias Jestaedt, Mohr Siebeck, 2008, 129.

[18] Jovanović, "Kelsen", 375.

As Jovanović points out, Kelsen's pre-state law (*vorstaatliches Recht*) basically means the same as natural law. The difference between the notion of natural law and the notion of natural rights is not affecting Jovanović's criticism of Kelsnen's basic norm. Every right (*Recht*) assumed to exist before the state (which is the only one conferring legal obligation), might be considered as natural (human) right (*Naturrecht*) or natural law (*Naturgesetz*). Since such rights do not include obligation in their notion, they are not legal notions. They are some kind of non-compulsory rights (laws). Jovanović clearly states that "natural law" (natural right) is *contradictio in adjecto*.

## 4. CRITICISM OF KELSEN`S CRITIQUE OF LEGAL PERSONALITY OF THE STATE

According to Kelsen, all notions of the science of law (jurisprudence) should be "purified" from other disciplines, especially sociology and politics. According to him, law can be only legally comprehended; therefore the state can be legally comprehended only if it is understood as system of legal norms, i.e. law. Thus, the state is, in fact, merely legal order, i.e. system of legal norms that are effective in the state. Contrary to the legal theory that defines state as a legal person (juristic person)[19], Kelsen deems that the deeper analysis leads to the conclusion that a legal person is but the sum of its legal norms. State personality [*Staatsperson*] is merely a legal person (increased in extent), as well as a physical person, just a "personification of the legal norms".[20] Thus Kelsen eliminates "fictious" legal person, replacing it with points of imputation (*Zurechnung*), or "conceptually constructed points of normative reference".[21]

Jovanović states that the notion of the state personality is implied within the notion of the legal norm: "Legal norm is defined as a norm commanded by the state authority."[22] The notion of the state personality cannot be expelled from legal reasoning without losing *differentia specifica* that determines a legal norm: "Truly, neither does Kelsen go so far as to claim that the legal norms exist *per se*, without organized authority to

[19] Jovanović, "Pitamic", *SD* 9, 377. At the end of the 19th and the beginning of the 20th century the most distinguished representatives of the German school of Law were Laband and Jellinek. Jurists of this school considered state as a legal person.

[20] H. Kelsen, *Das problem der souveränität und die theorie des völkerrechts; bei trag zu einer reinen rechtslehre*, Tübingen, J.C.B. Mohr (P. Siebeck) 1920. See Jovanović, *Država*, [*The State*], 105.

[21] See Paulson, Hans Kelsen`s "Hans Kelsen`s Earliest Legal Theory: Critical Constructivism", *Normativity and Norms*, 36; "Hans Kelsen's Doctrine of Imputation", *Ratio Juris*, 14 /1 (2001), 47 63.

[22] Jovanović, *The State*, 105.

prescribe them. However, he argues that the authority as a legal concept becomes possible only if based on the legal norm that has established it".[23] According to Kelsen, legal norm is valid not because it is enacted by the authority, but because the right to command, i.e. the authority, is based on a legal norm. He presupposes that creation of the legal order is not a legal process, but a social one. All authorities reside in the legal order, and the legal order has its source in social life. Kelsen assumes that in this process of transformation from social into state and legal, the basic legal norm that established certain authority emerges first. This first legally established authority in turn vest norm-creating power in other authorities.[24] Jovanović deems that it is vain to discuss which came first – the state or law. Actually, it is impossible to conceive the law without the state, or the state without the law, since the state authority springs from the law, and the law from the state.[25] According to Jovanović, the state, the law and the authority emerged simultaneously. They are one integral phenomenon. Since the state emerges at the same time as the law and the authority, it contains the notion of law in its very creation.

Jovanović evinces that any presupposition of legal norms existent before the creation of the state authority, which is the only one that may confer the obligation to the law, is a contradiction. The legal norm apprehended as the norm before the state is not a positive legal norm. Since it has not been derived from any higher norm, the basic norm of the legal order, it cannot be the legal norm, "which does not mean that it could not, in the absence of the legal significance, have some other significance – religious, ethical, political".[26] Therefore, the law before the state, i.e. the basic norm, is not the law in legal sense, but a moral attitude, sentiment or an opinion. Jovanović clearly states that: "coercion is not an accidental social phenomenon: it enters the content of concept of law, as one of its essential features that makes a difference between the law and all other norms – primarily religious and moral ones. Those norms may exist without the coercion, but not the law."[27]

Jovanović considers the state as a legal person since there is no difference between the will of an association or corporation, which is a legal person, and the will of a state as a legal person. He indicates that, by employing the principle of division of powers, a clear difference between the state as a legal personality and the organs of the state has been made. The state is, as a legislature, the legal person that obligates itself by enact-

[23] *Ibid.*, 106.

[24] *Ibid.*, 107.

[25] *Ibid.*

[26] Jovanović, "Pitamic", 381.

[27] *Ibid.*, 383.

ing laws.[28] The executive and the judiciary are at the lower level than the legislature and they are obligated to act in accordance with the rules enacted by legislature.

Kelsen criticizes the notion of the state as a legal personality and the idea of auto-obligation. According to him, legal personality is but the sum of its legal norms. On the other hand, Jovanović indicates that the notion of state personality is implied in the notion of the legal norm, for the legal norm has been defined as the norm commanded by the state: "Normative school of law objected the leading theory of the time the invention of the legal personality of the state, which, as they argued, was not derived from any previous legal order. One may answer that jurists of the Normative school of law invented a system of legal norms which lacked the legal basis, as much as the legal personality of state did."[29]

Jovanović points out that the norm preceding the authority of the state may have both factual and moral validity, but not a legal one. Therefore the best solution is to presuppose that both the law and the state have sprung from the social life at the same time as an inseparable whole: "The first authority that emerged, at the same time represented the first norm, which was that such authority should exist. Conversely, the first norm by its own existence represented a certain act of authority, for those who created it had to act as authority in the very moment of its creation. State authority springs from the law and the law springs from the state, until a primordial moment is reached, when both the state authority and the law appear as the two sides of the same thing [phenomenon]."[30]

The authority is based on legal norms, and their validity is based on the authority.[31] The answer to all objections on the circular reasoning occurring in defining law and state is that the state authority and the law appear as the two sides of the same thing [phenomenon].[32] Although *circulus vitiosus* occurs, it is inevitable in solving fundamental questions, since it exists in the very nature of thinking. For basic concepts of thinking, it is not obligatory to apply the laws of logic that are applied in their further deduction.[33]

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[28] See G. Jellinek, *Lehre von den Staatenverbindungen* (Wien: A. Hölder, 1882), 55.

[29] Jovanović, "Pitamic", 381.

[30] Jovanović, *Država*, 107.

[31] *Ibid.*

[32] *Ibid.* Cf. D. Basta "Slobodan Jovanović i Hans Kelsen", 32.

[33] For Kant, "freedom is **ratio** *essendi* of moral law, and moral law is **ratio** *cog noscendi* of freedom". See E. Kant, *Kritik der praktischen Vernunft*, *Kritik der Urteils kraft*, Kants gesammelte Schriften, Band V, Berlin: G. Reimer, 1913, 4. As for the logi cians' objections to the vicious circle, Heidegger answers: "This circle of understanding is not an orbit in which any random kind of knowledge may move; it is the expression of the existential fore structure of *Dasein* itself. It is not to be reduced to the level of a vicious

## 5. THE PRIMACY OF NATIONAL OVER INTERNATIONAL LAW, OR THE PRIMACY OF INTERNATIONAL OVER NATIONAL LAW

According to Kelsen, the theory which presupposes the primacy of state law over international law, as well as the theory which presupposes the primacy of international over state law, are both logically deducted. Kelsen argues that: "according to the first of the legal constructions, one's own state is at the center of the legal world, so likewise, in the Ptolemaic conception, the earth is at the center of the universe, with the sun revolving around the earth. And just as, according to the other legal construction, international law is at the center of the legal world, so likewise, in the Copernican conception, the sun is at the center of the universe, with the earth revolving around the sun. But this opposition of two astronomical conceptions is simply an opposition of two different frames of reference."[34] Although he claims that it is simply about two different frames of reference, it is certain that, when it comes to "Copernican shift", Kelsen opts for Copernicus and not for Ptolemy. According to Kelsen, the notion of the sovereignty of the state – rightly or wrongly – was standing in the way of everything that was aimed at forming international legal order and establishing special organs for further development, application and implementation of international law, as well as for the further development of international community from its state of primitiveness into a *civitas maxima*.[35] The primacy of international law over national law is also confirmed by Kelsen's association of the primacy of international law with the ideology of pacifism.[36] Although Kelsen does not explicitly give priority to the primacy of international law, he still presupposes its primacy over national law: "it expands scope of legal cognition. Theory which presupposes the primacy of national over international law, cannot legally comprehend more than one state; theory which presupposes the primacy of international law is legally able to comprehend multitude of states".[37]

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circle, or even of a circle which is merely tolerated. In the circle is hidden a positive pos sibility of the most primordial kind of knowing". See M. Heidegger, *Sein und Zeit*, 19. Auflage, M. Niemeyer, Tübingen 2006, 152 153.

[34] H. Kelsen, "Sovereignty", *Normativity and Norms*, 535.

[35] Kelsen, *The problem of Sovereignty*, 268 269.

[36] Although nowadays the question may be raised whether it is correct to connect the creation of the global super power (that Kelsen does not conceive as a rule of the ab stract law and the abstract norms, but the necessity of the force behind the law is under stood) with pacifism or the reality of the modern world provides the basis for the quite opposite conclusions. Even Kelsen considers pacifism as a process of achieving the world peace through the justified wars that will punish recalcitrant states and individuals breach ing the prescribed order. See H. Kelsen, "Sovereignty", *Normativity and Norms*, 532.

[37] Jovanović, "Kelsen", 370.

Although Kelsen presupposes the primacy of international over national law, he has not settled the dispute between these two theories to the benefit of the primacy of international law. The dispute between those systems is still in progress in legal science, and it is difficult to determine which theory is going to win. According to Kelsen the problem remains unsolved. Contrary to Kelsen, Jovanović asserts that the problem is not unsolved since the theory of the primacy of national law is still valid. As long as a state has its sovereignty, the international law has to be based on its sovereignty, i.e. it has to be derived from nation-state law.

Jovanović points out that Kelsen's position was logically deducted, but the question is what the contribution of that new position was: "Did it help us to solve the problems of legal science that the German school failed to solve? The answer to this question has to be negative, since the major problem he had been solving, Kelsen had to declare unsolved, even with this new standpoint."[38]

## 6. BASIC NORM AND INTERNATIONAL LAW

When it comes to the question of sovereignty in particular, the difference between Kelsen and the German school does not seem so great. According to Kelsen, sovereignty belongs to the legal order that is not derived from any other legal order, which, therefore, is not a part of any other legal order, but is a separate entity. Jovanović evinces that the terminology differs from the one of the German school, but the main idea remains the same. Sovereignty belongs to the public person, that is, the authority which is not subordinated to any higher person, i. e. authority: "The notion of sovereignty means the same both for Kelsen and for the German school – namely, it is something that is not legally derived from anything else and it does not depend on anything else. The only difference is that Kelsen ascribes this attribute to the legal order, while the jurists of the German school ascribe it to the legal person".[39] Any legal person might decomposed into its legal norms and all the norms related to a legal person may personify, i.e. may be understood as legal attributes of the person: "if legal norms may be converted into a legal person, and the legal person into the legal norms, then those two notions are interchangeable – consequently, it is allowed to apprehend the state as a legal person, as well as legal order".[40]

According to Jovanović, Kelsen's theory could be applied parallel with the theory of the German school. It can be used for a critical exami-

[38] *Ibid.*, 371.

[39] *Ibid.*, 372.

[40] *Ibid.*

nation of the results obtained by the German school, especially when it comes to the risk of anthropomorphism expressed in the opinion that national and international law can exist parallel since they are two separate, mutually independent legal orders that could be even incompatible. According to them, the state may be obligated in accordance with international law; however, those obligations could be invalid for national law, as would be the example of unconstitutional international agreements. According to Jovanović, Kelsen rightly points out that the state is not a person in the real sense, but only in legal sense as a personification of the national legal order.

Jovanović states that as much as Kelsen's theory may be useful for the detecting fallacies the German school was exposed to, all the same, the German school may be useful for detecting fallacies Kelsen himself was exposed to. Kelsen reduces the notion of state to the notion of legal norm. He refuses to accept the definition of legal norm prescribed by the state authority, since it fails to comply with his notion of legal norm. According to Kelsen, the basic norm as the starting point of the entire legal order and the entire state organization has to precede everything, even the supreme state organs (*oberste Staatsorgane*) which may not prescribe it, since the basic norm establishes them. However, the question is where the basic norm came from, since it had to be prescribed as well. Kelsen argues that the legal reasoning becomes possible only when the basic norm has been acquired. What preceded it and how it came into existence is not relevant from the legal standpoint.

Jovanović indicates that Kelsen ended up asking a completely futile question what came first in the state – legal norm or organs of the state authority: "a state cannot be conceived without the legal norms or the authority: the norm which is not supported by the state authority is not a legal norm; the authority which is not standardized by the legal regulations is not a legal notion. Therefore, it is the best to hold onto the standpoint of the German school who claim that the state is a legal person. The concept of the legal person contains both elements: the organs and the norm".[41]

According to Jovanović, "it happens that Kelsen, in his long chains of abstract reasoning ceases to sense the authority behind the norm" and, actually, holds on to the basic logical theses. If the state is reduced to the sum of its legal norms, and the system of the legal norms is logically organized, the consequences are in compliance with the logic, but the question is whether they are true or not. Logic has its limitations and Kelsen transfers those limitations and dilemmas to the law by reducing the law to the logic. Logical frame implies that something is general and something particular or specific, and that the specific is subsumed under the particu-

[41] *Ibid.*, 373.

lar and the particular under the general. Following this logic, Kelsen subsumes the narrower system under the extensional one.[42] Kelsen perceives national and international law exclusively as two systems of norms; a narrower one, since it comprises only one state (national law), and the wider one, since it comprises a multitude of states (international law); therefore he finds it completely logical that the narrower system should be subordinated to the wider one.[43]

Jovanović states that Kelsen forgets that it is not all about the norms that should be logically connected. Behind every system of norms is authority which prescribed them: "For national law, it is an organized state authority; as for international law, it is an unorganized international community. The organized state authority is a public legal person that has an *imperium*; the international community is a kind of a social awareness that has not become completely legally organized yet".[44] National law cannot be subordinated to international law, since the stronger legal organization of national law makes that formally logical precedence of international law illusory. The German school with its understanding of the state as a public legal person, without difficulties explains the relation between state law and international law, while Kelsen "who perceives those two laws as two systems of norms, concludes that international law should have a precedence over the national law, but instantly adds that the precedence has not been granted in practice yet. His theory is inadequate to explain reality and should be completed and corrected by the theory of the German school".[45]

## 7. IDEOLOGICAL TENDENCIES OF "ATNI-IDEOLOGICAL PURE THEORY OF LAW"

Jovanović points out that, whenever an old regime is falling apart, the notion of norm is getting importance in theory. Rationalistic criticism appears among the destructive forces, which rejects any authority and ac-

[42] Kelsen, *Pure Theory of Law*, 332: "the evolution of international law is similar to that of national law. Here, too, centralization begins with the establishment of tribunals [...] The entire legally technical movement, as outlined here, has in the last analysis the tendency to blur the border line between international and national law, so that as the ultimate goal of the legal development directed toward increasing centralization, appears the organizational unity of a universal legal community, that is, the emergence of a world state. At this time, however, there is no such thing. Only in our cognition of law may we assert the unity of all law by showing that we can comprehend international law together with the national legal orders one system of norms, just as we are used to consider the national legal order as a unit".

[43] Jovanović, "Kelsen", 373 374.

[44] *Ibid.*, 374.

[45] Jovanović, "Kelsen", 374.

cepts only the pure ideas that could be logically apprehended and proved. During the period of the creation of state order, the law has been defined as a command of state authority; within the period of its destruction, the authority has been defined as a legal institution. In the first case, the law has been reduced to the notion of authority, and in the second case, the authority has been reduced to the notion of law. Reducing the authority to the notion of law would be, surely, Kelsen's option, while Jovanović considers it as equally wrong as the reducing the law to the authority.[46]

Placing the law halfway between social, factual creation of the state and the authority, Kelsen instituted basic principles of the theory of the primacy of international law over the law of sovereign states.[47] This primacy has been ensured neither during Kelsen's life nor today, but for Kelsen it is something that ought to be.[48] Whether this can be seen as a deviation from the initial Kelsen's principle of value-free anti-ideological tendency of the pure theory of law?[49] According to Kelsen "pure theory of law refuses to serve any political interests by supplying them with an ideology by which one social order is justified or disqualified. [...] Thereby the pure theory of law places itself in sharpest contrast to traditional legal theory which, consciously or unconsciously, more or less, has an `ideological` character.[50] Kelsen criticizes Hegel's theory of the state sovereignty according to which "International law (*das äußere Staatsrecht*) applies to the relations between independent states [...] because it actuality depends on distinct and sovereign wills."[51]

According to Normative school "the notion of the state sovereignty has not been rejected yet; however, the idea of the single international law which denies the state sovereignty begins to invade, since it has been imposed on the states as a higher legal order. On the one hand, national awareness which can be fully expressed only within the sovereign state is

[46] It may be said that at the end of the Cold War, when the old world order was destroyed, it was insisted on the law; however, it may also be noticed that, regardless of the reasons, when it comes to the attempt of creating the new world order, once again the law has been reduced to the command of the power.

[47] It may be concluded that it is legally irrelevant which force acting as a social fact is going to ensure the primacy of international law; it is important that this primacy is going to be ensured on a global level.

[48] On the importance of is/ought [Sein/Sollen] for Kelsen and on methodological dualism in his early works see S. L. Paulson, "Hans Kelsen`s Earliest Legal Theory", *Normativity and Norms*, 29.

[49] Kelsen, *Reine Rechtslehre*, 30. On the relativity of the meaning of certain terms in Kelsen's works see J. Raz, "Kelsen`s Theory of the Basic Norm," in *The Authority of Law*, 2nd ed, (Oxford UP: Oxford, New York 2009),122 145.

[50] Kelsen, *Reine Rechtslehre*, 30.

[51] G. W. F. Hegel, *Grundlinien der Philosophie des Rechts, Naturrecht und Staats wissenschaft im Grundrisse*, [1821] Werke 7, E. Moldenhauer und K. Markus Michel, Suhrkamp, Frankfurt a. M. 1979, [§ 330], 497.

still strong. On the other hand, a much larger awareness appears – the awareness of the mankind in general, which perceives a sovereign state as an obstacle for creation of a legal community on a higher level, which would comprise each and every state as its member."[52] The law ought to be above the state, instead of the state being above the law; therefore the state authority would become a tool for maintenance of legal order.[53]

Jovanović points out that the presupposing the legal norms of international law to the authority of a sovereign state, implies either that the norms themselves oblige the state authority or that the legal norms ensue from the authority greater than the state. Firstly, he analyses hypothesis that the legal norms themselves oblige the state authority: "Nobody disputes that there are norms which impose themselves on their own on the consciousness and conscience of a normal man. However, those norms are not what we call legal norms".[54] Since they are not legal norms, they cannot be the foundation of the theory which imposes itself as purely legal. Legal norms must gain its obligatory character from the state authority, otherwise they cannot be considered as legal norms. Those norms which are not related to the external state authority, such as a voice of the *sensus communis*, are not legal, but moral norms.[55]

Jovanović indicates that the second hypothesis, according to which the legal norms ensues from the authority which is higher than a state, would not change old theory of state sovereignty. The only difference would be that the state authority, subordinated to the legal norms, would not be sovereign any more, and the higher authority would gain sovereignty. In other words, if the states belonging to an international community were subordinated to the norms of international law, that would mean that the sovereignty ceased to be the attribute of the certain states and became the attribute of the international community; "there would be a sovereign superstate consisting of a great number of non-sovereign states".[56] However, the sovereignty of the global superstate would be the state sovereignty and not the legal (normative, constitutional) sovereignty.

Although it may be said that Kelsen presupposes international law over national law in axiological and ethical sense, when it comes to the

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[52] Jovanović, "Kelsen", 371.

[53] *Ibid.*, 368.

[54] Jovanović, *The State*, 141.

[55] Ibid.

[56] Jovanović, *The State*, 141. Cf. M. Milojević, "Shvatanje Slobodana Jovanovića o odnosu izmedju medjunarodnog i unutrašnjeg prava" [Slobodan Jovanović's apprehen sion on the relation between international and national law], *Delo Slobodana Jovanovića u svom vremenu i danas*, [*Slobodan Jovanović and his work in his time and today*] S. Vračar (ed), Belgrade: Faculty of Law, 1991, 149 153.

law, he states that the dispute over the primacy of these two laws has not been resolved yet.[57] Kelsen does not argue that the norm can exist *per se*, without organized authority that would authorize it. Therefore, the dispute can be resolved in favour of international law when international law gains capacity to sanction.

Jovanović points out that, for now, not only has the dispute been solved, but also it has been solved in favour of primacy of the law of the state. The states, as well as individuals, may conclude contracts and form alliances: "The League of Nations was intended to be the coalition of sovereign states and not a superstate. As long as a state is sovereign, international law has to be based on its sovereignty – in other words, it has to be derived from national law."[58]

The state shall remain sovereign until some global supranational authority is created. However, the states that would be parts of that new state would not be states in the modern sense of the word, but non-sovereign regions of the new universal federal world state. Therefore, for Jovanović, the existence of the new world state would not mean the victory of the theory in favour of the primacy of international law; on the contrary, it would be confirmation of always existing theory of the primacy of national law. The only difference, if it is difference at all, would be that the theory of the primacy of nation-state law now applies to the sovereign global world state, rather than its current parts, once sovereign state-nations. Logically deducted conclusions of Kelsen's hypotheses lead to the vantage point according to which the primacy of international law, actually, abolishes international, i.e. interstate law in favour of the state law, since the conferred primacy of international law, actually, means that it became the state law of the new global world nation-state. Therefore, Kelsen's doctrine, consistently derived, presupposes the ideology of a world state, confirmed in his later works.[59]

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[57] Cf. D. Zolo, "Hans Kelsen: International Peace through International Law", 323: "The thesis of the primacy of international law (with its four corollaries, in particular acceptance of the doctrine of the *iustum bellum*) cannot aspire to any objective scientific validity, not even in the attenuated version that presents it as a hypothesis needed in order to construct legal knowledge. From the cognitive viewpoint, it is no more necessary than the opposite 'subjectivist' hypothesis that argues the primacy of state law, and does not subordinate the individual dimension to the objective validity of law. In Kelsen an Austrian intellectual personally involved in the tragedy of the Second World War legal internationalism is very likely a (noble) ethico political option".

[58] Jovanović, *The State*, 141.

[59] D. Zolo, "Hans Kelsen: International Peace through International Law", 317: "Kelsen borrows from Kant both the ideal of perpetual peace and the federalist model, as well as the idea of a *Weltbürgerrecht*, a 'world citizenship' which includes as its subjects all the members of the human species. According to Kelsen, the royal road to achieving the aim of peace is the union of all states (or the greatest possible number of them) in a world federal state. But to be realist, this objective must be viewed as the outcome of a

## 8. CONCLUSION

Jovanović's critique of Kelsen's pure theory of law may be divided into three mutually related topics. Firstly, Jovanović analyses the notion of the basic norm. The basic norm exists after the factual force and before the establishment of a state. The ascertaining the primacy of state and norm leads to a circular reasoning which is actually a dead end. The concept of law implies obligation which is ensured by state. If there is no obligation, then there is no law; therefore, according to Jovanović, the notion of natural (pre-state) law (right) is *contradictio in adjecto*. The basic norm preceding the state can be conceived as a natural law norm, that is, the norm which obliges in the moral or religious sense, but not in the legal sense. According to Jovanović, the norm coexisting with the authority is a legal personality of the state (*Staat als juristischer Person*) of the German school, which Kelsen's theory failed to surpass. Jovanović proves that the state and the law are the two sides of the same phenomenon. It is naïve to believe that the law could exist without force that would guarantee its enforcement.

Although Kelsen believes that, from the formally legal standpoint, monistic theories of international law based on the primacy of national law and those based on the primacy of international law are equally valid, in his works, even in those published before the World War II, it is clear that he confers the primacy to the international law. However, international law cannot have primacy for the same reason that the basic norm cannot have primacy over the state. International law has no power over the states; it acts as an expression of a certain vision or moral presupposition. International law is based on an agreement of the sovereign states and not until a sovereign authority which would have the primacy over the states is established, shall international law have primacy over national law. If the primacy of international law were established over the states, it would not be inter-national law anymore, but national law, since it would be the law of a new global superstate, which would be the state, while the former states would be its more or less autonomous non-sovereign regions.

The purity of the pure theory of law implies reestablishment of the entire antecedent law in accordance with Kant's attempt of reestablishing philosophy and, consequently, the complete antecedent knowledge based on new critical and pure foundations.[60] Kelsen explicitly compares objec-

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long historical process. It is only through numerous intermediate stages and on the basis of a conscious ideological, political and educational commitment that it is possible to achieve an attenuation of national feelings and a levelling out of cultural differences be tween the various countries."

[60] D. Zolo, *Ibid.*, 323, rightly determines that the basis of Kelsen's legal cosmo politanism are the ideas of the enlightenment represent basis of Kelsen's legal cosmopoli

tivity and purity of his theory with political and ideological tendencies of the former theories. Assuming that something can be based out of the presuppositions of political philosophy, most often turns out to be a naïve lack of reflection on one's own presuppositions. Jovanović indicates the importance of reflection of one's own prejudices and critical consideration of their influence on general and individual world view. Kelsen's theory is not ideologically and politically pure. It presupposes Kant's and Wolf's theories on universal world state and perpetual peace. Paradoxically Enlightenment contents subversive ideal of destroying the old and starting all over again on the basis of the "pure" reason.

Jovanović's critique of Kelsen's pure theory of law shows that Slobodan Jovanović's insights, although not widely known both in his country and abroad, were profound and accurate. The critique of Kelsen's theory developed, though not under Jovanović's influence, largely within the frame that he depicted and analyzed.[61]

tanism. On cultural and social influences that affected Kelsen's family life and education see Clemens Jabloner, "Kelsen and his Circle: The Viennese Years", *European Journal of International Law* 9 (1998), 368 385.

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# LEGAL REMEDIES AGAINST FACTUAL ACTS BY POLICE FORCE THE SERBIAN AND THE AUSTRIAN APPROACH

*In democratic countries founded on the rule of law, individuals' remedies against factual acts by police officers are crucial for the legal system. Different legal systems provide different concepts for the external control of the police. This paper compares the Serbian and the Austrian system and identifies every system's advan tages and weaknesses. Their identification allows the author to suggest a reform of both current systems. As to the major reform proposals, the Austrian legislator could adopt the fast Serbian first instance proceeding before the head of the police unit concerned by an act, whereas Serbia should establish an independent authority where complaints against the police could be filed with. In general, the comparison of both systems facilitates the understanding of the remedy system against factual acts by the police and enables the readers to consider their home country's remedy system from a different perspective.*

Key words: *Serbian Law on Police. Austrian Security Police Act. Legal rem edies. Factual acts. Police. Comparative study.*

## 1. INTRODUCTION

As a legal principle, every legal entity apart from individuals can only act by its representatives. This principle is particularly true for the State that acts by a myriad of state officials to fulfill a variety of tasks.[1] One of these tasks is to ensure the rights and freedoms of its people, which requires an effective legislative power as well as efficient law en-

[1] Arno Kahl and Karl Weber, *Allgemeines Verwaltungsrecht* (3rd edn, facultas. wuv 2011) para 241.

forcement bodies. One of these law enforcement bodies is the police. It is the police's responsibility to preserve public order and safety[2], and in line with the courts and other administrative units, to ensure the rule of law in a democratic society.

In everyday life, there is probably no other public entity that represents the State's authority in the same way as police forces do. If they are performing in accordance with the law without violating individuals' rights, citizens are more willing to accept the State's authority. Autocratic regimes, however, tend to exploit the police for their interests and to use its forces to ensure their power. This has a huge impact on the conduct of police officers and is often the reason for poor condition of police in post-conflict countries. The Yugoslavian police under the Milosevic regime may therefore serve as an example.[3]

When such a regime is brought down, one of the first steps in a new democratic era is a police reform to restore the citizens' confidence in the police as well as in the State's authority. Apart from setting new standards for the education of police officers and combating corruption within the police, a critical step is the adoption of an efficient remedy system. Citizens will even more rely on the work of the police, if they know that every action performed by a police officer can be appealed before independent courts.

There are many good reasons for an analysis of the remedy system against acts carried out by the police. The particular interest to compare Serbia and Austria is based on the fact that Serbia's legal and political system has undergone some substantial changes in the last twenty years while the Austrian system has been stable since 1945. In addition, Serbia and Austria are two countries that are not only linked by its political history. It should also not be neglected that Austria's administrative law has been a role model for Serbia to some extent.[4] A few years ago, the Serbian legislator has adopted a new law on police and thereby modified the remedy system. Given its lately modification, the new system has not been addressed by many Serbian scientists and any comparative work is, as far as I see, completely missing. This gap shall be closed by the following analysis. After some necessary definitions and a brief historical overview, every system's advantages and weaknesses are described and its major differences are identified. This approach allows making specific

[2] Slobodan Miletić, *Policijsko pravo,* vol 1 (Policijska akademija 1997) 14; Di eter Kolonovits, 'Sicherheitspolizeirecht' in Stefan Hammer and others (eds), *Besonderes Verwaltungsrecht* (facultas.wuv 2012) 47.

[3] Richard Monk, 'Study on Policing in the Federal Republic of Yugoslavia' (OSCE 2001) *http://www.osce.org/spmu/17676* accessed 15 April 2013.

[4] Dragan Milkov, *Upravno pravo: Upravna delatnost*, vol 2 (3rd edition, Pravni fakultet Univerziteta u Novom Sadu 2003) 67.

suggestions to improve both remedy systems to guarantee the highest level of protection for individual's rights and freedoms in a democratic society.

### 1.1. Definitions

Subject of the comparison are factual acts by police officers. To facilitate the comprehension of both the Serbian and the Austrian legal provisions, the following definitions will specify which kinds of actions are meant by the used terms.

#### *1.1.1. Factual acts*

Factual acts comprise every action by the police that does not take the form of an administrative decision or of general legal acts as regulations. Not included are acts carried out by the police to enforce a decision by a court or any other comparable preliminary act. The acts have to be assigned to the police as own acts. This condition is not met if the police intervene on behalf of the public prosecutor or on behalf of a criminal court. Classic examples of factual acts are the issuance of orders, the temporary seizure of objects, or the detention of persons.

#### *1.1.2. Police officers*

In general terms, a police officer is every person employed by the police performing law enforcement functions. Police employees only responsible for the inner administration and maintenance of police buildings as secretaries or cleaning ladies are not covered by this definition. The Serbian Law on Police (LoP)[5] and the Austrian Security Police Act (SPA)[6] contain provisions that explicitly indicate the police employees in charge with law enforcement.

According to Article 4 para 2 LoP, law enforcement officers are uniformed and plainclothes officers exercising law enforcement powers (No. 1), and personnel on special duty whose tasks pertain directly to police work and who are authorized to perform certain police tasks by the Minister of Interior (No. 2). On the other hand, community police officers must always be in uniforms when exercising their law enforcement powers (Article 39 of the Serbian Law on Community Police[7]).

§ 5 SPA para 2 SPA lists as law enforcement officers the members of the Federal Police (No. 1), the members of community police services

[5] Official Gazette of the RS No. 101/2005, 63/2009 and 92/2011.

[6] Federal Law Gazette No. 1991/566 as amended by: Federal Law Gazette I No. 2012/50.

[7] Official Gazette of the RS No. 51/2009.

(No. 2), and explicitly authorized employees in legal service at the security authorities (No. 3).[8]

These definitions will generally comply with the public understanding of police forces even if in everyday life people are confronted only with uniformed police officers.[9] One thing that is striking in the comparison of the two definitions is that the SPA in contrast to LoP mentions community police forces. This is due to the fact that a special law on community police exists in Serbia, whereas in Austria their competences and duties are regulated in the SPA.

## 2. HISTORICAL BACKGROUND

Before the analysis of the current remedy system starts, this section outlines how both remedy systems have developed over the last centuries.

### 2.1. Serbia

Whereas the Serbian legal system has traditionally internally controlled factual acts of police officers upon citizen's complaints[10], judicial control thereof has been introduced recently. A first step was the introduction of the constitutional complaint in the Constitution of the Republic of Serbia in 2006[11] (Article 170). This is a legal remedy that can be used against any legal or factual act of state authorities, including factual acts of the police, provided that all other remedies have been exhausted or that legal remedies are not prescribed at all. Constitutional complaint is submitted to the Constitutional Court. Another form of judicial control of factual acts has been introduced by the new Administrative Disputes Act (ADA)[12] in 2009. Before, administrative acts only could be challenged in a judicial court proceeding if they were rendered in administrative matters. Whether decisions on citizens' complaints against factual acts are rendered in administrative matters, could have been debatable pursuant to Serbian administrative law.[13] However, the new ADA widened the scope

[8] The German term for these groups of officials is *Organe des oeffentlichen Sich erheitsdienstes*.

[9] In Austria, those are the forces of the *Bundespolizei* (federal police).

[10] Interview with Dragan Vasiljević, Associate Professor, Serbian Police Academy (Belgrade, Serbia, 20 November 2012).

[11] Official Gazette of the RS No. 98/2006.

[12] Official Gazette of the RS No. 11/2009.

[13] Miloš Prica, *Pojam i pravna priroda upravne stvari* (Pravni fakultet Univer ziteta u Nisu, 2005).

of judicial control, by including all acts containing a decision on the rights or duties of citizens that were rendered in a particular case.

### 2.2. Austria

There has been a long tradition for remedies against factual acts by (police) administration in the Austrian legal system. Even in the days of the Austro-Hungarian monarchy, the Reichsgericht as predecessor of the Constitutional Court of the Austrian Republic provided some protection against factual acts affecting constitutionally guaranteed rights of individuals.[14] The Constitutional Court pursued this jurisdiction after 1918 based on an excessive interpretation of its competences in accordance with the new constitution. The Administrative Court, however, did not accept complaints against factual acts until the constitutional reform in 1975. The new provisions then explicitly enabled individuals to file complaints against factual acts with the Administrative Court for illegality and at the Constitutional Court for infringement of constitutionally guaranteed rights.[15] In 1988, the independent administrative tribunals[16] were established.[17] This reform affected again the remedy system; complaints against factual acts may now be filed with these tribunals. Their decisions are subject to judicial review by the Administrative Court and the Constitutional Court.[18]

### 2.3. Comparison

The Serbian and the Austrian remedy system have not had a lot in common in the last century. While Serbia focused on internal control within the police administration, acts by the Austrian police were subject to judicial control by the Constitutional Court as well as the Administrative Court. With the introduction of the independent administrative tribunals in Austria, the situation has changed. They provide now a preliminary administrative control in Austria. However, their decisions can still be appealed before the independent courts. The other way round, Serbia has lately adopted new possibilities for judicial control of acts by the police before the Administrative and the Constitutional Court.

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[14] Bernd Christian Funk, *Der verfahrensfreie Verwaltungsakt* (Springer, 1975) 39.

[15] Art 131a, Art 144 para 1 Federal Constitutional Act Federal Law Gazette No. 1930/1 as amended by: Federal Law Gazette No. 1975/302.

[16] The German term is *Unabhängige Verwaltungssenate*.

[17] Arno Kahl and Karl Weber, *Allgemeines Verwaltungsrecht* (3rd edn, facultas. wuv 2011) para 357.

[18] See 3.2 for a more details.

## 3. THE PRESENT REMEDY SYSTEM

The historical overview should facilitate the understanding of the present remedy system. In the following section, Serbia's and Austria's remedy system will be described from the first instance proceeding before administrative authorities to a final judicial review by independent national – not international – courts. Given that Serbia and Austria have both ratified the European Convention on Human Rights[19] and are therefore bound to the same rules, remedies before the European Court of Human Rights are not taken into account in this comparative study.

### 3.1. Serbia

#### *3.1.1. General facts*

Individuals can trigger external control of police work by the means of Article 180 LoP. According to Article 180 para 1 LoP, individuals shall have the right to file a complaint against a police officer if the individual believe that the police officer has violated their rights or freedoms by unlawful or improper action. This offers affected individuals a remedy against any form of factual acts by the police as far as their rights are violated.[20]

Pursuant to Article 12 para 5 LoP, the Government has also adopted a Code of Police Ethics[21] comprising, for example, provisions on the organization and functioning of the police force, on police officers' rights and duties and on the exercise of power. This Code, as an educational material, is included in the program of professional training and improvement of police officers[22], but does not constitute any subjective rights for individuals. Hence, Article 180 LoP does not offer a complaint against infringements of the Code. Given that no other special complaint procedure is provided by law, individuals cannot appeal infringements of the Code in a formal proceeding.

Complaints may be filed with the police or with the Ministry of Interior. The Minister of Interior has therefore established a Bureau for Complaints and Grievances within the Ministry.[23] This Bureau plays a

[19] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended by Protocols Nos. 11 and 14) (ECHR).

[20] Dragan Vasiljević, 'Normativni okviri kontrole rada policije' (2008) 10 Pravni zivot 789, 803.

[21] Kodeks Policijske Etike, Official Gazette of the RS No. 92/2006.

[22] Art 48 Code of Police Ethics.

[23] Dragan Cvetković, 'Makroorganizacija Ministarstva unutrasnjih poslova Re publike Srbije' (2010) 1 NBP Zurnal za kriminalistiku i pravo 177, 190; Republic of

fundamental role in the resolving of complaints; its tasks are described at the relevant stage of procedure.

The remedy system is divided into a two-tier procedure. Every complaint is first considered by the head of the unit in which the implicated officer is employed. If complainants are not satisfied by the result of the proceeding before the head of the unit, they may in a next step address a commission.

The Minister of Interior has, in accordance with Article 180 para 7 LoP, determined further details of the procedure in a Rulebook on complaint procedure.[24]

### *3.1.2. Proceeding before the head of the unit*

According to Article 180 para 2 LoP, complainants may file their complaint against a police officer with the competent police authority or with the Ministry within thirty days as of the alleged violation. Complaints filed with the Ministry are received by the Bureau for Complaints and Grievances. The Bureau keeps records and provides the Cabinet of the Minister with reports pertaining to submitted complaints.[25]

Every complaint against a police officer must first be considered by the head of the unit in which the implicated officer is employed.[26] The head of the unit may additionally authorize another member of the unit to act in his place. In this stage of proceeding, the head of the unit has to collect all necessary information trying to clarify the facts of the case. This includes the consultation of the accused officer.[27]

If the head of the unit agrees with the complainants after the verification of the complaint, the procedure may be considered concluded.[28] The head of unit records the complaint procedure and arranges a meeting with the complainants to inform them about the result. If the complainants agree with the findings of the head of the unit, the procedure is concluded (Article 180 para 3 LoP).

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Serbia, Ministry of Interior, 'Bureau for Complaints and Grievances' *http://www.mup.gov.rs/cms eng/home.nsf/MOI BCAG.h* accessed 15 April 2013.

[24] Pravilnik o postupku rešavanja pritužbi, Official Gazette of the RS No. 54/2006.

[25] Republic of Serbia, Ministry of Interior, 'Bureau for Complaints and Griev ances' *http://www.mup.gov.rs/cms eng/home.nsf/MOI BCAG.h* accessed 15 April 2013.

[26] Dragan Vasiljević, *Zakonitost uprave i diskreciona ocena* (Kriminalističko Policijska akademija 2012) 139.

[27] Art 9 Rulebook on complaint procedure.

[28] Dragan Vasiljević, 'Normativni okviri kontrole rada policije' (2008) 10 Pravni zivot 789, 803.

The head of the unit has to hand over all documents to a commission which then conducts further proceedings in the following cases[29]:

- If the complainants fail to respond to the request for a meeting.
- If the complainants respond but disagree with the findings of the head of the unit.
- If the procedure before the head of the unit cannot be concluded within 15 days after the complaint has been filed.
- If there are indications that a criminal act subject to public prosecution is being committed.

### *3.1.3. Proceeding before the commission*

If the complaint cannot be resolved within the first instance proceeding, it is passed to a three-member commission. There are no permanent commissions for this purpose. An ad hoc commission meets if complaints are submitted to it.[30] The commission is composed of an Internal Affairs officer, a representative of the police and a representative of the public. The representative of the public is appointed to a four year term with the possibility of a renewed mandate by the Minister.[31] The Minister appoints the representative of the public upon suggestion from the local government, or expert groups and non-governmental organizations (Article 180 para 5 LoP). The members of the commission are independent in their decision. Their membership in the commission, however, does not affect their normal work within the police force where they are still bound to directions.[32]

In the proceeding before the commission, complainants can be invited to explain the reasons why they have filed their complaint. The commission has to establish and scrutinize all facts; if necessary authorized experts may also be consulted for this purpose.[33] The Bureau for Complaints and Grievances provides professional and administrative support to the commissions based within the Ministry Headquarter and provides professional assistance to the authorized personnel and commis-

[29] Art 180 paras 3 and 4 LoP.

[30] Dragan Vasiljević, *Zakonitost uprave i diskreciona ocena* (Kriminalističko Policijska akademija 2012) 139.

[31] According to Art 18 Rulebook on complaint procedure, for this time period their names are included in a list of representatives for a certain area to be able to quickly form a commission if necessary.

[32] Dragan Vasiljević, *Zakonitost uprave i diskreciona ocena* (Kriminalističko Policijska akademija 2012) 140.

[33] Art 21, 22 Rulebook on complaint procedure.

sions within other organizational units.[34] The commission decides with a majority vote; this means at least two members have to agree. The representative of the public may add a dissenting opinion if the representative has been outvoted by the two other members.[35]

The complaint procedure ends by providing the complainants a written response within thirty days of the final proceedings by the head of the unit. The response to the complainants concludes only the proceeding before the commission; the complainants still have the right to pursue other legal redress, for example, claim for damages before the civil courts (Article 180 para 6 LoP). The commission's decision is subject to judicial review by the Administrative Court and the Constitutional Court.

*3.1.4. Remedies against the decision of the commission*

The decision of the commission is non-appealable. All non-appealable administrative acts can be challenged before the Administrative Court, except where other forms of judicial protection are provided (for example before a regular court in the civil proceeding).[36]

In the judicial review proceeding, an administrative act can be challenged only on the basis of illegality.[37] The court either rejects the suit as unfounded or finds that it is well grounded and annuls the challenged act (Article 42 ADA). If the Administrative Court annuls the challenged act, it shall return the case to the issuing authority, which is now obliged to conduct a new proceeding and issue a new act in accordance with the legal opinion of the Administrative Court and its remarks with respect to the previously conducted proceeding (Article 69 ADA). In addition, Article 9 ADA would also offer an extraordinary legal remedy that can be used for challenging judgments of the Administrative Court before the Supreme Court of Cassation, the highest court in the country.[38] However, the so-called request for reconsideration of judicial decision (Article 49 ADA) does not apply in this special case; hence, the decision of the Administrative Court is final.

Since the new constitution has been adopted in 2006, individuals may in accordance with Article 170 Serbian Constitution also challenge

[34] Republic of Serbia, Ministry of Interior, 'Bureau for Complaints and Griev ances' *http://www.mup.gov.rs/cms eng/home.nsf/MOI BCAG.h* accessed 15 April 2013.

[35] Art 23 Rulebook on complaint procedure.

[36] This is provided by Art 3 ADA; Zoran Tomić, *Opste upravno pravo* (7th edn, Pravni fakultet Univerziteta u Beogradu 2012) 373 74.

[37] Dragan Vasiljević, *Upravno pravo* (Kriminalističko Policijska akademija 2011) 238.

[38] Vuk Cucić, 'Administrative Appeal in Serbian Law' (2011) 32 Transylvanian Review of Administrative Sciences 50, 54.

the decision of the commission before the Constitutional Court.[39] This only applies if the complainants' human or minority rights and freedoms guaranteed by the Constitution are violated and if all other legal remedies have been exhausted.[40] However, according to the Bureau for Complaints and Grievances[41] nobody has ever challenged the decision of the commission before a court. The above-mentioned system of judicial review of factual acts by the police remains therefore for now theoretical.

### 3.2. Austria

The SPA includes several provisions on remedies against factual acts by the police. § 88 para 1 SPA regulates in accordance with Article 129a para 1 No. 2 Federal Constitutional Act[42] and § 67a No. 2 General Administrative Procedure Act 1991 (GAPA)[43] the complaints of individuals against the infringement of their rights through acts of immediate administrative instruction and compulsion[44] by police officers. § 88 para 2 SPA additionally provides that a person may file complaints against any other act[45] by police officers that is not covered by § 88 para 1 SPA. If a police officer has disregarded the guidelines for interaction with individuals, the thereby affected person can also file a complaint (§ 89 SPA).

#### *3.2.1. Immediate administrative instruction and compulsion*

Persons who allege infringement of their rights through acts of immediate administrative instruction and compulsion by police officers file their complaints with the independent administrative tribunals in the *Länder*[46]. One of these special administrative tribunals is established in every *Land*. Its members are independent and not bound by directions in their decision. They must be jurists and are appointed for at least six years by the *Land* Government. For their period of office, they are perma-

[39] Dragan Vasiljević, *Upravno pravo* (Kriminalističko Policijska akademija 2011) 238.

[40] Dragan Vasiljević, *Upravno pravo* (Kriminalističko Policijska akademija 2011) 239.

[41] Telephone Interview, 22 November 2012.

[42] Federal Law Gazette No. 1930/1 as amended by: Federal Law Gazette I No. 2012/65.

[43] Federal Law Gazette No. 1991/51 as amended by: Federal Law Gazette I No. 2011/100.

[44] The German term is *Akte unmittelbarer verwaltungsbehördlicher Befehls und Zwangsgewalt*.

[45] Considering the specific remedies against administrative decisions and regula tions, these acts are excluded.

[46] Austria is a federal state comprising nine provinces with legislative power called *Länder*.

nently employed and may not practice any activity liable to evoke doubts as to the independent conduct of their office. The decisions of these tribunals are generally delivered by one or more members. In the case of complaints against acts of immediate administrative instruction and compulsion – the tribunals are also competent in other administrative matters like administrative penal proceedings – the tribunals decide by a single member (§ 67a GAPA, § 88 para 4 SPA).

An act by police officers is an act of immediate administrative instruction and compulsion if they act for an administrative authority, not for the courts or a legislative body. Another requirement is that the police act in the framework of state authority, not on the basis of private law. The police have to exercise their power immediately; enforcement measures of preliminary acts (for example administrative decisions) are therefore not comprised. The exercise of immediate administrative instruction and compulsion must be clear. A clear and valuable instruction requires that the addressees are threatened by a physical sanction if they fail to follow it.[47]

Complaints shall be filed with the independent administrative tribunal within a period of six weeks. This is to be counted from the date when the complainants obtained information of the infringement of their rights. If they were prevented by the ongoing police measure to make use of their right to complain, it is to be counted from the termination of this measure (§ 67a GAPA). No specific time period is set for the decision of the tribunals. However, if the tribunals fail to resolve a complaint within six months, the affected individuals may file a complaint for inaction with the Administrative Court.[48]

The independent administrative tribunal determines whether the act of the police has constituted an infringement of the rights of the complainants or not. The complainants and the administrative authority responsible for the act of a police officer are party in the proceeding.[49] The civil courts are competent for claims for damages; these claims are not admissible in the procedure before the tribunals. The independent administrative tribunal's decision is subject to judicial review by the Administrative Court and the Constitutional Court.

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[47] This has been explicitly determined by the Constitutional Court (VfSlg 10.848/1986) as well as by the Administrative Court (VwSlg 15.443 A/2000) in many of their decisions.

[48] Theo Öhlinger and Harald Eberhard, *Verfassungsrecht* (9th edn, facultas.wuv 2012) para 654.

[49] Andreas Hauer and Rudolf Keplinger, *Sicherheitspolizeigesetz* (4th edn, Linde 2011) § 88 para 22.

### *3.2.2. Acts in accordance with § 88 para 2 SPA*

§ 88 para 2 SPA offers a subsidiary remedy of individuals against acts by the police that do not constitute acts of immediate administrative instruction and compulsion, administrative decisions or regulations. The provision amplifies the protection of individuals in the field of police administration. Complaints against acts by police officers operating in other areas of administrative law like traffic law, however, are not admissible.[50]

§ 88 para 2 SPA aims at unlawful police conduct that does not affect an individual's freedom sufficiently to be considered acts of immediate administrative instruction and compulsion. For example, if a police officer checks the identity of a person in an imperative way without reaching the level of an immediate instruction, the affected person can file a complaint in accordance with § 88 para 2 SPA. Even if the police refrain from protecting an assembly (Article 11 ECHR) from a violent interruption, § 88 para 2 SPA is applicable.[51]

According to § 88 para 4 SPA, complaints in accordance with § 88 para 2 SPA follow the same procedure as those in accordance with § 88 para 1 SPA. For a detailed analysis of the procedure refer therefore to subsection 3.2.1.

### *3.2.3. Guidelines for interaction with individuals (§ 89 SPA)*

§ 89 SPA establishes a remedy for individuals against acts by police officers that do not infringe their rights but are not in accordance with specific guidelines for interaction. The Minister of Interior has set these guidelines[52] to ensure certain standards in every-day police work. These guidelines are instituted in the form of a regulation[53]; they contain a Code of Conduct for police officers and shall guarantee that the officers respect human dignity and their notification and information obligations, if they are interacting with individuals. For example, police officers are obliged to address individuals in a polite way avoiding any behavior that might imply any form of discrimination (§ 5 Guidelines for interaction).

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[50] Andreas Hauer and Rudolf Keplinger, *Sicherheitspolizeigesetz* (4th edn, Linde 2011) § 88 para 17.2. criticize this limitation as unconstitutional.

[51] For further examples Dieter Kolonovits, 'Sicherheitspolizeirecht' in Stefan Hammer and others (eds), *Besonderes Verwaltungsrecht* (facultas.wuv 2012) 74 f.

[52] They were set in agreement with the Minister of Justice and the Minister of Economy and Traffic and apply therefore also in their area of jurisdiction (Andreas Hauer and Rudolf Keplinger, *Sicherheitspolizeigesetz* (4th edn, Linde 2011) § 89 para 5.).

[53] *Richtlinien Verordnung* Federal Law Gazette No. 1993/266 as amended by: Federal Law Gazette II No. 2012/155.

The remedy system in accordance with § 89 SPA consists of a two-tier procedure.[54] Individuals who consider that a police officer has not followed the guidelines for interaction, and who have been affected by this infringement, may file a complaint with the competent authority for Internal Affairs within six weeks.[55] Complaints can also be filed with the competent independent administrative tribunal and will be transferred to the authority for Internal Affairs (§ 89 para 1 SPA). The authority for Internal Affairs has to determine whether the police officer in charge has infringed the guidelines. If the authority agrees with the complaint, the complainants have to be informed about this result and the proceeding is closed.[56] In addition, a meeting of the complainants and the police officer in charge can be organized (§ 89 para 3 SPA).

If the authority does not agree with the complaint, the complainants can address the independent administrative tribunal within fourteen days (§ 89 para 4 SPA). This procedure – without time limit – also applies if the authority does not react within three months. The independent administrative tribunal has then to decide whether an infringement has been committed or not.[57] Its decision is subject to judicial review by the Administrative Court and the Constitutional Court.

### *3.2.4. Remedies against the decisions of the independent administrative tribunals*

Complaints against decisions of the independent administrative tribunals are examined by the Administrative Court (Article 131 para 1 No. 1 Federal Constitutional Act) and the Constitutional Court (Article 144 para 1 Federal Constitutional Act).

The judicial review of administrative decisions that do not infringe constitutionally guaranteed rights is – apart a special court for asylum cases – centralized at the Administrative Court.[58] Complaints against illegal administrative decisions may be brought before the Administrative Court by any party to an administrative proceeding (for example before the independent administrative tribunals) that claims a violation of its rights within six weeks after the service of the decision. The Administra-

[54] Ewald Wiederin, *Einführung in das Sicherheitspolizeirecht* (Springer 1998) para 746.

[55] Dieter Kolonovits, 'Sicherheitspolizeirecht' in Stefan Hammer and others (eds), *Besonderes Verwaltungsrecht* (facultas.wuv 2012) 75.

[56] Andreas Hauer and Rudolf Keplinger, *Sicherheitspolizeigesetz* (4th edn, Linde 2011) § 89 para 13.

[57] Dieter Kolonovits, 'Sicherheitspolizeirecht' in Stefan Hammer and others (eds), *Besonderes Verwaltungsrecht* (facultas.wuv 2012) 76.

[58] Theo Öhlinger and Harald Eberhard, *Verfassungsrecht* (9th edn, facultas.wuv 2012) para 646.

tive Court provides a one-tier cassational judicial review[59]; in case of illegality, the court annuls the decision of the independent administrative tribunal and remands the case to this authority, which is obligated to implement the opinion of the court.[60]

The Constitutional Court pronounces on decisions by administrative authorities including the independent administrative tribunals in so far as the appellants demonstrate that the decision either violated their constitutionally guaranteed rights or was based on an unconstitutional statute or treaty, or on an illegal regulation or treaty, and violated their rights.[61] Complaints against administrative decisions must be filed within a period of six weeks after the service of the decision.[62] The Constitutional Court may annul the decision or dismiss the complaint.[63]

### *3.2.5. Reform of the remedy system: adoption of administrative courts*

The previous sections describe the current Austrian remedy system against acts by the police. Given the huge reform[64] of the Austrian administrative court system soon entering into force, the future legislation will be briefly presented.

In 2014, the independent administrative tribunals will be replaced as well as more than hundred other special administrative authorities by eleven administrative courts. One court will be established for every *Land*, and a federal administrative court as well as a federal financial court for the federal government. The administrative appeal will be replaced by a judicial review of a first level administrative court.[65]

The administrative courts will decide on the illegality of administrative decisions, in cases of inaction of an administrative authority, and on complaints against acts of immediate administrative instruction and compulsion (Article 130 para 1 No. 2 Federal Constitutional Act [new version]). Further competences like the decision on complaints in accord-

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[59] Arno Kahl and Karl Weber, *Allgemeines Verwaltungsrecht* (3rd edn, facultas. wuv 2011) para 519.

[60] Theo Öhlinger and Harald Eberhard, *Verfassungsrecht* (9th edn, facultas.wuv 2012) para 650.

[61] Theo Öhlinger and Harald Eberhard, *Verfassungsrecht* (9th edn, facultas.wuv 2012) para 1049ff.

[62] Robert Walter, Heinz Mayer, Gabriele Kucsko Stadlmayer, *Grundriss des öster reichischen Bundesverfassungsrechts* (10th edn, MANZ 2007) para 1211.

[63] Theo Öhlinger and Harald Eberhard, *Verfassungsrecht* (9th edn, facultas.wuv 2012) para 1058.

[64] Act on the reform of administrative court (*Verwaltungsgerichtsbarkeits Novelle 2012*) Federal Law Gazette No. I 2012/51.

[65] Theo Öhlinger and Harald Eberhard, *Verfassungsrecht* (9th edn, facultas.wuv 2012) para 662c.

ance with § 88 para 2 and § 89 SPA may be transferred to the courts by federal legislation or legislation by the *Länder*.[66]

If a legal question of fundamental importance arises in the proceeding before the administrative court, a party may appeal the court's decision before the Administrative Court (Article 133 para 4 Federal Constitutional Act [new version]). Judicial review will then consist of a two-tier procedure.

The judicial review by the Constitutional Court is also affected by the reform. The Constitutional Court will no longer decide on complaints against decisions by administrative authorities. In the future, decisions by the administrative courts will be subject of judicial review. The criteria for a complaint, however, remain unchanged.[67]

### 3.3. Comparison

In general, both the Serbian Law on Police and the Austrian Security Police Act[68] offer remedies against factual acts by the police. The two systems show some similarities, the analysis, however, has revealed a lot of differences.

Primarily, the legislative approach differs concerning the subject of complaints. Article 180 LoP is the basis for complaints against any factual acts by Serbian police officers. No difference is being made between acts of immediate administrative instruction and compulsion (§ 88 para 1 SPA) and other police conduct infringing individuals' rights (§ 88 para 2 SPA). The infringement of the Code of Police Ethics is, however, not integrated in the procedure in accordance with Article 180 LoP. Hence, the Austrian system provides a higher level of protection of individuals with the special complaint procedure for the infringement of the Austrian guidelines for interaction similar to the Serbian Code of Police Ethics.

Another striking difference is that the Serbian remedy system has a stronger link to the police force. This is shown by the fact that complaints against factual acts by the police are to be filed with the police or at least with a special organizational unit within the Ministry of Interior. Considering the risk that an authority probably affected by the complaint could let it disappear, this might not be the best and most transparent choice for the initiation of a complaint proceeding. If thereby an effective complaint is no longer guaranteed, the current system would not be in line with Ar-

[66] Theo Öhlinger and Harald Eberhard, *Verfassungsrecht* (9th edn, facultas.wuv 2012) para 662c.

[67] Theo Öhlinger and Harald Eberhard, *Verfassungsrecht* (9th edn, facultas.wuv 2012) para 1049.

[68] The complaint against acts of immediate administrative instruction and compul sion is also laid down in the Constitution.

ticle 13 ECHR.[69] In Austria, complaints are also filed with an administrative authority. The advantage of these authorities is, however, their independence. The so-called independent administrative tribunals are, as well, not responsible only for proceedings concerning police, but have other competences. This ensures that the members of the tribunals will not be concerned about the interests of the police and eliminates the before-mentioned risk.

The substantial role of the Serbian police in the remedy system is also indicated by the competences of police members within the two-tier procedure. In the first instance proceeding, the complaint against a certain police officer is considered by the head of the unit in which the implicated officer is employed. If the complainant agrees with the findings of the head of the unit, the procedure is closed without ever being passed to an independent administrative authority like in Austria. This enables the police to seek conciliation with the affected individuals on their own. Complainants are, however, not obliged to get into contact with the police if they do not want to. In this case, their complaint is passed to a commission.

In Austria, there is generally no comparable first instance proceeding governed by the police. Yet, the procedure in accordance with § 89 SPA follows similar rules. In a first instance, the authority for Internal Affairs is competent for any complaint alleging an infringement of the guidelines for interaction. It is to point out that even in this proceeding the complaint may be filed with the independent administrative tribunal that transfers it to the competent authority. The Serbian system is very simple and tends to solve many complaints without addressing an independent authority. As complainants are not forced to respond to the request for a meeting of the head of the unit without thereby discontinuing the proceeding, their rights as victims of police force are also respected. The only critical point is that the complaint may not be filed with an independent authority. Complainants should not be obliged to get in contact with the Ministry of Interior or a subordinate unit to file a complaint. Apart from that weakness, the Serbian first instance procedure seems therefore to be more efficient and less complicated than the Austrian system.

Despite some substantial differences, the second instance proceeding before a commission in Serbia may better be compared to the proceeding before the independent administrative tribunals in Austria. Their decisions are both final, do not prevent the complainants from other legal redress (for example a claim for damages before civil courts) and are

[69] *Salman v Turkey* App no 21986/93 (ECtHR, 27 June 2000), para 121; Christoph Grabenwarter and Katharina Pabel, *Europäische Menschenrechtskonvention* (5th edn, C.H. Beck Helbing Lichtenhahn MANZ 2012) § 24 para 180.

subject to judicial review. However, the independent administrative tribunals are permanent authorities with a wider range of jurisdiction (not only in police matters) whereas ad hoc commissions decide only on complaints against police officers. The composition of the authorities also differs. The commissions have three members; the tribunals decide by a single member. The collegial approach to decision-making seems to be an advantage of the Serbian system. Considering that appellate and high courts generally decide in groups of several judges (senates), this approach emphasizes the importance of the commission's decision.

Regarding the composition, not only the number of members but their status is essential. Members of the Austrian tribunals are permanently employed and completely independent from the police or the Minister of Interior. The members of the Serbian commission, however, are not comparably independent, even if they are not bound by orders in their decision. One member is an Internal Affairs officer, that is a member of the police[70], and one is even a representative of the police force. The third member, a representative of the public, may diminish but not resolve doubts that the commission is factually not completely independent from the police or the Minister of Interior. This is aggravated by the fact that the commission decides with a majority vote so that the representative of the public may be outvoted.

The advantages of the Austrian system are not affected when the tribunals are be replaced by administrative courts. Their independence will not be in question and their procedural powers even stronger than the tribunals'.

An asset of the Serbian system should be the time passed from the filing of a complaint to a final decision. Even in a two-tier proceeding, a complaint should be resolved within at least 45 days. In Austria, a time period is explicitly just set for the filing of a complaint so that the tribunals are only limited by a remedy against their inaction. Individuals may file their complaints in Austria within six weeks; in Serbia, they have only thirty days. These periods are both long enough; the slight difference should not have any impact.

Both the decisions of the commissions and the tribunals may be challenged before the Administrative Courts only on the basis of illegality. The Courts may reject the complaint as unfounded or annul the challenged decision. The judgment of the Austrian Administrative Court is always final, that of the Serbian Administrative Court only in certain defined matters like in the case of the commissions' decision. No other national judicial review of the Courts' judgment is then admissible.

[70] Dragan Cvetković, 'Makroorganizacija Ministarstva unutrasnjih poslova Re publike Srbije' (2010) 1 NBP Zurnal za kriminalistiku i pravo 177, 189 90.

Under the new Austrian regime, the Administrative Court will only decide in exceptional cases, in other words if appeals against decisions of the first level administrative courts are admissible. Given the serious restrictions for appeals, the judicial review of factual acts of police officers will in practice not really consist of a two-tier procedure.

The final decisions of the administrative authorities may also be reviewed by the Serbian and the Austrian Constitutional Courts. The admission criteria are similar in both countries. The jurisdiction of the Constitutional Courts is strictly limited. They can only annul a decision if it violates the complainants' constitutionally guaranteed rights or freedoms.

## 4. CONCLUSION

This analysis has shown that both the Serbian and the Austrian legislators have been in the past and are still aware of the importance of remedies against factual acts by the police. In both countries, an elaborated remedy system is in force; only a few gaps in the protection of individuals could therefore have been identified.

One of these gaps is the lack of a complaint procedure for infringements of the Serbian Code of Police Ethics. The Austrian system might in this specific case serve as a role model for a new Serbian regulation. It is, however, to admit that a certain remedy ensures a very high level of protection and constitutes an advanced step to a very effective complaint system. The fact that this remedy is now missing in Serbia is therefore less of concern than the choice of the authority where complaints are to be filed with. The independence of that authority is crucial within the complaint procedure. If complaints are to be filed with the police, a transparent procedure is not guaranteed. Even the establishment of a special administrative unit based unit in the Ministry of Interior may not help to achieve the demanded standard. In the author's opinion, to acquire full transparency, the present remedy system must be at least adjusted in this point.

It should also not be neglected that the composition of the commissions in Serbia does not really ensure an independent decision. Individuals could get the impression that the commissions are under the influence of the Minister of Interior which would lower the legitimacy of their decision. With the integration of a civilian member, a first step has already been taken. Still, more steps should be taken to guarantee that justice also seems to be done.

However, the Serbian system could also be a role model for Austria. Regarding the duration of the complaint procedure, the Serbian pro-

cedure is much faster than the Austrian. In addition, the first instance proceeding directly before the police keeps the complaint procedure simple and short. A certain proceeding might also be adopted in Austria, if an independent authority is adopted, where individuals can file their complaints.

Comparative law is said to facilitate the improvement of national laws.[71] The present analysis has shown advantages and weaknesses of both systems; it allows now the legislator to reconsider and to possibly adjust the Serbian Law on Police as well as the Austrian Security Police Act to ensure the highest level of protection for individuals' rights and freedoms in a democratic society.

[71] Bernd Wieser, *Vergleichendes Verfassungsrecht* (Springer 2005) 33.

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# EVOLUTION THROUGH RESCUE A LEGAL PERSPECTIVE ON MECHANISMS APPLIED IN RESCUING THE EUROPEAN MONETARY UNION

*The mechanisms applied in rescuing the European Monetary Union since the outbreak of the sovereign debt crisis vary significantly in terms of size of funds, dy namics of application, time horizon for expected effects, etc. A legal perspective on these mechanisms reveals a wide variety of instruments and approaches. The paper suggests the approach which assesses whether the balancing between levels of soli darity and conditionality of assistance on commitment to integration inherent to each of these mechanisms was more important for their development, or the key factor for the design and application of those mechanisms remained the focus on common in terests of EMU as a whole.*

Key words: *Sovereign debt crisis. European Monetary Union. EFSF. ESM. LTRO. OMT. Solidarity.*

## 1. INTRODUCTION: TIMELINE OF KEY FACTS AND FIGURES

The world economic crisis, that started in the summer of 2007 and had its most dramatic outbreak in the Fall of 2008, evolved into a sover-eign debt crisis of the Euro area in December 2009. The latter signified the most serious crisis with which the architecture of the post-WWII Eu-ropean integration has been so far forced to cope. The crisis shattered the trust of the global financial markets in the Euro, and has also shaken the credibility of the EU as a political community, together with its aspiration to be perceived as a unity of economic interests.

At the time of the sovereign debt crisis outbreak, architecture of the European Union, as well as of the European Monetary Union (EMU) within it, was idiosyncratic and widely criticized for its structural imbalance: it was a monetary union without a fiscal unity. The only instrument for coordination of fiscal policies was the Stability and Growth Pact, which had a contractual, and thus political, and not institutional nature. The 2005 reform of the Pact did not overcome this core deficiency.[1] In the course of 2008 and 2009 the ceiling for budget deficit of 3% GDP was surpassed by as many as 20 countries.[2] The key practical aim of the EMU, according to Treaty on Functioning of the European Union (TFEU) Article 127, was maintenance of price stability, while the aim of maintaining high employment did exist, albeit as one of secondary importance. In addition, TFEU imposed strict requirements for ECB independence.[3] Among the novelties agreed upon in the Lisbon Treaty a prominent place belonged to formation of the Eurogroup, witihin the Ecofin Council.[4]

## 2. AN OVERVIEW OF MECHANISMS APPLIED SO FAR

### 2.1. Initial move by ECB: the Securities Markets Programme (SMP)

The SMP was put in place together with the European Financial Stability Initiative of May 2010 and the ensuing EFSF of June 2010. It consisted in ECB's purchases of bonds of over-indebted countries – first Greece, then Ireland, Portugal and Spain – in secondary markets. The fact

[1] J. V. Louis, "The Review of the Stability and Growth Pact", *Common Market Law Review* 43/2006, 103 106; L. Schuknecht, Ph. Moutot, Ph.Rother, J. Stark, "The Stability and Growth Pact Crisis and Reform", *European Central Bank, Occasional Paper Series,* No. 129, September 2011, 10.

[2] A. Willis, "European Commission to back Greek deficit cutting plan", *EU Ob server*, 1.2.2010, *http://euobserver.com/9/29381/?rk 1*, last visited 27 November 2013.

[3] On ECB independence see more: B. S, Lorenzo, "Central Bank Independence in the EU: From Theory to Practice", *European Law Journal,* vol. 14, 4/2008, 446 460.; R. Smits, "The European Central Bank's Independence and its Relations with Economic Policy Makers", *Fordham International Law Journal* 2008, 1614.; O. Issing, "Central Bank Independence Economic and Political Dimensions", *National Institute Economic Review* 196/2006, 66 76.; R. M. Lastra,"The independence of the European System of Central Banks", *Harvard International Law Journal* 33/2, Spring 1992, 475 519.; Ch. Zilioli, M. Selmayr, "Recent Developments in the Law of the European Central Bank", Yearbook of European Law, (eds. P. Eeckhout, T. Tridimas), Oxford University Press, Oxford 2006; M. Lukić, "Some Reflections on Independence of the European Central Bank and the Financial Crisis", Almanac of Contributions to the International academic conference Bratislava Legal Forum 2013: "The Role of Law and Justice in Dealing with the Current Economic Crisis", Bratislava, forthcoming.

[4] Protocol on the Euro Group, Official Journal of the European Union, C 306/153, 17.12.2007; J. L. Sauron, *Comprendre le Traité de Lisbonne*, Gualino, EJA, Paris 2008, 30.

that the purchases were done in the secondary markets and not from government directly meant that SMP circumvented the prohibition monetary financing of Member State budget deficits, stipulated in Article 21 of ECB Statute. The legal basis for the SMP was expressly provided in Art. 18.1 of the ECB Statute, which empowered the ECB and national central banks "In order to achieve the objectives of the ESCB... to operate in the financial markets by buying and selling securities outright."

With the SMP, ECB in fact became the first responder to the sovereign debt crisis – operationalization of guarantees and funds under the EFSF required authorization of Member States, and thus took months. For this reason the SMP was in fact the first instrument applied in the Eurozone rescue.

In the first 7 days of SMP, ECB spent EUR 16,5 bn on such purchases, corresponding to roughly 2% of the outstanding debt of the four countries at the time. The next big wave of purchases ensued again as response to the next serious outbreak of the crisis, in August 2011, when the volume reached EUR 22 bn, consisting in purchases of Spanish and Italian bonds. These purchases were considered as a temporary and urgent measure, necessary to stabilize market yields of the bonds issued by these countries.[5] By September 2012, ECB and Eurozone central banks bought Greek bonds with nominal value of EUR 56,6 bn (22% of the total outstanding).[6] ECB did not take a "haircut" of nominal value of its holdings of Greek as the private creditors did.[7] ECB purchased bonds mainly from private sector banks, and needed to ensure that the liquidity it provided in consideration for these bonds would not flow instantly into the financial system and cause inflation. That is why ECB in parallel invested its best efforts to "sterilize" these funds by offering remuneration (interest) for fixed term deposits to banks. Naturally, such deposits do not prevent the funds from flowing into the system but merely postpone such flows until the expiry of the term for which the funds are deposited with the central bank, so that the sterilization of these funds may also be regarded only as having temporary effect. The SMP was terminated with the introduction of the Outright Monetary Transactions (OMT), on 6 Sept. 2012. As of the end of 2012, the nominal value of holdings of bonds pur-

[5] A positive assessment of SMP's effectiveness in respect of Irish bonds was given in D. Doran, P. Dunne, A. Monks, G. O'Reilly, "Was the Securities Markets Programme Effective in Stabilizing Irish Yields", 7/RT/13, Central Bank of Ireland, *http://www.centralbank.ie/publications/Documents/07RT13.pdf,* 25 November 2013.

[6] Ch. Trebesch, J. Zettelmeyer, "Deciphering the ECB Securities Markets Programme: The Case of Greek Bonds" (September 18, 2012), *http://dx.doi.org/10.2139/ssrn.2148301*, last visited 25 November 2013.

[7] The haircut amounted to approximately between 59 and 65%. J. Zettelmeyer, Ch. Trebesch, M. Gulati, "Greek Debt Restructuring: An Autopsy", July 2013, *http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article 5343&context faculty scholarship*, last visited 25 November 2013.

chased under the SMP amounted to EUR 218 bn, with average remaining maturity of 4,3 years.[8]

The SMP presented a marked departure of ECB's conduct thus far.[9] The ECB President and the Governing Board maintained that it was strictly a monetary policy instrument, but such statements could only have lead to an erosion of ECB credibility, because it was obvious that providing liquidity to the secondary market for government bonds supported in fact the primary market for such bonds as well.

The efficiency of the SMP is often being attributed to the fact that ECB has an unlimited buying power, at least in theory, so that even its smaller interventions in the market, coupled with the perception that it was devoted to keeping yields of indebted countries down, produced sufficient effects.[10]

### 2.2. European Financial Stability Facility (EFSF)

The first in a row of instruments agreed upon, the EFSF, was in fact preceded by the European Financial Stability Initiative, which was in essence a pool of commitments of EMU members, joined by Poland and Sweden, to extend financial support to over-indebted EMU countries, primarily Greece. A condition for extending loans was a commitment to austerity and gradual reduction of budget deficit. Most of the assistance took the form of guarantees which the credit-worthy EU members provided for debts of the over-indebted ones. In June 2010 it was agreed that the credit guarantees committed under the European Financial Stability Initiative be concentrated to the EFSF, a joint-stock company established in Luxembourg with EMU Member States as shareholders. The purpose of incorporation of EFSF was to have the credit guarantees focused on the single corporate entity, which would thus be enabled to raise funds under preferable terms and lend them to over-indebted countries. The EFSF was envisaged as a temporary facility.

Funds from the EFSF were available to Euro area Member State only if such Member State negotiated a country programme with the European Commission, ECB and IMF, which would impose strict terms for budgetary discipline, economic policy and compliance.

The contributions of each country to the guarantee scheme corresponded to the relative size of the that country's ECB capital subscrip-

8 ECB Press Release 21 February 2013, *https://www.ecb.europa.eu/press/pr/date/2013/html/pr130221_1.en.html,* last visited 25 November 2013.

9 On how pronounced the change in ECB actions appeared with the introduction of SMP see more in: "The Euro crisis: Storm, meet structure", Editorial, *European Constitutional Law Review* 7/2011, 349–354.

10 EFSF (R)evolution, Credit Suisse, Fixed Income Research, 16 August 2011, 8, *http://www.credit-suisse.com/researchandanalytics,* last visited 25 November 2013.

tion. Greece, Ireland and Portugal stepped out from the contribution scheme.

The initial announcement stated that EFSF would be able to secure EUR 440 bn to over-indebted countries. Since however its AAA rating (Fitch Ratings) demanded that guarantees amount to 120% of loans that EFSF takes, as well as that a cash reserve of member states contributions is retained, the original facility was able to generate only EUR 250 bn in assistance.[11]

In July 2011 the maximum guarantee commitments were expanded to EUR 780 bn, in order to secure the actual financing capacity of EUR 440bn (the guarantee was increased from 120% to 165% of the intended financing capacity). In addition, the flexibility of the fund was increased by allowing it to provide loans to countries that have not entered a strict macro-economic adjustment programme for the purpose of recapitalization of their financing institutions, as well as to intervene in secondary markets in exceptional circumstances. The ability of EFSF to intervene in the secondary bond market was introduced in view of the perceived reluctance of the ECB to apply SMP except under exceptional circumstances. Decisions on the maximum amount of a loan, its margin and maturity, etc. are taken unanimously by the Eurozone finance ministers.[12]

In parallel with the preparations for expanding the lending power of the EFSF, Eurozone heads of state reached the "Euro Plus Pact", an agreement on future close coordination of national economic policies.[13] In the Fall of 2011, following the agreement on material expansion of the EFSF, the second reform of the Stability and Growth Pact was agreed as well. The reform entered into force in December 2011 by virtue of the s.c. "Six Pack" – a set of two Council regulations, three regulations of the Parliament and of the Council, and one Council Directive.[14] Budget mon-

[11] EFSF (R)evolution, Credit Suisse, Fixed Income Research, 16 August 2011, *http://www.credit suisse.com/researchandanalytics*, last visited 25 November 2013.

[12] European Financial Stability Facility, *http://www.efsf.europa.eu/attachments/faq en.pdf,* last visited 25 November 2013.

[13] German Federal Ministry of Finance, *Euro Plus Pact*, *http://www.bundesfinanzministerium.de/Content/EN/Standardartikel/Topics/Europe/Articles/Stabilising the euro/euro plus pact.html,* last visited 25 November 2013.

[14] Regulation (EU) No. 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No. 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, OJ L 306, 23. 11. 2011, 12 24; Council Regulation (EU) No. 1177/2011 of 8 November 2011 amending Regulation (EC) No. 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, OJ L 306, 23. 11. 2011, 33 40; Regulation (EU) No. 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area, OJ L 306, 23. 11. 2011, 1 7; Regulation (EU) No. 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area, OJ L 306, 23. 11. 2011, 8 11; Regulation

itoring was strengthened, the procedure in which Member State legislatures are expected to tackle budge imbalances was accelerated, and more accurate and independent reporting secured. Most importantly, a semi-automatic procedure for adopting Commission proposals for monitoring, warning and penalizing Member States who breach the Pact has been put in place: the Council is deemed to have adopted such a Commission proposal unless a majority of Member States, not including the Member State to which the proposal pertains, votes against the proposal.[15] The ECB maintained that the reform was going in right direction, but not far enough, and that transfer of sovereignty over fiscal matters to a single authority was necessary.[16]

The second expansion of EFSF powers happened in November 2011, when it was agreed that funds it obtains may be leveraged by allowing it to extent partial guarantee (20%) for new bond issues, as well as to create Co-Investment Funds (CIFs) with private investors.[17]

Since June 2013 EFSF is not allowed to enter into new financing programmes, it is simply continuing to manage and repay any outstanding debt, and shall be wound down once the outstanding debt is repaid.

### 2.3. European Financial Stabilization Mechanism (EFSM)

In contrast to EFSF which was a joint-stock company, EFSM was simply a dedicated borrowing and lending programme of the European Commission, having the legal basis in the power of the European Commission to borrow up to EUR 60 bn on behalf of the EU under an implicit EU budget guarantee. The EFSM was applied for providing assistance to Ireland and Portugal, during the period 2011–2013. A total of appr. EUR 50 bn has been disbursed under this programme. As in the case of EFSF, the disbursement of funds to a country was strictly conditioned upon adherence to a macroenomic adjustment programme by that country.[18]

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(EU) No. 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances, OJ L 306, 23. 11. 2011, 25 32; Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States, *Official Journal of the European Union* L 306/41 47.

[15] "FAQ on the economic governance 'six pack'", *European Parliament News,* 21.9.2011, *http://www.europarl.europa.eu/news/en/pressroom/content/20110920BKG27073/html/FAQ on the economic governance six pack,* last visited 25 November 2013.

[16] L. Schuknecht, Ph. Moutot, Ph. Rother, J. Stark, "The Stability and Growth Pact Crisis and Reform", *European Central Bank, Occasional Paper Series,* No. 129, September 2011, 15., 17.

[17] European Financial Stability Facility, "Maximizing EFSF's capacity approved", 29 November 2011, *http://www.efsf.europa.eu/mediacentre/news/2011/2011 015 maximising efsfs capacity approved.htm,* last visited 25 November 2013.

[18] European Commission, "European Financial Stabilisation Mechanism," *http://ec.europa.eu/economy finance/eu borrower/efsm/index en.htm,* last visited 25 November

## 2.4. European Stability Mechanism (ESM)

As a permanent instrument for maintaining trust in the Eurozone, ESM was agreed upon at the summit of Eurozone leaders in October 2010. By legal nature, the ESM is an international financial organization, founded in a separate treaty – the European Stability Mechanism Treaty (the ESM Treaty), which was initially agreed upon in June 2011 and signed the following month. The ESM was amended in line with agreements reached in July and December 2011.[19] The EMS Treaty entered into force in September 2012, whereas EMS itself started its operations on 8 October 2012.

The EMS Treaty was amended in February 2012, when a strict conditionality of EMS assistance upon accession to the Fiscal Compact was introduced. EMS rules expressly require that EMS loans are senior to any other obligation of the debtor, thus making EMS much less flexible and debtor-friendly than ESFS.

Although EMS Treaty has separate existence and validity from the founding treaties, its signatories pushed through an amendment of the TFEU Article 136, enabling Eurozone members to set up a financial stability mechanism. [20]

When the ESM was founded, the 17 euro area Member States agreed to provide the ESM's paid-in capital in five tranches. So far, the Member States have paid four tranches into the fund, securing a total amount of paid-in capital of EUR 65 bn. Currently the ESM finances an indirect bank recapitalisation programme in Spain and a macroeconomic adjustment programme in Cyprus which amount to approximately €50 billion.[21]

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2013; Council Regulation (EU) No. 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism, Official Journal of the European Union, 12.5.2010, L 118/1.

[19] Treaty Establishing the European Stability Mechanism Between the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hel lenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Grand Duchy of Luxembourg, Malta, the Kingdom of The Neth erlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic and the Republic of Finland, *http://www.european council.europa.eu/ media/582311/05 tesm2.en12.pdf*, last visited 30 October 2013.

[20] "The Member States whose currency is the euro may establish a stability mech anism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality". European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (2011/199/EU), Official Journal of the European Union 6. 4. 2011, L 91/1 4.

[21] "Euro area Member States transfer fourth tranche of ESM paid in capital", ESM website: Latest news, Press Releases, *http://www.esm.europa.eu/press/releases/euro area*

"The build-up of the ESM's paid-in capital proceeds as foreseen, said Klaus Regling, Managing Director of the ESM, in October 2013 – "By April next year the ESM will have a paid-in capital of around €80 billion, more than any other international financial institution worldwide."[22]

## 3. ROLE OF ECB: LONG-TERM REFINANCING OPERATION (LTRO) AND OUTRIGHT MONETARY TRANSACTOINS (OMT)

Although the ECB played an important role in the initial rescue of Greece with the SMP, it was only with LTRO that it took central stage as the backbone of stability of Euro area. As the interaction of the debt crisis and the banking crisis threatened to deepen dangerously, the European Central bank (ECB) launched its Long Term Refinancing Operation (LTRO). It provided commercial banks with some €1 trillion of three-year loans at 1% interest between December 2011 and February 2012; despite this, bank lending to households and firms actually declined slightly in the course of 2012.

After speculation against Spanish and Italian bonds intensified in mid–2012, the ECB also announced in August 2012 its programme of Outright Monetary Transactions (OMT).[23] This promised unlimited central bank intervention to support government bonds in the secondary market – but only if countries first agree to an approved programme of policies with the EU's rescue fund, the ESM.[24] The announcement of intro-

*member states transfer fourth tranche of esm paid in capital .htm*, last visited 31 October 2013.

[22] K. Regling, "How Europe is overcoming the euro crisis", speech at a Discussion & Luncheon jointly organized by the American Council on Germany, the Council for the United States and Italy and the French American Foundation, New York, *http://www.esm.europa.eu/pdf/20131008KRNewYorkACG.pdf,* last visited 8 October 2013.

[23] "It is hard to overstate the importance the ECB bond buying programme, known as Outright Monetary Transactions, has had on the three year old crisis. Whithin the EU policy circles, it is widely accepted that OMT was the most important element in stopping the panicked flight from the eurozone's periphery last year, a turning point many believed had finally ended the crisis' acute phase. By pushing the programme through despite opposition from Germany's powerful central bank, many officials believed ECB chief Mario Draghi had finally given the eurozone the 'bazooka' it long needed: the central bank's printing presses. Investors no longer had reason to fear their holdings would default or lack for buyers." P. Spiegel, M. Steen, "Fears rise that ECB plan has a weakness", *Financial Times*, Wednesday, February 27, 2013. p. 3.

[24] See more: M. Lukić, "The Euro as Trojan Horse of European Unification Subduing Member State Sovereignty in the Name of Austerity and Solidarity", *Pravo i privreda* 4–5/2013, 555–572; M. Lukić, "Legal and institutional perspective on vulnerability of the EU exposed in connection with the sovereign debt crisis", *Pravni život* 12/2010, 551–564.

duction of OMT was preceded by a now-famous statement of Mario Draghi, ECB President, that "the ECB would do whatever it takes to preserve the Euro."

Outright monetary transaction programme (OMT) remains untested.[25] Germany remains opposed to unlimited purchase of sovereign bonds under the OMT. The programme's legal basis remains uncertain, and the result of the German constitutional court challenge still unknown.

## 4. FISCAL COMPACT AND BANKING UNION AS TOOLS FOR STRENGTHENING EMU FURTHER

The Fiscal Compact[26] introduced in early 2012 a legal limit restricting each country's structural budget deficit to 0.5% of GDP. This restriction effectively prevents Member States from pursuing an active fiscal policy in the future. The economic policy instrument that remains viable is monetary policy, and that one is centralized in the hands of the ECB.

[25] "The ECB's Outright Monetary Transactions programme was officially justified as an effort to unclog the eurozone's transmission of monetary policy. After six months, we know that it brought down government bond yields, but did absolutely nothing to improve the transition mechanisms. Companies in northern Italy continue to suffer from higher interest rates on bank loans than their Austrian neighbors. Only a fully fledged banking union could end such discrimination. But that would require common deposit insurance and effective bank resolution policies. Neither is going to happen. The other priority should be to do what the Franco German legislation purports to do, but on a grander scale: provide adequate insurance that banks do not bring down the economy and hold taxpayers at ransom. A combination of full separation of investment and commercial banking, bail in rules, and transparency requirements would be a useful, yet possibly still incomplete, series of steps. None of this is happening and yet a lot of people have be come more optimistic about the eurozone, in some cases even euphoric. Hardly a day passes by without someone declaring the end of the crisis. But its two most dangerous aspects are unresolved zombie banks and macroeconomic adjustment. OMT has actu ally contributed to making the banking crisis worse, by taking away the political pressure to create a genuine banking union. The pressure was clearly present in July last year, but had evaporated by September. The renationalization of banking means that the monetary union is as unsustainable today as it was in July last year and now the policies needed to fix this problem have been abandoned." W. Munchau, "The eurozone crisis is not fin ished far from it", *Financial Times*, Monday, February 4, 2013.

[26] Treaty on Stability, Coordination and Governance in the Economic and Mone tary Union Between the Kingdom of Belgium, the Republic of Bulgaria, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hel lenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, Hungary, Malta, the Kingdom of the Netherlands, the Republic of Aus tria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland and the Kingdom of Sweden, *http://europe an council.europa.eu/media/639235/st00tscg26 en12.pdf*, last visited 30 October 2013.

The European Banking Union emerged in June 2012 and was defined in December 2012.[27] This was the response to the fact that the sovereign debt crisis in Europe originated from a banking crisis, and was in fact a symptom of the banking crisis[28].

The immediate reason for resorting to the banking union was the need that European rescue funds directly recapitalize Spanish banks, which were on the brink of failure in June 2012. A condition for the rescue was that EMU members agree to a centralized bank supervision.

Three months ago, on 12 September 2013, the European Parliament voted to set up the SSM, giving to the ECB the full responsibility for the European banks supervision. These powers will become effective in September 2014. Implementation of the single supervisory mechanisms (SSM) for euro area banks would allow ESM to directly recapitalise banks, thus breaking the vicious circle between sovereign debt crisis and banking crisis.

In addition to the SSM – the Single Supervisory Mechanism, the other two pillars of the Banking Union shall be the single resolution mechanism, and the European deposit guarantee scheme. Some additional elements have appeared gradually within the *European System of Financial Supervision (ESFS)*. For the banking union by far the most significant element is the *European Systemic Risk Board (ESRB),* established in 2010.[29]

A banking union may not exist without a deposit insurance scheme and Germany is opposing any scheme that would create a "legacy" risk – a liability for problems inherited from the period before the banking union is established.

## 5. CONCLUSION: SOLIDARITY COUPLED WITH CONDITIONALITY OF ASSISTANCE OR FOCUS ON COMMON INTERESTS?

As the sovereign debt crisis developed, and various mechanisms for saving the Eurozone applied, the prospect of the Eurozone breakup

[27] The banking community largely supports the idea of a single bank regulator, despite fears that the central EU banking oversight will mean that deep knowledge of national regulators is lost. The banking union is perceived as a means for overcoming the "balkanization" of the banking market, i.e. its fragmentation due to protective measures of national regulators. P. Jenkins, "Long road to a single EU regulator", *Financial Times*, Wednesday, December 5, 2012, 15.

[28] The cost and repercussions of the banking crisis in Ireland, for example, were so dire that the country effectively had to bring in entire slates of bank executives for top posts both in the private sector and in its central bank. J. Smith, "The outsiders inside Irish banks", *Financial Times*, Thursday, January 31, 2013, 8.

[29] J. V. Louis, "Le comité européen du risque systémique (CERS)", Cahiers de droit européen, 46/2010, ISSN 0007 9758, 645 681.

was kept alive. It was common perception that exit of one Eurozone country would most likely trigger widespread market turmoil, which would destroy the Eurozone as a whole. It was due to that perception that public figures speaking in favor of the EU and of the EMU insisted on decoupling a single country exit from the EMU from the prospect of EMU breakup. A good example was the statement of J.-C. Juncker, president of the Eurogroup, of August 2012:"exit of Greece would be manageable, although undesirable."[30]

It is obvious that when it was urgent, the EMU countries resorted to instruments of private law and free markets – the EFSF was a joint-stock company, which used state guarantees to raise funds in the open market. The urgency of the Greek crisis in Spring 2010 did not leave room for EMU members to negotiate new instruments and mechanisms within the institutional structure of the EU and EMU.

Academic literature singles out the ECB as the EU authority with the greatest independence from EU Member States.[31] With this in mind, it is not difficult to imagine reasons why the ECB mechanisms, both SMP and LTRO thereafter, were the most significant tools applied for saving the Eurozone.

On the other hand, the instruments agreed upon by the Member States, first ESFS and then ESM, served less for appeasement of financial markets and much for introducing conditionality of financial assistance. ESFS as the first and temporary mechanism introduced the conditionality of macroeconomic adjustment of indebted states. The expansion of the ESFS also coincided with the second reform of the Stability and Growth Pact in the Fall of 2011, which, inter alia, introduced semi-automatic penalties for Member States breaching the Pact. The second and permanent economic stability instrument, ESM, however, introduced conditionality of accession to entirely new treaties: the Fiscal Compact and the Treaty on the Banking Union. Preventing crisis from deepening, as well occurrence of a new crisis, via establishment of the ESM, became thus the incentive for stronger economic policy integration, and for transfer of fiscal

[30] C. Blumann, L. Dubouis, *Droit institutionnel de l'Union européenne*, 5e édi tion, LexisNexis, Paris 2013, 58.

[31] "La Banque centrale européenne donne l'image au plan juridique d'un organ isme beaucoup plus supranational que les autres institutions de l'Union. Le President Jacques Delhor n'hesitait pas à la comperer à une véritable structure fédérale. Ceci ne paraît pas errone. Les organes de la BCE, en effet, ne dependent nullement des gouverne ments et ils disposent dans leurs champ de competence d'un pouvoir de décision dont les consequences sur la vie quotidienne des citoyents européens sont considerables. Certes, le Conseil des gouverneurs, organe principal, représente les banques centrales nationales, mais celles ci sont par principe indépendantes du pouvoir politique, national et même européen. La comparaison avec le Conseil ou le Conseil européen n'est donc pas recev able". C. Blumann, L. Dubouis, *Droit institutionnel de l'Union européenne*, 5e édition, LexisNexis, Paris 2013, 305.

powers to the EMU. Such a pragmatic view on the financial assistance to over-indebted states in the Eurozone, however, must also take into account that in crucial moments the solidarity as the principle of EU integration played an indispensable role through the operations of the ECB. While a crisis proved necessary for Member States to abandon focus on preserving fiscal powers at national levels, at each dangerous point along the way ECB provided the safety net which preserved the integrity of the political and monetary system, thus safeguarding common interests of Eurozone Member States.

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# VERS UN SYSTÈME DE NOTIFICATION TRANSFRONTIÈRE DES ACTES JUDICIAIRES PLUS RAPIDE QUELLE PERSPECTIVE POUR LE DROIT SERBE ?

*In the situation where the cross border service of documents needs to be car ried out by diplomatic means of communication between States, this procedure ap pears to be rather lengthy and slow. In this paper the author analyzes the rules on cross border service of documents by diplomatic means as contained in the Serbian Code of Civil Procedure. As the main reasons of their inadequacy from the stand point of procedural efficiency, the author sees the complexity of the procedure and the absence of any timeframe for its performance. In the light of these shortcomings, the author proposes modifications to be made to the procedure which is currently in force. These modifications include the reduction of the number of instances that a document needs to go through before being serviced, the reconfiguration of the duties of the institutions which take part in the service of documents et the introduction of time limitations for the performance of each specific step of the cross border service of documents. Nevertheless, the author concludes that these modifications still have a limited scope due to the fact that the cross border service of documents by diplo matic means is necessarily governed by two different laws and requires cooperation between the organs of different States. Therefore, the full improvement of the effi ciency of cross border service of documents can be reached either through global harmonization of rules in this sphere, or through introduction of technologically more advanced means of service of documents, such as service by electronic mail.*

Key words: *International civil procedure. Cross border service of documents. Diplomatic communication. Procedural efficiency.*

## 1. INTRODUCTION

Dans un procès civil contenant un élément d'extranéité il peut être nécessaire de notifier[1] les actes judiciaires aux destinataires qui ne résident pas dans l'État dont les tribunaux sont saisis du litige. Si la notification doit avoir lieu à l'étranger, l'organe émetteur de l'acte est obligé de recourir à une forme d'entraide judiciaire internationale. L'entraide judiciaire internationale a pour objet le soutien de la justice de l'État requérant par les autorités et tribunaux de l'État requis qui accomplissent, sur leur territoire, des actes de procédure ou d'autres actes officiels et qui en communiquent le résultat aux autorités ou tribunaux de l'État requérant, en vue de son utilisation dans une procédure déterminée.[2] Partant, l'entraide judiciaire internationale représente en quelque sorte, comme le dit de manière illustrative M. Capatina, " *le dieu Janus à deux visages* ", car elle doit concilier deux exigences à première vue contradictoires. D'un côté, l'entraide judiciaire internationale doit respecter la limitation territoriale de l'autorité de l'État de trancher les litiges et d'exercer les actions liées à cette autorité et, de l'autre côté, cette forme de coopération internationale doit assurer l'efficacité procédurale.[3]

L'entraide judiciaire internationale apparaît sous forme de notification transfrontière des actes judiciaires et extrajudiciaires et l'obtention des preuves à l'étranger.[4] La notification transfrontière, dont les règles feront l'objet du présent article, représente le moyen de porter de manière officielle à la connaissance d'un destinataire résidant à l'étranger un acte de procédure civile ou commerciale en provenance de l'État d'origine.[5] En droit judiciaire privé serbe, les actes judiciaires qui exigent d'être notifiés personnellement à leur destinataire sont: l'acte introductif d'instance, l'injonction de payer et les actes contre lesquelles il est possible d'engager un recours.[6]

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[1] Dans la terminologie juridique française on distingue la notification (qui se fait normalement par lettre recommandée avec avis de réception) et la signification (qui se fait par le biais d'huissier de justice). Sur ce point, v. Loïc Cadiet, Emmanuel Jeuland, *Droit judiciaire privé*, Litec, Paris 2011[7], 390 391. Étant donné qu'il s'agit d'une distinction spécifique pour les droits français et belge, nous retiendrons la notion générique de noti fication pour désigner la remise d'un acte judiciaire personnellement à son destinataire par exploit d'un officier du tribunal.

[2] Département fédéral suisse de justice et police, *Entraide judiciaire internationale en matière civile Lignes directrices*, 1, disponible sur le site *http://www.rhf.admin.ch*.

[3] Octavian Capatina, "L'entraide judiciaire internationale", *Recueil des cours de l'Académie de droit international de la Haye* vol. 179 (1983), 318.

[4] Au sens large du terme, la demande d'information sur le droit d'un autre État peut également constituer une forme d'entraide judiciaire internationale.

[5] O. Capatina, 347.

[6] Art. 141(1) du Code de procédure civile serbe, *Journal Officiel de la Républi que de Serbie* No. 72/2011 et 49/2013.

Les opinions à l'égard du but de la notification sont partagées. Selon certains auteurs, le but de la notification est de donner la possibilité au destinataire de connaître le contenu de l'acte qui lui est adressé.[7] D'autres considèrent que la notification se fait en fonction du respect du principe du contradictoire et permet aux acteurs du procès d'être informés du développement de l'instance.[8] Quelle que soit la conception du but de la notification, cette procédure doit, en tant qu'une forme d'entraide judiciaire internationale, satisfaire aux exigences de l'efficacité. L'efficacité comprend le respect de deux principes directeurs: la rapidité et la fiabilité.[9]

Pour les besoins de la présente étude, notre attention restera limitée au problème de la rapidité de la notification transfrontière. Ce problème sera analysé à la lumière des règles du droit judiciaire privé serbe relatives à la notification transfrontière.

## 2. DÉFINITION DU PROBLÈME: LENTEUR DE LA NOTIFICATION TRANSFRONTIÈRE SELON LES RÈGLES DU DROIT JUDICIAIRE PRIVÉ SERBE

### 2.1 Contexte général

Le système de la transmission transfrontière des actes judiciaires devrait être conçu de façon à assurer la réalisation de trois objectifs procéduraux importants. Le premier objectif est de donner la possibilité au destinataire de recevoir l'acte judiciaire de manière effective et efficace et de le comprendre, afin qu'il puisse organiser sa défense. Le deuxième objectif est la protection des intérêts de l'autre partie au procès. Cette dernière doit être informée si l'acte judiciaire a été régulièrement notifié au destinataire afin qu'elle puisse prévoir la durée du procès et choisir la stratégie procédurale qu'elle estime être la plus efficace et la plus convenable. Enfin, les règles sur la transmission doivent mettre en place les mécanismes effectifs de contrôle de la régularité de transmission, ce qui sert à sauvegarder l'intégrité et la légalité du procès.

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[7] Siniša Triva, Mihajlo Dika, *Građansko parnično procesno pravo*, Narodne novine, Zagreb 2004[7], 367; Borivoje Poznić, Vesna Rakić Vodinelić, *Građansko procesno pravo*, Savremena administracija, Belgrade 2010, 228.

[8] Lojze Ude, *Civilno procesno pravo*, Uradni list RS, Ljubljana 2002, 193.

[9] Jean Pierre Relmy, "Règlement (CE) n° 1393/2007 du 13 novembre 2007 rela tif à l signification et à la notification dans les états membres des actes judiciaires et ex trajudiciaires en matière civile et commerciale et abrogeant le Règlement (CE) n° 1348/2000 du conseil", dans: Loïc Cadiet, Emmanuel Jeuland, Soraya Amrani Mekki (sous la direction de), *Droit processuel civil de l'Union européenne*, Litec, Paris 2011, 219 220.

La réalisation de ces objectifs devient particulièrement compliquée lorsqu'un acte judiciaire doit être notifié au destinataire qui réside dans un État autre que celui du for. Puisque la notification est généralement considérée comme un acte relevant des pouvoirs publics,[10] deux sortes de restrictions s'imposent. En premier lieu, les organes de l'État émetteur de l'acte ne peuvent pas agir sur le territoire de l'État où la notification doit avoir lieu. C'est pourquoi, à défaut d'une convention internationale, la notification transfrontière des actes aux ressortissants étrangers se fait normalement par voie diplomatique. Ce moyen de notification exige l'intervention des organes de deux États: l'État émetteur de l'acte (État requérant) et l'État requis. La deuxième restriction concerne la portée territoriale des règles relatives à la notification. En effet, dans le cas de la notification par voie diplomatique, la procédure est régie par deux systèmes de règles nationaux[11]: à partir du moment où l'acte à notifier est émis jusqu'à ce qu'il est transmis à l'organe chargé des relations internationales en matière d'entraide judiciaire, la transmission se fait conformément aux règles de l'État du for. La loi du for définit, entre autre, la forme de transmission d'un acte judiciaire (notification ou autre) et régit la forme et le contenu de cet acte. À partir du moment où l'acte à notifier est transmis à l'organe compétent de l'État où la notification doit avoir lieu, la transmission est régie par les règles de ce même État. Le droit de l'État requis est ainsi applicable aux modalités et aux moyens de notification.[12]

L'intervention des organes de deux États et l'application cumulative des règles appartenant à deux systèmes judiciaires nationaux est susceptible d'engendrer beaucoup de problèmes pratiques. C'est pourquoi la transmission transfrontière a fait l'objet de nombreux efforts d'harmonisation internationale. La Serbie est signataire de la Convention relative à la signification et la notification à l'étranger des actes judiciaires et extrajudiciaires en matière civile ou commerciale conclue le 15 novembre 1965[13] au sein de la Conférence de La Haye de droit international privé,

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[10] Aleksandar Jakšić, *Međunarodno privatno pravo*, Diagonale, Belgrade 2008, 195, se référant à la littérature juridique allemande.

[11] Sur le point de la loi applicable à la transmission transfrontière des actes judi ciaires, v. O. Capatina, 349 350.

[12] V. en ce sens la décision de la Cour Départementale de Požarevac, R. 32/2002 du 9 octobre 2002, *Bilten sudske prakse Vrhovnog suda Srbije* br. 2/2004, 86, où la Cour a dit pour droit que la validité de la notification faite à l'étranger (en Autriche dans l'es pèce) doit être estimée conformément aux règles procédurales de l'État où la transmission a eu lieu. De manière générale, le Haut Tribunal du Commerce a jugé que les irrégularités procédurales concernant les actes accomplis à l'étranger doivent être établies conformé ment aux règles applicables dans l'État où l'acte en question a été fait. V. la décision du Haut Tribunal du Commerce de Belgrade, Iž. 2714/2007 du 23 décembre 2008, disponible dans la base des données paragraf.net.

[13] Au jour du 20 août 2013, la Convention comptait 68 États contractants. Les informations sur l'état actuel de la Convention sont disponibles sur: *http://www.hcch.net/ index fr.php?act conventions.status&cid 17*.

qui est à la base de l'harmonisation globale des règles en la matière.[14] À part la Convention de la Haye, la Serbie a conclu plusieurs conventions bilatérales en matière d'entraide judiciaire internationale.[15]

Nonobstant le succès apparent de la Convention de la Haye de 1965 dans la simplification de la procédure de notification transfrontière, le rôle des règles nationales relatives à la notification transfrontière ne devrait pas être ignoré ni sous-estimé. La promotion de l'efficacité du système de notification transfrontière ne devrait pas se fonder exclusivement sur les instruments internationaux – la modification des règles nationales est susceptible d'y contribuer aussi. C'est pourquoi dans la suite de cet article nous nous concentrerons sur l'examen des règles d'origine nationale relatives à la notification transfrontière.

### 2.2 Notification par voie diplomatique en droit judiciaire privé serbe

Conformément à l'Article 133(1) du Code de procédure civile serbe, à défaut d'une convention internationale ou une disposition contraire, la notification des actes judiciaires aux personnes physiques et morales domiciliées à l'étranger et aux ressortissants étrangers qui jouissent de l'immunité diplomatique se fait par voie diplomatique.[16] Le Code permet la notification par voie consulaire aux ressortissants serbes domiciliés à l'étranger.[17] Toutefois, si le destinataire qui est ressortissant serbe domicilié à l'étranger refuse de recevoir l'acte judiciaire qui lui est transmis par voie consulaire, la notification devra être retentée par voie diplomatique.[18] Le problème de la lenteur de notification transfrontière est plus délicat pour l'État requérant, puisque ses tribunaux, étant saisis du litige, doivent assurer le respect du droit au jugement dans un délai raisonna-

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[14] D'autres conventions régissent la transmission des actes en matière civile sont: la Convention relative à la procédure civile (1954) et la Convention de New York sur le recouvrement des aliments à l'étranger (1956).

[15] La Serbie a conclu les accords bilatéraux internationaux en matière d'entraide judiciaire avec les États suivants: Algérie, Autriche, Belgique, Bulgarie, Royaume Uni, Grèce, Iraq, Italie, Chypre, Hongrie, Mongolie, Pologne, Slovaquie, Roumanie, Russie, Turquie, Ukraine, France, République tchèque et les pays de l'ex Yougoslavie. La liste des accords est disponible sur le site du Ministère de la justice, *http://www.mpravde.gov.rs/tekst/826/zamolnice.php*.

[16] En ce sens v. également la décision du Haut Tribunal de Commerce, Pž. 1942/2006(4) du 1er mars 2006, *Sudska praksa trgovinskih sudova Bilten* br. 1/2006, 21. Le Tribunal a dit pour droit que l'obligation de notifier les actes judiciaires par voie diplo matique ne peut être dérogée que par le biais d'une convention internationale.

[17] Art. 133(2) du Code de procédure civile serbe.

[18] Maja Stanivuković, Mirko Živković, *Međunarodno privatno pravo opšti deo*, Službeni glasnik, Belgrade 2010[4], 161.

ble.[19] C'est pourquoi dans la suite de cet article nous développerons l'hypothèse selon laquelle la Serbie apparaît et agit comme État requérant.

Le droit judiciaire privé serbe appartient au groupe des systèmes judiciaires qui ne considèrent la notification accomplie que lorsque la procédure dans l'État requis est complétée.[20] Par conséquent, le procès devant le juge serbe ne peut pas progresser avant que l'acte judiciaire ne soit effectivement remis (ou réputé remis) à son destinataire ou à la personne considérée par la loi de l'État requis comme autorisée de recevoir l'acte à la place du destinataire.

Il va sans dire que la notification par voie diplomatique est assez lente, principalement en raison de la complexité de la procédure de transmission. En effet, avant d'être notifié à son destinataire, l'acte judiciaire doit passer par au moins quatre instances. Émis par la cour ou le tribunal, l'acte arrive au ministère de la justice, qui le transmet à son tour au ministère des affaires étrangères. Ensuite, le ministère des affaires étrangères envoie l'acte à la mission diplomatique serbe auprès de l'État requis. Lorsque l'acte arrive à la mission diplomatique serbe, il est alors transmis au ministère des affaires étrangères de l'État requis. À partir de ce moment l'acte suit le chemin prescrit par le droit de l'État requis et passe par au moins deux instances (le ministère des affaires étrangères et le ministère de la justice de l'État requis) avant d'être délivré.[21] L'avis de réception, indispensable pour établir la date de la notification et sa régularité procédurale, est retourné à la cour ou le tribunal d'origine suivant le même parcours, ce qui exige à peu près le même temps que celui nécessaire pour la transmission de l'acte.

Le temps nécessaire pour l'accomplissement de la notification dépend de plusieurs facteurs, tels que: l'existence de la mission diplomatique serbe dans l'État requis, la complexité de la procédure de notification dans l'État requis, l'efficacité des organes chargés de la transmission ou de la remise de l'acte. Ces facteurs étant assez variables, il est difficile d'estimer la durée moyenne de la procédure de notification. Toutefois, les recherches conduites dans les années 80 du XXe siècle par M. Pak ont montré que la durée moyenne de la transmission par voie diplomatique lorsque le destinataire se trouve dans un État européen est de six mois, alors que la transmission vers les pays non-européens exige deux fois plus de temps.[22] Une trentaine d'années plus tard, la jurisprudence du

[19] Le droit au jugement dans un délai raisonnable est un des droits procéduraux fondamentaux consacrés par l'Article 6(1) de la Convention européenne des droits de l'homme.

[20] O. Capatina, 350.

[21] Vladimir Todorović, *Međunarodna pravna pomoć*, Službeni glasnik, Belgrade 1999, 497 498.

[22] Milan Pak, *Međunarodno privatno pravo*, Naučna knjiga, Belgrade 1986, 101.

Haut Tribunal de Commerce de Belgrade montre que les choses n'ont pas beaucoup changé et que le temps nécessaire pour la notification est toujours supérieur à six mois.[23]

Conscients du fait que la transmission aussi lente est susceptible de compromettre l'efficacité procédurale, certains tribunaux ont parfois recouru à une pratique *contra legem*, envoyant par poste, sous pli recommandé avec avis de réception, les actes qui auraient dû être notifiés par voie diplomatique.[24] Bien qu'il puisse sembler que ce " raccourci " est susceptible d'épargner le temps nécessaire pour la transmission officielle des actes, le remplacement de la voie diplomatique par la voie postale porte deux périls potentiels. Premièrement, considérant la notification comme un acte relevant des pouvoirs publics, certains États qualifient la notification par voie postale comme atteinte à leur souveraineté,[25] ce qui peut être sanctionné soit par des mesures diplomatiques contre l'État émetteur de l'acte, soit par le refus de reconnaissance de la décision judiciaire issue du procès au cours duquel les règles sur la transmission transfrontière par voie diplomatique n'ont pas été respectées. Deuxièmement, la notification par voie postale n'est efficace que si le destinataire accepte de recevoir l'acte envoyé sans protestation, convalidant ainsi l'irrégularité procédurale de ce mode de transmission.[26] Par contre, si le destinataire refuse de recevoir l'acte irrégulièrement envoyé, ce qui serait une manifestation tout à fait légitime de son droit de défense, l'efficacité du procès de la transmission serait davantage compromise puisque, en plus du temps investi dans la transmission par voie postale qui s'est avérée futile, il sera encore nécessaire de recourir à la transmission par voie diplomatique.

Le Code de procédure civile serbe, pour sa part, prévoit un moyen destiné à accélérer la notification à l'étranger. En effet, le Code impose l'obligation à la partie domiciliée à l'étranger de nommer un mandataire (domicilié en Serbie) autorisé de recevoir les actes judiciaires qui exigent

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[23] Haut Tribunal de Commerce, Pž. 1942/2006(3) du 1er mars 2006, *Sudska prak sa trgovinskih sudova Bilten* br. 1/2006, 20.

[24] M. Pak, 101.

[25] Tel est le cas avec la Suisse, par exemple. Conformément à l'Article 271(1) du Code pénal suisse, commet une infraction celui qui, sans y être autorisé, aura procédé sur le territoire suisse pour un État étranger à des actes qui relèvent des pouvoirs publics. V sur ce point: Département fédéral suisse de justice et police, *Entraide judiciaire interna tionale en matière civile Lignes directrices*, 2.

[26] Pourtant, M. Jakšić signale qu'il ne suffit pas qu'une telle convalidation soit faite par le destinataire pour qu'elle soit susceptible de produire les effets. La convalida tion doit également être permise par la loi de l'État où la notification a eu lieu. Sinon, la reconnaissance du jugement issu du procès dans le cadre duquel les règles sur la notifica tion transfrontière n'ont pas été respectées risque d'être refusée. V. Aleksandar Jakšić, "Međunarodna pravna pomoć između sudova zemalja Evropske unije", *Pravni život* 12/1995, 713.

la notification comme moyen de délivrance à leur destinataire.[27] Si la partie est représentée dans le procès par un avocat, la notification des actes judiciaires se fera à l'avocat au lieu de la partie qu'il représente. Ainsi, le devoir de réception des actes de procès entre dans le champ des devoirs liés à la représentation de la partie. L'acte prend le jour de notification à l'avocat, qui est d'ailleurs en mesure de connaître effectivement son contenu, de sorte que la dynamique du procès et la sécurité juridique ne sont pas compromises. Mais, étant donné que les justiciables étrangers ne sont pas tenus d'être représentés par un avocat dans une instance devant les tribunaux serbes alors que, en revanche, ils ne peuvent pas se soustraire à l'obligation de nommer un mandataire pour la réception des actes du procès, le Code prévoit des conséquences strictes et rigoureuses au cas où la partie domiciliée à l'étranger n'obéit pas à l'instruction de nommer un mandataire. Ces conséquences diffèrent selon le rôle procédural de la partie en question. Si la partie domiciliée à l'étranger est demanderesse, sa demande sera rejetée. Il convient de noter que, dans les circonstances pratiques, il est difficile d'imaginer la situation où le demandeur aurait l'intérêt de manquer à nommer le mandataire, parce que cela mènerait à l'obstruction du procès qu'il avait lui-même initié. Par contre, si la partie qui manque à nommer le mandataire est défenderesse, le tribunal nommera à sa place un représentant autorisé de recevoir les actes de procès. Toutefois, afin que le tribunal puisse procéder à cette nomination, il est nécessaire d'établir au préalable que la défenderesse avait régulièrement reçu l'acte introductif d'instance accompagné de l'instruction de nommer un mandataire et que le délai fixé pour la réalisation de cette instruction a expiré.

Par conséquent, il est possible de conclure que l'effet accélérateur de l'obligation de nommer un mandataire est quand même restreint. La notification ne devient plus rapide qu'à l'égard des actes de procès issus au cours de l'instance, puisque l'acte introductif doit, en tout état de choses, être notifié par voie diplomatique.

## 3. À LA RECHERCHE DE LA SOLUTION: COMMENT RENDRE LA NOTIFICATION TRANSFRONTIÈRE PLUS RAPIDE ?

Le besoin de rendre le système de notification transfrontière plus rapide semble avoir été le moteur de l'harmonisation internationale en matière d'entraide judiciaire. Ainsi, les signataires de la Convention de la Haye de 1965 témoignent, dans le préambule à la Convention, de leur souci d'améliorer la notification internationale " *en simplifiant et en accélérant la procédure* "[28]. De même, le Règlement No. 1393/2007 relatif

[27] V. Art. 146 du Code de procédure civile serbe.

[28] Considérant No. 3 à la Convention de la Haye de 1965.

à la signification et à la notification des actes judiciaires et extrajudiciaires entre les États membres de l'Union européenne consacre une place importante à la célérité de la transmission, soulignant à plusieurs reprises l'exigence de la rapidité de procédure.[29]

Les deux instruments internationaux utilisent les mécanismes similaires afin de parvenir à un système de notification internationale plus rapide. Il s'agit du raccourcissement de la procédure de notification transfrontière et de l'introduction des délais pour l'accomplissement de certaines étapes de cette procédure. Bien qu'il ne soit pas possible de transposer ces mécanismes de façon intégrale dans le Code de procédure civile serbe, nous allons quand même tenter d'analyser dans quelle mesure les règles nationales relatives à la notification transfrontière peuvent intégrer les solutions utilisées par les documents susvisés, en s'inspirant des idées développées en droit comparé.

### 3.1 Introduction des délais pour l'accomplissement de la procédure de notification transfrontière

L'introduction des délais pour l'accomplissement de certaines étapes de la notification transfrontière a représenté un moyen important de l'accélération de la procédure de transmission des actes judiciaires entre les États membres de l'Union européenne.[30] Ainsi, le Règlement No. 1393/2007 relatif à la signification et à la notification dans les États membres de l'Union européenne, dispose que la signification ou la notification d'un acte devraient être effectuées dans les meilleurs délais et, en tout état de cause, dans un délai d'un mois à compter de la réception par l'entité requise.[31] L'entité requise dispose d'un délai de sept jours pour envoyer à l'entité d'origine un accusé de réception de l'acte.[32]

Le Code de procédure civile serbe à l'heure actuelle ne fixe aucun délai pour l'accomplissement de la procédure de notification transfrontière. Il convient alors d'examiner si une éventuelle introduction des délais pour l'accomplissement des différentes étapes de la transmission dans le Code serait susceptible de rendre la notification transfrontière plus rapide, voire plus efficace.

Avant de s'engager dans cet examen, il faut noter que les délais contenus dans un instrument international (ou transnational, tel que le

[29] V. en ce sens le Préambule (considérants 6, 7, 9 et 12), Art. 4(1), 6(1) et 7(2).

[30] Gabriele Mecarelli, "La signification et la notification transfrontières des actes judiciaires et extrajudiciaires en Europe, dix ans après", dans: Mélina Douchy Oudot, Emmanuel Guinchard (sous la direction de), *La justice civile européenne en marche*, Dal loz, Paris 2012, 97.

[31] Règlement No. 1393/2007, considérant 9; Art. 7(2) du même Règlement. Les mêmes solutions étaient prévues par le prédécesseur du Règlement No. 1393/2007, le Règlement No. 1348/2000.

[32] Art. 6(1) du Règlement No. 1393/2007.

règlement européen) ne sont nécessairement pas censés de produire le même effet que ceux prescrits dans un instrument unilatéral. Si le délai prescrit dans un instrument international n'est pas respecté, cela constituera un incident d'application de l'instrument prescrivant le délai en question. En d'autres termes, il s'agira d'un manquement de l'État en question à respecter une de ses obligations *internationales*. Les instruments internationaux contiennent normalement les dispositions instaurant les voies de résolution des conflits causés par les incidents de leur application. Il existera donc un mécanisme *interétatique* ou *internationalisé*, capable de contraindre l'État en question de respecter les délais, de même que toutes ses autres obligations internationales. Par contre, dans le cas des délais contenus dans un instrument unilatéral, leur effectivité repose sur la volonté et la capacité de l'État qui les a proclamés de les respecter. Si les délais sont transgressés pour quelle raison qu'il soit, il n'y a pas de mécanisme externe, spécialisé et neutre, capable d'assurer leur respect. La partie intéressée ou lésée pourrait alors seulement utiliser les voies de droit ordinaires prévues pour les situations où l'État manque à appliquer sa propre législation.

Nonobstant cette observation générale, pour les besoins théoriques nous retiendrons l'hypothèse que l'État émetteur de l'acte possède des mécanismes internes capables d'assurer le respect des délais. Il nous reste alors d'examiner la faisabilité de l'introduction des délais dans la procédure de notification internationale. Comme nous avons noté dans la partie introductoire, la notification transfrontière par voie diplomatique demande la collaboration des organes de l'État requérant et l'État requis. Il va sans dire que les délais fixés par la législation nationale d'un de ces États ne sauront obliger l'autre. Alors, une éventuelle introduction des délais dans la procédure de la notification transfrontière pourrait seulement accélérer l'accomplissement des démarches dont la réalisation se trouve sous la sphère d'influence et de compétence de l'État émetteur de l'acte. C'est donc la question de la politique juridique de décider si l'accélération d'une partie de la procédure, et non pas de la procédure entière, est suffisamment rémunératrice pour justifier l'introduction des délais.

Mais, bien que l'État émetteur de l'acte ne puisse pas fixer les délais aux organes de l'État requis, il nous semble qu'il possède tout de même des moyens pour suivre le développement des démarches liées à la transmission de l'acte d'une manière acceptable du point de vue du droit international et de la courtoise diplomatique. En effet, l'État émetteur peut instruire sa mission diplomatique auprès de l'État requis de demander des renseignements sur l'état d'avancement de la procédure de notification à l'expiration d'un certain délai suivant la remise de l'acte aux organes de l'État requis. Mais déjà l'accélération dans une moitié du parcours, celle régie par le droit de l'État qui impose les délais pour l'accomplissement des démarches liés à la transmission, semble prometteuse.

Nous trouvons le support pour cette proposition dans un cas de la jurisprudence d'un État voisin, la Bosnie-et-Herzégovine.[33] En l'espèce, une entreprise bosniaque a été attraite devant le tribunal suisse en violation d'un contrat de coopération avec sa contrepartie suisse. Le tribunal suisse a envoyé, par voie diplomatique, un exemplaire de l'acte introductif au défendeur le 30 juin 2000. L'ambassade de Suisse en Bosnie-et-Herzégovine a remis l'acte au ministère bosniaque de justice, mais le ministère ne donnait aucune information sur l'état d'avancement de la procédure de notification, probablement parce que l'adresse du destinataire fut incorrecte et le ministère essayait de le localiser. Les demandes d'information adressées par l'ambassade au ministère sont restées sans réponse. Enfin, le 14 janvier 2002 le ministère fédéral suisse de justice a instruit l'ambassade à Sarajevo de " *fixer un dernier délai de 30 jours aux organes bosniaques compétents pour envoyer une information sur l'état de délivrance de l'acte à notifier* "[34]. À notre connaissance, les demandes d'information ainsi que la fixation du " dernier délai " aux organes de l'État requis n'ont pas été considérées comme une violation des coutumes diplomatiques. Cela nous mène à la conclusion que l'introduction des délais dans la procédure de notification transfrontière est faisable du point de vue du droit national et international.

Reste pourtant la question des conséquences de l'expiration des délais prévus pour l'accomplissement des formalités liées à la transmission de l'acte qui se trouvent sous la sphère d'influence des organes de l'État requis. Étant donné que l'État émetteur ne dispose pas des moyens de contraindre l'État requis, il paraît que la seule possibilité qui reste à l'État requis pour mener la notification transfrontière à terme dans le cas de l'absence de la collaboration effective de la part de l'État requis est de recourir à une forme de notification fictive. Il est vrai que la notification en droit judiciaire privé serbe repose sur le principe de la remise personnelle des actes judiciaires. Toutefois, ce principe connaît une exception même dans les contentieux qui ne contiennent pas des éléments d'extranéité. Dans le cas où la notification personnelle au destinataire s'avère impossible ou entraine de sérieuses difficultés, le Code de procédure civile serbe prévoit la possibilité de la notification fictive, qui se fait par l'affichage de l'acte à notifier au panneau d'informations du tribunal sai-

[33] La décision n'a pas été publiée. Nous relatons les faits d'après le commentaire rédigé par Mme Šaula, professeur à l'Université de Banja Luka, qui a eu l'accès à la décision originale rendue par la Cour constitutionnelle de la Bosnie et Herzégovine. V. Valerija Šaula, "Povodom jedne odluke Ustavnog suda Bosne i Hercegovine Problem dostavljanja u inostranstvo kao uslov priznanja presude stranog suda", dans: Maja Kostić Mandić (éd.), *Međunarodno privatno pravo i zaštita stranih investitora*, Pravni fakultet Univerziteta Crne Gore, Podgorica 2008, 205 220.

[34] Citation du jugement suisse, ainsi que rapportée et traduite en serbe par Mme Šaula. V. V. Šaula, 207.

si du litige.[35] Ce moyen de notification fictive est utilisé lorsque le destinataire, dont l'adresse est correctement citée dans l'acte à notifier, ne se trouve pas à l'adresse où la notification devrait avoir lieu. Dans ce cas, l'officier chargé de notifier l'acte judiciaire laissera la notice indiquant au destinataire qu'il peut retirer l'acte judiciaire dans le siège du tribunal émetteur dans un délai de 30 jours à compter de la date où la notification a été intentée. Pendant cette période une copie de l'acte restera affichée sur le panneau du tribunal saisi du litige et même si le destinataire ne retire pas son exemplaire de l'acte judiciaire, l'acte sera réputé notifié à l'expiration du délai de 30 jours.

La notification fictive par affichage de l'acte judiciaire sur le panneau du tribunal saisi ne nous semble pas adaptée à l'esprit de la notification transfrontière, puisque la possibilité pratique pour le destinataire résidant à l'étranger d'apprendre qu'un acte introductif d'instance contre lui a été affiché sur le panneau d'un tribunal serbe paraît assez modeste. C'est pourquoi il convient de concevoir un autre mode de notification fictive, ou bien d'adapter les termes du mode existant aux spécificités de la notification transfrontière dans le cadre de la discussion sur les possibilités du raccourcissement de la procédure de notification transfrontière.

### 3.2. Raccourcissement de la procédure de notification transfrontière

Il convient de noter au préalable que les États prévoient les différentes configurations de la voie diplomatique de communication dans le cadre de l'entraide judiciaire internationale. Ainsi, par exemple, la voie diplomatique de communication en France est encore plus compliquée qu'en Serbie parce que, à part l'intervention du ministère de la justice et ministère des affaires étrangères, elle prévoit également l'accomplissement de certaines démarches par l'huissier de justice et le procureur de la République.[36] En revanche, la voie diplomatique en Allemagne est moins complexe en ce qu'elle permet la communication directe entre le tribunal saisi et le ministère des affaires étrangères, sans besoin de s'adresser au ministère de la justice.[37]

Partant, il est possible de conclure que la modification de la configuration de la voie diplomatique de communication est théoriquement concevable et pratiquement faisable. La question est alors d'essayer de déterminer si elle est vraiment susceptible de rendre le système de notification plus rapide. Afin de répondre à cette question, il convient d'exami-

[35] V. Art. 141(2) du Code de procédure civile serbe.

[36] L. Cadiet, E. Jeuland, 393 395; Emmanuel Jeuland, *Droit processuel général*, Montchrestien, Paris 2012[2], 586.

[37] V. en ce sens les sources allemandes citées par: Aleksandra Maganić, "Pravna pomoć u građanskim stvarima između Republike Hrvatske i Republike Makedonije", *Zbornik PFZ* 2/2011, 256.

ner les rôles respectifs des deux acteurs importants du procès: le ministère de la justice et le ministère des affaires étrangères.

Le ministère de la justice est chargé de contrôler la conformité de l'acte judiciaire aux conditions formelles de la notification à l'étranger.[38] Notamment, le ministère de la justice est tenu de vérifier si l'acte est accompagné de sa traduction certifiée dans la langue officielle de l'État requis et de la lettre officielle du tribunal-émetteur indiquant les démarches à faire à l'égard de l'acte. En outre, le ministère de la justice devrait déterminer, en fonction de l'existence d'une convention internationale entre la Serbie et l'État requis, la méthode approprié de transmission de l'acte à l'étranger. À défaut d'une convention internationale qui permettrait au ministère de la justice de transmettre directement l'acte judiciaire à l'organe compétent de l'État requis, le ministère de la justice envoie l'acte judiciaire au ministère des affaires étrangères qui est chargé de communiquer avec les États étrangers par le biais du réseau des missions diplomatiques et consulaires serbes.

Toutefois, la pratique témoigne que le ministère de la justice ne montre pas toujours l'assiduité nécessaire dans l'accomplissement de ses devoirs à l'égard de la notification à l'étranger. Comme il a été remarqué dans un arrêt du Haut Tribunal de Commerce de Belgrade, le ministère de la justice ne fait que *transmettre* l'acte à notifier au ministère des affaires étrangères.[39] Dans cet état de choses, il semble que le passage de l'acte judiciaire par le ministère de la justice n'est pas une étape indispensable de la voie diplomatique de communication et que les devoirs qui incombent à ce ministère peuvent être délégués aux autres acteurs du procès. Étant donné que le ministère des affaires étrangères dispose du département des affaires juridiques, ses agents pourraient désormais devenir chargés de vérifier la régularité de l'acte juridique avant de l'envoyer à la mission diplomatique qui le remettra au ministère des affaires étrangères de l'État requis. Par contre, la tâche de l'élection du mode approprié de transmission (voie diplomatique ou voie prévue par une convention internationale) pourrait être attribuée au tribunal-émetteur. Si le tribunal établit que la notification devrait avoir lieu dans un État avec lequel la Serbie maintient un régime conventionnel dans le cadre duquel le ministère de la justice sert comme organe expéditeur,[40] l'acte sera transmis au ministère de la justice. Dans le cas contraire, s'il n'y a pas de convention internationale applicable en la matière et l'acte judiciaire doit être trans-

[38] Vesna Rijavec, "Mednarodna pravna pomoč", dans: Rajko Knez, Suzana Kraljić, Dušan Stojanović (éds.), *Evropski sodni prostor*, Pravna fakulteta Univerze v Mariboru, Maribor 2005, 26.

[39] Haut Tribunal de Commerce, Pž. 1942/2006(3) du 1er mars 2006, publiée dans: *Sudska praksa trgovinskih sudova Bilten* br. 1/2006, p. 20.

[40] Par exemple, ce serait le cas avec les États signataires de la Convention de la Haye de 1965.

mis par voie diplomatique, il sera envoyé par le tribunal directement au ministère des affaires étrangères.

Même si le parcours entre l'organe émetteur et la mission diplomatique dans l'État requis devient raccourci, reste le problème des formalités de notification à réaliser par les organes de l'État requis. La pratique de certains pays européens incite à explorer quelques pistes possibles afin de résoudre le problème de l'inefficacité des organes de l'État requis, sans toucher au principe fondamental du droit judiciaire privé serbe, selon lequel la notification prend le jour où l'acte est effectivement porté à la connaissance de son destinataire, sauf dans les cas exceptionnels que nous avons décrits. L'idée générale de l'accélération de la procédure de notification transfrontière serait, ainsi que noté par M. Rigaux, de localiser le plus grand nombre possible de formalités sur le territoire de l'État du for, pour que la notification ne doive pas faire appel à la collaboration des autorités étrangères.[41]

À cet effet, une solution particulièrement intéressante existe en droit italien. Selon l'Article 142(1) du Code de procédure civile italien, un acte procédural à notifier au destinataire résidant à l'étranger doit être émis en deux copies. Une copie est envoyée au destinataire par voie postale sous pli recommandé, et l'autre est expédiée au ministère des affaires étrangères. La notification sera considérée accomplie le vingtième jour suivant le jour où ces formalités ont eu lieu.[42]

La solution italienne repose donc sur le principe de la notification fictive – quel que soit le résultat de la transmission de l'acte judiciaire, il sera réputé notifié le vingtième jour suivant l'accomplissement des formalités prévues par l'Article 142(1) du Code de procédure civile. Par conséquent, nous sommes d'opinion que la solution italienne ne pourrait pas être intégralement transposée en droit judiciaire privé serbe, qui prévoit la notification fictive seulement comme un moyen du dernier ressort. Cependant, le point d'intérêt de cette solution est le fait qu'elle prévoit l'accomplissement parallèle de deux formalités, dont une est entièrement confiée aux organes de l'État émetteur et l'autre est plutôt classique et comprend la collaboration des organes de l'État émetteur de l'acte et l'État requis.

La réception du principe de la notification parallèle en droit judiciaire privé serbe, surtout lorsqu'elle serait accompagnée de l'introduction des délais pour l'accomplissement de la procédure, pourrait mener à la conception d'un nouveau système susceptible de promouvoir considérablement l'efficacité de la notification transfrontière. Le système de notification parallèle, tel que nous le concevons, exigerait que l'acte judi-

[41] François Rigaux, " La signification des actes judiciaires à l'étranger ", *Revue critique de droit international privé* 1963, 454.

[42] Art. 143(3) du Code de procédure civile italien.

ciaire soit envoyé en deux exemplaires. Lorsque l'acte arrive à la mission diplomatique serbe auprès de l'État requis, un exemplaire devrait être transmis à l'organe compétent de l'État requis et l'autre reste à la mission. L'exemplaire remis à l'organe de l'État requis suit alors le parcours régulier de la notification par voie diplomatique. Par contre, en ce qui concerne l'exemplaire qui reste à la mission diplomatique, la mission en informe le destinataire et l'invite à se présenter aux locaux de la mission afin de réceptionner l'acte en question. La notice de l'arrivée de l'acte judiciaire est envoyée au destinataire sous pli recommandé, l'accusé de réception faisant foi qu'elle a effectivement été portée à l'attention du destinataire. De cette façon la mission diplomatique serbe éviterait de s'engager dans l'exercice des actes relevant du pouvoir public sur le territoire de l'État requis, puisque l notice n'est pas un acte formel et le destinataire décide de sa propre volonté s'il va comparaître à la mission pour retirer l'acte judiciaire. Si le destinataire accepte de retirer l'acte judiciaire, la procédure est considérablement accélérée. Sinon, on se tourne à la transmission de l'exemplaire envoyé par voie diplomatique.

Cependant, pour éviter que la transmission par voie diplomatique prenne un temps excessif, la mission diplomatique serbe auprès de l'État requis devrait être instruite de demander les informations sur l'état d'avancement de la procédure de transmission dans un délai de 30 jours à compter de la date de remise de l'acte judiciaire à l'organe compétent de l'État requis. Si la réponse de l'organe compétent de l'État requis est favorable, c'est-à-dire si la notification a été réalisée avec succès, la mission diplomatique prendra les mesures pour assurer le retour de l'accusé de réception à l'organe émetteur dans les meilleurs délais. Dans le cas contraire, l'organe émetteur devrait considérer les possibilités de la notification fictive, en vue de sauvegarder le droit de la partie demanderesse à obtenir le jugement dans un délai raisonnable. Parmi les différentes possibilités de la notification fictive, une qui nous semble bien adapté au contexte du procès civil contenant un élément d'extranéité provient du droit suisse. C'est la notification par voie édictale, qui se fait par publication de l'acte judiciaire dans le journal officiel du lieu du tribunal saisi du litige.[43] L'acte sera réputé notifié le jour de sa publication. La notification par publication de l'acte judiciaire dans le journal officiel nous semble préférable à la notification par affichage sur le panneau, car la publication de l'acte ouvre la possibilité au destinataire résidant à l'étranger d'apprendre de manière indirecte le contenu de l'acte, ce qui est plus difficilement concevable dans le cas de la notification par affichage dans le bâtiment du tribunal saisi du litige.

[43] V. Art. 141 du Code de procédure civile suisse. La notification par voie édictale est permise, entre autre, dans le cas où la notification s'avère impossible ou lorsqu'elle présente des difficultés extraordinaires (Art. 141(1)(b)).

Les modifications du système de notification transfrontière que nous venons d'exposer nous semblent bien adaptées à tous les trois objectifs da la procédure de notification que nous avons avancés lorsque nous avons exposé le contexte générale de la problématique étudiée. En ce qui concerne la protection des droits procéduraux du demandeur, l'introduction des délais dans la procédure de notification et l'intervention de la notification fictive au point où la notification réelle commence à entraîner des difficultés sauvegarde l'efficience du procès et le droit au jugement dans un délai raisonnable. Quant à la protection des droits procéduraux du défendeur (dans l'hypothèse où c'est lui qui est le destinataire résidant à l'étranger), la notification parallèle lui donne plusieurs possibilités de réceptionner l'acte judiciaire. L'envoie de la notice avisant le destinataire qu'il peut retirer l'acte judiciaire auprès de la mission diplomatique serbe constitue une voie de notification qui fait appel à la coopération et la bonne volonté procédurale du défendeur. La notification par voie diplomatique classique représente le moyen ordinaire de la remise l'acte judiciaire à son destinataire. Si cette voie classique se montre trop lente, la notification par publication de l'acte dans le journal officiel constitue une sorte de publicisation de la notification, donnant la possibilité au destinataire d'apprendre le contenu de l'acte d'une façon indirecte. En outre, la notification fictive n'apparaît pas comme une surprise, car l'État émetteur aurait déjà tenté plusieurs moyens de notification réelle avant de procéder à la publication de l'acte. Enfin, pour ce qui est de la protection de l'intégrité du procès, les organes de l'État émetteur s'abstiennent de recourir aux actes relevant du pouvoir public sur le territoire de l'État requis (l'envoie de la notice ne constitue pas un acte public mais seulement un avertissement au destinataire, démuni de coercition), tentent trois différentes voies de notification (volontaire, diplomatique et fictive) et en même temps essayent d'assurer l'efficacité du procès.

## 4. CONCLUSION

La notification des actes judiciaires par voie diplomatique, ainsi qu'elle est conçue en droit judiciaire privé serbe, se montre comme un moyen de notification assez lent et partant inefficace. Les raisons principales de la lenteur de la notification par voie diplomatique sont la complexité de procédure et l'absence d'un mécanisme qui assurerait le respect de la dynamique procédurale. Toutefois, l'accélération de la procédure de notification transfrontière ne peut pas se faire au détriment des droits procéduraux du destinataire, surtout lorsqu'il se trouve dans le rôle du défendeur. En tenant compte de ces contraintes, nous avons essayé de proposer des modifications du système de notification transfrontière qui reposent sur le raccourcissement du parcours que l'acte judiciaire doit passer avant

d'être délivré, l'introduction des délais pour l'accomplissement des étapes de la notification qui se trouvent dans la sphère d'influence des organes de l'État émetteur et le recours à la notification fictive dans la situation ou plusieurs différents modes de notification réelle finissent sans succès. Cependant, nous sommes conscients que la portée des modifications proposées est tout de même limitée. La vraie accélération de la procédure de notification transfrontière ne parviendra qu'avec l'introduction de la notification par voie électronique dans les procès contenant un élément d'extranéité. Entretemps, l'accélération de la notification transfrontière restera l'art du possible avec les moyens limités.

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# THE LISBON TREATY THE FINAL INSTALMENT OF THE UNION'S 'CREEPING COMPETENCE OR A SOURCE OF LEGAL UNCERTAINTY?

*With the coming into force of the Lisbon Treaty, the European Union has tact fully shifted the vertical alignment of competence to regulate foreign direct invest ment away from EU Member States, thereby reserving all prerogatives in this field for itself. The new Treaty purports to dislove the existing bilateral treaty regime that has been regulating the field of foreign investment for the past fifty years and replace it with a common 'European' investment policy. The central question is: whether or not the legal mechanisms enshrined in the Lisbon Treaty are suitable and sufficient for facilitating and upholding the EU's bold objectives and whether or not the EU will have enough political leverage to lead Member States down a new 'European' investment path.*

Key words: *Foreign Direct Investment. Lisbon Treaty. Competence.*

## 1. INTRODUCTION

Mindful of the importance of Foreign Direct Investment (hereinafter FDI) in general and the necessity to have increased influence in the future determination of investment policies in particular, the European Union (hereinafter the EU) has decided to tighten its legislative reins with regard to FDI.

With the coming into force of the Lisbon Treaty,[1] the EU has included FDI within its area of exclusive competence. Needless to say, a

[1] Treaty of Lisbon amending the Treaty on European Union and the Treaty estab lishing the European Community, Official Journal of the European Union 2007/C 306/01,

new investment order is upon us and, apart from representing a new era and chapter in the sphere of international investment regulation, the new legal order marks a radical departure from the traditional allocation of FDI competences. In other words – the traditional sovereign right to regulate the entry of FDI – whether and to what extent a sovereign state will admit investors into its national economy and market[2] – no longer exists.

First, this paper will provide a brief illustration of the importance of FDI in general and the relevance of EU Member States as actors in this field in particular. Secondly, an elaboration on the past and present European investment regime will endeavour to provide insight on the significance of the Lisbon regime and its implications on the competences of Member States henceforward. Furthermore, Chapter III will dwell on certain contentious issues that have arisen from provisions of the Lisbon Treaty. Chapter VI will attempt to merge points raised in preceding chapters into what will hopefully be a modest contribution to the critical assessment of what the Lisbon Treaty has offered and outlook on how the EU could improve its investment policy in the future.

## 2. THE EU'S CREEPING COMPETENCE

The area of FDI has traditionally been within the competence of sovereign states. The admission of investments and the right of establishment concern a state's traditional prerogative to regulate and control.

Up until now, the legal framework of modern international investment law has primarily been established through investment treaties.[3] Naturally, as a consequence of the increasing importance and expansion of FDI, the need to sustain and efficiently protect it has developed in parallel. This has led to the conclusion of International Investment Agreements (hereinafter ILAs) and, in particular, Bilateral Investment Treaties (hereinafter BITs).[4] Although, as authors have noted, in spite of the prox-

*http://eur ex.europa.eu/JOHtml.do?uri OJ:C:2007:306:SOM:EN:HTML*, last visited 1 October 2012.

[2] I. Gomez Palacio, P. Muchlinski, "Admission and Establishment", *Oxford Handbook of International Investment Law*, Oxford University Press, 2008, 228.

[3] S. Greenberg, C. Kee, J.R. Weeramantry, *International Commercial Arbitration, an Asia Pacific Perspective*, Cambridge University Press, 2011, 478.

[4] S. D. Amarasinha, J. Kokott, "Multilateral Investment Rules Revisited", *Oxford Handbook of International Investment Law*, Oxford University Press 2008, 124: "[*I*]t *would be wrong to conclude that there is no multilateral regime for foreign investment. Rather, it is a fragmented regime with a variety of contracting parties, some being bilat eral, others regional or multilateral, as in the case of WTO Agreements. The result is that for each pair or group of international investment agreements (IILs), creating incentives*

imity between international trade and investment, there has been a disproportion in the extent and intensity of their regulation and liberalization at the multilateral level.[5] In other words, at least for now, BITs have been dominating the scene of international investment.[6]

Within the borders of the EU, Member States have together concluded more than 1,100 BITs.[7] Furthermore, the EU accounts for more inward and outwad FDI than any other trading entity. According to a review conducted by Copenhagen Economics, over the past decades, EU firms have increased their investments outside EU borders by a factor of five.[8] By 2008, the EU27 stock of outward FDI in non-EU countries amounted to €3.3 trillion,[9] whilst the stock of FDI into the EU by non-EU investors amounted to €2.4 trillion in 2008.[10] The conclusion of the study was, *inter alia*, that outward FDI has led to an increase in EU GDP of more than €20 billion over the period between 2001–2006.

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*for 'treaty shopping' by foreign investors who seek to enhance their protection even in cases where their own country has not concluded agreements that offer the same level of protection as those used by other countries. Thus there may be significant reasons for moving to a new multilateral investment regime*."

[5] *Ibid.*, 120.

[6] BITs, as instruments of international law, are signed between two states, pursu ant to which each offers substantive standards of treatment to private investors that origi nate from the other contracting state. Since the conclusion of the first BIT between the Federal Republic of Germany and the Islamic Republic of Pakistan in 1959, the past fifty years have seen a momentous increase in the number of BITs, resulting in a colossal and complex network of international agreements, amounting to more than 2600 agreements. *See* UNCTAD, "Recent Developments in International Investment Agreements (2008 June 2009)", *ILA Monitor, International Investment Agreements*, United Nations, 3/2009, http://unctad.org/en/docs/webdiaeia20098 en.pdf, last visited 1 October 2012. With the aim of ensuring the protection and promotion of foreign investments as well as develop ing the economies of states in which investments are made, BITs are infused with provi sions covering reciprocal conditions for access of FDI between the parties. These provi sions contain guarantees for national treatment, fair and equitable treatment, full protection and security, prohibition of expropriation and transparency. Importantly, a vast number of BITs contain specific dispute settlement provisions which enable investors to pursue claims they have against host states in breach of their treaty obligations. The plethora of BITs has created a universal system of substantive and procedural investment protection, a fundamental part of the contemporary international economic order. *See* K. Bökstiegle, "An Arbitrator's Perspective of BITs and their Relation to Other International Law Obli gations", *Paper given at the Conference 50 Years of Bilateral Investment Treaties Tak ing Stock and Look to the Future*, Frankfurt 1 3 December 2009, 3.

[7] See UNCTAD, "Recent Developments in International Investment Agreements (2008 June 2009)", *ILA Monitor, International Investment Agreements*, United Nations, 3/2009, *http://unctad.org/en/docs/webdiaeia20098 en.pdf*, last visited 1 October 2012.

[8] Copenhagen Economics, Impacts of EU Outward FDI, Final Report, 20 May 2010, 6, *http://trade.ec.europa.eu/doclib/docs/2010/june/tradoc 146270.pdf*, last visited 1 October 2012.

[9] *Ibid.*, 6.

[10] *Ibid.*, 13.

However, given the current economic downturn, authorities have observed that investment protectionism has gained the upper hand in various quarters of the world.[11] In the midst of an economic crisis, investment may prove to be a godsend to both potential investors and states eager to force their economies out of turmoil: whilst investors aim to gain an advantage and expand their ventures, weak economies, in attracting foreign investors, aim to bring in long-lasting and stable capital flows, generate higher employment levels, increase productivity by the transfer of technology and specialized knowledge, and, ultimately, achieve growth in the country's overall economy.

It is in the aforementioned context, and in view of the increased criticism aimed at the bilateral investment treaty regime, that calls for a global investment regime have been renewed.[12] Indeed, one should be mindful that a multilateral proposal has been tried, but failed, in both the Organisation for Economic Cooperation and Development (hereinafter the OECD) and the World Trade Organization.[13]

However, the position of EU Member States has always been somewhat specific. On the one hand, this is due to the fact that the Union is founded upon, and has stood behind, the 'four freedoms', which inherently entail and openness of the EU internal market. On the other hand, the importance and positive effects of FDI have not gone unnoticed by the EU, which has steadily, but surely, been adjusting its grasp on the regulation of FDI.

In other words, there have long been provisions in EU legislation which are located in the crossfire between FDI regulation and the Union's four freedoms. By way of example, Article 56 of the Treaty establishing the European Community (hereinafter the TEC) already addressed an important aspect of foreign direct investment, which is the free movement of capital.[14] Also, the provisions on freedom of establishment, one of the

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[11] W. Shan, S. Zhang, "The Treaty of Lisbon: Half Way Towards a Common Investment Policy", *European Journal of International Law*, 21/2011, 1072.

[12] *Ibid.*

[13] Albeit, the OECD has been successful, although with regard to a slightly different subject matter, with its Model Tax Convention which serves as the basis for more than 3,000 bilateral tax treaties in force today in the world. For more on the history of negotiations of 'multilateral' investment treaties *see* S. D. Amarasinha, J. Kokott, 119 153. It is precisely against this backdrop that the idea of a common investment policy within the EU has emerged. The fragmentation and legitimacy crisis of bilateral and regional investment treaties have put the 'spaghetti bowl' of investment treaties under severe criticism. This milieu renders the prospect of a multilateral investment treaty both tempting and necessary. Despite the previous failures of such endeavours, one might say, that having the EU at the negotiating table would certainly help in facilitating the negotiation process preventing the 'multilateral investment agreement' debacle from occurring again.

[14] This provision, unchanged, is incorporated in the Lisbon Treaty in Article 63: "*Within the framework of the provisions set out in this Chapter, all restrictions on the*

four prongs of the 'four freedoms' and the Common Commercial Policy (hereinafter the CCP) arguably grant some competence to the Community concerning the entry and operation of foreign investment in the internal market. However, these provisions, to the extent one can connect them to the regulation of FDI, pertain solely to the entry into market phase.[15]

Also, the EC has been incorporating elements of foreign investment in Association Agreements it has concluded with third countries,[16] thereby connecting investment regulation with market integration and development principles. By linking these two aspects, the EC has attempted to reflect its policy orientation in its external economic relations to promote a regulatory framework on foreign investment, placing emphasis equally on economic and social policy considerations.[17]

However, up until the Lisbon Treaty, the regulation of foreign investment had been, at the most, within the shared competence of the EU and its Member States.[18] The Community had not established either express or implied exclusive competence in this field of law, as the European Court of Justice, in its Opinion 2/92, averred with regard to the principle of national treatment, one of the most fundamental standards of foreign direct investment.[19] contained in virtually all BITs:

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*movement of capital between Member States and between Member States and third countries shall be prohibited... Within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited.*"

[15] Another contentious issue has been the question of expropriation and whether the Community had the power to take positive action and determine the conditions under which expropriation of foreign investors' property is legal and whether and to what extent the foreign investor is entitled to compensation. This predicament has, at least up until the Lisbon Treaty, was settled in favour of the Member States.

[16] Foreign investment provisions are found in agreements with countries aiming for future accession to the EU, such as the Stabilization and Association Agreements (SAAs) with Balkan countries. The EU has concluded Stability and Association Agreements with Croatia, the Former Yugoslav Republic of Macedonia and Albania. The EU is still negotiating an agreement with Bosnia and Herzegovina and is in negotiations with Serbia and Montenegro with regard to their accession to the Union. The EU has concluded Euro Mediterranean Association Agreements with Algeria, Egypt, Israel, Jordan, Palestine, Morocco, Tunisia and has recently concluded the negotiations with Syria. The EU has concluded Partnership and Co operation Agreements with Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Ukraine and Uzbekistan. See A. Dimopoulos, "Shifting the emphasis from investment protection to liberalization and development: The EU as a new global actor in the field of foreign investment policy", *Journal of World Investment and Trade,* 11/2012, 2.

[17] *Ibid.*

[18] W. Shan, S. Zhang, 1050.

[19] Opinion 2/92 of the European Court of Justice, 24. March 1995, *http://eur lex.europa.eu/smartapi/cgi/sga doc?smartapi!celexplus!prod!CELEXnumdoc&lg en&numdoc 61992V0002*, last visited 1 October 2012, *"Although it is apparent from the foregoing*

On the other hand, bearing in mind the importance of FDI for world economic relations, it would be erroneous to assume that the Union has been sitting idly, watching FDI gather momentum. Quite the contrary, the Community had shown evident suggestions that it would be intervening in FDI. Deciding otherwise would lead to a situation in which EU's power to regulate the CCP, the cornerstone and arguably the strongest pillar of the European integration, would become in fact curtailed as a result of being shared with the Member States.

A striking example of such indication was the Commission's Note on the Minimum Platform on Investment for EU FTA's – Provisions on establishment in template for a Title on "Establishment, trade in services and e-commerce (hereinafter the Minimum Platform).[20]

Given that this document is the Union's first formalized and comprehensive approach towards generating a common international investment policy, it represents significant proof of the Commission's contemporaneous willingness to intervene in an external economic policy field so far predominantly left to the Member States.[21] Commentators had named the Minimum Platform as a 'negotiation template'. Although a document possessing no legal sway, neither increasing nor decreasing the competence of the Union vis-à-vis its Member States, it was meant to be the foundation upon which an ambitious investment policy was to be built.[22]

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*that the national treatment rule concerns mainly the conditions for the participation of foreign controlled undertakings in the internal economic life of the Member States in which they operate, the fact remains that it also applies to the conditions for their par ticipation in trade between the Member States and non member countries, conditions which are the subject of the common commercial policy of the Community...[s]o far as the participation of foreign controlled undertakings in intra Community trade is concerned, such trade is governed by the Community's internal market rules and* ***not by the rules of its common commercial policy****... It follows from the foregoing that Article 113* ***does not*** *confer* ***exclusive competence*** *on the Commission to participate in the Third Decision."* (emphasis added).

[20] The European Commission's Note for the attention of the 133 Committee on the Minimum Platform on Investment for EU FTA's Provisions on establishment in template for a Title on "Establishment, trade in services and e commerce", 28. July 2006, *http://www.iisd.org/pdf/2006/itn ecom.pdf*, last visited 1 October 2012.

[21] W. Shan, S..Zhang, 1051.

[22] M. Burgstaller, "European Law and Investment Treaties", *Journal of Interna tional Arbitration Law* 26/2009, 204; Commission, 'Remarks' in the draft 'Minimum Plat form on Investment for EU Free Trade Agreements', 28. July 2006, *www.iisd.org/pdf/2006/ itn ecom.pdf*, last visited 1 October 2012. Furthermore, gradual re allocations of compe tence amongst the EC and its Member States are far from an uncommon phenomenon. By way of example, the shift in competence with regard to the CCP. Today, the CCP is one of the EU's most important and dynamic fields of external relations. *See*, A. Dimopoulos, "The Common Commercial Policy after Lisbon: Establishing Parallelism Between Inter nal and External Economic Relations?", *Croatian Yearbook of European Law and Policy*,

In any event, with regard to foreign investment, the aforementioned parallelism between international investment law and Community law has gradually been changing into an increasing interaction and the EU's 'creeping exclusive competence', concluding with the Lisbon Treaty which finally confers upon the Union the exclusive power to regulate FDI with the Union.

## 3. POST-LISBON & RE-ALLOCATION OF COMPETENCE

On 1 December 2009, the Lisbon Treaty finally came into force. As noted in the Commission's 2010 Communication, investment presents itself as a new frontier for the CCP.[23] The Lisbon Treaty provides for the Union to contribute to the progressive abolition of restrictions on FDI. The EU's task is to develop an international investment policy that increases EU competitiveness and thus contributes to the objectives of smart, sustainable and inclusive growth.

Articles 206[24] and 207[25] of the Lisbon Treaty set the deck to what constitutes a shift in the vertical alignment of competences between Member States and the EU.

The Commission has also advanced that a common investment policy will benefit not only the EU, but the rest of the world. The EU,

4/2008, 110. However, since its inception in 1957, it has significantly changed in order to adapt to the new realities of international trade and economic relations. In fact, the idea of giving the EC exclusive competence in the field of commercial policy developed through the case law of the European Court of Justice (hereinafter the ECJ) and can be tracked down by examining systematic changes introduced by the Amsterdam Treaty, followed by the Nice Treaty. For an elaborate discussion on the evolution of the Common Commercial Policy, *see* R. Leal Arcas, "Exclusive or Shared Competence in the Common Commercial Policy: From Amsterdam to Nice", *Kluwer International Law* 2003, 3 14.

[23] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, To wards a comprehensive European international investment policy, 2010, *http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc 147884.pdf*, last visited 1 October 2012.

[24] Article 206 of the Lisbon Treaty, "*By establishing a customs union in accordance with Articles 28 to 32, t**he Union shall contribute**, in the common interest, to the harmonious development of world trade, the **progressive abolition of restrictions** on international trade and **on foreign direct investment**, and the lowering of customs and other barriers*." (emphasis added)

[25] Article 207(1) of the Lisbon Treaty, *"**The common commercial policy shall be based on uniform principles**, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, **foreign direct investment**, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action*." (emphasis added).

now with greater political leverage, might be able to push for a global investment policy – succeeding where international organizations have failed previously. What is more, a complete European investment policy might help in the development of a more balanced investment treaty regime.[26] The Lisbon Treaty is purporting to create a stable, sound and predicable environment for investors where investors are able to operate in an open, properly and fairly regulated business environment, both within the EU's borders and beyond.[27]

The inclusion of FDI in EU competence is undoubtedly an important step towards the creation of a comprehensive EU approach to trade and investment that reflects the nature of international economy in which trade and investment are inextricably linked.[28]

The Lisbon Treaty should therefore streamline trade policy by bringing all key policy issues within EU competence. However, the changes that the Lisbon Treaty will bring about in EU trade policy must be seen in the light of past practice and the broader economic and political factors shaping EU policy.

## 4. THE LISBON TREATY A SOURCE OF LEGAL UNCERTAINTY?

Notwithstanding the legitimate forces behind, and undeniable benefits of, a common investment policy, one must be cautiously optimistic when it comes to the possibilities of implementation of the Lisbon Treaty and its contribution to the further development of FDI within the EU.

The Union, equipped with new clouts, will be able to "simplify and streamline EU external trade policy" with the aim of "increasing EU competitiveness"[29] and "contributing to the progressive abolition of restrictions on foreign direct investment".[30] The integration of European law into international investment law mirrors the steadily increasing claim of competence by the EU in this field.[31]

Despite the fact that the EU's competences may not have come as a surprise and although the new allocation of competences may have been

[26] See W. Shan, S. Zhang, "From 'South North Contradiction' to 'Public Private Conflict': Revival of the Calvo Doctrine and New View of International Investment Law", Northwest Journal of International Law and Business, 27/2007, 631.

[27] Commission Communication, 2.

[28] S. Woolcock, "The potential impact of the Lisbon Treaty on European Union Trade Policy", *Swedish Institute for European Policy Studies*, 8/2008, 5.

[29] Commission Communication, 1.

[30] *Ibid.*

[31] M. Burgstaller, "European Law Challenges to Investment Arbitration", *The Backlash against Investment Arbitration,* 2010, 456.

well received by some, the central question is: whether or not the legal mechanisms enshrined in the Lisbon Treaty are suitable and sufficient for facilitating and upholding the EU's bold objectives. After this question is answered, the next logically presents itself: whether or not the EU will have enough political leverage to lead Member States down a new 'European' investment path.

Even though authorities have received news of the EU's increased competence with a positive outlook, others have called the transfer of powers the "latest episode in the European Commission's struggle to obtain a larger role in investment policy" and an "overhaul"[32] of the traditional BIT practice. As commentators have aptly purveyed: the Treaty provisions have the appeal of an outright earthquake, concealing more than they reveal,[33]generating as many questions as they do answers.[34]

Unfortunately, practitioners and scholars will struggle to find solace in the broad terms of the Treaty. As will be elaborated below, Articles 206 and 207 of the Lisbon Treaty leave considerable room for diverging interpretations and therefore legal uncertainty.

In other words, the inclusion of FDI within the scope of the CCP raises a number of questions: First, what is the extent of the Union's exclusive competence over FDI, i.e. what does the Treaty recognize as elements of FDI? Second, given the re-allocation of competence, what is the role of Member States henceforward? Have the EU Member States lost all their prerogatives when it comes to regulating the inward and outward flows of FDI? Third, what is the legal status of existing agreements concluded by the Member States?

### 4.1. The Treaty's Definition of FDI

If one were to glance at the provisions of the Lisbon Treaty that give the Union the power to regulate and determine the course of a new investment policy by granting the EU coveted exclusive competence, one might be surprised to find that the Treaty fails to define the scope of such

[32] Seattle to Brussels Network, Reclaiming Public Interest in Europe's International Investment Policy, EU Investmet Agreements in the Lisbon Era: A Reader, 2010, 7, *http://www.corporateeurope.org/sites/default/files/S2b%20investment%20reader%20%2050%20pages!.pdf*, last visited 1 October 2012.

[33] P. Nacimiento, "Who's A Respondent in Light of Art. 207 of the Lisbon Treaty?", *Kluwer Arbitration Blog*, *http://kluwerarbitrationblog.com/blog/2010/04/30/who%E2%80%99s a respondent in light of art 207 of the lisbon treaty/*, last visited 1 October 2012.

[34] K. Lalore, "EU Proposal: who will investors face off in future investment treaty claims?", *Kluwer Arbitration Blog*, *http://kluwerarbitrationblog.com/blog/2012/07/23/eu proposal who will investors face off against in future investment treaty claims*, last visited 1 October 2012.

competence.[35] Namely, the Treaty does not provide for a definition of what constitutes a 'foreign direct investment', thereby being mute on the scope of its competence thereto.

Nonetheless, whether a deliberate or accidental omission, it is highly unlikely that the Lisbon Treaty's failure to precisely determine and define the term 'foreign direct investment' will cause any meaningful commotion in practice – this merely means that the term will be defined in accordance with international and community law.

Thankfully, at an international level, both the International Monetary Fund and the OECD have defined FDI, and have characterized it as a lasting interest with a long-term relationship and influence.[36] Also, such definition has been reflected in the ECJ's interpretation of the term 'direct investment' (used in former Article 57(2) TEC, now Article 64(2) TFEU) in accordance with Directive 88/361/EEC.[37] Conveniently, the Commission in 2010 has come forth with its Communication clarifying what it considers to fall within the ambit of FDI.[38]

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[35] J. Kleinheisterkamp, "The Dawn of a New BIT Generation? The New European Investment Policy", Kluwer Arbitration Blog, *http://kluwerarbitrationblog.com/blog/2010/12/23/the dawn of a new bit generation %E2%80%93 the new european investment policy/*, last visited 1 October 2012.

[36] For example, see the OECD Benchmark Definition of Foreign Direct Investment, Fourth Edition 2008, 17, "Direct investment is a category of cross border investment made by a resident in one economy (the direct investor) with the objective of establishing a lasting interest in an enterprise (the direct investment enterprise) that is resident in an economy other than that of the direct investor. The motivation of the direct investor is a strategic long term relationship with the direct investment enterprise to ensure a significant degree of influence by the direct investor in the management of the direct investment enterprise. The "lasting interest" is evidenced when the direct investor owns at least 10% of the voting power of the direct investment enterprise. Direct investment may also allow the direct investor to gain access to the economy of the direct investment enterprise which it might otherwise be unable to do. The objectives of direct investment are different from those of portfolio investment whereby investors do not generally expect to influence the management of the enterprise."

[37] Council Directive 88/361/EEC, 24 June 1988 for the implementation of Article 67 of the Treaty, Official Journal L 178, "Investments of all kinds by natural persons or commercial, industrial or financial undertakings, and which serve to establish or to maintain lasting and direct links between the person providing the capital and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity. This concept must therefore be understood in its widest sense"; *see* Maffezini v. the Kingdom of Spain, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000.

[38] Commission Communication, "*Foreign direct investment (FDI) is generally considered to include any foreign investment which serves to establish lasting and direct links with the undertaking to which capital is made available in order to carry out an economic activity. When the investment takes the form of a shareholding this object presupposes that the shares enable the shareholder to participate effectively in the management of that company or in its control. This contrasts with foreign investments where there*

In conclusion, despite the obvious omission of the drafters of the Lisbon Treaty, it is doubtful that the definition of FDI will create problems in practice.[39]

### 4.2. Member States' Competence

Given the re-allocation of competences, policy-making in the realm of international investment has seeped through the fingers of the EU sovereign states into the grasp of the Union. Even though this transfer of powers has dramatic consequences, it is, as noted by authorities, fairly uncontroversial by now, even accepted by Member States,[40] that in future all agreements on investment will be negotiated and concluded by the EU.[41]

With the aim of clearing the ambiguity concerning Member States' obligations arising from existing BITs and with regard to Member States' position regarding the modification or conclusion of future (short-term) investment agreements, the European Commission has presented a Proposal for a Regulation of the European Parliament and of the Council Establishing Transnational Arrangements for Bilateral Investment Agreements Between Member States and Third Countries (hereinafter the Proposal), the text of which was adopted (finally) on 10 May 2011.[42]

The Proposal, in Article 7, stipulates that subject to further conditions, a Member State shall be authorized to enter into negotiations to amend an existing or to conclude new agreements relating to investment with a third country. Furthermore, where a State intends to enter into negotiations in order to amend an existing bilateral investment agreement with a third country or to conclude a new agreement with a third country relating to investment, it shall notify the Commission of its intentions in

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*is no intention to influence the management and control of an undertaking. Such invest ments, which are more often of a more short term and sometimes speculative nature, are commonly referred to as [portfolio investments]*."

[39] FDI will be associated with establishment and/or participation in new or exist ing undertakings via equity or security holdings which are characterized by the existence of a lasting link and managerial control of their activity. On the other hand, portfolio in vestments, and other categories of foreign investment (intellectual property rights, mone tary claims, etc.) are excluded from the EU's competence. *See*, Dimopoulos, (2008).

[40] J. Kleinheisterkamp, "The Next 10 Year ECT Investment Arbitration: A Vision for the Future From a European law perspective, Report for the SCC / ECT / ICSID Conference on "10 Years of Energy Charter Treaty Arbitration" 9 10 June 2011", Foreign Affairs Council meeting Luxembourg 2010, *http://www.consilium.europa.eu/uedocs/cms data/docs/pressdata/EN/foraff/117328.pdf*, last visited 1 October 2012.

[41] *Ibid*.

[42] Proposal for a Regulation of the European Parliament and of the Council estab lishing transitional arrangements for bilateral investment agreements between Member States and third countries, 2010, *http://trade.ec.europa.eu/doclib/docs/2010/july/ tradoc 146308.pdf*, last visited 1 October 2012.

writing.[43] Where a Member State intends to conclude a new agreement with a third country relating to investment, the Commission shall consult the other Member States within thirty days to determine whether there would be added value in having an agreement of the Union.[44]

Also, the Commission shall be kept informed of the progress and results throughout the different stages of negotiations and may request to participate in the negotiations between the Member State and the third country concerning investment. The Commission may participate as an observer in the negotiations between the Member State and the third country as far as the exclusive competence of the Union is concerned.[45]

In a nutshell, the EU offers Member States a transitional regime. Without stripping Member States of their competences entirely, the EU will keep a watchful eye on the activities in which Member States partake with regard to FDI.

However, in contrast with the fervour with which the EU usurped competence over FDI with the Lisbon Treaty, the manner in which the Commission's Proposal aims to slowly tackle Member States' authority in this domain seems somewhat insipid.

### 4.3. The Legal Fate of Existing BITs

As previously articulated, EU Member States have together concluded more than 1,100 BITs and account for more inward and outward FDI than any other trading entity. Therefore, in the context of the Lisbon Treaty – the question concerning the legal fate of existing BITs naturally poses itself.

The aforementioned Commission's Proposal addresses this issue by asserting that the existing agreements remain binding on the Member States, as a matter of public international law. However, the Commission goes on to state that in view of the entry into force of the Lisbon Treaty, Member States' international agreements concerning investment should be addressed from the perspective of the Union's exclusive competence on FDI.[46]

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[43] Proposal, Article 8(1).

[44] Proposal, Article 8(3). In addition, the Commission may authorize the opening of formal negotiations unless it concludes that the opening of negotiations would be in conflict with the law of the Union other than the incompatibilities arising from the allocation of competence between the Union and its Member States on foreign direct investment, or negotiations would not be in line with policies of the Union relating to investments; they undermine the objectives of negotiations already underway between the Union and the third country concerned; constitute a serious obstacle to the conclusion of future Union agreements with that third country relating to investment, Proposal Article 9.

[45] Proposal, Article 10.

[46] Proposal, 2. Also, the Proposal stipulates, "*In the absence of an explicit transitional regime in the TFEU clarifying the status of Member States' agreements, the present*

Therefore, if one were to follow the text of the Proposal, the EU would authorize the continued existence of investment treaties. However, the Commission's Proposal also purports to review all agreements in force between Member States and third countries, thereby assessing their compatibility with EU law.[47] Furthermore, the Proposal also states that the Commission will have to present the European Parliament and the Council with a report on the review of all the BITs concluded by Member States and their compatibility with EU legislation, within five years from the entry into force of the proposed Regulation.[48]

The Commission's pitch has already been attacked by authorities, with respect to the technical challenge of reviewing over a thousand BITs.[49] However, in light of the circumstances, maintaining the status quo in relation to existing BITs until the Union offers its own comprehensive investment policy, the Commission's proposition does not seem too wide of the mark.

However if, during the review of existing BITs, the Commission finds that existing BITs are incompatible with certain mandatory rules of EU law, then this presents itself as a slightly more delicate problem. [50]

## 5. CONCLUSION

Needless to say, in the era of globalisation and expansion of industry and trade, the Union's move to take the regulation of FDI in its own hands, *prima facia*, seems like a wise strategic decision. However, given the significance of the field of law it purports to regulate and the stakes (and stakeholders) involved with FDI, the Lisbon Treaty does not have seemed to have risen to the challenge.

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*proposal for a Council and Parliament Regulation will authorise the continued existence of all investment agreements currently in force between Member States and third countries*."

[47] Article 5 of the Proposal reads, "*The Commission shall review the agreements notified pursuant to Article 2, including by assessing, in particular, whether the agreements: (a) conflict with the law of the Union other than the incompatibilities arising from the allocation of competences between the Union and its Member States, or (b) overlap, in part or in full, with an agreement of the Union in force with that third country and this specific overlap is not addressed in the latter agreement, or (c) constitute an obstacle to the development and the implementation of the Union's policies relating to investment, including in particular the common commercial policy.*"

[48] Proposal, Article 5(3).

[49] J. Kleinheisterkamp, (2010).

[50] For a discussion on the infringement proceedings brought against these Member States, see K. Scholz, "The Long Goodbye The Commission's Infringement Proceedings against Austria, Denmark, Finland and Sweden for Incompatibilities in their BITs with the EC Treaty", Policy Papers on Transnational Economic Law 14/2005.

The current 'transitional' regime is unsatisfactory on a number of levels. For example, whilst on one hand, the Union, with the Lisbon Treaty, boldly strips Member States of their right to regulate FDI within their territory, it backtracks with its 2010 Communication and 2011 Regulation purporting to grant them the 'authority' to maintain the *status quo*.

Also if, as the ECJ has advanced in the infringement proceedings brought against Austria,[51] Finland[52] and Sweden,[53] the existing extra-EU BIT regime has been superseded by EU, the Union will have to prepare to endure an uproar from the international community (along with the displeasure of its own Member States). Of course, this could have been mitigated had the EU come up with a plausible transitional solution, but it seems to have lacked political leverage to do so. This is perhaps also a reason why the Commissions Proposal had only been adopted in 2011 or why an outline of the future common investment policy is still not on the horizon.

In conclusion, the Union's ambitions in the field of investment have been lost in the broad stipulations of Articles 206 and 207 of the Lisbon Treaty and the Commission's ex post efforts to find feasible solutions thereto. The global investment community will therefore have to wait patiently for their European partner to efficiently utilize its new competence and articulate its position. Unfortunately, one can't help but think that the Union has pulled the trigger on a common investment policy, reserving for itself exclusive competences, without being mindful of the strong throwback this would cause.

[51] Case C 205/06, EC Commission v. Austria of 3 March 2009*, http://eur lex.europa.eu/LexUriServ/LexUriServ.do?uri CELEX:62006J0205:EN:HTML*, last visited 1 October 2012.

[52] Case C 118/07. EC Commission v. Finland of 19 November 2009, *http://eur lex.europa.eu/LexUriServ/LexUriServ.do?uri CELEX:62007J0118:EN:HTML*, last visited 1 October 2012.

[53] Case C 249/06, EC Commission v. Sweden of 3 March 2009, *http://eur lex.europa.eu/LexUriServ/LexUriServ.do?uri CELEX:62006J0249:EN:HTML*, last visited 1 October 2012.

# INSTRUCTIONS TO AUTHORS

The *Belgrade Law Review (Annals of the Faculty of Law in Belgrade)* is an international, peer-reviewed journal. All submitted articles will be evaluated by two external reviewers.

Manuscripts should be submitted in electronic form to *anali@ius.bg.ac.rs*.

The Editor-in-Chief will, under normal circumstances, inform authors of the Editorial Board's decision within three months of the receipt of the submission. Articles are accepted for review on the understanding that they are not being considered concurrently by any other journal and that there is a serious commitment to publication. The Editorial Board does not hold themselves responsible for the views expressed by contributors.

Articles should not exceed 43,200 characters in length and a precise character count should be included with each article submitted. Articles exceeding the character limit will be returned for adjustment to the author prior to review..

An abstract of the article of maximum 100–150 words should be included together with 3–5 keywords suitable for indexing and online search purposes. The whole text, including references and abstracts, should be double-spaced and presented on one side of the paper only, with margins of at least one inch on all sides. Pages should be numbered consecutively throughout the paper. Authors should also supply a shortened version of the title, not exceeding 50 character spaces, suitable for the running head.

Authors are requested to ensure that their articles follow the editorial style and format adopted by the *Belgrade Law Review*. The citation format that conforms to the 18th edition of *The Bluebook: A Uniform system of Citation* – is also acceptable (*www.legalbluebook.com*). The Editorial Board reserves the right to adapt texts to the law review's style and format.

The title should be centred, in bold caps, font size 14. Subtitles should be centred on pages, recto and numbered (for example, 1.1., 1.1.1. etc.).

## REFERENCE STYLE

1. Books: first letter of the author's name (with a full stop after it) and the author's last name, title written in verso, place of publication in recto, year of publishing. If the page number is specified, it should be written without any supplements (like p., pp., f., dd. or others). The publisher's location should not be followed by a comma. If the publisher is stated, it should be written in recto, before the publisher's location.

Example: H.L.A. Hart, *Concept of Law*, Oxford University Press, Oxford 1997, 26.

1.1. If a book has more than one edition, the number of the edition can be stated in superscript (for example: $1997^{2}$).

1.2. Any reference to a footnote should be abbreviated and numbered after the page number.

Example: H.L.A. Hart, *Concept of Law*, Oxford 1997, 254 fn. 41.

2. Articles: first letter of the author's name (with a period after it) and author's last name, article's title in recto with quotation marks, name of the journal (law review or other periodical publication) in verso, volume and year of publication, page number without any supplements (as in the book citation). If the name of a journal is longer than usual, an abbreviation should be offered in brackets when it is first mentioned and used later on.

Example: J. Raz, "Dworkin: A New Link in the Chain", *California Law Review* 3/1995, 65.

3. If there is more than one author of a book or article (three at most), their names should be separated by commas.

Example: O. Hood Phillips, P. Jackson, P. Leopold, *Constitutional and Administrative Law*, Sweet and Maxwell, London 2001.

If there are more than three authors, only the first name should be cited, followed by abbreviation *et alia* (*et al.*) in verso.

Example: L. Favoreu *et al*., *Droit constitutionnel*, Dalloz, Paris 1999.

4. Repeated citations to the same author should include only the first letter of his or her name, last name and the number of the page.

Example: J. Raz, 65.

4.1. If two or more references to the same author are cited, the year of publication should be provided in brackets. If two or more references

to the same author published in the same year are cited, these should be distinguished by adding a,b,c, etc. after the year:

Example: W. Kymlicka, (1988a), 182.

5. If more than one page is cited from a text and they are specified, they should be separated by a dash, followed by a period. If more than one page is cited from a text, but they are not specifically stated, after the number which notes the first page and should be specified "etc." with a period at the end.

Example: H.L.A. Hart, 238–276.

Example: H.L.A. Hart, 244 etc.

6. If the same page of the same source was cited in the preceding footnote, the Latin abbreviation for *Ibidem* should be used, in verso, followed by a period.

Example: *Ibid.*

6.1. If the same source (but *not* the same page) was cited in the preceding footnote, the Latin abbreviation for *Ibidem* should be used, in verso, followed by the page number and a period.

Example: *Ibid.*, 69.

7. Statutes and other regulations should be provided with a complete title in recto, followed by the name of the official publication (e.g. official gazette) in verso, and then the number (volume) and year of publication in recto. In case of repeated citations, an acronym should be provided on the first mention of a given statute or other regulation.

Example: Personal Data Protection Act, *Official Gazette of the Republic of Serbia*, No. 97/08.

7.1. If the statute has been changed and supplemented, numbers and years should be given in a successive order of publishing changes and additions.

Example: Criminal Procedure Act, *Official Gazette of the Republic of Ser bia*, No. 58/04, 85/05 and 115/05.

8. Articles of the cited statutes and regulations should be denoted as follows:

Example: Article 5 (1) (3); Article 4–12.

9. Citation of court decisions should contain the most complete information possible (category and number of decision, date of decision, the publication in which it was published).

10. Latin and other foreign words and phrases as well as Internet addresses should be written in verso.

11. Citations of the web pages, websites or e-books should include the title of the text, source address (URL) and the date most recently accessed.

Example: European Commission for Democracy through Law, Opinion on the Constitution of Serbia, *http://www.venice.coe.int/docs/2007/CDL AD(2007)004 e.asp,* last visited 24 May 2007.

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*Annals of the Faculty of Law in Belgrade (Belgrade Law Review)* is the oldest Balkan academic law journal, having been founded in 1906 as *Archive for Legal and Social Sciences*. This law review has been published continuously in Serbian with abstracts in foreign languages. Its Editors-in-Chief have been the most prominent Serbian law professors and lawyers, such as Mihajlo Konstantinović, Milan Bartoš, Vojislav Bakić, Vojislav Simović, Obren Stanković, Dejan Popović, Miodrag Orlić, Danilo Basta and Sima Avramović. Since 2006, the law review has added one international edition annually.

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