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ЧАСОПИС ЗА ПРАВНЕ И ДРУШТВЕНЕ НАУКЕ

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Year LXIII, 2015, No. 3, pp. 1–274

UDC 34/35 ISSN 0003-2565

TABLE OF CONTENTS

ARTICLES

CERIF: H 210, H 300

Dr. Miroslava Mirković*

PATRIA POTESTAS OR MURDER IN THE FAMILY

Patria potestas appears in the tradition in two aspects: as the father's right to put his son to death and as the right to dispose of the family property. All examples concerning the murder of the son (or daughters) known to the Roman authors are from the time of the Roman Republic. The father's right to dispose of the property even when the son is an adult lasted until the Later Empire. In a detailed study W. V. Harris limited his disucussion to ten examples of the son's murder and three of the daughter. They are mostly not qualified as the ius vitae ac necis by the Roman au thors. It is important to stress: a) That these examples mainly illustrate the father's right in charge as the high magistrate. In putting their sons to death the fathers magistrates did not use the vitae necisque potestas of the father but the authority of supreme state officers. The crimes of which the sons were accused belonged not to family affairs but to offences against the military discipline and State interests. b) The only condition in applying the vitae necisque potestas was a moral one, the exist ence of the iusta causa. Even then it was not unpunished, and in many cases the fa ther went into exile. c) The father's power existed only over legally born children within a legal marriage. Legal marriage was the privilege of patricians until 444 BC. That means that the patria potestas was originally limited only to patrician families. Biological kinship was not a decisive factor in the restitution of the father children connection. d) The main right of the pater in the family was not to kill its members, but to preserve his position in economic control and to dispose of the property which was once common and eventually to control the moral behavior of the family mem bers.

Key words: *Patria potestas. Vitae necisque potestas. Pater. Patricii. Le gal marriage*.

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1. INTRODUCTION

The essence of the power of the *pater familias* is in the modern studies mostly reduced to his *vitae necisque potestas.* The father's power to put his own sons to death is defined as being its core (Kernstück)[1]. Its substance was clearly described by Max Kaser, in his famous *Das römische Privatrecht*, 60–61: "als Kernstück der Familiengewalt wird das Recht über Leben und Tod (*vitae necisque potestas*) empfunden, das die äußsterste Reichweite der Rechtsmacht des *paterfamilias* bezeichnet. Wie ihm Macht gegeben war, die freie Personen unter seiner Gewalt zu töten, so konnte er sie auch züchtigen, verkaufen, die Kinder verheiraten und ihre Ehen scheiden. Freilich waren ihm alle diese weitreichenden Eingriffe nur unter besonderen Umständen erlaubt. Die Ausübung des Tötungsrechts war an das vorliegen gewichtiger Gründe und an die Durchführung eines hausgerichtlichen Verfahren gebunden. Wurde diese Verfahren nicht beobachtet, galt der Hausvatet vielleicht als Mörder"[2]. In another text Kaser again discussed the *patria potestas* problem and defined further facts crucial for gaining a deeper understanding of many cases which have been qualified as the effects of *patria potestas*, when the home authority was equated with the primordial state power[3]. The norms prescribed by law, *Recht,* were separated from the rules of customs, *Sitte*[4]. His further conclusion about the family not only as a social but also a political community and the home government which was equal to the power of the state, means that it was unlimited in nature and thus excluded any restriction from the State. According to this definition the family was independent of any outside power making the head of the house all-powerful in it.

The right of the *pater familias* was limited in the first place by a series of threats of sacral penalties which were developed in the pontifical praxis and which are transferred to us as allegedly kings' laws. Above all the father was threatened by sacration. That meant that anyone who failed to respect the norms would lose the gods' protection as *sacer* and would remain restless. Originally, in the pre-urban phase in Rome the father could kill his new born children, probably those who could not be alimented. However, even according to the law which is prescribed to Romulus it was not allowed to kill the male descendant, the first born daughter and all children under five years of age[5]. Gaius, *Inst. Frag. Augustodun*.

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[1] Max Kaser, *Das römische Privatrecht*, erster Abschnitt, München 1971, 60.

[2] M. Kaser, *Das römische Privatrecht*, 60 61.

[3] Max Kaser, "Der Inhalt der patria potestas", *ZSS* 58, 1938, 62 87.

[4] M. Kaser, *ZSS* 58, 1938, 64.

[5] Shaw, B. Shaw, "Raising and Killing Children, Two Roman Myths", *Mnemo syne* 54, 1/2001, 57, distinguishes between infanticide or infant exposure common to

IV 86. seems to say that although the power existed, the Twelve Tables specified that the father must have a *iusta causa*[6].

In a detailed article in the *Real Encyclopädie*, s.v. *Potestas patria*, Sachers cites cases when the father had a *iusta causa* to kill his son[7]. Under this he includes: α) high treason (Hochverrat), the reason why the sons of L.Brutus, A.Fulvius, and S. Cassius were killed by their fathers, β) bribery (Bestechlichkeit) which was the reason why Silanus was killed by his adoptive father T. Manlius Torquatus, and γ) military disobedience (militärische Ungehorsams), with the examples of A. Postumius and M. Scaurus who executed his son because he proved to be a coward in battle.

The participants in the Bachanalien in spite of the prohibition from the State were punished, but only the wives. As censor, F. Censorinus killed his son because of theft.

Yaron asserts that there is no reason to doubt the extreme antiquity of *vitae necisque potestas* which he dates back to the very earliest days of Rome[8]. However, he suggests that the cases enumerated by Sachers in groups a,b and g, should be rejected as examples of the killing of a son by his father within the frame of *patria potestas*, because, as he rightly asserts, the father did not act within his *patria potestas,* but in his capacity as military commander. This means that T. Manlius Torquatus acted within his power as consul, and A. Postumius Tubertus as dictator. These fathers disregarded their natural inclination towards clemency, giving preference to their duty over their paternal feelings. The same applies to the case of L. Iunius Brutus, Rome's first consul. He acted in his public

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many pre modern societies and as he formulates it, "a firmly established legal right (*ius*) or formal power (*potestas)* possessed by adult male citizens over their offspring". He sees in the Roman father's *vitae necisque potestas* "the firmly established legal right *(ius)* or a formal power (potestas) possessed by adult male citizens over their offspring". The differ ence between infanticide or infant exposure common to many pre modern societies and *patria potestas* is not clear. However, there are no decisive legal texts confirming this formulation. Even the instance he quoted of Gallic and German social relations mentioned in Caesar's BG (Shaw, p. 59) represents an argument against his assertion of the Roman *patria potestas*as was unique in the ancient world.

6 FIRA pars altera, 223f.: *nam si servi filiive nomine condemnatus fuerit dominus vel pater, poterunt in noxam dare etiam mortuum: condemnatus dominus noxali actione potest serum etiam mortuum in noxam dare...etc.* 85. *Ergo cum praetor dedere dom... parentem putes...iure uti t.domino vel parenti et occidere eum et mortuum dedere in nox am...patria potestas potest... u... eum patris potestas talis est ut habeat vitae ac necis potestatem.* 86. *De filio hoc tractari crudele est, sed.....non est post ...r...occidere sine iusta causa, ut constituit lex xii tabularum. Sed deferre iudici debet propter calumniam.*

7 E. Sachers, "Potestas patria", *Realencyclopädie der classischen Altertumswis senschaft*, XLIII (XXII), 1953, 1086 ff.

8 Reuven Yaron, "Vitae necisque potestas", *Tijdschrift voor Rechtsgeschiedenis* 30, 1962, 243 251, especially p. 245 f.

capacity, and not as a father. The case of T. Manlius Torquatus cos. 165, who banished his son Silanus from his sight because of bribery, is also irrelevant here. This did not concern *patria potestas*, because he had given his son up for adoption. In Yaron's opinion, the case of the female participants in the Bachanalian rites offers no example of the application of *patria potestas*. In all these cases the father did not act within the *patria potestas,* but as a military commander or censor. The cited instances do not concern family adheres, but state interests. However, even after excluding all these cases, Yaron asserts that sufficient examples remain to fully establish the father's *Tötungsrecht* (p.244), but he failed to enumerate them. Yaron focused his further interest on the examples of killing sons from the East, seeing in them an anthropological phenomenon common to many peoples.

In his article 'The Roman father's power of life and death' W. Harris adduced ten possible examples[9] with reasonably clear texts showing that from an early date the *ius civile* had allowed fathers to put their sons to death: 1. L. Brutus put his sons to death for planning to bring back the Tarquins; 2. the case of Sp. Cassius who was put to death for attempting to seize royal power; 3. the dictator of 431. A. Postumius Tubertus had his son put to death for desertion, but not cowardice; 4. Manlius Torquatus, cos. 340 for the third time had his son put to death for a breach of military discipline in battle; 5. the son of M. Aemilius Scaurus the consul of 115 was banished from his father's presence following his desertion in the battle against the Cimbri, as supposed in BC 102. which resulted in the son committing suicide; 6. Q. Fabius Maximus, who is identified as Eburnius, consul BC 116 and censor, killed his son for a sexual offence which was not qulified; 7. the same happened to Iunius Silanus; in case 8, the praetor in 141 BC who was judged guilty of having commited peculation the following year. It was not a question of killing, but of provoking the son's death by punishing him privately – he banished him from his sight and he hanged himself the following night; 9. a senator named A Fulvius killed his son for setting out to fight on behalf of Catilina; 10. Seneca mentions the case of a knight named Tricho who killed his own son by flogging (Seneca,*De clem*. I 15, 1) for a reason not stated thus provoking the revolt of the people who attacked him in the forum.

[9] William W. Harris, "The Roman father's power of life and death", *Studies in Roman Law in Memory of A. Arthur Schiller* (ed. R. S. Bagnal and W. V. Harris), Leiden 1986, 81 85.

2. FATHER'S RIGHT AS THE STATE MAGISTRATE AND *PATRIA POTESTAS*

However, Harris retained reasonable doubt in many of the quoted examples as to whether the death of the son was the consequence of the application of the *patria potestas,* as for instance case no. 2, regarding Sp. Cassius,who was put to death for attempting to seize royal power. The case is qualified by Harris as obscure, and it had plainly become the subject of notable controversy by the second century, and perhaps much earlier; some ancient authors assert that his father was responsible for his death, but no one refers to his *vitae necisque potestas.* The supposition of the father's role rests on the story told by Livy, II 41,10 that the family put on Sp.Cassius's statue the inscription *Ex Cassia familia datum* which some people saw as evidence that the father had been responsible for the killing. The story as told by Val. Maximus V 8, 2 is deprived of any sense: Cassius emulated the example of L. Brutus in putting his son to death, *tribunes plebis,* who had been the first to propose an agrarian law and currying popular favor in many other ways held public sentiment attached to himself. When he laid down that office, his father summoned a council of relatives and friends and condemned him in his house on the charge of aiming to be king." In Livy II 41, 10 he was accused of treason and condemned by the people and his house was destroyed *populi iudicio*. Treason is again not an issue pertaining to the family, but the state.

Val. Maximus mentions the case of dictator of 431. A. Postumius Tubertus (no.3) under the title *De disciplina militari* and explains: *quia non tuo iussu, sed sua sponte e praesidio progressus hostis fuderat, victorem securi feriri iussisti.* Liv. IV 29, 6 refused to believe this because of the *saevitia* and *crudelitas* of the father: *nec libet credere, et licet in variis opinionibus...*etc. The father held the dictatorship which cerainly entitled him to act in this fashion[10]. Manlius Torquatus, cos. 340 (no.4) is said to have acted not as a father but as a consul, as Val. Maximus explicitly points out, II 7, 6: *tu item, Postumii Torquati latino bello consul filium... abripi ab lictore et in modum hostiae mactari iussisti, satius esse iudicium patrem forti filio quam patriam militari disciplina carere.* Harris admits that no sources suggest that he relied on his legal rights as a father; the event did not end in capital punishment. Aemilius Scaurus, son of M. Aemilius Scaurus the consul of 115 in case 5, was banished from his father's presence after desertion in the battle against the Cimbri. It would be difficult to see the application of the father's *vitae necisqu potestas* simply because the story ended with the son's death. Harris described this case as an unsucceful attempt to present this as a deliberate attempt to avoid direct responsability for death.Two more events, enu-

[10] W. W. Harris, 83.

merated in Harris's list as cases nos. 5 and 6, should be added to those examples illustrating that service in State institutions excluded any emotional connections even between father and son. Both relate to punishment by the father not according to *patria potestas,* but his right as censor. Fabius Censorinus (M. Fabius Buteo) the censor of BC 241, supposedly had his son put to death because of theft at the time he was censor[11]. This event is dated in the years BC 221/219. To Harris it seems likely that the son did indeed die. He may have committed suicide like the victims in cases 8 and 9. The story of Q. Fabius Maximus, who is identified as Eburnius, consul 116 and censor, presents no clear example illustrating the application of *the patria potestas*. In Val. Maximus this case is cited in the chapter under the title *De pudicitia*. He was punished because he was *dubia castitatis.*As a consequence the father went into exile. Harris, 85, presumed that the father had claimed to act in virtue *vitae necisque potestas* and that this claim was evidently rejected. Valerius Maximus, who identified him as Servianus, made him to held treated him as a censor, which Servianus never was in order to rectify his behaviour and says: *Q. Vero Fabius Maximus Servilianus honoribus, quos splendidissime gesserat, censurae gravitate consummatis exegit posenas a filio dubiae castitatis et punito pependit, voluntareio secessu conspectum patriae vitando.* That means that he went into voluntary exile.

The same happened with Iunius Silanus, in Harris' case 8, who was praetor in 141 BC. This was not a question of directly having the son put to death. He caused his son's death by punishing him privately. He banished him from his sight and his son hanged himself the following night. It could be eliminated as an example illustrating the application of *vitae necisque potestas*, as Yaron suggests.

In the first century BC a deliberate attempt was made to present the killing of the son as the consequance of the application of the *vitae necisque potestas*[12].Killing the son for attempting to join Catilina's forces (7) represents a very particular case without any parallels in the past and could, as well as case 10, rather be qualified as a murder in the family than as punishment of the son by the father because of his political orientation. In the sources it is not expliicitely qualified as the application of the *vitae necisque potestas.*[13] Dio Cassius apparently held that Fulvius acted in *virtue of vitae necisque potestas* saying that it is not the only example of a private man killing his son. Val. Maximus compares this

[11] W. W. Harris, p. 84 suggests the years 221/219, when it is certain that the father held no office. The only source is Orosius, IV 13,18.

[12] As supposed by W.W. Harris, 85.

[13] B. Shaw, 61 observes that the closer investigation of each of the cases reveals not the actual act of killing done by fathers who were exercising the specific powers they held as *patres*, but rather ideological interpretations of their actions.

with the case of Scaurus, *quam Scaurus ex praelio fugientem.* The father was a senator. In Harris's case no.10 a knight named Tricho killed his own son by flogging (Seneca *De clem.* I 15, 1) for a reason not stated, thus provoking the revolt of the people who attacked him in the forum. Augustus' auctoritas saved him. There is no reason to qualify his action as the application of the father's *vitae necisque potestas*.Examples 7 and 10 from the first century BC probably represent an attempt to keep the murder in the family hidden under the mask of the legendary *patria potestas*. In both cases the father had to expiate for the violation of moral norms like the censors in the cases quoted under no. 5 and 6.

3. FAMILY AFFAIRS, SUCH AS SEXUAL OFFENCE, *STUPRUM*, AND ADULTERY

Both the literary tradition and modern authors focus the application of the *patria potestas* on the cases of sons being killed by their fathers. It was not clear whether the father had the same right when daughters were concerned even in the Antiquity. They asked the jurists as illustrated in the text of Papinian, *Collatio* IV 7,1, who asserts under the title *De adulteria* that a *lex regia* gave the father this power.[14] Harris quotes three examples of punished daughters. All three could be qualified as sexual offenses and are defined as *stuprum*. Val. Maximus mentions these under the title *De pudicitia*[15]: the case of Virginia from 450 BC, who was killed by her father in order not to be subjected to the decimvir Appius Claudius, the case of the Roman knight named Pontius Aufudianus who had his daughter put to death because her virginity had been violated by the slave paedagogus, and that of the freedman P. Atilius Philiscus who killed his daughter for *stuprum.*

A sexual offense or socially forbidden or politically illicit connection could have explained the daughter's murder in the earliest known example in which the *patria potestas* is mentioned, in the trial of Horatius (or Curiatius) in Livy I, 16. It does not illustrate the relations of the father to the son, but to the daughter. It is an instance which indicates competition between custom and law and indirectly the father's right to kill his daughter because she deplored the death of her fiancé, who was the enemy killed by her brother. Even in the case of a family matter the official

[14] Papin. Collatio IV 8,1, FIRA pars II, p.552 5: *cum patri lex regia dederit in filium vitae necisque potestatem, quod bonum fuit lege comprehendi ut potestas fieret etiam filiam occidendi velis mihi rescribere: nam scire cupio. Respondit: numquam ex contrario praestat nobis argumentum haec adiectio ut non videatur lex non habenti de disse sed occidi eam cum adultero iussisse ut videatur maiore aequitate ductus adulterum occidisse cum nec filiae pepercerit.*

[15] VI 1,2, 5 and 6

court was competent as in this case. When one of his sons, the last surviving one, was condemned to death for killing his sister, even though he was a hero who had defeated his enemy, the father Horatius made an appeal to the people as an afflicted parent. In order to protect his son from being punished by the death penalty for killing his sister, the father pretended that his daughter had been justly slain; "otherwise he should have used a father's authority and have punished his daughter himself using *vitam necisque potestas*." – *ni ita esset, patrio iure in filiam*[16] *animaversurum fuisse*[17]. Horatia was *iure caesa* because she was guilty of *proditio* (treason). The story reflects the parallel existence of family judgment (the father) and the civil court (king and civil institution, *duoviri* including the *provocation ad populum*). The father did not represent the merciless authority, but one who tried to protect his son from the death penalty despite his having violated the law of the community. In this case the *pater* had to act in accordance with the law prescribed to Romulus which allows the killing of the daughter. As it was necessary to have a *iusta causa*, the daughter was accused by Livy of treason, because she lamented the death of her fiancé who was an enemy of the state.

4. SOME CONCLUSIVE NOTES

Roman legal texts never discuss in detail the content of the *patria potestas*. The misuse of the *patria potestas* was not the subject of criminal law. The sacral prohibition and the customs represented the only control. The only condition was the moral one, the existence of the *iusta causa*. However, in Gaius' time the father's powers over persons of *liberi*, originally unlimited, though tempered by the family council and the censor, had been brought under legal control[18]. The father's power existed only over legally born children within a legal marriage[19]. Legal marriage was the privilege of patricians until 444 BC. That means that the *patria potestas* was originally limited only in patrician families. Biological kinship was not a decisive factor in the restitution of the father – children connection. A man became a father from the moment he recognized a son as his own child. The father as a central figure of great influence and unlimited power in the family appears from the moment it was possible to identify him as a *pater*. The unilateral descent, the father's line and the patriarchy which prevailed in the newly organized society in Rome might be crucial in the division of the society into two socially, thereafter also

[16] Filium j: filiam w.

[17] Livy I 26, 9.

[18] Francis de Zulueta, *The Institutues of Gaius* I, Oxford 1946, p.29.

[19] M. Kaser, *Das römische Privatrech,* 65. Gai Inst. I 55: *Item in potestate nostra sunt liberi nostri quos iustis nuptiis procreavimus*. See Aul. Gell. V 19,9

politically differently defined orders: that of patricians and plebeians. The presence of these two opposed groups represents a peculiarity of the social life in Rome which colored the history of the Roman State in the first two centuries of the Republic. The institution of *pater* is essential in gaining a deeper understanding of the meaning of the *patricii*. They were those of certain origin, who could name their fathers[20]. In his account of the struggle between the two classes in Rome, Roman author Livy defines the *patricians* as those who could name their fathers, *qui patrem ciere possent*[21]. That means that the *pater* at the head of the family was instituted only in part of Roman society. So the tradition of the strict and severe father appears to have been mainly senatorial and patrician[22]. In the early Roman state *patres* were organized as a body and included in the institutions which replaced the power of the *pater* in the individual kinship group, family or tribe. Livy X 8,4, always cites the fact that the auspices belonged only to the patricians, that only they had a certain gens, i.e. origin (*vos solos gentem habere*), that only they had the full *imperium* and right to divination, both at home and in the field[23].

If the *patria potestas* could have been realized only within patrician families, the murder of Virginia by her father could not be explained as a case of the application of the father's *vitae necisque potestas*. The daughter was innocent and the father's proceeding had no legal or human excuse. As a plebeian he could not have had *vitae necisque potestas*. She was not born in a legal marriage, because the father was of plebeian social status, i.e. belonged to the social group which had no *ius conubii* until 444 BC. That means that he could not have enjoyed *vitae necisque potestas*. The father's absence from the story until the end in Livy's account is not accidental. Livy adds him at the end in order to explain the girl's death. At first her plebeian fiancé Icilius and her mother's brother, *avunculus* Numitorius, tried to protect her[24]. The latter is the vestige of the early social system in which the mother's brother was more important than the biological father. As the girl's father was not present at the beginning of the story, (Livy said that he was away at war) Appius could present her as his slave. Her connection with Appius, however forced, was qualified as incestum because marriage between plebeians and patricians was not legally possible.

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[20] Theodor Mommsen, *Staatsrecht* III 13: Geschlechtgenossen, *gentiles, patres* die allein die einen Vater haben.

[21] Miroslava Mirković, "Der Vater und die Patrizier: *qui patrem ciere possent*", *Klio* 86, 2004, 83 100.

[22] W. W. Harris, 97

[23] The definition of patricians as those who were able to adduce their fathers was the reason for equalizing patricians and eupatrids in the Greek world by Dionysius of Halicarnasos.

[24] Livy III 54, 11, *avunculus*, mh/troj qei oj in Dionys. Hal. XI 28,7.

Originally the *patria potestas* included the father's right to decide about the destiny of the newborn child.This exceptional right, contrary to all natural feelings, the father's *vitae necisque potestas*in killing the adult son, does not appear in the evidence before the first century BC. There is no doubt that in Cicero's time it was generally believed that the father had the right to put his son to death. It became a popular pattern of thought. The term *patria potestas* appears in Cicero's *De domo* 77 as a rhetorical question, and as the argument against Clodius Pulcher's adoption, asking whether P. Fonteius had *vitae necisque potestas* over Clodius Pulcher whom he had adopted in order to make it possible for him to apply for the position of *tribunus plebis*, which meant he had the right to put him to death as a real father could[25]**.** In Ant. Rom. II 26, 4 Dionysius from Halicarnasus explains the father's right over his children as a peculiarity of the Romans. He states that the Romans gave virtually full power to the father over his son throughout his whole life in matters of whether he thought it proper to imprison him, to scourge him, to put him in chains and keep him at work in the fields, or to put him to death, and even when the son was already engaged in public affairs. He was the only author who explained the death of Manlius Torqutus and as he says, many others, as the application of the *patria potestas*[26]. The *potestas* of the father over his descendants is defined by Gaius in Inst. I 55 as *ius proprium civium Romanorum*[27]. Aulus Gellius, *Noctes Atticae* V 19, 9 cites the *rogatio* of the *pontifex maximus* Mucius as evidence that the father's right could be applied only to the legal son[28]. Legal texts mention the *patria potestas,* but do not discuss it.

In the majority of the cases enumerated in Harris's study the central problem is the question of the relationship between the power of the

[25] Cicero, *De domo* 77: *sed cum hoc iuris a maioribus proditum sit, ut nemo civis Romanus aut libertatem aut civitatem posit amittere nisi ipse auctor factus sit quod tu ipse potuisti in tua causa discere credo enim, quamquam in illa adoption legitime factum est nihil, tamen te esse interrogatum, auctorne esses ut in te P. Fonteius vitae necisque potes tatem haberet ut in filio.*

[26] II 26,6: "I forbear to mention how many brave men, urged by their valour and zeal to perform some noble deed that their fathers had not ordered, have been put to death by those very fathers, as is related by Manlius Torquatus and many others"(Engl. Transl. by E.Gary and E.Spelman, Loeb Class. Lib. 1961)

[27] Gai Inst. I 55: *Item in potestate nostra sunt liberi nostri quos iustis nuptiis pro creavimus.Quod ius proprium civium Romanorum est; fere enim nulli alii sunt homines, qui talem in filios suos habent potestatem, qualem nos hanemus. Idque divus Hadrianus edicto, quod proposuit de his qui sibi liberisque suis ab eo civitatem Romanam petebant, significavit. Ne me praeterit Galatarum gentem credere in potestate parentum liberos esse.*

[28] Aulus Gellius, *Noctes Atticae* V, 19, 9: *Eius (sc. Mucio pontifici maximo) roga tionis verba haec sunt: Velitis, audeatis, uti L. Valerius L. Titio tam iure legeque filius siet quum si ex eo patre matreque familia eius natus esset utique ei vitae necisque in eum potestas siet, uti patri eido filio est. Haec ita dixi, ita vos Quirites rogo*.

pater familias and the State authority. The fathers who had their sons put to death as consuls or dictators in 1, 2, 3, 4, and 9 are mythical figures. None of the examples which are described in Valerius Maximus is qualified by him as the application of the father's *vitae necisque potestas*. In his book *Facta et dicta memorabilia*, they are cited under different headings: *De severitate patrum in liberos, De discupilina militari* and *De pudicitia* and are not qualified as examples illustrating the *patria potestas.* He notes the following cases of fathers killing their own sons: 1**.** L. Brutus, 2**.** Sp. Cassius, 3**.** T. Manlius Torquatus, 4. M. Scaurus, and 5. A. Fulvius; while cases 6 and 7 are listed under the headline *De Pudicitia***.** *Patria potestas*is not mentioned in any of them**.** In the case of Brutus both Livy II 5, 5 and Valerius Maximus V 8,1 underline that "the office of the consul imposed upon the father the duty of exacting the penalty from his sons"[29] (Livy) and more explicitly by Valerius Maximus: he put off the father to play the consul[30]. In the examples he quoted the problem arises in the conflict between the natural feelings of the father and the duty of the military commander and in this sense the ancient author speaks most explicitly in II 7, 6 *tu item, Postumii Torquati latino bello consul filium... abripi ab lictore et in modum hostiae mactari iussisti, satius esse iudicium patrem forti filio quam patriam militari disciplina carere.* It was not the intention of Valerius Maximus to illustrate the application of the *patria potestas*, but to underline the strict application of the law, even against one's own son. Between the father's feelings and duty, the latter prevailed.

There is good reason to doubt that the killing of the sons in the majority of the cases quoted by Sachers was the consequence of the strict application of the *patria potestas.* In putting their sons to death the fathers-magistrates did not use the *vitae necisque potestas*of the father, but the authority of supreme state officers. The crimes of which they were accused belonged not to family affairs, but to offences against the State interests. The fathers acted as supreme state magistrates, and not as fathers and the cases of the father killing the son are not preserved in the Roman literary tradition as examples of the *vitae necisque potestas* of the father. In order to preserve the authenticity of the tradition modern researchers propose different solutions. M. Kaser asserts that the home authority was made equal to the primordial state power. Harris suggests that any conflict between the authority of the magistrate and that of the *pater familias* to whom he was subject was resolved by giving the magistrate the status of the *pater familias* while he was engaged in public business. This explanation concerns a traditional form or behavior in a state which

[29] Livy II 5,5: *quod poenae capiendae ministerium patri de liberis consulatus im posuit*.

[30] Val. Max. V 8, 1: *exuit patrem ut consulem ageret, probusque vivere quam pub licae vindictae deesse maluit.*

was still rudimentary and lacking the power to punish crime. But he supposes that it continued to be useful to the aristocracy as long as it represented the ruling class in Rome[31]. However, it must be kept in mind that the examples numbered 1 to 5 in Harris must have illustrated not the power of the father in the family, but the impartiality of the highest magistrate who was authorized to punish any act of treason or disobedience in war even if his own son were in question. In the time in which tradition puts examples 1, 2,3 and 4 the punishment of disobedience to the supreme magistrate and treason belonged to the competence of the State. Mommsen, Staatsrecht II–1, 51 explains the punishment for a public crime as the exclusive competence of the State[32].

The application of the father's right to kill unpunished family members under his authority is not possible to prove in the historical period. The leadership of the pater was no longer in danger; he preserved his position in controlling everything concerning family property. None of the quoted examples could be taken as indisputable proof of it, except those concerning moral delict, such as adultery or *stuprum*. Even then the patria potestas was not unlimited, as shows case 6: after killing his son for being *impudicus* or *dubia castitatis* the father went into exile in consequence[33]. Vestiges of this severity are preserved in the prerogatives of the high magistrate as legends about the father consul or dictator who killed his own son because of disobedience at war prove. In a society organized like a state the prerogatives of the pater were transmitted to the king or the magistrates in the republic. The punishment for being disobedient, treason and similar infringements were in the hands of state institutions.

In the Roman state the father's power mainly concerned family affairs, such as are exposure of children or *stuprum*, i.e. adultery and similar when it concerned adult sons or daughters. The son in Harris no.6 was accused of stuprum. *Stuprum* was named as one of the reasons for the application of the *patria potestas* in the legal texts: Dig. XLVIII 9,5: real cases could be those of a son or daughter punished for moral infringements, of the *dubia castitas* or *stuprum* (Harris, nos.5 and 6). Preserved laws concern the exposure of children (CJ V,4,16, VIII 51,2 or the question of stuprum, adultery (Papinian, *Collatio* IV 8,1; D.XLVIII 9,5) and

[31] W. W. Harris, 88f.

[32] Th. Mommsen, *Staatsrecht* II 1, 51: "Die Gemeindeverbrechen unterlagen, wie früher der königlichen, do jetzt der Ahnung der Magistrate der Republik und hinsichtlich ihrer änderte sich die Rechtordnung im allgemeinen nicht, aber die sacralen Delikten stand jetzt nicht mehr das königliche Imperium gegenüber, sondern der Oberpontifex und dieser behielt zwar die Behandlung der rein sakrale Delikte, aber die Strafgewalt ging ihm nicht minder verloren, wie bei die Legislation".

[33] On sacral punishment for the father and the legal limitations see M. Kaser, *Das römische Privatrecht,* 61f.

similar but not the father's right to put his son to death. Killing children in general is the subject of the Later Roman law by Valentinian, Valens from 365, CJ IX 16,7, which states that every killing of a child, by man or woman, must be punished as murder: *Si quis necandi infantis piaculum adgressus adgressa sit, sciat se capitali supplicio esse puniendum*. However, the legal text provides the punishment in some cases like *Dig*. XLVIII 9,51.

Rather than the father's right to kill the adult son, an essential feature of the father's authority in the classical times and the core of the *patria potestas* was his right to dispose of all property, not only that belonging to him, but also everything that other family members acquired. The only subject of the private right in the family was the *pater familias*. Even adult sons could not have this right as long as the father lived[34]. This father's right is explained by Linke who follows Leist, as an usurpation of the originally common right to property by individual society members[35]**.** Power in the small community, clan or family in the primitive society was not based on the common agreement of all adult members, but was imposed by force. Disobedience must have been brutally punished, even if the son was at question. The son could have been a rival for power. The main right of the *pater* in the family was not to kill the members in the name of the state, but to preserve his position in economic control and to dispose of the property which was once common and eventually to control the moral behavior of the family members. The *pater*'s right to dispose of all property, except the *peculium militare,* survived until the late Empire[36].

34 E. Sachers, RE 1135 ff.

35 Bernhard Linke, *Von der Verwandtschaft zum Staat, Die Entstehung politischer Organisationsformen in der frührömischen Geschichte*, Stuttgart 1995, 176: "Für die Ana lyse der Ursachen und des Ablaufs dieser sozialen Umwalzungen ist schon im 19 Jh der Indogermanist Wilchelm Leist einen entscheindenden Hinweis geliefert, indem er die Sin gularität der herausragenden Position des römischen pater familias im Familienrecht der indogermanischen Völker unterstricht. Die Überzeugung von Leisst, daß sich dieses Phänomen aus der ursprünglich kollektiver Eigentumsrechte durch einzelne Mitglieder der Gesellschaft erklärt, offenbart eine weitgehende Übereistimmung mit modernen eth nologischen Theorien".

36 Antti Arjava, "Paternal Power in Late Antiquity", *JRS* 88, 1998, 147 153, espe cially 148 ff.

CERIF: S142, S150

Dr. Milenko Kreća*

RELATIONSHIP BETWEEN THE INTERNATIONAL COURT OF JUSTICE AND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA IN RESPECT OF THE ADJUDICATION OF GENOCIDE

By opting for the approach based on the dichotomy of individual criminal responsibility for the act of genocide and the responsibility of the State in both the Bosnian and Croatian Genocide cases, the International Court of Justice enabled the establishment of a jurisprudential connection with the judgments of the International Criminal Tribunal for the Former Yugoslavia. After outlining the reasons for adopt ing such an approach, which are classified as both positive and negative, the author offers an extensive analysis of the differences between the ICJ and ICTY, stressing the necessity to take these differences into account when considering the interconnection between the "World Court" and the ICTY as a specialized tribunal. The paper fo cuses on the need for a balanced and critical approach to the jurisprudence of the ICTY as regards genocide, by differentiating between the Tribunal's factual and legal findings.The author insists that a substantive criterion, not a formal one, must be ap plied with a view to the proper assessment of the factual findings of the Tribunal in accordance with the standards of judicial reasoning of the ICJ. As regards the treat ment of the ICTY's legal findings which relate to genocide, it is stressed that their uncritical acceptance would compromise the determination of the relevant rules of the Genocide Convention by the Court. Namely, the law applied by the ICTY as re gards the crime of genocide is not equivalent to the relevant law established by the Convention and may be understood as its progressive development rather than its application.

Key words: *Genocide. International Court of Justice. International Criminal Tribunal for the Former Yugoslavia. Security Council Resolution 827.*

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1. INTRODUCTION

Following the filing of the Application against the FRY in the *Bosnian Genocide case*, on the basis of Article IX of the Genocide Convention, the International Court of Justice (ICJ) found itself on *terra incognita*. It had three possibilities at its disposal at the time:

(i) to pronounce itself incompetent, which was, perhaps, a solution closest to the letter of the Convention, although it contained a negative connotation in terms of the Court's judicial policy, implying that the World Court renounces making its contribution to the settlement of the disputes relating to the interpretation and application of the Convention constituting a part of *corpus juris cogentis*;

(ii) to pronounce itself competent to entertain the case, acting as a criminal court, some kind of a judicial counterpart to the French administrative court in a dispute of full jurisdiction (*le contentieux de pleine juridiction*). Legal obstacles for the Court to act in such a way do not exist. As a court of general jurisdiction it was in a position, like the courts in the continental judicial system which does not know the strict division into criminal and civil courts, to treat the issue of individual criminal responsibility for genocide as a preliminary part of the issue of the responsibility of a State for genocide. This possibility is additionally strengthened, representing even, in the light of logic and legal considerations, the most appropriate solution, in the frame of the *dictum* of the Court that a State, too, can commit genocide[1]; or,

(iii) to opt for a middle-of-the-road position, limiting itself to the issue of State responsibility, without entering, at least not directly, into the area of individual criminal responsibility. Such position is essentially based on the dichotomy of individual criminal responsibility for the committed act of genocide/State responsibility, in terms of the general rules of responsibility of a State for wrongful acts. The logic of dichotomy *in concreto* implies, or may imply, the establishment of a jurisprudential connection with the judgments of the International Criminal Tribunal for the Former Yugoslavia (ICTY). Judge Tomka, in his Separate Opinion to the 2007 Judgment, outlined the rationale of this connection in terms:

"The International Court of Justice has no jurisdiction over the individual perpetrators of those serious atrocities. Article IX of the Genocide Convention confers on the Court jurisdiction to determine whether the Respondent complied with its obligations under the Genocide Convention. In making this determination in the present case, the Court was entitled to draw legal consequences from the judgments of the ICTY, par-

[1] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, *I.C.J. Reports 2007*, 113 114, paras. 166 167.

ticularly those which dealt with charges of genocide or any of the other acts proscribed in Article III. Only if the acts of the persons involved in the commission of such crimes were attributable to the Respondent could its responsibility have been entailed. The activity of the Court has thus complemented the judicial activity of the ICTY in fulfilling the Court's role in the field of State responsibility for genocide, over which the ICTY has no jurisdiction. Hopefully, the activities of these two judicial institutions of the United Nations, the Court remaining the principal judicial organ of the Organization, contribute in their respective fields to their common objective – the achievement of international justice – however imperfect it may be perceived".[2]

It appears that the Court opted for this third possibility and applied it both in the *Bosnian Genocide case* and in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia).

2. REASONS UNDERLYING THE COURT'S APPROACH

It seems that the reasons underlying the choice of the Court for the third option are dual – positive and negative.

The main positive reasons could be the following:

primo, the crime of genocide, due to its specific collective nature, entails cumulatively the responsibility of individuals and that of the State;

secundo, it respects both the competence of the ICTY and the limitations on the judicial activity of the Court, which is, true, relatively limited to dealing with international responsibility for genocide;

tertio, enabling interconnecting international jurisdictions relating to genocide for the purpose of "[u]nity of substantive law as a remedy for jurisdictional fragmentation".[3]

quarto, opening space for "integrating the mandate and methodologies of international courts".[4]

[2] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Separate Opinion of Judge Tomka, 351, para. 73.

[3] E. Cannizzaro, "Interconnecting International Jurisdictions: A Contribution from the Genocide Decision of the ICJ", *European Journal of Legal Studies* 1/2007.

[4] D. Groome, "Adjudicating Genocide: is the International Court of Justice Capa ble of Judging State Criminal Responsibility?", *Fordham International Law Journal* 31/2008, 976.

The negative reasons relate to the capability of the Court, in practical terms, to act as a criminal court and the avoidance of competing jurisdiction with the fellow court – the ICTY.

Although the Court "can and does have much to say on matters of criminal justice",[5] its proper judicial activity in genocide cases calls for institutional and methodological accommodation, in particular as regards evidential matters. It appears that the Court considered competing jurisdiction with the ICTY undesirable, not only because of the problems of principle regarding competing jurisdiction in the legal environment of the international community which does not know the judicial system *stricto sensu*, but also because of the fact that the ICTY was established by the Security Council on the basis of Chapter VII of the Charter of the United Nations.

In principle, "interconnection" with a specialized tribunal such as the ICTY can be desirable and productive for the ICJ. However, it must not ignore the substantial differences between the two bodies and the proper effects deriving from these differences.

3. DIFFERENCES BETWEEN ICJ AND ICTY

The differences are many and range from those of a judicial nature and concerning the adjudicative function to judicial reasoning.

3.1. Differences relating to judicial nature

The International Court of Justice is a "World Court", established in accordance with a general multilateral treaty as the principal judicial organ of the United Nations.

Although a principal organ of the United Nations, coexisting with the other principal organs of the world Organization on the basis of Article 7, paragraph 1 of the Charter, the International Court of Justice is primarily the "principal judicial organ",[6] and "[t]he formula 'principal judicial organ' stresses the independent status of the Court in the sense that it is not subordinate or accountable to any external authority in the exercise of its judicial functions".[7]

The ICTY, for its part, is a specialized, criminal tribunal established by Resolution 827 of the Security Council, whose competence is limited

[5] K. J. Keith, "The International Court of Justice and Criminal Justice", *International and Comparative Law Quarterly* 59/2010, 895.

[6] UN Charter, Art. 92.

[7] S. Rosenne, *The Law and Practice of the International Court* 1920 2005, Vol. I, 2006, 141.

in all relevant aspects – *ratione materiae, ratione personae et ratione loci* – representing, basically, an "*ad hoc* measure" aiming to "contribute to the restoration and maintenance of peace"[8] or, promoting the idea of selective justice *versus* universal justice as inherent in the very essence of law and the judiciary. In the light of that fact, the ICTY has, actually, been established as an subsidiary organ of the Security Council, which is also reflected, *inter alia*, in its function according to Security Council resolution 827. It raises the question of its legitimacy, to which no proper legal answer has been provided to this day. The ICTY itself, in the *Tadić* case, reacting to the argument of the defence that the tribunal was "not established by law", as required, *inter alia*, by the International Covenant on Civil and Political Rights, pointed out that, in terms of the principle of *compétence de la compétence*, it had the inherent jurisdiction to determine its own jurisdiction.[9]

The position taken by the Appeals Chamber can hardly be considered satisfactory, for at least two reasons.

Primo, the principle of *compétence de la compétence* is not an omnipotent principle capable of transforming illegitimacy into legitimacy, illegality into legality or vice versa. It is simply a basic functional and structural principle inherent in any adjudicatory body, whether a regular court or any other body possessing adjudicatory powers. The principle is, as pointed out by United States Commissioner Gore in the Betsey case, "indispensably necessary to the discharge of any . . . duties" for any adjudicatory body.[10]

As such, the principle of *compétence de la compétence*, operating within the particular judicial structure, is neutral as regards the legitimacy or illegitimacy of the adjudicating body.

Secundo, even, if *arguendo*, the principle of *compétence de la compétence* is capable of serving as a basis of legitimacy of the ICTY, the finding of the Appeals Chamber in the *Tadić* case does not appear sufficient in that regard in the light of the fundamental principle – *nemo iudex in causa sua*. The proper forum for a proper assessment of legitimacy of the ICTY is the ICJ which, however, avoided explicit pronouncement in that regard (some other models of judicial review and of UN constitutional interpretation are also possible).[11]

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[8] UN Security Council Resolution 827 (1993), Document S/RES/827, 25 May 1993, Preamble.

[9] *Tadić*, IT 94 1, Appeals Chamber, Decision on the Defence Motion for Inter locutory Appeal on Jurisdiction, 2 October 1995, paras. 18 19

[10] J. B. Moore (ed.), *International Adjudications, Ancient and Modern, History and Documents, Modern Series*, New York 1929, 183.

[11] See J. Alvarez, "Nuremberg Revisited: The Tadić Case", *European Journal of International Law* 7/1996, 250.

3.2. Differences relating to adjudicatory functions

The differences as regards adjudicatory functions between the ICJ and the ICTY are particularly evident in relation to international peace and security.

The activity of the ICTY is strongly linked with international peace and security.

Security Council Resolution 827, establishing the ICTY, proceeded from the qualification that the situation in the territory of the former Yugoslavia "constitute[d] a threat to international peace and security" and that the establishment of the Tribunal "would contribute to the restoration and maintenance of peace".[12] The Appeals Chamber, in the *Tadić case*, concluded that "the establishment of the International Tribunal *falls squarely within the powers of the Security Council under Article 41*"[13] (emphasis added). The conclusion in *Tadić* has been substantiated in the *Milošević case* in which the Trial Chamber found that the establishment of the International Tribunal "is, in the context of the conflict in the country at that time, *pre-eminently a measure to restore international peace and security*"[14](emphasis added).

The instrumental nature of the ICTY is not a subjective perception of the Tribunal itself, but derives from the act by which it has been established. Resolution 827 provides, *inter alia*, that the establishment of the Tribunal, "in the particular circumstances of the former Yugoslavia", as "an *ad hoc* measure by the Council".[15] Such perception of the nature of the Tribunal is also reflected in the timing of the establishment of the Tribunal by the Security Council. May 1993 was the apex of the conflict in the former Yugoslavia, so that the establishment of the Tribunal was a part of international peace operations backed by the authority and enforcement power of the Security Council. Therefore, it can be said that the "overall purpose of the tribunals [ICTY and ICTR] coincides with other forms of humanitarian intervention with respect to humanitarian concern for victims in conflict-ridden areas. The ICTY's relationship with

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[12] UN Security Council Resolution 827 (1993), Doc. S/RES/827, 25 May 1993, Preamble.

[13] *Tadić*, para. 36.

[14] *Milošević*, IT 02 54, Trial Chamber, Decision on Preliminary motions, 8 No vember 2001, para. 7; as an aside, such a conclusion could be controversial in light of the provision of Article 41 of the Charter, which a limine enumerates the powers of the Secu rity Council proving that measures "may include complete or partial interruption of eco nomic relations and of rail, sea, air, postal, telegraphic, radio, and other means of com munication, and the severance of diplomatic relations."

[15] UN Security Council Resolution 827 (1993), Doc. S/RES/827, 25 May 1993, Preamble.

peacekeeping forces in Bosnia-Herzegovina during the Bosnian war indicates a critical juncture of judicial organs with military forces".[16]

As such, the ICTY essentially represents a "non-military form of intervention by the international community".[17]

Although there exists an indisputable nexus between law and peace, the instrumental role of the adjudicatory body in the establishment of peace hardly represents an inherent feature of judicial activity of the court of law. At least of the International Court of Justice.

Restoration of peace is pre-eminently a political matter achieved by way of measures which are *stricto sensu* non-legal or extra-legal. The notions of "peace" and "justice" do not necessarily coincide. More often than not, peace is achieved by means of unjust solutions. Moreover, law can even be an obstacle to the attainment of peace, as is shown by peace treaties. If the rules of the law of treaties were to be respected as regards peace treaties, the peace achieved through peace treaties could not be legally established because, as a rule, it is based on superiority on the battle-field; which is, in terms of the law of treaties, the essential lack of consent (*vice de consentement*).

The international practice "has developed two principal methods for settling international affairs and for dealing with international disputes. One is purely political. The other is legal. There are degrees of shading off between them, and various processes for the introduction of different types of third-party settlement. Because of this fundamental difference between the two approaches of settling international disputes, analogies from one to the other are false".[18]

The role of the Court is manifested in its "bolstering of the structure of peace . . . through its advisory opinions, [as well as through judgments] through the confidence which it inspired, and through the encouragement which it gave to the extension of the law of pacific settlement, rather than through its disposition of particular disputes".[19]

3.3. Judicial reasoning

It seems understandable that such a position of the Tribunal is also reflected in its judicial reasoning. In the interpretation of relevant legal rules, the Tribunal strongly, even decisively, relies on the respective interpretation of the Security Council and that of the chief administrative of-

[16] H. Shinoda, "Peace building by the Rule of Law: An Examination of Interven tion in the Form of International Tribunals", *International Journal of Peace Studies* 7/2002.

[17] *Ibid*., 15.

[18] S. Rosenne, 4 5.

[19] M. Hudson, *International Tribunals: Past and Future*, 1944, 239.

ficer of the world Organization – the Secretary-General of the United Nations. By reasoning in this way, the Tribunal in fact conducts itself loyally towards its founder. There can be no objection to that in the light of the circumstances surrounding the establishment and adjudicatory function of the ICTY, but the question posed is whether such an approach fits within the standards of judicial reasoning of the Court.

In the *Blaškić* case, the Tribunal found the decisive argument relating to "existing international humanitarian law" in the assertions of the Security Council and the Secretary-General of the United Nations. The Tribunal stated *inter alia*:

"It would therefore be wholly unfounded for the Tribunal to now declare unconstitutional and invalid part of its jurisdiction which the Security Council, with the Secretary-General's assent, has asserted to be part of existing international humanitarian law".[20]

The Tribunal found that in cases where there is no manifest contradiction between the Statute of the ICTY and the Report of the Secretary-General "the Secretary-General's Report ought to be taken to provide an authoritative interpretation of the Statute".[21]

The Tribunal is inclined to attach decisive weight to interpretative declarations made by Security Council members:

"In addressing Article 3 the Appeals Chamber noted that where interpretative declarations are made by Security Council members and are not contested by other delegations 'they can be regarded as providing an authoritative interpretation' of the relevant provisions of the Statute. Importantly, several permanent members of the Security Council commented that they interpret 'when committed in armed conflict' in Article 5 of the Statute to mean 'during a period of armed conflict'. These statements were not challenged and can thus, in line with the Appeals Chamber Decision, be considered authoritative interpretations of this portion of Article 5."[22]

4. THE NEED FOR A BALANCED AND CRITICAL APPROACH TO THE JURISPRUDENCE OF THE ICTY

The presented reasons require a balanced and critical approach to the jurisprudence of the ICTY as regards genocide. Balanced in the sense of a clear distinction between factual and legal findings of the Tribunal.

[20] *Blaškić*, IT 95 14, Trial Chamber, Decision on the defence motion to strike por tions of the amended indictment alleging "failure to punish" liability, 4 April 1997, para. 8.

[21] *Tadić*, IT 94 1, Appeal Judgment, 15 July 1999, para. 295.

[22] *Tadić*, IT 94 1, Trial Judgment, 7 May 1997, paras. 630 631.

4.1. Factual findings of the ICTY

The factual findings of the Tribunal are a proper point for the establishment of interconnection between two international jurisdictions which relate to genocide.

The methodology and techniques of a specialized, criminal judicial body constitute the basis of the high quality of factual findings of the Tribunal. The Court took cognizance of this, having found in the *Bosnian Genocide* case that it "should in principle accept as highly persuasive relevant findings of fact made by the Tribunal at trial".[23] The heavy reliance on factual findings of the Tribunal is, moreover, based on a formal, and not a substantive, criterion. This clearly derives from the pronouncement that "the Court cannot treat the findings and determinations of the Trial Chamber as being on an equal footing with those of the Appeals Chamber. In cases of disagreement, it is bound to accord greater weight to what the Appeals Chamber Judgment says".[24] In this sense, the position of the Tribunal as regards claims made by the Prosecutor can also be mentioned. The Court stated in a robust way that "as a general proposition the inclusion of charges in an indictment cannot be given weight".[25] The proposition has been mitigated in the present Judgment by the qualification that "the fact that the ICTY Prosecutor has never included a count of genocide in the indictments in cases relating to Operation 'Storm' does not automatically mean that Serbia's counter-claim must be dismissed".[26]

Reliance on ICTY factual findings must have precise limits. It cannot be considered as a formal verification of factual findings of the Tribunal nor as a simple rejection based on formal criteria.

Instead of a formal criterion, a substantive one must be applied with a view to the proper assessment of the factual finding of the Tribunal in accordance with the standards of judicial reasoning of the Court.

In addition to the general reasons which necessitate such an approach in the case at hand, of relevance could also be an additional reason which relates to the alleged connection between the institution of proceedings before the Court by Croatia and the treatment of Croatian citizens before the Tribunal, as claimed by Professor Zimmerman.[27] This claim was ultimately left unanswered by Croatia, nor has it been answered

[23] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 134, para. 223.

[24] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, 3 February 2015, para. 471.

[25] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 132, para. 217.

[26] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), para. 461.

[27] CR 2014/14, 11 (Zimmermann).

by the ICTY itself, despite it having been made publicly in the Court's Great Hall of Justice.

4.2. Legal findings of the ICTY

In contrast to factual findings of the ICTY, the treatment of its legal findings which relate to genocide needs to be essentially different. The Court should not allow itself to get into the position of a mere verifier of legal findings of the Tribunal. For, it would thus seriously jeopardize its judicial integrity and, even, the legality of its actions in the disputes regarding the application of the Genocide Convention.

A number of cogent considerations necessitate a critical approach to the legal findings of the Tribunal.

In dealing with the disputes relating to genocide on the basis of Article IX of the Genocide Convention, the Court is bound to apply only the provisions of the Convention as the relevant substantive law. In that regard, the Judgment states *expressis verbis*:

"since Article IX provides for jurisdiction only with regard to 'the interpretation, application or fulfillment of the Convention, including . . . the responsibility of a State for genocide or for any of the other acts enumerated in article III', *the jurisdiction of the Court does not extend to allegations of violations of the customary international law on genocide*. It is, of course, well established that the Convention enshrines principles that also form part of customary international law. Article I provides that '[t]he Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law'. The Court has also repeatedly stated that the Convention embodies principles that are part of customary international law. That was emphasized by the Court in its 1951 Advisory Opinion . . . That statement was reaffirmed by the Court in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro, Judgment, I.C.J. Reports 2007* (I), pp. 110–111, para. 161)"[28] (emphasis added).

The position of the ICTY as regards applicable substantive law seems different.

In its judgment in the Krstić case, which served as the basis for the Court's conclusion that genocide was committed in Srebrenica, the Trial Chamber stated that it "must interpret Article 4 of the Statute taking into account *the state of customary international law at the time the events in Srebrenica took place*"[29] (emphasis added).

[28] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), para. 87.

[29] *Krstić*, IT 98 33, Trial Chamber, Judgment, 2 August 2001, para. 541.

The Trial Chamber referred to a variety of sources in order to arrive at the definition of genocide that it applied:

"The Trial Chamber first referred to the codification work undertaken by international bodies. The Convention on the Prevention and Punishment of the Crime of Genocide . . . whose provisions Article 4 adopts verbatim, constitutes the main reference source in this respect. Although the Convention was adopted during the same period that the term 'genocide' itself was coined, the Convention has been viewed as codifying a norm of international law long recognised and which case-law would soon elevate to the level of a peremptory norm of general international law (*jus cogens*). The Trial Chamber has interpreted the Convention pursuant to the general rules of interpretation of treaties laid down in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. As a result, the Chamber took into account the object and purpose of the Convention in addition to the ordinary meaning of the terms in its provisions. As a supplementary means of interpretation, the Trial Chamber also consulted the preparatory work and the circumstances which gave rise to the Convention. Furthermore, the Trial Chamber considered the international case-law on the crime of genocide, in particular, that developed by the ICTR. The Report of the International Law Commission (ILC) on the Draft Code of Crimes against Peace and Security of Mankind received particular attention. Although the report was completed in 1996, it is the product of several years of reflection by the Commission whose purpose was to codify international law, notably on genocide: it therefore constitutes a particularly relevant source for interpretation of Article 4. The work of other international committees, especially the reports of the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the UN Commission on Human Rights, was also reviewed. Furthermore, the Chamber gave consideration to the work done in producing the Rome Statute on the establishment of an international criminal court, specifically, the finalised draft text of the elements of crimes completed by the Preparatory Commission for the International Criminal Court in July 2000. Although that document post-dates the acts involved here, it has proved helpful in assessing the state of customary international law which the Chamber itself derived from other sources. In this regard, it should be noted that all the States attending the conference, whether signatories of the Rome Statute or not, were eligible to be represented on the Preparatory Commission. From this perspective, the document is a useful key to the *opinio juris* of the States. Finally, the Trial Chamber also looked for guidance in the legislation and practice of States, especially their judicial interpretations and decisions."[30]

It appears that the fact that Article 4 of the ICTY Statute ad verbatim reproduces Articles II and III of the Genocide Convention does not

[30] *Ibid.*

automatically mean that the law of genocide as contemplated by the ICTY Statute is equivalent to the law of genocide established by the Convention. Article 4 of the Statute is but a provision of the Statute, which is itself a unilateral act of one of the political organs of the United Nations. As such, the provision cannot change its nature simply by reproducing the text of Articles II and III of the Convention, without any *renvoi* to the Genocide Convention. Consequently, interpretation of Article 4 of the Statute on the basis *inter alia* of the *travaux preparatoires* of the Convention, on which the ICTY amply draws, is essentially misleading. It reflects the difference in judicial reasoning between the ICJ and the ICTY.[31]

The interpretation of relevant provisions of the Convention can, however, be one thing and the application of these provisions quite another. Thus, the interpretation provided in paragraphs 87 and 88 of the Judgment appears to be in discrepancy with the positions of the Court in the *Bosnian Genocide* case, which, as the first case alleging acts of genocide dealt with by the ICJ, represents some sort of a judicial parameter in genocide cases before the Court.

In the *Bosnian Genocide* case, conclusio of the Court that genocide was committed in Srebrenica was based on the ICTY Judgment in the *Krstić* case,[32] which was decided by the ICTY on the basis of "customary international law at them time the events in Srebrenica took place".[33]

In connection with "customary law of genocide", two legal questions are posed which, due to their specific weight, transcend the question of customary law of genocide, affecting the very understanding of custom, as one of the main sources of international law, and the relationship between the Genocide Convention and customary law emerging, or which could merge, following the adoption of the Convention.

The ICTY perception of custom as a source of international law is highly innovative, going well beyond the understanding of custom in the jurisprudence of the ICJ.

According to the well settled jurisprudence of the ICJ, which follows the provision of its Statute referring to "international custom, as evidence of a general practice accepted as law",[34]custom is designed as a source based on two elements: general practice and *opinion iuri sine necessitatis*. As it pointed out in the Nicaragua case: "[b]ound as it is by

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[31] See, para. 3.3 above.

[32] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 163 166, paras. 292 297.

[33] *Krstić*, para. 541.

[34] Art. 38, para. 1 (b).

Article 38 of its Statute . . . the Court may not disregard *the essential role played by general practice*"[35] (emphasis added).

The jurisprudence of the ICTY generally moves precisely in the opposite direction, giving the predominant role to *opinio juris* in the determination of custom[36] and, thus, showing a strong inclination towards the single element conception of custom!

In doing so, it considers *opinio juris* in a manner far removed from its determination by the Court. For, in order "to constitute the *opinio juris* . . . two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it".[37] *Opinio juris* cannot be divorced from practice because "[t]he Court must satisfy itself that the existence of the rule in the opinio juris of States is confirmed by practice".[38]

The ICTY has often satisfied itself with "extremely limited case law" and state practice.[39]

A large part of law qualified by the ICTY as customary law is based on decisions of municipal courts[40] which are of a limited scope in the jurisprudence of the Court.[41] In case concerning *Certain German Interests in Polish Upper Silesia*, the Permanent Court stated that national judicial acts represent "facts which express the will and constitute the activities of States".[42]

Hidden under the surface of the general characteristic of the ICTY's approach to customary law, which is dubious *per se*, is incoherence and subjectivism. It has been well noted that differently-composed Chambers of the ICTY have utilized different methods for identifying and interpreting customary law, even in the same case, including simply refer-

[35] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, *I.C.J. Reports 1986*, 97 98, para. 184.

[36] G. Mettraux, *International Crimes and the ad hoc Tribunals*, 2005, 13 fn. 4.

[37] North Sea Continental Shelf, Judgment*, I.C.J. Reports 1969*, 44, para. 77.

[38] Military and Paramilitary Activities in and against Nicaragua, 98, para. 184.

[39] A. Nollkaemper, "The Legitimacy of International Law in the Case Law of the International Criminal Tribunal for the former Yugoslavia" in: T.A.J.A. Vandamme, J.H. Reestman (eds.), *Ambiguity In the Rule of Law: The Interface between National and In ternational Legal Systems*, 2001, 17.

[40] A. Nollkaemper, "Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY" in G. Boas, W.A. Schabas (eds.), *Interna tional Criminal Law Developments in the Case Law of the ICTY*, 2003, 282.

[41] H. Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence*, Vol. I, 2013, 248.

[42] Certain German Interests in Polish Upper Silesia Judgment, 1926*, P.C.I.J., Ser. A, No. 7*, 19.

ring to previous ICTY decisions themselves as evidence of a customary rule.[43] In addition, the ICTY has failed to consistently and rigorously address the concepts of state practice and *opinio juris* by, *inter alia*, failing to refer to evidence of either, referring merely to the bulk existence of national legislation as evidencing custom without addressing opinio juris or framing policy or "humanity" related rationales as *opinio juris*.[44]

The establishment of customary law in the ICTY resembles in many aspects a quasi-customary law exercise based on deductive reasoning driven by meta-legal and extra-legal principles. As can be perceived "many a Chamber of the *ad hoc* Tribunals have been too ready to brand norms as customary, without giving any reason or citing any authority for that conclusion".[45] This has resulted in judicial law-making through purposive, adventurous interpretation,[46] although, according to the Secretary-General, on the establishment of the ICTY, the judges of the Tribunal could apply only those laws that were beyond doubt part of customary international law.[47] Being in substantial conflict with custom, as perceived by the ICJ, the ICTY perception of custom, applied in its jurisprudence, opens the way to a fragmentation of international criminal law and, even, general international law.[48]

It is customary law to which is usually attributed the dynamic capacity in the development of treaty law, both as regards the scope of the established obligation and as regards its content. The question of modification of the substantive rules of the Convention in the form of custom is, as a rule, a neglected question although it seems to be of far-reaching importance.

Is custom capable of modifying a rule which belongs to *corpus juris cogentis*?

Given the inherent characteristics of customary law, on the one hand, and legal force of the rules of *corpus juris cogentis*, on the other, the answer to this question is necessarily negative.

The other side of the flexibility of custom, as a positive characteristic from the aspect of the creation of peremptory norms, is the fact that

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[43] N. Arajärvi, *The Changing Nature of Customary International Law: Methods of Interpreting the Concept of Custom in International Criminal Tribunals*, 2014, 117.

[44] *Ibid*., 118.

[45] G. Mettraux, 15.

[46] M. Swart, "Judicial Law making at the ad hoc Tribunals: The Creative Use of Sources of International Law and 'Adventurous Interpretation'", *Heidelberg Journal of International Law* 70/2010, 463 468, 475 478.

[47] UN Security Council, *Report of the Secretary General Pursuant to Paragraph 2 of Security Council resolution 808 (1993),* Doc. S/25704, 3 May 1993, para. 34.

[48] See Mettraux, 15, citing the case concerning Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, *I.C.J. Reports 2002*, 3.

customary rules, as a rule, come into existence slowly and painstakingly. This fact, besides the vagueness and imprecision of custom, is a big handicap in relation to an international treaty, in particular at a time of rapid and all-embracing changes in the overall set of relations regulated by international law. In the words of Friedmann, "custom is too clumsy and slow moving a criterion to accommodate the evolution of international law in our time"[49].

Precisely because of this, the advantages of custom as a source of existing peremptory norms of general international law represent, at the same time, and in certain cases, also a difficulty, if not an obstacle, to the formulation of new peremptory norms or the modification of those already in existence.

Namely, the very mechanism of the creation of an international customary rule by way of permanent, continual repetition of certain behaviour, coupled with the *opinio juris*, is certainly not in full harmony with the status enjoyed by the peremptory norm of general international law; in particular in relation to consequences inherent in such a norm in relation to contrary acts undertaken by a State or a group of States. The customary rule implies certain regularity as a characteristic of particular forms of behaviour which constitute the being of the material element of custom; a regularity on the basis of which the subjects of international law perceive this practice as an expression of the obligatory rule of conduct. On the other hand, such regularity should have overall scope, that is, it must be included, directly or indirectly, in the practice of the overwhelming majority of member countries of the international community. In view of the fact that the custom came into being diffusely, general practice is achieved through the accumulation of varied individual and common behaviours and acts.[50]

However, it follows from the character of a norm of *jus cogens* that all acts which are contrary to it are null and void *ab initio*. In other words, such practice does not possess legal validity; therefore it cannot represent a regular form of the coming into existence of a norm of *jus cogens superveniens* in the matter which is already covered by the cogent régime.

The inherent incapability of custom to modify the existing rule of *jus cogens* has been diagnosed in a subtle way by the International Law Commission. In the commentary to Draft Article 50,[51] the Commission, having found that "it would be clearly wrong to regard even rules of jus cogens as immutable and incapable of modification . . .", concludes that

[49] W. Friedmann, *The Changing Structure of International Law*, 1964, 122.

[50] See, Special Rapporteur M. Wood, "Second report on identification of customary international law", International Law Commission, Doc. A/CN.4/672, 22 May 2014.

[51] Article 53 of the Vienna Convention on the Law of Treaties.

"a modification of a rule of *jus cogens* would today most probably *be effected through a general multilateral treaty* . . ."[52] (emphasis added).

Only "instant custom" would possess the proper capacity for modification of an existing *jus cogens* rule, a conception of custom that has not become part of positive law.

The perception of customary law developed by the ICTY is highly destructive as regards the normative integrity of international law. Being essentially a subjective perception of customary law divorced from its deeply rooted structure which derives from the Statute of the Court as part of the international *ordre public*, actually a judicial claim of custom contradictory not only *per se* but also *in se*, it generates diversity in the determination of customary law, including the rules of *jus cogens* of a customary nature.

It can be qualified as the most serious challenge to the construction of customary law in recent history of international law. Reducing "general practice" to isolated judgments of national courts or, even, to statements in the United Nations Security Council and deriving *opinio juris* from these acts, or, going even further, simply asserting that a certain rule is of a customary nature, not only contradicts the positive-legal conception of custom reflected in the jurisprudence of the Court, but also trivializes the will of the international community as a whole as the basis of obligations in international law, in particular obligations of a customary nature. In sum, the ICTY's perception of customary law as a demonstration of judicial fundamentalism would seem to incarnate Lauterpacht's metaphor of custom as a metaphysical joke.[53]

The dangers of the ICTY's perception of customary law can hardly be overestimated. The effects of such a perception are not limited to the judicial activity of the ICTY and other *ad hoc* bodies. For a number of reasons, including, *inter alia*, the inclination to deductive reasoning based on meta-legal and, even, extra-legal considerations, not even the Court is immune to such perception.

Furthermore, the pronouncement of the Court that a customary law of genocide existed before the adoption of the Genocide Convention is unclear.[54] The arguments on which relies the *conclusio* of the Court are not excessively persuasive. The arguments of the Court are basically:

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[52] United Nations Conference on the Law of Treaties, "Draft articles on the Law of Treaties with commentaries, adopted by the International Law Commission at its Eight eenth Session", First and Second Sessions, Vienna, 26 March 24 May 1968 and 9 April 22 May 1969, Official Records, Documents of the Conference, 68, para. 4.

[53] H. Lauterpacht, "Sovereignty over Submarine Areas", *British Yearbook of International Law* 27/1950, 394.

[54] See case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), paras. 87 and 88.

(i) that it is "well established that the Convention enshrines principles that also form part of customary international law"; and

(ii) that Article I provides that "the Contracting Parties confirm that genocide ... is a crime under international law"[55].

As far as the first argument is concerned, it is, in fact, a strong assertion which lacks precision and proper evidence. In its 1951 Advisory Opinion, the Court rightly found "denial of the right of existence of entire human groups", which is *genus proximum* of genocide, contrary "to *moral law and to the spirit and aims of the United Nations*"[56] (emphasis added). It appears that, in the opinion of the Court, "the principles underlying the Convention are principles which are recognized by civilized nations . . .", in essence, "most elementary principles of morality".[57]

Apart from the question as to whether there is equivalency between legal principles stricto sensu and "moral law" or the "most elementary principles of morality", it appears that the latter are the guiding principles for the creation of legal rules on genocide, rather than legal rules per se. The term "customary law on genocide" necessarily implies only rules or rules and principles. Principles, no matter how fundamental they can be, cannot per se constitute any law whatsoever, including in respect of the law on genocide. Or, at least, not operational law or law in force.

The second argument is based on the meaning of the word "confirm". As it is only possible to confirm something that exists, the Genocide Convention would express the already constituted law of genocide or, in a technical sense, it would represent codification of customary law of genocide.

However, there may be a different interpretation. For, it seems that the subject of "confirmation" is something else and not customary law of genocide.

On 11 December 1946 the United Nations General Assembly adopted resolution 96 (I) on the Crime of Genocide which, *inter alia*, "Affirms that *genocide is a crime under international law* which the civilized world condemns, and for the commission of which principals and accomplices – whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds – are punishable" (emphasis added).

The Preamble of the Genocide Convention states, *inter alia*, that "the Contracting Parties, having considered *the declaration* made by the General Assembly of the United Nations in its resolution 96 (I) dated 11

[55] *Ibid*., para.87.

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

[57] *Ibid.*

December 1946 that *genocide is a crime under international law*" (emphasis added).

It could be said that the relation between resolution 96 (I) and the Genocide Convention is the embryo of the two-phase legislative activity which *tractu temporis* turned into a model for the creation of general multilateral treaty regimes in United Nations practice (*exempli causa*, General Assembly resolution 1962 (XVIII), Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, 13 December 1963; Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies 1967; General Assembly resolution 217 (III), A Universal Declaration of Human Rights, 10 December 1948; International Covenant on Civil and Political Rights 1966; International Covenant on Economic, Social and Cultural Rights 1966). In this model, resolutions of the United Nations General Assembly, adopted unanimously or by the overwhelming majority, declare the general principles relating to the particular subject, these principles become part of international public policy, and are finally transformed into binding legal rules in the form of general international treaty, thus constituting what has been referred to by Judge Alvarez as "international legislation".[58]

If, *arguendo*, customary law of genocide existed before the adoption of the Genocide Convention, it is unclear on what practice, in particular general practice, it was based? The Court did not indicate any evidence of the corresponding practice before the adoption of the Convention.

Moreover, the question may be posed why the corresponding practice, if it was constituted, was not respected by the Nuremberg and the Tokyo Tribunals which were established precisely at the time when that practice must have been constituted?

Does the thesis that customary law of genocide existed before the adoption of the Convention suggest that the Nuremberg and the Tokyo Tribunals were unaware of/it or did they, perhaps, intentionally ignore it?

5. CONCLUSION

Uncritical acceptance of the legal findings of the ICTY, essentially its verification, could result in compromising the determination of the relevant rules of the Genocide Convention by the Court.

[58] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, *I.C.J. Reports 1951*, Dissenting Opinion of Judge Alva rez, 49.

There exists a reason of an objective nature which produces, or may produce, a difference between the law of genocide embodied in the Genocide Convention and the law of genocide applied by the *ad hoc* tribunals.

The law applied by the ICTY as regards the crime of genocide cannot be considered equivalent to the law of genocide established by the Convention. In this regard, the jurisprudence of the ICTY can be said to be a progressive development of the law of genocide enshrined in the Convention, rather than its actual application. Article 4 of the ICTY Statute is but a provision of the Statute as a unilateral act of one of the main political organs of the fact that it does not contain any *renvoi* to the Genocide Convention, the provision cannot change its nature simply by reproducing the text of Article II of the Convention.

It is not surprising therefore that in the jurisprudence of the Court as regards the law on genocide there exist a discrepancy between the interpretation of the relevant provisions of the Convention expressing as a rule the letter of the Convention, and its application based on *in totto* acceptance of the ICTY's decision, that goes in the other direction.

I shall give two examples that concern the crucial provisions of the Convention.

The first example relates to the nature of the destruction of the protected group.

The Court notes that, in the light of the *travaux préparatoires*, the scope of the Convention is limited to the physical and biological destruction of the group.[59] The finding is consistently implemented in the Judgment as a whole.

Exempli causa the considers that "in the context of Article II, and in particular of its *chapeau*, and in light of the Convention's object and purpose, the ordinary meaning of 'serious' is that the bodily or mental harm referred to in subparagraph (b) of that Article must be such as to contribute to the physical or biological destruction of the group . . .".[60]

However, "destruction" as applied by ICTY in the *Krstić* and *Blagojević* cases, is a destruction in social terms rather than in physical and biological terms.

In the *Krstić* case the Trial Chamber found, inter alia, that the destruction of a sizeable number of military aged men "would inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica",[61] since "their spouses are unable to remarry and, conse-

[59] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), para. 136.

[60] *Ibid.*, para. 157, see also paras. 160, 163.

[61] *Krstić*, IT 98 33, Trial Judgment, 2 August 2001, para. 595.

quently, to have new children".[62] Such a conclusion, reflects rather the idea of a social destruction, rather than a physical or biological one.

The perception of destruction in social terms is even more emphasized in the *Blagojević* case. The Trial Chamber applied "[a] broader notion of the term 'destroy', encompassing also 'acts which may fall short of causing death'",[63] an interpretation which does not fit with the understanding of destruction in terms of the Genocide Convention. In that sense, the Trial Chamber finds support in the Judgment of the Federal Constitutional Court of Germany, which held *expressis verbis* that

"the statutory definition of genocide defends a supra-individual object of legal protection, i.e. the *social* existence of the group [and that] the intent to destroy the group . . . extends beyond physical and biological extermination . . . The text of the law does not therefore compel the interpretation that the culprit's intent must be to exterminate physically at least a substantial number of members of the group"[64] (emphasis and ellipses in original).

Thus perceived, the term "destruction", in the genocide definition can encompass the forcible transfer of population.[65]

The finding contradicts the *dictum* of the Court that "deportation or displacement of the members of a group, even effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement".[66]

Those findings of the ICTY served as a basis for the *conclusio* of the Court that Genocide was committed in Srebrenica.[67]

In addition, fortunately, the subjective character of destruction in a sociological sense is clearly shown precisely by the case of Srebrenica. One of the key arguments of the Tribunal in the *Krstić* case and the *Blagojević* case was that "destruction of a sizeable number of military aged men would inevitably result in the physical disappearance of the Bosnian Muslim population in Srebrenica".[68]

Life, however, proved the Tribunal's prediction wrong. Following the conclusion of the Dayton Agreement, the Muslim community in Srebrenica was reconstituted, so that today the number of the members of the two communities – the Muslim and the Serbian – is equalized. This is

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62 *Krstić*, IT 98 33, Appeal Judgment, 19 April 2004, para. 28.

63 *Blagojević and Jokić*, IT 02 60, Trial Judgment, 17 January 2005, para. 662.

64 *Blagojević et. al*., IT 02 60, Trial Judgment, 17 January 2005, para. 664.

65 *Ibid*., para. 665.

66 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), para. 190.

67 *Ibid*., paras. 296 297.

68 *Krstić*, IT 98 33, Trial Judgment, 2 August 2001, para. 595.

also evidenced by the fact that a representative of the Muslim community was elected Mayor at the last elections.

The other example relates to the relevance of customary law on genocide in disputes before the Court based on Article IX of the Genocide Convention.

In the present Judgment, the Court devoted considerable attention to the customary law on genocide and made proper conclusions in clear and unequivocal terms.

The Court stated in strong words that:

"[t]he fact that the jurisdiction of the Court in the present proceedings can be founded only upon Article IX has important implications for the scope of that jurisdiction. That Article provides for jurisdiction only with regard to disputes relating to the interpretation, application or fulfilment of the Genocide Convention, including disputes relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III of the Convention".[69]

The statement is supported by the following reasoning:

"any jurisdiction which the Court possesses is derived from Article IX of the Genocide Convention and is therefore confined to obligations arising under the Convention itself. Where a treaty states an obligation which also exists under customary international law, the treaty obligation and the customary law obligation remain separate and distinct (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 96, para. 179). Accordingly, unless a treaty discloses a different intention, the fact that the treaty embodies a rule of customary international law will not mean that the compromissory clause of the treaty enables disputes regarding the customary law obligation to be brought before the Court. In the case of Article IX of the Genocide Convention no such intention is discernible. On the contrary, the text is quite clear that the jurisdiction for which it provides is confined to disputes regarding the interpretation, application or fulfilment of the Convention, including disputes relating to the responsibility of a State for genocide or other acts prohibited by the Convention. Article IX does not afford a basis on which the Court can exercise jurisdiction over a dispute concerning alleged violation of the customary international law obligations regarding genocide".[70]

It should be noted that the position of the Court in that regard was couched in a similar, although more general, way, in the *Bosnian Genocide* case.

The Court stated that:

[69] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), para. 85.

[70] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), para. 88.

"[t]he jurisdiction of the Court in this case is based solely on Article IX of the Convention".[71]

True, the Court continued:

"[t]he jurisdiction of the Court is founded on Article IX of the Convention, and the disputes subject to that jurisdiction are those 'relating to the interpretation, application or fulfilment' of the Convention, but it does not follow that the Convention stands alone. In order to determine whether the Respondent breached its obligation under the Convention, as claimed by the Applicant, and, if a breach was committed, to determine its legal consequences, the Court will have recourse not only to the Convention itself, but also to the rules of general international law on treaty interpretation and on responsibility of States for internationally wrongful acts".[72]

However, it seems clear that the rules of general international law on treaty interpretation, for its object *in concreto*, can have only the Genocide Convention itself. These rules, as rules of interpretation of the Convention, cannot introduce through the back door customary law on genocide as applicable substantive law. As far as the rules on the responsibility of states for internationally wrongful acts, things seem to be equally clear. For, being essentially the secondary rules, the rules on the responsibility of states are "incapable" of modifying the substance of the primary rules contained within the Genocide Convention.

However, the ICTY's Judgment in the *Krstić* case was based, as the Tribunal stated *expressis verbis*, on "customary international law at the time the events in Srebrenica took place".[73]

It appears that the Court, having found that it "sees no reason to disagree with the concordant findings of the Trial Chamber and the Appeals Chamber"[74] in the *Krstić* and the *Blagojević* cases, has, in light of its pronouncement in paragraphs 87 and 88 of the Judgment, exceeded its jurisdiction, since Article IX confers jurisdiction *only* with respect to the "interpretation, application or fulfilment of the Convention . . . [and] the jurisdiction of the Court *does not extend to allegations of violation of the customary international law on genocide*"[75] (emphasis added) so that "Article IX *does not afford a basis* on which the Court can exercise jurisdiction over a *dispute concerning alleged violation of the customary international law obligations regarding genocide*"[76] (emphasis added).

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[71] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 104, para. 147.

[72] *Ibid*., para. 149.

[73] *Krstić*, IT 98 33, Trial Chamber, Judgment, 2 August 2001, para. 541.

[74] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 166, para. 296.

[75] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), para. 87.

[76] *Ibid*., para. 88.

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LEGAL STANDING AND CIVIC IDENTITY OF ATHENIAN MERCENARIES A CASE STUDY

The author examines different issues considering legal and social standing of mercenaries, mostly being focused upon the fourth court speech (On the Estate of Nicostratus) of the Athenian speech writer Isaeus, teacher of Demosthenes. On the one hand, he reveals a number of neglected data about mercenaries in terms of their legal activities in and out of their native polis. On the other hand, based on those findings and on other sources, the author studies the issue of Athenian civic identity in the case of mercenaries who spent years or decades out of their city state without participating in the political life of the polis. In that context he examines the question of whether a mercenary was regarded as "politikos" or "idiotes". As civic identity was mostly based on the citizenship, the author claims that mercenaries enjoyed a kind of sub identity or "frozen civic identity".

Key words: *Isaeus. Law of inheritance. Athenian citizenship. Politikos (an thropos). Idiotes. Sub identity. Frozen civic identity.*

1. THRIVING OF MERCENARIES IN ANCIENT GREECE

Ancient Greece and its neighbors were among the first civilizations where mercenaries were employed on a quite large scale. According to the tradition, the first mention of professional soldiers in history is connected to the biblical Jewish king David who in the 10th century B.C.

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employed as mercenaries people from Crete who spoke Greek language.[1] Although Greece was not the cradle of mercenary soldiering, Greek mercenaries were among the most famous and preferred soldiers who fought for money. Citizens of different Greek city-states were engaged all around the Mediterranean area and in Asia Minor for different "employers". Numerous Greek professional soldiers participated during the 5th century B.C. in the Sicilian wars between the Carthaginians and Greek colonies in *Magna Graecia*, either on the side of Syracuse against Carthage or fighting against Syracuse having been engaged by the Carthaginians. Greeks became renowned mercenaries particularly in Persia, both in Persian internal conflicts[2] or during the conquest of other countries.

The greatest expansion of mercenary service took place in the 4th century B.C. along with the economic crisis that affected many city-states including Athens.[3] Many professional Greek soldiers were hired by Philip II and took part in the battle of Chaeronea in 338 B.C. Alexander the Great took advantage of even broader use of professional soldiers from Greece in his conquest of Persia. Mercenaries constituted the core of Hellenistic armies.[4] Professional and experienced soldiers hired by Alexan-

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[1] Paul Cartlege, *Agesilaos and the Crisis of Sparta*, Baltimore, MD 1987, 315; H.W. Parke, *Greek Mercenary Soldiers from Earliest Times to the Battle of Ipsus*, Oxford 1933 (1970), 3.

[2] A very important source for Greek mercenary service is Xenophon's *Anabasis*. He describes both life and engagement of mercenaries, their destiny and journey back to Greece when their "employer" Cyrus the Younger was killed in the battle at Cunaxa. Xenophon was elected by the Greek soldiers to lead the expedition of about 10.000 mercenaries (the so called "Ten Thousand") to take them back home. His description of the tactics, different adventures and events, is one of the most popular and valuable sources for the Greek history. However, he offers very few data about the legal standing and civic identity of mercenaries. There is a recent book on Xenophon's expedition but it also reweals exclusively military aspects of mercenary service ignoring social, political, legal and other aspects, J. W. I. Lee, *A Greek Army on the March: Soldiers and Survival in Xenophon Anabasis*, Cambridge 2007. See also H. W. Parke, 23 42.

[3] The "boom" of mercenaries in the 4th century B.C. can also be explained by other factors, as shown by M. M. Austin, P. Vidal Naquet, *Economic and Social History of Ancient Greece*, London 1977, 136 (development of military monarchies, a demand in the Middle East, Persia and Egypt, need for specialization in war, etc.). But they also stress that impoverishment of the people was the chief reason why professional soldiers appeared in such a great number. An interesting text on that issue is offered Harvey F. Miller "The Practical and Economic Background to the Greek Mercenary Explosion", *Greece and Rome* 31, 2/1984, 153 160. A. G. Russel, "The Greek as a Mercenary Soldier", *Greece and Rome*, 11/1942, 104 also points that poverty was the chief reason for the emergence of professional soldiering (and compares it with Greek emigration in modern times). But he also adds crowded conditions in the cities, political troubles (exile), etc. as possible causes to choose foreign military service. H. W. Parke, 227 231 also contributed to this discussion.

[4] Antonio Santosusso, *Soldiers, Citizens & the Symbols of War*: *From Classical Greece to Republican Rome 500 167 B.C.,* Colorado 1997, 89.

der the Great were a decisive factor for his swift conquest of the Persian Empire. The same phenomenon, on the other hand, contributed to the alienation of Greek mercenaries from their native poleis.[5]

The Greeks themselves did not use professional soldiers extensively, particularly during the Greco-Persian Wars. Engagement of mercenaries became more common during the Peloponnesian War.[6] Most of the city-states established their military power relaying upon their own citizens, non-professional soldiers, who did not engage in military activities regularly and habitually (except in Sparta and some other mostly Doric city-states). Citizen-soldiers were mostly farmers, artisans, merchants and many others, including the most distinguished members of the community.[7] In the beginning, ordinary citizens who were able to afford the armor and weapons formed the core of the army and were expected to perform their military service as hoplites.[8] Citizen army was adequate for interpolis conflicts but the "military quality" of these regular troops became inadequate for the big conflicts in the 4th century B.C. Many sources note that indigent citizens chose the profession of mercenary soldiers in order to improve their economic condition,[9] while Isocrates clearly states that many Greeks enlisted into foreign armies out of necessity, often bringing their wives and children along.[10]

Trundle rightly observed that the military aspects of the Greek mercenary service were very carefully investigated in a few books de-

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[5] The role of professional mercenaries in the conquests of Macedonian kings and their inclusion in the new state system by being allotted a piece of land (*kleros*) connected with the obligation to serve in the army (*misthophoroi klērouhoi*), is strongly stressed by Victor Ehrenberg, *The Greek State*, London 1969, 219. He also points that only very few of the new settlors were Macedonians. Those were mostly Greek mercenaries who, after they accepted the lot assigned to them, soon merged with the local population.

[6] H. W. Parke, 14 15.

[7] A. G. Russell, 103 112 reminds us of those cases. One of the most famous examples is Socrates, who took part in the battle at Delium in Boeotia in his forties, as mentioned by Plato in *Symposium*, 220d 221c.

[8] R. T. Ridley, "Hoplite as Citizen: Athenian Military Institutions in their Social Context", *Antiquité Classique* 48/1978, 508 548. According to Gat Azar, *War in Human Civilization*, New York 2006, 295 298, about one third to one half of adult male citizens in the polis were encompassed by this duty. In the time of Isaeus military duty of citizens was still regarded as a very important obligation towards the polis. In his court speeches, we meet interesting objections to those who neglected to join the army (Isaeus V 46), considerations about the solidarity among the citizen soldiers in their private life (Isaeus IX 4), data about the importance of military service in the city state for social recognition (X 26).

[9] E.g. Demosthenes, 14, 31.

[10] Isocrates, 4, 167.168; 5, 121. P. Loman, "Mercenaries, Their Women, and Colonisation", *Klio* 87, 2/2005, 346 365 analyses in detail the relocation of whole families together with mercenaries and their settling in new places.

voted mostly to that topic.[11] But this is not the case with social, economic, political, ideological and other settings. Above all, there is almost no research on different legal aspects related to mercenaries in ancient Greece. Many aspects of their legal position, their family relations, their property rights, their involvement in judiciary, their civic activities, etc. remain unknown.

Particularly challenging is the issue of civic identity of mercenaries, as many of them spent years or even decades outside their native poleis. An important question may be asked: was a mercenary who stayed so long abroad, who performed no service to his city (particularly military duty), who did not contribute to the political life of the city-state, regarded as a *politikos (anthropos)* or as *idiotes*, a person who does not participate in public affairs?[12] Of course, both *politikoi (anthropoi)* and *idiotai* were Athenian citizens, provided they met the criteria for the citizenship status.[13] Some sources, particularly Isaeus' speech on Nicostratus' estate, leave impression that mercenaries who were absent from the polis during a lengthy period were perceived almost as foreigners. Although formally not foreigners, they were substantially alienated from their native community.

2. MERCENARIES IN ISAEUS' SPEECH *ON THE ESTATE OF NICOSTRATUS*

Isaeus, the teacher of Demosthenes, was a famous logograph in the 4th century B.C. who left twelve court speeches valuable for legal history and understanding of the Athenian society. One of them could be particularly useful in shedding more light on the general social position of mer-

[11] Matthew Trundle, *Greek Mercenaries from the late Archaic Period to the Alex ander*, London 2004, XVIII. There is also a recent book by S. English, *Mercenaries in the Classical World*, Barnsley 2012, but it has mainly popular rather than academic ambitions (mainly interpreting Trundle's findings). Among older literature the most influential works were H. W. Parke, (1933); Marco Bettalli, *I mercenari nel mondo greco. Dalle origini alla fine del V sec. a. C.*, Pisa 1955; Ludmila P. Marinovič, *Le Mercenariat grec au IVe siecle avant notre ere et la crise de la polis*, Paris 1988. For the Hellenistic period see more G. T. Griffith, *The Mercenaries of the Hellenistic World*, Groningen 1968 (1935). However, they all mostly concentrate on military issues. As already said, J. W. I. Lee, (2007) also ignores social and other aspects of mercenary soldiering.

[12] More on the notions of *politikos* and *idiotes* in Serbian, Sima Avramović, "O podeli na javno i privatno pravo u pravu grčkih polisa", [On the division between public and private law in the Greek polis], *Anali Pravnog fakulteta u Beogradu* 5/1982, 821 826. For a useful overview of the ancient Greek meaning of *idiotes* see A. W. Sparkes, "Idiots, Ancient and Modern", *Politics* 28, 1/1988, 101.

[13] W. Robert Connor, "The Problem of Civic Identity", *Athenian Identity and Civ ic Ideology* (ed. A. L. Boegehold, A. C. Scafuro), Baltimore London 1994, 34. We will come back to the issue of relation between citizenship and civic identity.

cenaries in Athens, and particularly on the different aspects of their legal status and activities. There are at least a few interesting but quite neglected points about Athenian mercenaries that can be deduced from the speech *On the Estate of Nicostratus*.

Nicostratus was a mercenary who spent eleven years outside Athens performing his military service and died abroad (in *Ake*[14]) leaving a fortune of two talents. Many claimants tried to get his fortune in court (Isaeus described so vividly the state of affairs in sect. 7–8 of the speech[15]). Two young brothers, Hagnon and Hagnotheus, clients of Isaeus, defeated many opponents in previous cases claiming that they are first cousins of Nicostratus. The last pretender was a certain Chariades, who asserted that he had been adopted in the will (*diatheke*) left by Nicostratus far away from Athens, as his close military-mercenary friend. Additionally, he contests the identity of Nicostratus declaring that Nicostratus is the son of a Smicrus and not of a Thrasymachus (a frequent trick with personal identity in Athenian courts to make the case more complicated). He offered a few witnesses from the army to confirm the alleged will by Nicostratus. The two previously mentioned brothers have a doubly unpleasant task: firstly, to show that the will is invalid (false) and secondly, that they are cousins and heirs of Thrasymachus' son Nicostratus. The court speech was delivered by an old family friend of young brothers. There is a possibility that the speaker was Isaeus himself as synegoros (although this theory is questionable).

Let us skip over many controversial issues of the case and the tactics chosen by the parties.[16] We will try to find out something more inter-

[14] Nowadays Acre in northern Israel.

[15] Isaeus (transl. E. S. Forster), Cambridge MA London (Loeb), 1962: "For who did not cut the hair when two talents arrived from Ake? Who did not wear black, hoping by mourning to inherit the estate? What was the number of would be kinsmen and adopt ed sons who claimed Nicostratus's property? Demosthenes (not the famous politician and orator, *note S.A.*) declared himself to be his nephew, but renounced his claim when he was unmasked by my clients. Telepus asserted that Nicostratus had made him a gift of all his property; he too soon desisted. Ameiniades appeared before the archon and produced as Nicostratus's son a child not yet three years old, although it was eleven years since Nicos tratus had been in Athens. Pyrrhus of Lamptra declared that the property had been conse crated by Nicostratus to Athena but that it had been given him by Nicostratus himself. Ctesias of Besa and Craneus at first asserted that Nicostratus had been condemned to pay them a talent; when they could not prove this, they pretended that he was their freedman; they were no better able to prove their statement. These were the men who at the very beginning swooped down upon the estate of Nicostratus. Chariades at that time made no claim, but came forward latter, foisting in not only himself but also his child from the mistress. It was all the same to him whether he was going to inherit the estate or have his son recognized as a citizen. He, too, perceiving that he would be defeated on the question of the child's birth, jettisoned the child's claim and paid a deposit to bring an action as serting his own right under a will".

[16] More on that in William Wyse, *The Speeches of Isaeus*, Cambridge 1904, 367 401. He was quite rigid in commenting Isaeus' tactic and stability of his argumentation,

esting – information about the two protagonists, Nicostratus and Chariades, since it might be very relevant for the reconstruction of the social, legal and civic standing of mercenaries.

At first sight, according to Nicostratus' case, it seems that a Greek mercenary could earn quite a lot of money from his military service. It is strange that Nicostratus' wealth did not attract proper attention in current literature and that it was not analyzed accurately in the context of mercenary's earnings and property.[17] It is particularly curious as there is a great controversy about mercenary wages and the terminology for different kind of income earned by mercenaries.

There were different types of payments and many terms were in use. *Misthos* was a salary or wage for military services. *Chremata* is often mentioned as an alternative, as a monetary term for the payment of mercenaries. *Trophe*, deriving from the verb 'to feed' (*trephein*), stood for the food they were served. *Ephodia* often meant travelling expenses. Finally, *siteresion* was the ammount of money provided for the purchase of food. Consequently, as *misthos* was the main expression for the salary of mercenaries (as well as for the salary earned by other people working for wages), a mercenary soldier was often denoted simply as *misthophoros* – a wage-earner.[18] But mercenary soldiers were also often described simply as *stratiotai*, with the generic Greek word for a soldier.[19] The Greek language did not coin a more specific noun for a mercenary nor a verb to denote the performance of mercenary service. *Misthophoros* was most common, although it is a general term denoting all people who earn money for their work.[20] The early Greek writers also use the term *epikouros*

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due to his general negative attitude towards Isaeus. I tried to perceive Isaeus speeches more impartially and this led me to the conclusion that Isaeus was not a "juggler of the truth" more than other logographs. I also attempted to show that many data deriving from his speeches are very relevant, particularly as a source for ancient Athenian law and soci ety, Sima Avramović, *Isejevo sudsko besedništvo i atinsko pravo*, Beograd 2005[4], also published in Italian as Sima Avramović, *Iseo e il diritto attico*, Napoli 1977.

[17] Paul McKechnie, *Outsiders in the Greek Cities in the Fourth Century BC*, Lon don New York 1989, 90 completely neglects the case and wealth of Nicostatus, although he devotes a lot of attention to mercenary salaries. Nicostratus would be a very important example, but McKechnie analyzes in details only the less significant case of two brothers mercenaries from Isaeus' speech *On the Estate of Menecles*.

[18] *Misthophoros* was used to denote any person who was regularly paid for some work, including *dikastai* members of the jury, etc. as Trundle, 16 points. H. W. Parke 231 stresses that the word *misthophoros* was simultaneously used for "State pensioners", those who received state maintenance, which was a rather recent invention then, Aristotle, *Politics* 1293 a. However the term *misthophoros* was most frequently used for mercenar ies.

[19] M. Trundle, (2004), 10.

[20] Other languages developed more specific words for mercenary service (like the Latin word *mercenarius*, which became the root for the French term *mercenaire* and the

(helper, ally) to designate a mercenary soldier. The word for the foreigner (*xenos*) was also used of mercenaries by the 5th century B.C. Among the Greek historians of the Roman period *misthophoros* became the standard word used for the mercenaries of the Classical world.[21]. However, Isaeus in his speeches does not use term *misthophoros* at all, although he mentions people who served as professional soldiers in few cases.[22]

So, what was the amount of that famed wage, salary of mercenaries? We know that it was paid in monthly instalments, sometimes on a daily basis as well,[23] but the issue of the amount of pay and earnings is still a matter of controversies.[24] Many sources attest that men were usually enrolled as mercenaries for one drachma a day but it varied considerably from period to period and from case to case.[25] Most scholars agree that the payment was decreasing through the 4th century B.C. along with the general economic crisis and changes on the "military market" caused by the increasing number of those competing for the job. "Four-obol men" is an expression used in the New Comedy for mercenaries.[26] Of course, some exceptions always exist and mercenaries used to get some extras sometimes. The sources often mention the famous case of Syracusans awarding their mercenaries with 100 minas after their success against the Dionysian tyranny in 357 B.C.[27] Cyrus promised five minas to each mercenary if they win, etc.[28] However, one drachma a day seems to have been the average wage.[29]

The evidence for the mercenary salary in the period 399–322 B.C. is poor and the whole issue controversial. For that reason, Nicostratus'

English *mercenary*, deriving from *merces*, similary as *misthophoros* derives from *misthos* loan for use, rent).

[21] M. Trundle, (2004), 10.

[22] Speaking about the two brothers in the speech *On the Estate of Menecles* he only says that the brothers were able to *strateusthai* to serve in the army, Isaeus, II 6.

[23] Xenophon, *Anabasis* 1, 1, 10; II 11; III 21. William T. Loomis, *Wages, Welfare, Costs and Inflation in Classical Athens*, Ann Arbor, MI 1998, 266 271.

[24] H. W. Parke, 231 233. Also A. G. Russell, 110, M. Trundle, (2004), 91. P. McKechnie, 89, G. T. Griffith, 294 297, Yvon Garlan, *War in the Ancient World: a Social History*, London 1975, 95 98.

[25] Thucydides 7.27.2; M. Trundle, (2004), 91. By 350 B.C. the salary was even less then one drachma and fell down to four obols (6 obols 1 drachma) including sub sistence, G. T. Griffith, 297. Yvon Garlan, 102 also believes that the mercenary pay was one drachma a day at the beginning and just over half a drachma at the end of the 4th century B.C., which is close to the pay of a manual worker with average skills.

[26] Menandre, *Perikeiromene*, 380.

[27] Plutarch, *Dion*, 31.

[28] Xenophon, *Anabasis* 1, 4, 13.

[29] An Attic talent of silver (c. 26 kg) equaled the value of nine man years of skilled work. Also, *nota bene* again, one talent was equivalent for 6.000 drachmas (60 minas)

case is so important, particularly as it contradicts the general attitude that the majority of mercenaries could never have achieved enough wealth to return home.[30] This opinion finds confirmation in another speech of Isaeus (*On the Estate of Menecles*), where two brothers claim that they went abroad to serve as soldiers in Thrace and that they saved only "a little money".[31] Only a minority of mercenaries came back home alive and wealthy.[32] On the other hand, two talents owned by Nicostratus were a considerable fortune in that time (according to some calculations, it could be the equivalent of about 50.000 $ today). The sheer number of claimants who tried to get hold of that amount is a strong proof that a mercenary soldier could amass a significant sum of money. Isaeus' testimony is convincing enough to prove that mercenaries had a well-paid job, depending on many variables (their position, military success, etc.). Of course, booty and plunder were also important motives for people to get into the adventure of mercenary soldiering.[33] H. F. Miller mentions four extra reasons to accept a risky military career, along with the basic pay and wage. It is private looting, official distribution of army plunder, special bonuses and awards, and in some cases a grant of free land.[34] In the case of Nicostratus there might have been an additional basis of his wealth. The first idea is that he might have had some (immovable) property in Athens. But if he was rich, why would he serve as a soldier abroad? Perhaps the answer can be deducted from another part of the speech dealing with legal issues and civic status that we are approaching.

The second point that appears clearly from Isaeus' speech is that some mercenaries were freedmen. Namely, Isaeus mentions that unsuccessful plaintiffs in the previous trials claimed that Nicostratus was their

[30] Trundle, (2004), 99. McKechnie. 93 also concludes that the rate of pay was consistently low. On the other hand, Isaeus IV 7 is explicit that the two talents earned by Nicostratus returned to Athens. According to the wording, it seems that Isaeus is speaking about the value in money and not about his property as a whole. One may guess that he had no other property, particularly not immovable in Athens, as it would also be a matter of the hereditary case.

[31] Isaeus, II 6. One of the brothers settled at home in Athens, but the other one one went abroad from time to time to travel (maybe as a mercenary?), coming back to Athens often, see Isaeus, II 12. It is strange that H. F. Miller, 153 starts his article by quoting this case from Isaeus, but completely wrongly attributes it to another speech of Isaeus, XI 40, where no mercenaries are mentioned!

[32] Nicostratus also did not come back to Athens alive, only his money arrived in Athens. It is not clear if Nicostratus was killed in a battle or died from some other cause after eleven years of mercenary service.

[33] Trundle, (2004), 98 claims that the amount of payment was therefore secondary to the real interests and other possible profits of mercenary soldiering. However, it is still very questionable who might receive booty after a successful campaign and in what am mount. Special prizes for victory were usually also not very high they took the form of double or rarely tripple pay, H. W. Parke, 234.

[34] H. F. Miller, 155.

freedman – and that they could therefore claim his property as his former masters.[35] Although they lost the case, this information on mercenaries of freedman status remains important for the social background of mercenaries, their civic status and identity. It confirms that mercenaries were drafted from all the social classes, particularly in the periods of acute economic crisis.

Now let us focus on some legal issues. We do not see from the speech if the alleged will of Nicostratus was of the usual type of *diatheke* whose legal consequence was adoption in case of death – the so-called adoption by will (usually referred to in the literature on Athenian law as *adoptio mortis causa*, which was different from the usual *adoptio inter vivos*). Nicostratus' testament could revive the issue of two types of wills (*diatheke*) in Athens – one that developed from adoption (testamentary adoption, *diatheke* with *esipoiesis*) and another that developed from the gift in case of death (*diatheke* without *eispoiesis*, *Legatentestament*).[36] Many elements of Nicostratus' case point to adoption by will. It opens new neglected legal issues.

If the alleged will of Nicostratus was a *diatheke* with adoption, it proves that it was possible in Athens to adopt (at least *mortis causa* – in a will) a man of the same or similar age, perhaps even older than *de cuius* (e.g. army-mate). Chariades was probably about the same age as Nicostratus, if not older (he served as a mercenary for about 17 years,[37] much longer than Nicostratus, who served 11 years). Isaeus does not attack the opponent on that point, showing thus that age of the adoptee was not an issue in the Athenian law on adoption (at least in the adoption *mortis causa*). This matter certainly deserves more attention, particularly if we keep in mind that the adoptee was supposed to continue the family of the adopter in order to prevent the *oikos* of the adopter to become *eremos* (empty, deserted).[38] Although Isaeus did not contest the age of Chariades as a possible problem for the adoption, it is still curious that Chariades at the beginning tried to obtain Nisostratus' property by imposing a child

[35] Isaeus, II 9.

[36] A long debate on this point started in the 19th century, mostly by F. Schulin, *Das griechische Testament vergleichen mit dem römischen*, Basel 1881 and E. F. Bruck, *Die Schenkung auf den Todesfall im griechischen und römischen Recht*, Breslau 1909. The discussion continued all through the 20th century, see particularly Alberto Maffi, "Adozi one e strategie successorie a Gortina e ad Atene", *Symposion 1990 Vorträge zur grie chischen und hellenistischen Rechtgeschichte*, Köln Weimar Wien 1991, 205 231 and my contribution Sima Avramovic, "Response to Alberto Maffi", *Symposion 1990 Vorträge zur griechischen und hellenistischen Rechtgeschichte*, Köln Weimar Wien 1991, 233 237.

[37] Isaeus, IV 29.

[38] David Asheri, "L' *oikos eremos* nel diritto successorio attico", *Archivio giuridi co* 1 2/1960.

Nicostratus supposedly had with a mistress.[39] Maybe he expected he would have a better chance of winning the case that way.

We can be sure that Nicostratus had no living sons, since otherwise he would not have been allowed to make a testamentary adoption. In addition, the mental capacity of the will-maker was an important point that Isaeus mentions just in passing, without seriously challenging it,[40] probably in order not to offend the memory of the deceased. Another interesting legal issue is related to Chariades. If we can believe Isaeus, Chariades was condemned for theft and then released by the Court of Eleven, but afterwards denounced to the Council as a malefactor.[41] Thereafter he spent 17 years abroad, probably as a mercenary, trying to evade possible troubles. This could signify that some people tried to escape legal and other problems by engaging in mercenary service abroad, far away from the jurisdiction of their own *polis*. We know that many mercenaries went abroad for political reasons, so that mercenary service could be a kind of self-imposed political exile.[42] In the case of Chariades we have unambiguous information that he wanted to escape the Athenian courts.[43]

3. NICOSTRATUS' CASE AND TIES OF A MERCENARY WITH HIS OWN POLIS

Although one can accept the general observation that mercenary armies were similar to small cities separate from the *polis* where they serve, they certainly had contacts with the local population. Of course, they also kept their family ties in their *poleis* of origin. However there is a room for statement that they created a new civic identity "beyond their own city-state boundaries".[44] A mercenary did not belong to the community that he served and at the same time, his ties with his own city-state were weakening. Time and distance are mighty factors, so that some mercenaries practically became people without a country and family (except those who took their families with them to start a new life abroad).[45] It

[39] Isaeus, IV 10.

[40] Isaeus, IV 16.

[41] Isaeus, IV 20.

[42] H. W. Parke, 227.

[43] Even if Isaeus was not telling the truth, his statement could be an acceptable explanation for the jurors. This leads us to the conclusion that the evasion of domestic jurisdiction was a credible motive for someone to opt for mercenary service.

[44] M. Trundle, (2004), 3. In his another text M. Trundle pays more attention to mercenary civic identity in the context of new social environment, Matthew F. Trundle, "Identity and Community among Greek Mercenaries in the Classical World: 700 322 BCE", *The Ancient History Bulletin* 13/1999, 28 38.

[45] Of course, it is not same situation if someone was a short term mercenary (like brothers in *Isaeus* II), or a person who spends years and decades abroad (like Nicostratus

seems that Nicostratus was one of those people who did not have many close relatives in Athens anymore. His ties to his relatives became so weak that many claimants tried to acquire his estate on various grounds different from family relationship.

We do not know much about the ties that mercenaries kept with their native polis, about the life of their families without them, about friendships at home, about their duties to the polis.[46] This is why the speech of Nicostratus is an important source. We see that the legal standing of a mercenary was completely preserved in the city of his origin. Thanks to Isaeus, we realize that mercenaries continued to belong to their *polis* of origin but that they did not necessarily contribute to its well-being, perform civic services, etc. On the other hand, they had a possibility to escape the jurisdiction of their polis, as Chariades did when he was condemned for theft. It makes an impression on us to see that this was a comfortable position in legal terms: the mercenary does not belong to the city-state of his residence and profession (war) and simultaneously, he is not available for his polis of origin. In any event, a mercenary who serves for a longer period abroad becomes less and less of a *politikos anthropos* in his own city-state, but more and more alienated from it.

On the other hand, some legal bonds to the native city are well attested: the Nicostratus property trial was to be held in Athens and not where he died or located his property (*forum rei sitae*). The estate of Nicostratus has to be distributed and treated in accordance with the Athenian law and in an Athenian court.[47] Likewise, it seems evident that mercenaries had a valid standing in domestic courts as witnesses, as Chariades offered some testimonies about the alleged will of Nicostratus.

This speech also shows that it was the duty of the relatives to bury the body of the deceased mercenary when his remains arrive in his native *polis*.[48] However, it is not certain that all mercenaries were transported back to their cities. On the contrary, many of them were probably buried abroad.[49] However, when someone has amassed some wealth, to care

and Chariades in *Isaeus* IV). This is why I prefer to distinguish those two types of mercenaries while analyzing their legal and social standing and identity, having in mind primarily those who are away from the city of origin for a longer time.

[46] M. Trundle, (2004), 2 states that a mercenary was not a member of the community for which he fought and had no stake in that society, being neither a citizen nor a landholder. The importance of mercenaries in transforming the nature of Greek society cannot be deminished. In the hoplite community war was highly political. Mercenary service cut the links between the citizen and community service, between a son and his household, between an independent farmer and his land, between the ideal amateur and the professional specialist.

[47] Isaeus, IV 7.

[48] Isaeus, IV 26.

[49] As H. Parke, 234 observes, a mercenary sometimes received an honorable and glorious funeral abroad from his comrades. As wondering soldiers, cut off from family ties, they valued the ceremony even more.

about his burial can provide an advantage in a possible trial with other pretenders to the property. It is one of important arguments raised by Isaeus that his clients – two young brothers as next-of-kin – are entitled to the inheritance because they performed that duty.[50] To fight over the body of the deceased was not a rare event in Athens, as organization of the funeral pointed in a way to the right to inheritance (cf. the famous case of the quarrel over the body of deceased Cyron in Isaeus' speech *On the Estate of Cyron*).[51]

One more observation. This speech shows that the life of mercenaries was not focused exclusively on military service. It may include some business transactions, as well. Isaeus tried to deny all connections between Nicostratus and Chariades,[52] while Chariades claimed that he had a *koinonia* with Nicostratus – a "joint venture" or "joint ownership", a "business association" (according to E. S. Forster's translation in the *Loeb* edition), and used this *koinonia* as an argument for their close relationship.[53] For this argument it is not important whether this was true or not. What is important is that mercenaries could have had a parallel business engagement in the city abroad where they served. Although it is only a guess, one cannot exclude the possibility that this business affair contributed to the wealth of Nicostratus. Business and other engagements of mercenaries abroad is another topic that is not yet explored in the existing literature.

However, the relationship between Nicostratus and Chariades was not particularly close in terms of military organization, and this fact was used by Isaeus to shape the juror's attitude. The two soldiers were not members of the same mess (they were not messmates), they were neither army-friends nor members of the same company.[54] This is one of the rare sources mentioning a messmate system of communal living abroad.[55] Trundle rightly observes that the Athenian evidence for messmates (*syssitoi*) is legal in its nature, suggesting that the relationship between messmates was regarded as a special one.[56] It is therefore quite relevant whether they served as soldiers together in the same company, as proba-

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[50] Isaeus, IV 26.

[51] Isaeus VIII 21 25.

[52] "Chariades was never a friend of Nicostratus either here in Athens or in the army", Isaeus IV 26.

[53] A. R. W. Harrison, *The Law of Athens*, I 242 stresses that the analogy with Ar istotle's use of *koinoniai hrematon* illustrates an aspect of friendship (*Nicomachean Etics*, 1163). It is important to note that the Athenians never achieved the convenient fiction of regarding such a group of joint owners as a single person juristically, like the Roman *so cietas*. They always remained joint several owners.

[54] Isaeus, IV 18.

[55] See also Demosthenes, 54, 4 5.

[56] M. Trundle, (2004), 140

bly claimed by Chariades. Whatever was the truth in this case, it is only relevant to note that the messmate relationship was expected by Isaeus to be a significant argument at court. In terms of their risky lives abroad, the military group sub-identity of mercenaries seems to have been more important than the civic identity.

4. CIVIC IDENTITY OF ATHENIAN MERCENARIES

The research on the civic identity in Athens is a relatively recent venture in modern literature on identity issues. The general attitude reached by scholars is that the Athenian civic identity was mainly based on Athenian citizenship and this in turn means on birth and ancestry.[57] In another important study on the same subject, W. R. Connor connects the citizen issue (and civic identity itself) to three chief features. The first is birth, since Athenians regarded themselves as the original inhabitants of the land. The second is the political and cultural homogeneity of the Athenians. Thirdly, – very importantly in this context – citizenship is best approached through law.[58] His contribution attempts to investigate the Athenian civic identity in the 4th century B.C. mostly through an analysis of the law and the legal standing of mercenaries, based upon the data available from the court speech on the estate of Nicostratus.

S. Lape rightly connects the concept of Athenian identity with the Athenian democracy. She also stresses that the question of identity is not usually singled out for special investigation in the studies on Athenian democracy. She claims that "citizens assumed that having the right birth and ancestry not only qualified them for citizenship but also endowed them with capacities and characteristics associated with citizenship, including an inherited *love for democracy*".[59] This is a very important conclusion. Nevertheless, what does it mean, "love for democracy"? Is it an emotional or a social, ethical or political category? How was it measured? Finally, how did it reflect on the life of a mercenary? This is the path we followed in this paper.

First, "love for democracy" was not a matter of feeling or a matter of rights (political and other). It was rather a matter of duties towards the polis. How was it evaluated? It was related to discharging of different

[57] Susan Lape, *Race and Citizen Identity in the Classical Athenian Democracy*, Cambridge 2010, 3. In this recent study Lape investigates the birth based narrative of citizen identity and its opposition to "racial identity", that is to say, to the ethnic back ground. Her "racial" approach is quite cotroversal but the author is well aware of that and tries therefore to soften the meaning of "race" and "racial".

[58] W. Robbert Connor, "The Problem of Civic Identity", *Athenian Identity and Civic Ideology* (ed. A. L. Boegehold, A. C. Scafuro), Baltimore London 1994, 34.

[59] S. Lape, IX.

political, religious, financial, social obligations, different contributions to the polis (public services, liturgies, etc.). It predominantly implied the participation of a citizen in polis institutions and his service in war times as a citizen-soldier.

Greek mercenaries were not stateless in the sense that they were not citizens of their *poleis*. They were still regarded as natives of their city of origin, they were perceived as citizens there, they applied Athenian law in their mutual relations abroad (as alleged by the will of Nicostratus), and they could appear at court once they were back home; at the end of their lives, their bodies could be buried in their polis (if they had enough wealth to be transported) in the traditional way. Nevertheless, while serving abroad in mercenary service, they became alienated citizens who were not able to perform any civic duties or participate in important state events. A mercenary who served a long time away from home became less and less of a *politikos anthropos*, a person who cares about his own polis and who is involved in its daily functioning. As he did not participate in the political, religious, economic and social life of his *polis,* he slowly became a private person interested only in his own welfare, an *idiotes*.[60] The famous Athenian speaker and logograph Lycurgus argued that a state is built up of three parts: the officeholder *(archon),* the juryman *(dikastes),* and the *idiotes*.[61] Famous are also the words in Pericles' *Funeral oration*: "We do not say that a man who takes no interest in politics is a man who minds his own business (*idiotes*); we say that he has no business here at all".[62]

Although Trundle argues that the mercenary service carried no stigma in and on itself,[63] one can in turn refer to Isocrates who disliked mercenaries and on one occasion compared them to barbarians.[64] Isocrates frequently mentions the problem of homeless mercenaries,[65] while in another place he defines them as "wanderers causing trouble to everyone they meet".[66] The New Comedy usualy represents a mercenary as a braggart, a

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[60] Josiah Ober*, Mass and Elite in Democratic Athens: Rhetoric, Ideology and the Power of People*, Princeton 1989, 108 112 points out to the word *rhetor* as an antonym for *idiotes*, whom he calls "ordinary citizen". However, he also admits that all Athenian citizens who were not serving as public officers or jurors were *idiotai.* See also S. Gol dhill, *The Good Citizen, in Love, Sex & Tragedy: Why Classics Matters*, London 2004, 179 94.

[61] Lycurgus, *Against Leocrates*, I 79.

[62] Thucydides, *The Peloponnesian Wars*, 1,22.

[63] M. Trundle, (1999), 29.

[64] Isocrates, *Epistle* 9 (To Archidamus), 8. See more details in P. McKehnie, 85, 95.

[65] Isocrates IV 64, 168, V 120 121, VIII 24, 44 46.

[66] Isocrates, *Philippus* 120.

drunkard, sometimes as a fool.[67] Isaeus also tries to inflame the passions of the jurors claiming that his clients never once left Athens unless by "your order" (of the people, assembly), while Chariades spent 17 years abroad as a mercenary by his own volition.[68] Isaeus apparently wants to paint Chariades as a person who does not care about his own polis.

It seems that mercenaries held a position between citizen and non-citizen. They had the possibility to take advantage of their citizenship whenever they wanted to, simply by returning to their polis. At the same time, they had the option to escape the obligations, legal responsibilities and jurisdiction of their city of origin with a valid excuse of finding their livelihood in mercenary soldiering. Most important of all, nearly every aspect of their lives found new roots in foreign lands and local conditions. Sometimes they were completely assimilated in the new society, particularly when they received a piece of land and brought with them the rest of their families. A mercenary who served for a long period abroad became a sort of expatriate. One may say that Athenian mercenaries enjoyed a kind of Athenian sub-identity, half-identity or even better, that they were people with a frozen civic identity.[69] Once they want and need to, they were free to reactivate this identity to the full. To put it in Santuosusso's words: "His allegiance as a citizen, if he still was one or if he still felt any attachment to his homeland, was usually directed toward a state far away".[70] One can agree with the general statement that it was easy to accept the existence of a clear distinction between citizens and everybody else.[71] However, mercenaries are not a part of this sharp division. A mercenary, particularly the one who served for many years in a foreign country, far from his city-state, was somewhere in the middle. His civic identity was melted. Even worse, his original civic individuality was seriously endangered, as civic identity has its subjective, ethical and political facets and lies at the heart of common notions of citizenship and civic participation.[72]

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[67] H. W. Parke, 234, referring to Menander's fragments 293, 388, 440, 562, 723.

[68] Isaeus, IV 27. In another speech, Isaeus take a different approach when a short term mercenary is concerned. "Being of military age (*en elikia epi to strateuesthai*), we adopted the career of a soldier and went abroad with Iphicrates to Thrace. Having proved our worth there, we returned after saving a little money", Isaeus, II 6. In other speeches he also points to the importance of soldiering for one's state of birth, see note 8.

[69] A similar situation is characteristic for economic emigrants of modern times who are incorporated into the new community, gradually accepting the values of the new country and keeping ties with their home country only in emotional and symbolic ways. Some parallels between mercenaries and Greek emigrants of modern times are often men tioned in literature, A. G. Russel, 104.

[70] A. Santosusso, 89.

[71] Kostas Vlassopoulos, "Free Spaces: Identity, Experience and Democracy in Classical Athens", *Classical Quarterly*, 57, 1/2007, 33.

[72] Daniel Hart, Cameron Richardson, Britt Wilkenfeld, "Civic Identity", *Hand book of Identity Theory and Research* (eds. Seth J. Schwartz et al.), Leuven 2011, 771.

Although mercenaries could rebuild their Athenian civic identity, they will be – at least for a certain period – socially regarded as individuals with a particular social standing. Long-term mercenary will be actually (if not legally) someone "between citizen and non citizen" until he fully reintegrates himself into the society and re-establishes his full civic identity, starting to behave again like a "good citizen" with "inherited love for democracy", performing his civic duties in a proper way. Or he will only find final rest in his grave in the homeland at the end of his life. Otherwise, his frozen civic identity will be buried along with his body somewhere far away from his *polis.*

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GENDER MAINSTREAMING IN LAW AND LEGAL EDUCATION

Political revolutions of the 18th and 19th century engendered an idea of uni versal equality. However, the American Declaration of Independence and the French Declaration of the Rights of Man and of the Citizen have not been gender sensitive documents. Women had to struggle for a long time in order to achieve visibility in laws and they did gain an equal right to vote in the USA only 144 years later and in France only 160 years after the issuing of these documents. Contemporary interna tional and national law has greatly advanced from a gender equality point of view. However, gender sensitive legislation and implementation of legal norms has been far from widely accepted. Gender sensitive legal education of (future) legislators, lawyers, judges, and prosecutors has thus been of the utmost importance.

First, the article offers theoretical clarifications and historical background analysis of a sense and purpose of gender mainstreaming. The achievements in inter national law and strategic documents concerning gender equality will be taken into consideration in the second chapter. The main focus will be on the meaning of and instruments for gender mainstreaming in legal education in Serbia as well as gener ally. Paradigmatic examples from judicial practice will also be presented.

Key words: *Gender mainstreaming. Legal education. Gender (in)sensitive case law.*

1. INTRODUCTION THEORETICAL CLARIFICATIONS AND HISTORICAL BACKGROUND

"Gender" is a social category, that is, socially constructed sexual identity[1]. Gender sensitivity is the phrase related to the mindset based on

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[1] See for example: Kate Millet, *Sexual Politics*, Garden City, NY 1970, 29; Judith Butler, *Gender Trouble: Feminism and Subversion of Identity*, Routledge, NY 1990 (1999), 6,7.

gender equality and applied in the approach to legal protection, power relations, cultural patterns, social roles, language, statistics, media cover, etc. "Gender mainstreaming"[2] is related to policy measures, which have been aimed at gender equality improvement and its full realization in a final instance; it implies an integration of a gender dimension into public life, according to which gender equality becomes a domain of public policies. Gender mainstreaming in the legal field means the promotion of an idea of universal human rights and women`s rights in formulation, interpretation and implementation of laws (including positive special measures, where necessary), with an aim to fulfill gender equality.

Gender equality and gender mainstreaming in family, society, and law has been the phenomenon of modern times. Modernity brought emancipation from a traditional patriarchal matrix of male domination in all spheres of life (which predominantly characterized all pre-modern societies).[3] The industrial revolution of the 18th century enabled massive access of women into economic production; political revolutions of the 18th and 19th century brought an epochal idea of universal equality, which inspired feminist movements of 19th century to express women`s self-recognition as equal human beings and to struggle for women`s own political and legal visibility, e.g. for equal rights to vote, to education and private property. Women`s massive participation in patriotic fronts of the First and Second World Wars and their replacing male workers during those wars at work in industrial and military production,[4] contributed also to the recognition of equal female right to vote. Thus women taking part in massive industrial production, as well as their inclusion into the massive education from the mid 20th century, contributed significantly to the gradual entry of women into public life.[5] Feminist movements of the second half of the 20th century played a special role in the growth of wom-

[2] The notion of gender mainstreaming appeared in international documents for the first time at the UN Third World Conference on Women held in Nairobi in 1985, and afterwards was accepted in Beijing in 1995., *http://www.undp.org/women/mainstream*, last visited 20 November, 2015.

[3] K. Millet, 23 59; Eva Figes, *Patriarchal Attitudes*, Virago, London 1970, 17 34, 152 167.

[4] Karen Offen," Feminism and the Republic", *The French Republic History, Values, Debates,* (eds. E. Berenson, V. Duclert, and C. Prochasson), Cornell University Press, Ithaca and London, 2011, 289 299; See also: Women in Wartime: The Rise of the Female Public Servants, Guardian Public Leaders Newsletter, *http://www.theguardian.com/public leaders network/2014/nov/08/world war women workplace public services*, last visited 20 November, 2015.

[5] Dragica Vujadinović, "Perespektive rodne ravnopravnosti u sferi prava slučaj Srbije", *Perspektive implementacije evropskih standarda u pravni sistem Srbije* (ed. S. Lilić), Pravni fakultet, Beograd 2012; Dragica Vujadinović, "Rod i pravna regulative", *Perspektive implementacije evropskih standarda u pravni sistem Srbije* (ed. S. Lilić), Pravni fakultet, Beograd 2013.

en's self-awareness and in the public (legal, political, social) recognition of half the world's population as equal human beings.[6] New feminist movements of the 1960s and 1970s and an explosion of feminist publications (starting in 1948 with Simone de Beauvoir's *Second Sex*[7] and many others in the 1970s and later), together with an extraordinary development of international human rights law,[8] did contribute to a dramatic change in a common mindset concerning gender emancipation. The Universal Declaration of Human Rights had its common foundation in the value of dignity of the human person. The very term "human" was used on Eleanor Roosevelt`s insistence, aiming to avoid the "neutral" understanding of universal rights as "men`s" rights.[9]

Throughout history, law was created by men, meaning that women and the female were not "visible" in legal documents[10], not even in the French Declaration of the Rights of Man and of the Citizen and the American Declaration of Independence[11]. For a long time, "Man" and "Citizen" simply meant "male". Women in France in 1789 and 1792 gained momentum and demanded representation in the assemblies, the right to vote, and the extension, that is, the full application of the Declaration of the Rights of Man and of the Citizen. They argued that citizenship should encompass both sexes.[12] Olympe de Gouges proposed the "Declaration of the Rights of Woman and the Female Citizen". However, women were not included among "active citizens" of the French Republic. This meant that at the time of the Declaration only male property owners held these rights. The revolutionaries and Jacobins did not match the ideas of self-

[6] J. Mitchell, *Woman's Estate*, Penguin 1971, 60 75; Vicky Randall, *Women & Politics*, *An International Perspective*, MacMillan Education Ltd, London 1982, 262 315.

[7] Simone de Beauvoir, *Second Sex*, 1949, in English Penguin, London 1972.

[8] Ari Kohen, *In Defense of Human Rights,* Routledge, London and NY 2007, 135 151.

[9] See: "The American Experience, Eleanor Roosvelt", *http://www.pbs.org/wgbh/amex/eleanor/peopleevents/pande09.html*, last visited 20 November, 2015.

[10] Zorica Mršević, *Ka demokratskom drustvu Rodna ravnopravnost,* IDN, Be ograd 2011, 23 33.

[11] Jack Balkin says: " The revolutionaries' demand for social equality was an ide al. It was not completely achieved in the years after the Revolution, nor did the revolu tionary generation understood how great a social transformation true social equality would require. Few thought the idea of social equality should apply to women, or to slaves, and many did not even think it should apply to white men who lacked property. " (J.M.Balkin, Declaration and the Promise of Democratic Culture, *http://www.yale.edu/lawweb/jbalkin/articles/declar1.htm, 1999*., last visited 20 November, 2015.)

[12] Sheila Rowbotham, *Svest žene svet muškarca*, Radionica SIC, Beograd 1983, 3 22; K. Ofen, Osporavanje muške aristokratije: Feminizam i Francuska revolucija, *Ženske studije*, online publication, June 11, 2013, *http://www.zenskestudie.edu.rs/izdavastvo/elektronska izdanja/casopis zenske studije/zenske studije br 13/79 osporavanje muske aristokratije feminizam i francuska revolucija*, last visited 25 November, 2015.

aware women. De Gouges was beheaded, and female associating in public was banned in 1795.[13]

Women had to fight – together with men who were cognizant of the gender equality issue – for decades and even centuries for the "visibility" of being equally human and for recognition of female human rights.[14]

A long struggle was necessary through suffrage and feminist movements for achieving real legal and political equality in the USA, Great Britain, France, and other Western countries.[15] In the USA, it took 144 for women to get the right to vote (from the American Declaration of Independence in 1776 to 1920). In Europe it took from 80 to 180 years: for example in France it took 160 years (from the French Declaration of Man and of the Citizen in 1789 to the universal right to vote in 1944).[16]

Women also had to struggle for the right to education. Female students did achieve the right to accede to higher education in 1863 at Zurich University, in 1870 at Cambridge, in 1878 at Oxford University, between 1870 and 1882 in the Scandinavian countries.[17] These, however, were the exception until the second part of the 20th century when, especially from the 1970s, there was a massive, global expansion of education, in which women/girls have taken part at a rate twice that of men.[18]

The second part of the 20th century and beginning of the 21st century brought significant steps forward in legal recognition and protection of women`s rights in international and national law. After the Second World War universal right to vote was established in almost all countries, and women`s rights have garnered legal support, such as the right to decide on abortion, the right to equal pay for equal work, protection from family/domestic violence, protection in general from gender-based violence, raise the legal issue of sex-trafficking, etc.

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[13] See: K. Ofen, 2013.

[14] Z. Mršević, 23 33; K. Ofen, 2013; D. Vujadinović, 2012; D. Vujadinović, 2013.

[15] *Ibid.*

[16] Dragana Obrenić, Pravo glasa žena, *Neko je rekao feminizam* (ed. A. Zaharijević), Artprint, Novi Sad 2008, 24 45; Women`s Suffrage, *Encyclopedia Britannica`s Guide to Women`s History*, *http://kids.britannica.com/women/article 216007*, last visited 25 No vember 2015.

[17] P. Marks, Femininity in the Classroom: An Account of Changing Attitudes, *The Rights and Wrongs of Women* (eds. J. Mitchell and A. Oakley), penguin Books 1976, 176 198; T. Blackstone, The Education of Girls Today, *The Rights and Wrongs of Women* (eds. J. Mitchell and A. Oakley), Penguin Books, 1976, 199 216; Tijana Krstec, "Pravo na obrazovanje", *neko je rekao feminizam* (ed. A. Zaharijević), Novi Sad 2008, 57 69.

[18] *http://www.coe.int/t/dghl/standardsetting/equality/05conferences/2014NFPHelsinki/Documents/Report%20Conference%20Helsinki.pdf,* last visited 25 November 2015.

The international legal[19] framework of protection of women`s rights was established in the late 20th century and the improvement has continued in the 21st. Policy is being rewritten from a feminist point of view, and gender mainstreaming, e.g. the so-called "state feminism"[20] has taken central stage.

2. INTERNATIONAL STANDARDS FOR GENDER MAINSTREAMING IN EDUCATION

In contemporary democratic societies education represents the main channel for promoting values of freedom, social justice and equality. These values include as their constituent part the value of gender equality, which means equal representation, power and participation of both genders in all spheres of public and private life, as well as their right to difference. Higher education especially, but also all educational spheres and levels represent a powerful mechanism for social change. Integrating a gender sensitive approach into higher education, as well as generally into educational fields, is of the utmost importance. In international documents dedicated to the advancement of gender equality, education has been recognized as one of crucial fields of action.

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[21] was adopted in 1979 by the UN General Assembly. CEDAW is often described as an international bill of rights for women and it establishes international standards in this respect. States that have signed CEDAW, accepted an obligation to eliminate traditional understanding of gender roles in all forms of education, and for that purpose to initiate revising of textbooks, curricula and teaching methods. At the World Conference on Human Rights[22], held in Vienna in 1993, the protocol for enhancing CEDAW was initiated as well.

The Beijing Declaration and Platform for Action, adopted at the Fourth World Conference on Women, held in Beijing in 1995,[23] established that gender discrimination in education remained very strong and that this must be overcome in order to cease further reproducing stereotypes and social inequalities.

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[19] Z. Mršević, 2011, 47 84.

[20] J. Outshorn and J. Kantala, *Changing State Feminism*, Palgrave MacMillan, London 2007, 1 20, 164 182.

[21] *http://www.un.org/womenwatch/daw/cedaw/cedaw.htm)*, last visited 15 Novem ber, 2015.

[22] *http://www.ohchr.org/EN/ABOUTUS/Pages/ViennaWC.aspx,,* last visited 15 No vember, 2015.

[23] *http://www.unwomen.org/~/media/headquarters/attachments/sections/csw/pfa e final web.pdf*, last visited 18 November, 2015

In 1995, the Council of Europe also considered the gender perspective of education issuing its Recommendation of the Parliamentary Assembly of the Council of Europe on Gender Equality in Education,[24] which insists on creating new policies aiming at gender mainstreaming.

In 1998, UNESCO adopted the World Declaration on Higher Education for the Twenty-First Century, Vision and Action, whose article 4 is devoted to "Enhancing participation and promoting the role of women".[25] The Committee of Ministers of European Council Member States adopted its 2007 Recommendation CM/Rec (2007)13 on Gender Mainstreaming in Education, which offers basics for educational reforms in member states of Council of Europe, and which insists that states have to introduce gender sensitive approaches in textbooks and in teaching methods for purposes of educating young people in favor of a democratic citizenry.[26]

In the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention), announced on May 11, 2011, article 14 (1), says that "(P)arties shall take, where appropriate, the necessary steps to include teaching material on issues such as equality between women and men, non-stereotyped gender roles, mutual respect, non-violent conflict resolution in interpersonal relationships, gender based violence against women and the rights to personal integrity, adapted to the evolving capacity of learners, in formal curricula and at all levels of education".[27]

The 2012 Gender Equality Transversal program, established by The Council of Europe, had the aim to organize meetings of experts around focal points. In October 2014, at the Helsinki conference, the focal point was to combat gender stereotypes in and through education. The conclusions of this Conference were that even seven years after the European Council`s Recommendations (CM/Rec (2007)13), gender equality in the EU has not been achieved; that the greatest obstacles in that respect are stereotyping and sexism; gender mainstreaming in schools throughout EU has not been established, although laws and policies with that aim have been adopted. The reason is, according to the conclusions, that education and schools have not been the target of policies and programs yet, although there are some good examples,[28] of course. The Conference also

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[24] Recommendation of the Parliamentary Assembly of the Council of Europe on Gender Equality in Education, (*https://wcd.coe.int*), last visited 18 November, 2015.

[25] *http://www.unesco.org/education/educprog/wche/declaration eng.htm*, last vis ited 16 November, 2015.

[26] *https://wcd.coe.int/ViewDoc.jsp?id 1194631&Site CM)*, last visited 16 No vember 2015.

[27] *https://www.coe.int/t/DGHL/STANDARDSETTING/EQUALITY/03themes/vio lence against women/Conv VAW en.pdf*, last visited 16 November, 2015.

[28] For good examples of training teachers, parents, promoting gender equality top ics for academic research, see the European Council`s Report: Promoting Gender Main streaming in Schools, *http://www.coe.int/equality*, last visited 17 November, 2015.

concluded that the concept of gender mainstreaming is not fully understood by all the actors in educational process throughout European countries. Therefore, systemic recommendations for governments and regional and local authorities, schools, educational training providers, relevant NGOs, international organizations, were declared.[29]

The EU has insisted in its primary law – foundational treaties, its secondary law – Directives (for example, Pregnant Workers directive, equal pay, equal treatment in occupational social security schemes directives, directives regarding the right to paid maternity leave, paternity leave, etc.), judgments/case law of the Court of Justice of the EU, and soft law (EU Road Map for Gender Equality, EU "Women`s Charter", Strategy for Equality Between Women and Men 2010–2015, the European Gender Equality Pact for 2010–2020)[30] – on improving gender equality. The EU also required accession countries to establish the Anti-Discrimination Law and the Law of Gender Equality, as well as to improve their Labor Law, Criminal Law, Family Law and all fields and aspects of legislation that deal with protection from gender-based discrimination. Further, the European Institute for Gender Equality was established, with one of its activities being the assessment of impact of gender equality policies in the EU and the Member States. The Institute does this through the Gender Equality Index, which is built around six core domains: work, money, knowledge, time, power and health, plus violence against women and intersectional inequalities.[31]

Introducing a gender dimension into higher education represents an important factor in the process of establishing common European Higher Education Area (EHEA), which was defined by the Bologna Declaration.[32]

3. GENDER MAINSTREAMING IN LEGAL EDUCATION

Due to the highest value standards of modern international and national law, which have been based on universal human rights and women`s rights, introducing a human rights sensitive approach and gender sensitive approach in legal education is quite necessary. Educating students of law – future lawyers, judges, prosecutors, administrative workers, mem-

[29] *http://www.coe.int/t/dghl/standardsetting/equality/05conferences/2014NFPHelsinki/Documents/Report%20Conference%20Helsinki.pdf*, last visited 17 November, 2015.

[30] *http://ec.europa.eu/justice/gender equality/law/index en.htm*, last visited 17 November 2015.

[31] *http://eige.europa.eu/gender statistics/gender equality index*, last visited No vember 2015.

[32] *http://www.ehea.info/article details.aspx?ArticleId 65*, last visited November 2015.

bers of parliamentary and governmental bodies – in a gender sensitive manner means a real investment into better legislation, more correct interpretation and implementation of laws. Sensitizing judges in particular, but also legal professionals in all fields of their legal practice serves the fulfillment of what the essence of contemporary law is – equal respect and protection for each individual.[33]

The mainstreaming of gender equality in legal education requires manifold institutional, pedagogical, educational changes. It implies reconsidering all textbooks from the point of gender sensitive language and content, overcoming gender stereotypes and prejudices in content articulations, explanations and language, developing a gender sensitive approach among professors and students concerning understanding and interpreting legislation and particular fields of law, concrete laws, case law, as well as concerning the pedagogical approach of professors. In addition, it requires the introduction of gender sensitive titles and positions, aiming at improving a gender balance of academic staff, and introducing gender sensitive statistics.

Gender-responsive budgeting initiatives are also important. They have to support manifold projects, consisting of issuance of guidelines, training activities (training of monitors, commissioners, trustees, representatives of all referential political, media, and educational bodies; training university professors, as well as primary school and high school teachers and lecturers); institutional empowerment and networking; building a monitoring infrastructure; developing and improving media coverage; conducting projects for empirical surveys of textbook, curriculum and syllabus content from the point of gender equality.

Systematic theoretical-methodological frameworks for reconsidering curricula and textbooks for higher education and legal studies do not exist either in the European Union or in Serbia. Gender mainstreaming in legal curricula should encompass, firstly, a reconsideration of legal courses and textbooks from the mentioned point of view, secondly, the introduction of particular courses of gender studies, and thirdly, the introduction of legal clinics for gender equality and anti-discrimination.

Gender equality aspects should be considered in all legal courses, especially in those which have been dealing with individual human rights, family and gender relations, individual and social welfare and security, protection of women and children in labor, power relations, participation in decision-making, etc. What should also be taken into account is how much presentation and interpretation of law-making and law implementation has been gender sensitive in its language, content, hidden stereotypes, implications for social roles.

[33] Dragica Vujadinović, Country Report on Legal Perspectives of Gender Equality in Serbia, in: *Legal Perspectives of Gender Equality in Southeast Europe*, SEELS, Skopje November 2012, 161 186.

For example, one of the introductory courses in legal studies, Introduction to Jurisprudence, is supposed to help students to understand how law has been made by men and how women were invisible until recently, i.e. to understand that behind gender neutral legal language and declarative universal legal norms lies a patriarchal matrix that hides gender inequalities. The course also attempts to familiarize students with formal and substantive equality and gender sensitive approaches in understanding the creation, interpretation and implementation of law. It should carefully introduce gender sensitive language. However, none of these textbooks in Serbia and elsewhere contains gender sensitive content. For example, in one recently published and otherwise good Serbian textbook, there is complete absence of gender sensitive content. Indeed, in expressing the plural of man and woman, the textbook employed once the old fashioned formulation people and women.

Sociology and/or Sociology of Law are also introductory courses that should consider family relations, genesis of the family, categories of sex and gender, family violence, parent-child relations, social roles, social and cultural factors from the point of the dialectic between patriarchy and anti/patriarchy. It should be obligatory to overcome traditional patriarchal stereotypes, and family relations and social roles must be treated differently than in the traditional matrix, especially in cases of rape, sex-trafficking, prostitution, child care, protection from family violence, etc. Sociology and sociology of law should include the feminist approach and its justifiability. Serbian textbooks for higher education and legal education in particular, have still not been articulated in a gender sensitive way.

Family Law is the field of civil law whose content (including its textbooks and syllabi) are most fit for explaining and interpreting social relations of the private sphere (marriage, family, parenting) from a proper gender equality perspective. For example, a gender sensitive approach is necessary to explain the prevalent practice of formally ascribing common property of a couple to the husband, despite the fact that the gender neutral norms regulate this issue on principles of equal rights to commonly acquired property. It is also necessary to explain to students the phenomenon of unpaid homework, and problems which emerge in the court concerning issues in evaluating such unpaid work when considering division of jointly acquired property. In the case of parenthood, impacts of gender stereotypes have to be considered as well as their influence on judicial decisions about who of the parents will get the right to care, custody and control of children in a divorce. However, some of the current textbooks still present approaches that openly support a patriarchal matrix, stereotypes and traditional social roles. The situation is similar in the case of Criminal Law. It is important to make students aware of the importance of sanctioning and systemic prevention of domestic violence. The text-

books and the teaching should have a gender sensitive approach when dealing with victims of rape, all too easily turned into perpetrators in the patriarchal matrix. What is sorely required is the study of necessary protocols of systemic coordinated police action, social service and the judiciary in the case of domestic violence.

Gender studies were first introduced in university curricula in the social sciences, coming later to legal studies. Under the influence of feminist movements, gender studies became a field of study in American and European universities in the 1970s. The first course of gender studies was introduced at Cornell University in 1969, and the first systemic gender study program was presented at San Diego University in 1970.[34]

When gender studies and legal clinics are concerned, good practices in the EU are linked with an existence of well developed networks, such as the Women`s International Studies Europe (WISE) (founded in 1990 on Cyprus), the *Advanced Thematic Network in Women`s Studies in Europe* (ATHENA) (established in Holland in 1996), as well as the Association of Institutions for Feminist Education and Research in Europe (AOIFE). In 2009, all these institutions banded together to form the European Association for Gender Research, Education and Documentation (ATGENDER).[35]

According to the recommendations outlined by the Council of Europe in 2007, one of the indicators of governments` will to overcome gender stereotypes and inequality in education is the "existence of gender/women's studies and research in universities and research institutions and their adequate support and financing".[36]

Regarding the so-called Gender Studies in Serbia,[37] it is first important to mention that each faculty and university in Serbia is autonomous in establishing its curricula and syllabi.[38] The introduction of Gender Studies must be initiated by professors and approved by the faculty administration. There are only a few faculties of law and social science

[34] Ž. Papić, *Sociologija i feminizam*, IIC SSO, Belgrade 1989, 20.

[35] *www//:atgender.eu/index.php/atgendermenu/mission*, last visited 18 November 2015.

[36] CM/Rec (2007)13, fn.26.

[37] N. Petrušić, S. Konstatinović Vilić, Integrisanje studija roda u univerzitetski sistem obrazovanja, Project of Ministry of Education of the R Serbia, No. 179046, 2013.

[38] For example, at the Law Faculty in Belgrade, the male and female professors initiated the course "Gender Studies" to be included in the curriculum of undergraduate studies and they have implemented an interdisciplinary approach (including a historical political, social, cultural and legal dimension of the gender issue). A national, regional, European and international context of legal regulation and affirmation of gender equality is considered in this course. In its teaching, special attention is paid to protection against violence, human and sex trafficking. Two debates pro and contra legalization of prostitu tion and right to abortion have also been included.

faculties in Serbia where this kind of syllabus has been introduced either at the undergraduate or graduate level of academic work.[39]

Legal clinics for gender equality and/or against discrimination are a specific form of gender mainstreaming in the frame of legal education. Students get an opportunity at legal clinics to witness cases that deal directly with issues of gender based discrimination, domestic violence, case law, etc. Legal clinics inter-connect students` theoretical knowledge, personal insights and practical legal experience.[40]

All the above mentioned forms and tracks of gender mainstreaming in Serbian legal education should become relevant standards and criteria for accreditation of a legal educational curriculum of faculties of law in Serbia.

4. LEGISLATION AND REFERENTIAL CASE LAW IN SERBIA

The Constitution of the Republic of Serbia (2006) does not fully comply with the EU Gender Equality Law. According to the Commentary on the Constitution,[41] certain Constitutional provisions are contestable from the point of gender equality, whereas others are not. Article 15 generally proposes equality and equal opportunities for women and men (female and male). The Constitution stipulates prohibition of both direct and indirect discrimination on any grounds, including the one based on sex [article 21 (3)]. Prohibition of gender based discrimination is not mentioned as such, the notion "sex" is used instead of "gender". Article 48, which is related to basic rights and recognition of differences, does not mention sex (gender), but only differences in ethnic, religious, linguistic and cultural identity. Article 49 speaks about forbidding religious, racial and ethnic hatred, but not based on sexual identity. Article 60 considers equal rights of women related to work, but does not specify necessity of equal pay for equal work, nor does it offer any solution for unpaid domestic labor. Article 62 (1) speaks in a contradictory way about the right to marriage and establishing a family. Article 63 speaks also in an unclear way about the right to give birth, whereas Family Law refers directly to women as possessors of this right.

The Law on Gender Equality[42] was adopted and came into force in December 2009. It was written in compliance with the EU Gender Equal-

[39] See: N. Petrušić, S. Konstatinović Vilić, Modeli rodne senzitivizacije obra zovanja, in: *Prava djeteta i ravnopravnost polova Između normativnog i stvarnog*, Ban ja Luka 2012.

[40] N. Petrušić, S. Konstatinović Vilić, 2013.

[41] M. Pajvančić, *Komentar Ustava Republike Srbije)*, *http://www.kas.de/wf/doc/kas 22016 1522 14 30.pdf?110224181009*, last visited 17 November 2015.

[42] Zakon o ravnopravnosti polova, "Službeni glasnik RS", br. 104/2009. The no tion "sex" instead of "gender" is used in the title and vocabulary of this Law, although the

ity legislation. The clauses in the Serbian Constitution which had not been sufficiently clearly articulated from the gender perspective, are here better articulated. Article 3 of The Gender Equality Law specifies what equal opportunities refer specifically to the case of female individuals. Articles 4, 5 and 6 specify indirect and direct discrimination based on gender. Article 7 articulates special measures for combating discrimination. Articles 11 and 17 specify women's right to work, and equal pay for equal work. Articles 30, 31, 32, 33 and 36 demand equal opportunities in education, sports, culture, political and public life. Article 47 describes extreme urgency for proceedings initiated for the purpose of protection from gender-based discrimination; Articles 48, 49 further elaborate on criminal procedures related to gender based discrimination.

Government agencies are responsible for planning, organizing, implementing and financing the measures aimed at raising public awareness concerning the need to prevent domestic violence.

The Law on Gender Equality does not provide, however, special measures and programs for victims of domestic violence, envisaging provision for shelters, social, legal and other assistance, and a compensation to the victims of violence.

According to the commentary on the Law on Gender Equality,[43] special importance is given to the fact that this law secures judicial protection from gender based discrimination, and also secures misdemeanor sanctions in that respect. However, the relevant judicial practice based on this Law has not been collected yet.

The Law on Prohibition of Discrimination[44], which was also adopted in 2009, essentially complements and enhances the Law on Gender Equality. It establishes an independent, autonomous and specialized state authority – The Commissioner for Protection of Equality (article 1).

The quota system is introduced in the amended Law on Electing the Members of Parliament, which proposes that one third of the MPs must be female. However, the amendment according to which a female people's representative should replace each female resigning MP, once again failed to pass the Parliamentary procedure of adopting amendments to this law. This, of course, opens space for manipulation and getting around the rule that one third of MPs must be women.[45]

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difference between "sex" (as the biological characteristic) and "gender" (socially estab lished roles) is mentioned in article 10.

[43] M. Pajvančić, N. Petrušić, S. Jašarević, *Komentar Zakona o ravnopravnosti polova*, Beograd, 2010. pp. 103 123.

[44] Zakon o zabrani diskriminacije, "Official Gazette of the Republic of Serbia ", 22/2009.

[45] Z. Mršević, 2011, 95.

In addition to the Law on Gender Equality and the Anti-Discrimination Law, positive steps in favor of female and child protection from violence have been taken in the amended Criminal Code from 2002; domestic violence was criminalized for the first time as a specific criminal act in Art. 118a of the Criminal Code[46]. Failing to pay alimony, marital rape, incest, as well as sexual harassment and human trafficking have been sanctioned by the Code. A new Family Law from 2005[47], followed the same track concerning domestic violence. In cases of abuse, neglect or violence against children, there is a possibility of depriving the parent of his/her parental rights.

Labor law[48] differentiates direct and immediate gender-based discrimination. All forms of discrimination, including based on gender, are forbidden when it comes to preconditions of employment and choice of candidate, work conditions, education, professional promotion and job advancement, termination of contract, etc.

With an intention to point out the good practices that can serve as examples of proper implementation of existing legislation in Serbia, the following are two court decisions which protect women`s rights (both verdicts passed before the adoption of the Law of Prevention of Abuse at Work and the Law on Gender Equality).[49]

The Municipal Court in Užice ruled in a civil case on 9 October, 2006, on a class action of several women for compensation due to discrimination on a gender basis during dismissal and determination of retirement benefits. In its decision explanation, the Court called for the application of domestic legislation (art. 13 of the Constitution, art. 12. and 18. of the Labor Law), but also of international documents, which the country is obliged to respect and apply.[50]

The Municipal Court in Jagodina passed a verdict on 3 September, 2008, in which it applied the existing legal provisions of criminal law to punish harassment of women in the workplace, specifically for mobbing. This was one of the first verdicts on mobbing in Serbia.[51]

The Commissioner for the Protection of Equality also confirmed the existence of indirect discrimination, not only towards specific women

[46] Criminal Code "Official Gazette of the Republic of Serbia", 2002, 26/77. *http:// www.cbs css.org/files/publikacije/krivicni zakon rs.pdf*, last visited 18. November 2015.

[47] Porodični zakon, "Official Gazette of the Republic of Serbia", br.18/2005.

[48] Zakon o radu, "Official Gazette of the Republic of Serbia", br. 24/2005, 61/2005, 54/2009, 32/2013 i 75/2014.

[49] B. Urdarević, Country Report on Legal Perspectives of Gender Equality in Ser bia, in: *Legal Perspectives of Gender Equality in Southeast Europe*, SEELS, Skopje No vember 2012, 161 186.

[50] J. Lazić, N. Dičić, N. Petković, *Radna prava žena u Srbiji,* Bg Centar za ljud ska prava, Beograd 2008, 32 36.

[51] *Ibid*, 36 38.

who submitted a complaint of returning to a lower level of work after their maternity leave, but also in the case of more than 30 other women from the same company. Therefore, the Commissioner for Equality engaged in strategic litigation against this firm, with the case ongoing.[52]

Cases of discrimination can also come onto the agenda according to a narrow interpretation of laws. The Administrative Secretariat of the City of Belgrade, municipal department Palilula, refused to give a certificate of single marital status to a person who announced plans to enter a same sex marriage abroad, with the explanation that the certificate cannot be given to persons who intend to commit the mentioned act in foreign countries, as long as same sex marriage is unconstitutional in Serbia. The Commissioner for Equality concluded that this administrative service is discriminating against persons on the basis of their sexual orientation.[53]

The Commissioner for Equality also reported a case based on complains against a university textbook in Criminology[54] that dealt in a contesting manner with issues of rape, women as victims and psychological profiling of women as witnesses. The Commissioner concluded that the author expressed clear gender stereotypes and derogated the dignity of women, especially those who are victims of violence. The Commissioner also pointed to the negative impacts of this textbook`s stereotyping and regressive ideas for shaping the mindset of students – future lawyers, judges, prosecutors.

The most sound case of gender based discriminatory legislation can be seen in the recently enacted Law on Ways to Determine Maximum Number of Employees in the Public Sector, which implied that only women become surplus workers in the public sector at the age of sixty and six months. Namely, their previously achieved advantageous right to retire on the basis of age has been in this law transformed into discriminatory proposal for diminishing the number of employees in the public sector. The Constitutional Court of Serbia recently announced the temporary suspension of this discriminatory provision – while being opposed to constitutional guarantees against gender-based discrimination and constitutionally guaranteed equal access to workplaces – until the final decision on the constitutionality of this law.[55]

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[52] *53 http://www.ravnopravnost.gov.rs/sr/pol rod/pritu%C5%BEba i s protiv a a d o o zbog diskriminacije po osnovu pola u oblasti rada i zapo%C5%A1ljavanja,* last visited 17. November 2015.

[53] Opinion No. 07 183/2013 02, August 28. 2013. *http://www.ravnopravnost.gov.rs/sr/seksualna orijentacija/pritu%C5%BEba o z l lj p protiv sekretarijata za upravu gu grada beograda zbog diskriminacije po osnovu seksualne orijentacije u p*, last visited 17. November 2015.

[54] Opinion No. 07 00 185/2014/02, July 31, 2014. *http://www.ravnopravnost.gov.rs*

[55] Republic of Serbia, Constitutional Court, No. IY з 244/2015, October 8, 2015.

The influence of the European Convention case-law on the Constitutional Court[56] of Serbian jurisprudence has been quite significant in the field of civil rights. The Constitutional Court has even tended to introduce some new rights, by relying on the well-established case-law of the Court. In particular, that was the case with the right to recognition of sex adjustment, which the legislation in force did not allow for, so the Constitutional Court had to fill in this normative gap.[57]

The case originated with a constitutional complaint which was submitted by X, born in 1949, and diagnosed with the *pseudohermaphroditism*, i.e. physical characteristics of the female sex with the gender identity of the male sex. After receiving different therapies, X had sex reassignment surgery in Belgrade, in December 2010. In March 2011, he sought from the municipal authorities responsible for keeping the birth registry, the rectification of the data related to his sex. The request was denied. He filed a constitutional complaint, against the denial. The Constitutional Court decided in favor of the complainant and ordered the authorities to alter the data related to sex in the registry of birth.[58]

The Constitutional Court referred to a number of the Court's judgments in which it found that there had been no administrative or judicial remedy at the applicant's disposal under domestic law.[59] It referred, in particular to: *Vernillo v. France* and *Lepojić v. Serbia*, for its holding that the remedy had to be sufficiently certain, not only in theory, but also in practice.[60] It made reference to *Chahal v. The United Kingdom*, in arguing that remedy should be of such a nature as to allow the competent authority both to deal with the substance of the relevant infringement and to grant appropriate relief.[61] It referred to *Airey v. Ireland*, stating that when there were several remedies available it was up to the victim to choose the one it wanted to use;[62] as well as to *Akdivar v. Turkey*, in its holding that the redress should have reasonable prospects of success.[63]

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[56] D. Popović, T. Marinković, "The emergence of the human rights protection in Serbia under the European Convention on Human Rights: The experience of the first ten years", in Iulia Motoc, Ineta Ziemele (eds.), *The Impact of the ECHR on Democratic Change in Central and Eastern Europe Judicial Perspectives*, Cambridge University Press, forthcoming (march 2016). Case law and references from 48 to 62, are taken from D. Popović,

[57] D. Popović, T. Marinković, op.cit.

[58] Ruling of the Constitutional Court, no. Uz 3238/2011, 8 March 2012, Part III.

[59] *Ibid*., Part V.

[60] *Vernillo v. France*, no. 11889/85, 20 February 1991, para. 27; *Lepojić v. Serbia*, no. 13909/05, 6 November 2007, para. 51.

[61] *Chahal v. The United Kingdom*, no. 22414/93, 15 November 1996, para. 145.

[62] *Airey v. Irland*, no. 6289/73, 9. October 2010.

[63] *Akdivar v. Turkey*, no. 21893/93, 16. September 1996, para. 68.

Concerning the recognition of the right to have one's sex adapted to his/her gender identity, as an inherent element of the right to respect for private life, the Constitutional Court had to recognize the right to respect of private life, which was not as such enshrined in the 2006 Constitution.[64] The Constitutional Court construed this right from the constitutional guarantee of "dignity and free development of individuals".[65] Supporting the inclusion of the right to respect of private life into the constitutional guarantee of dignity and free development of individuals, the Court resorted to the understanding of the notion of "respect of private life" in the Convention case-law. In particular, it quoted the Court's holding that the "respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings".[66]

The Constitutional Court also referred to the Convention case-law, for its notion of private life which implied "a physical and moral integrity of a person" together with "his or her sexual life".[67] The Constitutional Court held that "the sphere of private life of a person undoubtedly includes, *inter alia*, its sexual identity, sexual orientation and sexual life, as a result of which a right to a private life presupposes a right to have the details of personal identity specified, and in that sense a right to have one's sex adapted to its gender identity".[68] The Constitutional Court concluded that "although neither the Constitution nor the European Convention [on Human Rights] explicitly mention gender identity and the right to a change of sex, this sphere of a person's life undoubtedly belongs to a constitutionally guaranteed sphere of dignity and free development of individuals and conventionally guaranteed sphere of respect for private life".[69]

Consequently, after recognizing the right to have one's sex adapted to its gender identity, as a constitutionally entrenched right, the Constitutional Court introduced a positive obligation for the authorities to make necessary alterations in the birth registry.[70] Such a rectification should be allowed upon request of the person concerned, supported by the documentation provided by the medical institution, which effectuated the sex reassignment surgery.[71] In extending the boundaries of individual rights,

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64 Ruling of the Constitutional Court, no. Uz 3238/2011, Part VI.

65 Constitution of Serbia, Article 23 (1) and (2).

66 *Niemietz v. Germany*, no. 13710/88, 16. December 1992, para. 29.

67 *X and Y v. The Netherlands*, no. 8978/80, 26. March 1985, para. 22.

68 Ruling of the Constitutional Court, no. Uz 3238/2011, Part VI.

69 *Ibid*., Part VII.

70 *Ibid.*

71 *Ibid*., Part VIII.

the Constitutional Court found, once again, the necessary support in the Convention case-law, i.e. in the judgment given in *Goodwin v. The United Kingdom*.[72]

5. CONCLUSION

The contemporary epoch has brought about the awareness of the need to overcome patriarchal subordination of the female gender and to implement in law and societal life an idea of universal equality among human beings, equal respect for each individual and protection of universal human rights. However, the existent emancipatory trends in social, cultural, economic, political, and legal life of modern states and societies are far from complete in removing patriarchal remnants and manifestations.

Patriarchy has been deeply rooted in cultural patterns, social roles and family relations, as well as in the cultural, social, economic, political life. Thus far we can speak about the dialectic between patriarchy and emancipation in modern times. The patriarchal matrix of hierarchical male/female, parent/child relations fits perfectly well with an authoritarian political and social order, and serves to reproduce power relations in public life. Elements of patriarchy, however, exist even in the most developed countries and under various circumstances; the dialectical opposition and crossing between patriarchy and emancipation in gender relations has been part of the agenda in the life of each individual, each family, each social and political unit in the world. In more developed post-traditional societies and more democratic states, the emancipatory elements have been proportionally more existent; in contradistinction – in more authoritarian regimes and more traditional societies, regions, local communities, groups and associations and families – patriarchal power relations still prevail. The struggle between patriarchy and trends of gender emancipation (anti-patriarchy) has been an ever present task.[73]

Gender equality – as the aim of public policies – imposes a need for individual, social, political, cultural matrix change and thus a need to also introduce legal norms, mechanisms and policy measures for overcoming patriarchy.

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[72] *Christine Goodwin v. The United Kingdom*, no. 28957/95, 11 July 2002, para. 77.

[73] P. Ginsborg, "Uncharted Territories: Individuals, families, Civil Society and the Democratic State", *The Golden Chain Family, Civil Society, and the State*, (eds. J. Nautz, P. Ginsborg & T. Nijhuis), Berghahn, NY Oxford, 2013, 17 42; Dragica Vujadi novic, "Family and Civil Society in Present Day Serbia", *The Golden Chain Family, Civil Society, and the State*, (eds. J. Nautz, P. Ginsborg & T. Nijhuis), Berghahn, NY Oxford, 2013, 260.

A legal framework for gender mainstreaming consists of international and national legislation based on principles of gender equality and protection of women`s rights. It implies reconsidering different fields of legislation from the point of gender sensitivity, and enacting in each state the Anti-Discrimination Law and Law on Gender Equality. This legal framework should be supported by creating national policy frameworks on gender equality – establishing parliamentary and governmental bodies (on regional and municipality levels as well) for gender equality, establishing national strategies for promoting gender equality and action plans, introducing independent bodies such as the Ombudsperson and Deputy Ombudsperson for gender equality, as well as the Commissioner for Equality.

Concerning the stipulation of gender sensitive approaches in education, additional legal, political and institutional mechanisms at the state level, as well as the educational level are necessary.

Starting from kindergarten and including the university level, education plays an essential role in forming systems of values and engendering emancipatory social roles and power relations or, on the contrary, reproducing traditional gender social roles and stereotypes.

Higher education, including legal education, should provide an emancipatory mindset. It is necessary to introduce gender sensitive pedagogy and approaches in legal textbooks, as well as offer gender sensitive statistics. Sensitizing teachers is a crucial factor in this process. Without educating teachers in this respect, students will not receive a proper understanding of female (in)visibility in gender neutral legal norms, nor of social implications related to gender (in)sensitive interpretations and implementations of specific legal norms.

A gender sensitive approach in syllabi and pedagogy has been underdeveloped in higher education, not only in Serbia, but generally speaking. Though the EU has made the most significant steps forward in gender mainstreaming in its primary, secondary and soft law, as well as in its policy strategies, the European High Education Framework – in both its content and implementation – has also been lagging behind in this respect.

Therefore, the project of a "positive intervention from above" should be very useful, meaning introducing strategy-plans for training teachers and professors, reconsidering textbooks, curricula and syllabi from the point of gender sensitive language and content, monitoring the proportion of male and female academics and university administrators, introducing proper budgeting, and monitoring an all-encompassing process of gender mainstreaming.

Universal human rights as the civilization standard of modernity are not fulfilled in their meaning and mission unless they encompass gender equality. Gender mainstreaming has become a normative project and aim, marking an immense step forward in historical terms. However, the struggle for visibility of women (and all vulnerable groups) in legislation, legal education and jurisprudence has been consistently on the agenda both as the emerging practice and as the task to be fulfilled.

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NORMATIVE FRAMEWORK FOR THE PROTECTON AGAINST GENETIC DISCRIMINATION IN SERBIA

The paper is devoted to a normative framework of protection against genetic discrimination in the legal system of the Republic of Serbia, contained in the Law on Patients Rights, as of 2013 and in the Law on Prevention and diagnostics of genetic disorders, genetically conditioned anomalies and rare diseases, as of 2015. The anal ysis has shown that the rules on protection of the genetic data and the use of genetic samples, which are crucially important for prevention of genetic discrimination, have not been harmonized with contemporary ethical and legal standards. The contents of the Article 9 of the Law on Prevention and diagnostics of genetic disorders, geneti cally conditioned anomalies and rare diseases reduces the scope and level of protec tion against genetic discrimination in relation to the protection, given by the General Antidiscrimination Law. The legal definition of the genetic discrimination notion is not comprehensive, clear or precise, either, so it causes confusions, which, addition ally, make the application of anti discrimination regulations more difficult. Having in mind the harmful effects caused by the genetic discrimination, there is a need to eliminate the observed normative failures in due time and enable people to enjoy the benefits, provided by genetic investigations, without the fear from discrimination. In order to prevent the genetic discrimination, it is necessary to work on both informa tion providing and raising awareness about the genetic privacy and the genetic dis crimination problem, but also on promotion of the social justice and development of sensibility for bioethical challenges brought by the new age.

Key words: *Genetic privacy. Genetic features. Protection against genetic dis crimination.*

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1. HUMAN GENETICS AND THE NON-DISCRIMINATION RIGHT THE KEY ACHIVEMENTS AND CHALLENGES

Unbelievable expansion of medical genetics which followed after the human genome decoding"[1] enabled discovery of thousands of genetic diseases and disorders through genetic testing, and owing to findings in the field of genetic epidemiology and pharmacogenomics, the medical science greatly advances towards the personalized medicine, which should ensure individualized medical treatment of patients in accordance with their genetic profile.

New possibilities offered by genetic technologies initiated huge bioethical debates and opened a series of ethic dilemmas which required urgent solutions in order to establish clear limits of their applications and protect the essential human values. Among the problems which required a quick normative reaction, the problem of genetic discrimination[2] occupied a significant place. Namely, the comprehensive genetic screenings enabled establishing of genetic variability among the members of certain groups, but that created the possibility of the racism ideology justification, and additionally, stimulation of the race and ethnic discrimination by the non-scientific interpretations of differences in the inheritance material of some races and ethnic groups.[3] On the other hand, genetic testing opened the space for, not only genetic privacy invasion, but also for discrimination of individual persons based on their genetic characteristics.

Numerous researches in America, Australia, Canada and EU have shown that in the countries in which genetic tests are largely available, the genetic discrimination is in expansion, and that it is increasing in parallel with the increase of the number of genetic tests[4] and that it is most

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[1] Human genome mapping is the result of the megaproject "Human genome" work, the biggest and the most expensive scientific venture of all times, started in 1989, led by James Watson. See: Wolfram Henn, Eckart Messe, *Human Genetics* (translation), Laguna, Beograd 2011, 8 15, and the literature, mentioned there.

[2] The appearance of genetic discrimination threatened to endanger the "Human Genome" project goals realization. Due to that, Francis Collins, the Director of the Hu man Genome National Institute, recommended a strict protection against genetic discrim ination. See: *Introductory remarks on measure*, Congressional Record Senate, 846.

[3] On the global level, the superiority doctrine based on the race difference was pronounced a non scientific and false, already far back in 1995, pointing to the fact that it was morally inacceptable and socially unjust and dangerous, therefore it cannot be justi fied either in theory or practice. See the Preamble of the International Convention on the Abolition of all Forms of Race Discrimination.

[4] Confirmed in researches conducted in America, Australia, Canada and United Kingdom, far back in 90's of the last century. More: Sandra Taylor, Sue Treloar, Kristine Barlow Stewart, Margaret Otlowski, Mark Stranger, "Investigating Genetic Discrimina tion in Australia: Perceptions and Experiences of Clinical Genetics Service Clients Re garding Coercion to Test, Insurance and Employment", *Australian Journal of Emerging*

spread in the fields, vitally important for people: in the social insurance and in the fields of labour and employment. In the field of insurance, genetic discrimination is most frequently reflected in insurance rejection or in the insurance premium increase based on the data on an individual person genetic predispositions, that is, his/her family members, and in the fields of work and employment, it is most frequently done by employment rejection and dismissal from wok or denying of employees advancement, based on their genetic profile data. [5]

The fear from discrimination and stigmatization has caused mass rejection of people to participate in genetic tests and screenings.[6] Negativne effects of such a situation are manifold. Rejection to do the tests results is a missed opportunity of genetic diseases early detection and treatment, that being harmful for those at risk from getting diseases, but for the entire society, as well, because, due to untimely treatment, the health protection costs are increased, and, what is specifically important, the development of new genetic therapies is stagnating, because it is not possible without the inclusion of a big number of individual persons in genetic tests.

Dynamic development of new genetic technologies permanently produces new challenges and controversies and the need for regulations change. The changes are oriented to strict ban of genetic discrimination in

Technologies and Society Vol. 5, No. 2, 2007, 63 83. *http://www.researchgate.net/ publication/26486253 Investigating Genetic Discrimination in Australia Perception sand Experiences of Clinical Genetics Services Clients Regarding Coercion to Test Insurance and Employment. asp*, 17.06.2015.

[5] See: *Faces of Genetic Discrimination How Genetic Discrimination Affects Real People*, National Partnership for Women & Families on behalf of the Coalition for Genetic Fairness, 2004. *http://go.nationalpartnership.org/site/ DocServer/FacesofGenet icDiscrimination.pdf?docID 971. asp,* 17.06.2015.

[6] In America, 32% refused to have the free test done for the breast cancer risk, as offered by American National Health Institute, stating that their reason for concern was that they and their daughters would be exposed to discrimination in health insurance. See: *Introductory remarks on measure*, Congressional Record Senate, January 22, 2007, 846. *http://www.gpo.gov/fdsys/pkg/CREC 2007 01 22/pdf/CREC 2007 01 22 pt1 PgS828 3. pdf. asp,* 17.06.2015. A huge percentage of relatives of persons affected by Huntington's disease refused genetic testing, and even 46.2% of subjects were exposed to discrimina tion and stigmatization, Cheryl Erwin, Janet K. Williams, Andrew R. Juhl, Michelle Mengeling, James A. Mills, Yvonne Bombard, Michael R. Hayden, Kimberly Quaid, Ira Shoulson, Sandra Taylor, Jane S. Paulsen, *Perception, Experience, and Response to Ge netic Discrimination in Huntington Disease: The International RESPOND HD Study, http://www.researchgate.net/publication/44597481 PerceptionExperienceand Response to Genetic Discrimination in Huntington Disease The International RESPOND HD Study. asp,* 12.06.2015. The situation is also similar in the EU states Beatrice Godard, Sandy Raeburn, Marcus Pembrey, Martin Bobrow, Peter Farndon, Segolene Aymé, "Ge netic information and testing in insurance and employment: technical, social and ethical issues", *European Journal of Human Genetics,* 2003, 11**,** Suppl. 2, 123 142. *http://www. nature.com/ejhg/journal/v11/n2s/full/5201117a.html. asp,* 17.06.2015.

employment, in that, the genetic monitoring is allowed over the workers, dealing with toxic matters, for the purpose of health protection at their work post. However, when it is to do with insurance, there are still debates, discussing about if and to what extent it is necessary to respect the interest of the insurer to make the risk assessment and based on that, to decide about the insurance, having in mind that based on the results of genetic testing, in most cases it is not possible to give a reliable prognosis in view of the disease development and the expected length of life. The key argument of the authority is that the genetic data must remain confidential and be used only for medical purposes, and that in the field of insurance, as well, individual persons must not be discriminated on the grounds of their genetic characteristics. The insurers, however, assert that it is not to do with discrimination, but with legitimate differentiation, of not the individuals only, but of different risk categories, as well and that the entire insurance system is based on the just and reciprocity principles, in which the premium amount, naturally must be based on the risk.[7] The future will show the direction of further development of legal protection against genetic discrimination. It is certain, however, that it will be one of the most dynamic fields of antidiscrimination law.

Although there are no exact data on the genetic discrimination prevalence in Serbia, it may be concluded, having in mind other countries experience, that it is not a far future in Serbia either, for it has already been manifested and it will be increasing along with the increased number of people included in genetic tests, and these are also increasing,[8] in spite of the lack of financial resources for costly equipment and consumables procurement, and in spite of scattered research personnel and other difficulties.[9] In parallel with it, there is the increased application of commercial diagnostic, presympthomatic and predictive genetic tests, financed from public and private sources, respectively. The increase of a number of individual persons, included in genetic tests widens the space for genetic discrimination, and in order it would not take roots, it is necessary to take the comprehensive and coordinated measures in due time, to prevent its manifestations and enable people to enjoy the benefits offered by genetic tests without the fear from discrimination.

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[7] Godard, B. Raeburn, S. Pembrey, M. Bobrow. M. Farndon, P. Aymé, S. "Ge netic information and testing in insurance and employment: technical, social and ethical issues2, *European Journal of Human Genetics,* 2003, 11**,** Suppl. 2, pp. 123 142.

[8] Data about that are available at the web site of Serbian Geneticists Society, within the section Medical genetics. *http://www.dgsgenetika.org.rs/sekcije medicinska genetika.ph. asp,* 15.06.2015.

[9] The Republic of Serbia Strategy of Scientific and Technological Development for the period 2010 2015, also contributed to that, by which the bio researches, particu larly in the field of genetics, have been established as one of seven scientific priorities. See: The Strategy of Scientific and Technological Development of the Republic of Serbia for the period 2010 2015, *Official Gazette of RS,* No. 13/2010.

Like in other countries, a comprehensive and coherent normative framework is also a basic precondition for effective prevention of discrimination in Serbia. For that reason, this work is devoted to regulations which, in their entirety, make a domestic normative framework of protection against genetic discrimination. The immediate cause for a topic choice is the adoption of long awaited and eagerly expected *Law on Prevention and Diagnostics of Genetic Diseases, Genetically Caused Anomalies and Rare Diseases* as of 2015.[10] Although this law was named popularly "Zoja's Law",[11] recognized in public as a law to improve medical treatment of children affected by rare diseases, it has much wider significance because, for the first time in Serbia, it regulates in a comprehensive way, the conditions of genetic testing and mass genetic screenings.[12] That is why it is important for effective prevention of genetic discrimination, as well.

The objective of this work is to make a critical review of the actual situation in this specific field of our national antidiscrimination law, but also to point out to the genetic discrimination problem, which is in Serbia still on the margins of scientific interest. Having in mind that in the domesic literature, the legal concept of genetic discrimination has not been elaborated more specifically, the first part of work considers the concept, manifestations and characteristics of genetic discrimination, the second one gives a short presentation of the international standards and solutions in the Comparative law, while the third part is devoted to analysis of some legal solutions in Serbian legislation, in order to estimate if they provide a satisfactory level of protection against genetic discrimination.

2. GENETIC DISCRIMINATION NOTION, CHARACTERISTICS

Genetic discrimination is a complex and multifaceted ethical, psychosocial and legal phenomenon. As a legal phenomenon, it has not been

[10] *Official Gazette of R. Serbia,* No. 8/2015 (hereinafter: ZGBARB).

[11] Adoption of ZGBARB has been initiated by the parents of a girl, Zoja Mirosavljević, who died from Batten disease. When she was affected, the physicians in Serbia could not establish the diagnosis of her disease, so the parents were referred to ask for solution outside the country. They asked from the Republic Fund of Health Insurance to bear the costs of diagnostics and treatment abroad, but they were refused because Zo ja's disease had not been discovered and therefore, it was not on the list of diseases, the treatment of which might have been covered by the Fund resources. Zoja's parents man aged to travel to London on their own account, where the disease was diagnosed. The adoption of the Law was proposed by the deputy to the Assembly, Dušan Milosavljević, in January 2014, but his proposal did not get the majority, necessary to be put on the Agenda. The Law was adopted one year later, on 23 January 2015.

[12] See: *ZGBARB Proposal Rationale*, *http://www.parlament.gov.rs/upload/archive/files/lat/pdf/predlozizakona /2245 14Lat.pdf. asp,* 17.6.2015.

defined by legal enactments which ban it, therefore, in order to be understood, it is necessary to rely on the definition and elements of the general concept of discrimination.

In the contemporary law, the expression "discrimination" is unjust differentiation or unequal treatment, that is, indulgence toward a person, that is, a group of persons, based on some of their actual or presumed personal feature, such as the race, skin color, nationality/ethnic origin, sex, sexual orientation, genetic particularity, health condition, disability or any other personal feature.[13] There are two basic forms of discrimination – direct and indirect discrimination, respectively. The direct discrimination occurs when a person (group) is treated unequally (less favorable), because of some personal feature, compared to some other persons (group) in an analogue situation (*comparator*) which do not have such a feature. Indirect discrimination is a form of discrimination which occurs when an apparent neutral rule, criterion or practice produces disproportionately negative effects compared to a person or a group of persons, because of some personal feature of theirs, compared to some other persons, that is a group.

Genetic discrimination is a special kind of discrimination, the key specificity of which is the very ground of discrimination, and it is a genetic characteristic of an individual person – one of personal characteristics which is a part of the integrity and the identity of each individual person. Although in literature one may encounter various definitions of the notion "genetic discrimination", in spite of differences, authors agree that the essence of genetic discrimination is the less favorable treatment of an individual person on the grounds of his/her actual or presumed enetic characteristics,[14] in that, the data about a genetic characteristic may stem from genetic testing or from the family history.[15]

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[13] About the legal notion of discrimination, see: Petrušić, N., Krstić, I., Marinković, T, *Komentar Zakona o zabrani diskriminacije*, Pravosudna akademija, Belgrade, 2014, 20 21.

[14] In the literature of older times, there has been potentiated the difference be tween genetic characteristics of a discriminated person, that is, the members of his/her family, in relation to the "normal" human genome. The expression "normal human ge nome" is under quotation marks because, as pointed out, it is not possible to define what a "normal" genome is, having in mind that there are mutations, which are easy to qualify as abnormal genes, but there are also mutations and benign polymorphisms, present in all individuals. See: Paul R. Billings, Joseph S. Alper, Jonathan Beckwith, Carol I. Barash, Marvin R. Natowicz, "Reply to Hook and Lowden: the definition and implications of genetic discrimination", *American Journal of Human Genetics*, Vol. 51, 1992, 903 905. Stated according to: Marvin R. Natowicz, Jane K. Alper, Joseph S. Alper, "Genetic Dis crimination and the Law", *American Journal of Human Genetics*, Vol. 50, 1992, 465 475.

[15] Larry Gostin, "Genetic discrimination: The use of genetically based diagnostic and prognostic tests by employers and insurers", *American Journal of Human Genetics*,

Like all other forms of discrimination, genetic discrimination is the consequence of stereotypes and prejudices, the basic cause of which is – ignorance. It is duly followed by stigmatization, which includes names calling, stereotypization, separation and loss of social status, and its basis in the attitude that the social identity of such persons is less valid because they have the "bad blood"[16] and are the carriers of diseases.[17] It causes suffering of individuals, loss of self-respect, alienation from the family members, disturbed family relations, etc.[18]

Unequal treatment may be qualified as genetic discrimination only if in time of discriminatory act commitment an individual person has not got the genetic disease symptoms (*asymptomatic individuals*). If the genetic disease, that is, disturbance, has developed, it is to do with discrimination on the basis of health condition or disability.[19] Separating the genetic discrimination into the special category is relatively new, in the first place because in some cases it is difficult to differentiate genetic discrimination from discrimination based on the health condition, that is, disability. It has been realized, however, that difficulties in recognizing genetic discrimination do not negate the need to treat genetic discrimination as a special type of discrimination,[20] because in that way, there is provided protection against discrimination to individual persons who, at the time of discrimination, were just at risk of getting diseased, without any certainty that they would get diseased.

As a rule, discrimination is a reaction to some, obviously personal feature of an individual, such as sex, skin colour, disability, etc.,while genetic discrimination is specific for genetic profile of an individual which is not obvious, so that making discrimination implies that a descriminator actively searches for genetic data.[21] One of the specificities

Vol. 17(1 2). 1991, 109 144, *http://scholarship.lawgeorgetown.edu/cgi/viewcontent.cgi?article 1763&context facpub.asp,*17.6.2015.

[16] Thomas Lemke, "Beyond genetic discrimination: Problems and perspectives of a contested notion' Genomics", *Society & Policy,* Vol. 1, 2005, No. 3. Stated according to: S. Taylor *et al.,* 64 65.

[17] C. Erwin *et al.,* 3.

[18] S. Taylor *et al.,* 65.

[19] It is considered that the victims of genetic discrimination may also be those individuas, affected by some genetic disease, if the cause of discrimination is their geno type, rather than a genotype based fenotype, which is determined in any individual case. Joseph S. Alper, Marvin R. Natowiczt, "Genetic Discrimination and the Public Entities and Public Accommodations Titles of the Americans with Disabilities Act", *American Journal of Human Genetics,* Vol. 53, 1993, 26.

[20] More: J.S. Alper, M.R. Natowiczt, 26 32.

[21] Having in mind that it is to do with conscious and intended action, the dis criminator may not defend himself/herself by the argument that he/she did not intend to discriminate, and which is, by the way, used to justify discrimination. See Nevena Petrušić, "Teret dokazivanja", *Sudska građanskopravna zaštita od diskriminacije* (ed. Nevena

of genetic discrimination is reflected in the fact that its victims are individuals, who, as already mentioned, do not have the genetic diseases symptoms or that it is not certain at all if they would be effected by such disease, so that they are not different at all from persons who might be used as comparators. For that reason, genetic discrimination is viewed within the context of genetic privacy,[22] and the fight against genetic discrimination is based on the strict protection of individuals from unauthorized obtaining and using of genetic data.[23]

Genetic discrimination may be one of the elements of, so called, multiple discrimination, when genetic characteristics of individuals incur as one of bases for their unequal treatment. Namely, the identity of a peson make various personal characteristics, such as race, nationality, sex, genetic and other characteristics, so an individual may, at the same time, be discriminated on multiple grounds, which causes synergic harmful effect.[24]

Genetic discrimination covers a wide spectrum of discriminating activities in interpersonal relations, both in the private and public spheres of life. Like all other forms of discrimination, genetic discrimination may also be made in the way to deny some right to a person, which is available to other persons, or some right is limited to him/her, while it is fully recognized to others, or a person is placed in a worse position by giving priority, i.e., a privilege to some other persons.[25]

3. NORMATIVE FRAMEWORK OF PROTECTION AGAINST GENETIC DISCRIMINATION IN SERBIAN LEGAL SYSTEM

The normative framework of protection against genetic discrimination in domestic legal system comprises general antidiscrimination regu-

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Petrušić), Poverenik za zaštitu od diskriminacije, Pravosudna akademija, Belgrade 2012, 273).

[22] About the genetic privacy, in detail: Zorica Kandić Popović, *Legal protection of basic human values in Central and East Europe and modern biotechnology: towards Eu ropean harmonization*, Open Society Institute, Praga 1999, 73 77.

[23] See: Aart Hendriks, *Protection against genetic discrimination and the Biomedi cine convention*, 216. *https://openaccess.leidenuniv.nl/bitstream/handle/1887/13932/Prote ction+against+genetic+discrimination+and+the+biomedicine+convention.pdf?sequence 2. asp,* 15.6.2015.

[24] See: Snježana Vasiljević, "Multiple discrimination", *Žene i pravo: feminističke pravne teorije* (ur. Radačić, Ivana), Zagreb, Centar za ženske studije, 2009, 361 378.

[25] Thus, for example, an Employer may refuse to employ a person for whom, due to the family history, such employer presumes genetic predisposition for the disease, al though the genetic profile, itself, is not relevant for the working capacity of an individual. Having in mind the consequences it have caused, it may be qualified as a breach of the principle of equal rights and liabilities, disturbing, humiliating treatment, hate speech, etc.

lations, contained in the Constitution of the Republic of Serbia and the Antidiscrimination Law, as well as some special regulations, directly or indirectly concerned with prevention and protection against genetic discimination.

3.1. General Antidiscrimination Regulations

The principle of equality and antidiscrimination is proclaimed by the *Constitution of the Republic of Serbia,*[26] prescribing that "According to the Constitution and law, everybody is equal", that "everybody is entitled to equal legal protection, without the discrimination, as well as that "any kind of discrimination is banned, direct or indirect, on any ground, and particularly on the grounds of race, sex, nationality, ethnicity, social origin, birth, religion, political and other opinion, financial standing, culture, language, age and psychical of physical disability".[27]

The general regime of discrimination ban is regulated by the *Antidiscrimination Law* (ADL),[28] by means of the basic and general antidiscrimination laws. It regulates the general ban of discrimination, the form and discrimination cases, as well as the procedures for protection against discrimination. The ADL bans discrimination on the grounds of any personal features, and in the list of 20 named and exemplary stated personal features there are also the genetic characteristics. The ADL does not define the notion "personal feature", or the notion "genetic characteristic". In the theory and practice, there is a generally accepted attitude that "the personal feature" is a personal character of one person determining his/her physical, psychological, spiritual, economic or social identity, but the notion "genetic characteristic" has not been the subject of more specific elaboration of experts, nor has anything on its contents been commented by the legal practice.

The analysis of antidiscrimination rules contained in the Constitution and ADL indicates that the discrimination is universally banned in Serbia: discrimination ban is obligatory for anyone, the ban covers all segments of social relations, both in public and private spheres, and the ground for discrimination may be any personal feature, actual or presumed, including genetic characteristics, as well.

3.2. Regulations on the Rights of Patients / Subjects

For the suppression of genetic discrimination, the regulations on genetic testing agreement, regulation of confidentiality of genetic data, as well as the regulations on genetic discrimination ban are very important.

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[26] *Official Gazette of RS*, No. 98/2006.

[27] Art. 21. paras 1 and 2 of the Constitution.

[28] Antidiscrimination Law (hereinafter ADL), *Official Gazette of RS,* No. 22/09.

These regulations are contained in laws, regulating the rights of patients and subjects included in biomedical researches.

The Law on the Rights of Patients as of 2013[29] in accordance with the principle of autonomy (self-determination),[30] expressly prescribes that without the approval of a patient no medical measures may be undertaken over him/her, except in some extreme cases, established by the law and which are in accordance with the physicians ethics.[31] Having in mind the legal definition of a medical measure, which represents "any medical service provided for preventive, diagnostic, therapeutic and rehabilitation purposes",[32] this ban undoubtedly refers to genetic testing, as well, to which an individual may be subjected only if he /she agrees about that. The ban is also applicable in terms of genetic testing within the medical researches which may be conducted only with the agreement of the patient, given in a writing, which is expressly regulated by Law.[33]

For genetic discrimination prevention, the regulations on medical data confidentiality are of the key significance, including data on genetic characteristics, considered as particularly sensitive data about the patients personality.[34] The obligation to keep the data confidentiality applies to all the employees in health institutions dealing with health business, all the employees working in organizations of mandatory health insurance, as well as the employees in organizations dealing with voluntary health insurance, which is strictly prescribed by the law.[35] From these provisions, it comes that genetic data may be available to private insurers, as well, which presents a problem, not only from the aspect of genetic privacy protection, but also from the aspect of discrimination prevention.

For genetic discrimination prevention, in Serbia, one of the most important laws is the mentioned *Law on Prevention and Diagnostics of Genetic Diseases, Genetically Conditioned Anomalies and Rare Diseases (LGDPD),* of 2015. As already said, the purpose of this law is to improve the protection of genetic health and to regulate the reasons for, and condi-

[29] *Official Gazette of RS*, No. 45/13. (hereinafter LRP).

[30] More: Jakov Radišić, Hajrija Mujović Zornić, "Pomoć pacijentima u ostvar ivanju njihovih prava: Zapadna Evropa kao uzor Srbiji", Jugoslovensko udruženje za medicinsko pravo, Belgrade 2004, 11; Ivana Simonović, "Pravo na samoodređenje, au tonomija volje i pravo pacijenta na informisani pristanak", *Zaštita ljudskih i manjinskih prava u evropskom pravnom prostoru* Colletion of papers), Volume one, School of Law in Niš, Niš 2011, 455 472.

[31] Art. 15. LRP

[32] Art. 2 para. 1, 2 LRP

[33] Art. 25 LRP

[34] Art. 21 LRP

[35] Art. 2 para. 2 LRP

tions of genetic testing.[36] Therefore, this law is important for effective prevention of genetic discrimination, and in that, the regulations on genetic privacy protection and genetic discrimination ban are particularly significant.

When it is to do with protection of genetic privacy, it might be said that the ZGBARB has mainly been haromonized with International standards in this field, but there are also some individual rules which have not been harmonized. According to ZGBARB, a patient is entitled to data confidentiality, which results from genetic testing, considered to be the data about the personality, particularly those, relating to health condition of a person. Besides, there is also prescribed the obligation to keep biological samples, used for analyses, under conditions which guarantee their safety and confidentiality,[37] in that, the violation of this obligation has not been misdemeanor sanctioned. The protection of genetic privacy is also ensured by regulations about the way of keeping the results of genetic testing. ZGBARB indicates that they are kept in accordance with the regulations on medical documentation and records, in the field of health and it expressly prescribes the duty of reoving the results of a genetic test when requested by patient, that is, his/her legal representative.[38]

To the end of privacy protection, there are also regulations about the usage of genetic samples. They may be used only for intended purposes they have been taken for, after which they are destroyed, but there have been regulated two exceptions. Namely, the samples may be used 1) for other medical and scientific purposes "in the measure where such usage is allowed by the law, or some other legal provisions", or 2) if a patient, having been fully informed about the other intended purpose of his sample usage, gave his approval in writing.[39] Breaching of these regulations has been sanctioned by a fine.[40] It stems from the rules stated that a genetic sample given voluntarily by an individual person for an exactly specified purpose, may be used for some other medical and scientific purposes, without his/her being informed or giving approval regarding that. It is contrary to the self-determination right, top-ranked in the scale of human values, due to which it has been protected by all International le-

[36] LGDPD prescribed that genetic analyses may be performed only in tertiary health institutions, which caused turbulent reactions of biologists and molecular biolo gists. The Serbian Genetics Society Medical Genetics Section requested for urgent change of the law in that part, in order to prevent closing of genetic laboratories. (Politika, 14.08.2015).

[37] Art. 8. LGDPD.

[38] Art. 23. LGDPD.

[39] Art. 22. LGDPD.

[40] Art. 36. para.1,4. An institution may pay a fine ranging from RSD 300.000 to 1.000.000, an entrepreneur, from RSD 300.000 to 500.000, and a responsible person in a legal entity and a medical worker may pay the fine, ranging from RSD 40.000 to 50.000.

gal documents and ethic codes in the field of biomedicine. On the other hand, these rules open the space for invasion of genetic privacy, thus creating an appropriate ground for genetic discrimination. For that reason, the rules of ZGBARB, in the part related to conditions of genetic samples usage, should be urgently changed and harmonized with contemporary bioethical standards.

For protection against genetic discrimination, the ZGBARB provision, expressly banning genetic discrimination is of immediate relevance. In the Art. 9 of ZGBARB, in the rubrum "Discrimination Ban in the Process of Genetic Testing", it is prescribed that "*no one must be discriminated or brought into an infavourable position due to his/her genetic characteristics, genetic features of his/her genetically related person, or due to the very taking or not taking genetic tests*".

Such formulated antidiscrimination clause, due to its lack of precision and incorrect terminology, opens a series of disputable questions.

In the first place, objective and subjective ranges of this ban are not clear. Judging from the rubrum, it may be concluded that the discrimination ban, as of the Art. 9. of ZGBARB refers just to the genetic testing procedure, therefore, to the treatment (acting and not acting) of authorized persons when conducting genetic testing and genetic screening. However, the contents of the very provision do not specify in any way to what field the ban refers to, so it may be concluded that it refers to all fields,[41] therefore, it is obligatory for everyone.

On the other hand, the legislator prescribes that "no one must be discriminated, or brought into an unfavourable position". This provision may cause confusion because it could be concluded wrongly that "bringing somebody into an unfavourable position" is not discrimination, at all, but completely different treatment, banned by the legislator, as well. The general legal notion of discrimination, defined in the Art. 2 of ADL, however, cover acting which places in less favourable position an individual, that is, a group, due to some personal feature; then, it is to do with indirect discrimination, as one of legal forms of discrimination. It seems that the intention of the legisator was to ban both direct and indirect genetic discrimination by ZGBARB and that the errors in terminology, which incurred in formulation of antidiscrimination clause, were caused by wrong translation of foreign legal-technical terms: the term "discrimina-

[41] It is interesting that the ZGBARB wording miss the provision contained in the Art. 9, para. 2 of the Law, anticipating that "any discrimination ban or the request for equal treatment", provided by other laws and regulations in relation to para.1 of this Arti cle, remain unchanged, and especially when these regulations are adopted to protect a specific group of persons". Although this provision is quite unclear due to bad editorial, its sense may be hinted: that a special regulation ZGBARB about the ban of genetic dis crimination does not exclude, or change the regulations on the ban of genetic discrimina tion contained in other laws.

tion", was used in the meaning "disparate treatment", and the term "unfavourable treatment", in the meaning "disparate impact". However, due to such terminology confusion, it may be disputable in practice whether only the direct genetic discrimination has been banned or the ban also applies to the indirect discrimination. On the other hand, in the context of discrimination it may not be spoken about placing a person in "more unfavorable position", but in the "worse" position having in mind that indirect discrimination implies the comparison of the outcome of treatment, and the outcome is just the worse position of a discriminated person, compared to some other in an analogue situation. It is obvious that the law editors were not familiar with the general antidiscrimination notions.

Dilemas challenge the rules of ZGBARB related to the basics of genetic discrimination. In the International Comparative Law the customary approach in regulating the genetic discrimination ban implies that discrimination is banned on the basis of actual or presumed genetic characteristics. ZGBARB, however, does not prescribe expressly that genetic discrimination may be made on the basis of presumed genetic characteristics. From the statement of the discrimination basis, it may be hinted that the legislator had the intention to do so, because, the discrimination of an individual is banned not only on he grounds of his/her genetic characteristics, but also on the basis of *"genetic characteristics of his/her gentically related person*". However, due to non-existence of an express rule on genetic discrimination ban, based on presumed genetic characteristics and nomotechnically incorrect wording of the provision, discriminators have been given an opportunity to successfully defend themselves by proving that they were not familiar with genetic characteristics of a discriminated person, or genetic characteristics of persons he/she is related to, in genetic terms. The additional confusion may be caused by expressions, such as "*genetic characteristics*" and "*genetic features*" because they are not defined by ZGBARB, and in some legal provisions they have been used as synonyms.

Besides, when formulating the antidiscrimination clause, the legislator neglected the fact that the complex rules of human genetics were not known to everybody, and even to potential discriminators. Namely, the linguistic interpretation of the provision, as of the Art.9, suggests that genetic discrimination may be made if based on "genetic features" of a person with whom the discriminated person has been genetically related. In this way, the ranges of the genetic discrimination ban have been narrowed. Genetic discrimination may be made even when a discriminator presumes that a discriminated person has got certain genetic characteristics, basing his/her presumption on the fact that some family member of his/her family is affected by a genetic disease, with whom the discriminated person has not been genetically related at all.

It comes out from the ZGBARB provisions that only an individual for whom the discriminator knows or presumes to have certain genetic characteristics, may be exposed to genetic discrimination. His/her family members, however, may also be exposed to genetic discrimination, even though they are not geneticaly related to him/her, as well as persons close to him/her, that, based on the fact that they have been related to him/her. Thus, for example, the victim of genetic discrimination may be a spouse of a person, whom the discriminator knows about or presumes that he/she has got certain genetic characteristics. This possibility stems from the general definition of discrimination, contained in the Article 2 of ADL.

According to ZGBARB, the discrimination which occurs due to the very *"taking or not taking"* the genetic testing[42] has also got the character of genetic discrimination. A circumstance that a person has undertaken genetic testing may be the basis for making a presumption about genetic characteristics, so that here, it is to do with discrimination on the basis of presumed genetic characteristics. However, extending the genetic discrimination to cases, refusing to participate in genetic testing, is primarily in the function of protection of the self-determination right in the field of genetic testing.

Finally, it is necessary to point out to the fact that ZGBARB takes into consideration the genetic discrimination of a person only, although there is a possibility to have a group of persons discriminated on this ground, both directly and indirectly. So, for example, an Insurance company may deny the life insurance right to all persons who have the Hantington disease gene identified. Having in mind the effects caused, genetic discrimination of a group of persons is more dangerous than genetic discrimination of an individual, and it is more difficult to discover and prove it than it is the case with genetic discrimination of a person.

The analysis of the antidiscrimination clause, as of the Art. 9 ZGBARB showed that the Legislator had not managed to regulate adequately the discrimination ban based on genetic characteristics – personal feature, encroaching the identity of an individual most profoundly. Although the purpose and the sense of incorporating the antidiscrimination clause in ZGBARB is reflected in the way that, starting from general legal definitions of certain forms of discrimination, it is to concretize typical conducts and situations in which the genetic discrimination is manifested in order to recognize this form of discrimination in practice more easily, the Legislator has just introduced confusion, and, essentially, narrowed the range of protection against genetic discrimination established by general antidiscrimination regulations.

ZGBARB does not prescribe special criteria for conducting the discrimination test, which is a key instrument for establishing discrimina-

[42] Art. 9 ZGBARB (*in fine*).

tion. In the absence of special rules, there are applied the general rules contained in ADL. ZGBARB does not contain special rules on mechanisms of legal protection against genetic discrimination, so that they do not differ from mechanisms intended for protection against any other form and case of discrimination. It is important, however, that the Legislator, in regulating the misdemeanor legal protection, correctly considered the social danger of genetic discrimination, that being indicated by strict sanctions.[43]

4. CONCLUDING REMARKS

Genetic discrimination is a complex phenomenon, causing a series of harmful effects both on the individual and social plan, respectively. In spite of the increased interest of scientists, genetic discrimination, its forms and manifestations, problems related to genetic discrimination discovering and proving, have not been fully and scientifically elaborated yet. Although there are not exact data on the spread of genetic discrimination in Serbia, it may be concluded, having in mind the experience of other countries, that it is not a far future in Serbia, but that it has already occurred and that it would be increasing in parallel with the increase of the number of people, included in genetic researches. In order it would not burst, it is necessary to take comprehensive and coordinated measures to prevent its manifestation.

The basic precondition for effective prevention and protection against genetic discrimination is the existance of a comprehensive and coherent normative framework. In the legal system of Serbia the framework of genetic discrimination protection comprises general antidiscrimination regulations, contained in the Constitution of Serbia and the Antidiscrimination Law, as well as the special regulations, related to genetic discrimination: regulations on the consent to genetic testing, regulations on genetic data confidentiality, as well as a regulation about the genetic discrimination ban.

The analyses of relevant regulations, contained in ZOPP and ZGBARB have shown that some legal solutions about the genetic privacy

[43] For violation of genetic discrimination ban an institution may pay a fine ranging from RSD 300.000 to 1.000.000, an entrepreneur, from RSD 300.000 to 500.000, and a responsible person in a legal entity and a medical worker may pay the fine, ranging from RSD 40.000 to 50.000 (Art. 36. para.1, 2 and 3. ZGBARB). Just for comparison, for dis crimination in providing medical services, based on the health condition, the ADL pre scribes fines, ranging from RSD 10.000 to 100.000, for legal persons and entrepreneurs and from RSD 5.000 to 50.000 for a responsible person and medical worker. Fines are much lower when it is to do with other forms and cases of discrimination. See: Nevena Petrušić, Mirjana Tukar, Branko Nikolić, *Priručnik za primenu prekršajnog antidiskrimi nacionog prava*, Poverenik za zaštitu ravnopravnosti, NCSC, Beograd 2015, 46.

protection are not in accordance with general antidiscrimination and bioethical standards. Although the work on ZGBARB (by which there has been regulated conducting of genetic testing for the first time in Serbia) offered an opportunity of making the genetic discrimination ban more concrete, and was worked out in detail, this opportunity has not been used properly. The rules on the use of genetic samples and availability of genetic testing results, of key importance for genetic discrimination prevention, have not been harmonized with modern ethical and legal standards. On the other hand, antidiscrimination clause, contained in the Art.9 of ZGBARB reduces the range of protection against genetic discrimination compared to the protection offered by the general Antidiscrimination Law. The Clause is not comprehensive, clear and precise, therefore it causes a lot of doubts, which can make the application of genetic discrimination ban regulations more difficult. Having in mind the harmful effects caused by genetic discrimination, there is a need to eliminate the observed normative failures in due time, and enable people enjoy the benefits provided by genetic testing without the fear of discrimination.

In order to prevent genetic discrimination, it is necessary to work on informing and raising awareness of the public about the genetic privacy and the problem of genetic discrimination, but also on the social justice promotion and developing sensibility for bioethical challenges brought about by the new age.

CERIF: S112, S150, S155

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DIRECT EFFECT OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

This article explores the concept of direct effect of the European Convention on Human Rights. In order to discuss this and related issues the authors have se lected two opposite approaches to direct effect of the ECHR, the one of the Italian Constitutional Court and the other of the Serbian Court of Cassation as manifested in two similar cases Scordino and Crnišanin. The two opposite approaches might show how distinct international legal traditions of the two countries (dualist and monist) addressed the direct effect of the ECHR. While the response of the Italian Constitutional Court has been at the expense of legal economy and efficiency, the response of the Serbian Court of Cassation has been to neglect democratic element in determining the relationship between an individual and a general interest in hu man rights protection. The authors challenged both approaches with suggestions how deficiencies of both systems can equally be addressed despite their differences by relying on the concept of direct effect that was engineered by the European Court of Justice.

Key words: *European Convention on Human Rights. Direct effect. Efficiency. Democracy. Fair balance.*

1. INTRODUCTION

It has been generally accepted that domestic law governs domestic enforcement of international treaties.[1] There are a number of countries

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[1] M. Dixon, R. McCorquodale, *Cases and Materials on International Law*, Ox ford University Press, Oxford 2003, 104.

that permit 'direct effect' of human rights treaties, especially those concerning civil and political rights.[2] Certain specific features of the international regime of the European Convention on Human Rights (hereinafter: the ECHR or the Convention) press Contracting Parties to facilitate direct effect of the Convention. A direct effect enables national courts to apply the ECHR provision directly and, thereby, circumvent a time consuming process of harmonizing national provisions with the ECHR which would include decision of a constitutional court and act of legislature. The indirect effect facilitates a fine adjustment of domestic provisions with the ECHR. Both direct and indirect effect expedite enforcement and contribute significantly to the efficiency, legal economy and uniform application of the Convention in 47 Contracting Parties.

In this article we aim to stress the importance of direct effect of the Convention and examine it against the relationship between legislative and judicial powers in national human-rights regimes. Such human rights protection structure relies on legal economy, efficiency and legitimacy of human rights protection, which includes appreciation of democratic standards in the course of attaining balance between an individual and general interest in human rights protection. In order to demonstrate how to achieve such balance, we compare two different judicial approaches to direct effect of the ECHR: one of the Italian Constitutional Court in the case *Scordino* (2007) with the other of the Serbian Court of Cassation in the case *Crnišanin* (2011).

Although Italy and Serbia belong to different international legal traditions (that is, Italy is considered to have a dualist regime while Serbia is a monist one), these two jurisdictions nevertheless manifest a noticeable degree of convergence in respect of indirect effect of the ECHR. However, the standpoints of the two courts in these two cases disclose a considerable difference regarding direct effect of the ECHR. We argue that both approaches are not free from serious weaknesses. We contend that the standpoint of the Italian Constitutional Court endangers the efficiency and legal economy of domestic enforcement of the ECHR prolonging legal process by engaging legislature without a good reason, whereas the stance of the Serbian Court of Cassation jeopardizes democracy in determining the relationship between an individual and a general interest in human rights protection by avoiding legislature when the latter was needed. Further, we argue that application of the concept of direct effect in line with *Van Gend en Loos* could cure deficiencies in both approaches.

We begin with an overview of the general framework for domestic enforcement of the ECHR. After a discussion on the concept of direct and

[2] T Buergenthal, "The Evolving International Human Rights System", *American Journal of International Law (AJIL)* 4/2006, 783, 805.

indirect effect, we shall compare the two cases – the Italian case *Scordino* and the Serbian case *Crnišanin* – as both were decided by the ECtHR, as well as responses of the two national courts to the respective judgments of the ECtHR. The 2011 Opinion of the Serbian Court of Cassation and the 2007 Decision of the Constitutional Court of Italy will be critically assessed for on the basis of different judicial responses to the concept of direct effect.[3]

2. DOMESTIC ENFORCEMENT OF THE ECHR: GENERAL FRAMEWORK

Domestic enforcement of the ECHR[4] is herein referred to as national legal mechanisms and processes, which give the Convention legal effect within domestic legal orders.[5] The Convention is distinguished by its object and purpose—human-rights protection—and by an exceptionally effective control mechanism which consists of the ECtHR and the Committee of Ministers of the Council of Europe. The special character of the regime has been reflected in the Court's qualification of the Convention as 'a "constitutional instrument of European public order" in the field of human rights'.[6] Although the Convention is intended to produce equal legal effects in all Member States, the Convention falls short of imposing uniform standards for ensuring equal effects.

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[3] For an extensive overview of a critical appraisal of *Scordino* case in theory, see Section 7 and accompanying footnotes.

[4] Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) CETS No.005.

[5] There is a vast body of literature on this subject: *e.g.*, R. Beddard, "The Status of the European Convention on Human Rights in Domestic Law", *International & Com parative Law Quarterly (ICLQ)* 16/1967, 206; S. Karel Martens, "Opinion: Incorporating the European Convention: The Role of the Judiciary", *European Human Rights Law Re view* 1/1998, 5; *The Execution of Strasbourg and Geneva Human Rights Decisions in the National Legal Order* (eds. T. Barkhuysen, M. van Emerik, P. Hein van Kempen), Marti nus Nijhoff Publishers, The Hague London 1999; G. Ress, "The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order", *Texas International Law Journal* 40/2004 2005, 359; H. Keller, "Reception of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) in Poland and Switzerland", *Zeitscrhift für ausländisches und öffentliches Recht und Völker recht* 65/2005, 283; F. Hoffmeister, "Germany: Status of European Convention on Human Rights in domestic law", *International Journal of Constitutional Law* 4/2006, 722; A. S. Sweet, H. Keller, "The Reception of the ECHR in National Legal Orders" *Yale Law School, Yale Law School Legal Scholarship Repository 1/2008 http://digitalcommons.law. yale.edu/cgi/viewcontent.cgi?article 1088&context fss papers*, 17. February 2015.

[6] *Loizidou v Turkey* App. no. 15318/89 (ECtHR, 23 March 1995) para 75; *Bos phorus Hava Yolları Turizmve Ticaret Anonim Şirketi v Ireland* App. no. 45036/98 (ECtHR, 30 June 2005) para 156.

Therefore, the issue here is whether implementing legislation is required and possible. The ECHR does not contain a provision comparable to Article 2 (2) of the International Covenant on Civil and Political Rights[7] or Article 2 of the Inter-American Convention on Human Rights[8] which explicitly require implementing legislation. Still, it is difficult to argue that the founders of the Convention thought that domestic legislation would not have any role for national enforcement of the Convention and that the Convention always would produce direct effect as such. National legislation is certainly an important and primary tool for providing domestic effect of the ECHR.

Although Contracting Parties use their internal legal mechanisms to enforce the ECHR, they have been pressed to adapt these mechanisms to specific requirements of the international regime of the ECHR which has exerted a substantial influence on the internalization of the Convention.

The international regime of the ECHR is unique in many respects but, foremost, in its capacity to be effective. This regime consists of the compulsory jurisdiction of the ECtHR and the supervisory role of the Committee of Ministers which monitors execution of Court judgments.[9] Other international regimes—established by universal human-rights treaties[10]—are rather conciliatory by nature and, as such, are incomparable with the compulsory system of the ECHR. Victims prefer the binding ef-

[7] Art 2(2) of the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), states: "Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant".

[8] Art 2 of the American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (American Convention) reads: "Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or substantially other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Conven tion, such legislative or other measures as may be necessary to give effect to those rights and freedoms".

[9] D. Anagnostou, A. Mungiu Pippidi, "Domestic Implementation of Human Rights Judgments in Europe: Legal Infrastructure and Government Effectiveness Matter" *European Journal of International Law (EJIL)* 25/2014, 205.

[10] Human Rights Committee established by the ICCPR (n 11), Committee on the Elimination of Racial Discrimination (established by International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195), Committee against Torture (established by Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punish ment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85), and the Committee on the Rights of the Child (established by Convention on the Rights of the

fect of judgments of the ECtHR to the efficiency of the procedures of UN treaty bodies. This atmosphere of effectiveness transcends the legal sphere and becomes an element of European politics which—together with the activism of NGOs—compels Contracting Parties to search for adequate methods for internal enforcement of the Convention.

Another quality of the international regime of the ECHR is the role of the Court's interpretation of the Convention for the purposes of domestic enforcement. The provisions of the ECHR are very broad and case law of the ECtHR has a decisive role in their interpretation. Moreover, the ECtHR interprets the Convention as a living instrument. According to the ECtHR: 'A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement [...]'.[11]Case law of the ECtHR plays a crucial role in the domestic interpretation of the Convention in all Contracting Parties to the Convention.

Aware that their acts have to be in accordance with ECHR provisions as interpreted in the case law of the ECtHR—and frequently facing broad national provisions which allow various interpretations—national courts at times may perceive that they do not have any another possibility but to interpret and apply national provisions relying on relevant ECHR provisions and ECtHR case law. Some dualist Contracting Parties have formally recognized the importance of the interpretative function of the Convention in their internal legal systems. The British Parliament formally has instructed domestic courts to follow case law of the ECtHR.[12] Ireland has adopted a similar solution.[13]

Regarding the direct effect of its case-law the ECtHR was quite explicit: In its Recommendation Rec(2004)6 of 12 May 2004, the Committee of Ministers welcomed the fact that the Convention had become an

Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3).

[11] *Christine Goodwin v The United Kingdom* App. no. 28957/95 (ECtHR, 11 July 2002) para 74, *Chapman v the United Kingdom* App. no. 27238/95 (ECtHR, 18 January 2001) para 93, *D.H. and Others v the Czech Republic,* App. no. 57325/00 (ECtHR, 13 November 2007) para 181, *Sampanis et autres c Grèce* App. no. 32526/05 (ECtHR, 5 June 2008) para 72.

[12] See Article 2(1) of the UK Human Rights Act 1998 s 2(1), *http://www.legislation.gov.uk/ukpga/1998/42/section/2*, 25 February 2015.

[13] See Article 2(1) Republic of Irelands' European Convention on Human Rights Act 2003, *http://www.irishstatutebook.ie/2003/en/act/pub/0020/print.html*, 25 February 2015.

It should be mentioned here that the British and Irish legislation is limited to the ECHR and has not been extended to other human rights treaties, such as International Covenant on Civil and Political Rights, International Convention on the Elimination of All Forms of Racial Discrimination, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and others.

integral part of the domestic legal order of all States Parties while recommending that member States ensure that domestic remedies existed and were effective. In that connection the Court would stress that although the existence of a remedy is necessary it is not in itself sufficient. Domestic courts must also be able, under domestic law, to apply the ECtHR case-law directly and their knowledge of this case-law has to be facilitated by the State in question.[14]

The issue of an indirect effect which comprises each-and-every reference of a national judge to the ECHR or ECtHR case law, when a national judge interprets domestic provisions— that is, when the Convention itself is not a sole basis of the domestic decision—will be discussed later. However, such references to the ECHR and case-law of the ECtHR appear equally important in internal judicial procedures of monist and dualist Contracting Parties and they are converging elements in domestic enforcement of the Convention in Contracting Parties of different international legal traditions.

In spite of convergences regarding indirect effect of the ECHR, differences still exist in respect of direct effect. This includes situations in which an ECHR provision and/or ECtHR case law conflict with a domestic provision and the two cannot be reconciled by interpretation by domestic courts.

3. DIRECT EFFECT OF EU LAW AND INTERNATIONAL LAW

The concept of direct effect in EC law has been engineered by the Court of Justice of the European Communities (hereinafter: the ECJ) in the *Van Gend en Loos* case half a century ago.[15] The ECJ faced the issue whether Article 12 of the 1957 EEC Treaty could produce direct effects in the internal legal order of a Member State. The ECJ held affirmatively noting that Article 12, which prohibited the increase of custom duties, comprised 'a clear and unconditional prohibition which is not a positive but a negative obligation'. The ECJ went on to explain that: "This obligation [...] is not qualified by any reservation on the part of States which would make its implementation conditional upon a positive legislative measure under national law. The very nature of this prohibition makes it ideally adapted to produce direct effects'.[16]

[14] *Ibid*., para 239.

[15] Case 26 62 *NV Algemene Transport en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR1.

[16] *Ibid.*

Van Gend en Loos is truly a landmark decision, which gave a strong impetus to strengthening the efficiency of EC law.[17] In reaching for individuals and national courts directly,[18] the ECJ set standards for the direct effect of EC Treaty provisions. The provisions capable of producing direct effect—just like it was the case with Article 12 of the EEC Treaty—must be 'clear, negative, unconditional, containing no reservation on the part of the Member State, and not dependent on any national implementing measure'.[19]

The concept of direct effect has gone through changes and evolutions[20]: the conditions were made less stringent and direct effect ceased to be reserved only for *Treaties* as primary sources of EU law—being expanded to encompass EC *legislation* – secondary sources of EU law.[21] While originally it was perceived by the ECJ that only negative obligations would be capable of producing direct effect, later on direct effect was expended to positive obligations.

What can impede direct effect would be—as the ECJ found in the 1982 *Becker* case—where a certain margin of appreciation is left to the State,[22] even if this margin of appreciation or discretion regarding the implementation is minimal.[23] The case law on direct effect remains abundant and seems to set the so-called 'double test' which requires the examination of both the nature and purpose of an international norm (arguably looking for the original intent of contracting parties), on one hand, and examination of the wording of the norm in order to ascertain whether it is operational.[24] For the purpose of the present article, it is important to note that effects of international treaties, in which the EU is a Contracting Party, in domestic legal orders of State Members are exempted from their national provisions on application of international treaties. The ECJ found

[17] B. Rakić, "O smislu "saradnje" ili "dijaloga" između Suda pravde EU i sudova država članica", *Anali Pravnog fakulteta u Beogradu (Anali PFB)* 2/2013, 75.

[18] "[T]he ECJ looks through the veil of sovereignty and observes two important actors: the individual citizen, and the national court". E. Benvenisti, G. W. Downs, "The Premises, Assumptions, and Implications of Van Gend en Loos: Viewed from the Perspec tives of Democracy and Legitimacy of International Institutions" *EJIL* 1/2014, 85, 86.

[19] P. Craig, G. de Búrca, *EU Law, Text, Cases and Materials,* Oxford University Press, Oxford 2011, 186.

[20] Joined cases C 401/12P, 402/12P and 403/12P *Council and Others v. Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht* (Opinion of Advocate General Jääskinen, 8 May 2014) paras 58 84.

[21] P. Craig, G. de Búrca (2011), 182.

[22] Case 8/81 *Ursula Becker v Finanzamt Münster Innenstadt*, [1982] ECR 53.

[23] Joined cases C 100/89 and C 101/89 *Peter Kaefer and Andréa Procacci v French State* [1990] ECR I 4647.

[24] F. Martines, "Direct Effect of International Agreements of the European Union" *EJIL* 1/2014, 129, 138, 140 144 (providing an overview of the ECJ case law on the ap plication of a double test).

that these treaties may produce direct effect in domestic legal systems of State Members in accordance with its concept of direct effect of the EU law[25] regardless of national impediments or conditions for domestic application of international treaties.

The concept of *direct effect* is not limited to EU law. It covers also international law and was born in the US under the name of *self-executing treaties*.[26] The concept rises from different backgrounds—national and supranational respectively— but it has been equally engineered by national courts as well as by supranational ones.[27]

Direct effect doctrine provides for both application of international law as well as for the possibility of refusing its application. Refusal to provide direct effect to certain norms does not always result in detrimental outcomes nor should it necessarily be ascribed an 'anti-liberal' sentiment. The rationale of *Van Gend en Loos* does not make direct effect an 'open-ended' concept, and its essence can guide national courts in rendering their decisions regarding applicability of EU law and international law.

The concept of direct effect has its extended variant titled as *indirect* effect. Where a decision of a national court regarding an alleged individual right is based exclusively on an international provision that should be defined as direct effect of the international provision. However, where a decision of a national court concerning this individual right is based on a national provision, but where a national court interprets a national provision using an international provision to find its precise meaning, the issue is how to define a role of the international provision. It is a case where a determination of an individual right is the result of co-effect of two provisions – national and international or supranational. The effect of an international provision in these situations is termed as an *indirect* effect, which the authors herein also refer to as *harmonious* or *friendly* approach to interpretation of a national provision with its international

[25] Case C 469/93*Amministrazione delle Finanze dello Stato v Chiquita Italia SpA.* [1995] ECR I 4533.

[26] Direct effect of international law in general, and treaties in particular, seems to be a general problem for domestic courts. Even if a constitution gives a general permis sion for application of treaties by national courts, there is always a problem whether each and every treaty is capable of producing direct effect. U.S. Constitution and doctrine of self executing treaties devised by U.S. courts prove the existence of this global dilemma: U.S. Constitution allows for application of treaties whereas the doctrine of self executing treaties limits the scope of this Constitutional provision. Relevance of the U.S. Constitu tion for general discussion on direct effect here is twofold: doctrine of self executing treaties resonates the direct effect doctrine, and it precedes the discussion on direct effect of treaties both within EU and ECHR context. For a detailed discussion on self executing treaties in the U.S. legal system, see C. M. Vázquez, "The Four Doctrines of Self Execut ing Treaties" *AJIL* 89/1995, 695.

[27] *Ibid*., 119.

counterpart, or parallel application of domestic and international law. Under subtitle 'Indirect Effect: Development of the Principle of Interpretation' Craig and de Búrca's Textbook argues: 'The second way in which the Court of Justice encouraged the application and effectiveness of directives, despite denying the possibility of direct horizontal enforcement, was by developing a principle of harmonious interpretation, which requires national law to be interpreted 'in the light of' directives. There is a similar principle used in the context of international law and international agreements, whereby the Community is required to interpret secondary EC legislation in their light'.[28]

Nollkaemper sees a decisive role of an international law in interpretation of national provision as a sort of direct effect: 'The common ground between cases where a court decisively relies on an international right in the construction of national law, and thereby protects that right, on the one hand, and cases where courts rely on such rights directly (without resorting to interpretation), on the other, may be more important than the distinctions. It would be too limiting to exclude cases involving consistent interpretation *prima facie* from the category of cases in which national courts successfully mediate a conflict between a state and individuals by relying on international law—a category to which *VGL* [*Van Genden Loos*] also belongs'.[29]

Judge Tulkins seems to share this view. He has observed: 'It is broadly accepted—and this cannot be over-emphasized—that the object of the Convention is to be directly applicable in the domestic law of the member States. Today, in almost all the member States of the Council of Europe, the domestic judicial authorities, when ruling on rights and freedoms, refer to the European Convention on Human Rights and the national constitution in parallel'.[30]

In the 2004 General Comment the UN Human Rights Committee refers to the interpretative effect of the Covenant for the application of national law: 'The Committee notes that the enjoyment of the rights recognized under the Covenant can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law'.[31]

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[28] P. Craig, G. de Búrca, *EU Law, Text, Cases and Materials,* Oxford University Press, Oxford 2003, 211.

[29] *Ibid*., 108.

[30] Dialogue between judges, European Court of Human Rights (Council of Eu rope, 2007), *http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Seminar+documents/Dialogue+between+Judges/*, 14. March 2015.

[31] UN HR Committee General Comment No.31: 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, Adopted on 29. March 2004. at its

Terminology is a matter of convention. Since a term *indirect effect* has been already used to denote this particular type of effect of supranational or international provision, we also use this term. Still, it could indicate something completely opposite to direct effect. If the meaning of direct effect is that supranational or international provision produces effect directly without intermediation of national law, then indirect effect might be understood as effect via national law. In a little bit different context Sophie Robin-Olivier uses a term of *combined effect*. Another term, arguably better than *indirect effect*, would be also *co-effect*.

4. A COMPARATIVE ANALYSIS OF THE TWO CASES

The Italian Constitutional Court (*Corte costituzionale*) and the Serbian Court of Cassation (*Vrhovni kasacioni sud*) have provided different responses to comparable issues regarding direct effect of the ECHR. Both the Italian Constitutional Court decision and the Serbian Court of Cassation Opinion have been triggered by judgments of the ECtHR involving Italy and Serbia respectively. The Italian and Serbian high-court approaches are comparable on many points. They address violations of the right to a fair trial, protected by Article 6 of the ECHR and violations of the right to property, guaranteed by Article 1 of Protocol 1 to the ECHR. The violations were triggered by inadequate domestic legislation, the 1990s legislation on compensation for expropriation and the 2001 Pinto Act in Italy, and the 2007 amendments to the 2003 Privatization Act in Serbia. The Committee of Ministers of the Council of Europe recognized the similar domestic deficiencies and was equally concerned with the problems of ineffective implementation of the ECHR in both countries.[32]

2187th meeting', *Compilation of General Comments and General Recommendations Adopt ed by Human Rights Treaty Bodies*, HRI/GEN/1/Rev.7, (12 May 2004) 196, para 15.

[32] An agent of the Republic of Serbia before the European Court for Human Rights delivered to the Serbian Court of Cassation on 8 December 2010 the Report of the Committee of Ministers of the Council of Europe adopted at its 1100th session held from 30 November to 3 December 2010 devoted to the supervision of the enforcement of the Court's judgments. This report stated that some general issues regarding the improvement of the efficacy and transparency of the Court's judgments have been discussed, including measures for improvement and implementation of INTERLAKEN declaration and action plans, as well as measures that might affect the enforcement of judgments entered into against Serbia. The Report seems to suggest that as far as Serbia is concerned, a certain class of cases judgments adopted in relation to inefficient enforcement of domestic judgments in matters of debts owed by social companies, will be allocated to judgments under stringent supervision. In relation to this the Agent concludes that action plans are to be drafted by all involved authorities, which will ultimately be under scrutiny of the Com mittee of Ministers of the Council of Europe. 'Konačni tekst pravnog shvatanja o spro vodjenju izvršenja sa odvojenim mišljenjem od 22. februara 2011', *Vrhovni kasacioni sud*

We shall begin with a brief overview of the facts of the cases before the ECtHR, which provoked different responses of supreme national courts to issues arising from the ECtHR judgment and then address divergent views taken by the courts in Italy and in Serbia. The principal focus will be on the assessment of the shortcomings of both approaches.

4.1. The Scordino case (Italy)

The *Scordino* case arose out of the national expropriation case where the applicant (and subsequently his heirs) challenged the legislation on the basis of which they originally were awarded only 50% of the fair-market value of their property and where this amount of compensation was additionally taxed with 20% tax rate. While challenging national legislation and national judicial decisions Italy adopted Law no. 89 (2001) (Pinto Act) to tackle the issue of the breach of the right to a fair trial within reasonable time as this was the common problem in Italian judiciary. Thereafter applicants expended their claim to the Pinto Act due to the excessive length of expropriation proceedings. The compensation received under both headings of their complaints was dissatisfactory for the applicants (50% of the fair-market value and EUR 2,400 for excessive length of the proceedings).

They turned to the ECtHR which found, in its Chamber's judgment, that Italy was liable for the breaches alleged by Scordino because the compensation awarded for the expropriated property 'did not bear a reasonable relation to the value of the expropriated property. It follows that the fair balance was upset'.[33] After having been petitioned by the Italian Government, in 2006 the Grand Chamber affirmed the liability of Italy. The Grand Chamber paid special reference to Article 46 of the Convention (the effect of ECtHR judgments) given the number of applications which were pending before the Court raising the same issue as in

(2011) No.1,74 95,(Legal Opinion of the Supreme Court of Cassation on the Enforce ment Procedure, with Dissenting Opinion attached thereto) available in Serbian language at *http://www.vk.sud.rs/assets/files/bilteni/bilten 2011 1.pdf*, 25 February 2015. Regarding Italy, in the report CM/Inf/DH(2004)23, revised on 24 September 2004, the Ministers' Deputies made the following indications regarding an assessment of the Pinto remedy: '[...] 109. In the framework of its examination of the 1st annual report, the Committee of Ministers expressed concern at the fact that this legislation did not foresee the speeding up of the proceedings and that its application posed a risk of aggravating the backlog of the appeal courts. [...] 112. It should be pointed out that in the framework of its examination of the 2nd annual report, the Committee of Ministers had noted with concern that the Convention had no direct effect and had consequently invited the Italian authorities to intensify their efforts at national level as well as their contacts with the different bodies of the Council of Europe competent in this field'. *Scordino v. Italy (II)*, App. no. 36813/97 (ECtHR, Grand Chamber, 29 March 2006) para 71.

[33] *Scordino v. Italy (II)* App. no. 36813/97 (ECtHR, Chamber, 29 July 2004), para 102.

the *Scordino* proceedings. The Court affirmed the binding nature of its judgments under Article 46, one of effects of which was: 'that where the Court finds a violation, the respondent State has a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction under Article 41, but also to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress as far as possible the effects'.[34]

The Grand Chamber also ordered general measures which would remove systematic violations of the Convention identified by the ECtHR in the present case[35] and further opined: 'In that connection the Court's concern is to facilitate the rapid and effective suppression of a malfunction found in the national system of human rights protection'.[36] The Grand Chamber reaffirmed the obligation of Member States to ensure the compatibility of their domestic law with the Convention.[37]

4.2. The Crnišanin case (Serbia)

A Serbian case that followed, *Crnišanin*, raised a comparable issue as did the proceedings in *Scordino*. Crnišanin case arose out of the suspension of enforcement proceedings against the socially-owned companies in restructuring that resulted from the amendments of the Privatization Act. The disgruntled judgment creditors lodged their applications with the ECtHR and the Strasbourg Court found Serbia in violation of Article 6 of the ECHR and Article 1 of Protocol 1.[38] The logic of the European Court was that Serbia had failed to ensure the finality of judicial judgments and the result was the violation of the right to property. The Court ordered the enforcement of these judgments and awarded non-pecuniary damages to the applicants. Although the issues in this case potentially affected a number of prospective applicants or other pending applications, the Court did not make any reference to them nor did it decide to make use of the 'pilot judgment' procedure.[39] Although the debts of

[34] *Scordino*, Grand Chamber (fn. 32), para 233.

[35] *Ibid*., para 237.

[36] *Ibid*., para 236.

[37] *Ibid*., para 234.

[38] *Crnišanin and others v. Serbia* App nos 35835/05, 43548/05, 43569/05 and 36986/06 (ECtHR, 13 January 2009) paras 8 10.

[39] The pilot judgment procedure was developed as a technique of identifying the structural problems underlying repetitive cases and of imposing an obligation on a State to address these problems. Where the Court receives several applications that share a root cause it can select one for priority treatment and its task is not only to decide whether the violation of the ECHR occurred but also to identify the systematic problem and to give the State clear indications how to resolve it.

socially-owned companies belong to the category of systematic problems[40] but the Court decided to deal with it on case-by-case basis.

4.3. Response of the Italian Constitutional Court

Since compensation criteria for expropriation of land provided for in the Italian legislation[41] fell short of standards of adequate compensation as required by Article 1 of Protocol 1 of the Convention, their application in *Scordino* was found by the ECtHR to be in breach of the right to property. Under three separate referral orders by the Italian Court of Cassation in 2006 and 2007, the Italian Constitutional Court declared the relevant Italian legislation unconstitutional in its landmark 2007 decisions (Nos. 348 and 349).[42] Within a month, the Italian legislature responded by harmonizing the domestic legal provisions with Article 1 of Protocol 1: adopting legislation changing the criteria of compensation so as to provide for full compensation (equal to market value) except when the expropriation constitutes part of a wider socio-economic reform.[43]

While the Italian Constitutional Court failed to attract attention by rendering these two 2007 decisions on the unconstitutionality of these provisions of domestic Italian legislation, it did attract attention by its general exclusion of direct effect of the ECHR, that is, it excluded possibility for domestic courts to apply the ECHR directly either in the absence of a domestic provision or by replacing the conflicting domestic provision. The case law of Italian courts prior to decisions 348/349 had not been uniform on the issue of direct effect of the ECHR and a trend had been emerging of the non-application of domestic legislation which was contrary to the ECHR in Italian municipal and higher courts.[44]

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[40] Please see the discussion on debts of socially owned companies as being a sys tematic problem for Serbia in the Report of the Committee of Ministers (fn. 32).

[41] Art 5, Law (8 August 1992) No.359, *Gazzetta Ufficiale della Repubblica Ital iana* (1992) No.190.

[42] Italian Constitutional Court decisions: (2007) No.348 finding Art 5 *bis* (paras. 1 and 2), Law (1992) No.359 unconstitutional; and (2007) No. 349 holding Art 5 *bis* (para 7 *bis*) of Law Decree (1992) No 333 (compensation criteria set for unlawful expropriation of land) likewise unconstitutional. All decisions of the Italian Constitutional Court are available at *www.cortecostituzionale.it*, 1 March 2015.

Italian Constitutional Court decision (2007) No.348), *Gazzetta Ufficiale della Re pubblica Italiana* (2007) No. 348; and Italian Constitutional Court decision (2007) No.349 *Gazzetta Ufficiale della Repubblica Italiana* (2007) No. 349.

[43] 2008 Budget Law; as cited by F. B. Dal Monte, F. Fontanelli, "The Decisions No.348 and 349/2007 of the Italian Constitutional Court: The Efficacy of the European Convention in the Italian Legal System" *German Law Journal* 9/2008, 902. In case of such reforms, a 25% reduction in compensation can be applied.

[44] G.. Cataldi, "Italy", *International Law and Domestic Legal Systems: Incorpora tion, Transformation, and Persuasion* (ed. D. Shelton), Oxford University Press, Oxford 2011, 340; and F. B. Dal Monte, F. Fontanelli, 913.

The Italian Constitutional Court held that a provision of the ECHR would not automatically suspend contrary domestic provision because of a difference between the EU and the Council of Europe and, accordingly, between EU law and the ECHR. The Constitutional Court found a legal basis for supremacy and direct effects of the EU law in Article 11 of the Constitution which provides that Italy may accept 'limitations of sovereignty necessary for an order that ensures peace and justice among Nations...]'.[45] Since the Constitutional Court considered that Italian membership in the Council of Europe and ratification of the ECHR does not entail any limitations of Italian sovereignty, it concluded that Article 11 did not apply and, consequently, that the ECHR cannot produce legal effects equal to EU law.[46]

4.4. Response of the Serbian Court of Cassation

The core problem in the ECtHR's 2009 *Crnišanin* decision was the provisions of the Serbian Privatization Act that suspended enforcement of final judgments against 'socially-owned' companies undergoing restructuring.[47] Acting upon the initiative of the Ministry of Human and Minorities Rights – Sector of Representation before the ECtHR, the Court of Cassation adopted the legal opinion in February 2011. [48] According to this non-binding opinion, enforcement of monetary claims originating from employment and established by a final judgment against a debtor, a subject of privatization in process of restructuring, will not be stayed and those stayed will be continued and finished.[49] The Court of Cassation stated that the opinion was guided by standards and principles envisaged in judgments of the ECtHR in accordance with Article 18 of the Serbian Constitution.[50] The Court of Cassation referred also to the *Crnišanin* case and other 'cloned' cases; that is, cases related to the same problem of non-enforced final judgments whose enforcement was delayed by the Pri-

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[45] Italian Constitutional Court decision (2007) No.349 (n 76) para 6(1).

[46] *Ibid*., para 3(3); cited in F. B. Dal Monte, F. Fontanelli, 904.

[47] Initially, the postponement was limited to one year, but after the 2007 amend ments of the Privatization Act, such postponement was granted until the finalization of economic restructuring.

[48] The final text of the Legal Opinion in relation to the Enforcement (with Dis senting Opinion) has been published in the Bulletin of the Supreme Court of Cassation, Konačni tekst pravnog shvatanja o sprovođenju izvršenja sa odvojenim mišljenjem od 22. februara 2011*, Vrhovni kasacioni sud, Bilten* (2011) No.1, 74, available (in Serbian) at *http://www.vk.sud.rs/assets/files/bilteni/bilten 2011 1.pdf*, 25 March 2015.

[49] *Ibid*., 81.

[50] Article 18(3) of the Serbian Constitution: 'Provisions on human and minority rights shall be interpreted ... pursuant to valid international standards in human and minor ity rights, as well as the practice of international institutions which supervise their imple mentation'.

vatization Act. The Opinion refers also to Article 25 of the revised European Social Charter which obliges Contracting Parties to secure effective enforcement of the rights of workers and to protect their claims in the case of insolvency of an employer.[51]

There are three major pillars of the Court of Cassation opinion – Article 1 of Protocol 1, Article 6 of the ECHR and priority of employment claims. All these pillars find their grounds in international instruments: the first two have been based solely on the ECHR, whereas the third was foreseen by the revised European Social Charter. The Court of Cassation observed that undue delays in enforcement of final judgments distort the fair balance between the right of an individual and general interest of community, which is necessary to justify limitations of the right to property in favor of the public interest.[52]

4.5. Response of the Serbian Constitutional Court

The Constitutional Court of Serbia faced the issue of conformity of the disputed provision of the Privatization Act with the Constitution on two occasions. First, the Constitutional Court rejected constitutional review claim finding that the limitation of the right to property was justified by legitimate aim of transformation of socially owned property into private property.[53] The Constitutional Court understood the restructuring as a part of the privatization process that was deemed to be finalized within reasonable time. When the Serbian Privatization Act was amended again in 2012[54] extending the ban on enforcement deadline until 30 June 2014, the Constitutional Court *proprio motu*[55] reviewed the constitutionality of this amendment. This time around the Constitutional Court found that this provision of the Privatization Act was contrary to constitutionally guaranteed rights such as the right of property, the principle of the finality of judgments and the principle of the rule of law. The main reason which led the Constitutional Court to change its position was the excessive prolongation of the process of transformation of socially owned capital in companies in restructuring into private capital which distorted a balance between private claims and socially justified aim of transformation of property. The Constitutional Court believed that the legislative power had a possibility to establish a fair balance between the right to property of

[51] *Ibid.,* 80.

[52] *Ibid*., 78.

[53] Ruling of the Constitutional court of Serbia IUz 98/2009 of 23 June 2011 (*Rešenje Ustavnog suda IUz 98/2009*).

[54] Act on amendments of the Privatization Act (*Zakon o izmenama i dopunama Zakona o privatizaciji*, *Službeni glasnik RS* br. 119/2012).

[55] Ruling of the Constitutional court of Serbia IUz 95/2013 of 13 June 2013 (*Rešenje Ustavnog suda IUz 95/2013)*.

private persons, on one hand, and the justified aim of transforming of the social property and saving companies in restructuring from bankruptcy, on the other. To illustrate such possibility, the Constitutional Court referred to the Bankruptcy Act which provides for a possibility of re-organization of an insolvent company. The re-organization has to be in favor of both creditors and debtors so as to enable favorable settlements for creditors as well as the continuation of debtor's business.[56]

This indeed was the problem of systematic nature as it involved 153 companies in restructuring. Following the decision of the Constitutional Court, National Assembly of the Republic of Serbia adopted amendments of the Law on Privatization[57] which provided for a special procedure for affected creditors setting the short deadline of thirty days for submission of their monetary claims to the Privatization Agency which in turn had additional 90 days to review the claim and submit the proposal to claiming creditors. Failure to strike a deal triggered right of each creditor to initiate the enforcement procedure against the company undergoing restructuring. However, within three months following new amendments, the National Assembly of the Republic of Serbia adopted again a new Law on Privatization[58] which ordered all privatizations be ended by 31 December 2015. This new law again introduces moratorium on enforcement procedures against companies-in-restructuring[59] setting the expiry date of the ban on enforcement for 180 days following the deadline for privatization.[60]

5. A CRITICAL APPRAISAL OF DIFFERENT APPROACHES TO STRICT CONCEPT OF DIRECT EFFECT

A critical appraisal of two different approaches to direct effect of the ECHR points to the imbalance between legal economy and efficiency of human rights protection, on one hand, and democracy in determining the relationship between an individual and a general interest in human rights protection, on the other .

The approach of the Italian Constitutional Court, which always and without exception requires the engagement of legislature, even when such

[56] Decision of the Constitutional court of Serbia IUz 95/2013 of 14 November 2013 (*Odluka Ustavnog suda IUz 95/2013)* .

[57] Act on amendments of the Privatization Act (*Zakon o izmenama i dopunama Zakona o privatizaciji, Službeni glasnik RS* br. 51/2014.

[58] Privatization Act (*Zakon o privatizaciji, Službeni glasnik RS* br. 83/2014.

[59] *Ibid*., Article 17: "Proceeds from the sale of capital and/or assets in the privati zation process shall not be subject to forced execution".

[60] *Ibid*., Article 94.

an engagement does not seem necessary, favors democracy in balancing an individual and a general interest in human rights protection over efficiency and legal economy, but with justification that does not seem quite persuasive. The Serbian Court of Cassation, by avoiding legislative branch even when the issue at hand required intervention of legislature and enactment of national law, favored efficiency and legal economy over the other two values.[61] The proper balance between these values might be found in the concept of direct effect. Both approaches failed to appreciate benefits of the concept of direct effect.

Some scholars have criticized the approach of the Italian Constitutional Court according to which the ECHR is not directly applicable at the expense of contrary domestic legislation. Cataldi criticized the argument of the Constitutional Court that the ECHR "does not establish a supranational legal system and, therefore, does not create norms that are directly applicable in the contracting States".[62]

Cataldi and Iovane opine that: "It is hard to share the opinion that the 'structure' and 'objectives' of the ECHR or 'the characteristics of specific norms' are such as to bar the domestic judge from applying the ECHR to a specific case without passing through a preliminary ruling by the Constitutional Court. On the contrary, a two-step test is required when assessing the self-executing nature of a treaty norm: firstly, a verification on whether this norm was introduced into the domestic system; secondly, as recently highlighted by the *Corte di Cassazione*, a verification of the concrete possibility that this specific norm is actually relevant to the pending case. It was the negative result of the second part of the described test that rightly led the *Corte di Cassazione* to refer to the Constitutional Court the questions decided with the two 2007 decisions".[63]

We agree with the observation that the Italian Constitutional Court has been too restrictive in its acceptance of direct effect of the ECHR: as they argued, we also believe that the Italian Constitution leaves enough room for interpreting the ECHR in the same manner as the EU law. Constitutional arguments favoring direct effect of EU law could equally support direct effect of the ECHR.

On the other hand, we find that the Serbian Court of Cassation has wrongly extended the direct effect of the ECHR. The Court of Cassation usurped legislative power and created an imbalance in the national protection of human rights. This was far from necessary since the Conven-

[61] *Nota bene*, that finding is limited to the *Crnišanin* case and it should not be generalized. It does not represent general position of the highest courts in Serbia in rela tion to direct effect of international treaties or ECHR.

[62] G. Cataldi, 341.

[63] *Ibid*., 22.

tion itself does not require the circumvention of legislature in cases like this nor could this approach be justified by the concept of direct effect.

The Court of Cassation noted that the challenged provision of the Privatization Act disproportionally distributed the burden of general interest so that it fell solely on persons who had valid and enforceable claims arising out of the employment. We concur with this opinion. Nevertheless, setting aside the challenged provision and allowing enforcement procedures without any further regulation may redirect the disproportional burden to companies in restructuring and their employees. It can trigger bankruptcy of these companies and due to a significant number of employees serious social problems would inevitably arise. It is arguable that there were other possible approaches to the problem raised by the ECtHR judgments: to invite legislature to deal with the issue of both general importance and wide-ranging scale. The Privatization Act might be amended in line with the conception of re-organization in the Bankruptcy Act so that enforcement procedures would escape the liquidity of a company, if possible. Enforcement procedures might be conducted in several stages within a reasonable period of time in order to preserve a company. If that would not be possible, bankruptcy and liquidation would be the last resort. However, engineering such solutions falls out of the jurisdiction of the Court of Cassation as it belongs solely to the legislature.

Case law of the ECtHR supports balancing between an individual and a general interest within human rights protection. In the 1986 *James* case, the ECtHR stated that measures of economic reform or measures designed to achieve greater social justice may justify certain limitation of property rights.[64] Also, in the 1999 *Immobiliare Saffi* case, the ECtHR accepted that public-order problems may justify a provisional delay of execution of a judgment in exceptional circumstances.[65] In the 2004 *Broniowski v. Poland* case,[66] the Court accepted 20% of the market value as an adequate form of redress.[67] In the 2009 *Molnar Gabor v. Serbia* judgment,[68] the ECtHR again allowed public interest to come on board when it found that national legislation, which provided for conditions for repaying foreign currency deposits and accrued interests in commercial banks, following conversion of them to public debt due to collapse of commercial banks, was not contrary to the right of property although the

[64] *James and others v. The United Kingdom* App. no. 8793/79 (ECtHR, 21 Febru ary 1986), para 54.

[65] *Immobiliare Saffi v. Italy* App. no. 22774/93 (ECtHR 28 July 1999), para 69.

[66] *Broniowski v. Poland* App no 31443/96 (ECtHR 22 June 2004).

[67] I. Nifosi Sutton, "The Power of the European Court of Human Rights to Order Specific Non Monetary Relief: a Critical Appraisal from a Right to Health Perspective", *Harvard Human Rights Journal* 23/2010, 57, 58.

[68] *Molnar Gabor v. Serbia* (App. no. 22762/05) ECHR 8 December 2009.

legislation set forth the period of 14 years for paying back these deposits.

A separation of powers does provide for the conditions for adequate human rights protection: legislature is first in setting the legislative framework, whereas judiciary, at least in European continental countries, contributes to human rights protection with progressive interpretations of human-rights acts as living instruments and through the individualization of human rights protection. The executive branch also plays an important role for implementation of human rights. However, a proper relationship between legislature and judiciary secures sound relationship among mentioned values – legal economy, efficiency and democracy in determining fair balance between an individual and a general interest in human rights protection.[69] Justice of the Supreme Court of the United Kingdom, the Baroness Hale of Richmond, stated 'that certain judgments are better made by Parliament than by any court, whether in Strasbourg or in London'.[70]

We have argued that there are occasions where national courts should decline to apply the ECHR directly for the sake of democratic articulation of a fair balance between an individual and a general interest in human rights protection, even when national legal framework seems to place judiciary at the forefront of national implementation of international human rights by granting direct effect of human rights treaties. Position and role of national courts will equally depend on the kind of the ECHR demands, and there are occasions when national courts should give priority to legislature, even though these occasions come in small numbers.

Bypassing constitutional court and legislature is justified only if the requirement set by the ECHR as interpreted by the ECtHR leaves no other option except the replacement of a domestic provision with the ECHR rule, in line with the concept of direct effect.[71] If a provision of the ECHR, as interpreted by the ECtHR, governs the situation completely without leaving any margin of appreciation, that is, if it requires the achievement of only one precisely determined result, ordinary courts may step in and directly apply the norm of the ECHR. In such cases referring the issue of compatibility of domestic legislation with the ECHR to a

[69] *Ibid.,* para. 47.

[70] The Rt. Hon. The Baroness Hale of Richmond, DBE, PC, in European Court of Human Rights, *Dialogue between Judges 2011,* What are the limits to the evolutive inter pretation of the Convention" (Council of Europe, Strasbourg, 2011) *http://echr.coe.int/Documents/Dialogue 2011 ENG.pdf*, 10 February 2015.

[71] However, some authors argue that there is heterogeneous practice of direct ef fect. A. Nollkeamper, "The Duality of Direct Effect of International Law", *EJIL* 25/1/2014, 108. See, also, G. Martinico, "Is the European Convention Going to Be "Supreme"? A Comparative Constitutional Overview of ECHR and EU Law before National Courts", *EJIL* 23/2/2012, 401, 422, 423.

constitutional court and waiting for legislature to replace the contrary domestic provision with a provision harmonized with the ECHR is a futile effort, waste of time and opposite to legal economy, since the outcome of that legal process would be the same as it would be in a case of the replacement performed by an ordinary court. Legislature cannot do anything else but replace a domestic provision with the solution derived from a provision of the ECHR as interpreted by the ECtHR. In all other situations, when a provision of the ECHR as interpreted by the ECtHR does not regulate the situation completely and leaves a margin of appreciation to a Contracting Party, to adapt a provision of the ECHR to domestic circumstances, when the requirement may be satisfied by achieving a proximate result, national legislature has the best tools to harmonize domestic law with the ECHR.

We believe that both the Italian and Serbian approaches have been inappropriate. In cases where a provision of the ECHR in conjunction with the relevant case law of the ECtHR is clear, unconditional, without leaving any margin of appreciation and requiring only one possible result, the approach of the Italian Constitutional Court—involving control of constitutionality of domestic provision and legislative action—unnecessarily contravenes legal economy and efficiency of human rights protection. In cases where provisions of the ECHR taken together with the case law of the ECtHR were not suitable for direct effect, the approach of the Serbian Court of Cassation endangers democratic determination of fair balance between an individual and a general interest in human rights protection.

6. CONCLUSIONS

The international regime of the ECHR requires equal effect of the Convention in all Contracting Parties. This equality exists in relation to the results that Contracting Parties have to achieve, although the means themselves do not come under the same requirement of uniformity. Contracting Parties choose the means in accordance with their legal traditions through various constitutional arrangements. However, the uniformity of effects implies obligation of Contracting Parties to follow case law of the ECtHR. This has led to a widespread trend in Contracting Parties that their authorities look at provisions of the ECHR and case law of the ECtHR as a supplement to national law.

However, Contracting Parties use different means to resolve conflicts between domestic provisions and provisions of the ECHR as interpreted by the ECtHR. Some of them, like Italy, use the traditional avenue of constitutional review. The Constitutional Court has to establish that

national provision contradicts the ECHR and to repeal national provision. Then, legislature adopts a new provision to be in conformity with the ECHR. In other Contracting Parties, as in Serbia, provision of the ECHR, as interpreted by the ECtHR, automatically replaces contrary domestic provisions. Both methods may be criticized from the perspective of imbalance of legal economy and efficiency, on one hand, and democratic articulation of fair balance between an individual and general interests in human rights protection, on the other hand.

If a provision of the ECHR, as interpreted by the ECtHR, fully regulates a given situation, if it does not leave any margin of appreciation to Contracting Parties to adapt the provision to national circumstances, if it imposes just one and a precisely defined result that the ECHR Contracting Parties have to achieve, the principles of legal economy and efficiency require that every national court should apply this provision of the ECHR and suspend any contrary domestic provision. If this is not the case, if a provision of the ECHR and case law of the ECtHR leaves a certain margin of appreciation to the Contracting Parties, if it permits a few, no matter how close, alternative results, the automatic suspension of a contrary domestic provision would be erroneous and detrimental for the democratic determination of a fair balance between an individual and a general interest in human rights protection. In such a situation, a legislative power should be afforded an opportunity to adopt a new provision in accordance with the ECHR and to choose a result, which will protect the human rights of all concerned persons in the best possible way.

CERIF: S130

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ACQUISITION OF OWNERSHIP OF REAL PROPERTY BY CONTRACT IN SERBIAN LAW DEPARTING FROM THE TITULUS-MODUS SYSTEM?

This paper examines the systems of contractual acquisition of ownership of real property in various civil law jurisdictions. It then presents Serbian legislative solutions in that respect, commonly denoted as titulus modus system. It particularly emphasizes recent departures from the traditional system in respect of acquisition of ownership of real property in the current practice of Serbian courts and in recent legislation. These developments seem to indicate a certain shift towards a system of conveyance effect of the contract itself, resembling in some aspects the French law. This development is subjected to critical analysis, the conclusion of which is that there needs to be a consistent application of a chosen system, once it is chosen. Fi nally, the author proposes a solution that would achieve such goal and increase the level of legal certainty.

Key words: *Acquisition of Real Property. Iustus titulus. Modus acquirendi.*

1. INTRODUCTION

The rules of acquisition of ownership differ in various legal systems of civilian (continental) tradition. Understanding these differences, which are quite significant from the doctrinal point of view, is an excellent exercise for better understanding of each particular national system. Therefore Serbian textbooks on Property, while explaining the system adopted in Serbia, usually make a short reference to other existing systems.[1] The purpose is to get a better understanding of the domestic law, naturally, and not to go deep into comparative analysis.

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[1] See instead of many O. Stanković, M. Orlić, *Stvarno pravo* [*Property Law*], Belgrade 1999[9] 71 73. Even the pre World War II textbooks employed this approach, see

This paper will follow a similar structure: first, the relevant competing systems of real property ownership acquisition by means of contract within the civil law tradition willbe presented in brief, thereafter the paper will examine the system currently in existence in Serbia, followed by examination of circumstances in which Serbian case law and special legislation depart from such doctrinal solution. These deviations will be scrutinized from both theoretical and practical points of view, with certain suggestions for improvement and resolution of problematic issues.

2. SYSTEMS OF OWNERSHIP ACQUISITION BY CONTRACT IN CIVIL LAW COUNTRIES

Rules on acquisition of ownership by means of contract concluded with the existing owner are usually classified in three broad categories. What all three have in common is the requirement that the person conveying the ownership is indeed the owner, i.e. that the ownership is actually being transferred by the current owner to the new owner. Exceptions to this rule exist (acquisition *a non domino*, acquisitive prescription or *usucapio*, acquisition by reliance onland registry) but are considered outside of the 'acquisition by contract' scenario.

The first (and the oldest) is the concept that requires both *iustus titulus*, a contract or other legal act aiming at transfer of ownership, and *modus acquirendi*, the mode of the transfer itself. Not denying Roman law origins of such concept, it will be examined here from the point of view of the Austrian law, for several reasons: ABGB, Austrian codification, is one of the oldest codifications that still survives; Austrian civil law (especially property law) exerted greatest influence on civil (property) law in Serbia and Austrian system of registration of real property was the role model and the starting point for the Serbian real property registration system. The idea behind the said system is that the contract itself is merely a legal ground, *iustus titulus* for the acquisition of ownership, and that ownership is acquired, based on such contract, by a special act, called *modus acquirendi* or mode of acquisition in the strict sense.[2] The

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L. Marković, *Građansko pravo I, Opšti deo i Stvarno pravo* [*Civil Law I General Part and Property Law*], Beograd 1927[2], 353 356, 370 *et seq.*

[2] See for Austrian law, chronologically E. Demelius, *Grundriß des Sachenrechts*, Leipzig 1900, 24; J. Krainz, L. Pfaff, A. Ehrenzweig, *System des österreichischen allge meinen Privatrechts, Band I Der allgemeine Teil und das Sachenrecht*, Wien 1913[5], 135 137, 581 et seq., 624 626; A. Ehrenzweig, *System des österreichischen allgemeinen Pri vatrechts, Band I, Zweite Hälfte: Das Sachenrecht*, Wien 1923, 196 et seq., 253 254; H. Klang in H. Klang (Hrsg.), *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch, Erster band Zweiter Halbband*, Wien 1931, 151 152; F. Gschnizer, *Sachenrecht*, Wien 1968, 90 94; F. Gschnizer, *Österreichisches Sachenrecht*, Wien 1985[2], 99 104; H. Koziol, R.

purpose of the *modus* is to make the conveyance public (visible to others), therefore the modus is required with third parties in mind. The contract, as legal ground (*Rechtsgrund*, *Titel*) creates merely an obligation to convey the ownership, but the conveyance itself is carried out through a different act, *modus acquirendi* (delivery in respect of movables,[3] registration in respect of immovable property). Both *titulus* and *modus* are required for the transfer of ownership. Otherwise, if the legal ground, e.g. a sale contract, is void or avoided, there would be no valid acquisition despite registration. In other words, registration without a valid legal ground is itself invalid (but even such erroneous registration may have some consequences, in case of acquisition by reliance). The significance of the delivery (transfer of possession) for acquisition of real property by contract, irrespective of it not being the *modus* in that case, evolved in Austrian law. Older doctrine first refused to recognize any significance thereof (save for the case of fraud),[4] but later recognized its significance in case of multiple disposal of the same real property by one person.[5] The idea was that, in case the owner sold and transferred possession to an acquirer, the second acquirer who derives the ownership from the same transferor is in bad faith and thus cannot acquire ownership. More recent doctrine and case law, however, seem to reaffirm the principle of acquisition by filing (registration), reducing the significance of the transfer of possession.[6] Therefore, in contemporary Austrian law, in case of multiple transfer of ownership of real property by one transferor, the transfer of

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Welser, *Grundriß des bürgerlichen Rechts, Band II*, Wien 1996[10], 62, 74 78, A. Kletečka in H. Koziol, R. Welser, *Bürgerliches Recht*, Wien 2006[13], 310 311, 325 329; G. Iro, *Bürgerliches Recht, Band IV Sachenrecht*, Wien 2010[4], 129 et seq.

[3] The legal qualification of delivery was changed in Austrian law under German doctrinal influence. See H. Koziol, R. Welser (1996), 63, 75.

[4] See for a good overview of doctrinal dispute and case law at the beginning of the 20th century J. Krainz, L. Pfaff, A. Ehrenzweig, 630 636; slightly updated in A. Ehrenzweig, 258 265. Only in case of fraud would the registered owner have a weaker right than prior non registered acquirer who obtained possession.

[5] See an exhaustive overview of doctrine and case law in H. Klang in H. Klang (Hrsg.), 202 206. Klang proposed his solution at 206 207. If the registered acquirer knew or ought to have known of the prior contract followed by the delivery to the prior ac quirer, he is in bad faith and cannot acquire ownership by registration. Knowledge of the existence of the prior contract is irrelevant, if no delivery took place pursuant to that con tract. This position is followed by F. Gschnizer (1968), 96, who claimed that the case law followed the solution proposed by Klang.

[6] Already in the second edition of the Gschnizer's work, prepared by Faisten berger, Barta, Call und Eccher, the change of position was noticed. See F. Gschnizer (1985), 106 107. However, transfer of possession was still significant for acquisition of ownership in multiple disposal scenario, but to a lesser extent. Further change is reflected in H. Koziol, R. Welser (1996), 76 fn. 63. The position would read as follows: the first acquirer who obtained possession should be protected by damages claim, but the owner ship should rest with the acquirer who requested registration first. It seems that, with some

possession of real property may only lead to liability for damages of the subsequent registered owner (if he knew or ought to have known for prior transfer of possession), and not to the challenge of the principle of acquisition by registration. This meandering of Austrian doctrine and case law is partly attributable to the fact that the territory of Austria changed over the century, and that contemporary position is adequate for the orderly kept land registries (and they are indeed kept so in todays Austria), whereas the position that recognized the significance of delivery was more adequate for cases and territories where land registries were not so orderly kept.[7] In conclusion, the Austrian system is based upon differentiating the moment the contract aiming at ownership transfer is formed from the moment of acquisition of ownership by a different act, the *modus*, which in case of real property is registration, whereas the validity of the underlying contract is a condition for the acquisition based on delivery, respectively registration (as *modus*-es).

The second category, that is typical for French law, does not differentiate the moment of conclusion of contract from the moment of conveying the ownership – ownership is conveyed directly by contract, which has an *effet translatif*.[8] "*To sell is to alienate*", reads the maxim in French law,[9] which is explained by the fact that the contract on conveyance is executed in the moment it is formed. The roots of this rule are historical, and have to do with the pre-code practices in France in application of a different, Roman law system.[10] Theoretically, the principle is often attached to the recognition of the principle of autonomy of will (*autonomie de la volonté*) to the greatest extent possible, and also to the concept of will as the prevailing factor in private law.[11] The doctrine has also explained it by the principle of opposability of contracts against third parties in French law, which is self-explanatory in case the subject-matter of contract is conveyance of ownership or other *in rem* right, but also applies in cases of other contracts.[12] There are some exceptions to this "conveyanc-

exceptions, that position was adopted by recent case law, from the 1990s onwards. See A. Kletečka in H. Koziol, R. Welser (2006), 327 fn. 81 *in fine*; G. Iro, 132, fn. 34.

[7] Klang explicitly mentioned Galizia and Bukowina in that respect.

[8] See instead of many G. Ripert, J. Boulanger, *Traité de droit civil, d'après le traité de Planiol*, *Tome II, Obligations Droits Réels*, Paris 1957, 854. "*Il* [*le contrat*] *est translatif de propriété*" (emphasis in original text). See Art. 1138 CC, as well as Arts. 1583 and 938.

[9] *Ibid*. "*Vendre, c'est aliéner*".

[10] See Frédéric Zénati, *Les biens*, Paris 1988, 152; G. Ripert, J. Boulanger, 855. The use of *clause de dessaisine saisine* and *traditio ficta* led to the requirement of *modus acquirendi* of Roman law becoming obsolete in practice.

[11] G. Ripert, J. Boulanger, 858.

[12] See Alfred Rieg, *Le role de la volonté dans l'acte juridique en droit civil français et allemande*, Paris 1961, 489. Rieg also constitutes a specific class of legal acts

ing" effect of the contract between the parties in French law: first, the subject-matter of the conveyance must be specified, because one can only own a specified property, second, if the subject matter is a 'future property' than the conveyance takes part only after it is created, and third, the parties may deviate from the rule in their contract themselves.[13] However, and more importantly, given the fact that ownership as an absolute right is opposable against any third party, it should be supplied with *publicity*, because in that way third parties can be aware of the right they need to recognise and honour. Therefore the *effet translatif* of a contract in French law is limited in respect of the rights of the third parties, and in this point the rules pertaining to movable and immovable property begin to deviate. For the purpose of this paper, only the regulation of the real (immovable) property will be presented. The original Code civil of 1804 did not require publicity for transfer of ownership of real property, apart in case of the contract of donation, which needed to be *transcripted*, i.e. registered in order to be opposable against third parties.[14] Registration was introduced in March 1855 in the area of the law of hypothec (*loi sur le transcription en matière hypothécaire*), which was required for developing the *crédit foncier*, and that system was modified in October 1935. The current system of *publicité foncière* was introduced on 4 January, respectively 14 October 1955, by virtue of a thorough reform of Code civil rules, and the idea was to make all disposals of real property public. The effect was that the acts on conveyance of real property now required form of authentication in order to be registered, and registration is a condition for the opposability of the contract (and ownership acquired thereupon) against third parties. Under Art. 28 of the 1955 Act, all acts of changes of ownership of real property must be publicized,[15] and if it is not the case, under Art. 30–1, such act is *inopposable aux tiers*, so cannot be opposed to third parties who acquired and registered a right upon the same immovable.[16] Between two acquirers of ownership of the same real property, the one who was the first to publicize his act on conveyance shall prevail. The older doctrine and case law made an exception to this rule only in case of fraud.[17] Good faith on part of the second acquirer, who entered into contract later but registered first, is not required. So, irrespective of whether the second acquirer actually knew about the first con-

as 'l'acte translatif', the subject matter of which is conveyance of a right. See. A. Rieg, 424.

[13] G. Ripert, J. Boulanger, 859 860.

[14] Art. 939 CC, based upon a rule of an Ordinance from august 1539.

[15] See on that in detail J. Ghestin, C. Jamin, M. Billiau, *Traité de droit civil, Les effets du contrat,* Paris 2001[3], 855.

[16] *Ibid.*, 871 et seq., especially 872.

[17] G. Ripert, J. Boulanger, 863.

tract or ought to have known about it under the circumstances, he shall become the owner if he registers first, save in the case of fraud. This is in contrast to the rules on movables, where good faith is required on the part of the later acquirer whom the transferor delivered the possession first.[18] Thus not much is left of the *effet translatif* of a contract in case of real property, given the significance of publication, at least from the practical point of view. Theoretically, though, the difference remains, because the contract, which is valid even without registration, conveys the ownership, and only its opposability against third parties depends on its registration. In practice, the contracts and all the formalities related to ownership transfer in respect of real property are handled by notaries, who take good care that such contracts are registered immediately after formation. Therefore it is fair to conclude that, in French law, the contract conveys the ownership only between the parties, and that registration (inscription) is required for it to produce *contra omnes* effect.

Last but not least, the third category of rules on acquiring ownership by contract with the existing owner, attached primarily to German law, is the system upon which the ownership is transferred by a special kind of legal act, so-called legal act of disposition (*Verfügungsgeschäft*), which comes as an act of fulfilment of the contract by which the transferor undertook the obligation to convey the ownership, the legal act of obligation (*Verpflichtungsgeschäft*), irrespective of the validity of the latter. Attempting to translate this into the language of the *titulus*/*modus* system, one could say that the *modus*, understood as a legal act (contract) of disposition, transfers the ownership, irrespective of the validity of the *titulus*.[19] The system rests on two basic principles, the principle of differentiation or separation (*Trennungsprinzip*), under which the contract aimed at conveying ownership ('*Verpflichtungsgeschäft*') and the contract that conveys it ('*Verfügungsgeschäft*') are differentiated, and the principle of abstraction (*Abstraktionsprinzip*), under which the validity of the conveyance contract, the '*Verfügungsgeschäft*', is independent from the validity (and existence, for that matter) of the obligation contract, the '*Verpflichtungsgeschäft*'.[20] Doctrinally speaking, German law sees the

[18] Art. 1141 CC. G. Ripert, J. Boulanger, 861.

[19] One needs to be careful, though, for this "translation" often leads lawyers who are not directly involved with German doctrine to misunderstand their system.

[20] See on historical origins of this system S. Buchholz, *Abstraktionsprinzip und Immobiliarrecht*, Frankfurt a.M. 1978, 1 et seq. See also M. Wolff, L. Raiser, *Sachenrecht*, Tübingen 1957[10], 211 et seq. (for immovable property), 233 et seq. (for movables); K. H. Schwab, H. Prütting, *Sachenrecht*, München 2006[32], 137 et seq. (for immovable proper ty), 144 et seq. (for movables); J. Baur, R. Stürner, *Sachenrecht*, München 2009[18], 284 et seq. (for immovable property), 635 et seq. (for movables); H. P. Westermann, K. H. Gur sky, D. Eickmann, *Sachenrecht*, Heidelberg 2011[8], 634 et seq. (for immovable property), 305 et seq. (for movables). As of most recent papers see Michael Martinek, "Kollegiale Reflexionen zur Didaktik des Abstraktionsprinzips Wie lehren wir es und was lehrt es

delivery, respectively the *Auflassung* (a special declaration enabling the conveyance of real property by registration), itself as a contract (legal act, *Rechtsgeschäft*), based upon which the ownership is conveyed (or, in case of real property, which enables conveyance by registration). So, there are two contracts, the one that forms the legal ground for conveyance, e.g. sale contract, and the other that conveys ownership in the narrower sense, and that is delivery (for movables) and the *Auflassung* (for immovable property), as the act required for registration. The effect of the first contract is an obligation of the transferor to enter into the second contract and thus convey ownership, and the effect of the second is the conveyance of ownership itself. Behind the meticulous doctrinal development and analysis, originally carried out by C. F. von Savigny, lies a system which, quite pragmatically, aims at an increased security of legal transactions in business practice. Namely, in German law, the effects of rescission or invalidity of a contract that was used as the *Verpflichtungsgeschäft* take place only between the parties to that contract, without touching the issue of ownership conveyance, because ownership is conveyed by the other legal act, the *Verfügungsgeschäft*, the validity of which is independent from the validity of the underlying contract (abstraction principle). This overcomes the weak point of the *titulus-modus* system, which lies in the fact that the failure of the right of a predecessor carries with it the chain failures of ownership of all persons who acquired it against the faulty owner or his successors (the mentioned 'domino effect'). So, German law requires specific abstract agreement, with *in rem* effect for the conveyance of ownership, which they call *dingliche Einigung* (in case of real property, *Auflassung*). If the *Verpflichtungsgeschäft* fails, the *dingliche Einigung* can still produce its (conveying) effect, and the transferee may in that case request the "alienated" property back from the other party only as a creditor, not as an owner.[21] He can get the property back, provided the acquirer still has it in its' possession. If that is not the case, the acquirer may be liable for the value of the property and for damages, but the ownership stays as it is, with the successor of the acquirer.

3. SYSTEM OF ACQUISITION OF OWNERSHIP OF REAL PROPERTY BY CONTRACT IN SERBIA AND DEPARTURES THEREFROM

Rules on acquisition of ownership in Serbian law (including acquisition by contract with the previous owner) are contained in the 1980 Law on Basic Ownership Relations (*Zakon o osnovnim svojinsko-pravnim od-*

uns?", in Jürgen Stamm (Hrsg.), *Festschrift für Helmut Rüßmann*, Saarbrücken 2012, 95 et seq.

[21] Based upon the rules on *condictio sine causa* (unjust enrichment).

nosima, hereinafter: ZOSPO).[22], [23] In the area of regulation of matters of acquisition of ownership on the ground of a contract with previous owner, the Serbian law, traditionally, adopts as a model the solution of the Austrian law (§380 of the 1811 Austrian Civil Code – ABGB), providing that the right may be acquired from the *predecessor who is the owner*, if two requirements are fulfilled – i.e., that there exists a fully valid contract aimed at the conveyance of ownership (*iustus titulus*), that there is the act of handing over (delivery), for movable objects, and/or the act of filing the right into land books or the transfer of a title deed, for immovable property (*modus acquirendi*). Although already in the first half of the twentieth century there were viewpoints that this relatively conservative way of regulation of acquiring the right of ownership on the ground of a contract with previous owner should be abandoned in favour of the German system based on the principle of abstraction,[24] one might conclude that the *titulus*/*modus* system presented above is generally accepted at present, at least in the doctrine and the general legislation on property law.[25], [26] One of the most serious shortcomings of the system accepted in Serbian law is the mentioned 'domino effect'.[27]

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[22] *Official gazette of the Socialist Federal Republic of Yugoslavia* Nos. 6/1980 and 36/1990, *Official gazette of the Federal Republic of Yugoslavia* No. 29/1996, *Official gazette of the Republic of Serbia* No. 115/2005 (other statute).

[23] Some of the means of acquisition are not regulated in the ZOSPO but else where. See comprehensively with explanations M. Živković, "Acquisition of Right of Property" in *Property Law Amendments in Serbia*, Belgrade 2004, 83 et seq.

[24] See L. Marković, 335 336.

[25] Draft Property Code from 2012, available at *http://www.ius.bg.ac.rs/prof/Materijali/xivmil/NACRT%20ZAKONIKA%20O%20SVOJINI.pdf*, last visited on April 6, 2015, has retained this system, see Arts. 87 90. This text, however, is not likely to be come a statute, so it only reflects the opinions of the expert group that drafted it. The expert group preparing the Draft Civil Code has not yet published the part of the draft pertaining to property law, but as far as I am informed, the *titulus/modus* system shall be retained in this draft as well.

[26] A good part of case law also follows this traditional line. See Decision of the Higher Commercial Court, Pž. 2010/2008(3) dated 8 May 2008, *Sudska praksa trgovinskih sudova Bilten* [*Case Law of Commercial Courts, Bulletin*] No. 4/2008 (both *iustus titulus* and *modus acquirendi* required for acquiring ownership); Decision of the Supreme Court of Cassation, Rev. 385/2010(1) dated 30 June 2010 (contract without registration cannot lead to acquisition of ownership); Decision of the Commercial Appellate Court, Pž. 2739/2010 dated 20 October 2010 (registration without the valid contract, as well as contract without registration, are insufficient for acquisition of ownership), all available in database Paragraf Lex.

[27] See Decision of the Commercial Appellate Court, Pž. 6835/2010(1) dated 14 April 2010 (if the contract upon which the seller acquired his ownership is void, the ownership of the buyer falls, and the sale contract is also void); Decision of the Commercial Appellate Court, Pž. 8186/2014 dated 21 August 2014 (the successor in law cannot acquire nor transfer to other more rights than what his predecessor in law actually had), all available in database Paragraf Lex. It is interesting to note that there is almost a unison

As far as *immovable property* is concerned, ZOSPO includes only one entirely lapidary rule relating to the acquisition of ownership: "On the ground of a legal transaction, the right of ownership regarding an immovable object shall be acquired by means of filing it into a public book, or in some other way as specified by statute" (Article 33). Having in mind the state of affairs in the sphere of registers of real property, the expression "a public book" mentioned in the legislative text now in most cases means real estate cadastre but can still encompass land books in some cases, while the expression "some other way as specified by statute" refers to the title deed transfer in the areas where the title deed system still exists.[28] Also, given the significant number of unregistered real property that still exist in Serbia, the case law developed a rule that payment of purchase price and transfer of possession also qualify as "some other way as specified by statute" in respect of such properties, while admittedly there is no statute providing such rule.[29] ZOSPO does not contain a provision regarding the situation of several persons concluding particular legal transactions for the purpose of acquiring ownership over the same immovable object.[30] In respect of movables, ZOSPO contains a rule relating to such case, in which the primacy of right shall be with that acquirer to whom the object has been originally handed over.[31] According to a standpoint defended in the doctrine, that rule shall be applied only on condition that the acquirer to whom the object has been originally handed over acted in good faith, meaning that he has behaved like this if he was not aware or, according to the circumstances of the case, could not have been aware of the fact that the conveyor has previously concluded a con-

position of the courts that if the transferor is not the owner, the contract on transfer of ownership is null and void, a conclusion drawn by invoking the rule on forbidden con tracts. Without analyzing this here in more detail, I stress that I hold such position com pletely erroneous.

[28] See overview of real property registration systems in Serbia M. Živković, "Real Estate Registers" in *Property Law Amendments in Serbia*, Belgrade 2004, 103 et seq.

[29] See Decision of the Commercial Appellate Court, Pž. 7975/2013(2) dated 2. October 2014 (proof of payment of purchase price and of possession can replace registra tion as *modus acquirendi*); Decision of the Commercial Appellate Court, Pž. 8712/2013(2) dated 13. November 2014 (for unregistered real property, price payment and transfer of possession are *modus acquirendi*), all available in database Paragraf Lex.

[30] Consequently, there was no counterpart to §440 of the Austrian Civil Code, which was applicable in some areas of the former SFR of Yugoslavia as a "legal rule" (soft law), and according to which the priority has been with that acquirer who was the first to request the registration (while the theory used to be divided regarding the issue of the good faith requirement and significance of delivery, as explained above).

[31] See Article 35 of the ZOSPO. It should be noted in this respect that, according to the 1978 draft of that Act, this Article has expressly included the additional wording saying "regardless of good faith" of the acquirer; that additional wording, however, did not find its place in the final text.

tract with another person.[32] To a certain extent this shifts the moment of acquisition of movables towards the formation of contract aimed at conveyance of ownership, which is typical for French system as explained above. Along the same lines, handing over of immovable into possession has, under the law, no relevance at all for conveying the right of ownership (apart that it may lead to acquisition by means of acquisitive prescription).[33]

Courts have, however, faced considerable difficulties in the application of this provision, particularly after the records of real property became disorderly kept in the second part of the last century. This has additionally weakened the effect of the principle of (acquisition by) filing (registration). Case law therefore started to depart from the rule that ownership of real property is acquired upon a contract by registration, and became inconsistent. Thus, the following Conclusion was adopted at the joint session of civil and civil-commercial chambers of the Federal Court, republic and provincial supreme courts, and the Supreme Military Court, held on 28 and 29 May 1987 in Belgrade:[34] "(1) Where several persons have concluded particular legal transactions with the purpose of acquiring the right of property regarding one and the same immovable object, the court shall decide as to a predominant right by applying the principle of morality of the socialist, self-managing society, good faith and honesty, and *the principle of prohibition of the misuse of law. If all the buyers acted in good faith and if* the immovable property was not handed over to any of them, and if no one of them has effected the entry into the land books or another public records, the predominant right shall pertain to the earlier buyer. If all the buyers are in good faith, the predominant legal ground pertains to a buyer who did effect the entry into the land books or another public records, and if no one of them has effected the entry into the land books or another public records, the predominant right shall pertain to a buyer to whom the immovable object has been handed over in possession. This shall be the case also where a seller has handed over in possession the immovable object to a subsequent buyer who did not act in good faith, or if a buyer who did not act in good faith was successful in making an entry in the land books or an another public records. (2) In a litigation for the purpose of determining a predominant legal ground,

[32] See O. Stanković, M. Orlić, 66. Stanković refers to the change of final edition of the statutory text, mentioned in the preceding footnote.

[33] This is apart from the role that the case law attributed to it, which was already mentioned and shall be further presented and analyzed.

[34] See *Bilten sudske prakse VSS* [Court Practice Bulletin of the VSS], 3/1987, 5. On the development of case law and doctrine in former Yugoslavia that led to this Conclu sion see Meliha Povlakić, *Transformacija stvarnog prava u Bosni i Hercegovini* [*Trans formation of Property Law in Bosnia and Herzegowina*], Sarajevo 2009, 125 et seq.

the capacity to be sued shall pertain to the seller and to remaining buyers of the same immovable property, as unitary co-litigants."

Given that this Conclusion is still binding for judges of the civil chambers of the highest courts in the country (specifically, the rule is still binding for the Supreme Court of Cassation), it is rather close to a statutory rule, so that judges of lower-instance courts, too, adhere to it (although it is not formally binding for them).[35] Recent court decisions demonstrate that this Conclusion is still quite vital in Serbian case law,[36] despite the fact that the new registry (the real estate cadastre) is relatively up to date, given the significant investments made during the last decade. It should also be noted that under this Conclusion existence of good faith is assessed according to the need that the acquirer must not be aware of the existence of an earlier contract, nor that he should have been aware of it.[37] Consequently, it will not suffice if the acquirer only verifies the situation in the registry, or even demonstrates that he had checked the situation regarding the possession, because it is possible to prove that, although he has performed both checks, he still had been aware of the existence of an earlier contract, or should have been aware of it – which makes him considered to be in bad faith (*mala fide*) and with a weaker right as compared to the previous acquirer who has acted in good faith. In such a way the principle of acquisition by filing (registration) regarding the land books and real estate cadastre is *de facto* entirely derogated. On the other hand, the significance of the formation of contract on conveyance is yet again stressed, for the acquirer who was the first to conclude the contract shall always be held in good faith, and if the subsequent acquirers were in bad faith, i.e. if they knew or ought to have known for his contract, he shall prevail in obtaining ownership even against the registered owner. Two recent decisions demonstrate position of the courts in this respect in

[35] On the binding character of standpoints of principle of the highest court, see V. Vodinelić, *Građansko pravo Uvod u građansko pravo i Opšti deo građanskog prava* [Civil Law Introduction to Civil Law and General Part of Civil Law], Beograd 2012, 117 120.

[36] See Decision of the Supreme Court of Serbia, Rev. 1/2004 dated 19 April 2005 (good faith principle decisive in case of multiple alienation, and irrelevant outside that scenario); Decision of the Higher Commercial Court, Pž. 9360/2006 dated 30 January 2007 (possession decisive when both acquirers from the same transferor are in good faith); Decision of the Higher Commercial Court, Pž. 2010/2008(1) dated 8 May 2008, *Sudska praksa trgovinskih sudova Bilten* [*Case Law of Commercial Courts, Bulletin*], No. 4/2008 (among the acquirers in good faith, the one having possession prevails); Decision of the Supreme Court of Cassation, Rev. 1177/2010 dated 8 July 2010 (awareness of the existence of the previous contract, even if it is formally inadequate but apt for convales cence, renders the subsequent acquirer in bad faith), all available in database Paragraf Lex. It is clear that all of these decisions utilize the wording of the 1986 Conclusion.

[37] See O. Stanković. M. Orlić, 335 336, and the case law presented there, particu larly in fn. 1142. Orlić was correct to recognize inclination towards the French system in respect of this point.

a way that can be used as a model. The first is the Decision of the Appellate Court in Belgrade, Gž. 7114/2013 dated 13 June 2014.[38] The court found that the buyer of real property must have known for the existence of an earlier contract on disposition by the same real property, because that (second) byer installed bullet-proof entrance doors in a flat and attached the contract to that door.[39] Even though the Court found that the possession of the flat was first transferred to the first buyer, it is clear that the second buyer was the one who installed the bullet-proof doors, so was in actual possession of the flat. Therefore, the first buyer actually had only the contract, without possession, and the second had a contract with possession, and the court reasoned that, by formation of the first contract, the seller *lost the ownership* and the possibility to convey it to another acquirer subsequently. The second decision does not deal with transfer of ownership, but reflects the same line of thinking – that the *formation of contract on ownership transfer means that the transferor is no longer the owner*. It is the Decision of Commercial Appellate Court, Pž. 3047/14 dated 20 June 2014,[40] which had to do with establishing of hypothec by a registered owner of real property who had previously concluded a contract on sale of the same real property. The Court decided that: "Hypothecary declaration made after the sale of the encumbered real property is null and void, irrespective of the fact that the person giving such declaration was, at the moment of its creation, registered owner of such real property". This decision also rests on the idea that mere existence of contract aimed at transfer of ownership of real property deprives the transferor from ownership and makes him unable to dispose of the real property by a subsequent legal transaction. It also completely destroys the principles of land registration law, such as acquisition by filing and reliance.

One statutory provision in special legislation also seems to have shifted Serbian law towards the model inspired by the French system: it is Article 4a of the 1998 Law on Transfer of Immovable Property[41] (ZPN 1998), adopted by amendments made in 2009, which lasted until new Law on Transfer of Immovable Property came into force on 1 September 2014 (ZPN 2014).[42] The 2009 amendments to 1998 ZPN introduced territorial competence for court verification of signatures affixed to contract on transfer of immovable property. These amendments have also forbidden the court to verify signatures on the second contract related to the same real property if the conveyer is the same person. Court verification

[38] Available in database *Paragraf Lex*.

[39] It seems the court found that these were evidence that the second buyer doubted something is wrong, and there is another pretender to ownership of the same flat.

[40] See *Bilten sudske prakse privrednih sudova* [*Bulletin of Case Law of Commercial Courts*] No. 1/2015. 48 50.

[41] *Official gazette of RS* Nos. 42/1998, 42/2009.

[42] *Official gazette of RS* Nos. 93/2014, 121/2014 and 6/2015.

was a condition for validity of contracts on transfer of ownership over real property (now the notarial deed or notarial solemnization is required). Therefore the ban on court verification of subsequent contract, in fact, meant that one owner can conclude only one contract on transfer of his ownership over real property, for court verification of signatures is *forma ad solemnitatem* for such contracts. This was introduced, along with the appropriate software at the verification desks in courts, in order to avoid the situations of multiple alienations, which were more frequent than it could be tolerated, especially related to apartments that are under construction. This provision clearly does not adhere to the *titulus-modus* system, and thus its adherence to the Constitution may be challenged. This provision effectively revokes the power of owner to dispose of his property, if he already concluded one contract to that aim. Namely, the seller (or other transferor) remains the owner even after the sales contract is concluded, until the new owner is registered, and thus, as such, he should be able to conclude another contract to sell the same property. This has been made practically impossible by Article 4a of the ZPN 1998, and if the buyer from the concluded contract abandons it for some reason, the seller would have to either contractually rescind it or sue the buyer for rescission at the competent court of law, in order to be able to dispose of it again.[43] This really resembled the system in which the *titulus* i.e. the contract itself conveys ownership, without the need of any *modus* whatsoever. It seems the legislator realized that it had gone too far, and in the new ZPN 2014 the rules changed. While the registry of contracts on transfer and the territorial competence, now of public notaries, was kept, the ban on creating or verifying a second contract by the same transferor was abandoned, and public notary just has the duty to warn the parties that the database shows that there is a prior contract in respect of the same real property by the same transferor (seller).[44]

4. CONCLUSION

It is difficult to label the above presented set of positive law rules in Serbia as coherent. The Romanic system of *titulus* and *modus* is merely a starting point thereof. On the one hand, it seems that the registration is constitutive and that ownership cannot be acquired by virtue of contract if there was no registration, at least in respect of registered real property. On the other hand, case law and court practice, as well as some newer legislation, seem to be inspired by a different system, under which the

[43] In more details on this see M. Živković, "O kvalitetu novijih građanskopravnih propisa u Srbiji [On the Quality of Newer Civil Law Legislation in Serbia]", in *Pravni zapisi* [*Legal Records*] No. 1/2010, 129 132.

[44] See Art. 4b ZPN 2014.

contract itself conveys ownership, or at least in which the transfer of possession is quite relevant. While it is true that the courts departed from the system of acquisition by registration because of the poor state of the existing registries, it is also true that current position of case law is not apt to stimulate and promote an orderly keeping of real property registry. As a result, the current situation in respect of acquisition of ownership of real property by contract (considered integrally it cannot be called a system, in my opinion) does not provide an effective basis for the realisation of legal certainty in an otherwise exceptionally significant area of trade in immovable property. The departures from the traditional system, irrespective of how the reality required it at the time they were made, are now a liability that renders the real property trade uncertain. Mixing the systems in an incoherent way, so that sometimes sale contract suffices for ownership, sometimes delivery (possession) is required and sometimes also registration cannot lead to satisfactory outcome. Moreover, Serbian case law seems to go even a step further from its' French role model: in France a contract transfers the ownership of real property only *inter partes*, and registration is a condition for opposability against third parties, and in some Serbian court decisions it seems that the court found that the contract transfers the ownership fully, *erga omnes*.

I think that the approach that would apply a chosen system consistently has the best chances for success. Given that Serbia for reasons of tradition chose the *titulus-modus* system, it should be applied consistently, so registration should be required for acquisition of ownership by contract with the previous owner. In case of multiple transfers, the acquirer who requested registration first should have precedence over others, irrespective of who has prior contract or, eventually, possession, i.e. irrespective of his good or bad faith. The knowledge of a prior contract aimed at the transfer could be the ground for an obligation to compensate damages to an earlier acquirer jointly and severally with the transferor, but should be completely irrelevant for the issue of who acquires ownership – it is acquired by the person who registered based upon valid contract with previous owner. This solution, which means a consistent application of the principle of filing (registration), would from its part contribute to the orderly keeping of the real property registry, which would justify the huge investments made into reform and data update thereof. As for the non-registered properties, delivery (possession transfer) could be recognized as *modus acquirendi* until some sort of records of a more tangible nature is made (say, the collection of transfer documents, where the *modus* would be depositing a copy of the transfer document in such registry, as is the case in Austria[45]).

It seems that the confusion and antinomies in current case law makes it impossible to remedy the situation without adoption of the new

[45] See A. Ehrenzweig, 234.

codification, i.e. a new set of statutory rules, which should not leave too many issues unregulated, at least in this very sensitive and significant area. Introduction of notaries in Serbia in 2014,[46] only exposed the shortcomings of the existing situation and reiterated the need for codification of property law, which should remedy this situation in the future. Related to the issue at hand, it seems that the solution contained in the Draft Property Code of 2012 represents a good starting point for developing effective rules on real property ownership acquisition by contract. In case of multiple transfers of real property, Art. 90 of said Draft provides that the acquirer who registered first shall obtain ownership, provided however that he could not have known for the earlier disposition *based upon data contained in the registry*. Therefore even if the acquirer knows about the prior contract, or that a prior buyer is in possession, he is considered to be in good faith if the data in the registry, at the moment of his applying for registration, have not contained info on such prior contract and/or possession. This rule would also reaffirm the role of the registry and indirectly contribute to its orderly maintenance.

[46] The Law on Notaries Public was introduced in May 2011, and it started to be applied as of 1 September 2014.

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MORAL VALUES AS THE BINDING FORCE OF THE HUMAN RIGHTS

Moral values represent the binding force of human rights. They are primarily the binding force of norms of national legal systems, and then the binding force of legal norms of international law and international conventions and declarations on human rights. The very essence of moral values represents the primary issue for the creation of conventions and declarations which protect human rights. However, mor al values are not merely that, they are also the source of human rights. If we start from the fact that the values were given and are, thus, indestructible by man, then they are the best possible foundations of human rights. Actually, all human rights are based upon the values given to people to exercise and protect them. As with any issue of binding force of legal norms of national legal systems, the issue of respecting dec larations and conventions on human rights, the sanction is not and cannot be the source of the binding force of these norms and declarations. It must be something more durable, and these are just the values that are given to people. Therefore, we can assume that human rights are given and are independent of people, even when they are being oppressed and violated, human rights do not lose their value and its importance. Only an order of values does not allow human rights to be rejected and to enter into a vicious circle in which the man disappears. Distorted application of moral values, directly lead to the rejection of human rights. There is no establishment of human rights without accepting moral values, and they will then be a valid foun dation of durable establishment of human rights. Only then and only in this way hu man rights will not remain a record on a piece of international paper.

Key words: *Law. Moral Values. Human Rights. Binding force.*

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1. INTRODUCTON

The value approach in establishing human rights arises because of the nature of human rights which are not only a legal phenomenon. Such an approach of human rights will enable us to determine the roots of human rights, their structure and content, as well as their binding force. Such an approach is required in order to eliminate the possibility that human rights are just what stands in declarations and conventions. Their power is not derived from declarations, but from their value content.

The philosophical prism of the observation of human rights is present as a simple fact that the law, as a science, was derived exactly from philosophy, which was a basis for its development, so the understanding of any legal institute is only possible from the ontological-axiological point of view. Values represent the foundation for the construction of every legal system and the binding force of any legal norms, and it is impossible not to introduce an axiological perspective in observing human rights, which, as well as the legal norm, has the same root – value. How can values influence the human rights? This is the question that can be expected, because human existence without values, in its very core, cannot be considered. Human existence, without values, would be like animal survival and not like free Christian life. For these reasons we can say that there cannot be human rights issues without values considered. In this manner, searching for the value roots of human rights, we avoid all the traps of legal positivism which explains everything through a self-creating self-sufficiency. This law requires simple obedience without the involvement of the ontological and axiological social setting from which the law is derived. Actually, such law and legal system do not ask for the motives for respecting human rights, but only require submission. If we include practical wisdom, there is a simple question: how far will human obedience go? It is quite expected that it will exist as long as there is a fear of sanctions for violations of legal norms, which immediately implies that they might not be respected to that extent if there is no fear. Is it possible to set the construction on human rights on such fragile pillars such as sanctions? So, our reality requires a value approach in resolving all issues, and that includes human rights as one of the pillars of culture, society and the state.

What should also be avoided as the trap of the modern age is a trend in dealing with human rights. It is not and never will be a topic that is now "modern." Human rights are not a matter of fashion, but an integral part of man and society and only through the value approach to the study of all aspects of human rights is possible to see the bottom of their entirety. Therefore, a thorough value approach and a value construction of human rights are essential. This value construction of human rights is not only a metaphysical observation of ready-made things, but it includes the

active involvement of values in the process of construction and drafting of legal regulations that come as a finish of studying a phenomenon for which the state is interested. Thus, the value construction of human rights is not a post festum thing, but the primary issue of every study and construction of human rights. It is not a "meeting after" but rather before each of the final formulation of human rights; it is an absolute respect of human rights, because man and his life remain pure organic process if we exclude values. Thus, Max Weber and Leo Strauss point to our relation towards values as indispensable. It is actually about Weber's insisting on the role which values play in the social science.[1] Looking at it from the ontological point of view, the existence of man without values is impossible. If law was cleared of values it would be crippled in its human core. In case man really didn't take part in realization of values he would not be in position to realize his humanity. Man's deeds would have all the marks of unquenchable longing for the establishing the relation between our reality and values only in case of the realization of values. This would refer to human rights as well, which is also the value product of the human spirit. Therefore it is necessary to divert attention to the axiological surface of human rights. If values were excluded from the human rights, as the creation of the human spirit, as a reason for its existence, human rights would turn into a pure formal and legal way of existence of the declarations. Since the realization of human rights lies in the very construction of law, it is necessary to establish the place of human rights in the world of values.

The best way to recognize a man is to know what kind of future he is creating. His creation of future is based on values. The formulation of human rights is also a way of forming future, the future of nations, not of a person, because: "recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world... this Universal Declaration ... (is) a common standard of achievement of all peoples and all nations."[2] Thus, the emphasis is on the active participation of values in the development of human rights. Such a construction will contribute to their better understanding and their better implementation, which is the main goal, the application to the life of man and his well-being.

2. THE ABSOLUTE CHARACTER OF HUMAN RIGHTS

In the necessity to recognize the absolute, timeless validity, validity of a value per se, basic value forms, we insisted on finding a stable foun-

[1] L. Strauss, *Natural Right and History*, Chicago & London, 1992, 38 39.

[2] D. Little, *Natural Rights and Human Rights: The International Imperative*, in, *Natural Rights and Natural Law: The Legacy of George Mason*, edited by R. P. Davidow, The George Mason University Press, Boston, 1986, 68.

dation for absolute values. The belief that there are norms which rise above the empirical motif for the expression of human knowledge is based upon the assumption that the Government represents a higher intellectual system. If we want to conceive this system as a part of a higher real awareness in analogy with our impression of the relation between perception and its subjects or values, we must represent it as a set of ample provisions of an absolute mind, i.e. Creator, this because "For in six days the Lord made heaven and earth, the sea."[3] Thus, the absolute values, values per se and absolute criteria and norms have found the absolute legislative instance – God, and from there also "fundamental human rights logically precede governments and all positive law."[4] Therefore Max Scheler emphasized the eternity of values and was named absolutist when referring to value. This leads to the fact that essential values are timeless, as well as the principles of logic.[5] This implies that human rights founded on absolute values also constitute an absolute category. Actually, the eternity of values points to the absolute order of values which has the origin in God. All existing values are established on the value of timeless spirit and the world of values which lies ahead.[6] For, the value has its own being as a unique quality that exists by itself in the independent realm of values which exists objectively, absolutely and eternally, independent of any real object or subject, independent of man. In such manner, the values cannot be destroyed.[7] Thus, human rights originating from absolute values cannot be destroyed.

Such absolute values enable human rights to be absolute in terms of their foundation. It is, actually, ontological and axiological foundation of human rights which is unambiguously clear and absolute. What causes doubts about their absolute character is the issue of implementation of human rights, which often results in views such is the one of Alasdair MacIntyre: "(T)he truth is plain: the are no such rights (as human rights), and the belief in witches and in unicorns. The best reason for asserting so bluntly that there are no such rights is indeed of precisely the same type as the best reason which we possess for asserting that there are no witches and the best reason which we possess for asserting that there are no unicorns: every attempt to give good reason for believing that there are such rights has failed... Natural or human rights then are fictions."[8]

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[3] R. P. Davidow, *Introduction*, in *Natural Rights and Natural Law: The Legacy of George Mason*, 16

[4] D. Little, 73.

[5] L. Strauss, 39.

[6] M. Scheler, *Fromalismus in der Ethik und die materiale Wertethik,* 3 aufl., Haale 1927, 94.

[7] *Ibid*., 268.

[8] D. Little, 74.

This entirely skeptical attitude towards the existence of human rights originates from the issue of their implementation. That issue makes them a relative category, which is still arising, so that human rights sometimes cannot help us in deciding "whether a national law is good or bad, just or unjust."[9] The reality of monopoly of physical violence which the state possesses, very often makes us believe that human rights are relative categories and that "when the secret police come, when the torturers violate the innocent, there is nothing to be said to them of the form "There is something within you which you are betraying. Though you embody the practices of a totalitarian society which will endure forever, there is something beyond those practices which condemns you..."[10] This dismisses a possibility of not the literal existence of human rights, but the possibility that they are based on something more solid, on something like the absolute values. Quite the opposite of this attitude Look believes that "According to the law of nature all men alike are friends of one another and are bound together by common interests".[11] So, on the question: "Is every man's own interest the basic of the law of nature?" Locke simply answers: "No."[12]

This confirms that there is something higher than selfish interests or "rights of self-interest" of "egoistic person" who is in the words of Karl Marx "separated from community" and who is "wholly preoccupied with his private interest, and acting in accordance with his private caprice."[13] Therefore, something greater and more valuable is the basis of human rights than selfish interest of the individual and the government. Since for Loocke "Law of Nature" something "which obliges every one" thus, the values, as well as human rights, are something which absolutely obliges every one. Only if the values are binding force of human rights, then will they be guaranteed to all who were born as members of "human family." Thus, it becomes understandable that: "The State of Nature has a Law of Nature to govern it, which obliges every one: And Reason, which is that Law, teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions."[14]

These absolute values represent the binding force of human rights existing at the very root of human nature, which implies that we are com-

[9] *Ibid*., 73.

[10] R. Rorty, *Consequences of Pragmatism*, University of Minnesota Press, Min neapolis, 1982, xlii xliii, in: D. Little, 73 74.

[11] J. Locke, *Essays on the Law of Nature*, Clarendon Press, Oxford, 1954, 163, in: D. Little, 81.

[12] J.D. Little, 82.

[13] *Ibid*., 75.

[14] J. Locke, *Two Treaties*, bk. 2, sec. 6, in: D. Little, 90 91.

pletely aware when we act to someone's detriment, violating his/her human rights and his human dignity. Thus, via human rights, the values become a guaranty of the fight against pure voluntarism and arbitrariness, since "each and every human being always and everywhere is entitled not to be subjected to coercion, to severe pain, impairment, disfigurement, loss of life, or neglect, purely for the sake of anyone's pleasure or self-interst."[15] Values become a still actuator of human rights since they "claims that are justified by moral principles and rules that apply to all human beings qua human beings, regardless of their particular institutional arrangements. This rights are general rather than specific (specific rights originate out of transactions, such as contracts), and they are universal."[16] Quite expectedly, it is stated in the Virginia Declaration of Rights: "That all man are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."[17]

3. VALUES AS A BINDING FORCE OF LAW AND HUMAN RIGHTS

Since human rights at the national level are mostly mentioned in the Constitution, by observing the Constitution, we realize that it is a "pure" and not a "sanctioned" norm. Why is it binding then? What binds us? And, how is it possible for an entire legal system and system of human rights to be founded on a "pure" norm, a norm which is not sanctioned? Radbruch finds that: "Aber auf der Suche nach dem Grunde dieser Geltung stößt die juristiche Geltungslehre mit Notwendigkeit irgendeinmal auf die Tatsächlichkeit eines Rechtssatzes aus anderm Rechtssätzen ableiten, die Geltung einer Verordnung aus dem Gesetze, die Geltung eines Gesetzes aus der Verfassung. Die Verfassung selbst aber kann und muß eine solche rein juristiche Geltungslehre als eine causa sui auffasen. Sie kann wohl die Geltung eines Rechtssatzes im Verhältnis zu andern Rechtssätzen, aber niemals die Geltung der höchsten rechtsordnung, als Ganzen dartun."[18]

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[15] D. Little, 104.

[16] J. F. Childress, *The Meaning of "The Right to Life"*, in *Natural Rights and Natural Law: The Legacy of George Mason*,, edited by R. P. Davidow, The George Mason University Press, Boston, 1986, 129.

[17] *Ibid*., 130.

[18] G. Radbruch, *Rechtsphilosophie*, Verlag Von Quelle & Mezer in Leipzig, Leip zig 1932, 77.

In such a manner, we come to the issue of the binding force of a legal norm, and human rights which are contained within legal norms, and, then, to values. Positive law by itself does not possess value-based binding force, therefore, sanctions are applied. Positive law must be adjusted to values. The conflicts of social groups are not a mere struggle for law, but a struggle for the better law than the existing one, and for the human rights. Human rights are constantly being improved and their development is never finished. The value represents an absolute ideal, an eternal noble aspiration of mankind towards the perfection, the perfection of law and of human rights. The conflict between the value and positive law is reduced to the conflict between variable and permanent, real and ideal, stagnation and progress. It is a conflict that encourages the progress. Positive law retreats in front of values in this conflict. The view according to which the entire law consists of positive law, which equates the state with law and law with power, is absolutely unacceptable. The ambition to incorporate values into human rights would be of essential significance. Human rights should serve to realize values in reality. Only thus can the values have an actual impact on positive law. We study the binding force of human rights in order to demonstrate that values, which can be in conflict with positive law, and which are to take victory over positive law, are able to enforce us to achieve them. If we would think that only a sanction provides the binding force of a legal norm, then values would be useless for law.

It is more acceptable that the basis of human rights lies in values, than that it lies in a sanction. For, a norm is not able to draw its binding force from a sanction or from some other norm, a higher norm. If a norm would draw its binding force from other norm, then, the binding force of a legal norm would be reduced to a mere form, which is impossible, since the binding force cannot be contained within the form, but within the content in case it pledges for longevity: "Aus den Rechtssätzen als Imperativen, Willensäußerungen kann, wie gezeigt wurde, vielleicht ein Müssen, niemals aber ein Sollen abgeleitet warden."[19] Such an assumption on the form as the fundament of the binding force excludes the world of values and makes the human rights completely powerless, ineffective and useless.

However, a human rights by itself are actually able to bind a subject, that is, to bind him to execute it only as a value. In this way, a value is contained within the goal, the purpose of the human rights. Human rights are binding by means of the objectively postulated values, which are actually capable to motivate our will. Thus, we adopt objectively postulated values and execute human rights in practice. The binding force of human rights is created in the union with values.

[19] G. Radbruch, 43.

In brief, we believe that human rights must rely on values given by the Creator in order to be binding. Indeed, man has to discover and understand a value in order for it to become actually binding for him. In that respect, it is subjective. However, if the cognition of a value is indispensably subjective, the essence of a value is not subjective, it is a subjective feeling by no means, but it is an indispensably subjective cognition of an objective system of values given by the Creator. And, our cognition of a value must, more or less, correspond to the very objective value. It is important to emphasize that a value consists of the judgment that something should exist, and the judgment is an act of consciousness, therefore, it cannot exist outside the minds of one who produces it. Thus, it is possible that something represents a value for you, for me, but it is not possible to have a value per se, a value without a subject. In order for such a value to exist, an impartial mind should exist as well, independent from man, the consciousness which will make judgments about a value. That is the mind of the Creator. A value is not subjective solely in its essence. For, the first man who created a value and used his actions for its realization, was truly the first man, since, by then, there was no creature on this earth to consciously act in compliance with values that the first man – Jesus Christ. Law as a norm and human rights cannot be binding otherwise but by our acceptance of values they realize. Any single legal norm realizes a particular value, and any single human right realizes a particular value, respectively, which we can either accept or reject.

4. MORAL VALUES AS THE IMPERATIVE OF THE HUMAN RIGHTS

Everything that takes place in law, from the creation of human rights to their application, has been accompanied, motivated and justified with certain values. Thus, values are inherent for human rights and: "The word inherent, which Mason also uses, is virtually a synonym for natural. Inherent means "existing in something as a permanent attribute or quality... especially a characteristic or essential element of something; belonging to the intrinsic nature of that which is spoken of."[20]

The term inherent "is repeatedly used, as, most recently, in the Declaration on the Elimination of All forms of Intolerance and of Discrimination Based on Religion or Belief (adopted by the UN General Assembly 25 November 1981): "the dignity and equality inherent in all human beings." Something quite similar appears in the African Chapter on Human and People's Rights: "fundamental human rights stem from the attributes of human beings."[21] Thus, already with Lask, it is demonstrated

[20] J. F. Childress, 69.

[21] *Ibid.*

that philosophy of law studies typical value relations of law. Therefore, the operations of lawyers must be determined by value judgments manifested in positive-legal state regulations of human rights, because values are the absolute guarantee. "According to the law of nature all man alike are friends of one another and are bound together by common interests."[22] That is why: "the Sword is not given to the Magistrate for his own good alone."[23] In addition, the orientation of law towards values and deformalization of law are accomplished in this way as well. Value path of human rights should be the object of jurisprudence and the main ingredient of law. Values and human rights are often violated in such a refined manner that such injuries cannot be sanctioned by law, which itself often violates values. Actually, the subordination of values in relation to positive law is indispensably derived from the objective nature of values, for it is a duty of man to set his rules in compliance with values. Because we cannot accept the following: "Whatsoever pleased the sovereign, has a force of law."[24] This is the reason why law is often defined as ethical minimum, "etische Minimum (Georg Jelinek),"[25]and also because "we really do act within a moral world."[26]

Minimal value program of human rights contains the provision that we must account for the axiological content of the human rights entity, that is to say, its value features. Whereas, the utmost requirement is that jurisprudence should not be only descriptive, but should evaluate entire legal systems, human rights and all their elements from the standpoint of value, because non values *are hostis humani generic*.[27] Values are indispensable support for the responsible in a secularized society and in a state, where a valid life for all people is possible only through respect of values, because "The rights of the citizens rest upon the "rights of man."[28] At the same time, they are a manifestation of truth about the progress of implementation of the human rights.

We realize from the tragedy of human rights that values have inscribed laws in our hearts, for the answer to the question "Who show the

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[22] D. Little, 81.

[23] *Ibid*., 92.

[24] St. T. Aquinas, *Treatise on Law*, in: C. Johnosn, *Philosophy of Law*, New York 1993, 14.

[25] G. Radbruch, 42 43.

[26] D. C. Hendrickson, *A Commentary on Just and Unjust War*, in, *Ethics & International Affairs*, J. H. Rosenthal and C. Barry editors, Georgetown University Press, Washington D.C., 2009, 3.

[27] S. Benhabib, *On the Alleged Conflict between Democracy and International Law*, in, *Ethics & International Affairs*, J. H. Rosenthal and C. Barry editors, Georgetown University Press, Washington D.C., 2009, 185.

[28] *Ibid*.,190.

work of the law written in their hearts?"[29] is values given by the Creator, because they are an axiological face of human rights. Any legal system, which tends to be persuasive and obliging, has to find its place in the world of human rights, and every turning away from that value search is harmful for law. In Gustav Radbruch's opinion, law is man's project, but as such, it can only be comprehended through his ideas solely which can be regarded as a value. Legal norm, as a command, must be directed only towards values and human rights, so as to "emerge out of the ocean of morass of facts".[30] The rejection of value judgment of human rights leads to the strictly factual description of the obvious actions, as seen in the concentration camps.[31] So, Legal Positivism, which insists on the rejection of values as a binding force of human rights, brings itself into danger of historical objectivity. That prevents us from calling "spade a spade"[32] and it brings into danger the kind of objectivity which requires previous assessment, that is to say, "the objectivity of interpretation".[33] This attitude of legal positivism, devoided of values as a binding force of human rights, leads directly to legislation and the legal actions of the totalitarian regimes. This could be completely possible if we accept the existence of law without values. If law does not contain values, it will be divided of judging the social phenomenon.[34]

5. THE LIMITS OF THE HUMAN RIGHTS

The limit of the human rights is a man's attitude towards the values, and because we must bear in mind the "confession of the German priest, Father Niemoller: "When they arrested the gypsies, I said nothing. When they arrested the homosexuals, I said nothing. When they deported the Jews, I said nothing. But when they arrested me, the others said nothing."[35] Hartman points to man's attitude towards values, for man knows what many of his vital goods are only when they are taken away from him, because we very often believe that: "In this world, right and wrong, justice and injustice, have no place. If war belongs to the realm of necessity, it makes no more sense to pass moral judgment on it than it would to pass moral judgment on catastrophes occurring in nature."[36]

[29] St. T. Aquinas, 16.

[30] L. Strauss, 40.

[31] *Ibid*., 45.

[32] *Ibid*., 61.

[33] L. Strauss, 61.

[34] *Ibid*., 63 64.

[35] P. Virilio, *Art and Fear*, Continuum, London New York, 2003, 87.

[36] D. C. Hendrickson, 3.

Thus, it seems as if the values were banished from the realm of human rights, like: "There is not enough cruelty."[37] If the history of a conflict or "rule of the gun"[38] has shown something, it is the rejection of the moral minimum of international law which is necessary for human survival, and "is by nature founded on the principle that the various nations should do to one another in times of peace the most good possible, and in times of war the least ill possible, without harming their true interests."[39] Interstate and international conflicts directly involve the issue of limiting international law and human rights, and states are to "pursue their interests within the limits imposed by justice and good faith."[40] Quite apart from historical reasons, as well as of the rise of historical perspective of a conflict, there remains a question that no one gives an answer to, the question of the fate of the common man in a conflict and his future after the conflict.

The conflicts and "Verbrechen gegen die Menschlichkeit" (crimes against humanens)"[41] in the world "that shock the moral conscience of mankind"[42] show the inability to achieve a moral minimum of international law, which seems to remains paralyzed when it comes to protecting the only subject for which it exists, man and then it looks like we are living in a "universal tyranny."[43] Thus, the fact of a very fragile peace that has been established is coming under attack, and, therefore, man comes under attack as well., because of that Harry Truman said that "aggression anywhere in the world is a threat to peace everywhere in the world"[44] and also "whenever the filthy work can be stopped, it should be stopped."[45] As if in these conflicts it is forgotten what was the reason for the adoption of all international conventions, declarations on human rights. As if man as a value is forgotten, an individual with his hopes, fears, just as if a man is merely a word in the international legal and political dictionary.

International law, independent form its legal requirements and legal actions, has a moral value basis, because "Though banished from the realm of positive law, natural law did not simply disappear. It continued

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37 P. Virilio, 29.

38 D. A. Crocker, *Reckoning with Past Wrongs*, in, *Ethics & International Affairs*, J. H. Rosenthal and C. Barry editors, Georgetown University Press, Washington D.C., 2009, 54.

39 D. C. Hendrickson, 5.

40 *Ibid.*

41 S. Benhabib, 186.

42 D. C. Hendrickson, 14.

43 *Ibid.*, 9.

44 *Ibid.*, 12.

45 *Ibid.*, 13.

to march under the banner of morality."[46] In fact, moral values are the basis for the construction of human rights and a primary issue for the development of international law, and "Its principles constitute a common moral world in which human beings have rights not as members of this or that community but as members of the human community."[47] The moral minimum that is necessary for the proper functioning of the law is already compromised by the very fact of conflict. Then, it is being violated and eventually rejected, which undoubtedly happened in every country during the war.

The moral minimum does not ask for the rights of the state, it asks for the common man, and since the state is not a mystical creature, but a real legal and socio-political entity made up of people, the thing becomes paradoxical, but quite clear as well. The basic moral value that people who run a state must respect man, because "cosmopolitan norms of justice accrue to individuals as moral and legal persons in a worldwide civil society"[48], is being rejected by those people. How is it possible at all to talk about the application of international law to protect the human rights when states often ignore the previous issue of the protection of man? Do those who knowingly go into a conflict can confirm that they did not know that the very fact of causing conflicts would jeopardize human life? A man and his life are a moral minimum international law, because "all human beings are "neighbors"[49] but the inability to protect them in recent conflicts indicates the limit in the application of international law enforcement.

6. CONCLUSION

What is now most concerning is not the formal and legal presence of human rights in legal standards, declarations, resolution, but their absence in the actual practice of present-day states, both at national and international levels. This points out to the rule of pure legal positivism which complies with the fact that human rights are "mentioned" in legal standards. Such a purely formal and legal view of human rights represents the beginning of their disappearance.

Rejection of the real roots of human rights and the values leads to their cyto formal presence in the legal norms. Even when we talk about

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[46] T. Nardin, *The Moral Basis of Humanitarian Intervention*, in, *Ethics & International Affairs*, J. H. Rosenthal and C. Barry editors, Georgetown University Press, Washington D.C., 2009, 92.

[47] *Ibid*., 92.

[48] S. Benhabib, 187.

[49] T. Nardin, 95.

human rights, we refer to them as impersonal category. Is it possible that something which is fundamentally tied to the personality be impersonal? What kind of inconsistency it is? Intentional or accidental? This impersonality in the understanding of man, as well as the values, is reflected in the view of men as figures. Rejecting a mere legal positivism and adhering to the axiological understanding of the world, we are able to construct a human rights system that will be really ontologically linked to the man. In contrast, even in spite of the existence of sanctions for violation of human rights, human rights are "fatally" wounded with "Kill! Kill! Kill! One good thing: their skulls will make perfect ashtrays."[50]

We hereby do not reject the formal aspect of the existence of rights, but merely indicate to its inadequacy to explain the binding force of law and ensure the value fulfillment and duration of one legal system which ought to be the guarantor of human rights. For one thing will always stand, and that is the necessity for a formal side of rights expressed also in procedurality of law, but it is quite another matter the binding force of law, to which legal positivism has no answer. The answer to the question of binding force of law actually lies in the values, which thus form the basis of a binding force for human rights because "The moral principles of the natural law have become positive law in modern constitutional states."[51]

However, since a state is not a mystical creation, it actually made of people, what remains unaccounted for is such a neglect of man and his rights by man himself. In fact, if human rights were a product of man, then, because of the sheer neglect and violations, they would have logically disappeared so far. But since the foundations of human rights are values, which are given, human rights cannot disappear insofar their ontological – axiological structure. Their implementation, which depends entirely on people, may be the reason for their obscurity, but not for their total disappearance.

Only value-oriented legal theory may become an obstacle for the disappearance of human rights. Superiority of legal positivism lead to the disappearance of man together with his rights. This kind of axiological reversal is what should happen, because the history of human conflicts has confirmed the existence of an irrepressible desire to destroy man like "War is the world's only hygiene"[52] but: "If all men loved their enemies, there would be no more enemies."[53] So, the quest for peace is a search for

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[50] P. Virilio, 64.

[51] J. Habermas, *Law and Morality*, The Tanner Lectures on Human Values, Deliv ered at Harvard University October 1 and 2, 1986, 230.

[52] P. Virilio, 29.

[53] R. Girard, *The Girard Reader*, edited by J.ames G. Williams, A Crossroad Herder Book, The Crossroad Publishing Company, New York, p. 184.

the realization of human rights values, whose absolute respect can lead to peace, because there is no peace without respect for human values and respect for human rights cannot exist without peace. And all this can only be absolutely guaranteed by values that fulfill by their contents first man and then the law he creates, because "positive law is internally linked to moral principles."[54]

[54] J. Habermas, 269.

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ON CREDITOR'S SUPPLEMENTAL RIGHTS

In this paper, the authors introduce a notion of creditor's supplemental rights that so far has been insufficiently explored by legal theory.

The authors see the supplemental rights as a variety of subordinated (second ary) rights that commonly with creditor's principle right (main prestation) stands on the active side of an obligational relationship (obligation in a wider sense). Such rights follow the faith of the principal right, whereby they may not be disposed of separately. In addition to the circumstances of their onset by operation of law and their limited duration, a joint characteristic of such rights is the absence of their cor relation with the debtor's duties.

If we may say that these qualities appear with other secondary rights (Lat. genus proximum), one feature distinguishes supplemental rights from the other of the similar kind an influence on debtor's proprietary sphere. Through this influence the supplemental rights indirectly assure a claim, contributing thereby to accomplish ment of the (subsidiary) goal of an obligation satisfaction of claim by either re moving the obstacles for the satisfaction, or by preserving and strengthening the prospects for such satisfaction (Lat. differentia specifica).

Accordingly, the authors recognize three separate types of supplemental rights:

1) rights by which a creditor removes obstacles for the satisfaction of claim;

2) rights by which a creditor protects his prospects for the satisfaction of claim; and

3) rights by which a creditor enhances his prospects for the satisfaction of claim.

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1. OBLIGATIONAL RELATIONSHIP IN A BROAD AND NARROW SENSE

According to prof. Konstantinović, *being a creditor means to be authorized to require a debtor to act in a certain way*.[1] "Actionability *of* creditor's claim only against certain person qualifies the obligation as a relative right. Only the person being subject to an obligation is required to perform, and it is only towards such an individual that a creditor possesses the title to require performance".[2] The essence of a right to a claim consists therefore of the creditor's power to require performance from the debtor only with respect to a certain specific duty, the so-called – owed conduct[3] or, more precisely an owed prestation (Lat. *prestatio*).

The claim is the principal element of an obligational structure. An obligation is customarily defined as a private law relationship, which is voluntarily established and regulated.[4] The classic understanding of an obligation states it to be a bond existing between not less than two persons, which empower one of them to require something from the other.[5] In other words, obligation is a legal relation (Lat. *vinculum iuris)* that connects a creditor and a debtor and which constrain the debtor to conduct a prestation towards the creditor, who is in turn entitled to require such a performance.[6] Consequently, an obligation assumes the power to require a specific behavior from the other party, who thereupon becomes subject to that duty.[7] An obligation may not consist of a mere creditor's

[1] Mihailo Konstantinović, *Obligaciono pravo opšti deo* (prepared by V. Kapor according to notes from lectures), Belgrade 1959, 6.

[2] Julius von Staudinger, Manfred Löwisch, Ulrich Noack, Volker Rieblem, Jan Busche, *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsge setz und Nebengesetzen, Buch 2, Recht der Schuldverhältnisse, §§ 397 432 (Erlass, Abtretung, Schuldübernahme, Mehrheit von Schuldnern und Gläubigern)*, Sellier de Gru yter, Berlin 2005, 75.

[3] Andra Đorđević, *Sistem privatnog (građanskog) prava*, Belgrade 1996, 395.

[4] Whreby the author*'s attention has been focused here to a contractual obliga tion.* See*:* Jožef Salma, *Obligaciono pravo*, Novi Sad 2007, 50.

[5] Benedicte Fauvarque Cosson, Denis Mazeaud, *European Contract Law, Mate rials for a common frame of Reference, Terminology, Guiding Principles, Model Rules*, Münich 2008, 39.

[6] Christian Larroumet, *Droit Civil, Les Obligations*, 1ère Partie, tome III, 1986, 6.

[7] Compare: Bogdan Loza, *Obligaciono pravo opšti deo*, Belgrade 2000, 19. The subjects of an obligation are to be understood as parties to an obligation relationship. Therefore, there may be one or several persons on both the debtor's and the creditor's side when one speaks of a multitude of subjects of an obligation.

right, or of a mere debtor's duty.[8] A claim and a debt are a unity of opposites.[9] Debt is an antonym of claim. However, the question is raised in legal theory whether a debt is a *simple mirror reflection of a claim*, or is their interaction so complex as to create a whole bundle of complementary rights and duties for the subjects of an obligation – an obligation relationship.

Our legal doctrine provides no uniform answer on this issue. According to some authors, obligation and obligational relation are identical notions, overlapping in their essence.[10] Another group of authors differentiates between an obligation and an obligational relationship, by claiming that an obligational relationship regularly comprises several claims and certain other rights in addition thereto, while an obligation usually makes only one component of an obligation relationship.[11]

The German literature is dominated by a standpoint that distinguishes between an obligation relationship in a broad sense (Ger. *Schuldverhältnis im weiteren Sinn*) and an obligation relationship in a narrow sense (Ger. *Schuldverhältnis im engeren Sinn*). An obligation relationship in a broad sense assumes a legal relationship between not less than two persons, through which at least one of such persons is obliged to a performance, or to refraining from performance towards the other one.[12] Therefore, this implies the legal relationship as an organism (Ger. *Rechtsverhältnis als Organismus*), from which a whole range of individual rights and duties may arise.[13] An obligational relationship in a narrow sense assumes the right to a performance, an individual obligational claim of a creditor towards a debtor.[14] On the other side, any obligation relationship in a broad sense (e.g. a sales contract) contains at least one duties of the debtor that corresponds to one claim on the creditor's part.[15]

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[8] B. Loza, 20.

[9] Stevan Jakšić, *Obligaciono pravo opšti deo*, Sarajevo 1960, 33.

[10] "Obligation and right are two appearances of an obligational relationship, and an obligation in its entirety should be comprehended as a legal relationship..." Radomir Đurović, Momir Dragašević, *Obligaciono pravo, sa poslovima prometa*, Beograd 1980, 14.

"...the notions of obligation and obligation relationship are overlapping, i.e. are synonyms..." Oliver Antić, *Obligaciono pravo*, Belgrade 2011, 69. From the same author, see also: Oliver Antić, "Obligacija: pravna priroda, sadržina i zakon korelacije", *Anali Pravnog fakulteta u Beogradu* 1/2007, 31.

[11] Jakov Radišić, *Obligaciono pravo*, Belgrade 2004, 40 41.

[12] Hans Brox, Wolf Dietrich Walker, *Allgemeines Schuldrecht*, München 2002, 7.

[13] H. Brox, W. D. Walker, 7.

[14] The object of performance may be both a positive performance and a failure to perform by the debtor. H. Brox, W. D. Walker, 8.

[15] H. Brox, W. D. Walker, 8.

The above mentioned contemplation on the obligational relationship as a complex entity is adhered to also by Austrian theory,[16] which defines it as an *organic unity* (Ger. *organische Einheit*), a *framework relationship* (Ger. *Rahmenbeziehung*), an *organism* (Ger. *Organismus*), a *construction* (Ger. *Gefüge*), *from which individual claims originate*.[17] In that sense, M. Lukas also recognize an obligation in a broad sense – an obligational relationship, being a combination of various types of legal ties within a single legal relationship. On the other hand, an individual obligation to render a performance (Ger. *Leistungspflicht*), i.e. an obligational relationship in a narrow sense, makes a mere component part of such an organism, which also encompasses the secondary obligations and duties. Depending from the point of view, it is being called an obligation or a claim.[18]

2. THE NOTION AND CLASSIFICATION OF CREDITOR'S SUPPLEMENTAL RIGHTS

If one accepts the broader comprehension of an obligational relationship, which is advocated by the authors hereof, then the question arises which are the rights being available to a creditor from a contract towards his debtor. The basic rights of any contractual creditor are: 1) the right to performance stipulated by the contract and 2) the right to compensation of damage caused by debtor's nonperformance or undue performance. The right to performance represents a so-called primary contractual right, which arises in the moment of the onset of an obligational relationship, and in its essence is the content of an obligation. On the other hand, the right to compensation of damage is a so-called secondary contractual right, which takes place subsequently and only in case of failure to comply with the primary obligation, which is why one might say that it represents the contents of contractual liability.[19]

In addition to being entitled to require a specific prestation or compensation of damage in case of breach of contract, the creditor is also vested with certain other powers. In our legal theory, the most often referred to in the context of *other creditors' rights* are: 1) the rights aimed at securing and enhancing the claim – pledge and suretyship,[20] 2) potestative

[16] H. Koziol, R. Welser, *Grundriss des bürgerlichen Rechts, Band II: Schuldrecht Allgemeiner Teil, Schuldrecht Besonderer Teil, Erbrecht*, Wien 2007, 3 4.

[17] H. Koziol, R. Welser, 7.

[18] Meinhard Lukas, *Zession und Synallagma*, Wien 2000, 6.

[19] For more, see: J. Radišić, 42. In the similar context, certain authors mention the right of a buyer as a creditor to seek protection from the so called *eviction*. A. Gams, Lj. Đurović, 65.

[20] The Serbian Obligations Code SOC (*Official Journal of SFRY*, no. 29/78, 39/85, 45/89 and 57/89, *Official Journal of SRY*, no. 31/93, *Official Journal of SCG*, no.

rights, by which an obligation relationship is established, reversed or terminated (for example, right of pre-emption,[21] right to choose among alternative prestations, right to revoke the mandate, etc).[22] If one assumes the right to performance and the right to compensation of damage to be two flipsides of the principal creditor's right, the other abovementioned rights may be regarded as creditor's subordinated (secondary, accessory, ancillary) rights (Sr. *uzgredna prava*). The main characteristic of these rights is that they are accessory in their nature, because an existence of the claim is a prerequisite for the creation and performance of such rights. In addition to being accessory, the subordinated (secondary) rights of creditors possess another mutual features – exercising of such rights affects the very claim, as the principal right. For instance, if one party in an obligational relation exercises his/her potestative right declaring set–off, the counterclaims of the parties cease in their entirety or a mutual portion thereof.

However, it appears that creditors, in addition to the most often mentioned secondary rights, also control certain rights that have not been recognized appropriately in the legal theory so far. Such creditor's rights are similar to a great extent to the other secondary rights, but also possess certain features that make them stand out as a separate group. In that respect, we propose introduction of a new notion into the legal doctrine, by offering the term *supplemental (supplementary) rights* as a generic name for such creditor's rights. It is our intention to present the notion of supplemental creditor's rights understood as above and systematize them, without any pretension of making an exhaustive list thereof. In that sense, we are of the opinion that creditor's supplemental rights (Sr. *poveriočeva dopunska prava*) possess the following structural features:

a) *Acquisition by operation of law.* The creditor acquires supplemental rights *ipso jure*, and may not waive them in advance. Such rights

1/2003) does not use a single term to designate other rights of creditors towards the debt or, other than the right to performance and to compensation of damage. It is only in one place that the legislation uses the syntagma *accesory rights* (Sr. *sporedna prava*) in order to designate the object of assignment (cession), when emphasizing that by assignment of claim to the assignee also the ancillary rights are transferred, such as the right of priority in collection, mortgage, pledge, rights from guaranty agreement, rights to interest, con tractual penalty, etc (SOC, art. 437, para. 1). In order to refer to the same notion, Sketch of the Law of Obligations and Contracts (art. 362) uses the term *secondary rights* (Sr. *uzgredna prava*). By comparing the rights listed in the abovementioned legislation, it ap pears that the Draft fails to mention the *rights to interest, contractual penalty etc.* How ever, in both cases such rights are mentioned only as an example, and do not make an exhaustive list. For more, see: Nenad S. Tešić, *Prodaja i prenos potraživanja*, Belgrade 2012, 233 238. In this paper, the notion of secondary rights shall be used in a much broader sense for *other creditor's rights*, being disposed of by the active party in an obligational relationship in addition to the claim.

[21] Andrija Gams with Ljiljana Đurović, *Uvod u građansko pravo*, Belgrade 1994, 67.

[22] For more, see: J. Radišić, 42.

arise in consequence of the obligational relation itself, without any additional consent of the parties.[23]

b) *Accessoriness (dependence)*. Supplemental rights are dependent upon the existence of creditor's principle claim. In that respect, supplemental rights do not differ much from other secondary rights.[24] Accessoriness of supplemental rights means that they may neither arise, nor be exercised in the absence of a claim as the principal right. However, whether a particular creditor shall be eligible to conduct a supplemental right towards his debtor often depends on occurrence of different legal conditions. Some of these requirements address the parties in an obligation, while the other pertains to the claim. Therefore, it may be concluded that supplemental rights are not necessarily vested to all creditors with respect to any debtor. For example, supplemental rights set forth in the Bankruptcy Act address debtors being legal entities, wherefore it makes it clear, *argumentum a contrario*, that the creditors possess no such supplemental rights with respect to their debtors being natural persons.

c) *An influence on debtor's proprietary sphere*. A claim is a *direct legal relationship* between a creditor and a debtor.[25] However, supplemental rights, as we understand them here, raise the question of creditor's impact on the debtor's assets. It is usually pointed out in legal theory that the creditor "acquires a pledge of the entire debtor's property". Obviously, the term *pledge* in this context does not assume an actual security interest. Instead, such a theoretical construction implies existence of an invisible bond between the creditor, on one hand, and the debtor's assets on the other. Naturally, one may speak here only of a creditor's potential relation with the debtor's assets. A *general pledge* is in a way an *empty threat*, due to the fact that the creditor does not have right to follow (Fr. *droit de suite)*, i.e. creditor may not exercise a general pledge against a third party who has acquired the debtor's assets.[26]

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[23] Depending on the act from which they arise, supplemental rights are being granted by the *Serbian Obligation Code* (right to annulment of debtor's legal actions), the *Bankruptcy Act* (right to annul legal actions in bankruptcy procedure, right to file for opening of a bankruptcy procedure), *Commercial Entities Act* (piercing of the corporate veil), *Extrajudicial Proceedings Act* (right to file for declaration of death in absentia), *Family Act* (right to file for division of marital property), *Inheritance Act* (right to initiate the separation of inherited property from the remaining assets of an heir), etc.

[24] On division of rights to principal and dependent ones, see more in: Vladimir V. Vodinelić, *Građansko pravo Uvod u građansko pravo i Opšti deo građanskog prava*, Belgrade 2012, 230.

[25] Eleanor Cashin Ritaine, *Les cessions contractuelles de créances de sommes d'argent dans les relations civiles et commerciales Franco Allemandes*, Thèse, 1998, 54.

[26] On the relationship between a *general pledge* over the entire property of a debt or, which has a changeable and entirely uncertain contents, and a pledge over a specifi cally designated portion of debtor's property, which is best reflected in the Serbian prov

d) *Reverse influence on principle right.* There is an explicit tie between a claim and the majority of creditor's secondary rights, meaning that by exercising such rights the creditor directly affects the creditor-debtor relationship (right of first refusal, cancellation of lease contract etc.). In contrast, a creditor who activates certain of the guaranteed supplemental rights primarily affects the *debtor's proprietary sphere*, or the debtor's legal relations with third parties, while the consequences of exercising of supplemental rights on principal claim are being only circumstantial. Supplemental rights usually prevent defrauding of creditors and facilitate the execution of claim (recovery of debt).

e) *Absence of correlation.* If we accept that a correlation lies in the very core of the relationship between the creditor and a debtor, then an obligation relationship (in a narrow sense) implies a (full) correlation between a claim and a debt. Entitlement of a creditor to a prestation fully corresponds with the debtor's obligation to perform. In that sense, a lender's claim totally corresponds with a borrower's obligation to repay the loan. However, in an obligational relationship (in a broader sense), there are not necessarily any corresponding duties of the debtor standing against the secondary rights of the creditor. Even if there are some, such duties stand merely in a functional correlation with the creditor's powers. This applies also to the creditor's rights being named herein as supplementary. If we take into account that there is a certain debtor's obligation which is a matching piece of creditor's supplemental rights, then it is an only general and usually negative one, i.e. the one that consists of the debtor's duty to refrain, pursuant to the principle of good faith, from decreasing his own property. Creditor's supplemental rights are hence only complementary with the debtor's duty to abide by a certain invasion into his proprietary sphere.

f) *Limited duration.* Although the matter concerns creditor's rights in relation to the debtor, supplemental rights are not subject to statute of limitations. However, it still does not mean that supplemental rights are permanent. In a certain number of such rights the creditor is precluded from exercising them after expiry of a deadline. For example, creditors of an inheritance estate are precluded if they not demand within three months of the date the estate was opened that the estate be separated from the heir's assets.[27] Nevertheless, other supplemental rights are not limited in time, but extinguish naturally by the onset of certain legally relevant circumstances. In that sense, creditor's right to require division of the debtor's community (marital) property ceases, if such separation has already been requested by the spouses themselves.

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erb *better a sparrow in hand, than a pidgeon on the tree*, please see: Nenad Tešić, *Registrovana zaloga*, Belgrade 2007, 1.

[27] Inheritance Act, art. 225. Motion to contest debtor's legal actions is also tied to an objective deadline. See: SOC, art. 285.

g) *Support to the goal of an obligation*. It appears that in the contemporary law is not enough to emphasize that the creditor is authorized to enforce his claim against the debtor's entire property. This is so because the debtor is entitled to dispose of his assets in any way looking at his "best interest". The legal order therefore puts at creditors' disposal certain subjective entitlement – supplemental rights – being in their nature mostly potestative rights,[28] and in some cases absolute rights, by which the creditor preserves his legitimate interest that is inherent to any obligation – the possibility of compulsory enforcement. If we state that any subjective (obligational) right to be followed by a title (Sr. *zahtev*, Ger. *Anspruch*) as the possibility to enforce the claim, then the supplemental rights serve precisely to that title understood in such a sense (*action in a material sense*).

The primary goal of any obligation is a fulfillment, which is in most cases being voluntary. However, supplemental rights come on the scene whenever the debtor's voluntary performance fails. Hence, legislator provides creditors with various subjective entitlements, in order to facilitate the subsidiary goal of the obligation – satisfaction of claim. In other words, if a (voluntary) performance is the main (primary) cause of an obligation (Lat. *causa prima*), then the (enforsed) satisfaction is a subsidiary (secondary) cause of an obligation (Lat. *causa secunda*), to which the creditor turns if the achievement of the primary cause of obligation defaults. The role of supplemental rights in an obligational relationship reflects in creation of prerequisites to accomplishment of the subsidiary cause of an obligation understood in the abovementioned sense, i.e. enabling a satisfaction (execution) of claim.

The indirect relation between the creditor and the debtor's property is established precisely through the supplemental rights. Depending on the kind of supplemental rights, the meaning thereof may be threefold: removal of uncertainty with respect to assets the debtor disposes of; preservation of the initial value of the debtor's assets; and additional security and supporting of the creditor's principal right by the debtor's assets, or assets of a third party.

The first group of accessory rights is aimed at achieving certainty in terms of property by which the debtor is liable for his debts. For example, it encompasses the creditor's right to seek the division of debtor's marital property or creditor's right to initiate probate proceedings.

[28] Being aware of the limitations in terms of the scope of this paper, we have avoided herein the discussion on the nature and elements of subjective rights, and the dil lema whether the potestative rights (Ger. *Gestaltungsrecht*) are being subjective rights, or only appearing as such, wherefore they should be differentiated from subjective rights. In more detail on the different approaches to subjective rights and the nature of potestative rights: D. Stojanović in: Dragoljub Stojanović, Oliver Antić, *Uvod u građansko pravo*, Belgrade 2004, 197 199, A. Gams, Lj. Đurović, 67.

The second group of accessory rights enables the creditor to preserve the initial value of debtor's assets. For a creditor entering a contractual relationship with other party, the decisive factor in that direction is primarily the solvency of the prospective contracting party, i.e. the estimation of the entire property the latter disposes of at the moment of the stipulation. A creditor expecting fulfillment of an obligation obviously hopes that the initial debtor's assets shall be preserved, or even increased. It is therefore that the legal order grants the creditor certain entitlement with respect to the debtor's proprietary sphere. This group of creditor's supplemental rights encompasses, for example, the right of the creditor to contest debtor's fraudulent conveyance in a bankruptcy and out of it (Lat. *actio Pauliana*).

Finally, the third group includes such supplemental rights that enable the creditor to strengthen his position additionally, e.g. by compelling a third party (non-debtor) to become liable for the debtor's obligations, upon proving the perfection of the conditions set forth by the law. Piercing the corporate veil is a typical example of this class of supplemental rights. Although here the relation between the creditor and the debtor's assets has been pronounced to a lesser extent, it exists nevertheless because the piercing the corporate veil takes place usually when the debtor's assets are insufficient for repayment of debt.

Pursuant to all the aforesaid, it may be concluded that the notion of supplemental rights is a complex one. However, given the primary goal of their establishment, all supplemental rights being available to a creditor may be divided into the following:

1. rights by which the creditor removes obstacles for the satisfaction of claim,
2. rights by which the creditor protects his prospects for the satisfaction of claim, and
3. rights by which the creditor strengthens his prospects for the satisfaction of claim.

The most significant supplemental rights of the creditor in Serbian law shall be discussed in more detail herein below.

3. SUPPLEMENTAL RIGHTS BY WHICH THE CREDITOR REMOVES OBSTACLES FOR THE SATISFACTION OF CLAIM

There are situations in the law when a creditor may not satisfy his claim, because of the debtor's being over-indebted or incapable of repaying his debt as they become due, or because of such a personal status

which makes it unclear what are his assets eligible for enforcement. In such situations, the legal order grants to the creditor certain requests (the supplemental rights) that enable him to remove the obstacles for the execution of claim, and to achieve his legitimate interest thereby.

3.1. Filing the bankruptcy proceeding

In addition to the debtor and the bankruptcy administrator, the creditors also possess the active legitimacy to file a bankruptcy proceeding.[29] This supplemental right is limited in two ways: firstly, this right does not belong to every creditor, and secondly, it may not be used against any debtor. In Bankruptcy Law, a difference is made between claims that may be raised in a bankruptcy proceeding with the result of acquiring the right to participate in distribution of the estate, and the claims entitling their holders to initiate the bankruptcy proceeding. The scope of claims that may be raised in the bankruptcy proceeding encompass all claims irrespective of their value, maturity, determination, enforceability, conditionings or contesting, while the creditors who intend to initiate a bankruptcy proceeding over the estate of a debtor must dispose with a claim that is determined in a significantly narrower scope, which must be unsecured, unconditional, mature and undisputable, or even exceed a certain value in some legal systems.[30]

Creditors may file for bankruptcy only against a debtor who has the passive legitimacy in that respect. In that sense, a proposal for opening of bankruptcy may not be filed against a natural person,[31] state, autonomous province, unit of local self-government, mandatory insurance funds, etc.[32] Hence, the circle of bankruptcy debtors is narrower than the circle of debtors in a general sense accepted by Obligation Law.

In addition to filing a bankruptcy, the creditors are vested with numerous other rights in a bankruptcy proceeding, which may be either individual or collective. Creditors exercise individual rights separately (e.g.

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[29] Bankruptcy Act, *Official Gazette* no. 104/2009, 99/2011 other act, 71/2012 decision of the Constitutional Court and 83/2014, art. 55. On the material and procedural prerequisites to opening of bankruptcy proceeding upon a creditor's proposal see: Vuk Radović, "Predlog poverioca za pokretanje stečajnog postupka (nevoljni stečaj)", *Pravo i privreda* 1 4/2002, 160 174.

[30] On the views accepted in our judicial practice with respect to creditors being entitled to filing bankruptcy see in more detail: Gordana Ajnšpiler Popović, "Poverioci kao podnosioci predloga za pokretanje stečajnog postupka", *Pravo i privreda* 4 6/2011, 303 315.

[31] In Serbian law, bankrupt debtors may only be legal entities. More on the solu tions accepted in comparative legislations, and on the historical overview of bankruptcy proceeding over the estate of a physical persons in Serbia see: Vuk Radović, *Individualni stečaj stečaj nad imovinom fizičkog lica*, Dosije, Belgrade 2006, 27 78.

[32] Bankruptcy Act, art. 14.

the right to contest claims of other creditors), while the collective rights are effected by voting jointly with other creditors within the so-called creditors' bodies in the bankruptcy proceeding (creditors' assembly and board of creditors). These rights mainly belong to the category of creditors' supplemental rights.

3.2. Motion to declare death *in absentia*

In Serbian law applies the rule that the party claiming one's death (which may not be proven) in the process of exercising its rights, must obtain in a non-litigious proceeding the court appropriate decision, which declares an absent person to be dead.[33] Both a person having an *immediate legal interest* that a missing person be declared dead and the Public Prosecutor alike may file the motion initiating this procedure.[34] It appears to be a dilemma as to what would be the contents of the legal standard of an *immediate legal interest*. According to some authors, an immediate legal interest is owned by any person deriving certain right from the declaration of one's death in absentia – e.g. heirs, spouse, creditor whose rights arises if a certain person is not alive anymore.[35] The immediate legal interest of such persons may not be disputed. This is so due to the fact that declaration of a missing person presumed dead has the same effect as natural death – the marriage of such person terminates, wherefore rights of third parties tied to such a fact originate and cease, etc.[36] Creditors whose rights accrue under the condition of a person's not being alive – *e.g.* providers in *life care contracts*, or beneficiaries in *life insurance contracts*[37] – are surely the persons holding such an legitimate interest. However, the dilemma still remains if a step forward might be made in declaring a missing person presumed dead, so as to acknowledge such a right to creditors whose claim is not derived from the death of a missing person.

[33] A. Stanković, "Proglašenje nestalih lica za umrla po našem pravu", *Pravni život* 7 8/1990, 1151.

[34] Extrajudicial Proceedings Act EPA, *Official Gazette of SRS*, no. 25/82 and 48/88 and *Official Gazette of RS*, no. 46/95 other act, 18/2005 other act, 85/2012, 45/2013 other act, 55/2014 and 6/2015, art. 58. A similar rule applies to situations when a person's death may not be proven by a document set forth by the Book of Records Act, in which case the person holding an immediate legal interest and the public prosecutor have the right to file a motion to the court to establish the death of such person by a rul ing. See: EPA, art. 70.

[35] O. Antić in: D. Stojanović, O. Antić, 139. Other authors do not get any deeper into the defining of this standard. "The procedure may be initiated by any person having an interest granted by the law that the missing person be declared dead." A. Gams, Ljil jana Đurović, 75.

[36] A. Stanković, 1153.

[37] A contractor of insurance may determine by a contract, or a subsequent legal transaction, or even a will, the person to be entitled to rights from insurance. See: SOC, art. 957, para. 1.

It seems one may argue in favor of completely different approaches. Taking into account that the court verifies the basic conditions for commencing this procedure, concerning primarily the time period over which there were no news on a person's whereabouts[38] and bearing in mind the rule that the motion initiating such a procedure must contain the facts supporting the motion and evidence proving such facts or making them probable, as well as that such creditors must support their motion by information verifying their legal interest,[39] it appears as necessary to undertake a broader interpretation of the *immediate legal interest* standard, assuming that the right to file a motion in cases like this belongs also to creditors whose claim has been independent from the death of a missing person. On the contrary, arguing that declaration of a missing person presumed dead results not only in proprietary effects, but also in changes in personal statuses of citizens (e.g. termination of marriage), the narrower interpretation of the legal standard the *immediate legal interest* becomes more acceptable, particularly by holding that otherwise the procedure could be initiated by any creditor, irrespective of the value of his claim.

The court is the one acting upon the initiation of the procedure and the one rendering the decision.[40] Additionally, a custodian is appointed to the missing person, to take care that the interests of the latter be protected in the proceeding.[41] Finally, the initiation of the proceeding is announced in a public notice, inviting the missing person and other persons possessing information on such person to contact the court.[42] All of the aforesaid leads us to conclude that interests of the missing person have been properly protected. On the other hand, a longtime uncertainty in terms of the personal status of a citizen and the contents of his assets seems to be legally and socially unacceptable.[43] Therefore, we are of the opinion that the purpose of legal certainty, which lies in the very foundations of declaration of a missing person dead, calls for the adoption of the standpoint that accepts a broader contents of the *immediate legal certainty* standard".

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[38] EPA, art. 57.

[39] EPA, art. 59, para. 2.

[40] Additionally, the court obtains and discusses evidence *ex officio* in order to es tablish facts as to if and when the missing person died, i.e. whether it is still alive. EPA, art. 60, para. 2.

[41] The custodian is obliged to collect evidence on the facts of being missing and alive of the missing person, and to propose the same to the court. EPA, art. 60, para. 2.

[42] EPA, art. 61, para. 1.

[43] A long uncertainty with respect to the circumstance of one's being alive "cre ates a myrriad of difficulties and affects the proprietary and personal relations of certain parties, and is also unwanted from the standpoint of social circumstances". Obren Stanković in: Obren Stanković, Vladimir Vodinelić, *Uvod u građansko pravo*, Belgrade 2007, 54.

This maze may be a bit more difficult by raising a dilemma whether a claim of a creditor initiating the declaration of a missing person presumed dead must be indisputable, or does it suffice that the claim of this creditor be made probable. If the presumption is accepted that his claim must be ascertained, due to the fact that declaration of a person presumed dead affects irreversibly the personal statuses of citizens, then the creditor initiating such proceeding must possess an enforceable legal instrument. As opposed to that, accepting the position that the creditor initiating the procedure for declaration of a missing person presumed dead needs only to make his claim probable, would mean that the creditor should accompany his motion by a proof on the grounds of his claim (e.g. a valid loan agreement, or a authentic documents like: bills of exchange, invoices, excerpts from business records etc.). It seems that the supporting arguments in case of this dilemma also lead towards the broader interpretation of *immediate legal interest*, under which the existence of a claim is a procedural prerequisite that suffices to be made probable. In addition to the main reason thereto, which has already been pointed out, it appears that here one needs to take into consideration the indisputable public interest that a state of uncertainty (with respect to one's being alive) be removed from the legal sphere, with as little cost as possible.

Requiring the creditor to conduct a litigation in order to obtain an enforceable legal instrument is inacceptable due to the reasons of procedural economy,[44] given it to be known upfront that in the end the doubts related to the object of enforcement,[45] i.e. the problems related to identification of the debtor's assets would require initiation of the procedure for declaration of the missing person dead.[46] The prolonged ambiguity re-

[44] Such a procedure usually involves costs of appointment of a temporary repre sentative. In fact, if it turns out in course of a proceeding before the court of first instance that the regular procedure of appointment of a legal representative of the defendant would take long and possibly result in harmful effects on one or both parties, the court shall ap point a temporary representative to the defendant. This solution is particularly employed when the domicile, or place of residence, or the seat of the defendant are unknown, and the defendant has appointed no representative. See: Civil Procedure Act, *Official Gazette of RS*, no. 72/2011, 49/2013 decision of the CC, 74/2013 decision of the CC and 55/2014, art. 81.

[45] The objects of enforcement are things and rights eligible to be subject to en forcement with the aim of satisfaction of claim *Enforcement and Security Act*, *Official Gazette of RS* no. 31/2011, 99/2011 other act, 109/2013 decision of the CC, 55/2014 and 139/2014, art.19, para. 4.

[46] "Where, in filing the motion to enforce, the enforcement creditor calls for en forcement against the entirety of the assets of the enforcement debtor without indicating the means and objects of enforcement, or files a request for obtaining a statement of assets of the enforcement debtor along with the motion, the court shall order enforcement, or security without indicating the means and objects of enforcement. Following the identifi cation of the assets of the enforcement debtor, a order (conclusion) shall be issued to set the means and objects of enforcement." Enforcement and Security Act, art. 20, para. 3.

garding the circumstance of one's being alive does not contribute to legal certainty. This is so due to the fact that creditors of a missing person do not know who and with what property shall be liable for the assumed obligations. It seems that initiation of the procedure of declaration of a person's death *in absentia* does not jeopardize the interests of the missing person by itself, but contributes significantly to legal certainty as one of the main goals which an organized legal system strives to achieve. Consequently, a rule according to which this procedure may be initiated by a person holding an immediate legal (creditor's) interest should be interpreted so as to be accepting as sufficient the making of the creditor's claim probable. If this standard is approved in terms of the filing a bankruptcy proceeding (cessation of legal person), there is no reason not to adhere to it also in the sphere of termination of legal subjectivity of a natural person.

3.3. Motion to divide debtor's marital property

In addition to his principal claim, the creditor has a supplemental right to require division of debtor's marital property.[47] Under the law, beside the spouse and heirs of the deceased spouse, the right to seek the separation of marital property is also vested in creditors of the spouse, whose individual assets were insufficient for repayment of the creditors' claims.[48] Although the law explicitly speaks of a spouse's creditors, the systemic interpretation of the provision may lead to the conclusion that such an entitlement with respect to assets of unmarried couples, should also belong to creditors of one of the unmarried partners.[49]

3.4. Motion to initiate probate proceeding and exercising of other debtor's rights

Pursuant to the standpoint accepted in French Civil Code,[50] which is also followed in the *Sketch of the Law of Obligations and Contracts (1969)*, any creditor with a mature claim may exercise in the name and for the account of the debtor such proprietary rights of the latter towards third parties, which are neglected by him to the detriment of his creditor, except those rights that are tied exclusively to one's personality.[51] According to such opinion, *a creditor may issue an affirmative heir's state-*

[47] On marital property and separate property funds see: Nenad Tešić, "O zajedničkoj imovini supružnika", *Pravni život* 10/2006, 259 277.

[48] See: Family Act, *Official Gazette of RS*, no. 18/2005, 72/2011 other law and 6/2015, art. 181.

[49] See: Family Act, art. 4 and 191.

[50] French Civil Code, art. 1166.

[51] Sketch of the Law of Obligations and Contracts drafted by Professor Mihailo Konstatinović, art. 226, para. 1.

ment, require division of estate, accept a legacy, sue to vindicate his individual thing, require performance by a debtor's debtor, but he may not file a motion to divorce or annul a marriage, or establish and contest paternity of the debtor.[52] In addition to the aforementioned, a creditor could also exercise certain debtor's potestative rights, e.g. the right to choose the alternative prestation, or the right to file a motion to amend or terminate a contract due to changed circumstances (Lat. *rebus sic stantibus*), but he may not, however, require amendment of the amount of installments based on statutory maintenance.[53]

As opposed to the French law, the Serbian law apparently grants creditors no rights of such a broad scope in terms of exercising debtor's rights. However, even in the Serbian law there are provisions enabling the creditor in particular legal situations to exercise certain debtor's rights. In that sense, pursuant to the *Serbian Obligations Code* a lessor may, in order to settle his claim towards the lessee based on the lease contract, require the sub-lessee to pay directly to him whatever he owes to the lessee on the grounds of the sublease.[54] The possibility of the creditor to exercise the rights neglected by the debtor are derived in broader sense from the principle of the prohibition of abuse of rights. The features of this principle are visible also in certain other legal situations. For example, the court initiates a probate proceeding *ex officio* upon the receipt of the death certificate from the acting Registrar's Office, but the creditor being an interested party may submit relevant proofs of death of the decedent.[55] The heirs often do not wish the estate to be distributed, while a creditor is particularly interested therein, e.g. when the court *ex officio* terminates a litigation due to death of a party,[56] or when a creditor obtains an enforce-

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[52] J. Radišić, 337.

[53] V. Stanković, "Poveriočevo ovlašćenje da vrši prava svog dužnika", *Pravni život* 2/74, 27.

[54] See: S. Perović, 659.

[55] For mode details on the rights to initiate a probate proceeding see: Oliver Antić, *Nasledno pravo*, Belgrade 2011, 379 380.

[56] This interest is somewhat diminished as a result of the standpoint adopted by the judicial practice. In fact, the ruling on resumption of a proceeding that was terminated due to death of a party does not have to be preceded by a ruling on inheritance, because an estate is inherited by operation of law, while the ruling on inheritance has only a declarative character. See: Ruling of the Higher Court in Požarevac, no. 1 Gž. 1060/2013 dated December 6, 2013.

In another of its decisions, the court states as follows: "In order for a litigation that was adjourned due to the death of the defendant to be continued, it is not necessary that the statutory heirs of the latter be finally declared as such in a probate proceeding. Instead, it suffices that upon the proposal of the opposing party the court summons persons being next of kin of the deceased defendant, who moved to initiate probate proceeding upon his death (heirs presumptive) to assume his role in the litigation." See: Ruling of the Appelate Court in Belgrade, number Gž2. 332/2014, dated June 25, 2014.

able legal instrument against the deceased, whose heirs have still not been determined.[57]

Such examples are not unusual. In an enforcement proceeding, which is conducted by inventory, valuation and sale of movable assets, the movable things being subject to enforcement may have been put under the procedure of customs warehousing as of an earlier date. Should there be a judicial decision rendered in that respect, the customs authorities would be obliged to adhere to such decision, since the court ruling may not be subject to extrajudicial control. The enforcement agent must be enabled to review and appraise the value of such movables, informing him that the seized assets are in the procedure of customs warehousing and are not to be freely disposed with, i.e. that import duties have not been paid. If a public sale has been ordered, such a sale may not be properly conducted prior to putting the object of enforcement into market circulation. Also, the decision of the court rendered in an enforcement proceeding is a legal instrument proving the enforcement creditor's power to file to customs authorities the declaration for releasing the goods into market circulation.[58]

However, a creditor may not require withdrawal of a gift instead of the debtor if the donee shows grave ungratefulness toward a donor/debtor. Similarly, a creditor may not seek compensation for damages for infringement of honor and reputation instead his debtor.[59]

This group of creditor's rights encompasses also the entitlement of the guarantor to exercise set–off the principal debtor's claim against the creditor's claim.[60] The guarantor is here only a *conditional creditor*, onto whom the creditor's claim towards the main debtor would pass pursuant to the principle of personal subrogation, at the moment when guarantor pays to creditor the debt of the main debtor.

4. SUPPLEMENTAL RIGHTS BY WHICH THE CREDITOR PROTECTS HIS PROSPECTS FOR THE SATISFACTION OF CLAIM

The legal system puts at creditor's disposal certain legal means enabling him to keep his legal position unaltered, in order to prevent

[57] In more detail on furtherance of enforcement against heirs of an enforcement debtor, see: Nenad Tešić, "Prenos prava i obaveza u okviru načela formalnog legaliteta", *Harmonius Journal for Legal and Social Studies in South East Europe* 2014, 343 344.

[58] Decision of the Ministry of Finances, Customs Administration, The Department for Customs Proceedings and Procedures, 148 03.030.01 130/2015, dated March 12, 2015.

[59] B. S. Marković, 50.

[60] SOC, art. 1009, para. 1.

fraudulent transfers. The creditor preserves his prospects for the satisfaction of claim, by either preventing the assets of his debtor to be mixed with estate of other persons, or by preventing the debtor's property from becoming insufficient for repayment due to certain legal transactions or decisions of the latter.

4.1. Motion to separate an estate from the property of an heir

According to law, an (inherited) estate encumbered by debts is at the moment of death of the decedent merged with the property previously owned by a heir (Lat. *confusio bonorum*).[61] Interests of the decedent's creditors may become infringed thereby, particularly if the heir has creditors of his own. This is why the legal order grants to creditor the supplemental right to require separation of the estate from the pre –owned property of the heir (Lat. *separatio bonorum*),[62] i.e. to require formation of a *separate proprietary fund* within the heir's property, which would enclose only the rights from the estate.[63] Such *separate fund*, i.e. an appropriate part thereof, becomes thereby subjected to a special legal regime, which precludes the heir from disposing of the separate objects and rights.[64]

Creditors of an heir and creditors of the decedent who have failed to require separation may not collect his claim from the *separate proprietary fund* until all the creditors who have required inventorying and appraisal of the property are paid off.[65] That way, the creditor having filed for separation acquires priority for payment of his claims from the assets separated from the estate.[66] However, at the same time, he loses the right to collect his claim from the *pre-owned property* of the heir.[67] In this way an exception from the general regime of liability of heirs for the decedent's debts is established,[68] because his liability is narrowed down in

[61] More on this legal institute, see: Dejan B. Đurđević, *Institucije naslednog prava*, 2nd issue, Official Gazette, Belgrade 2010, 329 330.

[62] See: The Constitutional Court of Serbia, no: Rev 1391/02, dated June 11, 2003, *Judicial Practice from the Field of Property Law Relations*, 92.

[63] On separation of estate from the heir's assets, see: O. Antić (2011b), 417 418; D. B. Đurđević, 334 336.

[64] "...and if he had disposed of such things and rights prior to the separation, such disposal shall remain valid." See: Inheritance Act, *Official Gazette of RS*, no. 46/95, 101/2003 decision of the CC and 6/2015, ar. 225, para. 2.

[65] See: Inheritance Act, art. 226.

[66] D. B. Đurđević, 336.

[67] See: Inheritance Act, art. 227, para. 1.

[68] In more detail on the limited correlation in relation to liability for debt limited by the scope of proprietary fund see: O. Antić (2011b), 67. See also: D. B. Đurđević, 335 336.

terms of the subject matter thereof, by being limited to *objects and rights* from the estate.[69]

The abovementioned supplemental right belongs to any creditor of the decedent, who makes the existence of his claim probable, along with the jeopardy that the collection of the claim shall be frustrated, or made significantly more difficult.[70] The secured creditors are exception, the right to separation (*separatio bonorum)* is granted to them only if the value of the collateral has been insufficient for the repayment.[71]

4.2. Contestation of debtor's legal transactions

It seems that contestation of debtor's legal transactions as a legal institute has arisen in the historical context of creditors' collective repayment from the insolvent debtor's property. Over time, contestation started to develop as an autonomous institute, independent from collective proceeding of repayment.[72] Therefore it was already the Roman law that the petition *actio Pauliana* originated from.[73] Although stemming from the same roots, the separate development of the two legal institutes resulted in a number of differences between contestation of debtor's legal transactions in bankruptcy and out of such procedure.[74] Contestation in bankruptcy aims at protecting the collective interests of a bankrupt debtor's creditors, while contestation out of the bankruptcy procedure focuses on protection of such creditor who called for contestation.[75] The conflict between a collectivistic philosophy of contestation in bankruptcy and the

[69] Limited liability takes place when a creditor uses for rapayment certain items from the property, which belongs to separate proprietary fund (liability limited in object). Unlimited liability is a rule, and the limitation in object applies only when so envisaged explicitly by a contract, or the law. See: Karl Larenz, *Lehrbuch des Schuldrechts, Ersten Band, Allgemeiner Teil*, München 1987, 22 23. On the liability by a portion of assets in case of inheritance, see also: H. Brox, W. D. Walker, 16.

[70] See: D. B. Đurđević, 335.

[71] Compare: O. Antić (2011b), 418; D. B. Đurđević, 335.

[72] Božidar S. Marković, *Pravo pobijanja izvan stečaja*, The University of Bel grade School of Law, Belgrade 2014, 22.

[73] In Justinian's Code, employment of *actio Pauliana* was permitted against all fraudulent actions of a debtor, which might have assumed either an alienation of a portion of a property, or an omission to undertake a certain action. It was essential that it had re sulted in a decrease of the debtor's assets. Dragomir Stojčević, *Rimsko privatno pravo*, Belgrade 1985, 300.

[74] For more see: Jovan Gucunja, *Pravno regulisanje poverilačko dužničkih odnosa u slučaju prestanka organizacija udruženog rada*, doctoral dissertation, Novi Sad 1980, 334 336; Mihajlo Velimirović, "Stečajno i vanstečajno pravo pobijanja", *Pravni život* 11/2005, 349 356; Mihajlo Velimirović, *Stečajno pravo*, 3rd issue, University Union School of Law and Official Gazette, Belgrade 2012, 133 136.

[75] The passive legitimacy in a lawsuit for contestation of debtor's legal actions is granted to a person with whom, or in whose favor the contested legal action has been

individualistic concept of contestation out of bankruptcy resulted naturally in two set of rules on contestation.

However, those institutes do possess certain mutual characteristics. It is usually pointed out in theory that contestation is a subsidiary right, since it comes into being when creditors may not collect from the debtor's property.[76] In the case of contestation out of the bankruptcy, the subsidiarity of such contestation applies to its fullest. However, in case of contestation in bankruptcy, inability to collect is an incontestable presumption because the very opening of the bankruptcy proceeding provides a sufficient basis for the contestation.[77] The parties eligible to contest in a bankruptcy do not have to prove the insufficiency of assets in the bankruptcy estate for coverage of all liabilities of a bankrupt debtor.[78]

Contestations in and out of a bankruptcy are also tied by another mutual characteristic: the relativity of contestation. In a bankruptcy proceeding, the contested legal transaction does not have any effect in relation to the bankruptcy estate,[79] while out of the bankruptcy proceeding the contested legal transaction loses its effect only towards the plaintiff and up to such extent to which it is necessary for satisfaction of his claim.[80] The relativity of contestation means that the contested legal

undertaken. See: Ruling of the Court of Appeals in Belgrade, number Gž. 2209/2011 dated January 30, 2013.

[76] Tomica Delibašić, *Pobijanje pravnih radnji stečajnog dužnika*, Belgrade 1999, 73; Dragiša B. Slijepčević, "Uslovi i način stečajnog pobijanja po Zakonu o stečaju", *Pravni informator* 4/2010, 17.

[77] T. Delibašić, 73; D. Slijepčević, 17.

[78] D. Slijepčević, 17.

[79] The earlier Serbian bankruptcy legislation had set forth legal actions to be inef fective towards bankruptcy creditors. See: Bankruptcy Act from 1929, art. 27, para. 1. There are views in theory that this solution was more appropriate. See: T. Delibašić, 236.

"Given that the legal effects of contestation of legal actions of a bankrupt debtor also differ from the effects resulting from entering into a voidable legal transaction in line with the provisions of the Serbian Obligations Code, bearing in mind that an annulment of a judicial settlement is to be effective towards everyone, while challenging of a legal action assuming entering into a settlement results only in such action not being effective with respect to the bankruptcy estate of a bankrupt debtor, the court of first instance was correct, contrary to the statements from the appeal, in establishing in the pertinent case that application of the Bankruptcy Act, article 120 did not result in punishment of the creditor (herein: the defendant) for having entered into a settlement. Instead, the final goal was to enable a proportionate repayment of all creditors of the bankrupt debtor (herein: the plaintiff) in a situation where the debtor had been insolvent at the time of entering into the settlement, which in fact has led to opening of the bankruptcy proceeding." Judgment of the Appelate Commercial Court, no. Pž. 1451/2011(1) dated September 28, 2011. *Judi cial Practice of Commercial Courts,* bulletin no. 1/2012, 86.

[80] SOC, art. 284. "The contested legal action is deprived of its effect solely with respect to the contestant, and only to the extent sufficient for satisfaction of his claim."

transaction loses none of its legal effects in an absolute sense,[81] because it does not affect the legal relationship between the (bankrupt) debtor and third parties (objecting the contestation).[82] It is exactly the limitation of effects of the contested legal action that displays the essence of this supplemental right of the creditor. An authority of the creditor described as above improves significantly his prospects for repayment.

In cases of contestation out of bankruptcy, it was never disputable that any creditor has the right to do it against the insolvent debtor. However, as of the opening of a bankruptcy proceeding the situation changes significantly. It is as of such moment that the bankruptcy administrator becomes the legal representative of the debtor, wherefore the issue understandably arises whether the creditors should at all be awarded the right to contest, or should such right be reserved exclusively for the bankruptcy administrator. In the historical sense, in the beginning, Serbian bankruptcy legislation has primarily awarded to the bankruptcy administrator a monopoly on contestation,[83] which had precluded the creditors of the bankrupt debtor from doing the same. Nevertheless, the situation has changed in the postwar legislation, when this right had become granted unambiguously to creditors as well. The same concept is accepted in the contemporary bankruptcy legislation.[84]

Bogdan Đukić, *Preobražajna prava i paulijansko pravo pobijanja*, Belgrade 1935, 59. "Sale and purchase of a real estate property being subject to enforcement, that was ef fected with the purchaser's knowledge on the fact that the enforcement procedure was in course and with the intention of the seller to prevent thereby his creditors from recovery of their claims shall be deemed as a legal transation that may be successfully contested up to the amount of the unpaied claim of the seller's creditor." Judgment of the Supremen Court of Serbia, no. Rev. 1131/2004 dated June 30, 2005.

[81] Mihajlo Dika, "Pobijanje pravnih radnji u povodu stečaja", in: Mihajlo Dika (general editing), *Četvrta novela Stečajnog zakona*, Narodne novine d.d., Zagreb 2006, 220.

[82] Mihajlo Velimirović, "Pobijanje pravnih radnji dužnika u stečaju", *Pravni život* 11/1995, 315; T. Delibašić, 236.

[83] Franja Goršić, *Komentar Stečajnog zakona*, Geca Kon a.d., Beograd 1934, 151; SZ, art. 36, para. 1.

[84] Decree on Dissolution of Enterprises and Entrepreneurs, *Official Journal of FNRY*, no. 51/1953, 49/1956, 53/1961 and 52/1962, art. 48, para. 2; The Compulsory Set tlement and Bankruptcy Act, *Official Journal of SFRY*, no. 15/1965, 21/1965, 55/1969, 39/1972 and 16/1974, art. 95, para. 1; Act on Sanation and Dissolution of Associated Labor Organizations, *Official Journal of SFRY*, no. 41/1980, 25/1981, 66/1981, 28/1983, 20/1984, 7/1985, 39/1985, 9/1986 and 43/1986, art. 161, para. 1; Compulsory Settlement, Bankruptcy and Liquidation Act, *Official Journal of SFRY*, no. 85/1989, *Official Journal of SRJ*, no. 37/1993 and 28/1996, art. 112, para. 1; Act on Bankruptcy Proceeding, *Official Gazette of RS*, no. 84/04 and 85/05 other act, art. 107, para. 1; Bankruptcy Act, art. 129, para. 1.

4.3. Contestation of a mutually determined value of contributions in kind into a commercial entity

Contributions to a commercial entity may be made in cash or in kind. Value of contributions in kind must be expressed as a monetary value. It is determined by a mutual agreement by all members of the entity, or by a valuation made by a licensed appraiser.[85] Protection of creditors of a commercial entity is one of the reasons underlying the introduction of principle of compulsory valuation of contributions in kind.[86] The purpose of such estimation is to secure that value of contribution corresponds to the value of subscribed shares. Valuation by a licensed appraiser is regulated in detail, and there is no need for a better protection of creditors beyond them. However, additional protection of creditors is necessary in cases where members of a company estimate the contribution in kind by their mutual agreement. This was introduced in Serbian legal system for the first time through the *Commercial Entities Act*.[87] Pursuant to this solution, if a value of a contribution in kind has been determined by mutual agreement of all company members, and the company is unable to pay off its debts as they become due, a creditor of the company shall be entitled to file a motion before the competent court to determine in a non-litigious proceeding the value of contribution in kind at the time of investment thereof. Should the court establish in a proceeding initiated as above that the value of the contribution in kind has been lower than the mutually determined one, it shall order the member having made such investment in kind to pay out to the company the difference up to the value of his investment having been mutually agreed upon. In that case the burden of proof (Lat. *onus probandi*) in terms of the value of the investment lies with the company member who has made the investment in kind. The right of the creditor to file such a motion ceases upon the expiry of the objective deadline of five years as of the date of investment of the contribution in kind into the company. In other words, it is of no significance the moment when the creditor had obtained knowledge on investment of a contribution in kind into the company, i.e. that its value was not determined realistically. The payment of difference between the realistic and the mutually determined value of the contribution in kind increases assets of a commercial entity, which affects the preservation of a legal position of its creditors.

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[85] Commercial Entities Act CEA, *Official Gazette of RS*, no. 36/2011, 99/2011, 83/2014 other act and 5/2015, art. 50, para. 1.

[86] For more on the mandatory appraisal of contributions in cash in the EU law, see: Vuk Radović in: Mirko Vasiljević, Vuk Radović, Tatjana Jevremović Petrović, *Kom panijsko pravo Evropske unije*, The Belgrade University School of Law, Belgrade 2012, 139 145.

87 CEA, art. 59.

5. ACCESSORY RIGHTS BY WHICH THE CREDITOR STRENGTHENS HIS PROSPECTS FOR THE SATISFACTION OF CLAIM

The legal order puts at disposal of a creditor the certain legal means to strengthen his prospects for satisfaction of claim. In the modern law, there are numerous mechanisms in that respect: assuring priority in repayment in favor of particular creditors, retention of debtor's movables for exerting pressure on the debtor and eventually forced collection, strengthening the position of the creditor as compared to all third parties through granting of publicity to his claim, and committing a third party (non-debtor) to become liable for the other person debt, once the creditor proves that the statutory conditions thereto have been met.

5.1. Statutory pledge

Claims from a number of commercial contracts are secured by a lien (statutory pledge),[88] while in civil and consumer contracts this right is granted to the contractor engaged pursuant to a contract to produce the specific piece of work (Lat. *locatio conductio operis*).[89] It is essential that the subject matter of pledge serves the purpose of securing the claim that arises from the undertaken work pursuant to which the collateral entered the possession of the creditor (the so-called principle of connexity).[90] Such a pledge grants priority to the secured creditors by operation of law and requires no additional publicity,[91] both in comparison to the unse-

[88] In our law, the statutory right of retention belongs to the following creditors: first, a trade representative on the basis of a trade representation contract; second, the commission agent pursuant to a commission contract; third, a warehouse keeper pursuant to a warehousing agreement; forth, a freight forwarder pursuant to a freight forwarding agreement; fifth, controlling agent pursuant to a controlling agreement; sixth, transporters pursuant to a transportation agreement; and seventh, a bank pursuant to a safety deposit box contract. For more on statutory pledge in trade agreements, see: Ivica Jankovec, *Privredno pravo*, 4th edition, JP Službeni list SRJ, Belgrade 1999, 282 288; Mirko S. Vasiljević, *Trgovinsko pravo*, 14th edition, The University of Belgrade School of Law, Belgrade 2014, 62 65; Nikola Gavella in: Nikola Gavella, Tatjana Josipović, Igor Gliha, Vlado Belaj, Zlatan Stipković, *Stvarno pravo svezak 2*, 2nd edition, Narodne novine d.d, Zagreb 2007, 294 303.

[89] As a means of security to collection of the fee for work and the expended mate rial, as well as the other claims stemming from a contract to produce the specific piece of work, the law sets forth that a contractor (manufacturer) shall be entitled to a pledge over the objects made or repaired by him, and also over other objects delivered to him by the principal in relation to his work, for so long as he holds such objects and does not cease to hold them voluntarily. See: SOC, art. 628.

[90] I. Jankovec, 285; M. S. Vasiljević, 63 64.

[91] In more detail on the economic reasons for granting priority in collection to providers of important commercial services: Nenad Tešić, *Security Rights in Movables*

cured creditors and all other creditors whose claims are secured on a contractual basis. Although the statutory pledge differs significantly from the remaining creditor's supplemental rights, primarily in terms of its proprietary legal nature, it nevertheless possesses all the basic characteristics of supplemental rights: it is established independently from the will of the parties in an obligational relationship;[92] it is characterized by accessoriness (dependence) and the absence of correlation; and it increase significantly the creditor's prospects for satisfaction of claim.

5.2. The right of retention

Provided that certain criteria have been met, the claim as principal right entitles the creditor also to the right of retention (*ius retentionis*).[93] This right enables the creditor to retain an object from the debtor's property that the former has been holding in his possession, in order to exert pressure on the debtor,[94] or publicly sale the retained object wishing to repay his claim.[95] *The right of retention is granted to any creditor, irrespective of the legal ground and sort of the legal transaction from which the claim has arisen; it is necessary only for the obligational claim to be civil, and not natural*.[96] It is usually required for the claim to be mature. However, retention may also be undertaken by a creditor whose claim has been immature, should the debtor become insolvent.[97] The creditor's right

and Claims (Republic of Serbia), *Civil Law Forum for South East Europe, Collection of studies and analyses, First Regional Conference*, Cavtat 2010, Volume II, 104.

[92] A statutory pledgee is even granted priority in recovery of debt as compared to the creditors secured by a registered pledge that was established by mutual consent of contracting parties. Such priority right in comparison to a registered pledge exists only with respect to statutory pledge of a transporter, commission agent, freight forwarder, warehouse keeper and contractor (manufacturer). See: Act on Pledge Over Movables En tered Into the Registry, *Official Gazette of RS*, no. 57/2003, 61/2005, 64/2006 corr. and 99/2011 other acts, art. 33.

[93] The Serbian Obligations Code uses the term *right of retention* ("pravo zadrža vanja") (art. 286 289), while prof. Konstatinović uses the term *right of retaining* ("pravo zadržanja") (Sketch of the Law of Obligations and Contracts, art. 233 236).

[94] "Creditor of a mature claim, holding in his possession a certain object of the debtor shall be entitled to retain such object until the satisfaction of his claim." See: SOC, art. 286, para. 1.

[95] "Creditor holding an object of the debtor pursuant to the right of retention shall be entitled to collect his claim from the value of such object in the same manner as a pledgee." See: SOC, art. 289.

[96] For more on the right of retention, see: Miodrag Orlić in: Obren Stanković, Miodrag Orlić, *Stvarno pravo*, Nomos, Belgrade 1999, 261; N. Gavella in: N. Gavella, T. Josipović, I. Gliha, V. Belaj, Z. Stipković, 561 563.

[97] See: SOC, art. 286, para. 2. "Only the creditor of a mature claim holding in his possession a certain object of the debtor shall be entitled to retain such object until his claim is settled. Should the debtor become insolvent, the creditor may exercise the right of retention despite his claim not being mature." Judgment of the Higher Commercial

of retention ceases if the debtor provides him a certain security for his claim.[98]

5.3. Entry into public records

Certain contracts entitle the creditor to enter information about this stipulation into the public records, awarding his claim thereby the appropriate publicity. Entry in the form of a notice is made, for example, in case of life care contract.[99] A similar notice may also be entered in terms of real estate lease contracts.[100] Nevertheless, pursuant to the *Serbian Obligations Code,* entry into public records is not necessary for the effects of the lease towards third parties, because the lessee may raise his title against an acquirer of the leased object. The acquirer may not require the lessee to return the leased object prior to the expiry of the lease period, i.e. prior to the expiry of the notice period if the lease agreement is concluded for an indefinite period.[101]

5.4. Motion to create a security interest in case of decrease of share capital

Furtherance of the regular procedure of decrease of share capital of a joint-stock company may have a negative impact on the creditors' possibility to collect their claims. Therefore, company law makes this procedure more difficult by introducing the obligation to establish an adequate protection of creditors (security interest), as a necessary prerequisite to a decrease of share capital.[102]

Court, no. Pž. 3087/2007 dated March 20, 2008, *Judicial Practice of Commercial Courts*, bulletin no. 2/2008.

[98] See: SOC, art. 288.

[99] Such a remark enables the provider of maintenance to successfully raise his contractual right against all acquirers to whom the beneficiary of the maintenance might have transferred the ownership title over the real estate property being subject to the life long maintenance contract subsequently to entry of the remark. See: Tatjana Josipović, *Zemljišnoknjižno pravo*, Zagreb 2001, 231.

[100] This is why the nature of the rights belonging to a lessee, particularly in cases of long term lease of a real estate property e.g. for 99 years has been subject to vivid discussions. In more detail: M. Orlić, *Pravna priroda zakupa*, doctoral dissertation, Bel grade 1974.

[101] This right applies if a lessee holds possession over the object of the lease. How ever, if the object of the lease has not been delivered to the lessee, and the acquiror has had no knowledge on the lease agreement at the moment of his entering into the contract pur suanto to which he acquired the ownership title, the latter shall not be obliged to deliver the object of the lease to the lessee. However, the former shall in that case become entitled to claim compensation of damage. For more on rules applying to alienation of a leased object in Serbian law, see: Slobodan Perović, *Obligaciono pravo*, Belgrade 1990, 660.

[102] CEA, art. 319, para. 1. This creditors' right has been warranted for also by the provisions of the Second Company law EU Directive. See: Directive 2012/30/EU of the

The registry of commercial entities announces the decision on decrease of share capital within a continuous period of three months as of the date of registration thereof. Creditors, whose claims have arisen, irrespective of their maturity date, prior to the expiry of the period of 30 days from the date of announcement of the decision, may request the company in writing to secure such claims until the expiry of the period for announcement of the said decision. The creditors having raised such a request in a timely fashion, who were not provided by the company with a security of their claim within three months, or whose claims have not been paid, are entitled to move before the court to secure their claims. This is so, provided that they prove that such decrease of share capital infringes the repayment of their respective claims. Supplemental right to an adequate protection is not granted to bankruptcy creditors whose claims belong to the first or second rank of priority,[103] or creditors whose claims have already been secured. The right of the creditors to a security interest in case of decrease of share capital is strengthened additionally by the fact that one of the conditions for entry of changes into the Central Registry, and consequently in the Agency for Commercial Registries, has been the providing of a statement made in writing by the president of the board of directors, or the president of the supervisory board to the effect that creditors have been adequately protected, subject to joint and several personal liability of the issuer in case of subsequently proven falsehood of the statement. Moreover, distributions to shareholders may be made only upon the expiry of the 30 days period as of the date of registration of decrease of share capital.

The above proves the limitations of supplemental rights of creditors to a security interest in case of decrease of initial capital to be manifold: first, the claim must arise within a certain period from the date of announcement of the decision on decrease of share capital; second, the creditor must file in a timely fashion a request for creation of a security interest in writing; and third, the creditor is not to be secured, or fall within the privileged ranks of creditors in a bankruptcy proceeding.

European Parliament and of the Council of 25 October 2012 on coordination of safe guards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the European Union, in respect of the formation of pub lic limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, *Official Journal of EU*, L 315/74, 14.11.2012, art. 36. For more on this provision of the Second Directive, see: V. Radović in: M. Vasiljević, V. Radović, T. Jevremović Petrović, 171 172.

[103] For more, see: Bankruptcy Act, art. 54, para. 4(1 2).

5.5. Motion to take a security interest and the right to contest the decision on merger

Mergers may have a negative impact on the legal status of creditors of all companies participating in such a procedure, irrespective of their being the acquiring or the transferring entities. This is why it was justified to create a mechanism to protect creditors in case of mergers.[104] In Serbian law, a particular right to protection is awarded to any creditor of the company participating in the merger, provided that he fulfils two cumulative conditions: first, that his claim has arisen prior to registration of the merger; and second, that his claim has been jeopardized by the merger.[105] Such creditor is entitled to seek an adequate protection from his debtor (the so-called *ex ante* creditors' protection), and in case he has not be provided with it within 15 days from the date of dispatching the request, he shall become entitled to file a lawsuit (the so-called ex post creditors' protection). These rights are not granted to creditors whose claims fall within the first or second payment rank in a bankruptcy procedure, and creditors whose claims have been secured. All the aforesaid indicates a certain parallel between the protection of creditors of a commercial entity undergoing decrease of share capital in a regular procedure, and the protection of creditors in case of mergers.

5.6. Piercing of the corporate veil

The company law rest on two basic principles: the principle of legal separation and the principle of limited liability. The first principle points out that companies are legally autonomous and separated from its members. This principle is followed by the principle of limited liability, *i.e.* irresponsibility of company's owners (shareholders) for liabilities of the entity, being perhaps the most significant characteristic of commercial entities. In practical terms, application of these two principles manifests itself in the following manner: creditors of a commercial entity may require repayment exclusively from the commercial entity being its debtor, and not from the shareholders, or members of the entity.[106] This is the fundamental characteristic of commercial entities, and a privilege granted by the legal system to persons – prospective founders of a commercial entity – who intend to engage in entrepreneurship. However, the privilege of irresponsibility of members for liabilities of the company bears with it

[104] On the systems of creditors' protection, see in more detail in: Tatjana Jevremović Petrović, *Prekogranična spajanja društava u pravu EU*, The University of Belgrade School of Law, Belgrade 2010, page 272 277; T. Jevremović Petrović in: M. Vasiljević, V. Radović, T. Jevremović Petrović, 325 329.

[105] CEA, art. 509 511.

[106] On principle of limited liability of company members: Paul L. Davies, *Gower and Davies' Principles of Modern Company Law*, Sweet & Maxwell, London 2008, 37 40.

a duty to act accordingly. Members of a company may not misuse the principle of irresponsibility for the company's liabilities. In case of abuse, the law protects creditors of the commercial entity by enabling them to collect their claim not only against the company being the debtor, but also against its members.[107] In such situation, one figuratively speaks of *piercing of the corporate veil*, or *lifting of the corporate veil*. The basic consequence of the *piercing* consists of the following: liabilities of the company become liabilities of those of its members who have misused the legal subjectivity of the company. This way the personal assets of members of the commercial entity become exposed to repayment, by becoming liable for company's debts.[108]

5.7. Rights of a partners' creditors towards the partnership company

Certain legal means are available only to creditors of partnership company.[109] In that sense, a creditor who has a mature claim against a partner on the grounds of a final and enforceable judgment has the right to require the partnership company in writing to pay out to him in cash what the partner would be entitled to in case of liquidation of the company, but only up to the amount of his claim. Should the company fail to make payment towards the partner's creditor within six months as of the date of submitting of such request, the creditor may file for liquidation the company.[110]

6. CONCLUSION

Once we stop to observe an obligation exclusively as a relationship between two parties, and acknowledge the circumstance of obligation being a indirect bond between two persons properties, we shall start to un-

[107] For example, the Commercial Entities Act states that a misuse shall arise in particular if such person: uses the company to achieve an objective that is otherwise pro hibited for that person; uses or disposes of the company's assets as his own personal property; uses the company or its assets to cause damage to the company's creditors; re duces the company's assets for their own personal gain or for the gain of third parties, although they knew or ought to have known the company would be unable to meet its obligations (CEA art. 18, para. 2).

[108] For more on this institute in our legislation, see: Nebojša Jovanović, "Pobijanje pravnog subjektiviteta kompanija", *Pravni život* 10/1997, 865 890; Mirko Vasiljević, "Probijanje pravne ličnosti", *Pravni život* 11/1995, 17 27.

[109] CEA, art. 124.

[110] On the possibilities of collection by creditors of a partner from assets belonging to joint property of a civil partnership, see: Mirjana Radović, "Imovina ortakluka kao imovina zajedničke ruke", in: Milena Polojac, Zoran S. Mirković, Marko Đurđević (eds.), *Srpski građanski zakonik 170 godina*, University of Belgrade School of Law, Belgrade 2014, 284 286.

derstand the continued process of narrowing down of creditor's rights being aimed at debtor's personality on the one hand, and the expansion of creditor's rights in relation to the debtor's assets on the other.[111] We are of the opinion that the described connection between the creditor and the debtor's assets is to a vast extent based upon the evolution of one set of entitlements, being called herein the creditor's supplemental (supplementary) rights. By their very nature these rights are a variety of subordinated (secondary) rights that commonly with creditor's principle rights (main prestation) stands on the active side of an obligational relationship (obligation in a wider sense).

Creditor's supplemental rights are characterized by accessoriness (dependence), limited duration and absence of correlation between these rights and debtor's duties. In addition, these rights are acquired by operation of law, wherefore they may not be waived by the creditor in advance. If we may say that these qualities appear with other secondary rights (Lat. *genus proximum*), one feature distinguishes supplemental rights from the other of the same kind – *an influence on debtor's proprietary sphere*. Through this influence the supplemental rights making way to (compulsory) enforcement of claims – by either removing the obstacles for enforcement, or by preserving and strengthening the prospects for such enforcement (Lat. *differentia specifica*). Therefore it may be plausibly to conclude that supplemental rights represent in their essence a relation between parties of an obligation: creditor and debtor but in terms of debtor's property.

The primary goal of any obligation is its fulfillment thereof, which is in the vast majority of cases voluntary. However, supplemental rights come into effect in the case of a debtor's non-performance. Hence, supplemental rights appear as subjective rights of the creditors with the aim of achieving the secondary goal of obligation that is guaranteed by the legal order – the satisfaction of claim. In other words if (voluntary) fulfillment is the main (primary) cause of an obligation (Lat. *causa prima*), then the (enforced) satisfaction is a subsidiary (secondary) cause of an obligation (Lat. *causa secunda*), which the creditor turns to in the absence of accomplishment of the primary cause. Therefore, the main purpose of supplemental rights in obligation relations is to create the conditions for the achievement of subsidiary cause of obligation, i.e. to facilitate a satisfaction (execution) of claim.

Supplemental rights, as a rule, prevent the circumvention of creditors (for instance, fraudulent conveyance). Without supplemental rights which entitle creditors to enter into the proprietary sphere of the debtor, the creditor would often be prevented from protection of his legitimate obligational interest, either because the debtor's estate is not entirely

[111] Compare: B. S. Marković, 18.

specified, which would make it uncertain wherefrom may the creditor collect his claim or due to the fact that, contrary to the principle of good faith, the debtor's assets became insufficient for repayment as a result of debtor's negligent actions or decisions.

Accordingly, the authors distinguish three groups of supplemental creditor's rights:

1) rights by which a creditor removes obstacles for the satisfaction of claim,
2) rights by which a creditor protects his prospects for the satisfaction of claim, and
3) rights by which a creditor enhances his prospects for the satisfaction of claim.

CERIF: S112, S142, S155

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PROCEDURAL ASPECTS OF ARTICLE 8 OF THE ECHR IN ENVIRONMENTAL CASES THE GREENING OF HUMAN RIGHTS LAW

This paper analyzes the legal basis for 'proceduralization' of Article 8 of the European Convention on Human Rights in environmental cases. Procedural aspect of Article 8 has been interpreted as giving rise to a positive duty for States, under cer tain circumstances, to protect individuals from environmental factors that seriously affect their private and family life. The paper shows that the Court's reliance on the concept of positive obligations with regard to Article 8 has expanded significantly over time, abandoning the link between the State and the harmful activity, as well as reflecting strong preventive nature of duties contained in Article 8. It is shown that the proceduralization of Article 8 represents an influence by a number of well estab lished rules and principles of international law relating to the environment. Another aspect that is analysed in this paper is the scope of procedural dimension of Article 8, which is compared with other environmental law sources, as well as with other procedural rights that derive from the European Convention. Finally, it has been argued that the European Court has an environmentally expansionist interpretation of the right to private and family life, and that the Court set very important standards in relation to the content of procedural rights to participate in environmental deci sion making and to access justice in environmental matters. However, the authors conclude that the Court's approach in dealing with certain matters could be criti cized as well, such as the failure to provide clear standards in relation to the scope and definition of environmental information.

Key words: *Right to respect for private and family life. Environmental due process. European Court of Human Rights. Access to environ mental information. Environmental impact assessment.*

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1. INTRODUCTION

Back in 1991 Koskenniemi identified a general tendency of 'proceduralization' in environmental disputes, believing it to be the main reason for the international courts' distancing from their main function which consists in establishing an internationally wrongful act.[1] It is manifested through mechanisms of cooperation which prevail in most of international treaties that regulate the protection of the environment. The distinction between substantive and procedural obligations in environmental field can be traced to the work of the International Law Commission (ILC) as regards Draft Articles on Prevention of Transboundary Harm from Hazardous Activities.[2] Even the World Court's uneasiness to deal with environmental disputes manifested itself in its submissiveness to certain external influences, primarily the impact of the work of the ILC, despite Draft Articles' negligible importance and non-binding character.[3] Experiencing difficulties to establish violation of the most frequent duty in the field of environmental protection – the duty to prevent environmental harm – the International Court of Justice (ICJ) has literally copied the ILC's concept of duty to prevent as a substantive obligation consisting of four different procedural duties – duty to notify, to cooperate, to consult and to conduct environmental impact assessment.[4] The argumentation of the ICJ used in its Judgment in the *Pulp Mills on the River Uruguay* case clearly points to the conclusion that obligations of a procedural character appear as a shield from various obstacles encountered by the Court when resolving environmental disputes.[5] As opposed to these negative effects of 'proceduralization' in international environmental law, the area of in-

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[1] M. Koskenniemi, "Peaceful Settlement of Environmental Disputes", *Nordic Journal of International Law* 60/1991, 73.

[2] Draft Articles on Prevention of Transboundary Harm from Hazardous Activities Report of the International Law Commission on the work of its fifty third session, *Year book of the International Law Commission* 2/2001*,* UN Doc. A/56/10, 148.

[3] Y. Kerbrat, "International Law Facing the Challenge of Compensation for Envi ronmental Damages", *in* Y. Kerbrat, S. Maljean Dubois (eds), *The Transformation of In ternational Environmental Law*, Pedone & Hart 2011, 213 231.

[4] The Court concluded that Uruguay violated its procedural obligations provided in the 1975 Statute of the River Uruguay, but that it did not violate its substantive obliga tion to prevent pollution of the river, stemming from the same international treaty. Pulp Mills on the River Uruguay (*Argentina v. Uruguay*), Judgment of 20 April 2010, *ICJ Re ports* 2010, paras. 67 158.

[5] Parties expressed opposite views concerning the implications of an obligation's qualification as procedural or substantive as regards consequences of the established breach, encouraging the relevant discussions by the international legal doctrine: G. Haf ner, I. Buffard, "The Work of the International Law Commission: From Liability to Dam age Prevention", *in* Y. Kerbrat, S. Maljean Dubois (eds), 233 249; Pulp Mills on the River Uruguay, paras. 14, 76 and 77.

ternational human rights law has had nothing but benefits from such a process.[6]

The European Convention on Human Rights does not contain provision on the right to healthy environment, but under Article 8, which guarantees the respect for private and family life, the home and correspondence, the European Court of Human Rights found in many cases that severe environmental pollution can affect individual's well-being. In other words, the Court has developed approaches which indirectly protect the environment under Article 8, although its wording does not determine whether environmental effects can affect rights guaranteed in this article, and the protection of the environment is not included in the list of legitimate interests when the State can restrict rights enshrined in Article 8.[7]

In the past 20 years, the European Court broadly interpreted this provision in the context of environmental protection and became an important forum for providing protection and awarding damages.[8] There is, however, a limit in application of the European Convention to cases which concern environment, as the Court will not deal with the environment in general, but with serious harms that affect individual autonomy.[9] In its case law concerning environmental pollution, the Court indicates that "there is no explicit right in the Convention to a clean and quiet environment, but where an individual is directly and seriously affected by noise or other pollution, an issue may arise under Article 8".[10] In that case, the environmental pollution must be severe, which could affect individuals' well-being and "prevent them from enjoying their homes in such a way as to affect their private and family life adversely, even without seriously endangering their health."[11]

It is as early as in 1998 in the case *Guerra and Others v. Italy*[12] that the European Court of Human Rights started to accord procedural

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[6] N. A. Popović, "In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment", *Columbia Human Rights Law Review* 27/1995 1996, 489.

[7] These legitimate interests are: national security, public safety, the economic well being of the country, the prevention of disorder or crime, the protection of health or morals, and the protection of the rights and freedoms of others (Article 8, par. 2).

[8] R. Desgagné, "Integrating Environmental Values into the European Convention on Human Rights", *American Journal of International Law* 89/1995.

[9] See F. Stewart, "A Right to Silence?", *The Journal of the Law Society of Scot land*, 15 February, 2010, available at *http://www.journalonline.co.uk/Magazine/55 2/1007578.aspx,* last accessed 10 October 2015.

[10] *Hatton and Others v. the United Kingdom*, App. No. 36022/97, Judgment (Grand Chamber) of 8 July 2003, par. 96.

[11] See e.g., *Taşkin and Others v. Turkey*, App. No. 46117/99, Judgment of 10 No vember 2004, par. 113.

[12] *Guerra and Others v. Italy*, App. No. 116/1996/735/932, Judgment of 19 Febru ary 1998. In this case, a chemical factory was opened one kilometer from the inhabited

value to Article 8 of the Convention.[13] Observance of the procedural aspect of the right to private and family life has since evolved to such a significant level that it may as well be qualified as one of the most prominent features of the Court's jurisprudence in environmental cases.

This paper will first examine the legal basis for introducing procedural considerations in the Court's reasoning. An attempt will ensue to demonstrate that 'proceduralization' of Article 8 represented an influence of a number of well established rules and principles of international law relating to the environment. These considerations will be followed by an in-depth analysis of the scope and content of various procedural elements of the right to private and family life.

2. LEGAL BASIS FOR INTRODUCING PROCEDURAL ELEMENTS IN THE COURT'S REASONING

Legal basis for interpreting right to private and family life as containing certain procedural elements lies in the concept of State's positive obligations. However, as opposed to the concept of positive obligations in general, which does not relate exclusively to Article 8 of the Convention but also to other rights guaranteed by the Convention,[14] the Court seems to have established through its case-law the existence of State's positive obligations in a specific, environmental context.

Court's reliance on the concept of positive obligations with regard to Article 8 has expanded significantly over time.[15] The Court has con-

settlement. This factory produced fertilizers, labeled as highly risky to the health and well being of residents. The factory plant threw a high degree of flammable gas which freed toxic substances such as sulfur dioxide, ammonia, sodium and arsenic trioxide. Sev eral accidents had happened, and in one of them, the freed arsenic caused poisoning of about 150 people, who were hospitalized. The Court found that the State hadn't taken all reasonable steps to protect population from toxic fumes, and thus, to ensure the individu al's enjoyment under Article 8 of the European Convention.

[13] E. Folkesson, "Human Rights Courts Interpreting Sustainable Development: Bal ancing Individual Rights and the Collective Interest", *Erasmus Law Review* 6/2013, 147.

[14] J. F. Akandji Kombe, *Positive Obligations under the European Convention on Human Rights*, Council of Europe, 2007; H. Cullen, "Siliadin v. France: Positive Obliga tions under Article 4 of the European Convention on Human Rights", *Human Rights Law Review* 6/2006, 585 592; U. Kilkelly, "Protecting Children's Rights under the ECHR: the Role of Positive Obligations", *Northern Ireland Legal Quarterly* 61(3)/2010, 245 261; D. Xenos, *The Positive Obligations of the State under the European Convention on Human Rights*, Routledge 2012. See also the relevant jurisprudence of the European Court of Hu man Rights: *X and Y v. The Netherlands*, App. No. 8978/80, Judgment of 26 March 1985, par. 23; *Marckx v. Belgium*, App. No. 6833/74, Judgment of 13 June 1979; *Airey v. Ire land*, App. No. 6289/73, Judgment of 9 October 1979, par. 32.

[15] It is as early as in 1985 that the Court recalled that although the purpose of Article 8 "is essentially that of protecting the individual against arbitrary interference by

sistently required States to take "positive steps to legislate or carry out other preventative action".[16] However, first Article 8 cases with environmental implications decided by the Court reflect its cautious and timid approach in interpreting the right to private and family life as including specific positive duties for States.[17] Even though the *Lopez Ostra v. Spain* case represented an important moment for claims of environmental nature under the Convention, the Court failed to tackle the issue of whether there was a breach of State's negative obligation, positive obligation or both.[18] It is, nevertheless, indicative that the Court considered it necessary to establish the link between the State and the harmful activity in question thus implying that it represented an essential precondition for holding the State responsible for the violation of Article 8 of the Convention.[19]

The case of *Guerra and Others v. Italy* represented a turning point not only as regards State's positive obligations in environmental field,[20] but also in relation to their significance as legal basis for procedural elements of Article 8. The Court considered that in addition to primarily

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the public authorities, it does not merely compel the State to abstain from such interfer ence" but also to adopt "measures designed to secure respect for family and private life even in the sphere of the relations of individuals between themselves." *X and Y v. The Netherlands*, par. 23. For classification of positive obligations see D.J. Harris, M. O'Boyle, C. Warbrick, *Law of the European Convention on Human Rights*, 1995, 284.

[16] B. Clark, "Water Law in Scotland: The Water Environment and Water Services (Scotland) Act 2003 and the European Convention on Human Rights", *Edinburgh Law Review* 10/2006, 94.

[17] Acevedo believes that the Court was clearly struggling with finding the ade quate conceptual basis upon which to derive environmental rights. M. Acevedo, "The In tersection of Human Rights and Environmental Protection in the European Court of Hu man Rights", *New York University Environmental Law Journal* 8/1999 2000, 478 479.

[18] The Court's reasoning was criticized by the doctrine: S. Kravchenko, J. Bonine, "Interpretation of Human Rights for the Protection of the Environment in the European Court of Human Rights", *Pacific McGeorge Global Business and Development Law Jour nal* 25/2012, 251 255. In this case, the town Lorca in Spain was exposed to the opening of a large number of factories in leather industry. One of them was built without proper permits, some 12 meters from the house of the applicant. A waste treatment plant had emitted polluting fumes, smells, and noise, which immediately led to health problems among residents. The Government implemented some measures, but they were not enough to completely eliminate the risk to health. The Court simply stated that "the State did not succeed in striking a fair balance between the interest of the town's economic well being that of having a waste treatment plant and the applicant's effective enjoyment of her right to respect for her home and her private and family life". *Lopez Ostra v. Spain*, App. No. 16798/90, Judgment of 9 December 1994, par. 58.

[19] The Court stressed that Spanish authorities "were theoretically not directly re sponsible for the emissions in question" but that "the town allowed the plant to be built on its land and the State subsidized the plant's construction". *Ibid.*, par. 52.

[20] The significance of this judgmenet lies not only in a wide interpretation of Ar ticle 8, but also in proclamation that the State has a positive duty to ensure the respect of private and family life. See M. Acevedo, 438.

negative undertaking, "there may be positive obligations inherent in effective respect for private or family life".[21] It determined that the inaction through which the State failed to protect the right to private and family life was its failure to provide the applicants "with essential information that would have enabled them to assess the risks they and their families might run".[22] Such reasoning, qualified as "expansionist reading of Article 8",[23] implied that substantive rights contained in Article 8 included an implicit procedural right to environmental information.[24] However, thorough reading of the *Guerra* judgment leads to a somewhat surprising conclusion that the Court made no effort to provide an argumentation for such an opinion. An explanation was offered later that year in the case *McGinley and Egan v. the United Kingdom*.[25]

The *Hatton* judgment delivered by the Grand Chamber introduced novel standards. The Court made an explicit distinction between the substantive merits of the government's decision with environmental implications and its procedural aspect, i.e. the decision-making process.[26] Not only did the Court expand the concept of positive obligations contained

[21] The Court became more explicit by requiring that "it needed only be ascer tained whether the national authorities took the necessary steps to ensure effective protec tion of the applicant's right to respect for their private and family life". *Guerra and Others v. Italy*, par. 58.

[22] *Ibid*., par. 60.

[23] S. Kravchenko, J. Bonine, 273.

[24] The Court rejected the claim under Article 10 on the basis that Article 10 es sentially prohibits states from restricting a person from receiving information from others. However, it found a violation Article 8 due to the failure to inform the applicants about the risks from the chemical factory. See C. Hilson, "Risk and the European Convention on Human Rights: Towards a New Approach," *The Cambridge Yearbook of European Stud ies* 11/2008 2009, 356.

[25] In this case, the applicants had participated in nuclear tests conducted by the United Kingdom at Christmas Island. Their requests for test records for the support of their application for service disability pensions were denied. The Court explicitly stated that "where a Government engages in hazardous activities" respect for private and family life under Article 8 "requires that an effective and accessible procedure be established which enables such persons to seek all relevant and appropriate information." *McGinley and Egan v. The United Kingdom*, App. No. 10/1997/794/995 996, Judgment of 9 June 1998, par. 101. The same conclusion was reached in *Roche v. the United Kingdom*, App. No. 32555/96, Judgment of 19 October 2005. These cases also indicate that the right to receive environmental information from the State involves a procedural aspect of Article 8 and is not protected under Article 10 of the Convention. D. García San José, *Environ mental Protection and the European Convention on Human Rights*, Council of Europe Publishing, Strasbourg 2005, 63.

[26] *Hatton and Others v. The United Kingdom*, par. 99. In this case, it was recog nized that an excessive noise can cause a violation of Article 8. The Court confirmed the position of the European Commission in *Vearncombe* that noise nuisance is intolerable. See Eur. Comm., *Vearncombe and Others v. Germany and UK,* App. No. 12816/87, Deci sion of 18. January 1989.

in Article 8 to include a procedural duty to conduct an environmental impact assessment,[27] it also introduced a duty to use the precautionary principle in providing relevant information.[28] In other words, the State's inaction cannot be excused by the absence of relevant scientific data.

Irrelevance of the link between the State and the dangerous activity was confirmed by the Court in *Fadeyeva v. Russia* case. Here, the applicant lived in proximity of the plant and her right to privacy had been seriously affected by the pollution from the Severstal steel plant. The Court noted that the steel plant was neither owned, controlled or operated by Russia at the material time, but it failed to apply effective measures to protect interests of the local population affected by the pollution. Thus, the Court clearly pointed out that "State's responsibility in environmental cases may arise from a failure to regulate private industry" and that "the applicant's complaints fall to be analyzed in terms of a positive duty on the State".[29] In *Giacomelli* case, where the applicant complained about the harmful emissions from a plant treating hazardous waste, the Court admitted that "Article 8 contains no explicit procedural requirements".[30] However, it considered this to be no obstacle for scrutinizing the decision-making process that led to measures of interference with the right to private and family life. The Court summarized this procedural aspect of Article 8 by pointing to a number of positive obligations incumbent upon States.[31]

Initial doubts and scarce approach to State's positive obligations as regards Article 8 have been replaced by firm and unequivocal standings expressed by the Court in its recent jurisprudence. According to the Court, it is beyond any doubt that, when dangerous activities are at stake, States "have an obligation to set in place regulations geared to the special features of the activity in question, particularly with regard to the level of

[27] It noted that "a governmental decision making process concerning complex is sues of environmental and economic policy (...) must necessarily involve appropriate in vestigations and studies". *Ibid*., par. 128.

[28] The Court explicitly stated that "this does not mean that decisions can only be taken if comprehensive and measurable data are available in relation to each and every aspect of the matter to be decided". *Ibid.*

[29] In other words, the Court's role would be "to assess whether the State could reasonably be expected to act so as to prevent or put an end" to the violation of the right to home, private and family life. *Fadeyeva v. Russia*, App. No. 55723/00, Judgment of 9 June 2005, par. 89.

[30] *Giacomelli v. Italy*, App. No. 59909/00, Judgment of 2 November 2006, par. 82.

[31] The Court referred to the duty to conduct appropriate investigations and studies, duty to provide for public access to the conclusions of such studies as well as an obliga tion to inform the public about the risks that they may face. The Court also emphasized that the individuals must be able to appeal to the courts against any decision, act or omis sion "where they consider that their interests or their comments have not been given suf ficient weight in the decision making process". *Ibid*., par. 83. See also, *Taşkin and Others v. Turkey*, paras. 118 119.

risk potentially involved".[32] More precisely, the State is obliged to govern the licensing, setting-up, operation, security and supervision of the hazardous activity and it has a duty to "make it compulsory for all those concerned to take practical measures to ensure the effective protection" of the rights guaranteed by the Convention.[33]

A number of conclusions regarding State's positive obligations as basis for procedural aspect of the right to private and family life stems from the case-law outlined above. First of all, the Court's initial focus on the link between the State and the activity harmful to the environment has been abandoned over time. State's positive obligations in relation to dangerous activities have consistently been interpreted to mean that State is involved "even when the threat comes from private individuals or other activities not directly related to the State".[34] Secondly, as due diligence obligations,[35] duties contained in Article 8 of the Convention reflect strong preventive nature, which in turn suggests that duty to prevent environmental harm is implicitly contained in Article 8, at least where dangerous activities are at source of interference with the right to home, private and family life.[36] Thirdly, starting with a duty to provide environmental information, the Court has obviously adopted an extensive approach to interpreting Article 8 so as to include a number of procedural duties for States.

3. PROCEDURAL ELEMENTS AS AN INFLUENCE OF INTERNATIONAL ENVIRONMENTAL LAW

All of the duties outlined throughout previous section represent well established rules and principles of international environmental law.

[32] *Di Sarno and Others v. Italy*, App. No. 30765/08, Judgment of 10 January 2012, par. 106.

[33] *Ibid*. See also *Brincat and Others v. Malta*, App. Nos. 60908/11, 62110/11, 62129/11, 62312/11 and 62338/11, Judgment of 24 July 2014, par. 102. The Court also recognized that in the context of dangerous activities, the scopes of positive obligations under Articles 2 and 8 of the Convention overlap. Therefore, positive obligation under Article 8 requires the State to take the same measures as those expected of them under Article 2 of the Convention.

[34] U. Curi, "Concept of Environment, Sustainable Development and Respect for Human Rights", *Juridical Tribune* 3/2013, 225.

[35] E. Folkesson, 149.

[36] As rightly put by Van Dyke, protection of the environment through human rights mechanisms is "somewhat unique in that their enforcement requires proactive pro tection". Violations must, therefore, be prevented through the institution of appropriate preventive measures. B. Van Dyke, "A Proposal to Introduce the Right to a Healthy Envi ronment into the European Convention Regime", *Virginia Environmental Law Journal* 13/1993 1994, 338 339.

The Court seems to have imported them from various sources of international law, although its reliance on international law instruments has mainly been cautious and not always explicit.[37]

Duty to provide environmental information represents an exception in this regard. Although the *Guerra* judgment failed to offer any explanation as to why right to information constituted a part of the right to private and family life, in subsequent cases the Court felt the need to rely on relevant international law instruments. In *Oneryildiz v. Turkey*, where the authorities failed to take any measure to prevent explosion of methane at the rubbish tip, the Grand Chamber took the position that where "dangerous activities are concerned, public access to clear and full information is viewed as a basic human right".[38] However, the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters,[39] has made the most important contribution to the acceptance and development of procedural rights at regional and national levels,[40] influencing in particular the jurisprudence of the European Court.[41] In the case *Tătar v. Romania* the Court referred explicitly to international environmental standards. It stated that the procedural rights of access to information, public participation in environmental decision-making and access to justice in environmental matters

[37] See more on the general application of international law before the Court in M. Forowicz, "The reception of International Law in the European Court of Human Rights", *International Courts and Tribunals Series*, Oxford 2010.

[38] The Court cited Council of Europe Parliamentary Resolution 1087 on the Con sequences of the Chernobyl Disaster, stating that "Resolution 1087 (1996) makes clear that this right must not be taken to be limited to the risks associated with the use of nu clear energy in the civil sector". *Oneryildiz v. Turkey*, App. No. 48939/99, Judgment of 30 November 2004, par. 62. For a detailed discussion see S. Kravchenko, "Is Access to En vironmental Information a Fundamental Human Right?", *Oregon Review of International Law* 11/2009, 232 233. Van Dyke, on the other hand, cites the relevant provisions of the United Nations General Assembly World Charter for Nature, considering it to have "most conspicuously embraced" the procedural rights to information and participation in envi ronmental decision making. B. Van Dyke, 338. Environmental due process represents an integral part of the Rio Declaration as well which declares that environmental issues are best handled with the participation of all concerned citizens at the relevant level. L. Zie mer, "Application in Tibet of the Principles on Human Rights and the Environment", *Harvard Human Rights Journal* 14/2001, 264 265.

[39] ECE/CEP/43, Aarhus Denmark, 25 June 1998. This Convention is limited to the access to justice and information, as well as to public participation in environmental deci sion making, thus focusing strictly on procedural aspect of the right to the environment. See A Boyle, "Human Rights and the Environment: Where Next?", *European Journal of International Law*, 23(3)/2012, 622.

[40] M. Clemson, "Human Rights and the Environment: Access to Energy", *New Zealand Journal of Environmental Law* 16/2012, 68.

[41] A. Boyle, "Human Rights and the Environment: A Reassessment", *Fordham Environmental Law Review* 18/2008, 7.

were contained in the Aarhus Convention.[42] The Court took an important step further in the case of *Grimkovskaya v. Ukraine* where it explicitly applied the standards of the Aarhus Convention while considering whether the State provided a meaningful complaints mechanism.[43] It even relied on particular provisions of the Aarhus Convention in the case *Di Sarno v. Italy*, thus widening the scope of the duty to provide information to encompass not only dangerous human activities but also natural causes.[44] Surprisingly enough, the Court even decided to rely on standards contained in the Aarhus Convention in *Taşkin and Others v. Turkey*, despite the fact that Turkey is not a contracting party to this environmental treaty.[45]

As opposed to this frequent and explicit reliance on the provisions of the Aarhus Convention, the Court chose to import other international environmental standards in an implicit manner. This consideration is most obvious as regards the duty to conduct environmental impact assessment. Though regulated by the famous Espoo Convention at international level,[46] the environmental impact assessment has only recently come to be mentioned by the Court, each time relating to the states' failure to conduct relevant studies prescribed by national law.[47] However, the Court seems to have started to require more studies on environmental consequences of a particular activity, including its continuous monitoring and assessment, which suggests its willingness to widen the procedures aimed at taking environmental matters into account.[48]

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[42] The Court also referred to Council of Europe's Parliamentary Assembly Resolu tion 1430 (2005) on industrial hazards interpreting it to extend the duty of States to im prove dissemination of information in environmental field. *Tătar v. Romania*, App. No. 67021/01, Judgment of 27 January 2009, par. 118.

[43] The Court concluded that it had not been shown that the applicant was afforded a meaningful opportunity to contest the State authorities' policymaking regarding the M04 motorway during the relevant period of time, basing its conclusion on the provisions of the Aarhus Convention in particular. *Grimkovskaya v. Ukraine*, App. No. 38182/03, Judg ment of 21 July 2011, paras. 39, 69 and 72.

[44] *Di Sarno and Others v. Italy*, par. 107.

[45] *Taşkin and Others v. Turkey*, par. 99.

[46] Convention on Environmental Impact Assessment in a Transboundary Context, United Nations, *Treaty Series* 1989, 309.

[47] *Giacomelly v. Italy*, paras. 87 89; *Tătar v. Romania*. paras. 114 115.

[48] It remains to be seen whether the Court would go as far as it did with standards contained in the Aarhus Convention, i.e. whether the relevant standards relating to envi ronmental impact assessment would be applied as an international standard as well, to States whose national laws on environmental impact assessment procedures do not cor respond to relevant international and European law provisions. Kravchenko and Bonine challenge the applicability of the standards set in *Giacomelly v. Italy* and *Tătar v. Roma nia* in relation to Ukraine and its deficient law on environmental impact assessment. S. Kravchenko, J. Bonine, 275.

Finally, an obvious influence of international law can be seen in the Court's use of the precautionary principle.[49] An explicit mention of this principle has occurred only recently in the case *Tătar v. Romania*.[50] The Court relied not only on Principle 15 of the Rio Declaration, but also on the relevant European Union law.[51] It concluded that the precautionary principle required States not to delay taking preventive measures simply due to scientific uncertainty. However, an influence of international environmental standards in the context of the precautionary principle acquired a novel dimension in a more recent case of *Brincat and Others v. Malta* where the Court used international standards as means of proving that the respondent State cannot hide behind the claim that it had not been aware of dangers of a specific activity.[52]

These last remarks point to the Court's willingness to be under an intense influence of international environmental rules when dealing with the procedural aspect of Article 8 cases, not only as regards ready-to use provisions such as those contained in the Aarhus Convention but also less operative norms, precautionary principle being an excellent example.

4. SCOPE OF THE PROCEDURAL DIMENSION OF ARTICLE 8

This part of the article will focus on two aspects of the scope of procedural rights contained in Article 8. It will first remark on their extent

[49] This principle enables rapid response in a case of possible risk to the protection of the environment and is induced by the need to react in a situation of scientific uncer tainty to possible danger of human activities on the environment. See more H. Veinla, "Precautinary Environmental Protection and Human Rights*", Juridica International Law Review* 12/2007, 91 99.

[50] However, it should be noted that in *Balmer Schafroth* decision from 1997, sev en judges issued a joint dissenting opinion, explicitly referring to the precautionary prin ciple. They said: "The majority appear to have ignored the whole trend of international institutions and public international law towards protecting persons and heritage, as evi dent in European Union and Council of Europe instruments on the environment, the Rio agreements, UNESCO instruments, the development of the precautionary principle and the principle of conservation of the common heritage." They preferred to have "the judg ment of the European Court that caused international law for the protection of the indi vidual to progress in this field by reinforcing the "precautionary principle" and full judi cial remedies to protect the rights of individuals against the imprudence of authorities." *Balmer Schafroth and Others v. Switzerland,* App. Nos. 67\1996\686\876, Judgment of 26 August 1997. Also, *Hatton* and *Öneryıldız,* contain some elements of precautionary lan guage. See H. Veinla, 95.

[51] *Tătar v. Romania*, par. 120.

[52] Taking into account the high number of United Nations member states that ratified the Asbestos Convention, the Court concluded that Malta ought to have known about the dangers of asbestos and that it therefore failed to satisfy its positive obligation to ensure that the applicants were adequately protected and informed about the risk. *Brin cat and Others v. Malta*, par. 105.

as opposed to their international environmental law counterparts. An examination will follow of their relationship with other rights of procedural character included in the European Convention.

It is quite clear from the Court's jurisprudence that it is not concerned with environmental pollution as such, rather with its negative consequences on the enjoyment of rights contained in Article 8. This remark may be considered as representing the main cause for both *ratione personae* and *ratione materiae* aspects of the scope of procedural dimension of Article 8.

As correctly observed by Boyle, it is the risk to private and family life that "generates the requirement to provide information, not some broader concern with environmental governance, transparency of decision-making, or public participation".[53] Therefore, right to environmental information interpreted as being part of Article 8, is narrower than its international law counterpart contained in the Aarhus Convention. Namely, only those personally affected in the sense of being victims of violation of Article 8 rights may invoke their procedural right to environmental information.[54] These limitations of *ratione personae* character, however, cannot be qualified as an exclusive feature of environmental issues decided by the Court. They simply reflect the Court's individualistic approach in protecting human rights, in line with the applicable rules.

On the other hand, as regards *ratione materiae* aspect, the Court has significantly expanded the scope of Article 8 by taking into account relevant international standards. It continues to widen their scope, sometimes even exceeding relevant universal international law. In *Guerra v. Italy*, the Court held that the State's failure to provide essential information about environmental risks represented a violation of the right to private and family life.[55] The Court seems to suggest that, in addition to the duty to establish a procedure for acquiring environmental information, the State has an obligation to actively inform about the risks those who are affected.[56] In its *Taşkin* judgment, the Court emphasized the significance it attaches to an informed environmental process,[57] whereas in *Tătar v. Romania* it found that Romanian authorities failed to meet their duty to evaluate in advance the potential risks of the activity in question, thus violating rights to private and family life, and, "plus généralement, à

[53] A. Boyle (2008), 18 19.

[54] The same applies to the procedural right to participate in environmental deci sion making, as well as to the right to appeal to the court. *Taşkin and Others v. Turkey*, paras. 118 125.

[55] *Guerra and Others v. Italy*, par. 60.

[56] *Ibid.,* paras. 57 60, *Vilnes and Others v. Norway*, App. Nos. 52806/09 and 22703/10, Judgment of 5 December 2013, par. 235.

[57] *Taşkin and Others v. Turkey*, paras. 118 125.

la juissance d'un environnement sain et protégé".[58] Recent judgment in the case of *Kolyadenko and Others v. Russia* further broadened the procedural aspect of Article 8 to include natural phenomena by finding that Russia failed to inform the public of the fact that they lived in a flood prone area and that they did not establish an operational emergency warning system.[59] The ever evolving nature of the procedural aspect of Article 8 seems to be confirmed by the Court's approach in the 2013 *Vilnes v. Norway* case. The Court introduced what appears to be the new procedural element of Article 8, that of prior informed consent.[60]

The scope of certain procedural elements of Article 8 is also determined by their comparison with relevant Convention matches. In relation to the freedom of expression, the Court has consistently interpreted Article 8 as including the right to environmental information rather than finding a separate violation of Article 10.[61] By switching to Article 8, i.e. linking right to receive environmental information with the potential negative effects on the applicants' quality of life, the Court managed to "reach a result it otherwise could not".[62]

As regards Article 6 of the Convention, restrictive conditions for applying it have, in environmentally sensitive cases, again been overcome

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[58] *Tătar v. Romania*, par. 107.

[59] *Kolyadenko and Others v. Russia*, App. Nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, Judgment of 28 February 2012, par. 185.

[60] It suggested that not only should the Court investigate whether the State pro vided the applicants with essential information needed to be able to assess the risks, but also whether they had given informed consent to the taking of such risks. *Vilnes and Oth ers v. Norway*, par. 236. In this case, the applicants are former deep sea divers, who took part in diving operations in the petroleum industry from 1965 to 1990. They alleged that these operations caused them serious health problems, which led to partial disability, and that they hadn't consented to these risks of which they did not have full knowledge at that time.

[61] As early as in *Guerra v. Italy*, the Court decided not to consider that freedom guaranteed under Article 10 could be interpreted as "imposing on a State, in circum stances such as those of the present case, positive obligations to collect and disseminate information of its own motion". *Guerra and Others v. Italy*, par. 53. The Court had thus abandoned the reasoning adopted earlier by the Commission in the same case.

[62] M. Acevedo, 488. Acevedo also notes that by providing for this right under Article 8 instead of Article 10 the Court avoided the potential situation of the State ensur ing compliance with its obligation by simply not putting anything in writing or classifying writing materials as confidential. *Ibid*., 490, fn. 200. For a different standing see Concur ring Opinion of Judge Jambrek. *Guerra and Others v. Italy*, Concurring Opinion of Judge Jambrek. D. Shelton, "Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized?", *Denver Journal of International Law & Policy* 35/2006 2007, 137 139. M. Fitzmaurice, J. Marshall, "The Human Right to a Clean Environment Phantom or Reality? The European Court of Human Rights and English Courts Perspec tive on Balancing Rights in Environmental Cases", *Nordic Journal of International Law* 76/2007, 118.

by the introduction of adequate procedural elements under Article 8. In *Taşkin and Others v. Turkey* the Court ascertained that not only did Article 8 include a right to a fair decision-making process, it also implicated the right to access to court.[63] Furthermore, in *Tătar v. Romania*, the Court appears to suggest that right to access to court based on Article 8 is more extensive than the one envisaged by Article 6. By allowing the applicant to appeal against individual scientific environmental impact studies, the Court did not require the result of the court proceedings to be decisive for the applicant's rights.[64]

5. ENVIRONMENTAL DUE PROCESS CERTAIN REMARKS REGARDING ITS CONTENT AND FUNCTIONS

Folkesson argues that the European Court has "set national environmental standards as a measurement of compliance with the obligations under the ECHR" and that it is "hesitant to set its own standards for the environmental pillar".[65] Although such a conclusion may be true in relation to the substantive aspect of the right to private and family life since the Court relies on State's existing national standards and accords them certain margin of appreciation, when it comes to various procedural elements of Article 8 the Court not only chose to rely heavily on relevant international standards but also to be creative enough to overpass them and transform them into an environmentally expansionist interpretation of the right to private and family life. This remark, however, does not imply that the Court's approach in dealing with procedural aspect of Article 8 is devoid of any critique.

Through its case-law the Court established certain criteria for assessing violation of different procedural rights.

As regards the right to environmental information, the Court emphasized temporal and spatial elements, as well as the essential character of the information, as being decisive in that regard. In the *Guerra* judgment, it acknowledged that "the applicants waited, right up until the production of fertilizers ceased in 1994, for essential information that would have enabled them to assess the risks they and their families might run if they continued to live at Manfredonia, a town particularly exposed to

[63] *Taşkin and Others v. Turkey*, par. 119.

[64] *Tătar v. Romania*, paras. 113, 116 117 and 119. Similarly, in *Roche v. the Unit ed Kingdom* the Court noted that an individual should not be required to litigate in order to receive relevant information. What seems important is that the applicant made constant efforts to disclose such information independently of any litigation. *Roche v. the United Kingdom*, paras. 165 166.

[65] E. Folkesson, 147.

danger in the event of an accident at the factory".[66] However, the formulation used by the Court may be reproached for the fact that it seems to suggest that the purpose of providing environmental information consists in enabling the applicants to assess the risks on their own. The Court has continued to express this standard using the same wording in its subsequent jurisprudence despite the fact that it has since interpreted the procedural aspect of Article 8 as including the positive duty to conduct appropriate environmental studies.[67] It is, therefore, the duty of the State to assess the risks through an environmental impact study, as well as to provide relevant conclusions to interested persons. The Court seems to forget that, generally, applicants are not equipped with necessary prudence that would enable them to understand and assess difficult expert language used in environmental impact studies. Recent jurisprudence offers an indication that Court's reasoning may be starting to change in this regard.

In *Ledyayeva and Others v. Russia* the Court noted that the information contained in environmental report was definitely of use for determining the scale of the environmental problem and its consequences, but that "it did not impose any particular obligation on the plant or the State authorities".[68] The Court seems to suggest that relevant environmental reports must also include specific information as to what practical measures will be implemented by the State in response to an environmentally degrading situation. In *Tătar v. Romania* the Court went one step further and found it necessary to examine whether, in the context of the situation that ensued after the environmental accident in question, State authorities informed the public about potential risks that such accident may produce on their health and environment, whether they informed the population about preventive measures that would be taken in case similar accidents occurred in future, as well as whether the authorities informed the inhabitants about the measures they intended to take in order to mitigate risks for health and environment should such accident happen again.[69] In addition, the Court failed to provide clear standards as regards the scope and definition of environmental information. As opposed to the *Guerra* judg-

[66] *Guerra and Others v. Italy*, par. 60.

[67] In *Băcilă v. Romania* the Court reaffirmed the principles previously envisaged in *Giacomelli v. Italy*, implying that duty to conduct environmental impact assessment represents a standard in the Court's reasoning regarding procedural elements of Article 8, regardless of its status in national law. *Băcilă v. Romania*, App. No. 19234/04, Judgment of 30 March 2010, par. 62.

[68] *Ledyayeva, Dobrokhotova, Zolotareva and Romashina v. Russia*, App. Nos. 53157/99, 53247/99, 53695/00 and 56850/00, Judgment of 26 October 2006, par. 107. This case concerns four applicants, residents of the Russian town of Cherepovets, who lived around the steel works that caused the level of atmospheric pollution to be many times in excess of the limits established by domestic regulations.

[69] *Tătar v. Romania*, par. 101.

ment "where it was not disputed that the inhabitants of Manfredonia were at risk from the factory in question and that the State authorities had in their possession information which would have enabled the inhabitants to assess this risk", in *McGinley and Egan v. the United Kingdom* the Court attached particular significance to the fact that "the existence of any other relevant document has not been substantiated and is thus no more than a matter of speculation".[70] Latest development concerning criteria for environmental information occurred in the case of *Brincat and Others v. Malta*, which concerns former workers of the public ship repair yard. The Court rejected Maltese Government's contention that the distribution of masks represented an implicit source of information for the applicants regarding risks of asbestos to which they had been exposed,[71] thus confirming that not only should environmental information be explicit, but also that the State's duty to establish accessible and effective official procedures represents a precondition for enjoying the right to environmental information.

Introduction of the precautionary principle in the Court's reasoning has brought valuable improvements. However, its positive effect seems to remain restricted to the procedural aspect of Article 8, not the substantive one. In *Tătar v. Romania* the Court held that the precautionary principle required States not to hide behind scientific uncertainty for not taking preventive measures.[72] It seems to have gone one step further in its *Taşkin v. Turkey* judgment since it suggested that the applicant may claim violation of Article 8 as regards procedural guarantees even if it is not certain that he would be exposed to adverse consequences of a dangerous activity.[73] What Court demanded in this particular case was that the applicant showed that negative effects are likely to occur.[74] However, the Court refused to apply the precautionary principle in *Balmer-Schafroth v. Switzerland*. The Court held that the applicants "failed to show that the operation of Mühleberg power station exposed them personally to a danger that was not only serious but also specific and, above all, imminent".[75] It follows that severe pollution still represents the main requirement for considering the applicability of Article 8.[76]

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[70] *McGinley and Egan v. The United Kingdom*, par. 99.

[71] *Brincat and Others v. Malta*, par. 114.

[72] *Tătar v. Romania*, par. 120.

[73] *Taşkin and Others v. Turkey*, par. 113.

[74] Compare with *Ivan Atanasov v. Bulgaria*, App. No. 12853/03, Judgment of 2 December 2010, par. 76.

[75] *Balmer Schafroth and Others v. Switzerland*, par. 40.

[76] See also M. Fitzmaurice, J. Marshall, 116 118. For comparison see the case of *Luginbuhl v. Switzerland*, App. No. 42756/02, Judgment of 17. January 2006.

The Court has managed to set important standards in relation to the content of the procedural rights to participate in environmental decision-making and to access justice in environmental matters. In *Grimkovskaya v. Ukraine* the Court found that the State failed to show that its decision to route motorway M04 via K. Street in which the applicant resided, was preceded by an "adequate feasibility study, assessing the probability of compliance with applicable environmental standards and enabling interested parties, including K. Street's residents, to contribute their views".[77] The *Dubetska and Others v. Ukraine* case emphasized that the applicants need to be able to challenge environmental decisions "in an effective way" and that procedural guarantees available to the applicant may become inoperative and the State may be found liable under the Convention "where a decision-making procedure is unjustifiably lengthy or where a decision taken as a result remains for an important period unenforced".[78] However, the Court did not consider it appropriate to scrutinize the manner in which the decision-making process is organized by national law. In *Flamenbaum and Others v. France*, it did not attach importance to the applicants' argument that the decision-making procedure was fragmented and that they did not have the opportunity to have the project examined by a single judge. What seemed to matter is that the applicants had an occasion to participate in each phase of the decision-making process.[79] Also, the fact that the outcome of the proceedings did not meet the applicants' expectations is not considered by the Court to be "sufficient to establish that they were not involved in or given access to the decision-making process".[80] As regards access to justice in environmental matters, the Court found it important that domestic courts prematurely dismissed the applicant's civil claim against local authorities, it criticized the judgment for being too short and for not containing direct response to the applicant's main arguments.[81] The Court has thus set higher threshold for assessing violation of the relevant procedural aspect of Article 8. It not only examined whether the applicant had access to an adequate complaints procedure, but also the manner in which such procedure was conducted.

Another remark concerns the status of procedural environmental considerations in the Court's reasoning. Not only does the Court use the

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[77] *Grimkovskaya v. Ukraine*, par. 67.

[78] *Dubetska and Others v. Ukraine*, App. No. 30499/03, Judgment of 10 February 2011, par. 144.

[79] *Flamenbaum and Others v. France*, App. Nos. 3675/04 and 23264/04, Judgment of 13 December 2012, par. 159.

[80] *Zammit Maempel v. Malta*, App. No. 24202/10, Judgment of 22 November 2011, par. 71.

[81] *Grimkovskaya v. Ukraine*, par. 71.

procedural elements to establish violation of appropriate positive obligations and thus the breach of the right to private and family life, which may be qualified as their primary function,[82] it uses environmental due process for other, accessory purposes as well.

The Court has attached significance to procedural elements as means for evaluating the applicability of Article 8. More concretely, the Court considered that the issue of access to information which could either have allayed the applicants' fears or enabled them to assess the danger to which they had been exposed, was sufficiently closely linked to their private and family lives as to raise an issue under the provision of Article 8.[83] The Court used the same approach in *Tătar v. Romania* where, in assessing the applicability of Article 8 in the case at hand, it took into consideration official reports and environmental impact studies which enabled it to come to a conclusion that the pollution caused by the activity of Săsar factory could also result in depriving the applicants of their right to home, private and family life.[84]

In addition, the procedural elements may serve as a means for assessing the fair balance test.[85] In *Fadeyeva v. Russia* the Court thought it necessary to examine whether there had been "manifest error of appreciation by the national authorities in striking a fair balance between the competing interests of different private actors".[86] Admitting that its role regarding issues of environmental protection is primarily a subsidiary one due to their complexity, the Court considered it necessary to investigate into the decision-making process in order to assess whether due respect had been afforded to the interests of the applicant.[87] Despite the fact that Russian authorities referred to several environmental impact studies, the Court reproached the Government for having failed to produce these documents or to provide for explanation as to how their conclusions had been taken into account regarding the public policy towards the Cherepovets steel plant. Furthermore, the State failed to specify "how the interests of the population residing around the plant were taken into account when conditions attached to the permit were established", thus confirming the importance of participation in environmental decision-making in the

[82] *Budayeva and Others v. Russia*, App. Nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, Judgment of 20 March 2008, paras. 136 137, reaffirmed in *Brincat and Others v. Malta*, par. 101.

[83] *McGinley and Egan v. The United Kingdom*, par. 97.

[84] *Tătar v. Romania*, par. 97.

[85] *Hatton and Others v. The United Kingdom*, par. 128, *Powell and Rayner v. The United Kingdom*, App. No. 9310/81, Judgment of 21 February 1990, par. 45.

[86] *Fadeyeva v. Russia*, par. 105.

[87] The same approach was used in *Giacomelly v. Italy*, par. 84, *Zammit Maempel v. Malta*, par. 73.

course of applying the fair balance test.[88] Similarly, in *Grimkovskaya v. Ukraine* the Court attached importance to three factors when assessing the balance of interests. Firstly, there was no adequate environmental feasibility study that preceded the decision of the State authorities to designate K. Street as part of the M04 motorway. Secondly, the Government failed to establish "reasonable environmental management policy" in the aftermath of its decision. Thirdly, the applicant had no meaningful opportunity to contribute to the decision-making process or to challenge the decisions before an independent authority.[89]

Finally, procedural elements have served the Court, among other factors, to determine whether the pollution levels reached the high threshold of severity in order to be able to pronounce on the admissibility of the complaint in question. In a case concerning wind turbines, the Court noticed that the applicants had not made a formal demand for an in-depth noise investigation, despite having been reminded of the opportunity to do so by the competent authority. The Court considered that "such a demand would have resulted in a decision by the Environment Committee which could have appealed against to the Board and subsequently to the environmental courts".[90] Lacking such information about the noise levels, the Court found it necessary to accept the results from the noise tests made available to it, as an approximate estimate of the noise levels emitted from wind turbines. The Court has thus qualified relevant procedural elements as a factor for determining the level of severity of environmental interference, i.e. the factor to be taken into consideration with regard to proving it.[91]

6. CONCLUSION

The reason for introducing a procedural obligation into a Convention right is to ensure 'effective' respect for that particular right. Environmental cases very often raise an issue of access to information, as an integral part of the procedural aspect of protection afforded by Article 8. However, it is important to underline that the failure to grant access to information may give rise to a violation of this article in environmental cases, even where the individual is not seeking that information in order to enforce a civil right, as it was demonstrated in *Roche*.

[88] *Ibid*., par. 129. See also *Ledyayeva, Dobrokhotova, Zolotareva and Romashina v. Russia*, paras. 109 110.

[89] *Grimkovskaya v. Ukraine*, par. 72.

[90] *Fägerskiöld v. Sweden*, App. No. 37664/04, Decision on admissibility of 26 February 2008, par. 16.

[91] See also *Borysiewicz v. Poland*, App. No. 71146/01, Judgment of 1 July 2008, par. 53.

The European Court has recognized in its extensive jurisprudence that the need for providing information and communication on environmental hazards forms an integral part of the State's positive obligations under Article 8. It has also been established that public authorities must observe certain requirements as regards participation in decision-making process, access to justice in environmental matters and environmental impact assessment. The Court's reliance on the concept of positive obligations with regard to Article 8 has expanded significantly during the last two decades, its most important manifestations being the abandonment of the link between the State and the harmful activity and attribution of a strong preventive nature to the duties contained in Article 8.

Development of procedural aspects of Article 8 was influenced by a number of generally accepted and recognized environmental rules and principles. As correctly observed by Boyle, procedural rights are the most important environmental addition to human rights law, "as a human rights perspective directly addresses environmental impacts on the life, health, private life, and property of individual humans rather than on other states or the environment in general."[92] The growing jurisprudence of the European Court in environmental cases indicates the need to include this topic in mainstream human rights law. However, 'proceduralization' of Article 8 demonstrates a process of "greening" of existing human rights law in the absence of expressly recognized right to a healthy environment. There are two possible ways for the future expansion of environmental protection: inclusion of a separate right to a healthy environment, or further expansion of Court's jurisprudence in environmental matters. Apparanetly, it is more realistic to expect the latter scenario. Therefore, regardless of some weaknesses and inconsistencies in Court's jurisprudence, it is very important that the Court re-confirmed that the right to access to information is a free-standing procedural right under Article 8, and that it is creative enough to transform relevant environmental standards into an expansionist interpretation of this right.

[92] A Boyle (2012), 613.

CERIF: S181

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POTENTIALS AND STRUCTURE OF FISCAL DEVALUATION IN SERBIA

Fiscal devaluation is a set of synhronized policy measures with the aim to stimulate economic growth and improve economy competitiveness by simultaneous decrease of gross labor costs and increase of tax burden on consumption. The pre condition for successful fiscal devaluation is to comply with principle of fiscal neu trality. Fiscal devaluation could enhance competitiveness of the economy and con tribute to improved trade balance. Implementation of fiscal devaluation might be beneficial to both, countries which belong to a currency union and countries with a high level of public debt denominated in foreign currency. Comparative analysis pro vided potential short and long term effects of fiscal devaluations and enabled assess ment of structure of fiscal devaluation in Serbia. This article provides a framework for forthcoming debates on applicability of fiscal devaluation in Serbia and includes the potential structure of fiscal devaluation.

Key words: *Fiscal devaluation. Serbia. Competitiveness. Trade balance. Employment.*

1. INTRODUCTION

The time of economic crisis is especially adequate for fiscal policy adjustments due to the necessity to stabilize economy in short term and enable sustainable economic development in mid and long term. The pre-

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condition for effective implementation of active fiscal policy measures is acceptance of the fiscal neutrality principle. This principle signifies that the aggregate effect of fiscal policy changes must be revenue neutral and consequently not jeopardize maintenance of macroeconomic stability. Complying with fiscal neutrality principle enables creation of new solutions and might deliver Pareto improvement.

2. PRE-CONDITIONS FOR FISCAL DEVALUATION

Fiscal devaluation is a set of synhronized policy measures with the aim to stimulate economic growth and improve competitiveness of the economy by simultaneous decrease of gross labor costs and increase of tax burden on consumption. Therefore, fiscal devaluation consists of income tax burden decrease and increase of VAT (value added tax) or other types of consumption taxes. Fiscal devaluation can generate positive macroeconomic effects which are equivalent to the effects of exchange rate devaluation.[1] Namely, implementation of fiscal devaluation enables downsizing of productions costs, which in turn improves price competitiveness of domestic products at international markets.

The rationale for active fiscal policy relies within the long-lasting and prevailing negative macroeconomic effects of existing fiscal framework in a certain country. These effects can be summarized as follows:

a. negative or low rates of economic growth;
b. low share of investment in GDP (gross domestic product);
c. high and persisting rate of unemployment;
d. high ratio of gray economy to GDP and
e. long-lasting trade accounts deficit.

Although some of these effects might be decreased or neutralized in absence of any fiscal policy adjustments in mid and long-term it is very important to highlight exorbitant unnecessary losses and negative impact of these effects on economic development. Fiscal policy reforms do not guarantee anticipated results and outcomes, while different adverse effects may arise, corrupting or completely neutralizing implemented measures.

Fiscal devaluation contributes to economic growth and increased exports through two streams which strenghtens price competitiveness:

a. smaller gross labor costs allow price decrease of final products and

[1] E. Farhi, G. Gopinath, O. Itskhoki, *Fiscal devaluations*, NBER Working Paper, No. 17662, National Bureau of Economic Research 2011, 5.

b. VAT is levied on importers and is reimbursed to exporters – increased VAT rate has no negative effects on exports whatsoever.

Smaller gross costs per employee enable more opportunities for companies to invest in new technologies and equipment. These potential effects are especially relevant in capital intensive sectors. Also, in labor intensive sectors fiscal devaluation might open the possibility for hiring of new employees without putting additional pressure on the overall company costs. Fiscal devaluation could also be the remedy for high unemployment and persistent existence of unregistered workers and consequently support government efforts to decrease share of gray economy.

Countries can become more competitive if they manage to cut relative wages or if they become more productive. Productivity gains can be expected in mid and long term as results of changes in regulation and behaviour. In short term, competitiveness can be improved by depreciation of the currency in countries with flexible exchange rate regimes and by explicitly cutting relative nominal wages and prices in countries within a common currency area.[2]

Fiscal devaluation might be important for competitiveness convergence in countries which belong to monetary union, such as the EMU (European Monetary Union), with the aim to support structural reforms.[3] The same currency hinders economic growth of periphery countries of the euro zone (Greece, Italy, Portugal and Spain), which suffer extreme difficulties in restoring their competitiveness and fostering sustainable economic growth. Quantitative simulations show that revenue-neutral shifts (the fiscal neutrality principle) from the employers' social contribution toward the VAT in euro zone countries could indeed improve the trade balance, with quite sizable short-run effects.[4] This analysis emphasizes that positive effects of fiscal devaluation disappear in the long run and that such shifts rest largely on their potential to accelerate adjustment to deeper underlying problems. Fiscal devaluation is not "a substitute for deeper structural reforms of labor, product and financial markets" and can be perceived as "part of a broader package of reforms to regain external competitiveness by enhancing the flexibility of prices and wages as well the quality and variety of goods produced".[5] The examples of implement-

[2] O. Blanchard, F. Jaumotte, P. Loungani, "Labor market policies and IMF advice in advanced economies during the Great Recession", *IZA Journal of Labor Policy* 3(1) 2014, 12.

[3] P. Engler *et al*., *Fiscal Devaluation in a Monetary Union*, WP/14/201, International Monetary Fund 2014, 29 30.

[4] R. de Mooij, M. Keen, *"Fiscal Devaluation" and Fiscal Consolidation: The VAT in Troubled Times*, WP/12/85, International Monetary Fund 2012, 36.

[5] I. Koske, *Fiscal Devaluation Can it Help to Boost Competitiveness?*, OECD Economics Department Working Paper, No. 1089, OECD Publishing 2013, 6.

ed fiscal devaluation provide a framework for assessment applicability and potential effects of fiscal devaluation in Serbia.

3. EXAMPLES OF FISCAL DEVALUATIONS

Fiscal devaluation has been implemented in the following European countries in previous decades: Italy (three devaluations in the 1970s), Denmark (1988), Sweden (1993), Ireland (2002) and Germany (2007). Since the beginning of the World economic crisis it has been implemented in Spain and Finland (2010), the Netherlands (2012) and France (2014).[6]

Fiscal devaluation played an important role in the recommendations of the European Commission on tax shift in form of a fiscal devaluation in cases of Belgium, France, Germany, Italy, Latvia and Spain between the years 2011 and 2014.[7] However, it has only been applied in France and Spain. The expected effects in the short and long term are positive and might enhance restoration of competitiveness. Consequently, fiscal devaluation can be envisaged as a supporting policy for forthcoming deeper structural reforms.[8]

Simulations show that the unilateral implementation of fiscal devaluation might be the best option for a country to expand its GDP. The GDP effects become less favorable should three analyzed countries (France, Italy and Spain) coordinate fiscal devaluation. The implementation of fiscal devaluation in the entire euro zone would not be beneficial for individual member states.[9] Potential positive impact of fiscal devaluation would be smaller or completely neutralized if other countries implement same shift of fiscal policy.

Additional simulations of fiscal devaluation implementation in cases of Spain and Portugal provide important evidence on its potential effects. The key potential effects are following: improvement of trade balance, growth of exports (which surpasses the growth of imports), increase of investment, increase of employment and positive impact on GDP growth.[10] These potential effects prove high aptitude of fiscal devaluation to support macroeconomic stability improvement.

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[6] K. Bernoth, P. Burauel, P. Engler, "Fiscal devaluation: Economic stimulus for crisis countries in the euro area", *DIW Economic Bulletin* 4(10) 2014, 14.

[7] L. Puglisi, *Fiscal Devaluations in the Euro Area: What has been done since the crisis?*, Taxation Paper No 47, Office for Official Publications of the European Communi ties, Luxembourg 2014, 11 12.

[8] *Ibid*., 23.

[9] European Commission, *Study on the Impacts of Fiscal Devaluation*, Taxation Paper No 36, Office for Official Publications of the European Communities, Luxembourg 2013, 153.

[10] S. Gomes, P. Jacquinot, M. Pisani, *Fiscal devaluation in the euro area: a mod el based analysis*, ECB Working Paper, No. 1725, European Central Bank 2014, 18.

4. APPLICABILITY AND STRUCTURE OF FISCAL DEVALUATION IN SERBIA

Fiscal devaluation is especially relevant for countries that belong to a monetary union. Serbia does not belong to a monetary union and National Bank of Serbia independently governs the monetary policy. Currency depreciation is a possible policy option in Serbia and would lead to improvement of trade balance in the long run with negative effects in the short run.[11] However, currency depreciation that would generate substantial impact on trade competitiveness is not a realistic solution due to the fact that any sharper depreciation of the currency would lead to a higher public debt to GDP ratio[12] and would put additional pressure on budgetary stance. Consequently, implementation of fiscal devaluation as a substitute to currency depreciation seems to be an optimal policy endevour and might contribute to healing of underlying problems of Serbian economy and further contribute to the improvement of macroeconomic stability.[13]

As previously stated, the basic scenario for fiscal devaluation implies a revenue neutral transfer of tax burden from employers' social security contributions to VAT. A reduction of production costs should result in a drop of the prices of domestic goods. This is how consumer standard is maintained on the existing level, without being negatively affected by a simultaneous increase of VAT. Of course, *status quo* is not possible if individual net salary is cut down,[14] and/or consumption primarily relies on imported products where higher tax burden is not compensated by lower production costs. Domestic offer of adequate substitutes for more expensive imported products will cause a drop in the demand for the lat-

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[11] P. Petrović, M. Gligorić, "Exchange rate and trade balance: J curve effect", *Panoeconomicus*, 57(1) 2010, 38 39.

[12] Serbian public debt is pre dominantly denominated in foreign currency US dollars and euros, *http://www.javnidug.gov.rs/upload/Stanje i struktura/Stanje i struktura SRB_LATINICA.pdf*, last visited 15. September 2015.

[13] M. Babin, M. Erić T. Papić, "Economic Crisis in Serbia: Hanging Over the Old Cliff", *Revue europeenne de droit public European review of public law Eur. Zeitschrift des offtl. Rechts Rivista europea di diritto pubblico*, 25(1) 2013, 408 424.

[14] And vice versa, an increase of net salary increases production costs and blocks up space for price reduction. "With a flexible exchange rate, the increased demand for exports and reduced demand for imports prompted by this tax shift would cause an ap preciation of the nominal exchange rate that undoes its competitiveness impact. And even if the exchange rate is fixed, a fiscal devaluation will have no real effect if or when domestic wages adjust, as one would expect them to do: as workers find their real wage reduced by the increased VAT rate, they (or their unions) will aim to increase their nomi nal wages, moving the real producer wage back to the pre reform equilibrium.", R. de Mooij, M. Keen, 7.

ter on the domestic market, while an increased demand for domestic goods will stimulate economic growth and employment. Also, lower production costs positively affect the competitiveness of domestic suppliers compared to the foreign ones, thus enabling better placement of domestic products on foreign markets and improving the country's foreign trade balance. This is, of course, provided that the countries that import domestic products are not undergoing similar reforms at the same time.

Summa summarum, direct results of the described strategy are embodied in the reduction of foreign trade deficit and unemployment without any negative implications to the existing welfare of the population. Lower domestic production costs stimulate economic growth and foreign investment. Stricter taxation of consumption financed by funds earned in the area of gray economy, i.e. other untaxed income (such as transfers from abroad) will contribute to fiscal consolidation.[15]

It can be concluded that Serbia is an almost ideal candidate for fiscal devaluation, which is primarily implied by the following parameters: high unemployment rate,[16] significant share of gray economy in GDP,[17]

[15] In relation to this, note that in countries with high degree of corruption and low tax morale it is desirable to primarily rely on consumption taxation, instead of direct tax es, G. Ilić Popov, D. Popović "Poreska struktura i korupcija", *Anali Pravnog fakulteta u Beogradu* 1/2014, 12. Therefore, the highest corruption perceptions index among the member states of the Organization for Economic Cooperation and Development *(OECD)* in 2014 is found in Mexico, Greece, Italy, Turkey and Slovakia, Transparency Interna tional, Corruption Perceptions Index 2014, *https://www.transparency.org/cpi2014/results*, last visited 5. September 2015. In 2009, all these countries except Italy saw higher share of consumption tax in total tax revenue in relation to the average numbers among the OECD member states. Alongside Chile, Mexico and Turkey had the highest share of con sumption tax in total tax revenue among the OECD countries, OECD, *Consumption Tax Trends 2012: VAT/GST and Excise Rates, Trends and Administration Issues,* OECD Pub lishing, Paris 2012, 29. In the EU (the European Union) the highest share of indirect taxes in total tax revenue in 2012 was seen in Bulgaria, Croatia and Romania, Eurostat, *Taxation trends in the European Union, Data for the EU Member States, Iceland and Norway*, Publications Office of the European Union, Luxembourg 2014, 178. Alongside Greece and Italy, these three countries fall into the category of the EU members with the highest corruption perceptions index.

[16] According to a Labor Force Survey, in the second quarter of 2014, unemploy ment rate, which represents the share of the unemployed in the total number of active residents (employed and unemployed), amounted to 20,3%, Republički zavod za statis tiku, *http://webrzs.stat.gov.rs/WebSite/Public/PublicationView.aspx?pKey 41&pLeve l 1 &pubType 2&pubKey 2495*, last visited 6. September 2015. To compare with, at the end of January 2015, the unemployment rate in EU28 amounted to 9.8%, Ministarstvo finan sija Republike Srbije, *Bilten javnih finansija za januar 2015. godine,* Ministarstvo finan sija Republike Srbije, Beograd 2015, 11.

[17] Using the MIMIC method, the volume of gray economy in Serbia was esti mated to be at 30.1% of GDP, Fond za razvoj ekonomske nauke, Siva ekonomija u Srbiji: Novi nalazi i preporuke za reforme, rezime studije, *http://www.policycafe.rs/documents/loop/siva ekonomija u srbiji rezime.pdf*, last visited 6. September 2015.

pronounced foreign trade[18] and – constantly present for years – budget deficit.

However, it should be taken into account that such reform is quite risky, because it may lead to the deterioration of the population's existing standard of living, while the expected positive results attributed to it may fail to appear. This scenario would happen if the realized savings in labor costs were to become a profit for businesses.[19] That would block up space for price correction and the competitiveness of the domestic economy would remain at the existing level. The expected export, employment and investment increase would not appear, although higher VAT would improve the state of the treasury and lead to a fairer distribution of tax burden in the society by higher coverage of the income that escapes taxation with personal income tax. However, at the same time, that would lead to increased costs of living which is not appropriate, having in mind the current level of average net salary in Serbia, which amounts to RSD 45,601.00[20] or € 380.54.

In order to prevent the described risk, it is our opinion that fiscal devaluation should be implemented in two stages. The first one would see the increase of VAT, accompanied by the implementation of certain compensation measures that serve to maintain the population's standard. The second stage should lead to the reduction of production costs, as well as improved competitiveness of domestic manufacturers.

Considering the authors objective to use this paper to point to the idea and provide basic guidelines for the implementation of fiscal devaluation, the presentation of potential compensation measures is limited to employed persons. Whether the implementation of the suggested or alternative measures is justified and adequate in other cases, remains to be discussed separately, independently from this paper.

The reduction of employees' social security contributions (especially for pension and disability insurance) seems to be an adequate response to stricter taxation with VAT. An equal effect would be achieved

[18] In 2014, Serbia exported USD 14845.1 million, and imported USD 20609.1 million worth of goods, so the coverage of import by export in the given period totalled 72%, with a USD 5764.0 million deficit, Republički zavod za statistiku, *http://webrzs.stat.gov.rs/WebSite/public/PublicationView.aspx?pKey 41&pLevel 1&pubType 2&pubKey 3059*, last visited 6. September 2015.

[19] Precisely referring to this argument, fiscal devaluation saw great resistance and was not implemented in Portugal, L. Puglisi, 21.

[20] Average net salary in July 2015, Cekos In, Prosečne neto zarade po zaposlenom prema statističkim teritorijalnim jedinicama, *http://www.cekos.rs/prose%C4%8Dne neto zarade plate jul 2015 godine*, last visited 7. September 2015. In May 2015, the average pension paid in Serbia amounted to RSD 22,738.00 (€ 190.46), Ministarstvo finansija Republike Srbije, *Bilten javnih finansija za maj 2015. godine,* Ministarstvo finansija Republike Srbije, Beograd 2015, 9.

by reducing tax burden on salaries.[21] For these measures to be effective, it is essential to stipulate gross salary when entering a labor relationship, whereby the reduction of the given duties would automatically lead to increased net salary, thus compensating for higher consumption costs.[22]

The second component of the first stage of fiscal devaluation would imply stricter consumption taxation by means of general turnover tax. However, other tax forms are just as adequate to compensate for lower employers' contributions. What matters is that those taxes do not increase production costs, which would neutralize the savings made by businesses. Speaking of this, we particularly refer to excise taxes.[23] However, excise tax revenues might be highly volatile if the tax burden increases. Therefore, a significant increase of excise taxes might not generate enough revenues to enable fiscally neutral reform.

With the standard VAT rate of 20%[24], Serbia falls into the category of countries with moderate tax burden, compared to a majority of the EU member states. Germany, Cyprus, Malta and Luxembourg have a lower standard VAT rate. Bulgaria, Estonia, France, Austria, Slovakia and the UK are in the same category as Serbia. The remaining 18 member states have a higher standard VAT rate, led by Hungary (27%). As regards the reduced 10% rate[25], it is more complicated to make a comparison, considering that 15 member states implement more than one. We can claim with certainty that 12 member states have unique or several reduced rates under 10%, five member states have the reduced rate of 10%, mostly combined with lower rate(s), Latvia has a higher reduced rate (12%)

[21] Literature also contains mentioning of the reduction of personal income tax, L. Puglisi, 12. However, the schedular component of the personal income taxation system in Serbia is characterized by different effective tax rates whose uniform decrease implies an overall revision of the existing regulations. Also, the revenues generated by personal in come tax (which include the revenues from payroll tax) is divided between central au thorities and smaller political territorial units based on a formula established by law, Arti cle 35 (1) (1) of the Law on Financing of Local Self government, *Official Gazette of the Republic of Serbia*, No. 62/06, 47/11 and 93/12. It is questionable to which extent local self government units would agree to this approach even under the condition that there is a complex compensation procedure for outstanding revenues from the funds provided through increased VAT that belongs to the state budget, Article 2 of the Law on Value Added Tax, *Official Gazette of the Republic of Serbia*, No. 84/04, 86/04, 61/05, 61/07, 93/12, 108/13, 68/14 and 142/14. On the other hand, lack of contributions, for example for pension and disability insurance, would be simply compensated through routine prac tice of transfer to the Serbian Pension and Disability Insurance Fund.

[22] In the conditions of stipulated net salary, employer could again be the one to benefit the most from reduced employee's contributions by gaining profits at the ex pense of reduced labor costs on the equal level of net salary.

[23] In this context, literature also suggests to increase residential property taxation, R. de Mooij, M. Keen, 23.

[24] Article 23 (1) of the Law on Value Added Tax.

[25] Article 23 (2) of the Law on Value Added Tax.

while Denmark uniformly implements a standard rate of 25%. The remaining nine member states combine reduced rates lower or equal to 10% with those over 10%.[26] A comparative review shows that there is room to increase VAT rates in Serbia to the level of those implemented in the EU.

In relation to the question by how much should VAT be increased in order to compensate for deficit of employees' contributions, without jeopardizing the existing personal standard, we present some logical observations. The basis for the calculation of contributions is *gross* salary. On the other hand, the basis for the calculation of VAT is *net* consumption which cannot exceed *net* salary (which funds *gross* consumption), reduced by the accompanying VAT. In other words, the basis for the calculation of VAT is much lower than the one for the calculation of contributions, which proves that a reduction of contributions by 1% enables a proportionally higher growth of VAT while maintaining the same level of personal welfare.[27] This works for both VAT rates. However, the space for the growth of the reduced rate is somewhat smaller considering the higher share of net consumption in gross salary. Therefore, the larger the range between net consumption and gross salary, the bigger the space for VAT increase and vice versa.[28]

Since the implementation of a reduced rate serves to moderate the regressive effect of VAT, it is disputable how acceptable its growth is, above all for social reasons. However, since the ones to benefit the most from such a relief are those who do not need it,[29] it is advisable to consider other protection measures for poorer population members, such as direct subsidies or higher existential minimum alongside progressive income taxation.

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[26] European Commission, *VAT Rates Applied in the Member States of the Euro pean Union, Situation at 1st September 2015*, Taxud.c.1(2015) EN.

[27] Such transfer of tax burden would be particularly convenient for individuals who, by saving a part of net salary, avoid stricter consumption taxation, considering that the relation between consumption and savings in net salary is irrelevant for the amount of lower contributions.

[28] On the EU level, an average of 65% of final consumption is taxed by standard VAT rate, F. Borselli, S. Chiri, E. Romagnano, "Patterns of Reduced VAT Rates in the European Union", *International VAT Monitor* 1/2012, 16 17. Serbia has wider presence of taxation by means of reduced VAT rate. That is indicated by data on structure of personal consumption of households for 2014 in which expenses for food and non alcoholic bever ages on average covered a share of 38,4%, while rent, water, electric energy, gas and other fuels occupied 16,1%, Republički zavod za statistiku, *Raspoloživa sredstva i lična potrošnja domaćinstava u Republici Srbiji, 2014,* saopštenje br. 78 od 31.3.2015. godine, 1.

[29] OECD, Korea Institute of Public Finance, *The Distributional Effects of Con sumption Taxes in OECD Countries*, OECD Tax Policy Studies, No. 22, OECD Publish ing, Paris 2014, 68 69.

The second stage of the reforms would encompass the realization of the remaining element of the presented fiscal devaluation model – a reduction of employers' social security contributions, which would make room for lower costs of domestic production. A condition for this measure is a positive fiscal result of the previous stage of the reform, i.e. excess VAT revenue should improve public finances despite the deficit caused by employees' social security contributions. If the savings on labor costs would actually cause a drop in the domestic products' prices, fiscal devaluation would be a success. Otherwise, if they turn into a profit for businesses, unsuccessful fiscal devaluation would not jeopardize the existing welfare of the population.

In 2014, the total revenues from social security contributions in Serbia amounted to RSD 509,432.5 million, while RSD 409,564.2 million was collected through VAT.[30] Even if we started from the fact that the given data refers only to the contributions paid on employment relationship (which is not the case), considering that employees' contributions have a share of around 52.6% in them, it is justified to assume that the condition for the second stage of fiscal devaluation would be fulfilled. Therewith, a 1% increase of reduced VAT rate would generate 10% higher revenues from the taxation of the supply of goods and services, or import of goods in accordance with Article 23 (2) of the Law on Value Added Tax, while in the same conditions the revenues from standard VAT rate would be boosted by 5%. Therefore, proportional increase of both tax rates is a condition for a uniform growth of VAT revenues.

5. CONCLUSION

The goal of fiscal devaluation is to stimulate domestic production and make a positive impact on foreign trade balance and employment level by reducing labor costs (through lower employers' social security contributions) and introducing stricter consumption taxation. The constantly unfavorable economic situation in Serbia makes the potential benefits of such fiscal reform highly desirable. However, even though Serbia represents an almost ideal candidate for fiscal devaluation, there are certain risks it entails that need to be taken into consideration. If savings in labor costs were to become a profit for businesses, the expected effects would fail to appear. Such an outcome would deteriorate the population's already low standard of living, which is unacceptable. In order to prevent the described risk, we suggest to combine VAT increase with certain compensation measures whose goal is to maintain the existing welfare of the

[30] Ministarstvo finansija Republike Srbije, *Bilten javnih finansija za decembar 2014. godine,* Ministarstvo finansija Republike Srbije, Beograd 2014, 46.

population. Only then the remaining element of the advocated fiscal devaluation model – the reduction of employers' social security contributions – should be realized in order to reduce the domestic production costs and strengthen the competitiveness of the domestic suppliers in relation to foreign competition.

The actual effect of fiscal devaluation will depend on the scale of the reform, as well as on numerous specificities of the country that considers its implementation. Previously conducted research mostly provides evidence about positive, although modest effects of fiscal devaluation. Therefore, fiscal devaluation cannot be considered a cure that would bring economic recovery to Serbia, but it could be an addition to thorough system changes in that direction.

CERIF: H210, H300

Dr. Constantinos Vlahos*

COMMUNIS PATRIA ET *PATER PATRIAE* OU L'APPROPRIATION POLITIQUE DE L'ESPACE À ROME

In early Rome the notion of patria is a byword of the occupation of a specific geographical space by the populus, associated with a political identity of its occu pants. In this way the notion of patria designates two distinct features: territorial (the city of Rome) and social (Roman cives). In the Roman collective memory the figure of Romulus, patria's legendary founder, i.e. the (initial and) ultimate pater patriae, remained vivid until the last century of the Respublica. Subsequently all the leading politicians who contributed to the establishment of the Principate, used the notion of pater patriae as an ideological tool aiming at the establishment of a new form of patriotism, which would substitute the republican institutions by a bond of parent hood attaching the populus to the new pater patriae. In the literature of the classical jurisprudence this bond finds its correspondence to aspects of private law's pater familias: the Emperor, i.e. the incarnation of the notion of Rome, is depicted as a reflection of this privatization (appropriation) of the Respublica.

Key words: *Rome. Political theory. Ideology. Patria iuris. Pater patriae.*

Dans un fameux fragment de Callistrate, le Digeste 48.22.18, nous lisons:

'Le relégué ne peut rester à Rome, quoique cela ne soit pas exprimé dans le jugement, car elle est la patrie commune; et il ne peut non plus rester dans la ville où demeure le Prince, ou dans celle où il passe. C'est

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que seuls peuvent regarder le Prince ceux qui peuvent entrer dans Rome, car le Prince est le père de la patrie'.[1]

Pour le relégué, donc, comme le disait Yan Thomas[2], 'une interdiction de séjour dans sa ville d'origine (*patria*) impliquait tacitement une interdiction de séjour à Rome, *patria communis*, de même que dans tout autre lieu où se trouvait le Prince, père de la patrie: ce lieu à son tour était assimilé à Rome, selon le procédé courant de la fiction territoriale, qui dotait le sol de la Ville d'une véritable ubiquité'. Le savant français attachait cette fiction au cadre de la citoyenneté romaine organisée à un double degré. Née dans l'unique contexte de la municipalisation de l'Italie pendant le premier siècle av. J.C., la *communis patria* serait redevenue après l'édit de Caracalla 'celle de tous les citoyens des cités de l'Empire'.

Cette fiction territoriale de l'ubiquité de Rome rebondit sur un autre plan dans la seconde interdiction que contient le fragment de Callistrate. De même qu'il est interdit au relégué de rentrer dans Rome, il lui est interdit de séjourner dans la ville où séjourne l'Empereur. Cette fois-ci la fiction implique non seulement le sol mais aussi la personne. Car c'est alors la personne de l'Empereur qui, de par sa présence, rend fictivement le sol d'une *civitas* sol de Rome. Le *Princeps* devient symbole de l'idée de Rome et il porte celle-ci partout où il se trouve. Et tout cela pour une simple raison: car il en est le père.

Mais, cette *ratio decidendi* paraît un peu bizarre du point de vue logique. Une *ratio* du type 'car le *Princeps* est lui-même la *communis patria*' rendrait plus claire l'analogie entre les deux interdictions énoncées par Callistrate. De même que le relégué d'une cité quelconque est interdit d'entrer dans Rome, car Rome est la *communis patria*, de même lui est-il interdit de rencontrer l'Empereur dans une cité quelconque, car celui-ci *est* le symbole vivant – et mobile – de la *communis patria*. Mais, au lieu de cette *ratio*, Callistrate écrit: 'car le Prince est *le père* de la patrie'. Qu'en est-il de ce glissement logique?

La réponse ne se trouve pas dans la logique juridique mais dans l'évolution historique. La *ratio decidendi* '*quia princeps pater patriae est*' résume en une courte phrase le long parcours d'une fusion de concepts qui a déterminé le sens de l'histoire constitutionnelle de Rome. Il s'agit de la fusion du Public avec le Privé, de la transition de la République au Principat telle que celle-ci fut pensée et conceptualisée par les Romains. Dans les sources, cette transition se présente comme une appropriation

[1] D. 48.22.18: *Relegatus morari non potest Romae, etsi id sententia comprehen sum non est, quia communis patria est, neque in ea civitate, in qua moratur princeps vel per quam transit: iis enim solis permissum est principem intueri, qui Romam ingredi pos sunt, quia princeps pater patriae est.*

[2] Y. Thomas, *"Origine" et "commune patrie". Etude de droit public romain (89 av. J.C. 212 ap. J.C.)*, Paris 1996, 11 et 15 16.

politique de la *patria*, symbole par excellence de l'idée du Public, par une seule personne politique qui finira par devenir le *Princeps*. Le concept de la *patria* constitue le guide pour un autre récit de cette transition politique. C'est le récit que nous offrent la théorie politique du dernier siècle de la République et le regard historique qu'a jeté sur cette époque l'historiographie romaine.

La nature du symbolisme de la *patria* est politique. Dans le *De Legibus*, Cicéron distingue entre *patria loci* et *patria iuris*[3]. Chaque *municeps* a deux patries. De par sa naissance, la nature l'a attaché à un lieu. Cicéron désigne alors cette *patria* de *patria germana*, *patria naturae*, *patria loci*. Mais, en même temps, le *municeps* a également une seconde patrie dans laquelle il fut accepté par l'opération juridique de la citoyenneté. Cette patrie est Rome, la *patria iuris*, mais aussi la *communis patria* du fait qu'elle est partagée par tous les *municipes*.

La substance de cette seconde patrie est double. La *patria iuris* ne peut être conçue seulement comme une terre ni peut-elle être considérée seulement comme une communauté de citoyens. Elle est à la fois territoriale et sociale. Cette double consistance est due à la commune nature politique que la *patria iuris* partage avec les notions de la *res publica* et de la *civitas*. Citons à ce propos un exemple caractéristique: au lendemain de la bataille de Pharsale (août 48), Cicéron décide de retourner à Rome au lieu d'assumer la direction de l'armée de Pompée que celui-ci, vaincu par César, vient d'abandonner. 'Je suis revenu chez moi', écrira-t-il en mai 46, 'sans m'attendre à des conditions de vie excellentes, mais dans l'espoir, s'il subsistait vraiment quelque forme de la vie publique (*res publica*), de me trouver quasiment dans ma patrie, sinon, quasiment en exil. Aujourd'hui enfin, si cette *civitas* en est une, je suis un citoyen, sinon, je suis un exilé, dans une situation non moins favorable que si je m'étais rendu à Rhodes ou à Mytilène'[4]. Pour Cicéron la patrie existe tant qu'existe la constitution politique. C'est seulement sous cette condition que Rome est *patria* et qu'il est *civis* lui-même. Le cas échéant, la cité n'est plus qu'un simple *locus* et Cicéron se prive de sa qualité de citoyen comme il le serait s'il se trouvait dans un lieu quelconque d'exil.

L'explication de la double consistance de la *patria* passe par le biais de l'historisation de la légende. Pour Cicéron, l'état primitif de l'homme était marqué par son errance hasardeuse dans la seule fin de trouver sa nourriture. Sa transition de la férocité à la civilisation coïncide

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[3] *Leg.* 2.5.

[4] Cic., *Ad Fam.* 7.3.4 5: 4. *Veni domum, non quo optima vivendi condicio esset, sed tamen, si esset aliqua forma rei p. tamquam in patria ut essem, si nulla, tamquam in exsilio. (...)* 5. *(...) Nunc autem si haec civitas est, civem esse me, si non, exsulem esse non incommodiore loco quam si Rhodum aut Mytilenas me contulissem.* Traduction par J. Beaujeu, *Cicéron. Correspondance*, VII, 'Les Belles Lettres', Paris 1980, 34 35.

avec l'établissement de l'homme sur un endroit choisi pour être la base permanente de la communauté politique. 'C'est alors', dira Cicéron dans son *Pro Sestio*, 'que furent créées les choses destinées à l'utilité commune ('*res ad communem utilitatem*') que nous appelons publiques et les associations de gens qui reçurent plus tard le nom de cités (*civitates*), c'est alors que furent entourés de remparts les quartiers des maisons que nous appelons villes (*urbis*), une fois le droit divin et le droit humain inventés'[5]:la naissance de la *patria iuris* coïncide avec la fondation de l'*Urbs* et l'institution de la citoyenneté romaine.

La *patria iuris* exprime donc l'idée de l'appropriation politique de l'espace géographique par une communauté de personnes organisées en *populus*. Nous pensons aussitôt à la définition cicéronienne du *populus* comme 'multitude d'individus associés en vertu d'un accord sur le droit et d'une communauté d'intérêts'[6]. Ce procédé d'appropriation révèle la qualité de la *patria* en tant que construction socio-culturelle normalisatrice qui consolide une identité collective: à travers sa participation à la patrie juridique, le citoyen se reconnaît par rapport à un Autrui sur deux dimensions, territoriale et sociale[7]. Cette différenciation s'inscrit sur les deux composantes de la *patria* et leurs manifestations institutionnelles respectives: d'un côté la *domus* et la *militia*, séparées par le tracé du *pomerium* et de l'autre côté le *civis* et le *peregrinus*. Il faut donc voir dans le concept de *patria* l'idée d'un lieu propre de nature politique dans le sens aristotélicien du terme[8]. Mais, du fait que ce lieu propre est de na-

[5] *Pro Sest.* 42.91: *Quis enim nostrum, iudices, ignorat ita naturam rerum tulisse ut quodam tempore homines nondum neque naturali neque civili iure descripto fusi per agros ac dispersi vagarentur, tantumque haberent quantum manu ac viribus per caedem ac vulnera aut eripere aut retinere potuissent? Qui igitur primi virtute et consilio praes tanti exstiterunt, ii perspecto genere humanae docilitatis atque in geni dissupatos unum in locum congregarunt eosque ex feritate illa ad iustitiam atque ad mansuetudinem trans duxerunt. Tum res ad communem utilitatem, quas publicas appellamus, tum conventicula hominum, quae postea civitates nominatae sunt, tum domicilia coniuncta, quas urbis dicimus, invento et divino iure et humano moenibus saepserunt.* Traduction, avec quelques modifications de notre part, par J. Cousin, *Cicéron. Discours*, XIV, 'Les Belles Lettres', Paris 1965, 183 184.

[6] Cic., *Rep.* 1.39: (...) *populus autem non omnis hominum coetus quoquo modo congregatus, sed coetus multitudinis iuris consensu et utilitatis comunione sociatus.*

[7] L'identité comme représentation de soi même implique nécessairement la dif férenciation du sujet par rapport aux autres. L'identification est une action qui procède par un jeu combiné de différenciation et d'assimilation de tout sujet en regard d'autres entités individuelles ou collectives. Bien que privée de substrat spatial obligatoire, l'identité entre tout de même dans un contexte inévitable de spatialités, sans omettre que les lieux et les territoires lui fournissent souvent un ciment efficace, à la fois matériel et symbolique. Dans ce sens, G. Di Méo, "Identités et territoires: des rapports accentués en milieu urbain ?", *Métropoles* [En ligne], 1/2007, mis en ligne le 15 mai 2007, *http://metropoles. revues.org/80,* 7 8 (74 75), consulté le 27 août 2015.

[8] A propos de ce concept v. A. Cauquelin, "Aristote. Entre les causes et les choses", T. Paquot, C. Younès, *Espace et lieu dans la pensée occidentale. De Platon à Nietzche*, Paris 2012, 29 41.

ture politique, il trace une autre ligne de distinction en son intérieur, celle entre le Privé et le Public, entre vie privée et vie publique, voire entre intérêt privé et intérêt public. Cette Topique de la *patria* fait naître les préceptes du patriotisme. Pour Cicéron, il faut d'avantage aimer la *patria iuris* "car c'est à travers elle que le nom de '*res publica*' qualifie la cité entière"[9]. Le dévouement absolu à la patrie constitue la condition nécessaire pour que la vie dans la cité maintienne son caractère public, en servant ainsi l'utilité commune, bref, pour que la *patria* soit conservée comme identité politique collective. Le patriotisme, entendu comme dévouement absolu à l'intérêt commun, constitue le ciment qui lie entre-elles les notions de la *patria iuris* (identité politique), de la *civitas* (environnement politique, territorial et social) et de la *res publica* (ensemble des actes politiques).

Le nom de *pater patriae* occupe un lieu particulier dans la Topique du Privé-Public que nous venons de rencontrer. Il y a eu un *pater patriae* modèle et nous le connaissons tous. Selon Tite-Live, Romulus, lors de la dernière *contio* du peuple romain, qu'il convoqua avant son ascension aux cieux, fut salué à l'unanimité comme *parens urbis Romanae*[10]. Le témoignage des Annales d'Ennius, repris par Cicéron dans sa *République* est encore plus riche: le *populus Romanus* commémorait Romulus comme *pater*, *genitor, custos patriae*[11]. Et ce fut un véritable *pater patriae* celui qui a institué les deux composantes nécessaires de la patrie, l'*Urbs* et le *populus*. Constitution de la cité, constitution du peuple, bref, constitution du Public.

C'est précisément par rapport à ce point que la figure du *pater* ou du *conditor patriae* subit une profonde altération pendant le dernier siècle de la République. Appien est très décis dans l'introduction de ses Guerres Civiles quand il décrit sommairement les causes de la chute de la République: "Chaque fois" dit-il "qu'un groupe s'emparait de Rome, les autres faisaient une guerre de rhétorique contre leurs opposants, mais en réalité ils faisaient la guerre contre la patrie; car ils envahissaient Rome comme s'ils envahissaient l'ennemi". Et il devient encore plus perspicace à propos du triumvirat de l'an 43 quand il dit des Triumvirs qu'ils "se partagèrent l'empire des Romains comme s'il s'agissait d'une propriété privée"[12].

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[9] Cic., *Leg.* 2.5: (...) s*ed necesse est caritate eam praestare <e> qua rei publicae nomen universae civitatis est,* (...).

[10] Liv. 1.16.3.

[11] Cic., *Rep.* 1.64 [Enn., *Ann.* 116 (118)]: (...) *simul inter sese sic memorant, "O Romule, Romule die, qualem te patriae custodem di genuerunt! O pater, o genitor, o sanguen dis oriundum! Non eros nec dominos appellabant eos quibus iuste paruerunt, denique nec reges quidem, sed patriae custodes, sed patres, sed deos; nec sine causa; quid enim adiungunt? "Tu produxisti nos intra luminis oras*". *Vitam, honorem, decus sibi datum esse iustitia regis existimabant.*

[12] App., *B.C.* 1.2 et 1.5.

Ces deux remarques d'Appien résument l'évolution dramatique de la *patria*, provoquée par l'ébranlement de sa Topique: la *domus* serait devenue *militia*, la *res publica* serait traitée par les chefs des partis comme une *res privata*.

Cette profonde altération fut réalisée par le biais des deux composantes de la *patria*, la terre et le peuple. La crise politique de la République a pris l'allure d'une crise agraire et ceci n'est pas une coïncidence. Les temps des Gracques sont marqués par la conviction de chaque partie que son opposant politique s'approprie de façon injuste la *patria* dans son aspect territorial[13]. Et si, jusqu'à 111 av. J.C., les dispositions des lois agraires conservent plus ou moins un caractère abstrait, donc public, tant en ce qui concerne les procédures qu'en ce qui concerne les titulaires de la terre distribuée, il n'en va pas de même pour la période qui suit la *lex agraria* de cette année[14]. La distribution des terres deviendra alors un prix destiné à rembourser les vétérans de tel ou tel chef de parti. Or ces vétérans viennent des armées dites privées, car fondées sur la levée volontaire des partisans de la veille. Ainsi, le sol de la *patria* devient rémunération en même temps que le citoyen devient soldat qui combat ses concitoyens dans sa propre *domus* politique, envisageant son remboursement par son chef. Au sein de ce phénomène, la figure du *pater patriae* subit, elle aussi, une profonde altération qui reflète la privatisation de la vie politique, voire de la *res publica* au profit des finalités politiques personnelles.

Après sa victoire contre les Cimbres, Marius fut salué comme troisième fondateur de Rome, à la suite de Romulus et Camillus[15]. Mais ce n'est que son propre armée de volontaires qui le salua ainsi, une armée qui allait bénéficier l'année suivante de la loi agraire d'Apuleius Saturninus[16]. A son tour, Sulla remboursera lui aussi ses vétérans en leur assurant des terres confisquées aux proscrits. Et il sera lui aussi salué comme sauveur et père de la patrie lors de la procession triomphale de 81. Ici, il ne s'agira que d'une caricature: ce furent les exilés acceptés de nouveau à Rome qui le saluèrent ainsi, une salutation mise en scène par le dictateur lui-même qui cherchait à renforcer sa popularité. C'est ce qui conduira plus tard M. Aem. Lepidus à appeler Sulla comme une "contrefaçon" de Romulus[17].

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[13] Cf. App., *B.C.* 1.10.

[14] V. à ce propos, A. Lintott, *Judicial reform and land reform in the Roman Re public. A new edition with translation and commentary, of the laws from Urbino*, Cam bridge 1992, 55 58.

[15] Plut., *Mar.* 27.5.

[16] *Vir. Ill.* 73.1: *Lucius Apuleius Saturninus, tribunus plebis seditiosus, ut gratiam Marianorum militum pararet, legem tulit, ut ueteranis centena agri iugera in Africa diui derentur.*

[17] Plut., *Sull.* 34.1; Sall., *Hist.* 1.55.5.

Selon Appien, derrière les honneurs sans précédent rendus à César lors du triomphe de 45, parmi lesquels figurait sa salutation comme '*pater patriae*', il fallait voir la crainte du peuple à l'égard d'un maître redoutable, mais aussi l'espérance à la clémence de celui-ci[18]. L'avertissement de l'historien est pourtant exagéré. La clémence ferait le complément nécessaire à la politique populaire de César, mise en œuvre dès son premier consulat en 59[19]. César deviendra très tôt '*anèr khrématopoios*', 'homme producteur d'argent', au dire de Dion Cassius, qui cite à ce propos les paroles de César lui-même: 'deux choses, disait-il, assurent la constitution, la sauvegarde et l'augmentation du pouvoir: les troupes et l'argent (...); vienne à manquer n'importe laquelle des deux, l'autre disparaît du même coup'[20].

Une lettre de César, adressée en mars 49 à ses collaborateurs G. Oppius et L. Cornelius Balbus, dévoile un véritable programme de domination politique fondé sur la *misericordia* et la *liberalitas*[21]. *Il s'agit d'adopter une nouvelle attitude politique qui aspire au consentement de tous et, par le biais de celui-ci, à la durabilité du pouvoir. Déterminé à ne pas suivre les exemples de Marius et Sulla, César voit dans la miséricorde, voire la clémence, une 'nova ratio vincendi*' qui assure la légitimation de son pouvoir par le consensus général. Or, ce souci pour la nouveauté témoigne la quête d'une légitimation alternative d'un pouvoir arbitraire, car non conforme aux institutions républicaines. Le manque de légitimité sera guéri par le parcours à l'impératif moral: la clémence

[18] App., *B.C.* 2.106 in fin.

[19] Par la proposition d'une réforme agraire ambitieuse: Dion Cass. 38.1.3 6; 38. 7.3; App.,*B.C.* 2.10. V. à ce propos, C. H. Crawford, "The lex Iulia agraria", *ATHENAE UM*, 77/1989, 179 190; Ch. Carsana, "Riflessioni sulle *leges Iuliae Agrariae* del 59 a.C.: giuramento collettivo e principio di inabrogabilità nel II libro delle guerre civili di Appi ano", *Rendiconti dell'Academia Nazionale dei Lincei. Mor.*, ser. 9, XII/2001, 259 274; G. M. Oliviero, "La riforma agraria di Cesare e l'*ager Campanus*", G. Franciosi, *La romani zazione della Campania antica.* 1, Napoli 2002, 269 286.

[20] Dion Cass. 42.49.4 5.

[21] Cic., *Att.* 9.7c: [1] *Gaudeo me hercule vos significare litteris quam valde probetis ea quae apud Corfinium sunt gesta. Consilio vestro utar libenter et hoc libentius quod mea sponte facere constitueram ut quam lenissimum me praeberem et Pompeium darem operam ut reconciliarem.* Temptemus hoc modo si possimus omnium voluntates reciperare et diuturna victoria uti, quoniam reliqui crudelitate odium effugere non po tuerunt neque victoriam diutius tenere praeter unum L. Sullam quem imitaturus non sum. Haec nova sit ratio vincendi ut misericordia et liberalitate nos muniamus. *Id quem ad modum fieri possit non nulla mi in mentem veniunt et multa reperiri possunt. De his rebus rogo vos ut cogitationem suscipiatis. N. Magium Pompei praefectum deprehendi.* [2] *Scil icet meo instituto usus sum et eum statim missum feci. Iam duo praefecti fabrum Pompei in meam potestatem venerunt et a me missi sunt. Si volent grati esse, debebunt Pompeium hortari ut malit mihi esse amicus quam iis qui et illi et mihi semper fuerunt inimicissimi, quorum artificiis effectum est ut res publica in hunc statum perveniret.*

constitue un *beneficium* qui devra être récompensé par la reconnaissance[22].

Les *optimates* avaient beau essayer de terrifier le peuple en présentant César comme un nouveau Marius ou Sulla, la crainte se dissipait chaque fois par des promesses et des évocations à la clémence montrée à l'égard de l'ennemi politique[23]. A la veille de la bataille de Pharsale, César incitera ses légions à se battre contre l'ingratitude et l'injustice de ceux qui ont voulu dissiper, sans aucun triomphe et sans aucune récompense, une armée qui avait soumis à la *patria* quatre cents nations après dix ans de peines sur les champs de bataille. S'étant prouvés indignes de sa clémence, les *optimates* étaient maintenant passés dans la sphère du *nefas*. Leur ingratitude faisait contraste à 'la protection, la fiabilité et la générosité des prestations' de César[24]. Les soldats de celui-ci étaient invités à faire part d'un nouveau patriotisme, destiné à protéger une nouvelle *patria* qu'incarnait désormais un seul maître politique, grâce à ses vertus qui rappelaient l'idéal père-protecteur.

C'est cette 'privatisation' de la *patria* qui sera célébrée en 45. L'admirable série de titres honorifiques rendus à César symbolise le transfert de la *res publica* aux mains du maître unique. Afin d'éviter le détestable souvenir de la royauté, ce dernier sera reconnu comme le *pater* universel. Mais, désormais tout marquera sa prééminence: à part les pouvoirs exorbitants, il ne faut pas oublier les symbolismes qui s'inscrivent dans le

[22] Par ailleurs, la *clementia* avait un sens politique de toute importance en tant que vertu collective du peuple romain faisant partie du *vetustissimus mos:* Liv. 33.12.7; Cic., *Rep.* 2.26; Id., *Marc.* 12. Initialement relevant de la pratique de la guerre, la clémence conduit au choix conscient du vainqueur de ne pas annihiler totalement le vaincu mais de le traiter avec modération. Cette vertu est progressivement transmise à l'exercice du pou voir politique civil, désignant le magistrat modéré qui s'intéresse au consentement des sujets. Selon Cicéron, *Off.* 1.88, toute exception à un exercice clément de l'*imperium* doit être fondé à l'utilité commune et non pas à l'intérêt du magistrat. V. aussi, M. Ducos, "César et la clémence", *ACD*, XL XLI/2004 2005, 117 127.

[23] V. l'exemple caractéristique de la courte visite de César à Rome (31 mars 6 avr. 49), quelques semaines après la lettre de celui ci que nous venons de voir (supra, n. 21) et trois mois après la traversée du Rubicon. Selon Appien, César trouvera 'une multitude terrifiée, qui se souvenait des maux de l'époque de Marius et de Sulla': App., *B.C.* 2.41; Dion Cass. 41.15.1. Mais, quelques chapitres plus haut, Appien parle d'un Sénat en pa nique qui, en attendant l'arrivée de leur opposant politique, décrète des prières publiques, qui étaient traditionnellement prêtées en temps de danger: App., *B.C.* 2.36. César calmera les citoyens en leur rappelant la libération de L. Domitius et en leur promettant des presta tions. A la fin de la même année, il retournera à Rome où il sera élu dictateur par le peu ple, et non pas par un magistrat *cum imperio* comme c'était la règle républicaine: App., *B.C.* 2.48. Mais cette irrégularité sera aussitôt éclipsée par une série de mesures pour le soulagement financier des débiteurs et pour la restitution de la justice: Caes., *B.C.* 3.1; Plut., *Caes.*37.1 2; App., *B.C.* 2.48; Dion Cass. 41.37 38; Suet., *Div. Iul.* 42.

[24] App., *B.C.* 2.73 74. V., dans le paragraphe 74, le conseil de César à ses soldats d'éviter la cruauté contre les soldats de Pompée: il s'agit de la modération qu'impose la *clementia*.

tissu urbain de Rome afin d'évoquer l'appartenance du Public au *pater patriae*[25].

Après le meurtre de son père adoptif, le jeune Octave négligera les conseils de faire profil bas et de retourner à la sécurité de la vie privée. L'héritage de César était beaucoup plus riche que le contenu matériel de son testament. La *nova ratio vincendi* de la *liberalitas-clementia* sera reprise, cette fois-ci enrichie par la nécessité morale de venger le meurtre d'un père qui était aussi le *pater patriae*. Octave veillera à se montrer comme patriote désintéressé, voire altruiste, comme l'homme que la *Fortuna* a voulu charger de la protection du peuple romain contre tout usurpateur des bénéfices que César avait fournis à ses enfants-concitoyens tout au long de sa vie. Et il se confirmera très tôt comme le successeur digne de l'héritage moral de son père, avec la liquidation immédiate du patrimoine de César ainsi que de son propre patrimoine et avec la distribution du prix au peuple, puis avec des promesses d'argent et de terre aux soldats[26]. Le critère de la descendance glissera vite de l'éthique à la politique. Il suffit de penser aux évènements de 43, quand l'armée d'Octave exigera de lui de les conduire à Rome afin qu'ils l'élisent eux-mêmes consul, à travers 'une élection extraordinaire, du fait qu'il était le fils de César'[27]. Les paroles qu'Octave leur avait peu avant adressées sont révélatrices:

'Quelle garantie avons-nous, vous concernant les terres et l'argent que vous avez reçus de lui (César), et moi concernant mon propre salut, quand les parents de ses meurtriers règnent ainsi en maîtres dans le Sénat ? En ce qui me concerne, j'accepterai la fin, quelle qu'elle soit, qui viendra à m'échoir: il est même beau de subir le pire quand on prend fait et cause pour un père. Mais je crains pour vous, si nombreux et si méritants, qui êtes en danger par amour de mon père et moi ! (...) La seule planche de salut que je vois maintenant pour vous et pour moi, ce serait que je fusse élu consul par votre intercession. Tout ce qui vous a été donné par mon père sera ainsi confirmé, les colonies qui sont encore dues viendront s'ajouter à celles qui existent déjà, et toutes les récompenses seront intégralement versées. Et moi, après avoir traduit en justice les meurtriers, je pourrais bien mettre fin pour vous aux autres guerres'[28].

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[25] En printemps 45, le Sénat saluera César comme *Liberator* et décidera de consacrer un temple à la *Libertas*. Cette décision sera suivie par la consécration des temples de la *Concordia Nova* et de la *Clementia Caesaris:* Dion Cass. 43.44.1, 44.4.5 et 44.6.4. A ces symboles il faut aussi ajouter le *forum Iulium*, la *Cura Iulia* et les *Rostra Caesaris*, monuments d'une République qui porte désormais la signature du maître unique. V. à ce propos, R. Sablayrolles, "La guerre des Romes plus difficile que la guerre des Gaules ? La politique urbaine de César: de *ornanda instruendaque urbe*", *Pallas*, 76/2008, 353 381 et notamment 355 362.

[26] App., *B.C.* 3.23.

[27] App., *B.C.* 3.88.

[28] App., *B.C.* 3.87, traduction par P. Goukowsky, *Appien. Histoire Romaine*, X, 'Les Belles Lettres', Paris 2010, 80.

Les destins d'Octave et des soldats se croisent sur la nécessaire survie de l'œuvre morale et matérielle de César. Le seul expédient à ce propos est d'assurer à la lignée de descendance l'accès au pouvoir politique[29]. Instinct de survie, sentiment de sécurité, devoir moral du fils à l'égard du père, voilà les nouveaux fondements d'un pouvoir qui lie son titulaire et ses sujets au sein d'un rapport personnel et qui se substitue aux institutions républicaines; d'un pouvoir qui se déplace entièrement vers le milieu du Privé.

Beaucoup plus tard, en janvier 27, cette appropriation du Public résonne dans le discours qu'Octave adressera au Sénat quand il rendra la *res publica* aux membres de celui-ci[30]. C'est un pouvoir absolu et perpétuel que celui qui est restitué, un pouvoir qui avait été concédé à Octave par tous et qui avait été exercé dans l'intérêt de tous, voire en faveur de la patrie, mais sans aucun profit personnel pour son titulaire. A part le fait, dirions-nous, que ce pouvoir, cette *res publica*, bref, cette *patria* étaient entre-temps devenus les siennes à travers leur formulation selon son propre gré. Ainsi, Octave conclut-il son discours avec un avertissement. La patrie étant à ce moment-là dans son état optimal, augmentée plus que jamais tant en terres qu'en peuples et pacifiée *domi* et *militiae*, elle devait être conservée intacte. Les nouveaux titulaires du pouvoir devaient suivre la même voie que celle suivie par leur prédécesseur s'ils voulaient la maintenir dans le même état. Un avertissement exprimé sous forme de vœu, mais qui constituait en réalité un gage inscrit pour assurer le patronage de la *res publica* restituée. Personne ne se trompait: il n'y avait qu'un seul homme ayant le savoir-faire pour maintenir l'"*optimum status rei publicae*': son propre '*auctor*'[31].

La *res publica* fut, certes, restituée en 27 mais la République n'a jamais resurgi. Le long processus de son appropriation personnelle durant presqu'un siècle avait fait naître une nouvelle identité politique, voire une nouvelle *patria* qui s'était fatalement détachée des institutions républicaines pour être soumise à la maîtrise d'une seule personne. Ce phénomène devient un réflexe politique qui se manifeste dans les réactions du Sénat à l'abdication d'Octave. Au lieu de permettre à celui-ci de retourner à la vie privée, le Sénat l'arrosera d'une série de pouvoirs et de titres exceptionnels, parmi lesquels celui d'*Augustus*[32]. Une nouvelle période s'ouvre à partir de 27 pendant laquelle, chaque fois qu'Auguste procèdera à une confirmation symbolique de la République, le Sénat répondra par l'attribution à celui-ci de nouveaux pouvoirs qui confirment sa primauté politi-

[29] Il ne s'agit pourtant pas d'une succession dynastique mais d'une descendance fondée sur le mérite moral et l'intérêt pour la prospérité du peuple.

[30] Dion Cass. 53.3 10.

[31] Cf. Suet., *Div. Aug.* 28.2.

[32] Dion Cass. 53.11.4 12.8, 53.16.2, 53.16.6 8.

que quasi-monarchique[33]. Pendant cette période, la République se scinde en deux sphères, une traditionnelle qui est celle de ses organes institutionnels et l'autre, nouvelle, qui appartient à Auguste et qui se compose des nouveaux pouvoirs n'appartenant au régime républicain que de nom. Cette nouvelle condition politique, de nom républicain mais de substance monarchique, fut construite sur le fondement idéologique du *pater patriae*, justement pour éviter le tabou du retour à la monarchie[34]. Mais cette *patria* n'était plus le symbole par excellence de la *res publica*, elle était une patrie repensée, reformulée et, finalement, née par le *Princeps Augustus*, avant que celui-ci ne décide de la léguer au peuple romain avec, tout de même, son mode d'emploi à lui.

En février 2 (av. J.-C.) Messala saluera Auguste comme *pater patriae*, au nom du Sénat, mais aussi du peuple Romain. Le *Princeps*, les yeux en larmes répondra: 'Pères conscrits, mes vœux sont accomplis; que pourrais-je encore demander aux dieux immortels, sinon que ce consentement que vous éprouvez à mon égard soit maintenu jusqu'à la fin de ma vie ?'[35]. Le pouvoir politique, si violemment convoité pendant le dernier siècle de la République, si maladroitement approprié par des *homines novi*, pouvait maintenant resurgir dans le calme d'un environnement familial, dans lequel la figure paternelle de l'Empereur avait pacifiquement absorbé les deux composantes de la *patria iuris*, Rome et ses citoyens. La *ratio decidendi* '*quia princeps pater patriae est*' que nous avons rencontré chez Callistrate (D. 48.22.18) devient maintenant plus facile à comprendre. C'est cette absorption, cette appropriation de la *patria* par son *pater* symbolique, l'Empereur, qui faisait rebondir la fiction territoriale de Rome, *communis patria* chez sa propre personne.

[33] Ainsi, en 23, quand Auguste fera élire consul L. Sextius, ancien supporteur et camarade de Brutus, le Sénat lui attribuera la *tribunicia potestas* et l'*imperium consulare* perpétuels ainsi que le *ius agendi cum Senatu:* Dion Cass. 53.32.4 5. Les honneurs de 19, renouvellement de l'*imperium consulare*, nomination à la *censura* et la *cura morum* pour cinq ans, prières pour une fonction législative à libre discrétion, suivront l'intervention d'Auguste pour l'élection comme consul de Q. Lucretius, dont le nom avait été compris dans les listes des proscrits du Triumvirat: Dion Cass. 54.10.

[34] V. à ce propos, W. Eder, "Augustus and the Power of Tradition", K. Galinsky, *The Cambridge Companion to the Age of Augustus*, Cambridge University Press, Cam bridge 2005, 27 etc. et notamment 31 32.

[35] Suet., *Aug,* 58.2. Pour le rôle du consentement universel et du titre *pater patriae* à l'établissement du pouvoir du *Princeps*, v. C. Ando, *Imperial Ideology and Provincial Loyalty in the Roman Empire*, University of California Press, Berkeley Los Angeles 2000, 146 etc. et 398 etc.

CERIF: H180, H300, S112

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SECULARITY AND RELIGIOUS NEUTRALITY IN THE CONTEXT OF DEMOCRACY ORIGINS AND CONCEPTS

The paper aims to reflect on utility of principles of future articulation of church state relations in democratic political systems, particularly in Western de mocracies, especially with regard to the requirement that the state and law be secu lar. Secularity was born and grew in the shelter of the Christian philosophical tradi tion, not only because that tradition assumed respect for human dignity and funda mental freedoms, but also because the Christian doctrine of two empires served as fertile ground for decoupling of politics and religion. Modern day Western democ racy also grew with its roots in Christian heritage and tradition. Consideration is given to the arguments contained in the concept of post secular society, proposed by Habermas, and in the theses of Pope Benedict XVI, which both suggest that secular ity is not an end in itself, as well as that religion provides inner bonds of the society, in terms of identity, solidarity, values, political motivation, that are indispensable for the ability of a society to enjoy democratic process. Particular attention is given to understanding the encounter between Western democracy and Islam, as well as to the question whether secularization of Western democracies can proceed further, or should it backtrack, if democratic standards attained in the West are to be preserved and furthered? Out of the three actualized paradigmatic models of secularity in de veloped democracies of the West those of France, the U.S., and Germany key legal aspects of the last two, which both recognize the role of religious organizations in public life, are also considered. The findings shall be employed for a practical purpose: determining which concept, secularity or religious neutrality of the state, can be more useful for conceiving church state relations in democratic political sys tems, political those belonging to the Western type of democracy, in the future.

Key words: *Secularity. Neutrality. Post secular. Church state cooperation. Corporative Religious freedom.*

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1. INTRODUCTION

The objective of this paper is to reflect on relative utility of principles of articulation of church-state relations in democratic political systems in the future, especially with regard to the requirement that the state and law be secular. Particular consideration is given to understanding the encounter between Western democracy and Islam, as well as to the question whether secularization of Western democracies can proceed further, or should it backtrack, if democratic standards attained in the West are to be preserved and furthered? The findings shall be employed for a practical purpose: determining which concept, secularity or religious neutrality of the state, can be more helpful for resolving these dilemmas, both in theory and in practice.

In the second part a conceptual and historical background of secularity shall be presented, including a differentiation between French *laïcité* and the American concept of separation of church from state, as well as an assessment of the interplay between concordats and secularism. In the third part a selection of theoretical and real-life developments that are deemed indicative of the direction in which secularity may evolve in the future is provided. The fourth part entails a presentation of key elements of contemporary German and U.S. systems of church-state relations, not only because both cases stand on the opposite end of spectrum of actualized models from the exigencies of strict secularism, but also because the concept of religious neutrality of the state is emphasized in both systems.

2. SECULARISM CONCEPTUAL AND HISTORICAL BACKGROUND

A claim by Casanova seems to provide a useful perspective on secularism and secularity. He asserted that secularism "is not an end in itself", but instead "a means to some other end, be it democracy or equal citizenship or religious pluralism". The instrumental character of the phenomenon Casanova referred to as secularism led him to the conclusion that secularism "ought to be constructed in such a way that it maximizes the equal participation of all citizens in democratic politics and the free exercise of religion in society", as well as that "one cannot have democracy without freedom of religion."[1] The latter claim presupposes that majority, or a significant percentage of citizens in subject political community, are believers.

[1] J. Casanova, "The Secular and Secularisms", *Social Research* 4/2009, 1062.

2.1. Terminological disambiguation: secularism, secularization and secularity

The idea of secular state was born and grew side by side with the concept of individual rights. It emanated from the United States of America and the French Revolution to modern-day democratic countries. The human rights' claim to universal validity generated a similar claim of secularity.

On the philosophical and sociological plane, the process of *secularization* is associated with modernity, as well as with the decoupling of politics from religion. Furthermore, in states with the republican form of government, i.e. in those in which sovereignty was not embodied in a constitutional monarch, secularity of the state, i.e. its separation from the church, amounted to assertion of that state's sovereignty.[2]

Some authors emphasize that secularization as a process may only qualify a society at large, and not a particular state,[3] probably because states usually may or may not be regarded as having attained the quality of being secular (lay). It is widely accepted that modern-day secularization began in Europe and has remained a predominantly European phenomenon. Notable authors have perceived the fact that secularity, stripped down to the requirement of separation of church from state, is peculiar to modern Western democracies of Christian tradition.[4] Certain authors regard Christian tradition as the precondition of secularization, having regard to the doctrine of two separate kingdoms – the spiritual and the worldly government.[5]

Allegiance to secularity is pervasive in modern-day democratic societies. However, the understanding of its contents diverges between two distant meanings – while most societies claim that their political communities are secular simply because they are separated from religious influence, some societies require that political life and exercise of public authority remain completely blind to the existence of religion, while other conceive secularity primarily as reduction of religion to private sphere.

For the benefit of easier understanding, a terminological differentiation should be made between *secularism,* as a doctrine requiring strict

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[2] Patrice Canivez, "Le concept de laïcité", *L'Europe à venir: sécularisation, justice, démocratie* (eds. Emilian Cioc, Ciprian Mihali), Actes de l'Université d'été du réseau OFFRES (Cluj, 3 13 septembre 2006), Cluj Napoca, Idea Design & Print, 2010, 3 13, 5.

[3] P. Canivez, 42, 43.

[4] Vincent P. Pecora, *Secularization and cultural criticism: religion, nation, and modernity,* The University of Chicago Press, Chicago London 2006, 9.

[5] Ronan McCrea, "How to Hobble Religion", Aeon, 17 June 2013, *http://aeon.co/magazine/society/ronan mccrea secular europe/,* 13 October 2015.

separation of state and church, and *secularity*, understood as quality reached at certain level of separation of church from state.[6] If such terminological differentiation is adopted, the reason for claiming that *secularism* has plenty of meanings ceases, since it becomes possible to ascribe the existence of multitude of models of church-state relations to varied assessments of what level of *secularity*,[7] perceived as quality of a concrete legal system, is required in a particular political community.

2.2. Two paradigms of church-state separation: the USA and the French Republic – similarities and differences

Full-fledged secularism prescribes that churches and religious communities should be treated by the state as any other citizens' associations gathered around phenomena of thought and conscience. Such approach is championed by the United States of America and France, though the two differ greatly in respect of origins of their present-day standards.[8] Both

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[6] On the differentiation between secularism and secularity see more Sima Avramović, Dušan Rakitić, "Understanding secularity in a post communist state: case of Serbia," *Oesterreichisches Archiv für Recht und Religion* 2/2012, 284 314.

[7] In the academic literature there are definitions of *secularism* and *secularity* that are more or less different or more elaborated than those offered in this paper, e.g. for Casanova *secularism* denotes "a whole range of modern secular worldviews and ideolo gies that may be consciously held and explicitly elaborated into philosophies of history and normative ideological state projects..." José Casanova, "The Secular and Secular isms", *Social Research* 4/2009, 1051; Kosmin relies on a markedly different set of mean ings: "Since *Secularity...* involves individual actors' personal behavior and identification with secular ideas and traditions as a mode of consciousness. *Secularism ...* involves or ganizations and legal constructs that reflect the institutional expressions of the secular in a nation's political realm and public life." Barry A. Kosmin, "Contemporary Secularity and Secularism", *Secularism & Secularity Contemporary International Perspectives* (eds. B. A. Kosmin, A. Keysar), Institute for the Study of Secularism, Trinity College, Hartford 2007, 1.

[8] The French philosophical and constitutional tradition is proud of the concept of *laïcité*, which assumes complete independence of church and state from each other, order ing the state not to recognize or support or fund any exercise by the church of a function that belongs to the realm of public authority (public education, civil status, etc.). While the idea of separation of church from state was for the first time brought forward by the French Revolution, the 19th c. France continued to adhere to the concordat system, where as *laïcité* was brought into life only in 1905, with the enactment of the *Loi relatif a la séparation des Eglises et de l'Etat.* In the United States, the constitutional grounds for separation of church and state were established only due to a novel interpretation of the First Amendment within the Bill of Rights, that had originally served as a safeguard against the federal government's meddling into establishment of religion at the level of states. It was only in 20th c. that the predominantly Protestant elites among the politicians and the judiciary pushed towards an interpretation that would require strict separation of church and state at all levels of governments, as a safeguard against the perceived threat that Catholicism may seek establishment in predominantly Catholic states. "Separation of Church and State", *The Boisi Center Paper on Religion in the United States,* Boston Col

political communities were founded on civic, rather than on ethnic identity of their citizens. This may have required that building of political identity and loyalty in both cases be focused on the state, and, consequently, that the church be accorded as little influence as possible in the realm of political life. Furthermore, the constitutional systems of both countries were the first among the modern-day constitutions to promote and purport to protect individual rights due to their intrinsic value, and not merely as key safeguard against overreaching by the government. Finally, since the form of government of both countries is republican, secularity of the state in both cases has been perceived in the historical perspective as one of the cornerstones of their sovereignty, in contrast to traditional religious legitimacy of most monarchical governments.

In the United States, the role of religion in public and social life is considered to be far stronger than in Europe, though it is also receding under the pressure of strict secularism.[9] France does not accord to churches and religious communities a role in political affairs, nor in the exercise of public functions. Several reasons for the perceived discrepancy may be conceived. Philosophical and constitutional discourse in the United States has never abandoned the religious provenance of basic human rights and fundamental freedoms, whereas in France these were perceived from the outset as phenomena based on human rationality. Pope Benedict XVI put forth another explanation: the US model of church-state relations assumed independence of church from state and vice versa, and abstention of the church from political institutions, but also abstention of the state from cultural and social life, as well as facilitation of church's role in those realms by the state.[10]

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lege, Boisi Center for Religion and American Public Life, 10, *https://www.bc.edu/content/dam/files/centers/boisi/pdf/bc papers/BCP ChurchState.pdf*, 13 October 2015. On the more origins of *laïcité* see more Patrice Canivez, "Le concept de laïcité", *L'Europe à ve nir: sécularisation, justice, démocratie* (eds. Emilian Cioc, Ciprian Mihali), Actes de l'Université d'été du réseau OFFRES (Cluj, 3 13 septembre 2006), Cluj Napoca, Idea Design & Print, 2010, 3 13; "Church and State Issues in the United States", *Encyclopedia of Religion and Society,* Willam H. Swatos Jr. (ed.), Hartford Institute for Religion Re search, Hartford Seminary, Altamira Press, Walnut Creek 1998, *http://hirr.hartsem.edu/ency/csrelations.htm,* 13 October 2015.

[9] Joseph Ratzinger Pope Benedict XVI, Marcello Pera, *Without Roots, The West, Relativism, Christianity, Islam,* Basic Books, New York 2007, 107 120.

[10] "This is a separation that is conceived positively, since it is meant to allow reli gion to be itself, a religion that respects and protects its own living space distinctly from the state and its ordinances. This separation has created a special relationship between the state and the private spheres that is completely different from Europe. The private sphere has an absolutely public character. This is why what does not pertain to the state is not excluded in way, style or form from the public dimension of social life". Joseph Ratz inger Pope Benedict XVI, Marcello Pera, *Without Roots, The West, Relativism, Christi anity, Islam,* Basic Books, New York 2007, 111.

Canivez proposed a historical perspective on the differences between the French model of applied secularism – *laïcité*[11] – and the Anglo-Saxon concept of religious tolerance. The Anglo-Saxon concept of religious tolerance developed in, and spread from England which, in spite of having a state church, recognized religious pluralism. Canivez referred to such religious pluralism as to one that has been arrived at *a posteriori*, in contrast to the model of laïcité which *a priori* enables religious pluralism in a society. The same author points out that the Anglo-Saxon model of religious tolerance serves well the present-day Islamic states, which resort to it in order to enable religious pluralism in their societies while at the same time preserving Islam as their official faith.[12] While a state church has never existed in the United States, the same concept of religious tolerance seems to have fitted perfectly the model in which religion played a recognized role in public and social life.

2.3. Interplay of rigid secularism and concordats

The secularist standpoint is opposed to execution of concordats on both formal and content-related grounds. The fact that concordats are bilateral international treaties to which the counterparty of the state is the Holy See contravenes secularist view that a state should not enter into official relations with any religious organization. The problem is aggravated by the fact that the Holy See represents the Roman-Catholic Church on the global level, so that by entering into a concordat, a state not only recognizes the international personality of the Holy See, and, by way of implication, the international personality of the Roman-Catholic Church, but it also acquiesces to the transnational authority of the Holy See and its power to represent even the Roman-Catholic Church and its members on that state's own territory. Substantive grounds for the secularist *a priori* rejection of concordats concern the fact that the typical subject matter of modern-day concordats revolves around endorsement and financing of certain social activities of the Roman-Catholic Church by the state.

A practical consequence of the secularist opposition to concordats is the fact that the United States have not yet entered into a treaty with the Holy See on a specific issue that may be regarded as falling within the typical concordat subject matter, whereas France has only recently – in 2008 – executed one that may be subsumed under the concept of a concordat (on recognition of diplomas issued by institutions of higher education). A piece of palpable evidence that the pure secularist approach does

[11] On the meanings of *laïcité* see more Christian Joppke, "State Neutrality and Islamic Headscarf Laws in France and Germany", *Theory and Society,* 4/2007, 313 342.

[12] Patrice Canivez, "Le concept de laïcité", *L'Europe à venir: sécularisation, justice, démocratie* (eds. Emilian Cioc, Ciprian Mihali), Actes de l'Université d'été du réseau OFFRES (Cluj, 3 13 septembre 2006), Cluj Napoca, Idea Design & Print, 2010, 5.

not prevail in Europe is the fact that most European countries have entered into concordats with the Holy See, and that those instruments remain in force. Secularist opposition to concordats is not gaining ground on the global plane either, since the number of non-European countries that have entered into concordats, or about to do so, has been steadily increasing after the Second Vatican Council.

3. CHALLENGES TO STRICT SECULARISM

3.1. The concept of post-secular society proposed by Habermas

The 2011 *Lautsi* judgment of the Grand Chamber of the European Court of Human Rights,[13] upholding the placement of crucifixes in public schools, judging by its effect, stands in line with a significant development in the thinking Habermas, who began to emphasize the role of religion in modern society, particularly by popularizing the concept of *post-secular society* in relation to developed Western democracies.[14]

Habermas pronounced the grounding significance of Judeo-Christian tradition for the concepts of democratic government and the imperative of human rights protection.[15] According to Habermas, only the concept of an ideologically neutral, i.e. secular state has non-Christian roots – in the philosophy of Enlightenment.[16]

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[13] The Grand Chamber admitted that the presence of crucifixes gave greater visi bility to Christianity in schools, but found that its effects did not amount either to compul sory teaching of that religion, or to violation of the rights of parents to ensure education and teaching of their children in conformity with their own religious and philosophical convictions. *Lautsi and Others* v. *Italy* [GC], no. 30814/06, §74 76 ECHR 2011.

[14] "A 'post secular' society must at some point have been in a 'secular' state. The controversial term can thus only be applied to the affluent societies of Europe or countries such as Canada, Australia and New Zealand, where people's religious ties have steadily been lapsed, in fact quite dramatically so in the post War period. These regions have seen the more or less general spread of an awareness that the citizens are living in a secularized society. In terms of sociological indicators, the religious behavior and convictions of the local populations have since by no means changed to such an extent as to justify labeling these societies 'post secular'. Here, trends towards de institutionalized and new spiritual forms of religiosity have not offset the tangible losses by the major religious communi ties". Jürgen Habermas, "Notes on a post secular society", 18 June 2008 *http://www.sig nandsight.com/features/1714.html,* 13 October 2015.

[15] "Universalistic egalitarianism, from which sprang the ideals of freedom and a collective life in solidarity, the autonomous conduct of life and emancipation, the individual morality of conscience, human rights and democracy, is the direct legacy of the Judaic ethic of justice and the Christian ethic of love... And in light of the current challenges of a post national constellation, we continue to draw on the substance of this heritage." Jürgen Hab ermas, *Time of Transitions*, Polity Press, Cambridge Malden 2006, 150 151.

[16] "The history of the Christian theology in the Middle Ages particularly late Spanish scholasticism belongs, of course, in the genealogy of human rights. But the

While examining the source of legitimacy of the modern constitutional state, which has been left without the legitimacy of a sovereign monarch, Habermas assumes that the democratic process may be conceptualized "as a method by which legitimacy may be generated out of legality", as well as that "a 'constituted' (rather than a merely constitutionally tamed) state authority is juridified (*verrechtlicht*) to its very core, so that the law completely penetrates political authority."[17] Human rights, for Habermas, are essential for such legitimation of the modern secular democratic political community. The legitimation presupposes active participation of citizen in public affairs, i.e. citizens need to be motivated by their political virtues. Habermas remains optimistic vis-à-vis the capability of the liberal state to reproduce "its motivational preconditions out of its own secular resources", but only on an *a priori* level, under the assumption that solidarity among members of a political community is secured by that community's cultural values having been homogeneously permeated by the principles of justice[18]. It may be inferred that if cultural diversity stands in the way of equal acceptance of core principles of human rights and justice in the society, then the very fabric of solidarity among the members of that political community is endangered. Another threat for the modern democracy is seen by Habermas: external factors leading to depolitization of citizens, such as the modernization which causes citizens to act solely on their own interest, market forces, etc.[19] Both religion and religious communities serve strengthening solidarity of citizens, but their realm is being threatened by the other two major media of societal integration – markets and power of the state.[20] For Habermas, a *post-secular* society is not only one that "merely acknowledge[s] publicly the functional contribution that religious communities make to the reproduction of desired motives and attitudes", but also one in which "universalistic system of law and the egalitarian morals" are "connected to the ethos of the community from within, in such a way that one follows consistently from the other". The necessity of such a connection for Habermas is peculiar to the liberal state, due to the exigency for political in-

fundamental principles that legitimize the ideologically neutral authority of the state are, in the end, derived from the profane sources of seventeenth and eighteenth century phi losophy." Jürgen Habermas, "On the Relations between the Secular Liberal State and Religion", *Political Theologies: Public Religions in a Post Secular World*, Hent De Vries & Lawrence E. Sullivan (eds.), Fordham University Press, New York 2006, 252.

17 *Ibid.*, 252 253.

18 *Ibid.,* 254, 255.

19 *Ibid.*

20 Habermas provides the example of one significant transformation of a (Chris tian) religious concept into a norm that strengthens solidarity within the entire society. "The translation of the notion of man's likeness to God into the notion of human dignity, in which all men partake equally and which is to be respected unconditionally, is such a saving translation." *Ibid.,* 258.

tegration of citizens that is in such state much greater than in an authoritarian political community.[21]

The concept of the post-secular society led Habermas to practical normative findings: "The ideological neutrality of state authority, which guarantees ethical freedoms to every citizen, is incompatible with the political generalization of a secularistic worldview. Secularized citizens, ... may neither deny out of hand the potential for truth in religious conceptions of the world nor dispute the right of believing fellow citizens to make contributions to public discussion that are phrased in religious language."[22]

Habermas neither finds that achievements of secularization are being reversed in what he calls the post-secular world, nor he pleads to be in favor of such reversal. In effect, his thoughts seem to be aimed at saving secularization from itself, i.e. at saving secularism from assuming the role of an ideology or religion. From Habermas' arguments it may be inferred that a failure of secularized societies to recognize the role of religion in public life would, in fact, undermine viability of the very political communities formed by those societies.

3.2. Contemporary Europe – between religion and reason

In his dialogue with Habermas, Pope Benedict XVI called for establishment of "relatedness between secular reason and religion", aimed at avoiding "pathologies" of both religion and reason. While he singled out the Christian faith and Western secular rationality as "two main partners of this mutual relatedness", Cardinal Ratzinger stressed the importance of including other cultures in such dialogue. He based his argument on the impotence of secular reason to secure that positive law be just, as well as to support the claim of universal validity of human rights.[23] There are authors, such as Pecora, who also concede the inability of secularism to warrant a solid founding of ethical values of a society.[24]

Having found that secularism in Europe has been aggressive in its struggle against religion, Pope Benedict XVI ascribed most of the symptoms of what in his view was a serious crisis of modern-day Europe to

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[21] *Ibid*, 258 259.

[22] *Ibid*, 260.

[23] Cardinal Joseph Ratzinger Benedict XVI, "That Which Holds the World To gether The Prepolitical Moral Foundations of a Free State", *Natural Moral Law in Contemporary Society*, Holger Zaborowski (ed.), The Catholic University of North Amer ica Press, Washington, D.C. 2010, 15, 20.

[24] Vincent P. Pecora, *Secularization and cultural criticism: religion, nation, and modernity,* The University of Chicago Press, Chicago London 2006, 44.

secularism, i.e. to Europe's apostasy from its spiritual roots.[25] A helpful perspective on the present-day role of religion, namely Christianity, in the public and political sphere in Europe is McCrea's notion of "residual religious identity" of European public institutions.[26]

The decades-long process of the European Union's transformation from an economic into a political union reached the point at which it needed a legal articulation. The logical instrument for achieving that purpose would have been a constitution. The draft constitution of the European Union was indeed prepared, but became subject of strong disagreements. Among the principal subjects of controversy were references to God and Christian heritage of Europe. The secularist view prevailed and these references were omitted from the Treaty Establishing a Constitution for Europe.[27] The ratification process, and thus the constitution itself, failed, whereas the draft was transformed into the "reform treaty", the Treaty of Lisbon[28], which did not purport, at least on its face, to be a constitution. In effect, the Treaty of Lisbon transformed the two foundational treaties of the European Union to such extent that these two instruments, taken together with some of the case-law of the Court of Justice of the European Union, encompassed almost all usual traits of a constitution.

The principal challenges the European Union has faced since the Treaty of Lisbon entered into force – the Greek sovereign debt crisis, the migrant and refugee crisis – originated from the differing perspectives on the nature and level of solidarity that is required from Union's members. One cannot close eyes to the question – whether the European Union may

[25] Pera summarized symptoms of the moral, spiritual and identity crisis of Europe which had been put forth in the exchange of letters between Cardinal Ratzinger and him and presented in their book *Without Roots, The West, Relativism, Christianity, Islam*: the Judeo Christian roots had not been mentioned in the Preamble to the European Constitu tional Treaty, even though Europe would not have existed without them, the states violate fundamental human rights, especially the right of dignity of a human person (e.g. by al lowing cloning), the Judeo Christian religion not only is deprived of social role, but also discriminated against with respect to other religions, the concept of multiculturalism is interpreted so as to require abandonment of the European cultural heritage, political rela tivism leads to loss of normative perspective on political regimes, whereas pacifism cou pled with relativism had made Europeans unwilling to resort to use of force for the pur pose of defending the European civilization. Marcello Pera, "Europe, America, and Pope Benedict XVI", 6 February 2006, New York, *http://www.crossroadsculturalcenter.org/storage/transcripts/2006 02 06 Freedom%20without%20Roots.pdf,* 13 October 2015.

[26] R. McCrea.

[27] Treaty Establishing a Constitution for Europe, *Official Journal of the European Union* C 310, 16 December 2004.

[28] Treaty of Lisbon amending the Treaty on European Union and the Treaty estab lishing the European Community, *Official Journal of the European Union* C 306, 17 De cember 2007; the treaty entered into force on 1 December 2009.

preserve its present form of a political community of its citizens and of the Member States, and, of course, whether it may evolve and strengthen further, if its constitutional basis continues to be deprived of a reference to God, as well as to the religious heritage common to its Member States?

3.3. Influence of Islam on the standard of secularity in a democratic society

While Habermas seems to ascribe the phenomenon of a post-secular society primarily to the intrinsic maturing of a liberal political order, other explanations are present as well. One of the most prominent ones interprets the phenomenon as the Western reaction to the rise of political Islam.[29] The call by Habermas for reassessment of the role of religion in public life was in fact partly motivated by the need of accommodating, within the conceptual understanding of the modern secular democratic state, the pretensions of Islam to a significant role in public life.[30] Niall Ferguson devised the term *Eurabia* to illustrate the future of Europe in light of the low birth-rates of its present population and the intensive immigration from the Muslim world, though his predictions have been disputed.[31] Other authors, however, argue that the net result of the influx of Muslims shall be a further secularization of Europe, for Christianity as the incumbent furnisher of values, symbols, traditions and ideas shall need to step back (abandon its "residual political and symbolic roles, according to McCrea), so that stronger secularity may enable better accommodation of Muslims and the necessary religious pluralism.[32]

In order to properly appreciate the pretensions of Islam to a role in public life, one should have in mind that even the basic level of secularity is problematic for many Muslims. In the academic literature several explanations have been offered in respect of it: wide-spread understanding of Islam as unity of religion, law and politics,[33] the lack of supreme

[29] Philip Jenkins, "Europe's Christian Comeback", *Foreign Policy,* 12 June 2007, *foreignpolicy.com/2007/06/12/europes christian comeback/* 13 October 2015.

[30] Luca Mavelli, "Europe's Identity crisis, Islam in Europe, and the crisis of secu larity", *Routledge Handbook of Islam in the West* (ed. R. Tottoli), Routledge, London New York 2015, 193.

[31] Niall Ferguson, "Eurabia?", *The New York Times,* 04 April 2004,v*http://www.nytimes.com/2004/04/04/magazine/04WWLN.html* 13 October 2015; William Underhill, "Dispelling the Myth of Eurabia", *Newsweek,* 10 July 2009, *http://www.newsweek.com/dispelling myth eurabia 81943* 13 October 2015.

[32] R. McCrea.

[33] Gudrun Krämer, "'Islam is religion and state: secularity in traditional Muslim society", *Islam and the Secular State*, International Fund of Imam al Bukhari, Friedrich Ebert Foundation, Tashkent 2003, 192, *http://library.fes.de/pdf files/bueros/zentralasien/50123 3.pdf,* 13 October 2015.

authority in Islam, preventing parallelism between spiritual and worldly governments,[34] association with foreign (Christian) colonial occupation in the Middle East.[35]

On the other hand, it is clear that many Muslims are fully integrated in Western secularized societies, that the majority of the global Muslim population positively relates to the idea of democratic governance, as well as that voices of a number of reformist Islamic thinkers, vying for reassessment of the traditional critical attitude towards secularity, have been noted.[36] Hashemi, and Asad before him, pointed out the fact the two leading paradigms of liberal democratic secularity – the concepts of secularity in the US and France – have come into being as social constructs, resulting from idiosyncratic experiences of the two societies.[37] Hashemi has relied on these examples, as well as on his broader thesis against "false-universalisms" of Western political practice, to support his claim that Islam still needs to conceive its own, indigenous variety of secularity.[38]

The magnitude of the tension between Islam and secularity is well illustrated by poor success of democracy in the Muslim world. Statistical sensitivity of acceptance of democracy by a certain religion inevitably points primarily to secularity, since that quality is the lens through which any religious perspective conceives democracy. According to a 2015 survey by Freedom House, out of 124 electoral democracies in the world, only 12 (i.e. 10%) are countries with a Muslim majority, although out of the total of 195 countries surveyed, there are 50 countries with a Muslim majority (25%), while Muslims make up approximately 23% of the global population;[39] moreover, among 87 countries assessed as "free" by the same Freedom House report, only 2 (i.e. slightly more than 2%) are those

[34] On the absence of supreme authority in Islam see Stanislav Prozorov, "On the Issue of Supreme Authority in Islam", *Islam and the Secular State*, International Fund of Imam al Bukhari, Friedrich Ebert Foundation, Tashkent 2003, 176 179.

[35] John L. Esposito, "Rethinking Islam and Secularism", *Guiding Papers Series,* ARDA The Association of Religion Data Archives*,* 3, 5, *http://www.thearda.com/rrh/papers/guidingpapers/esposito.pdf,* 13 October 2015.

[36] *Ibid*., 20; John. L. Esposito, "Islam and Secularism: Exploring the place of religion in secular society", *Arches Quarterly,* 2/2008, 8 9, *http://www.thecordobafoundation.com/attach/Arches issue 03 Web.pdf*, 13 October 2015.

[37] Nader Hashemi, *Islam, Secularism, and Liberal Democracy*, Oxford University Press, Oxford New York 2009, 176 177; On the pluralism of meanings of secularism and the perceived opportunity for Islam to formulate its own concept of secularity see Talal Asad, *Formations of the Secular Christianity, Islam, Modernity*, Stanford University Press, Stanford 2003.

[38] N. Hashemi, 176 177.

[39] "The Future of the Global Muslim Population Projections for 2010 2030", Pew Research Center, January 2011, 13 15, *http://www.pewforum.org/files/2011/01/FutureGlobalMuslimPopulation WebPDF Feb10.pdf,* 13 October 2015.

with a Muslim majority – Tunisia and Senegal.[40] The global Muslim population is projected to grow by 73% by 2050, and to reach parity with the number of Christians at that time, whereby each denomination would make up approximately 30% of world population.[41]

4. RELIGIOUS NEUTRALITY OF THE STATE AND CHURCH-STATE COOPERATION

If the constitution and laws of a state put emphasis on its secular quality, then by definition such state is neutral vis-à-vis religious matters. If, however, secularity is not the primary concern of the state in its approach to church-state relations, the only alternative concept that has proven viable in modern democracies is the system of cooperation between state on one hand and churches and religious communities on the other. Each and every cooperation involves close encounter, arms-length negotiations, exchange of goods or value in some form, or thoughts between the cooperating persons or entities. That is the reason why the secularist stance sees in church-state cooperation an immense threat to the very essence of secularism: state neutrality vis-à-vis religion. The pro-cooperation side does not stop at merely rejecting such claim. Instead, a reverse view is proposed: in order to be able to remain neutral in relation to religion, a state has no other option than to embark upon cooperation with churches and religious communities. Acknowledging that the concept is complex, but much less problematic than the attribute "secular", Leigh has identified four possible aspects of neutrality: even-handed treatment of all religions, so that no religion is favored over others, strictly equal treatment, equal respect of religions, which, according to Leigh, "permits differences in treatment by the state in situations either where fundamental rights are not engaged or where differences in treatment can be justified", and objective treatment, which denotes anything between indifference towards religions and deeming them irrelevant.[42]

State neutrality comes to the fore in legal systems and societies which recognize the role of religion in the public realm. The two most relevant approaches to state neutrality vis-à-vis religion are those that can

[40] "Freedom of the World 2015 Highlights from Freedom House's annual report on political rights and civil liberties", Freedom House*, https://freedomhouse.org/sites/default/files/01152015 FIW 2015 final.pdf*, 13 October 2015.

[41] "The Future of the World Religions: Population Growth Projections 2010 2050", Pew Research Center, 2015, *http://www.pewforum.org/files/2015/03/PF 15.04.02 ProjectionsFullReport.pdf,* 13 October 2015.

[42] Ian Leigh, "The European Court of Human Rights and religious neutrality", *Religion in a Liberal State* (eds. G. D'Costa, M. Evans, T. Modood, J. Rivers), Cambridge University Press, Cambridge New York 2013, 38 39.

be perceived in the U.S. and in Germany.[43] Notable academics argue that the two approaches to neutrality are gradually converging.[44]

4.1. Neutrality of state and church-state cooperation in Germany

Eberle singles out the pervasiveness of the German approach, in the sense that constitutional provisions on church-state cooperation and freedom of religion and conscience affect all legal relationships, both public and private.[45] The complexity of positive law on the subject, even at the constitutional level, is coupled by the existence of a corresponding standalone academic discipline – the *Staatskirchenrecht*, which has formed part of the studies of public law since the second half of 18 c.[46]

According to Robbers, state neutrality vis-à-vis religion proclaimed by the German Basic law has several meanings: it "requires the state not to identify with a church; ... the state is not allowed to have any special inclination to a particular religious community...", nor it can be inclined to atheism; "the state is not allowed to take decisive action in the affairs of religious communities...", while positive neutrality "obligates the state to actively support religion and to provide for the space religion needs to flourish"; furthermore, according to Robbers, "neutrality does not mean neutrality in respect of specific values", so that "state neutrality is not violated when the state takes up values and concepts that have been developed in the religious sphere."[47] Several of the meanings which Robbers attributed to the concept of neutrality are satisfied by specific principles, which that author identified as key to the German system of church-state relations, in addition to separation, cooperation and neutrality: tolerance, parity, pluralism, institutionalism (freedom of faith is regarded as corporative right, exercised through religious communities) and openness to religion.[48] Korioth and Augsberg assert that neutrality is the basic principle of the relationship between state and religion in Germany, which is

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[43] For two recent comparative studies of the two examples see Edward J. Eberle, *Church and State in Western Society: Established Church, Cooperation and Separation,* Ashgate, Farnham 2011; Claudia E. Haupt, *Religion State Relations in the United States and Germany: The Quest for Neutrality*, Cambridge University Press, Cambridge New York 2012.

[44] C. E. Haupt, 6.

[45] E. J. Eberle, 25, 29.

[46] Brigitte Basdevant Gaudemet, "Histoire du droit ecclésiastique en Europe, une discipline universitaire", *L'enseignement du droit ecclésiastique de l'État dans les univer sités européennes* (eds. J. M. González dell Valle, A. Hollerbach), Peeters, Leuven Paris 2005, 9 26.

[47] Gerhard Robbers, *Religion and Law in Germany,* Kluwer Law International, Alphen aan den Rijn 2010, 86 87.

[48] G. Robbers, 86 88.

constituted as a synthesis of the individual religious freedom and the separation of state and church.[49]

An indispensable element of the German model of church-state relations is the recognition of corporative religious freedom, which is accorded to religious organizations.[50] In the legal environment in which religious freedom is not constrained to the plane of individual rights, cooperation with the state becomes a necessity.

The subjects of cooperation are those tasks of public nature and common importance for the exercise of which certain religious affiliation or identity is either necessary or valuable. The principal example of such a task is religious instruction in schools, but many others are present in the German system: operation of theological faculties, provision of welfare, provision of religious content for the media, participation of churches and religious communities in media monitoring and development of program selection, service of chaplains in the military, conservation and preservation of temples and holy places in general, levying and collection of church tax, etc.[51] The countries that were liberated from communism when the Berlin wall fell and that joined the EU in 2004 have all adopted the model of church-state cooperation.[52] The wide-spread adoption of the cooperative model by the post-communist states confirms that the model is the most accommodative of a strong contribution of religion to the constitutional identity of a political community, having in mind the fact that the Christian churches played a prominent role in the fall of communism in Central and Eastern Europe.

In a judgment brought in 2003[53] the Constitutional Court noted that in principle an abstract danger to religious freedom of children resulting from the fact that a teacher wears a head scarf cannot justify infringement upon religious freedom of that teacher. However, the same judgment referred the matter to the legislature, allowing for the possibility that state may regulate the matter within a wide margin of appreciation.

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[49] Stefan Korioth, Ino Augsberg, "National Report: Germany", *Religion and the Secular State: Interim Reports* (eds. J. Martinez Torrón, W. Cole Durham, Jr.), The International Center for Law and Religion Studies, Brigham Young University, Provo 2010, 323.

[50] "Organizations such as religious communities enjoy freedom of religion or belief in their own right. Organizations do not only represent the rights of their members, but also have their own proper rights." G. Robbers, 122.

[51] *The Relationship of Church and State A Perspective on the European Union, Joint Statement on Issues relating to the European Integration Process,* Church Administration Office of the Evangelical Church in Germany, the Secretariat of the German Bishops' Conference, 1995, 11 21, 24, 25, *http://www.dbk.de/fileadmin/redaktion/veroeffentlichungen/gem texte/GT 04 a.pdf,* 13 October 2015.

[52] I. Leigh, 41, 60 61.

[53] 2003 BVerfGE 108, 282.

As result, many states (eight out of sixteen) enacted laws prohibiting teachers to demonstrate their religious beliefs, but, in some cases (six out of sixteen), under an irrefutable assumption that demonstrating Christian and other traditional Western beliefs did not contravene the law.[54] The Constitutional Court effectively overturned the 2003 judgment by an order of 2015[55], declaring as unconstitutional a law forbidding display of religious symbols on grounds of abstract danger such display could create for religious freedom of the students or disruption in the school. Instead, concrete danger must exist in order that a limitation upon religious freedom of teachers is justified. Furthermore, the court found that students' negative religious freedom was not encroached if a teacher wore a head scarf. Finally, the Court also struck down the provision favoring display of symbols of Christian and traditional Western beliefs.[56]

4.2. The European perspective of the Strasbourg court

The European Court of Human Rights in Strasbourg confronted frontally the renaissance of religion in the countries of the post-communist Europe by striving to limit the discourse on religious freedom to the realm of individual rights.[57] It accords to churches and religious communities the "victim" status in relation to violation of freedom of religion "only when it can show it is bringing a challenge in representative capacity on behalf of its members."[58] According to Leigh, the case-law of the ECtHR has been shifting in the past decades from neutrality understood as "equal respect", which allowed for different treatment of religions for justified reasons and in matters not involving fundamental rights, to the understanding of neutrality that requires equidistance to all religions and strict equality of religions. The same author allowed that the *Lautsi* judgment, presented in part 3.1 of this paper, may signify a change of direction of the subject shift, concluding that overall recent case-law of the ECtHR has been fairly incon-

[54] Christine Langenfeld, Sarah Mohnsen, "Germany: The teacher head scarf case", *International Journal of Constitutional Law* 3/2005, 89 91.

[55] 1 BvR 471/10 and 1 BvR 1181/109.

[56] On the 2015 judgment of the German Constitutional Court see more Matthias Mahlmann, "Religious Symbolism and the Resilience of Liberal Constitutionalism: On the Federal German Constitutional Court's Second Head Scarf Decision", *German Law Journal* 14/2015, 887 900.

[57] Matthias Koenig, "The Governance of Religious Diversity at the European Court of Human Rights, *International Approaches to Governing Ethnic Diversity* (eds. J. Boulden, W. Kymlicka), Oxford University Press, Oxford 2015, 72.

[58] Jim Murdoch, *Protecting the right to freedom of thought, conscience and religion under the European Convention on Human Rights,* Council of Europe, Strasbourg 2012, 24, *http://www.coe.int/t/dgi/hr natimplement/Source/documentation/hb09 rightfreedom en.pdf,* 13 October 2015.

sistent on the subject of state neutrality.[59] A similar practical effect of affirming church-state cooperation had the judgment in *Wassmuth*, whereby the Court assessed that mandatory disclosure to the employer of affiliation to one of churches for which church tax was levied by the state was legitimate and proportionate to its aim, notwithstanding the applicant's right not to disclose his religious belief or lack thereof.[60]

4.3. State neutrality in the context of the Establishment Clause of the U.S. Constitution seen through the lens of recent case-law

It is widely accepted that the prohibition of state establishment of religion in the U.S. Constitution is interpreted in an unusually broad manner, demanding strict separation of state and church, in contrast to the same prohibition in the German Basic Law, which merely prohibits "institutional interconnections between church and state" and "identification of the state with a specific religion".[61] The peculiarity of the constitutional set-up in the U.S. is the tension between the Establishment and the Free Exercise clauses. The Supreme Court of the U.S. has had to address this tension over the decades, and the resulting body of law is usually perceived as non-homogenous or even inconsistent.[62]

Due to the principal historic influence of the Christian church, education has been the primary arena in which state neutrality is probed. In that field, the judgment in the case *Zelman v. Simmons-Harris* of 2002 stands out by its practical consequences rather by its dictum: it upheld an Ohio state pilot program of providing low-income families with financial aid in the form of vouchers that could be spent both in public and in private schools participating in the program. In the 1999–2000 school year, 96% of students participating in the program were enrolled in a religiously affiliated school. The majority was of the opinion that the program was "neutral with respect to religion."[63]

An often-cited recent example of the alleged inconsistency of the Supreme Court in interpretation of the Establishment Clause are two judgments rendered in 2005: *Van Orden v. Perry*[64] and *McReary County v. ACLU*[65], both involving public display of the Ten Commandments. In

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[59] Leigh claims that the new approach "fails to respect historic and cultural differ ences among European states", as well as that the model of strict secularity itself is not neutral in relation to individual beliefs. I. Leigh, 39 40.

[60] *Wasmuth v. Germany*, no. 12884/03, § 55, § 61, 17 February 2011

[61] E. J. Eberle, 26.

[62] E. J. Eberle, 31 32,

[63] Zelman v. Simmons Harris (00 1751) 536 U.S. 639 (2002).

[64] Van Orden v. Perry 545 U.S. 677 (2005).

[65] McCreary County v. American Civil Liberties Union of Ky. 545 U.S. 844 (2005).

the former case, the alleged violation of the Establishment Clause consisted in the placement of a Ten Commandments monument on the Texas State Capitol grounds. In the opinion for the majority, rejecting the violation of the Establishment Clause, Chief Justice Rehnquist emphasized the recognition of the role of God in the American history, citing a historical political document and certain decisions of the Supreme Court, and pointing to the wide-spread existence of similar public acknowledgments of the historic significance of the Ten Commandments, existing even in the Supreme Court itself and the Library of Congress. The opinion included a concession that the monument had "a dual significance, partaking both religion and government," whereas the only criterion provided for deciding such ambiguous situations was the finding that the subject monument had a passive nature. The majority expressly excused itself from applying the so-called *Lemon test*[66] for deciding Establishment Clause challenges, claiming that the test had not been consistently applied thus far, as well as that the test was inapplicable to "the sort of passive monument that Texas has erected on its Capitol grounds."[67]

In *McCreary,* the Supreme Court affirmed the Sixth Circuit Court of Appeals upholding of a preliminary injunction against posting of the Ten Commandments plates in courthouses by two counties in Kentucky. The majority opinion focused on applying the *Lemon test* to the case at hand, and based its decision on the finding that the first prong of the test – the requirement that government action must have a secular purpose – was not satisfied. Overall, the opinion emphasized the requirement of state neutrality and affirmed the Lemon test as a valid rule for assessing limits of neutrality.

Two very recent judgments of the Supreme Court articulate a distinctively American doctrine of corporate religious freedom. The 2012 judgment in *Hosanna-Tabor v. EEOC et al.*[68] was rendered after a Lutheran church (Hosanna-Tabor) had been sued by the Equal Employment Opportunity Commission, an agency of the U.S. Federal Government vested with investigative powers, for allegedly dismissing its employee because the employee had threatened it with a lawsuit based on the Americans with Disabilities Act (ADA). On writ of certiorari to the Court of Appeals for the Sixth Circuit, the judgment of the latter in favor of the EEOC was reversed, whereby the subject dismissal was upheld on grounds of the so-called ministerial exemption. The dismissed person had been a

[66] The test is passed only if the following three prongs are cumulatively satisfied: secular purpose of government (legislative) action, absence of primary effect of advancing or inhibiting religion, lack of excessive entanglement between government and religion. Lemon v. Kurtzman, 403 U.S. 602 (1971).

[67] Van Orden v. Perry 545 U.S. 677 (2005).

[68] Hosanna Tabor Evangelical Lutheran Church and School v. EEOC, 132 S. Ct. 694 (2012).

"called" teacher in an elementary school operated by the church, equaled in status to a minister. In an unanimous opinion, the Supreme Court asserted that the joint operation of the Establishment and Free Exercise clauses barred lawsuits brought by ministers against their churches, as well as that the relief sought by the former employee would violate the Establishment Clause.[69] The Supreme Court's reasoning clearly showed that at least part of the rights warranted by the Free Exercise clause were accorded to the church as such. In 2015 the Supreme Court issued a judgment in two joined cases, in which the U.S. Department of Health and Human Services (HHS) was confronted with two families and their three closely held corporations. The judgment has become popularly referred to after the largest of the three corporations – *Hobby Lobby, Inc*.[70] The three corporations and their owners had relied on the provisions of the Religious Freedom Restoration Act of 1993 (RFRA),[71] invoking their Christian beliefs, when they refused to provide to employees health insurance coverage for four contraceptive methods which may be used after inception, despite the fact that HHS mandated such coverage. The Supreme Court noted that HHS failed to satisfy the "least restrictive means requirement", since it already had in place an exemption from the subject requirement for religious non-profit organizations. In order to confront the core issue of the case – whether a for-profit corporation could exercise religion, the Court invoked the same exemption that HHS had in place for non-profits and thus removed the corporate form as basis for denying protection to exercise religion by for-profits. The for-profit objective thus remained the only possible basis for the subject denial. According to the Court, that element could not serve as a discriminating criterion among corporations, since reducing a for-profit corporation to the profit-making goal would contravene both modern corporate law jurisprudence and actual operation of positive corporate law in the U.S. In this respect, of crucial importance seems to be the reasoning behind the majority's refusal to accept the argument that for-profit corporations may not exercise religion: "protecting the free-exercise rights of corporations ... protects

[69] "The interest of society in the enforcement of employment discrimination stat utes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission. When a minis ter who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way." Hosanna Tabor Evangelical Lutheran Church and School v. EEOC, 132 S. Ct. 694 (2012).

[70] Burwell v. Hobby Lobby Stores, Inc. (2015).

[71] The RFRA prohibits the "Government [from] substantially burden[ing] a per son's exercise of religion even if the burden results from a rule of general applicability" unless the Government "demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U. S. C. §§2000bb 1(a), (b)

the religious liberty of the humans who own and control those companies... Corporations, 'separate and apart from' the human beings who own, run and are employed by them, cannot do anything at all."[72]

In order to assess the scope of the rule established by the *Hobby Lobby* ruling, one would need to understand whether the Supreme Court intended to accord protection under RFRA to all corporations, or only to closely held ones. The wording of the holding would suggest the latter ("The contraceptive mandate, as applied to closely held corporations..."). It seems, however, that the Court abstained from putting forth a clear-cut rule, since in the opinion it merely expressed doubt that a large corporation with dispersed ownership could in fact articulate and hold sincere religious beliefs.[73] It remains thus a question of fact whether in any given case a corporation may be deemed to possess religious beliefs, depending on the structure of its ownership and control.

5. CONCLUSION

Church-state relations and scope of protected freedom of religion vary greatly between national legal systems, making the common denominator of secularity in the modern-day democratic world difficult to determine. The task becomes even harder in the diachronic perspective: over the past two centuries, the process of *secularization* permeated the democratic world. The standards of secularity are strictest in the United States and in France. Religious provenance of basic human rights and fundamental freedoms has remained alive in the U.S., whereas in France these are perceived as phenomena of human rationality. Abstention of the state from cultural and social life leaves room for religion in the U.S. Europe-wide preponderance of states that have executed concordats represents firm evidence that strict secularism has not prevailed in Europe.

The present global diversity of church-state relations is a dynamic vector sum of numerous historical backgrounds, philosophical approaches and social and political values. Secularism purports to bring homogeneity to that complexity, but such ambition needs to assessed in light of the underlying question: is secularity an end in itself or an instrument for achieving other ends of a democratic society? The concept of *post-secular* society, proposed by Habermas, seems to hold the latter claim as true. The recent philosophical challenge to secularism by Pope Benedict XVI, in addition to attributing responsibility for the perceived modern-day moral, spiritual and identity crisis of Europe to secularism, entailed questions which in effect produced barriers for an endorsement of strict secu-

[72] Burwell v. Hobby Lobby Stores, Inc. (2015).

[73] *Ibid.*

larism. Major crises of the European Union revolve around lack of solidarity. It remains to be seen whether the European Union will be able to evolve and strengthen further, without adjusting its constitutional basis to its common religious identity.

The rapport between secularism and Islam is controversial – on one hand, secularization of Europe may seem important to Muslims because it dethrones Christianity from its traditionally dominant role in culture and society at large, on the other hand, secularization is opposed to the understanding of the nexus between religion, government and law which is dominant in Islam. These considerations are furthermore complicated by the fact that a relatively small number of countries with dominantly Islamic tradition and religious affiliation may be assessed, by Western standards, as representative democracies, or as respecting fundamental freedoms.

The idiosyncrasy of the German model of church-state relations consists in the concept of positive state neutrality, in conjunction with church-state cooperation. German law accords corporative religious freedom to churches and religious communities as such, but is still in pursuit of the adequate balance between recognition of religious identity and state neutrality. The tension between the Establishment and the Free Exercise clause of the U.S. Constitution provide ample room for the U.S. Supreme Court to mold the rules on state neutrality as it deems needed. Two judgments of 2005 serve as proof that public display of religious symbols by public authorities may be allowed under certain conditions. The U.S. approach to corporative religious freedom accords to religious organizations only those aspects of the freedom of religion which are necessary to them in order to function and to represent their believers, but it recognizes the religious freedom of all legal entities, including for-profit companies.

Secularity in developed democracies fluctuates between three actualized paradigmatic models – those of the U.S., France and Germany – which consist of different sets of solutions to two dichotomies – recognition or ignorance of the public role of churches and religious communities, and strict separation or cooperation of religious organizations and the state. The legal systems of the U.S. and Germany both recognize the role of religious organizations in public life, but only the German model endorses cooperation between religious organizations and the state. Recognition of corporative religious freedoms seems to go hand in hand with the recognition of the public role of religious organizations.

Secularism developed together with modern-day Western democracies. Democracy assumes common identity and political responsibility of the citizens, their motivation to participate in political life, to solidarize, etc. Western democracy has grown on the foundations of Christianity.

Somewhat paradoxically, secularism and secularity not only have roots in Christian political doctrine, but have developed in political communities held together by Christian values and identity. The question whether the fast-growing Muslim population shall accept one or more of Western understandings of secularity, or modify them, is an accessory one. A reliable and widely-applicable model of coordination of religious tenets of Islam with the principles of governance of Western democracies still needs to be designed.

The variables affecting the outcome of the encounter between Western democracy and Islam do not depend solely on Islam. Developed democracies of the West are re-assessing the role of secularity in their respective societies, particularly in Europe where strict secularism has gained more ground. For the past decades and even centuries, Christianity has been providing the ethos of modern-day Western democratic societies. In some of them, primarily in Europe, it has been deprived of the legal recognition of its public role, so its reach started to wane. The resulting crisis of democracy and society in Europe is evident. It seems as though the West, and Europe in particular, needs to scale down the standards of secularity, allowing religion to solidify common identity, values and motivational preconditions of its political communities, if it wishes to preserve and further the democratic strandards attained so far.

Concrete realizations of secularity are all conceptually dependent on the ideological doctrine of secularism, which seeks to achieve goals incompatible with the role of religion in a democratic society. For that reason secularity as a policy goal and a constitutional principle is prone to generating confusion. Religious neutrality of the state neither relies on an uncomprising ideology, nor it assumes deprivation of religion of its role in public life. Religious neutrality seems thus better suited than a reinterpreted secularity to serving the political, legal, and constitutional reassessment of the significance of Christianity for democracy in the West and in Europe in particular, as well as to ensuring a transparent and forthright dialogue on the place of Islam and Muslims in Europe.

CERIF: H165, H230, H300

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THE LEGAL STATUS AND MONASTIC ORGANIZATION ON MOUNT ATHOS IN THE 18TH CENTURY

Mount Athos represents a unique monastic community modelled after the great monastic centres of the Byzantine (Roman) Empire. Owing to the benevolence of Byzantine rulers a specific system of administration was established on Mount Athos, and the monks retained a high degree of self administration. Although the Ot toman Empire in the 15th century took control of Mount Athos, its specific legal re gime was not abolished. In the first centuries of Ottoman rule there were no signifi cant attempts of introducing new or revising the old rules which regulated the or ganization of the administration on Mount Athos. It was only in the 18th century that the period of the more lively legislative activities began. During that period the Athonite administrative bodies, more or less similar to the current ones, were formed. This paper deals with the reasons that led to their creation and their evolution in the 18th century.

Key words: *Mount Athos. Turkey. Typicons. Organization of administra tion.*

1. INTRODUCTION

During the period of Byzantine rule over the Holy Mountain, this particular monastic community was governed by two central administrative bodies: the protos and the synod[1]. After falling under Turkish rule,

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[1] Protos is a sole body characteristic for Athonite community of monks. It repre sented Mount Athos before secular and ecclesiastical authorities, it exercised judicial function and confirmed the choice of the monastery abbots. The synod initially consisted of all the monks of Mount Athos, and later on all the abbots and prominent monks. It represented the highest authority on the Holy Mountain. It chose a protos, distributed an nual financial aid to all the monks, and solved disputes. D. Papahrisantu, *Athonite Monas*

the institution of the protos declined, while large and rich monasteries eventually took control over the work of the synod. This was mostly due to the fact that in the new circumstances smaller monasteries grew poor much faster, and some of them became completely desolate. In the 17th century, Mount Athos faced with huge debts which threatened the survival and functioning both of the monastery and of the monastic community as a whole. There were several reasons that led to the constant increase of the debts, among which were extra taxes, self-will of the Turkish authorities[2], reduced donations (mainly gifts from Wallachian and Moldavian princes), etc[3]. However, the rapid growth of the debt was in particularly influenced by the reorganization of the central administration. Namely, the epistates (a supervisor, representative) of the Great Lavra had a special authority on the Holy Mountain. Apparently the monks of this monastery were in charge of common finances[4]. However, they did not have enough knowledge and skill to deal with serious economic problems that befell the whole community. Thus, one of the most serious reasons of over-indebtedness of Mount Athos in the 17th century was the lack of bodies and persons who would be able to manage the common finances with adequate knowledge and experience[5]. So, the monastic community of Mount Athos found itself in a vicious circle: economic difficulties caused destabilization and disorganization of the central administrative authorities, and then the newly formed authorities by excessive borrowing further worsened the financial situation of the monastic community, which led to the further destabilization and strengthening of centripetal forces at the expense of the authority of the central administrative bodies.

In order to consolidate up to a certain extent the external debt, the synod decided in 1661 to sell to the monasteries of Mount Athos all the

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ticism Origins and Organization, The Society of Friends of Mount Athos, Belgrade 2003, 213 242.

[2] Κ. Βλάχος, *Η χερσόνησος του Αγίου Όρους Άθω και εν αυτή μοναί και οι μοναχοί πάλαι τε και νυν*, Βόλος 1903, reprint: Αγιορειτική Εστία, Θεσσαλονίκη 2005, 103.

[3] Δ. Παπαχρυσάνθου, *Η διοίκηση του Αγίου Όρους (1600 1927)*, Εθνικό Ίδρυμα Ερευνών, Ινστιτούτο Βυζαντινών Ερευνών, Αθήνα 1999, 21.

[4] Δ. Παπαχρυσάνθου, 22. After the inventory of properties of Athonite monaster ies had been made in 1724, Turkish authorities imposed new taxes. The distribution of these taxes among monasteries was conducted by Timothy I, an epistates and prohegumen of the Lavra. I. Μαμαλάκης, *Το Άγιον Όρος (Άθως) δια μέσου των αιώνων*, Θεσσαλονίκη 1971, 284.

[5] Ν. Αντωνόπουλος, *Η συνταγματική προστασία του αγιορειτικού καθεστώτος*, Τροχαλία, Αθήνα 1997, 47. D. Papahrisantou points out that small monasteries were also responsible for that, because they did not timely fulfilled their obligations. Δ. Παπαχρυσάνθου, 22; Vlachos considers that the absence of a permanent body responsible for tax collecting and disposition of common funds was the main reason for the excessive indebtedness. K. Βλάχου, 103.

cells belonging to the Protaton[6]. Thus, the bodies of the central administration lost their own property and became economically dependent on the monasteries, as the only landowners on the peninsula[7]. This measure had only a short-term economic effect. However, it had far-reaching consequences for the organization of the authorities on Mount Athos since it contributed to the final termination of the old administrative system. In the meantime, since new administrative bodies were not formed, the period of general instability and the absence of rules that would regulate the organization of the central government followed. This situation caused dissatisfaction among the monks, and the idea of drafting a new typicon which would resolve all disputable issues became more and more prevalent.

2. THE TYPICON FROM 1744

2.1. The Circumstances that Led to the Adoption of Typicon

During 1724 and 1764 all the property of the monasteries of Mount Athos located on the peninsula of Chalkidiki was inventoried. Immediately after the inventory, the new higher taxes were imposed[8]. In addition to the regular and extra taxes, monks were often forced to pay various polls for which they often were even not responsible[9]. So, eventually the debts increased and reached the unbearable level.

In early 1744, the representatives of all Athonite monasteries went to Constantinople and presented to Patriarch Paisius II the difficult condition of their monastic community. All the nineteen monasteries blamed the Great Lavra for the current situation. At the same time the synod asked the "rufet" (guild) of furriers in Constantinople to help in repaying the debt. In order to find a lasting solution, Patriarch Paisius invited the representatives of the monasteries, the Constantinople Patriarchates (3 metropolitans) and representatives of the guild of furriers to a common meeting[10]. The decisions made at that meeting were confirmed by the

[6] The act was signed by the representatives of all the monasteries from Mount Athos except Hilandar, although Hilandar latter purchased the largest number of monastic cells. Α. Λαυριώτης, *Το Άγιον Όρος μετά την Οθωμανικήν κατάκτισιν*, Αθήναι 1963, 218 220.

[7] Not all the property of the Comunity was sold. Athonite metochions in Romania were kept.

[8] N. Αντωνόπουλος, 47; For detailed information about all tax increases see: K. Βλάχου, 102 103.

[9] Mount Athos paid fine of 40 kesas (20,000 piasters) in 1743, for providing shelter to the Metropolitan of Sofia, who supported Russia during Russo Turkish wars. N. Παπαδημητρίου Δούκας, *Αγιορειτικοί θεσμοί 843 1912/13*, Αθήνα Κομοτηνή 2002, 326

[10] Δ. Παπαχρυσάνθου, 23.

sigillion of Patriarch Paisius from 1744[11], which represents one of the typicons of Mount Athos[12].

2.2. The Content of the Typicon from 1744

The Sigillion of the Patriarch Paisius could be divided into three units[13]. The first unit is the introduction in which all the events preceding its adoption were outlined. It is about high debts of the Athonite monastic community and about the responsibility of the Lavra monks for such a situation. The end of the introductory part specified the way in which the debts should be repaid. The total debt was 102,448 piasters, and the Great Lavra monastery had to pay nearly a half of that sum, i.e. 45,631 piasters. It is obvious that accusations of other monasteries against the Lavra, which were presented to the Patriarch, resulted in the transfer of almost a half of the total Athonite debt to this monastery. Beside Lavra, two other large monasteries responsible for debts were obliged to pay a part of the common debt: Iviron 15,000 piasters and Vatopedi 7,500 piasters. The remaining twenty monasteries from Moun Athos were obliged to pay the rest of the debt, i.e. 34,417 piasters. According to a document, the decision about the sum that every monastery should pay was up to the *"elected judges" (αἱρετοὶ κριταὶ)*, i.e. three Metropolitans of the Patriarchate of Constantinople[14]. It is obvious that the share of each monastery in the repayment of the debt was proportional to its influence on the administrative bodies. This also means that it was proportional to its responsibility for the existing situation.

The second part of this typicon regulates all the matters relating to the finances of Athonite monastic community. It consists of eight provisions, the sole objective of which was to transfer the management of common finances from Athonite authorities to the furriers guild from Constantinople. The constant control of common finances was introduced, with the commission for supervision consisting of prominent representatives of the guilds who approved all the incomes and expenses related to Mount Athos as a whole. It was envisaged that there should be an updated book of incomes and expenses in other to achieve the constant con-

[11] The sigillion was published several times. Δ. Παπαχρυσάνθου, 62 70; Δ. Πετρακάκος, *Νέαι πηγαί των θεσμών του Αγίου Όρους*, Αλεξάνδρεια 1915, 5 14.

[12] The term typicon on Mount Athos indicates general legal document governing the organization of authority of the whole monastic community. The term constitution can be used as a synonym.

[13] The division of the typicon from 1744 in three parts can be found with majority of authors. Δ. Παπαχρυσάνθου, 23; Ν. Παπαδημητρίου Δούκας, 332.

[14] They were Metropolitan of Cyzicus (Exarch of all Hellespont), Metropolitan of Veroia and Naousa and Metropolitan of Serres (Exarch of Macedonia). Δ. Παπαχρυσάνθου, 64. Δ. Πετρακάκος, 7.

trol of the situation[15]. Similar control was also envisaged for two Atnonite metochs, in Bucharest and in Zion. There was also a rule that all regular taxes should be paid according to the instructions given by the members of the commission, and only after the money was counted and stamped by their seal. Considering all the mentioned regulations, it becomes apparent that the entire finances of Mount Athos were under the strict control of the furriers guild, while the powers of Athonite authorities were reduced to a minimum. The origin of these regulations was found in the conditions that the representative of the furriers guild set before the synod, in order to meet its requirements and to assist in the repayment of accumulated debts[16].

The third part typicon from 1744 was dealing with the problem of reorganization of the administration of Mount Athos. All the twenty Athonite monasteries were divided into two ranks (categories). The first rank consisted of three large monasteries: Lavra, Vatopedi and Iviron. The second rank included the remaining seventeen Athonite monasteries. All the monasteries participated in the election of the four administrators (διοικητὰς) – one of them was elected among the monks belonging to the monasteries of the first rank, and two monks belonged to the second rank monasteries. They were under the control of one administrator – Epistat, who belonged to one of the first rank monasteries. They kept the seal of the Community and together, not separately, managed all the affairs. If there occurred a serious problem they were required to notify all the monasteries, beginning with the Great Lavra, so that their abbots could gather to make necessary decisions. Their mandate lasted one year. At the end of the mandate they were to submit a report to the synod, especially concerning the incomes, expenditures and paid taxes.

2.3. The Importance of the Typicon from 1774

The sigillion of Patriarch Paisius from 1744 represents a great turning point in the history of Mount Athos. The new system of administration, which was gradually developing under the strong economic and po-

[15] Δ. Παπαχρυσάνθου, 24.

[16] The conditions of the guild of furriers envisaged that prominent members of the guild should form a board which would monitor and manage Athonite finances. The con ditions were as follows: Athonite monks must not solve any issue import for the Com munity without knowledge and approval of the board, all debts and taxes of Mount Athos could be paid only in accordance with the opinion and in the presence of the members of the board, the board held the seals of the Community for performing legal affairs, the board might act without informing the Community if it considers it necessary in order to prevent harm for the Mount Athos and for that the Community would provide reimburse ment of the expenses, etc. It is obvious that all the conditions of the guild were accepted and confirmed by the Patriarchate sigillion. Χ. Γάσπαρης, *Αρχείο Πρωτάτου*, Αθήνα 1991, 29 32.

litical pressures during 16th and 17th centuries, was made official by the act of the Patriarch of Constantinople. Many authors have described this new system as aristocratic, because big and rich monasteries had more influence on the authorities than the smaller or poorer ones[17]. But, the fact that the synod retained its supremacy over other administrative bodies is contrary to this point. The sigillion from 1744 officially abolished the old system of government characteristic for Mount Athos since the first monastic communities here appeared. However, due to new changes that would follow in the centuries to come, it was only a transition stage towards the establishment of self-administration system of Mount Athos which has remained until today.

The authors of the 1744 typicon introduced considerable terminological changes. To be more precise, the new terminology was made official by this typicon, since the terms had already been previously used. Thus the term Community (Κοινότητα) was introduced referring to the body which consists of the representatives of all the Athonite monasteries (previously called synaxis – Σύναξη). Besides, the epistates (ἐπιστάτης) was also mentioned for the first time in one typicon. The term Epistasia would derive from it, referring to a permanent executive body. The importance of these changes is still evident, since the same terms have been used to these days to denote the central Athonite self-administration organs.

However, what makes this typicon particularly significant is the fact that it was actually applied after being passed. On the basis of some available sources it is obvious that there was the four-member Community[18], as well as that the agreement between Athonite monks and the guild of furriers was respected[19]. The furriers guild of Constantinople helped Mount Athos to repay a part of the accumulated debts, and until the first half of the 19th century it supported the interests of Mount Athos in Constantinople[20].

Finally, it should be pointed out that some authors deny that the sigillion of Patriarch Paisius from 1744 had the character of typicon (statute). Bearing in mind all the above stated, it is evident that this act played the role that one typicon should have in the history of Mount Athos. Although its adoption did not solve all the problems of Mount Athos at the time it was issued, it remains one of the more successful attempts to pre-

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[17] Δ. Παπαχρυσάνθου, 24; Ν. Παπαδημητρίου Δούκας, 332; Γ. Σμυρνάκης, *Το Άγιον Όρος*, Αθήναι 1903, reprint Καρυές Αγίου Όρους 1988, 320.

[18] Δ. Παπαχρυσάνθου, 25.

[19] Χ. Γάσπαρης, 29.

[20] Although it is commonly thought that they helped until 1806, the opinion of D. Papahrisantou that they provided their services until 1811 should be taken as correct. Δ. Παπαχρυσάνθου, 25 fn. 43.

serve the organization of the Athonite monastic community during the period of Ottoman rule.

3. THE ATTEMPT OF RESTAURATION OF THE ANCIENT SYSTEM OF ADMINISTRATION

3.1. The Conditions on Mount Athos in 1770s

Despite the legislative intervention of the Patriarch of Constantinople from 1744, the most serious problem that the monastic community on Mount Athos faced during the 18th century remained the difficult economic situation. This was mostly due to excessive borrowings, which were again the consequence of the unstable political situation and the lack of a strong system of central government. Therefore, the second half of the 18th century was the period of constant instability and unsuccessful attempts to find a solution to the difficult financial situation on Athos by temporary changes of the administration system.

Beside the constantly growing taxes, the financial situation of the Holy Mountain was burdened by various other obligations. Thus, during the Russo-Turkish wars in the 1770s Greek rebels got into Mount Athos to obtain necessary supplies. Their ships often approached Athonite shores mainly to take the food which monks gave them secretly. In order to prevent the reaction of the Turkish army and its entry into the Holy Mountain, the Community allocated huge sums of money[21]. For this reason its debts grew rapidly and in 1783 reached the amount of 325,000 piasters[22].

Financial problems encountered by the Holy Mountain affected the organization of the central government. Although the sigillion from 1744 defined precisely the composition and competence of the central administration, the available documents reveal that the regulations of this typicon were not systematically applied. Thus, in 1771 monk Cyril form Docheiariou monastery was invited to manage the common Athonite finances. He was an epistates for seven years[23], while in the period 1776–1777 the other epistatae beside him were from the monastery of Iviron, Xeropotamou and Zografou. It is obvious that neither the regulation about the setting up of two epistatae from the ranks of large monasteries was respected, nor the regulation that the first place among them should be occupied by a monk from one of these monasteries. Athonite monks again acted quite pragmatically and for the person in charge set the monk who

[21] Ι. Μαμαλάκης, 290.

[22] Χ. Γάσπαρης, 114.

[23] Ι. Μαμαλάκης, 291.

possessed enough knowledge and skills to bring progress. Although Cyril succeeded in this partially, there was no significant recovery and improvement[24]. Soon a new change occurred, and in 1778 the Epistasia was made of five epistatae of Great Lavra, Vatopedi, Iviron, Xeropotamou and Zografou. However, in the following year the Epistasia had two members consisting of the representatives of Great Lavra and Iviron[25]. Thus, concerning the central government it can be said that the situation was extremely unstable and depended on the ephemeral factors and power relations among monasteries.

In this period there occurred another significant change. Besides the fact that the regulations of the typicon from 1744 were not respected, there was a new regrouping of monasteries. Instead of the previous division into two unequal categories, the monasteries were now divided into four equal groups of five monasteries. At the head of each group there was one large monastery, the representative of which was called an epistates.

Despite some short-term positive developments, the majority of Athonite monks were not satisfied with the situation. Thus, in the period between 1780 and 1783 it was decided to start drafting a new typicon. Smaller monasteries rightly blamed the large monasteries for the unfavourable situation of the whole monastic community, while, on the other hand, they believed that the main cause of such a state was the dysfunctional system of administration, which allowed large monasteries to abuse the given authority. The draft of the new typicon was probably created in 1783, and it envisaged the return to the ancient system of government according to which protos would regain a prominent position. The treasurer of the monastery of Esphigmenou Ignatius was elected protos, and he was sent to the Patriarch of Constantinople to have him ordained. Having learned that Patriarch was going to ordain the protos, the monks from two large monasteries, Lavra and Iviron, protested energetically against such a decision. In the end, the Patriarch gave up and disapproved of reintroducing the institution of protos in the monastic organization of Mount Athos. Due to the strong resistance of major monasteries, the draft of the typicon from 1783, created by Athonian monks themselves, had never come into force. Nevertheless, it represents an important source of information concerning the situation on the Athonite peninsula in the late 18th century[26].

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[24] Ι. Μαμαλάκης, 290.

[25] Αλέξανδρος (Λαζαρίδου) Λαυριώτης, *Το Άγιον Όρος μετά την Οθωμανικήν κατάκτησιν*, Αθήναι 1963, 115; Ι. Μαμαλάκης, 291. Δ. Παπαχρυσάνθου, 27 fn. 53.

[26] Text of the typicon was published several times: Γ. Σμυρνάκης, 312 315; Δ. Παπαχρυσάνθου, 71 75.

3.2. The Content of the Draft Typicon from 1783

There is only one copy of this draft preserved, and it is kept in the archives of the monastery Ksiorpotam. Unfortunately, the transcript does not contain any indication of the time of its creation[27]. In addition, the first act of 36 acts of this typicon has not been preserved, so its content remains unknown. This typicon is the first serious codification of customary rules created on Mount Athos in the 18th century. The most significant and unique novelty is the return of an ancient system of administration, with protos as its central authority. All other regulations reflected the customary rules that had already been applied in the life of the Athonite monastic community.

According to this draft typicon the central administration bodies were made of protos, his four assistants (*δευτερεύοντες του Πρώτου*), and the synod. The protos was elected by all the Athonite monasteries regardless of their size and position in the hierarchy. The person elected the protos was to be ordained by the Patriarch of Constantinople. The rule was introduced that before the future protos the ordination had to renounce his monastery and his monastic institution, so that he could manage the entire Mount Athos impartially and incorruptibly (Art. 2). The protos mandate lasted for life, but the synod might release him of his duty (Art. 4)[28]. He holds the key to the meeting hall (Art. 6) and has the right to carry a staff, like all the other officials ordained by the Patriarch of Constantinople. The draft envisaged that protos had a wide range of competencies. However, he performed most of the work with the help of his four assistants.

This typicon would make official the new classification of Athonite monasteries. Instead of the previous several categories[29], all the monasteries were now made equal, but were divided into four groups of five monasteries. At the head of each group of five (pentad) was one of the large monasteries. The typicon did not specify which monasteries made each pentad, which shows that this division had already become common, well-established and well-known on Mount Athos. Each pentad set one representative, who had one-year mandate, and helped the protos with his duties. In this way the protos received four assistants (defterevonts, δευτερεύοντες), who took turns each year according to the established

[27] Smirinakis considers that the typicon was created in 1780. Γ. Σμυρνάκης, 292. Since the time of creation of the typicon is not known, most authors uncritically accept Smirinakis stance that the typicon was created in 1780. However, it is more certain that it was finished in 1783. Ν. Παπαδημητρίου Δούκας, 333.

[28] The typicon provided that the former protos should be expelled from Mount Athos, after Patriarch of Constantinople was informed about this replacement.

[29] The previous typicon introduced the division into two categories. Δ. Παπαχρυσάνθου, 67.

order (Art. 29). This draft envisaged the introduction of a new Community seal, divided into four parts, with one quarter of the seal kept by each of assistants of the protos[30].

As noted above, the protos and his assistants performed most duties together. They were to discuss all disagreements and disputes on the Holy Mountain (Art. 3). However, in the case of a serious dispute which they could not solve on their own, they should put it before the synod. In case that even the synod could not find a solution, then such a dispute should be put before the Patriarch and the Synod of the Patriarchate of Constantinople (Art. 15). The protos with the consent of the four assistants chose a skevofilax. The brotherhood of each monastery should choose one monk to perform that duty (Art. 10)[31]. The protos and his assistants were obliged to cooperate with skevofilaxes in distributing among all the monasteries the amount of the annual tax to be paid, taking into account their financial situation (Art. 16). Besides, the protos and his assistants had the obligation to control the finances of each monastery separately (Art. 17) and to submit to the Synod an annual report on what actions they had taken during the previous year (Art. 18). In addition to these duties, they had certain rights. Twenty monasteries in accordance with their economic condition should finance the activities of the protos and his assistants, and a part of the contributions that pilgrims brought to the Holy Mountain was put aside for the needs of Protaton. From everything mentioned herein, it is evident that the authors of this draft regulated all the details to ensure the smooth functioning of the institution of the protos, which, in accordance with the regulations of this draft, should again become the central administrative organ of the Holy Mountain.

Of all the regulations of the draft typicon only one referred to the work of the synod. It was forbidden that more than two representatives of one monastery should attend the sessions of the synod. The synod probably functioned relatively well, so there was no need for larger scale interventions. The aim of this provision was to reduce the number of those present at the sessions, which certainly contributed to the expediency and quality of the sessions. This regulation shows that the sessions of the synod were still open for all the Athonite monks, and not only for monastery superiors or representatives.

In addition to the regulations concerning the organization and competences of the central administration bodies, the draft contained some strictly ethical rules. Once again beardless people were banned from en-

[30] The division of the seal into four parts was done following the example of the Patriarchate of Constantinople, which seal was divided into four equal parts by the order of the Sultan in 1763. Π. Χρήστου, *Το Άγιον Όρος, Αθωνική πολιτεία ιστορία, τέχνη, ζωή*, Αθήνα 1987, 210.

[31] A skevofilax (guardian of treasures) was in charge of monastery finances.

tering Mount Athos (Art. 8), consumption of meat was sanctioned, with the exception of Turkish clerks (art. 9), various workshops in Karyes were to be closed, and the lay persons residing on Mount Athos were obliged to leave, with the exception of those in charge of monastery chores (Art. 30).

This is the first typicon in the history of Mount Athos mentioning pilgrims. It envisaged the obligation, which has been in force until recently, that every pilgrim entering Mount Athos at the invitation of one of the monasteries, had to visit Protaton, as well. The aim was to stress the importance of the protos, and also to achieve better control of the pilgrims entering Mount Athos.

3.3. The Importance of the Draft Typicon from 1783

As already stated, the above mentioned draft has never officially become effective. However, it was for at least two reasons important for the organization of the monasticism on Mount Athos. First, it codified the customs of Mount Athos from the second half of the 18th century. This particularly refers to the regulations concerning the organization of the central administration and the division of the monastery in pentads. Another important fact is that this draft was the basis for the adoption of sigillion of Patriarch Gabriel from 1783, which was declared the fifth typicon of Mount Athos[32]. Therefore, it should be noted that the draft from 1783 was not only an unsuccessful attempt of restoration of the ancient administration system. Its contribution to the establishment of central administration was far more important.

There were two significant changes that this draft typicon tried to introduce. One was progressive, and the other regressive. The division of the monasteries into four pentads (groups of five monasteries) was for the first time made formal by the draft, and this represents a major step forward in comparison to the earlier Athonite typicons. It is hard to determine when exactly such a division of the monasteries appeared. It is only certain that it happened between 1744 and 1780. The available sources do not reveal the criteria for this division of the monasteries. The second change concerns the reintroduction of the dignity of protos, i.e. the return to the old system of administration where he held a central position.

[32] Lj. Maksimovic consider it the fifth typicon, although he confuses it for the typicon of Patriarch Gabriel from 1783. Lj. Maksimović, "Svetogorska uprava kroz vek ove", *Kazivanja o Svetoj Gori*, Prosveta, Beograd 1995, 38 39. For Antonopoulos it is the sixth typicon. N. Αντωνόπουλος, 48. There are some authors who think it is the eighth typicon of Mount Athos. It depends on whether all the acts of patriarchs of Constantinople are considered a typicon. N. Παπαδημητρίου Δούκας, 334. It is important that all the au thors recognise the sigillion of Patriarch Gabriel from 1783 as a typicon, which reveals its importance for the organisation of Athonite monastic community.

The new system of government, which the authors of this draft were trying to introduce, revealed the lasting aspirations of most Athonite monasteries. These aspirations were directed towards achieving two objectives: the stability and the participation of all the monasteries in the administration system. As previously stated, the organization of the administration on Mount Athos during the middle of 18th century was very unstable. It is evident from the constant change in the number of epistatae and unregulated and arbitrary representation of some monasteries in the administrative bodies[33]. This situation caused even greater dissatisfaction of small monasteries and confirmed the general impression that the large monasteries were unable to cope with the serious problems of Mount Athos. Reintroduction of the institution of the protos was aimed at achieving the desired stability of the organization of administration. Therefore, it insisted on the lifelong mandate of protos and a wide range of his competencies. On the other hand, the new division of monasteries in pentads was to ensure equal representation of all the monasteries in the administration, regardless of their size or position in the hierarchy. Thus, the aim of this typicon was to achieve the stability of the central administration by regressive, and the participation of the monasteries in it by progressive measures.

However, the authors of this draft did not think that their attempt at reorganization of the central administration on Mount Athos would encounter serious resistance of major monasteries. The return to the old system of administration was not possible[34], so the Patriarch of Constantinople used the presence of Athonite monks in Constantinople, and in cooperation with them and with the consent of the Synod adopted a new typicon in the form of sigillion from 1783. Thus, Mount Athos actually got a new typicon in 1783, but not the one composed by Athonite monks, but another one composed in Constantinople[35].

4. THE SIGILLION OF PATRIARCH GABRIEL FROM 1783

As already mentioned, the sigillion of Patriarch Gabriel was created as an attempt to find a solution to the long-lasting problems of the

[33] Δ. Παπαχρυσάνθου, 27 φη. 53; Ι. Μαμαλάκης, 290.

[34] Γ. Σμυρνάκης, 292 293.

[35] The sigillion was published several times: Δ. Παπαχρυσάνθου, 76 80; Κ. Δελικάνης, *Περιγραφικός κατάλογος των εν τοις κώδιξι του Πατριαρχικού Αρχειοφυλακείου σωζομένων επισήμων εκκλησιαστικών εγγράφων περί των εν Άθω μονών (1630 1863) καταρτισθείς κελεύσει της Α. Θ. Π. του Οικουμενικού Πατριάρχου Ιωακείμ του Γ 'Κωνσταντινούπολη* 1902, 281 285; Ph. Meyer, *Die Haupturkunden für die Geschichte der Athosklöster*, Amsterdam 1965, 243 248; I. Μαμαλάκης, 290; The summary was pub lished by X. Κτενάς, 363 364.

Athonite monastic community, including the most serious ones like the difficult financial situation and the lack of a stable system of administration. The sigillion comprised 18 articles, i.e. less than half of the draft that had previously been compiled by Athonite monks and which represented its basis. The provisions of this typicon regulated the organization of the central administration, financial management and some issues concerning the Christian ethics and morals.

4.1. The Bodies of the Central Administration

The sigillion of Patriarch Gabriel from 1783 envisaged the Epistasia and the Community as the central authorities. The Epistasia consisted of four epistatae, elected each year on the first day of June by the four pentads (groups of five monasteries). They were responsible for the finances of the Community. The epistatae had a one-year mandate, in order to allow the representatives of all the monasteries to participate periodically in the work of the central administration. According to the typicon, the epistatae should submit the account to the Community before their mandate ended (Art. 1). The Community was to deliver their account to the Synod of the Patriarchate of Constantinople, which together with other prominent persons checked its contents and validated it. The aim of this provision was to provide the supervision and system of control of the work of epistatae, which would be independent from the influence of large Athonite monasteries. In addition, it also restricted the self-will of epistatae, who were aware that their work at the end of the mandate was to be checked by independent bodies outside Mount Athos.

The typicon envisaged that the existing seal of the Community should be destroyed and a new one used, which had been made just before the enactment of the typicon. The text of the new seal was printed in the Turkish and Byzantine (Greek) letters. The provision concerning the division of the seal into four parts was taken from the draft, and each part was to be preserved by one of the epistatae. The rule was introduced stating that the seal could be used for any legal transaction except for verification of homologa (bonds), which were used as warranty for Mount Athos when borrowing from Istanbul and Thessaloniki (Art. 2). The aim of this provision was to put an end to excessive borrowings, mainly made by epistatae, since their service was temporary and short-term. For the same reason the rule was introduced that all bonds not registered in the order book kept in Constantinople should be made void. If, however, such a bond would occur, it would become the obligation of the person whose signature appeared on such a document (Art. 3). It is obvious that epistatae could not borrow without the consent of the Patriarchate of Constantinople and epitrope. In this way, the Community finance management (common Athonite finance) came under the full control of external fac-

tors. The attempt of smaller monasteries to restrict the self-will of the central administrative bodies by the institution of protos, ended in such a way that their power (especially in economic matters) was limited by the Patriarchate of Constantinople.

Epistatae were to examine and verify the books of incomes and expenses kept by skevofilaxes of monasteries (Art. 12). This provision was also taken from the draft, with minimal modifications. Instead of a protos, epistatae controlled monastery finances and the work of skevofilaxes. Such an amendment to provisions was necessary, since the new typicon did not envisage the institution of a protos.

As far as paying taxes is concerned, it should be pointed out that none of Athonite administrative organs was responsible for redistribution of the common tax among the monasteries and their regional establishments (cells). The typicon from 1783 regulated the issue of redistribution of taxes. Namely, the rule was introduced that the tribute should be paid per capita, and other taxes and penalties should be paid in proportion to the number of monks who lived in each of the monasteries.

4.2. Judicial Power

The sigillion of Patriarch Gabriel from 1783 introduced several instances of the judiciary in the organization of the Athonite monastic community. The question of the judiciary was regulated by Art. 4 of the typicon, which provided that all disputes between monasteries should first be examined and resolved by the four epistatae. So, the epistatae had judicial power and represented a kind of the court of first instance, to which the parties turned concerning all kinds of civil disputes. If the four epistatae were unable to resolve the dispute, then they were obliged to convene the synod, which included the representatives of all the monasteries. The judgment was passed at the meeting of the synod, so the synod represented a sort of court of second instance. Finally, the parties to the dispute might challenge the decision of the synod before the Patriarchate of Constantinople. The Patriarchate made the final judgment and had the role of an appellate court[36].

The organization of the judiciary, introduced by the typicon from 1783, was taken from the draft typicon which also provided three levels of judicial authority, but with the participation of a protos. Since there was no restoration of the old system of administration which would imply the existence of institutions of the protos, the responsibilities which were by the draft typicon the obligation of the protos, by the typicon from 1783 were transferred to the Episatsia consisting of four members. In all other aspects, the provisions were identical, indicating that the draft of 1783

[36] Δ. Παπαχρυσάνθου, 28.

played a significant role in the organization of the judiciary on Mount Athos. The system which was established at that time has been in force until today with certain changes.

There are two important consequences concerning the judiciary arising from the provisions of the typicon from 1783. In the first place, there is the Constantinople Patriarchate court jurisdiction in civil disputes. Although the Patriarchate of Constantinople centuries before had the jurisdiction in ecclesiastical disputes on Mount Athos, civil cases were usually solved by state courts. The second important issue is connected with this. Namely, the above mentioned organization of the judiciary prevented the participation of the laity in resolving the disputes that arose on Mount Athos. Although this had always been the aim, it was only in 1783 that such a rule was made explicit in one typicon.

5. THE CONCLUSION

The importance of the Athonite typicons is represented by two facts, i.e. how they were respected and how long after having been passed. The sigillion of Patriarch Gabriel from 1783 is one of the rare ones that was quite consistently applied in practice[37]. Of course, just as was the case with the previous typicons, the sigillion from 1783 was applied most consistently in the first years after its adoption, and, as the time passed, its provisions one by one started losing their importance and became *de facto* unbinding[38].

The sigillion from 1783 was the first typicon of Mount Athos which introduced a new organ of the central administration – the Epistasia[39]. As mentioned above, the Epistasia existed in a certain form even before the adoption of this typicon[40]. However, until 1873 there was no body with the functions and authority the Epistasia had[41]. This organ of administration was gradually formed, taking over the jurisdiction of the protos, and it was only in 1783 that it was made official. Since that year until today the Epistasia has possessed three kinds of competencies: it has seen to the

[37] Δ. Παπαχρυσάνθου, 29; Ν. Παπαδημητρίου Δούκας, 335.

[38] Χ. Κετνάς, 363.

[39] The word epistates comes from the verb επιστατώ (monitor, supervise, take care of something) and it refers to a foreman or supervisor.

[40] Many different points of views can be found concerning the time of the appear ance of the Epistasia. Most authors have agreed that the Epistasia in its present form was officially formed in 1783. Χ. Κτενάς, 806; Κ. Δελικάνης, 280; Δ. Πετρακάκος (1925), 56 57; Ν. Αντωνόπουλος, 74 Ε. Δωρής, *Το Δίκαιον του Αγίου Όρους Άθω*, Αθήνα Κομοτηνή 1994, 237.

[41] *Ibid*., 237.

execution of decisions taken by the Community, it has performed the first instance judicial power and specific tasks from the domain of local self-administration[42]. This is another reason why this year is considered the year when this *sui generis* authority, specific only for Mount Athos, appeared.

All the provisions of the typicon from 1783 concerning the composition and competences of the Epistasia were taken from the draft previously made by Athonite monks. However, there are two major differences. The first is the fact that this typicon did not envisage the institution of protos, so the epistatae represented the only permanent central administration organ. Another significant difference concerned the jurisdiction of the Constantinople Patriarchate. Athonite monks partly succeeded in limiting the power of epistatae, who were elected for one year, by reviving the protos as a lifelong institution. Because of the resistance of large monasteries the protos could not take office, but the same effect was achieved by expanding and establishing the authority of the Patriarch over the four epistatae. Once again it became obvious that only those that were outside Mount Athos benefited from the disagreements among Athonite monks.

Except for exercising the control over the work of epistatae, by the typicon from 1783 the Patriarch of Constantinople restored old and acquired new powers. He compiled new typicon, confirmed it by sigillion, controlled finances of Athonite monastic community and represented the highest judicial authority[43]. All these powers of the Patriarchate of Constantinople to some extent have been preserved until today. Bearing all this in mind, it can be said that the provisions of the mentioned typicon governing the scope and jurisdiction of Epistasia and of the Patriarchate of Constantinople were most consistently applied, and therefore had the strongest influence on the development and formation of Athonite monastic community as exists today.

Since Mount Athos kept its autonomy during Ottoman rule, it was necessary to establish self-administration bodies, which would perform all the tasks that were exempt from the scope of the Turkish authorities. For that reason, during the 18th century the major reform of organizing the administration on Mount Athos was completed, which resulted in the formation of new administrative bodies and different distribution of responsibilities. The basis of this new organization was composed of two bodies: the Epistasia and the Community. These bodies remain until our days the foundation of self-administration of Mount Athos, what makes those reforms so significant. In the meantime, the rules regulating their

[42] Ε. Δωρής, 238.

[43] Ν. Παπαδημητρίου Δούκας, 335.

competence and activities have only been adapted and made more precise. Therefore, it is necessary to investigate the reasons and historical background in which they were created. Their characteristics and their specific role in the modern organization of the authorities on Mount Athos can be fully comprehended only through such examination.

CERIF: S142

Hon. Frank J. LaBuda*

STALKING IN NEW YORK

1. INTRODUCTION

In a society people enact laws to protect the innocent. These laws often reflect the morals, values and concerns of that society. In ever changing societies laws too must change to protect the innocent. The United States is a very rapid changing society, and with changes in society come new concerns regarding social deviancy. In recent times, the issue of "stalking" has grown to become a concern for public and individual safety. In response to that concern, both the Judicial and Legislative Branches of Government have responded by enacting new laws and interpretations to protect people from Stalkers. This article will explain New York State's response to the social deviancy of Stalking.

Stalking, in common parlance today, is defined as "closely following and watching another person for a long period of time in a way that is threatening and dangerous" (Merriam-Webster's Dictionary).

As a general matter, even where attempts to criminalize stalking and to punish stalkers have been made, these efforts have often neglected the concerns of the victims of stalkers who are overwhelmingly women. This is not surprising, in view of the gendered nature of this crime, and given that "the politics of battered and raped women [has] become estranged from local [victim support] schemes, the State, and much of the criminal justice system."[1]

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[1] Balboni Anti Stalking Legislation Gains Statewide Support, News from State Senator Michael A.L. Balboni (Office of N.Y. State Sen. Michael A.L. Balboni, Albany, N.Y.), May 4, 1999.

When first proposed in 1992, the New York anti-stalking legislation was only ten to fifteen lines long; the law ultimately enacted was over ten single-spaced pages long. By being the last of the fifty states in the U.S. to enact anti-stalking legislation, New York had the advantage of learning from the examples, both positive and negative, of other states. One such example is that of providing protection for family members in extended households; Awhere the woman is being stalked and all of a sudden the Stalker switches and goes after the sister or the mother, and it=s all wrapped into the same kind of offense. Indeed, the New York legislation not only protects against this, but takes the concept of family one appropriate step further, in that, for purposes of the Act, "members of the same family or household, are included." *(See, Balboni, N1)*

The nature of stalking has been described as Aan individualized campaign of terrorism against the victim, and has factors which the law enforcement communities are very familiar with. It should be noted that the New York Legislature in criminalizing stalking set up a standard of intent that does not require that the stalker have a specific intent to stalk, but rather that the stalker intentionally engages in a course of conduct, which s/he "knew or reasonably should have known that such conduct" is likely to cause reasonable fear of material harm to the physical health, safety or property of the victim or a member of the victim's family, or the conduct causes material harm to the mental or emotional health of the victim or a member of the victim's family, or that the conduct "is likely to cause such person to reasonably fear that his or her employment is threatened, where such conduct consists of appearing, telephoning or initiating communication or contact at such person's place of employment or business, and the actor was previously clearly informed to cease the conduct."

This last and particularly bold initiative was to provide within the statute, recourse for victims who suffer employment, business or career consequences or reasonable fear in that regard, emanating from the conduct of the stalker, where the stalker has been once clearly informed to cease his conduct. New York State Senator Balboni, who sponsored New York's Stalking Statute, noted that prior to this enactment, there was no recourse for interference with employment and business, even civilly. This salutary provision statutorily recognizes that most stalking is statistically done by former intimate/friends or arises out of or intrudes into the workplace.

With respect to New York's first attempts in criminalizing "Stalking" behavior, in 1992, the New York Legislature only amended the misdemeanor statutes of Menacing (Penal Law §120.13) *(See Appendix for complete wording of the Status* [i]) and Harassment (Penal Law §240.26)[ii]

to the address the problem of one person Stalking another but only in a threatening, frightening or violent way.

The legislative history and legal analysis of anti-stalking laws which began in 1992 with the New York State Legislature recognized that the social deviancy of Stalking warranted stronger legal measures and amended the crimes of Menacing (Penal Law §120.13) and Harassment (Penal Law §240.26) to include sections addressing Stalking-like behaviors. It was determined shortly thereafter that even these new laws inadequately addressed the dynamics of anti-social behavior/criminality related to Stalking and the victims in our society.

The high correlation between stalking behavior and the infliction of physical violence or sexual assault was demonstrated by two federal studies. A recent FBI (U.S. Federal Bureau of Investigations) crime report showed that thirty percent of all murdered women are killed by their husbands or boyfriends who stalked them. A November 1997 National Institute of Justice study of stalking found that eighty percent of stalking victims who were stalked by their current or former intimate partner had, at some point in their relationship, been physically assaulted by their partner and thirty-one percent had been sexually assaulted by their partner. In recognition of the real and substantial risk of harm associated with stalking behavior, 49 states enacted anti-stalking laws. In 1992, the N.Y. Legislature took an important step towards recognizing that stalking requires stronger enforcement measures by amending New York′s Menacing and Harassment Laws to include stalking behavior within the definition of these crimes. However, with the new act in 1999, New York created the separate crime of stalking. The new law protects victims by providing real and effective sanctions for stalking conduct even at the earliest stages of their anti-social behavior. It also provides increased penalties for repeat offenders; for those offenders who stalk children, for those offenders who possess weapons when stalking, and for those offenders who commit stalking in violation of an order of protection. L.1999, c.635, §2.[2]

The Legislative History to the new stalking statute is self-explanatory in the necessity for enhanced penalties for stalking behavior. The Legislature found and declared that:

The legislature finds and declares that criminal stalking behavior, including threatening, violent or other criminal conduct has become more prevalent in New York state in recent years. The unfortunate reality is that stalking victims have been intolerably forced to live in fear of their stalkers. Stalkers who repeatedly follow, phone, write, confront, threaten or otherwise unacceptably intrude upon their victims, often inflict immeasurable emotional and physical harm upon them. Current law does not

[2] 1999 L Laws of New York, Chapter 635, Section 2.

adequately recognize the damage to public order and individual safety caused by these offenders. Therefore, our laws must be strengthened to provide clear recognition of the dangerousness of stalking.

In 1999 not satisfied with the previous amendments, the New York Legislature decided to create an additional and separate crime expressly known as "Stalking", and to designate certain degrees of stalking crimes as felonies.

The new statute established Stalking as a separate and distinct crime in New York State. Although some of the antisocial behaviors (criminal acts) associated with this type of offence are addressed in other provisions of the Penal Law regarding Harassment and Menacing, New York was the only state at that time in 1999 that had not established Stalking as a separate and distinct crime punishable with incarceration under the Penal Law.

The Stalking Legislation is designed to serve as a deterrent for those who "stalk" victims. Previous to the enactment of this legislation a defendant, who was known to have called 72 women and threatened to rape their female relatives unless the victim engaged in certain sexual behavior with him was only punishable by misdemeanor prosecution and no more than one year in jail.

The new provisions of Penal Law §§120.45 et seq. recognize the particular nature of this "victim-focused" crime by increasing the level of criminal charge and punishment in cases where the stalker has previously been convicted of one of a list of crimes against the victim or a family member, or those who regularly reside with the victim. The highest level of potential criminal stalking responsibility is established as a Class D Felony, which carries a maximum sentence of up to two and a third to seven (2 1/3 – 7) years in state prison!

In addition, the New York Stalking Law expands the definition of Stalking to include a situation where an individual engages in "serial stalking" by committing the crime against ten or more persons. The legislative intent was to increase the penalty to a substantial (7 year) state's prison sentence for this type of terrifying anti-social behavior.

The Penal Law in New York divides the crime of Stalking into four degrees, depending upon aggravating circumstances. The basic crime is Stalking in the fourth degree (Penal Law §120.45). ([iii] See Appendix for full text.)

The four essential elements for a crime of Stalking is that the defendant 1) "intentionally"; 2) for "no legitimate purpose"; and 3) engages in "a course of conduct" directed at a specific person; and 4) must know or "should reasonably know" the person.

The first basic element of a stalking crime requires a mens rea intent, which is a general mens rea applicable to all intentional crimes. (See full text of Penal Law Section 15.05 in Appendix[iv]) According to the Penal Law a person acts intentionally with respect to a result or to conduct (for example stalking) described by a statue defining a defense when his conscious objective is to cause such result or to engage in such conduct.[3]

The Stalking statute focuses on what the offender does and not what he means by it, or what he intended as the ultimate goal. This is a crucial difference, and in this manner, the Stalking law may hold responsible those ″delusional″ stalkers who believe that their victims are in love with them or that they can win their victims love by pursuing them″ *as stated by the NY Court of Appeals case People v. Stuart, 100 N.Y.2d 412)*[4].

With respect to the second element of ″no legitimate purpose″ the Court of Appeals in the *Stuart* case defined this term to mean ″the absence of a reason or justification to engage someone, other than to hound, frighten, intimidate or threaten.″ Such antisocial conduct is not constitutionally protected and is punishable under the law as a crime. Thus a stalker cannot claim a Constitutional defense of Freedom of Speech or the Freedom of Assembly for his course of conduct against the victim.

Although there is no statutory definition of ″course of conduct″ (the third basic element) the Courts, through legal precedent have held that an ″isolated incident″ does not constitute a ″course of conduct″ as defined by the *New York State Court of Appeals case of People v. Valerio, 60 N.Y.2d 669*[5]. The Court opined that where the violation of Harassment was not proved beyond a reasonable doubt where the only proof was that while picketing on the opposite side of the street from a union headquarters, defendant pointed to a union official as he left the building and stated publicly in a loud voice, ″There is the corruption I am talking about, and there is one of the corrupt ones.″ That constituted proof of neither the course of conduct nor the repeated commission of acts proscribed by the statute *(NY Penal Law, §240.25 subd 5)* under which defendant was convicted. Clearly, the NY Court of Appeals found that this type of conduct was not a course of conduct, but rather an isolated incident.

The fourth basic element of stalking is that the criminal must know or ″reasonably should know″ that his or her conduct will have one of the consequences specified in the statute. Thus the conduct need not actually cause reasonable fear; it is only required that it is ″likely″ to cause reason-

[3] New York Penal Law Section 1505 (1)

[4] People v Stuart 100 N.Y.2d 412

[5] People v. Valero 60 N.Y.2d 412

able fear. In this respect New York′s Stalking Law is pro-active in penalizing this kind of anti-social behavior.

It must be noted that, the specific Person (victim) has been expanded and is statutorily defined in the Penal Law to include "any other person who regularly resides or has regularly resided in the household of that person"[6]. Regularly is not defined by this statute and thus under standard statute interpretation it has its ordinary usage and meanings. Thus this provision significantly broadens the protected class of victims to include non-family members of the victim's household provided that they regularly reside with the victim.

The Stalking Statute now protects the victim from three different types of prohibited conduct.

The first alternative conduct under subdivision one is likely to cause reasonable fear of material harm to the physical health, safety or property of such person, a member of such person′s immediate family or a third party with whom such person is acquainted.

The second alternative conduct under subdivision two is to cause material harm to the mental or emotional health of such person, where such conduct consists of following, telephoning or initiating communication or contact with such person, a member of such person=s immediate family or a third party with whom such person is acquainted, and the actor was previously clearly informed to cease that conduct.

Under the third alternative consequence of Stalking (4th Degree) of Penal Law §120.45(3) the conduct required: ″is likely to cause such a person to reasonably fear...″ Here as in subdivision 1 there is no requirement that the conduct in fact caused such reasonable fear, but only that it is ″likely″ to cause the result. Subdivision 3 specifically spells out the type of conduct required to be performed. Also, most notably, both subdivisions 2 and 3 of this Section require that the defendant be informed to cease such conduct before the conduct is criminally actionable.

The new statute also punishes the recidivist stalker more severely for each subsequent stalking. Stalking in the 3rd Degree, Penal Law ′120.50 was designed to punish the recidivist stalker more severely for each such actionable behavior. Stalking in the 3rd Degree pursuant to NY Penal Law §120.50 provides that the commission of Stalking in the 4th Degree within ten years of the first conviction is Stalking in the 3rd Degree and a class A Misdemeanor punishable by up to one year in jail or three years of misdemeanor probation. Whereas, the lesser crime of Stalking in the 4th degree is a Class B Misdemeanor punishable by up 120 days in jail or by one year of probation.

[6] New York Penal Law §120.40(4)

Stalking in the 3rd Degree (Penal Law §120.50 – see Appendix for full text) may be committed three ways. Under subdivisions 1 and 2 there is an initial element of the commission of stalking in the 4th degree and that 4th degree must be against three or more persons "in three or more separate transactions that did form the basis of the previous conviction; or the commission of stalking or the commission of stalking in the 4th degree must be after having been convicted within the preceding ten years of the specified predicate crimes and the victim of the specified predicate crime must have been either the victim of the stalking or immediate family member of that victim."

Under subdivision 3 the crime of stalking in the 3rd degree requires the intent to engage in a course of conduct "likely to cause" the victim to reasonably fear physical injury, a commission of a sex offense, kidnaping, unlawful imprisonment of the person, or such person's immediate family.

Under subdivision 4 stalking in the 3rd degree is complete when the defendant has previously been convicted in the preceding ten years of stalking in the 4th degree.

The more severe crime, a Class E Felony, of Stalking in the 2nd (Penal Law §120.55 – see Appendix for full text) degree carries a maximum sentence of up to four years in prison or five years of felony probation as a first time offender. The crime of staking in the second degree may be committed in any one of five different ways and it enhances the penalty by way of a felony sentence for basically "serial" stalkers or under subdivision 1 for a stalker who in the course of and in furtherance of the commission of stalking displays or threatens the use of several designated weapons, or under subdivision ii displays "what appears to be a pistol, revolver, shotgun, machine gun, or other firearm." It must be noted that the actor need not actually possess the prescribed firearm, but merely displays what appears to be a "fake" pistol or threatening bulge would be sufficient to satisfy this element.

Finally, the most serious Stalking crime in New York is a Class D Felony of Stalking in the First Degree[7] carrying a maximum of seven years in states prison or five years of felony probation. This statute is in response to serial stalkers who "cause any physical injury to the victim,"[v] or have a previous conviction for Stalking in the 2nd Degree. Physical injury is defined by the NY Penal Law to mean any impairment of a physical condition or creating substantial pain.[8]

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[7] New York Penal Law §120.60 (See Appendix for full text.)

[8] New York Penal §10.00(9)

2. CONCLUSION

Enacting anti-stalking legislation is not the end of the story, although it is a good beginning. Although the passing of anti-stalking legislation is important, (it will deter people from stalking, it will save lives,) our attention must be focused on creating social support mechanisms to aid victims of stalking and to enhance legal enforcement and prevention of stalking behavior. It has been suggested that preventive education for children at a young age is important to deter adult stalking behaviors. In the U.S. where money is put into many social programs, such as Domestic Violence; Alternative Drug; and Veteran Courts[9], and we now need to invest ″tax dollars″ into social and educational programs to deter stalking behavior. I would suggest a comprehensive approach involving education, law enforcement and appropriate punishment that will effectively lessen the violence and protect people from stalkers.

Nonetheless in New York the Clinic Access and Anti-Stalking Act of 1999 does more than merely protect against stalking as traditionally defined or described, because it expands the proscribed activities to include the following: phoning and/or mailing a target. By legislating protections regarding the safety and lives of victims, their family and household members, and further statutorily protecting the victims′ employment, educational and financial lives, New York Penal Law provides the means for victims to take back ownership and control of their lives. Most importantly, the legislation provides the criminal justice system with a way in which to fight the insidious and pernicious conduct that previously was viewed as legally innocuous. What was once viewed before in society as an indiscretion is now culpable and criminal conduct which is prosecutable, and punishable under the Law.

APPENDIX

I. Penal Law ‘120.13 **Menacing in the First Degree**

A person is guilty of menacing in the first degree when he or she commits the crime of menacing in the second degree and has been previously convicted of the crime of menacing in the second degree or the crime of menacing a police officer or peace officer within the preceding ten years. Menacing in the first degree is a class E felony.

ii. Penal Law ‘240.26 **Harassment in the Second Degree**

[9] Judge LaBuda has also been designated in New York as a Drug Court and Vet eran Court Judge.

A person is guilty of harassment in the second degree when, with intent to harass, annoy or alarm another person:

1) he or she strikes, shoves, kicks or otherwise subjects such other person to physical contact, or attempts or threatens to do the same; or
2) he or she follows a person in or about a public place or places; or
3) he or she engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose.

iv. Penal Law Section 15.05(1). The following definitions are applicable to this chapter: 1. "Intentionally." A person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct. 2. "Knowingly." A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such circumstance exists. 3. "Recklessly." A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto. 4. "Criminal negligence." A person acts with criminal negligence with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

v. Some states have enacted statutes directed at stalking which have defined the term Acourse of conduct.@ A Aleading@ definition is that a Acourse of conduct@ means Aa pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose@ [West=s Florida Statutes Annotated '748.048]. Some states do not use the Ahowever short@ language [Alabama Code '13A-6-92; Rhode Island Statues '11-59-1; Maryland Code, Criminal Law, '3-801 (Maryland also requires that the pattern of conduct be a Apersistent@ pattern of conduct)]; some states instead of requiring a Aseries of acts,@ require two or more acts [Michigan Compiled Laws Annotated, Chapter 750,

Michigan Penal code ‘750.411h; North Dakota Century Code, Title 12.1 Criminal code ‘12.1-17-07.1]. California initially utilized the Aleading@ definition and then amended it to require two or more acts [Cal. Penal Code present and former section 646.9]. One state couples the Aleading@ definition with examples of the type of conduct that is included in the definition, namely, Aa series of acts of following, detaining, restraining the personal liberty of, or stalking the person or telephoning, contacting, or otherwise communicating with the person.@ [Nebraska Revised Statutes ‘28-311.02].) Several New York trial courts have utilized the Aleading@ definition [*People v Payton,* 161 Misc.2d 170, 612 N.Y.S.2d 815 (Criminal Court, Kings County, 1994); *People v. Murray*, 167 Misc.2d 857, 635 N.Y.S.2d 928 (Criminal Court, N.Y. County, 1995); *People v. Monroe,* 183 Misc.2d 374, 703 N.Y.S.2d 690 (Criminal Court, N.Y. County, 2000)].

6. ‘**10:00 Definitions of terms of general use in this chapter**

Except where different meanings re expressly specified in subsequent provisions of this chapter, the following terms have the following meanings:

9) APhysical injury@ means impairment of physical condition or substantial pain.

§ 120.50 Stalking in the third degree

A person is guilty of stalking in the third degree when he or she:

1. Commits the crime of stalking in the fourth degree in violation of section 120.45 of this article against three or more persons, in three or more separate transactions, for which the actor has not been previously convicted; or

2. Commits the crime of stalking in the fourth degree in violation of section 120.45 of this article against any person, and has previously been convicted, within the preceding ten years of a specified predicate crime, as defined in subdivision five of section 120.40 of this article, and the victim of such specified predicate crime is the victim, or an immediate family member of the victim, of the present offense; or

3. With intent to harass, annoy or alarm a specific person, intentionally engages in a course of conduct directed at such person which is likely to cause such person to reasonably fear physical injury or serious physical injury, the commission of a sex offense against, or the kidnapping, unlawful imprisonment or death of such person or a member of such person's immediate family; or

4. Commits the crime of stalking in the fourth degree and has previously been convicted within the preceding ten years of stalking in the fourth degree.

Stalking in the third degree is a class A misdemeanor.

(Added L.1999, c. 635, § 13, eff. Dec. 1, 1999.)

87

§ 120.55 Stalking in the second degree

A person is guilty of stalking in the second degree when he or she:

1. Commits the crime of stalking in the third degree as defined in subdivision three of section 120.50 of this article and in the course of and in furtherance of the commission of such offense: (i) displays, or possesses and threatens the use of, a firearm, pistol, revolver, rifle, shotgun, machine gun, electronic dart gun, electronic stun gun, cane sword, billy, blackjack, bludgeon, plastic knuckles, metal knuckles, chuka stick, sand bag, sandclub, slingshot, slungshot, shirken, "Kung Fu Star", dagger, dangerous knife, dirk, razor, stiletto, imitation pistol, dangerous instrument, deadly instrument or deadly weapon; or (ii) displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm; or

2. Commits the crime of stalking in the third degree in violation of subdivision three of section 120.50 of this article against any person, and has previously been convicted, within the preceding five years, of a specified predicate crime as defined in subdivision five of section 120.40 of this article, and the victim of such specified predicate crime is the victim, or an immediate family member of the victim, of the present offense; or

3. Commits the crime of stalking in the fourth degree and has previously been convicted of stalking in the third degree as defined in subdivision four of section 120.50 of this article against any person; or

4. Being twenty-one years of age or older, repeatedly follows a person under the age of fourteen or engages in a course of conduct or repeatedly commits acts over a period of time intentionally placing or attempting to place such person who is under the age of fourteen in reasonable fear of physical injury, serious physical injury or death; or

5. Commits the crime of stalking in the third degree, as defined in subdivision three of section 120.50 of this article, against ten or more persons, in ten or more separate transactions, for which the actor has not been previously convicted.

Stalking in the second degree is a class E felony.

(Added L.1999, c. 635, § 13, eff. Dec. 1, 1999; amended L.2000, c. 434, § 4, eff. Oct. 20, 2000; L.2003, c. 598, § 1, eff. Nov. 1, 2003; L.2008, c. 257, § 2, eff. Nov. 1, 2008.)

§ 120.60 Stalking in the first degree

A person is guilty of stalking in the first degree when he or she commits the crime of stalking in the third degree as defined in subdivision three of section 120.50 or stalking in the second degree as defined in section 120.55 of this article and, in the course and furtherance thereof, he or she:

1. intentionally or recklessly causes physical injury to the victim of such crime; or

2. commits a class A misdemeanor defined in article one hundred thirty of this chapter, or a class E felony defined in section 130.25,

130.40 or 130.85 of this chapter, or a class D felony defined in section 130.30 or 130.45 of this chapter.

Stalking in the first degree is a class D felony.

(Added L.1999, c. 635, § 13, eff. Dec. 1, 1999; amended L.2000, c. 434, § 5, eff. Oct. 20, 2000.)

Notes of Decisions

Physical injury 1

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1. Physical injury

Evidence that defendant repeatedly punched victim on her face and body, causing bruising that lasted for days, swollen and bleeding lips making it difficult to drink, difficulty walking, and substantial pain was sufficient to establish element of physical injury required for conviction of first-degree stalking. People v. Gomez (1 Dept. 2007) 43 A.D.3d 763, 842 N.Y.S.2d 21. Assault And Battery ⇐ 91.7

Dr Boris Begović*

George A. Akerlof, Robert J. Shiller, *Phishing for Phools: The Economics of Manipulation and Deception*, Princeton University Press, Princeton Oxford, 2015, 272

Two intellectual heavyweights, even by the standard for Nobel Prize winners, focused on an unquestionably gravy topic and produced a rather compact, very readable book (not only because no maths is used). Is it a recipe for success or for disaster? Their own words about the book are not very helpful for answering the question, as they intended the book to be serious, but enjoyable – a rather strange choice for economists deeply immersed in the notion of trade-offs.

The opening salvoes are heavy: with selfish and self-serving behaviour of business people, our free-market system tends to spawn manipulation and deception. This is followed by the insight that, inevitably, the competitive pressure for businessmen to practice deception and manipulation in free markets lead us to buy products that we do not need. And this has been written by the two authors, who just one sentence later, considered themselves as admirers of the free-market system. Hence at the very beginning of the book they set the bar very high. They have to provide evidence for the mechanisms of the ubiquitously disastrous consequences of the free-market system (manipulation and deception), and it is even more difficult to explain why they admire a system with such disastrous consequences.

Being economists, after all, the authors start the deliberation by offering their definition of phishing, considering the computer definition only as a metaphor. Hence *phishing* for Akelof and Shiller is about getting people to do the things that are in the interest of the phisherman, but not in the interest of the target. Furthermore, a *phool* is someone who, for whatever reason, is successfully phished. In the case of psychological phools it is due to emotional or cognitive biases, while informational phools act on information that is intentionally crafted to mislead them.

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After providing the definitions, the authors spell out the plan for the book: to give a number of cases of phishing for phools that will illustrate how much it effects our lives, i.e. their lives, as most of the cases are from the USA. And the authors thoroughly and meticulously execute their plan. Case by case a reader is submerged in the sea of what should be phishing for phools.

In the first chapter, before never-ending cases and examples of what should be considered phishing, a concept of phishing equilibrium is introduced and it is compared to the perfect competition market equilibrium. Not a big deal: phishing equilibrium is inferior to the perfect competition equilibrium regarding social welfare. For nearly 60 years, since the introduction of the notion of market failures in economic theory, it is evident that any discrepancy from perfect competition moves the economy away from the Pareto optimality, i.e. from maximum efficiency. Furthermore, the list of psychological biases (formulated by Robert Cialdini) is spelled out. We are phishable because: we want to reciprocate gifts and favours; because we want to be nice to people we like; because we do not want to disobey authority (point not valid for Serbia though); because we tend to follow others in deciding how to behave; because we want our decisions to be internally consistent; and because we are averse to take losses. That is correct; we are just humans, we make mistakes, but one could struggle with the notion that something is wrong with our aversion to take losses. Economists would say that this is consistent with utility maximising behaviour.

Two cases in the first chapters are about human mistakes and about – monkeys. The findings of the empirical studies on price schemes that are chosen by the customers at health clubs show that when customers were at the health club, they were overoptimistic about their exercise plan, so they signed up for a package that they overpaid. So what? They made a mistake. And they can cancel the contact and sign a new one simply by going down to the club – the very club they regularly visit for exercise. This is phishing for phools? Reader wonders if he/she missed something. But no, this is the whole story. Maybe the monkeys will be more convincing.

The experiment with capuchin monkeys is about their choices. The crucial insight is that capuchins have a limited ability to resist temptation. They also love marshmallows, although we have every expectation that they would become anxious, malnourished, exhausted, addicted, quarrelsome and sickened. The issue is that what we expect is irrelevant; the crucial insight is whether capuchins have the same expectation, if any. And then, with the wave of a magic wand, the finding of the capuchins' preference for Marshmallows is used as the grounds for the conjecture ("we can imagine") that we humans, like the capuchins, have two differ-

ent types of tastes. The first concept of tastes (or preferences, to use economic jargon) describes what is genuinely good for us. The second concept of tastes is the tastes that determine how we actually make out choices. And those choices, according to the authors, may not be good for us. The reason why? Because of the capuchins and their choices? Monkey business for sure.

Then a painful and cumbersome trip through all the subsequent chapters follows. Chapters and chapters of cases, some of them relevant for the topic, some of them not. One of them is on temptations and unpaid bills from which could be learned that free market produces continual temptation. As though mankind had not faced temptation far before the emergence of the free market. This was mentioned in the texts published much earlier than the contributions of Adam Smith. And the subsequent chapter is one on reputation mining and financial crises. The problem is that the reasons for reputational mining, i.e. deliberate destroying one's own reputation, are not explained. The section with the promising title "Why was reputational mining so profitable?" gives no clear answer. And the appendix of this chapter with the promising title "The credit default swap sideshow", presents the case of the AIG who supplied credit default swap insurance for a negligible premium of 0.12 percent. That is hardly phishing, just a wrong business decision (although based on the results of the econometric model) under conditions of uncertainty. Everyone bet that the bubble would never burst, on never-ending increase of property values and no increase of mortgage defaults. Everyone was wrong, so it was not a case of fishing for phools.

Numerous stories of cases of ostensibly phishing for phools follow. We learn that advertisers discovered how to focus on our weak spots, that the greatest rip-offs can be found in car and house purchases and purchases by credit cards, that there is phishing in politics in democracies, as well as in food and pharmaceutical industries (appropriately labelled as *phood* and *pharma*), that innovations are not necessarily good, that tobacco and alcohol are bad for us, that someone can profit from bankruptcy. Finally, there are stories about junk bonds as phishing, and the resistance to phishing and its heroes.

Although all the stories should be cases of phishing for phools, many of them are nothing more than stories about wrong business decisions. It is rather trivial insights that business decisions are made under uncertainty and that any decision of that kind can be assessed as wrong only *ex post*. Human knowledge is rather limited, especially about the future; meaning well is only a necessary, but not a sufficient condition for business success.

Furthermore, having such a large number of cases is definitely a weakness of this book. One could speculate that the intention of the au-

thors was to demonstrate that phishing is pervasive. However, the choice to offer a huge number of cases/stories prevents them from presenting a systematic and in-depth analysis of the phenomenon. Basic mechanisms are not explored, nor are the contributing factors. As it is reasonable to assume that phishing for phools is not evenly distributed across sectors (even if it is pervasive), we learned nothing about the factors of this distribution: why it is more probable that phishing for phools will emerge in one sector than in another? Taking that into account it is not surprising that the book offers no clue about what may be done to stop phishing for phools.

Furthermore, there are some fundamental weaknesses in the analysis and its findings. It is neglected that humans adjust themselves to incentives. Being fooled ones does not mean that very individual will be fooled again. Learning by doing is a process that includes phools too. In addition to that, there is a budgetary constraint that undermines spending activities, whether they are foolish, irrational or other. Budgetary constraint of consumer is difficult, not unrealistic. Finally, there is an implicit assumption by the authors that market exchanges are a zero-sum game; i.e. profit for one participant necessarily means the loss for the other. But markets are not a zero-sum game – they are welfare enhancing, essentially because the exchange is voluntary. Taking that into account it is easier and in the long run more profitable for the supply side entrepreneurs to produce and sell products that customers actually need. It is easier and more profitable because there would be no cost of persuasion of the customers and because it is sustainable. This is more-less free market economics 101.

It is rather difficult to rate this book as a success. After many of the insights, the reader's reaction is simply "So what!". Hence the recipe from the beginning of this review is definitely one for disaster! What was the motive for two intellectual heavyweights to attempt in such an endeavour and produce such a book? It is difficult to speculate about motives, but it seems that there is a strong wish for certain Nobel Prize winners to become households' names, the way that Joseph Stiglitz and Paul Krugman did. And the reputation risk is negligible – they will be Nobel Prize winners forever, one way or another. So the book, it seems, has its origin in the Stiglitz-Krugman syndrome.

It is tempting to use the notions from the book to express a personal opinion of a reader for the end. One could *prima facie* say that I was phished by Akelof, Shiller and Princeton University Press and I was phooled. Yes, I have paid 20.25 GBP (including postage & packing) for a book that I obviously do not appreciate – that I did not really want, to use the terminology from the book. But this book has an incredible value. It reminds everyone concerned of the consequences of lowering the bar for

measuring the quality of your contribution, the consequences of the attitude that the names of the authors are enough for their product to be of high quality and the consequences of unlimited vanity – a Nobel Prize is not enough for social recognition. For all these reasons (save the Nobel Prize vanity, I am not at risk), I will keep this reminder in a highly-visible place in my library. I was not phooled after all – it was money well spent!

As with many things in this book, the authors have no second thoughts on the human preferences: "No one wants to be an alcoholic". Although after reading such a book, one should keep an open mind.

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Example: H.L.A. Hart, *Concept of Law*, Oxford University Press, Oxford 1997, 26.

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Example: H.L.A. Hart, *Concept of Law*, Oxford 1997, 254 fn. 41.

2. Articles: first letter of the author's name (with a period after it) and author's last name, article's title in recto with quotation marks, name of the journal (law review or other periodical publication) in verso, volume and year of publication, page number without any supplements (as in the book citation). If the name of a journal is longer than usual, an abbreviation should be offered in brackets when it is first mentioned and used later on.

Example: J. Raz, "Dworkin: A New Link in the Chain", *California Law Review* 3/1995, 65.

3. If there is more than one author of a book or article (three at most), their names should be separated by commas.

Example: O. Hood Phillips, P. Jackson, P. Leopold, *Constitutional and Administrative Law*, Sweet and Maxwell, London 2001.

If there are more than three authors, only the first name should be cited, followed by abbreviation *et alia* (*et al.*) in verso.

Example: L. Favoreu *et al*., *Droit constitutionnel*, Dalloz, Paris 1999.

4. Repeated citations to the same author should include only the first letter of his or her name, last name and the number of the page.

Example: J. Raz, 65.

4.1. If two or more references to the same author are cited, the year of publication should be provided in brackets. If two or more references

to the same author published in the same year are cited, these should be distinguished by adding a,b,c, etc. after the year:

Example: W. Kymlicka, (1988a), 182.

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Example: H.L.A. Hart, 238–276.

Example: H.L.A. Hart, 244 etc.

6. If the same page of the same source was cited in the preceding footnote, the Latin abbreviation for *Ibidem* should be used, in verso, followed by a period.

Example: *Ibid.*

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Example: *Ibid.*, 69.

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Example: Personal Data Protection Act, *Official Gazette of the Republic of Serbia*, No. 97/08.

7.1. If the statute has been changed and supplemented, numbers and years should be given in a successive order of publishing changes and additions.

Example: Criminal Procedure Act, *Official Gazette of the Republic of Ser bia*, No. 58/04, 85/05 and 115/05.

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Example: Article 5 (1) (3); Article 4–12.

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10. Latin and other foreign words and phrases as well as Internet addresses should be written in verso.

11. Citations of the web pages, websites or e-books should include the title of the text, source address (URL) and the date most recently accessed.

Example: European Commission for Democracy through Law, Opinion on the Constitution of Serbia, *http://www.venice.coe.int/docs/2007/CDL AD(2007)004 e.asp,* last visited 24 May 2007.

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