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ПРАВНОГ ФАКУЛТЕТА У БЕОГРАДУ

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Dr Stefan Kirchner[*]

Katarzyna Geler-Noch[**]

COMPENSATION FOR VIOLATIONS OF THE LAWS OF WAR THE *VARVARIN* CASE BEFORE GERMAN AND INTERNATIONAL COURTS[***]

As has happened in many wars, during NATO's 1999 war against Yugoslavia innocent civilians became accidental targets. International Humanitarian Law (IHL) prohibits indiscriminate attacks, that is, attacks which do not distinguish between legitimate military targets and civilians. A NATO aircraft bombed the bridge in Var varin, resulting in the death of several civilians. Although the aircraft had not been German, family members of those who had been killed sued for compensation in Ger man courts on the basis of Germany's NATO membership. German law includes rules on compensation for illegal activities by public authorities. In the Varvarin case, German courts have continued to find that these rules are not applicable to armed conflicts. In autumn 2013, the German Federal Constitutional Court upheld this ju risprudence. This article shows the shortcomings of this approach as well as the gaps in current International Humanitarian Law concerning compensation for victims of violations of the laws of war.

Key words: *Germany. Varvarin. War. Humanitarian Law. Compensation.*

1. INTRODUCTION

On 30 May 1999, NATO aircraft operated in Yugoslavian Airspace during Operation "Allied Force". On this day, two NATO F-16 fighter

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planes bombarded the bridge over the Morava River in a small town of 4,000 with the name of Varvarin, located in Serbia, some 200 km north of Kosovo. A total of 10 civilians were killed and some 30 injured when the planes attacked the bridge in two waves in the early afternoon of that day. The first wave of attacks killed three people, among them 15 year old *Sanja Milenkovic*, the daughter of Prof. *Zoran Milenkovic*, the small town's mayor and a political enemy of *Slobodan Milosevic*. Although the bridge had been destroyed another attack followed three to six minutes later, killing seven. Among those killed in the second attack were local residents attempting to rescue the initial victims including the 76 year old priest *Milivoje Ciric*. At the time of the attacks, some 2,000 to 3,000 people were in the immediate vicinity of the bridge, many of them on a nearby market square for the Sunday market, and many others at the nearby church for the celebration of the religious holiday of the Holy Trinity. It appears as if Germany's air force is not directly responsible for the attacks, since Germany only used Tornado Aircraft in the 1999 war and the attack was conducted by F-16s, most likely American or British.[1]

Nevertheless, the plaintiffs brought the case before courts in Germany since the country not only supported Operation Allied Force but actively participated in it. Furthermore, the legal fees for the plaintiffs were paid by some 1,500 German citizens who donated the required funds.[2] Moreover, the mother of *Sanja Milenkovic*, a lawyer who became a spokesperson for the plaintiffs, grew up in Germany and still feels at home there.[3] The survivors and relatives claimed financial compensation from the Federal Republic of Germany for their loss which cannot be measured in money.[4]

2. THE ATTACK AT VARVARIN AS A VIOLATION OF INTERNATIONAL HUMANITARIAN LAW

Whichever party to the conflict actually conducted the attacks on Varvarin violated fundamental norms of International Humanitarian Law in doing so.

1 R. Jung, "Die Brücke von Vavarin", Frankfurter Rundschau Online, 14 October 2003, *www.fr online.de* (also available at *http://aldeilis.net/german/die bruecke von var varin/*), last accessed 21 March 2014.

2 *Ibid.*

3 *Ibid.*

4 On this case see also H. J. Heintze, "Durchsetzung eines menschenrechtlichen Mindeststandards im bewaffneten Konflikt", 25 Sicherheit und Frieden 2007, 43, 49 and N. Quenivet, "The Vavarin Case: The Legal Standing of Individuals as Subjects of Inter national Humanitarian Law", 2 Journal of Military Ethics 2004, 181.

2.1 Art. 48, 52 of the 1st Additional Protocol to the Geneva Conventions

According to Art. 48 of the 1st Additional Protocol to the Geneva Conventions, [5]armed attacks may only be directed against military targets. These are defined by Art. 52 of the same protocol as those "which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."[6] Aside from the fact that the bridge over the Morava River was only 4.5 meters wide[7] and was only capable of supporting a weight of eight tons, making it too small to allow for significant military use, it was located some 200 km north of the actual battlefields of Kosovo. While the bridge was referred to by NATO as a highway bridge,[8] the next highway is 15 km away, which in fact forced the Yugoslav Armed Forces to actively avoid the Varvarin area.[9] Therefore, the bridge over the Morava at Varvarin did not make an "effective contribution" to the military activities undertake by Yugoslav forces. Consequently, the bridge did not constitute a military target within the meaning of Art. 52 of the 1st Additional Protocol to the Geneva Conventions, making the attack a violation of Art. 48 of the 1st Additional Protocol. Even if the bridge had been used by the armed forces of Yugoslavia, the bombardment was also at odds with other norms of International Humanitarian Law.

2.2 The prohibition of disproportionate bombardment, Art. 51 (5) lit. b of the 1st Additional Protocol to the Geneva Conventions

The bombardment of the bridge over the Morava at Varvarin could have also constituted a disproportionate bombardment within the meaning of Art. 51 (5) lit. b of the 1st Additional Protocol to the Geneva Conventions because the attacks "may [have been] expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated". As of yet, it is unclear which military advantages could have been gained from bombarding the bridge. The word "anticipated" seems to indicate that prior knowledge of the bombarding party regarding the target at the time of the bombardment is required. But even if the pilots and weapons system officers had assumed

5 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, available online at *http://www.icrc.org/ihl/INTRO/470* last accessed 21 March 2014.

6 Art. 52 of the 1st Additional Protocol to the Geneva Conventions.

7 R. Jung, *ibid.*

8 *Ibid.*

9 *Ibid.*

that they were in fact bombarding a highway bridge, the fact that hundreds and thousands of people had assembled in the immediate vicinity of the bridge for the holiday must have been a clear warning as to the true nature of the bridge and the potential dangers for the civilian population resulting from attacking the bridge.

2.3 Art. 57 of the 1st Additional Protocol to the Geneva Conventions

Moreover, the bombardment amounted to a violation of Art. 57 of the 1st Additional Protocol to the Geneva Conventions, which in essence requires that "[i]n the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects."

3. THE OBLIGATION TO COMPENSATE FOR VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW

Art. 91 of the 1st Additional Protocol to the Geneva Conventions and Art. 3 of the 4th Hague Convention state that violations of provisions of the Geneva Conventions or the Additional Protocols, in this case the violation of Articles 48, 51 (5) lit. b and 57 of the 1st Additional Protocol to the Geneva Conventions, lead to liability of the "party to the conflict which violates the provisions of the Conventions or of this Protocol" to pay compensation and that it "shall be responsible for all acts committed by persons forming part of its armed forces." Art. 3 of the 4th Hague Convention has become part of the law of the land of the Federal Republic of Germany by virtue of Art. 25 of the Federal Constitution[10] (the *Grundgesetz* or GG for short[11]) and both the 4th Hague Convention[12] and the 1st Additional Protocol to the Geneva Conventions have been ratified by Germany.

4. GERMAN RESPONSIBILITY FOR ALLIED CONDUCT

But it was not the German air force which in fact bombarded the bridge in Varvarin. Yet, the German air force was involved in Operation Allied Force. Moreover, German-based AWACS Aircraft had a supportive

[10] Oberlandesgericht Köln, Case no. 7 U 167/97, Judgment of 27 August 1998, available online at *http://openjur.de/u/154971.html* last accessed 21 March 2014.

[11] Federal Gazette (*Bundesgesetzblatt*) 1949, 1.

[12] Convention (IV) respecting the Laws and Customs of War on Land and its an nex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 Oc tober 1907, available online at *http://www.icrc.org/ihl.nsf/INTRO/195* last accessed 21 March 2014.

role with regard to the aircraft employed for the actual bombardment. This raises the question of whether or not, and if yes, under which conditions, a state can be held liable for the wartime conduct of her allies. The wording of Art. 91 of the 1st Additional Protocol to the Geneva Conventions refers to the armed forces of a party to a conflict. The term "party" within the meaning of Art. 91 of the 1st Additional Protocol to the Geneva Conventions refers to states, rather than to international organisations such as NATO, since only states are parties to the convention. Yet this would mean that within an alliance of states, among which the respective treaty law IHL obligations differ considerably, the "dirty work" could be allocated to those states which have accepted less strict IHL obligations through international treaties. Therefore there is a necessity for a shared responsibility, at least in cases in which there is a unified and integrated command. Especially in cases where decision makers consider not the nationality of the employed forces, but rather their technical and military skills when deciding which tasks will be assigned to which force.

5. *LOCUS STANDI* OF INDIVIDUALS FOR CLAIMS ARISING OUT OF A VIOLATION OF INTERNATIONAL LAW

Yet, even if one assumes that Germany could be liable under Art. 91 of the First Additional Protocol to the Geneva Conventions for the unlawful conduct of its allies, the question arises again, whether individuals can bring such a claim before German courts. In the *Distomo* decision, concerning a massacre committed by German forces during the occupation of Greece in World War II, the *Bundesgerichtshof* (BGH), Germany's Federal Court of Justice, deliberately left the open the question of whether individual victims are still required to rely on their state to bring a claim for compensation for war crimes on their behalf.[13]

6. THE DECISION OF THE LANDGERICHT BONN[14]

The *Landgericht* (District Court) in Bonn,[15] sitting as the court of first instance in that matter, accepted the case as admissible[16] but denied

[13] Bundesgerichtshof, Case no. III ZR 245/98, Judgment of 26 June 2003, availa ble online at *http://openjur.de/u/66929.html* last accessed 21 March 2014.

[14] Landgericht Bonn, Case no. 1 O 361/02, Judgment of 10 December 2003, avail able online at *http://openjur.de/u/100649.html* last accessed 21 March 2014.

[15] The court in Bonn was the correct forum as the Federal Republic of Germany is represented in such cases by the Federal Ministry of Defense which retains its seat in Bonn rather than Berlin.

[16] Landgericht Bonn, *ibid.*

compensation based on both domestic and international law.[17] The court held that neither domestic German law nor international law provides a basis for the claims by survivors and relatives of victims of the Varvarin attack.[18] But by examining both German and international legal rules, the court produced a highly instructive ruling which touches upon many of the problems faced in various cases involving compensation claims for violations of International Humanitarian Law.

6.1 Claims based on International Law

The court denied the existence of norms of international law which provide for direct compensation for the plaintiffs.[19] The traditional, *i.e.* Westphalian, understanding of international law does not, in the words of the Bonn court, accept the individual to be a subject of international law, but only "grants indirect international protection".[20] Just like a society which is organised in a state is collectively responsible for violations of international law by the state,[21] only a collective can claim rights under international law.[22] Under the Westphalian system, a state which claims that international law was violated to the detriment of its citizen(s) does not claim a right of its citizen but its own right.[23] The individual is merely connected to the international legal system by the state, without being a subject of this legal system itself.[24] Although this traditional view can hardly be sustained in the light of the developments in the field of international human rights law in the last half century, the Bonn court in upholding this concept[25] remains in line with both the majority view on international law as well as the jurisprudence of Germany's Federal Constitutional Court, the *Bundesverfassungsgericht*.[26] Therefore, under this traditional understanding of international law, in general, an individual cannot claim damages under international law.[27] However, the court in Bonn also accepted the changes imposed on this traditional view by the

[17] *Ibid.*, no. 113 *et seq.*

[18] *Ibid.*, no. 114 *et seq.*

[19] *Ibid.*, no. 120.

[20] *Ibid.*, no. 121.

[21] Cf. A. Cassese, *International Law*, Oxford University Press 2001, 7.

[22] Landgericht Bonn, no. 121.

[23] *Ibid.*

[24] *Ibid.*

[25] *Ibid.*, no. 122.

[26] *Cf.* Bundesverfassungsgericht, Case no. 2 BvL 33/93, Order of 13 May 1996, BVerfGE (Collection of the Decisions of the German Federal Constitutional Court) 94, 315, 334, available online at *http://www.servat.unibe.ch/dfr/bv094315.html* last accessed 22 March 2014.

[27] Landgericht Bonn, no. 122.

development of International Human Rights Law in the UN era.[28] Nowadays individuals have become not only mere stakeholders but also holders of rights under international law who can enforce them within the frameworks offered by different International Human Rights documents, both on a global[29] and regional level, e.g. with the European Convention on Human Rights. But as has been held in the discussion surrounding Art. 36 of the Vienna Convention on Consular Relations (VCCR),[30] which was triggered by the cases *Breard*,[31] *LaGrand*[32] and *Avena*[33] before the International Court of Justice (ICJ) in The Hague and which eventually led to the U.S. withdrawal from the VCCR settlement procedure involving the ICJ,[34] individuals can also have rights under treaties not primarily intended to be Human Rights Treaties.[35] The court in Bonn followed the earlier jurisprudence of the German Federal Constitutional Court, the *Bundesverfassungsgericht*, that "as far as states create norms of international law to this effect, they can, through these norms, give or allocate rights or duties to an individual and thereby grant him or her partially the status of a subject of international law"[36] – by relating to the content of the norm in question and the states concerned. A true right of the individual under international law is created only if the states also offer a treaty-based procedure to enforce these rights against states.[37] Otherwise we are only talking about a right of state. Individuals can at best be (merely) beneficiaries, without being holders of these rights themselves.

[28] *Ibid.*

[29] For an overview on the UN system see A. F. Bayefsky, *The UN Human Rights Treaty System*, Transnational Publishers, Ardsley 2001 and A. F. Bayesky *How to com plain to the UN Human Rights Treaty System*, Transnational Publishers, Ardsley 2003.

[30] Vienna Convention on Consular Relations, 24 April 1963, available online at *https://treaties.un.org/doc/Publication/UNTS/Volume%20596/volume 596 I 8638 Eng lish.pdf* last accessed 21 March 2014.

[31] International Court of Justice, Case concerning the Vienna Convention on Con sular Relations (*Paraguay v. United States of America*), Order of 10 November 1998, I.C.J. Reports 1998, 426.

[32] International Court of Justice, LaGrand (*Germany v. United States of America*), Judgment of 27 June 2001, I.C.J. Reports 2001, 466.

[33] International Court of Justice, Avena and other Mexican Nationals (*Mexico v. United States of America*), Judgment of 31 March 2004, I.C.J. Reports 2004, 12.

[34] See J. Quigley, "The United States' Withdrawal from International Court of Justice Jurisdiction in Consular Cases: Reasons and Consequences", 19 Duke Journal of Comparative & International Law 2009, 263, 265.

[35] See S. Kirchner, "The Right to Consular Assistance: Is the Vienna Convention on Consular Relations Self Executing?", Social Science Research Network, 8 January 2008, available online at *http://ssrn.com/abstract 1081584* last accessed 22 March 2014.

[36] Landgericht Bonn, no. 123.

[37] *Ibid.*, Bundesverfassungsgericht BVerfGE 93, 315, 334.

At present, the most successful example of such a system has been the system created by the European Convention on Human Rights (ECHR),[38] which includes both the right to life (Art. 2 ECHR) and compensation rules (Art. 5 (5) ECHR).[39] Thus, relying successfully on the ECHR requires that the case in question fall within the jurisdiction of the respondent state. Based on the *Bundesgerichtshof*'s decision in the case concerning the World War II massacre in Distomo,[40] the *Landgericht* Bonn therefore denied the possibility for individuals to bring claims under international law.[41] The latter court also did not accept the idea that Art. 25 GG could provide for individuals to make a claim based on general rules of international law in case of violations of International Humanitarian Law[42]. In cases of IHL violations, international law therefore does not provide standing in German courts.

6.2 State liability claims

Plaintiffs in German courts therefore have to resort to rules of German law, in particular to the law of compensation for illegal activities attributable to the state (*Staatshaftungsrecht*). The Bonn court accepted that international law allows for claims under domestic law against a claimant‘s home state parallel to the claims brought by the home state on the international plane.[43] Nevertheless, it denied that there is a legal basis for such a claim under German law.[44]

6.3 Compensation claims based on constitutional rights

Fundamental or constitutional rights (*Grundrechte*) alone are also insufficient for the purpose of obtaining compensation before Germany‘s civil law courts since they lack legal basis for a claim beyond the protected right itself.[45]

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[38] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), 4 November 1950, European Treaty Series No. 5, available online at *http://www.echr.coe.int/Documents/Convention ENG.pdf* last ac cessed 22 March 2014.

[39] Landgericht Bonn, no. 124.

[40] Bundesgerichtshof, Case no. III ZR 245/98, Judgment of 26 June 2003, availa ble online at *http://lexetius.com/2003,1416* last accessed 22 March 2014.

[41] Landgericht Bonn, no. 124.

[42] *Ibid.*, no. 129 *et seq.*

[43] *Ibid.*, no. 133.

[44] *Ibid.*, no. 134.

[45] *Ibid.*, no. 135.

6.4 The German law of torts

The court furthermore rejected claims based on § 823 of the Civil Code (*Bürgerliches Gesetzbuch* (BGB)[46]), the cornerstone rule of the German law of torts, due to the fact that liability was to be based on the conduct of a state official.[47] The court specifically referred to an earlier decision by the *Bundesgerichtshof* in which the latter had dealt with the issue and had drawn the line between the law of torts and the law of state liability.[48]

6.5 The German law of state liability and International Humanitarian Law

The court denied claims based on the law of state liability. It stated that in cases involving armed conflicts domestic law of state liability disappears behind International Humanitarian Law.[49] For the time of hostilities, many peacetime rules become suspended[50] and all questions surrounding the responsibility for the outbreak of hostilities and the legal questions stemming from the use of force are to be answered only by international law.[51] Consequently, all questions of compensation regarding the use of force are questions of international law.[52] On the national level, according to the Bonn court, claims require a codified legal basis in order to be successful.[53] The fact that Art. 74 para. 1 GG sees a difference between civil law[54] and the law concerning compensation for victims of war[55] indicated to the court that war compensation cannot be based on civil law, including tort and state liability law.[56] Although one can understand Art. 74 para. 1 no. 10 GG to include compensation for future conflicts,[57] this interpretation appears to be adhering very strictly to the

[46] Bürgerliches Gesetzbuch, 18 August 1896, as promulgated on 2 January 2002, last changed on 1 October 2013, available online at *http://www.gesetze im internet.de/ bundesrecht/bgb/gesamt.pdf* last accessed 22 March 2014.

[47] Landgericht Bonn, no. 135.

[48] Bundesgerichtshof, Case no. III ZR 40/95, Judgment of 13 June 1996, Neue Juristische Wochenschrift 1996, 3208.

[49] Landgericht Bonn, no. 135.

[50] *Ibid.*

[51] *Ibid.*

[52] *Ibid.*

[53] *Ibid.*, no. 136.

[54] Art. 74 para.1 no.1 GG.

[55] Art. 74 para. 1 no. 10 GG.

[56] *Cf.* Landgericht Bonn, no. 137.

[57] C. Pestalozza, *Article 74*, in: H. von Mangoldt / F. Klein / C. Pestalozza, *Das Bonner Grundgesetz*, Vol. 8, Verlag Franz Vahlen, Munich 1996[3], Article 74, margin no. 438.

wording of the norm. From the perspective of German courts: too strictly. The history of the *Grundgesetz*, which was created in the wake of the Second World War, on the other hand seems to indicate that the focus of Art. 74 para. 1 no. 10 GG was indeed the question if the states or the federal republic had the legislative competence to deal with the question of wartime compensation with regard to World War II, which was a pressing issue for post-war West Germany at the time the *Grundgesetz* entered into force in 1949. Accordingly, for the court in Bonn the narrow view added to the opinion that the law of state liability is not applicable in armed conflicts.

6.6 Interim Conclusion

Since the court did not find that there was a legal basis for any of their claims it did not even have to examine whether the requirements of the claims made on the ground of law of torts or the law of state liability were given and consequently the plaintiffs were denied compensation by the *Landgericht* Bonn.

7. APPEAL COURTS

The *Oberlandesgericht*, that is, the regional Court of Appeals, in Cologne upheld the Bonn court's ruling[58] and the *Bundesgerichtshof*, Germany's Federal Court of Justice, decided in Fall 2006 that neither German nor International Law would provide a legal basis for compensation.[59]

8. THE DECISION OF THE GERMAN FEDERAL CONSTITUTIONAL COURT 2013

On 13 August 2013, the German Federal Constitutional Court (*Bundesverfassungsgericht*) finally ruled on the matter.[60] While focusing on procedural issues, the judges denied a right to compensation[61] and

[58] Oberlandesgericht Köln, Case no. 7 U 7/04, Judgment of 28 July 2005, availa ble online at *http://openjur.de/u/112612.html* last accessed 22 March 2014.

[59] Bundesgerichtshof, Case no. III ZR 190/05, Judgment of 2 November 2006, available online at *http://juris.bundesgerichtshof.de/cgi bin/rechtsprechung/document.py?Gericht bgh&Art en&nr 38105&pos 0&anz 1* last accessed 22 March 2014.

[60] Bundesverfassungsgericht, Case no. 2 BvR 487/07, Order of 13 August 2013, available online at *http://www.bverfg.de/entscheidungen/rk20130813 2bvr266006.html* last accessed 22 March 2014.

[61] *Ibid.*, no. 38 *et seq.*

ruled, based on a few pieces of academic literature,[62] that there is no such right of individual victims in international law.[63]

The disappointingly short treatment the issue at stake received in the *Bundesverfassungsgericht*'s decision, though, indicates that the view described here appears to be fairly set in stone for German judges. However, the political pressure to provide compensation, also for older cases, is increasing.[64]

The question which the courts have failed to address in detail is whether there is a new rule of customary international law to the effect that States are directly liable towards individual victims for violations of International Humanitarian Law. So far, many States appear reluctant to accept such a legal obligation. Payments to victims of U.S. actions in Iraq or Afghanistan,[65] for example, have usually been made *ex gratia*, without accepting an obligation to compensate e.g. for damage to homes caused by U.S. troops operating there. Right now it is questionable whether there is already a new rule of customary international law[66] to the effect that compensation is owed to the victim. This question, however, should have been answered by the *Bundesverfassungsgericht*. The Federal Constitutional Court will take academic literature into account. When it comes to a question of customary international law, however, merely relying on academic literature which is already several years old is not enough. *Iura novit curia*, the principle that the Court knows the law, also applied here. The Federal Constitutional Court should have investigated the existing state practice, and in particular the question of whether or not the practice of States which provide compensation in similar cases is supported by a corresponding *opinio juris*.

[62] *Ibid*., no. 43.

[63] *Ibid.*

[64] S. Kirchner, *Völkerrechtliche Immunitäten und die Frage der Entschädigung für Verletzungen des Humanitären Völkerrechts im Kontext des Globalisierungsdiskurses*, Grin Berlag, Munich 2011, 58.

[65] See e.g. D. I. Grimes / J. Rawcliffe / J. Smith (eds.), *2006 Operational Law Handbook*, The Judge Advocate General's Legal Center and School, International and Operational Law Department, Charlottesville 2006, 155; United States of America, Code of Federal Regulations, Title 32, Subtitle A, Chapter V, Subchapter B, Part 536, Subpart J, Section 536.145 (32 CFR 536.145), available online at *http://www.law.cornell.edu/cfr/text/32/536.145* last accessed 22 March 2014; United States Government Accountability Office, *Report to Congressional Requesters, Military Operations The Department of Defense's Use of Solatia and Condolence Payments in Iraq and Afghanistan*, GAO, Wash ington D.C. 2007, available online at *http://www.gao.gov/new.items/d07699.pdf* last ac cessed 22 March 2014.

[66] The *Bundesverfassungsgericht*, no. 43, concludes that at this time there is no such rule of customary international law but does not exclude its potential emergence for the future.

9. CONCLUSIONS AND OUTLOOK

According to German courts, only states, not individuals, can claim compensation against other states for violations of the laws of war. In Germany therefore, the courts maintain an old fashioned view which seriously undermines the position of individuals in international law and is not in line with the developments of international law since 1945. It is therefore to be hoped that the courts will abandon this conservative view in the future and open the way for at least some form of compensation for victims of violations of the laws for war. Leaving the legal situation as it is can only be considered unsatisfactory. As a nation with a rich history in the legal sciences, Germany cannot afford to stay behind current developments but should set the pace in times of change. So far, German courts seem unwilling to take up this task. However, courts can only make decisions when cases are brought before them. At the end of the day, it is the lawmakers and those who elect them who have to change the course.

The fact that German armed forces are deployed under EU, NATO and UN mandates around the world makes it likely that sooner or later German forces will again cause damage to civilians. Germany could remedy the situation by establishing a norm in domestic law to the effect that compensation is paid for intentional violations of the laws of war. In doing so, Germany could aid victims of war crimes worldwide by contributing to the development of a future norm of customary international law which would provide for compensation for war crimes victims outside Articles 75[67] and 79 of the Rome Statute.[68]

[67] Article 75 Rome Statute, entitled "Reparations to victims", reads as follows: "1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, deter mine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting. 2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79. 3. Before making an order under this article, the Court may invite and shall take ac count of representations from or on behalf of the convicted person, victims, other inter ested persons or interested States. 4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1. 5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article. 6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law." More information on the work of the Trust Fund cre ated under Article 79 Rome Statute and mentioned in Article 75 para. 2 Rome Statute is available online at *http://www.trustfundforvictims.org/* last accessed 21 March 2014.

[68] Rome Statute of the International Criminal Court, 17 July 1998, available on line at *http://www.icc cpi.int/nr/rdonlyres/ea9aeff7 5752 4f84 be94 0a655eb30e16/0/rome statute english.pdf* last accessed 21 March 2014.

CERIF: S142, S150

Dr Milenko Kreća*

THE *RES JUDICATA* RULE IN JURISDICTIONAL DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE

The author discusses the effects of the res judicata rule as regards jurisdictional decisions of the International Court of Justice. He finds that there exists a special position of a judgment on preliminary objection in respect to both aspects of the res judicata rule its binding force and finality. A perception of distinct relativity of a jurisdictional decision of the Court, expressing its interlocatory character pervades, in his opinion, the body of law regulating the Court's activity. Preliminary objections as such do not exhaust objections to the jurisdiction of the Court, as evidenced by non preliminary objections to the jurisdiction of the Court giving rise to the application of the principle compétence de la compétence understood in the narrow sense. With regard to the binding force of a judgment on preliminary objections, it does not create legal obligations stricto sensu. The author finds that the relative character of jurisdictional decisions of the Court as compared with a judgment on the merits is justified on a number of grounds.

Key words: *Res judicata*. *Preliminary objections*. *Binding force*. *Finality*.

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1. GENERAL CONSIDERATIONS IN RESPECT TO THE *RES JUDICATA* RULE

The expression *res judicata* has more than one meaning. It is used to mean an issue decided by a court of law;[1] a judgment which cannot be refuted by ordinary legal vehicles;[2] and, also, a decision which is immutable and irrevocable.[3]

The broad use of the expression *res judicata* could be attributed to confusion about the very quality of a judicial decision and its effects both subjective and objective. Occasionally and especially as regards some types of judgments, the difference between irrefutability and irrevocability is not taken into account. If bearing in mind the absence of the ordinary legal vehicles provided by the Statute and the Rules of Court to a dissatisfied party for overturning a judgment, it could be said that in general the judgments of the Court are irrefutable. It could not however be said that they are irrevocable as well, owing not only to the rule on revision embodied in Article 61 of the Statute, as an extraordinary legal vehicle, but also due to some other judicial vehicles that exist in the law of the Court, such as the principle of *compétence de la compétence* in regard to jurisdictional issues as well as non-preliminary objections to the jurisdiction of the Court.

Two components may be discerned in the substance of *res judicata* as provided in the Statute of the Court:

(i) Procedural, which implies that: “The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party” (Art. 60); and

(ii) Substantive, according to which: “The decision of the Court has no binding force except between the parties and in respect of that particular case.” (Art. 59).

The primary effect of *res judicata* in the procedural sense is claim preclusion – meaning that a future lawsuit on the same cause of action is precluded *(non bis in idem)*, whereas the effect of *res judicata* in the substantive sense is mainly related to the legal validity of the Court’s decision as an individualization of objective law in the concrete matter – *pro veritate accipitur* – and, also, to the exclusion of the application of the principle of *stare decisis.*

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[1] Maritime Delimitation and Territorial Questions between Qatar and Bahrain, *I.C.J. Reports 2001*, para. 138.

[2] Corfu Channel Case, *I.C.J. Reports 1949*, pp. 244, 248.

[3] Case Concerning the Application of the Convention on the Prevention and Pun ishment of the Crime of Genocide, *I.C.J. Reports 2007*, para. 120.

The two components of *res judicata* – procedural and substantive – do not necessarily go hand in hand in each particular case. Each decision of the Court – be it judgment or order – is binding upon the parties, although not in an identical way, but such characteristics of the decision of the Court are not necessarily followed by its finality.

The relationship between these two components of *res judicata* is not static and *a priori* defined, because it reflects the balancing power of the considerations underlying the procedural and substantive aspects of *res judicata* rule, respectively.

The considerations underlying the substantive aspect of *res judicata* essentially protect the authority of the Court as a court of law and the legitimacy of its decisions. Hence, it is possible to say that the binding force of the Court's decisions derives from the very nature of the judicial function, irrespective of the nature and content of a Court's decision. As the Court established in the *Northern Cameroons* case[4], the effect of *res judicata* also extends to the judgment of the Court establishing the impossibility of changing the created legal situation.

Underlying *res judicata* in the procedural sense are, in fact, considerations of legal security and predictability combined with economy of the judicial process.

The distinction between the characteristics of a judicial decision and its effect derives from contrasting *res judicata* in its abstract normative meaning with its application within the body of law regulating the judicial activity of the Court, i.e. its legal meaning *in casu*.

Although it is a rule of fundamental importance, forming part of the legal system of all civilized nations, *res judicata* is certainly not a fetish of, or seen as a *deus ex machina* by, courts of law, including the International Court of Justice.

The *res judicata* rule operates within the law that the Court applies in parallel, with other rules having an objective nature. In other words, the *res judicata* rule, just like other fundamental rules governing judicial activity of the Court, is only a part, however important it may be, of the normative milieu in which the Court operates and which, as a whole, determines the effect of a Court's decision. A possible effect that the other rules of an objective nature have upon *res judicata* might be summarized as follows: "Finality itself...is rather a plastic term that need not prohibit re-examination."[5] It seems clear that revision in accordance with the conditions specified in Article 61 of the Statute "constitutes direct exception to the principle *res judicata*, affecting the validity of a final judgment" [6].

[4] Nothern Cameroons Case, *I.C.J. Reports 1963*, p. 38.

[5] M. Reisman, *Nullity and Revision*, 1974, 341.

[6] B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 1953, 372.

It is equally true that the operation of the principle of *compétence de la compétence* and non-preliminary objections to the affirmed jurisdiction of the Court may result in a reversal of one sort of Court judgment, i.e., judgments on preliminary objections.

In that regard, none of the legal vehicles designed to challenge or capable of challenging a matter already decided derogate the existence of the *res judicata* rule as such, for they are based on the authority of the law which the Court applies in its totality and are made operational in the form of a binding decision by which the previous decision of the Court is repudiated – *judicum posterior derogat priori*. As the effects of *res judicata* attach only to decisions brought *lege artis*, in accordance with the rules, procedural and substantive, of the law applied by the Court, it could be said that the exceptions to the finality of a Court judgment constitute a part of the substance of *res judicata*.

Consequently, the finality of the Court's judgments within the law applied by the Court may be relative or absolute. Only for the latter can it be said that finality is tantamount to *res judicata* in terms of irrevocability.

The judgment *(sententia)* and *res judicata* in the sense of a final and irrevocable decision of the Court obviously are not identical notions. The judgment as such is *res judicans* while *res judicata est causa sinae finem controversiae accepit*.

As a judicial act, every judgment of a court of law has a potential of *res judicata* in terms of irrevocability which may materialize or not, depending on the outcome of procedures and weapons designed to challenge the decision of the court. So, the intrinsic quality of *res judicata* is, in fact, the end point in the development of the authority which is inherent in every judgment, the point in which *jugement passe en force de la chose jugée*, judgment becomes enforceable.

2. RES JUDICATA AS REGARDS JURISDICTIONAL DECISIONS

The full effect of the *res judicata* rule is in principle attached to "a final decision of an international tribunal"[7]. In his separate opinion in the *Fisheries Jurisdiction* case, Judge Waldock stated, "[u]nder Article 60 of the Statute the Judgment is 'final and without appeal'. It thus constitutes a final disposal of the case brought before the Court by the Application of 14 April 1972".[8]

[7] Permanent Court of Arbitration (*Trail Smelter* case), *Reports of Interna tional Arbitral Awards (RIAA)*, Vol. III, pp. 1950 1951.

[8] Fisheries Jurisdiction Case, *I.C.J. Reports 1974*, p. 125, para. 46). A.V. Free man, *International Responsibility of States for Denial of Justice*, 1938, 975; B. Cheng, 337; G. Schwarzenberger, *International Law*, I, 1949, 454 455.

However, it does not follow *a contrario* that the Court's judgments on preliminary objections are excluded from the scope of Articles 59 and 60 of the Statute of the Court. Such an interpretation would obviously run counter to the general determination made in these Articles.

It appears that the effects of judgments on preliminary objections, or at least some types of judgment on preliminary objections, with respect to both their binding force and finality, are of a specific character distinguishable to some extent from the effects of judgments on the merits of the case.

The meaning of the characterization "final" in regard to a judgment on a preliminary objection lies solely in the fact that, after it is pronounced, all the parties are precluded from raising any preliminary objections whatsoever leading to revival or restitution of the preliminary objection proceeding, as provided for in Article 79 of the Rules of Court.

But a preliminary objection as such is not the only legal vehicle in the body of law of the Court designed to challenge a decision. Therefore, it is difficult to say that a judgment on the preliminary objections raised by a party to a dispute before the Court puts a final end to the issue of jurisdiction, so that the issue of jurisdiction can never be raised. In the jurisprudence of the Court, and on the basis of Article 79, paragraph 1, of the Rules, the notion of non-preliminary objection to the jurisdiction of the Court has developed, which proves, by itself, that the notion of objection to jurisdiction is broader than the notion of preliminary objection. The fundamental principle *compétence de la compétence* may also give rise to reconsideration of the jurisdictional decision taken.

As long as it is the *functus officio* in the case, the Court, as a court of law, has the inherent power to re-open and reconsider any issue of law and fact decided. That power would be devoid of substance if not accompanied by the power of the Court to reverse its earlier jurisdictional decision under special circumstances.

The uncritical ascribing of immutability to every judgment is fetishist and may find a model only in some long-abandoned decisions under Langobardic law[9]. Since the Roman Law (in the Roman Law the character of *res judicata* could be given only to final decisions *in meritum*[10]), the solution has been adopted that the authority of *res judicata* belongs, as a rule, only to decisions based on the merits of a case. For instance, in French law, decisions on incidental questions may not acquire the *autorité de la chose jugée*, unless that is indispensable for the inter-

[9] Capitula 370 Edictum Langobardorum stipulated that an adjudicated case *semper in eadem deliberatione debeant permanere*, although there existed the possibil ity of its rejection by a higher instance. G. Pugliese, *Giudicato civile*, Enciclopedia di diritto XVI, 1969, 158.

[10] *Ibid.*, 752. M. Kaser, *Das römische Zivilprozessrecht*, MCMLXVI, 504.

pretation of the *dispositifs* of the decision in *meritum* or they are its "*soutien nécessaire*".[11]

The Italian judiciary also tends to perceive *res judicata* as covering the solution of the dispute which the parties submitted to the court.[12] Paragraph 322 of the German Zivilprozessrechnung (Materielle Rechtskraft) states that only those decisions which on the demand *(Anspruch)* which is stipulated in the accusation or counter-accusation may be effective.

In English law as well, *res judicata* indicates the final judicial decision adopted by the judicial tribunal competent for the *causa*, or the matter in litigation.[13] Also, the existence of the competent jurisdiction is considered a condition of validity of every *res judicata*.[14]

Therefore, the view that the application of *res judicata* is objectively limited to the issues decided by the final judicial decision is dominant in the law of civilized nations.

In that regard three types of judgments on preliminary objections may be distinguished:

– Judgments by which a preliminary objection, irrespective of its nature, is accepted and the dispute *ipso facto* ended;
– Judgments by which the objection is rejected and the Court is declared competent to entertain the merits of the case; and
– Judgments by which a preliminary objection raised is determined to be an objection which does not possess an exclusively preliminary character.

The effects of *res judicata,* such as those characterizing a judgment on the merits of a case, are possessed only by those judgments on preliminary objections by which an objection is accepted. In contrast to the other two remaining jurisdictional decisions, which are both constituent parts of the pending case, this kind of jurisdictional decision puts an end to a case, thus assuming the full effects of the *res judicata* rule attaching to a final judgment in the case. There are certain differences as regards *res judicata* effects between the two remaining kinds of judgments on preliminary objections, on the one hand, and judgments on the merits, on the other.

The difference in finality between jurisdictional decisions, on the one hand, and decisions on the merits, on the other, is, in principle, quan-

11 R. Perrot, *Chose jugée*, *Répertoire de procédure civile et commerciale*, 1955, 1, Nos. 8, 45, 78 87; J. Vincent, *Procédure civile*, 1978, No. 76, 98.

12 G. Pugliese, 834.

13 Bower, Turner, Handley, *The Doctrine of Res Judicata*, 1969, II, 1; Walker and Walker, *The English Legal System*, 1885, Vol. 6, 589.

14 Bower, Turner, Handley, 92.

titative rather than qualitative in nature. The finality of jurisdictional decisions is more relative owing to a larger number of legal weapons by which they can be challenged. It is reflected in the fact that a jurisdictional decision may be challenged not only through a revision proceeding under Article 61 of the Statute but also in the further course of the proceedings and by a non-preliminary objection, i.e., by an objection which is raised to the Court's jurisdiction[15] after the preliminary objection procedure has been completed by the delivery of the judgment.

In the practice of international courts, in particular that of the International Court of Justice, this difference assumes qualitative proportions. Reversal of judgments on the merits, as opposed to jurisdictional decisions, is unknown in the jurisprudence of the International Court of Justice, unlike that of arbitration courts[16].

The question as to whether the tribunal is irrevocably bound by its preliminary objection judgment was raised for the first time in the *Tiedemann* case (1926) before the Polish-German Mixed Arbitral Tribunal.

Sedes materiae of the matter, the Tribunal explained succinctly and convincingly:

> "the Tribunal considers that, in the interests of legal security, it is important that a judgment, once rendered, should in principle be held to be final.
>
> However, the question takes on a special complexion when the preliminary judgment rendered is a judgment upholding the Tribunal's jurisdiction and the latter finds subsequently, but prior to the judgment on the merits, that in fact it lacks jurisdiction. In such a case, if it were obliged to regard itself as being bound by its first decision, it would be required to rule on a matter which it nevertheless acknowledges to stand outside its jurisdiction. And when – as in the instant case – it has in the meantime ruled that it has no jurisdiction in cases of the same nature, it would totally contradict itself by nevertheless ruling on the merits, and it would expose itself to the risk that the respondent State might take advantage of the Tribunal's own acknowledgment of its lack of jurisdiction, in order to refuse to execute its judgment . . .
>
> In other words, in order to remain faithful to the *res judi cata* principle, it would have to commit a manifest abuse of authority."[17]

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[15] The word "jurisdiction" is used in its generic sense comprising both general, i.e., *locus standi in judicio*, and special jurisdiction.

[16] See J. L. Simpson, M. Fox, *International Arbitration Law and Practice,* 1959, 250 *et seq.*

[17] *Von Tiedemann* v. *Polish State, Rec. TAM*, t. VI, pp. 997 1003; see also CR 2006/44, Varady, translation.

The principle that a court of law hearing a case which has proceeded beyond a judgment on preliminary objections is not irrevocably bound by that judgment has also been confirmed by the jurisprudence of the Court.

In the *Nottebohm* case (Preliminary Objections) the Court rejected by its Judgment of 18 November 1953 Guatemala's preliminary objection to its jurisdiction and resumed proceedings on the Merits[18]. Guatemala, however, raised a number of objections to admissibility in its Counter-Memorial, in its Reply and in the course of the oral proceedings on the merits, but treated them as subsidiary to the subject of the dispute. In its Judgment of 6 April 1955, the Court accepted one of the objections, which related to the admissibility of Liechtenstein's claim given that at the time of naturalization no "genuine link" had existed between Nottebohm and Liechtenstein.[19]

The *Nottebohm* case can be taken as an example of reversal of the preliminary objection judgment upon a non-preliminary objection raised by the Respondent.

On the other hand, the *South West Africa* cases (Second Phase) illustrate the pattern of reversal of the judgment on preliminary objections by action of the Court *proprio motu*.

In the preliminary objections phase[20], the Court rejected four South African objections, among others the objection concerning the standing *(locus standi)* of the applicant as well as its interests. South Africa pointed out, *inter alia*, that:

> "*Secondly*, neither the Government of Ethiopia nor the Government of Liberia is 'another Member of the League of Nations', as required for *locus standi* by Article 7 of the Mandate for South West Africa; *Thirdly*, ...more particularly in that no material interests of the Governments of Ethiopia and/or Liberia...are involved therein or affected thereby".[21]

In the merits phase the Court returned to the determination made in its 1962 Judgment and found that, in fact, the applicants did not have standing in the proceedings[22]. Namely, in its Judgment on Preliminary Objections of 21 December 1962, the Court established *inter alia* that:

> "*For the manifest scope and purport of the provisions of this Article indicate that the Members of the League were under*

[18] Nottebohm Case, *I.C.J. Reports 1953*, p. 124.

[19] Nottebohm Case, *I.C.J. Reports 1955*, pp. 4 65.

[20] South West Africa Cases (Second Phase) *I.C.J. Reports 1962*, p. 319.

[21] *Ibid.*, p. 327.

[22] South West Africa Cases (Second Phase) *I.C.J. Reports 1966*, pp. 36 38.

stood to have a legal right or interest in the observance by the Mandatory of its obligations both toward the inhabitants of the Mandated Territory, and toward the League of Nations and its Members",

and that:

"Protection of the material interests of the Members or their nationals is of course included within its compass, *but the well being and development of the inhabitants of the Mandated territory are not less important*".[23]

In essence, the Court explained the reversal of its previous finding by describing the nature of the decision on preliminary objection. The Court stated *inter alia:*

"As regards the issue of preclusion, the Court finds it unnecessary to pronounce on various issues which have been raised in this connection, such as whether a decision on preliminary objection constitutes a *res judicata* in the proper sense of that term, whether it ranks as a 'decision' for the purposes of Article 59 of the Court's Statute, or as 'final' within the meaning of Article 60. *The essential point is that a decision on a preliminary objection can never be preclusive of a matter appertaining to the merits, whether or not it has in fact been dealt with in connexion with the preliminary objection.*"[24]

However, reasoning further about the preclusive effect of the 1962 Judgment, the Court characterized – albeit indirectly – jurisdictional decisions, finding that:

"Since *decisions of an interlocutory* character cannot prejudge questions of merits, there can be no contradiction between a decision allowing that the Applicants had the capacity to invoke the jurisdictional clause...*and a decision that the Applicants have not established the legal basis of their claim on the merits*." [25]

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[23] South West Africa, Preliminary Objections, Judgment, *I.C.J. Reports 1962*, pp. 343 344; emphasis added).

[24] South West Africa Cases (Second Phase) *I.C.J. Reports 1966*, pp. 36 37, para. 59; emphasis added.

[25] *Ibid.*, p. 38, para. 61; emphasis added.

[26] *Ibid.*, pp. 36 38.

The legal basis for reconsideration of a preliminary objection judgment and, possibly, a reversal of an affirmative finding on jurisdiction, lies in the inherent power of the Court to determine its own jurisdiction (the principle of *compétence de la compétence*), in both its narrow and broad meanings.

In the narrow sense, as expressed in Article 36, paragraph 6 of the Statute, the Court makes jurisdictional decisions in cases of disputes between the parties as regards its jurisdiction. Jurisdictional decisions of the Court under Article 36, paragraph 6, may be either of two types: judgments on preliminary objection raised in accordance with Article 79 of the Rules of Court; and decisions taken upon non-preliminary objection. Decisions on non-preliminary objections are typically taken in phases of the proceedings other than the preliminary objection stage, generally in the phase which should be on the merits and which is determined in the practice of the Court to be a judgment on jurisdiction (*Nottebohm* case) or simply a Judgment in the Second Phase (*South West Africa* cases). The real meaning of the last expression is in fact the second jurisdictional phase, given that the judgment upon preliminary objection was adopted previously.

However, as commonly observed, the Court is bound to remain attentive to the issue of jurisdiction independently from the actions of the parties in the litigation. The Court achieves this by application of the principle *compétence de la compétence* in its wider form[27] as the basis for *proprio motu* action of the Court.

"Remaining attentive" as such, without proper action of the Court, has no practical effect on the fundamental question – whether the Court has jurisdiction *in casu*. The Court, bearing in mind *ex officio* its competence from the moment the proceedings are begun until their end, undertakes various decisions in that regard. Specifically, the Court's *compétence de la compétence:*

> "is not limited to verifying in each case whether the Court can deal with the merits...By extending the scope of the power in issue *[compétence de la compétence]* to all matters within the incidental jurisdiction of the Court, the Court has established this power as the most pre-preliminary function the Court undertakes."[28]

The very sensing of the Court as a first step of a procedural nature implies the operation of the principle *compétence de la compétence* by *proprio motu* action of the Court. The need to resort to the principle *compétence de la compétence* results directly from the fact that the seisin of

[27] Nottebohm case, *I.C.J. Reports 1953*, p. 120.

[28] I. Shihata, *The power of the International Court to determine its own jurisdic tion: compétence de la compétence*, 1965, 41 42.

the Court is not the automatic consequence of the proper actions of the parties to a dispute, and the seisin of the Court is not a pure fact but a judicial act linked to the jurisdiction of the Court.[29]

Without the operation of the principle *compétence de la compétence* as a principle of general international law, it would be legally impossible to establish the competence of the Court to indicate provisional measures, since objections to the Court's jurisdiction, pursuant to Article 79 of the Rules, may be submitted by the Respondent within the time-limit fixed for the delivery of the Counter-Memorial and by a party other than the Respondent within the time-limit fixed for the delivery of the first pleading. The operation of the principle in this case results in the judicial presumption on proper jurisdiction of the Court in the form of "prima facie jurisdiction".[30]

The special position of a judgment on preliminary objection exists in respect to both aspects of the *res judicata* rule – its binding force and finality.

A perception of distinct relativity of a jurisdictional decision of the Court pervades the body of law regulating the Court's activity. The rules regarding preliminary objections are grouped in Subsection 2 of Section D of the Rules of Court, entitled "Incidental Proceedings". Such placement of the rules on preliminary objections suggests, as the Court stated in the *South West Africa* cases (Second Phase)[31] that a judgment on a preliminary objection is "of an interlocutory character", which implies a provisional, rather than final, character. Furthermore, Article 79, paragraph 1, of the Rules of Court, providing that "[a]ny objection . . . to the jurisdiction of the Court or to the...*or other objection* the decision upon which is requested before any further proceedings on the merits" (emphasis added), *per se* expresses the relative finality of a judgment on preliminary objections. Preliminary objections as such do not, however, exhaust objections to the jurisdiction of the Court. As early as the 1980s, the jurisprudence of the Court, supported by State practice, developed to the effect that the formal preliminary objection procedure is not exhaustive of the matter.[32] In addition, non-preliminary objections to jurisdiction are also capable of reversing a judgment on preliminary objections, as demonstrated in the *Nottebohm* case. Non-preliminary objections to the juris-

[29] See Nottebohm case, Preliminary Objections, Judgment, *I.C.J. Reports 1953*, p.122; Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain, (Jurisdiction and Admissibility), Judgment*, I.C.J. Reports 1995*, p. 23, para. 43).

[30] Legality of Use of Force, Preliminary Objections, Judgment, *I.C.J. Reports 2004*; separate opinion of Judge Kreća, para. 1; emphasis added).

[31] South West Africa Cases (Second Phase) *I.C.J. Reports 1966*, p. 38, para. 61.

[32] See S. Rosenne, "The Reconceptualization of Objections in the ICJ", *Com municazioni e studi,* volume quattordicesimo, 1975, 735 761.

diction of the Court give rise to application of the principle of *compétence de la compétence* understood, as I have noted before[33] in the narrow sense.

Finally, the principle of *compétence de la compétence* understood in a general sense can be seen in the Resolution Concerning the Internal Judicial Practice of the Court in its provision stating that "the Court *may proceed to entertain the merits of the case or, if that stage has already been reached, on the global question of whether, finally, the Court is competent or the claim admissible*" (Art. 8 (ii) *(b)*; emphasis added). It seems clear that the "global question" is "one which would normally arise only after all the previous questions and the merits have been pleaded (that is to say, the *substance of any particular phase [has] thus been decided*").[34]

With regard to the binding force of a judgment on preliminary objections, it seems clear that it does not create legal obligations *stricto sensu* which parties in the proceedings are required to comply with. The party that raised a preliminary objection rejected by the Court does not suffer any legal consequences if, for instance, it decides not to participate in the proceedings for which the Court declared itself competent. An affirmative judgment in the preliminary objection procedure creates for that party a procedural burden rather than a legal duty *stricto sensu.* Moreover, the applicant has no legal obligation to proceed to plead the claim either. While an affirmative jurisdictional decision creates a procedural burden for the respondent, vis-à-vis the applicant it constitutes a pure procedural entitlement which the applicant uses with absolute discretion *(discretio legalis)* without suffering any sanctions in proceedings of failure to comply with the letter of affirmative jurisdictional decisions.

In fact, an affirmative judgment in the preliminary objections phase creates a duty for the Court only to proceed to the merits phase, but judicial action by the Court in that regard is dependent upon proper actions by the parties to a case.

In contrast to a jurisdictional judgment, a judgment on the merits of a case possesses binding effect in terms of creating legal duties for the parties, so that "neither party can by unilateral means free itself from its obligation under international law to carry out the judgment in good faith".[35]

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33 Legality of Use of Force, Preliminary Objections, Judgment, *I.C.J. Reports 2004*, paras. 43 50.

34 S. Rosenne, *Procedure in the International Court. A Commentary on the 1978 Rules of the International Court of Justice*, 1983, 232; emphasis added.

35 Société Commerciale de Belgique, Judgment, *1939, P.C.I.J., Series A/B, No. 78*, p. 176.

The more relative character of jurisdictional decisions of the Court as compared with the finality of a judgment on the merits of the case is justified on a number of grounds.

Jurisdictional issues are not, as a rule, core issues of cases before the Court, nor are they the *raison d'être* of recourse to the Court by the parties to a dispute. Cases, such as the *Appeal Relating to the Jurisdiction of the ICAO Council*[36], in which the Court acts as a court of appeal, are the only exceptions.

The parties to a dispute turn to the Court to protect a subjective right or interest in the sense of substantive law, not because of the issue of jurisdiction as such. An affirmative judgment on jurisdictional issues establishes only the necessary prerequisite for resolving the main issue and it concerns substantive law in terms of conferring or imposing upon the parties a legal right or obligation of a positive or negative nature. In this sense, a judgment on jurisdictional issues is of "a purely declaratory nature and it can never create a right i.e., bestow on the Court itself a jurisdiction which is not supported by applicable rules of law either general or particular".[37]

In other words, a judgment on jurisdictional issues is adjective rather than substantive in its nature and, consequently, in its effects as well. It does not create a new legal situation in terms of substantive law nor gives an order to perform an act as it does not state how the law disputed between the parties is to be applied.[38]

The reversal by a court of law acting within its judicial prerogatives of the jurisdictional judgment in a pending case does not substantially, if at all, affect stability and predictability as the *rationale* of finality of the judgment. This is because the subject matter here is not substantive rights and obligations of the parties. As an affirmative jurisdictional decision merely confers entitlement to have a claim entertained and decided by the court, it is hard to say that its reversal may result in disturbing jural relations under substantive law. The only disturbance that can be spoken of in case of a reversal of an affirmative jurisdictional decision is the disturbance in the procedural relationship established by the jurisdictional decision, a disturbance which is a matter of the subjective expectations of the parties to a dispute rather than a matter of public policy underlying the finality of the Court's decision.

[36] Case concerning the Appeal relating to the jurisdiction of the ICAO Council, *I.C.J. Reports 1972.*

[37] Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6*, 1925, P.C.I.J., Series A, No. 6*, dissenting opinion of Judge Rostworowski, p. 32).

[38] For classification of international judgments, see *Encyclopedia of Public In ternational Law*, III, 1997, 33 34.

On the contrary, if, after adopting a jurisdictional decision and before handing down its judgment on the merits, the Court found that its decision was erroneous for any reason, it would commit a manifest abuse of its power if it were to abide by the *res judicata* rule. Thus, rather than strengthening the *res judicata* rule, an insistence on the finality of jurisdictional decisions in all circumstances would be to its detriment, paralyzing, and even nullifying, the activity of the Court as a court of law and justice, for, besides the intrinsic, constituent elements of the *res judicata* rule, there exists the fundamental extrinsic condition, the requisite validity of the Court's decision in terms of substantive and procedural law.

3. SHORT CONCLUSION

The more relative character of jurisdictional decisions, as regards finality, results or may result from the operation of the principle of *compétence de la compétence*. Specifically, the principle of *compétence de la compétence* operates exclusively in respect of jurisdictional issues.

In practical terms, the relativity of jurisdictional decisions, especially judgments on preliminary objections as a formal type of jurisdictional decision, might result from balancing two considerations which differ by nature:

(i) Special circumstances forming an objective element deriving from legality which dictate reversal of the jurisdictional decision; and

(ii) A subjective element, which implies the readiness of a court of law to address the matter.

As regards this element, while somewhat pathetic, the warning is essentially correct that the "future of international adjudication, if not global peace, may paradoxically depend on the capacity of our supreme judicial organ to say *mea culpa*"[39].

[39] W. M. Reisman, "Revision of West South Africa Cases An Analysis of the Grounds of Nullity in the Decision of 18 July 1966 and Methods of Revision", *The Virginia Journal of International Law*, 1966, Vol. 7, No. 1, 4.

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IDENTIFICATION OF CUSTOM IN INTERNATIONAL LAW

The paper analyzes an issue of fundamental significance for international law the procedure for the identification of custom in public international law. Since customary law may be qualified as a sui generis source of international law, instru ments and procedures for proving customs are of major importance. Particular atten tion is given to the role of custom in modern international law. The first part of the paper outlines the work of the International Law Commission relating to formation and evidence of customary law, including its identification. The second part of the article analyzes the jurisprudence of the International Court of Justice concerning the process of formation of customary law, instruments through which it is evidenced, as well as the procedures for evidencing it. Particularly noteworthy is the necessity to introduce objectified rules for detecting customs and to determine the scope of these rules, both internationally for a number of actors, as well as internally in the legal systems of States.

Key words: *Customary international law. Identification of customary interna tional law. International Law Commission. International Court of Justice*.

1. INTRODUCTION

Customary law is of vital importance for public international law. Customs were the first and predominant source of international law and, at the same time, the basic means for the creation of new rules of interna-

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tional law. With the formation of the modern international community, customs seem to have become a source of secondary importance due to a fact that universal codification of international law started to occur within the United Nations.[1] However, it must be stressed that the International Court of Justice (ICJ) made an important contribution to maintaining customs in the contemporary international community, even assigning them certain novel functions which are of relevance for the entire international legal order.[2] Numerous authors have dealt with the scope and legal nature of international custom, as well as its dichotomous structure, attempting at the same time to offer theoretical explanations for the specific subjective construction contained in Article 38 of the Court's Statute. A rough distinction between traditional and modern customs is perceived in the works of the doctrine.[3] This paper will, *inter alia*, indicate some of the main differences that exist between traditional customs and customs that operate in the modern international community.

2. WORK OF THE INTERNATIONAL LAW COMMISSION RELATING TO IDENTIFICATION OF CUSTOMARY INTERNATIONAL LAW

At its sixty-fourth session, the International Law Commission (ILC) decided to include on its agenda the topic "Formation and evidence of

[1] For such an opinion see: P. Kelly, "The twilight of customary international law", *Virginia Journal of International Law* (*Va. J. Int'l L*) 40/1999 2000, 450 492.

[2] In a number of cases the ICJ accepted the application of rules contained in conventions not yet in force, although it was always in relation to State, which expressed its willingness to become bound by the treaty in question. The Court traced the legal basis for such a decision in the customary nature of the rules included in the convention. A treaty with a limited number of State parties may evolve into law which is generally rec ognized. The famous Briand Kellog Pact may serve as an illustration. Furthermore, rules contained in Draft Articles on State Responsibility for Internationally Wrongful Acts pre pared by the International Law Commission undoubtedly represent customary interna tional law, despite the fact that they are not yet in force. As correctly stated by Pellet, "the impact of the draft articles on international law will only increase in time, as is demon strated by the growing number of references to the draft articles in recent years." A. Pellet, "The ILC's Articles on State Responsibility for Internationally Wrongful Acts and Related Texts", *in* J. Crawford, A. Pellet, S. Olleson (eds), *The Law of International Responsibil ity*, Oxford University Press, Oxford 2010, 87. See also: C. Annacker, "Part Two of the ILC's Draft Articles on State Responsibility", *German Yearbook of International Law* (*GYBIL*) 37/1994, 206; H. P. Aust, "Through the Prism of Diversity: the Articles on State Responsibility in the Light of the ILC Fragmentation Report", *GYBIL* 49/2006, 165; J. Crawford, "Revising the Draft Articles on State Responsibility", *European Journal of International Law* (*EJIL*) 10/1999, 435.

[3] A. E. Roberts, "Traditional and Modern Approaches to Customary International Law: A Reconciliation", *American Journal of International Law* (*AJIL*) 95(4)/ 2001, 757 791.

customary international law".[4] At the session that followed, the ILC appointed Mr. Michael Wood as Special Rapporteur. In his first address to the Commission Mr. Wood observed that the procedure of evidencing customary law is very complex and that it represents one of the fundamental problems of international law. Such an observation came as no surprise. Although the Special Rapporteur Manley Hudson identified instruments for proving custom quite a while ago,[5] there is no unified position or objective rules that would undoubtedly determine if a custom is created or from which moment and for which States it may be considered as an unquestionable source of law.[6]

The work before the Commission should result in the adoption of a practical guide[7] that would include rules relating to the procedure of proving customs, confirm instruments that are to be used as evidence and assist judges of both international and national courts in the course of their work. From the methodological point of view, working on such a guide implies a long and comprehensive analysis of the jurisprudence of different international bodies, the ICJ in particular. The very manner in which the analysis is posited implicates an extremely wide field of research, since instruments that constitute evidence of customary law are varied and numerous and are to be found in both international and national law. The publication of the International Committee of the Red Cross entitled "Customary International Humanitarian Law" serves as an indicator as to how long and serious the venture of evidencing customary law may be.[8] Therefore, the role of the guide which is on the ILC's pro-

[4] Official Records of the General Assembly, Sixty sixth Session, Supplement No. 10 (A/66/10), paras. 365 367.

[5] Special Rapporteur Hudson considered that following elements may constitute evidence of customary international law: texts of international treaties, judgments of inter national courts, judgments of national courts, national laws, diplomatic correspondence, opinions of national legal advisors and practice of international organizations. See: M. Hudson, "Article 24 of the Statute of the International Law Commission", *Yearbook of the International Law Commission* (*Yearbook*) 2/1950, UN Doc. A/CN. 4/16.

[6] Statute of the International Law Commission offers some assistance as to what may constitute evidence of customary rules. Article 24 of the Statute provides that "The Commission shall consider ways and means for making the evidence of customary inter national law more readily available, such as the collection and publication of documents concerning State practice and of the decisions of national and international courts on questions of international law, and shall make a report to the General Assembly on this matter." As means for evidencing State practice Baxter mentions the following: "diplo matic correspondence, the decision of a municipal court, a resolution of an international organization, a decision of an arbitral tribunal, a press communiqué or a municipal stat ute." R. R. Baxter, "Multilateral Treaties as Evidence of Customary International Law", *British Yearbook of International Law* (*BYIL*), 41/1965 1966, 275.

[7] See: Official Records of the General Assembly, Sixty seventh Session, Supple ment No. 10 (A/67/10).

[8] J. M. Henckaerts, L. Doswald Beck, *Customary International Humanitarian Law*, International Committee of the Red Cross, Cambridge University Press, Cambridge

gram of work is accordingly less ambitious since its main aim is to objectify both instruments and the procedure for identifying customary international law, with no ambition as to its codification.

The process of creating customary law is a specific legal construction in many respects. On the one hand, it represents a spontaneous undertaking due to the fact that States voluntarily subject themselves to a particular practice that is in accordance with their interests. On the other hand, it is an entirely atypical procedure if compared to the process of creating rules in national law since it implies an unwritten rule. The very moment in which the custom obtains the written form is usually after the act of crystallization. Thus in the case of custom, an organic process appears which is highly specific and difficult to incorporate into clear and objective rules. That is why the decision of the Commission to work on the adoption of a guide for the practice of States rather than on the text of the convention should be considered as justified.

2.1. First report of the Special Rapporteur

At the Commission's sixty-fifth session the Special Rapporteur presented his first report on elements for proving custom.[9] In order to implement the work relating to the formation and evidence of customary process it is necessary to divide the entire matter into a number of segments. The Commission thus selected the following elements: general overview, State practice, subjective element of custom (*opinio juris sive necessitatis*), relevant practice of international organizations, relevant judgments and opinions of the doctrine. In addition to these core areas, other important questions are also identified, such as the issue of the obligatory character of custom and its features in modern international law, the question of the creation of *erga omnes* rules, rules of *jus cogens* and their relationship with customary rules, as well as the relationship between universal customs and universal treaties.[10]

2009. Such publications may assist in the preparation of the practical guide which is on the ILC's agenda since they may serve as a sort of codification of a part of international law. A special focus is on the practice of States regarding the mandatory character of customs in international humanitarian law. States wish to accord the status of customary law only to rules that dispose of absolute application in their practice, at the same time refusing such status to a number of other rules presented in this publication.

[9] First report on formation and evidence of customary international law by Michael Wood, Special Rapporteur, International Law Commission, Sixty fifth session, Geneva, 6 May 7 June and 8 July 9 August 2013, General Assembly, A/CN.4/663. The Special Rapporteur recalls at the very beginning of his work that this is not the first time that the ILC is dealing with such an important matter. A special position should thus be accorded to the origins of the Commission's work, i.e. when in 1950 it introduced to its agenda the topic entitled "Ways and Means of Making the Evidence of Customary Inter national Law More Readily Available". *Yearbook* 2/1950, 367 374.

[10] First report on formation and evidence of customary international law by Michael Wood, 6 11. See also: A/CN.4/659, summary.

An important matter to be examined in the course of the examination of evidence in customary process is the issue of fragmentation of international law both *ratione materiae* and *ratione loci*. Regarding the material aspect, views are expressed by various authors that autonomous legal regimes have started to appear such as international humanitarian law, human rights law and international criminal law.[11] These authors claim that the method of forming rules in these areas, their application and scope, differ from other rules of general international law.[12] The introduction of special and autonomous legal regimes would mean, quite naturally, their exemption from the effects of rules of general international law. This would lead to the disintegration of the entire international legal regime, an exemption of peremptory rules and eventually it may undermine the general international legal order. Such a process would be dangerous and harmful in every respect. On the other hand, the process of making custom may be perceived through the emergence of comprehensive regional regimes, such as the European Union, where rules are established through special legal techniques and are applied in a manner which is not accepted in general international law. There are views that rules of universal international law are unenforceable within *ordre communautaire*. As in the previous case, an exemption for such a regional legal order from the general international law would certainly be detrimental for the international community as a whole.[13] If one takes into consideration the obvious uniqueness of the international order and the width of the issue of formation and evidence of customary law, the task of the Commission is more legally-technical in its nature, as it involves the determination of objective rules to detect the existence of custom, determine the process of their creation and their final formation. The aim of the Commission's work is therefore justifiably reduced to creating clear indicators in the customary process, rather than giving the final judgment as to whether a particular rule has been established as a custom or not.[14]

The ILC was particularly interested in the relationship between customary and imperative rules. As these rules mainly arose out of cus-

[11] For sociological analysis of custom in the modern international community see: E. Posner, J.L. Goldsmith, "Understanding the Resemblance between Modern and Tradi tional Customary International Law", *Va. J. Int'l L* 40(2)/1999, 639.

[12] T. Meron, *Human Rights and Humanitarian Norms as Customary Law*, Claren don Press, Oxford 1989, 28 32.

[13] A clear critique of any sort of fragmentation in international law is contained in the declaration of Judge Greenwood: "International law is not a series of fragmented spe cialist and self contained bodies of law, each of which functions in isolation from the others; it is a single, unified system of law". Declaration of Judge Greenwood, Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Judgment of 19 June 2012, *ICJ Reports* 2012, 394, para. 8.

[14] First report on formation and evidence of customary international law by Michael Wood, 9.

tomary law, views were expressed that they should also be included in the guide. Even though their definition is contained in the 1969 Convention on the Law of Treaties,[15] *jus cogens* rules still provoke various controversies not only in practice but also and mainly in the doctrine of international law. There is no agreement as to which norms fulfilled the necessary conditions in order to be considered as peremptory norms. However, there seems to be no doubt as regards their legal effect. On the other hand, if we observe positive international law, cogent norms are inevitable in the process of creating customs since they represent formal restrictions regarding trends in State practice and the very process of formation of new customary rules. Some authors tend to interpret contemporary cogent norms as general customary law.[16] However, this is an excessively liberal conception because the necessary form possessed by cogent norms would thus be diluted and, as a result, an unjustified extension of norms pretending to acquire such legal nature would occur. Clearly, general customary law may, over time, lead to the creation of cogent norms. Nevertheless, it is also apparent that not all general customary rules have so far reached the required level of imperativeness in order to be considered as *jus cogens*. The theoretical discord regarding rules of cogent character has led the members of the Commission to avoid including the issue of *jus cogens* in the scope of the present topic.[17] Still, the ILC's work on the guide would not be possible without taking into account cogent norms and they will surely be elaborated on to the extent necessary.

As one of the unavoidable issues related to customary law, a question arises regarding its relationship with treaties. On the one hand, there is formal equality between them[18], on the other hand there is a reverse rela-

15 Article 53 of the Convention on the Law of Treaties. *United Nations Treaty Series* (*UNTS*) 1155/1980, 344.

16 A. de Hoogh, *Obligations Erga Omnes and International Crimes*, Kluwer Law International, 1996, 45 48; P. Reuter, *Introduction au droit des traités*, Librairie Armond Colin, 1972, 139 140; A. Kaczorowska, *Public International Law*, 4th edition, Routledge, 2010, 28; R. Jennings, A. Watts (eds.), *Oppenheim's International Law*, 9th edition, Ox ford University Press, Oxford 1992, 7 8; R. B. Baker, "Customary International Law in the 21st Century: Old Challenges and New Debates", *EJIL* 21/2010, 173, 177; A. D'Amato, *The Concept of Custom in International Law*, Cornell University Press, 1971, 132; A. Cassese, "For an Enhanced Role of Jus Cogens", *in* A. Cassese (ed.), *Realizing Utopia,* Oxford University Press, Oxford 2012, 158, 164; T. Meron, "On a Hierarchy of International Human Rights", AJIL 80/1986, 13 21; A. McNair, *Law of Treaties*, Claren don Press, 1961, 213 215; J. Paust, "The Reality of Jus Cogens", *Connecticut Journal of International Law* 7/1991, 81, 82; J. Crawford, *Brownlie's Principles of Public Interna tional Law*, 8th edition, Oxford University Press, Oxford 2012, 594; N. G. Onuf, R. K. Birney, "Peremptory Norms of International Law: Their Source, Function and Future", *Denver Journal of International Law and Policy* 4/1974, 187, 191.

17 First report on formation and evidence of customary international law by Michael Wood, 11.

18 In the meaning of Article 38 of the Statute of the International Court of Jus tice.

tion in the sense that customary law often acquires written form through codification while treaties become part of general customary law. The importance of custom in modern international law is perceived through ensuring the implementation of legal obligation in situations when certain rules of the treaty may apply to States which are not parties. The 1969 Convention on the Law of Treaties may serve as an example.[19]

2.2. Second report of the Special Rapporteur

During the Special Rapporteur's work on his first report it was suggested that the title of the topic was only provisional. Based on the discussions led in the Commission it was finally decided that the topic in the second report would be entitled "Identification of customary international law". This is a welcome change since it better reflects the very essence of the Commission's work on the present topic, i.e., an effort to establish objectified rules for detecting customary law. Due to the fact that States are the primary creators of customary process, comments provided by certain among them have already been received during the work on the second report.[20] According to reports submitted by States, but more importantly, based on the jurisprudence of international bodies, the ICJ in particular, it may be concluded that there is a general acceptance of custom's dichotomous legal nature in the spirit of Article 38 of the Statute of the Court – State practice and *opinio juris*.[21] The conclusion of the Commission seems to follow the same line of reasoning.[22]

The subsequent work of the Commission is designed to adopt basic guidelines relating to fundamental elements of custom – practice and *opinio juris*. As far as practice is concerned, it needs to meet certain requirements in order to qualify as a relevant constituent of custom. Above all, it must emanate from the State.[23] In addition, the act that is attributed to the State must represent a clear manifestation of will which is per-

[19] E. W. Vierdag, "The Law Governing Treaty Relations between Parties to the Vienna Convention on the Law of Treaties and States not Parties to the Convention", *AJIL* 1982, 779 801.

[20] The following States have already submitted their reports to the Special Rap porteur: Belgium, Botswana, Cuba, Czech Republic, El Salvador, Germany, Ireland, Rus sia, and Great Britain. Second report on identification of customary international law by Michael Wood, Special Rapporteur, International Law Commission, Sixty sixth session, 2014, UN Doc. A/69/10, 4.

[21] *Ibid.*, 8 *et seq*.

[22] *Ibid.*, 7 8.

[23] M. H. Mendelson, "The Formation of Customary International Law", *Recueil des Cours* 272/1998, 155 201. Rules of attribution, similar to those relating to attribution as regards State responsibility, are to be applied here. ILC Draft Articles on the Responsi bility of State for Internationally Wrongful Acts, *Yearbook* 1/2001, chp. II; J. Crawford, *State Responsibility. The General Part*, Cambridge University Press, 2013, 113 126. Thus, in order to be relevant, the practice must emanate from official State organs, legisla

formed in the same manner as it used to be done and in which it will continue to be done in the future. Such acts of the State need not necessarily be identical. In certain cases they may take the form of a legislative act, in other cases they might consist in press releases or be derived from a decision of the national court.[24] Some authors suggest that: "[w]ith the development of international organizations, the votes and views of states have come to have legal significance as evidence of customary law."[25] Although these views are frequently cited, one should be very careful when automatically attributing votes or discussions to States in the sense of creating practice as an element of custom. Though it undoubtedly represents the position of the State in question, it can hardly be claimed that such acts also constitute practice suitable for creating custom since the *animus* of the State is missing. The will of the State expressed by voting within an organ of an international organization reflects the adoption of the resolution, not the creation of a custom. This objection may be classified as material, even though from a formal point of view the State's will could be considered as suitable for the creation of practice attributed to it. It is also essential to distinguish between acts of State representatives performed in their official capacity when there are stronger grounds for attribution, and situations in which they act in a personal or professional capacity such as, for example, members of the ILC and expert groups, when their actions can in no way be treated as acts of States and therefore are of no relevance for the process of creating practice. Since it is apparent that manifestations of practice may be quite different, there are situations in which a State, through its acts, expresses disparate or not quite identical positions. All of these different manifestations should be taken into account in a balanced way. Thus the ILC itself held that there is no hierarchy among elements of practice of the subject in question.[26]

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tive, judicial or administrative, and regardless of their position in the internal organization of authority.

[24] The second report of the Special Rapporteur cites various acts that may be in terpreted as elements of practice attributed to States: diplomatic correspondence, state ments of officials, press conferences, opinions of official legal advisers, official manuals for internal organs, administrative decisions, comments of States submitted at the request of the ILC, decisions of courts,... J. Crawford, (2012), 24. It is clear that this list is not closed but may be altered depending on the particular manifestation of will. It may even be the General Assembly resolution adopted with a positive vote of the State in question in cases when its vote may be taken as its manifestation of will which is attributed to it as an element of custom. Separate Opinion of Judge Ammoun, Barcelona Traction, Light and Power Company, Limited, Judgment of 5 February 1970, *I.C.J. Reports* 1970, 302 303. There are opinions that decisions of the Security Council may also represent an obvious indicator of practice for the States that adopt them by voting.

[25] R. Higgins, *The Development of International Law Through the Political Or gans of the United Nations*, Oxford University Press, Oxford 1963, 2.

[26] Second report on identification of customary international law by Michael Wood, Draft Conclusion 8, Weighing evidence of practice, 33.

Universal or general customs require an additional criterion to be met which relates to the general character of practice. This is a specific condition which is interpreted in a relative manner by the organ that applies law, the ICJ in particular. The practice is required to bewidespread, which means that it encompasses States belonging to different regions, representative States and States whose interests are particularly affected.[27] In order to be suitable for creating custom, practice needs to be consistent and uniform. Repetitive actions are thus essential for the formation of customary law. Naturally, actions can never be absolutely identical, nor are they always performed by the same actors. Circumstances also vary. However, the purpose of the action in question should in no way be changed.[28] This interpretation is not entirely justified since it goes beyond the domain of practice and is already halfway to the second, subjective element of custom which reflects the sense of legal obligation. Nevertheless, a clear distinction should be made between consistent practice of States where minor deviations may be tolerated, and practice which is inconsistent enough to consider it an indication of the creation of a novel, different custom.

State practice as the first element of custom raises no major disagreements since it may be considered a measurable category. The second element, *opinio juris*, is far more difficult to prove. It is often referred to as the subjective or qualitative element of custom. It actually points to a voluntary subordination to a particular rule of law, thus providing international law with a new evaluative dimension. It is particularly difficult to distinguish between practice that creates custom and practice which is not eligible to form a rule of customary law. An effort is visible in the second report of the Special Rapporteur to detect tangible criteria that could serve as grounds for recognizing the existence of the subjective element in the process of formation of customary law. The report tends to suggest that *opinio juris* is formed according to the interests of individual States. When national interests of a number of States match and they accordingly take identical or similar actions during an extended period of time, the subjective element of customary law is constituted.[29] However, this

[27] J. L. Kunz, "The Nature of Customary International Law", *AJIL* 47/1953, 666. See also: North Sea Continental Shelf Cases, (Federal Republic of Germany v. Nether lands, Federal Republic of Germany v. Denmark), Judgment of 20 February 1969, *ICJ Reports* 1969, 42, para. 73. Creation of custom in the law of outer space may be used here as an example. Only a limited number of States were in a position to use this area in a rather short period of time. However, this was not an obstacle to establish certain general rules which have since become mandatory for all the States in the world.

[28] J. Barboza, "The Customary Rule: From Chrysalis to Butterfly", *in* C.A. Armas Barea et al. (eds.), *Liber Amicorum 'In Memoriam' of Judge José María Ruda,* Kluwer Law International, 2000, 7.

[29] Second report on formation and evidence of customary international law by Michael Wood, 42 et seq.

mental element should be present with every State participating in the creation of custom. "The normative sense of behavior can be determined only once we first know the 'internal aspect' – that is, how the State itself understands its conduct."[30] A psychological element is introduced to the legal environment, thus granting customs special position among sources of international law. Although this is a highly delicate issue, it seems that conclusions relating to the second element of custom ought to have been more specific in explaining how the subjective element should be recognized in practice.[31]

There is an expectation that the future work of the Commission will improve rules that have already been accepted and further shape the framework for the objective identification of customs in international law. For the moment, however, the impression remains that the Special Rapporteur could have offered more through his reports, especially if we take into account the rich jurisprudence of the ICJ on this issue, but also abundant theoretical studies. Framework rules that have so far emerged from the report are not of much assistance for clarifying ambiguities which are inherent in the identification of customary international law.

3. IDENTIFICATION OF CUSTOMARY INTERNATIONAL LAW IN THE JURISPRUDENCE OF THE INTERNATIONAL COURT OF JUSTICE

The principal judicial organ of the United Nations and its case law will surely be of particular significance for the present topic since members of the Commission expressed the view that the jurisprudence of the ICJ "may be considered the primary source of material on the formation and evidence of rules of customary international law".[32] Being a result of a thorough analysis of the entire case-law of the ICJ relating to customary international law, this part of the paper will firstly outline the reasons for according such a particular importance to the approach employed by the Court when faced with the task of identifying the customary nature of a

30 M. Koskenniemi, *From Apology to Utopia: The Structure of International Le gal Argument*, Cambridge University Press, Cambridge 2005, 388.

31 Draft Conclusion 10 (Role of acceptance as law): 1.The requirement, as an ele ment of customary international law, that the general practice be accepted as law means that the practice in question must be accompanied by a sense of legal obligation. 2. Ac ceptance as law is what distinguishes a rule of customary international law from mere habit or usage. Second report on formation and evidence of customary international law by Michael Wood, 49 50.

32 Report of the International Law Commission on the work of its sixty fifth ses sion, 6 May to 7 June and 8 July to 9 August 2013, General Assembly Official Records, Sixty eighth Session, Supplement No. 10 (A/68/10), chp. VII, 98, para. 93.

rule in question. Secondly, it will be argued that there is coherence in the jurisprudence of the Court as regards certain general issues relating to the identification of customs. The analysis has, however, shown an inconsistent approach of the Court regarding evidence of particular rules of customary international law. The last part of the paper will therefore review different approaches used by the Court in particular cases in order to prove the existence of a customary rule.

3.1. Relevance of the ICJ's case law for the work of the ILC on the present topic

The significance of ICJ's case law for the work of the ILC on this topic may be discerned at multiple levels.

First of all, the very wording of the topic to be discussed by the ILC seems to be tailored according to the Court's role in dealing with customary law.[33] The term "identification" encompasses evidence, but it actually does not include formation. The choice of the ILC regarding the title of the topic must have been heavily influenced by the Court and its contribution to the topic, since the Court only identifies customs, it does not create them.[34]

[33] Instead of the initial title "Formation and evidence of customary international law", the topic under present consideration is now entitled "Identification of customary international law". *Ibid.*, 95, para. 76.

[34] Stern considers it "absolutely clear" that the Court's confirmation of a custom ary nature of a rule in question in a dispute between two States "could not help but have a certain impact above and beyond the two States concerned". B. Stern, "Custom at the Heart of International Law", *Duke Journal of Comparative and International Law* 11/2001, 101. Kopelmanas's words on the relevance of the Permanent Court of International Justice (PCIJ) for the issue of identifying customary law may as well apply to its successor. The author does not take the PCIJ's role for granted. He believes that its doctrine on the matter of identification of customary international law is "unstable and vague". However, Kopel manas stresses that the Court's position needs to be acknowledged and that the question "can be raised most frequently before the Court". L. Kopelmanas, "Custom as a Means of the Creation of International Law", *BYIL* 18/1937, 129 fn. 1. The same author's further position on the decisions of international courts as factors in the evolution of custom seems to go too far, beyond the role usually attributed to them. He considers the judge to be "the author *par excellence* of custom". *Ibid.*, 141. This statement should be taken as an excessive interpretation of the Court's contribution to identification of customary interna tional law. We agree with the author that important rules of international law, such as those relating to the interpretation of treaties or the rules on State responsibility indeed became undisputed rules of positive customary international law due to the fact that they were declared as such by numerous decisions of both the PCIJ and ICJ. Nevertheless, it does not mean that the Court is their creator, but that it simply contributed to the clarifica tion of the matters previously prone to States' contradictory views. Katzenstein's position that "international judicial decisions shape contemporary understandings of international legal rules" seems to better express the nature of the Court's role with regard to customary law. S. Katzenstein, "International Adjudication and Custom Breaking by Domestic Courts", *Duke Law Journal* 62/2012 2013, 683. Baxter's statement relating to *Nottebohm*

Secondly, the most accurate and widely accepted definition of international custom is contained in the Statute of the ICJ. Article 38 (1) (b) defines custom as "evidence of a general practice accepted as law". This observation relates to both the formal and material aspect of the definition contained in the ICJ's Statute. Namely, the two-element approach is well established in the case law of the Court and may be considered as a part of its "settled jurisprudence". The Commission itself obviously has no intention of departing from such an understanding of international custom.[35]

Thirdly, the ILC insists on analyzing the influence that other sources of law may have in relation to evidence of customary international law. Weight to be accorded to particular acts, including acts qualified as soft law, is best perceived through the jurisprudence of the Court.[36]

Finally, in addition to the previous reasons which all relate, in one way or another, to the Court itself or its personal approach to identifying customary international law and may therefore be qualified as intrinsic in their nature, the last remark relating to the importance of the Court's case-law could be referred to as extrinsic. The ILC clearly noted that State practice as an element of customary international law may, *inter alia*, be evidenced by States' arguments before international courts, ICJ in particular.[37]

case that "the very assertion of the International Court that Articles 1 and 5 of the Convention had passed into customary international law did make them pass into customary international law" should be understood in the same manner. R.R.Baxter, 296. Finally, it should not be neglected that even Judge Manley Hudson, when reporting to the ILC on the five elements required for "the emergence of a principle or rule of customary international law", considered as the fifth element that the presence of each of the previous four elements "is to be established as a fact by a competent international authority". M. Hudson, 26, para. 11. For the comment on Hudson's inclusion of this element see A. D'Amato, "Wanted: A Comprehensive Theory of Custom in International Law, *Texas International Law Forum* 4/1968, 39 40.

[35] Report of the International Law Commission on the work of its sixty fifth session, 99, para. 101.

[36] In addition to the Court's early judgments, in which it shed important light on the relevance of international treaties and various unilateral acts for the identification of customary law, the Court has recently made an important elaboration of certain soft law acts, such as General Assembly resolutions, and the weight that should be attributed to them when evidencing customary law. North Sea Continental Shelf Cases, 41 42, paras. 68 74. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, *ICJ Reports 1996*, 254 255, para. 70.

[37] Report of the International Law Commission on the work of its sixty fifth session, 98, para. 91. The Court has, however, cautiously approached the position proclaimed by the parties during the dispute, and has insisted that States "must have behaved so that their conduct is evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it." North Sea Continental Shelf Cases, 44, para. 77. The Court confirmed its position in the case relating to *Military and Paramilitary Activities in*

3.2. Coherence in the case-law of the Court as regards certain general issues of customary law identification

Certain general aspects of customary international law have constantly been invoked by the ICJ in its judgments and must therefore be regarded as indisputable. Both the Permanent Court of International Justice (PCIJ) and the ICJ have constantly held that international customary law is formed through State practice followed by *opinio juris*.

As early as 1927 the PCIJ stated that international law emanates from, *inter alia*, "usages generally accepted as expressing principles of law".[38] The ICJ, as its successor, has constantly held the same position. It is indicative to cite two quite recent judgments delivered by the Court. They may be taken as proof that perception of international customary law in the twenty-first century differs in no way from its conception adopted almost a century earlier. In its judgment in the case concerning *Questions relating to the Obligation to Prosecute or Extradite*, the Court expressed the opinion that the prohibition of torture is a part of customary international law since it "is grounded in a widespread international practice and on the *opinio juris* of States".[39] The Court was consistent with the traditional conception of international custom in a judgment delivered several months earlier in the case concerning *Jurisdictional Immunities of the State*. The Court considered that its task is to "determine .... the existence of international custom, as evidence of a general practice accepted

and against Nicaragua. Referring to the position proclaimed by the United States to the principle of non intervention, the Court concluded that "the United States authorities have on some occasions clearly stated grounds for intervening in the affairs of a foreign State (...). But these were statements of international policy, and not an assertion of rules of existing international law." Military and Paramilitary Activities in and against Nicaragua, (Nicaragua v. United States of America), Judgment on the Merits of 27 June 1986, *ICJ Reports* 1986, 108, para. 207. States' explicit acknowledgment of a particular rule's cus tomary nature, as a part of its argumentation during pleadings, is thus not taken for grant ed by the Court as evidence of its attitude towards that particular rule. P. M. Dupuy, "La pratique de l'article 38 du Statut de la Cour international de justice dans le cadre des plaidoiries écrites et orales" in *Collection of Essays by Legal Advisers of International Organizations and Practitioners in the Field of International Law*, United Nations, New York 1999, 377 394.

[38] The Case of the SS 'Lotus' (France v. Turkey), 1927 PCIJ (ser. A) No. 10, 18. PCIJ further clarified the very essence of customary law by focusing on the imperative presence of both elements: "Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstances (...) it would merely show that States had often, in practice, abstained from instituting criminal pro ceedings, and not that they recognized themselves as being obliged to do so; for only if such abstentions were based on their being conscious of having a duty to abstain, would it be possible to speak of an international custom." *Ibid*., 107.

[39] Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Sen egal), Judgment of 20 July 2012, *ICJ Reports* 2012, 457, para. 99.

as law".[40] In order to do that the Court thought it necessary to "apply the criteria which it has repeatedly laid down for identifying a rule of customary international law".[41] The Court seems to consider these criteria as being part of its settled jurisprudence as it simply chose to refer to its most important judgments in this regard.

In the *North Sea Continental Shelf* cases the Court has not only insisted upon both "settled practice" and *opinio juris*, it has further elaborated on specific features that the two elements need to possess in order to be considered as candidates for the objective and subjective elements of custom. The Court took the position that "State practice, including that of States whose interests are specifically affected, should have been both extensive and virtually uniform ... and should moreover have occurred in such a way as to show general recognition that a rule of law or legal obligation is involved."[42] In addition, the same judgment tends to provide for guidance on the relevant criteria that State practice, as an objective element of custom, needs to meet. Attention should, according to the Court, be devoted to the frequency and habitual character of acts, as well as the level of their excessiveness and virtual uniformity.[43] The ICJ has also stressed the significance of actual practice, observing that "it is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States".[44] Furthermore, in another case well known for the Court's elaboration on different aspects of customary international law – *Military and Paramilitary Activities in and against Nicaragua*, the ICJ clearly stated that State practice is not expected to provide for absolute uniformity with respect to a particular rule as a requirement for customary law, but rather to meet the condition of consistency and generality. It held that "in order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule".[45] The importance of consistency as crite-

[40] Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment of 3 February 2012, *ICJ Reports* 2012, 122, para. 55.

[41] *Ibid.*

[42] North Sea Continental Shelf Cases, 43, para. 74.

[43] *Ibid.*, 44, para. 77.

[44] Continental Shelf case (Libyan Arab Jamahiriya v. Malta), Judgment of 3 June 1985, *ICJ Reports* 1985, 29 30, para. 27. In another case the Court referred to "the actual practice of States" as "expressive, or creative, of customary rules". Continental Shelf (Tu nisia v. Libyan Arab Jamahiriya), Judgment of 24 February 1982, *ICJ Reports* 1982, 46, para. 43.

[45] Military and Paramilitary Activities in and against Nicaragua, 98, para. 186.

ria for State practice was also confirmed, though in an indirect manner, in the famous *Asylum* case.[46]

The issue of *opinio juris* as the second necessary element of custom, has not, as opposed to State practice, received that much elaboration in the case-law of the Court. In the *Nicaragua* case the ICJ simply indicated that the existence in the *opinio juris* of States of the principle of non-intervention should be backed by established and substantial practice.[47] The Court went on to explain that "either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."[48] This statement, originally proclaimed by the Court in the *North Sea Continental Shelf* cases,[49] reveals the only so far "settled" aspect of the subjective element of customary law. Since it is implied in State practice and, therefore, needs to be deduced from it, the *opinio juris* element is, according to some authors, at the very root of all problems relating to the identification of customary international law.[50]

3.3. Incoherence in the Court's case-law as regards evidence of particular rules of customary international law

The ICJ does not apply a single, uniform approach to the identification of rules of customary international law. The Special Rapporteur has so far made a distinction between two basic approaches, taking presence of a detailed analysis as the relevant criterion.[51] However, Mr. Wood's differentiation neither reveals nuances in these two approaches which may be identified through a close examination of its case law, nor

[46] The Court observed that "the facts ... disclose so much uncertainty and contra diction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions (...) that it is not possible to discern (...) any constant and uniform usage, accepted as law" Colombian Peruvian Asylum case (Co lombia v. Peru), Judgment of 20 November 1950, *ICJ Reports* 1950, 277.

[47] Military and Paramilitary Activities in and against Nicaragua, 106, para. 202.

[48] *Ibid.*, 108 109, para. 207.

[49] North Sea Continental Shelf Cases, 44, para. 77.

[50] Stern believes that the element of *opinio juris* "undeniably gives the judge a very wide margin in which to maneuver." She also considers that there is much truth in Kelsen's words that *opinio juris* masks the role of the judge in the creation of law. B. Stern, 101 102.

[51] According to the Rapporteur, the first approach consists in ascertaining the cus tomary nature of a rule in question without any detailed analysis of either of the two ele ments, whereas the second one engages the Court in a thorough analysis of State practice and *opinio juris*. It seems that the Special Rapporteur was aware of the "risk of oversim plification" that may occur as a result of such a distinction. First report on formation and evidence of customary international law by Michael Wood, 24, para. 62.

focuses on the very essence of the problem. The relevant criterion should be qualitative, not quantitative.

In general, the Court considers it crucial to "satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by the practice".[52] Still, it is in various manners and using different techniques that the Court reaches such a conclusion.

It is quite often that the Court chooses not to enter into the complex and cumbersome process of investigating and evaluating State practice, but instead simply declares that a rule is to be considered as customary international law. Such a flexible or liberal approach, which will be referred to as "identification without evidence", may also vary from case to case and therefore, different categories of the first approach may be identified depending on the level of flexibility in the Court's approach. In certain cases, the Court simply ascertains that a rule in question "reflects customary international law" without any additional reference to its previous case-law, State practice or other arguments.[53] This approach may be qualified as extensively flexible and should be avoided, since by using it the Court departs in a rather disturbing manner from its "openly proclaimed standards" for establishing customary law.[54] The second version of the first approach is quite similar to the previous one since it also tends to identify the rule as customary international law without properly evidencing it. This approach, however, differs from the excessively flexible one by the Court's tendency to find some kind of support for its position, although this "support" can in no way be considered as evidence of either State practice or *opinio juris*. For example, the Court has the habit of simply pointing to the position taken by the ILC as regards the customary character of a rule in question. This kind of approach was used by the Court in its judgment in the case concerning *Gabčikovo-Nagymaros Project,* where the Court simply stated that the conditions for a state of necessity, as a ground for precluding wrongfulness, included in the ILC Draft Article 33, "reflect customary international law".[55] This approach is

52 Military and Paramilitary Activities in and against Nicaragua, 98, para. 184.

53 Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Judgment of 16 March 2001, *ICJ Reports* 2001, 97, para. 185, and 100, para. 201. Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment of 19 November 2012, 666, para. 118.

54 R. H. Geiger, "Customary International Law in the Jurisprudence of the Inter national Court of Justice: A Critical Appraisal", *in* U. Fastenrath et al. (eds.), *From Bilat eralism to Community Interest: Essays in Honour of Judge Bruno Simma*, Oxford Univer sity Press, Oxford 2011, 692.

55 *Gabčikovo Nagymaros Project* (Hungary v. Slovakia), Judgment of 25 Septem ber 1997, ICJ Reports 1997, 40 41, para. 52. Similarly, in the case concerning Applica tion of the Convention on the Prevention and Punishment of the Crime of Genocide (Bos nia and Herzegovina v. Serbia and Montenegro), the Court did not bother to provide evidence for its statement that a particular rule is a rule of customary international law. It

not to be confused with the Court's reliance on the work and research of ILC as regards State practice in situations in which, instead of making its own research on the subject, the Court uses a "shortcut" and accepts the thorough analysis of State practice already conducted by the Commission.[56] Even though the Court does not engage itself in the process of collecting evidence of State practice and *opinio juris*, its reliance on the work of the ILC should be considered as acceptable. It may be presumed that often the ILC has put in several decades of long work on a certain topic and can offer a research of State practice on a particular subject that the Court would never be able to either collect or examine during the course of proceedings in a case at hand. Another variation of the "identification without evidence" approach is reflected in the Court's reasoning that the fundamental character of a rule in question is in itself enough to identify it as customary law. In the Advisory Opinion delivered by the Court in *Legality of the Threat or Use of Nuclear Weapons*, the ICJ claimed that "it is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity'" that they "are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law".[57] The Court itself offered an

simply stated that the rule in question "is one of customary international law" and that it is "reflected" in a particular article of the ILC's Draft Articles on State Responsibility for Internationally Wrongful Act. Application of the Convention on the Prevention and Pun ishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, *ICJ Reports* 2007, 202, para. 385, 207, para. 398, 217, para. 420. The same approach was used by the Court in its Advisory Opinion concerning immunity of a Special Rapporteur of the Commission on Human Rights. Difference Re lating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion of 29 April 1999, *ICJ Reports* 1999, 87, para. 62.

[56] In the case concerning the *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada/United States of America), the Chamber of the ICJ concluded that it "can best express its thinking on this subject by quoting the comment made by the Court, in its Judgment of 20 February 1969" which referred to "the records of the International Law Commission, which had the matter under consideration from 1950 to 1956". De limitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment of 12 October 1984, *ICJ Reports* 1984, 297, para. 107. Quite re cently the Court used the same approach and relied exclusively on the work and research provided by the ILC. In the case concerning *Jurisdictional Immunities of the State*, it held that "the International Law Commission concluded in 1980 that the rule of State immu nity had been 'adopted as a general rule of customary international law solidly rooted in the current practice of States". The Court, however, thought it necessary to stress that the Commission's conclusion "was based upon an extensive survey of State practice and, in the opinion of the Court, is confirmed by the record of national legislation, judicial deci sions, assertions of a right to immunity and the comments of States on what became the United Nations Convention". Jurisdictional Immunities of the State, 123, para. 56.

[57] Legality of the Threat or Use of Nuclear Weapons, 257, para. 79.

explanation for using such an approach in the case concerning *Delimitation of the Maritime Boundary in the Gulf of Maine Area*. It seems to suggest that no particular State practice is necessary to be proven with regard to basic legal principles as customary international law.[58] It may be expected that the Court will continue to use the flexible "identification without evidence" approach with regard to abstract rules incapable of being applied directly to the facts of the case.[59] It might also be expected that such an approach would prevail in respect to rules appertaining to newly developed areas of international law. In the case concerning *Pulp Mills on the River Uruguay*, the Court not only pointed out that "the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory" but also considered "that this obligation 'is now part of the *corpus* of international law relating to the environment'".[60] Two remarks need to be made on this point. First of all, the Court's approach to identifying rules of customary international law does not vary depending on the specificities of a particular field of law. The Court will most probably use the flexible approach in certain areas of international law in which State practice has not so far reached the necessary level of coherence, but in relation to which there is common understanding in the international community as regards the importance of such basic principles. However, the reason should be traced to the general and abstract nature of the rule, not the fact that it belongs to a specific area of international law. Secondly, the Court extended the customary effect of a rule in question to a new area of international law by simply invoking its previous statement on the subject. It does not consider it necessary to conduct a novel procedure for identification of the customary nature of a rule in question with regard to the specific sphere of relations between States.

The second approach used by the Court when identifying rules of customary law will be qualified as "identification through evidence". As will be seen, this approach also varies.

In certain cases the Court "satisfies" itself by invoking its own statements contained in previous decisions as to the customary nature of the rule in question.[61] The Court should, however, bear in mind that the

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58 Such legal principles, according to the Court, "lay down guidelines to be fol lowed with a view to an essential objective." Delimitation of the Maritime Boundary in the Gulf of Maine Area, 290, para. 81.

59 The Special Rapporteur's explanation for using such an approach relies on the "obvious" character of the matter and the fact that the Court views it as "unquestioned law". First report on formation and evidence of customary international law by Michael Wood, 24, para. 62.

60 Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment of 20 April 2010, *ICJ Reports* 2010, 55 56, para. 101.

61 Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment of 4 June 2008, *ICJ Reports* 2008, 219, para. 112. Invocation of previous case

temporal element may be of significance in situations in which it is "relying on precedent rather than repeatedly engaging in detailed analysis".[62] Subsequent practice of States must be taken into consideration instead of simply presuming that States continue to act in the same manner in which they used to act at a certain point in the past.[63]

The genuine "identification through evidence" approach consists, however, in the Court's own examination of both State practice and *opinio juris* in order to reach a conclusion about the existence of a customary rule. Relevant case-law in which the Court decided to apply this model tends to suggest that a number of questions still remain open and that the ILC should endeavor to clarify them in the course of its future work on the subject. First of all, what seems to be the weight accorded by the Court to the two elements of custom – State practice on the one hand and *opinio juris* on the other? Is it always easy to make a distinction between the two elements in the Court's analysis, or has the Court "blurred the distinction between State practice and *opinio juris*"?[64] As opposed to situations in which the Court engages in a thorough examination of State practice, there are cases when reference to State practice is only a formality. Thus, instead of focusing on the objective element and traditionally deducing *opinio juris* from a detailed analysis of State practice, the Court sometimes gives more weight to the subjective element and focuses exclusively on the examination of *opinio juris*.[65] Secondly, there is the eter-

law notwithstanding, the position of State parties to the dispute stresses the relevance of the Court's position regarding the customary nature of a particular rule even outside of the context of the case at hand. This remark further indicates how important it is to establish clear and unequivocal standards with regard to identification of customary law. Pulp Mills on the River Uruguay, 103 104, para. 273. Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment of 6 November 2003, *ICJ Reports* 2003, 198, para. 76. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Terri tory, Advisory Opinion of 9 July 2004, *ICJ Reports* 2004, 194, para. 140.

[62] T. Meron, *The Making of International Criminal Justice: A View from the Bench: Selected Speeches*, Oxford University Press, Oxford 2011, 31.

[63] Chigara takes the position that "indirect violation of custom occurs when an international tribunal invokes and applies customary international law, as previously de clared by another tribunal, without scrutinizing the basis for such a declaration". B. Chi gara, "International Tribunal for the Law of the Sea and Customary International Law", *Loyola of Los Angeles International and Comparative Law Review* 22/2000, 450. We see no reason why the same would not apply to invocation of previous case law of the same international tribunal.

[64] O. Yasuaki, "Is the International Court of Justice an Emperor Without Clothes?", *International Legal Theory* 81/2002, 16.

[65] The ICJ expressly stated that it has to be satisfied "that there exists in custom ary international law an *opinio juris* as to the binding character of such abstention." Mili tary and Paramilitary Activities in and against Nicaragua, 99, para. 188. Referring to the Declaration on Principles of International Law concerning Friendly Relations and Co operation among States in accordance with the Charter of the United Nations, the Court noted that "the adoption by States of this text affords an indication of their *opinio juris* as

nal question of what constitutes State practice and what weight should be accorded to certain acts of States? It may generally be noted that there is a tendency in the Court's jurisprudence to widen the range of State activities to be considered as practice for the purposes of identifying customary international law. The Court has so far relied on international instruments of universal application – both binding and non-binding, domestic law, decisions of national and international fora.[66] In addition it stressed the significance of the claims advanced by States before tribunals, as well as their statements outside legal fora, more particularly in the course of the studies undertaken by ILC and in the context of adoption of international treaties.[67] What is more, the ICJ observed that the practice needs not "be documented in any formal way in any official record".[68] Thirdly, it may be concluded from the Court's jurisprudence that it is with enormous discrepancies with regard to the level of thoroughness that the ICJ embarks on an analysis of State practice. In certain cases it does not outline particular examples of State practice but only generally refers to some of its elements.[69] On other occasions the Court chooses to be more analytical and largely cites specific instruments of both international and national law. The ICJ's judgment in the case concerning *Jurisdictional Immunities of the State* is quite indicative since it reveals the variations in the Court's approach to evidencing State practice even within a single judgment.[70]

to customary international law on the question". *Ibid*., 101, para. 191. It further stressed that "expressions of an *opinio juris* regarding the existence of the principle of non intervention in customary international law are numerous and not difficult to find". *Ibid*., 106, para. 202. Petersen qualifies this insistence of the Court on the subjective element as an interpretative approach to international custom. N. Petersen, "Customary Law without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation", *American University International Law Review* 23/2007 2008, 278.

66 Questions relating to the Obligation to Prosecute or Extradite, 457, para. 99.

67 Jurisdictional Immunities of the State, 122, para. 55.

68 Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment of 13 July 2009, *ICJ Reports* 2009, 265, para. 141.

69 Questions relating to the Obligation to Prosecute or Extradite, 457, para. 99.

70 With regard to the customary nature of a right to immunity, the Court considered it enough to rely on the work of the ILC. While examining whether customary international law developed to a point where a State is not entitled to immunity in the case of serious violations of human rights law or the law of armed conflict, ICJ referred to a couple of decisions of national courts in order to deny the proposition advanced by Italy. At a later point of the same judgment the Court uses a third approach and cites a large number of decisions of both national courts of different States, as well as the relevant jurisprudence of the European Court of Human Rights. Jurisdictional Immunities of the State, 123, para. 56, 134 135, para. 77, 136, para. 83, 137, para. 84, 139 para. 90.

4. CONCLUDING REMARKS

The main objectives of this study were to present one of the fundamental issues of public international law – the process of formation and evidence of international customs. This issue belongs to the group of systemic questions and it would be too ambitious to expect that it could be fully elaborated on in a single article. The approach therefore consisted in detecting some objective indicators in the process of formation and evidence of customary law, i.e. its identification. The paper analyzes the work of the International Law Commission on the one hand, and the inevitable case law of the International Court of Justice on the other. It is obvious that members of the ILC chose the safe method of largely relying on the settled jurisprudence of the Court relating to the identification of customary international law. The impression, nevertheless, remains that the Special Rapporteur has frequently been sparse in his reports and has missed the opportunity to synthesize abundant practice and positions of the doctrine into more precise and comprehensive rules that would provide assistance to those intended.

International customary law owes its longevity to both the ILC and ICJ. Even though the World Court strengthened the role of international custom and clarified certain general aspects of customary international law, it obviously considered it unnecessary to introduce more coherence with regard to its approach to identifying rules of customary law in specific cases. Sometimes the Court applied the "identification without evidence" approach. On other occasions it preferred to use the model qualified in this paper as "identification through evidence". Though the analysis of the jurisprudence revealed certain templates in the Court's attitude towards identification of customary international law, there still exist a number of inconsistencies. It is beyond dispute that the identification of customary international law cannot be conducted in a completely mechanical manner. However, "objectively determinable and replicable procedures of legal methodology"[71] should prevail over reasons of judicial strategy and discretion, which seem to be at the very root of the problem. It remains to be seen whether the work of the ILC will produce a reversible impact on the future case law of the Court.

[71] A. D'Amato, 39.

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LEGAL CULTURE IN CONTEMPORARY SERBIA: STRUCTURAL ANALYSIS OF ATTITUDES TOWARDS THE RULE OF LAW

The article analyzes the support for the rule of law among Serbian citizens. The research data show that support for the rule of law depends on the structural socio economic position of respondents and their position on the transition winners and losers scale i.e., the level of fulfilment of their interests in the new system. There is differentiation among better educated respondents. Those who benefited from the new system recognize the importance of the rule of law. Others, due to their knowl edge and understanding of the functioning of the system, are more disappointed and more critical towards it.

Key words: *Serbia. Legal culture. Rule of law. Post socialist transition. Values.*

1. INTRODUCTION: WHY STUDY LEGAL CULTURE?[***]

The causal relations of values and value changes on one hand, and on the other, structural features and changes in a given society, have attracted considerable academic attention.[1] On a very general level, indi-

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[1] Talcot Parsons, Societies. Evolutionary and Comparative Perspectives. Engle wood Cliffs, NJ: Prentice Hall Inc., 1977; Ronald Inglehart, Modernization and Postmod

vidual values are seen as reflections of social and political processes and institutions while at the same time constituting their social foundations. For example, liberal and democratic values are seen as a social foundation of democracy and a barrier to anti-democratic ideologies and politics, but also as part of the political culture nurtured by democratic regimes. As Inglehart and Welzelsay say, "democracy is not simply the result of clever elite bargaining and constitutional engineering. It depends on deep-rooted orientations among the people themselves. These orientations motivate them to demand freedom and responsive government – and to act to ensure that the governing elites remain responsive to them. Genuine democracy is not simply a machine that, once set up, functions by itself. It depends on the people".[2] This conclusion was reinstated particularly strongly in the analysis of the second and third wave of democratization, and of the process of democratization and democratic consolidation of the former socialist countries.[3]

A similar argument is often applied when discussing *Rechtsstaat* – certain values are simply the outcome of the functioning of the *Rechtsstaat,* but, nonetheless, also constitute its societal foundations.[4] *Rechtsstaat* is perceived as a political and legal system which depends on the prevailing values and attitudes of ordinary citizens. *Rechtsstaat* can exist only when an appropriate culture exists, a "culture of the rule of law" that actively supports the *Rechtsstaat* and resists violations of laws,

ernization. Cultural, Economic and Political Change in 43 Societies. Princeton: Princeton University Press, 1997; Mladen Lazić and Slobodan Cvejić, "Post Socialist Transforma tion and Value Changes of the Middle Class in Serbia", European Sociological Review 27 (6), 2011, 808 823.

[2] Ronal Inglehart and Christian Welzel, *Modernization, Cultural Change and De mocracy. The Human Development Sequence*, Cambridge: Cambridge University Press, 2005, 2.

[3] Lehnard J. Cohen. and John R. Lampe, *Embracing Democracy in the Western Balkans. From Post conflict Struggles toward European Integration*, Washington, D.C. and Baltimore: Woodrow, 2011; Bojan Bugarčić, "Populism, liberal democracy and the rule of law in Central and Eastern Europe", *Communist and Post Communist Studies* (41) 2008, 191 203; David J. Galligan,.and Marina Kurkchiyan, (eds.), *Law and Informal Practices: The Post Communist Experience*, Oxford: Oxford University Press, 2003; Hand Dieter Klingemann, Dieter Fuchs and Jan Zielonka (eds.), *Democracy and Political Culture in Eastern Europe*, London: Routledge, 2006; Richard Rose and Don Chull Shin, "Democratization Backwards: The Problem of Third Wave Democracies", *British Journal of Political Science* 31 (2), 2001, 331 354.

[4] Notions of *Rechtsstaat* and the rule of law have emerged in two distinct aca demic, political and legal traditions. Some authors think there is a conceptual equivalence between the two concepts (e.g. Danilo Zolo, "The Rule of Law: A Critical Reappraisal" in Pietro Costa and Danilo Zolo (eds.), *The Rule of Law: History, Theory and Criticism*, Dodrecht: Springer, 2007, 3 73), while others emphasize differences (e.g. Gianluigi Pal ombella, "The Rule of Law and its Core" in Gianluigi Palombella and Neil Walker (eds.), *Relocating the Rule of Law*, Oxford and Portland, Oregon: Hart Publishing, 2009). For the sake of simplicity, we will use them as synonymous.

arbitrariness or corruption.[5]. In a similar vein, Brian Tamanaha states that, "for the rule of law to exist, people must believe in and be committed to the rule of law [...]. When this cultural belief is pervasive, the rule of law can be resilient, spanning generations, surviving episodes in which the rule of law is flouted by government officials. When this cultural belief is not pervasive, however, the rule of law will be weak or non-existent".[6] He also adds that, "pervasive societal attitudes about fidelity to the rule of law [...are] the mysterious quality that makes the rule of law work".[7] Since democracy and the rule of law are closely intertwined, at least in the sense that equality before the law, predictable, efficient justice, and public power respectful of fundamental rights imply a pre-existing democracy[8], then the societal foundations for democracy and *Rechsstaat* are based in the same set of individual values.

However, the idea that the success of a particular state in establishing the rule of law depends on a conducive political or legal culture has drawn sharp criticism.[9] Following Unger, we interpret the *Rechtsstaat* primarily as a result of the interaction of social interests supported subsequently in the day-to-day operations of an appropriate legal culture. [10] We also believe that legal culture is not endogenous; it is a reflection of social and institutional factors and it influences the application of law and the rule of law itself. For these reasons, studying values and attitudes towards the rule of law contributes to our understanding of the functioning and legitimacy of the legal and political system. In this article we offer an account of legal culture in contemporary Serbia as well as a structuralist explanation of its features. We analyze attitudes towards *Rechtsstaat* as

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5 James L. Gibson, Jeffrey Sonis and Sokhom Hean "Cambodians' Support for the Rule of Law on the Eve of the Khmer Rouge Trials" *The International Journal of Transitional Justice 4/2010,* 377 396.

6 Brian Tamahana, "A Concise Guide To The Rule Of Law", St'Johns University School of Law, legal studies research paper series paper No.07 0082/2007, 10.

7 Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory*, Cambridge: Cambridge University Press, 2004, 141.

8 Leonardo Morlino "The two 'rules of law' between transition to and quality of democracy" in Leonardo Morlino and Gianluigi Palombella (eds.) *Rule of Law and Democracy: Inquiries into Internal and External Issues*, Leiden: Brill, 2010, 40; *cf.* Jose Maria Maravall and Adam Przeworski (eds.), 2003. *Democracy and the Rule of Law*, Cambridge: Cambridge University Press; Berry R. Weingast, "The Political Foundations of Democracy and the Rule of Law", *American Political Science Review* 91 (2), 1997, 245 263.

9 E. g. Adam Pzeworski "Why Do Political Parties Obey Results of Elections?" in Jose Maria Maravall and Adam Przeworski (eds.). *Democracy and the Rule of Law*, Cambridge: Cambridge University Press, 2003, 114 147.

10 Roberto Mangabeira Unger, *Law in Modern Society*, New York: The Free Press, 1976; for the Serbian context *cf.* Danilo Vuković, "Društvene osnove pravne države: Slučaj Srbije", *Sociološki pregled*, 45 (3), 2011, 421 451.

part of the legal culture embedded in the social stratification pattern of contemporary Serbia and we argue that attitudes towards the law are strongly dependent on the socio-economic position of individuals.

The article has four sections. After this introduction, in part two we introduce the concept of legal culture and its operationalization. In the third part of the article we provide the analytical background for our research. The characteristics of contemporary legal culture in Serbia are the subject of the fourth part of the article. The final section summarizes our analysis of empirical data.

2. EMPIRICAL ANALYSIS OF THE LEGAL CULTURE

Empirical analysis of legal culture calls for different approaches to operationalization of the concept. Lawrence Friedman defines legal culture as a network of values and attitudes regarding the law. The legal culture is composed of those elements of general culture, customs, opinions, ways of doing and thinking that bend social forces towards or away from the law.[11]. Legal culture, among other things, explains when, why and where people tend to use legal procedures, when they use other institutions and when they do nothing.[12] For David Nelken, "legal culture, in its most general sense, is one way of describing relatively stable patterns of legally oriented social behavior and attitudes. The identifying elements of legal culture range from facts about institutions such as the number and role of lawyers or the ways judges are appointed and controlled, to various forms of behavior such as litigation or prison rates, and, at the other extreme, more nebulous aspects of ideas, values, aspirations and mentalities". [13] Friedman makes a distinction between "internal" and "ex-

[11] Lawrence M. Friedman, *The Legal System: A Social Science Perspective*, New Yourk: Rasel Sage Foundation, 1975, 15.

[12] L. M. Friedman, *The Legal System: A Social Science Perspective*, New Yourk: Rasel Sage Foundation, 1975, 76.

[13] David Nelken,"Using the concept of legal culture", *Australian Journal of Legal Philosophy* 29 (1), 2004, 1 26. Rodger Cotterrell criticized Friedman for discussing the legal culture in an "often avowedly impressionistic" manner (Roger Cotterrell, *Law, Cul ture and Society. Legal Ideas in the Mirror of Social Theory*, Ashgate, 2006, 88). Cotter rell emphasizes the power of the professional community and doctrine in the broader contextual environment, as opposed to Friedman, who deals with the wider aspects of the social environment in which law operates, that is, the culture as a determinant of the law. His critique of the concept of legal culture is based on the idea that socio legal studies shift from a strict scientific explanatory framework to a more interpretative framework. At the same time, he is willing to admit that studying legal culture is important as it indicates the complexity of the social environment in which modern legal systems operate (R. Cot terrell, *Law, Culture and Society. Legal Ideas in the Mirror of Social Theory*, Ashgate, 2006, 88 95; *cf.* Roger Cotterrell, "The Concept of Legal Culture", in David Nelken, (ed.)

ternal" legal culture. Internal culture refers to the ideas and practices of lawyers, while external legal culture refers to the values, ideas and attitudes of citizens. This aspect of legal culture – external legal culture – will be the subject of our analysis.

The concept of legal culture has been operationalized more exactly, through several dimensions such as attitudes towards the rule of law, the neutrality of the law and the relative importance attached to individual freedom. [14] This approach has been applied in a series of explorations of legal cultures across Europe and the world[15] and in our research as well. As a result, we were able to perform a rudimentary cross-country comparison and, more importantly, to propose an explanatory model that enabled us to interpret the data in the particular Serbian social context.

Gibson and Caldeira operationalize legal culture through three dimensions: (1) attitudes towards the rule of law, (2) perceptions of the neutrality of law and (3) relative valuation attached to individual liberty. [16] Attitudes towards the rule of law were measured through the level of agreement with a series of three groups of declarative statements. The first group of statements measures strict adherence to the law and unwillingness to tolerate deviations. Gibson and Caldeira acknowledge that this is only a partial conceptualization of the notion of the rule of law, but state that other aspects will probably receive unanimous support (e.g. whether the government ought to be allowed to govern arbitrarily, setting law aside whenever necessary or expedient). They start from the hypothesis that individuals differ in the rigidity with which they believe the law ought to be adhered to.[17] The second group of statements deals with the societal grounds of the law. The law is depicted as a result of the interests of dominant groups and interests, on one side, and as the result of social consensus, on the other side. The assumption is that those who view the law as more neutral will be more willing to accept absolute compliance

Comparing Legal Cultures, Darmouth Publishing, 1997; David Nelken, "Three Problems in Employing the Concept of Legal Culture" in Fred Bruinsma and David Nelken (eds.), *Exploration in Legal Cultures*, Amsterdam: Elsevier, 2007).

[14] James L. Gibson, and Gregory A. Caldeira, "The Legal Cultures of Europe", *Law & Society Review* 30 (1), 1996, 55 86.

[15] J. L. Gibson, and G. A. Caldeira, "The Legal Cultures of Europe", *Law & Society Review* 30 (1), 1996, 55 86; Kathryn Handley "Who Are the Legal Nihilists in Russia?" *University of Wisconsin Law School Legal Studies Research Paper Series Paper* No. 1187, 2012; Iwon Jakubowska Branicka, "Expectations Regarding Law and the Emerging Concept of Legality in the Process of Democratic Transformation", European Network on Law and Society Virtual Series, 1996, available at *http://www.reds.msh paris.fr/publications/collvir/kourilski/kourilski4.htm.*

[16] J. L. Gibson, and G. A. Caldeira, "The Legal Cultures of Europe", *Law & Society Review* 30 (1), 1996, 59.

[17] *Ibid.*, 60.

with the law. Finally, the valuation of individual liberty was chosen as the third dimension, because the issue of individual liberty, i.e., the struggle over the extent of individual liberty, rests at the core of most modern legal systems. Gibson and Caldeira hypothesize that those who value liberty more are more likely to favor universalistic application of the rule of law and are less likely to view law as an instrument of repression and social control. [18]

A series of empirical investigations of legal culture across the western world and Central and Eastern Europe have led to inconclusive results. The first one of these, conducted by Gibson and Caldeira in 1996, reveals that "nation-of-residence" is *not* an especially strong predictor of attitudes. [19] Although there are considerable within-country variations, Gibson and Caldeira were able to distinguish countries such as Greece, Belgium, Luxemburg, Portugal and territories of the former East Germany where regard for the rule of law was not strong, support for individual liberty was weak and alienation from law fairly common. At the opposite end of the continuum were Denmark, The Netherlands, West Germany and Great Britain.[20] Other cross-country comparisons indicated that citizens of former socialist countries were less inclined to support the rule of law. [21]

When it comes to within-nation variations, Gibson and Caldeira found that differences in legal values are mainly rooted in social class or education. "To some extent, it is those who profit from the existing socio-economic structuring of the society who tend to view law as a beneficent institution".[22] Gibson's more recent analysis of Russian legal culture indicates that better educated Russians tend to express more positive evaluations of the rule of law, although not much more. The level of education was the strongest predictor, while age was also significant, though less so. Positive attitudes towards the rule of law also correlate, to a degree, with positive attitudes towards democratic institutions. Gibson concludes that attitudes towards the rule of law are an integral part of the democratic belief system in Russia.[23]

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18 *Ibid.*, 61.

19 *Ibid.*, 68 (emphasis in original).

20 *Ibid.*, 70.

21 I. Jakubowska Branicka, "Expectations Regarding Law and the Emerging Con cept of Legality in the Process of Democratic Transformation", European Network on Law and Society Virtual Series, 1996; Ase Berit Grødeland and Aadne Aasland, "Fighting corruption in public procurement in post communist states: Obstacles and solutions", *Communist and Post Communist Studies* 44 (2011), 17 32.

22 J. L. Gibson, and G. A. Caldeira, "The Legal Cultures of Europe", *Law & Soci ety Review* 30 (1), 1996, 73.

23 James L. Gibson, "Russian Attitudes towards the Rule of Law: An Analysis of Survey Data" in Denis J. Galligan and Marina Kurkchiyan (eds), *Law and Informal Prac tices: The Post Communist Experience*, Oxford, Oxford University Press, 2003, 89 90.

Although Gibson found that economic well-being was a poor predictor of attitudes towards the rule of law, Kathryn Hendley found that those who see themselves as being either at the top or the bottom of the economic pyramid are less likely to support the rule of law. This, in her opinion, "provides confirmation of two seemingly contradictory pieces of common wisdom about contemporary Russia. The nihilism of the rich supports the popular belief among Russians that the wealthy view law as an inconvenience rather than as a constraint on their behavior [...] Those who are struggling to provide for their families also tend to be nihilistic".[24] She also found a strong relationship between democratic values and support for the rule of law and an even stronger relationship between trust in public institutions and support for the rule of law.[25] In her research, the relationship between a lack of trust in state institutions and a rejection of the culture of the rule of law was even stronger than for the rejection of democratic ideas. On the other side of the scale, those who voiced firm trust in institutions were much more likely to be committed to abiding by the law, but those in the top quartile of the scale for support of democratic principles were not noticeably more law abiding than the rest of the sample.[26] Finally, she also returns to the "winners and losers of the transition" explanation, claiming that those who were able to take advantage of the chaotic 1990s might not necessarily have much respect for the law. Perhaps they attributed their lot in life, Hendley suggests, to the manipulability of the rules of the game. Among those who benefited from this, positive attitudes to legal nihilism are understandable. When it comes to the losers, she suggests that they were more inclined to "resign to the perceived reality [and] blame the ability of more powerful actors to manipulate the system for their misfortune". [27]

In the following chapters we try to offer a sound theoretical explanation of who, in the Serbian post-socialist context supports the rule of law, and why. First, we will present the analytical background for the analysis of the Serbian data, and then proceed with the presentation and explanation of the research data.

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[24] K. Handley "Who Are the Legal Nihilists in Russia?" *University of Wisconsin Law School Legal Studies Research Paper Series Paper* No. 1187, 2012, 13.

[25] For the relationship between political beliefs and law obedience *cf.* Tom R. Tyler,. "Public Mistrust of the Law: A Political Perspective", *University of Cincinnati Law Review* 66, 1998, 847 876.

[26] K. Handley "Who Are the Legal Nihilists in Russia?" University of Wisconsin Law School Legal Studies Research Paper Series Paper No. 1187, 2012, 15.

[27] K. Handley "Who Are the Legal Nihilists in Russia?" *University of Wisconsin Law School Legal Studies Research Paper Series Paper* No. 1187, 2012, 21.

3. POST-SOCIALIST TRANSFORMATION AND *RECHTSSTAAT* IN SERBIA

During the last decade of the 20th century, while Central European countries were more or less successfully undergoing post-socialist transformation, Serbia and other post-Yugoslav countries were in a state of civil war, political strife and economic crisis. In the Serbian context, this period was designated 'blocked' or 'delayed' post-socialist transformation. This notion is used to describe the blocking of changes towards a market economy and political pluralism. In Serbia, stagnated reform was held up by the political elite in order to capture public economic resources and to remain in power as long as possible. [28] This was a period of institutional breakdown, modest democratization and a lack of the rule of law. The legitimization of the political system rested on the values of social and national solidarity in times of crisis and external threat (ranging from UN sanctions to NATO bombing) and the fight for Serbian national interests after the dissolution of the former Yugoslavia.

During the 90s political and social changes were to a great extent backed by urban, highly educated segments of the middle classes, while workers, farmers and the rural population did not start to switch allegiance to political forces for change until 1999.[29] This was not enough to bring such change about. It was only after the peak of the conflict with the international community (the NATO bombing of Serbia and Montenegro) and the breakdown of the political program and legitimization formula that rested on misuse of the idea of the Serbian nation state and social solidarity, that the then opposition parties managed to overthrow the authoritarian government and initiate social and economic changes. These reforms took place in a society burdened by severe economic scarcity, deep poverty and institutional breakdown, in an international environment marked by the prolonged effects of the wars and political crises

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[28] Slobodan Antonić, *Zarobljena zemlja: Srbija za vlade Slobodana Miloševića*, Beograd: Otkrovenje, 2002; Silvano Bolčić,. "Ownership Transformation and the Prob lems of Redistribution of the Social Power in the Post Socialist Societies", *Balkan forum* 1997¸ 5 (2), 221 240; Mladen Lazić (ed.), *Rački hod. Srbija u transformacijskim procesi ma*, Beograd: Filip Višnjić, 2000; Mladen Lazić and Slobodan Cvejić. "Stratificational changes in Serbian society: A case of blocked post socialist transformation", in Anđelka Milić (ed.), *Transformation and Strategies*, Belgrade: ISI FFB, 2005.

[29] Marija Babović, "Akteri blokade društvenih promena i akteri transformacije" in Silvano Bolčićand Anđelka Milić (eds.), *Srbija krajem milenijuma: razaranje društva, promene i svakodnevni život*, Beograd: Institut za sociološka istraživanja Filozofskog fakulteta u Beogradu, 2002; Slobodan Cvejić, "General Character of the Protest and Pros pects for Democratization in Serbia", in Mladen Lazić, (ed): *Belgrade in Protest: Winter of Discontent*, Budapest: CEU Press, 1999.

of the 90s.[30] On the macro-political and societal level, these factors continue to influence the pace and the course of political change in the new millennium, which can be categorized as lagging post-socialist transformation. A new democratic capitalist system has, nonetheless, managed to emerge and develop against this social and political background, as have a new legitimization formula and normative framework (i.e., publicly acclaimed values) which promote democracy and the rule of law. [31] The new normative framework was developed in line with the interests of elites and segments of the middle classes that would become the key societal ground for the new social and political system. Democracy, rule of law and a free market economy provide these groups with economic prospects[32] but also correspond to the dominant values and ideologies of this segment of Serbian society.[33]

The last thirteen years of social and political change have yielded mixed results. The annual growth rate until 2007 was 5.4%, but GDP has managed to reach only 68% of the 1989 level. Salaries, in contrast, increased much faster, 13.7% annually or twice as fast as productivity growth.[34] This has evidently led to an increase in living standards that was not backed up by economic growth. Not only was there an imbalance between the increase in living standards and economic growth, but the growth itself was not sustainable in the long run. Two thirds of economic growth is attributed to growth in the non-tradable parts of the economy (financial services, wholesale and retail trade, transport and telecommunications).[35] The domestic currency (dinar) was and still is strong, making exports expensive and imports cheap and thus imported goods more accessible. This has often been interpreted as an economic policy shaped by the interests of emerging domestic economic elites or

[30] These were primarily the political pressure to cooperate with the International Criminal Tribunal for the Former Yugoslavia, dissolution of the federation of Serbia and Montenegro, and Kosovo and Metohija's proclamation of independence.

[31] Mladen Lazić and Slobodan Cvejić, "Class and Values in Post Socialist Trans formation in Serbia", *International Journal of Sociology,* 2007, 37 (3), 54 74.

[32] These range from the control and conversion of state and public resources for the elites to better market position in a free and open economy for some segments of the middle classes, though less for those whose socio economic position is dependent on the state.

[33] Slobodan Vuković, *Čemu privatizacija*?, Beograd: SDS IKSI, 1996.

[34] Edvard Jakopin, Sonja Radosavljević, and Danica Jovanović (eds.) (2009), *Izveštaj o razvoju Srbije*, Beograd: Republički zavod za razvoj, 2010, 20.

[35] Dušan Vasiljević, "Serbia's Economic Growth and International Competitive ness", *Quarterly monitor*, 2009/18, 85. Growth was also based on increased domestic demand financed from foreign resources. From 2000 to 2008 Serbia received EUR 3 bil lion in international development aid and 1.8 billion in loans (*Bilten javnih finansija, januar 2011*, Beograd: Ministarstvo finansija Vlade Republike Srbije, 2011). The trade deficit increased from 2.5% of GDP in 2001 to 22% in 2009.

tycoons[36] and has led to an increase in the fiscal deficit and foreign debt, having a devastating effect on domestic industry and its competitiveness.[37]

At the beginning of this period, poverty rates were high. However, they soon began to fall with the increasing efficiency of redistributive mechanisms (welfare policies, fast growth of salaries, monetary policy etc.).[38] There has also been a slight increase in inequality. In 2000 the Gini coefficient was 0.28 but as soon as 2002 it had risen to 0.33 and, with certain fluctuations, has remained the same ever since. As can be seen, this period has been marked by unsustainable economic growth and redistributive policies that increased the living standards of certain social groups, while leaving others at the bottom of the social hierarchy with even fewer resources than in the previous period.

Channels that led to the increase in living standards and social position have varied across social groups and classes. The elites benefited from the transformation more than other groups through the conversion of resources, i.e., the political power and privileged social position of the former socialist elites, into economic capital.[39] In the case of the middle class, these were primarily (1) an increase in public sector employment and (2) growth in the number, size and relative strength of foreign firms that employ skilled and qualified labor. This is important, as our previous research indicates that two thirds of the middle classes in Serbia actually work in the public sector.[40] Other non-targeted redistributive mechanisms

[36] Danica Popović, "Privredna aktivnost i makroekonomska politika u tranziciji", in Boris Begović*et al.*, *Četiri godine tranzicije u Srbiji*, Beograd: Center for Liberal Dem ocratic Studies, 2005; Dragovan Milićević, "Pošast zvana devizni kurs", *http://www.mak roekonomija.org/0 dragovan milicevic/posast zvana devizni kurs/*, 2009.

[37] Dušan Pavlović and Mihail Arandarenko. "Serbia: Equity and Efficiency Hand in Hand" in Predrag Bejaković and Marc Meinardus (eds.), *Equity vs. Efficiency: Possibilities to Lessen the Trade Off in Social, Employment and Education Policy in South East Europe*, Sofia: Friedrich Ebert Foundation, 2011, 163 177; D. Popović, "Privredna aktivnost i makroekonomska politika u tranziciji", in Boris Begović*et al.*, *Četiri godine tranzicije u Srbiji*, Beograd: Center for Liberal Democratic Studies, 2005.

[38] In 2000, the absolute poverty rate was 36.5%, it fell to 14.5% in 2002 and to 7.9% in 2009 and with the expansion of economic crisis rose again to 9.2% in 2010. However, the at risk of poverty rate (EU adjusted relative poverty rate) is high, amount ing to 18.3% in the general population. It is much higher again in vulnerable groups: 33.9% among the unemployed and 38.6% among the rural population (the first two fig ures are from official statistics; the last one is from an independent source: Slobodan Cvejić, Marija Babović, Mina Petrović, Natalija Bogdanov, Olivera Vuković, *Socijalna isključenost u ruralnim oblastima Srbije*, Beograd: Program Ujedinjenih nacija za razvoj, 2010, 38).

[39] M. Lazić and S. Cvejić. "Stratificational changes in Serbian society: A case of blocked post socialist transformation", in A. Milić (ed.), *Transformation and Strategies*, Belgrade: ISI FFB, 2005.

[40] Household Coping Strategies, research conducted in 2007 by the Institute for Sociological Research, Faculty of Philosophy, Belgrade University, original data set.

also contributed to the improvement of the social and economic position of the middle classes during the post-socialist transformation, including subsidized prices for distant heating and electricity, availability of public services etc.[41] Finally, these groups, characterized by higher education, urban residence and a better labor market position, were able to influence numerous public policies that were shaped according to their socio-economic interests[42] and they ultimately became the winners of the Serbian post-socialist transformation.

As in other post-socialist countries, the workers were the principal losers of the transformation. During socialism their position was protected (*inter alia* because the whole system was legitimized through the new social role and position of the working class) and this continued in the 90s (e.g. layoffs in state-owned enterprises were banned). After 2000 their overall socio-economic position started to depend solely on their market position. The policy of protected employment was abandoned and there were major layoffs in privatized companies. The labor market was not vibrant and the unemployment rate has risen to 24.3% with a constant decrease in the activity rate (49.3% in 2012). Two thirds of the unemployed are long term unemployed and the vast majority of them have elementary and secondary education (19.1% and 67.2% respectively). Altogether, the economic and political (ideological) changes led to deterioration in the economic position of workers. The trade unions have failed to make successful organizational changes during the last two decades and they are unable to actively protect workers.[43] Finally, the post-socialist transformation has led to stratification among the rural population. While a small number of entrepreneurs in agriculture have managed to improve their economic position, the majority of the rural population employed in agriculture remain at the bottom of the social hierarchy.[44]

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[41] UNDP (2004), *Stuck in the Past: Energy, environment and poverty in Serbia and Montenegro*, Belgrade, United Nations Development Programme.

[42] Danilo Vuković and Marija Babović, "Social Interests, Policy Networks and Legislative Outcomes: The Role of Policy Networks in Shaping Welfare and Employment Policies in Serbia", *East European Politics and Societies,* February 2014, pp.5 24; Marija Babović and Danilo Vuković, "Shaping Social Policies in the Western Balkans: Legal and Institutional Changes in the Context of Globalisation and Post Socialist Transformation" in Margo Thomas and Vesna Bojičić Dželilović (eds.), *Public Policy Making in the West ern Balkans: Case Studies of Selected Economic and Social Policy Reforms*, London, Springer, 2015, 17 43.

[43] Apart from the public sector, they have low membership rates and hence seek legitimization in politics (*cf.* Zoran Stojiljković i Srećko Mihailović, *Stanje socijalnog dijaloga u Srbiji posle dvadeset godina tranzicije*, Beograd: Swiss Labour Assistance, 2010).

[44] Slobodan Cvejić, *Korak u mestu. Društvena pokretljivost u Srbiji u procesu post socijalističke transformacije*, Beograd: Institut za sociološka istraživanja Filozofskog fakulteta u Beogradu, 2006.

Development of the rule of law was also ambiguous and inconsistent.[45] The World Bank Rule of Law Indicator for 2011 was –0.33 and Serbia is performing worse than all European countries apart from Russia, Belarus, Albania, Bosnia and Herzegovina, and Moldova.[46] One aspect of the *Rechtsstaat* is of particular importance for our discussion: a legal and political system in which public officials and citizens are bound by the law. Public officials are bound by the law in two senses: first, they must abide by the positive law and second, they can change the law only in accordance with the prescribed procedures.[47] Laws limit the discretionary power of state officials and provide mechanisms for holding them *accountable,* while in power, and after leaving office. The laws themselves ought to be such as to lead to certainty, predictability and security in relations between the state and the citizens and citizens to citizens.[48]

The Serbian context is characterized by strong state involvement in the economy and society, powerful political and economic elites that control huge public and state resources and are often not accountable for their actions, along with a weak civil society and other control mechanisms.[49] Therefore, one aspect of the rule of law has been constantly highlighted as problematic – control of corruption and economic crime. Post-socialist societies are themselves susceptible to crime and corruption because of the massive privatization and prominent role of the state in the economy and society.[50] Privatization of state owned enterprises provided a basis for the development of new economic and political elites and represented a massive administrative, economic and political endeavor to convert state owned into privately owned resources. It was also a huge

[45] For an overview *cf.* L. J. Cohen. and J. R. Lampe, *Embracing Democracy in the Western Balkans. From Post conflict Struggles toward European Integration*, Washington, D.C. and Baltimore: Woodrow, 2011 and Slobodan Antonić, *Elita, građanstvo i slaba država*, Beograd: Službeni glasnik, 2006).

[46] The index can range from 2.5 indicating weak to 2.5 indicating strong per formance.

[47] The limits to lawmaking are: 1) constitutionally imposed limits, 2) transnation al or international legal limits, 3) human rights limits, and 4) religious or natural law limits. In modern societies, the key limiting factor is the list of widely accepted human rights (Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory*, Cambridge: Cambridge University Press, 2004, 115*ff*).

[48] William E. Scheuerman, (ed.), 1996, *The Rule of Law under Siege: Selected Essays of Franz L. Neumann and Otto Kirchheimer*, Berkeley: University of California Press, 1996, 116; Friedrich von Hayek, *The Road to Serfdom*, Chicago: Chicago Univer sity Press, 1994, 80).

[49] For an overview, *cf.* Danilo Vuković, "Društvene osnove pravne države: Slučaj Srbije", *Sociološki pregled*, 45 (3), 2011, 421 451.

[50] Presently, 40% of Serbian GDP is produced in the public sector which is higher than in other more successful transition countries such as Slovakia and Hungary (20%) or Slovenia and Croatia (30%) (data from *www.ebrd.com*).

administrative and political challenge[51] burdened with many problems, from the breaking of contracts to the violation of laws.[52] The last decade has been marked by numerous cases of financial and economic crime and corruption, many of which were a byproduct of privatization or other forms of redistribution of public goods (issuing various licenses, public procurement and the like).[53] This led to the emergence of a "predatory elite"[54] and "state capture"[55] and contributed to a shared belief that corruption and economic crime are among the most important social and political problems in contemporary Serbia. [56] In spite of the fact that researching corruption is a complex endeavor[57], various social and political factors have been identified as the roots of widespread corruption and economic crime. We can only briefly indicate them here, but they include political pressure on the judiciary and the failure to establish a professional and independent judiciary[58], the dominant role of political parties in politics and society, the system of party financing[59], and the broader

[51] Between 2002 and 2011 2,397 enterprises with 340,000 employees were sold.

[52] Altogether, 25% of privatization contracts were canceled due to the non fulfill ment of the obligations on behalf of the buyers.

[53] *Cf.* S. Antonić, *Elita, građanstvo i slaba država*, Beograd: Službeni glasnik, 2006; *Crime and its Impact on the Balkans and Affected Countries*, Vienna: United Na tions Office on Drugs and Crime, 2008; for investigative media reporting *cf. www.cins. org.rs*, for a series of case studies of the Anti Corruption Council *cf. http://www.antiko rupcija savet.gov.rs*.

[54] Ivan Krastev, *Zamka nefleksibilnosti: frustrirana društva, slabe države i demokratija*, Beograd: UNDP i BFPE, 2004; Karla Hoff and Joseph E. Stiglitz, "After The Big Bang? Obstacles To The Emergence Of The Rule Of Law In Post Communist Societies," *American Economic Review* 94 (3), 2004, 753 763.

[55] Dušan Pavlović, "Zarobljena država" in Srećko Mihailović (ed.) *Pet godina tranzicije*, Beograd: Friedrich Ebert Stiftung, 2006.

[56] *Cf.* Boris Begović and Boško Mijatović, *Corruption in Serbia Five years later*, Belgrade: CLDS, 2007; *2012 Serbia Progress Report*, Brussels: The European Commis sion, 2012; *European Parliament resolution on the European integration process of Ser bia*, 2012 *http://www.europarl.europa.eu/sides/getDoc.do?type MOTION&reference B7 2012 0188&language EN*; Leslie Holmes, "Crime, organised crime and corruption in post communist Europe and the CIS", *Communist and Post Communist Studies* 42, 2009, 265 287; *Crime and its Impact on the Balkans and Affected Countries*, Vienna: United Nations Office on Drugs and Crime, 2008.

[57] Petrus C. van Duyne, Ellena Stocco, Vanja Bajović, Miroslava Milenovic, Eliz abeta Lojpur, 2010. "Searching for Corruption in Serbia", *Journal of Financial Crime* 2010, 17 (1), 22 6.

[58] Ratko Marković, "Sudstvo Ahilova peta države Srbije", *Pečat*, 28.4.2010; Ve sna Rakić Vodinelić,"Kojim putem do ka vladavini zakona", *Republika*, 2010, No. 476 477.

[59] Vanja Bajović and Savo Manojlović, "Corruption and Financing of Political Parties Case of Serbia", OBEGEF Working Papers No21, *http://www.gestaodefraude. eu/wordpress/wp content/uploads/2013/01/wp021.pdf*; Vesna Pešić, "State Capture and Widespread Corruption in Serbia", CEPS Working Document No. 262/March 2007, *http:// aei.pitt.edu/11664/1/1478.pdf*.

issues of weak institutions and independent regulatory bodies,[60] and weak societal grounds (including civil society) for the development of the rule of law. [61] State capture has been sharply criticized by the European Commission and international organizations (WB, UN bodies, etc.) and apparently widely explained by the national academic community. Finally, the issue of corruption and clientelism was crucial to the political campaign for the last national elections held in spring 2012, which contributed to a shift in political power in Serbia.

To summarize, post-socialist transformation in Serbia has been marked by an unsustainable increase in the living standards of elites and the middle class, and a deterioration in the socio-economic position of workers and a majority of farmers. This is the basic line of division between the winners and losers of transition. On the other side, the new normative framework and the legitimizing formula of the new social and political system lie in sharp contrast with the realities of the *Rechtsstaat*, especially in relation to the white collar crimes of corruption and state capture by political and economic elites. With the national elections of 2012 this issue became the most emphasized normative and value problem in Serbia.

4. ATTITUDES TOWARDS THE RULE OF LAW IN SERBIA

In this part of the paper we will present the methodology and the results of our analysis of the attitudes of the citizens of Serbia towards the rule of law. The analysis is based on data collected through a survey in November-December 2012. Face to face interviews were conducted with a nationally representative multi-stage sample of 1057 respondents[62].

As stated earlier, we applied a standard methodology, focusing on one of the dimensions of political culture relevant to a successful democratic transition in Serbia. Attitudes towards the rule of law were measured using the following statements:

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[60] Dejan Milenković, "Nastanak, razvoj i problem kontrolnih tela u Srbiji posle 5. oktobra" in Grupa autora, *Razvoj demokratskih ustanova u Srbiji deset godina posle*, Beograd: Fondacija Heinrich Böll, 2010; Slaviša Orlović, "Nezavisna tela četvrta grana vlasti ili kontrolor vlasti" in Dušan Pavlović and Zoran Stojiljković (eds.), *Savremena država, struktura i socijalne funkcije*, Beograd: Konrad Adenauer Stiftung i Fakultet političkih nauka, 2010; D. Pavlović, "Zarobljena država" in Srećko Mihailović (ed.) *Pet godina tranzicije*, Beograd: Friedrich Ebert Stiftung, 2006.

[61] D. Vuković, "Društvene osnove pravne države: Slučaj Srbije", *Sociološki pre gled*, 45 (3), 2011, 421 451.

[62] As usual for samples of this size, members of elites appeared in extremely small numbers.

1. It is not necessary to obey a law you consider unjust.
2. Sometimes it might be better to ignore the law and solve problems immediately rather than wait for a legal solution.
3. If you don't particularly agree with a law, it is all right to break it if you are careful not to get caught.

Serbian respondents demonstrated a rather strong commitment to the values of the rule of law. Only between 8.3% and 11.6% of respondents agree with the idea of breaking the law if it is in one's interest or breaking a law one does not agree with. Approximately one third of the sample agrees with breaking an unjust law and statements suggesting that it is alright to bend or ignore the law.

Compared to other EU countries from the Gibson and Caldeira 1995/1996 sample, Serbian citizens demonstrate a high level of commitment to the values of the rule of law. In table 2 we have compared Serbian scores with countries low on the support to the rule law (Greece, Belgium, Portugal and territories of former East Germany) and those at the opposite end (The Netherlands and Germany). Obviously, contemporary Serbia is somewhere in between. It is not necessary to point out that 2012 and 1995/1996 data are not easily comparable, and that one could have expected an increase in support for the rule of law with the strengthening of democratic institutions and diffusion of democratic values. The particularity of the 2012 pre-electoral political propaganda contributes to such an outcome as well.

Table 1: Attitudes towards the rule of law, Serbia 2012 and selected EU countries 1995/1996[63]

It is not necessary to obey a law you consider unjust.				
	Agree & Strongly agree	Don't know	Strongly disagree & Disagree	WB Rule of Law indicator at the time of research
Greece	37.1	22.6	40.3	0.98
Belgium	28.0	13.4	58.8	1.31
Portugal	33.5	25.8	40.7	1.23
East Germany	18.3	19.6	62.1	–

63 All data except Serbia from J. L. Gibson, and G. A. Caldeira. "The Legal Cul tures of Europe", *Law & Society Review* 30 (1), 1996, 55 86.

The Netherlands	18.4	4.7	76.9	1.65
Germany	24.2	12.6	63.2	1.57
Serbia	29.2	16.5	64.2	-0.33
Sometimes it might be better to ignore the law and solve problems immediately rather than wait for a legal solution.				
Greece	37.9	18.8	43.3	0.98
Belgium	55.4	7.3	37.3	1.31
Portugal	32.3	15.7	52.0	1.23
East Germany	37.3	25.9	36.8	–
The Netherlands	48.1	7.4	44.6	1.65
Germany	46.2	14.7	39.1	1.57
Serbia	33.9	16.6	49.6	-0.33
If you don't particularly agree with law, it is all right to break it if you are careful not to get caught.				
Greece	17.9	20.8	61.3	0.98
Belgium	25.0	6.4	68.6	1.31
Portugal	20.4	18.4	61.1	1.23
East Germany	6.2	16.0	77.7	–
The Netherlands	15.4	3.2	81.4	1.65
Germany	11.6	7.6	80.8	1.57
Serbia	11.6	13.4	75.0	-0.33

Having looked at the World Bank rule of law indicators, we were unable to identify a direct relation between the level of development of the rule of law and attitudes towards the rule of law. Clearly, there are some intermediary variables that need to be taken into account. Furthermore, there are also significant variations within the sample that need to be explained. Since we can only deal with the second task – explanations of variations within the sample – we formulated a general hypothesis that is based on the consideration we presented above: *due to the blocked and postponed post-socialist transformation the rule of law was not established in due time and in an effective manner, and the new normative* *framework was abused by the new political and economic elites in order to essentially legitimize capture of the state, which provoked mistrust in political institutions and localized low appreciation of the rule of law among the 'transition losers'.*

We derived several specific hypotheses out of this general hypothesis.

1. Mistrust in political institutions is highly correlated with low acceptance of the rule of law.
2. Prevalence of authoritarian and traditionalistic values, dominating in the socialist system, decreases support for the rule of law.
3. Younger and more educated people, who have greater opportunities in the labor market vacancies, show a higher appreciation of the rule of law.
4. Due to the biased transformation path of post-socialist Serbia, economically better off people show greater support for the rule of law

To test our hypotheses, we derived several variables to construct a multiple regression model. Our initial model contained a scale of the rule of law as a dependent variable and six predictors: the scale of trust in political institutions, the scale of authoritarianism, the scale of traditionalism, age, education and the scale of wellbeing.

The scales of the rule of law, authoritarianism, traditionalism and trust were confirmed by PCA factorial analysis and tested for reliability using Crombach's Alpha. The scale of the rule of law consists of 7 attitudes/statements, the scale of authoritarianism of 6, the scale of traditionalism of 4 and the scale of trust of 6 attitudes/statements.

To adequately cover the prevailing issues of the rule of law in the Serbian context and ensure comparability with other research, we have added the following two statements to the abovementioned Gibson and Caldeira's list of 3 statements:

4. It‘s alright to bend the law as long as we do not break it.
5. It‘s alright to break the law if it is in our interest.

The factorial analysis could not distinguish between the scales of the rule of law and legal alienation as used in the Gibson and Caldeira research. Through principal component analysis (PCA) we derived a single factor based on seven statements. Therefore, to the abovementioned five we added the following two:

1. Law is rarely on my side, usually I find laws to be restrictive and against my interests.
2. My interests are rarely represented in the law, usually the law reflects the interests of those who want to control me.

The scale of authoritarianism consists of the following statements:

1. Collective interests must be more important than individual ones.
2. Without a leader, a nation is like a man without the head.
3. Everyone has all he/she needs if the country is strong.
4. Homosexuals are no better than criminals and they should be severely punished.
5. There are two main groups of people in the world: the weak and the strong.
6. The most important thing is to teach children to be obedient to parents.

The scale of traditionalism consists of the following statements:

1. If one spouse is employed it is natural it should be the man.
2. The majority of domestic jobs are more suitable for women.
3. Men should do more domestic jobs than they do now.
4. Public functions are more suited to men and private activities to women.

Finally, we measured the level of public trust in the following institutions: the state, the President of the Republic, the police, the Prime Minister, the Government and the National Assembly.

The education variable is the ordinal one distinguishing between 5 levels of education: primary or less, vocational secondary, general secondary, lower university and university education (including PhD level). The age variable is a standard numeric variable. The well-being scale is an ordinal variable distinguishing between three levels of sufficiency of income: those who have serious difficulties in providing basic living necessities (food, housing, utilities) or cannot pay at all, those who have some difficulties or are late with some bills, and those who don't have any problems at all.

The results for our initial regression model are presented below.

Table 2: Regression model 1, scale of the rule of law as dependent

Model		Standardized Coefficients	t	Sig.	Collinearity Statistics	
		Beta			Tole-rance	VIF[64]
1	(Constant)		17.572	.000		
	Trust	.242	7.783	.000	.874	1.144
	Authoritarianism	-.178	-5.218	.000	.729	1.372
	Traditionalism	-.113	-3.324	.001	.730	1.370
	Education	.037	1.125	.261	.779	1.283
	Well-being	.118	3.945	.000	.953	1.049
	Age	.059	1.864	.063	.845	1.184

Our first, second and fourth hypotheses were confirmed and the third one was rejected. The more people trust in political institutions, the more they support the rule of law. The more authoritarian and patriarchal/traditional people are, the more they are inclined towards rejecting the rule of law; the higher their wellbeing, the higher they value the rule of law. Education and age, however, showed no statistical significance in the model.

To check for more nuances in our analysis and find explanations for the results of the education and age variables in our model, we introduced two interactions into the analysis, namely interactions of well-being with age and education. While the first interaction didn't turn out to be significant, the revised model proved to be fruitful for bringing education back into the explanation, but also revealed an unexpected finding. The results of the second model are presented below.

64 Variance inflation factor.

Table 3: Regression model 2, scale of the rule of law as dependent

Model		Standardized Coefficients	t	Sig.	Collinearity Statistics	
		Beta			Tole-rance	VIF
2	(Constant)		22.067	.000		
	Trust	.257	8.501	.000	.922	1.085
	Authoritarianism	-.167	-4.959	.000	.742	1.348
	Traditionalism	-.113	-3.344	.001	.733	1.363
	Education	-.163	-2.756	.006	.241	4.144
	Education X well-being	.247	4.276	.000	.252	3.961

There was a slight increase in R^2 from .120 to .122. Education and interaction of education and well-being suffer from higher collinearity, but show statistical significance. The respective regression coefficients indicate that those who live better thanks to their education show higher support for rule of law values. But, surprisingly, with such an effect of the interaction it turns out that among those who failed to make their education pay off, those with higher education are more resistant to the values of the rule of law!

With the last finding we actually had to refine our third hypothesis to better fit our initial theoretical explanations: even among the better educated, only those who benefited from the newly established institutional and economic arrangements recognize the importance of the rule of law in current social relations. Those who couldn't benefit probably have more knowledge and understanding of the functioning of the system, but are also more disappointed, and therefore more critical towards it. We believe that 2012 electoral campaign biased answers of all our respondents towards higher scores on the scale of the rule of law, but structural determinants apparently kept their effect and produced differences between winners and losers of transition, even splitting the most educated along the fulfillment of their interests (i.e., along emanation of their class position). It could be said that the *part* of the tentative middle class (approximated in this analysis through higher education) that *benefits* from the state of affairs that the post-socialist transformation brought about are those who have the highest appreciation of the new normative framework that rests *inter alia* on the ideals of the rule of law.

5. CONCLUSION

Our analysis of legal culture in contemporary Serbia focused on attitudes towards the rule of law, and it has led us to a set of theoretical and practical conclusions. We will first present our theoretical conclusions and then proceed to the practical ones.

The data revealed significant variations, and our analysis primarily aimed at explaining these variations. We analyzed data in a social context marked by post-socialist transformation and we tried to explain the variations using a general hypothesis that relied on a brief exploration of the two features of post-socialist transformation: (1) changes in the socio-economic position of social groups and (2) establishing the *Rechtsstaat*. We hypothesized that in the course of blocked and postponed post-socialist transformation the new normative framework was built around the values of the rule of law and democracy. However, the new normative framework was abused by the new political and economic elites in order to essentially legitimize capture of the state, which provoked mistrust in political institutions and low appreciation of the rule of law among the 'transition losers'.

The analysis confirmed the general hypothesis. The support for the rule of law is quite widely accepted, but it depends on the structural socio-economic position of respondents, while in a severe economic situation it depends on the level of fulfillment of interests, too. For the later finding it was crucial that we have identified a differentiation among the better educated respondents. Those who were able to improve their socio-economic position were more supportive towards the rule of law, while those whose socio-economic position did not improve were far more critical of it. The winners of the transition were able to adjust their values to the new normative framework as long as the new system that rests on them was beneficial to their interests.

Our explanation rests on an elaborated understanding of the process of post-socialist transformation (the shift from a command economy to a free market economy and from an authoritarian to a democratic political regime; integration into global political and economic processes), its drivers (the interests of national political and, later, economic elites) and the role of various social classes (support from parts of the middle class and reluctance on behalf of workers and farmers) in the specific Serbian context (marked by a recent past of ethnic conflict and international military interventions and a vigorous authoritarian regime). We believe this contributes to our understanding of the role of the law in post-socialist societies and the place it holds in the values of citizens. This analysis confirms that attitudes towards the rule of law are strongly dependent on their structural position in a given social and economic system. In a post-socialist context these attitudes are heavily dependent on the individual's position on the transition-winners-and-losers scale. Therefore, on the practical side, we argue that a shift of values towards the rule of law will appear as a by-product of the improvement of the socio-economic position and fulfillment of the interests of the middle and lower social strata, rather than through a direct appeal to values and attitudes e.g. through awareness-raising campaigns.

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Dr Marko Stanković[*]

THE SIGNIFICANCE OF JUDICIAL REVIEW OF SUB-NATIONAL CONSTITUTIONS AND LAWS IN FEDERAL STATES[**]

This article discusses various issues that emerge as a consequence of constitutional pluralism existing in federal states. Particular attention is dedicated to the relationship between constitutions of federal units and federal constitutions and laws. As a consequence of two coexisting legal systems in a federation, there are as many as six categories of general acts a constitution, laws and bylaws of the federation, on the one hand, and constitutions, laws and bylaws of federal units, on the other. It is necessary that so many categories of legal acts are in harmony with each other, and this can be ensured only by means of judicial (constitutional) review. Two of the globally most recognized and most representative models of conformity control among different categories of legislative acts German and American have been presented. Finally, an attempt has been made to emphasize the importance of such control and the challenges that it may face in the future.

Key words: *Judicial review. Federal constitution. Sub national constitution. Constitutionality and legality. Federal law.*

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1. FEDERAL SUPREMACY PRINCIPLE AS THE BASIS OF FEDERAL LAW

The federal supremacy principle[1] consists of two elements, i.e. it implies that a federation is a separate political and governmental organization and a "super-state" – a carrier of absolute sovereignty, both international and constitutional. The first element reflects the fact that by no means may the character of a federation as a special form of governmental and political entity be brought into question. The second element of supremacy on the one hand suggests that a federal union holds full international or external sovereignty, which is reflected in its right to decide on war and peace (*ius belli*), the right to enter into international treaties (*ius tractatum*), as well as the right of its external representation (*ius legationis*). On the other hand, an internal or constitutional sovereignty of a federation is best reflected in a German saying that "the federal law breaks the state law" (*Bundesrecht bricht landesrecht*)[2], meaning that the federal laws in all cases prevail over or amend the nonconforming state laws. It is common that the federal law takes precedence over the state law which is subordinate to it and is thus held in check in every situation where it does not conform to the federal law. Every federal law is based on the supremacy principle of federal constitution, and in order to consistently follow and administer the principle in practice, appropriate methods and procedures are required to keep such acts and operations contravening the federal constitution at bay. Under such terms, every federal system needs an adequate review of constitutionality.[3] Internal or constitutional sovereignty of a federation is based on the supremacy of the federal law, the protection of which represents the most important task of the constitutional judiciary in federal states. Therefore, even though the federal law and the state law are basically independent, it should be emphasized that the latter must conform to the former, as otherwise the survival of a federal union would be impossible.[4]

The federal constitution defines two separate constitutional forms of law – federal on the one hand, and the law of federal units on the other – which implies the existence of multiple individual systems of gen-

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1 Mauro Cappelletti, *The Judicial Process in Comparative Perspective*, Oxford 1989, 317.

2 Article 31 of the Basic Law for the Federal Republic of Germany of 1949.

3 An exception to this rule would be the Belgian federation, since it is a pre dominant opinion that it does not apply there, as there is no hierarchy between the acts adopted by the federal parliament (laws) and those enacted by the community and re gional parliaments (decrees and ordinances), which means that Belgium thus borderlines the confederation, since the federal law may be overridden through regional and commu nity regulations.

4 Karl. J. Fridrih, *Konstitucionalna demokratija*, Podgorica 2005, 180 181.

eral legislative acts. Such systems relate to one another in a certain sense that is also determined by the federal constitution. The hierarchy of general legislative acts within federations is therefore more complex, since a much greater number of categories of normative acts occur compared to the unitary states.[5] Therefore, when it comes to federation, "a question arises as to the conformity of not only federal laws and other acts to the federal constitution, but of laws and other acts adopted by federal units to the federal law, which prevails over the law of an individual state with its legally binding character."[6] Significant issues may emerge particularly in the sphere of mixed legislative jurisdiction, where we can "imagine a situation in which either of the legislators could get ahead of themselves in the legislative process, and for instance a federal legislator could get engaged in a detailed legislation process instead of dealing with principles only, while a state legislator, through the legislative activity, could be in full breach of any principles adopted by the federal legislator."[7]

2. HOW DO SUB-NATIONAL CONSTITUTIONS RELATE TO FEDERAL CONSTITUTIONS?

As a consequence of two coexisting legal systems in a federation, there are as many as six categories of general acts – a constitution, laws and bylaws of the federation, on the one hand, and constitutions, laws and bylaws of federal units, on the other.[8] If we put the bylaws at both governmental levels aside for a moment, and direct our attention towards the most important normative acts (constitutions and laws), we can conclude

5 The opinion of Lukić is that it is possible to differentiate between two elements combined in the hierarchy of legal acts or norms. One of the two elements may be termed as "positive" based on the fact that a superior legal norm defines the structure of an inferior legal norm. In that way, the creation of such a norm and the development of law is secured. The other element may be considered "negative" in that it "determines the manner of establishing as a fact that a norm has been created in accordance with a superior norm, as well as the steps to be taken in order for a seemingly legal norm to be removed from the legal order." (Radomir D. Lukić, "O hijerarhiji pravnih normi", advisory report *Division of Normative Function between Authorities of Various Political and Territorial Units*, Belgrade 1966, 12)

6 Kosta Čavoški, *Ustavnost I federalizam*, Belgrade 1982, 71.

7 Miodrag Jovičić, *Savremeni federealizam uporednopravna studija*, Belgrade 1973, 251.

8 However, there are federal states (India, Belgium) where federal units do not have an independent constitutional capacity, which in itself is an anomaly of a federal system and a significant restriction to the autonomy principle of federal units. Nonetheless, such federations have a far more simplified hierarchy of general legislative acts. Some authors, one of them being Jovan Djordjević, consider that federal units "need to have their respective constitutions. An existence of a constitution is not a proof of a federal relation, although without one such a status has not been secured nor does it exist to this day." (Jovan Djordjević, *Politički sistem*, Belgrade 1985, 291)

with certainty that the federal law must conform to the federal constitution and that the state law must conform to both the federal constitution and laws and the state constitution. However, the relationship of the federal constitution and the federal law with the constitution of a federal unit may pose a problem. Most federations have adopted a rule requiring that the state constitution must conform both to the federal constitution and federal legislation. At the same time, the subordination of state constitutions to the federal constitution is unconditional, while the subordination to the federal law is conditional on the fact that the law conforms to the federal constitution. Otherwise, the constitutional court will abolish or abrogate a federal law, while a state constitution will stay in force. As stated by Jovičić "a solution that provides for subordination of state constitution to the federal constitution and laws shows unquestionable practical values, as it secures the establishment of a unique constitutional and legal system within a federation and it averts the danger of discrepancies between the constitutional and legal systems of the federation and federal units. However, from the perspective of the application of the federal principle, this solution points to its obvious weaknesses, as it significantly undermines the independence of federal units."[9] In simple words, this rule is a result of a preference for the principle of constitutionality and legality over the federal principle.

A judicial review of state constitutions is a highly significant matter for the functioning of any federal state. The rule by which sub-national constitutions need to conform to the federal constitution is one of the basic elements of the federal supremacy principle[10] and it is based on three assumptions. Firstly, a federal constitution is an act made at the highest level of the governmental hierarchy and it has supreme legal force in a federation, for which reason state constitutions must conform to it. Secondly, the federal constitution precedes state constitutions in time and in logical sequence. Therefore, a sub-national constitution with respect to the federal constitution is not simply a *lex inferior*, but as a rule it is a *lex posterior* as well. For that reason it is important that the federal constitution takes legal precedence over state constitutions, as a state constitution would otherwise have the power to amend it. And thirdly, the federal constitution is a general legislative act binding even for the federal units whose representatives to the federal parliament voted against the constitution, i.e. whose parliament or citizens, being against it, did not proceed to its ratification. Sub-national constitutions may be subjected to court control of their constitutionality, and in the event that their nonconformity to the federal constitutions is determined by a review, such unconstitutional provisions shall be abolished or abrogated. We may find an interesting

[9] M. Jovičić (1973), 257.

[10] Francis Delpérée, *La droit constitutionnel de la Belgique*, Bruxelles Paris 2000, 87 88.

solution in the Republic of South Africa, where such reviews of conformity of a sub-national constitution to the federal constitution are part of a regular enactment procedure, and constitutions may not go into effect until the Constitutional Court has confirmed their conformity to the federal law. An exception to the rule by which a constitutional court or a supreme court decides on the constitutionality of state constitutions would be Switzerland, where cantonal constitutions are not subjected to judicial review. However, it is far from the fact that cantonal constitutions are excluded from any review, as cantons submit their constitutions to the federal parliament for ratification, and the constitutions are therefore treated as federal regulations and are integrated into the federal law. Consequently, the Swiss Federal Court would not take on the task of controlling the constitutionality of cantonal constitutions, and such a move has faced criticism from some distinguished constitutionalists.[11]

3. HOW DO SUB-NATIONAL CONSTITUTIONS RELATE TO FEDERAL LAWS?

The relationship between state constitutions and federal laws poses more problems compared to how they relate to the federal constitution. However, "in all federations, with slight differences here or there, it is posited that a state constitution is inferior not only to the federal constitution but to the federal laws as well."[12] Between two legal systems, as pointed out by Jovičić, "no discrepancies are desirable, but if they should emerge, then it is in the best interest of maintaining order and legal security to determine 'seniority', which would favor the federation and, in this case, its general act."[13] Such a solution, however, as previously noted, has little to do with the application of the federal principle. Nonetheless, its absolute application is found only in federal states where federal acts are not subjected to the control of constitutionality, as is the case in Switzerland. In other federations it is only assumed, arguably so, that federal laws conform to the federal constitution, but if the constitutional court determines that this is not the case, a federal law shall be abolished or abrogated. In that respect, the nonconformity between federal laws and a state constitution may have two outcomes: if it is found that a federal law is unconstitutional, i.e. it does not conform to the federal constitution,

[11] More details in: Miodrag Jovičić, *O ustavu teorijsko komparativna studija*, Belgrade 1977, 243 245; Marcel Bridel, *Précis de droit constitutionnel et public suisse*, tome II, Lausanne 1965, 147.

[12] Ljiljana Slavnić, *Federalizam i ustavnosudska funkcija slučaj Jugoslavije pravna studija sa uporedno pravnim elementima*, Belgrade 2000, 31 32. Such a solution has been adopted in the United States of America, Federal Republic of Germany, Austria, Russian Federation etc.

[13] M. Jovičić (1973), 251.

such law is abolished or abrogated, while the state constitution remains in effect; if it is determined, however, that a federal law does conform to the federal constitution, then the controversial provisions of the state constitution are abolished, abrogated or they simply are not applied. Although the cited rule "allows for the establishment of a unique system of constitutionality and legality within a federation and it clears the danger of nonconformity between the two legal systems"[14], it significantly affects the state autonomy principle which is supposed to materialize through the enactment of their own constitutions and represents "an obvious degradation of the importance that the constitution of a federal unit has."[15]

In spite of the criticism that the rule of legal supremacy of federal laws over sub-national constitution significantly reduces the extent to which the federal principle is applied, it is almost impossible to avoid it in federations where the federal constitution grants major freedoms to states when it comes to creating their own constitutional orders. Most federal constitutions contain minimum requirements that federal units have to meet when enacting their constitutions, and with increasing freedom of the states in terms of self-organization comes greater importance of the federal regulation priority principle. In other words, if the framers of sub-national constitutions organize states almost independently from the federal constitution, it is necessary to secure an efficient application at the federal level of the rule by which state constitutions have to conform to federal laws.[16] It is the only way to ensure proper functioning of the federal legal system.

4. JUDICIAL (CONSTITUTIONAL) REVIEW OF LAWS IN FEDERATIONS

When we consider the judicial review of laws in federations, the situation is somewhat different. As previously said, there are two types of laws in legal systems of federations – federal laws and state laws, and thus the basic function of constitutional judiciary – the function of judicial (constitutional) review of laws – in federations has two aspects.

The first aspect of the judicial (constitutional) review of laws is putting the state laws to a test of constitutionality and legality. Such laws need to be in accordance with both the federal constitution and federal laws, and with a state constitution.[17] Scholars are virtually unanimous in

[14] Lj. Slavnić, 32.

[15] M. Jovičić (1977), 246.

[16] Lj. Slavnić, 32 33; M. Jovičić (1977), 246 248.

[17] The relationship between the federal laws and state laws is somewhat more complex in federations where the federal constitution differentiates between absolute and

their opinion that the conformity review of laws of federal units to the federal constitution is an institute that every federation needs, and some authors believe that a federal order may not survive without such review. Thus Čavoški states that this aspect of review is a "*condicio sine qua non* of the federal order, without which it could not exist at all (...)."[18] It is considered that unless a federal court has such authority to review the conformity of state regulations to the federal constitution and federal laws, and to abolish or abrogate any nonconforming regulations, the federal supremacy principle would be jeopardized and in practice this would lead to a gradual collapse of the federal order.

Another form of judicial review in federations – judicial (constitutional) review of federal laws – is considered less important with respect to the first aspect and hence it is not a necessary requirement for a federation to function successfully. However, this form of judicial review of laws is more than useful and is in fact desirable, since it is a reliable legal mechanism that may prevent the federal legislator from crossing the jurisdiction limits as defined in the constitution. The classical theory of federalism therefore supports the perspective that a federation needs an arbitrator in the form of judiciary, whose task is to protect the federal constitution both from federal and state enactments.[19] The judicial review of federal laws seeks its theoretical grounds in the idea of a "restrictive constitution", as the constitution sets the limits within which the federal parliament may act.

Even though the second aspect of court control of constitutionality in a federation – which is based on the abolishment or abrogation of unconstitutional federal laws – is undoubtedly less important, it would be entirely incorrect to claim that it does not have any relevance when it comes to the proper functioning of the constitutional system. "A federal order may survive without it, but then there are no reliable legal guarantees that the separation of powers between the federal government and member states, once established, would remain within the limits defined by the constitution."[20] The reason for that is the possibility that the federal legislator may have in enacting laws that could breach the jurisdiction of federal units without fear that such laws would be abolished or abrogated. In other words, as the judicial review of state laws is aimed at protecting the federal supremacy principle, the judicial review of federal laws is needed primarily to protect the principle of state autonomy. It should be kept in mind however that federal units as such have their representatives in the house of the federal parliament, which is basically co-

mixed jurisdiction, as is the case in the Federal Republic of Germany (Article 72 of the Basic Law) and the Russian Federation (Article 76 of the Constitution).

18 K. Čavoški, 72.

19 For more details, see: J. Djordjević, 294.

20 K. Čavoški, 72.

equal with the general house of representatives in terms of the legislature, and any potential enactments of unconstitutional laws that would expand the federal jurisdiction would come as the result of a vote by a majority of member states. Such laws "in fact have a character of amendments to the constitution, despite having been enacted in a regular legislative procedure"[21]. However, considering that laws are adopted by a simple majority of votes, such actions would be unjust towards the minority that is against extending federal jurisdiction, as such a minority would be able to prevent the adoption of a constitutional amendment that would introduce such changes, since the enactment of an amendment, as a rule, requires a supermajority.

However, even though the judicial review of all laws is undoubtedly desirable in federations, some of them have exempted specific legislative acts from the judicial review through the federal constitution or judicial practice, by the court's narrow interpretations of the constitution. For the sake of illustration, we will refer to the cases of two European federations – Switzerland and Austria. Switzerland is the first case where federal laws have been placed out of the reach of judicial review by provisions of the constitution.[22] Such provisions were present in the Constitution of 1874, and they were reiterated at the 1939 referendum, when a proposed amendment was repealed that would have otherwise allowed the judicial review of federal laws by the Federal Court. The provisions banning the Supreme Federal Court from reviewing the constitutionality of federal laws were included in the new constitution of the Swiss Confederation of 1999.[23] According to the opinion of Jovan Stefanovic, "a truncated form of judicial review" that is present in Switzerland is a consequence of both historical circumstances and the governmental system, as the constitutional order of the country was not constructed on the grounds of separation of powers, but rather on the principle of unity of power.[24] The traditional historical reasons are to be sought in how this country, which converted from confederation to federation in 1848, was initially created. However, even after its conversion, central authorities were quite limited in their powers, and the review of their acts was unnecessary. But, the court control of the constitutionality of federal laws was not introduced even after 1874 when the evolution that led towards the allocation of significant constitutional powers to the Federal Court, in spite of certain attempts to do so. Another form of restricted constitutional review may be seen in Austrian federation, and it comes as the consequence of a complex hierarchy of legal regulations found there.

21 *Ibid.*

22 K. J. Fridrih, 187.

23 See Article 189, Paragraph 4 and Article 191 of the Swiss Constitution of 1999.

24 Jovan Stefanović, *Ustavno pravo Jugoslavije i komparativno pravo*, Vol. I, Za greb 1965, 89 91.

"The Constitutional Court of Austria has taken a stance that the federal constitutional laws are to be exempt from the constitutionality review in material terms, while their conformity to the constitution may be a matter of formal review."[25] The Constitutional Court's attitude is an appropriate one, in consideration of the nature of the Court's function as constitutional guardian, which is to not allow the legal review of acts with a super-legal, i.e. constitutional status.[26]

Finally, the question of conformity between the laws of federal units and their constitutions from the perspective of the federal seat and federal order is not relevant, as every federal unit should take care of this aspect on its own. In fact, in the event of nonconformity, the federal law would remain unharmed. Federal units may employ different ways to defend constitutionality within their own jurisdictions, and the most effective solution to achieve that is the establishment of separate constitutional courts for every state, as is the case of the Federal Republic of Germany, the Russian Federation, and Bosnia and Herzegovina.

5. AMERICAN AND GERMAN MODELS OF JUDICIAL (CONSTITUTIONAL) REVIEW AS ROLE MODELS FOR COMPARATIVE LAW

Edward McWhinney has termed the systems where the task of controlling constitutionality is assigned to regular courts as *judicial review* systems, while those that have a separate constitutional court are termed *constitutional review* systems.[27] First is an American-style *judicial review* posited upon a Supreme Court of general jurisdiction determining concrete case/controversies against a detailed fact record, where essentially a decision on the rights and duties of the parties in an active and direct mutual conflict is made based on facts. On the other hand, a Continental European-style *constitutional review* is applied by a specialized constitutional court in the case of abstract controversies between different units of government (e.g. executive and legislature) or various levels of government (e.g. central and regional administration) about their respective rights and duties under the constitution.[28] As a part of this

[25] Lj. Slavnić, 35. On the other hand, in the Russian Federation, constitutional laws are subjected to control by the Constitutional Court of the Russian Federation.

[26] However, a number of federations and most specifically the Federal Republic of Germany accept the concept that allows a constitutional court or a supreme court to re view the constitutionality of amendments to the constitution.

[27] This classification is discussed by Christopher F. Zurn, *Deliberative Democracy and the Institutions of Judicial Review*, Cambridge 2007, 29 30.

[28] Edward McWhinney, *Supreme Courts and Judicial Law making: Constitutional Tribunals and Constitutional Review*, Dordrecht Boston Lancaster, 1986, XIV.

chapter, we will discuss solutions offered by two federations as the most important representatives of the first and the second system, respectively – USA and Germany. In today's world of constitutional judiciary there are two leading standards in the form of the U.S. Supreme Court and German Federal Constitutional Court. Their practice is a treasury of ideas in terms of constitutional judiciary for the majority of countries.

The most prominent representative of the first system is the United States of America. Renowned American constitutionalist Edward S. Corwin distinguished among three forms or branches of court control of constitutionality in the USA that originated as a result of the federal system of government. The first is the *national judicial review* that implies the right of all courts to review conformity of congressional acts to the U.S. Constitution. Another form of court control of constitutionality is the *federal judicial review* that refers to the right and duty of all courts to give priority to the U.S. Constitution over controversial state constitutions and laws. Finally, the third branch is the *states' judicial review* which refers to the state courts' power to decide the conformity of state legislative acts to their respective constitutions.[29] The only branch of judicial review that is not expressly mentioned in the Constitution, but has derived from Supreme Court practice is the national judicial review. It was established by a decision delivered in the case of *Marbury v. Madison* (1803), where the main conclusions were based on two essential arguments: the first stating that the supremacy of the Constitution as a fundamental act over ordinary acts exists, and the second by which all courts have the power and duty to interpret laws and to not apply such laws contradicting the Constitution.[30] The other two branches of court control of constitutionality have their strongholds in constitutional norms – the federal review has its own in the *Supremacy Clause*, while states' review has it in state constitutions.[31]

Thus all acts of Congress, constitutions of states and all laws, as well as bylaws, are subject to a review of constitutionality. Apart from the specified legislative acts, international treaties undergo the court control of constitutionality as well, although court practice in that area is not extensive. In fact, "even though no international treaty has ever been held to be unconstitutional, in the case of *Missouri v. Holland* (1920) it was clearly

[29] Edward S. Corwin, "Judicial Review", *Encyclopedia of Social Sciences* (vol. 8), London, 1932, 457.

[30] See: Edward S. Corwin, "*Marbury v. Madison* and the Doctrine of Judicial Re view", 12 *Michigan Law Review* (1914), 538; Stanley L. Paulson, "Constitutional Review in the United States and Austria: Notes on the Beginning", *Ratio Juris*, Vol. 16, No. 2, June 2003, 227.

[31] On the constitutional basis for court control of constitutionality in the USA, see: Louis L. Jaffe, "The Right to Judicial Review II", *Texas Law Review*, Vol. 71/5, 1958, 795.

expressed that the constitutional validity of treaties and legislation resting on treaties may appropriately be the subject of judicial inquiry."[32]

Generally, the constitutional judiciary of the Federal Republic of Germany has three distinctive features. Firstly, there is a centralized system of constitutional judiciary where the Federal Constitutional Court is vested with the power to review the constitutionality of legislative acts, although regular courts are allowed to control constitutionality in certain cases, which obviously is a tinge of decentralization in the system. Secondly, apart from the Federal Constitutional Court, Germany has constitutional courts in federal units, and those courts have the power to review the constitutionality of state acts. Evidently, this form of "federalization" of the constitutional judiciary is not to be considered as introductory of a specific decentralized system of court control of constitutionality. The existence of multiple constitutional courts (one federal and several state courts) is to be considered as a logical consequence of a complex federal system. Thirdly, German Constitutional Court (comprising 16 judges) consists of two senates with eight judges each.[33] The First Senate decides on constitutional controversies between the federation and federal units, as well as conflicts among states themselves ("senate of constitutional disputes"), while the Second Senate decides on constitutional complaints ("senate of human rights"). The majority of activities of the Court are conducted by the Senates, and many authors name it the "twin court" due to the existence of two Senates.[34] As the main protector of the federal constitution, the Federal Constitutional Court of Germany holds extensive jurisdiction, and its functions may be classified into several groups.[35] These are: control of regulation constitutionality, deciding on controversies regarding separation of powers (horizontal and vertical), impeachment procedures, election scrutiny, protection of human rights, prohibition of political parties and issuing legal opinions on constitutional matters.[36]

[32] Allan R. Brewer Carias, *Judicial Review in Comparative Law*, Cambridge, 1989, 138. Decision: 252 U.S. 416 (1920).

[33] Judges are appointed by both houses of parliament by a two thirds majority. Appointments by the *Bundestag* are indirect, while those by the *Bundesrat* are direct. The court chairman and his deputy are appointed interchangeably by both houses of parlia ment.

[34] In that regard, see: Luka Mezeti (Lucca Mezzetti), "Savezni ustavni sud Nemačke struktura i funkcije", Pravni život, 11/1997. (vol. III), 902.

[35] "Jurisdiction of the Constitutional Court is generally defined by the Basic Law itself." (David P. Currie, *The Constitution of the Federal Republic of Germany*, Chicago 1994, 27)

[36] Compare: Ralf Rogowski, Thomas Gawron, *Constitutional Courts in Compari son: The U.S. Supreme Court and the German Federal Constitutional Court*, New York Oxford, 2002, 62.

The Federal Constitutional Court controls the constitutionality of legislative acts "in the event of disagreements or doubts concerning the formal or substantive compatibility of federal law or Land law with this Basic Law, or the compatibility of Land law with other federal law"[37], and in the event of disagreements on whether a law meets the requirements on application of the *Bundesrat* or of the government or legislature of a land.[38] All legislative acts may be subjected to constitutional review in the Federal Republic of Germany, including laws enacted before the constitution was adopted, as well as amendments to the constitution, acts of the executive government and international treaties (or more specifically, the laws ratifying such treaties).[39] From the aspect of the federal order, a very important power held by the Constitutional Court is that of controlling the constitutionality of state constitutions.

6. CONCLUSION

Apart from its aim to protect the principle of constitutionality and legality (the same task it has in unitary states as well), the constitutional judiciary in federations has the delicate function of maintaining equilibrium in federal relations by preventing any transformations leading to a unitary or confederate system. Over the first nine decades of the past century the prospect of unitarization of federal states was considered a far more serious threat to federal systems worldwide, compared to the other prospect of its disintegration which emerged only in the last two decades and turned out to be a real threat.

Grosso modo, the constitutional judiciary in federations faces two basic challenges: "firstly, it needs to secure the respect of separate functions between the federation and federal units as determined by the constitution, and secondly, it has to secure the conformity among various categories of general acts adopted by the federation and federal units."[40] In that regard, for the constitutional judiciary to be able to successfully complete its tasks, two important prerequisites must be satisfied: its independent operation needs to be protected, and the federal principle should be sufficiently reflected in its organization.

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[37] Article 93, Paragraph 1, Item 2 of the German Basic Law.

[38] Article 93, Paragraph 1, Item 2a of the German Basic Law. The federal law on concurrent legislation may be enacted "if and to the extent that the establishment of equiv alent living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest." (Article 72, Paragraph 2 of the German Basic Law).

[39] Ralf Rogowski, Thomas Gawron, *Constitutional Courts in Comparison: The U.S. Supreme Court and the German Federal Constitutional Court*, New York Oxford, 2002, 63.

[40] M. Jovičić (1973), 252.

In the 20^{th} century, and particularly after the Second World War, an obvious trend of passing more powers onto the federal center at the expense of federal units came into sight, and it was based on the need to achieve better government efficiency. This trend has been described by constitutionalists as the “weakening of the content of federal principle” or “strengthening of federal functions”. However, at the end of the past century, and after the collapse of socialist constitutionality in particular, some federations followed an entirely different pattern of weakening federal power and strengthened the powers of federal units, while the constitutional judiciary held a noteworthy role in the process by supporting this trend with its decisions. However, the global economic and financial crisis, comparable to that of 1930s, has brought in a new wave of government interventionism which inevitably leads to centralism, and we will soon witness the response of the constitutional judiciary to the challenges it will undoubtedly have to face.

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THEORETICAL DISAGREEMENT ABOUT LAW

As the dominant direction of the study of legal phenomena, legal positivism has suffered criticisms above all from representatives of natural law. Nevertheless, the most complex criticism of legal positivism came from Ronald Dworkin. With the methodological criticism he formed in "Law's Empire", Dworkin attacked the sole foundations of legal positivism and his main methodological assumptions. Quoting the first postulate of positivism, which understands the law as a fact, Dworkin claims that, if this comprehension is correct, there could be no dispute among jurists con cerning the law, except if some of them make an empirical mistake while establishing facts. Since this is not the case, Dworkin proves that this is actually a theoretical disagreement which does not represent a disagreement about the law itself, but about its morality. On these grounds, he rejects the idea of law as a fact and claims that the law is an interpretive notion, which means that disagreements within jurisprudence are most frequently interpretative disagreements over criteria of legality, and not empirical disagreements over historic and social facts.

Key words: *Jurisprudence. Grounds of law. Dworkin. Theoretical disagree ment. Criteria of legality.*

1. INTRODUCTION

Developing his own theory of law, Ronald Dworkin has offered two different criticisms of legal positivism. The first criticism is aimed at the phenomenological deficiencies of positivism. With this type of criticism Dworkin has proven the importance of legal principles, especially in hard cases. By stressing their importance, he has brought into question the explanatory power of legal positivism, which is not capable of properly defining legal practice since it excludes legal principles from its de-

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scription. In his second criticism, outlined in his most reputable work "Law's Empire", Dworkin attacks the sole foundations of legal positivism and its main methodological postulates. Quoting the main edification of modern positivism which understands the law as a social fact, Dworkin claims that if this understanding is correct, there could be no disputes among jurists concerning the law, except if one of them made an empirical mistake while establishing facts. Since this is not the case, Dworkin has proven that this is the issue of theoretic disagreement about the law itself. On these foundations, he rejects the idea of law as a fact and states an original presumption on law as an interpretive concept, thus pointing out that disagreements within jurisprudence are most frequently interpretive disagreements over criteria of legality, and not empirical disagreements on historic and social facts.

Dworkin bases his second criticism, which could also be called methodological criticism, on an analysis of hard cases. Even though adjudication is not the only characteristic element of legal practice, it is, according to Dworkin, the most important as the court procedure combines all or most other elements. If one bears in mind the importance of the judiciary and adjudication in the Anglo-Saxon legal system, it should not be surprising that Dworkin, during the development of his methodological criticism, directed his attention in this direction. Court decisions confirm or dispute the rights of individuals or groups, but these decisions are frequently of more general importance. United States Supreme Court decisions can declare invalid legal acts which are not in compliance with the Constitution of the United States. This is the body with the final say in many issues which are of interest for the entire political community. During court procedures painful and controversial topics for the whole community are frequently raised, which have undisputable moral dimensions, like the death penalty, racial segregation, euthanasia, etc. These are, therefore, the reasons which have compelled Dworkin to take adjudication as the focal point around which he further organizes his methodological criticism of legal positivism.

2. WHAT IS THEORETICAL DISAGREEMENT ABOUT LAW?

Adjudication, as per rule, initiates three different types of disputable issues: 1) the question of facts, 2) question of law and 3) intertwined issues of political morality and fidelity to the law.[1] There can be disagreements with any of these three issues. The first issue mainly deals with determining exact facts which have happened in the past and are relevant to the case being deliberated. However, this issue is not of a purely tech-

[1] Ronald Dworkin, *Law's Empire*, Cambridge, MA: Harvard University Press, 1986, 3.

nical character, since it cannot be merely reduced to determining of facts, but also involves determining which facts are relevant to the case, and which are not. The third issue relates to determining whether rules on the basis of which the case should be solved are in accordance with moral principles or not and whether the court must necessarily follow and apply rules which deviate from morality. These two issues are known in the legal theory, while the second question – the issue of law– causes the most dilemmas according to Dworkin. There is frequently no consent between judges and lawyers concerning the law which regulates a particular case. In hard cases, members of the same panel of judges cannot agree on whether a rule should be applied to a particular case and whether an adequate rule exists at all. In order to examine what type of disagreement concerns the issue of law and whether the discussion which such disagreement initiates is different than discussions on historical facts and moral questions, Dworkin introduces two distinctions in his analysis of this problem.

The first difference is between the "propositions of law" and "grounds of law".[2] Propositions of law are those different statements and claims on the content of law within a particular legal system which can be of a very general nature, i.e. "the law forbids states to deny anyone equal protection within the meaning of the Fourteenth Amendment", or, in opposite, very determined – "the law requires Acme Corporation to compensate John Smith for the injury he suffered in its employ last February". According to Dworkin, propositions of law can be true or false. For example, a provision is true that states "the highest permitted speed on the highway is 120 kilometers per hour", while a provision stating that "driving on the highway is prohibited after sunset" would be false. All propositions of law, more precisely – their accurateness, are evaluated "in virtue of other, more familiar kinds of propositions of law that are (as we might put it) parasitic". These more familiar propositions of law represent the grounds of law. A provision would be, therefore, true in Serbia that speed limit on the highway is 120 km/h because a majority of deputies of Serbian Parliament voted for the draft law which contains such provisions, and the President of the Republic proclaimed this law. Since, in this particular case, acts of the lawmaker make a proposition of the law on-speed limit accurate, they therefore represent the grounds of the legal system of the Republic of Serbia.

On the basis of differences between propositions of the law and the grounds of law, Dworkin argues that there are two possible types of disagreements concerning law. The first type of disagreement Dworkin calls "empirical disagreement". Judges and attorneys "might agree about the grounds of law – about when the truth or falsity of other, more familiar propositions, makes a particular proposition of law true or false – but

[2] *Ibid.*, 4 5.

disagree about whether those grounds are in fact satisfied in a particular case".[3] For example, there could be an agreement on the content of a certain proposition of law because it is contained in the law, but there could also be a disagreement on whether this truly is an effective law, since it is arguable whether the law actually came into force.

The second type of disagreement does not relate to the question of whether grounds of law have in fact been obtained in the case of some particular proposition of the law, but what the grounds of law actually are.[4] Theoretical disagreement on the law, or on the grounds of law, exists among jurists when they agree on what the law actually defines or what the highest court practice says, but they disagree on what the law is in a particular case. One brief view on U.S. court practice can serve as an illustration for this distinction. For example, after the American Civil War and after the victory of North over South, constitutional changes ensued which prohibited slavery. Federal states which belonged to the Confederation were forced to, among other things, respect a provision contained in the Fourteenth amendment of the Constitution which guarantees that no person be denied the right to equal legal protection. Subsequently, the states of the defeated South conducted racial segregation concerning many public goods, which meant that blacks were not disputed the right to, for example, public transport or education, but they could only ride in the back of the bus or only go to schools for blacks. Even though the question of the constitutionality of racial segregation was raised several times before the Supreme Court, only in the case of *Brown v. Board of Education* from 1954 was it proclaimed unconstitutional.[5] This case, as well as many others, shows that theoretical disagreements about law exist regardless of agreement concerning the content of legal propositions of law. Even before 1954 and the *Brown* case, it was very well known what provisions of the Constitution of the United States say and what the practice of the Supreme Court was in this regard, but only in this case did judges decide to declare segregation unconstitutional. This proves that there was no empirical disagreement concerning the content or applicability of provisions of the law, but that there was a theoretical disagreement *what the law actually is* in the said case, as well as in previous similar cases of racial segregation. According to Dworkin, this and countless other cases support the view that there is frequently no consent on what the grounds of the law are, and whether they can be reduced only to existing laws and court precedents.

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3 *Ibid.*

4 See Scott Shapiro, *Hart Dworkin debate*, Public Law and Legal Theory Work ing Paper Series, No. 77, 2007, 29.

5 See Ronald Dworkin, *A Matter of Principle*, Harvard University Press, Cam bridge Massachusetts, 1985, 295.

Hence, if there is no agreement concerning the identity of the grounds of law, then it cannot be stated for certain for propositions of law whether they are true or false, which means that before stating a claim on truthfulness of the proposition of law a question must be answered on precise criteria for identification of the grounds of law.[6] Without an answer to that question, discussion concerning the truthfulness of propositions of law cannot be grounded and represents a redirection of attention from the main problem.

3. NOTION OF LAW AS A PLAIN FACT

On the basis of his stated observations, Dworkin says that it is stunning that within a modern jurisprudence there is no acceptable theory on disagreement about law. The reason for such a condition in the jurisprudence Dworkin recognizes in the prevailing notion on plain-fact view of law. He describes this notion in the following way: "The law is only a matter of what legal institutions, like legislatures and city councils and courts, have decided in the past. If some body of that sort has decided that workman can recover compensation for injuries by fellow workmen, then that is the law. If it has decided the other way, then that is the law. So questions of law can always be answered by looking in the books where the records of institutional decisions are kept".[7]

According to Dworkin, the notion of plain-fact view of law is comprised of two main elements. First, the grounds of law in each political community are fixed by consensus among legal officials or, more precisely, "if officials agree that facts of type *f* are grounds of law in their system, then facts of type *f* are grounds of law in their system".[8] The second element purports that grounds of law may cover only plain historical facts. This means that law exists exclusively as a plain fact and that the reply to the question of what the law is does not depend in any way on the notion of what the law should actually be. However, by accepting the notion of law as the plain fact, positivism as a dominant theory cannot offer an acceptable response to why courts in a particular moment, as in the *Brown* case, apply the same rules radically differently and how decisions adopted on the basis of the same legal rule can be so different.

Dworkin argues that positivism is not capable of providing adequate answers to these and many other questions because it starts from the notion of law as a plain fact, meaing that the law is a historical fact

6 S. Shapiro, *ibid.*, 30.

7 R. Dworkin, *Law's Empire*, 7.

8 S. Shapiro, *ibid.*

which never depends on morality. By accepting this notion, one rejects the possibility of theoretical disagreement on law, as according to the first element, the grounds of law are accepted by consensus among officials, so there can be no disagreement in this regard. The only sensible disagreement on law can be in regards to the existence or the lack of existence of plain historical facts, which are actually pure empirical disagreements. In order to dispute the notion of the law as a plain fact Dworkin concentrates on analysis of known hard cases.

One such case comes from British court practice and pertains to the application of the precedent and rules established in previous court decisions. On October 19, 1973, at 6 o'clock in the afternoon, Mrs. McLoughlin received news at home that members of her family were in a terrible traffic accident. She immediately went to the hospital where she learned that her daughter had succumbed to her injuries, while her husband and three remaining children were in a very serious condition, which resulted in her nervous breakdown. Upon the advice of her attorney, who told her that UK courts were awarding damages for psychological sufferings to people who saw their closed relatives in difficult conditions after the accident, Mrs. McLoughlin decided to sue the driver whose reckless driving caused the accident, along with other participants involved in this tragic case in different ways. In previous cases, the court awarded had awarded damages to people who were at the scene of an accident or who appeared there a few minutes after the accident, while in one case from 1967 the award was granted to an individual which was not in any close kinship to the victims. While drafting a claim, Mrs. McLoughlin's attorney quoted all these cases as precedents.

The doctrine of precedent obliges courts to follow previous court decisions in similar cases. The problem with the application of the doctrine is the determination of whether the cases are truly similar. Not a single case is identical to a previous one, but jurists agree that regardless of the differences, similar cases share essential elements. The trial judge who first acted in the McLoughlin case considered that the precedents quoted in the claim are essentially different than Mrs. McLoughlin's case. The trial judge said that in these precedents the award was granted for psychological suffering to individuals who were at the scene of the accident, while Mrs. McLoughlin suffered a shock in the hospital, about two hours after the accident. Since all courts follow the principle of *common law* stating that people who act negligent can only be held responsible for damages caused to another which could have been reasonably predicted, the trial judge was of the opinion that the difference between the cases was very significant, because a reasonable individual could have predicted psychological suffering of close relatives at the scene itself, but not the suffering of a mother who witnessed the consequences of an accident in the hospital.

A complaint was filed against the decision of the Trial Court. The Court of Appeal confirmed the decision and rejected the appeal, but on the basis of completely different argumentation compared to the one stated by the Trial Court. The Court of Appeal stated that it was reasonable to predict that the mother would rush to the hospital upon hearing the news and that she would suffer a shock when she learned about the death of her daughter and see the difficult condition of the injured members of her family. The Court of Appeal did not consider that such a difference was essential compared to previous cases, so the appeal was rejected for political arguments, and added that upholding the appeal of Mrs. McLaughlin would produce significant undesirable consequences for the society as a whole. Such consequences would be reflected in a greater number of lawsuits because of psychological suffering which would overload the courts, while the expansion of the established rule on cases of suffered shock away from the scene of an accident would create an opportunity for various abuses and stating of false claims. All of this would significantly raise the price of auto liability insurance policies and probably prevent poorer members of the society to own or use their own vehicles.

Mrs. McLoughlin finally appealed to the House of Lords, which unanimously decided to abolish the decision and order a repeat trial before the Court of Appeal. Even though the decision was unanimous, lords disagreed regarding what they called the "true state of the law".[9] Some of them considered that political reasons may be determining in reply to the question of whether a certain accident was similar to some previous one and whether these reasons, in certain situations, justify the notion of the court to, for example, fail to extend the field of responsibility. But they nevertheless stated that political reasons were not sufficiently convincing in the given case, so they rejected the argument of the Court of Appeal stating that a danger loomed from an increased number of lawsuits, stressing that courts must differentiate true from false lawsuits. On the other side, two lords have voiced completely different arguments. As opposed to judges of the Court of Appeal and their lord colleagues, they have not agreed that justified lawsuits can be disputed at all for political reasons. "The precedents should be regarded as distinguishable, they said, only if the moral *principles* assumed in the earlier cases for some reasons did not apply to the plaintiff in the same way. And once it is conceded that the damage to a mother in the hospital hours after an accident is reasonably foreseeable to a careless driver, then no difference in moral principle can be found between two cases. Congestion in the courts or a rise in the price of automobile liability insurance, they said, however inconvenient these might be to the community as a whole, cannot justify refusing to enforce individual rights and duties that have been recognized and

[9] R. Dworkin, *Law's Empire*, 27.

enforced before".[10] Simply said, they established that political arguments play a very important role in the lawmaking process, but not in the adjudication process, as two very different types of processes are in question, the purpose of which is also quite different.

The McLoughlin case is an example of theoretical disagreement about law. In the notions of members of the House of Lords, there was no consent on the role and importance of political reasons on one hand, and moral principles on the other. Regardless of the fact that in their decision lords came to the same conclusion, the question of how they understand the grounds of law remained open. Do all of these grounds include only legal acts and precedents? Why is disagreement so easily recognized in their interpretation concerning the principle of precedent? Do grounds of law also purport, aside from the above, political reasons or moral principles? In which way do political reasons and moral principles affect rights and obligations of the parties in dispute? Are they binding on the court? Dworkin thinks that all these questions troubling judges during adjudication in hard cases are not on the level of empirical disagreement about law, but that they represent theoretical disagreements on the grounds of law to which positivism as a plain-fact theory of law cannot provide proper answers. Studying hard cases shows that among judges, as state officials, there is no consent about what in their legal system actually represents grounds of law, so, accordingly, there can no consent among them about which legal provisions in particular cases are true, and which are false. In other words, disagreements on the question of law in particular cases (i.e. whether Mrs. McLoughlin has the right to damages for suffered mental anguish) stems directly from disagreement over grounds of law.

Dworkin's conclusion in regards to theoretical disagreement about law directly affects the main science of modern positivism, the science which represents from Hart onwards one of his basic methodological assumptions. This science is characterized by the notion that the law is of a conventional nature, and the notion that among state officials there is *consent regarding facts* which represents criteria for the identification of the law. These criteria are characterized in one final test of verification of validity, which Hart calls the rule of recognition and the obligation of which lies in the *fact* that it is accepted by state officials. The assumption that all other rules of the system draw their validity from the rule of recognition, while it still remains just an originary rule, leads Dworkin to the conclusion that modern legal positivism actually represents one plain-fact theory of law.

The reason for this claim Dworkin finds in the semantic nature of legal positivism. Legal positivism, like other important theories of law, is

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[10] *Ibid.*, 28.

according to Dworkin, semantic, because it tries to identify common criteria which are followed by jurists when they evaluate propositions of law. Jurists, just as any other participants in oral practice, follow certain common criteria when they use a certain word. If the word "law" is in question, then, according to semantic theories, jurists accept the same criteria in shaping, accepting and rejecting expressions of what the law is, like how other participants in oral practice accept common criteria when they use a certain word, such as "house" or "airplane". Simply said, if there were no general acceptance of criteria, one could hardly discuss with any proper understanding among participants in oral practice. On the basis of this observation, Dworkin stresses that the main task of the philosophy of law would be to establish common criteria through the analysis of the word "law". Of course, among law philosophers themselves there could be disagreements concerning the common criteria, but, on the other hand, all of them follow the same assumption – that participants in the law practice share a certain set of criteria when they use the expression "law".

Methodologically speaking, the structure of modern legal positivism as a dominant theory is rather simple – the accuracy of a certain proposition of the law depends on the grounds of the law, which are by their very nature historical facts, and which are accepted as common criteria for the identification of the law. So, a certain proposition of the law in an Anglo-Saxon legal system would be true if adopted on the basis of the law or precedent, because laws and precedents are considered common criteria for the identification of the law. In short terms, positivism starts from the assumption that there is a general consensus among jurists on the grounds of law. This fact, which actually supports the notion of legal positivism on the conceptual detachment of law and morality, according to Dworkin represents the main reason why positivism is not capable of performing its main task, and why it is not capable of properly describing legal practice. So, for example, since the adoption of the Fourteenth amendment until the Brown case nothing among the historical facts changed. However, one thing did changed, and that was the moral comprehension of the fact that segregation does not represent respect for equality, but is rather an expression of racial inequality. That is the true reason why the Supreme Court changed its opinion and proclaimed segregation unconstitutional.

4. ARGUMENTS FOR THE DEFENSE OF POSITIVISM

Within his methodological criticism of legal positivism Dworkin has also analyzed arguments which could support the positivist thesis on law as a plain fact and the claim that the only sensible discussion about law is necessarily empirical, and not theoretical. The first argument which could explain the positivists' apparent theoretical disagreement about law, lies in the notion that in hard cases dispute does not concern what the law actually is, but what the law should actually be.[11] This is why, according to the positivists‘ understanding of the law as a plain fact, judges were prone to repairing the existing law in hard cases. From the positivists‘ point of view, the fact that the rhetoric of judges in most hard cases does not focus on repairing, but rather on revealing and applying the existing law, is justificatied in modern legal systems in which there is a wider or stricter division of legal, executive and judicial authorities. In these systems where, in general, the lawmaker adopts, and courts uphold and apply the laws, judges are not prone to admitting that by performing their function, in fact, they correct the existing law. Exactly because of this, their arguments frequently show that the case involves a theoretical disagreement about the law, and not what this is actually all about – the practice of judicial discretion and improvement of the existing law.

Dworkin does not share this viewpoint. Hence, the Court of Appeal judges in the McLoughlin case have, it seems, thought that there was no right arising from mental anguish suffered at of the place of accident, since previous verdicts only related to the places of accidents, so they thought that their task was to, taking all circumstances into consideration, correct this and improve the law in the best possible way. However, the House of Lords did not concur with this, especially not the lords who separated their opinion, as they considered that they were obliged by moral principles established by previous precedents. Members of the House of Lords were unanimous with judges of the Court of Appeal and, like them, they were aware of the importance of the political argument that awarding of damages in a given case could harm the community as a whole, but they were not unanimous concerning the power and character of precedents as the source of law. According to Dworkin, "though the disagreement was subtle it was nevertheless a disagreement about what the law was, not about what should be done in the absence of law.[12]

The other argument which could support the positivists‘ understanding of the law as a plain fact is more sophisticated than the previous one. Namely, this argument stresses that there are differences between standard or common cases of the use of the expression "law" and those cases which could be considered as borderline. For example, categorical legal rules like the speed limit on public roads or the tax rates do not leave any space for disagreement– neither regarding their legality nor in the sense of their content and meaning. However, the rules on the use of expressions are not exact and borderline cases may occur. In these cases,

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[11] R. Dworkin, *ibid*., 46, S. Shapiro, *ibid*., 33.

[12] R. Dworkin, *ibid*., 39.

jurists may use the expression “law” differently, as then only some, and not all the grounds can be identified which are stipulated by the rule of recognition.[13] This is the way in which their disagreement is explained in hard cases, as the use of the expression “law” does not differ from the use of some other expression which is considered undisputed, like the expression “house”.[14] Simply said, people mainly agree about the standard meaning of a certain expression, but since not everyone follows exactly the same rules, and since the rules are not completely exact, it can be disputable whether, for example, the White House could be considered a house. On the basis of this argument it turns out that jurists and judges especially, sometimes do not agree on the status of law, but these disagreements are of a verbal and not of a theoretical nature.

According to this type of argumentation, it is possible to correctly understand the legal phenomenon if the expression “law” is used to describe only what represents the core of the term law, and if it is used in a way which includes only those legal provisions which are true according to the central rule for the use of expression “law”, like provisions on the speed limit on highways.[15] Hard cases should be considered a question of correcting the existing law, regardless of whether the judges in such cases truly understood that they were doing just that. In order words, if some case cannot be solved with the application of a generally accepted rule on the grounds of law, then the action of judges in such hard cases becomes a question of how should judges actually develop and improve the law.

Dworkin rightfully wonders how cases like the McLoughlin case can ever be called a borderline case. First of all, if a parallel is drawn between these cases concerning the problematic use of the expression “law” and other, legal borderline cases common in the language practice, it is clear that with the latter there are no reasons for discussing them excessively. Simply, people generally don‘t spend much time discussing whether the White House could be considered a house or whether an amphibian vehicle is a vehicle or vessel. As opposed to these examples from the language practice, the defense of positivism with borderline cases omits that hard judicial cases are those which cause the most legal arguments, which are broadly discussed and which assume central positions in legal reviews and textbooks. Also, it is impossible to neglect numerous other very important questions which are opened by these cases, like political questions regarding division of state power, questions of basic legal values such as equality, freedom, etc. It is not possible, or even desirable, to consider these cases as borderline, as big issues obviously cannot be studied in this way on the basis of a language analysis of the use of expression “law”.

13 *Ibid.*

14 *Ibid.*, 40.

15 *Ibid.*

Most importantly, Dworkin claims that this sophisticated defense of the positivists' understanding of the law as a plain fact with the assistance of borderline cases neglects the differences between two types of disagreements. The first type of disagreement relates to borderline cases, while the second type of disagreements pertains to pivotal cases, and on disagreements concerning the truthfulness of tests for the use of expressions or terms. In the first case, it is possible to imagine a dispute on whether a palace or court could be considered a house, as according to certain characteristics the palace or court are identical to the term house as they all serve for dwelling, but according to some they are not, as they describe especially large and luxurious facilities, to which the common use of the term house certainly does not apply to. In the second case there is no consent concerning the question of the legal meaning of a certain expression, i.e. if a disagreement would be conceived regarding the question of whether a house represents a facility for the dwelling of people at all.

In order to explain this in more detail, Dworkin used an imaginary discussion between two art critics on whether photography could be considered as art. Roughly viewed, two types of discussions are possible in this case. In the first discussion, there can be consent between the two critics that photography is in some elements similar, or not similar with some other phenomena like sculpting or painting, which represent art in the true sense of the word. They can agree that photography in the best case represents a borderline form of art, and on the basis of this they would also agree that the decision of whether photography should be considered art is arbitrary in the final instance and that the adoption of such a decision is mainly motivated by some other reason (i.e. for the purpose of easier presentation in some modern art textbook). Hence, there is no reason for them to discuss whether photography represents a "true" art. On the other hand, it is possible to imagine a completely different discussion in which one of the critics claims that photography represents an example of the art form, while the other one supports a completely different opinion and claims that photography cannot be classified as art, since photographic techniques are essentially foreign to the goals of art. In the case of this second discussion, one can no longer talk about the question of where to draw a border line, as the critics' comprehension of art is so different that they observe even standard forms of art, like sculpting and painting, to be standard for completely different reasons.[16]

On the basis of this parallel, Dworkin concludes that a sophisticated defense of positivism on the basis of borderline cases completely exceeds the essence of the problem, as it fails to recognize these two differences. Figuratively said, judges in the so-called hard cases are not in the position of two art critics which argue where the border line should be

[16] *Ibid.*, 41 42.

drawn and whether photography should be included in the modern art textbook or not, but are in the second position of two critics who differently understand the art itself. Because of missing so many different types of disagreements, such defense of positivism leads in the wrong direction and blurs the fact that among many judges who tried hard cases there was, actually, a profound disagreement on the law and precedent.

5. ONE POSITIVIST REPLY

Using the analysis of hard cases Dworkin successfully proved the existence of a theoretical disagreement about law. The cases he analyzed showed that neither an inclusive nor exclusive line of positivists' defense is appropriate for explaining the obvious theoretical disagreement among judges in such cases. Regardless of not so insignificant differences, both positivistic routes share the same methodological ground which in short says the grounds of law are determined by a consensus among state officials. Understandably, the question remains how positivists "account for disagreements about the legal bindingness of certain facts whose bindingness, by hypothesis, requires the existence of agreement on their bindingness?"[17] On the other hand, it is amazing how, regardless of so much ink spilled in the so-called Hart-Dworkin debate, so little attention was paid to this exceptionally convincing argument of Dworkin's.

There are several possible explanations of positivistic indolence towards Dworkin's argument on theoretical disagreements about law. One of the reasons could be grounded in Dworkin's insistence on presenting positivism as a semantic theory. With this argument Dworkin tried to prove how positivism, from its methodological foundations, is not capable of detecting a true type of disagreement, but only empirical disagreements on the existence or non-existence of certain historical facts. He baldly claimed that the so-called semantic sting simply paralyzes legal positivism and leaves him on the surface of the problem. Positivists have successfully refuted the semantic sting, but have overlooked the fact that regardless of it, the argument on theoretical disagreement remains. The validity of the argumentation on theoretical disagreement is not connected to, or at least has no direct connections with, the semantic sting with which Dworkin tries to prove how positivism cannot count on such a form of disagreement. And so, several years ago, the debate in jurisprudence on the topic of semantic sting ended, with positivists making a convincing defense against Dworkin's attacks, but also against the arguments of his followers,[18] while the debate on theoretical disagreement about law still hasn't been opened in the right way.

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17 S. Shapiro, *ibid*., 38.

18 See Veronica Rodriguez Blanco, "A Defence of Hart's Semantics as Nonambi tious Conceptual Analysis", *Legal Theory*, 2003/9, 100. Nicos Stavropoulos, "Hart's Se

The second possible explanation may lay in the assumption that positivists haven‘t noticed how the argument on theoretical disagreement about law is, by its nature, significantly different than semantic sting, but also in comparison to criticism about the explanatory strength of legal positivism. To this latter criticism, positivists replied by arguing that the grounds of law are determined by convention among officials. This type of previously stated defense, which was used against Dworkin‘s arguments about the explanatory weakness of legal positivism, cannot be used against the argument on theoretical disagreement as well, which in essence does not differ from the previous one, since this argument attacked exactly this positivistic defense and the main methodological science of modern positivism on the conventional nature of law.

In the end, as a possible explanation of the insensitivity and disinterested positivists show towards Dworkin‘s arguments on theoretical disagreement about law, a notion can of, above all, exclusive positivists can be used, which is also quoted by Dworkin. It states that theoretical disagreement does not exist, that this is only a mirage or deception. Since the grounds of law are fixed by convention, each theoretical disagreement is excluded, which is also claimed by Dworkin, while cases which only resemble theoretical disagreement actually represent examples of repair arguments, which are opposed by Dworkin.

Scott Shapiro is one of few reputable legal positivists who addressed Dworkin‘s argument on theoretical disagreements about law.[19] As Shapiro notes, judges are not the only ones involved in theoretical disagreement, as they are also accompanied by legal theorists who study legal practice. And while judges, as members of the separate segment of authorities, frequently conceal that such theoretical disagreement exists among them at all for political reasons,[20] legal theorists, sometimes unconsciously, broadly discuss it. The true example of such a discussion is a discussion about which is the best or the most suitable way of interpretinglegal rules, in which theorists advocate different conceptions such as textualism, originalism, purposivism, doctrinalism, etc.[21] All these conceptions, which propose or argue for a certain interpretative methodology of legal provisions, represent nothing else but theoretical disagreement about the law, simply because a replay to the question *what is law* in some particular case, depends on a *way of interpreting* propositions of

mantics”*,* y *Hart's Postscripts*, Jules Coleman, (ed.), Oxford University Press, Oxford/ New York, 2001, 62.

19 *Ibid.*, 40 52.

20 If we were to assume the contrary, that judges openly acknowledge theoretical disagreements among them, established legal principle *iura novit curia* would be brought into question.

21 Scott J. Shapiro, “What is the Rule of Recognition (and does it exist)?”, *Public Law & Legal Theory Research Paper Series*, Research Paper No. 181, 2009, 15 16.

law. "Positivists, therefore, appear to be in an awkward position. If they wish to deny the existence of theoretical legal disagreements, they are forced to say that legal scholars are so confused about the practice they study that they routinely engage in incoherent argumentation".[22] This, in turn, definitely represents an unpleasant conclusion for positivists, but as Shapiro claims, establishing his basic thesis against Dworkin's argument, this does not mean that positivists should avoid this argument, but rather acknowledge it while not abandoning the positivists' methodological foundation.

The first step toward the inclusion of the theoretical disagreement problem into a positivistic framework, according to Shapiro, is rejecting the notion of the existence of a convention among judges on the proper interpretation of the law, because a suitable way of interpreting the law can also be fixed in a different way. Even though judges in their deliberations most frequently fail to raise the issues of theoretical disagreement, they certainly exist, which is demonstrated by the case of "Edwards vs. Canada", where the court, which is completely unusual, in its deliberation rejected originalism as a suitable method of interpretation of the Constitution. The second step involves positivists agreeing with Dworkin's notion that when a theoretical disagreement appears in the law, establishing a proper way of interpretation always involves attributing certain purpose to the legal practice. On the contrary, if a disagreement on the proper way of legal interpretation would be separated from the purpose of legal practice, then it would be difficult to understand why the disagreement exists at all. Finally, positivists should agree with Dworkin that in such cases the main role of the proper interpretation of particular propositions of law is in interpreting such propositions in accordance with the goals of the legal system. This is also the last point over which positivists need to agree with Dworkin's notions, and after that they should distance themselves from the basic postulates of his theory. Even though positivists need to attribute some purpose to a certain legal system, they should not do so in Dworkin's way, but should, using empirical methods, seek it in *social facts*. The correct way of interpreting the law would then be established with a reply to the question of which of the existing ways is the most compliant with the recognized goals and values of a particular legal system. Shapiro claims that positivism will thus significantly reduce the power of Dworkin's criticism, adding that "by claiming that interpretive methodology is a function of empirically derivable objectives, the positivist will have grounded the law in social fact".[23] Moreover, positivists shall, going down that road, establish social foundations of the law to some extent in a different manner than before, by abandoning the notion that all correct ways of interpreting the law are determined by special

[22] S. Shapiro, "Hart Dworkin debate", 41.

[23] *Ibid.*, 43.

conventions among judges and thus enable for positivism to accept the theoretical disagreement about law which was undoubtedly proven by Dworkin. In this case, the theoretical disagreement would only appear as a consequence of the discussion about goals of the legal system and the ways of interpretation which are most compliant with this purpose.

6. CONCLUSION

It seems that the above-presented defense against Dworkin's argument on theoretical disagreement actually shows all of its strength. Freely speaking, Shapiro, in his intention to blunt the edge of Dworkin's criticism, actually cut himself in the process. His defense for the purpose of recognition of the obvious truth that theoretical disagreement about law truly exists, involves certain elements which are very close to Dworkin's theory, while in those parts of his argumentation which redefine methodological grounds of positivism, solutions are offered which positivism is not capable of offering. One does not need to go further from the question which, for so long, bothers even the greatest legal philosophers – by using which empirical method is it possible to attribute purpose or purposes to the legal practice, and how to find it in social facts?! If positivism develops such a method while not abandoning its methodological foundations, then Shapiro's argument would have the necessary strength, even though the acknowledgment itself that theoretical disagreement exists and that modern positivists should not act like ostriches, represents a step in the right direction.

CERIF: S155, S143

Filip Bojić*, LLM

CHANGES IN THE SOCIAL PROTECTION OF SURVIVING SPOUSE A COMPARATIVE LEGAL ANALYSIS**

European countries introduced the concept of social protection of survivors, primarily spouses and children, in their respective legislations back in the 19th century. Since its introduction, the concept has undergone significant changes in the majority of EU Member States. This paper will provide an overview of the concept of social security survivors benefits, with the main focus on the survivors benefits for surviving spouse in the European Union, and in particular on the differences in regulation of this concept in Western European and the Eastern European countries. The author of this paper will endeavour to point out the ways the survivors benefits follow, and to establish whether this form of social security will survive in the future, in spite of the numerous changes Europe witnesses. **.** *The paper offers a comparison among three different systems of social protection for surviving spouse in the European Union, as follows: (i) the Scandinavian concept, (ii) the Western European concept and (iii) the Eastern European concept. Finally, on the basis of the characteristics of these three models and a comparative analysis of their effects, this paper will try to propose grounds of new European model for the social protection of surviving spouse.*

Key words: *Surviving Spouse. Social Security. Social Benefits. Survivors Pension. European Union.*

1. INTRODUCTION

In the last few decades, many changes have occurred with regard to the social protection of survivors in Europe. The concept of social protec-

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tion for survivors, in the first place for the widows and children of deceased persons, has been present in European society since the end of the 19th century. The concept itself was established through a contribution method, where social security organizations ensured benefits for survivors in the case of the death of the breadwinner of the family, who had been insured through contributions before their death. Pieters claims that "this social risk regards a social risk which occurred as a result of the decease of the breadwinning partner".[1] According to the same author "the decease of one person will often result in the loss of a source of income for other person; hence the recognition as a social risk of a person's death or, viewing it from a different angle, of another person's surviving or being left behind".[2] As far as this is concerned, upon the death of the breadwinner, the family would stay without appropriate income and in those cases they would be able to get some kind of benefits. In the majority of cases, the family of the insured person (widow, widower, orphan/semi-orphan and other relatives) are secured through survivors benefits, which are based on the contribution method or in some countries, especially in Great Britain, through death benefits which are predominantly granted based on means testing.

Today, the concept of social protection of survivors has been changed in the majority of European Union countries. Luckhaus claims that with regard to the changes in the protection of survivors, two recent developments have been observed: "the introduction of survivors benefits in both statutory and occupational schemes and the conversion of some statutory schemes from entitlement based only on contributions to entitlement based on means testing or a mix of means testing and contributions".[3] The first attitude with respect to the changes concerns the fact that during the development of survivors benefits, the main sources governing the benefit rights were statutory schemes, i.e. State provisions – law, ordinances, rules and regulations etc. The family of the deceased would be entitled to survivors' benefits only to the extent that the law governing such rights provided so. Today, the situation has changed and there is a possibility for employees and employers to secure rights to survivors benefits through special occupational schemes, where employees pay in contributions to special private funds and by means of such payments of contributions they secure their families in case of a social risk of death. An occupational pension scheme can be contributory or non-contributory, insured or a self-administered pension scheme, which an employee may be eligible to join by reason of his or her employment in a firm or mem-

1 D. Pieters, *Social Security: An introduction to the Basic Principles*, Kluwer Law International, The Netherlands 2006, 31.

2 *Ibid*, 59.

3 L. Luckhaus, "Equal treatment, social protection and income security for wom en", *International Labour Review* 139/2000, No. 2, 158.

bership of a profession or trade, and nowadays in the majority of the European countries (Sweden, the Netherlands), within such firms there is an option of instituting special schemes for survivors benefits.[4]

The second attitude of Luckhaus concerns the conversion of some statutory schemes from entitlement based only on contributions to entitlement based on means testing. Furthermore, when survivors benefits were first instituted, the main idea was to finance these kind of benefits through contributions and only the family of the deceased who paid the contributions was entitled to survivors benefits. Today, in some countries the main idea regarding the protection of survivors is that only those families that do not earn income for decent living are entitled to survivors benefits. Because of this fact, the means testing is conducted and in those situations, survivors benefits have an element of social assistance. Some European states decided to abolish survivors benefits based on the contribution method and to allow only benefits based on the means test method, as a consequence of the prevailing attitude according to which the right to such benefits are to be granted only to the families of the deceased which are in need.

It is of crucial importance to provide a correct theoretical definition of survivors benefits. It is not an easy task to find a clear definition, especially as there is a lack of relevant scientific work with regard to this topic. There are a few different scientific definitions of survivors benefits. Despite the numerous changes, the most widely accepted concept of survivors benefits is that which ensures the benefits for survivors through contribution methods of financing. This concept occurs in those countries that have adopted the Bismarckian method of social security. Pieters explains the goal of the survivors benefits as follows: "at guaranteeing an income replacement for the surviving relatives who depended upon the labour income of the deceased person; this will apply as long as the survivors concerned are expected not to be able to provide for earnings of their own".[5] The survivors benefits which are based on the Bismarckian concept in the majority of cases take the form of a long-term periodic allowance – survivors pensions.[6] Therefore, most scholars define the concept of survivors benefits by employing the definition of survivors pension for such a purpose. The most commonly encountered definitions of

[4] In spite of the specified very strict conditions for the national survivors benefits, the situation in the Netherlands with regard to protection of the surviving spouse is not so hopeless, because of a well developed second pension pillar. There are more than 800 company pension funds which covered more than 80% of employees in the Netherlands and through them surviving spouses are better secured in the cases of death of one spouse. Occupational pension scheme, Bussiness dictionary, *http://www.businessdictionary.com/definition/occupational pension scheme.html*, last visited 16 June 2014.

[5] D. Pieters, *Ibid*.

[6] *Ibid*, 61.

survivors pensions are those contained in various laws providing the scope of application and the requirements of entitlement to the survivors pension for both the widow/widower and the children, which thus makes it fairly difficult to find a precise scientific definition concerning this sphere of social security. Creutz, for example, provides a definition of survivors pensions: "pensions paid to the survivor intended to make good the permanent loss of support suffered by the family through the death of the breadwinner".[7] According to the Council of Europe Glossary, survivors pension is "the pension received by the members of the deceased insured person's nuclear family (husband/wife and children)".[8] Baltić and Despotović define the survivors pension as "a right as provided by the law that certain members of the insured person's family are entitled to on the basis of the pension and invalidity insurance, if the insured persons have satisfied certain requirements of insurance until the day of death: a certain duration of insurance before death of the insured person is required and/or the deceased insured person enjoys certain rights arising from the pension and invalidity insurance".[9] This concept of survivor's pension has been accepted in the majority of the Eastern European countries during the period of communism.

Also, for the development of the concept of survivors benefits around the Europe, a very important fact is the adoption of ILO Convention No. 102 on Minimum Standards of Social Security in 1952 as well as the adoption of the Council of Europe European Code of Social Security in 1964. A concept which has been provided in those documents with regard to the survivor's benefits and the requirements of entitlement to benefits is the concept which has been adopted by the majority of the European countries in consideration of the protection of survivors. In spite of the numerous changes the world has undergone over the course of the last sixty years, particularly in relation to the concept of family as the beneficiary of support in the case of death of the breadwinner, and with regard to the labour market as well, and especially as far as the position of women in the labour market is concerned, the Convention no. 102 continues to hold an unquestionable influence on the development of social systems in most European countries.[10] On the other side, there are

[7] H. Creutz, "Introductory report", *Survivors benefits in a changing world*, Stud ies and Research No. 31, International Social Security Association Geneva 1992, 2.

[8] *Glossary of Social Security*, Social Institutions Support Programme, Council of Europe, European Commision, Skoplje Council of Europe Regional Office 2006, 73.

[9] A. Baltić, M. Despotović, *Osnovi Radnog prava Jugoslavije sistem samou pravnih međusobnih radnih odnosa i osnovni problemi sociologije rada*, Savremena ad ministracija, Beograd 1979, 522. See more: B. Lubarda, *Uvod u radno pravo sa elemen tima socijalnog prava*, Beograd 2013, 517 520; P. Jovanović, *Radno pravo*, Novi Sad 2012, 466 469.

[10] A downside of the Convention and something perceived as a feature of the past times when the Convention was adopted is that the Part X regulates exclusively the rights of widows and children, thus automatically eliminating the possibility that the wife could

also the diverging opinions and appeals for some changes in ILO social security standards and the need for new challenges in this area. Kulke claims that "Social Security Minimum Standards Convention No. 102 which is still considered the flagship of all International Labour Organization social security Conventions, has played a predominant role in defining its parameters" and in this context she has asked the question, "whether it still constitutes the most adequate instrument to guarantee universal coverage worldwide, or if it would need to be complemented by a new instrument more suited to the achievement of new social security objective".[11]

The main focus of this paper is to explain the concept of survivors benefits, especially survivors benefits for widows and widowers in the European Union, as well as different concepts of social protection of surviving spouse in different parts of Europe, especially emphasizing the distinctions that exist between Western European and Eastern European countries. The author of this paper shall make an endeavour to point out the ways the survivors benefits follow, and to establish whether this form of social security shall survive into the future in spite of the numerous changes society experiences**.**

A comparison shall be made among three different systems of the social protection of surviving spouse in the European Union, namely the Scandinavian concept of social protection of survivors, the Western European concept and the Eastern European concept. On the basis of those three different concepts, comparative analysis will attempt to propose an innovative European model for the social protection of surviving spouse in the changing world. The main focus will be to compare differences in the social protection of surviving spouse and the different eligibility conditions in regards to the rights to those benefits. Furthermore, a short analysis will be made about the right to survivors benefits for cohabitants and same sex couples in the analyzed countries, due to the changes in the traditional family concept.

2. THE SCANDINAVIAN CONCEPT OF THE SOCIAL PROTECTION OF SURVIVORS

For the comparison of different concepts of social protection of surviving spouse in Europe, Sweden will serve as an example of the

be a breadwinner and that upon her death the husband as a supported person could be entitled to survivors benefits. See more: Lj. Kovačević, *Normiranje socijalne sigurnosti u međunarodnom pravu*, MPhil thesis, Beograd 2007, 297 299.

[11] U. Kulke, "The Present and future role of ILO standards in realizing the right to social security", *International Social Security Review*, Vol. 60, 2 3/2007, International Social Security Association Geneva 2007, 121.

Scandinavian countries. We shall cite the most significant characteristic features of the system. The Scandinavian countries are characterized by the fact that they organized a separate system for the protection of survivors and have abandoned the traditional concept of social security for survivors based on the contribution method, deciding to abolish widow/widower pensions as early as the 1990s. The characteristics of such a model are reflected in the new benefits for survivors that have been created in the form of an adaptation pension, with the main feature being the limited duration, or even lump sum benefits, provided as support for the new situation which caused the reduction in the family budget. The aim of the survivor's social protection system reform in the Scandinavian countries is contained in the fact that the surviving spouse should be discouraged from relying upon the usual form of unlimited benefits, thus avoiding participation in the labour market, and encouraged to adapt within the shortest possible period of time to the new circumstances. In the first place, it is important to note that Sweden provides national pension based on Beveridge model of social security, which is granted to all citizens at a certain age, and thus there is no need to uphold the traditional widows/widowers concept of protection.

2.1. Social Protection System of Surviving Spouse in Sweden

According to Smedmark "an entitlement to a survivor's pension provided by the national insurance scheme was introduced in Sweden in the mid-40s and in that time the benefits were low, they were income tested and the right was limited to woman between the age of 55 and the general pensionable age as well as to widows and widowers in care of young children".[12] In the 1960s, two new types of benefits were instituted for widows – the basic pension as defined in the 1940s was extended to younger women without children, and the second type was created through the supplementary pension scheme, introducing the benefits for women which were linked to the deceased husband's previous income.[13] In this period, the survivors pension was granted to women who would usually get married and abandon the labour market in order to dedicate themselves to the household and their family. Men, as in the majority of the European countries at the time, would play the role of the breadwinner, and wives would be pension insured in the case of death of their partners, which was not motivation for them to rejoin the labour market. The situation changed, however, in the last decade of the 20th century. Since the early 1990s, there has been no concept of the widows' pension in the

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[12] G. Smedmark, "Survivors pensions in Sweden: A recent adaptation to changed conditions", *Survivors benefits in a changing world, Studies and Research No 31*, Interna tional Social Security Association Geneva 1992, 63.

[13] *Ibid.*

Swedish social insurance system as it was consistent "with the aim of implementing an individual model in Sweden that pursues the goal of economic independency for all adults".[14] According to Pieters, "the basic idea behind the reform was to remove differences between sexes concerning the right to a survivors pension since the number of woman in active employment increased".[15]

Today, when a person entitled to *folkpension* (flat-rate national basic pension scheme for all persons being 65 or older) or ATP (earning-related national supplementary pension scheme) dies, "the surviving children or spouse can be entitled to survivor's pension which can be paid as Child Pension, Adjustment Pension and Special Survivors Pension".[16] Since the 1990s, the original widows' pension based on the contribution method has been abolished. What is specific for the new Swedish system of protection of survivors is that a surviving spouse has the right to an adjustment pension (*omstallningspension*), which is "paid to a surviving spouse under the age 65 for a period of ten months if the surviving spouse lived uninterruptedly with the deceased spouse for a period of at least five years".[17] Furthermore, "the adjustment pension is maintained for as long as the surviving spouse lives with a dependent child under the age of 12".[18] The right to this form of benefits is also granted to "a person who lived permanently together with the deceased without being married is regarded as a spouse if they had been married earlier or have had or were expecting a child at the time of death".[19] Upon the expiration of a twelve-month period, when the surviving spouse is entitled to the adjustment pension and when the beneficiaries adjust to the new circumstances, the spouse shall lose the right to allowance. The legislator probably consid-

[14] J. Selen, A.C.Stahlberg, "Survivors Pension Rights in Occupational and Social Insurance: The Swedish Experience"*, European Journal of Social Security*, 3/2001, 131.

For women born in 1944 or earlier, the option is provided that in the case of death of a husband, a woman shall be granted a right to widow's pension based on the legisla tion in force before the reforms, however only on the condition that on December 31, 1989 and at the moment of the husband's death, they were married. If a woman was born in 1945 or later, she may realize the right to a part of the widow's pension on condition that on December 31, 1989 and at the moment of the husband's death the two were mar ried. All those women are not affected by the new rules in regard with the social protec tion of survivors. *www.pensionsmyndigheten.se*, last visited 29 May 2014.

[15] D. Pieters, *The Social Security Systems of the Member States of the European Union,* Intersentia, Antwerp Oxford 2002, 321.

[16] *Ibid.*

[17] Social protection Social Inclusion, ",Comparative tables on Social Protection Sweden", European commision MISSOC, *http://ec.europa.eu/employment social/missoc/db/public/compareTables.do;jsessionid qsyGPVJJs8xcPwKHJRpbJYcs84psFlrdQ9jQqTg5cxLmKnBk1lTx!2015099289*, last visited 31 May 2014.

[18] D. Pieters (2002)*, Ibid.*

[19] *Ibid.*

ered that the twelve-month period would be enough for the surviving spouse to make a decision as to the manner of providing adequate income for a decent living for himself/herself and his/her family.

The Swedish legislator has also provided for a situation when a surviving spouse is unable to earn an adequate living through work. In those cases, the surviving spouse shall be entitled to a Special Survivors pension when the right to an adjustment pension expires and when the surviving spouse cannot support themselves by working and do not receive a retirement pension.[20] Pieters claims that "the Special Survivors Pension can be limited in time and in any case it will be reviewed every three years; it is not means tested because the deciding factor is whether the surviving spouse is able, or should be able to support himself by working".[21] According to the Swedish pension legislation, when the surviving spouse turns 65, he/or she will be entitled to the basic guarantee old-age pension, which all citizens of Sweden are entitled to after a minimum of three years of residence. It should be noted that as provided by the Swedish legislation, the concept of spouse comprises registered partners and cohabitants, if the deceased had or expected a child with the spouse, or they lived together in a marriage or registered partnership.[22] Consequently to such equalizations, it would make sense that the same rights to survivors benefits were granted to cohabiting and same-sex couples in Sweden.

There is the possibility in Sweden to ensure a classic survivors pension, based on the contribution method, through an occupational insurance scheme. According to Selen and Stahlberg "Sweden has a quasi-mandatory system of employer-provided pensions, where the occupational pension is not a legal requirement imposed by the state, but is the result of a contractual agreement between labour unions and employers that covers most workers".[23] Furthermore, same authors claim that "the survivors pensions from the occupational schemes in Sweden are paid to widows, widowers and children of private white-collar workers, state employees, and local authority and country council employees if the deceased worked for more than 40 per cent of full time".[24] Such a form of security is widespread in Sweden, particularly as the rate of organizing into trade unions is significantly high, ranging from 80 to 89 per cent, and therefore, a large number of employees provide social protection for their

[20] *Ibid.*, 322.

[21] *Ibid.*

[22] International Serbiska, Porodična penzija u slučaju smrti člana porodice, Pensionsmyndigheten, *http://www.pensionsmyndigheten.se/EfterlevandepensionOmEnFamiljemedlemAvlidit sr.html*, last visited 29 May 2014.

[23] J. Selen, A.C. Stahlberg, *Ibid*, 119.

[24] *Ibid.*

family members based on the traditional contribution model of survivors protection.

3. THE WESTERN EUROPEAN CONCEPT OF SOCIAL PROTECTION OF SURVIVORS

The traditional concept of the social protection of survivors, based on compulsory social insurance scheme and benefits which depend on the pension of the deceased person, still exists in the majority of the Western European countries. Here we shall make an analysis of the social protection system of surviving spouse in Germany and an overview of the changes that have happened in the Western European system during the last decade, along with the main features of widows and widowers rights on survivor's pension.

3.1.The Social Protection System of Surviving Spouse in Germany

It is a well-known fact that Germany is a country where the Bismarckian concept of social security is established, and where the Law on Mandatory Insurance in Case of Invalidity, Old Age and Death was adopted in 1889, whilst the concept is applied even today in the majority of the EU countries. In Germany today, widow or widower pensions still exist, and are granted on the condition that "the deceased was entitled to a pension or had satisfied, actually or fictitiously, a waiting period of 60 months".[25] Holden and Brand claims that in "Germany statutory old-age pension benefits are strictly earning-related, based on a ratio that measures the person's lifetime earnings relative to those of the average worker, although there are some credits for periods out of the workforce due to unemployment, sickness and raising children".[26] The deceased must have 5 years of contributions paid, although the "qualifying period may be deemed fulfilled when the insured person passed away as a consequence of an employment injury or a short time after education/training".[27] Apart from the traditional compulsory social insurance scheme for survivors, there is also the possibility of voluntary insurance for all persons over the age of 16, who are residents of Germany and for all Germans abroad.

[25] D. Pieters (2002) *Ibid*, 125; See more: E. Eichenhofer, *Sozialrecht*, Mohr Siebeck Tübingen 2012, 71 73, 183.

[26] K. Holden, J. Brand, "Income Change and Distibution upon Widowhood: Comparision of Britain, the United States and Germany", *Pensions: Challenges and Reforms*, (eds. E. Overbye, P. A. Kemp), Ashgate, United Kingdom 2004, 213.

[27] Social protection Social Inclusion, Comparative tables on Social Protection Germany, European commision MISSOC, *http://ec.europa.eu/employment social/missoc/db/public/compareTables.do;jsessionid qsyGPVJJs8xcPwKHJRpbJYcs84psFlrdQ9jQqTg5cxLmKnBk1lTx!2015099289*, last visited 14 June 2014.

Significant changes in the German system for the social protection of survivors happened with regard to the right to survivors pension for cohabitants and civil union partners. German law provides that, apart from the surviving spouse and orphaned children, cohabitants, divorced spouses and partners of a registered civil union also have the right to survivors pension. Germany has recognized the civil union of same-sex couples and explicitly provides that partners to the union have the same rights as the surviving spouse, on the same condition that marriage/civil union must have lasted for at least one year and in such a manner, the rights to survivor's pension are equalized for both marriage and civil union. The same rule applies for the cohabitants. The right to survivors pension in Germany is granted to "widowed persons aged 45 years or more, persons with reduced capacity to work or for persons caring for a child up to the age of 18 (no limit in the case of disabled children unable to maintain themselves)".[28] This points to the fact that the requirements for survivors pension in Germany are set alternatively. Due to demographic changes and a growing ageing population problem in Germany, the Act on the adjustment of the standard retirement age to demographic development and the reinforcement of the principles of statutory pension insurance financing of April 20, 2007, provided for the gradual increase of the retirement age for widows or widowers pension in case of death of the insured person from 45 to 47 years in 2012.[29] The same rules apply to surviving spouses, surviving partners and cohabitants.

According to Pieters "the survivor's pension in Germany is derived from the pension rights of the deceased person".[30] The German system of social protection of survivors distinguishes two types of survivors pension – the major widows or widower's pension and the minor widows or widower's pension. There is also a form of adaptation survivors benefits, which is reflected in the fact that "the insured person's full pension is paid to the widow or widower for the 3 months following the insured persons death".[31] It is a relevant fact that, in Germany, the pension is granted to widows and widowers on an equivalent basis, as a result of the 1985 Reform, when the Federal Constitutional Court "had declared the legislation previously in force unconstitutional in that it gave rise to inequality of treatment between widows and widowers".[32] With regard to this equality, Germany is one of the countries where during the 1950s and 1960s, there was significant inequality in the labour market and women

[28] *Ibid.*

[29] *Ibid*

[30] D. Pieters (2002), *Ibid*, 125.

[31] *Ibid.*

[32] F. Ruland, "Survivors benefits of the pension scheme in Germany", *Survivors benefits in a changing world*, Studies and Research No 31, International Social Security Association Geneva 1992, 52.

in the majority of cases decided to stay at home to take care of children.[33] Therefore, a traditional contribution method of funding still exists in Germany, and the resulting fact is that the survivors pension still derives from the earnings of the deceased spouse. The need for equality between widows and widowers came to light in the 1980s and 1990s, when the increase in women's participation in the workforce on the labour market was recorded.

Today, the major survivors pension amount is 55 % of the old-age pension for which the deceased spouse would have been eligible, while the minor survivors pension amount is limited in time and it is "payable for a maximum period of 24 months to the amount of 25% of the old-age pension for which the deceased spouse has been eligible".[34] It is important to note, that in regard of the amount of benefits, survivors who have raised children receive a dynamic supplement.[35] The said minor survivors pension is paid only in situations when widows/widowers have not met the requirements for the major survivors pension (age/incapability for work/raising children). In a way, the minor survivors pension also has certain features of the adaptation benefits for the new circumstances caused by death of the spouse and changes in household income.

According to the new changes resulting from the 2002 Reform of the German social security system, there is a possibility for the spouses to opt for splitting pension entitlements between spouses instead of providing for dependents in the form of a derived widows or widower's pension.[36] This represents to a certain extent an alternative form of survivors pension. The option to split pension entitlements only applies to couples married after December 31, 2001 and those couples "can decide to split their pension entitlements when they both reach retirement age or when one partner dies".[37] This new system in Germany provides for the possibility for the couples to decide what option is better for them – "whether to split pension entitlements or go for a widow(er)s pension, also they will have to consider a number of questions such as which partner is

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[33] See more: G. Bonoli, *The origins of Active Social Policy Labour Market and Childcare Policies in a Comparative Persective*, Oxford University Press, Oxford 2013, 129 131.

[34] For marriage before 1.1.2002 or in situation where at least one spouse born before 2.1.1962 or deceased before 1.1.2002, the major survivors pension amounts to 60% of the pension for which the deceased spouse would have been eligible.

Social protection Social Inclusion, Comparative tables on Social Protection Ger many, European commision MISSOC, *Ibid.*

[35] *Ibid.*

[36] Germany, Pension insurance, MISSOC; *http://ec.europa.eu/employment social/missoc/2003/022003/de en.pdf*, last visited 26 May 2014.

[37] H.Conrad, T. Fukawa, "The 2000/2001 Pension Reform in Germany Implica tions and Possible Lessons for Japan", *The Japanese Journal of Social Security Policy*, 2/2003, 76.

likely to live longer, whether there is any additional income of the surviving spouse which might reduce a widow(er)s pension, how high individual pension claims would be in case of splitting and whether the widow(er) is likely to marry again".[38] According to Conrad and Fukawa, "several criteria have to be met before such a pension can take place, the most important being that both partners have reached retirement age and that both have individually accumulated 25 years of qualifying time".[39] Certainly, it is a very interesting new concept in the protection of survivors and it is highly probable that this concept will expand across Europe in the near future and maybe replace survivors benefits, especially as there is an increasing participation of women in the labour market and further as we are closer to realizing the idea of equalization of rights of women and men in the sphere of labour, especially the rights concerning salaries. Based on all these facts, it may be concluded that the splitting of pension rights seems like a very good idea and maybe represents a better option of securing a decent income for the spouses upon death of one spouse.

4. THE EASTERN EUROPEAN CONCEPT OF SOCIAL PROTECTION OF SURVIVORS

The concept of the social protection of survivors in Eastern European countries was well developed in the period of communism. Despite the equality principle of work for men and women in communist societies, there were much fewer women who would stay at home with children than in the Western European countries. Because of a small percentage of widows, who would be the beneficiaries of survivors benefits, the eligibility conditions were not very strict. In those countries, women gained social security on the basis of their own work and payment of contributions for mandatory social insurance and in that period the number of beneficiaries of survivors pensions was rather lower than in Western European countries. However, the reality was completely different. According to Širovatka and Saxonberg, "women continued to have full responsibility for the household chores and child upbringing and in reality women accepted lower positions and lower salaries than men, so in those cases they could balance work and family".[40] "The state-socialist system did not see women simply as housewives, but rather as wives-mothers-workers".[41]

[38] *Ibid*, 76 77.

[39] *Ibid*, 77.

[40] According to same authors "All women worked, but only men had careers", S. Saxonberg, T. Širovatka, "Failing family policy in post communist Central Europe", *Jour nal of Comparative Policy Analysis* 8(2)/2006, 196.

[41] A. Cerami, *Social Policy in Central and Eastern Europe The Emergency of a New European Welfare Regime*, LIT Verlag, Hamburg, Berlin 2006, 162.

Since the 1990s, the situation on the labour market in Eastern Europe has changed, and a lot of women lost their jobs during the period of transition. In order to alleviate the crisis caused by massive release of employees, in that period an idea was promoted for women to be at home with their children, rather than at work. It is interesting that in four post-communist countries (the Czech Republic, Poland, Slovakia and Hungary) in the 1990s, a general tendency in familist-gendered policies was to encourage women to leave the labour market to raise children.[42] In a way, there was a shift in employment policies in Eastern and Western European countries. While the concept of equality was advocated in Western European countries where women were encouraged to enter the labour market, leave their households and "ovens" and stand side by side with their husbands, the Eastern European countries, where women were included in the working process during almost the entire 20th century, left the concept of dual breadwinner and shifted to the concept that prevailed in the West during the fifties of the 20th century. All those facts produce an increased percent of widows, beneficiaries of survivors pensions and therefore, the countries had to change their laws with regard to the conditions for survivors pensions in order to reduce deficits in the social security budget caused by increasing number of beneficiaries of the survivor's pension. Also, the majority of Eastern European countries have not adopted the concept of certain rights of survivor benefits for cohabitants and same-sex partners, primarily because of the traditional concept of marriage which is still very present in those states. It will take time until the rights to survivors benefits are approved and equalized for the cohabitants and, in particular, for same-sex couples. Through an analysis of the Romanian system of the social protection of survivors, we will review the main features of the Eastern European countries' concept.

4.1. Social Protection System of Surviving Spouse in Romania

Romania became a member state of the European Union in 2007 and in the process of association it reformed its pension system. The New Romanian Law on Unitary Pension System was adopted in 2010 and the main changes were "the public pension system has been unified into a single Law, the cap of five times the average gross salary for pension contributions has been reintroduced and the standard retirement age has been raised to 63 for women (previously 60)".[43] According to the new law, the rights to survivors benefits are granted to the surviving spouse and children of the deceased who were pensioners or eligible for Invalidity Pension, Old-Age Pension, Old-Age Pension with Reduced Standard

[42] S. Saxonberg, T. Širovatka, *Ibid.* 189.

[43] KPMG Romania, *https://www.kpmg.com/RO/en/IssuesAndInsights/ArticlesPublications/Newsflashes/Tax/Direct Tax Newsflash/Documents/TNF%20231%20EN.pdf*; last visited 29 May 2014.

Retirement Age, Retirement Pension and Partial Early Retirement Pension (all forms of pension specified are a part of the public system of pensions).[44] In Romania, there are two different conditions with regard to the surviving spouse – conditions related to age and conditions unrelated to age. Compared to Western European countries, where the condition for the surviving spouse with regard to duration of marriage is approximately one year, the condition related to age for the surviving spouse in Romania is at least 10 years plus the standard retirement age.[45] If the surviving spouse is affected by category I or II invalidity in accordance to the Romanian standard of invalidity, the condition with regard to marriage will be that marriage has lasted for at least one year.[46] Also, the surviving spouse will be entitled to survivors benefits if his/her "level of income is lower than 35% of the Average Gross Earnings (in July 2011–167 Euro) and raising a child who is up to 7 years of age".[47] According to MISSOC Tables, "The surviving spouse who does not meet the conditions un/related to age, is nevertheless entitled to receive a Survivor Pension for a limited period (6 months following the date of death of the supporting spouse) if during this period the level of income is lower than 35% of the Average Gross Earnings (EUR 167)." The last form of survivor's benefits possesses some features of adaptation benefits and social assistance and seems to include means-testing. The surviving partner, cohabitant or divorced spouse in Romania is not eligible for survivors benefits. It is an interesting fact that not until 2004 could the widowers in Romania claim the survivors pension and before that, pension used to be payable only to widows.[48]

There are specific rules in Romania which are different from the rules of most Western European countries, and they refer to calculating the amount of pension. The survivor pension amount is calculated and paid monthly as a percentage of the old-age pension or old-age pension with reduced standard retirement age paid or payable to the deceased person.[49] According to Pieters, "the calculation basis is the deceased's pension or the one she/he would have received and the level of the survivors

[44] Social protection Social Inclusion, Comparative tables on Social Protection Romania, European commision MISSOC, *http://ec.europa.eu/employment social/missoc/db/public/compareTables.do;jsessionid qsyGPVJJs8xcPwKHJRpbJYcs84psFlrdQ9jQqTg5cxLmKnBk1lTx!2015099289*, last visited 12 June 2014.

[45] Before Reforms, condition was minimum 15 year of marriage, *Ibid.*

[46] *Your Social Security Rights in Romania*, Social Europe, European Commission, European Union 2011, 23.

[47] Social protection Social Inclusion, Comparative tables on Social Protection Romania, European commision MISSOC, *Ibid.*

[48] Reforms, "Survivors' benefits now also payable to widowers", International Social Security Association, *http://www.issa.int/Observatory/Country Profiles/Regions/Europe/Romania/Reforms2/(id)/2439*; last visited 30 May 2014.

[49] *Your Social Security Rights in Romania, Ibid, 24.*

pension is established according to the number of the survivors: one survivor – 50%; 2 survivors – 75%, 3 or more survivors – 100%, this being the maximum percentage awarded".[50] This form of calculation brings us to the conclusion that the amount of pension for the surviving spouse without children in Romania is 50% of the pension that the deceased would have received and it is probably insufficient for a decent life. This concept of calculation is also adopted in other countries of the Balkans (Bulgaria, Serbia, Slovenia, Croatia, Montenegro), with certain conditions for the calculation of pension being more favourable than in Romania. A concept for calculating the amount of pensions which corresponds to the number of the family members, present in most Eastern European countries, shows that the concept of survivors protection is still the strongest form of social security which relates to the family as an important social category in this part of the world. In the further reform of the pension system in Romania, it will be useful to change the conditions with regard to the calculation and thus provide better security for the surviving spouse.

5. CONCLUSION

The social protection system of surviving spouse in Europe has changed in the last decades, and will continue to change into the future. From the traditional concept, which was based on the contribution method of funding, there has been a shift towards occupational schemes, universal coverage through means testing and helping only those survivors who are in need. It will be quite useful for all member states of the EU to ratify the relative part of the ILO Convention no. 102 as well as the section of the European Code of Social Security with regard to the protection of survivors. Further, it would be beneficial that the ILO adopts new standards which would come sixty years after Convention no. 102, regarding the principles of social security, comprising new trends and changes to that extent. Member states of the EU should coordinate their systems concerning entitlement to survivors' benefits and the calculation thereof.

The role of women in the labour market has changed in the last decades, and women have the same rights as men. Their emancipation and inclusion in the labour market, particularly in the countries of Western Europe, has resulted in a reduction in the number of beneficiaries of survivors pensions. National legislation of some countries, like Sweden, abolished the right to widow's pension. It is a large step that all countries recognize the right of widowers to pension, and that their rights are in all

[50] D. Pieters, *The Social Security Systems of the States Applying for Membership of the European Union*, Intersentia, Antwerp Oxford 2003, 159.

equalized with those of the widows. It is expected that the new forms of social security of survivors shall further develop, and that traditional concepts shall be substituted for the new forms, as is the case in Sweden. There is a distinction among Scandinavian, Western and Eastern concepts, and it could be favourable to overcome the differences in the future, in order to establish an innovative European model for social protection of survivors. In the future perspective, it is expected that we shall have a concept of protection of survivors, especially spouses, for the purpose of offering them the best option for protection in the case of their new circumstances, which would enable them to have decent living standards.

CERIF: S115

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ON CRYSTALLIZATION OF LAW

The article introduces the problem of autonomy of law. The paper examines the medieval origins of legal positivism from a historical approach, sketching the main theories concerning the emergence of law, and phrasing some preliminary con sideration for a historical and philosophical view of the problem of the birth of law. As a result of reasoning the article suggests some legal historical and human etho logical ideas relating to the phenomena of crystallization of the law.

Key words: *Autonomy of law. Emergence of law. Human ethology. Legal positivism. Medieval law. Philosophy of history.*

1. INTRODUCTION

In this article I attempt to sketch some viewpoints to illuminate the emergence of law as a special phenomenon, giving a contribution to the thinking on the real nature of law. It is often believed that law has been formed and shaped from the medium of social customs and has become a rational structure gradually and linearly. Although this interpretation can catch either side of the birth of law, namely that the law does not come into the existence over one or two days, the law needs special social situations in order to disentangle itself from the medium of other social rules. However these situations can deeply influence the rapidity of the rise of law.

As is well known, the law does not have equal importance everywhere and in every legal cultural region. In some places, such as in the West, the law is a highly regarded instrument for social control. Elsewhere legal institutions have less importance compared to traditional so-

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cial rules and education. Thus, I tend to suppose, law needs to have a special cultural and social situation to reach a very developed and sophisticated condition– a condition wherein the law appears as the ultimate argument in deciding conflicts. In order to see the reasons for that process, wherein the law can become an highly important phenomenon, we should circumambulate some historical, theological momenta besides legal philosophical problems, and we should also touch on some questions of the philosophy of history.

2. ON AUTONOMY OF LAW

Theories of legal positivism, in extreme cases, think: if moral arguments are kept out of legal discussions, this practice is useful from social aspects. Antecedents of this thought can already be discovered in the work of Langdell, who asserted and approved the autonomy of law, because this autonomy could guarantee neutrality and the balancing of law in a plurality of social mores.[1] However, as it will be touched upon, these modern and secular ideas are deeply rooted within protestant theology. This is probably true concerning the thoughts of Josef Raz, wherein the law appears with "content-independent" and "preemptive" characters. Thus, as a norm-based and juridical authority-based force or power demanding an absolute and unconditional validity. In Raz's interpretation, the law requires authority[2] and this circumstance can distinguish law from advice. However the real question is, how the law is delimitable from morality and religious rules on the basis of its demand to authority, when we know "moral or religious rules" can be hardly real rules, if they do not claim and require an unconditional following. These are also only opinions without demand to unconditional following and general validity.

Raz properly showed that, the law, according to its essence, requires moral authority.[3] However it is highly dubious to suppose that the law needs only a demand to moral authority, but a certain measure of morale is not a necessary element of law. Namely, Raz does not ask that evident and obvious question, and he also does not answer the question of why the law demands legitimacy and moral authority, if moral content is not necessary for the existence of law, and the law can exist without this. It is highly useful to consider that moral references are always promises relating to certain kind of values. Thus, if we experience that, as Raz has

1 Christopher Columbus Langdell, *Selection of Cases on the Law of Contracts*, Boston, Little, Brown, and Company, 1871; See also James G. Milles, "Leaky Boundaries and the Decline of the Autonomous Law School Library", *Law Library Journal,* Vol. 96:3 387 423, 2004.

2 Joseph Raz, *Ethics in the Public Domain*, Oxford, Clarendon, 1994, p. 215.

3 Joseph Raz, "Hart on Moral Rights and Legal Duties", Oxford Journal of Legal Studies 1984:4, pp. 123 131

asserted it, the law requires moral authority (namely in general by moral references which are properly speaking indirect promises) and this phenomenon belongs to the nature of law, we can reasonably suppose that the law makes only such promises as can be accomplished through numerous concrete legal norms (at least formally and theoretically). Our supposition is probably true, even if the everyday legal practice is not equal to the content of the legal system in many essential aspects (for example in Nazism or Communism). That is another issue: when law helps certain values to come into existence, this sometime creates more damages than a passive manner of law.

3. ON THE MEDIEVAL ORIGIN OF LEGAL POSITIVISM

As is well known, legal positivism maintains the duality of law and morals, the idea of the autonomy of law, however this stream does not sincerely take into account the relationship between its ideas and reality, not to mention the theological origins of its thoughts. Max Weber has already shown the connection betweenprotestant puritanism and the capitalist economy. However legal positivism also takes its origin from late medieval thinking. In the Christian Middle-Age canonical and ecclesiastical law dominated against profane law and legal institutions. At this time, Christian morality provided an unambigous basis for the interpretation of thinking about the law and justice. On the trail of a struggle between the papacy and the Holy Roman Empire the profane domination wished to get emancipation and to become independent of ecclesiastical influence.

From the aspect of legal philosophy Dante's pamphlet, namely De Monarchia, was an excellent and highly characteristic sign of this process. He thought that profane power and ecclesiastical power both derive directly from God. [4] He mentioned an example, namely the antique profane Roman Empire, which could come into existence without contribution from the ecclesiastical power and papacy, because these did not exist when Rome was born. However we should take into consideration, the Roman kings, the member of College of Pontiffs and (at least at early times) praetors were sacerdotal people, so they embodied both sacred and profane domination.

The ideas of Dante were later repeated by Marsilius of Padua[5] and William of Ockham[6] later. By the way, we can regard William of Ockham

[4] Dante Alighieri, *De Monarchia*, Boston and New York, Houghton, Mifflin and Company, 1904, pp. 137, 196 207.

[5] Marsilius of Padua, *The Defender of Peace*, Cambridge, Cambridge University Press, 2005.

[6] William of Ockham, *Quaestiones et decisiones in quattuor libros sententiarum*, Lyon, 1495, Vol. II, pp. 19. See also: Marilyn McCord Adams, *William Ockham*, Notre Dame. Ind., University of Notre Dame Press, 1987.

as the first positivistic legal philosopher, who thought that God could have given other statutes for us aside from the law of Bible, and we would have to respect those in the same way. However Ockham emphasized the goodness of God in order not to characterize Him as a despot. In a paradoxical way, he did not take into account that the absolute character of God could suffer damage from the formally emphasis on a precise and definite quality (namely,charity) relating to God.

Later John Wyclif also asserted the primacy of secular power in secular things and that ecclesiastical goods are taxable. At thebeginning of the 15th century the autonomy of secular power and secular law was emphasized only against ecclesiastical power, but it was not related to morality. Just about one century later this view commenced to change. Although Machiavelli did not deal with legal philosophy explicitly, he executed a significant deed emphasizing the special logic of political power, in reality the autonomy of the political sphere not only against ecclesiastical power, but against morality too. Ironically, Dante and Machiavelli, who represented a rational and pragmatical stream in political thinking, thay were actually idealists, and they both had to suffer banishment.

Nevertheless Machiavelli anticipated and foreshadowed Max Weber's distinction between responsibility-morality and conscience-morality, showing the special, expediency-based logic of politics. It was a very important moment for the legal positivistic view, because if political power is independent of morality, political power-created law is independent of moral consideration too. However it is a favorite topic of later ages.

The Reformation in 16^{th} century, especially the Calvinist variation, wished to enforce rational reason in the realm of theology. Calvin argued as if continuing the ideas of Ockham when he said, the reason for salvation is only God itself, and it is nothing else. Namely, if there were a reason for salvation above this, it would be a more powerful thing than God, however this is obviously nonsense and impossible. As Calvin said: *"For if it has any cause, then there must be something antecedent, on which it depends; which it is impious to suppose. For the will of God is the highest rule of justice; so that what he wills must be considered just, for this very reason, because he wills it. When it is inquired, therefore, why the Lord did so, the answer must be, because he would. But if you go further, and ask, why he so determined, you are in search of something greater and higher than the will of God, which can never be found. Let human temerity, therefore, desist from seeking that which is not, lest it should fail of finding that which is. This will be a sufficient restraint to any one disposed to reason with reverence concerning the secret of his God."* [7]

[7] John Calvin, *Institutes of the Christian Religion*, Philadelphia, Published by Philiph H. Nicklin and Hezekiah Howe, New Haven, 1816, Vol II, pp. 444.

Thus, Calvin warned, we should not search for causes of salvation besides the will of God, otherwise we will miss things which exist, while we are looking for such phenomena that do not exist. This argument, according to its structure, is highly similar to the logic of legal positivism, which emphasizes the importance of available legal security instead of often changeable, variable and particular morality and justice. As Calvin writes: *"and this is what I asserted from the beginning, that we must always return at last to the sovereign determination of God's will the cause of which is hidden of God's in himself."* [8]

I suppose this intellectual structure is similar to the argument of legal positivism not only accidentally, but rather that the relationship between these phenomena has deeper roots. We should not forget that the structures of thinking and forms of arguments tend to spread not only in a conscious way. Some ideas can shape all territory of culture, and not only that area of culture where it was born. Moreover, consequences of some thoughts can emerge after other circumstances have also been shaped. Legal positivism, which emphasizes the available,, in the same way asserts the autonomy of law, and that the essence of law is in law itself. However, what does Calvin establish? As we saw: *"and this is what I asserted from the beginning, that we must always return at last to the sovereign determination of God's will the cause of which is hidden of God's in himself."*[9] However, what can be proper, or at least defendable theologically by the concept of God, is highly dubious concerning the relative category of the law in legal philosophy. Especially, if a juridical decision (which is formally correct from the legal aspect) is unacceptable for a majority of society. Nevertheless, thoughts of Ockham and ideas of Calvin prepared the intellectual ground to accept ideas about "content-independent" authority.

There were further consequences of the secularization of Western law, when Thomas More had to warn about the human-created limits of divine law,[10] and Montaigne could describe with indignation, how human lives were sacrificed on the basis of legal formalism, when some people's innocence became obvious after the sentence concerning their death had been created, but had not been pronounced.[11] We should not forget that the legal institution of appeal has generally arrived gradually and slowly.

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[8] *Ibid.*, 446.

[9] *Ibidem*.

[10] Thomas More, *Utopia*, London, A. Murray, 1869, p. 46.

[11] *"How many innocent people have we known that have been punished, and this without the judge's fault; and how many that have not arrived at our knowledge? This happened in my time: certain men were condemned to die for a murder committed: their sentence, if not pronounced, at least determined and concluded on. The judges, just in the nick, are informed by the officers of an inferior court hard by, that they have some men in custody, who have directly confessed the murder, and made an indubitable discovery of all*

As Burckhardt has reminded us, the 16th century was a changing, transforming age with a lot of uncertainty, insecure and fatalistic feelings.[12] The idea of predestination has derived from these circumstances among others. Shakespeare's drama The Merchant of Venice also has a highly ironic attitude relating to legal formalism, which had to win against the formal argue of Shylock, because mere reference to morality was not enough in the legal process at that time. We can call the 16th century the age of prepositivistic law, after the natural law and legal philosophy emerged on the trace of Grotius' and Pufendorf's works.[13] Natural legal conceptions could push prepositivistic-formalistic ideas to the background, however only temporarily, because when the role of Roman law became stronger, and Western history once again saw a period of moral-plurality, simultaneously positivistic forms of thinking returned more strongly.

Thus, we should inquire into ideas about the autonomy of law on the basis of their historical shaping. Natural law often asserts that there is a transcendent non-formal law next to or above positive law, however this legal interpretation usually establishes the contents of that sublime law on the basis of an ideological preliminary supposition. I tend to think, it cannot be an accident, that the Catholic legal philosophy has a more significant natural legal tradition compared to the protestant based philosophy of law, because pre-protestantism or pre-reformation (Dante, Marsilius of Padua, Ockham, Wyclif, Hus) and Reformation prepared legal positivism by separation of the sacred and profane powers.

We probably can establish that the "modern" and "secular" imagined ideas about the autonomy of law are based on political-theological thoughts at least half a thousand years old. It is also true that conceptual-analytical legal efforts have derived from theological related legal positivism. However that is a huge question, what kind of scientific results can descend from only belief-like, politically and theologically based ideas.

the particulars of the fact. Yet it was gravely deliberated whether or not they ought to suspend the execution of the sentence already passed upon the first accused: they considered the novelty of the example judicially, and the consequence of reversing judgments; that the sentence was passed, and the judges deprived of repentance; and in the result, the poor devils were sacrificed by the forms of justice." Michel de Montaigne, *Essays*, Stanford, Stanford University Press, 1958, pp. 819 820.

12 Jakob Burckhardt, *The Civilisation of the Renaissance in Italy*, US. Dover Courier Corporation, 2012, p. 303.

13 Hugo Grotius, *On the Laws of War and Peace*, New York, M. Walter Dunne, 1901; Samuel Pufendorf, *Of the Law of Nature and Nations*, London, 1729; Craig L. Carr (ed.), *The Political Writings of Samuel Pufendorf*, Oxford University Press, 1994.

4. THEORIES CONCERNING THE EMERGENCE OF LAW

In Western legal thinking there is the view that we can only speak about law and the state from a certain developed social and historical situation, wherein these phenomena had reached definite stations of development. Among others American Legal Realism fought against this view with some success. This stream, namely American Legal Realism, has shown the complicated webs of social control in so called primitive societies.[14] However it must be a necessity that Western ideas relating to law and the state have been shaped in this way, because the thinking about law and state could analyses directly only those situations and conditions wherein this legal thinking has emerged, namely the circumstances of the 16th and 17th centuries and later ages. Thus, relatively sophisticated phenomena provided themselves as the basis for legal philosophical inquiries, so philosophy of law tended to think that the phenomena of its age had a general character. Bodin's terminology of and his sovereignty-theory survived its own time, and appears again and again in Austin, Somló and others up to the 20th century, although the principle of democracy dominated in these late ages. Nevertheless, a special fiction got general about demarcation between no-state and state and traditional rules and the law. However these ideas did not take into consideration, for example, that the Roman Empire did not exist as a state according to our recent Western theories and categories, and only Roman municipal institutions (for example the senate of Urbs) decided matters of the Empire, and these institutions operated further in the Middle ages too, after the defeat of the Empire.

After the 16th century, so-called social contract theories have in wholly speculative way supposed that supremacy come into existence through agreement between the leader and other members of society. Numerous theories thought jurisdictional functions and their operation result in the emergence of law. In this interpretation a lot of decisions can mature the law. However the main problem is that the law does not have as outstanding and excellent a role everywhere as it had and has in Rome and in the West. Namely, law has not become an independent social phenomenon in every culture detaching itself from religious and moral spheres. Religious determination of the law is obvious in the Islamic world.[15] In Japan education and conciliatory processes have fundamental importance in treating conflicts.[16] In China there is an old legend that the

[14] Karl Nickerson Llewellyn, E. Adamson Hoebel, *The Cheyenne way; conflict and case law in primitive jurisprudence*, Norman, University of Oklahoma Press, 1941.

[15] Joseph Schacht, *An Introduction to Islamic Law*, Clarendon, Oxford, 1966.

[16] Hajime Nakamura, *Ways of Thinking of Eastern Peoples: India, China, Tibet, Japan*, Honolulu, East West Center Press, 1964; Edward T. Hall, *Beyond Culture*, Anchor Press/Doubleday, Garden City, New York, 1981, pp. 107 112.

law was invented by a guilty Northern nation, which died out, because of its sins,[17] and therefore Confucianism considers exemplary manners are the most important aspect of social control.[18] Thus, Western theories and ideas concerning an autonomous law and the importance of law are not universal conceptions.

Moreover, a human ethological phenomenon is highly important for understanding the law, namely so called rule-following behavior.[19] Its essence is that humans have an instinctive, biologically coded inducement to keep social rules. Rule-following behavior can exist relatively efficiently in little traditional groups (those consisting of about 100–150 people), because rules and customs are clear, and so-called normative aggression of members of society touch directly people who neglect common rules. It is also clear that certain rules of coexistence can exist as religious rules in bigger societies, and finally we can see secular legislation in numerous legal cultures. The big question is whether subsequent developments are accidental momenta or rather consequences of special social-cultural situations.

5. SOME PRELIMINARY CONSIDERATIONS FROM THE ASPECT OF PHILOSOPHY OF HISTORY

Sir Henry Maine was perhaps the first scholar who distinguished so-called progressive societies from stationary societies, classifying Rome and the West within the first type and, for example, India in the second category. [20] In contrast to this interpretation Spengler (as Ibn Khaldūn did about six centuries earlier) [21] thought that every civilization moves along a certain developmental curve from birth to decline and death. However, Spengler referred properly to the magical-mystical character of the Eastern cultures and to the circumstance that Eastern cultural phenomena do not show as high a degree of differentiation the Western phenomena. Thus, at this point there is a contradiction between the ideas of Maine and Spengler, namely Spengler did not distinguish between two types of cultural progressions.

[17] Tibor Bakács, "Hommage á prophesseur Tamás Prugberger" in: *Ünnepi Ta nulmányok Prugberger Tamás professzor 60. születésnapjára*, Miskolc, Novotni Alapítvá ny, 1997, pp. 15 21, 20.

[18] David L. Hall, Roger T. Ames, *Thinking Through Confucius*, Suny Press, Al bany, New York, 1987, p. 241.

[19] Vilmos Csányi, "Reconstruction of the Major Factors in the Evolution of Hu man Behavior" *Praehistoria*, Vol. 4 5, 2003 2004, pp. 221 232.

[20] Henry Maine, *Ancient Law*, New York, Henry Holt and Company, 1873, pp. 21 23.

[21] Ibn Khaldūn, *The Muqaddimah: An Introduction to History*, 3 vols., New York, Princeton, 1958.

Nietzsche outlined the duality of Apollonian– and Dionysian-principles in Greek culture. According to Nietzsche, these phenomena induced the progress of the Greek civilization. However this German philosopher did not create any general theory from this idea. It is quite clear that the model of Spengler is similar to the thoughts of Nietzsche, but the intellectual system of Spengler is not able to describe all the cultural formations in an accurate and adequate way, because for example the Chinese or Indian cultures are too old and too "balanced" and linear to be pressed into Spengler's cycles. Of course, this circumstance does not mean that none of the cultures form special cultural cycles. And at this point I changed the terminology of Maine, so I call the inquired entities progressive and stationary cultures instead of progressive and stationary societies.

It seems that progressive cultures can form a special developmental curve, although Maine did not mention the declines of these progressive structures. It is considerable too that Nietzsche, although not constructing a general and elaborated cultural theory on the basis of his ideas relating to Greek culture, mentioned the principle of "perpetual return", which has become a key idea in Spengler's theory. Nevertheless, it was a big question for me, whether it is possible that those progressive cultures are brought into motion by a duality of two contrasting principles or forces. Nietzsche's idea must be a possible solution, if we consider numerous further positions relating to culture and humanity. Namely, Huizinga perceived that so-called antithetical groups generate the development of culture, [22] Jung, on the basis of a statement of Heraclitus, also emphasized that circumstance, that antithetic psychical energies set spiritual progress in motion.[23] It is also not indifferent that Karl Löwith, on the basis of Hegel's idea, supposed that the contra-Asiatic spirit of the West lies hidden in the critical attitude. [24] However, criticism needs different, conflicting values and views, which are in most cases held by various national entities.

A model appeared in my thoughts on the basis of these considerations. I presume two modes of existence of cultures. One is a cyclical, progressive cultural form that is determined by the duality of two cultural entities. The other is a stationary, quite monistic structure, wherein this kind of sharp duality is missing, although there can be a certain plurality. However, a main cultural entity dominates this plurality in a hegemonic way and the other entities do not pose a serious challenge to it.

[22] Johan Huizinga, *Homo Ludens: a study of the play element in culture*, London, Maurice Temple Smith Ltd., 1970, pp. 66 74.

[23] Carl Gustav Jung, *Über die Psychologie des Unbewussten*, Zürich, Rascher, 1943, pp. 95 105.

[24] Karl Löwith, "Der Europäische Nihilismus", in: *Sämtliche Schriften*, Vol. II, Stuttgart, Metzler, 1983, p. 538.

In my interpretation Mesopotamian (Sumerian-Akkadian), Greek (Pelasgian-Hellene), Roman (Etruscan-Italic), and Western (Mediterranean-Northern) cultures are dualistic-progressive cultural systems. In these cultural areas two entities coexist in a quite balanced way, although one of them is (or was) more determinant at the beginning. The other entity could become emancipated only gradually, during quite a long process. The culminations of these cultures can be realized when their contrasting principles and views penetrate, impregnate, and complement each other. This event can result in highly considerable, moreover emblematic phenomena. As I suppose, these contrasting views are the idealistic and materialistic attitudes in Mesopotamia shaping a special theology and epics with problems of life and death. The main question of the Gilgamesh epic is the first manifestation of a thinking which will be called "Western" in later epochs. Death and the ending of life became connected with the value of life in this epic, as this problem would later be treated in the legend of Orpheus or by Goethe. Life and death are not detached so sharply in Eastern religious philosophies.

These contrasting principles are chaos and order as spiritual forces in the Greek culture, forming tragedy as a genre, as Nietzsche established.[25] However it is thought-provoking that Greek sculpture transformed starting from an Apollonian-character approaching to a Dionysian-spirit, while expression became feminine leaving previous masculine characters. I agree with Julius Evola that anxiety and imperialistic attitude were the main principles of Rome. [26] These principles resulted in an especially sophisticated legal system, which took its formality from anxiety, and its power-character from the imperialistic attitude. Finally emotion and analytical rationality must be principles of Western culture creating polyphonic, contra-punctual, instrumental music. These emblematic genres mean wholly new phenomena of human culture, not resembling anything existing earlier.

However nowadays I presume, there is a totally new dual-progressive cultural entity emerging, namely Latin-America which Huntington characterized as an independent civilization.[27] He only mentioned this entity with its determining Catholic character and its integrated ancient cultural elements, but I argue that the recent development of South-America is connected with its dual character, namely with the duality of Western and aboriginal Indian cultural principles. The rise of this cultural area is realizable in economic and literal areas alike.

[25] Friedrich Nietzsche, *The Birth of Tragedy*, Arlington, VA. Richer Resources Publications, 2009.

[26] Julius Evola, *Revolt against the modern world*, Rochester, Vt., Inner Traditions International, pp. 258 266, 1995 (1934).

[27] Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order*, New York, Simon & Schuster, 1996, pp. 31 39.

Of course, the culminations of these cultures mean the classical condition of those cultural forms at the same time. However from this point the contrasted principles start approaching their opposites. But, as is known, things have different opposites from various aspects. For example, the Western emotional attitude gradually becomes speculative and often cynical and the rational habit of mind approaches an irrational attitude. We can see the mainstream of this process after the philosophy of Hegel from Schopenhauer to Freud, Jung and the more modern intellectual efforts relating to instinctive phenomena, while the emotionally rooted arts become abstract, constructed and experimental. In Greece tragedy transformed into comedy and order– and force-ideal turned into enervation in Hellenistic sculpture. Roman imperialism turned to a defensive spiritual form wherein anxiety dissolved too, namely in Christian trust towards God. There are some sculptural and epochal signs concerning this transformation in Sumerian-Akkadian Mesopotamia, especially in the commercialization of culture before rise of Assyrian Empire.

During these transformations the spiritual capitals of these cultures shift to relatively "tabula rasa" territories, where intellectual processes can develop further being unaffected by the restrictions of traditions. The Hittite Empire so became the cultural center of Mesopotamian-rooted civilization after the great time of Babylon mediating Sumerian-Akkadian culture to Greece and Italy. Likewise, Alexandria formed the most important Greek cultural center when Athens declined, and Byzantium became the real capital of the empire while Rome perished. North-America could rise from the 18th century representing and diffusing a new European spirit.

There are the stationary cultures opposite to these dual-cyclical forms. These stationary cultural systems are relatively monistic, and they have a very long lifespan. In my interpretation Chinese, Indian, Japanese and more or less Islamic cultures are such cultural systems. As I mentioned, in these cultural regions there can be some plurality, and elements of this plurality can also have different origins. However, the significant spiritual opposites and contrasts are missing in these systems and main cultural entities can assimilate different influences, as China imbibed Mongolian and Central-Asian impacts. Although these influences were significant sometimes, they never acquired an importance compared to autochthonic elements. And there can be lot of nations and languages in India, but Hinduism and its spirit penetrate all societies, representing about 80 percent of the population and having a hegemonic position. Similarly Islamic culture could receive various cultural phenomena into itself from Arabian to Persian or Turkish elements, but after this it did not leave any alternatives besides itself, providing its hegemony not only culturally but in a military sense too. As we know Christianization in the West was not so totally independent of southern inquisitions. Namely we know among others the Nibelung and Edda sagas have been preserved moreover by presumably ecclesiastical people[28] and Rome represented “only” spiritual, religious and cultural primacy and did not have a military force against the Northern regions of Europe.

In monistic-stationary cultures there is no considerable differentiation of cultural phenomena, because differentiation needs a critical attitude, which takes its origin from a real plurality. However this critical view cannot be developed in a monistic-hegemonic medium. Painting, philosophy, religion, architecture, arts and scientific “disciplines” are not in a separated state in these cultural systems. These phenomena exist only as different sides of the same spiritual reality, preserving its classical forms and avoiding autotelic innovation. It is highly characteristic that adoption, example-following, respect for customs and traditionalism are more significant in monistic-stationary cultures than they are in the West. Moreover the role of separate, autonomous law is not so important in these areas as it is in Western culture. It is a big question, whether the importance of law is connected with the heterogeneity of a culture. But I tend to suppose that cultural diversity within a civilization heightens the role of law as it seems in the melting pot, namely in the USA where Campos could say even there is jurismania.[29]

6. LEGAL HISTORICAL AND HUMAN ETHOLOGICAL CONSIDERATIONS TO THE CRYSTALLIZATION OF LAW

Ludwig Gumplowicz created an especially interesting theory about the birth of state and law.[30] In his interpretation, the state always came into existence through a fight between different “races” (properly speaking, national entities). According to Gumplowicz the lower classes of societies are originally inhabitants of a conquered territory. This population has been submitted to conquerors, but it gradually became similar to the winners culturally. Thus, a nation can come into existence even without the disappearance of the original social differences. Law emerges as an instrument for maintaining the relationship of domination, substituting personally realized and enforced dependence. However, the law could become a very efficient weapon for the lower classes to obtain their emancipation later, helping the development of the political nation. This highly

[28] Nibelung saga probably by Konrad writer, who was writer of bishop of Passau, Pilgrim in 10^{th} or an anonymous poet at the bishop’s court in 12^{th} century; Edda saga by Brynjólfur Sveinsson bishop in 17^{th} century.

[29] Paul F. Campos, *Jurismania: The Madness of American Law*, New York, Ox ford University Press, 1998.

[30] Ludwig Gumplowicz, *Der Rassenfampf. Sociologische Untersuchungen*, Inns bruck, Verlag der Wagnerische Univ. Buchhandlung, 1909, p. 218.

witty and attractive theory has numerous elements of the truth, but it does not take into account the natural cooperation between nations and the instinctive inclination towards obedience[31] within groups, independent of whether it operates in inter– or intra-cultural relations. However this ingenious legal theorem is a very exciting and valuable contribution to the knowledge of social progress and at the same time is highly relevant from the aspect of philosophy of history.

Considering that the ideas of Ortega are very similar to Gumplowicz's thoughts, I must suppose Ortega knew of Gumplowicz's theory at least indirectly. In spite of the nationalist attitude of the beginning of 20th century, Ortega thought that the state is not a consequence of national development and progress. Just to the contrary, nations have been formed by states.[32] These powers, namely states, can force different populations to coexist by providing common aims for them. This is the spiritual and physical factor that shapes a nation from various, formless groups. Ortega mentioned for example France, which consisted of numerous "nations" before a central will formed them, creating French nation. Ortega's idea is very important for the philosophy of history as well as for legal philosophy. Namely, it can illuminate the nature of national progress and the essence of development of state and law.

If we accept that the state is connected with a national plurality and we suppose a close connection between state and law, we can also accept that the rise of law needs a cultural heterogeneity. Zlinszky inquired into a highly ancient period of law, namely the origin of Roman law. The problem of the beginning of Roman law is an especially reasonable question in light of our topic. How is it possible that the small and rudimentary Rome had a well-developed legal system highly early, when numerous huge and well advanced Eastern empires did not have such a sophisticated construction? Zlinszky marked the cultural and social heterogeneity of Rome as reason for the rise of law.[33] According to him, the population of Rome had wholly different origins and customs and unity of social practices lacked in Rome, so that in the beginning conflicts were not solved in a proper way. According to Zlinszky, the law substituted for customs. However he did not mark that cultural entity where the rules derived from. It is clear the law is a power-phenomenon. Thus, it is hardly credible that there was not a certain entity from where the rules took their origin. This cultural entity was Etruscan culture, which had hegem-

31 Stanley Milgram, *Obedience to Authority: An Experimental View*, New York, Harper and Row, 1974.

32 José Ortega y Gasset, *The Revolt of the Masses*, Notre Dame, Ind., University of Notre Dame Press, pp. 150 170, 1985 (1930).

33 Zlinszky János, *Állam és jog az ősi Rómában*, Budapest, Akadémiai Kiadó, 1996.

ony from every aspect (culturally and as a military force) in Italy in the 8th and 7th century B.C..

I have already expounded on the relationship and similarity of formal-ritual-symbolic Etruscan religion to the institution of early Roman law (in iure cession, mantipatio, stipulation) in my other study. [34] Here I only wish to hint, that there are well known circumstances showing that, firstly, early Roman law had a religious origin,[35] and secondly Etruscan formal religion[36] thoroughly influenced Roman religion by its predictable processes and respect for Fate. Consequently, we can suppose that the roots of Roman law are worth researching in the area of Etruscan religion. Of course, that is another question, how the formality of Roman law dissolved and received a secular character during process of praetor peregrinus. However the essence of the phenomena is that the rise of law needed a complex cultural medium.

Thoughts of Gumplowicz, Ortega and Zlinszky concerning the emergence of state and law seem to refute that previous and recent conception wherein the law has been shaped in quite homogenous mediums of certain nations. These conceptions relating to the plural cultural origin of law do not get in conflict with Kohler's ideas (namely every culture creates such law for itself, which is adequate for its own nature and spirit),[37] because Kohler abstained for that interpretation, which identifies the concept of culture with the concept of national cultures.

I too tend to suppose the necessity of cultural heterogeneity relating to the rise of law wholly on the basis of human ethological knowledge. As I mentioned, rule following behavior is a biologically coded characteristic of humans, and it can exist especially consistently in small traditional groups. Eibl-Eibesfeldt showed that social rules are accepted by people fundamentally emotionally and by belief-like ideas, and are not followed on the basis of rational decisions. The constructional inclination or ability and sensitiveness to symbols of humans have an important role in this phenomenon. Namely the human clings to his own group as an entity and to the abstract idea of this group. Thus, this loyal manner and emotion concerns not only members of the group. The affection for the group operates through symbols, for example by adherence to the name of the group, the flag or other signs.

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[34] Szmodis Jenő, *A jog realitása (The Reality of the Law)*, Kairosz, Budapest, 2005.

[35] Gustav Demelius, *Untersuchungen aus dem römischem Civilrechte*, Weimar, Hermann Bühlau, 1856; Max Weber, *Economy and Society: an outline of interpretive so ciology*, Berkeley, University of California Press, 1978.

[36] Massimo Pallottino, *The Etruscans*, London, Allen Lane, 1974, pp. 130 150.

[37] Joseph Kohler, *Das Recht als Kulturerscheinung*, Würzburg, Druck und Verlag Stahelschen Universitäts Buch & Kunsthandlung, 1885.

It is also a highly interesting phenomenon that the dominant individual can be substituted with abstract ideas or rules in human groups. [38] This is a modern human ethological knowledge about a highly ancient human fact, but Gumplowicz mentioned a similar process about 100 years ago. As he described his supposition, the relation of personal domination gradually transformed, shaping the domination of abstract institutions and rules during the rise of law and state.[39] However Gumplovicz did not suspect that, firstly this process has a prehistorical and evolutionary origin, and secondly this phenomenon has already existed in early, relatively homogenous groups as well.

A further characteristic of the human, indoctrinability, or a low degree of inclination to refuse commands, obedience, imitation, refers to the fact that human behavior is fundamentally rule-following in a more or less clear and firm rule– and custom-order, and the solutions to conflicts do not need physical force in most cases. Attachment to the group results in sensitiveness concerning the disapproval of the group, so this psychical normative aggression is fundamentally enough to control society. In these situations and circumstances the rules do not always appear in conceptual forms, but rule following behavioral practices can control and organize the order of little societies almost instinctively. Of course, the plurality and heterogeneity of social practices and rules appear in bigger communities (such as tribes or unions of tribes), so rule-following behavior cannot operate as involuntarily as it can in little groups. As I suspect, certain essential rules get confirmation by common cult and they appear as religious rules at this period of social evolution, namely in the social reality of tribes. Thus, common practices are fixed in an unconscious way or in belief-like ideas in small groups (genus), but these practices are embedded with an expressively religious character in a tribe or in an alliance of tribes.

As is generally known, religious rules can operate highly efficiently. If a religion creates and has a quite homogenous medium, its norms are respected as similar customs are followed in a traditional small group. Thus, various religions can provide obedience quite thoroughly and firmly in their own medium. Consequently, there is not a necessity to create expressively legal norms. However, if significantly different religious entities have to coexist lastingly, certain rules appear necessarily as legal norms. Thus, as I see, the law can precipitate or crystallize from mediums of religious or traditional rules, and this can happen only in heteronomous cultural and religious situations. This process is highly probable despite the fact that crystallized rules can gain support from a new, syncretized

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[38] Irenäus Eibl Eibesfeldt, *Human Ethology*, New York, Aldine de Gruyter, 1989, p. 345.

[39] Ludwig Gumplowicz, *Rasse und Staat*, Wien, Manz, 1875.

religion, as happened in Rome. Roman law remained in a religious medium for a long time after that, a special syncretic religion emerged from Etruscan fatalism and Italic active transcendent ideas.

It is also thought-provoking, that the role of law (with collections of legal customs, formal legislation and statutes) became significant in the West after great migrations. In my opinion the mixture of Mediterranean and Northern cultures means the beginning of Middle Age. The spirit of statutes and jurisdictional system had an ecclesiastical character providing a certain harmony between Christian morality, the old Roman cultural and spiritual aspirations and the pagan reality of new societies. The monarchies played an important role in the creation of this special synthetic balance with support of knowledge of highly efficient ecclesiastical practices relating to public administration. However the spirit of the Western law was fundamentally influenced by Christian morality and Biblical ideas at the beginning. Nevertheless the essence of this process is the emergence of law, which got a secular character and self-value after monarchies had aspired to emancipation from ecclesiastical power.

The difference between the Mediterranean and Northern cultural character became obvious during the events of the Reformation, and it is also visible when treating of economic problems. This fundamental duality of the cultural tradition of the West must be an important phenomenon during the crystallization of Western law, which got significant impacts from Roman law too. I think without this duality, Roman law would be dissolved in canonic law, as was visible in late antique legal progress.

Thus, we should regard the law not only as an independent organic consequence of a homogenous spiritual and cultural phenomenon and progress, but consider it as a crystallization from the values of different cultural entities.

CERIF: S181

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NATIONALITY NON-DISCRIMINATION IN SERBIAN TAX TREATY LAW

This paper deals with the nationality non discrimination provision in Serbian double taxation treaties. First the author analyses the historical development of the nationality non discrimination clause found the in the OECD Model Tax Convention and illustrates the dilemmas related to its interpretation, particularly the relevance of residence of taxpayers for comparability purposes and the application of Art. 24.1 of the OECD Model Tax Convention. Subsequently, the author turns his attention to the solutions found in Serbian double taxation treaties which are methodologically di vided into three groups. One of them stands out as the most notable, being unique in global terms: double taxation treaties which provide for a prohibition of discrimina tory treatment based on residence. The author critically addresses the fundamental flaws of the Serbian double taxation treaty policy which are recognized thorough a detailed scrutiny of the relevant norms of these international agreements.

Key words: *Non discrimination. Residents. Non residents. Double taxation treaties. OECD Model Tax Convention.*

Non-discrimination is one of the fundamental principles of international tax treaty law, embedded in the vast majority of more than 2,500 bilateral double taxation treaties which are being applied at this moment in the world.[1] Furthermore, the prohibition of discrimination is at the core of most legal systems of supranational organizations, such as the European Union and the World Trade Organization.[2] On the other hand, differ-

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[1] See: R. S. Avi Yonah, *International Tax as International Law An Analysis of the International Tax Regime*, Cambridge University Press, New York 2007, 6.

[2] See: S. van Thiel, "General Report", *WTO and Direct Taxation* (eds. M. Lang, *et. al.*), Linde Verlag Wien, Vienna 2005, 19 21; C. Staringer, H. Schneeweiss, "Tax Trea

ent treatment of taxpayers, as well as of particular situations, is present in the tax systems of virtually all countries. In international tax law, which is primarily contained in the rules of domestic legislation which govern cross-border taxation,[3] we unavoidably come across provisions which differently treat those who are subject to unlimited tax liability (tax residents) and those who are taxed only based on the source of their income and property (non-residents).[4] In addition, tax laws will often apply diverging approaches to the treatment of expenses, and in some cases income, depending on whether these have been incurred (or generated) from domestic or foreign sources. Double taxation treaties, as a further source of international tax law, do not stipulate how contracting states will tax their residents and non-residents, but only delineate which contracting state will be allowed to tax particular income and property. Apart from the non-discrimination principle, there is nothing in double taxation treaties which would impact the described state of affairs in international tax law, as found in domestic tax legislation, while we may also note that these treaties are founded on the premise of different treatment of resident and non-resident taxpayers.

The task before us is to determine the relevance of the primary rule found in the non-discrimination provision of double taxation treaties: the nationality non-discrimination clause. Avi Yona noted a striking similarity in the wording of double taxation treaties,[5] which is caused by the widespread reliance of countries on the OECD Model Tax Convention[6] in drafting their bilateral double taxation treaties. In other words, an analysis of the provision of Art. 24.1 of the OECD Model Tax Convention, which contains the prohibition of discrimination based on the nationality of the taxpayer, should provide us with an understanding of the global consensus, if such a consensus exists, on this particular issue. However, researching the 54 bilateral double taxation treaties applied by Serbia in 2014[7]

ty Non discrimination and EC Freedoms", *Tax Treaty Law and EC Law* (eds. M. Lang, J. Schuch, C. Staringer), Lind Verlag Wien, Vienna 2007, 230.

3 See: K. Vogel, *Klaus Vogel on Double Taxation Conventions Third Edition,* Kluwer Law International, London 1997, 10.

4 See: D. Pinto, "Exclusive Source or Residence Based Taxation Is a New and Simpler World Tax Order Possible?", *Bulletin for International Taxation*, Vol. 61, 7/2007, 277.

5 See: R. S. Avi Yonah, "Double Tax Treaties: an Introduction", December 3, 2007, *http://ssrn.com/abstract 1048441* or *http://dx.doi.org/10.2139/ssrn.1048441*, last visited 30 September 2014.

6 See: *OECD Model Tax Convention on Income and on Capital Full Version* (as it read on 22 July 2010), OECD Publishing, Paris 2012, I 4.

7 In 2014 Serbia applies double taxation conventions with the following coun tries: Albania, Austria, Azerbaijan, Belgium, Belorussia, Bosnia and Herzegovina, Bul garia, Canada, (PR) China, Croatia, Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, India, Iran, Ireland, Italy, (DPR)

may lead us to surprising findings, which stand apart in comparative international tax treaty law.

1. NATONALITY NON-DISCRIMINATION IN THE OECD MODEL TAX CONVENTION UP TO 1992

The OECD Model Tax Convention resembles an outline of a theatrical play. Two contracting states are given their respective roles, one as the state of residence of the taxpayer and the other as the state of source.[8] Double taxation is solved by either preventing the state of source from taxing particular income or property, while in the case it is allowed to do so, the state of residence is obliged to alleviate double taxation.[9] The non-discrimination article (Art. 24) can be described as a dissonant element of the OECD Model Tax Convention, as it, contrary to its other provisions, does not stipulate a technical rule relevant for the taxation of a particular form of income and property, but an overreaching principle to which any such taxation must adhere. Furthermore, Art. 24 of the OECD Model Tax Convention is not a coherent legal norm, but a heterogeneous compilation of prohibitions of various forms of discrimination, which are not always interrelated. Namely, in it we find a general prohibition of discrimination of taxpayers based on nationality, followed by non-discrimination provisions addressing quite specific situations (non-discrimination of stateless persons,[10] permanent establishment non-discrimination,[11] non-discrimination in deductibility of expenses,[12] capital ownership non-discrimination[13]). Thus, the described structure of the non-discrimination provision of the OECD Model Tax Convention enables us to separately analyze specific forms of prohibited discrimination.

The initial nationality non-discrimination provision found in Art. 24 of the 1963 OECD Draft Double Taxation Convention on Income and Capital stated:

Korea, Kuwait, Latvia, Libya, Lithuania, Macedonia, Malaysia, Malta, Moldova, Mon tenegro, Netherlands, Norway, Pakistan, Poland, Qatar, Romania, Russia, Shri Lanka, Slo vakia, Slovenia, Spain, Sweden, Switzerland, Tunisia, Turkey, Ukraine, United Arab Emirates, United Kingdom and Vietnam.

8 See: *OECD Model Tax Convention on Income and on Capital Full Version*, I 5 I 7.

9 See: *Ibid.*, I 7 I 8.

10 Art. 24.2 of the OECD Model Tax Convention.

11 Art. 24.3 of the OECD Model Tax Convention.

12 Art. 24.4 of the OECD Model Tax Convention.

13 Art. 24.5 of the OECD Model Tax Convention.

"The nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirements connected therewith which is other of more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances are or may be subjected.

The term "national" means:

a) all individuals possessing the nationality of a Contracting State;
b) all legal persons, partnerships and associations deriving their status as such from the law in force in a Contracting State."

At first glance the cited provision may be deemed as irrelevant in the international tax environment. Most countries in the world (with the notable exception of the United States of America) do not use nationality of the taxpayer as a factor relevant for determining tax obligations.[14] Therefore, we will almost never find a case wherein two taxpayers are subjected to a different tax treatment explicitly due to their respective nationality. The tax residence of individuals, which determines whether they are subject to unlimited tax liability in a particular country, or to source based taxation only, will be decided based on criteria which do not include nationality.[15] In the case of legal persons, partnerships and associations the conclusion is somewhat more complicated due to the fact that the same criteria may be used for tax residence as they are for deriving their legal status as such under respective national legislations.[16] Two main issues may be drawn from the nationality non-discrimination provision of the 1963 OECD Draft Double Taxation Convention on Income and Capital:

a) While overt nationality discrimination of individuals is only a theoretical possibility, does this rule encompass covert nationality discrimination? Namely, in the case of individuals' tax residence, criteria usually include domicile and habitual abode and quite often it may be that tax residents are in fact also nationals of a particular state. Thus, despite the fact that domestic tax legislation does not differentiate on the basis of nationality, the outcome of its norms may lead to nationality discrimination.
b) Is tax residence a factor which must be taken into account independently, regardless of the fact that the criterion used for its

[14] See: D. Popović, *Poresko pravo*, Pravni fakultet Univerziteta u Beogradu, Beograd 2013, 225 226.

[15] See: L. Cerioni, "Tax Residence Conflicts and Double Taxation: Possible Solutions?", *Bulletin for International Taxation*, Vol. 66, 12/2012, 647.

[16] See: D. Popović, 230.

ascertainment is identical to the one used for nationality purposes? E.g. what if a legal entity derives its status from the laws of the state in which it has been incorporated, while that same state uses the place of incorporation criteria for determining tax residence?

The two posed dilemmas essentially come down to determining when two taxpayers are in the same circumstances, and which elements must be taken into account when deciding on the comparability of those circumstances. In order to clarify our conclusion we may use a simple example. Assume that national legislation of a particular country deems as tax residents individuals who have their domicile in its territory. Dividend income of resident taxpayers is taxed at a rate of 10%, while non-residents are subjected to a rate of 20% on the same type of income. Resident taxpayers are obliged to pay tax on their worldwide dividends, while non-residents have that duty only with respect to the dividends distributed by companies established in that country. Resident individual A and non-resident individual B receive dividends from a company established in that particular country.

First we must wonder are there any objective differences, apart from residence, which justify the variation in the tax treatment of individuals A and B regarding the dividends received from the same company? The described cedular system of taxation leaves little room to argue the existence of any objective differences between resident and non-resident taxpayers.[17] Accordingly, if residence is not a factor which can be included in the same circumstances analysis, than we are faced with the question of whether this is a case of covert discrimination, provided that we conclude that the overall majority of tax residents of the country in question are at the same time its nationals. If we apply our example to persons other than individuals, where the legislation of this particular country uses the same criteria for deriving their legal status, as it does for tax residence, than the crucial issue for determining the presence of discriminatory treatment is whether tax residence is a particular circumstance which must be taken into account for the purposes of comparability. Notably, with respect to persons other than individuals we would not even have to consider the applicability of Art. 24 1963 OECD Draft Double Taxation Convention on Income and Capital to covert discrimination, as

[17] In a cedular income tax system particular types of income are taxed by virtue of designated tax forms which usually prescribe proportional tax rates. E.g. employment in come is subject to a Salary Tax, while dividends are subject to Capital Income Tax. As the taxpayer's overall ability to pay is irrelevant for tax purposes, no general expenses (ex penses which are not related to the generation of any specific type of income, but to his personal circumstances children's school fees, medical expenses, mortgage payments, etc.) can be claimed in a cedular income tax system. Thus, effective tax rates remain un changed regardless of the amount of taxable income.

our example would represent a clear case of overt nationality discrimination.

Depending on the interpretation we apply, the nationality non-discrimination provision of Art. 24 of the 1963 OECD Draft Double Taxation Convention on Income and Capital has the potential to undermine the fundamentals of international tax law. E.g. most countries in the world will not tax dividends received by resident companies from other resident distributors, but will levy a withholding tax in case a resident company distributes dividends to a non-resident one.[18] If tax residence is not a "circumstance" of a taxpayer, while identical criteria are used for deriving legal status (i.e. nationality) and for tax residence of companies, than the described taxation of dividends represents prohibited nationality discrimination under Art. 24.1 of the 1963 OECD Draft Double Taxation Convention on Income and Capital. In case of individuals we may be dealing with prohibited forms of nationality discrimination, only if we extend the application of the respective rule to cover covert discrimination.

The general and somewhat esoteric nature of the nationality non-discrimination provision of Art. 24.1 of the 1963 OECD Draft Double Taxation Convention on Income and Capital was most likely the reason why taxpayers were slow to realize its full potential. It was the development of non-discrimination based case law of the ECJ in the area of direct taxation, which started in the 1980's,[19] which brought to light the possibilities which may arise from the application of non-discrimination norms in double taxation treaties. However, the OECD member states promptly reacted to this threat.

2. NATIONALITY NON-DISCRIMINATION IN THE OECD MODEL TAX CONVENTION AFTER 1992

In 1992 the wording of Art. 24.1 of the OECD Model Tax Convention was amended in a attempt to give tax residence the crucial relevance in determining if two taxpayers are in the same circumstances:

"Nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirements connected therewith, which is other or more burdensome than the taxation and connected

[18] E.g. Art. 25, para. 1 and Art. 40, para 1 of the Serbian Corporate Income Tax Law, *Official Gazette of the Republic of Serbia*, No. 25/01, 80/02, 80/02, 43/03, 84/04, 18/10, 101/11, 119/12, 47/13, 108/13 and 68/14.

[19] See: M. C. Bennett, "The David R. Tillinghast Lecture Nondiscrimination in International Tax Law: A Concept in Search of a Principle", *The Tillinghast Lecture 1996 2005*, NYU School of Law, New York 2007, 411 412.

requirements to which nationals of that other State in the same circumstances, *in particular with respect to residence*, are or may be subjected."

In principle, by adding that residence must be given particular importance when deciding if two taxpayers are in the same circumstances, the authors of the OECD Model Tax Convention closed the doors to some of the dilemmas which exited in the past. A resident and a non-resident are not in comparable circumstances and thus Art. 24.1 of the OECD Model Tax Convention is limited to prohibiting only overt nationality based discrimination, which, as we have already stated, is at least in the case of individuals, only a theoretical possibility. However, the ultimate relevance given to tax residence in determining the comparability of taxpayer's circumstances may be accepted in rare circumstances. Only in completely synthetic global income tax systems, which prescribe progressive tax rates and alleviate double taxation by applying a tax credit mechanism, can we recognize the objective divide between resident and non-resident taxpayers. Namely, in such a tax system the economic strength (ability to pay) relevant for taxation of resident and non-resident taxpayers is incomparable, warranting the differences in their treatment as justified. In the case of tax residents it is their overall ability to pay which will govern the extent of their tax obligations, while in the case of non-residents this factor will not be of relevance. On the other hand, in cedular or dual income tax systems, equation between these two categories of taxpayers may be reached more easily, as in them the importance of the taxpayer's ability to pay for the purpose of taxation significantly diminishes even in the case of residents. Our conclusion becomes more relevant when we note that completely synthetic global and progressive income tax systems relying on the credit method for avoiding double taxation are virtually extinct in the world today. Therefore it would be more precise to state that residence should be given a considerable role in determining the comparability of taxpayer's circumstances, but that it cannot be an unconditional divide, as much depends on the overall tax environment within which we observe the respective taxpayers. However, the Commentary of the OECD Model Tax Convention chooses to give tax residence the role of an insurmountable obstacle, and adopts a position under which resident and non-resident taxpayers are never in comparable circumstances.[20]

One would have to ask what to do in the case of the multitude of double taxation treaties which are still in force and were drafted based on the versions of the OECD Model Tax Convention prior to 1992, thus lacking the explicit reference to residence as the deciding element in de-

[20] See: Para. 7 of the Commentary on Art. 24 of the OECD Model Tax Convention.

termining the comparability of taxpayer's circumstances. The Commentary of the OECD Model Tax Convention attempts to solve this issue by stating that the 1992 addition – *in particular with respect to residence* – is no more than a clarification, and that the same reverence should be paid to the issue of tax residence regardless of the version of the OECD Model Tax Convention after which a particular double taxation treaty has been tailored (the 1963 OECD Draft Double Taxation Convention on Income and Capital or the 1977 OECD Model Double Taxation Convention on Income and on Capital).[21]

Faced with a growing volume of non-discrimination case law, the OECD member states (a) used the Commentary in order to close the venues for allowing Art. 24.1 of the OECD Model Tax Convention to be anything more than a very narrow overt nationality based discrimination prohibition. In 2008 several addition were made to the Commentary in order to prevent the further development of broad interpretations of Art. 24.1 of the OECD Model Tax Convention:

- Covert discrimination is not prohibited by Art. 24.1 of the OECD Model Tax Convention. In other words, if the criterion used for determining tax residence allows for even a theoretical possibility that a non-national can be a tax resident, nationality discrimination cannot be invoked.[22]
- In the case of persons other than individuals, even if the criterion for tax residence is identical to the one for nationality, it is tax residence which determines the comparability of their circumstances.[23]
- Finally, if all else fails, the Commentary undermines the relevance of Art. 24 by making its interpretation subject to all other provisions of the OECD Model Tax Convention.[24] Thus the non-discrimination principle is not a general rule which governs the application of other technical rules of taxation found in the OECD Model Tax Convention, but should be applied only in situations which are not covered by them. E.g. if Art. 10 of the OECD Model Convention allows the state of source to tax dividends distributed to non-resident taxpayers, such a right cannot be disputed by virtue of the non-discrimination provision.

[21] See: *Ibid.*

[22] See: Para. 1 of the Commentary on Art. 24 of the OECD Model Tax Convention.

[23] See: Paras. 9 and 17 of the Commentary on Art. 24 of the OECD Model Tax Convention.

[24] See: Para. 4 of the Commentary on Art. 24 of the OECD Model Tax Convention.

It would be safe to say that the fear from the potential consequences of Art. 24.1 of the OECD Model Tax Convention lead the OECD member states to introduce into the Commentary interpretations which are highly questionable. Relying on the overwhelming authority of the Commentary, its authors promote a legal approach which can hardly be based on the very nature of Art. 24.1 of the OECD Model Tax Convention, or in sound legal reasoning.[25] On the other hand, the threat from denying many of the taxation prerogatives countries have so far taken for granted and in turn tearing down the structure of the global double taxation treaty network, was too great to shy from this temptation.[26] Only time will tell if the current state of the Commentary of the OECD Model Tax Convention will "survive" the onslaught of taxpayers and if the courts will be ready to overlook its evident faults. However, at this point in time, the *authorized* approach is that there can be no discussion on the comparability, and therefore discrimination, between a resident and a non-resident taxpayer. On the other hand, it would be important to note, that even if this view were to be changed, it could never reach the opposite extreme of unquestionable comparability of residents and nonresidents.[27]

3. THE NATIONALITY NON-DISCRIMINATION PROVISION IN SERBIAN DOBULE TAXATION TREATIES

Serbian double taxation treaties are a notable source of challenges for both scholars and practitioners. Firstly, this area of law is still a *terra incognita* in many ways, due to the fact that we are yet to see any court decisions in the interpretation of double taxation treaties in Serbia. Secondly, as we will show later in some detail, it is often impossible to determine the policy reasons which underline some of the solutions adopted by Serbia in its double taxation treaties.

If we use the nationality non-discrimination provision as a *criterium divisionis,* Serbian double taxation treaties can be separated into three groups.

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[25] Prior to the 2008 additions to the Commentary the courts in several jurisdictions (logically) interpreted Art. 24.1 of the OECD Model Tax Convention to contain a principle to which all other provision of the OECD Model Tax Convention must adhere. See: *Undisclosed v. Commissioner for Inland Revenue* of 10 March 1992, 54 SATC 456 (T); BFH, Beschluss vom 14.09.1994 I B 40/94; BFH, Urteil vom 22.4.1998 I R 54/96.

[26] If Art. 24.1 of the OECD Model Tax Convention was given the power to deny countries the prerogative to freely discriminate between residents and non residents, this would inevitably lead to the renegotiation of most double taxation treaties being applied today and in some cases their termination.

[27] In other words, residents and non residents may be in comparable circumstances, but this has to be confirmed on a case by case basis.

The first group includes the double taxation treaties Serbia applies with Belgium,[28] Kuwait,[29] Malaysia,[30] United Arab Emirates,[31] and Vietnam,[32] which do not contain a provision dedicated to the prohibition of discrimination at all. To these double taxation treaties we can add the one with Germany[33] due to the fact that it prescribes a specific non-discrimination article, which however does not contain a nationality non-discrimination clause.[34] In the case of the aforementioned double taxation treaties there can be no discussion on the prohibition of discrimination of taxpayers based on their nationality, but they indicate that neither Serbian policies, nor those of any of its predecessor states, were adamant in respect to the issue of non-discrimination. In other words, Serbia (SFRY and FRY in the past) is ready to accept the exclusion of the non-discrimination article from its double taxation treaties on the insistence of the other treaty partner.

The second, numerically most significant group is made up of those double taxation treaties which do contain a nationality non-discrimination provision, similar to both the OECD Model Tax Convention solution prior to[35] and after the 1992 amendments.[36] However, within them stand out double taxation treaties with China[37] and Sweden[38] in whom nationality non-discrimination clauses encompass only individuals and do not relate to the tax treatment of legal persons.

For the purposes of interpreting those Serbian double taxation treaties which follow the OECD Model Tax Convention we should be able to rely on its Commentary, despite the fact that Serbia is not a member of the OECD.[39] However, a comparison between the Serbian and English versions of a number of the double taxation treaties falling into this group

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28 *Official Gazette of the SFRY International Agreements*, No. 11/81.

29 *Official Gazette of the FRY International Agreements*, No. 4/03.

30 *Official Gazette of the SFRY International Agreements*, No. 15/90.

31 *Official Gazette of the Republic of Serbia International Agreements,* No. 3/13.

32 *Official Gazette of the Republic of Serbia International Agreements,* No. 7/13.

33 *Official Gazette of the SFRY International Agreements,* No. 12/88.

34 See: Art. 25 of the double taxation treaty with Germany.

35 E. g. see: Art. 24.1 of the double taxation treaty with the Netherlands, *Official Gazette of the SFRY International Agreements, No*. 12/82.

36 E. g. see: Art. 25.1 of the double taxation treaty with Austria, *Official Gazette of the Republic of Serbia,* No. 8/10.

37 *Official Gazette of the FRY International Agreements*, No. 2/92.

38 *Official Gazette of the SFRY International Agreements,* No. 7/81.

39 See: D. Popović, S. Kostić, *Ugovori Srbije o izbegavanju dvostrukog opo rezivanja pravni okvir i tumačenje*, Cekos IN, Belgrade 2009, 33.

indicates a much deeper problem. Namely, if we take e.g. double taxation conventions with Hungary,[40] Greece,[41] Malta,[42] Spain[43] and Switzerland[44] we see that the English versions of their nationality non-discrimination provisions are identical to the one found in the OECD Model Tax Convention after 1992. On the other hand, the Serbian text of those norms is significantly different, as under it the residence of taxpayers cannot be understood as a crucial circumstance which determines their comparability, but as one of the aspects of taxation in which uniform treatment is required, provided nationals of two contracting states are in similar circumstances.[45] As the role of residence in interpreting the nationality non-discrimination clause of Art. 24 of the OECD Model Tax Convention is of the utmost importance, the Serbian versions of the aforementioned double taxation treaties show a worrying lack of comprehension of issues on the Serbian side. Namely, we can with some surety confirm that the described difference in the Serbian and English versions of the nationality non-discrimination clauses in the double taxation treaties with Hungary, Greece, Malta, Spain and Switzerland are due to a translation error. The nationality non-discrimination provision of the Serbian Model Tax Convention, a model used by Serbian representatives in negotiating double taxation treaties, is identical to one found in the 1992 OECD Model Tax Convention, while Serbian tax authorities rely on the interpretations of the Commentary for the purposes of applying the aforementioned treaties, regardless of the differences in their Serbian and English versions.[46] Alas, "blaming the translators" is not of much consolation, as we must note that the Serbian versions of these five double taxation treaties had to be scrutinized by the representatives of the Serbian Ministry of Finance (in case of the double taxation treaty with Hungary – the FRY Ministry for International Economic Relations), the Serbian Government and its

[40] *Official Gazette of the FRY International Agreements*, No. 10/01.

[41] *Official Gazette of the Republic of Serbia International Agreements,* No. 2/98 and 42/09.

[42] *Official Gazette of the Republic of Serbia International Agreements,* No. 1/10.

[43] *Official Gazette of the Republic of Serbia International Agreements,* No. 105/09.

[44] *Official Gazette of the S&M International Agreements,* No. 11/05.

[45] Translated into English these norms would state: Nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any require ment connected therewith, particularly with respect to residence, which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances are or may be subjected.

[46] See: D. Dabetić, *Republika Srbija i izbegavanje dvostrukog oporezivanja Priručnik za primenu međunarodnih ugovora o izbegavanju dvostrukog oporezivanja*, Računovodstvo d.o.o., Beograd 2008, 191.

support services and finally by the members of the Serbian Parliament and presumably experts who assist them in their work. Thus, wrong translations of financially very relevant international agreements managed to pass three tiers of control without anyone seeing, or being able to see the evident errors. Such a state of affairs duly calls for a serious analysis of the capacities of Serbian administrative and legislative bodies to facilitate its international fiscal policy and even beg the question of whether such a policy exits.

Finally, we come to the third group of double taxation treaties applied by Serbia today, whose non-discrimination provisions are so unique that they require a separate analysis.

4. PROHIBITION OF DISCRIMINATION ON THE BASIS OF RESIDENCE IN SERBIAN DOUBLE TAXATION TREATIES

In the double taxation treaties Serbia applies with Belorussia,[47] Bulgaria,[48] Cyprus,[49] Macedonia,[50] Norway,[51] Poland,[52] Romania,[53] Russia,[54] and Sri Lanka,[55] instead of a nationality based non-discrimination provision, we find the prohibition of unequal treatment on the basis of residence:

"*Residents of a Contracting State* shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements t*o which residents of that other State* in the same circumstances are or may be subjected."[56]

The cited provision found in 9 Serbian double taxation treaties leads to two important questions:

[47] *Official Gazette of the FRY International Agreements*, No. 5/98.

[48] *Official Gazette of the FRY International Agreements*, No. 1/99.

[49] *Official Gazette of the SFRY International Agreements*, No. 2/86.

[50] *Official Gazette of the FRY International Agreements*, No. 5/96.

[51] *Official Gazette of the SFRY International Agreements*, No. 9/85.

[52] *Official Gazette of the FRY International Agreements*, No. 2/98.

[53] *Official Gazette of the FRY International Agreements*, No. 4/96.

[54] *Official Gazette of the FRY International Agreements*, No. 3/95.

[55] *Official Gazette of the SFRY International Agreements*, No. 4/86.

[56] See: Art. 25.1 of the double taxation treaty with Belorussia; Art. 25.1 of the double taxation treaty with Bulgaria; Art. 23.1 of the double taxation treaty with Cyprus; Art. 25.1 of the double taxation treaty with Macedonia; Art. 24.1 of the double taxation treaty with Norway; Art. 25.1 of the double taxation treaty with Poland; Art. 26.1 of the double taxation treaty with Romania; Art. 25.1 of the double taxation treaty with Russia; Art. 24.1 of the double taxation treaty with Sri Lanka.

- What are the implications of this diversion from the nationality based discrimination prohibition?
- What are the reasons behind such an approach?

The relevance of a residence based non-discrimination provision cannot be overestimated, particularly when the double taxation treaties which contain it include countries such as Cyprus and Russia, i.e. some of the most relevant inbound foreign investment jurisdictions. It is sufficient to remember that under Art. 10 of the double taxation treaty with e.g. Cyprus, Serbia can subject dividends distributed by its residents to Cypriot resident shareholders to a 10% withholding tax. However, when those same companies distribute dividends to Serbian shareholders – legal entities, no tax is levied. Thus, evidently, Cypriot residents are subjected to more burdensome taxation as compared to Serbian residents in the same circumstances, and such treatment may represent prohibited discrimination. Essentially, the residence based non-discrimination prohibitions threaten all Serbian norms which provide for higher nominal or effective tax rates in case income is generated by non-residents (residents of one of the mentioned 9 treaty partners) as compared to those provided for residents. This implies that they undermine the very foundations of the Serbian international tax system for legal entities which is based on the provisions of Art. 40 of the Serbian Corporate Income Tax Law. In other words, the withholding taxation which is prescribed for non-resident legal entities in Serbia is discriminatory and cannot be applied in its present form in the case of income generated by residents of Belorussia, Bulgaria, Cyprus, Macedonia, Norway, Poland, Romania, Russia, and Sri Lanka.

When one realizes the full potential of the residence non-discrimination provisions found in Serbian double taxation treaties, it is highly surprising that no taxpayer has tried to exploit it so far in Serbia. Such impressions may only be enhanced if we realize that the only defense which may be used to counter this threat effectively, lies in the questionable interpretation derived from Para. 4 of the Commentary on Art. 24.1 of the OECD Model Tax Convention, under which treatment explicitly allowed by a double taxation convention cannot be viewed as discriminatory. The lack of legal actions by taxpayers can only be explained by the quite low level of expertise in international taxation which exists in Serbia and perhaps by the fear that confronting Serbian authorities with the consequences of the residence based non-discrimination norms may lead them to terminate some or all double taxation treaties which contain them.

With respect to the policy reasons which lie behind using residence instead of nationality as the basis for the prohibition of unequal treatment we are to a notable extent in the dark. Comparative academic sources usually only mention this peculiarity of double taxation treaties concluded by the SFRY and FRY and reference it to a similar approach used by the USSR.[57] However, in double taxation treaties concluded by the USSR we find the requirement for equal treatment of residents of one contracting state and citizens of the other contracting state or of residents of one contracting state with the residents of third states, but not the one for equal treatment of residents of the two contracting states.[58]

Demirović and T. Popović, citing Arsić, state that due to the fact that the notion of a "national" in Serbian domestic legislation includes only individuals, in older (SFRY and FRY) double taxation treaties residence based non-discrimination provisions were provided in order to encompass legal entities under their protection.[59] Similar explanations related to the inability to cover persons other than individuals under the term "nationals" have been put forward to explain USSR examples of straying from the nationality non-discrimination norms.[60] However, in the case of the USSR, alternative non-discrimination provisions were tailored in ways which raise much less controversy and do not open the *Pandrora's box* of equal treatment of residents of two contracting states. Furthermore, we are also faced with examples where the SFRY and FRY, virtually simultaneously with the conclusion of some of the enumerated 9 double taxation treaties, concluded double taxation treaties which dealt with the problem of including legal entities under the scope of nationality non-discrimination provisions in a rather simple manner. E.g., Art. 24.1 of the double taxation treaty with Italy[61] states:

"The nationals of a Contracting State, whether or not they are residents of one of the Contracting States, shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances are or may be subjected. This paragraph shall also apply:

(a) to legal persons deriving their status as such from the laws in force in Yugoslavia;

(b) to legal persons, partnerships and association deriving their status as such from the laws in force in Italy."

57 See: J. F. Avery Jones, *et al*., "The Non discrimination Article in Tax Treaties", *European Taxation*, Vol. 31, 10/1991, 311.

58 See: *Ibid*., fn. 6.

59 See: D. Demirović, T. Popović, "Serbia", *Non discrimination at the Crossroads of International Taxation*, IFA Cahiers de Droit Fiscal International, Vol. 93a, Sdu Fiscale & Financiele Uitgevers, Amersfoort 2008, 525 526.

60 See: K. Vogel, 1285 1286.

61 *Official Gazette of the SFRY International Agreements,* No. 2/83.

Similarly, in the case of the FRY, we may mention the double taxation treaty with the Ukraine[62] whose Art. 25.1 provides the following solution:

"Nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances, are or may be subjected. This provision shall apply also with regard to legal entities possessing their status as such according to the Yugoslav law in force."

Residence based non-discrimination provisions found in Serbian double taxation treaties can only be explained as a rather ill-conceived attempt to solve a non-existent problem. Namely, the term "national" is rarely attributed to persons other than individuals in numerous comparative jurisdictions, but most of them did not have an issue with accepting the wording of Art. 24.1 of the OECD Model Tax Convention. Including a corresponding provision in a country's double taxation conventions does not imply giving legal entities the status of nationals under domestic legislation, but merely tailors terminology for the purposes of the proper functioning of an international agreement. Furthermore, the readiness to implement novel and untested solutions in drafting norms whose basic principles were not fully understood (as evidenced in our discussion on the problem of inadequate Serbian translations) testifies to the need to put Serbian double taxation treaty policy under scrutiny and provide its administration with the resources needed to address this fiscally highly relevant area with more care. Academic literature from countries with whom Serbia has concluded double taxation treaties which provide residence based non-discrimination provisions is silent with respect to this anomaly, and we may be bold enough to imply the same criticism to their negotiators and policy makers as we have made in the case of Serbian ones.

5. CONCLUSION

Our venture into the topic of nationality non-discrimination provisions in double taxation treaties showed that this is a legal area which hides a growing potential to undermine state's power to be unhindered in drafting their international tax legislation. However, controversies which are found in comparative discussions become of secondary importance in the Serbian environment where we witness striking examples of negligence by virtually all responsible parties when it comes to approaching double taxation treaties. Such callousness and lack of awareness of one's

62 *Official Gazette of the FRY International Agreements*, No. 4/01.

inadequacies, particularly those related to legal expertise, caused Serbian double taxation treaties to provide for residence based non-discrimination, while the majority of the world's tax administrations fought bitterly to prevent even the notion of the possibility of comparing a resident and a non-resident taxpayer. If the true nature of the use of the term "national" (a *terminus technicus* whose implications were limited to the application of a particular double taxation treaty) in double taxation treaties was better understood, perhaps we would not be facing the *Damocles sword* of residence based non-discrimination that we are today. The only thing shielding the Serbian *fiscus* from the grave consequences (i.e. loss of much needed revenue) of the described residence based non-discrimination provisions is the novelty of many international tax issues to Serbian taxpayers as well as tax practitioners and the lack of trust in Serbian courts which drives taxpayers away from litigation. However, Serbia cannot afford to allow norms which may lead enormous amounts of tax revenues away from the coffers of its government to continue to be introduced without any qualified public debate and critical analysis. It is with the call for more public insight into the development and application of the Serbian double taxation treaty policy that we must end our journey, as without it there is little hope that similar issues will not arise in the future as well.

CERIF: 181

Dr Ilija Vukčević*

ABILITY-TO-PAY PRINCIPLE IN THE MONTENEGRO TAX SYSTEM   CONSTITUTIONAL COURT CASE PRACTICE AND LEGISLATIVE APPROACH

The tax systems of many countries have faced major changes because of the global financial crisis. A budget deficit and decrease in revenues have forced the Montenegrin legislators to introduce new taxes and to increase the rates of already existing taxes. Indirect taxes (VAT, excises and custom duties) represented the biggest source of tax revenues in 2011 and 2012. Due to this fact, changes in the tax system were scrutinized in the light of their social effects, especially regarding the principle of ability to pay. This article will analyze the understanding of this principle in the case practice of the Constitutional Court of Montenegro and the Parliament of Montenegro. Precisely, it will show that these two important institutions do not understand this important tax principle correctly.. On one side, the analysis will show conclusions of the Constitutional Court of Montenegro that there is no legal basis for the introduction of the ability to pay principle in the Montenegrin tax system and that it has no authorization to assess the impact that the burden of a fiscal duty has on taxpayers are totally incorrect. On the other side, the introduction of the progressive tax scale regarding employment income earned only from a single employer had left other types of income and employment income generated from more than one employer out of the tax progression.

Key words: *Principle of equality before the law.   Ability to pay principle.   Progressive taxation.   Effective tax rates.*

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1. INTRODUCTION

In October 2012, the Constitutional Court of Montenegro (hereinafter: the Constitutional Court) passed a decision about the constitutionality of the Law on Fees (Taxes) on Public Services (hereinafter: the Law on Fees). The reason for the enactment of the disputed Law on Fees was the financial crisis and the unexpected budgetary deficit which the Government of Montenegro (hereinafter: the Government) faced in the beginning of 2012. The Parliament of Montenegro (hereinafter: the Parliament) adopted the Law in March 2012, and introduced a fee (tax) on five types of services:[1] 1) mobile telephone cards; 2) electricity consumption meters; 3) cable connection for the transmission of radio and TV channels; 4) consumption of tobacco products in hospitality facilities; and 5) use of electro-acoustic and acoustic devices in hospitality facilities after midnight. The fee (tax) is payable at a fixed amount (1 Euro). It is charged monthly, and the provider of the service has an obligation to calculate and pay the fee (tax). Shortly after the enactment of the Law on Fees an initiative for a constitutionality review was filed. The applicant demanded from the Constitutional Court to declare provisions related to fees on mobile telephone cards, electric meters and cable connections unconstitutional. One of the basic claims from the initiative was that the contested taxes violate the principle of equality before the law.[2] The Constitutional Court rejected the whole initiative, and regarding this contention by the taxpayer, scrutinized the disputed provisions of the Law on Fees for the first time in its practice in the context of the ability-to-pay principle.

Only a couple of months later, in January of 2013 the Parliament adopted amendments to the Law on Tax on Income of Natural Persons (hereinafter: the Law on Income Tax). The essential feature of these amendments was the introduction of progressive taxation of income from employment (personal earnings). The main reason for the subject changes of the Law on Income Tax was the same as in the case of the Law on Fees – the financial crisis and the budgetary deficit[3]. The basic justification for the switch from proportional to progressive taxation was, according to the members of the Parliament who proposed these changes, the ability-to-

[1] Article 1 of the Law on fees on access to certain services of public interest and on consumption of tobacco products and acoustic and electro acoustic devices, *Official Gazette of Montenegro*, No. 28/12.

[2] Initiative for the assessment of constitutionality of the Law on fees on access to certain services of public interest and on consumption of tobacco products and acoustic and electro acoustic devices, 2. *http://www.mans.co.me/wp content/uploads/2012/06/Inicijativa Ustavnom sudu.pdf*, last visited 06 March 2014.

[3] Report on the discussion of bill of Law on amendments of the Law on tax on income of natural persons, no. 16 02/13 1/, EPA 72 XXV, Podgorica, 28 January 2013, 1.

pay principle. In this way, in only a few months, the ability-to-pay principle was trying to find its place for the first time in the tax system of Montenegro. This study provides analysis of the understanding and the effects of this principle in the tax system of Montenegro.

2. THE PRINCIPLE OF ABILITY-TO-PAY AS A SPECIAL DIMENSION OF THE PRINCIPLE OF EQUALITY BEFORE THE LAW

A definition of tax discrimination does not exist. The concept of discrimination, therefore, can be determined only on the basis of the general meaning of the term and the general concepts that the term comprises and, as regards forbidden discrimination, on the basis of situations and characteristics provided for the purpose of this prohibition. The concept of discrimination recalls that of equality, being its opposite, and therefore in principle it corresponds to the concept of inequality.[4] Therefore the principle of equality before the law and the principle of non-discrimination represent two sides of the same coin. This concept is very well defined in the practice of the Court of Justice of European Union (hereinafter: CJEU), where discrimination is based on the general principle of equality, which is eminent to all Member States' legal systems: "... the prohibition of discrimination laid down in the aforesaid provision is merely a specific enunciation of a general principle of equality..."[5]

According to Constitutional Court case practice, discrimination does not constitute simple differentiation, but its negative feature: "The principle of non-discrimination is based on the Constitution in such a way that it prohibits something that is equal or similar from being treated differently according to the law, as well as that what is essentially different is treated equal according to the law."[6] Therefore, prohibition of discrimination indicates the criteria of differentiation that are not allowed.[7] The Constitutional Court also explicitly prohibits reverse discrimination: "The principle of non-discrimination (equality) does not refer only to the

[4] P. Adonnino, "General Report", (in: *Non discrimination at the crossroads of international taxation*, Vol. 93a Caheires de Droit Fiscal International), International Fis cal Association, 2008, 22.

[5] Joined Cases C 117/76 and C 16/77, *Albert Ruckdeschel & Co. and Hansa Lagerhaus Stöh & Co. v Hauptzollamt Hamburg St. Annen; Diamalt AG v Hauptzollamt Itzehoe* (19 October 1977), 1769.

[6] Constitutional Court of Montenegro (24 March 2011) Decision U I no. 27/10, 30/10 and 34/10.

[7] K. Van Raad, *Non discrimination in international tax law*, Kluwer Law Interna tional, 1986, 9.

same treatment of equal situations but also to the substantive equality – different treatment of unequal cases in proportion with their inequality."[8]

It must be noted that there are a number of countries that have no case practice in the area of the application of the principle of equality in the area of taxes. In Great Britain the judiciary cannot abolish laws because of unconstitutionality, except in cases of non-compatibility with the European Union law. In the Netherlands, although the principle of equality before the law is formulated in Article 1 of the Constitution, the courts cannot assess the compatibility of laws and international agreements (Article 120). In France laws can be assessed regarding their compatibility with the Constitution only before enactment, therefore the case practice is scant.[9]

In contrast, probably the most comprehensive definition of the non-discrimination principle regarding taxation can be found in the Spanish Constitution: "Everyone shall contribute to sustain public expenditure according to their economic capacity, through a fair tax system based on the principles of equality and progressive taxation, which in no case shall be of a confiscatory scope."[10] The violation of the principle of equality before the law (discrimination) in the area of taxation exists when there is deviation from: 1) the principle of universal tax liability; 2) the principle of equal treatment; 3) the principle of ability-to-pay; and 4) the principle of proportionality. Therefore, the principle of ability-to-pay represents a special dimension of the equality principle in taxation. Its other name is the principle of justice in taxation, and it contains a two-level standard: 1) horizontal ability-to-pay – the requirement that persons with the same economic capacity (tax capacity) must pay the same amount of tax; and 2) vertical ability-to-pay – the requirement that persons with greater economic capacity (tax capacity) must pay a larger amount of tax.

In relation to the constitutional principle of equality, as the main source of the principle of ability-to-pay, we can find two approaches. The first one states that its tax dimension is developed from the general principle of equality in combination with the principle of the welfare state (Germany). Court practice of the German Constitutional Court considers that the Basic Law's principle of equality "forbids any regulation imposing a tax for which the ability-to-pay is not a principle consideration".[11]

[8] Constitutional Court of Montenegro (24 March 2011) Decision U I no. 27/10, 30/10 and 34/10.

[9] D. Popović, G. Ilić Popov, "Jednakost građana u poreskom pravu" *[Equality of Citizens in the Tax Law]*, *Banja Luka University School of Law Yearbook*, Vol. 33, 2011, 152 155.

[10] Section 31.1 of the Spanish Constitution.

[11] W. B. Baker, "The Three Faces of Equality Constitutional Requirements in Taxation", *Case Western Reserve Law Review*, 2006, 52.

On the other hand, there are countries in which Constitutions, besides the general principle of equality, explicitly contain this specific tax dimension. An example is the Italian Constitution: "Every person will contribute to public expenditures in accordance with his/her tax capacity."[12]

In most European countries the ability-to-pay principle draws the dividing line between taxation and expropriation of property.[13] Ability-to-pay is a principle strictly connected to equity and equality and requires that, within a country, taxation be levied according to the taxpayer's capacity to contribute to public spending.[14] Thus, taxpaying capacity operates as a limitation on the legislature when it enacts taxable events because such capacity arises from the taxpayer's ability to be the obligor of a tax obligation. Likewise, in this regard the Supreme Court of Argentina held: "The power to establish taxes is essential and indispensable for the existence of government, but when this power is unlimited as to the selection of the taxable matter or the amount payable, it necessarily entails the possibility of destruction that is inherent in it because there is a limit beyond which no thing, person or entity will tolerate the burden of a certain tax" (Banco de la Provincia de Buenos Aires v. Nación Argentina).[15] Similarly, in its court practice the Italian Constitutional Court clarifies that: "Article 53 Paragraph 1 of the Constitution represents a clarification of the general principle of equality...Article 53 Paragraph 1 of the Constitution demands that every tax obligation be related to the tax capacity of the person: it is based on the requirement of equality, as a necessity that every tax finds its basis in a specific fact which reflects his welfare."[16]

However, comparative analysis shows that the fact that some constitutions contain this specific feature of the equality principle before the law does not mean that the equality of citizens in taxation in that state is more protected than in states in which there is only a general principle of equality. The most important factor is how constitutional courts perform their duty, and accordingly to what extent they are willing to declare tax laws unconstitutional because of inequality, at least if equality exists in

[12] Article 53 Paragraph 1 of the Constitution of the Italian Republic.

[13] M. Greggi, "The Masa Investment Group as a `Nec Plus Ultra' Case for the ap plication of the European Convention on Human Rights to Tax Law?", *INTERTAX*, Vol 35, Issue 6/7, 2007, Kluwer Law International, 369.

[14] C. Bardini, "The Ability to Pay in the European Market An Impossible Su doku for the ECJ", *INTERTAX*, Volume 38, Issue I, 2010, Kluwer Law International BV, 2.

[15] A. Tarsitano, "The Defence of Taxpayers' Rights in the Courts of Argentina", *Bulletin for International Taxation*, August/September 2005, IBFD, 411.

[16] E. Marello, *Raccolta di giurisprudenza costituzionale in materia tributaria 1957 2007* [Collection of constitutional case practice in tax matters: 1957 2007], 2008, 292 *http://aperto.unito.it/bitstream /2318/488/1/0 composto.pdf*, last visited 06 March 2014.

the form of a general principle. Thus the German Constitutional Court undertook significant activity in the annulment of tax laws because they violated the principle of equality, developing the interpretation of this principle according to the doctrine that taxes must be paid in accordance with the principle of ability-to-pay (which is not formulated in the Constitution). When it comes to the application of the ability-to-pay principle, in most cases judicial practice is related to tax on the income of individuals.[17] The logical reason for this is the fact that this form of taxation is suitable for the application of progressive rates and different social-political reliefs, and therefore is the most suitable way to mitigate or eliminate the regressivity of indirect taxes. Precisely, individualized incomes are taxed at progressive rates to obtain a redistributive impact from taxation.[18]

The special value encapsulated in the German principle of equality and ability-to-pay requires, according to the Federal Constitutional Court, progressive taxation: "Here justice demands that relative equality for a more powerful economic performer means that taxes must be paid according to a higher percentage rate than an economically weaker person".[19] This is the vertical ability-to-pay principle. A comparative overview shows that there are also countries in which the principle of progressiveness can be found in the Constitution.[20] The Italian Constitutional Court has repeated several times that the constitutional principle of progressiveness refers to the tax system as a whole, and that it is not a prerogative of all specific tax forms, and that it is applicable in accordance with preferences related to specific tax forms.[21] In this way it is possible not only to neutralize the regressive effect of indirect taxes, but also to achieve the outcome where people with a higher tax capacity pay more taxes as a percentage.[22] That is why this principle is directly related to the constitutional principle of social solidarity.[23]

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17 D. Popović, *Poresko pravo* [Tax law], Faculty of Law, University of Belgrade, 2011, 32.

18 R. A. de Mooij, L. G. M. Stevens: "Exploring the future of ability to pay in Europe", EC Tax Review, 2005/1, Kluwer Law International, 9.

19 W. B. Baker, 52.

20 Article 53 Paragraph 2 of the Constitution of Italian Republic; Article 104 Paragraph 1 of the Constitution of the Portuguese Republic; Section 31.1 of the Constitution of the Kingdom of Spain.

21 E. De Mita, "Diritto tributario e corte constitutionale: Una giurisprudenza 'necessitata'" [Tax law and the constitutional court: Necessitated case law], (in. *Diritto tributario e Corte Costituzionale*, eds. Leonardo Perrone, Claudio Berliri), Deastore, Roma, 2006, 4.

22 B. Jelčić, *Porez na dodanu vrijednost* [Value added tax], Savez računovođa i finansijskih radnika Hrvatske, Zagreb, 1992, 36.

23 R. Lupi, *Diritto tributario: Parte generale* [Tax law: General part], Giuffrè Editore, Milano, 2005[8], 10.

As has already been stated, apart from the progressive rates, individual income tax offers the best choice of different kinds of social elements in taxation which affect the taxpayer's ability-to-pay. A good example is the minimum substance amount – "*minimum vitalis*". According to the principle of human dignity the legislator must not tax this amount, but only the economic capacity above it.[24] The principle that income tax should tax only true economic capacity led the Constitutional Court of Germany to conclude that an amount representing the necessities of life, that is, a minimum subsistence amount, should be excluded from taxation.[25] More precisely, article 1 of the Basic Law protects human dignity: human dignity shall be inviolable. Combining it with the social state principle, the Constitutional Court of Germany determined that the state must guarantee each citizen a subsistence amount consistent with human dignity. On the tax side, this principle that the state has a duty to assure each citizen "the basic needs for a humane and dignified existence" grew into a limitation on the power of the state to tax non-disposable income, which represents that portion of the citizen's income that the citizen must dedicate to providing the family with the necessities of life. Expenditures necessary to producing the income diminish the income available for necessities.[26] Even CJEU in its case practice declared that this measure has: "...a social purpose, allowing the taxpayer to be granted an essential minimum exempt from all income tax".[27] The Constitutional Court of Colombia, in a case of VAT on basic consumer products, determined that the average person in the lowest income segments of the population spends about 85% of his or her income in acquiring the *minimum vitalis* (the fundamental right of decent living) of food, housing, health and education, so the total tax burden may only affect the remaining 15% in order to be considered constitutional.[28]

The next very important subject related to the ability-to-pay principle in constitutional court practice is its application within the context of the constitutional principle of family protection. The German Constitutional Court was asked to determine whether widowed or unmarried persons with a dependent child were being treated equally with married parents where the income tax law did not provide any tax relief for the additional costs of child care. The German Constitutional Court determined that this was an unjustified burden on these individuals. Hence, the prin-

[24] D. Popović, 32 fn. 18.

[25] W. B. Baker, 43.

[26] H. Ordower, "Horizontal and Vertical Equality in Taxation as Constitutional Principles: Germany and United States Contrasted", *Florida Tax Review*, 2006, 32 33.

[27] Case 234/01 Arnoud Gerritse v Finanzamt Neukölln Nord, para. 48.

[28] N. Q. Cruz, "Minimum Vitalis and the Fundamental Right to Property as a Limit to Taxation in Columbia", (in: *Human Rights and Taxation in Europe and the World,* eds. Georg Kofler, Miguel Poiares Maduro and Pasquale Pistone), IBFD, 2011, 359.

ciple of equality in taxation led to the conclusion that equality unambiguously mandated that taxes be assessed in accordance with a taxpayer's ability to pay. Likewise, the German Constitutional Court considers expenditures that are "necessities," those that are unavoidable, to be relevant for appropriate and equal taxation. Expenses for child care presented just such an inescapable additional burden for single individuals and could not be ignored by the Bundestag (German Parliament) without violating the principle of equality.[29]

Other non-personal forms of taxation, like consumption taxes (e.g., VAT, excises, and custom duties) cannot truly conform to the more modern social construct of ability-to-pay. The main negative social feature of consumption taxes is their regressivity. Therefore, tax systems that rely heavily on consumption taxes rather than income taxes will *ceteris paribus* tolerate a comparatively higher degree of social inequality.[30] Acceptance of the VAT as an internal manifestation of an individual's ability-to-pay – that is, if one buys something, he or she must pay for it and the price includes the tax – is a correct one, but a narrow view. Certainly, consumers must have the ability to pay the tax if they consume, but that view misses the impact of embedded value added taxes insofar as they may limit consumers' overall ability to consume. Therefore, notwithstanding that consumption patterns purely reflect ability-to-pay, governments sometimes try to bring progressive principles to consumption taxes, especially in the case of VAT. Multiple rates (lower VAT rates on necessity goods and excises tax on some luxury goods) represent legislative determinations as to which products are more likely to be consumed by those who are better off. Like the German VAT, some of the U.S. state sales taxes use dual or multiple rate structures to ameliorate the regressivity of the sales tax or to burden limited types of expenditures more heavily.[31] At present, there is a broad consensus (at least in democratic societies) that a VAT should refrain, as far as technically possible, from taxing expenditure for the basic necessities of life.[32]

A rare example of an explicit request for social justice in the area of consumption taxation can be found in the Constitution of Portugal: "Consumer taxation shall aim to adapt the structure of consumption to changes in the requirements for economic development and social justice, and shall increase the cost of luxury consumer items."[33] Despite initial

[29] W. B. Baker, 42 43.

[30] J. Englisch, "VAT/GST and Direct Taxes: Different Purposes", (in: *Value Added Tax and Direct Taxation: Similarities and Differences*, eds. Michael Lang, Peter Melz and Eleonor Kristoffersson), IBFD, 2009, 24.

[31] H. Ordower, 14.

[32] J. Englisch, (2009) 25.

[33] Article 104.4 of the Constitution of the Portuguese Republic.

objections by some scholars, the *ability-to-pay* principle has in the meantime also been firmly established by the German Constitutional Court as a relevant expression of tax justice in the area of consumption taxes.[34] In the area of VAT it is interesting to mention the case practice of the Constitutional Court of Colombia. When examining the constitutionality of VAT for certain household products, it ruled that the tax was unconstitutional in view of the fact that the principles of progressiveness, *minimum vitalis* and equity had been violated by the law.[35] In another case of VAT, the Constitutional Court of Germany held that a significantly lower VAT rate for small businesses with gross receipts under 60,000 German marks than for other enterprises was a reasonable exercise of legislative discretion and did not violate the equality principle. With the significant general rate increase, the legislature carved out the exception because it was concerned that small businesses would not be able to pass the higher rate on to their customers.[36]

3. CONSTITUTIONAL COURT CASE PRACTICE REGARDING THE ABILITY-TO-PAY PRINCIPLE

3.1. Constitutional Court case practice regarding taxation

The Constitutional Court developed a very reluctant attitude in its case practice towards interference in this area of the legal system. Among other examples, this is evident from its stance in the case related to the constitutionality of the Law on Tax on Income of Natural Persons[37]: "... Apart from the basic principles, the Constitution does not define the subject, procedure and the method of taxation nor does it contain limitations regarding their regulation, but it leaves these questions entirely to the legislator."[38]

From these assumptions the Constitutional Court draws the conclusion that it has no authorization to assess the appropriateness of choices made by the legislator in the area of taxation: "...the Parliament is authorized through legislation, in accordance with the Constitution, to regulate the way of the exercising of human rights and freedoms, when it is necessary for their exercising, and other issues of interest for Montenegro, and

34 J. Englisch, "The Impact of Human Rights on Domestic Substantive Taxation the German Experience", (in: *Human Rights and Taxation in Europe and the World,* eds. Georg Kofler, Miguel Poiares Maduro and Pasquale Pistone), IBFD, 2011, 290.

35 N. Q. Cruz, 357.

36 H. Ordower, 54.

37 Law on Tax on Income of Natural Persons, *Official Gazette of the Republic of Montenegro*, No. 65/01, 37/04 and 78/06.

38 Constitutional Court of Montenegro (14 October 2010) Decision U I no. 2/10.

everyone is liable to pay taxes and other fiscal duties... The Constitutional Court, in accordance with the provisions of Article 149 of the Constitution, has no jurisdiction to assess the appropriateness of the disputed legal solution, such assessment being in the domain of legislative policy."[39]

In this way the Constitutional Court effectively leaves all competences regarding taxation to the legislator: "...Moreover the legislative body is authorized to determine the forms of taxation and relevant elements of tax liability (the taxpayer, tax base, tax rate, assessment and payment, exemptions and other significant questions for the functioning of the tax system in its entirety), and therefore the elements of the disputed tax are formed in a way that is not inconsistent with the Constitution."[40]

3.2. Constitutional Court reasoning in the case of the Law on Fees

Probably the most important part of the decision of the Constitutional Court is the analysis of disputed levies in the light of the special tax dimension of the principle of equality – ability-to-pay. Firstly, it should be said that the Constitutional Court correctly invoked the case practice of the German Constitutional Court, which can serve as a landmark in terms of comparative constitutional court practice regarding this area, and confirms the same constitutional basis for this principle: "Standards in determining those limits in constitutional practice that are formed by the German Federal Constitutional Court today are regarded as leading guidelines in the activities of the European constitutional courts. According to the comparable constitutional bases, they are also applicable in the Montenegrin constitutional system, because similarly in the Constitution of that state "ability-to-pay" is not a constitutional category for the distribution of the tax burden..."[41]

Comparative analysis shows that Montenegrin and German constitutional court practice rely practically on the same legal (constitutional) basis. The German Constitution also does not explicitly contain principles of *ability-to-pay* or of progressivity in taxation. These principles are the outcome of German Constitutional Court case practice and, as mentioned above, the legal basis is the combination of the general principle of equality and the social state principle. If we look in the Montenegro Constitution, we will find the principle of equality in Article 17 Paragraph 2 and the principle of the social state in the Preamble and Article 1. In addition,

[39] Constitutional Court of Montenegro (28 January 2010) Decision U. no. 104/07.

[40] Constitutional Court of Montenegro (29 March 2007) Decision U. no. 12/07.

[41] Constitutional Court of Montenegro (9 October 2012) Decision U I no. 15/12 and 17/12.

the Constitutional Court explicitly confirms the identical constitutional basis for the creation of the ability-to-pay principle.

More precisely, as the German Constitutional Court creates the principle of ability-to-pay by combining the principle of social state and the principle of equality, in the same manner the Constitutional Court elaborates on this subject matter in its decision: "In this context, according to the findings of the Constitutional Court, the principle of the equality of citizens before the law...whose violation is indicated in the applicant's initiative is at the same, constitutional, level as the principle of (economic and social) solidarity and the principle of benefit."[42]

Therefore, the Constitutional Court takes a logical position that in the exercise of its taxing powers according to the Constitution, the state must ensure social justice: "The constitutional character of social rights as fundamental rights guaranteed by the Constitution indicates two basic requirements of the social state – the state and public authority is obliged to follow the policy of just and equal redistribution of national resources to equalize external inequality; and legislative and executive authorities are legally bound to achieve harmony between limited state budget funds and social goals which are set in the Constitution."[43]

However, after quoting the principles of the German Constitutional Court, and after explicit confirmation that the Montenegrin Constitution provides for the same legal basis as the German Constitution, the Constitutional Court put forward a completely different reasoning: "The Constitution of Montenegro, however, does not establish directly ability-to-pay of a taxpayer...as a criterion to determine the proportionality of fiscal duties...According to the findings of the Constitutional Court, it stems that the solution of that question is in exclusive competence of legislator. It is the legislator who is entitled within a certain type of taxes or other levies to determine this criterion or to deviate from it, respectively, whenever it has a good reason for that."[44]

In other words, instead of building the same criteria as the German Constitutional Court related to the ability-to-pay principle, the Constitutional Court overturned all views expressed herein. As a conclusion, the Constitutional Court rejected the possibility to assess the impact that the tax burden of contested taxes has on the taxpayer: "The Constitutional Court, according to Article 149 of the Constitution, from the aspect of abstract constitutional control, has no competence to assess the level of the contested fee...and to what extent it affects the taxpayer."[45]

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42 *Ibid.*

43 *Ibid.*

44 *Ibid.*

45 *Ibid.*

Generally, subject standings demonstrate a certain kind of fear of the Constitutional Court regarding its involvement in the questions of the constitutionality assessment in the area of taxation. This reluctance could be, on one side, the result of an inadequate level of understanding of this specific legal area which can produce wrong decisions, or on the other side, could represent an intentional retreat before the Parliament request for unlimited competence in the tax area of the Montenegrin legal system. This behavior of the Constitutional Court must be considered unacceptable. We consider that the Constitutional Court must deviate from this line of court practice. A good example of an adequate direction could be found in the case practice of the Constitutional Court of Serbia: "...the state has, regarding the regulation of the tax system, a wide margin of appreciation but not in an absolute sense..."[46]

4. THE LEGISLATIVE APPROACH REGARDING THE ABILITY-TO-PAY PRINCIPLE

4.1. Introduction of the progressive rate of tax on income from personal earnings (salaries)

Until the above mentioned changes in the Law on Income Tax, the whole Montenegro system of income taxes (of companies and individuals) was proportional. Additionally, the Law on Income Tax did not contain any social element – neither the existential minimum nor basic allowances for dependent children. For a proper understanding of the introduction of progressive taxation of salaries, the whole legislative process regarding the subject changes to the Law on Income Tax must be analyzed. This procedure was not easy or without debate, because the first proposal of the government was rejected by the Legislative Committee. The discussion in the committee dealing with the constitutional implications of the proposed progressive tax rate was very interesting. The problem for the committee was that the government's proposal provided for a global progression, implying that the tax rate of 12% would apply on salaries exceeding €400 per month.[47] In this way, a certain tax rate would be applicable over the entire taxable base. The result of this type of progressive taxation is that in certain cases a taxpayer with higher pre-tax income would be left with lower post-tax income than a taxpayer who had a lower pre-tax income.[48] It was precisely this issue that was the greatest prob-

[46] Ustavni sud Republike Srbije (08.11.2012) IУз 128/2011.

[47] Law on amendments of the Law on tax on income of natural persons, no. 06 131, Podgorica, 11 January 2013.

[48] D. Popović, 194 fn. 18.

lem, emphasized the committee, pointing out that the disputed legislative solution represented a certain form of discrimination[49]

For this reason several amendments regarding this legislative proposal were submitted. After a debate the Parliament adopted an amendment that replaced the initially proposed system of global progression. According to the new legislative regime, a tax rate of 15% is applicable only on the amount of the gross salary exceeding €720 per month. The goal of the amendment was to protect the amount of average salary in Montenegro from the additional tax burden.[50]

4.2. Progressive taxation of personal earnings and the ability-to-pay principle

Notwithstanding the claim that the legislative regime in question is based on the principle of ability-to-pay, in my view this assertion is not correct, primarily for two reasons. Firstly, the Law on Income Tax subjects five different types of income to taxation: 1) personal earnings; 2) income from self-employment activities; 3) income from property and property rights; 4) income from capital; and 5) capital gains.[51] Hence, the above mentioned changes in the Law on Income Tax introduce only the progressive taxation of personal earnings (salaries). This puts individuals with this type of income in a less favourable position compared to individuals who generate income from other sources. The legislator tried to justify this controversial legislative solution through the fact that salary income (personal earnings) represents the largest component of the total revenue from tax on the income of individuals (more the 90% of total revenue from tax on the income of individuals) and because the taxation of other income sources with a higher tax rate would require the submission of tax returns at the end of the year and additionally complicate administrative procedures.[52]

Notwithstanding that the subject tax regime is in general contrary to the ability-to-pay principle, it must be noted that a number of countries provide for a similar tax regime regarding capital income – a dual income tax system. Namely, the dual income tax is a scheduled tax regime which divides total income into capital and labor income and regards them as

[49] Report on the discussion of bill of Law on amendments of the Law on tax on income of natural persons, no. 16 02/13 1/, EPA 72 XXV, Podgorica, 28 January 2013, 2 3.

[50] Amendment 16 02/13 1/7, EPA 70 XXIV, 28 January 2013, p. 1.

[51] Article 12 Paragraph 2 of the Law on tax on income of natural persons, *Official Gazette of the Republic of Montenegro*, No 65/01, 12/02, 37/04, 29/05, 78/06, and 04/07; Official Gazette of Montenegro No 86/09 of 25 December 2009, 40/11 of 8 August 2011, 14/12 of 7 March 2012, 06/13 of 31 January 2013.

[52] Amendment 16 02/13 1/7, EPA 70 XXIV, 28 January 2013, p. 1.

different tax bases. Capital income includes dividends, interest income, rents, but also rental values as well as capital gains on real capital and property. Labor income consists of wages and salaries, non-monetary fringe benefits, pension payments and social security transfers. Capital income is taxed at a flat rate, whereas labor income, on the other hand, is subject to progressive tax rates.[53]

In many countries dividends are taxed on the personal shareholder level at lower rates than the personal income tax rates that are levied on wage income. One reason for reducing the effective tax rate on dividends has been that it is potentially the rate faced by equity investors in a new business (since such a business does not have retained profits from existing business activities available to reinvest).[54] Precisely, increased taxation of capital income could in principle raise additional revenues and have a significant redistributive effect. However, there could also be substantive behavioral effects that could be damaging not just to the size of the total 'cake' but also to its future growth.[55] A second reason for the existence of the dual income tax system is the mitigation of economic double taxation of dividends which are distributed to shareholders. In that sense the intention of the legislator is not mainly the decrease of the economic double taxation, but primarily a general decrease of the tax burden regarding capital income.[56]

Another fact that also suggests that this tax regime is not in accordance with the ability-to-pay principle is based on the Instruction for the implementation of a progressive tax rate on salary income. This Instruction provides for the aggregation of salary income before the application of the progressive tax rate only on the level of one employer.[57] This system of taxation introduces a preferential tax treatment for individuals who generate income from more than one employer. Because the aggregation of income is provided for only on the level of a single employer, the tax base for the calculation of the tax rate is fragmented and as a result there

53 B. Genser, The Dual Income Tax: Implementation and Experience in European Countries, *Ekonomski pregled*, 57 (3 4), 2006, 271 288, p. 276.

54 B. Brys, S. Matthews and J. Owens, "Tax Reform Trends in OECD Countries", *OECD Taxation Working Papers*, No. 1, OECD Publishing, 2011, p. 6, *http://dx.doi.org/10.1787/5kg3h0xxmz8t en*

55 S. Matthews, "Trends in Top Incomes and their Tax Policy Implications", *OECD Taxation Working Papers*, No. 4, OECD Publishing, 2011, p. 28, *http://dx.doi.org/10.1787/5kg3h0v004jf en*

56 H. Blažić, Ekonomsko dvostruko oporezivanje u Hrvatskoj, *Ekonomski pregled*, 53 (3 4) 362 390, 2002, p. 368.

57 Article 3 of the Instruction on the calculation and payment of taxes and contri butions from and on personal earnings from the employment, *Official Gazette of the Re public of Montenegro*, No. 81/06 and *Official Gazette of Montenegro* No. 04/10 and 8/13.

is a smaller tax debt for the taxpayers earning income from more than one employer.

5. CONCLUSION

With respect to the principle of *ability-to-pay*, it must be pointed out that the conclusion reached by the Constitutional Court, that it has no authorization to assess the impact that the burden of a fiscal duty has on taxpayers, is completely incorrect. I agree with the settled case law of the Constitutional Court that it is not its duty to say if the tax rate subject to its scrutiny is adequate: “The regulation of the number, type and level of tax rates is considered as an expression of legislative state policy in the fiscal area, within the constitutional independence of the legislator.”[58]

The same reasoning can be found in the case practice of the Croatian Constitutional Court: “...The Constitutional Court can...abolish a piece of legislation but cannot create legislation in the sense of determining different tax rates of VAT, nor can it abolish the single tax rate and in this way deprive the whole system of taxation of sense only for the reason that the applicants consider that the single tax rate is too high, commercially inadequate or against the principles of social justice.”[59]

The level of statutory tax rates in the tax legislation is a matter for the parliament to decide. But, on the other hand, the Constitutional Court has an obligation to assess the impact that the actual tax burden has on a taxpayer after the application of the tax rate, with regard to his/her income, property or consumption. The tax rate becomes the subject of constitutional review only in cases where its application cannot be considered as proportional to the particular facts of statutory tax liability (in other words, where the tax burden is not in proportion to the taxpayer’s ability to pay).[60] In such circumstances, the applicable tax rate can be considered unconstitutional. Precisely because of this, the principle of *ability-to-pay* exists in comparative constitutional court practice.

The Interest Case (1991) is a good example of the German constitutional review of tax laws regarding, among other issues, the question of factual tax burden. Under the German tax law, some interest income was taxable and other interest income – for example, interest payments from banks – was not taxable. The law was also unclear as to when interest income was to be reported for tax purposes and when not, leaving the

[58] Constitutional Court of Montenegro (29 March 2007) Decision U. no. 12/07.

[59] Constitutional Court of Croatia (5 July 2000) Decision U I /607/1996.

[60] D. Deák, “Pioneering Decision of the Constitutional Court of Hungary to In voke the Protection of Human Dignity in Tax Matters”, *INTERTAX*, Volume 39, Issue 1, 2011, Kluwer Law International BV, The Netherland, 541.

taxpayer with considerable discretion in reporting his/her taxable income. The German Constitutional Court's Second Senate held that current tax provisions related to the interest income would be held invalid unless Parliament corrected the constitutional deficiency by a fixed date. The Court emphasized that the tax burden on all taxpayers must be legally and factually equal and that the Parliament must adopt procedural measures to guarantee an equal tax burden on income from interest payments.[61] This case shows that the level of the statutory tax rate and the level of the actual tax burden are two different legal questions which the Montenegrin Constitutional Court obviously does not distinguish. In this way the Constitutional Court is avoiding the responsibility to develop the ability-to-pay principle in the tax system of Montenegro.

The lack of understanding and the fear of interfering in the area of taxation are best illustrated by the recent standings of the Constitutional Court. With an aim of justifying such behaviour, the Constitutional Court has tried to correlate the ability-to-pay principle with the competence of the legislator to determine certain elements of tax liability, such as the object of taxation or tax reliefs and exemptions: "Because the Constitution does not determine the ability-to-pay of a taxpayer as a criterion for the assessment of the proportionality of fiscal duties, according to the Constitutional Court view there is no restriction for the legislator to determine the object of taxation within a certain type of tax, and also to prescribe tax reliefs and exemptions for certain objects of taxation."[62]

The way that the legislator has shaped the progressive taxation in the Law on Income Tax (only the income from employment) is contrary to this principle, because other types of income (e.g., interest, dividends, and capital gains), which are in most cases generated by the richest individuals, are excluded from the tax progression. As a result the bulk of the burden of the financial crisis will be put on the shoulders of the middle class because the poorest citizens will also be protected from the higher tax rate on salaries (applicable only on gross income over €720 – the average salary). Additionally, the new tax regime puts individuals who earn their employment income only from one employer in a less favourable position, because the aggregation of this type of income exists only at the level of a single employer. In this way the tax base can be split by generating income from more than one employer and thus always keep the single salary below the threshold of €720 gross income. This represents clear discrimination against individuals who earn their salary income from a single employer and it is again contrary to the ability-to-pay principle.

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[61] D. P. Kommers, Russell. A. Miller, "The Constitutional Jurisprudence of the Federal Republic of Germany Third edition", *Duke University Press*, 2012, 246.

[62] Constitutional Court of Montenegro (22 March 2012) Decision U I no. 8/11.

CERIF: S112, S123

Ivana Stepanović[*], MA

MODERN TECHNOLOGY AND CHALLENGES TO PROTECTION OF THE RIGHT TO PRIVACY

The right to privacy is a fundamental human right and can be categorised as a first generation human right. However, it is one of the most controversial human rights due to the fact that it is not properly defined. The development of technology has changed our understanding of privacy and shifted the boundary between private and public, which has resulted in confusion related to the very meaning of privacy and made us question to what extent we should protect it anyway. Security issues continuously undermine the protection of privacy by imposing the need for more sur veillance and control. Instead of being considered as a natural right, the right to privacy is constantly being contested.

In this paper it is analysed how new technologies altered our understanding of privacy and blurred the line between private and public spaces, imposing many challenges to protection of the right to privacy. I argue that these challenges are caused by the lack of definition of privacy and propose that we should rethink the concept itself in order to create a new operative definition which would enable better protection of this fundamental human right which is one of the most important pillars of modern democratic society and protects individuals from despotic controlling powers.

Key words: *Privacy. The Right to Privacy. Technology. Human Rights. Security*.

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1. INTRODUCTION

The right to privacy is included in the *Universal Declaration of Human Rights*,[1] *International Covenant on Civil and Political Rights*,[2] and in the *European Convention on Human Rights*[3], but there are numerous controversies around the meaning of the notion itself, as well as the demarcation line between the private and public sphere. One of the main reasons for this confusion is the rapid development of modern technology which has caused a major shift in our understanding of the notion of privacy. It almost seems that nobody knows the meaning of the word and this has big repercussions in the sphere of law.

The problem is not simply what does the word mean, but what does it mean to us. How much do we really care for privacy today? This issue is open to interpretation and sometimes debates arise even in courts when it gets difficult to make decisions just because parties disagree on the meaning and value of privacy. This fundamental human right constantly collides with the right to security and we are forced to choose sides and decide who is going to be the winner. While many think that the right to privacy should be defended as one of the pillars of democracy, others argue that privacy is overestimated since "we have nothing to hide"[4] thereby legitimising the ever increasing surveillance and control conducted by the military, police, secret services and even banks, medical institutions and business corporations. Colin Bennett pointed a way out of this conundrum when he stated that there is no consensus on how to define the notion of privacy, but there is some sort of "common agreement" that every human being needs it to a certain extent.[5] This is why the first task related to the protection of privacy should be accepting the arbitrariness connected to it and understanding it as a social construct, but also accepting it as something desirable.

It is commonly accepted that the development of digital tools of surveillance and control is the biggest privacy related problem of the postmodern society. Legal protection of privacy against technology is a problem apparently yet to be solved. In fact, technology dramatically

[1] The Universal Declaration of Human Rights, *http://www.un.org/en/documents/udhr/,* last visited 01 December 2014.

[2] International Covenant on Civil and Political Rights, *http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx,* last visited 01 December 2014.

[3] European Convention on Human Rights, *http://www.echr.coe.int/documents/convention eng.pdf*, last visited 01 December 2014.

[4] D. Solove, *Nothing to Hide*, *The False Tradeoff Between Privacy and Security*, Yale University Press, New Haven and London 2011, 47 210.

[5] C. J. Bennett, *Privacy Advocates: Resisting the spread of Surveillance*, The MIT Press, Cambridge, Massachusetts, 2008, 1.

transformed "the landscape on which laws are made".[6] Since the 1970s, there has been a struggle to fit technology within a legal framework, but its constant development makes this task increasingly difficult.[7] Dealing with the consequences of technological improvement, which includes endless possibilities for "miniaturisation, convergence, interoperability and ubiquity"[8], is an on-going project. For example, nowadays it is especially difficult to protect the right to private correspondence stated in the European Convention of Human Rights[9]. Prior to the invention of the telephone, the notion of correspondence referred to letters. Today it also refers to text messages and electronic mail. Electronic media are making privacy very hard to preserve. The main problem is that the antagonism between technology and privacy law is like a race between the tortoise and the hare: "No matter how many laws are passed, it will prove quite impossible to legislate away the new surveillance tools and databases. They are here to stay."[10] This is why in order to find a solution to this problem, we must change the perspective and observe the problem from another point of view.

We must acknowledge that technology itself is not the problem, but the way we use it can be. As James Rule claims, blaming technology is definitely the wrong route to solving existing problems, as we are facing "uncomfortable and far-reaching choices among conflicting interests and basic social values"[11]. Firstly, to defend the right to privacy today means to require some sort of transparency of control. Establishing a fair and democratic control consists of, among other elements, a fairly transparent system within which citizens will not be secretly monitored and every individual would be able to see and control exactly where and to whom their data is shown. Control should be thoroughly regulated by law with special concern for human rights. Both concern for privacy and security must be respected without sacrificing one or another, but the right balance between the two can only be achieved within a particular context. Technology used for control must be used in a democratic and humane way. This means that there is nothing wrong with using technology in order to

[6] A. T. Keynon, and M. Richardson eds., *New Dimensions in Privacy Law*, Cam bridge University Press, Cambridge 2006, 11.

[7] Council of Europe, *New Technologies: a challenge to privacy protection?,* Le gal Affairs, Strasbourg 1989, 5.

[8] S. Gutwirth, *et al*., *Computers, Privacy and Data Protection: an Element of Choice*, Springer, Brussels 2011, v

[9] European Convention on Human Rights, *http://www.echr.coe.int/documents/convention eng.pdf*, last visited 01 December 2014.

[10] D. Brin, *The Transparent Society*: *Will Technology Force Us to Choose Between Privacy and Feedom,?* Addison Wesley, Reading 1998, 9.

[11] J. B. Rule, *Privacy in Peril: How we are Sacrifising a Fundamental Right in Exchange for Security and Convenience*, Oxford University Press, Oxford 2007, x.

maintain security, however, negative effects on individual freedom must be minimised.

Worryingly, technology is often used for morally wrong purposes that do not just violate privacy, but also have disempowering effects on individuals. We are often unaware of the ways in which we are being observed. It is exactly this unawareness that is making us frightened. Therefore the use of technology for the purpose of control should be regulated in such a way that it enables us to have greater control over life instead of jeopardising our actions.

2. BRAVE NEW PARANOID WORLD

Today's world is paranoid. We are constantly suspicious that we are being followed because we can never be certain of the ways in which we are being observed. Technology is in this sense invisible and unpredictable. There are several big fears linked to the rapid development of technology that humanity is now facing. One of them is the fear of a complete loss of privacy. There are some indications that this scenario may come true, and one of them is questionable privacy on the internet. As recognised magazines report: "Internet users have only recently begun to realise that every single thing they do online leaves a digital trace."[12] What seems to be the most disturbing fact is that people are being watched without even knowing it. Common sense suggests that it is deeply immoral.

What really seems worrying is the fact that surveillance is imperceptible, but not in the sense of Bentham's invisible watcher[13]. The "inspector" is replaced by spying devices such as mini flying cameras and radio frequency identification chips, of which we are not even aware of. In this sense, perhaps it is not just the government that poses a threat to our privacy. It seems that surveillance today is primarily linked to global capitalism, while in previous epochs it was performed mainly for the purpose of governmental control[14].

In his book "The Transparent Society", David Brin lists surveillance gadgets that are not just used by the military, police and secret services, but are also available for civilians to use, such as infrared optics, camera robots and sound and video devices for indoor monitoring.[15] In

[12] The Economist, *Horror Worlds, http://www.economist.com/node/17388328*, last visited 01 December 2014.

[13] J. Bentham, *The Panopticon Writings: Edited and Introduced by Miran Bozo vic*, Verso, London, 1995.

[14] S. Garfinkel, *Database Nation: The Death of Privacy in the 21st Century*, O'Reilly, Sebastopol 2000, 3.

[15] D. Brin, 7.

comparison to those devices, CCTV does not seem psychologically disturbing at all. Those small privacy intruders seem like an embodiment of Deleuze's theory about a society of control in which everyone controls everyone and instead of only one big brother, there are millions of them[16]. Invisible and uncontrollable, anarchistic surveillance is in this sense a real reason for paranoia. This invisible surveillance seems to be a by-product of capitalism. Everything, even surveillance, is available for sale. To avoid such potential dangers of capitalism, there should be laws that can effectively prevent the abuse of technology.

New technology also invites many other fears. One of them is that the machines will spin out of control and take over the world, just like in the film "The Matrix".[17] Other than that, there is a belief that people will begin to rely on machines to make decisions instead of them. Concerning privacy itself, there is a fear that surveillance systems will become so ubiquitous and unavoidable that individuals will not even have an opportunity to decide whether the data recorded on cameras can be used or not. Some theoreticians suggest that there is a big risk that "smart systems become black boxes, closed even to citizens who have the skills to understand them. Smart systems will make the world more transparent only if they themselves are transparent."[18] It is precisely the transparency of technology that must be provided in order to avoid the worst consequences of its development.

In order to get rid of our fears and restore the privacy that we have perhaps lost in the past decade, when all the major changes in the development of digital technology occurred, we must first acknowledge that technology itself is not the problem, for it can be used in both a right and wrong way. We can say that "technology produces adverse consequences for the individual, in particular his right to private life, his human identity, his dignity and his autonomy."[19] Furthermore, there are several characteristics of technology that are a potential threat to human rights. Firstly, networks are enabling the free transit of personal data. Secondly, integrated services digital networks (ISDN) are ensuring the collection of data through telemetric means without the intervention of the individual. Accordingly, "there is a danger of the surveillance of citizens, cutting an individual out of the information circuit, collecting personal information without the knowledge of the subject, exploitation of those data for different purposes, and finally, there is also fear of increasing the powers of

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[16] G. Deleuze "Postscripts on the Societies of Control" *L'autre Journal* 1/1990, 3 7.

[17] The Economist, *Horror Worlds*, *http://www.economist.com/node/17388328*, last visited 01 December 2014.

[18] *Ibid.*

[19] K. E. Mahoney and P. Mahoney, *Human Rights in the Twenty first Century, A Global Challenge, Part 2*, Martinus Nijhoff Publishers, Dordrecht 1993, 803.

certain public and private bodies in the absence of democratic controls."[20] Since there is not yet a proper way to protect human identity, dignity and privacy, we need some kind of principle-based approach to the application of information technology to protect those values.[21] Further development of technology can lead to even more severe intrusion into private life. Therefore, the problem must be solved legally and even on the constitutional level. Firstly, the problem must be recognised by governments. Secondly, new laws and rules must be introduced. In order to save the right to privacy, surveillance systems ought to be made transparent so individuals can be fully aware of the process.

3. THE FACEBOOK EFFECT

While on the one hand people are frightened of complete loss of privacy, on the other hand, they are clearly showing readiness to trade some of it. It can be argued that social networks have somewhat reshaped our attitude towards privacy. Many experts agree that internet users should act as if everything they do online – they do publicly.[22] Some of them have even suggested that a substantial shift in values has occurred and that our understanding of privacy significantly changed with the expansion of social networks. Even though people are aware of the fact that it is very hard to keep secrets in the virtual universe, they are actually revealing them every day as if they don't really care about discretion as much as they used to. However, we must keep in mind that there is a big collision between our need to expose ourselves and protect our intimacy. In the words of Harry Blatterer, it seems that we are in "pursuit of visibility" while still wanting to have our privacy[23].

Clashing desires for privacy and social recognition have often been misinterpreted. The founder of the most popular social network *Facebook* Mark Zuckerberg said that "people no longer have the expectation of privacy."[24] Without a doubt, the enormous popularity of social networks shows that people have the need to expose themselves publicly and connect with each other. They enthusiastically share their intimacy on the

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[20] *Ibid.*, 803 804.

[21] *Ibid.*, 804.

[22] S. Lohr, "How Privacy Avanishes Online", *New York Times*, *http://www.nytimes.com/2010/03/17/technology/17privacy.html? r 1*, last visited 01 December 2014.

[23] H. Blatterer, "Social Networking, Privacy, and the Pursuit of Visibility", *Mod ern Privacy: Shifting Boundaries, New Forms*. H. Blatterer, P. Johnson and M. R. Markus, eds., Palgrave Macmillan, New York 2010, 73.

[24] B. Johnson, "Privacy no Longer a Social Norm", *The Guardian, http://www.theguardian.com/technology/2010/jan/11/facebook privacy*, last visited 01 December 2014.

wall: publishing photographs and thoughts, disclosing facts such as who they are in a relationship with, or who they are drinking coffee with. However, apart from the basic need to keep their privacy, there seems to be an equally powerful psychological urge to share their privacy with an audience. The reason people are willing to throw their private lives into the public realm is to get more friends or to become a more popular friend. The more information they share, the more attention they receive. This attention is so powerful and addictive that it significantly devaluates privacy.

However, it would be wrong to conclude that the fact that *Facebook* now has hundreds of millions of users means that privacy is an abandoned concept. Firstly, there are also very powerful campaigns against Facebook[25] and other social networks whose primary concern is privacy. Secondly, despite the fact that people are happy to disclose their private lives, they are still concerned with protecting their privacy. They want to have control over what they are sharing and with whom they are sharing. This is precisely what has been the most discussed topic related to social networks since they became widely popular.

The first time privacy became a problem for *Facebook* users, was when it introduced the "news feed' without previously announcing it. What used to be a private conversation among individuals suddenly became visible to all interconnected users. The problem here was not the fact that the new conception of communicating through this network included public conversations, but the fact that private correspondence had become open overnight without users' permission: "When Facebook launched News Feed, it was changing the rules in the middle of the game, like a teacher who confiscates a passed note and forces the students to read it aloud."[26] Paradoxically, the change that caused a scandal at the beginning later became the main characteristic of *Facebook,* which shortly became the most popular social network in the world. This proves that people are generally willing to put their private lives on display, but only under the condition that they are in control of this process.

According to this new understanding of privacy, influenced by the emergence of social networks, there is nothing wrong with revealing our private lives, as long as we are in control of this practice, and as long as it is regulated by the law. It is the users that should be able to decide where the border between private and public actually is. The fact that this boundary shifted after *Facebook* introduced the "news feed" confirms

[25] One of the world's most famous *Facebook* saboteurs is a hacker group "Anony mous" that is, among other issues, concerned with privacy: *https://www.facebook.com/OffiziellAnonymousPage*, last visited 01 December 2014.

[26] D. E. Wittkower, ed., *Facebook and Philosophy*, Open Court, Chicago and La Salle 2010, 10.

that the distinction depends on the specific context. What seems to be confidential from one point of view can be considered as a public matter from another. This is yet another proof that privacy depends on a particular framework. In order to avoid violations of privacy, there must be strict rules regulating it: "What matters is not how many people know something, but whether the implicit rules of privacy in a social context are respected."[27] Violation of privacy occurs when we do not give our consent to disclose certain information. As long as we are aware of the rules and accept them, privacy is not a problem.

Hence, the problem occurs when privacy is not clearly defined within a certain context, and when there are no policies or legislation to protect it. A few years ago, *Time* magazine published a cover story article about privacy on *Facebook* after the social network caused a scandal by exposing (selling) information on their users to the advertisers.[28] This was a clear sign that privacy on social networks needed to be meticulously defined and regulated by the law. This article was followed by several online protests of *Facebook* users. By doing this, protesters sent a clear message that they are aware of their entitlements to more privacy than they already have. They demanded to be in charge of not only how much information they share, but also with whom they share it. What was discovered is that the data users put on *Facebook* was being abused. Different companies were secretly controlling consumers. Extensive debates on privacy regarding social networks in the media were followed by significant changes in the so called "privacy policies" of *Facebook* and other companies. Once the border between private and public was shifted one more time, and a new set of rules regulating the social game were introduced, the dust settled again. This proves that the battle for privacy we have lost by joining social networks is not in vain.

It is precisely the invisible control, such as secret surveillance of *Facebook* users that poses the greatest threat to privacy nowadays. Under these circumstances, privacy is not even sacrificed for something more important, but is simply abused and should be protected by the law. In this context power is in the hands of company owners who are controlling their customers. It is crucial that this control be limited by laws and regulations that prevent abuse. Consequently, the proper balance between privacy and control, among other factors, depends on the rule of law and mechanisms for the protection of human rights.

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[27] *Ibid.*, 8.

[28] D. Fletcher, "How Facebook is Redefining Privacy", *The Time*, *http://www.time.com/time/business/article/0,8599,1990582,00.html*, last visited 01 December 2014.

4. WORK IN PROGRESS

Establishing the desired proportionality between privacy and control is a process rather than a single achievement. Since privacy itself exists only within a particular context, determining the desired proportion between privacy and control should also be done contextually. This assignment should be dealt with within particular frameworks, since there cannot be only one operative principle that would resolve the relationship between privacy and control. The correlation between the two is too complex to reduce it to a simple dilemma of which one to choose, or which of them should be granted absolute primacy. Each context or milieu demands a different approach to the problem. However, debates about the right to privacy often start with the assumption that we should make a choice between the two priorities, namely – security and privacy. Nevertheless, making a definite choice seems to be impossible. Even though on the first thought security perhaps appears to be the more reasonable choice, there are cases that prove the opposite. Therefore we should not opt for one single solution, but rather for multiple options.

Some theorists such as David Solove argue that our society generally prefers pro-security arguments over those that favour privacy and suggests that exchanging the latter for the former is a "false tradeoff" that we should have not accepted, since both of them are essential values of a democratic society:

> The consequences of the debate are enormous, for both privacy and security are essential interests, and the balance we strike between them affects the very foundations of our freedom and democracy. In contemporary times–especially after the terrorist attacks on September 11, 2001–the balance has shifted toward the security (...) But there's a major problem with the debate: Privacy often loses out to security when it shouldn't. Security interests are readily understood, for life and limb are at stake, while privacy rights remain more abstract and vague. Many people believe they must trade privacy in order to be more secure. And those on the security side of the debate are making powerful arguments to encourage people to accept this tradeoff.[29]

Therefore it is much more reasonable to decide on a balance between the two priorities than to entirely exclude one of them. This balance should be established by the rule of law and mechanisms for protection of human rights. However, even though legislation often seems satisfactory, there is little balance in practice. In reality, the court decision often amounts to devaluing privacy and sacrificing it to security. It does not seem too extreme even to say that the dilemma is often whether there

[29] D. Solove, 1 2.

should be privacy instead of searching for a rationale how to protect it, and to what extent it should be protected. There are many examples of a wrong proportion between privacy and security: "The law sometimes stringently protects against minor privacy invasions yet utterly fails to protect against major ones. For example, the Fourth Amendment will protect you when a police officer squeezes the outside of your duffel bag yet it won't stop the government from obtaining all your Google search queries or your credit card records."[30] This clearly shows why the right proportion should be looked for within a particular context.

Furthermore, there must be some general criteria that will decide what can be considered the proper balance between privacy and control within a particular context. What should certainly be taken into account is the well being of the whole society, but also the benefit of the individual. It is not only security, and consequently the right to life, that is in danger, but also the freedom and dignity of citizens. While taking care of public security, disempowering consequences for the individual should be avoided. In other words, perhaps the optimal strategy in the majority of cases would be to maximise security and minimise privacy violations. However, both benefits and losses should be carefully calculated.

Even though the two values often collide when collective and individual interests meet, it would be wrong to conclude that privacy is merely an individual or even a selfish concern. As David Solove further argues: "Balance shouldn't just focus on your privacy – it should weigh privacy of location for everybody in society. Privacy should be understood as a societal value, not just an individual one."[31] In fact, a good society can perhaps be characterised as one in which individual requirements and the needs of the whole community are not divergent. Accordingly, just as control should not be seen simply as an unnecessary restraint of an individual (because it is for his/her own benefit), neither should privacy be perceived as needless limitation of the social order.

It is through the mechanisms for protection of human rights that the balance between privacy and control is being created and sustained. For example, mechanisms for the protection of personal data limit controlling powers, while at the same time regulation of data flow across borders for security reasons limits privacy. But even though regulations are constantly being improved, there are many problems yet to be solved, such as privacy on internet. The rapid development of technology generates many problems related to both privacy and security. Constant change is hard to grasp by the legislature, which is why remedies are often created *post hoc*.

30 *Ibid.*, 2 3.

31 *Ibid.*, 47.

In the process of creating legal and human rights remedies, finding a proper balance between privacy and control, rather than making a definite choice of preference between them should be the first guiding principle. Furthermore, this should be done in accordance with democratic principles. Controlling powers must be constantly pacified and limited so that they are democratic rather than despotic. In other words, there is nothing substantially wrong with control if it is kept transparent and actively and lawfully restrained. Control should only be conducted with respect for privacy to a certain limit which must be determined contextually. The vital criteria of this double limitation is the benefit of both society as a whole and on the individual level, rather than in particular power formations. What should be prevented is that control/power becomes centralised and repressive. In this sense, there is a constant danger that the institutions of capitalism could become centres of repressive power that conduct surveillance without any respect for privacy. This is why the rule of law and human rights must constantly create and maintain the democratic balance. It is a work in progress.

5. CONCLUSION

It seems that the problem with the right to privacy is obvious: development of technology has led to uncontrollable and invisible digital surveillance. Legal protection is always a few steps behind the mechanisms of control and unable to deal with the growing number of problems related to protection of privacy.

However, the underlying problem is our understanding of privacy. There is no consensus on what we mean by it. Moreover, there are also contrasting views on how it should be protected and even whether it should be protected at all, or perhaps sacrificed for security. Therefore privacy needs to be both redefined and reassessed. It is crucial that we first acknowledge it as a social construct. Instead of struggling to define it, we should accept the fact that it is impossible because its meaning depends on a particular context. Furthermore, we should let go of the classical libertarian definition according to which it is a negative right and the private sphere should be free from any governmental interference[32]. However, it is equally wrong to marginalise privacy and surrender to the faceless power of the post-modern Deleuzian "*societies of control*"[33].

The solution lies somewhere in the middle, between radical individualism and capitulation to total control. This means that privacy and

[32] J. Locke, *Two Treatises of Government*, *The works of John Locke.* In Ten Volu mes. Vol. V. London 1823.

[33] G. Deleuze, "Postscript on the Societies of Control", *L'autre Journal*, 1/1990, 5.

control should no longer be seen as contradictory, but rather as complementary values. They should limit each other and therefore prevent negative consequences of excessive freedom or potentially oppressive controlling power. Balance should be sought contextually, since it is impossible to find proportionality that would fit universally.

However, it is not just any kind of control that is compatible with privacy. Contemporary societies aspire to democratic control which should be understood in relation to the notion of power. Democratic control aims to pacify existing power relations in order to prevent any despotic powers. In this sense democratic control is preventive, and amounts to surveillance that is mere monitoring without aspirations to be manipulative in any way. But even this democratic control needs to be limited by the respect for privacy, since without this restriction it can easily become autocratic. On the other hand, privacy limited by control which preserves peace and security enables more control over life. In deciding upon the desirable balance between them, regulated by the rule of law and human rights mechanisms, we should opt for the solutions which are beneficial for both society and the individual.

When it comes to modern technology, the process of monitoring data should be visible to citizens and there should be some kind of "principle of reciprocal benefits" which means that both controlling powers and common citizens not only have access to data but also both gain something from the process of control.

Regarding the conflict between privacy and security, the optimal solution is to ensure security while at the same time minimising violations of privacy. Disempowering consequences of surveillance on individuals should be avoided, for providing public good is not the only condition for maintaining a just society. This is particularly important with regards to data surveillance, which now poses the biggest threat to privacy. It seems that a Kafkaesque bureaucracy nightmare is now more real than ever, considering that identity thefts as well as buying and selling data have become an everyday practise. Even espionage is no longer a job done only by the secret services and military. This is why limiting control by privacy rights is vital for every democratic society. In this sense technology should play for both sides: protecting privacy on the one hand and preserving security on the other.

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Example: *Ibid.*, 69.

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