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Marko Jovanović, PhD**

NECESSITY AS A GROUND FOR PRECLUDING WRONGFULNESS IN INTERNATIONAL INVESTMENT LAW

The issue of necessity as a ground for precluding wrongfulness has received close attention over the last two decades both in case law and in scholarly writings. Arbitrations conducted against Argentina for breaches of bilateral investment treaty obligations committed while fighting against economic crisis revived the old contro versies related to the concept of necessity in general public international law, but also brought up some new dilemmas. This paper analyses the use of necessity in in ternational investment law in light of what the authors suggest to be the legal pur pose of this concept, points to and discusses the divergences in case law with respect to some of the elements of the defence based on necessity and offers the solutions susceptible to lead to a more harmonious understanding of necessity in international investment law.

Key words: *Necessity. International Investment Law. Ecological Emergency. Economic Emergency. Bilateral Investment Treaties.*

1. INTRODUCTION

The rules of general public international law have played an important role in shaping the modern law of investment protection.[1] Even

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[1] K. J. Vandevelde, "A Brief History of International Investment Agreements", *University of California Davis Journal of International Law and Policy* 1/2005, 157–194;

though today, at the time when the process of "treatification"[2] of international investment law has well advanced, one might be tempted to conclude that investment law has grown into an autonomous and specialized set of rules fully emancipated from general international law, the bonds between the two normative systems are still not entirely broken. Despite the existence of a dense web of bilateral and multilateral investment treaties and provisions on investment protection in municipal law, investment arbitration tribunals have not ceased to rely on general rules of international law.[3] One of the areas of investment law where the rules of general international law still find their recurrent applicability is the area of exclusion of the host State responsibility for protection of foreign investments on its territory. There are several types of circumstances which preclude wrongfulness in international law: consent, compliance with peremptory norms, self-defence, countermeasures, force majeure, distress and necessity.[4] Two of these grounds are the most likely to be relied upon by States in investment arbitrations as a defence against claims for violation of investors' rights: force majeure and necessity.[5] This paper will focus on the latter.

Unlike force majeure, in case of which a State justifiably disrespects its international obligation due to an unpredictable, irresistible and external factor, necessity refers to a situation where a State has made a conscious comparison of values in conflict and deliberately decided to sacrifice one in order to protect another. It is thus precisely due to this subjective element – the assessment of relative importance of the con-

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Peter Muchlinski, "Policy Issues", *The Oxford Handbook of International Investment Law* (eds. Peter Muchlinski, Federico Ortino, Christoph Schreuer), Oxford University Press, Oxford 2008, 16–19; R. Dolzer, C. Schreuer, *Principles of International Investment Law*, Oxford University Press, Oxford 2012^2, 1–19.

[2] For an overview of ever increasing role of international treaties as sources of investment law see: R. Echandi, "Bilateral Investment Treaties and Investment Provisions in Regional Trade Agreements: Recent Developments in Investment Rulemaking", *Arbitration under International Investment Agreements: A Guide to Key Issues* (ed. Katia Yannaca Small), Oxford University Press, Oxford 2010, 3–6.

[3] More on this point see P. Dumberry, "A Few Observations on the Remaining Fundamental Importance of Customary Rules in the Age of Treatification of International Investment Law", *ASA Bulletin* 1/2016, 41–61.

[4] See Arts. 20–26 of Articles on Responsibility of States for Internationally Wrongful Acts 2001 (hereinafter: ARSIWA).

[5] A. K. Bjorklund, "Emergency Exceptions: State of Necessity and Force Majeure", *The Oxford Handbook of International Investment Law* (eds. Peter Muchlinski, Federico Ortino, Christoph Schreuer), Oxford University Press, Oxford 2008, 461. Cf. Alexis Martinez, "Invoking State Defenses in Investment Treaty Arbitration", *The Backlash Against Investment Arbitration* (eds. Michael Waibel *et al.*), Kluwer Law International 2010, 316; R. Doak Bishop, J. Crawford, W. Michael Reisman, *Foreign Investment Disputes: Cases, Materials and Commentary*, Kluwer Law International 2014^2, 897.

flicting values at stake – that necessity is often considered to be a highly controversial ground of defence in international law.[6]

What is more, the recent investment arbitrations against Argentina[7] have added new aspects to the already controversial character of the defence based on necessity in international investment law. Namely, the controversies which follow the defence based on necessity in investment arbitration are not only due to the complexity of the necessity exception itself, but also to the fact that State defences based on customary law grounds can sometimes be confused with the so-called "non-precluded measures clauses"[8]. Even though both necessity and non-precluded measures eventually lead to the same result – the exclusion of State liability, the conditions for successfully invoking necessity need not correspond to the conditions that must be fulfilled for resorting to non-precluded measures.[9] Therefore, investment tribunals ought to pay close attention to the set of conditions they examine when deciding on each of the respective grounds of defence, which, as we will show further on, did not always occur in practice.

In light of the aforementioned controversies, the aim of this paper will be to present and analyse the specificities regarding the use of the defence based on necessity in international investment law. In order to achieve this goal, we will start off by explaining the basics of the concept of necessity in general public international law (2.) and then turn to its particularities in international investment law (3.).

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[6] Case Concerning the Difference between New Zealand and France (Rainbow Warrior), 30 April 1990, *Reports of International Arbitral Awards* vol. XX, 254; M. Shaw, *International Law*, Cambridge University Press, Cambridge 2008[6], 798.

[7] Since the outbreak of the Argentinean economic crisis in the end of the 20th and the beginning of the 21st century, more than 40 investment claims were lodged against it before the International Centre for Settlement of Investment Disputes (ICSID). A detailed and updated list of cases is available at: *https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx?rntly ST4*, last visited 1 October 2016. However, this is not the full list of cases, since some disputes were resolved under other procedural mechanisms, such as *ad hoc* arbitrations pursuant to the UNCITRAL Rules.

[8] "Non precluded measures clauses" are provisions contained in an international treaty which stipulate that nothing in that treaty shall preclude a State party to take mea sures that are necessary to protect a certain interest. More on these clauses in bilateral investment treaties see: W. Burke White, A. von Staden, "Investment Protection in Ex traordinary Times: The Interpretation and Application of Non Precluded Measures Provi sions in Bilateral Investment Treaties", *Virginia Journal of International Law* 2/2008, 307–410.

[9] On the differences between the two grounds of defense in the context of the Argentinean economic crisis see: T. Gazzini, "Foreign Investment and Measures Adopted on Ground of Necessity: Towards a Common Understanding", *Transnational Dispute Management* 1/2010, 1–28; P. Tomka, "Defenses Based on Necessity Under Customary International Law and on Emergency Clauses in Bilateral Investment Treaties", *Building International Investment Law: The First 50 Years of ICSID* (eds. Meg Kinnear *et al.*), Kluwer Law International 2015, 477–494.

2. BASIC CHARACTERISTICS OF THE CONCEPT OF NECESSITY IN GENERAL PUBLIC INTERNATIONAL LAW

The customary concept of necessity is codified[10] in the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts of 2001 (hereinafter: ARSIWA). Even though the current wording is considered to be a somewhat enlarged version of the necessity provision which existed in the 1996 draft,[11] ARSIWA nevertheless contain a very strict and exceptional concept of necessity. The strictness of the concept is reflected in the requirement that all conditions for the application of necessity must be cumulatively met for this defence to be successfully invoked.[12] The exceptional character of the necessity defence is emphasized by the negative wording of Article 25 ARSIWA – necessity may *not* be invoked unless all the conditions prescribed are met.[13]

Namely, Article 25 of ARSIWA reads:

"Necessity may not be invoked by a State as a ground for precluding wrongfulness of an act not in conformity with an international obligation of that State unless the act:

(a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and

[10] Even though the International Court of Justice held, though without further explanation, that Art. 25 ARSIWA reflects customary international law on necessity (see *Case Concerning the Gabčíkovo Nagymaros Project (Hungary/Slovakia)*, Judgment of 25 September 1997, *ICJ Reports* 1997, para. 52; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, *ICJ Reports* 2004, para. 140), some authors argue that the aforementioned provision might represent not only the codification but also the progressive development of international law (see R. Boed, "State of Necessity as a Justification for Internationally Wrongful Conduct", *Yale Human Rights and Development Journal* 1/2000, 45; D. Caron, "The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority", *American Journal of International Law* 4/2002, 874; I. Brownlie, *Principles of Public International Law*, Oxford University Press, Oxford 2008[7], 466; R. Sloane, "On the Use and Abuse of Necessity in the Law of State Responsibility", *The American Journal of International Law* 4/2012, 450). Bearing in mind the topic and purpose of this paper, we will not take position on this question and we will content ourselves with merely noting various opinions on the issue.

[11] S. Heathcote, "Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Necessity", *The Law of International Responsibility* (eds. James Crawford, Alain Pellet, Simon Olleson), Oxford University Press, Oxford 2010, 495.

[12] M. Agius, "The Invocation of Necessity in International Law", *Netherlands International Law Review* 2/2009, 99.

[13] International Law Commission, "Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries" (hereinafter: Commentary), *Yearbook of International Law Commission* vol. II, 2001, 83, para. 14.

(b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

(a) The international obligation in question excludes the possibility of invoking necessity; or

(b) The State has contributed to the situation of necessity."

As its structure shows, Art. 25 ARSIWA contains two sets of conditions for the application of necessity: the conditions related to the balancing of conflicting interests at stake and the conditions of absolute preclusion of the possibility to resort to necessity defence.[14] The first, "positive" set of conditions encompasses five elements: (1) the existence of an essential interest, (2) a threat to such interest by a grave and imminent peril, (3) the lesser value of the interest sacrificed compared to the interest safeguarded, (4) the requirement that the act taken in necessity is the only means to safeguard the essential interest, and (5) the requirement that the adequate balance of interests exists on a bilateral or multilateral level, or in relation to the international community as a whole. The second, "preclusive" set of conditions requires the absence of two elements: (1) unsuitableness of the international obligation to be disrespected in necessity and (2) the contribution of the State to the situation of necessity.

The involvement of an essential interest appears to be the keystone of the necessity concept as laid down in Art. 25 ARSIWA. This element should be considered both on the side of the State acting in necessity and on the side of the State or the States injured, and its importance is twofold. On the one hand, the existence of the essential interest provides legitimacy to the act taken in necessity since the breach of an international obligation may be justified only if committed in view of protecting an essential interest of the breaching State.[15] Historically, States have relied upon the need to preserve an essential interest in cases where there was a danger of extermination of certain animal species[16] or the threat of a biological hazard[17]. On the other hand, the essential interest of the State or

[14] For such taxonomy of conditions see S. Heathcote, 496. Cf. M. Agius, 102–111.

[15] Art. 25(1)(a) ARSIWA.

[16] E.g. *Russian Fur Seals Controversy* (1893), cited in Commentary of Draft Ar ticles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of the Inter national Law Commission* vol. II(2), 2001, 81.

[17] E.g. *The Torrey Canyon Incident* (1967), cited in Commentary of Draft Articles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of the Interna tional Law Commission* vol. II(2), 2001, 82.

the States injured by the breach constitutes a boundary to the act taken in necessity, since the breach of an international obligation committed in necessity may not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.[18]

Nevertheless, the very definition of the term 'essential interest' is left open in the text of ARSIWA. This was done intentionally,[19] since it was believed that the essential character of an interest invoked should be assessed in light of all circumstances of each particular case[20]. By way of example only, it was stated that the essential interest may take a form of a State's "*(...) political or economic survival, the continued functioning of its essential services, the maintenance of internal peace, the survival of a sector of its population, the preservation of the environment of its territory or a part thereof, etc.*"[21] It seems, however, that this approach of the International Law Commission makes it possible to argue that Art. 25 ARSIWA objectivises to a certain extent the concept of essential interest. Namely, it is our understanding that, precisely by stating that the essential character of the interest safeguarded should be established in each particular case, the International Law Commission actually suggests that the assessment of the essential character of an interest is suitable to be subjected to review – the subjective assessment of the State acting in necessity as to the essential character of the interest that it was safeguarding does not suffice.[22] This will prove to be particularly important for the use of necessity in investment disputes.

Not only do ARSIWA leave the notion of essential interest open, but they also contain no guidelines as to how the reference to grave and imminent peril should be interpreted. It was therefore left to commentaries and case law to define the said notion. Accordingly, with respect to the element of graveness of the peril, it was submitted that the peril "*(...) does not need to take the form of a threat to the life of individuals whose conduct is attributed to the State, but [that it can represent] a grave danger to the existence of the State itself, its political or economic survival, the continued functioning of its essential services, the maintenance of inter-*

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[18] Art. 25(1)(b) ARSIWA.

[19] J. Crawford, "Second Report on State Responsibility Document A/CN.4/498/ ADD.1 4", 1999, para. 283, available at: *http://legal.un.org/ilc/documentation/english/a cn4 498.pdf*, last visited 1 October 2016.

[20] International Law Commission, "Report on State Responsibility Document A/35/10", *Yearbook of the International Law Commission* vol. II(2), 1980, 49, para. 32.

[21] R. Ago, "Addendum to the Eighth Report on State Responsibility Document A/CN.4/318/ADD.5 7", *Yearbook of the International Law Commission* vol. II(1), 1980, 14, para. 2.

[22] For a discussion on this point see A. Bjorklund, 503–505; S. Heathcote, 496.

nal peace, the survival of a sector of its population, the preservation of the environment of its territory or a part thereof, etc."[23]. As far as the element of imminence of the peril is concerned, the International Court of Justice (hereinafter: the ICJ or the Court) stated that the "*[i]mminence is synonymous with 'immediacy' or 'proximity' and goes far beyond the concept of 'possibility'*"[24]. This is very important for understanding the boundaries of the concept of necessity. Namely, even though the word 'peril' implies the element of risk as opposed to 'damage' where the detriment has already materialized,[25] the requirement of its imminence prevent the necessity to serve as a precautionary principle but rather limits it to a "*(...) preventative mechanism [for] managing crises [already occurred] which, if not averted, will lead to grave harm*"[26].

A particularly delicate element of the concept of necessity is the requirement that the disrespect of an international obligation represents "*the only way*" for the State to preserve its essential interest. It is understood that the reliance on necessity is excluded where "*(...) there are other (otherwise lawful) means available, even if they may be more costly or less convenient*"[27]. Due to such restrictive understanding, this requirement significantly narrows down the possibility of invoking necessity. Even though some authors consider that the role of this element is decreasing over time in international law,[28] it should be noted that the landmark decisions of the ICJ in the matter of necessity still find this requirement vital and important.[29]

Despite its exceptional character, the defence based on necessity plays an important role in international law. It serves, as stated in doctrine, "*to avoid an overly rigid application of the law in circumstances where there are conflicting values*"[30]: one of a fundamental character (which needs to be safeguarded) and the other of a comparatively lesser importance (which is to be sacrificed). In other words, the concept of necessity is meant to be a "*(...) safety valve [used] to relieve the inevitably untoward consequences of a concern for adhering at all costs to the*

[23] R. Ago, "Addendum to the Eighth Report on State Responsibility Document A/CN.4/318/ADD.5 7", *Yearbook of the International Law Commission* vol. II(1), 1980, 14.

[24] *Gabčíkovo Nagymaros*, para. 54.

[25] *Ibidem.*

[26] S. Heathcote, 497.

[27] Commentary, 83, para. 14.

[28] M. Agius, 105.

[29] See *Gabčíkovo Nagymaros*, para. 58; *Construction of Wall*, para. 140.

[30] S. Heathcote, "Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Necessity", *The Law of International Responsibility* (eds. James Crawford, Alain Pellet, Simon Olleson), Oxford University Press, Oxford 2010, 491.

letter of law"[31]. Accordingly, the concept of necessity might be viewed as a legal tool which enables fair and distribution of detriment arising out of the situation where there is a grave and imminent peril to the occurrence of which the State did not contribute and which threatens its essential interests.[32] It is precisely in light of that purpose of necessity that we will assess the use of this concept in international investment law.

3. USE OF NECESSITY IN INTERNATIONAL INVESTMENT LAW

At the turn of the 21st century the issue of necessity started becoming relevant for a specific type of international disputes – disputes related to the protection of foreign investments. There were two emblematic situations in which States argued the existence of an essential interest: threats to ecological safety (3.1) and economic stability (3.2). Other situations that would give rise to necessity have not yet been recorded in case law.

3.1 Ecological safety as a ground for invoking necessity

Ecological safety as the essential interest of a State was in focus of the *Gabčíkovo-Nagymaros* case before the ICJ. This dispute arose after Hungary decided to unilaterally suspend and some time later abandon certain obligations under a treaty with Slovakia concerning joint works on a part of the River Danube, which forms the natural border between the two countries. Even though this was not a "classical" investment dispute in the sense that it opposed an investor to a host State, the case nevertheless did revolve around a project that, on the basis of its duration, risks associated to its performance, magnitude and importance may qualify as an investment jointly performed by two States. In the proceedings before the ICJ Hungary relied on the "state of ecological necessity" in order to justify its withdrawal from the project. Namely, Hungary argued that, if the project were to be entirely carried out as set by the Hungary-Slovakia treaty, this could lead to such changes in the environment that would be likely to result in the artificial floods and changes of groundwater level, significant drop of quality of water in certain parts of the country and consequently, to the extinction of the fluvial flora and fauna as well as of certain species living in alluvial planes.[33]

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[31] R. Ago, "Addendum to the Eighth Report on State Responsibility Document A/CN.4/318/ADD.5 7", *Yearbook of the International Law Commission* vol. II(1), 1980, 51, para. 80.

[32] For a detailed economic analysis of necessity see A. Sykes, "Economic 'Neces sity' in International Law", *American Journal of International Law* 2/2015, 296–323. Al though we do not necessarily agree with all the conclusions presented by this author, we draw attention to the complexity and perceptiveness of his analysis.

[33] *Gabčíkovo Nagymaros*, para. 40.

As it is expressly stated in the judgment, the ICJ had "*no difficulty*" finding that the protection of environment as argued by Hungary indeed presented an essential interest within the doctrine of necessity,[34] and invoked an earlier advisory opinion issued by the Court which emphasized the significance of a healthy environment for human beings, "*including generations unborn*"[35]. Therefore, the Court's upholding of the need for preservation of ecological safety may indeed constitute an essential interest of a State and give rise to breaches of the investment-related international obligations committed in necessity. However, what appeared to be more difficult for Hungary to prove in the case at hand were other elements of the defence based on necessity. Namely, the Court found that Hungarian essential interests were not exposed to grave and imminent peril[36] and that Hungary could have resorted to means other than the breach of the treaty with Slovakia in order to effectively address its environmental concerns (though it failed to specify what these means may have been *in concreto*).[37]

Even though the *Gabčíkovo-Nagymaros* judgment represents one of the landmark decisions in the modern general international law of necessity, its helpfulness for clarifying the specificities of the operation of necessity in international investment law seems somewhat doubtful. We acknowledge that the judgment is fundamentally important for it confirms that ecological safety could generally constitute an essential interest of a State susceptible to be safeguarded in necessity. Furthermore, the Court pointed to the importance of properly proving the requirement of "grave and imminent peril" by declaring that this condition must be substantiated and proven with sufficient certainty. This point was subsequently developed at a general plan by Prof. James Crawford in his Second Report on State Responsibility, where he submitted that "*(...) the peril [should be] established on the basis of the evidence reasonably available at the time*"[38]. Nevertheless, it should be noted that the *Gabčíkovo-Nagymaros* dispute did not arise from the breach of a bilateral investment treaty (hereinafter: BIT), which is the most common legal basis of international investment disputes. Therefore, the findings of the ICJ on specific elements of the availability of the defence based on necessity in cases of threat to ecological safety (especially the one relating to the "only way" requirement) do not seem particularly insightful for predicting the likely outcomes of relying on this defence in a BIT-arbitration.

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[34] *Ibid.*, para. 53.

[35] *Legality of Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, *ICJ Reports* 1996, para. 29, cited in: *Gabčíkovo Nagymaros*, para. 53.

[36] *Gabčíkovo Nagymaros*, paras. 42–44.

[37] *Ibid.*, paras. 44–45.

[38] J. Crawford, para. 291.

3.2 Economic stability as a ground for invoking necessity

The preservation of economic stability as an essential interest of a State was relied upon by Argentina in several investment arbitrations led against it following the economic and fiscal crisis that this country had faced in the late 90s.[39] In an attempt to stop economic recession which led to social unrest and a series of political leadership changes, the government introduced legislation that allowed for the renegotiation of contracts with public services providers (who were mostly foreign investors), reformed the foreign currency exchange system (which brought significant losses to foreign investors) and restricted transfers out of the territory of the country. Argentina argued that the emergency measures did not constitute a breach of its obligations under BITs but even if they did, Argentina should be exempted from liability since "*(...) the very existence of the Argentine State was threatened by the events that began to unfold in 2000*".[40] Consequently, the State was acting in an attempt to prevent economic, financial and social stability, which represented, in the eyes of Argentina, its essential interest.

Arbitrations arising out of the measures taken by Argentina in order to deal with the economic crisis received significant attention in scholarly writings[41] since they highlighted many dilemmas that emerge from the application of the concept of necessity to investment protection cases. The initial question might already refer to whether the necessity could even be invoked in investment arbitrations. This problem was briefly touched upon by the tribunal in *BG Group*, where the arbitrators first declared that the necessity exception pursuant to the rules of customary (i.e. general) international law was inoperable in the case at hand since Art. 25 ARSIWA may relate exclusively to international obligations between sovereign States, but they then nevertheless proceeded to examining whether the conditions for application of necessity exception were

[39] See in particular: *CMS Gas Transmission Company v Argentina*, ICSID Case No. ARB/01/8; *Enron Corporation and Ponderosa Assets, L.P. v Argentina*, ICSID Case No. 01/3; *LG&E Energy Corporation et al. v Argentina*, ICSID Case No. ARB/02/1; *Sem pra Energy International v. Argentina*, ICSID Case No. ARB/02/16; *Continental Casualty v Argentina*, ICSID Case No. ARB/03/9; *El Paso Energy International Company v Argen tina*, ICSID Case No. ARB/03/15; *BG Group v Argentina*, *ad hoc* arbitration pursuant to UNCITRAL Rules; *National Grid v Argentina*, *ad hoc* arbitration pursuant to UNCITRAL Rules.

[40] *CMS*, Award of 12 May 2005, paras. 304–305.

[41] See e.g. M. Waibel, "Two Worlds of Necessity in ICSID Arbitration: *CMS* and *LG&E*", *Leiden Journal of International Law* 3/2007, 637–648; J. Fouret, "CMS c/ LG&E ou l'état de nécessité en question", *Revue de l'Arbitrage* 2/2007, 249–272; A. Bjorklund, 459 523; W. Burke White, A. von Staden, 307–410; A. Martinez, 318 327; A. Reinisch, "Necessity in Investment Arbitration", *Netherlands Yearbook of International Law*, vol. 40, 2010, 137–158; P. Tomka, 477–494.

satisfied and reached a negative conclusion.[42] Other tribunals did not dispute the possibility of reliance on necessity in investment protection cases and the doctrine does not seem to challenge the applicability of the customary concept of necessity in the context of investment arbitration.[43]

What is particularly noteworthy when it comes to Argentinean arbitrations arising out of the measures taken in order to deal with economic crisis is the fact that even though all disputes arose out of the same factual background and most of them were even based on the same BIT (Argentina-USA)[44], the tribunals reached sometimes diametrically different conclusions on certain aspects of necessity. On the one hand, there were tribunals which found that the defence based on necessity was justified[45] while, on the other hand, there was also a significant body of decisions where the necessity was ruled out.[46] This divergence is generally justified as the reflection of absence of the *stare decisis* principle in investment arbitration,[47] but it also sheds light at certain difficulties in applying the concept of necessity in international investment law. It should be therefore unsurprising that some tribunals were creative in finding ways to avoid the discussion on the justification of the defence based on necessity.[48]

We will now proceed to presentation and discussion of the most important differences in approaches of the tribunals to the particular elements of necessity.

3.2.1 Grave and imminent peril to an essential interest

At the outset, the assessment of the essential character of the need for preservation of economic stability in practice of investment arbitration tribunals proved to be somewhat more complex than in case of ecological safety. The tribunal in *LG&E* found that the situation in Argentina ex-

[42] See *BG Group*, Award of 24 December 2007, paras. 407–412.

[43] In that sense: P. Tomka, 493–494.

[44] This BIT was signed on November 14, 1991 and entered into force on October 20, 1994. Its text is available at: *http://investmentpolicyhub.unctad.org/Download/TreatyFile/127*, last visited 1 October 2016.

[45] See the awards in *LG&E* and *Continental Casualty*.

[46] See the awards in *CMS*, *Enron* and *National Grid*.

[47] J. Fouret, 250.

[48] See e.g. *Metalpar y Buen Aire v Argentina*, ICSID Case No. ARB/03/5, Award on the Merits, 6 June 2008, paras. 208–213, where the Tribunal declared that they did not need to examine whether the necessity was justified since Claimants did not prove that their investment was adversely affected by Argentinean measures taken to fight the crisis. For a commentary of this decision see: Iñigo Iruretagoiena Agirrezabalaga, "El estado de necessidad, como causal eximente de la responsabilidad por daños a las inversiones", *Revista de Arbitraje Comercial y de Inversiones* 1/2009, 199–209.

ceeded mere economic problems and business cycle fluctuations but it rather reached "*catastrophic proportions*" and "*the highest degree of public disorder*", threatening total collapse of the Government and the State, as well as Argentina's essential security interests.[49] The tribunal in *Continental Casualty*, although discussing the issue from the standpoint of Art. XI of the Argentina-USA BIT (non-precluded measures clause), reached a similar conclusion.[50] Somewhat more cautiously, the tribunal in *CMS* admitted that the crisis was indeed severe but it also added "*[A]s is many times the case in international affairs and international law, situations of this kind are not given in black and white but in many shades of grey*".[51] Finally, the tribunal in *Enron* considered that the extent of the economic crisis in Argentina was not sufficient to compromise the very existence of the Argentinean State so that, consequently, it may not have been qualified as involving an essential interest.[52]

Despite certain differences in nuance and tone of the aforecited decisions, it may be concluded that all four tribunals nevertheless share a common point – they all agree that, *in abstracto*, the preservation of economic stability may generally qualify as essential interest of a State.[53] This is an important contribution because the earlier practice of necessity in general international law did not provide for an unambiguous answer to this question.[54] The differences in wording stem from the fact that the tribunals often considered the requirement of essential character along with the requirements of grave and imminent peril and the non-availability of other means for overcoming the crisis,[55] which are the true points around which the opinions were divided.

Even though the ICJ in the *Gabčíkovo-Nagymaros* judgment introduced solid guidelines for assessing the graveness and imminence of a peril, the tribunals in the Argentinean cases did not seem to be willing to engage into a methodological and substantiated evaluation of the extent and immediacy of the economic crisis. Some tribunals even completely refrained from examining whether this condition was fulfilled since they had already found that other, more easily provable elements of necessity were not established, so they considered that further examination of other elements was redundant.[56] The decisions in which the issue of graveness

[49] *LG&E*, Decision on Liability of 3 October 2006, paras. 231–232.

[50] *Continental Casualty*, Award of 5 September 2008, para. 178.

[51] *CMS*, Award of 12 May 2005, para. 320.

[52] *Enron*, Award of 22 May 2007, para. 306.

[53] In that sense: A. Bjorklund, 481.

[54] J. Fouret, 259–260; M. Waibel, 641–642; A. Reinisch, 145–146.

[55] In that sense, for *Enron* dispute, see *Enron*, Decision on Annulment of 30 Jul 2010, para. 360.

[56] *National Grid*, Award of 3 November 2008, para. 262.

and imminence of the peril was discussed can be divided into two groups. The first group is gathered around the *CMS* award, where the tribunal simply, and without any particular explanation, declared that "*[t]he relative effect of the crisis [does not] allow (...) for a finding in terms of preclusion of wrongfulness*"[57].[58] A different conclusion was reached by the *LG&E* tribunal, which, somewhat surprisingly, did not use the terms "*grave and imminent peril*", but rather concluded that Argentina "*[f]aced an extremely serious threat to its existence (...)*"[59]. Nevertheless, the tribunal performed a very interesting three-layered analysis of the economic situation in Argentina within which it considered the social situation in Argentina, specially emphasizing the speedy deterioration of the Gross Domestic Product, increasing unemployment rate and the significant drop of the buying power, took into consideration an unstable political situation in the country and examined the content and the effect of the legislation adopted to fight the crisis.[60]

Apart from the astonishingly different results that the tribunals reached when qualifying the intensity and proximity of the threat to Argentinean essential interest, it is striking to see that most tribunals completely disregarded the need to establish an objective test for determining whether the threat to essential interests of the host State was indeed grave and imminent. The rare, if not the only exception was the *Enron* tribunal which stands the closest to guidelines formulated in the *Gabčíkovo-Nagymaros* judgment. Bearing in mind that the economic crisis as a ground for invoking necessity is perfectly suitable to be objectively and even scientifically analysed, we do not see any convincing reason for deviation from the approach adopted in the *Gabčíkovo-Nagymaros* judgment with respect to determining the graveness and imminence of threat to an essential interest of the State in this type of cases.

3.2.2 The "only way" requirement

Stark differences developed around the understanding of the requirement that the measures taken in necessity needed to represent "only way" for safeguarding an essential interest. Pursuant to a more rigorous interpretation, adopted by the *CMS* tribunal, the "only way" requirement shall not be deemed fulfilled whenever there was at least one other alternative to the measure taken by the host State.[61] Therefore, it may be concluded that this tribunal subscribed to a literal interpretation of the "only

[57] *CMS*, Award of 12 May 2005, para. 322.

[58] In similar terms and equally without any elaboration: *Enron*, Award of 22 May 2007, para. 307; *Sempra*, Award of 28 September 2007, para. 349.

[59] *LG&E*, Decision on Liability of 3 October 2006, para. 257.

[60] *Ibid.*, paras. 230–237.

[61] *CMS*, Award of 12 May 2005, para. 323.

way" requirement as it considered that it sufficed to establish merely whether the measure taken had any alternatives, the assessment of appropriateness and soundness of a State's policy choices being outside the scope of a tribunal's task.[62] A similar approach was taken by the *Enron* tribunal, which stated that it was not up to arbitration to assess which of the alternatives would be the most recommendable nor to substitute for the governmental determination of economic choices, but only to establish whether the choice made was indeed the only one available.[63]

However, this approach was criticised and rejected by the Annulment Committee, which adhered to a more flexible reading of the "only way" requirement, holding that it encompasses not just the existence of other alternatives but also the analysis of their relative effects.[64] Accordingly, the Committee was not satisfied with the tribunal examining the mere availability of other alternatives. Rather, the Committee considered that the tribunal should have gone on to examine the appropriateness and feasibility of applying other available measures, having in mind the circumstances and information that were known to the State at the time of making the choice and not an *ex post facto* analysis of their potential effects.[65]

It was submitted in doctrine that, in cases of economic emergencies, it would seem justified to allow a more lenient interpretation to the "only way" requirement in order to leave a possibility for some practical application of this criterion (and consequently the entire concept of necessity), which would otherwise be very rarely available due to a high threshold that would exist had the term "only way" been given a strict literal interpretation.[66] The ruling of the *Enron* Annulment Committee seems to be going in that direction, but the echoes of such approach yet remain to be heard.

3.2.3 Non-contribution to necessity

The examination of the non-contribution of the State to necessity appeared to be equally sensitive as was the case with the previously discussed criteria. The *CMS* tribunal, relying on the Commentary of ARSIWA, established that in order for this condition to be satisfied, there must a substantial and not merely incidental or peripheral contribution of the State.[67] Due to the interactive nature of the global economy, the tribunal

[62] *Ibidem*. In the similar vein see *Sempra*, Award of 28 September 2007, para. 350.

[63] *Enron*, Award of 22 May 2007, para. 309.

[64] *Enron*, Decision on Annulment of 30 Jul 2010, paras. 368 378.

[65] *Ibid.*, paras. 371–372.

[66] A. Reinisch, 154.

[67] *CMS*, Award of 12 May 2005, para. 328.

went on to declare that the factors leading to the Argentinean economic crisis were both endogenous and exogenous,[68] which warranted for a further inquiry as to the intensity of the State influence to the collapse of the economic system. Without any particular analysis or detailed justification, it found that "*(...) the government policies and their shortcomings significantly contributed to the crisis and the emergency and while exogenous factors did fuel additional difficulties they do not exempt the Respondent from its responsibility in the matter*"[69].[70] On the contrary, the *LG&E* tribunal considered that it was upon claimant to prove that the host State contributed to necessity,[71] while the *Continental Casualty* tribunal did not examine this issue under Art. 25 ARSIWA but rather under the non-precluded measures clause contained in the Argentina-US BIT and consequently, by applying a different, less stringent standard, found that Argentina was justified in relying on that provision[72].

A more detailed discussion of the non-contribution requirement can be found in *National Grid* arbitration. The tribunal enumerated endogenous and exogenous factors which contributed to the crisis and then, relying upon the documents of the International Monetary Fund on the evaluation of this crisis, analysed the measures taken by Argentina and reached the conclusion that the State's response to the crisis only further contributed to its worsening.[73]

The tribunal in *El Paso* thoroughly discussed the issue of Argentina's contribution to the economic crisis,[74] but it also considered this point from the perspective of the non-precluded measures clause. This makes its analysis somewhat unsuitable for further discussion in relation to our topic. However, we find it important to stress that the tribunal decided to take an innovative approach in interpreting the non-precluded measures clause. Namely, it reaffirmed the standard established in its Decision on Jurisdiction, stating that "*[t]his Tribunal considers that a balanced interpretation is needed, taking into account both State sovereignty and the State's responsibility to create an adapted and revolutionary framework for the development of economic activities, and the necessity to protect foreign investment and its continuing flow*"[75].

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[68] *Ibidem.*

[69] *Ibid.*, para. 329

[70] Similar conclusions were reached in: *Enron*, Award of 22 May 2007, paras. 311–312; *Sempra*, Award of 28 September 2007, paras. 353–354.

[71] *LG&E*, Decision on Liability of 3 October 2006, para. 256. For a comment on this point of the award see M. Waibel, 642.

[72] *Continental Casualty*, Award of 5 September 2008, paras. 234–236. For a com ment on this point of the award see A. Reinisch, 155.

[73] *National Grid*, Award of 3 November 2008, paras. 258–261.

[74] *El Paso*, Award of 31 October 2011, paras. 649–670.

[75] *Ibid.*, para. 650, referring to the Decision on Jurisdiction of 27 April 2006, para. 70.

The issue of non-contribution shows the importance of making a clear distinction between the defences based on necessity and on emergency clauses. It should also be noted that almost all the tribunals sought to establish whether there was substantial contribution of Argentina to necessity, and not just any contribution, as it may stem from the plain reading of Art. 25(2)(b) ARSIWA. The support for such approach is found in the Commentary to ARSIWA, which states that "*[c]ontribution to the situation of necessity must be sufficiently substantial and not merely incidental or peripheral*"[76]. This was welcomed by doctrine since, due to the mixed nature of reasons leading to an economic crisis, it should be deemed appropriate to require a more substantial rather than merely any degree of contribution to necessity.[77]

3.2.4 Non-impairment of interests of other States or international community and suitability of the obligation to be disrespected in necessity

As far as non-impairment of interests of other States or international community as a whole is concerned, this element did not spark significant attention of the tribunals. They generally seem to agree that acts committed by Argentina did not endanger the interests of other States or of the international community.[78] What is more, they only mentioned but failed to elaborate on the relevance and role of the interests of private parties, investors or others, which might potentially have been appropriate, seeing the architecture and the purpose of BITs. Despite the objection that, had they done so, this might have constituted a departure from the language of Art. 25 ARSIWA, it may be argued that the hybrid nature of investor-State disputes justifies the need to balance the interests of the host State not only against other States but against private parties as well, in order to give fair chances to both parties in dispute to make their case as to the requirements for necessity.[79]

Finally, the least disputed seemed to be the requirement that the obligation in question does not exclude necessity. Most tribunals considered the existence of the "non-precluded measures" clause contained in some Argentinean BITs as a proof that the protection accorded by such BITs was, by its nature, susceptible to be suspended in extreme circum-

[76] Commentary, 84, para. 20. This point was explicitly referred to in *CMS*, Award of 12 May 2005, para. 328.

[77] A. Reinisch, 155.

[78] *CMS*, Award of 12 May 2005, para. 325; *LG&E*, Decision on Liability of 3 October 2006, para. 257; *Enron*, Award of 22 May 2007, para. 310; *Sempra*, Award of 28 September 2007, para. 352.

[79] More on this point: A. Bjorklund, 487.

stances.[80] However, even the tribunals which took a different path came to the conclusion that the necessity defence would be available even absent the "non-precluded measures" provision.[81]

4. CONCLUSION

The analysis of the use of necessity as a ground for precluding wrongfulness in international investment law shows that the concept of necessity plays an important role in the system of investment protection. It seems, however, that, in order to maintain and uphold the purpose of necessity, which is, in our eyes, to enable fair and distribution of detriment arising out of the situation where there is grave and imminent peril to the occurrence of which the State did not contribute and which threatens its essential interests, some adjustments of the model developed in general international law should be made when necessity is applied in international investment law. Several conclusions may thus be suggested.

Firstly, the tribunals must pay close attention to the distinction between the defence based on necessity and the defence based on the application of the "non-precluded measures" clause. This is because the two defences do not have the same content and entail different elements. Consequently, different thresholds and tests should be applied when examining whether the conditions for invoking any of the two defences are fulfilled. While the defence based on necessity is always available, as a part of general international law, the defence based on a non-precluded measures clause may be invoked only when the applicable investment treaty provides for such an exception and in the way stipulated by the treaty in question.

Secondly, the interpretation of the "positive" set of requirements (Art. 25(1) ARSIWA) should take into consideration, to use the words of the tribunal in *El Paso*, the need to achieve a balance between State sovereignty and State's responsibility to create an adapted and revolutionary framework on the one hand, and the need to protect foreign investment and its continuing flow on the other. This is because any excessive strictness or lenience in interpreting the concept of necessity might compromise its very purpose – the fair distribution of detriments. Namely, an overly strict interpretation of necessity would render it virtually inoperable in the realm of investment protection. Foreign investments would thus be protected in all times and under all circumstances by an absolutely bulletproof shield of international obligations that could not be lifted even

[80] *LG&E*, Decision on Liability of 3 October 2006, para. 255; *Enron*, Award of 22 May 2007, para. 333–334; *Sempra*, Award of 28 September 2007, paras. 374–375.

[81] *CMS*, Decision on the Annulment of 25 September 2007, paras. 133–134.

in the extreme and exceptional cases. Consequently, all the detriment arising out the situation causing State to act in necessity would break down to all the economic operators and citizens in that State except the investors. This would be in sharp contrast with our view that financial burden caused by the circumstances inducing necessity should be distributed in a *fair way* between *all* the operators and citizens in the host State. Conversely, if necessity were to be interpreted in an excessively flexible manner, this would give an opportunity to the host State to easily escape its international obligations of investment protection, causing the balance in sustaining the necessity-induced detriment to shift so as to place relatively more financial burden on foreign investors than on other persons in the host State, creating yet again an unfair and undesirable situation.

Finally, as far as the "preclusive" set of requirements (Art. 25(2) ARSIWA) is concerned, it seems justified to seek for a substantial and not just any contribution of the host State to necessity. Bearing in mind the nature of situations in which necessity is likely to be invoked in international investment law (ecological and economic crises), it would seem appropriate to examine the (non-)substantial character of contribution by relying on objective, perhaps even scientific concepts, by analogy to the method of establishing graveness and imminence of peril.

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Sima Avramović, PhD*

RELIGIOUS EDUCATION IN PUBLIC SCHOOLS AND RELIGIOUS IDENTITY IN POST-COMMUNIST SERBIA

The author analyses types of religious education in European and Serbian state run schools searching for an innovative approach to existing classifications. He suggests four criteria to differ and categorize types of religious education in public schools, claiming that the actual taxonomy is often insufficient, inconsistent or per plexed (having usually been based upon one or two elements). He proposes categoriza tion which encompasses point of view and interests of tax payers, of the politics, of the pupils and of the religious teachers. More criteria could lead to a better assessment of particular system of religious education. He also suggests that, apart from usual cate gorization in confessional and non confessional religious education, it would be useful to introduce categories like “mostly confessional” and “mostly non confessional”, as clear cut models are very rare. In addition to this he offers arguments why “cognitive” type of religious education would be more proper label instead of “non confessional”.

Further on the author examines controversies, disputes and manner of re introduction of religious instruction in Serbian legislation after the fall of the com munist regime in 2000 and presents the current situation, including very recent changes considering curricula. He points to some very distinctive features of reli gious education model in Serbia which could be of interest in comparative perspec tive, particularly in the time when many states in Europe tend to improve their reli gious education system. Finally, he points to importance of religious education in building religious identity of young generations in post communist countries, and differs two types of religious identity perceptive (intuitive) and cognitive (rational). He concludes that “educating into religion” has to exist for some time in post com munist countries due to historical circumstances (within more or less confessional model). Additionally, he finds that it should be only gradually transformed into “edu

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cating about religion" and "education from religion" pattern, fostering cognitive religious identity to strengthen parallel with the perceptive one.

Key words: *Secularity. Toledo Guiding Principles. Models of Religious Educa tion. Intuitive Religious Identity. Cognitive Religious Identity.*

1. INTRODUCTION

Religious education/instruction in public schools is an important element of the right to religious freedom.[1] Many international documents and declarations provide for obligation of the states to ensure the religious and moral education of the children in conformity with their parents'convictions. It includes right to obtain proper instruction in religion in proper age and place, offered by proper educators. But that objective is shaped quite differently in various legal systems. All member countries of the EU (except Slovenia, but including France in Alsace-Lorraine[2]) recognize and respect importance of religious education (RE) in public schools and organize it in some form.[3] RE is overwhelmingly

[1] I do not follow consequently English terminological distinction where the term *religious instruction* refers usually to teaching of a particular religion (confessional type), while *religious education* implies mostly teaching about religions in general (cognitive approach). This terminological distinction is quite tricky, particularly as many models or sub models of religious education exist in between the two mentioned. Also, it may reflect a kind of prejudice that within the confessional courses of religious instruction there is no room for teaching about other religions and vice versa. Therefore, I prefer to use terms religious instruction and religious education as synonyms.

[2] In other parts of France there is no RE in public schools in a strict sense, al though chaplaincy can be established in secondary schools upon request of pupils or par ents. In coordination with the school authorities the chaplain (*aumônier*) can give classes in religion in the school premises, but not in the school time nor within the regular school curriculum. Therefore, it is not quite accurate to say that there is no RE in public schools in France as a consequence of the secularity principle. Existence of regular religious in struction in the part of state territory, as it is organized in Alsace Lorraine, clearly demon strates that even in French legal lenses, presence of RE in public schools does not violate constitutional principle of *laïcité* and separation of church and state.

On history and tendencies in RE in France, see particularly: J. P. Willaime, "Teach ing Religious Issues in French Public Schools. From Abstentionist *Laïcité* to a Return of Religion to Public Education", *Religion and Education in Europe* (eds. R. Jackson *et al lia*), Münster New York München Berlin 2007a, 87 102 and F. Messner, "Religion et éducation en France", *Religion in Public Education La religion dans l'éducation publique* (ed. G. Robbers), Trier 2011, 155 166.

[3] Schreiner stresses that "Religious education is part of the curriculum in most of the European states". He mentions only France, Slovenia and Macedonia as countries with no RE (although Montenegro and Albania should also be added). See: P. Schreiner, "Situ ation and Current Developments of Religious Education in Europe", *Religious Education in a Plural, Secularised Society. A Paradigm Shift* (eds. L. Franken, P. Loobuyck), Mün ster – New York – München – Berlin 2011, 19.

regulated not only at the international level but also in the national legislations and discussed in public. The majority of European states do not deny value and importance of RE in state-run schools. Only its nature, type and goals can be a matter of dispute. Role of RE particularly in primary and in secondary schools, regardless of being public or private, can be of vital importance for the formation of young people, their attitude towards their own religion and faith of the others, but also to foster better understanding of religious diversity and of the society as a whole. Of course, other elements also affect religious identity, particularly ethnicity. It is well observed that national identity is strongly connected to prevailing religion, such as Lutheranism in Denmark, Catholicism in Italy, Orthodoxy in Greece, etc.[4] Parental responsibility is also crucial in formation of religious profile of their children depending on their attitude towards their own and other religions and beliefs. Religious instruction in schools is also an influential factor in religious identity building, developing positive social attitude and avoiding religious isolation, hatred and abuse of religious feelings. Some studies have shown that a positive correlation exists between RE and democratic conduct – the lesser the degree of religious education, the greater the potential for religious differences to be politically instrumentalized.[5] In brief, RE in public schools is of great

[4] J. P. Willaime, "Different Models for Religion and Education in Europe", *Religion and Education in Europe* (eds. Robert Jackson *et allia*), Münster – New York – München – Berlin 2007b, 57.

Confessional national symbiosis is particularly firm in Balkan countries. This is also true in case of Serbia where about 85% of the population declared as Orthodox Christians. According to the census of 2011, out of total number of 7,186.862 inhabitants, religious structure of Serbia is as follows:

Orthodox Christians	6,079.396	84,59
Catholics	356.957	4,96
Muslims	222.828	3,10
Protestants	71.284	0,99
Other Christian religions	3.211	0,04
Jews	578	0,01
Oriental cults	1.237	0,02
Other religions	1.776	0,02
Agnostics	4.010	0,06
Atheists	80.053	1,11
Unanswered	220.735	3,07
Unknown	99.714	1,38

Source: *http://webrzs.stat.gov.rs/WebSite/Public/PublicationView.aspx?pKey 41&pLevel 1&pubType 2&pubKey 1586*.

[5] Very convincing is the research by A. Hasenclever, "Geteilte Werte Gemeinsamer Frieden? Überlegungen zu zivilisierenden Kraft von Religionen und Glaubensgemeinschaften", *Friedenspolitik: Etische Grundlagen internationaler Beziehungen* (eds. H.

significance for the society due to its impact on democratic conduct of the young generations.

The goal of this text is to reveal the process of re-introduction of religious instruction in public schools in Serbia, its peculiarities and place within the existing models of RE organization, but also how it affects religious identity of youth after many decades of official atheist dogma. It is still a matter of dispute if religious instruction in state-run schools harms the principle of secularity and, in the last instance, if it has positive or negative impact on the whole society. Those two topics are quite hot and controversial in the public discourse of Serbia, but academic elaboration, particularly in foreign languages, is quite scarce.[6] The aim of this article is also to point to strengths and weaknesses of religious instruction in Serbia and to explore how much it can, with some modifications, contribute fostering formation of tolerant religious identity of the young post-atheist generations. Now when the society is faced with strong revival of religion after its long lasting suppression it is important to keep in mind the importance of the relationship between religion and identity.[7] Also, some unique solutions applied in Serbian legislation might be useful for comparative research. Many countries in Europe are still seeking for the best possible approach in organizing RE in public schools and it is quite suitable domain for legal transplants.[8]

Küng, D. Senghaas), München 2003, 204. See also: W. Weisse, "The European Research Project on Rerligion and Education REDCo. An Introduction", *Religion and Education in Europe* (eds. R. Jackson *et allia*), 2007, 9.

[6] Indeed, there are no many academic contributions on RE in Serbia, particularly in the last ten years years. One should firstly observe (at least at the Internet) two early texts written in the time when religious instruction was reintroduced in Serbia: B. Aleksov, "Religious Education in Serbia", *Religion, State & Society,* 4/2004, 340 361 and Z. Kuburic, M. Vukomanovic, "Religious education: the case of Serbia", *Sociologija*, 3/2005, 230 253. Those contributions depict hot debate in Serbia about introduction of religious instruction in state run schools. More recent analytic papers are mainly missing. There is an interesting text by D. Kaurin, W. J. Morgan, "Orthodoxy and Education in Post Socialist Serbia, A Comment", *Journal of Religion and Society* 15/2013, 1 7, but it is more of a short observation (as noted in the title) than elaboration of the issue. The most comprehensive book in Serbian is a very detailed collection of documents about the introduction of RE in Serbia, M. D. Jankovic, "Vracanje verske nastave u obrazovni sistem Srbije" [Return of Religious Instruction in Educational System of Serbia], Novi Sad 2015, 550.

[7] More in Steward Harrison Oppong, "Religion and Identity", *American international Journal of Contemporary Research*, 3, 6/2013.

[8] Serbian model of RE is basically influenced by German solutions (German concept of cooperative separation of the state and Church is in general prevailing in Serbian legislation). Of course, in issues of religious instruction in public schools historical, ethnic, societal, political, religious demography and many other peculiarities play an important role in adapting models borrowed from the donor legal system, as contextual approach to RE is unavoidable.

However, the issue in Serbia is not only what would be the best model of religious instruction in state-run schools. There are still more extreme voices, as well as in some other post-communist countries,[9] imposing crucial questions: is religious instruction still necessary in public schools curricula today and does it contradict to the principle of state neutrality?[10] Some answers are already well elaborated in the *Toledo Guiding Principles on Teaching about Religions and Beliefs in Public Schools* prepared by the OSCE Office for Democratic Institutions and Human Rights, more precisely by its Advisory Council of Experts on Freedom of Religion or Belief in 2007.[11] The document assumes that religious instruction in public schools is legitimate activity which does not challenge the secularity principle. It also stresses that teaching *about* religion would be a desiring goal which can contribute to better understanding of different religions in multicultural and changing Europe. *Toledo Guiding Principles* do not pretend to impose changes in different national legislations of RE in public schools and does not foster any model. It only traces a possible preferable road and tools that would contribute to enhance religious freedom and promote good practices in RE in the future.

After the fall of the Berlin Wall and emergence of the post secular wave, already in 1990s or in early 2000s many ex-communist/socialist Eastern European countries (Poland, Bulgaria, Romania, Slovakia, Latvia, Lithuania, etc.), introduced mostly confessional RE in state-run schools when they abandoned harsh ideological heritage. Some countries of the former Eastern Block have preferred non-confessional RE in public schools (Estonia), while the Check Republic and Hungary do not have RE within the regular school curricula but churches and religious communities can organize religious classes in schools within the school hours.[12] Several countries of ex-Yugoslavia did not introduce RE in pub-

[9] P. Valk, "Religious Education in Estonia", *Religion and Education in Europe* (eds. Robert Jackson *et allia*), Münster – New York – München – Berlin 2007, 171 il lustrates that harsh debates on religious instruction in a post communist country affect nearly all strata of the society.

[10] It is not only a political but a doctrinal, academic issue. See three different views in the recent book *Religious Education in a Plural, Secularised Society. A Para digm Shift* (eds. L. Franken, P. Loobuyck), Waxmann, Münster – New York – München – Berlin 2011, 117 168 (contributions by F. Schweitzer, T. Jensen and P. Cliteur).

[11] *http://www.osce.org/odihr/29154*, last visited 5 October 2016.

[12] In Hungary RE in public schools is delivered by churches and religious com munities, not by the school. The religious instruction is not a part of school curriculum, the teacher is not a member of the school staff, grades are not given in the school report, the churches decide freely on the content of religious instructions, teachers are church employments, but the state provides funding for the churches. The school has only to obtain appropriate time for classes, B. Schanda, "Religious education in Hungary", *The Routledge International Handbook of Religious Education* (eds. D. H. Davis, E. Mirosh nikova), London New York 2013, 141. See also: B. Schanda, *Legislation on Church*

lic schools until today (Slovenia, Monte Negro, and FYR of Macedonia).[13] On the contrary, Croatia, Serbia and Republic of Srpska established confessional religious instruction in public schools, while in the Federation of Bosnia and Herzegovina RE was also established in different forms in many cantons.

Restoration of religious instruction in public schools took place in Serbia about a decade later than in other countries with similar political and ideological background. It was mostly consequence of tragic events connected with the dissolution of Yugoslavia and continuation of basically communist policy by the Milosevic regime, who rejected all initiatives for introduction of RE. After the democratic changes in 2000 and fall of Milosevic, religious instruction in public schools was quite quickly introduced, along with general rapid revival of religion.[14]. It provoked a very heated and divisive debate in public discourse.[15] The question was not what form of RE should be organized but whether it should be installed in the public schools curricula at all. After two "religious cases" at

State Relations in Hungary, Budapest 2002, 22 23. The Czech Republic has a similar system, J. R. Tretera, Z. Horák, "Religion in Public Education in the Czech Republic", *Religion in Public Education La religion dans l'éducation publique* (ed. G. Robbers), Trier 2011, 105.

[13] Albania also does not have RE in public schools yet, K. Loloçi, "Albania", in: *Encyclopedia of Law and Religion*, I V (eds. G. Robbers, W. C. Durham), Leiden – Bos ton 2016, IV, 7. It is significant that many South Eastern former communist countries are still quite attached to inherited atheist tradition of avoiding religious instruction in public schools.

[14] More about the political background and different opinion within the Govern ment of the Republic of Serbia in that time, see A. Prascevic, "The Process of Religious Education in Public Schools of Republic of Serbia 2001 2011", *http://www.pravoslavie.ru/english/51724.htm*, last visited 5 October 2016.

[15] Among many discussions in media, at the Constitutional Court, etc. an aca demic debate between two professors of the University of Belgrade Faculty of Law also had effect: M. Draskic, "Pravo deteta na slobodu veroispovesti u skoli", *Anali Pravnog fakulteta u Beogradu* ["Right of children to religious freedom in schools", *Annals of the Faculty of Law in Belgrade*], 1 4/2001, 511 523; S. Avramovic, "Pravo na versku nastavu u našem i uporednom pravu", *Anali Pravnog fakulteta u Beogadu* ["Right to religious instruction in our and comparative law", *Annals of the Faculty of Law in Belgrade*], 1/2005, 46 64; M. Draskic, "O veronauci u državnim školama, drugi put", *Anali Pravnog Fakulteta u Beogradu* ["On religious instruction in public schools, the second time", *An nals of the Faculty of Law in Belgrade*], 1/2006, 135 151; S. Avramovic, "Ustavnost verske nastave u državnim školama *res iudicata*", *Anali Pravnog fakulteta u Beogradu* ["Constitutionality of religious instruction in public schools *res iudicata*", *Annals of the Faculty of Law in Belgrade*], 2/2006, 251 257 (all in Serbian); S. Avramovic, "Right to Religious Instruction in Public Schools", *Annals of the Faculty of Law in Belgrade* 3/2006, 4 17 (response to M. Draskic in English).

See also S. Avramovic, "Church and State in Serbia", in: *Law and Religion in Post Communist Europe* (eds. S. Ferrari, W. C. Durham), Leuven – Paris – Dudley, MA 2003, 295 310; S. Avramovic, "Serbia", in: *Religion and the Secular State: National Reports* (eds. W. C. Durham, J. Martinez Torron), Madrid 2015, 599 613.

the Constitutional Court of Serbia (in 2003 and 2013),[16] it seemed that RE has founded its stable place. But, religious instruction is still vulnerable and is often challenged in legal, political, educational, social, psychological, and many other contexts. In 2016 Minister of Education of Serbia proposed to merge religious instruction with the alternative subject (in Serbia called "Civic education"). He did not claim that existence of RE in public schools is unnecessary or unconstitutional but defended his proposal by overloaded school curricula. It was a new opportunity for excited public dispute over existence of RE in public schools.

All those challenges have affected the Serbian pattern of religious instruction in public schools to become more receptive, flexible, specific, and interesting in comparative perspective. Different impacts, historical and political, educational and legislative, have shaped quite specific type of RE in Serbian public schools.

2. MODELS OF RELIGIOUS EDUCATION IN PUBLIC SCHOOLS

There is a variety of criteria to categorize existing types of RE in public schools and quite diverse solutions in different jurisdictions. Importance of various criteria is not the same and consequently there are varied classifications in the literature. Some authors take only one, while others are combining and perplexing different criteria. Several classifications are therefore a bit confusing.[17] A recent book on RE in contemporary Europe differs denominational model, absence of RE, multi-faith pattern, non-denominational type, mixed model (denominational and non-denominational, compulsive and non-compulsive) and non-denominational integrative mod-

[16] Constitutional Court of Serbia, IU 214/2002, ruling of November 4, 2003 (*Official Gazette of the Republic of Serbia*, No. 119/2003) and IUz 455/2011, ruling of January 13, 2013 (*Official Gazette of the Republic of Serbia*, No. 23/2013). On the contrary, Supreme Court of Macedonia rejected in 2009 the Law on Schools of 2007, which provided establishing RE in public schools, on the basis that it violates the principle of separation of the state and church.

[17] P. Schreiner, "Religious education in the European context", in: *Crossings and Crosses: Borders, Educations, and Religions in Northern Europe* (eds. J. Berglund, T. Lundén, P. Strandbrink), Boston – Berlin 2015, 145 differs three basic types of religious instructions depending on who organizes RE. The first is teaching by religious communities with exclusive responsibility for RE (denominational/ confessional/ catechetical; mainly a voluntary subject, e.g. in Poland, Ireland, Italy). The second is teaching organized in collaboration between state authorities and religious communities (denominational/confessional/non confessional; voluntary and/or obligatory subject, e.g. in Austria, Belgium, England, Germany, Greece, Hungary, Russia, Spain, some parts of Switzerland). The third is teaching organized exclusively by state authorities (non confessional, religious studies; obligatory subject, e.g. Denmark, Estonia, Finland, Norway, Sweden, some parts of Switzerland). The author adds that the fourth "type" is the one with no RE.

el.[18] This perplexing example of categorization attests need to define and rank criteria clearly in order to achieve proper outcome.

J-P. Williame proposes the most frequent and acceptable classifications, following approach of S. Ferrari. It recognises three categories: states with no RE, confessional religious instruction and non-confessional RE.[19] Basically, there is only one criterion applied: essence/content of RE (confessional or non-confessional). Content of RE is certainly among the most important elements, but it is not sufficient to describe other vital features of RE models. Variety of RE types should be followed by more diversified criteria and classifications. In order to describe some pattern of RE more comprehensively, it should be followed by at least few important criteria or, better to say, elements that shape RE in particular country. Four of them seem to be central from different points of view.

The first one should be perceived from the point of view and interest of *tax payers*. They consider whether the state undertakes burden of financing RE in public schools or not, whether the state performs it alone or shares the costs with beneficiaries, how many churches and religious communities have that privilege, etc.[20]

Secondly, from *political* and *educational* standpoint, the most important issue is its content – is RE profiled as denominational/confessional or non-denominational/non-confessional, cognitive subject?[21] What should be the prevailing essence of teaching, what are the most important

[18] *Religious Education in a Plural, Secularised Society. A Paradigm Shift* (eds. L. Franken, P. Loobuyck), Münster New York München Berlin 2011, 10.

[19] J P. Williame, 60. He reffers mostly to the article of S. Ferrari, "L'enseignement des religions en Europe: un aperçu juridique", in: *Des maîtres et des dieux. Ecoles et religions en Europe* (eds. J P. Willaime, S. Mathieau), Paris Berlin 2005, 31. Silvio Ferrari, "Religious education in the European Union", in: *The Routledge International Hand book of Religious Education* (eds. D. H. Davis, E. Miroshnikova), London New York 2013, 100 has recently modified terminology a bit, but basicaly kept the same classification. He labels the second model as "non denominational" teaching (instead of "non confessional") but the essence is the same.

[20] It is not always possible to make clear classification, which will fit completely to all types of RE in all countries, even when more diversified criteria are applied. For example, if the criterion is who pays costs of RE in public schools (the state or churches and religious communities), Serbia can not be easily classified in one or another type. Namely, RE in state run schools is funded by the state for the seven traditional religions only. But, other churches and religious communities are free to organize RE on their own expenses, while the school is obliged to obtain premises (within the general limit of the minimum number of pupils). Therefore, sometimes classification should take into account *prevalent* characteristic of RE features in each country. Consequently, in case of Serbia, religious instruction in public schools is mostly, but not exclusively, the state paid effort.

[21] However, there are many non confessional approaches: combination with confessional RE, inter confessional type, multi confessional pattern, cultural or historical approach, etc.

goals, objectives and educational outcomes of RE in public schools – those are controversial political issues *par excellence*.

Thirdly, *pupils* perspective is mostly focused on question whether RE in public schools is a mandatory, elective/alternative or optional subject. From their point of view main issue is also whether the grade in RE is evaluated within the school system and whether it affects general average grade. Right to opt out completely or right to alter RE with the alternative subject is also important for the pupils as it may contribute to their mobility, enabling them to combine at some point RE and ethics, civic education, etc.

Fourthly, it is important to observe RE in public schools from the stance of *religious teachers*. Their legal standing may differ very much in different countries depending on who is in charge to authorise their position (the state, churches and religious communities or they do it cooperatively). The issue is whether they have a permanent post, are they employees of churches and religious communities or of the state, etc. Position of religious teachers is vital for the character and quality of RE in public schools. It is therefore also a significant criteria in defining types of RE.

Those are not the only criteria to be perceived in creating classifications of RE models. However, they are central in shaping the character of RE in the school system and society. For that reason it is not enough to seize only one or two criteria for a valid evaluation of RE pattern in particular countries.

2.1. In *financing* most countries incline towards state-paid religious instruction in public schools. It should mean that the state takes economic burden about preparing curricula, teachers' salaries, preparing and printing reading materials, etc. However, in many instances the state remunerate costs even when the churches and religious communities decisively affect curricula, appointment of the teachers, content of reading materials, etc.[22]

The next problem connected with financing is whether the state is disbursing costs of religious instructions for all Churches, religions and denominations or only for some of them. It is a very delicate issue of equality and discrimination, on the one hand, but also of rational and effective conduct of the state, on the other. The matter is whether the state is obliged to organize and pay teachers and other costs for RE for every single religious denomination, regardless of how many followers it has. Selective approach is vulnerable by itself, particularly as choice of privileged churches and religious communities is mostly based upon historical

[22] Austria, Spain, Portugal, Malta, Poland, Greece, Cyprus, Belgium, Czech Re public, etc.

(long presence of the religion in the country – how long?) or statistical data (number of followers – how big should it be?). Also, which number of pupils who opt for RE imposes obligation to the state to organize and pay RE in public schools for them? The answer depends upon financial capabilities of the country, social sensitiveness, perception of rational expenditures of the state budget, etc.[23]

Issue of financing is often used and abused in discussions about RE existence in public schools due to its unavoidable selectiveness. Parents who are believers expect that they have right as tax payers to rely upon the state to educate properly their children in religion in conformity with their convictions. The state has a duty to assist parents on their children's education in general, as well as in adequate religious upbringing, but then it faces the issue of fiscal rationality.

2.2. The second issue is even more complicated and delicate: which *content* is offered to the pupils through RE classes? Most countries still incline predominantly to *confessional* approach, such as Germany, Austria, Italy, Spain, Greece, Belgium, Denmark (in primary and first classes of secondary schools), Luxembourg, Ireland, Poland, Slovakia, Bulgaria, Romania, Croatia, Serbia, Republic of Srpska, etc. However, in many countries pupils are actually offered to learn a bit or a lot about other religions. There is a general tendency to shift RE towards more cognitive contents, with or without legal provisions and curricula.

The other most frequent pattern is *non-confessional, non-denominational, cognitive (informative)*. That model has been usually introduced through legislative reforms (although it is sometimes consequence of internal and factual development). It mostly affects curricula of the higher classes (Great Britain, Norway, Finland,– upper classes of secondary schools). In some countries cognitive approach can vary quite a lot, both in its content and in timing when it will be introduced in the curricula (Sweden, Denmark, Lithuania, Estonia). Teaching "about religion" can be oriented towards some group of religions (e.g. Christianity including all denominations, Orthodox culture as proposed in Russia at some point,[24]

[23] Finland prescribes minimum of only 3 pupils who belong to non registered churches and religious communities. In Germany the state is obliged to organize and pay classes (as religious education is regarded as a constitutional right) if the minimum num ber of interested pupils is 6 to 12. In the Czech Republic and Poland minimum number of pupils is 7, in Portugal 10, in Slovakia 12, in Estonia and Serbia 15, etc.

[24] Russia has quite a fluid model. After the dissolution of USSR religious instruc tion was non confessional or there was no RE, depending on regional or local regulations, F. Kozyrev, V. Fedorov, "Religion and Education in Russia, Historical Roots, Cultural Context and Recent Developments", *Religion and Education in Europe* (eds. R. Jackson *et allia*), Münster New York München Berlin 2007, 133 158; E. G. Romanova, "Religious education in modern Russia", *The Routledge International Handbook of Re ligious Education* (eds. D. H. Davis, E. Miroshnikova), London New York 2013, 287

etc.), towards selected types of the most important religions (when the issue of criteria arises) or about all existing religions in the world. Also it can focus teaching about comparative history of religion/s, philosophy of religion/s, institutions of religion/s, religious doctrines, religious knowledge, etc. This is why I prefer to label the non-confessional model as *cognitive (informaive)*.

Therefore, strict distinction into confessional and non-confessional type of RE can not fit completely well inthe legislative reality in many countries. Basically, there are not so many clear cuts, binary models of RE in state-run schools considering content of the subject. Due to gradual informal or formal involvement of multi-confessional and cognitive elements into teaching of confessional religion, it would be useful to add into the existing black and white classification at least two, more flexible types: *mostly confessional* and *mostly cognitive*.[25] It could help to describe better many varied systems and different approaches. Also, it could probably make more visible the fact that most of existing RE patterns are essentially mixed in content, and that the tendency of convergence is quite current.[26] Those assorted RE models are now probably dominant or at least they are tending to become dominant.

2.3. The most important issue for the *pupils* is whether religious instruction is a regular subject for all or not. The issue has its pedagogical, but also legal, societal, political and many other aspects. In some legal systems RE in state-run schools is a *mandatory, obligatory, required* subject within the regular curriculum, without possibility to opt out. This model might be criticized in terms of right to equality and non-discrimination, violation of children's rights, etc.[27] The issue is thoroughly discussed during past decades, but nevertheless compulsory RE is often a regular subject (regardless of its content – confessional or cognitive).

294. Since 2012 public schools in Russia have started to teach "Fundamentals of religious cultures" which includes four religions Orthodoxy, Islam, Buddhism, and Judaism. Pu pils can choose one of these four religions, a survey of world religions or take a secular course in ethics. See E. Lisovskaya, "Religious Education in Russia: Inter Faith Harmony or Neo Imperial Toleration?", *Cogitatio, Social Inclusion* 4, 2/2016, 117 132.

[25] Term "cognitive" underlines different kinds of knowledge that could be includ ed in non confessional courses (it usually includes knowledge and doctrine of other reli gions, but also cultural facts about the pupil's own religion). In the same way confes sional approach does not exclude non confessional elements. This is the good reason to favor the notions like *mostly confessional* and *mostly cognitive.*

[26] J P. Willaime, 2007a, 65; P. Schreiner, 23.

[27] General Comment adopted by the Human rights Committee of the International Covenant on Civil and Political Rights, No. 22 (48) (art. 18) states: "The Committee notes that public education that includes instruction in a particular religion or belief is inconsis tent with article 18 (4) unless provision is made for non discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians".

Mandatory type of RE is frequent in the jurisdictions which had experienced state religion and the State-Church model. Although its essence was at first mostly confessional, some countries switched to mostly non-confessional or multi-confessional contents (Great Britain, Denmark, Finland,[28] Sweden,[29] Norway[30]). On the other side RE in Greece,[31] Cyprus and Malta is also mandatory, but it is strictly confessional. Some countries belonging to other models of the state-church relationships are also favoring mandatory and confessional RE in public schools. This is the case in Austria,[32] in two entities of Bosnia and Herzegovina – in Republic of Srpska, in some cantons of the Federation of Bosnia and Herzegovina, etc.

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[28] It is usually stated that in Finland RE is mandatory but non confessional sub ject. However, pupils both of elementary and secondary schools attend classes according to their religion (about 92% Evangelical Lutheran RE, 1,4% in Orthodox, 1,5% in Islam, 0,5% in other religions, 4% Ethics). Those who do not belong to any religion have class es in Ethics, *http://www.suol.fi/index.php/uskonnonopetus suomessa/religious education in finland*, last visited 5 October 2016. It contradicts in a way to qualification that the subject is non confessional. It is basically rather multi confessional and cognitive as pu pils still receive elementary information primarily in their own religion. More about RE in Sweden, Norway, Denmark and Finland: V. Llorent Bedmar, V. Cobano Delgado, "The Teaching of Religious Education in Public Schools in the Nordic Countries of Europe", *Review of European Studies* 6, 4/2014, 50 57.

[29] Although State and Church were formaly separated in 2000, Church of Sweden kept many privileges that were granted to it by the state. As for religious instruction, con fessional education is generally offered in the schools which receive a subsidy from the private sector, often organizations of a religious nature. It is also possibile to receive confessional RE in public schools, when they also receive State subsidies, V. Llorent Bedmar, V. Cobano Delgado, 55.

[30] Church was separated from the State by constitutional amendment of 2012 but the Church of Norway remains state funded, where bishops and priests are still civil ser vants, as well as RE remained mandatory subject paid by the state.

[31] It is a very long tradition in Greece that RE is a mandatory subject both in pub lic and private schools. The right to opt out is recognized for non Orthodox pupils. The content of the subject is strongly influenced by Orthodox theology. Participation at reli gious services is practiced usually once a month. Daily common prayer must necessarily be made, every day before the start of the course, at a joint gathering of students and teachers in the schoolyard, see: N. Ch. Magioros, "Religion in Public Education Report on Greece", *Religion in Public Education La religion dans l'éducation publique* (ed. Gerhard Robbers), Trier 2011, 195 216.

[32] Religious instruction in public schools is still regulated in Austria by the law of 1949 (*Religionsunterrichtsgesetz*) and its status seems quite stable. It is an obligatory subject for all pupils who are members of a legally recognized church or religious com munity in all primary schools. Churches and religious communities are responsible for organization and curriculum of the religious instruction but the state pays teachers, manuels, etc. More in S. Hammer, J. Franck, "Religion in Public Education Report on Austria", *Religion in Public Education La religion dans l'éducation publique* (ed. G. Robbers), Trier 2011, 39 62.

RE in public schools is frequently offered to pupils as *compulsory (mandatory) but optional subject with an alternative*. Alternative subjects are usually ethics or moral or some other peculiar subject, like "Civic education" in Serbia. The model does not attract so many objections considering discrimination and violation of constitutional principles. Pupils/parents have an alternative, freedom of choice between the two topics. So the claim that RE is imposed to the pupils/parents contrary to their wish or conviction is not operational. This model is wide spread – in Germany, Belgium, Luxembourg, Netherlands, Slovakia, Moldova, Latvia, some cantons in the Federation of Bosnia and Herzegovina, Croatia in secondary schools, schools for EU officers' children, etc.

In Portugal there is no alternative subject and pupils who want to opt out have free time during the lecture in RE.[33] Similarly to this, Romania recognizes right of pupils to opt out, but an alternative subject is not provided.[34] The last two examples are near to the system of completely elective courses. The difference is that pupils have to opt out (as the subject is mandatory), in the second case they simply choose RE or not, while in some countries their explicit request to have religious instruction is needed.

The third model includes completely *elective, voluntary, non-compulsory* subject. Pupils in public schools do not have to opt out as RE is not set forth in the regular curriculum. RE is offered as an elective course in Italy, Spain, Portugal (in high schools), Czech Republic, Poland, Hungary, Croatia in primary schools, Russia, Bulgaria, Ukraine, Estonia, Lithuania, etc.

Non-compulsory RE in public schools is particularly characteristic for many ex-communist countries, but it also exists in some countries with strong religious, particularly Catholic tradition (where religious instruction is either optional or elective). However, in Catholic countries majority of pupils often opt for religious instruction although they have no obligation (Italy, Spain, Portugal, Croatia in primary schools). Percentage of pupils who want to take religious instruction as an elective subject is quite high. Many of them opt for the Catholic religious instructions following tradition, due to expectations of the family, from personal religious feelings, for pragmatic reasons (counting of the average grade into the overall school grade record), etc.[35] Namely, from the point of pupils,

[33] A. Folque, "Religion in Public Portuguese Education", *Religion in Public Education La religion dans l'éducation publique* (ed. G. Robbers), Trier 2011, 399 424.

[34] E. P. Tăvală, "Religion and Public Education in Romania", *Religion in Public Education La religion dans l'éducation publique* (ed. Gerhard Robbers), Trier 2011, 425 442.

[35] During my lecture at the Lumsa University in Palermo in April 2016 nearly all present students (about 60), having been asked what was their personal choice during their previous schooling, declared that they did opt for RE. Having been asked why they opted

grade in RE can also be an important motive to opt for that school subject, particularly if it affects the final school report.[36] And to get the best grade in religious instructions is usually not a heavy task. Therefore it seems that grading policy can be a subtle motivation for pupils to attend RE in cases when it is an alternative or completely elective subject.

Finally, as already stressed, only a small number of countries have no religious instruction in public schools (Slovenia, FYR Macedonia, Montenegro, Albania, France with the exception in Alsace and Lorraine[37]). However, Slovenia and Albania are slowly moving forward. A facultative non-confessional subject called "Religions and Ethics" was recently introduced in Slovenia (together with a compulsory subject "Civic and Patriotic Education and Ethics"),[38] while during 2016 Albania is facing the Government initiative to include RE as a compulsory non-confessional course in secondary schools. RE convergence process in Europe is evidently in progress.

2.4. An important criterion to evaluate and qualify RE in public schools is connected to the status of religious teachers in terms of labor law, stability of their position and their motivation. There are basically three systems – when the church or religious community is completely in charge to select religious teachers for the position in the schools, when the choice of teachers is in hands of the state and when the state and religious institutions cooperate in their appointment and jointly regulate their

for religious instruction, most answers were that it was their wish, that they were influ enced by the decision of their friends, that their parents made the choice for them, that they searched for a more profound knowledge in religion, etc.

[36] Although religious instruction is elective, non compulsory subject in Croatia, more than 85% of pupils attend it (grade in RE affects the average grade). In Italy about 91% of pupils choose classes in religious instruction; the grade is also counted in the evaluation of their final overall results, A. Ferrari, "La religion dans l'éducation publique le cas Italien", in: *Religion in Public Education La religion dans l'éducation publique* (ed. Gerhard Robbers), Trier 2011, 257 272. The same privilege has RE in public schools in Spain, where the grade received in RE is taken into account for promotion, J P. Wil laime, (2007b), 64. In Finland the grade in religious instruction also contributes to pupils' final average grade. On the contrary, in countries where religious instruction is a manda tory subject the grade (which is usually descriptive) most frequently does not influence the final school report (Austria, Serbia, etc.).

[37] A gradual change regarding religion in France is quite evident, see more in J P. Williame, (2007a), 87 102. He points that already since 1945 "militant" *laïcité* has gradu ally given way to "management" *laïcité*. This process is also described by two well known definitions. Famous French professor Jean Baubérot, in his programmatic book *Vers un nouveau pacte* laïque, Paris 1990, defined the process as "a pact for a new *laïcité*", while former French Minister of Education Régis Debray in 2002 (after the terrorist attack on September 11) defined it as a path "from a *laïcité* of ignorance to *laïcité* of understand ing", J P. Willaime, (2007b), 90, 93.

[38] B. Ivanc, "Religion in Public Education Slovenia", in: *Religion in Public Education La religion dans l'éducation publique* (ed. G. Robbers), Trier 2011, 460.

legal standing. Also it is relevant whether they are lay persons or priests, what their educational background is, if they are part of the school staff, if they are paid by the religious institutions or by the school (state), etc.

Personality and enthusiasm of the teachers strongly affect pupils' commitment to attend RE classes, particularly when they have a choice between two alternative subjects. Teacher's charisma is often a key factor for successful enrollment of pupils. An interesting recent research in Serbia manifests clearly that ambitious religious teachers are often more inovative than the official syllabi, and that they are introducing topics related with psychology, philosophy, literature and history, Biblical history, history of religion, Church and society, Christian culture, Christian ethics, bioethics, Church and contemporary challenges.[39] However, the most important issue is whether religious teachers are properly incorporated into the school system and have a stable labor position or operate as part-time, temporary and transitory actors. The legal status of religious teachers, their position and duties in the schools from the point of labor law, remains one of the central factor in assessment of the RE model in every country.

2.5. Proper combination of the four elements can facilitate shaping of the best theoretical and practical RE pattern in public schools. Of course, there is a variety of combinations that can help different societies adapt their RE model to specific societal needs. In any case, those four attributes, together with some other less important features, are essential in profiling RE in legal systems and affect overall impression of the state-church relations in different countries. Type of religious instruction is in a way a kind of litmus paper for revealing the political setting, attitude towards the religion, degree of cooperation and confidence between the state, churches and religious communities, relationship towards fundamental human rights and many other important characteristics of the state.

3. RETURN OF RELIGIOUS EDUCATION IN PUBLIC SCHOOLS IN SERBIA PRESENT SITUATION

In every jurisdiction four mentioned elements of RE create more or less specific combination. Considering those criteria, RE in public schools in Serbia is state-paid only for the seven traditional Churches and religious communities. Religious instruction is a mandatory optional subject with alternative (Civic education). RE is mostly confessional, multi-de-

[39] *Orthodox Catechesis as Mandatory Optional Subject in Primary and Secondary Schools Evaluation of the Programs and Teacher's Competences*, Institute for Evalua tion of Education Quality, Belgrade 2013, 13 17 [in Serbian].

nominational, both in elementary and in secondary schools.[40] It is carried by religious teachers who are elected in coordination of the state and representatives of seven religious authorities, but they do not have a permanent position in the schools.

Religious instruction was firstly introduced in public schools quite carefully, by virtue of a governmental decree (not by law). It was the *Decree on organization and realization of religious instruction and an alternative subject in the elementary and high schools* issued in July 2001.[41] The Decree was used as an interim legislation to enable religious instruction in public schools to start already during the 2001/2002 school year. It was provided for members of seven traditional Churches and religious communities, relating to the first-year primary school pupils and the first year in high schools, but as an elective subject.[42]

The second step followed already in 2002**,** and that model of religious instruction is more or less effective up to the present time. The change was performed by *Amending laws on the elementary and high schools*.[43] Important innovation was that religious instruction and alternative subject were not elective subjects like a year before. They became mandatory optional courses which are offered alternatively in the regular school curriculum. The parents (in elementary schools) or the pupil (in

[40] Primary school in Serbia comprehends 8 classes (children from 7 to 14 years) and secondary school has 4 classes (14 to 18 years, after finishing primary education, non compulsory). Consequently there are three cycles of RE: the first one encompasses first four classes of elementary school, the second cycle is from 5th to 8th class of elementary school, and the third one is organized in four classes of grammar school.

[41] Official Gazette of the Republic of Serbia, No. 46/2001 of July 27, 2001. Ac cording to the Decree, parents and other legally recognized representatives decide wheth er their children will attend Religious instruction in primary school or not. Pupils in sec ondary schools (starting with the age of 14 or 15) decide for themselves on enrolment of Religious instruction. Alternative subject was defined as "Civic education". Pupils may also opt out all together. Pupils were given only a descriptive mark that does not affect their final grade point average.

[42] Interestingly, that *Decree* was the first legislative document which mentioned term "traditional churches and religious communities" and which defined seven of them in Art. 1, Clause 2 (Serbian Orthodox Church, Roman Catholic Church, Slovak Evangeli cal Church, Reformed Christian Church, Evangelical Christian Church, Islamic Commu nity, and Jewish Community). The concept of "traditional churches and religious com munities" became latter the chief notion, having been used in all subsequent legislations dealing with religious freedom, including the actual *Law on Churches and Religious Com munities* enacted in April 2006 (*Official Gazette of the Republic of Serbia*, No. 36/2006 of April 28, 2006). The Law itself has only a short provision concerning religious instruction (Art. 8: "The right to religious instruction in state and private primary and secondary schools is guaranteed in accordance with law").

[43] *Law on amending the Law on Primary School* (*Official Gazette of the Republic of Serbia*, No. 22/2002 of April 26, 2002) and *Law on amending the Law on Secondary (High) School* (*Official Gazette of the Republic of Serbia*, No. 23/2002 of May 9, 2002).

secondary schools) have to opt for one subject or the other another.[44] Usually, in every generation, a bit more than a half of pupils opt for religious instruction while others prefer Civic education.[45] Attendance is mandatory for the given school year. Classes of religious instruction and civic education are scheduled once per week (36 classes per school year). Pupils are graded only with a descriptive mark that does not affect their final grade average

The minimum number of pupils which was required in Serbia for organization of RE in public school in the first years when religious instruction was introduced (2001) was only one pupil, according to the internal recommendation of the Ministry. It was technically impossible to realize such a concept consequently and it became an immense financial burden for the state. Therefore, according to the official *Expert recommendation on structuring classes and financing elementary and secondary schools*, which started to appear annually (the last was for 2015/16 school year),[46] religious instruction has been organized in public schools if there has been a minimum of 15 interested pupils. During the last few years a number of schools have been allowed to enroll smaller groups than 15 pupils (but not less than 5). It was rather a tacit consensus than a normative solution.

The state and religious institutions cooperate closely within the mixed Commission for Organization and Realization of Religious Instruction (hereinafter: the Commission).[47] It had first been formed by virtue of the mentioned *Decree on organization and realization of religious in-*

[44] During the following years only a few changes were introduced, the most im portant being that pupils could choose alternative subject for one school year (instead for the whole cycle of four years). Consequently they may switch from one to another and combine the subjects. It established mobility and enabled pupils to get some knowledge in both fields of study.

[45] Civic education has a hidden privilege in attracting more pupils. In the first four classes of primary school parents often pragmatically decide to opt for Civic education as it is taught by the class teacher (who is in charge of other subjects). On the contrary, RE is taught by a person who is not a regular member of the school staff and has only an an nual contract. Similarly, at the high school level, some pupils opt for Civic education having pragmatically in mind a better relationship and communication that they can make with professors of philosophy, sociology, psychology, history or other subjects, who teach Civic education parallel with their major subjects. There are no teachers specialized in Civic education only, and teachers of other subjects who teach Civic education had passed through a particular training in that subject.

[46] *Expert recommendation on structuring classes and financing elementary and secondary schools*, No. 110 00 181/2015 07 of July 14, 2015 issued by the Ministry of education.

[47] Similar joint commission of the state and Lutheran Church exists for example in Estonia, but it is formed to discuss many issues (not only religious education), and it does not encompass other churches and religious communities like in Serbia. More in P. Valk, 167.

struction and of an alternative subject in elementary and high schools of 2001. Its position was finally fixed in the Laws on Primary and Secondary (High) schools in 2013.[48] The Commission is the primary body tasked to follow up and manage organization of religious instruction. It consists of six representatives of the state (in the first three years those were, among others, the Minister of Education and the Minister of Religion in person) and representatives of all seven traditional churches and religious communities (at the level of bishops, of the rabbi and of the muftis), who are elected by the Government for the six years term. The Commission's competences included revision and approval of all syllabi and textbooks prepared by churches and religious communities.[49] The Minister of education adopts syllabi for Religious instruction upon unanimous proposal of churches and religious communities. Not a single syllabus of a religious instruction course could have been followed, nor a textbook published and circulated, without consent of all six other churches and religious communities, as well as of the state representatives. Also, religious institutions make the list of teachers, but the Commission has a final say in adopting it and consequently in selection of religious instructors. In that way full consensus in respect of the content and other important elements of religious instruction in the country has to be achieved. There is no privilege for the predominant Serbian Orthodox Church in that respect.

Evaluation of pupils in RE has remained descriptive and does not affect the final average grade. Classes are held once a week (36 hours per year). Religious teachers get a part-time job based upon an annual contract with the schools. Although the contact is usually renewed every year, it discriminates them in relation to other teachers in the schools, as well as in their labor law status and social benefits (credit restrictions, maternity leave, etc.). In this moment there are approximately 1.900 religious instructors in the country (over 1.600 Orthodox, over 150 Catholic, about 130 Muslim, etc.). Teachers are priests or laypersons who regularly posses certain university degree or "higher school" (college) level of education in religion, as some churches developed their own Institutes for Catechism. Fifteen years ago, in the beginning of RE introduction, qualification and competency of religious teachers was a serious problem. Currently they are mostly graduates from the Faculty of Theology or the

[48] Art. 33 of the *Law on Primary Education and Upbringing* (*Official Gazette of the Republic of Serbia*, No. 55/2013) and Art. 7 8 of the *Law on Secondary (High) Edu cation and Upbringing* (*Official Gazette of the Republic of Serbia*, No. 55/2013).

[49] Law on Primary Education of 2013, Art. 33, Clause 8: "The Commission is particularly entitled for the issues of harmonization of syllabi for religious instructions, in adopting manuals in religious instructions, in adopting the list of teachers and other issues connected to organization of religious instruction". Similar provisions are prescribed in the Law on Secondary (High) Education of 2013 in Art. 7 and 8.

catechetic institutions. Some of them graduated psychology, history of arts, political sciences, law, even military academy, and became teachers of religion after a particular preparation organized by the state and Churches. Not a small number have now master degree, while in this moment four religious teachers hold posses PhD degree. Majority of religious teachers are today laypersons, women and young people. In undeveloped areas and smaller places religious instruction is usually provided by the priests or some less competent persons, but generally speaking, an important step forward has been made in the religious teachers' competences.

Important development considering content of RE took place in June 2009. The agreement was reached between the representatives of seven traditional Churches and religious communities with the Ministry of Education on the curricula in the final grades of elementary and grammar (high) schools. In line with the *Toledo Guiding Principles*, but also due to genuine internal inputs, it was agreed that starting with the 2009/2010 school-year some cognitive and value oriented, not strictly religious elements have to became a part of the curriculum in the final class of the secondary school.[50]

The latest changes in Serbia have happened quite recently. Just in time when this text was about to be finished, a new RE curricula was adopted. The preparation lasted about two years and was handled by the Commission. The drafting team included several dozens of prominent religious teachers from all seven churches and religious communities. The result is modernized curricula with recognizable elements of *teaching about religion* and *teaching from religion* and value oriented approach, but again mostly in the final class of the secondary schools.[51] In that way the first more serious step in developing rather cognitive religious teaching in Serbia has been made.

Together with those more or less common features of RE similar to many countries, there are some quite peculiar features in Serbian legislation on religious instruction.

3.1. The first is legal ground applied to delineate seven traditional churches and religious communities to qualify them for state paid RE in public schools. It is neither long historical presence nor number of followers (often used in some legislation for justification of the selection).

[50] The syllabus of the fourth class of secondary schools since 2009 includes topics such as Christian comprehension of history; Liberty and Christianity; Egoism; Problems of Bioethics; Individual, family and social morality; Delinquency; Peer violence, etc.

[51] *Official Gazette of the Republic of Serbia Educational Official Gazette*, No. 11/2016 of August 27, 2016. The curriculum encompasses a wider topic "Christianity in the modern world", and treats issues such as egoism, bioethics, diseases, individual, fam ily and social morality, consumer society, violence, theodicy, etc.

The ground for that privilege in Serbia has been explained as rather legalistic, more objective and less vague. Namely, restitution (restoration) of RE belongs only to churches and religious communities which have had the right to state-paid religious instruction in public schools according to particular laws regulating their position before the World War II.[52] This right was abolished by communist authorities (similarly as private property was nationalized) and RE was returned in the school system following property rights' principle of restitution. Legislative continuity and historical legal identity are usual explanations of that quite distinctive solution in comparative legislation.

3.2. Harmonization of attitudes and full consensus of the state and all traditional churches and religious communities among themselves is needed to achieve any decision about the content, syllabi, manuals, and selection of RE teachers. Role of the mixed Commission for religious instruction is quite distinctive in comparative legislations. In that way Serbia's multi-religious identity is strongly reflected and confirmed through RE.

3.3. Civic education as a subject which is an alternative to RE in the mandatory elective system is also not so frequent in other countries. Usual options are Ethics or Moral (with variations in the title). Having in mind that communist heritage has not affected only lack of religious feelings and knowledge, but also incomplete comprehension of human rights, it is necessary to offer to pupils more profound understanding of civil liberties and values. Both subjects have a similar goal – to foster tolerance, to increase pupil's capability for dialogue, to advance understanding of family members, friends, neighbors, and other people and have respect for their rights and convictions, to develop proper relationship between personal identity and otherness, etc. Possibility to change the elective subject every school year contributes to pupils' mobility and enable them to combine contents of the two approaches.

3.4. Very careful steps have been made towards non-confessional contents. It occurs in curricula of the last classes of secondary school but it also becomes less formally a part of religious instruction teaching.

[52] The same logic was followed in the Law on Churches and Religious Communi ties of 2006. It firstly defines traditional churches and religious communities in Art. 10 (Traditional Churches are those which have had a historical continuity within Serbia for many centuries and which have acquired the status of a legal person in accordance with particular acts, that is: the Serbian Orthodox Church, the Roman Catholic Church, the Slovak Evangelical Church (a.c.), the Christian Reformed Church and the Evangelical Christian Church (a.c.), the Islamic Religious Community and the Jewish Religious Com munity). Then articles 11 15 refer to separate laws or other documents that granted the status of religious institutions before the World War II.

Quick and aggressive shift in changing existing RE models could be counterproductive. Serbian experience shows that RE should evolve gradually, rather than radically.

3.5. Tendency to form new profile of educators in religion came out of necessity and it has shown good results. Religious teachers are not only theologians but also those who graduated psychology, philosophy, philology, history of arts, political sciences, law, etc. Contrary to previous habit to have mostly priests as teachers of RE in the public schools, the way towards more diversified intellectual background of teachers affects internal changes and modifications within the subject in each particular case.

3.6. Part time annual contract of RE teachers raises the level of their responsibility for an appropriate, multi-confessional and tolerant, fair and balanced approach to all religions and stimulates them to avoid religious extremism and radicalism. Knowing that their position depends every year on consensus of representatives of the seven religions and of the state, teachers avoid approach which could bring them reputation of religious activist who indoctrinates pupils. Consensus of the churches, religious communities and the state about the list of teachers has as a consequence risk for religious teachers to be replaced quite easily.

Further improvement of RE in Serbia should aim:

a) to perform additional improvements of syllabi, including more elements of cognitive and value approach, although confessional substance could not be abandoned;
b) to prepare new modern and high-quality manuals of religious instruction with a variety of contents in order to acquire better understanding of other religions;
c) to organize adequate trainings of religious instruction teachers in order to prepare them properly for the necessary innovations;
d) to ensure more stable legal position of religious teachers, to enable their devotion to more liberal pedagogical approach, not mostly being based on syllabi and formal set up;
e) to establish fair choice in opting for RE or Civic education, without a factual privilege of the latter, as parents/pupils often opt for it having in mind that regular teachers of other subjects teach Civic education in the same time;
f) to introduce more steady inspection (supervising) by the Commission, similarly as in some other countries such as Netherlands, Austria, etc., in order to evaluate how the goals are per-

formed, particularly if there are doubts that some religious instruction classes are abused;

g) to enhance competences of the Commission as a constructive safeguard of inter-religious balance, equality and mutual understanding, both between churches and religious communities on the one hand, and the state on the other. Due to its composition and decision making processes, the Commission could guarantee valid fruitful co-operation and become *spiritus movens* of the changes towards reasonable future development of religious instruction in public schools in Serbia.

4. RELIGIOUS IDENTITY V. ATHEISTIC HERITAGE

The majority of parents in Serbia are unable to offer proper knowledge about their own religion due to their long-lasting communist alienation from the religion. Generations of parents received systematic atheist education at schools and religious illiteracy is immense. Many parents are still quite ignorant in their own faith, as well as in religious issues in general, even when they label themselves as believers. Children therefore-quite quite rarely acquire appropriate education in religion from their parents or carers. The role of educators in religion has very often been undertaken by generations of grandparents, most frequently by grandmothers. Having been faced with that background, RE in public schools in Serbia was mainly oriented to the confessional approach, aiming to provide information to the pupils about their own religion, to instruct them in proper manners during the liturgy and inform them about importance of active and accurate participation in religious ceremonies, to encourage them to perceive, recognize and understand religious assessments together with other cultural, ethical and societal values. It is very important if young people acquire adequate information and attitudes from professional educators rather than by quite ignorant parents. Considering mostly atheist and agnostic heritage, after more than half a century, proper approach through RE in state-run schools is crucial in forming suitable and tolerant religious identity of the young generation. In conformity with religious diversity in the country, RE in public schools aims to secure formation of adequate religious identity not only for the majority Orthodox denomination (often closely connected with national identity), but it strongly respects plurality of religions and their differences. With the state paid religious instruction in public schools about 95% of believers in the country are given opportunity to obtain a professional and appropriate RE for their children.[53]

[53] According to the last census of 2011 believers encompass about 95% of the population 85% Orthodox Christians and about 10% of other denominations, see n. 4.

Due to long ignorance of religion during the communist era, religious identity of an average citizen is mostly *intuitive, perceptive, historical, inherited and basically formal*, as a kind of "collective ideal".[54] Religious identity of about 85% of the Serbian population with Orthodox background is often based upon the religious tradition, ethnicity and culture. In every day's life religious feelings are manifested mainly sporadically: by celebrating once a year specific Orthodox family feast "Slava" (a peculiar Serbian St. patron's, holly protector's day), by observing Christmas and Easter rituals (now mostly followed by formal exchange of standardized SMS greetings), by church marriages, baptizing ceremonies, religious funerals, and quite rarely by regular attendance to the masses in the churches.[55] However, important distinction exists between formal, external manifestation of religiosity on one side and internal, subjective attitude, on the other, which is not so easy to be discovered through statistic empiric polls.[56] But, both types of religiosity are in Serbia mostly followed with a poor knowledge of religion in spite of vivid revival of religiosity after the fall of communism.[57] Religious illiteracy is still huge. Nevertheless, religious feelings are quite strong and gladly manifested.

[54] Durkheim similarly asserts that religion expresses a "collective ideal" which is the result of "the school of collective life that the individual has learned to idealize", E. Durkheim, *The Elementary Forms of Religious Life,* Oxford 2001, 318. And he adds that "it is an arbitrary simplification to see only the idealistic side of religion in its way, it is realistic". This is why Z. Kuburic, D. Gavrilovic, "Verovanje i pripadanje u savremenoj Srbiji" [Believing and Belonging in Contemporary Serbia], *Religija i tolerancija* 10, 18/2012, 19 rightly differ traditional and personal religiosity.

[55] Z. Kuburic, "Serbian Orthodox Church in the Context of the State's History", *Religija i tolerancija* 12, 22/2014, 394 395; P. Simic, "Srbija i Evropska unija: izmedju nacionalnog i evropskog identiteta", *Religioznost građana Srbije i njihov odnos prema procesu evropskih integracija*, ["Serbia and EU: between national and European identity", in: *Religiosity of Serbian Citizens and their Relation towards European Integrations*], (ed. J. Jablanov Maksimovic), Beograd 2011, 15 16. He mostly resumes results of the re search performed in 2010 (see n. 57), stressing that although 93% of citizens decleare as believers only about one third (27,8%) consider themselves as convicted believers accept ing the teaching of their faith, 16,4% do not accept completelly the faith teaching, 39,1% participate in the religious rites but are not active in their religious community. About 90% are practicing traditional religious rites like baptising, Slava, religious funerals, etc. but 51,9% go to church only few times during the year and about one fourth of population pray few times in year.

[56] Valuable methodological contribution on religiosity research is offered by M. Blagojevic, "Aktuelna religioznost gradjana Srbije" [Actual Religiosity of the Serbian Citizens"], in: *Religioznost u Srbiji 2010 [Religiosity in Serbia in 2010]*, (ed. A. Mladen ovic), Belgrade 2010, 43 71.

[57] The only recent research in that field is *Religioznost u Srbiji 2010 [Religiosity in Serbia in 2010]*, (ed. A. Mladenovic), Belgrade 2010. Particularly instructive in that volume is article by M. Nikolic, A. Jovic Lazic, "Religiozna tranzicija i/ili tranzicija reli gioznosti u Srbiji" [Religious Transition and/or Transition of Religiosity in Serbia"], 113 121. They point that "collectivistic religiosity" is characteristic of all dominant denomina tion Orthodox, Catholic and Muslim and define this attitude as "laic cursory" religious

In those circumstances young people usually accept the model of their parent's religious behavior without proper understanding of their own religion in depth.[58] When parents have poor knowledge in religion, if they incline towards simplified, distorted, extreme or other kind of non-proper religious perceptions, it is quite likely that their children will follow the parents' path. If the influence of parents is insufficient or incorrect due to lack of adequate awareness of their own religion, and particularly if the parents have *a priori* prejudices towards other religions, it might result in dangerous consequences when religious identity of the child is formed in the primary group only.[59] In countries whose generations of parents are quite ignorant in their own religion, the role of RE in schools becomes more important in forming appropriate religiousness.

Religious instruction in public schools in Serbia has therefore accomplished an important role during the last ten years since it was introduced.[60] It contributed in developing more knowledgeable and substantial acceptance of one's *own* religion and in shaping of more mature religious identity. It may take a decade more to fill the gap that existed in serious understanding of religions, but it could result in shaping more objective and valuable religious identity of the coming generations and could promote approach to other religions without animosities and prejudices.[61] The next step should be expansion of RE profiled as cognitive and non-confessional subject. It could cultivate in the long run more *cognitive, intellectual, substantial religious identity*, including awareness of importance of all religions in the lives of individuals and of the society.[62]

feelings. General conclusion is that religiosity in Serbia has rather formal character, based upon a need to fulfill the duty.

[58] The influence of religion on identity formation often works through parental influence. Children whose parents are significantly religious are more likely to be sig nificantly religious themselves, S. H. Oppong, "Religion and Identity", *American inter national Journal of Contemporary Research*, 3, 6/2013, 15.

[59] Issue of individual religious identity of the child could be more complicated when parents do not belong to the same religion. More on that in interesting study of E. Arweck, E. Nesbitt, "Young people's identity formation in mixed faith families: continu ity or discontinuity of religious traditions?", *Journal of Contemporary Religion* 25/2010, 67 87.

[60] Z. Kuburic, "Verska nastava u Srbiji deset godina posle vracanja u obrazovni sistem" [RE in Serbia ten years after its return in educational system], in: A. Mladen ovic, 98 claims that RE enabled greater openness, more positive attitude towards religion and increasing interest in other religions.

[61] In a recent PhD thesis defended at the University of Novi Sad Faculty of Phi losophy (Dpt. of Pedagogy) the author's general conclusion is that RE contributes to the overall morality of the pupils, their self respect and esteem of the others and otherness, N. Kacaric, *Doprinos verske nastave moralnosti mladih* [Contribution of Religious Educa tion to the Morality of Youngsters], Novi Sad 2016.

[62] My classification into *intuitive* and *cognitive* religious identity corresponds in some way to Simon Coleman's and Peter Collins' attitude that each identity theory fits

Consequently, in this moment in Serbia it is reasonable to affirm and stabilize teaching *into* religion. But it does not mean that it is impossible to educate pupils in the same time, at least partially, *about* other religions, as Hull would put it.[63] Those two goals are not opposing and they could meet with each other in RE organized as *mostly* confessional subject. It is easy to achieve that aim by comparison, stressing the similarities and fostering positive approach to other religions. This is the process that Williaime has recognized as convergence in RE in Europe. It mostly happens through internal development within the confessional courses of religious instruction.[64] The convergence of the content should not be necessarily prescribed in the formal RE curricula. During the classes of inspiring, good and responsible teachers critical topics appear spontaneously, often imposed by pupil's interaction. Quality and objectivity of religious teachers is essential in that process, as they could foster critical thinking and positive approach towards other religions. Religious teachers perform vital societal task, as adolescence is the period when identities, including religious identity, are mostly formed. The manner how religious identity is shaped, in hostile way towards others or on the path of understanding and cultivating religious solidarity, may affect behavior of the person during all his life.[65]

Surely, it does not mean that RE alone can decisively affect proper development of religious identity of the young people. Many other factors are involved in the process of personality building. Also, religious upbringing and education of the child is highly dependent on how well goals and curricula demands are implemented in practice. If organized or realized in fanatic, extreme or exclusive way (whether conceptually or due to deficiencies in organization and realization), religious instruction

into one of two classifications*: primordial* (where continuity is central) *or situationalist* (identity is contextual), *Religion, Identity, and Change: Perspectives on Global Transfor mations* (eds. Simon Coleman, Peter Collins) Aldershot 2004, 4. The former (primordial) is essentially the view of identity that suggests historical continuity. The primordial view of identity may entail continuity between community and individual, past and present. Following Coleman Collins view, Powell describes those two types of religious identities. Primordial is the sort of identity intended by those pushing for recognition of a certain ethnicity or nationality; uniformity/homogeneity is paramount. Instead, religious identity may transform over time, receive fresh articulation given new situations, or may struggle with or against alternative identities throughout the daily life of the actor, A. J. Powell, "The Ideal One Possibility for the Future of Religious Identity", *Intermountain West Journal of Religious Studies*, 6, 1/2015, 113 115.

63 J. Hull, "The contribution of religious education to religious freedom", in: *Com mitted to Europe's Future: Contributions from Education and Religious Education* (eds. H. Spinder, J. Taylor, W. Westerman), Münster 2002, 107 110.

64 J P. Willaime, (2007b), 65.

65 More on that in C. McNamara Barry, L. Nelson, S. Davarya, Sh. Urry, "Religi osity and spirituality during the transition to adulthood", *International Journal of Behav ioral Development*, 34/2010, 311 324.

may grow to be harmful. But when it is properly conceptualized and controlled, as in the great majority of European countries, it can definitely mean a positive step forward in religious identity building, particularly in ex-communist countries. In the states whose official ideology was until recently that the "religion is opiate for the masses", when systematic and professional education in religion was lacking for many decades, presence of RE in public schools is indispensable. It is not a risk but an opportunity for the state and society, depending on how RE is be organized and controlled. When it implements tolerance, understanding, respect for others and their beliefs, leading to the education for democratic citizen, RE could turn out to be an important tool in making a better society.

Due to variety of elements and criteria in RE organization (concerning financing, content, degree of compulsoriness, status of religious teachers), it is possible to profile it to the best of the country's convenience and in accordance with its religious demography, historical, social, political, ethnic, and other peculiarities. Combination of different criteria could enable every legislation to find their own model which will develop proper balance and proper understanding of one's own religion and respect for other faiths. RE in public schools, which is supervised by the state and religious institutions jointly, whether confessional or non-confessional, mostly confessional or mostly cognitive, contributes to appropriate upbringing of religious identity of the young generation and affects their future valid perception of citizenship in a pluralist society.

Shaping of religious identity through RE is certainly not the same as citizen formation, although there are possibilities to link these two fields further,[66] but not through formal education programmes by merging school subjects. Also, countries with different history and heritage should not be under any preasure to organize RE in a similar way. Traditions of the Netherlands and Russia, for example, are so diverse that it is would be wrong to approach to RE in state-run schools with the identical models. Countries with long atheistic (often anti-theistic) historical background are obliged to enable building of proper religious identity of the youth, and then to make a step forword. Any combination of educating about and from religion, as Jackson is so much in favor, is a very good answer for European countries which experienced continuity in relationship between the state and religion,[67] but not necessarily for countries with different traditions.

[66] S. Miedema, "Context, Debates and Perspectives of Religion in Education in Europe", *Religion and Education in Europe* (eds. Robert Jackson *et allia*), Münster –New York – München – Berlin 2007, 268.

[67] Educating *from* religion "involves pupils in considering different responses to religious and moral issues, so that they may develop their own views in reflective way, to develop their own point of view on matters relating to religion and values", R. Jackson, "European Institutions and the Contribution of Studies of Religious Diversity", *Religion*

5. CONCLUSION

Having in mind importance of religious identity formation and its impact to overall society there is always a need to improve RE system. Most European countries are continually exploring the model which could best fit historical, ethnic, political, social environment and other important factors. The tendency to shift from confessional religious instruction towards a cognitive model, the way from teaching *into* religion to teaching *about* religion, is perceived as a kind of convergence process in many European countries. Religious unstruction is an issue and a matter of debate not only in post-communist countries. It is still arguable how quickly the changes should be introduced, how radical the shift should be, and most importantly, how far should it go in deserting the prevailing denominational model of RE in public schools.

Religious instruction in Serbia is mostly confessional in this moment but it has interesting and useful peculiarities from comparative point of view. In order to improve quality of religious instruction in Serbian educational system, to shape formation of proper religious identity as a part of overall civic identity, two needs are contending – to keep teaching pupils in their own religion and to accustom them with values of other religions. Immediate transformation to a multi-religious subject, merging with civic education as proposed by the former Minister of education, or introducing a similar kind of patchwork subject, would rather be a risky experiment than a useful change. Having in mind present context it would be a great step forward if education *into* religion steadily acquires elements of education *about* religion, inspired with the idea of education *from* religion. Transformation towards *mostly* confessional religious instruction by introducing more cognitive and value oriented elements is maybe not completely satisfactory and quick enough. But it looks like the most realistic scenario for the present societal and political circumstances in Serbia and many other ex-communist countries. Gradual changes approach is not only necessary, but the only promising successful way of RE transformation into a valuable school subject which will make contribution to development of appropriate religious identity of the young people, fostering of religious tolerance, mutual understanding, and prevention of all kinds of religious extremism.

and Education in Europe (eds. R. Jackson *et allia*), Münster New York München Berlin 2007, 29.

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INTERNATIONAL LAW AND THE RULE OF LAW

The rule of law cannot achieve its main goal the protection of individual freedom and well being without international law. The peculiar characteristics of international law and international legal order do not harm the rule of law. There is nothing inherent in international law that is an obstruction to the rule of law. Inter national human rights law plays a particular role in strengthening the rule of law. The revolt of the European Court of Justice against the arbitrary interference of the UN Security Council in human rights has opened a new horizon for the rule of law in relationships between individuals and international organizations.

Key words: *Rule of law. International law.*

1. INTRODUCTION

This paper aims at providing answers to whether international law serves the rule of law (hereinafter: the ROL) and whether it serves individual freedom and well-being or it serves as a shelter for unlimited power of national rulers.[1] Additionally, due to the particular characteristics of international law and the international community, as the community of sovereign States, the question is if international law is appropriate for any role in the ROL. Some suspicions concerning the issue have appeared.[2]

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1 J. Waldron, "Are Sovereigns Entitled to the Benefit of the International Rule of Law?", *The European Journal of International Law (EJIL)* 2/2011, 316–343.

2 *Ibid.*

We shall endeavor to show that due to the effect of the "global village", the ROL, limited to national law and national borders, does not suffice and require the service of international law. After a short determination of standards pertaining to the ROL, we shall endeavor to explain why the ROL needs international law. Considerations on peculiar characteristic of international law and international legal order from a perspective of the ROL will follow. The impact of the breadth and abstractness of provisions of international law, of present state international judiciary and the enforceability of international law to the ROL will be explored. Particular references to the revolt of the European Court of Justice against arbitrary interference of the UN Security Council in human rights of individuals, affected by sanctions, and to the distinguished role of international human rights law in the ROL will be made.

2. STANDARDS OF THE ROL

According to Henkin, the doctrine of the ROL was conceived by *Magna Carta Libertatum* in 1215. Henkin states: "A perhaps innocent, incidental phrase in *Magna Carta*, providing that a freeman shall be punished only 'by the lawful judgment of his peers or by the law of the land', came to establish the rule of law..."[3] A. V. Dicey established the Anglo-Saxon doctrine of the ROL as a limitation of governmental power by the law in favor of basic rights and freedoms. According to him the main elements of the ROL are equality before the law and legal certainty.[4] Historically, the ROL relates to the limitation of the absolute power of a ruler, but contemporarily it relates to the control of the State's authority by the judiciary.[5] Concluding his lecture on the ROL, delivered at Cambridge University on 16 November 2006, Lord Bingham stated that the ROL "does depend on an unspoken but fundamental bargain between the individual and the state, the governed and the governor, by which both sacrifice a measure of the freedom and power which they would otherwise enjoy".[6]

Standards of the ROL have been defined by authors in various, but similar ways. Some standards relate to certain qualities of the law itself. The law has to consist of general rules, publicly accessible, clear enough

[3] L. Henkin, "The Age of Rights", *Human Rights* (eds. L. Henkin, G. L. Neuman, D. F. Orentlicher, D. W. Leebron), University Casebook Series, New York 1999, 11.

[4] A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, Liberty Classics, Indianapolis 1982., 120. G. Vukadinović, D. Avramović, *Uvod u pravo,* Pravni fakultet u Novom Sadu, Novi Sad 2014, 107.

[5] W. C. Whitford, "The Rule of Law", *Wisconsin Law Review* 3/2000, 724.

[6] L. Bingham, "The Rule of Law", *Cambridge Law Journal* 1/2007, 84.

to be foreseeable,[7] to enable people to understand what the law requires of them and to predict the legal consequences of their actions, "and what they can rely on so far as official action is concerned".[8] The law should not have retroactive effects.[9] The law has to be controlled by the principle of equality[10] and to be in accordance with international human rights standards.[11] "Absence of arbitrary power" is an important requirement of the ROL.[12] The other standards refer to supremacy of the law. States, governments,[13] public authorities,[14] institutions, public and private entities and individuals have to be subjected to the law[15] and no one should be above the law.[16] The third group of standards distinguishes the judiciary in organization of a state: an independent judiciary established by the law,[17] procedural guaranties of fairness of procedures "and allowing people an opportunity...to challenge the legality of official action, particular when it impacts on vital interests in life, liberty, or economic well-being".[18]

3. THE ROL BEYOND NATIONAL LAW AND NATIONAL BORDERS

The ROL is envisaged as a national concept, as a set of legal standards that should be applied to internal legal system in favor of freedom and well-being of citizens. Such a concept cannot be complete. Waldron remarks correctly: "it may be a mistake to think that the ROL aims only

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[7] S. Chesterman, Panel on "The 2012 UN Declaration on the Rule of Law and Its Projections", *American Society of International Law Proceedings* 107/2013.

[8] J. Waldron, 317.

[9] J. Crawford, "International Law and The Rule of Law", *Adelaide Law Review* 24/2003, 4.

[10] J. Waldron, 317, S. Chesterman, 467, R. E. Brooks, "Conceiving a Just World under Law: A Panel Summary of Remarks by Frederic L. Kirgis", *Proceedings of the 98th Annual Meeting of the American Society of International Law* 2004, 126.

[11] The rule of law and transitional justice in conflict and post conflict societies, Report of the UN Secretary General, 23 August 2004, S/2004/616, 4; R. E. Brooks, 126.

[12] J. Crawford, 4; J. Waldron, 316; The rule of law and transitional justice in con flict and post conflict societies, Report of the UN Secretary General, 23 August 2004, S/2004/616, 4; S. Chesterman, 467; R. E. Brooks, 126.

[13] J. Crawford, 4.

[14] S. Chesterman, 467.

[15] The rule of law and transitional justice in conflict and post conflict societies, Report of the Secretary General, 23 August 2004, S/2004/616, 4.

[16] J. Waldron, 317.

[17] J. Crawford, 4.

[18] J. Waldron, 317.

to protect subjects from the state, government, or law itself. It also aims to protect them from one another, both from other individuals at the national level, and perhaps from other nation-states at the international level".[19] But, what concerning interactions among individuals at the international level? In spheres, such as economy, environment or security, individuals in one State can be affected by the acts of individuals in other States. Our thesis is that the ROL, as an exclusively national concept, is not sufficient to protect individual freedom and well-being and it should be supplemented by international law. The time has come to consider whether the ROL does indeed depend today on bargains between individuals and States at the international level. Indirect bargains between individuals and States at the international level is not a new fact. In most international fields, the State acts as an agent of their citizens. Most of international law governs directly or indirectly interactions among subjects from two or more States. If the purpose of the ROL is to defend personal freedom and well-being by a set of legal standards, international law should not be left aside. The issue might be whether a legal defense of individual freedom and well-being against any detrimental interference of foreign States or individuals in foreign States is possible without international law.

If we accept the relevance of international law for the ROL, the following issue is how standards of the ROL correspond to particular characteristics of international law and international legal order. International law addresses primarily States, not individuals. The international community, composed of sovereign States, is much more political than the legal community. The relationships among States are not relationships between the governed and the governor. There is no central government, neither general compulsory judiciary nor executive power.[20] However, we are not investigating the validity of the ROL at international level, but how particular characteristics of international law and international legal order affect standards of the ROL. The provisions of international law are frequently very broad. Such broad provisions leave certain freedom to States in fulfillment their obligations. If the ROL opposes the arbitrariness in the performance of State's authority, whether the left freedom harms the ROL? If judicial control over the performance of the State's authority is a standard of the ROL, how does the present state of interna-

[19] *Ibid*., 324, Concerning protection of individuals from other nation states at in ternational level, see E. Benvenisty, "Sovereigns as Trustees of Humanity: On the Ac countability of States to Foreign Stakeholders", *American Journal of International Law (AJIL)* 2/2013, 295–333.

[20] D. Avramović, "Vladavina prava međunarodno priznata vrednost?", Scientific Conference "*The European Union of Nations and Universal Values*", held on 13 Septem ber 2008 in the organization of NATEF, available at *http://natef.net/downloads/Dragutin%20Avramovic.pdf*, last visited 14 October 2016.

tional judiciary affect the ROL? We shall endeavor to address these questions. When we consider the relationship between the standards of the ROL and particular characteristics of international law, we should separate international human rights law which has had a distinguished role in strengthening the ROL.

4. THE BREADTH AND ABSTRACTNESS OF INTERNATIONAL PROVISIONS ARE NOT AN OBSTACLE TO THE ROL

Waldron says that "the ROL may be thought to require clarity in the rules that are applied to states in the international arena; it may be thought to prohibit the imposition of international obligations on states by norms whose meaning is controversial or unclear"[21] and notes that some governments have objected that various international human rights provision violate ROL standards, being not clear enough.[22] It cannot be denied that international treaties contain sometimes controversial or unclear provisions. It happens that parties to a treaty intentionally mask an absence of their agreement on the concrete issue by unclear provision. However, it is rather an exception than a regular phenomenon of international law.

The frequent, but not prevailing, characteristic of provisions of international law is their breadth and abstractness. Under "broad" or "flexible" international provisions we understand the provisions that leave significant discretion to a State in respect of their execution. Such provisions are characterized by the absence of strict international obligations in respect to a precise result that has to be achieved or in respect of the means for its achievement. Under "abstract" international provisions we understand the provisions whose content does not determine precisely each legal situation on which the provisions apply. "Abstract" international provisions leave also some discretion to States, but it is not as large as it is in the case of "broad" international provisions. The European Court of Human Rights names it "margin of appreciation."[23]

Regulating social interactions at an international level can be a much more complex process than regulating them at national level. The variety of involved interests is considerably larger and their reconciliation requires broader legal solutions. States search for solutions that will enable an achievement of a common goal and the preservation of particular interests as far as possible. Due to that reason, international provisions

[21] J. Waldron, 326.

[22] *Ibid.*

[23] See consideration on extension of the doctrine beyond the European Convention on Human Rights in Y. Shany, "Toward a General Margin of Appreciation Doctrine in International Law", *EJIL* 5/2006, 907–940.

foresee sometimes a range of alternative results and by achieving one of them a party fulfils obligations, established by these provisions. A good deal of international treaties is of a legislative character and the reason of abstractness of their provisions is the same as the reason of abstractness of any national legislative act.

However, the breadth and abstractness of international provisions do not contravene legal predictability and certainty in the context of the ROL. No matter whether internal constitutional rules allow the direct effects of international treaties, the broad provisions of international law are frequently of such legal characteristics that require implementation in internal law. Implementing international provisions and transforming them in internal law, States can meet standards of the ROL. Article 3 (1) of the 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters obliges parties "to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention". Besides that, Article 9 of the mentioned Convention requires parties to provide the rights, guaranteed by the Convention, with judicial protection and Article 9 (4) determines certain qualities of such protection. According to Article 9 (4) the procedures, foreseen by Article 9, "shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive". Such instructions for implementation of a treaty's provision, which obviously meet standards of the ROL, are not typical for international treaties, but, in spite of the fact that implementation is not fully an autonomous process, there is no any obstacle that a State may not apply standards of the ROL in the process of implementation, so that implementing domestic provisions satisfies them.

However, in spite of their abstractness, some provisions of international provisions are capable of producing a direct effect. If internal constitutional rules allow the direct effect of international provisions, subjects can invoke them before internal courts, asking for the protection of their rights derived from such provisions. In such cases their determinative incompleteness might not be eliminated in the process of implementation. Or, on the other hand, in the case of implementation, the interaction between international provisions and an internal implementing act remains alive, at least, in the process of interpretation. Interpreting an internal implementing act, a national judge can take into account its international source. It means that the insufficiency of a determinative effect of an international provision might be relevant even in the case of implementation. The problem is not characteristic only for international law. It appears also in internal law and in the both cases it has to be resolved by interpretation. Rules on interpretation of international treaties are codified

in Articles 31–33 of the Vienna Convention on the Law of Treaties. The other source of clarification of broad and abstract international provisions is international judicial jurisprudence.

We shall endeavor to outline further our thesis by a short reference to the law of the World Trade Organization (hereinafter: the WTO) and international human rights law.

Bearing in mind the goals of WTO, such as full employment, raising standards of living, expanding the production of and trade in goods and services, preservation of environment and sustainable development,[24] on one hand, and different realities in various States, on the other, WTO law has to reconcile a lot of different and opposing interests. Due to that fact, WTO law is very complex and flexible, leaving significant discretion to Members to adjust achieving the goals to their needs, concerns and levels of development. The European Court of Justice found that a great flexibility of the GATT, which manifests in the possibility of derogation from the general rules by the measures to be taken when confronted with exceptional difficulties and in the settlement of disputes that includes a possibility of bargaining between the contracting parties, precludes direct effects of its provisions.[25] It means that the implementation of WTO law is necessary. However, the importance of flexibility was confirmed, for example, by the Ministerial Conference of the WTO, at its meeting in Doha, of 14 November 2001. The Conference stressed that the Agreement on Trade-Related Aspects of Intellectual Property Rights provides flexibility necessary for reconciliation of Members' right to protect public health and to advance access to medicines for all and obligation of protection of intellectual property rights.[26]

The complexity and flexibility of WTO law does not necessary mean that legal uncertainty and unpredictability are permanent characteristics of that law. The WTO includes the Dispute Settlement Body of compulsory jurisdiction for all Members. Decisions of the Dispute Settle-

[24] The first recital of the Preamble of the Agreement Establishing the World Trade Organization reads: "Recognizing that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective de mand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustain able development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development,... " *http://www.wto.org/english/docs e/ legal e/04 wto.pdf,* last visited 21 September 2016.

[25] Case C 469/93, *Amministrazione delle Finanze dello Stato v Chiquita Italia SpA*., Judgment of 12 December 1995, para 26–29.

[26] F. M. Abbott, "The WTO Medicines Decision: World Pharmaceutical Trade and the Protection of Public Health", *(AJIL)* 2/2005, 317.

ment Body make the "GATT acquis,"[27] that supplements and clarifies WTO law. Article 3 (2) of the Understanding on Rules and Procedures Governing the Settlement of Disputes defines the dispute settlement system of the WTO as "a central element in providing security and predictability to the multilateral trading system". In his departing statement to the General Council of 14 April 1999, R. Ruggiero, Director-General of the WTO has distinguished a "combination of equality in commitments with flexibility in implementation" as "the foundation of the WTO's success in building a respected and credible system which has strengthened the rule of law in international system".[28] "A combination of equality in commitments with flexibility in implementation" is enabled by broad and flexible provisions of WTO law.

The main source of clarification of international human rights provisions is case law of human rights bodies and international human rights courts. The source is of such importance that some countries of the dualist approach to the relationship between international and national law have formally instructed their courts to follow the practice of the European Court of Human Rights.[29] Article 18 (3) of the Serbian Constitution, which adheres to monist tradition, instructs that provisions on human and minority rights should be interpreted, inter alia, pursuant to the practice of international institutions that supervise their implementation.

Abstract provisions of the European Convention on Human Rights, due to the poorness of content, frequently do not say anything about rights in a concrete situation. In such situations, the European Court of Human Rights searches for a determination in subsequent practice of the parties concerning the application of the provisions, as it is foreseen by Articles 31 (3b) and 32 of the Vienna Convention on the Law of Treaties. Article 31 (3b) of the Vienna Convention refers to subsequent practice in the application of an international treaty, which reflects an informal agreement among all parties concerning interpretation of provisions of the treaty, as to an authentic means of interpretation. Article 32 recognizes the relevance of an informal agreement of some parties, reflected by the practice, as a supplementary means of interpretation. When a provision of the European Convention on Human Rights is silent concerning the right in a

[27] P. Lamy, "Place of the WTO and its Law in the International Legal Order", *EJIL* 5/ 2007, 972.

[28] *http://www.wto.org/english/news e/sprr e/sppr 14apr99 e.doc*, last visited 26 September 2016.

[29] The British 1998 Human Rights Act incorporating the ECHR in the UK law is explicit. Section 2(1) of the Act states: "A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any (a) judg ment, decision, declaration or advisory opinion of the European Court of Human Rights...". Similar provision is inserted in section 4 of the 2001 European Convention on Human Rights Bill that incorporated the ECHR in Irish law.

concrete situation and if the practice of the application of the provision in majority of the parties discloses their sufficiently common position concerning the right in the concrete situation, the European Court of Human Rights usually takes it as determinative for the interpretation.[30] It is known as evolutive method of interpretation. The ECtHR has stressed many times the importance of dynamic and evolutive interpretation:

"...since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond (...) to any evolving convergence as to the standards to be achieved (...) A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement (...)".[31]

It means that the European Court of Human Rights changes its case law over time and that it might be an element of legal uncertainty. Practitioners in State Parties should look at the case law of the European Court of Human Rights and at comparative practice in the application of the Convention in other State Parties, what is not an easy task. However, legal certainty is a fundamental standard of the ROL, but not an absolute one. Any small harm made by evolutive interpretation to legal certainty has been compensated for by progress in human rights standards allowed by evolutive interpretation. Since the final goal of the ROL is protection of rights and freedoms of an individual, such compensation cannot be seen as contrary to the ROL. It should be added that the European Court of Human Rights attributes a great value to legal certainty. The Court stated: "While the Court is not formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases". [32]

If the breadth and abstractness of international provisions enable necessary adjustment of local particular interests with general international goals and if there are the means for their alignment to standards of the ROL in the process of implementation or interpretation of these provisions, we cannot see harm these characteristics can cause to the ROL.

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[30] R. Etinski, "Subsequent Practice in the Application of the Convention for the Protection of Human Rights and Fundamental Freedoms as a Means of its Interpretation", *Thematic Collection of Papers, Harmonisation of Serbian and Hungarian Law with the European Union Law*, Novi Sad Faculty of Law 2015, 17–36.

[31] *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.

[32] *Christine Goodwin v The United Kingdom* App. no. 28957/95 (ECtHR, 11 July 2002) para 75.

5. PRESENT STATE OF INTERNATIONAL JUDICIARY AND THE ROL

Supreme national courts are of the key importance for the ROL. By making a final determination of law in concrete situations, the supreme judicial authority harmonizes national judicial practice, providing legal certainty and equality before law. There is nothing comparable at the international level. Attempts for the establishment of a world compulsory arbitration, inspired by a desire to secure "principle of law in international relations"[33] failed at The Hague Peace Conferences in 1899 and 1907[34] and judicial means of dispute settlements have remained the matter of disposition of States.

However, possibilities of final judicial determination of the law in international disputes vary from one to the other field of international law, as well as from one to the other world region in the same field of international law. They depend on interests of States. The international trade regime, which functions in the framework of the WTO, includes a compulsory dispute settlement mechanism. The WTO included 164 Members on 29 July 2016.[35] The international legal regime of the sea, established by the UN Convention on the Law of the Sea includes compulsory judicial mechanisms of dispute settlement. There are 168 parties to that Convention.[36] The 1998 Rome Statute of International Criminal Court is accepted by 122 States.[37] The Rome Statute is not of the same type as compulsory judicial mechanism in the WTO or that, established by the UN Convention on the Law of the Sea. It should be part and parcel of international humanitarian law, of the Geneva Conventions, but it is self-standing treaty. Nevertheless, it is accepted by 122 States, a much larger number of States in comparison with 70 States which accepted compulsory jurisdiction of the International Court of Justice by unilateral declarations.[38] The judicial bodies of compulsory jurisdiction are, also, Criminal Tribunals or UN Compensation Commission,[39] established by the UN Security Council.

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[33] W. I. Hull, "Obligatory Arbitration and The Hague Conferences", *AJIL* 2/1908, 731.

[34] H. Lammash, "Compulsory Arbitration at the Second Hague Conference", *AJIL* 4/ 1910, 93.

[35] *http://www.wto.org/english/thewto e/whatis e/tif e/org6 e.htm*, last visited 1 October 2016.

[36] *https://treaties.un.org/Pages/ViewDetailsIII.aspx?src TREATY&mtdsg no XXI 6&chapter 21&Temp mtdsg3&clang en*, last visited 1 October 2016.

[37] *https://treaties.un.org/pages/ViewDetails.aspx?src TREATY&mtdsg no XVIII 10&chapter 18&lang en*, last visited 1 October 2016.

[38] *http://www.icj cij.org/jurisdiction/index.php?p1 5&p2 1&p3 3*, last visited 1 October 2016.

[39] *http://www.un.org/press/en/2005/ik486.doc.htm*, last visited 1 October 2016.

At the regional level, a distinguished example is the European Convention on Human Rights. All 47 Members of the Council of Europe are Parties to the European Convention on Human Rights and, as such, accept compulsory jurisdiction of the European Court of Human Rights. Regional economic integrations include regional courts.

The number of States which have accepted optional mechanisms of judicial and quasi-judicial resolution of international disputes at universal and regional levels might be indicative for global trend of interaction of national and international legal orders in the context of the ROL. It is also important to note to raising number of judicial and quasi-judicial mechanisms for dispute resolutions between States and non-State private subjects. Let us just mention ICSID tribunals, human rights bodies at global level and the American Court of Human Rights, the European Committee of Social Rights or the Aarhus Compliance Committee at regional level. States are more eager to accept compulsory judiciary in some fields of international relations than in others.[40] The absence of a world compulsory mechanism for dispute resolution is not in favor of the ROL, though not an inherent deficiency of international legal order, rather the failure of States.

6. ENFORCEABILITY OF INTERNATIONAL LAW

Concerning the enforceability of WTO law, Pascal Lamy, Director-General of the WTO, says: "Everything is done to ensure that the complaint, if it is substantiated, is followed by concrete effects. After the adoption by the panel, and possibly the Appellate Body, of their 'recommendations', WTO Members continue to monitor and to follow up on the implementation by the losing country of the conclusions of the case. Furthermore, if the conclusions are not fully implemented, the winning party that so requests may impose countermeasures in the form of trade sanctions". [41]

The European mechanism of control over respect for human rights, consisting of the European Court of Human Rights and the Committee of Ministers of the Council of Europe, which monitors the execution of the Court's judgments, is distinguished by its capacity to be effective.[42] Exclusion of a State from the membership of the Council is the last measure

[40] Y. Shany, "Assessing the Effectiveness of International Courts: A Goal Based Approach", *AJIL* 106/2012, 225–270.

[41] P. Lamy, 976.

[42] D. Anagnostou, A. Mungiu Pippidi, "Domestic Implementation of Human Rights Judgments in Europe: Legal Infrastructure and Government Effectiveness Matter" *EJIL* 25/2014, 205.

in the case of persistent and grave disrespect for human rights of fundamental importance.

Concerning the judgment of the International Court of Justice Article 94 (2) of the UN Charter authorizes the UN Security Council, upon a request of a party to a dispute, to take measures to give effect to a judgment. But, the Security Council will take measures if it deems it necessary. For the time being, the Security Council has not taken such measures.

Mr. Lamy referred to counter-measures as the last resort at disposition of States to enforce law. Indeed, in a community of sovereign States, counter-measures and sanctions are a last resort for the enforcement of international law. However, it is a considerable issue on how much they are effective in relationships between small and big countries. [43]

The existence and performances of enforceable mechanisms depends on the will of States. Despite some fluctuations, it seems that there is a rising trend of building such mechanisms.

7. THERE IS NO WORLD GOVERNMENT, BUT THE UN SECURITY COUNCIL TO INTERVENE IN BASIC HUMAN RIGHTS

Writing about the Hobbesian problem and the absence of the world sovereign, Waldron observes that there are some worries "about lawlessness or arbitrary exercise of power at the highest level of international governance, for example, in the UN Security Council" and that "there do appear to be certain Hobbes-like difficulties in subjecting its decisions to legal control (not to mention legal review)".[44] Crawford has seen a problem of arbitrary power of the Security Council in missing "regular institutional means for bringing Charter constraints to bear on the Security Council".[45]

However, the first acts of direct and indirect control of legality of acts of the Security Council have been performed. The first instance of direct international judicial control over the Security Council resolutions was, probably, the Decision on the defence motion for interlocutory appeal on jurisdiction, adopted by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia on 2 October 1995.[46] The Appeals

[43] See critical observations about counter measures in: J. J. Jackson, "Internation al Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to 'Buy Out'?" *AJIL* 98/2004, 109–123.

[44] J. Waldron, 319.

[45] J. Crawford, 10.

[46] *Prosecutor v. Dusko Tadic*, Decision on the defence motion for interlocutary appeal on jurisdiction, adopted by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia on 2 October 1995.

Chamber controlled whether the International Criminal Tribunal had been established in accordance with human rights standards and gave a positive answer.

But, potentially far-reaching effects of limiting arbitrary power of the Security Council were produced by judgments of the European Court of Justice in cases *Kadi* and *Al Barakaat*.[47] The European Court of Justice annulled regulations of the EU Council implementing resolutions of the Security Council on individual sanctions, since effects of human rights breaches, done by the Security Council resolutions, had been transferred by the Council's regulations in the EU legal system. Due to the violation of some human rights, the European Court of Justice deprived the Security Council resolutions of their legal effects in the EU legal system. The Judgments have provoked a huge discussion among writers.[48] The Secu-

[47] Case T 306/01, *Ahmed Ali Yusuf, Al Barakaat International Foundation v. Council of the European Union, Commission of the European Communities*, Judgment of 21 September 2005, para. 277, Case T 315/01, *Yassin Abdullah Kadi v. Council of the European Union, Commission of the European Communities*, Judgment of 21 September 2005, para. 226, Joined Cases C 402/05 P and C 415/05 P, *Yassin Abdullah Kadi v. Coun cil of the European Union*, Judgment of 3 September 2008, para. 287, Case T 85/09, *Kadi v. Commission*, 30 September 2010, Joined Cases C 584/10 P, C 593/10 P, C 595/10 P, Judgment of 18 July 2013.

[48] C. Tomaschut, "Case T 306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v Council and Commission*, judgment of the Court of the First Instance of 21 September 2005; Case T 315/01 *Yassin Abdullah Kadi v Council and Commission*, judg ment the Court of the First Instance of 21 September 2005, nyr", *Common Market Law Review* 43/2006, 537, E. Cannizzaro, "A Machiavellian Moment, The UN Security Coun cil and the Rule of Law", *International Organizations Law Review* 3/2006, 189, J. d'Aspremont, F. Dopagne, "*Kadi*: The ECJ's Reminder of the Elementary Divide between Legal Orders", *International Organizations Law Review* 5/2008, 371, E. Sándor Szalay, "Fundamental Rights at the Crossroads", Conferinþa Internaþională Bienală, Timişora 2008, 917, P. De Sena, M.Ch. Vitucci, "The European Courts and the Security Council: Between Dédoublement Fonctionnel and Balancing of Values", *EJIL* 20/2009, 193, See observations to this text from G. de Búrca, A. Nollkaemper, I. Canor, published under the same title "The European Courts and the Security Council: Between Dédoublement Fonc tionnel and Balancing of Values: Three Replies to Pasquale De Sena and Maria Chiara Vitucci," in *EJIL* 20/2009, 853, 862, 870, respectively and the reply of P. De Sena, M. Ch. Vitucci, "The European Courts and the Security Council: Between Dédoublement Fonc tionnel and Balancing of Values: A Rejoinder to Gráinne de Búrca, André Nollkaemper and Iris Canor", *EJIL* 20/2009, 889, G. De Búrca, "The European Court of Justice and the International Legal Order after *Kadi"*", *Jean Monnet Working Papers* 1/2009, *www.jean monnetprogram.org/papers/09/090101.html,* last visited 10 October 2016. D. Halberstam, E. Stein, "The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order", *Jean Monnet Working Paper* 2/2009, *http://centers.law.nyu.edu/jeanmonnet/papers/09/090201.pdf*, last visited 10 Oc tober 2016, K. S. Ziegler, "Strengthening the Rule of Law, but Fragmenting International Law: The *Kadi* Decision of the ECJ from the Perspective of Human Rights", *Human Rights Law Review* 2/2009, 288, P. Takis Tridimas, J. A. Gutierrez Fons, "EU law, Inter national Law and Economic Sanctions against Terrorism: The Judiciary in Distress?", *Fordham International Law Journal* 32/2008–2009, 660, A. Aust, "Kadi: Ignoring Inter

rity Council has established an Ombudsman Office to serve as a communicator between individuals on Al-Kaida sanctions lists and the Security Council Sanction Committees.

Reinisch noted that "with regard to individuals listed by the UN Security Council as terrorists, the Ombudsperson institution has markedly improved the situation, although Paragraph 29 of the 2012 Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels suggests that there is still a need for reform when it 'encourage[s] the Security Council to continue to ensure that [. . .] fair and clear procedures are maintained and further developed'."[49]

The first issue is whether the competence of the Ombudsperson should be extended to individuals affected by sanctions of the Security Council beyond the ISIL and Al-Qaida list and the following issue is whether the institution of Ombudsperson should be supplemented by other mechanisms capable of satisfying standards of the right to a fair trial. But, no doubt the revolt of the European Court of Justice against any arbitrary interventions of the Security Council in human rights has opened a new horizon for the ROL in relationships between individuals and international organizations.

8. INTERNATIONAL HUMAN RIGHTS LAW AND THE ROL

The above text has investigated a role of international law in the trans-border relationships between individuals and foreign States, between individuals from more States and between individuals and the UN Security Council concerning the ROL. International human rights law is dedicated to the most important relationships between a State and individuals under its jurisdiction, which make a substance of the ROL. By the establishment of minimal standards of human rights, that branch of international law secures a worldwide minimum of the ROL. On the other hand, by developing standards on the right of fair trial or the right to effective remedy, or by establishing standards which internal law has to meet, to be recognized as legally appropriate limits of the human rights, international human rights law directly improves the ROL.

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national Legal Obligations", *International Organizations Law Review* 6/2009, 293, M. Lukić, "The Security Council's Targeted Sanctions in the Light of Recent Developments Occurring in the EU Context", *Annals of the Faculty of law in Belgrade Belgrade Law Review* 3/2009, 239.

[49] A. Reinisch, "Panel on the 2012 UN Declaration on the Rule of Law and Its Projections", *American Society of International Law Proceedings* 107/2013, 469, 473.

9. CONCLUSIONS

Standards of the ROL can be separated between those related to some qualities of the law, such as sufficient clarity and determinative power of the legal provisions to exclude arbitrary exercise of a State's authority, and those related to legal order, the separation of powers, organization of judicial system etc. Purposes of the ROL include providing all subjects with legal certainty and protection of individual freedom and well-being against illegal interferences.

Since many of illegal interferences are trans-border and come from foreign States or individuals in foreign States, a successful defense of personal liberty and well-being is not possible without international law. A State may have whatever power, but in its "sovereign isolation" the State is not capable of protecting its citizens from foreign interferences. International cooperation and international law are necessary. The particular characteristics of international law and international legal order are not obstacles for international law to serve the ROL. However, the scope and quality of the service of international law to the ROL varies from one to the other legal field and from one to the other world region in the same legal field and depend on the interests of States.

The exceptional breadth of provisions of international law has a legitimate purpose, that purpose being the accommodation of particular national interests within the common goal of general interests. International reality in fields such as economy or environment is far more complex than national, and it requires harmonization of larger number of particular interests. Due to this fact, international provisions in some fields are probably broader that national, but it does not harm the standards of clarity and legal predictability. Most of such international provisions have to be implemented in internal legal systems and by transforming them into internal law States can meet the standards of the ROL. Even beyond implementation, there are enough means at disposal of subjects for their clarification in concrete situations. Even a small harm which might be cause to legal certainty by evolutive interpretation of abstract provisions of human rights treaties by international courts and bodies is compensated in advance of international standards of human rights, brought to be evolutive interpretation.

The possibilities of international judicial determination of international law in disputes or enforceability of international law vary from one to another area of international law and from one to another world region in the same area. After the Second World War, the number of international proceedings between States and individuals has grown. That meant that possibilities of international judicial or quasi-judicial determination

of the international law in disputes between individuals and States have risen.

The revolt of the European Court of Justice against arbitrary interference of the UN Security Council in human Rights has opened a new horizon of the ROL in relationship between individuals and international organizations.

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WHICH ANIMAL RIGHTS SHOULD BE RECOGNISED?

The paper considers the issue of the possibility to award the fundamental rights to sentient animals. Taking as a starting point contemporary animal protec tion laws, particularly the ones in which animals are treated as human's co beings, the latest scientific investigations, which prove irrefutably a sizeable genetic simi larity between humans and animals, but also negligible differences in intelligence and capability to communicate between themselves, as well as the change of course in individual contemporary codifications towards disallowing treating animals as things, the author advocates argumentatively for recognising the fundamental rights of animals and thereby their legal personhood. According to the author's understanding, sentient animals should be awarded the fundamental rights corre sponding to their interests, needs and species, such as: the right to life; the right to freedom; the right to not have pain, suffering and stress inflicted on them; the right to be cared after by humans; the right to acquire ownership rights; and the right to legal protection.

Key words: *Legal protection of animals. Animal behaviour. Animal funda mental rights.*

1. INTRODUCTORY NOTES

Contemporary law recognises people and legal persons as legal subjects. Presently, just as at the beginning of human civilisation, animals have no status of legal subjects.

However, in the last couple of decades, mostly thanks to the passing and application of the laws protecting the welfare of animals and particularly those progressive normative creations where an animal as a

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co-being of human beings is at the centre of attention,[1] then to the numerous researches that showed a great resemblance in the genetic material between human beings and animals (particularly chimpanzees, bonobo monkeys, and pigs),[2] animals' intelligence and their capacity for empathy and socialisation,[3] as well as the change of the course of individual civil codifications in the direction where animals are not considered things,[4] a legal dilemma occurs: are these natural creations legal subjects or objects? If they are subjects, then which rights are to be recognised to animals to protect them in the most efficient manner?

In this paper, we make an attempt to provide answers to the questions posed.

2. ANIMAL RIGHTS – A BRIEF BACKGROUND

Fight for animal rights is not an achievement of the 21st century. As far back as 1964, at the request of the English Government, a Committee was formed, headed by Roger Brambell with a task to assess the real status and conditions in which domestic animals raised on farms live. The following year already, the mentioned Committee drew up and delivered a report (Report of the Technical Committee to Enquire into the Welfare of Animals kept under Intensive Livestock Husbandry Systems) to the Government, where the rights (freedoms) of an animal to "to turn round, groom itself, get up, lie down and stretch its limbs" are mentioned for the first time. A short while later, in 1979, the newly established Farm Animal Welfare Council, FAWC improved the concept of the five stated rights of those animals to: right to diet and water; right to life free from

[1] 1 See in particular: Austrian Law on the Protection of Animals – ALPA, (Tier schutzgesetz, 2004, BGBI. I, Nr. 118/2004, including the amendments dated 4. 3. 2016, BGBI I, Nr. 80/2013), para. 1 and the German Animal Welfare Act – GAWA (Tier schutzgesetz, 1972, in its version published in 2006, BGBI. I S. 1206,1313, including the amendments dated 3. 12. 2015, BGBI I S. 2178), para. 1.

[2] The data are retrieved from the following web page: *http://www.b92.net/zivot/vesti.php?yyyy 2012&mm 06&dd 25&nav id 621302*, last visited 5 February 2016.

[3] So, for instance, the results of the conducted research can be found with: V. Joveski, "Neobična životinjska inteligencija", 2013. Retrieved from *http://znanost.geek.hr/clanak/neobicna zivotinjska inteligencija*, last visited 22 February 2016; L. Medak, "Empatija kod životinja češća nego što se prije mislilo", 2016. Retrieved from *http://znanost.geek.hr/clanak/empatija kod zivotinja cesca nego sto se prije mislilo/#ixzz40tTmSd6e*, last visited 22 February 2016.

[4] For instance, see the Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch, 1811, JGS Nr. 946/1811, including the amendments dated 30. 7. 2015, BGBI I, Nr. 87/2015), para. 285a; the German Civil Code (Bürgerliches Gesetzbuch, 1896, RGB1 I S. 195, including the amendments dated 19. 2. 2016; L. I S. 254, 264), para. 90a and the Swiss Civil Code – SCC (SR 210 Schweizerisches Zivilgesetzbuch, 1907, including the amendments 2009, AS 2009, 3577), para. 641a.

pain, injuries and diseases; right to appropriate shelter; right to express normal behaviour, including also social contacts with the animal's own kind, and the right to life free from fear and suffering.

Today the concept of five rights of animals on farms is widely accepted in practice for pets and animals kept in zoos.

The Universal Declaration of Animal Rights,[5] as the Universal Declaration of Human Rights,[6] acknowledges a broad range of the so-called natural rights to these beings, placing them practically in the position of legal subjects. Thus, this legal document proclaims: that the life of any animal deserves respect; that animals have the right to live and reproduce freely in their natural environment; the right to be cared for and protected by humans; the right to life free from pain, stress and suffering.[7]

The World Society for the Protection of Animals, the creator of the Universal Declaration on Animal Welfare,[8] being aware of the fact that the use of the term "rights" of animals will not attract the support of states at international plane, opted for the term "welfare"[9]of animals.

Although there are opinions[10] in legal literature that essentially it is about the same rights that are directly (in the Universal Declaration of Animal Rights), or indirectly (in the Universal Declaration on Animal Welfare) acknowledged to animals, we cannot agree with it since the latter legal source puts the improvement of conditions for animals used by humans for various needs in the foreground, not the guaranteeing of the elementary rights of animals, such as the right to live and the right to freedom. The point where both Declarations coincide is the right of animals to be protected against maltreatment.[11]

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[5] The text of the Universal Declaration of Animal Rights UDAR, can be found on the following web page: *http://www.declarationofar.org/*, last visited 6 March 2016.

[6] The text of the Universal Declaration of Human Rights UDHR, can be found on the following web page: *http://www.poverenik.rs/yu/pravni okvir pi/međunarodni dokumenti pi/146 univerzalna deklaracija o ljudskim pravima.html*, last visited 1 March 2016.

[7] See UDAR, art. 1 5.

[8] The text of the Universal Declaration on Animal Welfare UDAW, can be found on the following web page: *http://worldanimalprotection.ca/sites/deafault/files/ca case for a udaw tcm22 8305.pdf*, last visited 6 March 2016.

[9] This term implies the provision of conditions, by man, in which an animal should satisfy its biological needs, free from fear, suffering, pain and stress. The biologi cal, basic needs of animals are: need for food, water, adequate space for shelter, need for expressing normal patterns of behaviour and veterinary care. Such a determination of this term, say, is contained in the UDAW, art. 1.

[10] See: M. Paunović, "Životinjska prava, Prilog proširenoj teoriji ljudskih prava", *Strani pravni život* 3/2005, 39.

[11] Cf. UDAW, art. 2, para. b and c, with UDAR, art. 3, para. 1.

Depending on whether the advocates for the protection of animals focus their attention to the prohibition of the use of animals, in all its aspects, or to the improvement of conditions in which animals live, for their further exploitation, animals are given higher or lower number of rights of various contents.

So, Francione believes that the basic right to be guaranteed to animals is the right not to be treated as objects of property rights.[12]

Paunović does not insist to a strict application of the previously mentioned law[13] and he advocates for a bit wider range of animal rights, proposing the following to be acknowledged to animals: right to life; right to freedom, in accordance with the species they belong to; right to habitat adequate to animal species; right not to be harmed by man, and right to be cared for by man.[14]

Favre advocates for an improvement of conditions for animals and proposes the following rights to be acknowledged: Not to be put to prohibited uses; not to be harmed; to be cared for by man; to have living space; to be object of a "proper" ownership; to acquire property; to "enter into contracts"; to be legally protected.[15] In this author's opinion, this must not be a final list of rights to be acknowledged to animals anyhow.[16]

Visković approaches the rights of animals cautiously, pointing out that there are general and special rights. The former shall be valid for all animal species and all the individual ones within them, such as the case of the right of animals not to be inflicted pain, suffering and harm. The latter stated rights would only be intrinsic to specific species; for example, the right to life would only be "intended" to those animals that are not used as food for man. Some general rights, according to the understanding of this theoretician, would have various modalities, depending on the animal species they refer to, say, the right to freedom.[17]

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[12] G. Francione, R. Garner, *The Animal Rights Debate, Abolition or Regulation?,* Columbia University Press, New York 2010, 1.

[13] Paunović states several possible discrepancies from the right of animals not to be treated as objects. See in more detail: M. Paunović, 41.

[14] *Ibid.,* 40 44.

[15] D. Favre, "Living Property: A New Status for Animals within the Legal Sys tem", *Marquette Law Review* 93/2010, 1062 1070.

[16] *Ibid.,* 1062.

[17] N. Visković, "Stradanja, zaštita i prava životinja (Prilog raspravi o 'trećoj gen eraciji prava')", *Zbornik radova Pravnog fakulteta u Zagrebu* 39 (5 6)/1989, 820.

3. WHY SHOULD THE FUNDAMENTAL RIGHTS AND LEGAL SUBJECTIVITY BE RECOGNISED TO ANIMALS?

Although it may be closer to science fiction than to cruel reality that is mainly not benevolent to animals, particularly to those abandoned or used for satisfying various necessities of man, we dare to bring up a stand that the fundamental rights belonging to man should also be recognised to animals, and which are, as such, guaranteed by the Universal Declaration on Human Rights and the supreme legal acts (constitutions) of any state.[18] Thereby, those rights must fit the interests of animals. The recognition of, say, the right to life or the right not to be inflicted pain, suffering or stress is something intrinsic to any animal species that feels. To the contrary, other animals, besides man, do not need, for example, electoral right, right to education or freedom of association.

Why is it necessary that the norm setters undertake this revolutionary step in legislative practice? In our opinion, this is the only way in which animals as our co-beings may enjoy a more complete legal protection, now as legal subjects. The mere fact that animals are legally guaranteed narrower or broader array of rights may be a specific type of barrier, first created in heads of people and then demonstrated in the real world to act contrary to what law guarantees and protects.[19]

There are more and more reasons for recognising the rights to animals. Here we shall implicate those that can be, with their volume and weight and each one individually taken, a sufficient justification for a different status of animals.

Respecting the basic postulate of Darwin's Theory Of Evolution, it entails that people are connected to other animal species through evolution,[20] that man is not God's creation, but they originate from animals and are at the same time the top evolutionary phase in the development of animals.[21] Modern Zoology classifies human species in the superfamily Hominoidea – consisting of, besides people, great apes, too.[22] Because of that evolutionary connectedness, the recognition of appropriate corps of the fundamental rights of animals follows as a logical conclusion.

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[18] See: The Constitution of the Republic of Serbia (*Official Gazette of the RS,* no. 98/2006), art.s 23 74.

[19] Similar observation, see: N. Visković, 820.

[20] Darwin's Theory of Evolution, say, is processed in more details with: J. Stevanović, Z. Stanimirović, N. Đelić, *Zoologija,* Fakultet veterinarske medicine, Beograd 2013, 275.

[21] On origins of man, see in detail: C. Darwin, *Čovekovo poreklo i spolno odabi ranje* (*The Descent of Man and Selection in Relation to Sex*), Matica srpska, Novi Sad 1977.

[22] See: J. Stevanović, Z. Stanimirović, N. Đelić, 159.

If legal entities are recognised legal subjectivity,[23] which bear no much resemblance to physical persons, we do not see the reason why animals cannot enjoy legal protection as subjects with rights adequate to their needs, interest and species.

The long time ago confirmed scientific knowledge that numerous animals are, as people, sensitive beings, supports our claims, as they have, like people, in their organism: oxytocin, epinephrine, serotonin and testosterone, the substances that affect feelings and behaviour.[24] Hence, animals have interest not to suffer, not to be exposed to stress and pain.[25]

Additionally, genetic similarity of animals to people would be confirmed with legal norms by acknowledging the fundamental rights of animals. Here, first of all, we bear in mind that genetic materials between chimpanzee and bonobo monkey is almost identical (98.7%), on one hand, and man, on the other hand.[26] In the last years, however, some scientific research have confirmed the similarity between genomes of pigs and man.[27]

The similarity in regard to intelligence, the manner of communication and the complex rules of conduct in their community are in favour of the recognition of the elementary rights to animals. There are many examples from the animal world testifying in favour of the existence to intelligence with animals and, thereupon, the closeness to human species. Monkeys particularly stand out in that regard: chimpanzee, orangutans and bonobo monkey. Characteristically, they learn fast, have the best memory in animal world and possess a very developed sense for justice. Besides that, they can plan, set objectives themselves and fulfill them. Like people, these kinds of monkeys also live in communities, they can fight, but can also comfort each other. Maybe it seems a bit strange, because they are not primates; but crows also belong to the order of very intelligent animals. They have excellent memory and capability to recognise people. Besides, crows regularly use twigs, stones and well-shaped

[23] On legal entities as subjects in law, see in more detail: V. Vodinelić, *Građansko pravo, Uvod u građansko pravo i opšti deo građanskog prava,* Pravni fakultet Univer ziteta Union, Beograd 2014, 413 417.

[24] Emotional life of animals is particularly considered by: M. J. Moussaieff, S. McCarthy, *Kada slonovi plaču Emocionalni život životinja (When Elephants Weep The Emotional Lives of Animals)*, Algoritam, Zagreb 2004, 36.

[25] T. Regan, *Defending Animal Rights,* University of Illinois Press, United States of America 2001, 42; G. Francione, R. Garner, 7.

[26] The data are retrieved from the following web page: *http://www.b92.net/zivot/vesti.php?yyyy 2012&mm 06&dd 25&nav id 621302*, last visited 5 February 2016.

[27] Some geneticists, such as for example prof. Eugene M. McCarthy, claim that man is actually a hybrid originating from a wild boar and a female chimpanzee. See the basic ideas of the conducted research titled: "Human Origins the Hybrid Hypothesis. Hu man Origins: Are we Hybrids?" Retrieved from: *http://www.macroevolution.net/human origins.html*, last visited 5 February 2016.

wires to reach food. Even besides their genetic similarity to people, it is characteristic for pigs; they belong to the most intelligent species among domestic animals. They remember for a long period of time, they learn fast and respond when called by name, they are social and capable of expressing complex emotions.[28]

Those, but also many other examples from animal world only confirm that differences among individual animals and people are only the matter of degree, not the species.[29] Intelligence, thus, is not something that separates people from other animals, but it is on the contrary their "brand"; therefore, the fundamental rights that belong to man should also be acknowledged to animals.

Omnipresent hunger in the world goes in favour of acknowledging the elementary rights to animals. Currently, over 864 million undernourished people are recorded within the international frameworks.[30] According to the assessment of competent experts,[31] meat industry and their consumers are considered the main culprits for such a situation. Today 80% of the produced cereals in the developed world is used for raising animals on farms, and in the poor countries, instead to be used to feed population, they are mainly sold and transported to richer countries for livestock breeding.[32] Thus, there is enough food in the world, but it is not rationally distributed.

By acknowledging the fundamental rights to animals, the health status of human population would significantly improve because staple food would be of plant origin. Numerous studies and multiyear researches showed that vegetarians, as well as vegans, in principle, are the healthier part of human population since they are less exposed to risks of cancer, cardiac diseases, diabetes, osteoporosis, Alzheimer's disease, arthritis and meat poisoning because they normally have no obesity problem.[33] Besides, scholars confirmed in a number of research projects that vegetarians are more resistant, stronger, recover quicker after hard work comparing to meat eaters.[34]

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[28] The data are retrieved from the following web page: *http://www.b92.net/zivot/vesti.php?yyyy 2012&mm 06&dd 25&nav id 621302*, last visited 5 February 2016. See also: V. Joveski.

[29] C. Darwin, 121 122.

[30] Food and Agriculture Organization of the United Nations, *Livestock's long shadow environmental issues and options*, Rome 2006, 271. Retrieved from *http://www.fao.org/docrep/010/a0701e/a0701e00.htm*, last visited 29 February 2016.

[31] For example: M. F. Lappé, *Diet for a Small Planet*, Ballantine Books, United States 1971.

[32] Food and Agriculture Organization of the United Nations, 14 20.

[33] The data are retrieved from the following web page: *http://www.prijatelji zivotinja.hr/index.hr.php?id 1734*, last visited 15 December 2015.

[34] The data are retrieved from the following web page: *http://www.prijatelji zivotinja.hr/index.hr.php?id 227*, last visited 15 December 2015.

By acknowledging the fundamental rights to animals, the existing biosphere of the planet Earth would also be protected better. Grim statistics shows that livestock industry "participate" with 18 percent in greenhouse gas emissions, thus, much bigger share than the one of transportation (14%). Carbon dioxide, methane, nitrous oxide and ammonium produced by animals raised on farms are to be mainly blamed for this. Particularly dangerous, out of this range of detrimental gases is ammonium that is directly responsible for the occurrence of "acid rains", which have detrimental effects on environment, particularly on forests, rivers, lakes, and soil quality.

Mass deforestation carried out for the sake of creating pasture and land for raising food for animals on farms surely contributes to the increased greenhouse gas emissions. Mass destruction of forests, for the needs of animal husbandry, further contributes to endangering and even destruction of numerous animal species, whereby it directly contributes to the decrease of biological diversity.[35] Not less significant contribution to ecological disaster is made by the waste that is product of animal husbandry, in total 13 billion tons per year.[36]

More economic use of natural resources surely goes in favour of acknowledging the elementary rights to animals. It seems that data about spending averagely 990 litres of water for the production of one litre of milk is alarming enough, which is enormously more than spent for the production of cereals (for 1 kilo of wheat, 150 litres of water is spent) and out of the total consumption of water of human population, at the global level, 8% refers to animal husbandry.[37] Almost the same disbalance also exists in the use of fossil fuels. According to the calculation done, 11 times more energy is spent for the production of meat and other animal products than for the production of cereals. At the global level, 1/3 of the total consumption of fossil fuels is attributed to animal husbandry.[38]

4. THE FUNDAMENTAL RIGHTS THAT SHOULD BE ACKNOWLEDGED TO ANIMALS

4.1. Animal right to life

The right to life as the highest value of man is guaranteed, as we have already said, by international and the highest legal acts of each state, too.

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[35] Food and Agriculture Organization of the United Nations, 214 218.

[36] The data are retrieved from the following web page: *http://www.prijatelji zivot inja.hr/index.hr.php?id 1516*, last visited 15 December 2015.

[37] Food and Agriculture Organization of the United Nations, 167 and 272.

[38] The data are retrieved from the following web page: *http://www.prijatelji zivot inja.hr/index.hr.php?id 1734*, last visited 15 December 2015.

Does/should the same right belong to animals? At the current development degree of scientific thought and legislative practice, the answer may be undetermined at the very least. On one hand, when the UDHR guarantees this right, it does not limit itself to humans only, using the formulation "Everyone has the right to life..."[39] On the other hand, animals, even besides significant changes in treating them, are still closer to being treated as things, than to the recognition of their legal subjectivity.

Two streams, which exist in relation to the protection of animals, give a special seal to the complexity of the situation. Within the framework of the one, there are theoreticians (the so-called welfarists)[40] who deem animals are things; they do not propose abolition of their use, and they strongly support the reform and improvement of treating animals in the form of welfare.[41] On the other side, there are abolitionists who advocate for the abolition of all aspects of exploitation of animals and recognition of their fundamental rights.[42], [43] Between these diametrically opposed conceptions, Cochrane proposed the so-called free-range farms where animals are bred for milk, chicken for eggs, where animals would not be killed or exposed to suffering. Consequently, according to this author, such an aspect of the use of animals would not be, because they are not independent, opposed to their interest.[44]

It is quite clear that on the basis of the presented starting ideas, the right to life of animals is not in the welfarists' focus of attention, because in that case it would mean that people should not eat animals or use them for experiments, which are the two main aspects of using animals.

Advocates for the welfare of animals share common opinion that life of animals is morally less valued comparing to life of people, therefore, it is justified to use and kill them.[45]

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[39] See: UDHR, art. 3.

[40] From English term "animal welfare".

[41] In that direction, say, see: J. Bentham, *An Introduction to the Principles of Mor als and Legislation*, Hafner Press, New York 1948; J. S. Mill, "Utilitarianism", *Utilitari anism and Other Essays: J. S. Mill and Jeremy Bentham* (ed. A. Ryan), Penguin, Har mondsworth 1987; P. Singer, *Oslobođenje životinja,* IBIS grafika, Zagreb 1998; R. Garner in: G. Francione, R. Garner.

[42] This conception of legal protection of animals, for instance, is advocated for by: G. Francione, "Animals as Property"*, Animal Rights Law* 2/1996; T. Regan.

[43] Some authors, however, state their attitude that these two theoretical directions should not be so radically separated, which, finally, have protection of animals as their goal. So, Garner deems that standardisation of animal welfare can serve as a means for ending their exploitation or decreasing their use or suffering of animals. See: G. Fran cione, R. Garner, 9.

[44] A. Cochrane, "Ownership and Justice for Animals", *Utilitas* 4/2009, 438.

[45] G. Francione, R. Garner, 125.

Welfarists justify the absence of interests of animals to go on living and be used as resources, since they cannot conceive of themselves existing in the future, as people can,[46] and are not aware of themselves, as well as the fact that emotional experiences of people far outweigh those of animals.[47] Besides, derecognition of this rights is justified by death not being harmful to animals, since they live in present and are not aware of what they are losing when their life is taken from them. Also, welfarists believe that killing animals, *per se*, is not a moral issue until they are treated and killed "in a humane way".[48]

On the contrary, abolitionists hold that animals, as sensitive beings, have an interest to live; that they are aware of their existence and affiliation to a specific species; that death is harm to them;[49] as well as that life offers them an opportunity to acquire precious experiences, which is obvious welfare for them.[50]

According to abolitionists, the right to life of animals is directly linked to the rights of animals not to be treated as things and property of people.[51] Until animals are treated as things, they will not be members of moral community, and the value of the interest of animals as things will be worth less than the interest of the owners of animals.[52] Hence, the joint belief of theoreticians who fight for the fundamental rights of animals is that life of beings having feelings, as people, so animals too, have the same moral value, so it is equal for the purpose of not being treated like resources.[53]

If biodiversity and life on the planet Earth are to be preserved, the right to life to animals that feel must be guaranteed, not only to the animals that are currently endangered.

The right to life must also be acknowledged to animals raised for feeding people or satisfying other people's needs. Only exceptionally,

46 P. Singer, *Practical Ethics,* Cambridge University Press, Cambridge 1993, 199.

47 G. Francione, R. Garner, 15.

48 J. Bentham, 310 311.

49 G. Francione, R. Garner, 15.

50 D. DeGrazia, *Prava životinja: kratak uvod,* TKD Šahinpašić, Sarajevo 2002, 59 64.

51 There are opinions in the theory that the abolition of possessions does not nec essarily mean that animal will be recognised the right to life and other fundamental rights. It is also debatable whether the ownership right over animals a barrier to significant re forms on the welfare of animals, since that authorisation is a reflection and not the cause for the existence of the laws on the welfare of animals that are being applied. See: G. Francione, R. Garner, 130.

52 *Ibid.,* 22.

53 *Ibid.,* 5.

killing animals for the sake of feeding people if no food of plant origin or other kind of food is available, may be permitted.

The right to life may only be, as well as with people, abolished to animals in strictly stipulated, limited cases: if an animal represents danger to life and health of people and other animals; if the animal is incurably ill, and therefore, it suffers great pain or suffers a lot, according to the assessment of competent experts in the area of veterinary science, and with the permission of owner, i.e. another person authorised for the protection of animals.[54]

4.2. Animal right to freedom, according to the category it belongs to

Animal right to life gains in weight if related to the right to freedom. Animal right to freedom implies that the animal lives in its natural environment, where it can express and satisfy its physiological needs (to get up, lie down, move, mate, etc.).

In theory, there is no unique viewpoint on acknowledging this right to animals. Cochrane and Garner, say, deem that, since animals have no interest to be guaranteed the right to freedom (as well as the right to life), as they have no autonomy, this right should not be acknowledged to them.[55] Francione, for example, directly opposes this opinion, claiming that sentient animals have interest to be free (as well as to live) and to have the necessary level of autonomy, which enables them to live without being owned also.[56]

The animal right to freedom must be viewed primarily through a prism of the category the animal belongs to. So, for wild animals (as for hunted animals, so for non-hunted ones also), freedom represents the condition for survival and a "shield" of possible suffering and stress, because of its loss or limitation. For tamed animals (as for economic animals, so for pets also), freedom has another form, because of multi-centennial dependence on man.[57] Full "liberation" (abandonment) of these categories of animals from man's authority and their release in wilderness, without human care, regularly results in their fear, stress and suffering. Hence, it seems that the opinion expressed in literature that owning animals limits their freedom, but the lack of that freedom does not necessarily disturb their interests, which depends on the nature and type of those limitations.[58] So, owning wild animals does not essentially disturb their free-

[54] On other reasons, listed in the literature, why an animal may be deprived of life, see: M. Paunović, 41 42.

[55] A. Cochrane, 424 442; R. Garner in: G. Francione, R. Garner, 128.

[56] G. Francione in: *Ibid.,* 128.

[57] Classification of animals in the stated categories is taken from: N. Visković, 821 822.

[58] A. Cochrane, 436.

dom if they live in natural reserves, contrary to those kept in zoos. On the other hand, "being free in the wild might not be valuable to him simply for its own sake, but it might make his life more enjoyable".[59] Keeping domestic animals in cages, boxes, etc. enables them regularly to function naturally, whereby their interest not to suffer is disturbed.[60] On the other hand, however, since domestic animals, like children, have no capacity frame, revise and pursue their own conceptions of the good, that lack of autonomy confirms that complete freedom is not their basic interest.[61]

Independently of whether we consider animal freedom is important to them or it is relevant only for the interest that animals have thereof, just as Cochrane believes that freedom is important for animals only when suffering is alleviated,[62] this authorisation must be a basic element of the legal subjectivity of animals.

4.3. The right of animals not to be inflicted pain, suffering and harm

Where the advocates for the protection of animals agree is that a high number of animals belong to the group of sentient animals, which are capable of experiencing pain, suffering, fear and pleasure. This allegation is sufficiently illustrated by Bentham's understanding,[63] that animals are not considered with whether people use or kill them for their own needs. Their concern is not to suffer, as the result of being used or killed by humans. Garner shares similar positions.[64]

The right of animals not to be inflicted pain, suffering and harm is guaranteed by almost all laws protecting the welfare of animals.[65]

What theoreticians has no unique viewpoint upon is that individual theoreticians advocate for the understanding that the majority of animals possess no mental capability that is expressed in an existence of the awareness of themselves,[66] whereas the others deem that animals are

[59] *Ibid.*

[60] Similar examples mentioned by: G. Francione, R. Garner, 128.

[61] A. Cochrane, 436.

[62] A. Cochrane, "Do animals have an interest in liberty?", *Political Studies,* 3/2009, 660 679.

[63] J. Bentham, 310 311.

[64] R. Garner in: G. Francione, R. Garner, 128.

[65] See, for instance: ALPA, para. 5 para. 1, para. 2, point 1, 8, 9, 10, 11, and 13; GAWA, para. 1 and para. 2, para. 2; Swiss Law on Animal Welfare SLAW, (SR 455 Tierschutzgesetz, 2005, including the amendments dated 1. 5. 2014, art. 4, para. 2; Croa tian Law on the Protection of Animals CLPA (*Official Gazette,* no. 135/2006, 37/2013, and 125/2013), art. 4, para. 1 and para. 2, point 1, 11, 12, 13 and 14 and Serbian Law on Animal Welfare SrLAW (*Official Gazette of the RS,* no. 41/2009), art. 6, para. 5 and art. 7, para. 1, point 4, 7, 12, 17 and 29.

[66] P. Singer, (1998), 16 17.

aware of their own existence; that they comprehend that they are beings of a specific species, and not of any other; that they certainly recognise that they suffer, and that they feel the need or desire for this experience to stop.[67] The opinion of welfarists that people have superior mental strength and, therefore, they experience pleasure and pain more intensively, follows as a "natural continuation" of those allegations.[68] Abolitionists categorically refuse such a thinking with the argumentation that if such a thing would be accepted as correct, that would mean that there is a difference in the degree of pleasure and pain between less intelligent and more intelligent people, as well as between more and less educated people.[69]

Welfarists, since they consider the use of animals for satisfying various needs of humans acceptable, agree that they are treated for those purposes as much as possible humanely and no unnecessary pain is inflicted on them.[70]

Abolitionists are against any use of animals by man, therefore, against any suffering generated as the product of such a use.[71]

If we read the texts of animal welfare laws thoroughly (independently of the state), and fathom their essence, it is obvious that they serve man and represent primarily a "legalisation and legitimisation of a bloody practice of abusing, torturing and killing animals, and not a legal speech on the welfare and protection of animals".[72] Hence, this right, which is indirectly proclaimed by the regulations on the protection of animals, is more an idea with no real cover.

4.4. The right of animals to be cared for by man

Survival of domestic as well as wild animals is directly linked to the duty of man to care for them.

The term "care for animals" implies an entire array of activities undertaken by man with an aim to alleviate life of animals and enable the satisfaction of their biological needs.

Man, according to this right, is obliged to provide to domestic animals appropriate food, adapted to their species, necessary quantity of water, adequate shelter that meets their basic needs: to be able to move, get up, communicate with other animals of own kind or other kind, to lie

[67] D. Griffin, *Animal Minds: Beyond Cognition to Consciousness*, University of Chicago Press, Chicago 2001, 274.

[68] G. Francione, R. Garner, 18.

[69] *Ibid.,* 18 19.

[70] J. Bentham, 310 311; *Ibid.,* 5 and 10.

[71] T. Regan, 24; *Ibid.,* 24.

[72] H. Jurić, "Veliki ciljevi i mali koraci"*, Zarez* 194 195/2006.

down, breathe clear air, have daylight and adequate temperature, needed care, in the event of illness or very old age, and veterinary aid.[73] In principle, the same goes for wild animals – pets, as well as for wild animals kept in zoos, animal shelter or wild animals breeding centre.[74]

Care for wild animals in the wild primarily refers to conservation of their natural habitats and not undertaking any actions preventing them to perform their physiological functions (feeding, watering, reproduction); and when the circumstances require (e.g. due to major natural disasters), provision of needed food and care, too.[75]

4.5. The right of animals to acquire property rights

In the series of challenging the rights to animals, a special place belongs to property rights. Argumentations mainly go in the direction that animals, since they have no interest to live, but only not to suffer, have no interest to acquire property, therefore, it should not be protected by law either.[76] Besides, it is claimed that animals do not recognise the concept of property law, therefore, they cannot make correct decisions on investment or use of money or other property.[77]

That animals are not benevolently looked at as the holders of property rights in legislative practice either, is also testified by the solution contained in the Swiss Civil Code that stipulates that an animal cannot be specified as a testamentary heir, but if an animal receives a bequest by testamentary disposition, this is transformed through a legal conversion to an order to the heir or the legatee by which the animal must be cared for according to the rules on animal welfare.[78]

The presented arguments in theory may equally be valid for children, even for many adults and persons capable for business (particularly the lateral explanation stated), but acquiring property rights in human population is not challenged in any way.[79] It seems that the presented stands are losing weight if one takes into consideration the animal potential to, thanks to their physical (e.g. participation in horse races) or intellectual efforts (e.g. creation of a work of art by elephants or chimpanzees),[80]

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[73] See: ALPA, para. 13 19; GAWA, para. 2, and para. 2a; SLAW, art. 6 and art. 7; CLPA, art. 36 42 and SrLAW, art. 6 and art. 20 21.

[74] See: ALPA, para 25 26 and SrLAW, art. 58 and 71.

[75] See: CLPA, art. 46 and art. 47 and Serbian Law on the Protection of Nature (*Official Gazette of the RS*, no. 36/2009, 88/2010, 91/2010, and 14/2016), art. 71 85.

[76] J. Bentham, 310 311.

[77] D. Favre, "Living Property: A New Status for Animals within the Legal Sys tem", *Marquette Law Review* 93/2010, 1021 1071.

[78] See: SCC, Art. 482, para 4.

[79] Also: D. Favre, 1069.

[80] Examples stated with: *Ibid.,* 1068 1069.

enable their owner to acquire certain property (first of all, monetary awards). The fairness principle orders to take into consideration the efforts and engagement of the owner, but also the efforts of the animal, and to share the gain accordingly. Property acquired in that way would be used by the representatives of animals for the needs of the animals themselves exclusively.[81]

Also, we do not see the reason why an animal cannot be, by bequeath, specified for a heir, particularly if it, during its lifetime, was emotionally closer to the owner than the persons who he/she was in family or other legally recognised relations influential for constructing a legal inheritance order.[82] The position of a heir in the legal trade is much safer than the position of the beneficiary of the order, which animals have today.

On the other hand, the limitation of the authorisation of animal's owner, in relation to the animal itself, by banning animals to be objects of specific rights (e.g. right of pledge, right of retention, object of enforcement,[83] or that, when dividing common acquired property, the animal falls to the participant of the division who can care for animals better[84]), speaks in favour of a consistent respect of the principle of animal welfare.[85]

4.6. The right of animals to legal protection

Within the framework of the proposed rights that would fall to animals, the right to legal protection would also make an inextricable whole that would enable animals to protect their vital interests with the intervention of state organs.

Since animals do not have legally relevant will and capacity for legal communication, their interests, primarily, should be protected by people who care for them. For those animals that no one cares for or does it sporadically, it is acceptable, as per the Austrian law,[86] to establish special and independent state organ – animal ombudsman for each county in the territory of the Republic of Serbia.

Animal ombudsman would be authorised to protect interests on animals that are not cared for, and on animals that are owned, unless the

[81] *Ibid.*

[82] Also M. Paunović, 21; F. Foster, "Should Pets Inherit?", *Florida Law Review* 4/2011, 844 852.

[83] See: Serbian Law on Enforcement and Security (*Official Gazette of the RS,* no. 106/2015), art. 218, para. 6.

[84] See: SCC, art. 651a.

[85] Also: V. Vodinelić, 426.

[86] Austrian LPA regulates the appointment of animal ombudsman for each prov ince. See: para. 41, para. 1 therein.

owner instigated adequate legal mechanism for the protection of animals' interests. Animal ombudsman would have to, by the wording of law, have the position of a party to the procedure conducted for the protection of animals' interests. [87]

5. CONCLUDING CONSIDERATIONS

Correlation of people with other animal species through evolution, irrefutable scientific evidence that numerous animal species (like people) are sensitive animals, genetically similar to people, that they have intelligence and capability to communicate are arguments that speaks in favour of acknowledging the elementary rights to animals. Additional incentive to the norm setter in guaranteeing basic rights to those natural creations may be the following: omnipresent hunger in the world, improvement of the healthcare status of human population and a more quality protection of the ecosystem on the planet Earth.

All the presented arguments exactly speak in favour of our assertion that animals should be acknowledged the basic rights that fit their interests, needs and species, and consequently, their legal subjectivity. In our opinion, the basic rights to be acknowledged to animals should include the following: right to life; right to freedom, adequate to the category they belong to; right not to be inflicted pain, suffering and harm; right to be cared for by man; right to acquire property rights and right to legal protection. Animals, thus, should be acknowledged the so-called limited or passive legal subjectivity, which excludes obligations, since they, like children or persons fully deprived of business competency, do not have such intellectual capacities to understand their essence, as well as they do not have an acquired sense on correct and incorrect behaviour.

Just as the acknowledgement of the fundamental rights to people by international documents and the supreme legal acts of each state does not represent any guarantees that they will be observed in practice, so the acknowledgement of the rights to animals will not represent any guarantee that animals will really protect their legal position. What is, however, certain (analogous to what happens in the area of human rights) is that acknowledgement of the rights to animals will create change in awareness of a large number of people, and consequently (sooner or later) changes in their behaviour in relation to animals, too.

[87] Analogous to what is contained in the ALPA, para. 41, para. 4.

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ANTI-DISCRIMINATION LAW ON THE GROUNDS OF RELIGION WITHIN THE ITALIAN LEGAL SYSTEM: SUBSTANTIVE AND PROCEDURAL ASPECTS

The author illustrates the normative framework of protection against religious discrimination in Italian legal system, scattered over several different pieces of legis lation. The analysis is devoted to the substantive and procedural rules on the princi ple of equal treatment irrespective of religion. The analysis shows that the law guar antees every aspect of freedom of personal convictions in religious matter and pro tects not only people who belong to traditional organized religions, but all people who have held religious beliefs or practices. Italian law prohibits discrimination in regard to religion, not just in employment, but also in other areas. Consequently, the scope is wider than the EU Non discrimination Directive 2000/78/EC, which only covers discrimination in employment, occupation and working conditions. The rules for the procedure before the court, designed to ensure the protection for persons who have been subject to discrimination are then examined. The author focuses in par ticular on the provisions regarding the legal standing, the burden of proof, and the remedies, which are crucially important for the effective implementation of the prin ciple of equality.

Key words: *Right to equal treatment. Religious discrimination. Directive 2000/78/EC. Judicial procedure against discrimination. Legal standing. Burden of proof. Remedies and enforcement.*

1. INTRODUCTION

The non-discrimination principle requires the equal treatment of an individual or group protected under European law in the fields of public life, employment and other areas, such as the social and economic fields[1].

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People should not be treated less favourably than others in similar situations, without reasonable justification, or equally in different situations. Among the various grounds for discrimination covered by the European legislation I will focus on the ground of religion.

As a premise it should be noted that the right to non discrimination and its expansion to different grounds, has taken an increasingly significant role in European law connected to the new perspective of the protection of fundamental rights. The EU Treaties initially, with the narrow view to build an European market, has only provided prohibition of discrimination based on the sex and nationality. Equal treatment of men and women, on matters relating to working conditions, equal pay and working hours, equal treatment of workers irrespective of their nationality, were contemplated to ensure fair competition between the member States and free movement of workers[2], and not from the perspective of protection of disadvantaged groups. The adoption of the Treaties of Maastricht and Lisbon has marked a new stage in the European Union with regards to fundamental rights, as it provides the accession of the Union to European Convention on Human Rights and recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the EU, which have become legally binding and have the same legal value as the Treaties[3].

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[1] The right of all persons to equality before the law and protection against dis crimination constitutes a universal right recognised by the Universal Declaration of Hu man Rights, the United Nations Convention on the Elimination of All Forms of Discrimi nation against Women, United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories. Convention No 111 of the International Labour Organisation (ILO) prohibits discrimina tion in the field of employment and occupation.

[2] In this regard, paragraph 1 and 2 of Article 45 of TFEU (ex Article 39 of the Treaty Establishing the European Community, EC Treaty) provides that: "1. Freedom of movement for workers shall be secured within the Union. 2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment", and article 141 (ex Article 119) of TEC which provides the principle of equal pay between men and women for equal work or work of equal value.

[3] Paragraph 1 of Article 2 of the Treaty on European Union (TEU) provides that "The Union is based on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons be longing to minorities"; Article 6 TEU provides that: "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European

Within the new context, and given the consideration of the European Court of Human Rights, the principle of non-discrimination has become a crucial element in the European social model and is one of the European Union's basic principles[4].

In terms of legislation, several Directives have been adopted since 2000 with the aim to combat discriminations, such as Council Directive 2000/43/EC, 2000/78/EC, 2006/54/EC and 2010/41/EC. In particular, the directive 2000/78/EC, of 27 November 2000, in the perspective to put into effect the principle of equal treatment in the Member States, lays down a general framework for combating discrimination in matters of employment and occupation[5]. The Directive protects against direct and indirect discrimination, harassment and victimisation on the ground of religion or belief[6].

Two aspects need to be made clear first: 1) the directive does not define the terms "religion" or "belief"[7]; 2) religion is taken into consideration as a ground of discrimination just in respect of employment and occupation, unlike the directive on equal treatment between persons irrespective of racial or ethnic origin (2000/43/EC), which is also applied in relation to social security, healthcare, education and access to and supply of goods and services.

Union of [...] 12 December 2007, which shall have the same legal value as the Treaties. 3. Fundamental rights, as guaranteed by the European Convention for the Protection of Hu man Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.".

[4] As stated in the Green Paper on *Equality and non discrimination in an enlarged European Union* (Text available at *http://eur lex.europa.eu/legal content/EN/TXT/ HTML/?uri CELEX:52004DC0379*, last visited 20 October 2016.): "the principles of equal treatment and non discrimination are at the heart of the European Social Model. They represent a cornerstone of the fundamental rights and values that underpin today's European Union".

[5] Article 2.1. For the purposes of this Directive, the "principle of equal treat ment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

[6] The other factors of discrimination considered by the Directive 2000/78 are the grounds of age, sex orientation, disability and belief.

[7] See in this respect, Rodoljub Etinski, Ivana Krstić, *EU Law on the Elimination of Discrimination*, Belgrade, 2009, 288; Lucy Vickers, *Religion and belief Discrimination in Employment the Eu law,* European Commission, November 2006, 25. About the con cept of religion in the law, *ex plurimis* see: Rafael Palomino Lozano, *Religión y derecho comparado*, Madrid, 2007, *passim*. According to the jurisprudence of the European Court of Human Rights (ECtHR), the concept of "religion" in Article 9 of the European Con vention on Human Rights is to be interpreted broadly. This Article also protects the right not to observe any religion, see for example the judgment of the European Court of Hu man Rights of 18 February 1999 in the case of *Buscarini and others* v. *San Marino*, no. 24645/94. In this perspective the right to freedom of religion means also freedom of no choice or atheism.

2. THE PROHIBITION OF RELIGIOUS DISCRIMINATION IN THE ITALIAN LEGAL SYSTEM: EMPLOYMENT AND OCCUPATION

The topic of religious discrimination necessarily passes through the freedom of religion, of thought and conscience, which are fundamental rights protected by different international human rights treaties, including UN human rights conventions[8].

The right to freedom of religion in the Italian legal system is guaranteed by Article 19 of the Republican Constitution of 1948, which provides that "anyone is entitled to freely profess his religious belief in any form, individually or with others, and to promote it and celebrate rites in public or in private, provided they are not offensive to public morality"[9]. As has been observed, freedom of religion binds the public authorities to observe a position of equidistance and impartiality not only with respect to all religious beliefs (in fact, the public authorities have the duty to protect the confessional minorities and to promote the exercise of moral freedom in conditions of equality[10]), but also with respect to all the confessional counter-cultures which require the same consideration and the same respect due to the ideology dominant, provided that they are respectful of human dignity[11]. Furthermore, the right of all persons to equality regardless of their religion before the law constitutes a universal

[8] Article 18 of the Universal Declaration; Article 1 and 2 of UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief, adopted in New York on 21 December 1965, ratified in Italy with the law on 13 October, 1975 n. 654.

[9] Regarding the principle of equality irrespective of religion, it is also important to emphasize articles 7 and 8 of the Italian Constitution, dedicated to the relation between State and religion, as well as art. 20: "The ecclesiastical character and the purpose of re ligion or worship of an association or institution may not be a cause for special legislative limitations, nor for special fiscal impositions in its constitution, juridical capacity and any form of activity". See: Alessandro Ferrari, Silvio Ferrari, "Religion and the Secular State: The Italian National Reports to 18th World Congress of Comparative Law", *The Cardozo Electronic Law Bulletin,* VOL. 16(1), Special Issue, (Ed. P. G. Monateri), Washington 2010; Most recently, Gaetano Silvestri, "La religione nello spazio pubblico. Leggere la costituzione in un'Italia multiculturale", *Aggiornamenti sociali*, 2015, 196.

[10] As it is well known, Italy is a predominantly Catholic country.

[11] Vincenzo Pacillo, "Libertà di religione, luoghi di culto e simboli religiosi. Pros pettive generali", *Veritas et Jus* (8), 2004, 87. The autor observes that the exercise of the right to religious freedom "includes as a corollary logical two specific rights: the right to use signs and symbols characteristic of own faith and to build places of worship ac cording to the precepts of the confession to which one belongs. These rights can legiti mately be compressed when there is the need to protect rights guaranteed by constitutions belonging to individuals or social groups or when there is the need to protect principles, values or interest explicitly mentioned in the Constitution, but only on condition that it is to give rise to a situation of conflict and that such other rights, interests or values would

right recognised by Article 3 of our Constitution, which provides that: "All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinions, personal, and social conditions. It is the duty of the Republic to remove those obstacles of an economic and social nature which in fact limit the freedom and equality of citizens, impede the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country".

Religion as a ground for discrimination in Italy was introduced before the adoption of EU Employment Equality Directive 2000/78 (in 2003), in particular in the Law no. 300, 20 May 1970, known as the *Statuto dei lavoratori* or Workers' Statute, and in the Immigration Law no. 286, 25 July 1998[12]. Therefore, the regulatory framework regarding discrimination based on religion was present in two legislative bodies, which take into consideration the rules and regulations of principle of equality on the matter of labour and immigration respectively. Workers' Statute, excluding the Constitution which established the basic principles of labour law, is the most important source in matters of work and occupation in Italy's system. In this body of legislation the expression "discriminatory acts" appears for the first time in Italian law[13].

The Workers' Statute was of considerable importance in implementing the principles of equality laid down in the Italian Constitution as regards employment and occupation; beginning from Article 15, as amended by Article 13, Law 9 d December 1977, n. 903, which provides that any agreement or act is void which intends: a) to subordinate the employment of a worker to the condition that he/she does adhere or does not adhere to a trade association or religion; b) to dismiss or discriminate an employee in the allocation of qualifications or duties, in transfers, in disciplinary action, or otherwise cause him/her injury because of his/her religion, or belief[14]. Moreover, article 8 of the *Statuto* states that it is for-

be distorted, or it would be difficult or impossible to exercise if there were no limitation of that fundamental right, and always with reasonable and proportionate measures".

[12] Entitled: "*Testo unico delle disposizioni concernenti la disciplina dell'immigra zione e norme sulla condizione dello straniero*".

[13] It should be noted that in the Italian Constitution the term *discrimination* (or similar) does not appear; unlike Spanish Constitution of 1978, which in Article 14 (Equal ity) states: "Spaniards are equal before the law, without any discrimination for reasons of birth, race, sex, religion, opinion, or any other personal or social condition or circum stance".

[14] Article 15 l. n. 300/1970, recorded under the title "discriminatory act", provides that: "Is null any agreement or act intended to: a) make the employment of a worker sub ject to the condition that join or not join a trade association or cease to be part of it; b) dismiss an employee, discriminate him in the allocation of qualifications or duties, in transfers, in disciplinary action, or otherwise cause him injury because of his affiliation or trade union activities or his participation in a strike. The provisions of the preceding para

bidden for the employer, for the purpose of recruitment of staff, or during the employment period, to conduct investigations, even through third parties, to discover political opinions, religious or trade union affiliation of the worker[15]; provision which should be integrated with provisions of Italian Personal Data Protection Code[16]. By way of a general remark, questions on religious affiliation or convictions "are incompatible with the secular character of the State which follows a traditional liberal and individualistic approach with respect to religious orientation inquiries"[17].

In the Law on immigration (Law no. 286/1998), as mentioned above, there have also been included legislative measures in the area of religious discrimination in workplace. In particular, Article 43[18], in the first paragraph that constitutes discrimination of any behavior which, directly or indirectly, involves a distinction, exclusion, restriction or preference based on religious beliefs and practices (among other ground such as race, color, national or ethnic origin)[19], and which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field[20], states, in the second paragraph, that in any case, is discrimination if the em-

graph shall be also applied to discriminatory contracts or acts relating to political, reli gious, racial, language or sex, handicap, age or sexual orientation or belief".

[15] Article 8 (Ban on investigation into employees' opinions) states: "It is prohib ited to the employer, for purposes of employment, such as during the course of employ ment, to conduct investigations, even through third parties, political opinions, religious or trade union of the worker, as well as non relevant facts to purposes of employees profes sional qualifications assessment".

[16] Legislative decree 30 June 2003, no. 196 "*Testo unico delle disposizioni con cernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero*".

[17] A. Ferrari, S. Ferrari, § 1.

[18] In Chapter IV entitled "Provisions on social inclusion, on the discrimination and establishment of the fund for migration policies".

[19] Paolo Cavana, "Pluralismo religioso e modelli di cittadinanza: L'azione civile contro la discriminazione", *Il diritto ecclesiastico*, 1/2000, 170, says that the inclusion of religion as a ground of discrimination is an important novelty because, among other things, is the only factor on a voluntary basis that responds to convictions freely embraced by the individual, while the other factors imply strictly biological or historical belonging of an individual to a determined social group, regardless of the personal accession.

[20] This is a broader concept compared to that given in the EU Non discrimination Directives, that does not contain textual reference to unequal treatment. It has been re marked that this definition covers hypotheses of atypical discrimination concerning any human behaviour which has potential effects of discrimination, see: Giuliano Scarselli, "Appunti sulla discriminazione razziale e la sua tutela giurisdizionale", *Rivista Diritto Civile*, 2001, 807; Gabriele Carapezza Figlia, *Divieto di discriminazione e autonomia con trattuale*, Napoli, 2013, 37; Paolo Morozzo Della Rocca, "Gli atti discriminatori e lo straniero nel diritto civile", Id, *Principio di uguaglianza e divieto di compiere atti dis criminatori*, Napoli, 2002, 31.

ployer carries out an act or behaviour which discriminate, directly or indirectly, workers by reason of their religious affiliation, or which adopts a prejudicial treatment resulting from the establishment of criteria which have proportionately a greater disadvantage on workers of a particular religion and does not relate to the essential requirements for the job[21].

It is to be pointed out that through using the expression religious convictions and practices (Article 43, first paragraph, 286/1998) it is clear that the law guarantees every aspect of freedom of personal convictions in religious matter. The law protects not only people who belong to traditional organized religions such as the Catholic, Ortodox, Jewish or other faiths, but all people who have held religious beliefs or practices. In recruitment policy it means that it is forbidden for an employer to use selection criteria that will cause a distinction or exclusion for the access to the job based on religion, religious opinions, or religious practices. In simple words, employers may not deny employment, training or promotion on the basis of religion conviction. Religion and belief are factors of prohibited differentiation[22]. The ban of discrimination concerns both public and private employers.

Therefore, before the adoption of the Directive 2000/78, the Italian law has already prohibited religious discrimination, as well as racial, national and ethnic discrimination – during the recruitment of the workers and during the ongoing employment period. The right of worker not to be subjected to detrimental treatment because of his/her religion is thus protected.

Finally, in 2003 the Employment Directive 2000/78/EC on equal treatment irrespective of religion and belief (among other grounds as disability, age or sexual orientation) regarding employment and occupation has been implemented in Italy by Legislative decree n. 216 (of 9 July 2003)[23], issued by the government acting upon delegation of the Parliament.

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[21] Article 43, second paragraph, lett. e). Scarselli, op. ult. cit., notes that the sec ond paragraph, unlike the first, identifies acts or behaviours that have already been identi fied by the legislator as discriminatory.

[22] About the prohibition against religious discrimination in employment relation ship, see Vincenzo Pacillo,, *Il divieto di discriminazione religiosa nel rapporto di lavoro subordinat*o, *www.olir.it*, 2004, last visited 20 October 2016.

[23] The introduction of the term "belief" implies in the Italian system an extension of workers protection. The Rome Court of Appeal in the interesting Judgment of 19 Oc tober 2012 (Fabbrica italiana Pomigliano Fiom Cgil nazionale) establishes that trade union affiliation constitutes a belief and notes that "The fact that the term "belief" can be combined with that of "religion" does not mean that belief should be understood that be lief, like religion, is characterized by specific characteristics of pervasiveness and stability. In fact, the notion of belief is characterized by a variable application in the different legal sources of the anti discrimination law, but it certainly includes categories ranging from

In the light of the implementation of above mentioned Directive, the Italian law covers all areas of employment, including selection criteria and recruitment conditions, promotion, training provisions, benefit provisions, working conditions including dismissals and pay, membership of, and involvement in an organisation of workers or employers, that could be affected by certain discriminatory treatment[24].

To conclude, in 2012 the Article 18 of Statuto Lavoratori has been amended by l. 28 June 2012, n. 92, which introduced a new proceedings for discriminatory dismissal[25], establishing the greatest form of protection represented by the reintegration into work.

2.1. Discrimination regarding religion – areas apart from employment

Italian law prohibits discrimination in regard to religion not just in employment, but also in other areas. In fact, under Article 43 of Immigration Act no. 286/1998, the areas covered by the provision are also training, access to house and social services. In particular, it says that it is an act of discrimination if anyone imposes less favourable conditions or refuses to supply goods or services offered to the public to a foreigner only because of his race, religion, ethnicity or nationality; if anyone illegally imposes less favourable conditions or refuses to provide access to employment, housing, education, training and social and welfare services to foreigners legally residing in Italy; if anyone prevents, by actions or omissions, the exercise of economic activity lawfully undertaken by foreigners legally residing in Italy. Thus, we can say that the scope of Article 43 is wider than the implementing legislation of the Directive 2000/78/EC, which only covers discrimination in employment, occupation and working conditions.

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ethics, philosophy, politics (broadly defined) to the sphere of social relations and therefore includes also trade union, to understand as an occasion to express a conception of labor and human dignity in it realized". See*: Il laboratorio Fiat. La tutela della Fiom tra diritto sindacale e diritto antidiscriminatorio* (*Nota a App. Roma, ord. 19 ottobre 2012, App. Potenza 23 marzo 2012 e Trib. Roma, ord. 21 giugno 2012*), in *Foro italiano*, 5, 1716 ss., comment of Mariagrazia Militello, ""Caso Fiat", affiliazione sindacale e tutela antidiscriminatoria: una lettura fondata sulle fonti internazionali ed europee" (nota a Trib. Roma, ord., 22 gennaio 2013), *Argomenti di diritto del lavoro*, 2013, 363, with the comment of Valerio De Stefano.

[24] Article 3.

[25] Most recently, Alberto Lepore, "Non discriminazione, licenziamento discriminatorio ed effettività delle tutele", *Riv. giur. lav*., 3/2014, 531; Domenico Dalfino, "Il Licenziamento dopo la legge n. 92 del 2012: profili processuali", *Il licenziamento individuale nell'interpretazione della legge*; Marco De Cristofaro, Gina Gioia, "Il nuovo rito dei licenziamenti: l'anelito della celerità per una tutela sostanziale dimidiata", Ceste, *I licenziamenti dopo la legge n. 92 del 2012*, 382; Francesco Paolo Luiso, "Il processo speciale per l'impugnazione del licenziamento", *Riv. it. Lav*. 2013, 125; Alberto Guariso, *ll licenziamento discriminatorio,* in *Giornale di diritto del lavoro e di relazioni industriali*, 2014, 351.; Marzia Barbera, "Il licenziamento alla luce del diritto antidiscriminatorio", *Riv. giuridica del lavoro e della previdenza sociale*, 2013, 139.

3. DIRECT AND INDIRECT DISCRIMINATION ON THE GROUND OF RELIGION

The Italian law, in accordance with the directives on non-discrimination, introduced in 2003 a new definition of discrimination, partially different from that of the above-mentioned national legislation, based on unequal treatment and on the clear distinction between direct and indirect discrimination.

Pursuant to Article 2 of Legislative decree n. 216, direct discrimination occurs where one person is treated less favourably than another, has been or would be treated in a comparable situation because of his/her religion. An example of direct discrimination would be if a Jehovah's Witness job applicant gets passed over for a job in favour of a Catholic applicant who is less suited for the job; or in a call for teachers the preference will be given to those of a certain religion; or staff barred from promotion if they are not of a particular religion[26].

Indirect discrimination occurs when apparently neutral provision, criterion or practice, would put persons of a certain religion at a particular disadvantage compared to other persons, (unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary). It means that the use of criteria or practices which can have a disparate impact on persons of a particular religion in respect of generality of them are forbidden [27]. An example of indirect discrimination would be if as a seventh day adventists employee needs to take Saturday off work in respect of his religion – for the employer this is not a problem, the employee will make up the time during the

[26] In the Case of the Court of Justice C 157/15, request for a preliminary ruling under Article 267 TFEU from the *Hof van Cassatie* (Court of Cassation), Belgium, the Advocate General Kokott takes the view that there is no direct discrimination on the ground of religion where an employee of Muslim faith is banned from wearing an Is lamic headscarf in the workplace, provided that that ban is founded on a general company rule prohibiting visible political, philosophical and religious symbols in the workplace and not on stereotypes or prejudices against one or more particular religions or against reli gious beliefs in general. If that is the case, there is no less favourable treatment based on religion.

[27] European Court of Human Rights in its Judgment of 1 July 2014, S.A.S. v. France, (n. 43835/11) states that the French law of 11 October 2010 prohibiting full veil (known as the niqab or burqa) does not cause a violation of the European Convention of Human Rights and specifically the right to respect for private life, the right to manifesta tion of religious belief. With reference to the principle of 'non discrimination', the Stras bourg Court agrees that the French legislative measure, although worded in neutral terms, is likely to deploy injurious effects on the group of Muslim women who want to wear the full veil for religious reasons, that could give rise to an indirect discrimination. For the Court this must be excluded because the French legislative measure responds to an objec tive and reasonable justification and there is a relationship of proportionality between the means employed and the objectives pursued.

rest of the week. However, it is discriminative if the employer introduces a new shift pattern, and the adventist employee has to work on Saturday without valid business reason. Harassment shall also be considered discrimination (for example, bullying at work because of the religion).

The assessment as to whether there is a discrimination based on religion or belief requires a comparative judgment between differential treatments. The comparative judgment can also be purely hypothetical, as may be inferred from the literal formulation of the definition itself of direct discrimination.

The reasons behind the act which constitutes discrimination are irrelevant; it means there is discrimination regardless of the intention of the perpetrator of that. In our legal system it is now captured an objective concept of discrimination (both direct and indirect) that attaches decisive significance to the result of actions[28].

The difference of treatment may be justified where a characteristic related to religion or belief constitutes a genuine occupational requirement, when the objective is legitimate and the requirement is proportionate. Difference which is based on profession of a particular religion or certain beliefs that are practiced as part of religious bodies or other public or private organizations, shall not constitute discrimination where, by reason of the nature of the occupational activities, the religion or belief constitute an essential, legitimate and justified occupational requirements for carrying out of activities[29]. It should also be mentioned that in case of dismissal of a worker by a religious leanings organisations (*organizzazioni di tendenza*)[30] the Italian law does not provide reintegration into the workplace, as required by Article 18 of the Workers' Statute in case of discriminatory dismissal. It means that the unfairly dismissed employee can only claim compensation for the loss, but not the right to be taken back to work. The aim is to prevent forcing of these organizations to retain in work an employee who does not share, or whose orientation is in contrast with their ideological orientation and the aims that they pursue[31].

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[28] See the ordinance of Tribunale Alessandria sez. lav. 25 May 2015 n. 1725.

[29] See Article 3, par. 5, d.lgs. 216/2003, in line with the 24th recital of the pre amble to the Directive 2000/78 *"The European Union in its Declaration No 11 on the status of churches and non confessional organisations, annexed to the Final Act of the Amsterdam Treaty, has explicitly recognised that it respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States and that it equally respects the status of philosophical and non confession al organisations. With this in view, Member States may maintain or lay down specific provisions on genuine, legitimate and justified occupational requirements which might be required for carrying out an occupational activity.*

[30] This expression refers to institutions, associations, organizations, etc., pursuing an aim of religious character.

[31] According to Italian jurisprudence of the Court of Cassation (Cass. lav. n. 4983/2014) the exemption provision to the rules on unfair dismissal concerning leanings

4. JUDICIAL PROCEDURE FOR ENFORCING THE RIGHT TO EQUAL TREATMENT

The Italian legislator, in order to combat acts of discrimination for racial, ethnic, national or religious reasons, both on the part of public authorities or private, has already in Article 44 of Law on immigration (no. 286/1998) provided a specific procedure before the Court to ask the cessation of the discriminatory conduct (*Azione civile contro la discriminazione*). This action was the procedural model of reference for the subsequent anti-discrimination legislation of Community origin.

In 2011 with the adoption of the Legislative Decree no. 150 of September 1st 2011[32] (containing the reduction and simplification of civil proceedings) the legal proceedings about discrimination was reformed[33]. From this reform, the civil action against discrimination shall be conducted, according to Article 28 of said Legislative decree, under the simplified and accelerated procedure of the "summary proceedings" (*procedimento sommario di cognizion*e). As provided in Article 28, anyone who believes he or she is a victim of discrimination can apply directly at first instance, namely without a lawyer, to the judge of a Civil Court with territorial jurisdiction in order to obtain an injunction against the discriminatory activity as well as damages. It is possible to make discrimination claim in the tribunal even if the relationship in which the discrimination has occurred has ended[34]. The hearing, in accordance with Article 702 *ter* of the Italian Civil Procedure Code, takes place avoiding all unnecessary formality, and the judge can choose the most suitable method for gathering evidence.

It should however be said that, although in our legal system exists a specific procedure to fight against discrimination, its effectiveness is

organisation (art. 4 of Law 5 November 1990, n. 108), can only be applied if the em ployer is a non entrepreneur employer, or that performs business without typical require ments that characterize, under the law, the figure of the entrepreneur, such as: profession alism, organization, productive activity of goods and services. Also, it should be non profit organization.

[32] Published in the Official Gazette (*Gazzetta Ufficiale*, 21. 9. 2011, no. 220).

[33] The proceedings for discrimination cases, amended in 2011 by Article 28 of legislative Decree 150/2011 contains a reference to all Italian laws covering different grounds of discrimination, except on ground of gender. See: Cettina Di Salvo, "Discrimi nazione", *Riordino e semplificazione dei procedimenti civili*, (a cura di Fabio Santangeli), Milano, 2012, 848.

[34] In this respect see Article 9 parag. 1 of Directive 2000/78/EC, which reads that: "Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended after the relationship in which the discrimination is alleged to have occurred has ended.".

highly dubious in term of the length of process and effectiveness and of judicial protection for a particularly sensitive area such as discrimination[35]. Moreover, as a result of the recent legislative intervention, the current regulatory framework appears rather complex. The procedural regulation is, in fact, distributed over the following legislative texts: Code of Civil Procedure, Article 28 Legislative Decree 150/2011, Article 18 Workers' Statute for discriminatory dismissal[36], implementing laws of EU directives, Article 44, Legislative Decree 286/98; which do not facilitate the access of the victims of discrimination to justice.

Instead, it is of importance the establishment of a solidarity fund for administrative or judicial proceedings of the victims of discrimination by the National Bar Council and National Anti-Racial Discrimination Office (UNAR). The Fund operates through a mechanism of anticipation and refund of legal fees, in order to facilitate access to justice for the victims, if they do not have the conditions for granting legal aid.

With specific reference to the use of the civil action in case of discrimination for religious reasons, it has been observed critically that the legislator with the provision of a judicial instrument *ad hoc*, which, on the one side, entails the subjection to procedure of a sphere of social relations that regards the cultural and religious identity of persons and entire communities and, on the other, removes responsibility from the public authorities in the management of potential social and cultural conflicts requiring specific support measures for the integration. The judicial response to these problems,although it is not a policy, thus without a planning approach but casual and episodic, depending on individual evaluation of the judges of merit, does not favour the necessary cultural and inter-confessional mediation[37].

5. LEGAL STANDING

Any person that believes he/she has been subject to harassment or discriminated against because of their religion can take a legal action before the Court. They can act on their own or through a legal representation. Under Italian law the local representation of the main representative organizations at the national level, which have a legitimate interest in ensuring that the principle of equality, are entitled to act in the name and on behalf or in support of the victim of discrimination, against the author of the act or behavior discriminatory (art. 5 d.lgs. 216/2003)[38]. Therefore,

[35] C. Di Salvo, 843.

[36] As amended by Law 28 June 2012, n. 92 (Fornero Reform).

[37] In this sense P. Cavana, 185 187.

[38] In compliance with Article 9, par. 2 of Directive 2000/78/EC which states that "Member States shall ensure that associations, organisations or other legal entities which

the Italian law provides two different types of assistance in the judial procedure:

1) Legal entities may engage in civil proceedings for the enforcement of principle of equality, in the name on behalf of victim, against the alleged perpetrator of discrimination. In such cases, they must be authorized from the presumed victim with public act or private deed.

2) Legal entities may also participate and support the victim in the proceedings. It means that the organisations can intervene in proceedings already initiated from the victim (due to the alleged violation of the principle of equality) as a third part to advance the interest of victim. The cessation of discriminatory act or behaviour is in their interest because the purpose of the organization/association is to promote and to protect the principle of equality with reference to factors (under law) which can be a source of discrimination[39]. The Court will decide to allow or not to allow the intervention.

These subjects empowered to take legal action on behalf or in support of the victim shall also be entitled (without permission) when the discrimination in employment and occupation[40] concerns a group of people[41] and the members are not identified in a direct and immediate way[42]. For example, an employer declares that he never engages workers of a certain religion. The victims are not identified in direct way, but there is discrimination because the effect is the dissuasion to present the candidacy for a job in his office. This declaration constitutes a form of direct discrimination.

Among the legal entities, which have a legitimate interest in ensuring that the principle of treatment irrespective of religion is applied (Article 5.2, 216/2003), I believe, might be included the representatives of the religious communities to which the discriminated groups belong, such as the Jewish community, the Evangelic-Lutheran community or the Catholic diocese.

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have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Direc tive".

[39] See Article 105, par. 2 of Italian Civil Procedure Code.

[40] This rules applies only in the field of employment and occupation, not for the other fields of religious discrimination.

[41] The same procedural mechanism works in the field of consumer protection. The Italian Consumer Code (Legislative Decree 6 September 2005 n. 206) allows most repre sentative consumer associations at national level to bring claims, even where a victim cannot be identified. See Cettina Di Salvo, "Sulla legittimazione all'azione collettiva ini bitoria: associazioni rappresentative dei consumatori, singolo consumatore e altri organ ismi", *www.diritto.it*, June 30th, 2011.

[42] Article 5, par. 2, Legislative Decree 216/2003.

Finally, it should be noted that wide legal standing is a key element in guaranteeing the effectiveness of the principle of non discrimination, because these legal entities can contribute to protect the right to equality. People discriminated often do not want to take legal action for reasons of money (victims have to bear the cost of litigation), because of the weak position of the discriminated or negative consequences in an employment relationship. This type of considerations could lead the victims to renounce to bring the cases to Court, with a very clear consequence of such a decision: the perpetrator of that discrimination can continue to behave in discriminatory way[43]. In addition to that, sometimes the victims are unaware of their rights.

6. BURDEN OF PROOF

The general rule concerning the burden of prooving a fact in Italian civil or labour law proceedings is related to the rule concerning the burden of alleging that fact. The party who alleges the fact on which the right is based has to prove it. Therefore, the burden of proof falls on the party advancing the matter in question[44].

[43] With reference to the grounds of sex orientation recently there has been an interesting Italian Case Law, see Tribunal of Bergamo, 06 August 2014 Court of Appeal of Brescia, 11 December 2014, with comment of Maura Ranieri, "Da Philadelphia a Taormina: dichiarazioni omofobiche e tutela antidiscriminatoria", *Riv. It. Dir. Lav*. 2015, 125. In 2013, during an interview made in a radio program, a famous Italian criminal lawyer had declared that he would never engaged a homosexual in his office, and specifying that he makes "proper sorting in a way to make sure that this does not happen". Therefore, the association "Advocacy for LGBTI rights" had sued the lawyer for discrimination, and won both, first instance and the appeal proceedings, brought by the losing lawyer. In the view of the Brescia Court, the appellant expressed, publicly, a discriminatory recruitment policy. They are statements which can dissuade candidates, belonging to the category of persons, from submitting their candidacy to his law firm Studio. That certainly impedes access to employment or makes it more difficult. The orders of Italian Court are in line with the case law of the Court of Justice, *Centrum voor gelijkheid van kansen en voor racismebestrijding* vs *Firma Feryn* NV, C. 54/07.

[44] The burden of proof is governed by article 2697 of the Italian Civil Code, according to a person who wants to assert its rights in a trial the facts which constitute the basis of its act must be proved; any person who challenges the rellevance of these facts, or who claims that the right has either been changed or expired, must prove the facts on which the exception is based. The Italian rule is based on Article 1315 of the French Civil Code, the current text of which is "*Celui qui réclame l'exécution d'une obligation doit la prouver. Réciproquement, celui qui se prétend libéré doit justifier le paiement ou le fait qui a produit l'extinction de son obligation*". With regard to the burden of proof in Italian legal system, *ex plurimis* Giovanni Verde, *L'onere della prova nel processo civile*, Napoli, 1974; Gian Antonio Micheli, *L'onere della prova*, Padova, 1966; Paolo Comoglio, *Le prove civili*, Torino, 2010, 3rd ed., 293; Michele Taruffo, "La valutazione delle prove", *La prova nel processo civile* (a cura M. Taruffo), Milano, 2012, 244.

In order to achieve the aim of ensuring the effective enforcement of principle of equal treatment, the non-discrimination Directives have introduced a specific rule concerning the burden of proof[45]. The paragraph 1 of Article 10 of Directive 2000/78/EC provide that Member States have to take necesarry measures to ensure that, when persons claiming to be a victim of discrimination can establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it is for the respondent to prove that there has been no breach of the principle of equal treatment[46]. This rule[47], closely connected to the enforcement of the principles of equal treatment, is a response to the need to strengthen the protection of persons that have suffered discrimination who find it more difficult to obtain the evidence necessary to prove the case[48]. The defendant, in fact, often is in a procedural stronger position, especially if it is an employer, because he has a monopoly of the information and he can usually rely on the reluctance of witnesses.

In accordance with the rule laid down in said Directive, the Italian Law provides a procedural facilitation for the claimant who states only certain elements from it – it may be presumed that a discriminatory situation has occurred[49]. The alleged author of discrimination must prove that there was no violation of the principle of non discrimination, other-

[45] It is to be noted that the fifteenth recital of the preamble to the Directive 2000/43 states that "The appreciation of the facts from which it may be inferred that there has been discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide in particular for indirect discrimination to be established by any means including on the basis of statistical evi dence".

[46] The wording of these Articles are based on that of Articles 3 and 4 of the Coun cil Directive 97/80/EC on the burden of proof in cases of discrimination based on sex. On the proof of discrimination in the EU directives see Guillermo Ormazabal Sánchez, *Dis criminación y carga de la prueba en el proceso civil*, Madrid, 2011, 77.

[47] This rule is not applied to proceedings in which it is for the court or other com petent national body to investigate the facts.

[48] See the report by Lilla Farkas, "Reversing the burden of proof: Practical dilem mas at European and national level", 2014, available at *http://www.migpolgroup.com/ portfolio/reversing the burden of proof practical dilemmas at theeuropean and national levels*, last visited 20 October 2016.

[49] With reference to the burden of proof, Article 28(5) d.lgs. 150/2011 states that "*Quando il ricorrente fornisce elementi di fatto, desunti anche da dati di carattere statis tico, dai quali si può presumere l'esistenza di atti, patti o comportamenti discriminatori, spetta al convenuto l'onere di provare l'insussistenza della discriminazione. I dati di car attere statistico possono essere relativi anche alle assunzioni, ai regimi contributivi, all'assegnazione delle mansioni e qualifiche, ai trasferimenti, alla progressione in carri era e ai licenziamenti dell'azienda interessata*". In the early stages of EU directives im plementation in Italy the rules on the burden of proof have been incorrectly transposed. On the burden of proof relating to discriminatory dismissal, Domenico Borghesi, "L'onere della prova nei licenziamenti disciplinari e discriminatori", *www.judicium.it.,* last visited 20 June 2016.

wise he will be liable for a breach of non-discrimination law. This means that in proving his defence, he has to reboot the presumption by showing contrary proof or giving objective reasons for the different treatment[50].

It is important to emphasise that the shift in the burden of proof to the defendant does not translate in a full exemption of proof for the person who believes he/she is a victim of unequal treatment. The claimant, in fact, has to prove the factual evidence from which an unjustified differential treatment than that alleged may be presumed.

7. REMEDIES AND SANCTIONS

According to Article 28 d.lgs. 150/2011, a judge, once he/she has ascertained the religious discrimination, may issue an order to terminate the ongoing discriminatory behaviour or act; an order to rectify the consequences of the discrimination; an order to adopt a plan to rectify the discrimination within a fixed time determined by the Court. It should be noted that the order to cease the unlawful conduct does not constitute a necessary content of the judicial decision, because it is related to the ongoing discrimination. However, if the discrimination happened, the order for cessation can also be justified where the conduct has ongoing consequences, or if there are circumstances that suggest its recurrence. For example if the employer re-grades the work of an employee resulting in a reduction in pay, and the employee believes this is because his/her religion; as a consequence the employee receives less pay.

The Court may order the publication of the decisions, at the expense of the defendant, in a daily national newspaper. The victim of discrimination is also entitled to recover damages to compensate for non-material loss suffered[51]. It represents one of certain cases provided by the

[50] The Court of Justice of the European Union, through request for a preliminary ruling under Article 267 TFEU, has provided relevant judgments relating to the burden of proof; see *Centrum voor gelijkheid van kansen en voor racismebestrijding contro Firma Feryn NV*, C. 54/07. The Court of Luxembourg stated that public statement by an em ployer, who declares that he will not recruit employees of a certain ethnic or racial origin, may constitute a presumption of existence of discriminatory recruitment policy. The Court observes that, in accordance with EU provisions, the employer has to adduce as evidence to the contrary that it has not breached the principle of equal treatment, which it can do, *inter alia*, by showing that the actual recruitment practice of the undertaking does not cor respond to the statement. See also, *Bundesarbeitsgericht (Germany) lodged on 20 August 2010 Galina Meister v Speech Design Carrier Systems* C 415/10; *Kelly v National Uni versity of Ireland* (C 104/10) *Asociația ACCEPT contro Consiliul Național pentru Com baterea Discriminării* (C 81/12). Italian Case Law, Cassazione civile, sez. lav., 11/03/2014, n. 5581.

[51] In accordance with the principle that breaches of the non discrimination Direc tive must be met with effective proportionate and dissuasive sanctions, which may include

law of compensation for non-material damage (Article 2059 of the Italian Civil Code)[52].

For the purposes of assessment of damages, the court shall take into account the fact that the act or the discriminatory behavior constitutes retaliation to an previous legal action or unjust reaction to a previous activity of the injured party aimed at enforcing compliance with the principle of equal treatment.

Considering that the perpetrator of the discrimination is obliged to perform an act which cannot be performed by third parties, there is a problem of its enforcement in case that he/she does not abide to the judgment. For the purpose of inducing the perpretator to perform a specific act or behaviour, general measure of indirect coercion may be used. In Article 614 *bis* Civil Procedure Code, with regard to the obligation to perform a specific fungible or infungible act and to the obligation to deliver goods, the Italian law says that the Court must also order, at the initiative of a party, the payment of a fine in favour of the creditor. The judge fixes the amount of money due by the obligor for any violation, or any succeeding non-compliance, or for any delay in the measure.

However, under article 614 *bis* indirect coercive measures to disputes regarding subordinate employment contract may not be used, as well as to contract for continuative and coordinated services[53]. It means that in case a person was subject to unlawful religious discrimination (incl. age, sex orientation, disability...etc), in relation to conditions for access to employment, vocational training or working conditions, regarding both the public and private sectors, this measure can not be applied, creating a lack of protection.

8. CONCLUDING REMARKS

Religious discrimination is undoubtedly a complex phenomenon, which has negative impacts on both, the individual and social levels. Although Italy is predominantly Roman Catholic country, it is officially secular State which guarantees religious freedom and the right of all persons to equality, regardless of their religion – a fundamental right recog-

compensation being paid to the victim. Member States should provide for effective, pro portionate and dissuasive sanctions in case of breaches of the obligations under this Direc tive.

52 G. Carapezza Figlia, 276; Pietro Virgadamo, *Danno non patrimoniale e "in giustizia conformata"*, Torino, 2014, *passim*.

53 On the exclusion of employment relationship, among other, see: Giorgio Costantino, "Tutela di con danna e misure coercitive", *Giurisprudenza Italiana*, 2014, 737; Michele Taruffo, *Note sull'esecuzione degli obblighi di fare e di non fare*, in *Giurisprudenza Italiana*, 2014, 744.

nised by the Constitution. Religion as a ground for discrimination appears in the legal system of Italy in 1977 in the Workers' Statute, and then in 1998 in the Immigration Law, namely before the Employment Equality Directive 2000/78/EC, which contanined religion as a factor of discrimination.

The effective protection from discrimination on the grounds of religion requires, first of all, a clear, coherent and comprehensive legislative discipline both on the substantive and procedural plan. Although domestic laws provide a wide concept of religious discrimination and prohibit different treatment on grounds of a person's religion in the field of employment and in other fields, and also contain elements to be praised, such as the legal aid, the shift of the burden of proof, the measures that can be taken against both, privates and public administration, it can not be underestimated that regulations are spread across several pieces of legislation. This with specific reference to the procedural rules relating to the civil action, could cause confusion or to mislead the persons who have been subject to discrimination and might make access to justice more difficult. Furthermore, if the religious discriminatory behaviour is e.g. a dismissal, the proceedings against the employer shall be subject to the different rules of Article 18 of the worker's Statute, posed in 2012 by the "Fornero" Reform; discipline which provides nothing about the regime of burden of proof. Similarly, nothing is said about the legal standing before a court of representative entities or other entities. In addition, there is other critical element that can reduce the level of protection in case of unfavourable treatment related to religion – it is concerned with, beyond employment, the lack of provision to allow representative associations or religious communities to bring claims, where victims can not be identified.

To conclude, even if the Italian legislator has foreseen a special procedure against discrimination, the choice of the model of the "summary proceedings", beyond critical comment for choosing it, does not appear capable of guaranteeing the judicial decision within a reasonable time in case of infringement of the principle of equality between persons irrespective of religion. In order to ensure the effective protection against any discrimination, the Italian legislator should work on the reorganization, coordination and harmonisation of substantive and procedural rules through a single legislative act which will replace the existing legal texts.

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RIGHT TO PRIVACY AND LEGAL RECOGNITION OF GENDER IDENTITY IN SERBIA CONSTITUTIONAL COURT OF SERBIA AT WORK

This paper discusses different issues pertaining to a 2012 landmark decision of the Constitutional Court of Serbia on the legal recognition of surgical gender reas signment. In this case, the SCC made a substantial contribution to the protection of human rights, in general, and an important contribution for the protection of the rights of transgender persons, in particular. The former was achieved by the interpre tation that art. 23 of the Constitution on the right to dignity and free development of individuals included protection of the right to privacy and family life (which was omitted in the list of rights guaranteed by the Constitution), interpreting the scope of this right in accordance with ECtHR standards. The latter was done by analogous application of the existing Act on Public Registries to situations in which medical gender reassignment was conducted to enable the necessary changes be made in the birth register. By the virtue of this, the SCC took an active approach in filling a la cuna in the Serbian legal system. This paper also strives to examine impact of the SCC decision on the protection of rights of transgender persons and the current nor mative setting in respect to this vulnerable group in Serbia. It shows that the decision of the SCC remains the only legal basis on which transgender persons who have undergone a gender reassignment operation in Serbia can rely upon. However, bear ing in mind Serbia's EU aspiration and the fact that the EU Commission has been continuously noting that Serbia lacks in regulation in this field, one should expect improvements, since EU integration seems to be the most effective tool for legislative and policy changes in Serbia.

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Key words: *Constitutional Court of Serbia. Human rights. Transgender. Privacy. EU*

1. INTRODUCTION

In 2012, the Serbian Constitutional Court (SCC) delivered a landmark decision[1] pertaining to the legal recognition of gender reassignment.[2] The SCC held that the refusal of relevant administrative state organs to enter changes in the birth register after a person had undergone gender reassignment surgery[3] – due to the fact that the Act on Personal Registry did not regulate this issue – violated the Constitution. Upon this ruling, postoperative transgender[4] persons in Serbia have been able to secure a gender change in their entry in the birth register.

This decision resonates beyond the transgender community in Serbia, having the importance for the enjoyment of human rights in Serbia in general. Namely, in this case the SCC used an opportunity to fill a lacuna in the Constitution as it did not contain a provision on the protection of the right to privacy. It took the position that art. 23 of the Constitution[5] on the right to dignity and free development of individuals includes implicit protection of the right to private life. Moreover, this decision provided a good example on how constitutional human rights provisions should be interpreted in the light of the practice of international supervisory bodies (as set by art. 18(3) of the Constitution). In this case, the SCC heavily relied on the relevant jurisprudence of the European Court of Human Rights (ECtHR).

The purpose of this article is twofold. Firstly, in Part 2, it aims to discuss different aspects of the SCC's decision, including those going beyond the issue of the protection of rights of transgender persons. Sec-

[1] Decision on constitutional complaint, Už 3238/2011, 8 March 2012, *Official Gazette RS*, No. 25/12 (hereinafter: Decision Transgender).

[2] The decision was rendered in constitutional complaint proceedings.

[3] Transgenderism (unlike sexual orientation) can (but need not) be a result of a medical condition, gender dysphoria; transgender persons often themselves request medi cal treatment, of which gender reassignment surgery is only one kind. See more in Jelena Simić, "Medicinskopravni aspekti transseksualnosti U susret priznavanju pravih pos ledica promene pola", *Pravni zapisi* 2/2012, 302, 305 308.

[4] The author is aware of different terminologies in this field. In this paper, the term "transgender" will be used to denote all persons who have different gender identity other than the gender (sex) assigned at their birth, regardless whether they have undergone any medical intervention or not. There is a trend emerging to use a term "trans" as an umbrella term to include all such persons. See: *http://www.ilga europe.org/what we do/ our advocacy work/trans and intersex/trans*, last visited 20 September 2016.

[5] *Official Gazette of the RS*, No. 98/06.

ondly, in Part 3, it strives to examine the impact of the SCC decision on the protection of rights of transgender persons and the current state of the normative setting applying to this vulnerable group, in particular to what extent the decision of the SCC was respected by the relevant state bodies and whether it was relevant in the broader context of the protection of the rights of transgender persons. Finally, Part 4 will offer concluding observations.

2. DECISION OF THE CONSTITUTIONAL COURT OF SERBIA

The constitutional complaint of 8 September 2010 was filed because local administrative organs refused to make the necessary changes in the birth register in the case of the applicant who underwent gender reassignment surgery, because the Act on Personal Registries[6] did not provide for such a possibility.[7] In this way, they denied legal recognition of the gender reassignment. The applicant claimed he was denied his constitutional rights by the omission of the National Assembly to regulate the legal consequences of gender reassignment, namely the right to equality and prohibition of discrimination (art. 21 of the Constitution) and right to dignity and free development of individuals (art. 23 of the Constitution).[8] He also complained of the violation of the right to private and family life under art. 8 European Convention on Human Rights[9] (ECHR).[10] The applicant asked the Court to order the National Assembly to adopt legislation that would regulate legal recognition of the sex reassignment in the expedited proceedings. [11] He also asked the SCC to award him non-pecuniary damages and to rule that the said constitutional complaint applied to all persons in the same legal situation.[12] The SCC rendered its decision on 8 March 2012.

It is important to note that the applicant claimed that said violations were due to the conduct of the National Assembly, i.e. its omission in regulating gender reassignment and not the conduct of local administrative organs, which refused to make the changes in the birth register.[13] Nevertheless, the SCC viewed this complaint as lodged *both* against the

6 *Official Gazette RS*, No. 20/09.

7 Constitutional complaint, para. 46. Available in the archives of the Belgrade Centre for Human Rights (BHCR), which represented the applicant in this case.

8 Complaint, n 7, para. 46.

9 *Ibid.*

10 *Official Gazette SCG (International Agreements)*, No. 9/03.

11 Constitutional Complaint, para. 46

12 *Ibid.*

13 *Ibid.*, para. 2.

National Assembly and other state organs.[14] It rejected the constitutional complaint with respect to the omission of the National Assembly, on the basis of reasoning that this legislative body's omission to adopt certain legislation or regulate a specific area or question cannot be viewed as an *individual action* in the context of the admissibility criteria for constitutional complaints (art. 170 of the Constitution and art. 82 of the Act on Constitutional Court[15]).[16] However, the SCC considered whether the omission of other state bodies led to the violation of constitutional rights and the ECHR, despite the fact that the applicant did not complain of their actions,[17] and consequently deliberated on the substantive part of the complaint.

2.1. Interpretation of the scope of the constitutional provision on the right to dignity in the context of legal recognition of gender reassignment

The substantive part of the complaint was primarily based on art. 8 of the ECHR and art. 23 of the Constitution, which respectively guarantee the right to protection of private and family life and the right to dignity and free development of individuals.[18] The reliance on the ECHR's provision was due to the fact that there was no constitutional provision expressly guaranteeing the right to privacy. In this decision, the SCC corrected this constitutional deficiency, taking the position that art. 23 of the Constitution includes implicit protection of the right to private and family

[14] Decision Transgender, para 5.

[15] *Official Gazette RS*, Nos. 09/07, 99/11, 18/13 (decision of the SCC), 40/15 and 103/15. Namely, art. 170 of the Constitution and art. 82 of the Act on Constitutional Court provide that 'a constitutional complaint may be lodged against *individual* acts or actions of state bodies.' (emphasis added).

[16] Decision Transgender, para 5.1. The opinion was based on the reasoning that the exclusive legislative competence of the National Assembly was executed by the adop tion of general legal acts, which regulate a specific area or issue in a general manner. This reflects the position of the SCC that the attribute 'individual', from art. 170 of the Consti tution and art. 82 of the Act on Constitutional Court (n. 15), is to be applied to both acts *and actions* of state organs. However, the text of these provisions does not exclude the interpretation that the qualification "individual" is only to be applied to "acts" and not "actions". Additional important point is that the practice of the ECtHR stands on the posi tion that the failure of the state to regulate access to reassignment surgery results in a vio lation of the state's positive obligations under art. 8 of the ECHR in *L. v. Lithuania*, App. No. 27527/03 (11 September 2004), para. 56 60. Nevertheless, one can conclude that the SCC's interpretation of the admissibility requirement (from art. 170 of the Constitution art. 82 of the Act on Constitutional Court) prevented it to adopt such an approach. See: Marija Draškić, "Prava transseksualnih osoba u Srbiji: prva odluka Ustavnog suda Srbije", *Sveske za javno pravo*, br. 10/2012, 6, napomena 13, *http://www.fcjp.ba/templates/ja avi an ii d/images/green/Marija Draskic.pdf*, last visited 5 December 2016.

[17] Complaint, n 7, para. 2.

[18] *Ibid.*, para. 32.

life.[19] Moreover, the SCC interpreted the scope of this right and the corresponding obligation of the state by relying on the jurisprudence of the ECtHR[20] – as required by art. 18(3) of the Constitution.[21] The ECtHR recognised the right to legal recognition of gender change in the case of *Christine Goodwin v. UK*,[22] as protected by the right to privacy from the art. 8 of the ECHR.

Thus, the SCC concluded that gender identification falls within the scope of private life, so the right to privacy also encompasses "the right to sex reassignment in line with one's gender identity."[23] Consequently, the SCC found that the protection of the rights from art. 23 of the Constitution and art. 8 of the ECHR included not only the negative obligation of the state to refrain from interference in the enjoyment of these rights, but also entailed a positive obligation to ensure their protection.[24]

Against such legal background, the SCC concluded that the refusal of relevant administrative state organs to enter changes in the birth register, after the gender reassignment surgery, was in violation of art. 23 of the Constitution and art. 8 of the ECHR.[25]

The SCC was of the opinion that although the Act on Personal Registry did not regulate changes in the birth register in cases of gender reassignment, it still provided grounds for such changes. Namely, the view of the SCC was that the existing provision on entry of fact of birth – requiring a medical institution to report to the administrative organ the fact of birth and the gender of a child (art. 47(1)) – could be analogously applied in the situations when changes in the birth book were required due to the surgical gender reassignment of a transgender person.[26] Therefore, the SCC took the position that changes in the birth register could be made when the administrative organ was provided with documentation from a medical institution evidencing that it conducted the intervention of gender reassignment.[27]

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[19] Decision Transgender, para 6.

[20] For a short overview of the EctHR's caselaw and international law standards see respectively David Harris et al., *Harris, O'Boyle & Warbrick Law of the European Convention on Human Rights*, Oxford University Press, Oxford 2014, 536 537.

[21] This provision requires the interpretation of the human and minority rights pro visions in accordance to the international standards in force and the practice of interna tional bodies, which supervise their implementation.

[22] App. No. 28957/95 (11 July 2002), para. 89 93.

[23] Decision Transgender, para 6.

[24] *Ibid*., para 7.

[25] The SCC did not deem it necessary to rule on other claims of human rights vio lations from the constitutional complaint (right to equality and prohibition of discrimina tion). *Ibid*, para 10.

[26] Decision Transgender, n 1, para 8.

[27] *Ibid.*

2.2. Measures SCC deemed appropriate as redress in this case

The SCC ordered the local administrative authority to decide on the applicant's request by applying the provisions from the Act on Personal Registry in accordance with the interpretation given in this decision within 30 days.[28]

The SCC viewed that the just satisfaction in this case was a declaration of a violation of rights.[29] The request for the award of non-pecuniary damages was rejected.[30] Moreover, the SCC rejected a request to hold that this constitutional complaint pertained to all persons in the same legal situation in accordance with art. 87 of the Act on Constitutional Court,[31] but ruled that the decision was to be applied to all persons in the similar situation.[32]

In addition to these measures, the SCC also decided: (1) to send the decision to the ministry dealing with public administration so that it could be disseminated to the relevant state administrative bodies;[33] (2) to send a letter to the National Assembly in which it would indicate all shortcomings of the lacuna concerning gender reassignment, emphasizing that the lack of legislation in this regard was contrary to the practice of the ECtHR;[34] and (3) to send a letter to the Ombudsperson, with similar content,[35] so this institution could initiate adoption of legislation[36] dealing with the issue.

2.3. Commentary of the Decision

There are several important aspects of this decision.

Firstly, it should be noted it is an example of an active approach of the SCC, which filled a lacuna in the Serbian legal system, which is rare in its practice.[37] By adopting such an interpretative decision, the SCC turned itself into a positive legislator as opposed to the primary function

[28] *Ibid.*, para 9.

[29] *Ibid.*, para 10.

[30] *Ibid.*

[31] *Ibid.*

[32] *Ibid.*

[33] In accordance with art. 108 of the Act on Constitutional Court, n 15; Decision Transgender, para 10.

[34] In accordance with art. 105 of the Act on Constitutional Court, n 15; Decision Transgender, para 11.

[35] *Ibid.*, para 12.

[36] This falls within the mandate of the Ombudsperson, in accordance with Art. 18 of the Act on Ombudsperson, *Official Gazette RS*, No. 79/05 and 54/07.

[37] *Ibid.,* 212.

of a negative one that it has usually exercised.[38] In this way, it contributed to the stability of the legal order and protection of human rights. [39]

Secondly, by this decision, the SCC interpreted the scope of its competence to rule on legislative actions of the National Assembly only to the situations in which rights and freedoms were already subject to legislative action,[40] reiterating its approach of "a negative legislator"[41]. Thus, potential victims of human rights violations that resulted from the lack of legislation are without redress in the Serbian legal system. However, the SCC also demonstrated an active approach by deciding to adjudicate the case by considering the conduct of administrative organs for which was not the subject of the applicant's constitutional complaint.

Thirdly, the SCC has also shown judicial activism in respect to the question of the application of existing constitutional and legislative framework to the issue of the gender reassignment. There it made a substantial contribution to the protection of human rights, in general, and an important contribution to the protection of the rights of transgender persons, in particular. The former was achieved by the interpretation that art. 23 of the Constitution on the right to dignity and free development of individuals included the protection of the right to privacy and family life (which was omitted in the list of rights guaranteed by the Constitution), thus interpreting the state obligations in accordance with the ECtHR standards. The latter was achieved through by analogous application of the provision of the existing law to situations in which the medical gender reassignment was conducted, so to enable the necessary changes be made in the birth register.

3. THE IMPACT OF THE SCC DECISION AND BEYOND

After the relevant ministry disseminated the decision of the SCC,[42] administrative organs changed their practice on requests of transgender persons related to the changes of gender in the birth register. To that extent the decision was implemented and had effects.

[38] A. Kartag Odri, "On Legal Gaps and New Interpretative Techniques of the Court's Decision Making", *Courts, Interpretation, the Rule of Law* (eds. M. Jovanović, K. E. Himma), Eleven International Publishing, The Hague 2014, 208.

[39] *Ibid.*, 215.

[40] See: n. 16.

[41] H. Kelsen, *General Theory of Law and State*, Haravard University Press, Cam brigde, 1945, 268, 269.

[42] See the interview with Prof. Jelena Jerinić conducted for the purposes of the project "Courts as Policy Makers?" under the auspices of the *Regional Research Promo tion Programme 2014*. Archives of the BCHR.

However, other measures that the SCC deemed appropriate in this case failed. In particular, the National Assembly, as of the time of writing, has not adopted legislation as recommended by the SCC. Moreover, Ombudsperson did not initiate adoption of a new legislation but only drafted 'Recommendations for Amending Regulations of Relevance to the Legal Status of Transgender Persons'[43] (together with the Commissioner for the Protection of Equality).[44] These Recommendations comprehensively deal with the issue of the legal status of transgender persons, going beyond the issue of the legal recognition of the medical gender reassignment procedure.[45]

The reference to the 'institutional practice' of administrative bodies based on the SCC decision found its place in the documents the Serbian government adopted in the context of its EU aspiration: the National Anti-Discrimination Strategy 2013–2018[46] (of June 2013) and the Action Plan for its Implementation[47] (October 2014). Moreover, the Action Plan envisages a measure of continuous guarantee of the implementation of this SCC decision.[48]

These documents also deal with other issues pertaining to the promotion and protection of transgender persons' rights. Hence, the Strategy recognizes that "there are no legal solutions to protect their rights and clearly ensure a quick change of identity documents" and that this amounts to "the denial of numerous other rights to transgender persons."[49] Therefore, the Strategy notes that all statuses of transgender persons are uncertain, such as "marital and parental relationships, employment, the issue of violence motivated by hatred, continuation of education, etc."[50] Thus, the Strategy, *inter alia*, envisages future "amendments of a large number of laws (the Law on Registers of Births, Marriages and Deaths, the Family Law, the Law on Pension and Disability Insurance, the Law on Foundations of the Education System, the Labour Law, etc.) [...] or regulating all issues related to the status of transgender (including transsexual) persons with a special law."[51]

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[43] See:*http://www.ombudsman.rodnaravnopravnost.rs/images/stories/preporuke%20transpolne%20osobe.doc*, last visited 19 September 2016.

[44] See: V. Petrović (ed.), *Human Rights in Serbia 2014*, Belgrade Centre for Human Rights, Belgrade 2015, 327.

[45] See: n 41.

[46] *Official Gazette RS*, No. 107/14, *https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId 090000016801e8db9*, last visited 19 September 2016.

[47] *Official Gazette RS*, No. 107/14.

[48] *Ibid*., measures 3.1.6. and 3.1.14.

[49] Anti Discrimination Strategy, section 4.4.2.2.

[50] *Ibid.*

[51] *Ibid*., point 4, section 4.4.4. The NGO sector provided two model laws: the Center for Advanced Legal Studies (2012) and the Geyten LGBT (2013). The former

Furthermore, the Action Plan provides that there should be legislative changes,[52] along with other measures pertaining to the normative regulation of the protection of rights of transgender persons,[53] including promotion of equality in social care,[54] health,[55] education,[56] sports[57] and etc.

However, until the time of the closing of this paper, available data show that only two measures have been implemented:[58] one dealing with the continuous execution of the SCC decision; and the one that has envisaged the adoption of the Rules of Procedure on concrete criteria for identifying discrimination in educational institutions.[59]

Additional normative improvement in this field is noted in respect to the adoption of the new on Act on Police, which is tangentially connected to the Anti-Discrimination Strategy and its Action Plan.[60] The anti-discrimination clause (art. 5) of the said Act, which requires employ-

provides a proposition on regulation of legal consequences only in the cases of gender reassignment, while the latter contains comprehensive regulation of different legal issues pertaining to gender identity. See: *Model zakona o priznavanju pravnih posledica promene pola i utvrđivanja* transseksualizma: Prava trasn osoba od nepostojanja do stvaranja zakonskog okvira (ed S. Gajin), CUPS, Beograd 2012 and *Trasn* osobe u Srbiji: Analiza položaja i predlog pravnog rešenja*, Geyten LGBT,*http://www.transserbia.org/images/2015/dokumenti/Trans%20osobe%20u%20Srbiji%20%20analiza%20poloaja%20i%20predlog%20pravnog%20reenja.pdf*, last visited 23 September 2016.

[52] The Action Plan is unclear and contradictory when it comes to the deadlines for this activity. Measures 3.1.6. and 3.1.14. overlap in substance (drafting the legislation), while providing different deadlines for the implementation of the said measure (second quarter of 2016 and fourth quarter of 2017, respectively).

[53] For an analysis of different issues pertaining to the protection of transgender persons see: Slavoljupka Pavlović, "Analiza pravnog položaja transrodnih i transseksu lanih osoba u Srbiji", *Model zakona o priznavanju pravnih posledica promene pola i utvrđivanja* transseksualizma, n 49, 50.

[54] *Ibid.*, measures 4.4.2.

[55] *Ibid.*, measures 4.4.1. The special emphasis was given to the abolition of steril ization until the fourth quarter of 2015. *Ibid.*, measure 4.4.5.

[56] These encompass amendments to the Act on Foundation of Educational Sy stem and adoption of Rules of Procedure on criteria for identifying discrimination in edu cational institutions to include 'gender identity' as explicit ground in their anti discrimina tion clauses. Furthermore, it envisages the adoption of rules on change of name in diplo mas and certificates on the basis of the Commissioner for the Protection of Equality opinion 297/2011. See: Action Plan, measure 4.1.3 and 4.1.4. The deadline for the imple mentation of this measure was the first quarter of 2015.

[57] This encompasses amendments to the Act on Sports to include 'gender identity' as explicit grounds in anti discrimination clause. See: Action Plan, measure 4.5.1.

[58] Interviews with relevant experts conducted on 19 and 20 September 2016, and information provided by the Ministry of Education on 23 September via e mail. On file with author.

[59] *Official Gazette RS*, No. 22/16.

[60] The Strategy, measure 4.4.4, point 3; Action Plan, measure 3.2.10.

ees of the Ministry of Interior and the police to treat everyone equally, now includes explicit reference to 'gender identity' as prohibited ground of differential treatment.[61]

4. CONCLUSION

Among other vulnerable groups, transgender persons remain the most discriminated against in Serbia.[62] Although the European Commission has been observing improvements[63] in its progress reports since 2014 in respect to the protection of LGBTI population,[64] it has also continuously emphasized that persistent efforts to ensure "effective and consistent promotion and protection" of the LGBTI persons have to be undertaken by state authorities.[65]

As has been shown, in the decision on legal recognition of gender reassignment, the SCC not only provided the basis for the protection of postoperative transgender persons by taking an active approach in the interpretation of the Act on Personal Registry, but also gave a substantial contribution to the constitutional protection of human rights in going beyond purely textual interpretation of the constitutional human rights guarantees.

This decision can be viewed in a broader political setting, in particular Serbia's EU integration aspirations, which required promotion and protection of human rights. This setting, as Bešireviæ noted,[66] contributes to a growing assertiveness of the SCC in human rights cases, which is also backed by the authority of the ECtHR jurisprudence that is referred to in the SCC's rulings.[67]

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[61] *Official Gazette RS*, No. 6/16. See: n 54.

[62] See: European Commission, *2015 Progress Report*, *http://ec.europa.eu/enlargement/pdf/key documents/2015/20151110 report serbia.pdf*, last visited 21 June 2016, 56. Others are Roma, lesbian, gay, bisexual, intersex persons, persons with disabilities and persons with HIV/AIDS. *Ibid.*

[63] For example, since 2014 the Pride Parade in Belgrade has been taking place without major incidents. Moreover, some improvements can be noted in the respect to the state health insurance coverage of gender reassignment surgery. See more in J. Simić, 299.

[64] See: European Commission, *Serbia 2014 Progress Report*, *http://ec.europa.eu/enlargement/pdf/key documents/2014/20140108 serbia progress report en.pdf*, last visited 21 June 2016, 51 and *Serbia 2015 Progress Report*, 57.

[65] *Ibid.*, 17.

[66] See: V. Beširević, "Governing *without* Judiciary: The politics of the Constitutional Court of Serbia" *International Journal of Constitutional Law* 12/2014, 954, 966.

[67] *Ibid.* See also T. Papić, V. Đerić, *Uloga Ustavnog suda Srbije u procesu demokratske tranzicije*, Beogradski centar za ljudska prava, Beograd 2016, 74 75. On the influence of the ECtHR on national legislative changes in respect to LG

On the basis of the SCC decision, there was a positive development in processing requests of transgender persons related to changes of gender in the birth register. However, other measures the SCC deemed appropriate – pertaining to the adoption of necessary legislation[68] – have failed.

Obviously, this decision of the SCC does not solve other legal issues arising from the cases of the gender reassignment, such as those concerning marriage or parental rights. These questions were at issue in another constitutional complaint filed with the SCC, pertaining to the same issues but related to a transgender person who was married with a child.[69] The SCC rejected the complaint relying on the reasoning from the previous decision – that the omission of the National Assembly could not be the subject of a constitutional complaint.[70] Thus, the ball remains in the court of the political branches of the government to deal with other issues pertaining to the protection of transgender persons.

This was recognised in the 2013 Anti-Discrimination Strategy and its 2014 Action Plan. However, the measures provided thereof, aimed at the promotion and protection of transgender persons, have not been implemented so far. Against such a background the decision of the SCC remains the only legal base on which transgender persons who have undergone gender reassignment operation in Serbia can rely upon.[71]

Bearing in mind Serbia's EU aspirations and the fact that the EU Commission has continuously noted that the Anti-Discrimination Strategy and its Action plan need to be implemented and specifically emphasized that Serbia lacks "procedures for legal gender recognition in place, even

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BTI population, see: L. R. Helfer, E. Voeten, "International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe", *International Organization* 68/2014, 77.

[68] See: M. Draškić, "Evolucija u jurisprudenciji Evropskog suda za ljudska prava u pogeldu transseksulanih osoba: Evolucija i u Srbiji", *Perspektiva implementacije evrop skih standarda u pravni sistem Srbije* (knjiga 2) (ed. S. Lilić), Pravni fakultet Univerziteta u Beogradu, Beograd 2012, 57, 73 75.

[69] Decision on constitutional complaint, Už 4111/2010, 28 January 2014, available in the archive of the BCHR.

[70] *Ibid.*, para. 3. Due to prolonged proceedings before the SCC, the applicant in this case decided to get a divorce in order to be able to secure gender change in the birth register while the case was still pending. Consequently, the applicant was able to change gender in the birth register. Archive of the BCHR, March 2013.

[71] There is also a Commissioner for the Protection of Equality Recommendation 335/2012 of 15 March 2012 directed at universities in Serbia to enable change of name in diplomas in the cases of transgender persons who have managed to change their name and sex in the birth register, see: *http://ravnopravnost.gov.rs/rs/preporuka univerzitetima za usvajanje mera za sticanje ravnopravnog tretmana lica koja su nakon sticanja diploma promenila ime zbog promene pola/*, last visited 23 September 2016.

in cases of gender reassignment,"[72] improvement in this field will eventually come. The requirements of EU institutions seem to be the most effective tool for legislative[73] and policy[74] changes in Serbia. Hopefully, the political majority, when eventually embarks on a mission to adopt relevant legislation, will justify it by referring to the decision of the SCC and not just the EU progress reports, as was previously the case.[75]

Finally, one should be aware of the following. There were two administrative civil servants working in two municipalities in Belgrade, who, behind the closed doors, were analogously interpreting the Act on Personal Registry to cases of gender reassignment years before the SCC. They were an example of civil servants who – contrary to common public perception – creatively secured the protection of human rights. Postoperative transgender persons who were able to afford to change their residence and move to Belgrade, could benefit from their creativity and secure the gender changes in the birth register. Others had to continue to live in an intermediate zone between the postoperative gender and the one assigned to them at birth, which was discriminatory on the grounds of their residence and property. Viewed from that perspective, the SCC decision serves as multiple vindication of the principle of equality in Serbia.

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[72] *Ibid.,* 57.

[73] See: T. Papić, V. Đerić, 44 45.

[74] For example. see the change in respect to the issue of Kosovo in Tatjana Papić, "Political Aftermath of the ICJ Advisory Opinion on Kosovo," *The Law and Politics of the Kosovo Advisory Opinion* (eds. M. Woods, M. Milanović), Oxford University Press, Oxford 2015, 259, 266 267.

[75] In the case of the amendments to the electoral legislation. See: T. Papić, V. Đerić, 44 45.

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ENVIRONMENTAL IMPACT ASSESSMENT IN SERBIAN LEGAL SYSTEM: CURRENT ISSUES AND PROSPECTS FOR REVISION

This paper analyses current issues regarding the environmental impact as sessment procedure (hereinafter: EIA). The author analyses the legal nature of the decisions made in the EIA procedure and points out the problems which in practice raise the question of whether an EIA should be organized as three independent ad ministrative proceedings or as one comprehensive procedure. In answering the ques tion of whether the appeal is an effective legal remedy in the EIA procedure, special attention was paid to the analysis of the practice of the Administrative Court and the Constitutional Court of Serbia. In the concluding observations, the author points out preconditions for the establishment of a new EIA system.

Key words: *EIA. Effectiveness of Appeals in EIA. Legal Nature of Decisions in EIA. Extraordinary Legal Remedies and Environmental Protec tion. Temporary Measures and Environmental Protection.*

1. INTRODUCTION

EIA is a procedure which determines the environmental impact of projects that are planned or executed, whether there are alternative solutions and the possibility of applying technology that would have a more favourable environmental impact and whose measures can be applied in order to prevent, mitigate or eliminate adverse environmental impacts.[1] It

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[1] EIA is forcing "truly revolutionary changes upon traditional administrative processes (...) it informs administrators, project initiators, and third parties and provides them with an opportunity to require fuller integration of environmental concerns into the

is a special administrative procedure that aims to achieve a preventive environmental protection.[2]

The first codification of the EIA procedure, which introduced important changes to the administrative decision-making process, we find in the law of the United States of America – the National Environmental Policy Act, adopted in 1969.[3] A demand for establishing a special EIA procedure was recognised shortly in comparative law, which led to introducing particular laws on EIA: in Canada in 1973, Australia in 1974, Germany in 1975 and in France in 1976.[4] A unique EIA procedure is a part of the environmental acquis since 1985, when Directive on the Assessment of the Effects of Certain Public and Private Projects on the Environment was adopted in 1991, UN Economic Commission for Europe adopted Espoo Convention on EIA in a Transboundary Context, and in 1992 the requirement of implementation of EIA was adopted as the 17th principle of the Rio Declaration on Environment and Development. Public participation and legal protection in environmental matters, which are applied in the EIA procedure, are prescribed in the Aarhus Convention (hereinafter: AC) as well.

By ratifying the AC, Serbia committed to provide "efficient, equitable, fair and timely" legal protection in matters of importance to the environmental protection.[5] Eleven-year practice of applying Law on EIA[6] in Serbia has revealed a large number of deficiencies of the procedure,[7] which raises many questions: what is the legal nature of the decisions made in the first and second stage of the EIA; what are legal consequences of the obligation to deliver the decisions to certain parties in the procedure, while remaining parties are being informed of the decisions; whether informing the public as stipulated by the Law on EIA is the same as informing stipulated by General Administrative Procedure

decision making process". N. de Sadeleer, *Environmental Principles: From Political Slo gans to Legal Rules*, OUP, 2002, 87 89.

[2] See: E. Fisher *et al*., *Environmental Law*, OUP, 2013, 847 850.

[3] See: R. J. Lazarus, *The making of Environmental Law,* University of Chicago Press, 2008, 67 80; J. F. Benson, "What is the alternative? Impact assessment tools and sustainable planning", *Impact Assessment and Project Appraisal* 4/2003, 261 280.

[4] K. Miller, A. Rawson, *Act Environmental Law,* Canberra, 2009, 43 44.

[5] See: Art. 9, para. 4 of the AC

[6] Law on Environmental Impact Assessment, *Official Gazette of the Republic of Serbia* Nos. 135/04, 36/09.

[7] In its Report for 2015, the European Commission stated that no progress could be reported on horizontal legislation and that additional efforts are required to boost ca pacity for effective public participation and consultation in the environmental decision making. Serbia 2015, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Brussels, SWD(2015) 211 final, p. 66.

Act (hereinafter: GAPA);[8] in what manner the two instance principle and devolution are provided in resolving the appeal; whether the appeal is an effective legal remedy in an EIA procedure set in that manner; whether the application of suspensory effect of the complaint (in accordance with Art. 23 of the Administrative Disputes Act – hereinafter: ADA[9]) provides a basis for "adequate and efficient" temporary measure, in accordance with Art. 9 para. 4 of the AC; whether the request for the court decision review, as an extraordinary legal remedy, can be considered an adequate substitute for the cases which stipulate finality of first instance administrative decision-making in environmental matters.

The paper aims to portray, by analysing the basic elements of the EIA and the existing administrative and judicial practices, the distinctiveness of this administrative procedure and provide answers to questions which arise.

2. BASIC PRINCIPLES OF THE EIA PROCEDURE

For the purpose of further analysis, firstly we shall identify the basic steps of conducting an EIA procedure in Serbia's judicial system.

The EIA is carried out for projects in the fields of industry, mining, transport, tourism, agriculture, forestry, water management, waste management and utilities, as well as for projects that are planned in protected natural areas and in protected surroundings of an immovable cultural property. The EIA is conducted in three stages. In the first stage the decision is made on the need for conducting EIA, in the second stage the scope and contents of the EIA is determined, and, in the third stage, it is decided on the approval of the EIA study. The projects which require the EIA are provided in a separate List.[10] This means that the first stage does not apply for these projects. The national legal framework contains a List

[8] General Administrative Procedure Act*, Official Gazette of the Republic of Ser bia* No. 30/10.

[9] Administrative Disputes Act, *Official Gazette of the Republic of Serbia* No. 111/09.

[10] Those are projects for the construction of: oil processing plants, power plants for production of 50 MW of electricity and more, nuclear reactors and facilities for processing spent nuclear fuel, chemical plants, major railways and reconstruction of main highways, airports with a runway longer than 2.100 m, inland waterways with interna tional or bilateral regime of navigation, hazardous waste treatment plants, plants for the treatment of non hazardous waste capacity of more than 70t per day, exploitation of groundwater, with an annual capacity of more than 10 million m³ exploited or recharged water and the like. See: Decree on establishing the List of projects for which the impact assessment is mandatory and the List of projects for which the EIA can be requested, *Of ficial Gazette of the Republic of Serbia* No. 114/08.

of projects for which an impact assessment may be required, and for which implementation of the first stage is mandatory.[11] For other projects the EIA is not conducted.

In the first stage, the competent body shall inform the authorities, organizations and the public concerned on the request submitted for deciding on the need for EIA within ten days of receipt of the request. Thereafter, the above entities have the right to express an opinion on the proposed project. The competent authority shall decide on the request on the basis of particularity and location of the project, as well as voiced opinion of authorities, organizations and the public concerned. The project owner and the public concerned may lodge an appeal against his ruling.

The second stage involves defining the scope and contents, i.e. providing a framework of the EIA study. At this stage, the project owner discloses the information about the project, presents the main alternatives which he considered, and the most important reasons for reaching a decision, describes the environmental factors susceptible to risk due to the implementation of the project, describes possible short– and long-term environmental impacts of the project and measures for prevention, mitigation or elimination of any adverse environmental impact.[12] Based on above facts and opinions of authorities, organizations and the public concerned, the competent authority shall decide on the scope and contents of the EIA study, i.e. whether the study analyses e.g. only the impact of operation of the plant, or the construction and operation of the plant; whether the study considers the impact of the planned project on the local level or the global impact as well, etc. The project owner and the public concerned may lodge an appeal against this ruling.

In the third stage, a decision is made on approval of the EIA study. Only authorized organizations registered in a special register may conduct an EIA study. An EIA study evaluates quality of environmental factors and their sensitivity within areas of planned activities, foresees the direct and indirect adverse impacts of the project on environmental factors as well as measures and conditions for mitigation and elimination of adverse impacts. A competent authority shall decide on approval or denial of the request for approval of the EIA study by considering the opinion of special committee for technical verification. The reviewing committee issues a report containing professional assessment of the EIA study and draft decision, after analysing the EIA study and the report with a

[11] Decree on establishing the List of projects for which the impact assessment is mandatory and the List of projects for which the EIA can be requested, *Official Gazette of the Republic of Serbia* No. 114/08.

[12] See: Rulebook on the contents of requests for the necessity of impact assess ment and on the contents of requests for specification of scope and contents of the EIA study, *Official Gazette of the Republic of Serbia* No. 69/05.

systematised overview of the opinions of authorities, organizations and the public concerned.[13] The decision of the competent authority is final, which means that in the third stage the applicant and the public concerned do not have the right to appeal against the ruling, but only to initiate an administrative dispute.

The competent authority has the obligation to deliver the decisions made at all stages of EIA only to the project owner. In accordance with the Law on EIA, authorities, organizations and the public concerned are "informed" about these decisions, as stated in the Law on EIA (Art. 10 para. 7, Art. 14 para. 4, Art. 24 para. 1 and Art. 25).

Only upon the approval of the EIA study, which is obtained in the final, third stage of the EIA, the project owner may start with the implementation.

3. THE RIGHT TO APPEAL AND COMPLAINT IN THE EIA PROCEDURE

3.1. Decisions in the EIA Procedure as Subjects of Appeal and Complaint

The first two questions that arise are: what is decided in each stage of the EIA and what can be subject to appeal? In the first stage, it is decided on whether it is necessary to conduct EIA. It means that, based on the material enclosed by the operator and an opinion of authorities, organizations and the public concerned, the competent authority evaluates whether the potential impact of the facility on human health and the environment is such that it requires further examination through EIA study or not. In addition, in the decision stating that it is not necessary to conduct an EIA the competent authority may determine the minimum requirements for environmental protection. In that case, the project owner may appeal to challenge the measures imposed.[14] If a decision stipulates

[13] Rulebook on work of technical committee for EIA study, *Official Gazette of the Republic of Serbia* No. 69/05.

[14] See: Decision of the City of Belgrade, Secretariat for Environmental Protection, No. 501.4 15/2012 V 04, dated 27 February 2012. The decision reads that it is not neces sary to perform EIA for the project of constructing radio base stations for mobile teleph ony. The same decision stipulated that the project owner may start executing the project, as long as conditions and safeguards, which are listed, are applied in the construction and in regular use of the building. In one case, the Administrative Court considered whether the ordered measures are adequate and whether the complainant provided adequate legal protection against further activities. The Administrative Court held that the project owner shall ensure the execution of the programme of continuous monitoring of air quality, noise, waste water, the quality and the total amount of bio compost and waste manage ment in accordance with the applicable regulations, which is specifically defined in the

that the EIA is not required, the project owner may start with the implementation. If a decision stipulates the necessity of EIA, the project owner is referred to the second and third stage of the EIA. In both cases, the public concerned may lodge an appeal if they are not allowed to participate in the proceedings or if they consider that the opinions expressed were not taken into account.[15] Initiation of an administrative dispute does not prevent moving on to the next stage.

The competent authority's decision of EIA study approval is final administrative act. This ruling cannot be appealed, but the applicant and the public concerned are able to institute an administrative dispute. There are no restrictions in terms of participation of the public concerned. Therefore, even if they did not participate in the first two stages of the procedure, the public concerned may submit a complaint.

The question then arises as to which acts of administrative authorities issued in the third stage of the procedure can, in fact, be disputed. The first such act is Report of the technical committee, which must be

part of the decision on giving approval in the section "program of monitoring the environ mental impact". The project owner is obliged to submit the data to the Agency for Envi ronmental Protection, City Administration for Environmental Protection and the City Ad ministration for Inspection. This further means that the complainant can protect their rights and interests in the future, because in the event that the project owner fails to com ply with the project plan for the implementation of prescribed measures, the complainant may address the competent inspections for environmental protection. See: The ruling of the Administrative Court ZU. 15891/10 (2009) of 19 January 2012.

[15] In the case of III 5 U.13200/11 of 13 March 2014 the Administrative Court considered the justification of the complaint filed against the decision of the City Secre tariat of Environment, which rejected the petitioner's appeal against the decision of the City Administration for Environmental Protection, which read that EIA is not necessary in the project of setting base stations for mobile telephony in a particular location, since projects for base stations of such strength do not require EIA. The Administrative Court expressed the opinion that the appeal should have been heard. When the base station un deniably has users, other than the person concerned, with their antenna systems of differ ent strengths, it is the obligation of administrative authorities to assess the impact of the base station with all installed systems as a whole. The Court, in this case, took into ac count the doctor's opinion that the petitioner's son's health problems were caused by negative radiation in the environment. According to the interpretation of the Court, "in such a situation, the assessment of the harmful effects of base station as one of the pos sible sources of disease of the petitioner's household member is necessary, regardless of the defendant's allegations that it is on the List of projects II of the Decree, for which it is not necessary, but possible to conduct EIA". The Trial Chamber of the Administrative Court referred to the practice of ECHR in the reasons for judgment alleging that "assess ing environmental impact at the request of the petitioner and her family represents an ele ment of her right to respect for private and family life as stated in Article 8 of the Euro pean Convention for the Protection of Human Rights, and addressed by the Strasbourg court in the case Dubecka v. Ukraine (application no. 30499/03), which obliges the na tional authorities to take all measures in the environmental protection of the applicant." See: Jelena Tišma, "Upravno sudska zaštita prava na zdravu životnu sredinu", *Bilten Vrhovnog Kasacionog suda*, 2/2015, 327 337.

presented in detail by the competent authority in the explanation of the decision on the EIA. In that sense, the complaint can point to shortcomings identified in the report and request amendments or a new EIA study.[16] Here we point to the significant shortcomings of the Law on EIA. After the public opinion is acquired, the competent authority may prescribe certain amendments to the EIA study. However, the Law on EIA does not provide the possibility for the public concerned to express their opinion on the amended EIA study. That prevents the possibility to determine whether the amendments to the EIA study were carried out in accordance with the opinions expressed, which would enable further amendment of the EIA study in the administrative procedure, and, here as well, provides only the possibility of an administrative dispute.

The second document is the Notice which the competent authority issues in order to inform the authorities, organizations and the public concerned about the contents of the decision on the EIA, the main reasons on which it is based and the most important measures that the project owner is obliged to undertake. The legal nature of the Notice in the Law on EIA will be further discussed in section 4.1.

3.2. Shall the party have the right or the ability to pursue the procedure when the decision is made in the first and second stage of the EIA?

A final administrative act passed in the first and second stages represents a basis for the issuance of an administrative act in the third stage.[17] The question that arises is: what does a party gain by the decision about need for EIA and the decision on the scope and content of the EIA study? The conducted analysis shows that the party does not obtain the right applicable separately from the EIA procedure. An issue here is a need to establish what it is that precedes the decision on approval of the EIA study.[18]

An illustrative example of the legal nature of the decisions made at various stages of proceedings can be found in the Decision of the Constitutional Court of Serbia on compliance of certain provisions of the Law

[16] In a complaint regarding the approval of the EIA study for the construction of a hydropower plant, the complainant requested a new study, explaining that the alternative solutions were not analysed to a sufficient extent, particularly bearing in mind that the planned project covers the territory of several protected natural resources. In the same complaint, it was pointed to the need that the new study is based on updated information relating to the state of the environment in the area of planned project. See: The case file to the Ministry of Environment and Spatial Planning of Serbia No. 353 02 01396 /2010 02. See: M. Drenovak Ivanovic, "The Development of the Right to Public Participation on Environmental Matters as a New Concept of Administrative Decision Making in Ser bia", *Transylvanian Review of Administrative Sciences* 44/2015, 74 90.

[17] See: Art. 16, para. 3 of the Law on EIA.

[18] See: Art. 192, para 1 of the GAPA.

on Expropriation with the Constitution.[19] Explaining the decision, the Constitutional Court established that the expropriation procedure, in fact, consists of two stages. In the first stage, a special law or decision is issued by the Government in order to define the public interest, and in the second stage an act of expropriation is adopted, which legitimates the exemption of certain immovable property from former owner's property rights. The Decision of the Constitutional Court reads that "the decree of the Government which adopts the proposal for the establishment of public interest does not formally and legally restrict or deprive the immovable property owner of his property rights, but it introduces a legal presumption of exempting certain immovable property from property rights of the former owner"[20]. Having in mind the earlier analysis of the legal nature of the decision in the EIA, the same principle can be applied to the EIA procedure: the decision in the first and second stage creates a legal presumption for the decision-making on the EIA study.

That raises the further question as to whether it is considered that the facts are established if the final administrative act is passed in the first or second stage of the EIA, or this act has to be final judgement passed by the Administrative Court? The answer to this question requires an analysis of the effectiveness of the right to appeal to the EIA, which will be discussed in section 4.

4. THE EFFECTIVENESS OF EXERCISING THE RIGHT TO APPEAL IN THE EIA

An analysis of the effectiveness of exercising the right to appeal in the EIA requires in-depth consideration of the following matters: the manner of delivering the decisions to the parties in the EIA procedure and whether informing as stipulated by the Law on EIA is the same as informing stipulated by GAPA; in what manner the principle of two instances is provided in resolving an appeal and what is the jurisdiction of the Administrative Commission of the Government of the Republic of Serbia; whether the absence of two-level decision-making in cases where an appeal is excluded can be mitigated by using an extraordinary remedy.

4.1. Delivery in the EIA Procedure

A matter of delivering acts, adopted by the competent authority in three stages of the procedure, has an important role in the implementation of the EIA procedure. The competent authority delivers decisions to the

[19] Decision of the Constitutional Court of Serbia, ИУз 17/2011 dated 23 May 2013.

[20] Decision of the Constitutional Court of Serbia, ИУз 17/2011 dated 23 May 2013.

project owner at all stages of the EIA, and "informs the authorities, organizations and the public concerned" about them. Bearing in mind that the EIA procedure is bipartisan and the public concerned has the status of a party to the proceedings, it is necessary to point out the legal nature of procedural steps taken in order to acquaint the public concerned with the contents of the adopted legislation.

Notifying, in terms of GAPA, is a procedural action in accordance with which the party, the third party and the authority have the right to be informed of the proceedings.[21] "Notification" stipulated by the Law on EIA cannot be understood in this manner. "Notification" stipulated by the Law on EIA may be in some way similar, but not equal to the concept of delivery by public announcement, as a special form of delivery in exceptional circumstances. Bearing in mind that the public concerned has the right of appeal, or complaint, regarding the decisions made, and that the delivery is crucial for calculating the deadlines, "notifying" the public concerned should be understood as "delivering" in the sense of GAPA, i.e. as a procedural action.[22] Otherwise, it may occur that the public concerned is precluded in this right, without any knowledge that an act was adopted, which would have a negative impact on the effectiveness of the right to appeal. Explaining the decision, which also raised a question of the constitutionality of a legislative solution to consider the decision, adopting a proposal for establishing the public interest for expropriation of certain immovable property, delivered to the parties in the proceedings at the moment of its publication, the Constitutional Court, in one case, held that "the principle of availability of the legal remedy cannot exist only on a theoretical level, and it is more important that the statutory remedy is actually available in practice in a particular period of time. (...) The available legal remedy against the decision on establishing the public interest – an administrative dispute, in essence, represents 'an illusory remedy', especially bearing in mind the prescribed manner of its delivery".[23]

4.2. Principle of Two Instances and Devolution of the Appeal in the EIA

The EIA procedure is conducted by the ministry in charge of environmental affairs for those projects which are approved by a republic authority. If the decision in the first instance is issued by the ministry, the Administrative Commission of the Government shall decide on the appeal.

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[21] Art. 70 par. 5 of GAPA.

[22] See: Z. Tomić, *Upravno pravo sistem*, Belgrade 2002[4], 379 380.

[23] Decision of the Constitutional Court, IУз 17/2011.

According to the Rules of Procedure of the Government,[24] only a member of the Government shall be the chairperson or a member of the Administrative Commission. (Art. 30 para. 2) The same Rules of Procedure stipulate that the ministry shall prepare a proposed act for the Government (Art. 36), where the proposed decision shall be prepared and submitted to the Government with a disposition and rationale (Art. 38). The question then arises whether, in case of an appeal, when a ministry is the first instance authority, the Law on EIA ensures devolution and fundamental two-instance decision-making on the appeal.

In order to answer this question, a wording that an official who resolves in administrative matters shall be excluded if he/she was involved in proceedings or adjudication in the first instance should be addressed.[25] The participation of this person in the preparation of a decision of the Administrative Commission would open the possibility that such a decision is annulled before the Administrative Court. We regard that a more precise regulation of second-instance decision-making in these situations with an act of legal force no lower than that of the law, would eliminate the potential weaknesses of the appeal effectiveness in the EIA procedure.[26]

4.3. Additional Decision Review in Cases without the Right to Appeal

It was indicated earlier in the paper that a decision deciding on approval of the EIA study is final administrative act. In other words, there is no second-instance administrative decision in this matter, but an administrative dispute may be initiated. The question arises on whether the request for review of a court decision, as an extraordinary remedy stipulated by the ADA, can alleviate the absence of the second instance control of regularity. [27]

A party to an administrative dispute or a public prosecutor may submit a request for a court decision review. The public concerned may resort to this remedy only after the procedure on the complaint in an administrative dispute in which they participated as a party. The request for review of court decisions is decided by the Supreme Court of Cassation,

[24] Rules of Procedure of the Government, *Official Gazzette of the Republic of Serbia* No. 61, dated 18 July 2006 revised text, 69 dated 18 July 2008, 88 dated 28 October 2009, 33 dated 18 May 2010, 69 dated 24 September 2010, 20 dated 25 March 2011, 37 dated 3 May 2011, and 30 dated 2 April 2013.

[25] GAPA, Art. 32 para. 4. See: S. Lilić, *Upravno pravo/Upravno procesno pravo*, Belgrade 2012^{6}, 527.

[26] For efficiency of the administrative appeal in Serbia See: D. Milovanović, M. Davinić, V. Cucić, "Efficiency of the Administrative Appeal (The Case of Serbia)", *Tran sylvanian Review of Administrative Sciences*, 37 E/2012, 95 111.

[27] Art. 49 of the ADA.

which has more authority than the Administrative Court. In this case, the Supreme Court of Cassation can not only abolish, but also reverse the decision that is challenged. The Supreme Court of Cassation, however, does not conduct the hearing upon this extraordinary legal remedy. That excludes the possibility of verifying the facts and circumstances that might be considered by the administrative authority on appeal.[28]

This extraordinary legal remedy is used only to review the violations of the rules of procedure which could have had the effect on the final decision. According to Art. 9, para. 2 of the AC, the public concerned is guaranteed the right to review a decision made by an administrative authority before a court or other independent and impartial body, in order to challenge the substantive and procedural legality. The request for reviewing court decisions, as an extraordinary legal remedy, does not allow an opportunity to challenge the substantive legality.[29]

5. THE APPLICATION OF PROVISIONAL MEASURES AND THE EIA

A final decision on approval of the EIA study represents a basis for the issuance of other administrative acts to the investor and a prerequisite for obtaining a building permit. The question arises on whether one can seek a stay of execution of the contested decision on the approval of the EIA study if obtaining building permits and the commencement of construction inflicts permanent and irreparable damage which is reflected in a complete, permanent and irrevocable destruction of natural values. In other words, must a decision on the approval of the EIA study be final administrative act, enforceable and legally valid as a final judgement passed by the Administrative Court?

One of principal obligations arising from the AC is the establishment of procedures that should guarantee "adequate, efficient ... provisional measures."[30] Parties to the administrative procedure have a possibility to institute administrative proceedings and request a stay of deci-

[28] The administrative authority shall issue a decision on the administrative matter which is the subject of proceedings on the basis of the facts established in the proceed ings. See: Art. 192 para. 1 of the GAPA.

[29] M. Drenovak Ivanović, "Environmental Law in Serbia", *Comparative Environ mental Law and Regulation* (eds. E. Burleson, N. Robinson, L. H. Lye) West Law, Thomp son Reuters 4/2016, 45A:1 25.

[30] Art. 9, para. 4 of the AC. For the ECJ, ECHR and Aarhus Convention Compli ance Committee case law on Art. 9, para. 4 see: M. Drenovak Ivanović, *Pristup pravdi u ekološkim upravnim stvarima,* Beograd, 2014; M. Drenovak Ivanović, *Environmental Justice in a Comparative Context*, "Justice Connections" (ed. P. Easteal), Cambridge Scholar Publishing, 2013, 282 307.

sion execution.[31] However, in case of emergency and when an appeal has no suspensive effect by law, and the appeal has not been finalised, the party to the administrative procedure may, before filing a complaint, ask the administrative court a stay of execution.[32] The possible application of suspensory effect of the complaint is bordered by the condition that the execution of the decision causes damage to the complainant that can hardly be recovered. However, postponing the execution cannot inflict a greater or irreparable damage to the opposing party, and nor should it be contrary to the public interest.

The question then arises as to how the terms "greater damage" and "irreparable damage" are determined in environmental matters. In the absence of domestic practice, some of the criteria by which the court may order postponing the execution of the administrative act in environmental matters can be found in Recommendation No. R (89) 8 of the Committee of Ministers to Member States on Provisional Court Protection in Administrative Matters.[33] According to the Recommendation, the court may order the postponement of execution: "When a court is seized of a challenge to an administrative act, and the court has not yet pronounced its decision".[34] Further on, "Measures of provisional protection may in particular be granted if the execution of the administrative act is liable to cause severe damage which could only be made good with difficulty and if there is a prima-facie case against the validity of the act."[35]

6. CONCLUSION

The EIA is a special administrative procedure which establishes an extent of potential negative impact of planned activities on the environment and human health. The analysis provided in this paper reveals five key elements of the EIA. The first element is screening, determining whether a proposed project requires an EIA procedure. The second element is scoping, determining the extent of issues of planned project to be considered in the EIA. The third element is preparation of the EIA study. The fourth element is involving the public in decision-making about the

[31] See: Art. 23 of the ADA.

[32] Z. Tomić, *Komentar zakona o upravnim sporovima*, Službeni glasnik, 2012[2], 451.

[33] Recommendation No. R (89) 8 of the Committee of Ministers to Member States on Provisional Court Protection in Administrative Matters, adopted by the Committee of Ministers on 13 September 1989, available at: *https://wcd.coe.int/com.instranet.InstraServlet?command com.instranet.CmdBlobGet&InstranetImage 2011090&SecMode 1&DocId 702300&Usage 2*, last visited 1st January 2015.

[34] *Ibid.*, Principle I.

[35] *Ibid.*, Principle II.

first three elements. The fifth element is an administrative and judicial review of decisions made in the EIA procedure.

Under the current legal framework, the EIA procedure is conducted in three stages, with each stage organised as a special administrative procedure. Performed analysis indicates significant deficiencies in the EIA procedure, which in practice leads to cases where the third stage of the EIA is launched, with ongoing court proceedings concerning the disputed decision issued in the first or second stage. This further raises the possibility that a competent authority consent to the EIA study, which provides the operator with an opportunity to start implementing the project, and having the decision on the scope and contents of impact assessment reversed and the entire EIA process put back to the beginning.

A decision on the scope and a decision on the contents of the EIA study create a legal prerequisite for a decision on approval of the EIA study, by stipulating the basis of the analysis to be contained in the study. Although it is not directly decided in the first and second stage of EIA whether a particular activity may be allowed or not, acts issued in these stages shall provide a stand on the legal interest of the public concerned and operators, which is in accordance with the law and a prerequisite for entitlement in the third stage. Therefore, the EIA procedure can be viewed in two ways: either as three separate administrative proceedings, with a system of independent legal protection after each stage, or as a single administrative procedure. In the first case, the condition for launching the next stage would be not only the finality of the administrative decision from the previous stage, as provided for in the existing legal framework, but also the validity set by final judgement passed by Administrative Court. This would remove the disputability of the current EIA procedure regarding the effectiveness of the appeal. In the second case, the decisions in the first and second stage could be considered facts which are determined for purpose of making a decision on approval of the EIA study, without independence property, which may be the subject of an appeal or complaint initiated regarding a decision on approval of the EIA study. In both cases, the proceedings before the court should be speedy. Both possibilities require a revision of the current legal framework.

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THE NEW THEATRE OF THE STRUGGLE FOR EU UNITY JUDICIAL COOPERATION IN CRIMINAL MATTERS AND POLICE COOPERATION CONFRONTS MEMBER STATE SOVEREIGNTY

Most institutions that play crucial role in enforcement of EU law regulating judicial cooperation in criminal matters and police cooperation today had existed before the enactment of the Lisbon Treaty, which transformed the nature of European legislation in that area from intergovernmental to supranational. The Lisbon Treaty afforded judicial cooperation in criminal matters and police cooperation a pro nounced idiosyncrasy: the greatest degree of flexibility of Member State participa tion. The experience gained in applying the mechanism of enhanced cooperation, including the concept of the European public order, contributes to the utility of the entire body of law on judicial cooperation in criminal matters and police cooperation as the new unifying factor of the EU.

Key words: *Area of Freedom. Security and Justice. European public order. Enhanced Cooperation. Lisbon Treaty.*

1. INTRODUCTION

The integration of the European Union has resulted seemingly more from the developments of the EU law, particularly from the case-law of the Court of Justice of the European Union (CJEU), than from a political process.[1] In the course of the past five decades several areas of law have

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[1] Cappelletti, Seccombe and Weiler developed a theoretic framework on the basis of this phenomenon, which to a fair extent remained useful for understanding the develop

appeared on the forefront of EU integration. Certain recent events suggest that judicial cooperation in criminal matters and police cooperation may have become the new engine for furthering the unity of the EU.

2. KEY ACHIEVEMENTS PRECEDING LISBON

Before Lisbon Treaty, justice and home affairs belonged to the so-called third pillar, and the CJEU lacked jurisdiction over that field.[2] In that period, judicial cooperation in criminal matters and police cooperation relied on instruments of a predominantly intergovernmental nature, and it continues to rely on some of the major instruments from that period.[3] These are mostly framework decisions, which were not accorded direct effect.[4] Among these, two have been regarded as the most important – those providing for the European Arrest Warrant (EAW),[5] and the European Evidence Warrant (EEW).[6] The former has drawn until present by

ments that succeeded the publishing of their work. See: M. Cappelletti, M. Seccombe, J. H. Weiler (eds.) *Integration Through Law Europe and the American Federal Experience*, Walter de Gruyter, Berlin New York 1986, 1–5.

[2] As summarised by Brkan, until Amsterdam Treaty of 1997, the Member States could only adopt conventions by virtue of which jurisdiction would be bestowed upon the CJEU in the subject field; the Amsterdam Treaty (Art. K7(2)) introduced the possibility that the CJEU issues preliminary rulings, but only when a Member State accepts such jurisdiction. M. Brkan, "The Role of the European Court of Justice from Maastricht to Lisbon: Putting together the scattered pieces of patchwork", *The Treaty on European Union 1993 2013: Reflections from Maastricht* (eds. M. de Visser, A. Pieter van der Mei), Intersentia, Cambridge Antwerp Portland 2013, 90.

[3] Protocol (No. 36) on Transitional Provisions, Article 9, *Official Journal of the EU,* C326, 26. 10. 2012. See also: Wolfgang Bogensberg, Rudi Troosters, "The End of Soft Law Cooperation: the Court's Jurisprudence in Criminal Matters", *International Review of Penal Law* 1/2006, 334–345.

[4] As noted by Dane and Goudappel, Member States adopted national measures in view of the fact that framework decisions did not have direct effect. The Lisbon Treaty cancelled such differentiation of framework decisions *vis à vis* ordinary decisions, where as CJEU gained full jurisdicton in respect of measures based on the legislation in the Area of Freedom, Security and Justice as of 1 December 2014. The result of the two occurences may be that certain national measures will have to be renegotiated. M. Dane, F. Goudappel, "European Criminal Law", *Freedom, Security and Justice after Lisbon and Stockholm* (eds. S. Wolff, F. Goudappel, J. de Zwaan), TMC Asser Press, The Hague 2011, 156.

[5] Council framework decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States Statements made by certain Member States on the adoption of the Framework Decision, 2002/584/JHA, *Official Journal* L 190, 18/07/2002, 0001 0020.

[6] Framework decision 2008/978/JHA on the European Evidence Warrant, *OJ* L 350/72, 30 December 2008, COM(2003)688.

far the greatest number of controversies both in academia and in courts, especially before national constitutional courts.[7]

Several years before enactment of the Lisbon Treaty, judicial cooperation in criminal matters started evolving from a system based on mutual legal assistance to one based on mutual recognition. The principal driver of that evolution was the European Arrest Warrant. Framework decisions were the instrument of choice also for a limited harmonization of substantive criminal law in the decade preceding enactment of the Lisbon Treaty.[8] In that period, the CJEU also made its contribution to the creation of a limited body of substantive criminal EU law by resorting to the doctrine of implied Union powers – by virtues of two decisions of 2005 and 2007 it upheld two decisions of the Council, enacted under the Third Pillar, whereby Member States were required to prescribe criminal penalties for certain environmental offences. In essence, the Court opined that criminalization was justified if it had been effective, proportionate and necessary for enforcement of environmental protection.[9]

Most institutions that play a crucial role in enforcement of judicial cooperation in criminal matters and police cooperation within the present-day EU had been in existence before enactment of the Lisbon Treaty: Europol, Eurojust, OLAF, and Frontex.

3. NOVELTIES BROUGHT BY LISBON TREATY AND STATE OF PLAY

The Lisbon Treaty brought significant changes – the judicial cooperation in criminal matters and police cooperation were removed from the former third pillar, which was thus abolished, into the Area of Freedom, Security and Justice, [10] forming part of the equivalent of the former first pillar.[11] The coming into effect of these changes was postponed until 1 December 2014, at which point the CJEU gained its normal jurisdiction

[7] Damian Chalmers, Gareth Davies, Giorgio Monti, *European Union Law,* Cam bridge University Press, Cambridge 2015[3], 642; See: Libor Klimek, *European Arrest Warrant,* Springer, Cham Heidelberg 2015.

[8] For a concise outline of these instruments see M. Dane, F. Goudappel, 159.

[9] Case C 176/03, *Commission v. Council* (*Environmental Crime*), ECR I 7879, European Court of Justice, 13 September 2005 and Case C 440/05, *Commission v. Coun cil* (*Ship source Pollution*), ECR I 9097, European Court of Justice, 23 October 2007.

[10] Marković points out that the Area of Freedom, Security and Justice is enumer ated in Art. 3 of the UEU both before the European Internal Market and the European Monetary Union, as well as that such order of enumeration is indicative of Union's evolu tion beyond economic goals. I. Marković, "Evropsko krivično pravo", *Pravni život* 12/2012, 507.

[11] See: I. Marković, "Evropsko krivično pravo", *Pravni život* 12/2012, 503–520.

in that field as well. Among the reasons proposed by Peers for the significance of that date for judicial cooperation in criminal matters and police cooperation, we stress the fact that the EU Commission became empowered to bring infringement actions against Member States which had not implemented pre-Lisbon EU criminal law measures, or did so improperly. A number of measures may become grounds for such infringement proceedings: transfer of prisoners, probation, parole and supervision orders, hate crimes and Holocaust denial, conflicts of jurisdiction and recognition of prior convictions.[12] All the measures enacted under the previous third pillar are now treated as all other EU legislative measures from the perspective of CJEU powers.[13]

The Lisbon Treaty has accorded the system of mutual recognition an important role in respect of judicial cooperation in criminal matters, but at the same time provided for direct harmonization of certain areas of criminal procedural law – rights, support and protection of victims of crime,[14] the right to continue to benefit from protection measures when moving to another Member State.[15] From the fact that the directive on victims' rights does not stipulate a right to compensation, some authors deduce that its central role is "to patrol the investigative process and criminal proceedings".[16] In the post-Lisbon environment, the Commission has been proposing separate pieces of legislation for individual procedural rights, thus compensating for the unsuccessful proposal for a framework directive of 2004. In 2013 the Commission proposed a package of decisions relating to the presumption of innocence and the right to be present at trial, special safeguards for children suspected and accused in criminal proceedings, and provisional legal aid was proposed.[17]

An avenue for creating a body of substantive criminal norms at the level of EU law has been introduced by virtue of TFEU Art. 83 (1) and

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[12] S. Peers, "Childhood's End: EU Criminal Law in 2014", *EU Law Analysis* 29. 12. 2014. *http://eulawanalysis.blogspot.com/2014/12/childhoods end eu criminal law in 2014.html,* last visited 15 October 2015.

[13] E. Capitani, "Metamorphosis of the third pillar: The end of the transition period for EU criminal and policing law", *EU Law Analysis* 10. 7. 2014, *http://eulawanalysis. blogspot.co.uk/2014/07/metamorphosis of third pillar end of.html,* last visited 5 October 2015.

[14] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, *OJ L* 315, 14.11.2012, 57 73.

[15] Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order, *OJ L* 338, 21.12.2011, 2 18.

[16] D. Chalmers, G. Davies, G. Monti, 625.

[17] The European Commission, Criminal Justice, Rights of suspect and accused, *http://ec.europa.eu/justice/criminal/criminal rights/index en.htm*, last visited 15 October 2015.

(2): for the purpose of establishing "minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crimes with a cross-border dimension, resulting from the nature or impact of such offenses of from a special need to combat them on a common basis", in accordance with ordinary legislative procedure, and "if the approximation of criminal laws and regulations of the Members States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures", in accordance with procedure applicable to the underlying harmonisation measure.

Claiming that a codification of the general part of EU criminal law is indispensable in case the EU wishes to directly enforce its criminal law, Klip has pointed out that the existing treaty basis is sufficient for the EU to legislate the general part of EU criminal law, as well as that it has already implicitly done so in relation to certain criminal offences.[18]

Chalmers, Davies and Monti emphasize that the idiosyncrasy of that area of law persists despite the fact that it has become like any other area of EU law by virtue of the Lisbon Treaty, and attribute such persistence to strong nexus between criminal law and national sovereignty, as well as due to deep-rooted tradition of intergovernmental legislative activity in that field.[19] These authors have recognized three points at which TFEU affords special treatment to this field.[20] Firstly, in the fields of judicial cooperation in criminal matters and police cooperation the Commission shares the right of legislative initiative with one quarter of Member States.[21] If legislative initiative is taken by the Member States, then TFEU Art. 295(15) deprives the Commission of the option to provoke the requirement of unanimity in the Council by giving a negative opinion in the second reading. Secondly, an "emergency brake procedure" is available to Member States in respect of legislative proposals that purport to create substantive criminal norms at the EU level. The mechanism allows any Member State to refer a draft measure to the European Council, which must accept it by unanimity. This procedure, however, is balanced with automatic approval of enhanced cooperation in such a situation, for initiatives submitted by at least nine Member States.[22] A lower threshold for the number of votes of national parliaments claiming non-compliance of a draft legislative act with the principle of subsidiarity is prescribed

[18] A. Klip, "Towards a General Part of Criminal Law for the European Union", *Substantive Criminal Law of the European Union* (ed. A. Klip), Maklu, Antwerpen Apeldoorn 2011, 19, 24–25, 32.

[19] D. Chalmers, G. Davies, G. Monti, 626.

[20] *Ibid.*, 635–636.

[21] TFEU Art. 76.

[22] TFEU Art. 83(3).

solely for this area of EU law: one fourth instead of one third for all other situations.[23] Finally, the Lisbon Treaty accorded to the United Kingdom the right to opt-out, in the field of police cooperation and criminal law, of both the pre-Lisbon measures, and of those enacted after entry into force of the Lisbon Treaty, as well as to re-enter some of the measures. The UK exercised the block opt-out in 2013, after which it has been allowed to re-enter to a number of pre-Lisbon measures.[24] De Witte predicts that the phenomenon to which he refers as to "variable geometry" of the EU, consisting in a number of mechanisms ensuring institutional flexibility, is "likely to last, and to flourish".[25]

As has already been noted, pre-Lisbon intergovernmental measures continue to produce legal effects in the post-Lisbon, mostly supranational, environment. Peers has pointed to two recent CJEU judgments,[26] which in effect authorize the Council to adopt the implementing measures to pre-Lisbon acts by following the pre-Lisbon rules.[27] The significance of this authorization lies in the fact that pre-Lisbon measures mostly do not have direct effect, and thus do not create individual rights that can be invoked before national courts, as well as in the fact that the European Parliament does not have legislative competence in respect of such measures.

It was only by virtue of the Lisbon Treaty (Article 86) that the grounds for establishment of the Office of the European Public Prosecutor (EPPO) have been set forth. The prosecutor would be responsible for investigating, prosecuting and bringing to judgment the perpetrators of, and accomplices in, offences against the financial interests of the Union. Such designation of competence corresponds to the scope of investigative powers of the OLAF. Unlike OLAF, which has been operating since 1999, the office of the European Public Prosecutor is still in the making.[28] At

[23] Protocol (No. 2) on the Application of the Principles of Subsidiarity and Pro portionality, Art. 7 (2), *OJ of the European Union,* C236, 26. 10. 2012, 7.

[24] De Witte based his prediction not only on the analysis of institutional mecha nisms available under primary legislation, but also on the examples of the European Mon etary Union and the Fiscal Compact. Bruno de Witte, "Five Years After the Lisbon Trea ty's Entry into Force: Variable Geometry Running Wild?", Editorial, *Maastricht Journal of European and Comparative Law* 1/2015, 3–9.

[25] De Witte, 9.

[26] Judgment of the Court (Fourth Chamber) of 16 April 2015, C 540/13, *European Parliament v. Council of the European Union*, and Judgment of the Court (Fourth Cham ber) of 16 April 2015, *European Parliament v. Council of the European Union,* Joined Cases C 317/13 and C 679/13.

[27] S. Peers, "EU Zombie Law: the CJEU re animates the old 'third pillar'", *EU Law Analysis,* 17 April 2015, *http://eulawanalysis.blogspot.com/2015/04/eu zombie law cjeu re animates old.html*, last visited 15 October 2015.

[28] This paper has been drafted as of, and thus all statements referring to present time refer to 1 November 2015.

present, the Commission's proposal for the regulation on the establishment of that office is undergoing discussions within the Council and its preparatory bodies.[29] That proposal is coordinated with the Commission's proposal for reform of Eurojust, aimed at ensuring support of Eurojust to EPPO, involvement of the European Parliament and of the national parliaments in evaluation of Eurojust's performance, and differentiating between Eurojust's operational and administrative functions.[30] The treaty basis for EPPO reveals at the same time the importance accorded to that office by the framers of the Lisbon Treaty, and their awareness that establishment of EPPO may not be accepted unanimously – TFEU Art. 86(1) prescribes a special procedure of enhanced cooperation, which in effect provides for automatic authorization of enhanced cooperation if at least nine Member States request it, and upon failure of both the Council and the European Council to reach unanimity on the matter. TFEU Art. 86(4) allows the European Council, acting unanimously upon obtaining consent of the European Parliament and consulting the Commission, to extend the powers of EPPO to "serious crime having a cross-border dimension." The crucial points in the ongoing debate about EPPO consist in the choices for the levels – EU or national – at which ex-ante authorization of coercive measures and decisions on remedies against certain judicial decisions, including the choice of jurisdiction, shall be made.[31]

4. ENHANCED COOPERATION

Enhanced cooperation is a treaty-based mechanism that enables at least nine Member States to enact measures within the Union's non-exclusive competences. It is associated with concepts of asymmetric integration, "constitutional variable geometry", and "the multi-speed Europe". In contrast to the seemingly fragmentizing nature of the mechanism, TEU proclaims that enhanced cooperation "shall aim to further the objectives of the Union protect its interests and reinforce its integration process."[32]

The Lisbon Treaty introduced three different procedures for establishing enhanced cooperation: the default procedure, the procedure ap-

[29] For the state of legislative proceedings and the text of the proposal see EUR Lex, Procedure 2013/0255/APP, *http://eur lex.europa.eu/legal content/EN/HIS/?uri celex: 52013PC0534*, last visited 15 October 2015.

[30] European Commission, Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Criminal Justice Cooperation (Eu rojust), COM (2013) 535 final, 2013/0256 (COD), Brussels, 17.7.2013, *http://eur lex.eu ropa.eu/legal content/EN/TXT/PDF/?uri CELEX:52013PC0535&from EN*, last visited 15 October 2015.

[31] J. Vervaele, "Guest Editorial", *Eucrim* 2/2014, 45 46; A. Klip, *European Crim inal Law: An Integrative Approach,* 459–464.

[32] TEU Art. 21(1).

plicable in the area of Common Foreign and Security Policy (CFSP), and the one applicable in the area of criminal and police matters.

The first two are stipulated in TEU Art. 20 and in TFEU Art. 326–334 – while the default procedure depends on the Commission's willingness to submit a proposal to the Council, as well as on the approval of the European Parliament, the procedure applicable in relation to CFSP requires only that opinions be obtained from the High Representative for Foreign Affairs and Security Policy and the Commission, so that the request is approved by the Council, by unanimity of representatives of the participating Member States. Cremona explains the greater flexibility afforded to enhanced cooperation in the area of CFSP as a result of the fact that the operational flexibility in the area of common defense and security policy proved highly practical before Lisbon, due to Member States varying international defense commitments and operational capacities.[33]

Enhanced cooperation in the areas of judicial cooperation in criminal matters and police cooperation has been afforded an even greater flexibility than the one in the area of CFSP, by virtue of a number of special identical provisions of TFEU[34] enhanced cooperation is established merely by virtue of a notification addressed to the European Parliament, the Council and the Commission, whereas consent of the Commission and of the Council is deemed granted, furthermore, participating Member States do not need to show that their proposal represents a means of last resort. The enhanced procedure mechanism in the area of criminal matters (apart from the clause on EPPO) is in one particular instance related to another idiosyncrasy of the decision-making process in that area – the so-called "emergency brake" mechanism, afforded to all Member States in relation to legislative proposals for creation of substantive criminal norms at the EU level. This most flexible variety of enhanced cooperation, thus, counterbalances the emergency brake, but has a much wider field of application, and is often referred to as the "accelerator clause".[35]

Herlin-Karnell noted that the absence of obligation to show the last resort character of enhanced cooperation in the area of criminal law contravenes the sensitive nature of that area of law, that such great flexibility in establishing enhanced cooperation in the subject area increases the risk of varying degrees and notions of freedom, security and justice, as well as that it deprives the European Parliament of a legislative role.[36]

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[33] M. Cremona, "Enhanced cooperation and the common foreign and security and defense policies of the EU", *EUI Working Papers,* Law 2009/21, 11, 15.

[34] TFEU Art. 82(3), 83(3), 86(1), 87(3).

[35] F. Priollaud, D. Siritzky, *Le traité de Lisbonne*, *Texte et Commentaire, article par article des nouveaux traités européens (TUE et TFEU),* La documentation Française, Paris 2008, 107.

[36] E. Herlin Karnell, "Enhanced cooperation and conflicting values: are new forms of governance the same as 'good governance'?", *The Treaty of Lisbon and the future of*

Enhanced cooperation was also provided for under both Amsterdam Treaty and the Treaty of Nice, but only in the form of the default procedure, conditioned upon the Commission's willingness to forward the proposal. The mechanism was not applied under those treaties. Its first application was under the Lisbon Treaty, in 2010, and concerned divorce and legal separation.[37] By 2013, there were only three cases of enhanced cooperation – in addition to the one from 2010, the second was resorted to for the purpose of creating unitary patent protection,[38] whereas in 2013 Council established the financial transaction tax (FTT) as a form of enhanced cooperation.[39] Blanke seems to justify the flexibility afforded to enhanced cooperation in the areas of criminal law and CFSP by the necessity that the Union provides palpable protection to its citizens, and to act upon important international developments, respectively.[40]

Enhanced cooperation is not the only aspect of asymmetry within the EU construct – one may not need look further than some major achievements such as the Schengen Area, the EMU, and the Fiscal Compact. Some authors regard it as a promising tool for energizing the development of EU law and for overcoming transitory difficulties, but fears that it may lead to disintegration rather than to further integration persist.[41] In the context of the EU constitutional setup, therefore, enhanced cooperation remains a tool of resort to be applied for overcoming legislative and institutional impasses, strictly on temporary bases.

5. THE EUROPEAN PUBLIC ORDER

Judicial cooperation in criminal matters and police cooperation operate within the realm limited by the proclamations of TEU Art. 4(2), which impose upon EU the obligation to respect the maintenance of law and order as an essential function of Member States, as well as national

European Law and Policy (eds. Martin Trybus, Luca Rubini), Edward Elgar, Cheltenham Northampton 2012, 154–155.

[37] Council Decision 2010/405/EU, implemented by Council Regulation (EU) No. 1259/2010 of 20 December 2010, *O.J.*L. 189/12 (2010).

[38] Council Decision 2011/167/EU authorising enhanced cooperation in the area of the creation of unitary patent protection, *O.J.* L. 76/53 (2011).

[39] Council Decision 2013/52/EU authorising enhanced cooperation in the area of financial transaction tax*, O.J.* L. 22/11 (2013).

[40] H. Blanke, "Enhanced cooperation", *The Treaty on the European Union (TEU) A Commentary,* Springer Verlag, Berlin Heidelberg 2013, 819–822.

[41] C. Cantore, "We're one, but we're not the same: Enhanced Cooperation and the Tension between Unity and Asymmetry in the EU", *Perspectives on Federalism* 3/2011, E1 E21; Paul Craig, "Enhanced Cooperation, Amendment, and Conclusion", *The Lisbon Treaty. Law, Politics, and Treaty Reform*, Oxford University Press, Oxford 2010, 449.

security as exclusive responsibility of Member States.[42] Chalmers, Davies and Monti have pointed out that the wide recognition of the "EU criminal law", especially by the CJEU, seems to contravene the seemingly narrow space provided for it by TEU Art. 4(2), and have proposed two possible rationales of "EU criminal law" on which such recognition may be based: augmentation of national security of each Member State, and the operation of the European public order.[43] While the former does not seem capable of either explaining the constantly growing body of supranational competences, or complying with the principle of solidarity, the latter seems to be more promising in all those respects.

While the concept of public order easily escapes exact definition,[44] the common denominator of its possible meanings may be conceived to include principal elements: fundamental values of a political community, and norms necessary for the preservation of integrity and security of that community.

6. CONCLUSION: WHAT EFFECT ON UNITY OF THE EU SHOULD BE EXPECTED FROM JUDICIAL COOPERATION IN CRIMINAL MATTERS AND POLICE COOPERATION AT EU LEVEL?

The Lisbon Treaty transformed the nature of European legislation in the area of criminal law from intergovernmental to supranational, although important intergovernmental elements have been preserved. The principle of mutual recognition prevailed over the principle of inter-governmental coordination. The same treaty introduced direct harmonization in the subject area.

The Lisbon Treaty afforded judicial cooperation in criminal matters and police cooperation a pronounced idiosyncrasy over all other areas of EU law: a much greater degree of flexibility in relation to Member State participation. The Member States share legislative initiative with the

[42] The same provision imposes upon the EU obligation to respect national identi ties of the Member States. Chalmers, Davies and Monti pointed out to the fact that not only "national security" has several meanings, but also that the German Constitutional Court attributed to German criminal law a significance for the German national identity, contributing to the strength of the requirement for strict interpretation of EU competences in the field of criminal law. D. Chalmers, G. Davies, G. Monti, 627–628.

[43] These authors pointed out to the opinion of Advocate General Bot in *Josemans* case, as well as to a Commission Communication on EU Criminal Justice Policy, as sources of the doctrine on the European public order, but at the same time expressed con cerns that the subject notion may serve as source for excessive criminalization and Gov ernment overreach. *Ibid.,* 631–632.

[44] See: R. de Lange, "The European public order, constitutional principles and fundamental rights", *Erasmus Law Review* 1/2007, 3–24.

Commission, and the Commission may not provoke the requirement of unanimity of the Council in respect of a proposal filed by the Member States. The so-called "emergency brake" mechanism has been afforded to individual Member States exclusively in respect of proposals aimed at harmonization of substantive Union criminal law. The emergency brake is counter-balanced with the automatic enhanced cooperation of at least nine Member States, which is unfettered from Council, European Parliament and Commission approvals. In contrast to the emergency brake, automatic enhanced cooperation is available in all major aspects of legislative activity within the area of judicial cooperation in criminal matters and police cooperation. Finally, the United Kingdom was granted an option to exercise a block opt-out from the area of police cooperation and criminal law, which it did in 2013.

Pronounced institutional flexibility, peculiar to the subject area of EU law, may lead to the conclusion that it has the potential to reverse the decades-long process of EU integration, by commencing the fragmentation of the law of the European political community.[45] Some authors regard the flexibility of EU law in this area as part of the larger phenomenon of the "variable geometry" of the EU, together, for example, with the European Monetary Union and the Fiscal Compact.

It seems, however, that the risk of fragmentation may seem probable only from a synchronic perspective. If the passage of time and the relevant legislative developments are taken into consideration, then a contrary conclusion appears plausible.

It should be noted that even the common variety of enhanced cooperation has been rarely used so far. Both the intended principal purpose of enhanced cooperation, and its effect in few situations it has been applied so far, was the unclogging of a stalled legislative process in relation to controversial issues, as well as overall dynamization of the legislative process. Enhanced cooperation may be regarded as an instrument for preserving the legitimacy and authority of the EU, since it enables the Member States to act in crucial situations in spite of opposition of one or more Member States. All these aspects suggest that enhanced cooperation is a tool instrumental for promoting greater unity among Member States.

Secondly, legal jurisprudence seems to suggest that this area of EU law has developed to such an extent, so that together with the EU Charter it forms part of an effective public order. On the legislative plane, TFEU Article 83(2) authorizes the EU to enact criminal law norms whenever

[45] On fears of fragmentation of EU law, instigated by developments in other areas thereof, see: Branko Rakić, "Fragmentacija međunarodnog prava i evropsko pravo – na Zapadu nešto novo", *Anali Pravnog fakulteta u Beogradu* 1/2009, 122–147; B. Rakić, "Evropski sud pravde između ljudskih prava i brobe protiv terorizma – odnos međunarodnog i evropskog prava", *Anali Pravnog fakulteta u Beogradu* 2/2009, 155–185.

such norms prove necessary for supporting harmonization in other areas. The synergy of the greater flexibility afforded to EU law in the areas of judicial cooperation in criminal matters and police cooperation and the concept of the European public order should enable EU criminal law to continue strengthening the Union.

EU law in the subject area operates under a significant constraint – it must not infringe upon exclusive competence of Member States for protection of national security. This constraint may significantly be eased by the concept of the European public order. References to the European public order as the rationale for the persistent expansion of judicial cooperation in criminal matters and police cooperation suggest that the security and constitutional values of the EU may prevail over security and constitutional values of any Member State.

The experience gained in applying the mechanism of enhanced cooperation so far, in conjunction with the concept of the European public order, increases the utility of judicial cooperation in criminal matters and police cooperation as the new unifying factor of the EU, despite its pronounced flexibility.

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APPLICATION OF THE REVERSE-CHARGE MECHANISM IN THE FIELD OF CONSTRUCTION

Amendments to the Law on Value Added Tax from 2012 introduced the application of the reverse charge mechanism into Serbian legislation in the construction industry. Subsequent changes from 2015 have expanded the scope of the reverse charge mechanism in the construction industry, and one of the reasons were uncertainties that arose while applying the said mechanism in former practice. Namely, the main concern was whether a given supply should be treated as a supply from the construction industry for the purposes of VAT or not, under the applicable rules. However, the abovementioned changes have further complicated the situation, significantly increased legal uncertainty and additionally burdened VAT payers (as well as the Ministry of Finance itself, which drafted the new provision) due to the fact that there is a need to interpret, on a daily basis essentially, who is liable to compute VAT for a vast variety of supplies that might be deemed as supplies from the construction industry. Furthermore, the (official) reasons for introducing the reverse charge mechanism are not entirely in line with the reasons for which this mechanism is used within the EU. Therefore potential changes should be considered regarding the application of the said mechanism in the construction industry on the territory of the Republic of Serbia.

Key words: *Value added tax. Reverse charge mechanism. Construction.*

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1. INTRODUCTION

Amendments to the Law on Value Added Tax[1] (hereinafter: VAT Law) from October 2015 included also the provision of Article 10 (2) (3) of the VAT Law, which regulates the application of the reverse-charge mechanism in the field of construction. Although the intervention of the legislator was inspired by the intention to eliminate ambiguities in the application of the previously valid provision,[2] the revised provision has not led to the desired results. Moreover, it is fair to say that practical difficulties have become more noticeable, and that the present uncertainty causes higher business expenses not only for taxpayers, but also for the Ministry of Finance, as a result of the continuous engagement in clarifying disputed situations.[3]

In this paper we will identify the most important practical problems in the implementation of the current provision and point to their implications on the operations of business entities engaged in the construction industry. We will try to draw the attention of professional public to the necessity of its further development or application of an alternative suitable for accomplishing the goal for the purpose of which the reverse-charge mechanism in the field of construction was originally implemented into our VAT system.

1. ABOUT THE REVERSE-CHARGE MECHANISM IN GENERAL

The reverse-charge mechanism assumes that the recipient of goods or services has the obligation of computation and payment of VAT instead of the person supplying the goods or providing services. It is, therefore, an exception to the main rule, which undoubtedly stems from the provision of Article 10 (1) (1) of the VAT Law, according to which the tax debtor (the person liable for payment of VAT) is "a person who carries out the taxable supply of goods and services, except when another person

[1] 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, 142/14 and 83/15.

[2] Proposal of the Law on amendments to the VAT Law from 2015 states that the objective of the new legislation is "*a simpler* and more adequate taxation of supplies in the construction industry".

[3] Thus, in the first four months of application of the new provision, the Ministry of Finance published almost 40 official opinion papers devoted to this issue. By compari son, the Ministry of Finance published less than 5 official opinion papers in the first four months of application of the reverse charge mechanism in the field of construction indus try upon its initial introduction into the VAT system at the end of 2012. The presented data testify, *inter alia*, in favor of the presented theory that the former situation is further com plicated by the amended provision of Article 10 (2) (3) of the VAT Law.

has the obligation to pay VAT (in accordance with Article 10 of the VAT Law)". The consequences of such an approach are twofold and can be defined as primary and secondary, having in mind the sequence of their occurrence.

The primary consequences arise from the statutory provision *per se*. The mere fact that there is a deviation from the general rule opens up a practical dilemma of when to apply the rule, and when the exception. This dilemma becomes more noticeable if the provision which envisages the deviation provides room for different interpretation. Then, according to the circumstances of a particular case, it is necessary to properly assess whether the tax debtor is the person who carries out a supply of goods or services or the person to whom the supply is being carried out. If this is disputed, the conflicting interests of the participants in a transaction will lead them into an unpleasant situation. The supplier will insist on the computation of VAT, in order to eliminate the risk of penalty at his own expense for the non-payment of tax.[4] The customer will, however, advocate the use of the reverse-charge mechanism, not only because in his opinion such is "required by law" (specifying him as the tax debtor), but also in the interest of protection of current liquidity (especially if he has the right to deduct the computed VAT at the same time in the same tax return as input tax in accordance with Article 28 (5) (2) of the VAT Law). It is therefore important that the application of the reverse-charge mechanism is unambiguous. Wider room for interpretation implies higher costs of taxation for businesses.

Secondary effects are a direct result of the practical application of the reverse-charge mechanism. We would like to point out the following:

1. *fractional collection of VAT is de facto abandoned* because the state treasury does not receive revenue until the stage of final consumption (or the equivalent phase of a transaction cycle – if the transaction is carried out to another person who is not entitled to deduction of the computed VAT from the actual transaction).[5] The amount of the tax owed is "offset" in the same tax return with the corresponding amount of input tax on the basis of Article 28 (5) (2) of the VAT Law, with a fiscally neutral outcome, both for the taxpayer and state treasury.[6]

[4] Let us keep in mind that in the field of construction a potentially high value of a particular transaction can generate high amount of tax.

[5] Note that in the structure of gross value added in the last quarter of 2015 in Serbia, construction accounted for 6.9%, Ministarstvo finansija Republike Srbije, *Bilten javnih finansija za januar 2016. godine*, Beograd 2016, 19. This area generates a signifi cant amount of taxes whose collection is deferred.

[6] We can say that even in a regular taxation regime, the same effect is created, due to the customer's deduction of input tax. In literature, this phenomenon is known as

2. *a taxpayer may be more frequently, if not constantly, in a position to ask for a refund of input tax* which is the result of the purchase of goods and services under the auspices of the above mentioned general rule, which are then used for the purpose of carrying out the transaction subject to the reverse-charge mechanism.[7] The refund entails higher costs of tax control to which the taxpayer is not immune either (e.g. in the case of the site control).

3. *a contradictory effect on the anti-evasion potential of VAT system* – the application of the reverse-charge mechanism automatically eliminates some forms of VAT evasion, but may create room for others. Thus, for example, it may be assumed that the more difficult control of the merits of refund requests, as a result of an increased number of requests, will encourage an unfounded refund of input tax.

4. *a different effect on the liquidity of the participants in a transaction* − from the viewpoint of the supplier, the liquidity is safeguarded, as he does not have to pre-finance the tax which he has not collected from the customer. However, at the same time the liquidity of the supplier worsens in the amount of VAT which would have been at his disposal from the moment of collection from the customer until the day the tax becomes due in accordance with the statutory deadline,[8] which, on the other hand, has a positive effect on the liquidity of the other participant in a transaction.[9] Also, the VAT payer who acquires goods or services according to gross and performs supplies according to net price, will have

"zero sum game" (German: *Nullsummenspiel*) in which the same amount of tax "circu lates" between participants in a transaction and tax administration (the customer pays it to the seller, the seller to the tax administration and tax administration back to the purchaser) without the realization of tax revenue, Ministerium der Finanzen Rheinland Pfalz, "Ein führung von Vorstufenbefreiungen als Mittel zur Umsatzsteuerbetrugsbekämpfung", *Um satzsteuer Rundschau* 9/2001, 385. Nevertheless, as a rule, the amount of VAT based on VAT payer's turnover in the tax period will be higher than the amount of input tax, result ing in budget realizing the revenue fragmentarily, in proportion to the value added at each stage of the turnover cycle. On the other hand, by applying the reverse charge mechanism, the revenue on the total turnover value will be fully realized in the last phase of the turn over cycle, M. Milošević, *Nezakonita evazija poreza na dodatu vrednost*, Pravni fakultet Univerziteta u Beogradu, Beograd 2014, 223–224.

[7] Particularly exposed to such effect are construction companies which incorpo rate the acquired (construction) material burdened with VAT within the supply performed pursuant to Article 4 (3) (6) of the VAT Law, Ministry of Finance of the Republic of Ser bia, Explanation on the implementation of Article 10 (2) (3) of the VAT Law in the field of construction, No. 011 00 1180/2015 04 of 10 November 2015.

[8] Particularly exposed to such effect are taxpayers who file tax returns quarterly in accordance with Article 48 (2) of the VAT Law.

[9] For an empirical confirmation of the presented statement, European Commis sion, *Assessment of the application and impact of the optional 'Reverse Charge Mecha nism' within the EU VAT system*, European Union 2014, 66.

to cope with longer deadlines for the refund of input tax (as a rule 45 days from the expiry of the deadline for submitting the tax return, if it is timely submitted)[10] compared to input tax deduction (which is achieved by submitting the tax return). *Summa summarum*, the impact on the liquidity of the supplier is not necessarily positive.

5. *there is a possibility of calculating additional VAT liability which could not be adjusted* – in practice it may happen that a tax inspector, in the procedure of site control with the person who has computed VAT as a tax debtor by applying the reverse-charge mechanism, challenges the application of the mechanism in a specific case, due to which the controlled taxpayer would undoubtedly be denied the right to deduct input tax on that basis, but it is questionable whether (each) tax inspector would at the same time adjust the corresponding VAT liability (which should certainly be done, since "falling off" of the basis for the recovery of input tax was conditioned by the previous challenging of the basis for calculation of VAT liability by the recipient). Namely, if the tax inspector would not carry out the adjustment of VAT, which is shown on the "output" side in the VAT return, the VAT payer would no longer have the legal possibility to make the adjustment for that VAT by making subsequent amendments, since the filing of supplementary VAT return for the controlled period would no longer be possible, and also it would not be correct to adjust the VAT liability through the VAT return for some other tax period. Bearing in mind that the current statutory provisions do not explicitly require that tax inspectors carry out the control and adjustments of data reported in the VAT return even if an error which is detrimental to the controlled VAT payer is noticed (which we think is not in dispute in the case when the taxpayer has not e.g. recovered all input tax to which he was entitled), in this case we believe that it is necessary to issue at least an official instruction according to which such acting would be seen as obligatory for tax inspectors, which would be in line with, inter alia, the principle of neutrality.

We may conclude that in the wider application of the reverse-charge mechanism, the described secondary consequences (both positive and negative) become more noticeable, and vice versa. They are particularly important when dealing with large tax amounts which are not uncommon in the construction industry.

[10] Article 52 (4) of the VAT Law.

2. REASONS FOR THE INTRODUCTION OF THE REVERSE-CHARGE MECHANISM IN THE FIELD OF CONSTRUCTION

2.1. Motives of the Serbian legislator

Proposal of the Law on amendments to the VAT Law from 2012 states as the sole reason for the introduction of the reverse-charge mechanism in the construction industry "*the reduction of insolvency of business entities* – VAT payers, who are, as contractors, engaged by an investor – a VAT payer or entities referred to in Article 9 (1) of the VAT Law (state and political subdivision or local authority thereof and legal entities established for the purpose of performing tasks of state administration and local authority) in such a way that investors will have the obligation to compute and pay VAT for the supply of goods and services performed by the contractors – VAT payers".[11] The aim of the legislator was, therefore, to safeguard the liquidity of the contractor by eliminating taxation disadvantages stemming from the principle of accrual accounting, according to which the obligation of payment of VAT on the basis of a performed supply is independent of the collection of the agreed consideration, which can lead to pre-financing of taxes by the supplier.[12] Next to this, we should not forget that significant amounts may be involved, bearing in mind the potential value of turnover in the construction industry. Proposal of the Law on amendments to the VAT Law from 2015 reiterates the above mentioned explanation, and states: "The proposed solution will reduce the insolvency of business entities in this (construction) industry".[13]

Also, the fact that, unlike in other cases of application of the reverse-charge mechanism under Article 10 (2) of the VAT Law, only in the field of construction it is envisaged that the person liable for payment of VAT shall also be a person who is not a VAT payer (referred to in Article 9 (1) of the VAT Law), witnesses the aim of Article 10 (2) (3) of the VAT Law, given that the mentioned persons are frequent ordering parties in practice. With this approach, the Serbian legislator has overlooked the

[11] Proposal of the Law on amendments to the VAT Law from 2012, Justification, 21, *http://www.parlament.gov.rs/upload/archive/files/cir/pdf/predlozi zakona/2707 12.pdf*, last visited 30 November 2016.

[12] Taxation according to the principle of accrual accounting favors delinquent pay ers. While the supplier is forced, to the detriment of his liquidity, to pre finance the tax amount, the customer is entitled to input tax deduction, even though he did not pay the price, for the benefit of his liquidity.

[13] Proposal of the Law on amendments to the VAT Law from 2015, Justification, 12–13, *http://www.parlament.rs/upload/archive/files/lat/pdf/predlozi zakona/2232 15%20 lat.pdf*, last visited 30 November 2016. Although the immediate cause for amending the provision of Article 10 (2) (3) of the VAT Law in 2015 lies in simpler application, its *ratio* has remained the same.

risk of evasion which such a solution entails, or has remained consistent with the motives set forth at the cost of that risk.

However, with the revised provision of Article 10 (2) (3) of the VAT Law, the application of the reverse-charge mechanism has also been extended to low-value cases where it cannot be seriously spoken about prefinancing of tax which would significantly undermine the VAT payers' ability to pay, such as e.g. the supply of air conditioning units with installation.[14] Such cases are, however, the inevitable consequence of the interpretation of the term "construction activity". Without a detailed elaboration of it, it is impossible to exclude them. Therefore, this argument cannot be accepted as valid for challenging the above mentioned objective.

2.2. Motives of the communitarian legislator

The reverse-charge mechanism in the construction industry was implemented in the Directive 77/388/EEC[15] by means of the Directive 2006/69/EC[16] at the initiative of the European Commission in 2005. From the explanation of the document by means of which the modification of the communitarian legislation was proposed, it may be concluded that the motives for such intervention were primarily anti-evasive,[17] which also stems from the opinion[18] given by the European Economic and Social Committee regarding the proposal of the European Commission and the preamble of the Directive 2006/69/EC. The confirmation of the aforementioned can also be found in literature,[19] as well as in current legisla-

[14] Opinion of the Ministry of Finance, No. 430 00 14/2016 04 of 5 February 2016, Ministarstvo finansija Republike Srbije, *Bilten javnih finansija za februar 2016. godine*, Beograd 2016, 81–82.

[15] Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes Common system of value added tax: uniform basis of assessment, OJ L 145 of 13 June 1977.

[16] Council Directive 2006/69/EC of 24 July 2006 amending Directive 77/388/EEC as regards certain measures to simplify the procedure for charging value added tax and to assist in countering tax evasion or avoidance, and repealing certain Decisions granting derogations, OJ L 221 of 12 August 2006.

[17] European Commission, Proposal for a Council Directive amending Directive 77/388/EEC as regards certain measures to simplify the procedure for charging value added tax and to assist in countering tax evasion and avoidance, and repealing certain Decisions granting derogations, COM(2005) 89 final, Brussels 2005, 2–9.

[18] Opinion of the European Economic and Social Committee on the 'Proposal for a Council Directive amending Directive 77/388/EEC as regards certain measures to sim plify the procedure for charging value added tax and to assist in countering tax evasion and avoidance, and repealing certain Decisions granting derogations', OJ C 65 of 17 March 2006, item 3.7.

[19] J. Swinkels, "Combating VAT Avoidance", *International VAT Monitor* 4/2005, 241–242.

tion of individual Member States. In Austria, for example, it is necessary for the application of the reverse-charge mechanism that the recipient of goods and services from the construction industry is the contractor to whom construction works are entrusted or that this is a subject that normally carries out supplies in the construction industry. Therefore, its application is mostly limited to the relationships of (less reliable) subcontractors and contractors, where the risk of damage to the treasury is the largest in such a way that the subcontractor computes but does not pay VAT, while the contractor exercises its right to deduct input tax. In transactions between the contractor and the investor, on the other hand, the general rule applies (unless the investor himself is the subject that normally carries out supplies in the construction industry), since these are usually reliable taxpayers who are not prone to such evasive conduct.[20] Finland, France, Germany, Ireland, Italy, Sweden and the Netherlands have similar solutions.[21]

The reverse-charge mechanism in the construction industry undoubtedly represents an anti-evasion measure in the eyes of the communitarian legislator. The safeguarding of liquidity of VAT payers is not contained in any of the aforementioned documents as an argument in favor of deviation from the general rule. At the same time, as set forth, it is not certain either.

3. APPLICATION OF THE REVERSE-CHARGE MECHANISM IN THE CONSTRUCTION INDUSTRY IN SERBIA

3.1. Situation in the period from January 1st 2013 until October 15th 2015

Law on amendments to the VAT Law from 2012[22] implemented the provision of Article 10 (2) (3) of the VAT Law which stipulates that the tax debtor is the recipient of goods and services in the construction industry, a VAT payer, or the person referred in Article 9 (1) of the VAT Law, for the supply performed by another VAT payer, if the recipient of goods or services is the investor and if supplier of such goods or services is the contractor, in accordance with the Law on Planning and Construction (hereinafter: LPC). Therefore, the application of the reverse-charge mechanism depended on fulfillment of the following cumulatively prescribed conditions:

[20] Steuerplattform ÖSV Österreichischer Steuerverein, *http://www.steuerverein.at/umsatzsteuer/019 steuerschuld steuerschuldner 01.html*, last visited 7 June 2016.

[21] European Commission, (2014), 113, 117, 121, 133, 136, 173.

[22] Law on amendments to the VAT Law, *Official Gazette of the Republic of Serbia*, No. 93/12.

a) that the supplier of goods or services in the construction industry is registered for VAT purposes and has the status of a contractor in accordance with the LPC and

b) that the recipient of such goods or services in the construction industry is registered for VAT purposes or the person referred in Article 9 (1) of the VAT Law, who acts in capacity of an investor in accordance with the LPC.

As basic disadvantages of the above mentioned provision we would note the following:

1. *practical difficulties, especially when determining the status of a contractor and proving such status*. The status of an investor is quite clear. An investor is a party for whose needs the object is built and in whose name the construction permit is issued. [23] On the other hand, the statutory definition of a contractor stated in Article 150 (1) of the LPC is very broad. Building of an object, or construction activities could be performed by a company, other legal entity or an entrepreneur.[24] The Ministry of Finance was forced to, with reference to other provisions of LPC, rely on additional criteria when determining the status of a contractor,[25] from which practical doubts arose;[26]

2. *too narrow field of application*. Bearing in mind that the notion of an investor assumes existence of a construction permit, the application of Article 10 (2) (3) of the VAT Law was limited to construction of an object for which such permit is issued.[27] In that manner, activities that

[23] Article 2 (1) (21) of the Law on Planning and Construction, *Official Gazette of the Republic of Serbia*, No. 72/09, 81/09, 64/10, 24/11, 121/12, 42/13, 50/13, 98/13, 132/14 and 145/14.

[24] Article 150 (2) of the LPC prescribes special conditions for obtaining contractor status only for a company or other legal entity engaged in construction of an object, i.e. performing construction activities enlisted in Article 133 (2) of the LPC.

[25] Accordingly, it was necessary for a contractor to sign a contract with an inves tor regarding the construction of an object, including upgrading, with rights and obliga tions of a contractor prescribed by the LPC; that it is a party whose name, as a contractor, is stated on the board used for marking a construction site, provided by an investor; that a contractor's authorized person signed the main project before beginning of construction activities; that a contractor determined a responsible contractor on site by issuing an ap propriate decision etc.

[26] Proposal of the Law on amendments to the VAT Law from 2015 regards the aforementioned "simplification" of taxation in the construction industry in a situation where in "*every* supply in this industry performed by a VAT payer to another VAT payer, or the person from Article 9 (1) of the VAT Law, the person liable for payment of VAT shall be the recipient of goods and services, and *not only* in a situation where the supplier has a contractor status, and the recipient status of an investor, in accordance with the LPC", Proposal of the Law on amendments to the VAT Law from 2015, Justification, 12.

[27] Cekos in, *PDV časopis za primenu propisa o porezu na dodatu vrednost i akcizama* 5/2014, 38.

clearly represent activities in the construction industry, such as adaptation, reconstruction or recovery of existing objects, would unreasonably be left out therefrom.[28] The same applies to construction of illegal objects. Moreover, the Ministry of Finance in practice reduced the term "construction" of objects pursuant to Article 2 (1) (30) to "building" and "upgrading" in accordance with Article 1 (1) (31) and (33) of the LPC.[29] Article 10 (2) (3) of the VAT Law was also not applicable on transactions between a subcontractor and contractor due to not fulfilling prescribed conditions, which is a diametrically opposite approach compared to previously described practice of Member States who place emphasis exactly on these type of transactions. This reduces the potential of anti-evasion measures;

3. *inapplicability of the reverse-charge mechanism for activities outside the scope of activities for which construction permit is needed*. In practical terms, this led to situations of dual tax treatment within the same construction project.[30]

3.2. Situation from October 15th 2015

Law on amendments to the VAT Law from 2015[31] amended the provision of Article 10 (2) (3) of the VAT Law. The tax debtor is now the

[28] Explanation of the Ministry of Finance, No. 011 00 77/2012 04 of 18 January 2013, Ministarstvo finansija Republike Srbije, *Bilten javnih finansija za januar 2013. go dine*, Beograd 2013, 27. In all three cases the construction permit is not issued in accor dance with Article 145 (1) of the LPC.

[29] "Building" of an object pursuant to Article 2 (1) (30) of the LPC includes, *inter alia*, preparation work for subsequent construction (e.g. demolition of existing objects on the lot, relocation of an existing infrastructure, clearing of a site etc.) on which Article 10 (2) (3) of the VAT Law did not apply, Opinion of the Ministry of Finance, No. 011 00 00515/2014 04 of 14 July 2015, Ministarstvo finansija Republike Srbije, *Bilten javnih fi nansija za juli avgust 2015. godine*, Beograd 2015, 72–73.

[30] When a VAT payer contractor makes a supply of goods and services in the construction industry to an investor, whereby part of such construction activities refers to building of an object for which a construction permit is issued, and part refers to building of objects for which construction permit is not needed (e.g. approach roads, parking lots etc.), for supply of goods and services regarding the construction of the object for which the construction permit is issued the tax debtor is the investor, while for the supply of goods and services regarding the construction of objects for which construction permit is not needed the tax debtor is the contractor, Opinion of the Ministry of Finance, No. 430 01 126/2013 04 of 16 September 2013, Ministarstvo finansija Republike Srbije, *Bilten javnih finansija za septembar 2013. godine*, Beograd 2013, 24–25. Same applies when, e.g., based on the same legal act, object construction and reconstruction, or revitalization of an existing object is performed, Opinion of the Ministry of Finance, No. 413 00 657/2013 04 of 26 June 2014, Ministarstvo finansija Republike Srbije, *Bilten javnih fin ansija za juni 2014. godine*, Beograd 2014, 9–10.

[31] Law on amendments to the Law on Value Added Tax, *Official Gazette of the Republic of Serbia*, No. 83/15.

recipient of goods and services in the construction industry, a VAT payer, or the person referred in Article 9 (1) of the VAT Law, for the supply performed by another VAT payer. It is not necessary an investor and a contractor to be there anymore, in accordance with the LPC.

The bylaw closely determines what are considered to be "goods and services in the construction industry".[32] These are goods and services supplied in accordance with Article 4 (1) and (3) (6) and Article 5 (1) and (3) (3) of the VAT Law, when performing any of the enumerated activities from the Regulation on classification of economic activities[33] (Section F – Construction). When a VAT payer performs any of the construction activities, regardless of whether the VAT payer is registered for performing such activities in accordance with the law, by order from a purchaser, with its own material, subject to the condition that it is not merely an additional or some other ancillary material, it is considered that the VAT payer, in accordance with Article 4 (1) and (3) (6) of the VAT Law, performs a supply of goods in the construction industry. Supply of services in the construction industry shall exist under equal conditions, when a service is provided through an order and with purchasers' material, in accordance with Article 5 (1) and (3) (3) of the VAT Law.[34]

Application of the reverse-charge mechanism now depends on fulfillment of the following cumulatively prescribed conditions:

a) that a supplier in the construction industry is registered for VAT purposes and that a recipient of goods or services in the construction industry is also registered for VAT purposes or that it is the person referred in Article 9 (1) of the VAT Law;

b) that a supplier performs construction activities, regardless of whether he is registered for such activities or not and

c) that there is a supply of goods in accordance with Article 4 (3) (6) or supply of services in accordance with Article 5 (3) (3) of the VAT Law.[35]

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[32] Rulebook on determining goods and services in the construction industry for the purpose of determination of tax debtor for VAT purposes, *Official Gazette of the Re public of Serbia*, No. 86/2015.

[33] Regulation on classification of economic activities, *Official Gazette of the Re public of Serbia*, No. 54/10.

[34] Article 2 of the Rulebook on determining goods and services in the construction industry.

[35] Article 2 (1) of the Rulebook on determining goods and services in the con struction industry mentions the supply of goods in accordance with Article 4 (1) *and* (3) (6) of the VAT Law. The aforementioned provisions govern two different legal situations. Article 4 (1) of the VAT Law regulates "regular" supply of goods, while Article 4 (3) (6) regulates the supply of goods which also includes a service element. According to the linguistic interpretation it is correct to conclude that the author of said bylaw has taken

The new legislation significantly expanded the scope of Article 10 (2) (3) of the VAT Law, in objective as well as subjective sense. For example, reverse-charge mechanism is now applicable in situations of adaptation, revitalization, reconstruction or recovery of an existing object. Also, all subjects (including subcontractors, and not only contractors in direct contractual relationship with an investor), who perform a supply of goods and services in the construction industry, are subject to the amended provision. Thereby previously described secondary consequences, arising from practical application of the reverse-charge mechanism, additionally gained importance. Unfortunately, the same could be stated for primary consequences, bearing in mind that the new provision has increased insecurity when determining whether in particular case this measure will be applicable or not.

3.3. Problem of qualification of a supply of goods and services in the construction industry and possibilities for its overcoming

The most important disadvantage of the new provision is reflected in potential difficulties when determining whether a supply of goods and services is considered to be provided in the construction industry or not. These difficulties could arise when assessing if goods and services are supplied in accordance with Article 4 (3) (6) and Article 5 (3) (3) of the VAT Law. For example, transporting and pouring concrete on a construction site could be treated as installation of materials pursuant to Article 4 (3) (6) or as a (regular) supply of materials in accordance with Article 4 (1) of the VAT Law.[36] Also, they could be the result of an ambiguity whether a VAT payer performs a supply in the construction industry or not.[37] Therefore, for example, delivery of props for children (teeters,

into account both situations. However, from phrasing of Article 2 (2) of the Rulebook fol lows that the author has taken into account exclusively situation stated in Article 4 (3) (6), despite the fact that the author again refers to Article 4 (1) *and* (3) (6) of the VAT Law. The confirmation of this fact is also found in previously quoted Explanation of the Min istry of Finance of 10 November 2015, which explicitly excludes (regular) supply of ma terials *without installation* from the scope of Article 2 of the Rulebook. Our opinion is that at this place it is necessary to align the wording in Article 2 of the Rulebook and to limit the provision only on the supply of goods in accordance with Article 4 (3) (6) of the VAT Law. An analog amendment, according to the same arguments, is desirable with respect to the provision of services.

[36] The Ministry of Finance does not consider a supply of concrete with transporta tion and pumping to be a supply of goods in the construction industry, Opinion of the Ministry of Finance, No. 430 00 115/2016 04 of 25 March 2016, Ministarstvo finansija Republike Srbije, *Bilten javnih finansija za mart 2016. godine*, Beograd 2016, 25 26.

[37] From previous practice of the Ministry of Finance it could be concluded that while assessing the fulfillment of this requirement the Ministry of Finance strictly fol lowed the Regulation on classification of economic activities. We consider such approach to be correct since the analogy (bearing in mind the variety of possible situations) is very

swings, merry-go-round) including transportation and installation into concrete foundation is a supply from the construction industry (activity 42.99 – Classification of economic activities). On the other hand, this is not the case in a situation when the delivery includes transportation and placing, i.e. fixing to concrete (without installation) of such goods.[38] Finally, attention should be paid that conditions are met cumulatively. Demolition of an object, for example, clearly represents construction activity,[39] but if purchaser's material is not used, it cannot be considered as a supply of services in accordance with Article 5 (3) (3) of the VAT Law.[40]

We note that in the European Union the precise determination of the scope of the reverse-charge mechanism in the construction industry is also identified as the main cause of complexity of this issue.[41] European classification of economic activities, in its current edition, (Statistical classification of economic activities in the European Community – NACE Rev. 2) is identical to the Regulation on classification of economic activities in the construction industry. Hence, classification problems present in our (domestic) practice could be considered to exist in all Member States who determine the notion of construction activities by relying on the aforementioned classification.

Bearing in mind the conflicting interests of participants in a transaction when deciding whether or not a specific situation should fall under the scope of Article 10 (2) (3) of the VAT Law, it is necessary to consider the ways in which the current situation can be improved. This is conceivable even in the absence of intervention of any kind, assuming that by the time the practice will more closely determine the definition of a supply of goods and services in the construction industry. The alternative to such an approach could be one of the following options. The first option would be to define more precisely the supply of goods and services in the construc-

dangerous, although it seems desirable and justified. However, it is justifiable to wonder whether this authority has enough competences and if it is authorized at all to assess the fulfillment of this condition.

[38] Opinion of Ministry of Finance, No. 413 00 216/2015 04 of 15 December 2015, Ministarstvo finansija Republike Srbije, *Bilten javnih finansija za decembar 2015. godine*, Beograd 2015, 74–76.

[39] Article 2 (1) (9) of the Rulebook on determining goods and services within construction industry.

[40] As the opposite of previously stated, the Ministry of Finance applies Article 10 (2) (3) of VAT Law in case of maintenance and repair of cooling equipment (which is possible without the use of materials) considering it is a construction activity in accor dance with Article 2 (1) (12) of the Rulebook on determining goods and services in the construction industry, Opinion of Ministry of Finance, No. 430 00 14/2016 04 of 5 Febru ary 2016, Ministarstvo finansija Republike Srbije, *Bilten javnih finansija za februar 2016. godine*, Beograd 2016, 81–82.

[41] European Commission, (2014), 13 and 68.

tion industry for the purposes of application of Article 10 (2) (3) of the VAT Law. The second option would be to supplement the current legislation by providing an option to the participants in a transactions to, in case of dissenting opinions, agreeably overcome qualification problems. A good example is the Croatian solution. If a supplier of goods, or a provider of services in the construction industry issues an invoice without VAT (mentioning that the reverse-charge mechanism is applied) or issues an invoice with VAT and the recipient considers that such action is incorrect, then, the recipient asks the supplier, in written, within 8 days form the day of the receipt of the said invoice, to correct it. Otherwise, it shall be considered that recipient is consentient with the way in which the invoice is issued. Within 8 days the supplier must notify the recipient if he accepted the recipient's request for the invoice correction. If the supplier does not accept the said request, the recipient must accept such invoice, and then, in written, notify tax administration.[42] We encounter a similar solution in Austria. Participants in a transaction shall agree regarding the application of the reverse-charge mechanism if in a certain situation the application thereof is questionable. If they consider that there is no supply of goods and services from the construction industry, and afterwards turns out they were incorrect, the agreement shall remain applicable if it can be proven that there was no damage caused to the state treasury (i.e. that VAT on this basis is paid).[43] The third option is completely devoted to preserving the liquidity of VAT payers and implies dismissing the current solution and taxation according to the principle of cash accounting pursuant to Article 36a of the VAT Law.[44] Finally, the fourth option implies a limited application of the reverse-charge mechanism above the prescribed threshold (e.g., in Malta the value of a contract may not be lower than EUR 70,000).[45]

We are of the opinion that between previously described options choice should be made by applying the criteria of overcoming qualification problems of goods and services in the construction industry, protecting liquidity of VAT payers and anti-evasion effect of the amendment. It is hard to imagine clear and exhaustive list of goods and services in the construc-

[42] Article 152 (4) (5) of the Rulebook on Value Added Tax, *Official Gazette of the Republic of Croatia*, No. 79/13, 85/13 corrected, 160/13, 35/14, 157/14 and 130/15.

[43] Steuerplattform ÖSV Österreichischer Steuerverein, *http://www.steuerverein.at/umsatzsteuer/019 steuerschuld steuerschuldner 01.html*, last visited 21 June 2016.

[44] Please note that Article 36a (5) (3) explicitly excludes principle of cash ac counting in situations that fall under the scope of Article 10 (2) (3) of the VAT Law. However, even in the absence of this provision, the threshold of 50,000,000 Serbian di nars stated in Article 36a (1) of the VAT Law would represent a barrier to preservation of liquidity in this way to certain number of VAT payers.

[45] European Commission (2014), 148.

tion industry. Therefore, the suitability of the first option to ensure clear application of the reverse-charge mechanism is very uncertain. Also, it is reasonable to assume that the "refinement" (more or less) would narrow the scope of the application of this provision at the expense of fulfilling other criteria. The second option does not eliminate initial qualification problems bearing in mind that the current legislation remains substantially unaltered. However, this option provides acceptable modality for overcoming consequences thereof by freeing participants in a transaction from responsibility in a situation of misapplication of the law.[46] Protection of liquidity of a supplier in the construction industry shall depend on the agreement in a particular situation. However, bearing in mind the exceptional occurrence of uncertain cases, the current situation shall not be significantly altered. The proposed solution also does not represent a threat to the volume of collected tax revenue. Tax administration is notified about the reached agreement, while its validity is conditioned by the evidence that VAT arising from the transaction is duly settled. By switching to taxation in accordance with the principle of cash accounting, the objective that the Serbian legislator bore in mind when implementing Article 10 (2) (3) of the VAT Law would be preserved. Also, dilemmas regarding application of exception to the general rule typical for reverse-charge mechanism (in this situation – principle of cash compared to accrual accounting), the application of which exclusively depends on the VAT payer's will to opt for it, would be eliminated. On the other hand, the system would again be exposed to the abovementioned aspect of evasion. The fourth option partially eliminates qualification problems by always applying general rule in case of low-value supplies.[47] If relatively low threshold is prescribed (e.g. in the amount of a few hundred thousand Serbian dinars) protection of VAT payers liquidity and anti-evasion potential of the reverse-charge mechanism in the construction industry in significant cases (high-value supplies) would not be endangered.

From previously stated follows that second option is the most appropriate option to eliminate the aforementioned disadvantages of the current legislation. Afterwards follows the fourth option, whose range is somewhat limited. The first option cannot be accepted because of an ex-

[46] This approach is economical because it reduces the need for intervention of the Ministry of Finance in uncertain situations. The same applies for a VAT payer, who does not incur additional administration expenses.

[47] For example, next to the aforementioned delivery that includes installation, i.e. installation of cooling equipment, delivery of furniture with installation (library, wardrobe and other closets, radiator grille, bookshelves, counters etc.), Opinion of the Ministry of Finance, No. 430 00 522/2015 04 of 12 December 2015, Ministarstvo finansija Republike Srbije, *Bilten javnih finansija za decembar 2015. godine*, Beograd 2015, 46. It is reason able to assume that VAT payers who participate in such supply actually do not know that the said supply is within the scope of goods and services in the construction industry in accordance with Article 10 (2) (3) of the VAT Law.

treme uncertainty it entails, while the third option deserves further interest only if we disregard anti-evasion potential of the reverse-charge mechanism and exclusively aspire to protecting VAT payers' liquidity.

4. CONCLUSION

The revised provision of Article 10 (2) (3) of the VAT Law has expanded the scope of application of the reverse-charge mechanism in the construction industry. The Serbian legislator has succeeded to, in a more comprehensive way, achieve the objective which initially inspired the implementation of this provision into the VAT Law. Taking into account a more diverse range of goods and services supplied in the construction industry practically all VAT payers will enjoy liquidity protection provided by such tax treatment. However, the Serbian legislator is apparently unaware of the fact that reverse-charge mechanism in the construction industry is in essence an anti-evasion measure, which communitarian sources also confirm. Hence, the legislator, by accident, accomplished to improve existing VAT system by making it more resistant to certain forms of tax evasion.

Certain (secondary) consequences, as an unavoidable result of practical application of the reverse-charge mechanism, are now more worthy of attention. Tax administrations' capacity to cope with an increased number of VAT refund requests is questionable,[48] and implications of absence of fractional tax collection on the budget must also not be ignored. Also, the new solution has increased insecurity when determining whether, in a particular case, the application of a special tax treatment will take place (in the meaning of the described primary consequences). The most elegant solution for overcoming "qualification problems" while preserving positive effects of the reverse-charge mechanism in the construction industry is in amicable solution of an unclear situation by participants in a transaction. If it turns out that the law was misapplied, they are freed of responsibility after they prove that the there was no damage caused to the state treasury.

Summa summarum, the revised provision of Article 10 (2) (3) of the VAT Law represents an acceptable solution for achieving a twofold objective – protection of suppliers' liquidity and strengthening the resistance of the VAT system in terms of tax evasion. However, a prompt intervention of the legislator is necessary in order to eliminate previously stated practical dilemmas.

[48] During the 6th edition of "Tax evenings" from June 23rd 2016 Dr. Svetislav Kostić stated that tax authorities employ only 500 tax inspectors. At the same time, around 333,000 legal entities and entrepreneurs are registered in Serbia. Even if we take into consideration that the number of VAT payers performing construction activities is much lower, our doubts are still valid.

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SOME REMARKS REGARDING THE PROCEDURE OF THE APPOINTMENT OF THE SECRETARY GENERAL OF THE UNITED NATIONS

Appointing Secretary General is a process that has always been enshrined in secrecy. In 2016, due to reforms in the appointment process instigated by the presi dent of the Security Council Mogens Lykketoft, more inclusion and transparency have been achieved, with the non state actors being much more involved in the process. In the procedure itself, first five straw polls suggested that Antonio Guterres will be the new Secretary General and this proved to be truth. Will this more transparent system result in appointment of the most appropriate candidate is the question that will be partially answered. In this article we will try to assess how much is done towards this goal and what still needs to be done. Moreover, we will investigate some aspects of the appointment procedure and pressing issues that Antonio Guterres will have to face.

Key words: *Secretary General. Antonio Guterres. Geographical rotation. Straw polls. Appointment procedure*.

1. INTRODUCTION

Secretary-General (SG) of the United Nations (UN) Ban Ki-moon has been recently described as deplorable, irrelevant[1] and generally considered incompetent. However, position itself is a position of the utmost importance – but those are big shoes to fill. Personality, overall qualities

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[1] "Disquiet grows over performance of Ban Ki moon, UN's 'invisible man'", *https://www.theguardian.com/world/2010/jul/22/ban ki moon secretary general un*, last visited 28 September 2016.

and general profile of a person of the SG contributes a lot to the position itself as well as to the reputation and strength of the UN. Sole fact that only 8 people have been appointed SG of the UN in the organization's 70 years long history demonstrates how hard is to reach to this position. Being at the helm of the Secretariat that comprises around 44,000 members brings huge responsibility and requires immense devotion from their leader. External role of the SG is even harder, political one, with the necessity of balancing different streams, different influences: personal, political, institutional and national. Special place is taken by an administrative[2] function of the SG, including its function as a depositary.[3] That is why selecting appropriate candidate for SG is a quest of the utmost importance. Ever-standing question is to whom this person should be adequate. Are the interests of major nations similar or at least compatible with the ones of smaller economies and are their interests corresponding with the UN vision of appropriate candidate? Is politician, diplomat or professional of some other kind most adequate for this position? These and many other questions are actualized every time when SG is appointed. In 2016 with more transparent appointment process and increased polarization at the international scene, choosing worthy candidate was more important than ever in the last 25 years. Did more transparent system contribute to the appointment of the most appropriate candidate? In Mr. Antonio Guterres will be something that can be assessed after his mandate is over. But appointing the best possible candidate in the most transparent way is the process that started in 2016 and hopefully there is no coming back to the system of appointment at the beginning of the UN.

2. OVERVIEW OF THE PROCEDURE FOR THE APPOINTMENT OF THE SG

UN Charter (Charter) regulates the procedure of the appointment of the SG in a very minimalistic manner. In the article 97 of the Charter it is stated that "The SG shall be appointed by the General Assembly upon the recommendation of the Security Council."[4] This minimalist approach is not at all unusual for the Charter. Charter is a basic document and it is not envisaged to regulate all the aspects or all the procedures in detailed manner. When it was written, Charter was founding instrument of a new organization that emerged in the post-World War II arena. UN

[2] I.C.J. Judgment of 12 April 1960, Right of Passage over Indian Territory (Portugal v. India)

[3] B. Milisavljević, "Depozitar kod višestranih međunarodnih ugovora", *Pravni život* 12/2012. 303–317.

[4] Article 97, UN Charter.

founding fathers had to leave enough room for the organization to evolve and since nobody could predict how the world will look like in next decade or a century, the Charter had to be capable to survive the test of time. After 70 years, Charter still stands as a very current and applicable document that endured very few changes and it is due to its flexibility and adaptability.

At the San Francisco conference in 1945[5] there were several ideas how the appointment process of the SG should look like. Honduras suggested that General Assembly should elect SG without the interference of the other UN organs.[6] This suggestion of course did not stand a chance, since it would limit the influence of major powers in this very important question. Uruguay suggested that SG should be chosen by General-Assembly from the list of three candidates comprised by Security Council, while Mexico proposed that the SG should be chosen by General Assembly, on a suggestion of Security Council.[7] Uruguay's suggestion was not accepted due to the recommendation of the General Assembly that Security Council should put only one candidate before them, in order to avoid public debate[8] and thus further confrontation in the General Assembly. This is why one of the requests – to have two or more candidates to the General Assembly is not considered.[9] As a matter a fact General Assembly accepted all candidates for SG by acclamation, except in 1950 when there was actual voting.[10] Mexico's proposition was later accepted but not before two clarifications were adopted as well. One was that simple majority of votes in Security Council is enough for the candidate to be proposed. The other one is that question of the appointment of the SG should be considered as substantial rather than procedural question.[11]Since the appointment of the SG was substantive question, negative votes of the permanent members of Security Council[12] got the strength of the veto.[13] At the San Francisco conference, several countries including Netherlands,

[5] 1945: The San Francisco Conference, *http://www.un.org/en/sections/history united nations charter/1945 san francisco conference/index.html*, last visited 22 Septem ber 2016.

[6] O. Šuković, *Položaj i uloga generalnog sekretara Ujedinjenih nacija*, Institut za međunarodnu politiku i privredu, Beograd 1967, 11.

[7] *Ibid*.

[8] "Who wants to rule the world?", *http://www.straitstimes.com/opinion/who wants to rule the world,* last visited 22 September 2016.

[9] *http://www.1for7billion.org/why/*, last visited 25 September 2016.

[10] L. Sievers and S. Daws, *The procedure of the UN Security Council*, Oxford University Press, Oxford 2014[4], 404.

[11] O. Šuković, 22.

[12] In the text permanent members of the Security Council will be referenced as P 5

[13] Article 27 of the UN Charter.

Canada, Belgium and Australia insisted that appointment of SG should be regarded as a procedural matter, insisting that if the power of veto is given to the permanent Security Council members, the independence of the SG would be jeopardized and diminished.[14] The fact is that Security Council members have more power in electing SG and this imparity influence is often criticized as inequitable[15] and undemocratic.[16] However, there are at least two reasons why this bigger influence of the P-5 is justified and fair. On the one side, SG will definitely have to cooperate and find common grounds first of all with Permanent Members of Security Council. Consequently it is better for the functioning of the Organization and to him personally to be approved with non-usage of veto then to obstruct him/her in every step and thus effectively stultify the appointment. On the other hand, even a brief look at the financing scheme of the UN will show us another reason that justifies this inequality between P-5 members and other UN members. It is illusory and even unfair to expect that country such as USA that finances 22% of the entire UN budget, to have the same voting power in every question as countries with virtually none contribution. At first 9 places of the list of the contributors, there are all 5 permanent members: USA (22.000), China (7.921), France (4.859), United Kingdom (4.463), and Russian Federation (3.088). Apart for them, there are three former Axis powers – Italy (3.748), Japan (9.680) and Germany (6.389) and one country aspiring to become permanent member – Brazil (3.823).[17] P-5 members are financing 42.331% of UN budget, so their bigger influence is well financially founded.

3. MORE TRANSPARENT APPOINTMENT PROCEDURE

A lack of transparency and inclusion of the appointment procedure of the SG has been often criticized.[18] In 1997 the General Assembly recognized that greater level of transparency was indeed desirable at the appointment process of the SG and it decided in the resolution 51/241 that the process of selection of the SG shall be made more transparent. It also established the role for the President of the General Assembly in identifying potential candidates. Critiques regarding the election system happens

[14] UNCIO, Vol. 8, Doc. 471/II/1/17, наведено према О. Шуковић, 40.

[15] T. Weiss, "Overcoming the Security Council Reform Impasse: The Implausible versus Plausible", *Dialogue on Globalization (Occasional Paper)* 14/2005.

[16] J. S, Lund, *Pros and Cons of Security Council reform*, Center for UN Reform Education, Wayne, New Jersey 2010.

[17] United Nations Secretariat, Assessment of Member States' advances to the Working Capital Fund for the biennium 2016–2017 and contributions to the United Na tions regular budget for 2016, ST/ADM/SER.B/932, 28 December 2015.

[18] Security Council Report, Special Research Report Appointment of the New Secretary General, 3.

far not only from the eyes of the public, but away from many states, prompted the response of the UN General Assembly. On September 22th 2015 General Assembly passed the resolution 69/321 and thus started implementing ideas of making election more transparent.

At the 7539th Security Council meeting (SC/12088) on 20th October 2015, among topics addressed by speakers was appointment procedure of the SG.[19] María Emma Mejía Vélez from Colombia stated that the holding of Arria Formula meetings[20] on candidates for that post demonstrates that the wider UN membership was more involved in the Council's work. This process (named after Ambassador Diego Arria, representative of Venezuela on the Security Council (1992–1993) is very informal and enables Security Council members to exchange of views with candidates.[21] Mogens Lykketoft, not long after being elected for the president of the UN General Assembly on 15 June 2015,[22] put an effort to make election of the SG more transparent and more inclusive. As he committed to running his Presidency in the most open and transparent manner possible he also tried to apply this manner of work to the process of electing and appointing of the next UNSG.[23]

Mr Lykketoft institutionalized several guidelines in order to promote interactive nature of meetings, such as encouraging Member States to pose short, focused questions, requesting them to limit any intervention to a maximum of 2 minutes (groups to 3). In the quest to enhance transparency, meetings were open and webcasted in all official languages. In order to improve inclusivity, 1–2 representatives from civil society were given floor.[24] Afterwards, each candidate was given a two-hour televised and webcast time slot. Prior to opening up the floor for questions from UN delegates, civil society representatives and the public through social media, candidates gave short oral presentations – their vision statements – addressing challenges and opportunities facing the UN and the next SG.[25] One can with certainty state that inclusion and transparency was improved in 2016 but that these reforms did not make the procedure

[19] Speakers Focus on Veto Power, Appointment of Next Secretary General, Coop eration among UN and Regional Bodies as Security Council Debates Working Methods, *http://www.un.org/press/en/2015/sc12088.doc.htm*, last visited 16 June 2016.

[20] Background Note on the "Arria Formula" Meetings of the Security Council Members, *http://www.un.org/en/sc/about/methods/bgarriaformula.shtml*, last visited 14 June 2016.

[21] *Ibid.*

[22] President of the seventieth session of the United Nations General Assembly H.E. Mr. Mogens Lykketoft, *http://www.un.org/en/ga/70/presskit/*, last visited 11 July 2016.

[23] General Assembly of the United Nations, Procedure of Selecting and Appoint ing the next UN Secretary General.

[24] *Ibid.*

[25] UN News Center, The next UN Secretary General: Assembly President says 'new standard of transparency' established, *http://www.un.org/apps/news/story.asp?News ID 53695#.V9lFlPl974Y*, last visited 7 July 2016.

transparent. UN should strive to reach higher level of transparency but at the same time, public have to be aware that some degree of secrecy will be necessary. No one should be in fallacy – election of SG will always be, at least in this UN format, in the hands of the P-5 members but with clear rules and more transparent and inclusive procedure of appointment SG would have to be competent in order to be legitimate.

3.1. Vision statements – shouldn't the UN start the change from itself?

In the history of the UN, there is probably nothing more shameful and appalling than atrocities committed by the UN troops among which especially abominating are those committed to the children in general but especially to the children in armed conflicts.[26] This issue was mentioned by Mr. Jeremić in one general manner, alongside with other reforms of UN Secretariat[27] although he, commendably, noted the importance of the protection of the whistleblowers.[28] In the statements of Ms. Gherman[29] and Ms. Figueres[30] this problem was addressed more specifically. Candidates that gave appropriate attention to th UN troop's atrocities (both in wording and merit) are Mr. Türk[31] and Mr. Lajčák.[32] Absolute silence regarding this question by Ms. Bokova,[33] Ms. Clark,[34] Mr.Lukšić,[35]

[26] Šurlan T. "Legal status and protection of children in armed conflicts: New ten dencies", *Bezbednost* 3/2012, 121–137.

[27] Vision Statement Serbia, *http://www.un.org/pga/70/wp content/uploads/sites/10/2016/01/12 April Vision Statement Serbia.pdf*, last visited 6 July 2016.

[28] Vision Statement Serbia, *http://www.un.org/pga/70/wp content/uploads/sites/10/2016/01/12 April Vision Statement Serbia.pdf*, last visited 6 July 2016.

[29] Vision Statement Costa Rica, *http://www.un.org/pga/70/wp content/uploads/sites/10/2016/01/Costa Rica Vision Statement 1.pdf*, last visited 6 July 2016.

[30] Vision Statement Moldova, 2, *http://www.un.org/pga/70/wp content/uploads/sites/10/2016/01/Secretary General Election Vision Statement Moldova 7 April 2016.pdf*, last visited 6 July 2016.

[31] Vision Statement Slovenia, 2, 4, *http://www.un.org/pga/70/wp content/uploads/sites/10/2016/01/4 April Secretary General Election Vision Statement Slovenia 4 April 2016.pdf*, last visited 6 July 2016.

[32] Vision Statement Slovakia, *http://www.un.org/pga/70/wp content/uploads/sites/10/2016/01/Secretary General Election Vision Statement Slovakia 2 June.pdf*, last visited 6 July 2016.

[33] Vision Statement Bulgaria, *http://www.un.org/pga/70/wp content/uploads/sites/10/2016/01/6 AprilSecretary General Election Vision Statement Bulgaria 6 April 2016.* pdf, last visited 6 July 2016.

[34] Vision Statement Helen Clark, *http://www.un.org/pga/70/wp content/uploads/sites/10/2016/01/8 April Helen Clark Vision Statement ENGLISH FRENCH.pdf*, last visited 6 July 2016.

[35] Vision Statement Montenegro, *http://www.un.org/pga/70/wp content/uploads/sites/10/2016/01/5 April Secretary General Election Vision Statement Montenegro 5 April 20161.pdf,* last visited 6 July 2016.

Mr.Kerim[36] and Ms. Pusić[37] criticizes them more loudly than any article could. The biggest disappointment in this regard was Ms. Malcorra. Despite the fact that she was Under-SG of the UN for Field Support she practically did not mention the question of UN troops outrageous misconduct,[38]and although she gave more attention to this in the informal dialogue[39] her overall address just demonstrates unwillingness to change the UN approach regarding this painful matter. New SG, Mr. Guterres addressed this issue in one, although emphasized, sentence ("People in need of protection are not getting enough. The most vulnerable, such as women and children, are an absolute priority"[40]).

It is understandable that due to specific, general nature of the vision statements, limited space and huge number of topics, not all of them could be covered, but protecting the part of the world population that virtually does not have any chance of protecting themselves has always been huge issue both in national and international level and as such it must be at the top of the priority to every national and international actor. This especially relates to the UN, because some of the darkest moments in the UN history are committing and covering up atrocities to the children by members of peace keeping missions. The most recent example where UN not only failed to stop and failed to prosecute members of a mission that raped children in Central African Republic, but actually suspended the whistleblower Mr. Anders Kompass,[41] leaves no space of avoiding this issue. It is unclear where from the UN and next SG will derive its authority to instruct countries to improve position of children and women, when their own troops are becoming notorious for their atrocities to those groups. UN is becoming as much notorious for the failure to react appropriately – reacting by processing the whistleblowers. While world's problems such as Syria crisis, refugee crisis and ever-

[36] Vision Statement Montenegro, *http://www.un.org/pga/70/wp content/uploads/sites/10/2016/01/Secretary General Election Vision Statement FYR of Macedonia 6 April 2016.pdf*, last visited 6 July 2016.

[37] Vision Statement Croatia, *http://www.un.org/pga/70/wp content/uploads/sites/10/2016/01/Secretary General Election Vision Statement Croatia 5 April 2016.pdf*, last visited 6 July 2016.

[38] Vision Statement Malcorra, *http://www.un.org/pga/70/wp content/uploads/sites/10/2016/01/Vision Statement Malcorra.pdf*, last visited 6 July 2016.

[39] Informal Dialogue Malcorra, *http://webtv.un.org/search/susana malcorra argentina informal dialogue for the position of the next un secretary general/4931454866001?term malcorra*, last visited 6 July 2016.

[40] Vision Statement Portugal, 3, *http://www.un.org/pga/70/wp content/uploads/sites/10/2016/01/4 April Secretary General Election Vision Statement Portugal 4 April 20161.pdf*, last visited 6 July 2016.

[41] M. Novaković, "Position Of The Whistleblowers In The United Nations System 10 Years After Secretary General's Bulletin On Protection Against Retaliation How Far Have We Come?", *Social Change in the Global World* (ed. Strasko Stojanovski), 2016.

present terrorism hazard is something that Mr.Guterres have to address immediately on the external level, internally there is no more pressing concern than reforming the UN system and preventing those atrocities happen ever again.

3.2. Straw Polls

Straw polls were covered very vividly by the world media and thus it was much easier to find their results then ever before. Straw polls as a way of narrowing down SG job candidates were developed in 1981 by Olara Otunnu of Uganda, at that time president of the Security Council.[42] Colored ballots were first introduced in 1991[43] to differentiate votes equipped with veto power (red) from negative votes given by non-permanent Security Council members. This practice has been formalized as a set of guidelines in November 1996 and since then they are known as the 'Wisnumurti Guidelines,' named after Ambassador Nugroho Wisnumurti of Indonesia who held the rotating presidency of the Security Council when the guidelines were set. These straw polls continue until there is a majority candidate without a single veto from a permanent member of the Security Council.[44] Some permanent Security Council members insisted that it is very important for the straw polls results to remain secret. Straw polls are not envisaged to be public – and *de iure* they are not butresults of the straw polls are leaked so promptly, that one can doubt that leaking was allowed to occur.

Table no. 1: Results of the First Straw Poll – July 21st 2016

	Candidate	**Encourage**	**No Opinion**	**Discourage**
1	António Guterres	12	3	0
2	Danilo Türk	11	2	2
3	Irina Bokova	9	2	4
4	Vuk Jeremić	9	1	5
5	Srgjan Kerim	9	1	5
6	Helen Clark	8	2	5

[42] Research Report Appointing the UN Secretary General: The Challenge for the Security Council, 2016, No. 4.

[43] *Ibid.*

[44] "Selecting a new UN Secretary General: a job interview in front of the whole world", *http://www.un.org/apps/news/story.asp?NewsID 53641#.V9lFnfl974Y*, 6. 7. 2016.

	Candidate	Encourage	No Opinion	Discourage
7	Miroslav Lajčák	7	5	3
8	Susana Malcorra	7	4	4
9	Christiana Figueres	5	5	5
10	Natalia Gherman	4	7	4
11	Igor Lukšić	3	5	7
12	Vesna Pusić	2	2	11

Table no. 2: Results of the Second Straw Poll, August 5th 2016.

	Candidate	Encourage	No Opinion	Discourage
1	António Guterres	11	2	2
2	Vuk Jeremić	8	3	4
3	Susana Malcorra	8	1	6
4	Irina Bokova	7	1	7
5	Danilo Türk	7	3	5
6	Srgjan Kerim	6	2	7
7	Helen Clark	6	1	8
8	Christiana Figueres	5	2	8
9	Natalia Gherman	3	2	10
10	Miroslav Lajčák	2	7	6
11	Igor Lukšić	2	4	9
12	Vesna Pusić	dropped out		

Table no. 3: Results of the Third Straw Poll – August 29th 2016.

	Candidate	Encourage	No Opinion	Discourage
1	António Guterres	11	1	3
2	Miroslav Lajčák	9	1	5
3	Vuk Jeremić	7	3	5
4	Irina Bokova	7	3	5
5	Susana Malcorra	7	1	7
6	Srgjan Kerim	6	2	7
7	Helen Clark	6	1	8
8	DaniloTürk	5	4	6
9	Christiana Figueres	2	1	12
10	Natalia Gherman	2	1	12
11	Igor Lukšić	dropped out		
12	Vesna Pusić	dropped out		

Table no. 4: Results of the Fourth Straw Poll – September 9th 2016.

	Candidate	Encourage	No Opinion	Discourage
1	António Guterres	12	1	2
2	Miroslav Lajčák	10	1	4
3	Vuk Jeremić	9	2	4
4	Irina Bokova	7	3	5
5	Susana Malcorra	7	1	7
6	Srgjan Kerim	8	0	7
7	Helen Clark	6	2	7
8	Danilo Türk	7	2	6
9	Christiana Figueres	5	0	10
10	Natalia Gherman	3	1	11
11	Igor Lukšić	dropped out		
12	Vesna Pusić	dropped out		

Table no. 5 September 26th 2016.

	Candidate	Encourage	No Opinion	Discourage
1	AntónioGuterres	12	1	2
2	Vuk Jeremić	8	1	6
3	MiroslavLajčák	8	0	7
4	DaniloTürk	7	0	7
5	Susana Malcorra	7	0	7
6	Irina Bokova	6	2	7
7	Helen Clark	6	0	9
8	Srgjan Kerim	6	0	9
9	Natalia Gherman	3	1	11
10	Christiana Figueres	dropped out – September 12th		
11	Igor Lukšić	dropped out – August 23th		
12	Vesna Pusić	dropped out – August 4th		

Chart no. 1:

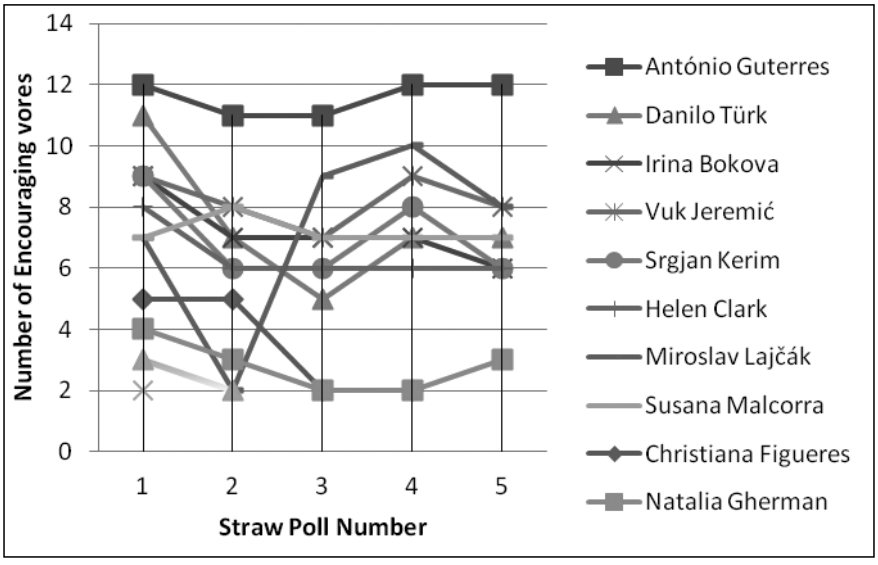
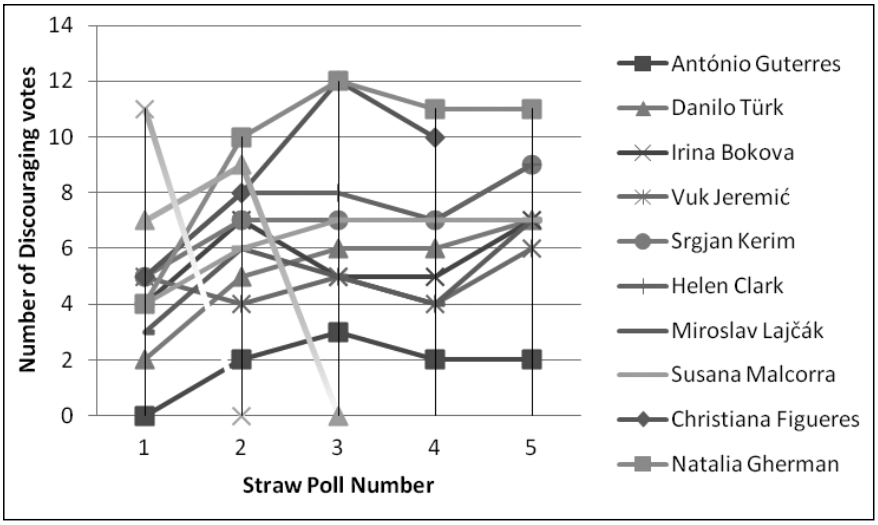


Chart no. 2:



In order to explore the results more closely, we are presenting the two charts, each focusing on one of two most important aspects – first one is presenting number of encouraging votes by every candidate per poll, while the second one is presenting number of discouraging votes per poll. It has been noted that those are not actual votes, but rather general observations by Security Council members regarding candidates.

There was a lot of suspicion that first five straw polls were just stage for the negotiations. For example, we could see the willingness to negotiate in Russia's position that they think that the next SG should come from Eastern European group, but Russia also (officially) stated that they will not block candidate only because he is not coming from Eastern European group.[45] Furthermore, since there is no deadline for the candidacy and no rule forbidding new candidates to enter the race at any time (as we saw at the example of Kristalina Georgieva) there was an open possibility for somebody other than already nominated candidates to be appointed for the position of the SG at any stage of the procedure. It could have happened that more than one candidate had one or more vetoes, as in 1996 when both Kofi Annan of Ghana and Amara Essy of Côte d'Ivoire had colored ballots. After seven rounds of straw polls, veto against Annan was dropped.[46] Another scenario was that two or more

[45] "Front runners emerge for U.N. chief from town halls with General Assembly" *http://uk.reuters.com/article/uk un secretarygeneral idUKKCN0XC2H7*, last visited 22 July 2016.

[46] B. Boutros Ghali, *Unvanquished, a United Nations United States Saga*, L.B. Tauris Publishers, London New York 1999, 329.

candidates do not have any red colored ballots. This situation occurred in 1991 when neither Boutros Boutros Ghali of Egypt nor Bernard Chidzero of Zimbabwe had any red-colored votes. In this case, the Council proceeded to vote formally on each of the two candidates, with Boutros-Ghali emerging as the victor.[47]

The biggest surprise of 2016 appointment procedure was actually that most obvious thing happened, and it happened very fast. Clear leader in all stages was appointed SGafter first colored. This might not be the case in the future but this time public has feeling that not much of horse-trading happened behind the closed doors. Finally, some organizations are insisting on clear timetable for the appointment of the SG.[48] While date and time of the straw polls should be arranged and publicly announced, deadline for the appointment of the SG is not necessarily good solution, because agreeing on SG should be the only goal. Forcing Security Council to rush into appointment, pressed by the deadline could potentially lead to the appointment of the candidate that is not the best one or appointment of the SG that would not have long-lasting support of the P5 members.

4. MODELING SG ACCORDING TO THE "INFORMAL CRITERIA"

If there wasa computer program that generates SG according to all the requests stated by relevant actors on the international stage in the last year, new SG would have been a woman from Eastern European group of countries, with experience in working the UN system, and life experience as well. Shaping the General Secretary towards these requirements will put aside the merit and need to look for a candidate with necessary substantial qualities and this is why these criteria should be disregarded. Showing lack of the legal basis of these criteria is an important task in the quest of transparent background and clarification of criteria in the future.

4.1. Geographical Rotation

From the early days of the UN, question whether SG should be a citizen of a country that is P-5 member or not was very vividly debated.[49] At the San Francisco conference, Soviet Union proposed that the mandate

[47] *Ibid.*

[48] *http://www.1for7billion.org/why/*, last visited 6 July 2016.

[49] League of Nations had three SGs namely Sir Eric Drummond from the United Kingdom (1926–1933), Joseph Avenol (1933–1940) from France and Seán Lester (1940 1946) from Ireland, aut.

of the SG should be two years, thus enabling all P-5 members to have a SG during one decade.[50] However, during the Cold War it would be extremely hard to find a person from P-5 members that would be acceptable for both blocks. Another issue was whether the person coming from these countries would be able to perceive and appreciate all the problems and needs of "small" countries. Consequently, there is mutual consensus, or we can say gentlemen's agreement between P-5 members not to nominate their own nationals for the SG position. Although this rule is not legally formalized this practice has been respected without a precedent for over 70 years now.

Another informal principle that was given much attention is appointing SG according to the geographical rotation. Some lawyers see legal foundation in this rule in article 101 of Charter of the UN, that states: "*Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible"* but deriving rotation basis rule from this article is very far-fetched. Even that part XV of the Charter where article 101 is situated is in its entirety devoted to the Secretariat of the UN, and SG is not only member but also the chief and the most important figure of the Secretariat, in the first article of the part XV is stated that there is "clear distinction" between *staff and SG* and consequently article 101 cannot apply to the SG. More precisely, article 101 is aimed for the SG to consider when he is appointing "upper echelons of the Secretariat",[51]such as High Commissioner[52] for example, and not as guidance for electing SG.

The issue of geographic rotation was particularly actualized in the late 1980's when African countries insisted that next SG should come from that continent. Eventually, their request was granted by electing Boutros Boutros-Ghali from Egypt, who started his mandate in 1992. However, this does not make geographical rotation prerequisite or obligation even in the widest sense. This is not a rule – not only because it is not formalized in any way but also because even practice regarding this question clearly denies even emerging rule of regarding the geographical rotation. SGs came from, respectively these blocks – Western European and Others (WEOG), Western European, Asia-Pacific, WEOG, Latin America &Caribbean, Africa, Africa, Asia-Pacific and WEOG. There is also not much resemblance to the rotation system, if we look it through number of terms held by SGs as from certain UN regional group. Includ-

[50] O. Šuković, 31.

[51] United Nations A/RES/42/220 General Assembly Distr. GENERAL 21 Decem ber 1987 ORIGINAL: ENGLISH A/RES/42/220 99th plenary meeting 21 December 1987.

[52] C. Norchi, "Human Rights: A Global Common Interest", *The United Nations: Confronting the Challenges of a Global Society* (ed. J.E.Krasno), Lynne Rienner Publish ers, London 2004, 89.

ing the newest appointment of Mr. Guterres, Western European and Others group had 7 terms, Asia-Pacific, 4, Africa 3, Latin America & Caribbean 2, and Eastern Europe none. And even if there is practice, practice itself without awareness of conforming to the legal obligation does not make something rule.[53] In the practice of the UN, we can see that some other informal considerations were more important tnan the geographic rotation. For example, during the Cold War it was much more important that candidate is coming from the country and background neutral to major blocks.[54]

Geographical rotation should not be perceived even as a consideration. There is no legal basis for that and also this consideration will not promote the best person to a SG position. The UN should strive to have the best candidate for these position criteria and not the best from certain part of the world. On the other hand, there are many other positions in the UN system where geographical consideration is more appropriate and not only at the highest posts. One of the issues where due to the financial costs is reserved for Western countries only is internship posts. According to the rules of many UN organizations, interns are not only obliged to pay all the accommodation, health insurance and living costs on their own but they are forbidden to do any jobs during their internships.[55] Consequently, only people living in the vicinity of the UN New York, Vienna, Geneva and other major locations of the UN are able to attend this important internship and due to these rules instead of the best candidates are not the ones attending this practice. Putting aside the fact that geographical rotation is not a legal binding or an obligation in any way, chances for candidate from this group to be chosen in 2016 were diminished not only by some P-5 members but by the countries of this group as well.

First of all, since the new and to some point more transparent process of appointment was introduced, many of the countries rushed to have their own candidates even when they were aware that they do not have real chance. They did this in order to promote themselves and to achieve some short-sighted goals. Out of 12 candidates, 8 of them were candidates from the Eastern European group. This number of candidates from Eastern European group actually diminished already slim chances for a candidate from this group to be appointed by dissipating their lobbying and other capacities to 8 candidates.

Political situation in the Eastern Europe also damaged chances of candidates from this region. Migrant crisis, strengthening of the right-wing

[53] International Court of Justice, North Sea Continental Shelf Casses, Judgment of 20 February 1969, para. 77

[54] L. Sievers and S. Daws, *The procedure of the UN Security Council*, Oxford University Press, Oxford 2014[4], 405.

[55] D. A. Mundis, "Practicing International Criminal Law", *Careers in Internation al Law* (ed. S.A. Swartz), American Bar Association, Chicago, 122.

parties, Russian sanctions are just some of the topics where it will be hard to remain neutral and not to antagonize any of the P-5 members. Once again, the Eastern Europe is a place of clash of western and eastern interests, and it is hard to stay neutral and not to antagonize major powers.

4.2. Gender Equality

Despite all UN proclamations insisting on gender equality and work through UNWOMEN activities for example, female SG is yet to be elected. The importance of appointment of a female SG has been stated at the Security Council's 7539th meeting, where it was stated that "election of a female SG would mark a significant improvement and historic opportunity for change". The most radical in pursuing female SG was The Non-Alignment Movement (NAM), more precisely its ad-hoc working group, that suggested that only female candidate should been considered for the SG position in 2016.[56]

While there is no doubt that woman should be given equal opportunity and eventually chosen for the SG position, gender of the candidate (same as origin or UN experience) should not have any influence in electing next SG if we are trying to appoint the best person overall. Woman will be at the helm of the UN when P-5 members agree that that person is appropriate candidate not sooner or later.On the other hand, not appointing female SG in the next rounds will demonstrate that UN is not doing enough regarding empowerment of women.

The next SG appointment should not be designated for a woman, but instead UN and Mr. Guterres should work hard that in the next 5 years position of women is so drastically improved, that it is not so hard for the numerous excellent female candidates to participate in the race and thus be appointed.

4.3. UN Experience

One of the criteria that have been echoing diplomatic couloirs is that next SG should come within the organization. Vesna Pusić, one of the former candidates was of the same opinion and she even listed her lack of UN experience as one of the reasons for her withdrawal.[57] Regardless of this being the real reason for her withdrawal, the fact is that three candidates that finished with fewest encouraging votes and biggest number of discouraging votes in the first straw poll are among ones without UN

[56] *http://www.unelections.org/?q node/71*, last visited 15 September 2016.

[57] "Vesna Pusić Withdraws as Candidate for UN Secretary General", *https://www.total croatia news.com/item/13428 vesna pusic withdraws as candidate for un secre tary general*, last visited 15 September 2016.

experience.[58] Furthermore, two straw poll favorites Mr. Guterres and Mr. Jeremić came from the UN bodies.

None of these informal "criteria" should have bothered any candidate this year and should not bother them at all in the future – not only because they cannot change it, but rather because all of them are ultimately irrelevant and should remain that. At the example of Mr. Jeremić, his only obstacle was in the fact that he is not favored by several P-5 members. Some of his statements during his time as a Minister of Foreign Affairs and his presidency of the General Assembly especially regarding Kosovo's* independence[59] and the critiques of the work of ICTY[60] could prove very costly to his generally highly regarded candidacy. Jeremić's efforts to alter this picture of him were obvious. In the late stage of the race, we could see some very commendable articles in USA newspapers hailing Jeremić as the best candidate.[61] He was also trying to emphasize his not so well-known role in the fight against Slobodan Milosevic's regime,[62] presenting himself as pro-western candidate. However, this proved not to be enough.

Overall quality of the candidate is the only criteria that should be relevant and since final decision will be reached by P-5 members it is very important that public is involved as much as possible in order to at least pressure the appointment of the best and prevent appointment of somebody who is obviously below the standards.

4.4. Antonio Guterres as a SG

On the shoulders of Mr. Guterres is great responsibility and high expectations as a SG. Formally, he seems a good candidate in general, being also equipped with appropriate skills to tackle current world issues. He is experienced in high politics since he was Prime minister of Portugal, experienced in UN experience with a 10 year experience as a UN High Commissioner for Refugees, respected even by his opponents,[63] favorable by all major powers.

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[58] Table 1 and 2.

[59] "Jeremić: Kosovo will join UN over my dead body", *http://www.b92.net/eng/news/politics.php?yyyy 2012&mm 07&dd 11&nav id 812111*, last visited 6 July 2016.

[60] UNGA president's Serbian nationalism rankles Western powers, *http://foreignpolicy.com/2013/03/25/unga presidents serbian nationalism rankles western powers/.*

[61] "A Different Kind of UN Secretary General", *http://nationalinterest.org/feature/different kind un secretary general 17839*, last visited 6 July 2016.

[62] "Who Will Run the U.N.? The best choice for reform at Turtle Bay is Serbia's Vuk Jeremic", *http://www.wsj.com/articles/who will run the u n 1474236158,* last visited 27 September 2016.

[63] "Antonio Guterres, the Man Who May Become the Next UN Secretary General", *http://thewire.in/53385/antonio guterres/*, last visited 5 September 2016.

He did well in the informal dialogues but also showed his political versatility in avoiding giving up to much. One of the questions was regarding independence as a SG – certainly crucial issue for every high position and especially for the position of the SG. Mr. Guterres insisted that independence is not matter of measures taken but rather of the attitude and that he can't avoid pressure but he can resist one.[64] There is lot of truth in this simple statement. Leader of the UN is often left alone to fight the pressure and influences. This is the only way to elect the best SG. It is well known that, since P-5 members are the ones electing SG, he has to "please" them or otherwise he will not see the second mandate, as it was in the case of Mr. Boutros Boutros-Ghali that was denied a second term in 1996 after criticizing the Clinton administration for caring more about bloodshed in the Balkans than in Africa.[65] Wise approach and balancing with P-5 members is something that every SG must be capable of achieving.

As UN High Commissioner for Refugees, Mr. Guterres did a lot on decentralization and overall reform of the UNHCR. Those changes were not just cosmetic – UNHCR is much more efficient and capable organization now than it used to be before he was appointed.[66]At the helm of the United Nations, he will have to deal with one opposite issue – fragmentation[67] in the United Nations system.

Thing to watch after appointing Mr. Guterres will be UN's response to migrant crisis under his lead. UN struggled to deal with the refugee crisis both directly and in coordinating states efforts. As a High Commissioner for Refugees he openly criticized Europe's politics regarding refugee crisis[68] and on the other side, he also was criticized for "weak" response".[69]

Antonio Guterres stated that he will not compare himself with other SGs,[70] but he can certainly learn a lot from some of his predecessors,

[64] *http://www.1for7billion.org/news/2016/4/12/antnio guterres commentary from the general assembly hearing*, last visited 20 June 2016.

[65] "Where Are You, Ban Ki Moon?", *http://www.nytimes.com/2013/09/25/opinion/tepperman where are you ban ki moon.html?r 0*, last visited 21 August 2016.

[66] *http://www.unhcr.org/4a2d1a4b2.pdf*, last visited 24 September 2016.

[67] M. Novaković, "Moderne tendencije u međunarodnom pravo fragmentacija i ekspanzija međunarodnog prava", *Savremeni međunarodni ekonomski i pravni poredak* (ed. Sanja Jelisavac), Institut za međunarodnu politiku i privredu, Beograd 2016, 147.

[68] Migrant crisis: EU 'must accept 200,000 refugee', UN says, *http://www.bbc.com/news/world europe 34148891,* last visited 28 September 2016.

[69] As refugee crisis grows, U.N. agency faces questions, *http://www.reuters.com/article/us europe migrants unhcr insight idUSKCN0RG13E20150916*, last visited 6 July 2016.

[70] António Guterres – live commentary from the General Assembly hearing, *http://www.1for7billion.org/news/2016/4/12/antnio guterres commentary from the general assembly hearing*, last visited 6 July 2016.

most of all from Mr. Dag Hammarskjöld, a SG who probably coined the term international civil servant[71] but undoubtedly was exemplary international civil servant, until the tragic death in a plane crash[72] in 1961.

5. CONCLUSION

Every SG should ask himself the question in the line with J.F. Kennedy's inaugural speech (or Georg St Johns line?)[73] – what he can do for the UN and consequently for the mankind? The first answer that will come to mind to many is probably "not much". However, if he is to do anything or at least to prepare the stage for substantial changes, he has to start from the organization itself. There are numerous cases of corrupted activity within the UN and even some of the candidates such as Irina Bokova[74] were suspected for this (and failed to provide adequate answer[75]). While the UN is weak there are not much chances to make any change. The only candidates that elaborated more extensively on the corruptive issues were Vuk Jeremić[76] and Miroslav Lajčák,[77] but this is not surprising, since they are the only ones coming outside the UN system and it was hard to expect candidates such as Guterres, Bokova or Malcorra to elaborate more on the corruption of the system they have been working within for many years. Integrity is one of the crucial qualities next SG has to possess in order to deal with the corruption within. Regarding Mr. Guterres integrity, being praised by P-5 member sis important[78] but confidence in his ability expressed by Mr. Kofi Annan[79] adds additional and more independent dimension. He has overwhelming support by all P-5 members[80] and the world can just hope that he will put

[71] P. Tejler, "Introduction", *Dag Hammarskjöld and Global Governance* (ed. Hen ning Melber), Upsalla 2012, 9

[72] S. Williams, *Who Killed Hammarskjold?: The Un, the Cold War and White Supremacy in Africa*, Hurst & Co., London 2011.

[73] C. Matthews, *Jack Kennedy: Elusive Hero*, Simon & Schuster, New York 2011.

[74] *http://intpolicydigest.org/2016/03/14/controversial un candidacy stirs world s past and present/*, last visited 6 July 2016.

[75] Bulgaria: UN Candidate Property Wealth Raises Questions, *https://www.occrp. org/en/daily/5078 bulgaria un candidate property wealth raises questions*, last visited 7 October 2016.

[76] Vision Statement Serbia.

[77] Vision Statement Slovakia.

[78] "Antonio Guterres: I will serve most vulnerable as UN chief", *http://www.bbc. com/news/world 37576421*, last visited 6 October 2016.

[79] *Ibid.*

80 "Portugal's Antonio Guterres set to be UN secretary general", *http://www.bbc. com/news/world* 37566898, last visited 6 July 2016.

this favorable situation into good use and react efficiently to the Syria situation, migrant crisis and terrorism on the external and UN reform on the internal plan. Although Mr. Guterres does not like comparison with other SGs,[81] to achieve all those goals he will need to apply a lot of Hammarskjöld-like governance and leadership.

Future of the appointment procedure of the SG certainly lies within further improvement of transparency and inclusion. Of course, this process has it limits since one cannot expect absolutely open selection process at least in this political constellation and current system. One of the possible improvements would certainly be more clear criteria that candidates must fulfill before even being considered for the SG position. That is very important step that would significantly diminish the possibility of appointment of incompetent SG.

Finally, we have to address one formal aspect regarding SG's mandate and appointment procedure that burdens the independence of SG – possibility for second mandate. Second mandate is a very important tool in the hands of the people who are deciding on the re-appointment process and any institution aiming for independence must abolish re-election as possibility. European Court of Human Rights,[82] in the quest of improving capabilities for protection of human rights in XXI century[83] adopted this view and abolished second mandate, and that is the path that UN should follow as well.

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[82] D. J. Harris, M. O'Boyle, E. Bates, C. Buckley, *Law of the European Convention on Human Rights*, Oxford University Press, Oxford 2014, 105.

[83] M. Jovanović, I. Krstić "Ljudska prava u XXI veku između krize i novog početka", *Anali Pravnog fakulteta u Beogradu* 4/2009.

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CONSTITUTIONAL PROVISIONS ON JUDICIAL INDEPENDENCE AND EU STANDARDS

Implementation of the "Checks and balances" principle as one of the mile stones in modern democracies, demonstrates its full complexity when it comes to balancing guaranties of judicial independence and the need to prevent misinterpreta tion or abuse of the rights. Additional issue in that process is determination of the border line between constitutional and guaranties of judicial independence pre scribed by law. Raising that issue opens various questions which go beyond the legal framework itself. It actually tackles the historical, political and cultural country background. Furthermore, if analyzed from the prospective of the requirements de fined in the accession negotiation process with the EU, constitutional guaranties of judicial independence become division criteria that challenge the idea of EU stand ards' existence and their unselective application as an accession benchmark. Fur thermore, lack of clear and objective criteria of (non)application of the EU standards might demotivate candidate countries in their efforts to achieve substantial reform results.

Key words: *Judicial independence. Separation of powers. European stand ards. Accession negotiations. Chapter 23.*

1. SEPARATION OF POWERS AS A STARTING POINT OF JUDICIAL INDEPENDENCE

Checks and balances principle is usually understood as a system of counterbalancing influences whereby each branch of the government (executive, judicial, and legislative) has some extent of influence over the other branches and may choose to block procedures of the other branches.

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This principle is directly derived from separation of powers, division of the legislative, executive, and judicial functions of the government among separate and independent bodies. Such separation limits the possibility of arbitrary excess by any of them in the process of the designing, implementing, and administering of laws.

The first modern formulation of the doctrine was that of the Montesquieu in The Spirit of Laws (*De l'esprit des lois*).[1] Montesquieu's argument that liberty is most effectively safeguarded by the separation of powers influenced the authors of the U.S. Constitution that precludes the concentration of political power. The same principle is now built in constitutional framework of numerous modern states. Checks and balances principle has been clearly articulated in the article 4 of the Constitution of the Republic of Serbia which says that the legal system is unique but the government system shall be based on the division of power on legislative, executive and judiciary. Relationship between three branches of power shall be based on balance and mutual control. The fact that par. 4 of the same article says that judiciary power shall be independent, represents the biggest challenge in establishment of the mutual balance and control system between three branches of government.

2. STANDARDIZED AND/OR TAILOR-MADE NATIONAL LEGISLATION

The milestone and essential starting point of the idea to establish a united Europe is based on the idea of unification. This process affects all segments of society, but it is undoubtedly the most important when it comes to reform of national legal systems. A degree of unification ranging from complete in areas regulated by *acquis,* to framework-based on EU standards. Depending on the particular field, these frames can be extremely wide forming a "scale" of permissible or desirable, within which candidate countries could opt to be on the basic level (just to satisfy the requirements), or to pose themselves on mid-level or even in the top. In some areas the scope of permissible is extremely narrow, and the process for harmonization with standards closely resembles the process of transposing the *acquis*.[2]

EU decision on the required level of unification is basically decision to regulate some field by *acquis* or by (wider or narrow) standards,

[1] C.L. de Secondat Montesquieu, *The Spirit of Laws*, 1748, 30.

[2] M. Kolaković Bojović, "Organizacija pravosuđa u Republici Srbiji i Poglavlje 23", *Evropske integracije i kazneno zakonodavstvo (Poglavlje 23 norma, praksa i mere harmonizacije),* Serbian Society for Criminal Law and Practice, Intermex, Zlatibor–Beograd 2016, 99.

depends on several factors. One of the key criteria is importance of the subject area for the functioning of the EU. Issues of the essential importance for the EU dealing with its competences had been ruled by *acquis* at an early stage of Union's life. Another important criterion concerns the sensitivity of certain issues in the context of readiness of candidate countries to renounce their own traditions. Constitutional regulation of key state institutions' competences and functioning, the judiciary in particular, undoubtedly represents one of the areas in which it is difficult for a country to waive heritage. In this sense, absence of *acquis* is not a peculiar specificity of the Chapter 23 that deals, *inter alia*, with judicial reform. With the exception of procedural safeguards, there are just few issues regulated by EU legislation that imply alignment with European standards. Seemingly, this resembles the mitigatory circumstance, since instead of strictly prescribed solutions that candidate countries are obliged to pass into their legal system, there is a kind of acceptable full scale of solutions within which a candidate country for EU membership should select the one that best suits it. However, this scale represents only an illusion, caused by the fact that the "freedom of choice" has been continuously challenged by selective application of the standards. Furthermore, their selective application has been approved by Venice Commission as well as by the European Commission (hereinafter EC) and has become a tool for pre-sorting particular country in one of the two possible "quality" groups based on (non)existence of their obligation to meet relevant standards as a precondition for EU membership.

Besides that difference, the approach of the Venice Commission, as well as the EC, differs when it comes to definition of the border line between constitutional, and guaranties of judicial independence prescribed by law. This "discriminatory" approach was clearly articulated in 2007, through the Venice Commission's Opinion CDL-AD(2007)028 (par. 5 6)[3]. The Commission admitted that in some older democracies, systems exist in which the executive power has a strong influence on judicial appointments. At the same time, the Commission stated that such systems may work well in practice and allow for an independent judiciary because the executive is restrained by legal culture and traditions, which have grown over a long time. Contrary to this, the new democracies have not yet had a chance to develop these traditions, which can prevent abuse (CDL-AD(2007)028, par. 45).

However, limitations in developing the "tailor-made legislation" for candidate countries are not exhausted in above mentioned opinion. The Venice Commission has gone further in its views stating that at least in new democracies explicit constitutional provisions are needed as a

[3] European Commission for Democracy through Law (Venice Commission),CDL AD(2007)028, Judicial Appointments Report adopted by the Venice Commission at its 70th Plenary Session (Venice, 16–17 March 2007).

safeguard to prevent political abuse by other state powers in the appointment of judges. What does that mean in practice? When the detailed constitutional guaranties of judicial independence are in place, the chance for political interference through legislative amendments is limited (CDL-AD(2007)028, par. 46).Without denying that there is a positive logical pattern in such approach of the Venice Commission, it stays unclear who, when and based on which criteria made the decision on division of European countries in two "qualitative groups"? Furthermore, as it is even obvious that there is neither a list of the countries with the great democratic tradition nor of those classified as new democracies, it seems a bit inappropriate to raise such issue in expert or EU bureaucracy circles. The status of "those who need to meet EU standards" is obtained by every single country through the Venice Commission's opinions on constitutional, or amendments to judicial legislation.

3. THE KEY ISSUES THAT EU STANDARDS OF JUDICIAL INDEPENDENCE DEAL WITH

In general, the guaranties of judicial independence could be sorted in two groups. The first one deals with guaranties of independence of judiciary as the branch of government, in order to allow realization of the "checks and balances" principle, as well as to provide a solid ground for realization of the individual guaranties of judicial independence, such as permanency of tenure, guaranties of financial independence, immovability, functional immunity, limited ground for removal, etc. It is important to notice that there are significant differences in level of interest in particular type of guaranties among legal professionals. While guaranties of independence of judiciary as the branch of government are continuously being subject of discussion, it seems that only permanency of judicial tenure still tends to be an individual guaranty that needs further clarification.

Since there are no EU directives and regulations in this field, the relevant EU standards are derived from various acts adopted by the United Nations and relevant committees of the Council of Europe, especially the Committee of Ministries and Consultative Council of European Judges (hereinafter CCJE), as well as from the opinions of the Venice Commission. Even the Venice Commission noticed that there are large number of texts on the independence of the judiciary that exist at the European and international level. Having that in mind, all the above mentioned guaranties should be considered as a tool for establishment of the system that allows realization of the "checks and balances" principle, preventing the misinterpretation and abuse of the concept of judicial independence.

It could be said that "independence" became the buzzword of justice reform in transitional countries that is promoted and frequently used beyond the scope that includes impartiality, competence, quality, accountability and efficiency. The independence of judiciary has been wrongly understood and misinterpreted as the right on some kind of self-perpetuation and corporatization of judiciary. Contrary to this, efforts of executive or legislative power to have a strong influence or total control over the judiciary are sometimes so intensive that they don't even try to hide them. Producing a so called "parrot judges" is usually defended by arguments related to necessity of compliance of a "judge's basic outlook on life, his attitude to life and his politics" with the policy of government.[4] Additional problem could be found in some kind of "forced widening" of standards dealing with judicial independence, on position of public prosecution service that is, in its nature, different from judicial. This difference is significant to the extent that shall be subject of a separate analysis.

Commonly, the right solution should be found in a balanced approach that assumes application of basic principles of democracy, where no branch of government should be potentially self-perpetuating." A mature democracy requires those who exercise significant public power to hold themselves open to account. Judicial power ought not to be excluded from accountability requirements. The challenge is to develop mechanisms of accountability that do not undermine judicial independence."[5] Without such a balanced approach, one branch of government is in danger of effectively becoming a "self-perpetuating oligarchy".[6] The imperative of every state has to be identification of an ideally balanced normative and institutional scope that stays in line with the Venice Commission request to avoid both – the risk of politicization and the risk of self-perpetuating government of judges.[7]

The fact that the Republic of Serbia has been placed in above mentioned category of the new and young democracies became obvious after submitting the Venice Commission opinion on the draft Constitution in

[4] F. Musthafa, "Does the Government want parrot judges"*, http://www.livelaw.in/ government want parrot judges/*, last visited 14 October 2016.

[5] A. Paterson, C. Paterson, *Guarding the guardians? Towards an independent, accountable and diverse senior judiciary,* Centre Forum, London 2012, 11. (See also: A. Le Sueur, "Developing mechanisms for judicial accountability in the UK", *Legal Studies,* 1–2/2004, 73–98.)

[6] R. Stevens, "Reform in haste and repent at leisure: Iolanthe, the Lord High Executioner and Brave New World", *Legal Studies*,1–2/2003, 1–34.

[7] European Commission for Democracy through Law (Venice Commission) Opinion on two Sets of Draft Amendments to the Constitutional Provisions Relating to the Judiciary of Montenegro, adopted by the Commission at its 93rd plenary session (Venice, 14–15 December 2012), 20 and 52.

2005[8], where Commission insisted on the complete elimination of the impact of legislative and executive power on the judiciary. The Venice Commission stated that the position of legislative and executive powers is not in accordance with EU standards, which proclaimed independence of the judiciary, in terms of the role that parliament has in the process of electing the members of the High Judicial Council (hereinafter HJC) and the State Prosecutorial Council (hereinafter SPC), court presidents and public prosecutors, as well as of judges and deputy public prosecutors (first election on judicial or prosecutorial function), but also due to the fact that the representative of the Committee on the judiciary, public administration and local self-government of the National Assembly, as well as the Minister of Justice, are members of the HJC and SPC, who participate in decisions of these bodies. One of the most serious critiques of the Venice Commission on Serbian Constitution was directed to three years' probation period for judicial office holders who have been elected on their first tenure. These opinions showed that Serbia will need to go through the long path of alignment with EU standards, but if we look at recent EC recommendations to Serbia[9] and the other candidate countries,

[8] European Commission for Democracy through Law (Venice Commission) Opinion on the Provisions on the Judiciary in the Draft Constitution of the Republic of Serbia, adopted by the Commission at its 64th plenary session (Venice, 21 22 October 2005) and European Commission for Democracy through Law (Venice Commission), CDL AD(2007)004, Opinion on the Constitution of Serbia, adopted by the Venice Com mission at its 70th Plenary Session (Venice, 17–18 March 2007).

[9] In the Screening Report (pp. 21–22) the EC noticed that the independence of the judiciary is, in principle, provided for by the Constitution (Articles 4 and 149). How ever, suggestions given below this sentence, raise concerns regarding common under standing of the relevant EU standards dealing with judicial independence. The EC criti cized the role of the National Assembly in the election and dismissal of judges as substantial shortcoming that creates risks for political influence over the judiciary. The same goes for the relation with HJC, having in mind that the National Assembly also elects eight of the eleven members of the HJC while the other three are members *ex offi cio*, including the President of the Supreme Court of Cassation (appointed by the Na tional Assembly), the Minister of Justice and the chairman of the competent parliamen tary Committee. The EC confirmed that described set up is not in line with EU standards through the comment that "Serbia should ensure that when amending the Constitution and developing new rules, professionalism and integrity *become* the main drivers in the ap pointment process, while the nomination procedure should be transparent and merit based. Serbia should ensure that a new performance evaluation system is based on clear and transparent criteria, excludes any external and particularly political influence, is not per ceived as a mechanism of subordination of lower court judges to superior court judges and is overseen by a competent body within the respective Councils." Even more problematic is a sentence where the EC challenges the role of the Ministry of Justice regarding its role in administration of justice as well as the part of the Report where the EC says that "the judicial reform process should lead to tasking both Councils with providing leadership and managing the judicial system." Also, the probation period has been challenged and described as "very long". See more: *http://seio.gov.rs/upload/documents/eu dokumenta/ Skrining/Screening%20Report%2023 SR.pdf*, last visited 25 May 2016.

we can get a wrong impression about the legal and institutional set up that can be considered aligned with the EU standards. Furthermore, the importance of proper understanding and implementation of the standards is growing in the moment when the Republic of Serbia needs to fulfil its obligations from the Action Plan for Chapter 23 (hereinafter Action Plan)[10] that had been adopted as the response to recommendations from the Screening Report. It seems that there are several issues of crucial importance when, in accordance with the Action Plan, drafting constitutional and legal amendments dealing with judicial independence is concerened: the system of appointment for judges, the role and composition of judicial councils and permanency of judicial tenure.

4. APPOINTMENT OF JUDGES AND SEPARATION OF POWERS

Methods of judicial appointment in Europe vary greatly among different countries and their legal systems, but these rules can be grouped under two main categories: The elective system– where judges are directly elected by the people or by the parliament, and the direct appointment system, where it is possible to establish appointment body or to use existing institutions/bodies. Even though there is no single model that can just be transposed in the national legal systems, there are relatively clear borders of acceptable in line with EU standards and basic principles of democracy. The common idea of all relevant documents that include standards in this field is that "all decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency."[11] On the same path is the opinion of the CCJE[12] which says that "every decision relating to a judge's appointment or career should be based on objective criteria and be either taken by an independent authority or subject to guarantees to ensure that it is not taken other than on the basis of such criteria." The most problematic part within this issue is the choice of the authority which will be responsible for appointment of judges. Predominate, but not a single acceptable from the perspective of relevant bodies is that "the authority

[10] Action Plan for Chapter 23, *http://www.mpravde.gov.rs/files/Action%20plan%20Ch%2023.pdf*, last visited 16 October 2016.

[11] *Judges: independence, efficiency and responsibilities Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe, on 17th November 2010 and explanatory memorandum*, Council of Europe, Strasbourg 2011, I.2.c.

[12] Consultative Council Of European Judges (CCJE), Opinion No 1 (2001) of the Consultative Council of European Judges (CCJE) for the Attention of the Committee of Ministers of the Council of Europe on Standards Concerning the Independence of the Judiciary and the Irremovability of Judges, Strasbourg, 23 November 2001, par. 37.

taking the decision on the selection and career of judges should be independent of the government and the administration".[13]

Having in mind this principle and previously mentioned diversity of national legal systems in Europe, the Venice Commission stated that appointments of judges are not an appropriate subject for voting by the parliament because the danger that political considerations prevail over the objective merits of a candidate cannot be excluded. From the perspective of the Commission, elections by parliament are discretionary acts, therefore even if the proposals are made by a judicial council, it cannot be excluded that an elected parliament will not self-restrain from rejecting candidates. Consequently, political considerations may prevail over the objective criteria. Based on this, the Commission suggests the establishment of a judicial council, which should be endowed with constitutional guarantees for its composition, powers and autonomy (CDL-AD(2007)028, par. 47 48), as an appropriate method for guaranteeing judicial independence. Emphasizing that there is a need to put in place constitutional guaranties regarding all relevant issues dealing with judicial council, the Venice Commission underlines importance of its protection from political interference through the frequent legal amendments. "Democratic legitimacy requires a degree of involvement of elected officials in the appointment of those adjudicating on the laws passed by elected officials".[14] Paterson states that doubtless, the separation of powers is an important underlying factor in the appointment and operation of the judges, but underlines unacceptability of this principle as an absolute one in relation to the appointment of judges because the judges cannot be purely a self-appointing body. The same author perceives the appointment procedure which is exclusively in hands of judges, as an opportunity for self-replication.[15]

When it comes to the role that other branches of government (e.g. president of the state) may have in systems where the strong "position for intervention" is reserved for judicial council, according to the Explanatory Memorandum of the European Charter, their "intervention" in that process could be legally articulated as an opinion, recommendation or proposal, as well as an actual decision.[16] In line with the standards, when some other authority is in charge for appointment, the proposals from the council may be rejected only exceptionally, and the other authority would not be allowed to appoint a candidate not included on the list submitted by it. The Venice Commission underlines that, as long as the other author-

[13] *Ibid*., 38

[14] A. Paterson, C. Paterson, 11.

[15] *Ibid.*, 30.

[16] The European Charter on the statute for judges DAJ/DOC(98)23, adopted in Strasbourg in July 1998, par. 1.3.

ity is bound by a proposal made by an independent judicial council, this type of appointment does not appear to be problematic. But again, the Commission emphasizes that this method may function in a system of settled judicial traditions, but its introduction in new democracies would clearly raise concern (CDL-AD(2007)028, par. 14 15).

5. THE ROLE AND COMPOSITION OF JUDICIAL COUNCILS

As the establishment of judicial councils or similar types of bodies has become widely used, increased attention of professionals, politicians and academics is focused on the composition of these bodies and their (non)exclusive role in judicial appointment (and judicial career in general), as well as their other competences regarding administration of judiciary.

It seems that relevant bodies were aware of legal systems' diversity when defining standards relevant for composition of judicial councils. According to the Venice Commission, "there is no standard model that a democratic country is bound to follow in setting up its Supreme Judicial Council so long as the function of such a Council falls within the aim to ensure the proper functioning of an independent judiciary within a democratic State. Though models exist where the involvement of other branches of power (the legislative and the executive) is outwardly excluded or minimized, such involvement is in varying degrees recognized by most statutes and is justified by the social content of the functions of the Supreme Judicial Council and the need to have the administrative activities of the Judiciary monitored by the other branches of power of the State"(CDL-AD(2007)028, par. 28). The European Charter on the statute for judges[17] states that "in respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary." The similar recommendation is consisted in the Venice Commission opinion which says that "substantial element or a majority of the members of the judicial council should be elected by the judiciary itself. But, it is important to notice that, in line with previously mentioned need for application of basic democratic principles, the Venice Commission recognizes a need to include other members of the council beside judges, stated that judicial councils include also members who are not part of the judiciary and represent other branches of power or the academic or professional sectors. Such a

[17] *Ibid.*

composition is justified by the fact that the control of quality and impartiality of justice is a role that goes beyond the interests of a particular judge. Moreover, an overwhelming supremacy of the judicial component may raise concerns related to the risks of "corporatist management". In this mixture composition and the Council's performance of this control, the Commission sees as mechanism that will raise citizens' confidence in the administration of justice." In a system guided by democratic principles, it seems reasonable that the Council of Justice should be linked to the representation of the will of the people, as expressed by parliament (CDL-AD(2007)028, par. 30 31). However, since the involvement of parliament in election of the judicial council's members is acceptable, the Commission recommends qualified majority for the election of its parliamentary component to ensure that a governmental majority cannot fill vacant posts with its followers. From the perspective of the Commission, in order to protect the judicial council from politics, its members should not be active members of parliament (CDL-AD(2007)028, par. 32).

When it comes to involvement of representatives of the executive power in judicial councils (e.g. Minister of Justice), the Venice Commission, having in mind practice of numerous European countries, in general allows possibility of the minister's membership in council, but suggests his exclusion from decision making" concerning the transfer of judges and disciplinary measures against judges, as this could lead to inappropriate interference by the Government"(CDL-AD(2007)028, par. 34). The Commission underlines the necessity to ensure that disciplinary procedures against judges are carried out effectively and are not marred by undue peer restraint (CDL-AD(2007)028, par. 30, 50 51).

The Venice Commission's tendency to provide solution that allows democratic legitimacy of the judicial council as well as to find a balance between judicial independence and self-administration on the one side and the necessary accountability of the judiciary on the other side, in order to avoid negative effects of corporatism within the judiciary, is also visible in its recommendation to elect the chair of the council by the council itself from among the non-judicial members of the council (CDL-AD(2007)028, par. 35).

The situation is quite different when it comes to the competences of the councils that go beyond the scope of judges' career. The Venice Commission is of the opinion that a judicial council should have a decisive influence on the appointment and promotion of judges and (maybe via a disciplinary board set up within the council) on disciplinary measures against them, as well as that an appeal against disciplinary measures to an independent court should be available. While the participation of the judicial council in judicial appointments is crucial, there is no need to take over the whole administration of the justice system, which can be

left to the Ministry of Justice. "An autonomous Council of Justice that guarantees the independence of the judiciary does not imply that judges may be self-governing. The management of the administrative organization of the judiciary should not necessarily be entirely in the hands of judges"(CDL-AD(2007)028, par. 25 26).

6. PERMANENCE OF JUDICIAL TENURE

Even though the permanence of judicial tenure has been included in numerous relevant documents dealing with standards of judicial independence, it seems that there are still some open issues with this regard, such as a decision of every single country to choose between nonexistence and limitation of probation period.

The Universal Declaration on the Independence of Justice[18] (2.19 2.20) provides the same guaranties, saying that "judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or expiry of their term of office, where such exists. The appointment of temporary judges and the appointment of judges for probationary periods is inconsistent with judicial independence. Where such appointments exist, they shall be phased out gradually." According to the Declaration, the term of office of the judges, accompanied with other essential guaranties of their independence, shall be secured by law and shall not be altered to their detriment. In the Declaration it is also emphasized that such a provision is intended to exclude probationary periods for judges after their initial appointment, in countries which have a career judiciary and doesn't exclude possibility of hiring part-time judges where such practice exists. The European Charter on the statute for judges states as follows: "Clearly the existence of probationary periods or renewal requirements presents difficulties if not dangers from the angle of the independence and impartiality of the judge in question, who is hoping to be established in post or to have his or her contract renewed".

Since the probation period has been challenged by supreme courts of some European countries[19], the Venice Commission considered that set-

[18] Universal Declaration on the Independence of Justice, adopted at the final ple nary session of the First World Conference on the Independence of Justice held at Mon treal (Quebec, Canada) on June 10th, 1983.

[19] The Venice Commission underlines importance of the decision of the Appeal Court of the High Court of Justiciary of Scotland (Starr v Ruxton, [2000] H.R.L.R 191 and also Millar v Dickson [2001] H.R.L.R 1401). In that case the Scottish court held that the guarantee of trial before an independent tribunal in Article 6(1) of the European Con vention on Human Rights was not satisfied by a criminal trial before a temporary sheriff who was appointed for a period of one year and was subject to discretion in the executive not to reappoint him.

ting probationary periods can undermine the independence of judges, since they might feel under pressure to decide cases in a particular way. Having that in mind, the Commission stated that this should not be interpreted as excluding all possibilities for establishing temporary judges. Especially in countries with relatively new judicial systems there might be a practical need to first ascertain whether a judge is really able to carry out his or her functions effectively before permanent appointment. Anyway, if probationary appointments are considered indispensable, a "refusal to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office". The Commission pointed that the main idea is to exclude the factors that could challenge the impartiality of judges, and concluded that "despite the laudable aim of ensuring high standards through a system of evaluation, it is notoriously difficult to reconcile the independence of the judge with a system of performance appraisal. If one must choose between the two, judicial independence is the crucial value"(CDL-AD(2007)028, par. 40–43).

7. CONCLUSIONS

As already stated, the "judicial independence" as some kind of reform buzzword tends to be wrongly interpreted and understood. On the one hand, the intention of judges to ensure their own position and unable total control over judicial system is understandable. At the same time, when such an intention goes beyond depolitization, it places the checks and balances principle at risk of corporatization of judiciary. From the perspective of realization of the checks and balances principle, establishing the self-perpetuating judiciary is equally wrong as inappropriate influence of other branches of government. It seems that balancing these two different approaches has become extremely important in the context of fulfilling the EU standards requirements within accession negotiations with EU. Having in mind earlier practice of non-transparency, lack of inclusiveness and ignorance of EU standards limits, it seems necessary to disseminate the correct information on their content, not only among judges, but also among academics, legal professionals and civil society, to ensure constructive dialogue in the process of constitutional amendments. At the same time, it is important to consider judicial independence as a part of wider picture that makes independence a starting point of modern and high quality judiciary which is efficient, competent and impartial. Lastly, but not leastly important is accountability, as a characteristic that shall counterbalance judicial independence. The proper information on what EU standards dealing with judiciary actually provide, should move or at least spread the focus on other important issues besides independ-

ence. As Musthafa has well noticed: "Let judiciary to show the same level of determination and zeal to protect citizens' rights that it demonstrates in preserving its own independence".[20]

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[20] F. Musthafa, "Does the Government want parrot judges"*, http://www.livelaw.in/government want parrot judges/*, last visited 14 October 2016.

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IMPACT OF GENERAL DATA PROTECTION REGULATION ON CHILDREN'S RIGHTS IN DIGITAL ENVIRONMENT

Raising the age of consent to data processing to 16 and allowing member states to set it at a lower age, was one of the major points of argument in the wake of passing the new EU General Data Protection Regulation (GDPR), otherwise hailed for intro ducing the Article 8 that recognizes children as a vulnerable group. This paper ana lyzes legal grounds for concerns raised over the provisions related to personal data protection of minors, possible ramifications and remedies within the given framework. It also highlights innovations and positive solutions set in the GDPR, with respect to privacy risks and opportunities for children in the information society.

Key words: *Data protection. Privacy. Children rights. Information tech nology law. EU law*.

1. INTRODUCTION

One of the most important novelties of the General Data Protection Regulation (GDPR),[1] which will as of 2018 replace the 1995 Directi-

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[1] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing directive 95/46/ec (General Data Protection regulation), *OJ L 119, 4.5.2016*, p. 1 88, *http://ec.europa.eu/justice/data protection/reform/files/regulation oj en.pdf*, 21 June 2016.

ve,[2] is that it contains provisions that deal specifically with the protection of children's data. Although challenging, this is a welcome innovation. EU regulators probably did deserve criticism because 1995 Directive has been age blind. Thus, the fact that the GDPR recognized that children deserve special protection due to their vulnerability should be worthy of applause. The question if this protection is appropriate remains.

Challenge for the GDPR legislators was far from insignificant, introducing rules on protection of data of generations born in the digital age.[3] As opposed to GDPR's legislators, these children are not acquainted with other socializing environment except the one that heavily relies on the Internet. In these modern times children's "real" lives are more than ever internet concentrated. We are all in exponential speed grabbing through digital into Internet of Things (IOT) era.[4] Statistics say that an estimated one in three of all internet users in the world today is below the age of 18,[5] while one in five of all internet users in the EU is a child.[6] Thus, a common tendency that children on the Internet are observed only through the lens of the risks have to change to a more realistic approach, which includes all the opportunities on the other side of spectrum.

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[2] Directive 95/46/EC of the European Parliament and of the Council of 24 Octo ber 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ *L 281, 23.11.1995*, p. 0031 0050, *http://eur lex.europa.eu/LexUriServ/LexUriServ.do?uri CELEX:31995L0046:en:HTML*, last visited 21 June 2016.

[3] SMILE report: Challenges and opportunities for schools and teachers in a digi tal word Lessons learned from the 2012 SMILE action research project, *http://www.eun. org/c/document library/get file?uuid 232671ea 32ca 4272 8b24 20328aafe8bb& groupId 43887*, 21 June 2016: "It is commonplace today to state that we are living through a digital revolution. It is a revolution that has many facets broadband, wireless, the Cloud, big data, and many others and one of the most potent is the emergence of social media. These new and highly social forms of media are radically different from traditional media and they are transforming whole industries as well as large swathes of our cultural, political and economic lives."; D. Frau Meigs, L. Hibbard, "Education 3.0 and Internet Governance: A new global alliance for children and young people's sustain able digital development", *Contribution to the Global Commission on Internet Gover nance* 2015, *https://www.cigionline.org/publications/education 30 and internet gover nance new global alliance children and young peoples sus*, last visited 21 June 2016: "Education 3.0 addresses children's level of autonomy and empowerment on the Internet. This recognises that their online agency is higher than it is offline (i.e. starts from a younger age). Part of this response means transforming the activities of 'solo kids' online into the collective efforts of young people with advocacy skills who can both express themselves and assemble and associate, as part of the exercise of their human rights."

[4] A Brief History of Internet of Things, *http://postscapes.com/internet of things history*, 21 June 2016.

[5] S. Livingstone, J. Byrne, J. Carr, "One in three: internet governance and chil dren's rights", *The Global Commission on Internet Governance, Paper Series,* 22/2015, *https://www.cigionline.org/publications/one three internet governance and childrens rights*, last visited 21 June 2016.

[6] "When Free isn't", eNASCO Report, *http://www.enacso.eu/wp content/uploads/ 2015/12/free isnt.pdf*, 59, last visited 21 June 2016.

How well does the GDPR strike this balance? The answer seems to be in the cornerstone GDPR provision that regulates the age threshold for children's consent to data processing. Article 8(1) of GDPR states the following: "Where Article 6 (1)(a) applies, in relation to the offering of information society services directly to a child, the processing of personal data of a child below the age of 16 years, or if provided for by Member State law a lower age which shall not be below 13 years, shall only be lawful if and to the extent that such consent is given or authorised by the holder of parental responsibility over the child".

It still may be too early for a final verdict. Even though the GDPR applies directly to all EU citizens, there is some space for maneuver left to member states to sort out various potential shortcomings. According to some critics, these are many.

2. THE CRITICISM

2.1. No adequate previous analysis

Most of the criticism from practitioners in the field point out the fact that Article 8(1) went through the last minute change during a trialogue, when the threshold age was raised from 13 to 16 years, seemingly out of the blue.[7] The most questionable issue of this provision is that the respective change has been adopted with no prior stakeholder consultation and no analysis on the matter.[8]

This omission alone means that there is no obvious rationale or arguments for the adopted age threshold.[9] The result is that this core child related provision lacks legitimacy.[10] Moreover and most importantly, in

[7] Bloomberg Law: Privacy & Data Security, Data Processing Consent Age Uncle ar in EU Regulation, *http://www.bna.com/data processing consent n57982066440/*, last visited 21 June 2016.

[8] There has been no age threshold analysis itself for GDPR purposes, but various researches have been conducted under European Commission's (EC) Safer Internet Pro gramme with the aim to analyze various aspects of children's presence on the internet, e.g: *http://eprints.lse.ac.uk/59518/1/ lse.ac.uk storage LIBRARY Secondary libfile shared repository Content EU%20Kids%20Online EU Kids Online Final%20recom mendations%20Sep%202014.pdf*, last visited 21 June 2016.

[9] eNASCO Report, 41–42; CHIS letter to Claude Moraes MEP, Chair of the Eu ropean Parliament's LIBE Committee, *https://johnc1912.wordpress.com/2016/02/27/the eu gets it completely wrong/*, last visited 21 June 2016.

[10] John Carr on the GDPR: Poor process, bad outcomes, *https://www.betterinternet forkids.eu/web/portal/news/detail?articleId 687465*, last visited 21 June 2016: "This is more than merely ironic because in the GDPR itself Article 33 expressly requires everyone else to carry out a data protection impact assessment which takes into account the nature, scope, context and purposes of any proposed data processing where that data processing is

the lack of any justification or underpinning principles policy makers used to set the threshold, it will be very difficult to interpret other provisions of the GDPR that aim to serve for child protection. In other words, since we do not know what the rationale behind 13 to 16 age threshold is, we cannot analyze its impact and suitability for designated purpose. The whole situation being turned upside down, now that we already have the legal provision all we can do is discuss the legal, policy and technical implications it will cause.

2.2. No definition of a "child"

The GDPR does not define "child". Age threshold set out in the Article 8(1) serves only for the purposes of that Article, i.e. for rules regarding the information society services offering. What does this mean in terms of interpreting all other provisions regulating the status and rights of the children? As all the EU member states are signatories of the UN Convention on the Rights of the Child, it seems logical to conclude that definition from that legal instrument should be used (18 years), though it would be better if this issue is explicitly sorted out by GDPR legislators. UNCRC is not mentioned anywhere in the GDPR and the EU is not a party thereto. Thus, alternatively, one may even interpret that GDPR age threshold from the Article 8(1) actually incorporates definition of the child valid for interpretation of all other provisions.

If member states should use the UNCRC definition, this would mean that the GDPR effectively has two streams of rules regarding children: all the provisions where children are mentioned would be applicable to young people aged under 18, while Article 8(1) will be an exception in its own regime. This duality of rules regarding children may potentially cause some misunderstandings and misusage of the GDPR.

2.3. No unique age threshold

The inconsistent age threshold for consent to information society services, ranging from 13 to 16 years, is controversial for at least two reasons: (i) varying threshold, which in theory could differ in each of the member states (a member state is not prevented to set its national threshold to e.g. 14 years and six months, even though this is not common and is highly unlikely) instead of one unique for all states, is directly and seriously jeopardizing one of the GDPR's most important goals – EU harmonization; (ii) there is proof serious enough that a default 16 age threshold

likely to result in a high risk for the rights and freedoms of individuals." Example of legiti mate outcome: *http://blogs.lse.ac.uk/mediapolicyproject/2012/12/18/government response to the consultation on parental controls is good news but raises new questions/*, last visi ted 21 June 2016.

simply too high and sits at odds with numerous studies of child behavior on the Internet.

Regarding the first controversy and a variety of age thresholds across EU, it is evident that problems arising from conflicting laws are inevitable, for service providers as well as for regulators. Legal dilemma here is, among other situations, whether country of origin or country of destination principle will be followed. Fox example if member state 'x' has 13 years threshold, and member state 'y' has 16 years threshold, will controller from state 'x' have to respect higher threshold in country 'y'? This should be the case, otherwise country's 'y' right to set higher threshold would be futile. However, there is no clear answer in GDPR.

Due to the numbers of young internet users, this problem might be much more significant than it appears at first glance. At the moment it is expected that businesses will simply set the highest age (i.e. 16 years) by default, in order to avoid conflict of laws hustle. On the other hand, we will have to wait and see how member states would approach the matter, would they also go down the path of least resistance and adopt a default age, or would they engage more deeply in the analysis and try to make up for the lack of serious policy scrutiny on the EU level. There are concerns however that their decision might not be policy but business driven, as there is a likelihood of some powerful companies lobbying efforts to set a lower threshold in order to meet the terms of the COPPA.[11]

On the other hand, claims that 16 years is simply too high a threshold, which are strongly pointed out by a number of the experts in field,[12] have issues of their own.

2.4. Default age threshold is too high

There are serious arguments that setting the default age to 16 years actually violates children's rights under UNCRC, to which all of the

[11] John Carr on the GDPR: Poor process, bad outcomes: "Is the EU happy to con template or encourage the emergence of diverging youth cultures within the Union? Isn't that the obvious implication of the decision they have made? The ramifications of such a development are potentially quite profound. They should be talked about not allowed to creep in under the radar."

[12] J. Savirimuthu, "EU General Data Protection Regulation Article 8: Has Anyone Consulted the Kids?", *http://blogs.lse.ac.uk/mediapolicyproject/2016/03/01/eu general data protection regulation article 8 has anyone consulted the kids/*, last visited 21 June 2016: "What is missing from the way policymakers have drafted Article 8 is an ability to appre ciate, at a practical level, that if children as individuals are taken seriously, respect for their human rights would mean that their interests and needs are not readily assumed to be aligned with those of their parents. Also: Article 8 seems like a policy prescription attem pting to address the future and does nothing more than mirror prejudices of the past." A. Pals, GDPR from a youth perspective, *https://www.betterinternetforkids.eu/web/portal/news/detail?articleId 687738*, last visited 21 June 2016.

member states are a party. Among others, UNCRC guarantees children the right to access information, to express their views and to participate in the decision-making processes, the right to learn and to develop, etc.[13] The legal rule from Article 8(1) in its effect bans children younger than 16 to actively participate in many activities on the Internet, most of which are worthy means of communication and participation, although they bear some data protection risks.[14]

In the lack of an adequate age threshold analysis, there is no way to understand how well does the adopted threshold strike the balance between data protection related risks and harms on one hand, and children's rights (UNCRC) on the other.

In the words of Sonia Livingstone, a professor at the London School of Economics and Political Science: "Even when specific provision is made for children, it focuses heavily on child protection, especially in relation to illegal activities that threaten children. This is important, for sure. But beyond this, children's rights to protection must somehow be balanced against their rights to participation, since addressing the former in isolation risks the unintended consequence of infringing the latter."[15]

The respective GDPR provision might be the result of indiscriminating between younger children and younger teenagers. A recent research indicates that a dividing line might be drawn between the children according to their school maturity,[16] and it is this differentiation that GDPR legislators appear to have ignored completely.

While it might be that younger children really do not understand the implications of their online activities and data protection risks, teen-

[13] On UNCRC rights see Young and Well Cooperative Research Centre, Melbourne 2014, *http://www.unicef.org/publications/files/Childrens Rights in the Digital Age A Download from Children Around the World FINAL.pdf*, last visited 21 June 2016.

[14] Open letter of members of the ICT Coalition for Children Online who have been following negotiations on the GDPR, *http://www.ictcoalition.eu/news/96/GDPR%3A parental consent from age 13 to age 16, possibly a mistake*, last visited 21 June 2016; Smile report, 24: "Social media can also be used to provide an authentic audience for children's work"; A. Third *et al*., "Children's Rights in the Digital Age: A Download from Children around the World, One in three: internet governance and children's rights", *Young and Well Cooperative Research Centre*, Melbourne 2014, 5, 12, 16: "However, children's rights encompass protection, provision and participation rights, not only protec tion rights."; Council of Europe Explanatory Memo, *http://www.coe.int/en/web/internet users rights/children and young people* and *https://search.coe.int/cm/Pages/result de tails.aspx? ObjectID 09000016805af669*, last visited 21 June 2016.

[15] One in Three: Internet Governance and Children's Rights, *http://blogs.lse.ac.uk/ mediapolicyproject/2015/11/02/one in three internet governance and childrens rights/*, last visited 21 June 2016.

[16] S. Livingstone, K. Ólafsson, E. Staksrud, *Social networking, age and privacy*, EU Kids Online, London 2011, *http://eprints.lse.ac.uk/35849/*, last visited 21 June 2016

agers might be much more aware of those (even more than their parents) or might even be using the internet services to connect with their community through social networks in situations when they encounter problems and seek out the solution. Internet for teenagers is a valuable source of news and possibilities for engagement, as well as an efficient tool for engagement in civil society and environmental issues,[17] while GDPR could seriously jeopardize all those indispensable benefits.

2.5. No distinction between consent and authorization

The GDPR in Article 8(1) requires that consent is "given or authorised", but does not provide an explanation as to what is the difference between the two activities, be it material or technical. This may give a rise to doubts with regard to the nature of the parental consent, or even the moment when the consent can be given, e.g. could it be that a parent can authorize child's consent at some later point of time, after the data processing has already commenced.

This question might also be relevant in situations when a child has lied about his/her age, and the parent finds out. Can that processing be "authorized" by the parent at a later moment? Also, how should these situations be interpreted in the light of the right to objection and the right to erasure? Who would have these rights, a parent or a child, or both, and in which moment?

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[17] L. Magid, "Europe Could Kick Majority of Teens Off Social Media, and That Would Be Tragic", *http://www.huffingtonpost.com/larry magid/europe could kick majorit b 8774742.html*, last visited 21 June 2016: "Teens also use social media for engagement, not just to keep up with their friends and family (important in its own right) but to engage in civic activity. Social media is not only today's 'water cooler', but today's town square. It's the place where young people mobilize support for environmental causes, better health care, educational reform and so many other critical issues. To deny youth access to social media is to ban them from the important conversations that will shape their and our world. Nobel Peace Prize laureate Malala Yousafzai, who is now 18, started speaking publicly about the rights of women and girls in Pakistan and other countries long before she turned 16. Under this regulation, she could have been prevented from speaking out without her parents' consent. [...] Given what's happening in the world today, we need more youth com municating and participating, not fewer. Although we have heard reports about a tiny num ber of people who may be using social media to radicalize youth, the fact is that there are a very large number of people using social media for positive counter speech and to mobilize young people in every country and among every ethnic and religious group to seek peaceful solutions to our problems." Also: World Summit on the Information Society, Geneva Decla ration of Principles and Plan of Action, principle 11, *http://www.itu.int/net/wsis/documents/ doc multi.asp?lang en&id 1161|1160*, last visited 21 June 2016: "We are committed to realizing our common vision of the Information Society for ourselves and for future genera tions. We recognize that young people are the future workforce and leading creators and earliest adopters of ICTs. They must therefore be empowered as learners, developers, con tributors, entrepreneurs and decision makers. We must focus especially on young people who have not yet been able to benefit fully from the opportunities provided by ICTs. We are also committed to ensuring that the development of ICT applications and operation of ser vices respects the rights of children as well as their protection and well being."

A guidance on these matters would be more that useful.

2.6. "Holder of parental responsibility" as the only consent giver

The Article 8(1) is drafted very narrowly in terms of who can give consent on behalf of the child. The GDPR gives this right only to the parents or the holders of parental responsibility. However, one may ask why the legislators did not take into account a possibility of introducing certain competences in this respect also to qualified persons that are engaged in schools and education?[18]

There is a number of reasons why some parents would simply not be able to fulfill the role designated for them in the GDPR.

It may easily be conceived that a number of parents or holders of parental responsibility across the EU do not possess enough knowledge, experience or computer skills to exercise this right. On the other hand, information society services have already found their valuable use in various classrooms, by skilled educators. These activities can now be at risk of losing their effectiveness, because parents have to be involved. In other words: "The added layer of bureaucracy required to procure parental permission before any teacher could use information society tools in class would undermine any possibility of schools fulfilling this role, and at the same time stop the valuable flow of guidance that young people are able to take home to parents and siblings".[19]

Parents may also refuse to give consent due to their own lack of understanding as to how information society services function, what their goals are, what the risks and threats are, and most importantly from the GDPR perspective, how their use could put their children's and their families' personal data at risk. Unfortunately, there has been no research regarding the computers skills and literacy among parents across the EU in all the areas that are relevant for their performance of this rather important task envisaged for them in the GDPR.

Finally, the GDPR legislators regrettably did not pay necessary attention to the real life situations when parental responsibility is not performed in the child's best interest. Such parents might as well intentionally misuse their rights and prevent their children from engaging with people who might be of assistance to them through information society

[18] Examples of use of social media in education can be found in Smile Report, 25; also Council of Europe Explanatory memo in its point 3 states that internet safety respon sibilities are vested with "teachers, educators and parents", *http://www.coe.int/en/web/internet users rights/children and young people explanatory memo*, last visited 21 June 2016.

[19] J. Richardson et al., Letter of concern to the draft General Data Protection Reg ulation, *http://www.antibullyingpro.com/blog/2015/12/11/letter expressing concern to the draft general data protection regulation 13to16*, last visited 21 June 2016.

services, while there are proofs that endangered children tend to reach out for help using these tools.[20] Exception provided in the GDPR preamble regarding preventive or counselling services offered directly to a child, does not seem to address this issue with enough necessary clarity.

All these reasons are concisely summed up by Larry Magid: "Some parents may not have the literacy or technology skills to fill out the necessary consent mechanisms, others may be afraid to provide information that they fear might get into the hands of government or immigration authorities, many will simply be confused by the consent mechanisms, some may be too busy or too preoccupied with the challenges of providing for their families. There will be many parents who will refuse to give consent because they don't want to support their children's curiosity in such areas as religion, civic engagement or sexual health or orientation. And, sadly, there are some parents who abuse or mistreat their children who may want to keep them from being able to reach out for help".[21]

Therefore, since we are now left with narrow wording of Article 8(1), the focus should turn to the education of parents. Due to the pace at which digital age has familiarized Internet with everyday lives of people, internet education for children is likely to be more detailed and substantive than the one their parents receive. Thus, it might be that some children are more IT literate than their parents.[22] There is a research indicating that children possesses more experience then their educators particularly in the field of social media.[23] But since it is the parents who should give the consent, their IT literacy should be at an appropriate level. The question is: does the EU bear responsibility in bringing forward this issue, and if yes, how it should be implemented?

2.7. Other issues

Practitioners in the field have raised certain additional questions regarding the interpretation of the Article 8(1). Namely, Martin Sloan and

[20] J. Richardson et al.: "Sadly, we know that some parents do not always act in their child's best interests. The Internet can represent a lifeline for children to get the help they need when they are suffering from abuse, living with relatives who are addicted to drugs or alcohol, or seeking confidential LGBT support services, to name a few. Although the proposed recital 29 makes an exception for direct counselling services, we know that peer support through media platforms often plays a positive role for young people under physical or mental duress"; also in D. Frau Meigs, L. Hibbard, 22.

[21] L. Magid, Europe Could Kick Majority of Teens Off Social Media, and That Would Be Tragic.

[22] Recommendation Rec(2006)12 of the Committee of Ministers to member states on empowering children in the new information and communications environment, *https:// search.coe.int/cm/Pages/result details.aspx?ObjectID 09000016805af669*, last visited 21 June 2016.

[23] Smile report, 38.

Kathryn Alexander have asked: "It is also unclear whether any form of materiality test will apply. For example, if information is only being collected using cookies will parental consent be required? Or is it only where a particular level/type of information is being collected? Given the multitude of devices and browsers that people use to access information society services, technically managing the consent process will be particularly difficult if the user can access the service without creating a user account".[24]

Even though the GDPR in paragraph 3 of the Article 8 declares: "Paragraph 1 shall not affect the general contract law of Member States such as the rules on the validity, formation or effect of a contract in relation to a child", member states might experience difficulties in harmonizing their contractual laws with GDPR Article 8(1). And some of them, e.g. United Kingdom, would definitely have to adapt their practice regarding use of information society services in order to meet Article 8(1) requirements.

3. ON THE BRIGHT SIDE

3.1. Pioneering legislation focused on privacy

The fact that children's rights and need for their special protection are explicitly acknowledged in the GDPR, and that the GDPR in its various provisions recognizes that children are a group of users that deserve particular protection, is in essence a major step forward.[25] The GDPR also openly acknowledges the children's special position and their needs in online environment through a special reference in the preamble, which reads: "Children merit specific protection with regard to their personal data, as they may be less aware of the risks, consequences and safeguards concerned and their rights in relation to the processing of personal data. Such specific protection should, in particular, apply to the use of personal data of children for the purposes of marketing or creating personality or user profiles and the collection of personal data with regard to children when using services offered directly to a child. The consent of the holder of parental responsibility should not be necessary in the context of preventive or counselling services offered directly to a child".[26]

It has been widely acknowledged that the safety of children on the Internet is a major concern, but before GDPR there has been no legislation whatsoever on the European level that regulated this matter directly.

[24] M. Sloan, K. Alexander, GDPR and the Digital Age of Consent for Online Ser vices, *http://www.scl.org/site.aspx?i ed46357*, last visited 21 June 2016.

[25] G. González Fuster, "GDPR: we all need to work at it!", *https://www.betterin ternetforkids.eu/web/portal/news/detail?articleId 694148*, last visited 21 June 2016.

[26] See items 58, 65, 71, 75 of GDPR preamble.

Regarding the balance of the risks and opportunities stemming from information society services, there are opinions that children's right to privacy (which of course includes their personal data) is at the moment in such need for protection that it should come before other rights. [27] Some research also show evidence that children aged under 16 do not understand information services privacy issues[28] or legal protection available to them.[29]

The threats for children on the Internet are real and unavoidable.[30] Research shows that dangers stem from practice of many information service providers, while on the other hand there are positive examples of privacy non-invasive practices that can be used as role models.[31]

Therefore, what should be explored in more detail is whether children's rights can still be exercised and expressed through other online means. In other words, the question that deserves special attention in assessing the GDPR's impact on children of certain age is: could the same opportunities that are available through information society services be obtained (online or offline) through certain less invasive and harmful tools with regards to data protection?

It should be pointed out that the GDPR is a piece of legislation that primarily deals with privacy (data protection) and not safety in general,

[27] A. Keen, "Free speech shouldn't be more important than the safety of our children", *http://thenextweb.com/insider/2016/02/06/free speech shouldnt be more important than the safety of our children/*, last visited 21 June 2016: "The challenges involved with implementing these kinds of measures do not negate the need to make the internet a safer place for its youngest users. We protect children when they need protecting, not when it's 'feasible'."

[28] S. Livingstone, K. Ólafsson, E. Staksrud, 7.

[29] A. Third *et al*, 49, 74: "Evidence generated by this project overwhelmingly showed that children's greater levels of access to digital media does not imply a greater awareness of their rights in the digital age. Rather, if we are to support children to better realise their rights using digital media, then this will require a concerted effort. To date, it appears that children are not necessarily being given the opportunities to consider how digital media might positively impact their rights, although it is clear that most children have a clearer conception of how digital media might infringe on their rights in the digital age."

[30] EU Kids Online, Findings, Methods and Recommendations, *http://eprints.lse.ac.uk/60512/1/EU%20Kids%20online%20III%20.pdf*, last visited 21 June 2016.

[31] J. Morton, Hacked off, *http://www.toynews online.biz/opinion/read/hacked off/045915*, last visited 21 June 2016; 2015 GPEN Sweep Children's Privacy, *http://194.242.234.211/documents/10160/0/GPEN+Privacy+Sweep+2015.pdf*, last visited 21 June 2016: "Many websites and apps targeted at, or popular among, children are collecting personal information without offering kids and their parents adequate protective controls to limit the use and disclosure of such personal information, or a simple means of deleting an account permanently. That said, one third of websites or apps that were swept demonstrated that they could be successful, appealing and dynamic without the need to collect any personal information at all."

though the critics seem to pay little attention to the difference. Some research imply that children are not concerned with their privacy issues by default when they engage in online activities, on the contrary.[32] Therefore, when conducting analysis of the purpose of GDPR Article 8(1) implications, focus should be placed on data protection related risks, which is only one segment of the online safety risks.

3.2. Clear language adapted to children

The GDPR sets a requirement that any information and communication, when processing is addressed to a child, should be articulated in such a clear and plain language that the child can easily understand it. This principle of transparency aimed particularly at the children is important because of the manner in which children access Internet, that is mostly when they are alone, but also because of the availability of the devices that have internet access (e.g. children's personal phones and tablets).

It remains yet to be seen how the transparency principle would actually be implemented, but given the fact that thus far controllers tended to conceal what they do with the data they collect, a direct pressure to them to reveal their practices should lead to improvements in this respect. With regards to the children, it should lead to a change in perception where children are not treated like just another group of prospective consumers, but a vulnerable group of internet users.[33] Particular spotlight on nature of their consent to data processing seems on one of the big steps forward.[34]

3.3. Indirect influence of GDPR novelties to children

There is a number of GDPR provisions that have generally improved European data protection regime when compared to the 1995 Directive, which indirectly but significantly benefit the children.

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[32] S. Livingstone, K. Ólafsson, E. Staksrud, 18; see also: D. Smahel, M. F. Wright, "Meaning of online problematic situations for children. Results of qualitative cross cultur al investigation in nine European countries", *EU Kids Online, London School of Econom ics and Political Science*, *http://www.ijvs.org/files/EUKIDSONLINE June 2014.pdf*, last visited 21 June 2016.

[33] D. Frau Meigs, L. Hibbard, 21: "As ever younger children access the Internet, the corporate sector has a vested interest in lowering the age barriers of Internet consent (from 13 down to eight), and uses the access to education argument for lobbying purpos es. The sector is effectively not treating young people online as children but as consumers (and even prescribers to their parents), whose uses attract a lot of attention in marketing research."

[34] Linklaters, "The General Data Protection Regulation: A survival guide", *http:// www.linklaters.com/pdfs/mkt/london/TMT DATA Protection Survival Guide Singles. pdf*, last visited 5 September 2016.

One of those is the broadening of the personal data definition, setting a clearly what personal data include (e.g. clear reference to metadata). Such "widening" of the personal data definition is even more significant because of the increase in number of "things" that collect data, including children's data. In addition to a potential complexity of personal data notion for young people, it might be that they experience even more difficulties in understanding of the Internet of Things concept, and the risks arising therefrom.[35]

The GDPR has also set higher standards for consent quality and has narrowed possibilities for controllers to rely on legitimate interest justification. Profiling of personal data is also stricter now when compared to 1995 Directive. In addition to increased obligations of controllers, the GDPR is also setting certain obligations to processors. Commission's powers are widened, in terms of territorial scope of the GDPR application, and in terms of opportunity to impose significant fines.

New rights of data subjects and obligations of controllers and processors introduced by the GDPR also benefit protection of children's data, e.g. privacy by design and privacy by default, data portability, data protection impact assessments etc. In this respect, right to be forgotten i.e. right to erasure is particularly important from children's perspective.

Article 17 of the GDPR particularly states that one of the grounds for data erasure request is when "the personal data have been collected in relation to the offer of information society services referred to in Article 8(1)". Such a provision has incorporated position of Council of Europe on this topic, which is stated in the Declaration of the Committee of Ministers on protecting the dignity, security and privacy of children on the Internet.[36]

In regards to the implementation of the right to be forgotten, the final provision of the Article 17(2) imposes the obligation of the controller that has received erasure request to take reasonable steps to inform other controllers about the erasure request by such controllers of any links to, or copy or replication of those personal data, "taking account of available technology and the cost of implementation", but it does not mention data processors. This could pose a risk that the right to be forgotten cannot be fully implemented.

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[35] On ethical aspects of Internet of Things see: G. Baldini, M. Botterman, R. Neisse, M. Tallacchini, "Ethical Design in the Internet of Things", *Science and Engineering Ethics*, 2016, *http://link.springer.com/article/10.1007%2Fs11948 016 9754 5*, last visited 21 June 2016.

[36] Council of Europe Explanatory memo, point 5; also Council of Europe, Declaration of the Committee of Ministers on protecting the dignity, security and privacy of children on the Internet, *https://search.coe.int/cm/Pages/result details.aspx?ObjectID 09000016805d3d2d*, last visited 21 June 2016.

Finally, even though the GDPR does not explicitly clarify, it should be understood that the right to be erased can be used (i) by children whose data is collected on the basis of their parent's consent, when they reach age above prescribed 13–16 threshold, as well as (ii) by parents whose children lied about their age in order to freely use information society services, if they find out about this before a child reaches the required age threshold.

3.4. Incentive to create privacy friendly business models

As already noted, the GDPR's accent is on data protection. Since the information service providers have shown little care for data protection and privacy issues, especially when children are involved, a change was inevitable at some point. Now that strict rules of the GDPR are in place, business models will have to adapt to this new business environment.

Although one may claim (e.g. the US companies) that children related provision of the GDPR will in practice be the obstacle to innovation, it can also be argued that the current state of affairs favored unproportionally business to detriment of privacy, and that the balance should be restored.[37]

4. CONCLUSION

Although the negotiations of the GDPR were a perfect opportunity to dedicate much more time and energy to get an optimally balanced legal provision regarding the use of information society services by children, it seems that for the moment nothing more could be done on the EU level. In this sense, one possible angle of looking at the 13 16 age range could be that it did leave a necessary maneuver space for member states to take this matter further and make more sensible national legislation. This will of course require additional efforts of all stakeholders, but member states could use the mentioned criticism as guiding tools for making the improvements in national legislation.[38]

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[37] B. Dainow, "Understanding the new EU data regulations", *http://www.imediaconnection.com/article/195098/understanding the new eu data regulations*, last visited 21 June 2016.

[38] M. Schmalzried, "GDPR: A 'flexible' step in the right direction", *https://www.betterinternetforkids.eu/web/portal/news/detail?articleId 687553*, 21 June 2016; see also, E. Lievens, Ending the shifting game: towards true responsibility for children's rights in the digital age, *http://www.lse.ac.uk/media@lse/events/pdf/IAMCR16/Lievens.pdf*, last visited 5 September 2016.

Thus, it will have to be the member states who will balance privacy risks and information society service related opportunities for children aged between 13 and 16. The level of their IT education, when compared to level of their parents' knowledge and experience, should be inevitable part of the balancing result. However, regardless of the actual legislative results, we can conclude that in order for any legal rule to have its intended effect, continued educational efforts of both children and parents seem to be the key to efficient data protection practices across the EU.[39]

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[39] D. Frau Meigs, L. Hibbard, 2: "Children and young people are increasingly re liant on the Internet for their everyday lives. They communicate, share and collaborate online. They use it to learn and play. They recognise its importance for their adult working lives. Considering their increasing access, agency and autonomy in using content and services, their protection as a vulnerable group needs to be coupled with their education as emerging citizens to ensure they develop a healthy and positive relationship regarding the Internet. Their general well being, participation in society, and prospects of employ ment greatly depend on Media and Information Literacy (MIL) as the new set of basic skills for the 21st century, where computational thinking interfaces with the rich and di verse 'cultures of information' (news, data, documents, codes, etc.)."

Smahel, D., Wright, M. F., "Meaning of online problematic situations for children. Results of qualitative cross-cultural investigation in nine European countries", *EU Kids Online* 2014.

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NOTARIAL FORM *AD SOLEMNITATEM* IN MONTENEGRIN LAW

The paper considers the notarial form of legal transactions in Montenegrin law. Notarial legal transactions constitute a novelty within a legal system of Mon tenegro. Notaries started their work only five years ago. The author hereto pays special attention to the significance and functions of notarial form. The law provides for a notarial form as a prerequisite of validity of a number of the most significant contracts in the area of inheritance, family and obligations law. The author has ana lysed regulations pertaining to notary activities when making legal transactions in a form of notarial deed and specified that a constitutive form of certain legal transac tions has given positive results in practice. Legal certainty has increased, especially in legal transactions pertaining to real estate. By impartial instructions to the par ties, a notary makes sure the contracts constitute a result of true will of the parties engaged, that parties understand the legal consequences of undertaken transaction, that valid transactions are concluded and that conduct of court cases is avoided. If these contracts are not concluded in the form of notarial deed, they will not be le gally effective. Notarial deed on any legal transaction shall acquire the status of public document and under certain conditions it may also obtain the status of execu tive title. The probative force of a legal transaction shall thus be increased in gen eral and shall provide the execution without the participation of the court.

Key words: *Notary. – Notary form. – Notary deed. – Solemnization.*

1. INTRODUCTION

A form is an eternal companion of contracts. Throughout the history, the contract law has never freed the contracts from the form.[1] From

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[1] Rudolf von Jhering wrote: Form is the archfoe of arbitrariness, the twin sister of freedom (*Die Form ist die geschworene Feindin der Willtür, die Zwillingsschwester der*

the earliest ages until today it has been present in a contract law, but not always to the same extent, shape and meaning.[2] Form, according to various criteria, can be verbal, written, public, solemn, real, electronic, constituent/essential (*ad solemnitatem*) and evidentiary (*ad probationem*). Notarial form has a special significance among the public forms. However, notarial form of legal transactions constitutes a novelty in Montenegrin law.

Notarial service was introduced into a legal system of Montenegro by Law on Notaries, 2005.[3] Thereby Montenegro joined the majority of European and Non-European countries that have a tradition in implementation of this institute. In Montenegro, unlike some countries having centuries long experience in implementation of notarial service, so far there has been no significant impact of notaries. In medieval coastal towns (Kotor, Budva, Bar, Ulcinj), notariat was substantially developed,[4] but influence of notaries in Old Montenegro was negligible, in the extent of impacts of Venetian and Austro-Hungarian law. Notariat had not been practically affirmed while Montenegro was a part of the Kingdom of Yugoslavia, that is, at the time of validity of the Law on Public Notaries from 1930.[5] Notaries were repealed in 1944[6] and did not exist in a socialist Yugoslavia.

The idea of re-introducing notaries into a legal system of Montenegro came on a wave of a wider movement of public notaries' reform in Central and Eastern Europe at the beginning of 90s of the last century, following the fall of communism in socialist countries. In these so-called

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Freiheit), See R. Zimmermann, *The Law of Obligations: Roman Foundations of the Civil ian Tradition*, Oxford 1996, 88 fn. 125.

[2] See on that in detail: S. Perović, *Formalni ugovori u građanskom pravu*, Bel grade 1964[2], 12 et seq.

[3] *Official Journal of Montenegro*, No. 68/05.

[4] Notary service has been legally shaped by provisions of Statutes of some cities, and a developed notarial activity has been substituting the vagueness of statutory provi sions. The occurrence, establishment, legislative and practical actions of notaries in medi eval communes of Montenegrin coast were also influenced by factors from the other side of the sea and from inland. Thus, the profilation and actions of notaries in Montenegrin coastal towns were also influenced by Roman *ius commune*, Byzantine and Serbian law, as well as local customary law. In the beginning, the same as in all other towns, notarial activities were taken by priests and then, somewhere faster and somewhere slower it came to the laicization of notary service. See V. Korać, "Notarijat u srednjovjekovnim komu nama jugoistočnog Jadrana uticaj na moderna evropska rješenja", *Harmonuis Journal of Legal and Social Studies in South East Europe*, Belgrade 2013, 118–133.

[5] The Law was published in the *Official Journal of the Kingdom of Yugoslavia*, No. 220 LXXVI dated 26 September 1930.

[6] Notary service introduced into the legal system of the Kingdom of Yugoslavia by the Law on Public Notary 1930 was definitively repealed in 1944, although it had never taken hold in the entire territory of Yugoslav community.

transition countries in the process of affirmation of the rule of law and judiciary reform the emphasis was on introduction or privatization of notaries. That request was widely supported by the governments of the Western European countries, judiciary authorities, faculties of law, numerous professional associations, individuals and international vocational organizations, especially by International Union of Latin Notaries (UINL) and the Council of the Notariats of the European Union (CNUE).[7]

By adoption of the Law on Notaries (hereinafter: ZNot),[8] Montenegrin legislator adheres to the Latin concept of notary service. A so-called Latin model of notariat implies legally arranged and organized service performed by notaries as autonomous and independent professionals, individuals to whom the state has transferred its authorities for making public documents which, under certain conditions, may be executive titles. Thus, the citizens and other legal entities became entitled to a free and independent notary service with a possibility of choosing a trustworthy notary at their own discretion.[9] In addition to drawing up, acknowledging and maintaining documents on legal transactions and other facts, these public officers provide legal advice and assist citizens, entrepreneurs and companies, taking into account the interests of each party. Public authorities constitute a barrier to all other legal matters to fall under the competence of notaries.[10] Their work involves independent action separate from the practice of law and other free professions impartial treatment, with the obligation of instructing the parties and keeping the professional secret. Notaries from a Latin model are not allowed, as holders of public authorities, to carry out any other activity, but to exclusively practice their own profession. It is independent from other state services and institutions, but also from its clients because it will always refuse to take illegal activities the party demands.[11]

In Montenegro, as well as in other countries that have adopted the Latin model of notariat, there is a limited number of notaries (total of 65 in Montenegro), and the state territory is divided in areas in which individual notary may perform his functions. *Numerus clausus* and the territorial principle provide efficient, independent and effective operation of notary service. Positioning of registered offices of notaries corresponds to

[7] K. Woschnak, "Javnobilježnička reforma u Srednjoj Europi od 1989. do 1995. iz austrijske perspektive", *Javni bilježnik* 39/2013, 9.

[8] *Official Journal of Montenegro*, No. 68/05, 48/08.

[9] S. Zimmerman, A. Schmitz Vornmoor, "Javnobilježnička služba u Europskoj uniji, Filozofija struke i trendovi razvoja, harmonizacija i ujedničavanje", *Zbornik Pravnog Fakulteta u Zagrebu* 6/2009, 1224.

[10] D. Hiber, "Pojam beležnika (notara) i beležničkog (notarijalnog prava)", *Javnobeležničko pravo* (ed. D. Hiber), Beograd 2006, 18.

[11] Ch. Seger, "*Lex est quod notamus* O uvođenju latinskog Notarijata u tranzici jskim zemljma Istočne i Jugoistočne Evrope", *Nova pravna revija – časopis za domaće, njemačko i evropsko pravo* 1–2/2000, 25.

the interests of clients who demand notary service and is also justified by public interests because it is therefore limiting the unloyal competition.[12] Pursuant to a principle of free access to a notary, any natural person and legal entity, local or foreign one, may turn to any notary in Montenegro.[13] Notary will accept any local citizen who has selected him/her as a trustworthy person, as well as a foreigner[14] or a stateless person and will not deny it a requested service only because it is not permanently residing on the territory of his/her notary area.[15] Thereat, the trust will be their main determinant. It is very important for a party asking for a notary service that the statements made before the notary shall remain the secret. The duty of keeping a secret shall primarily protect the public trust in the obligation of keeping secret since the trust is necessary for the principle of the rule of law,[16] but will also be in the interest of clients themselves.[17]

Notariat rests on the principles of independence and impartiality. These two fundamental principles are also functionally related principles of notary service arising from the position of a notary as holder of public authorities. Independence means freedom from the impact of state authorities, especially of executive authorities. Notary does not act upon the order and instructions of administrative or judicial authorities. He is not under the subordination relation. Civil law legal principle of coordination of wills applies to a notary, and not the subordination rule that is applied in administrative law.[18] Without prejudice, a notary may exercise its service only if saved from external impacts, if acting in accordance with positive regulations and if subordinated solely to the Constitution and the law. Independence manifests as factual (in subject-matter), personal and organizational one.[19]

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[12] J. F. Pillebout, J. Yaigre, *Droit professionnel notarial*, Paris 2012, 22.

[13] On the principle of free access to notary in German law see C. Armbrüster, N. Preuß, T. Renner, *Beurkundungsgesetz und Dienstordnung für Notarinnen und Notare Kommentar*, Berlin 2009, 49 *et seq*. On the same principle in Serbian law see (among many others) D. Đurđević, *Javnobeležnička delatnost*, Belgrade 2014, 39–46; A. Jakšić, "Notarijat kao javna služba", *Javnobeležničko pravo* (ed. D. Hiber), Beograd 2006, 98. See on the right to choose a notary in French law J. F. Pillebout, J. Yaigre, 127.

[14] Compare C. Armbrüster, N. Preuß, T. Renner, 49 Rn. 77.

[15] In that respect see M. Povlakić in: M. Povlakić, Sh. Schalast, V. Softić, *Komen tar Zakona o notarima u Bosni i Hercegovini*, Sarajevo 2009, 90.

[16] H. Eylmann in: *Bundesnotarordnung, Beurkundungsgesetz: BNotO BeurkG Kommentar* (Hrsg. H. Eylmann, H. D. Vaasen), München 2011^3, 231 Rn. 3.

[17] See S. Formage, M. Liatti, "Le secret professionnel du notaire a travers le prisme du droit patrimonial de la famille", 2014, 2 *et seq*., available at *http://dumas.ccsd.cnrs.fr/dumas 01064970/document*, last visited 6 May 2015.

[18] J. Salma, "Konvergencija evropskog notarijalnog prava", *Zbornik Pravnog Fakulteta u Novom Sadu* 2/2012, 46.

[19] See N. Preuss, *Zivilrechtspflege durch externe Funktionsträger*, Tübingen 2005, 179–186.

Counseling of parties when making of a notarial deed shall be a principle task of the notaries. Counseling is connected to impartiality of a notarial profession. Impartial counseling and instructing of parties shall constitute an essential notary duty, grounded by the famous French *Law 25 Ventôse* from 1803 that laid down the foundations for a contemporary model of Latin notariat.[20] Thereby, one will have to be guided by a consciousness and honesty principle. As a general clause originating from a Roman term *bona fides*[21]consciousness and honesty remain the standard of notary conduct in performing their activities.

2. MANDATORY FORM OF NOTARIAL DEED

Montenegrin legislator decided that a certain number of legal transactions has to be concluded in a mandatory form of a notarial deed. A notarial deed is the most important notarial act, the most important document made by a notary, the most creative form of notarial activity. A notarial deed is made by a notary following the request of a party (parties), according to the rules of notarial procedure and by observing elements of the legally prescribed form. He writes down their statements of will for the purposes of execution of their interests.[22] Observance of rules with regard to the form and contents of notarial deed as well as procedures of compiling of this act provide a good guarantee that the respective legal transaction will be valid and the parties thereto shall execute their intended legal consequences. Besides, a contribution to legal certainty also constitutes legislator's committment to consider a notarial deed as public document which in certain cases may also be considered as executive title.

When determining the *ad solemnitatem* form the legislator benefited by comparative legislative practice, without any special and detailed review. Traditional activities of notary are related to some of the family and inheritance relations, as well as to the relations caused by immovable

[20] "Charte constitutive du notariat moderne, la loi française du 25 Ventôse An XI (1803) 22 circonscrit la profession autour du statut d'officier public traditionnellement re connu au notaire", A. Roy, "Notariat et multidisciplinarité: Reflet d'une crise d'identité pro fessionnelle?", *Revue du Notariat* 106/2004, 8, *https://papyrus.bib.umontreal.ca/xmlui/handle/1866/767*, last visited on May 6, 2015; See on that in detail D. Knežić Popović, "Zakon Ventôse, kodeks modernog notarijata", *Arhiv za pravne i društvene nauke* 1–2/2009, 49.

[21] M. J. Schermaier, "*Bona fides* in Roman contract law", *Good Faith in European Contract Law* (eds. R. Zimmermann, S. Whittaker), Cambrige Univeristy Press 2000, 63 *et seq*.

[22] Compare: K. Wagner, G. Knechtel, *Kommentar zur Notariatsordnung*, Wien 2006[6], 10 Rn. 14.

property.[23] According to the Law on Notaries, the following contracts have to be concluded in mandatory form of notarial deed: 1) marriage contracts and contracts on property relations between persons living in the common law community, 2) contracts on disposition of property belonging to juvenile persons and persons without capacity to contract, the scope of which are immovable property or valuable movables and rights; 3) contracts on distribution and use of assets during lifetime, contracts on life-long maintenance and inheritors' declarations; 4) sales contracts by retaining ownership right; 5) promised gifts and agreements on gift in cases of death; 6) contracts regulating transfer or acquisition of ownership or other *in rem* rights over immovable property.[24] Legal transactions whose subject is transfer or acquisition of ownership or other *in rem* rights on immovable property appear to be: the sale contract, barter, donation, hypothec contract, contract on fiduciary transfer of ownership, contract on servitudes, partnership and settlement. Some contracts on company status changes appertain to this group, such as, for example, the contract on separation and merging of companies that posess immovables in their assets. If any of these legal transactions has not been concluded in a form of a notarial deed, it shall be deemed as absolutely null and void. In addition to that, a principle of parallelism of forms applies in our law, meaning that power of attorney for entering into any of these legal transactions will have to be made in a form of a notarial deed.[25] The same principle applies to the preliminary contract,[26] as well as to the consent of a third person.[27] However, it does not apply to the contract on distribution (division) of things because ownership is not transferred and immovable property trade is not executed, considering that co-owners already had ownership.[28] It is different if contract on distribution is an integral part of a marriage contract or sale contract. Different modalities are possible at joint construction contracts and, subject to whether the property rights are transferred under the contract (for example, ownership on the land on which the building was built), we will know if the validity of the contract requires notarial form. But, if we speak about co-investing of the construction, whereat the decision on building permit and use permit is written under the names of contracting parties, form of notarial deed is not required as validity requirement since there is no transfer between the co-

[23] V. Gomez Bassac, E. Pidoux, *Droit notarial*, Paris 2011, 10.

[24] Article 52 para. 1 ZNot.

[25] See Article 86 Law on Obligations, *Official Journal of Montenegro*, No. 47/08, 4/2011 (hereinafter: ZOO).

[26] Article 40 para. 2 ZOO.

[27] Article 22 para. 2 ZOO.

[28] See Decision of the Supreme Court of Serbia, Rev. No. 5478/97 dated 24 Sep tember 1998, "Court decisions", *Anali Pravnog fakulteta u Beogradu* 1–2/2002, 193.

investors of a joint construction, considering that ownership is acquired by original and not derivative mode of acquisition.

According to the explicit legal provision, the parties shall be entitled to also require a form of a notarial deed for other legal transactions.[29] The parties may require a form of a notarial deed for a legal transaction for which the law stipulates a different form. Freedom to choose the form is a manifestation of freedom of contracting.[30] For example, for each apartment lease contract, the ZOO stipulates a form of public certified (legalized) document (so-called qualified written form), but parties may agree on a form of a notarial deed. The agreed form must then be stricter, to be in a hierarchical relationship with the statutory one and to absorb a prescribed form within.[31] Agreeing on a form stricter than the one stipulated by the law shall not violate the public interest, and shall additionally protect the private interests of the parties hereto.[32] Notarial deed, as a stricter form, may replace a written form or a form of legalized document.[33]

Notarial deed is not the only form of contract in which immovable property can be transfered. The legislator has prescribed a competing form of solemnized notarial document. In Montenegrin notary law, solemnization specifies a deed on certification of a private document made by the notary. By this notary action, the certified private document obtains the capacity of a notarial deed. Therefore, a private document is by solemnization turned into a public document.[34]

The original 2005 Law on Notaries text did not envisage a solemnization.[35] The 2008 reform introduced a possibility of solemnization of all legal transactions without compiling a special notarial deed.[36] Legislations of Croatia and Serbia do not allow solemnization of private documents on legal transactions concluded in a mandatory form of a notarial deed. The same was in the legislation of a former Kingdom of Yugoslavia. Also, legislation of Bosnia and Herzegovina does not envisage sol-

[29] Article 52 para. 4 ZNot.

[30] R. Bork, *Allgemeiner Teil des Bürgerlichen Gesetzbuchs*, Tübingen 2006[2], 393 Rn. 1044.

[31] M. Vuković, *Obvezno pravo, knjiga II*, Zagreb 1964, 76.

[32] See on that in detail M. Karanikić Mirić, "Ugovorena forma ugovora o otuđenju nepokretnosti", *Srpska politička misao* 2/2015, 322 *et seq*.

[33] Compare for German law D. Leipold, *BGB I: Einführung und Allgemeiner Teil*, Tübingen 2008[5], 230 Rn. 18; See also § 126/4 BGB and § 129/2 BGB.

[34] K. Wagner, G. Knechtel, 252 Rn. 1.

[35] See V. Korać, "Notari i notarska služba u Crnoj Gori", *Zbornik Pravnog fakulte ta u Podgorici* 36/2008, 314 *et seq*.

[36] Article 14 Law on Amendments to the Law on Notaries, *Official Journal of Montenegro*, No. 48/08.

emnization of legal transactions by a notary. We deem it would be more appropriate and would have more justification if Montenegrin legislator adopted the solution already existing in Croatian and Serbian law, because wide possibility of certifying documents on legal transactions practically equalizes solemnization and notarial deed. And solemnization, according to its legal nature, is treated as the middle ground between the legalization (certification of signature) and making of notarial deed.[37]

In Montenegrin law, any private document on a legal transaction is eligible to be solemnized. The following may be drawn up in a form of a private document: contracts on disposition of property belonging to persons without capacity to contract, the scope of which are immovable property, contracts on life-long maintenance, sale of immovable property, hypothec contract and all other legal transactions the parties may ask to be solemnized. A solemnized document is equated with the notarial deed, and the parties may choose whether they will enter into a legal transaction prescribing a notarial form *ad solemnitatem* in a form of a notarial deed or in a form of a solemnized private document.

Therefore, the notaries do not have an exclusive monopoly in providing legal services. The parties may write the contract that has to be concluded in mandatory notarial form (for example, hypothec contract, or sale of immovable property) alone or with assistance of a legal expert and certify such written private document before the notary. Montenegrin legislator equalized the notarial deed and notarial solemnization and made them competing forms, which is not customary in comparative law. Such a solution has its good and its bad sides. The benefits lie in prevention of the notary monopoly, where they would be the only ones to make contracts whose validity requires notarial form. The parties are hereby given the opportunity, in the market of providing legal services, to choose whether their contract is going to be made by a lawyer, notary, or any other legal expert. The negative side of this solution reflects in a possibility to also solemnize a private documents on legal transactions for which is prescribed a notarial form *ad solemnitatem*. Thus preventive function of a notary is weakened, since he is not taking part in making of the legal transaction from the beginning, and is not compiling the text of a legal transaction (contract, will), regardless of the fact that only a private document, which is in accordance with legal provisions on a form and contents of notarial deed, may be certified. Instructing and counseling the notary is providing before and during the written editing of the legal transaction; having a different meaning from the warnings and clarifications the notary has to make in the process of solemnization. When the parties bring a written legal transaction text for their certification, the actions of counseling, introducing with the contents of a legal transaction

[37] D. Đurđević, 229.

and giving the statement that it complies with the true will of the parties are in practice brought down to the formality. Still, in the notary practice so far, the parties were the ones dominantly selecting a form of a notarial deed. In addition to the freedom of choice, notarial solemnization was practiced in less than 10% of cases. The reasons why the parties are more frequently deciding to use the form of a notarial deed compared to the form of notarial solemnization lie in the confidence which notaries as holders of public authority have. But, there are also financial reasons (at solemnization, the party is paying to both the notary and the lawyer). *De lege ferenda* a certain number of the most significant legal transactions should be designated as transactions that have to be concluded in the exclusive form of a notarial deed and private documents on these legal transactions would not be suitable for the solemnization.

A similar solution was also prescribed in Serbia, but applied only for a few months in 2014. Since the beginning of 2015, following the agreement between the government and lawyer's profession representatives, solution for concluding the immovable property trade contracts in a form of a notarial certified (solemnized) document was adopted.[38] However, parties may still agree on notarial deed as a form stricter than the legally prescribed one. This is a dominant opinion in Serbian legal theory,[39] based on the principle of autonomy of will and the general provision of the Law on Obligations (Article 69), allowing the parties to agree upon a special form for the validity of their contract.

Pressure of lawyer's (advocate) profession in Serbia, Bosnia and Herzegovina and Macedonia had an impact on amending of legal solutions regarding the form of the immovable property trade contracts, with their request to abolish the exclusive monopoly of notaries in the market of legal services. Therefore, after 15 years of application, the Constitutional Court of the Federation of Bosnia and Herzegovina repealed the provisions of the Law on Notaries (Articles 6, 27, 73) that guaranteed exclusivity in making certain legal transactions to notaries. The judgment explained that notary service had been thus directly favoured in relation to the law practice, which was contrary to the Constitution. This, in turn, created inequalities before the law and discrimination in relation to other legal professions to enter contracts and other legal transactions. [40] In Macedonia, a special solution on participation of lawyers in the procedure of providing notary services was proposed. Proposal of the new Law on

[38] The Law on Public Notaries, *Official gazette of the Republic of Serbia*, No. 6/2015.

[39] See (instead of many) M. Karanikić Mirić, 320 fn. 19.

[40] See Decision of the Constitutional Court of the Federation of Bosnia and Her zegovina, No. U 15/10 dated 02 December 2015, *Official gazette of the Republic of Fed eration of Bosnia and Herzegovina*, No. 30/16.

Notaries envisages mandatory participation of lawyers, as attorneys of the parties in question, when drafting a notarial deed, if legal transaction value exceeds the amount of 20,000 euros. Additionally, it is envisaged that a lawyer drafts contracts and preliminary sale contracts as well as documents on legal transactions to be solemnized by a notary, if the amount of transaction exceeds 10,000 euros.[41] Such compromise of traditionally opposed interests between the notary and legal profession is not, in our opinion, in accordance with the concept of Latin model of notariat. However, position of the European Commission certainly contributed to this by striving for economic liberalization and deregulation of the Latin notarial system whose rules, allegedly, are hindering business operations. In this regard, back in 2011, the European Court of Justice passed the judgments that nationality may not be a condition for obtaining the status of Notary, nor an obstacle for providing of notarial services,[42] which is a potential threat to endangering the character of a notarial deed as a public document, being the main product of notarial activity.

Solution on a role of notary in transactions of immovable properties practically constitutes the most significant novelty in operation of notary service in Montenegro.[43] Laying down of a notarial deed as essential form for legal transactions transferring ownership and other *in rem* rights on immovable property is fully justifiable according to our opinion. Since these are the things of high value and a significant commercial resource governed by a larger number of regulations, whose sales is often

[41] Article 54, 55 and 56 para. 3 Proposal of the new Law on Notaries, available at *http://www.pravdiko.mk/wp content/uploads/2015/12/copy of predlog notarijat do vlada 20122015 1.pdf*, last visited 15 May 2016.

[42] See Judgments C 47/08 *European Commission v Kingdom of Belgium*; C 50/08 *European Commission v French Republic*; C 51/08 *European Commission v Grand Duchy of Luxemburg*; C 53/08 *European Commission v Republic of Austria*; C 54/08 European *Commission v Federal Republic of Germany*; C 61/08 *European Commission v Hellenic Republic*, available at *http://curia.europa.eu/.*, last visited 30 May 2014.

[43] Legislator envisaged that a mandatory form of notarial deed is used for making legal transactions whose subject matter is transfer of *in rem* rights on immovable properties, which is not a frequent provision in a comparative legislation. *Ad solemnitatem* notarial form for immovable properties sale is envisaged by German (§311b and §925 BGB), Greek (Article 369 Civil Code), Swiss (Article 216 Law on Obligations), Bosnia Herzegovina (Article 73 Law on Notaries) and by French law to a certain extent (see Article 1601 2 Code Civil for so called VIC (*a vente d'immeuble à construire*). Law on Public Notaries of Serbia, in its original text, also envisaged that immovable properties disposal contracts are made in a form of notary deed, but enforcement of this provision was postponed in two years (See Article 82 para. 1 and Article 182 Law on Public Notaries, *Official gazette of the Republic of Serbia*, No. 31/11, 85/12 and 19/13). This legislative solution was changed by reform of the Law from 2014 (*Official gazette of the Republic of Serbia*, No. 121/2014) and the mandatory form of notarial deed was envisaged only for the immovable properties disposal contracts concluded by persons with incapacity to contract.

the subject of court disputes, a notarial deed is the most optimal form for contracts conveying rights on these objects. Such stand is also advocated in legal theory of some other countries of former SFRY which have adopted a similar provision.[44] This provision of the Law on Notaries shall contribute to legal certainty in this area, especially with immovable property sale contracts and hypothec contracts, as the most frequent legal transactions whose subject is related to immovable properties. It will to a significant extent remedy the obvious weaknesses in immovable property files kept in the public register. Real estate cadastre has not been prepared for the entire territory of the state yet, the data are often inaccurate and their updating is not complete. Notaries will therefore contribute to certainty in transfer of rights on immovable properties, they will verify ownership of transferor, update the entries into real estate cadastre and prevent multiple sales. Electronic connection between the notaries and real estate cadastre will by all means contribute to the same.

The mandatory form of a notarial deed has superseded the former private document on legal transaction conveying the rights on immovable property by public document which may also serve as executive title. A former practice of preparing the forms of immovable property contracts[45] by parties themselves, by pettifoggers or real estate agencies was eliminated. Often in these cases right of preemption has not been observed, existence of joint ownership of spouses has not been observed, legal and material deficiencies, which caused numerous litigations on contract annullment.[46] In addition to their duty to make notarial deeds on contracts that conveys ownership and other *in rem* rights on immovable property, notaries may, by will of their parties, be entrusted the other jobs related to immovable properties, such as having a direct insight into the public register, obtaining the consent of a third party, control of the price maturity, payment of the price through notarial account intended for parties, submission of application for registration, registration of notes and priority notice in real estate cadastre.[47]

Now the notaries are checking if the seller, or other transferor of *in rem* right is the sole owner or there is the title of many persons (joint owners). Thus they are preventing the litigations that have often been

[44] D. Đurđević, 230 231; M. Živković, V. Živković, "O uvođenju javnog beležništva u Srbiji", *Zbornik Pravnog Fakulteta u Zargebu* 2/2013, 440 i 441; M. Škaljić, "Uloga i značaj latinskog tipa notarijata u oblasti stvarnih prava u Bosni i Hercegovini", *Referat na stručnoj konferenciji Uloga i perspektiva notarske službe u BiH*, Sarajevo 2013, 9 *et seq*.

[45] This refers to contracts that convey ownership and other *in rem* rights on im movable property (e.g. sale contract, donation, hypothec contract).

[46] In that respect M. Škaljić, 13.

[47] M. Povlakić in: M. Povlakić, Sh. Schalast, V. Softić, 139.

conducted in cases when a spouse alienated or pledged immovable property without the knowledge of other spouse. Likewise, they may also check the tax debt encumbering the respective immovable property as well as so-called overheads (electricity, water, utility bills) that have not been settled by the transferor of rights on the respective immovable property.[48] This solution will in future eliminate unregistered ownership that had not been a rarity in the past, especially in the period of social ownership dominance, where donation and sale contracts have been concluded, but no registration of the ownership was entered into the public registers. Additionally, a mandatory notarial deed provides regular settling of tax duties with regard to the sale of immovable property, since notary submits a copy of a notarial deed to the competent tax authority.[49] Further on, when making the deed on acquisition of *in rem* right on immovable properties a notary controls the scope of foreigners' rights to acquire ownership over immovable properties in Montenegro and at the same time investigates a client when there is a risk of money laundering.

3. MULTIFUNCTIONALITY OF A NOTARIAL DEED

The form of legal transactions in modern law is not a purpose to itself. Different forms (written, real, solemn, electronic, notarial) should in a specific case reach the expected goals and protect certain interests. Formal requirements, as tools of legal techniques,[50] are instrumentalized in order to transport content to the intended recipient.[51] A contract form may be in the public interest, interests of the contracting parties and third parties interest. Although the rights and duties of the contracting parties arise due to their freely expressed will, and not the form, it often happens that the law or parties themselves require fulfillment of a certain form as a prerequisite for the validity of the contract (*forma ad solemnitatem* or *forma ad substantiam*[52]). On the other hand, the form is sometimes just only way of providing evidence about the contents and entry into the contract (*forma ad probationem*). A protective and evidence functions of the form are most frequently indicated as objectives of the form, but registration and control functions are also significant.[53] Authentication, iden-

[48] M. Škaljić, 12.

[49] Article 82 para. 4 ZNot.

[50] See G. Grumetto, "La Forma" in: F. Pasquale (a cura di), *Il contratto*, Milano 2012, 893 with reference.

[51] P. Mankowski, "Information and Formal Requirements in EC Private Law", *European Review of Private Law* 6/2005, 781. Form is a loyal servant of a substantive purpose, substance reigns over form.

[52] This notion is used almost exclusively in Italian literature.

[53] H. Kötz, A. Flessner, *European Contract Law, Volume 1: Formation, Validity, and Content of Contract; Contract and Third Parties, Translated by Tony Weir*, Oxford

tification, communication, information, demarcation, warning, regulatory and control functions have been recently introduced.[54]

All legal systems are to a greater or lesser extent familiar with the formalization of the declaration of intent.[55] Observance of the form will lead to expenditures, efforts, loss of time and delay in entering into a legal transaction.[56] Freedom of choosing the form will facilitate legal traffic, and for the form prescribed by law as an exemption from this principle a justification will be required. Expenditures related to the observance of the form will have to be worthwhile. There is a link between the rules governing the procedure of making a notarial deed and the objective the form of the same deed has to reach.[57] Its worthiness will mostly depend on the purpose of the form. Legal traffic will have to be subject of overall benefits through form. Regulations regarding the form cannot always easily demonstrate it since their essential benefit constitues of preventing inefficient, hasty and unconsidered legal transactions. Costs of individual participants shall make one factor and benefit of the society as a whole, through effects, shall make the other factor.[58]

In legal theory we distinguish formal and material functions of the forms of notarial deed.[59]

4.1. Formal functions of a notarial deed

The first formal function is shown in creating the increased probative force of notarial deed as public document.[60] Practically, the most frequent objective of the form is the probative force since formalization provides the documentation and the documentation enables, if necessary, additional presentation of evidence.[61] Original of a notarial deed must be

2002, 78 *et seq*; S. Perović, 42–44; S. Cigoj, *Obligacije*, Ljubljana 1976, 323; S. Perović, *Obligaciono pravo*, Belgrade 1980, 196; O. Stanković, V. Vodinelić, Uvod u građansko pravo, Belgrade 2007[5], J. Radišić, *Obligaciono pravo*, Belgrade 2008[8], 112; 165 Z. Rašović, *Građansko pravo*, Podgorica 2009[2], 278.

[54] See P. Mankowski, "Formzwecke", *Juristen Zeitung* 13/2010, 663–668. In this paper, the author discerns 16 form functions.

[55] See historically and comparatively K. Zweigert, H. Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts*, Tübingen 1996[3], 359–371.

[56] P. Mankowski (2010), 662.

[57] C. Armbrüster, N. Preuß, T. Renner, 8 Rn. 14.

[58] P. Mankowski (2010), 663.

[59] R. Arnet, "Form folgt Funktion: Zur Bedeutung der öffentlichen Beurkundung im Immobiliarsachenrecht", *Zeitschrift des Bernischen Juristenvereins (ZBJV)* 149/2013, 402, *http://www.rwi.uzh.ch/lehreforschung/alphabetisch/arnet/person/publikationen/Separata ZBJV 05 2013 Arnet.pdf*, last visited 15 May 2015.

[60] R. Arnet, 402.

[61] P. Mankowski (2010), 663

kept since there is always a possibility of issuing transcript. Notarial deed shall be a dispositive (constitutive) public document since the document contains a legal transaction undertaken by parties hereto (e.g. contract, will).[62] Notarial deed as public document shall have a full probative force.[63] The principle of legal evaluation of evidence shall apply to it and on the other side the principle of free evaluation of evidence for the private document.[64] The Law prescribes that the court must consider what is acknowledged or determined in a public document as true.[65] The court shall not evaluate its authenticity, its probative value as it evaluates the probative value of private document. The assumption of authenticity and accuracy shall apply to a public document. It means that the document was issued by the authority designated hereto as issuer[66] and that the contents of the document is true (accurate), that is, that the contents of the document conform with the facts.[67] However, these are rebuttable presumption (*praesumptio iuris tantum*), and evidence may be presented contrary to the public document. Authenticity of public document in case of any doubt shall be verified by the court *ex officio*. According to the Article 226 ZPP, the court may, for the purposes of avoiding any doubt about authenticity of the aforementioned document, demand from the authority from which it originates to make a statement in that regard. Suspicion with regard to the authenticity of public document that may arise due to its formal appearance, formal deficiency or content, the court may prove by other means of evidence.[68]

When making a notarial deed the notary shall verify the entire procedure of making the document, including statements regarding the personality of party, as well as the time and place of making the statement. The document compiled with regard to the statement shall constitute a full evidence of the confirmed (verified) procedure.[69] The form will pro-

[62] Compare L. Rosenberg, K. H. Schwab, P. Gottwald, Zivilprozessrecht, München 2010[17], 674 Rn. 9

[63] Compare B. Poznić, *Komentar Zakona o parničnom postupku*, Belgrade 2009, 606. It seems that the expression *full probative force* comes from phrase *vollen Beweis*. See § 415/1 German *Zivilprozessordnung* and § 292/1 Austrian *Zivilprozessordnung*. Ex pressions *pleine foi* from French *Code Civil* (Article 1319) and *piena prova* from Italian *Codice civile* (Article 2700) have the same meaning.

[64] See G. Stanković, *Građansko procesno pravo, Prva sveska, Parnično procesno pravo*, Niš 2007, 433.

[65] Article 226 Law on Civil Procedure, *Official Journal of Montenegro*, No. 22/2004, 28/2005, 76/2006, 47/2015 48/2015 (hereinafter: ZPP).

[66] See W. H. Rechberger, D. A. Simotta, *Grundriss des österreichischen Zivilproz essrechts,* Wien 2010[8], 450 Rn. 796.

[67] W. H. Rechberger, D. A. Simotta, 452 Rn. 798.

[68] B. Poznić, 607.

[69] N. Preuß in: C. Armbrüster, N. Preuß, T. Renner. 29 Rn. 14; P. Jansen, *FGG Kommentar*, Berlin 1971, 40 Rn. 45; Compare P. Limmer in: H. Eylmann, H. D. Vaasen, 1007 Rn. 7.

vide authenticity and guarantee the accuracy of stated wills. The form will disable any manipulation after giving the statement and will mitigate the risk of forging it, which will lead to increasing trust (authentication function of the form).[70] This function of the form shall be accompanied by identification function indicating the statement originates from a specified person. A handwritten signature in particular is providing a unique and inseparable connection to the signatory.[71] Original of the notarial deed is kept and there is always a possibility of providing a transcript. Besides, a full evidence also refers to the identity of a person giving the statement.[72].

Therefore, a notarial deed establishes a full evidence of accuracy and completeness of the process of compiling the document,[73] as well as a comprehensive evidence that the statement has been given at the place and at the time and before the notary as indicated in the deed.[74] It is deemed the statements of will given before the notary are full and accurately reproduced.[75] Therefore, even besides a possibility of contesting the notarial deed within certain meaning, the notarial deed is used for the simplification of legal protection procedure and thereby for making it more efficient.[76]

Other formal function of a notarial deed is manifesting full legal grounds for acquisition of rights. It constitutes a legal ground which, both in formal and substantive meaning, includes all elements necessary for entry into the real estate registers (cadastre of real estate, land registers, etc.).[77]

4.2. Material functions of a notarial deed

One of the material functions of a notarial deed is warning function. The parties thereto may use a prescribed form as protection from hastiness. A complex procedure of compiling and structure of a notarial deed protect the parties from reckless bonding by legal transaction.[78] That

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[70] P. Mankowski (2010), 664

[71] *Ibid.*

[72] N. Preuß in: C. Armbrüster, N. Preuß, T. Renner, 29 Rn. 14.

[73] See P. Limmer in: H. Eylmann, H. D. Vaasen, 1008 Rn. 7;

[74] H. J. Ahrens in: B. Wieczorek, R. A. Schütze (Hrsg.), *Zivilprozessordnung und Nebengesetze Grosskommentar*, Zweiter Band, 3. Teilband, 2. Teil, Berlin 2010, 647 Rn. 28.

[75] This does not apply to so called substantive probative force. See N. Preuß in: C. Armbrüster, N. Preuß, T. Renner, 30, Rn. 15; P. Limmer in: H. Eylmann, H. D. Vaasen, 1008 Rn. 7; P. Jansen, 40 Rn. 45, fn. 42.

[76] P. Mankowski (2010), 663–664.

[77] R. Arnet, 402.

[78] *Ibid.*, 403.

is how the form protect the autonomy of will from itself,[79] which is preventing negative aspects of freedom of contracting.[80] That is why it is said the form has seriousness function.[81]

As an independent professional, a notary is, through counselling and instructing, enabling the vagueness to be remedied and that possible contracting parties make a mindful decision on whether to enter into the contract in a form of a notarial deed or not.[82] If they make the decision to enter into a legal transaction in a form of a notarial deed, the expert advice of a notary may either clarify or avoid divergent interpretation of its contents and thus diminish the potential for any dispute.[83] But not only that, if a legal transaction is executed in a form of a notarial deed there is less possibility to endanger the autonomy of will by unbalance between the contracting parties.[84]

Principle of instructing parties consists of commitment of notary to 1) clarify facts, 2) examine the will (intention) of parties, 3) instruct them on legal consequences of intended legal transaction and 4) fully, clearly and specifically enter such statements of the parties thereto into the notarial act.[85] Establishing facts makes the basis of proper instructions.[86] Notary shall himself examine the accuracy of factual statements of the parties. He should instruct the parties about a significance of legal terms they use and if they are used within their true meaning.[87] Therefore, a notary duty is to establish if legal terminology used by a party actually conforms to its will.[88] Notary must clarify to participants a true meaning of their statements and direct legal requirements for the intended legal success. Instruction includes all aspects necessary according to a true will of the parties thereto for the implementation of formally effective (valid) deed.[89]

A procedure of compiling a notarial deed, specially the duty to instruct, compensates the deficit of experience and knowledge of a weaker

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[79] P. Mankowski (2010), 665.

[80] R. Arnet, 403

[81] P. Mankowski (2010), 665 with reference.

[82] R. Arnet, 403.

[83] See P. Mankowski (2010), 666.

[84] R. Arnet, 404.

[85] See Article 48 ZNot; Compare C. Armbrüster in: C. Armbrüster, N. Preuss, T. Renner, 273 Rn. 17.

[86] Compare K. Wagner, G. Knechtel, 242 Rn. 8

[87] C. Armbrüster in C. Armbrüster, N. Preuss, T. Renner, 273 Rn. 20.

[88] N. Frenz in: H. Eylmann, H. D. Vaasen, 1141 Rn. 5.

[89] *Ibid*., 1143 Rn. 9. In that respect compare V. Softić in: M. Povlakić, Sh. Scha last, V. Softić, 180 without any reference and D. Đurđević, 83 with reference on judgment of the Federal Court of Justice of Germany (BGH).

contracting party.[90] Besides that, a notarial deed additionally builds and secures autonomy of will of the parties by providing them a competent legal expert who shall support parties in using the freedom of creation of their legal transactions through counselling and instructing. In the procedure of compiling a notarial deed, a neutral expert will present the possibilities, chances and risks of creating a intended legal transaction and thus enable the autonomy of parties to be implemented in reality.[91]

4. CONCLUSION

Introduction of notaries and notarial form of legal transactions into the legal system of Montenegro has its justification. For the first five years of notarial practice there has been a substantial increase of legal certainty, especially in the area of legal transactions whose subject-matter is transfer or acquisition of ownership and other *in rem* rights on immovable property. A number of court disputes regarding legal transactions concluded in a notarial form *ad solemnitatem* has been substantially reduced.

Notarial form of legal transactions has its justification through its objective. The objective of *ad solemnitatem* form consists of the protection of private interests of parties, third party interests and public interest. As a preventive judge, notary guarantees entry into a valid legal transaction matching the true will of the parties. Performance of fiscal duties regarding the trade of real estate is more efficient, public records on acquisition, change and termination of *in rem* rights on real estate are better, and prevention of money laundering when entering into legal transaction is more successful. By prescribing a mandatory notarial form for certain legal transactions the State commits both natural persons and commercial entities, when entering into major contracts, to subject themselves to control of a legal professional who holds a public authority.

Observance of strict rules of the form and procedure of compiling a notarial deed guarantees validity of undertaken legal transaction, ensures that the parties will achieve their intended objectives, that third party interests will be protected and public interests obtained. Notary, as a legal expert and impartial trustworthy professional, by instructing and counselling, renders his services to his parties with a huge guarantee that their statements of will are going to create a legal transaction to implement their interests. Notarial deed on legal transaction acquires the capacity and probative force of public document and may become an executive document, if a debtor of monetary obligation or certain quantity of fungi-

[90] See R. Arnet, 405

[91] *Ibid*., 406.

ble things accepts the execution without a delay. It contributes to the speed of legal trade because rights and duties are easier to prove and execution is ensured without the participation of the court.

Besides the reasons of legal certainty, promptness of real estate records and fiscal regularity, an important reason for commitment of Montenegrin legislator to prescribe a mandatory notarial form for legal transactions related to real estate, was also financial stability of notaries. Notaries generate major income from fees paid for compiling of notarial deeds containing legal transactions regarding the transfer or acquisition of ownership and other *in rem* rights on immovable property. As legal experts, notaries would unlikely have any motivation to dedicate to this profession if these jobs would be excluded from their competencies. Notary practice in Montenegro most frequently recognizes notarial deeds of real estate sale contracts and hypothec contracts.

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TYPES OF RELATIONSHIPS BETWEEN THE STATE, RELIGION AND RELIGIOUS ORGANIZATIONS IN EUROPE AN ATTEMPT TO DEVELOP A NEW CLASSIFICATION

Existing theorethical models of relationship between the state and religious organisations is under consideration in this article. European countries have imple mented different legal/legislative solutions which are used for regulating the relation ships between the state, religion and religious organisations. Many authors have classified these different types of regulations in a number of ideal types. Within the context of this paper a new type of classification which is based on two separate di mensions of the relationship towards religion and religious organisations is present ed. The first dimension is intimately interlinked with the laicisation of the state, whilst the second one is linked with its secularistion. These dimensions are measured by an in depth study of a number of variables. Data based on the analysis of legislations within 19 European countries are presented herein within our classificatory scheme. This article can be a starting point for further theoretical and empirical work within this particular subfield.

Key words: *Church and state. Religious organisation. Laicisation. Secu larisation.*

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1. INTRODUCTION

The relationship between the church and state within European context, and within U.S. as well, has become an important topic of research in the last twenty years. Broadly conceived, relationships between the church and the state can be perceived from the angle of view of a number of scientific disciplines: law, history, sociology, political science, and so on. The aim of this work is to offer a more reliable empirical basis for the classification of model of the relationship of the state and religious organisations in Europe by using comparison of legal regulation of church-state relations in 19 counties as a methodological tool. A number of authors have developed various models for the classification of the relationship between the church and the state in the past.[1] Passages below will analyze the advantages and shortcomings of the existing theoretical models and offer a proposition for a new classification, as well as arguments on why exactly this proposition is instrinsically preferable to other models.

The first part of the text will present the most important areas that are regulated by church-state law. Later, theoretical models of other authors will be analyzed that deal with the issue of the relationship between the state and religious communities, and then the theoretical basis of our comparative research will be presented. Within the fourth part, we will present the methodology with the aid of which we conducted comparative research of the modes of relationship of the state and religious organizations, and we will present the research results in addition to this. At the very end, we will examine critically the extent to which the results of our research fit within the presented theoretical model.

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[1] S. Monsma, C. Soper, *The Challenge of Pluralism*, Rowman & Littlefield Pub lishers, Lanhman 2009; A. Stepan, "The Multiple Secularism of Modern Democratic and Non Democratic Regimes", *Rethinking Secularism* (ed. C. Calhoun), Oxford University Press, New York 2011; S. Avramović, *Prilozi nastanku državno crkvenog prava u Srbiji*, Službeni glasnik, Beograd 2007; S. Ferrari, "The Emerging Pattern of Church and State in Western Europe: The Italian Model", *BYU Law Review* 2/1995, 421 437; M. Minkenberg, "The Policy Impact of Church State Relations: Family Policy and Abortion in Britain, France, and Germany", *Church and State in Contemporary Europe* (ed. J. Madeley), Frank Cass, London 2005; M. Chaves, E. D. Cann, "Regulation, Pluralism, and Religious Market Structure. Explaining Religion's Vitality", *Rationality and Society* 4/3/1992, 272 90; V. Bader, "Religions and States. A New Typology and a Plea for Non Constitutional Pluralism", *Ethical Theory and Moral Practice* 6/2003, 55 91; J. Madeley, "European Liberal Democracy and the Principle of State Religious Neutrality", *Church and State in Contemporary Europe* (ed. J. Madeley), Frank Cass, London 2005b; J. Martinez Torron, C. Durham, "Religion and the Secular State / La Religion et l'État laïque: Interim Re ports, General Rapporteurs" *Religion and the Secular State / La Religion et l'État laïque: Interim Reports* (ed. C. Durham), International Center for Law and Religion Studies 2010, 1 56; J. Fox, "World Separation of Religion and State in the 21st Century", *Comparative Political Studies* 5/2006, 537 569.

2. THE AREAS THAT ARE REGULATED BY THE CHURCH-STATE LAW

Broadly speaking, when studying the relationships between the church and religious communities a number of theoretical models can be employed, whilst it is worth mentioning that within social sciences the most useful and the most frequently employed are historical and that belonging to sociology and political science. Historical methods offer a framework for understanding and explanation of the historical development of politics, religion and religious organisations, most frequently within a particular state. Socio-political model helps us understand the way state and religious organisations have impact on other spheres of life: culture, politics, ideology, family, economy and so on. Wihin this particular segment we wish to focus our attention on an important field of study, as well as answer a particular question: how are the principles of laicisation and secularisation of the state, i.e. the processes of the final division of authority between the religious organisations and the state, implemented within the legal systems of various state systems? Sima Avramović[2] argues persuasively that three major principles should be borne in mind when considering the relationship between the state and the religious organizations: 1. Religious freedoms (with an emphasis on corporate freedoms); 2. Neutrality of the state (the division of authority between the state and religious organizations); 3. The principle of equality of religious organizations. As a starting point, it is essential that we define what the division between the state and the religious organizations implies.

The above mentioned separation between church and state in essence has two important aspects. On the one hand, the state is divided from religious organization from the legal point of view, which practically means: the state is divided/independent from religious authority; there is no official church; all departments of the government and the local government are not connected to any religion, not even symbolically; religion does not interfere in key political questions; political parties are not close to religions, churches or church authorities; the laws are enacted irrespective of the attitudes of religious organizations towards them.[3] On the other, this division means that the state does not interfere in the internal matters of the religious organisations and treats all of the religious organisations equally. In that sense, the separation of the religious organisations from the state rests on a number of key assumptions and these are: all religious organizations have the same status; the government and

[2] S. Avramović, 98.

[3] B. Basdevant Gaudemet, F. Messner, *Les origines historiques du statut des confessions religieuses dans les pays de l'Union européenne,* Presses Universitaires de France, Paris 1999; J. Francis, "The Evolving Regulatory Structure of European Church State Relationships", *Journal of Church and State* 1992, 775 804.

parliament do not make decisions that impact the internal organization and the functioning of the church; the state (monarch, government and parliament) does not influence the establishment of church hierarchy; religious education/catechism is not controlled by the state; church law is independent from the state law; religious organizations are free to define their teaching and beliefs without any state involvement.[4]

Within our particular analysis, we will study both of these mentioned aspects. It is important to add that the analysis of primary data will focus on formal and legal solutions that particular states have adopted to define the relationship between the state and religious organizations within a specific context (for some areas actual implementation of the legal solutions within the current legal practice will be taken into account). Legal regulation that defines the relationships between the state, religion and religious organizations is mainly located in the part of law that is labeled as church and state law. This law regulates a number of important questions in each particular state.

3. THEORETICAL MODELS OF THE RELATIONSHIP BETWEEN THE RELIGIOUS ORGANIZATIONS AND THE STATE

The most simple approach to the classification of the relationship between the religious organizations and the state is the one that sees them as secular or those with state (or established) church. Nonetheless, this classification studies only one variable, the existence and non existence of the state church within the Constitution, whilst the other aspects of the relationship between the church and the state are neglected. Since there is no perfect example of blending of church and state within the European context (with the exception of Vatican), and in addition to this there is no perfect example of the full division of authority of the church and the state, given classification is not applicable to any of the European states. A bit more nuanced classification is given in a book authored by Sima Avramović. One the one hand there is a model of absolute division, that exists in France, The Netherlands and Slovenia. The second model is that of the state church where the state identifies with the majority church. Leading examples here are England, Greece and a number of Nordic countries. And finally, the third model is that of the cooperative division of authority which intrinsically implies benevolent cooperation. Such a model exists in Germany, Belgium and Austria, and Italy and Spain are tending towards this model. The third model – also called cooperative separation – means that the state allows for religious organisations to

[4] R. Remond, *Religion et société en Europe: La sécularisation aux XIX et XX siècles 1789 2000,* Seuil, Paris 2001.

exercise certain functions that are in other countries performed exclusively by the state, that is to say, the areas of authority become intertwined. Nonetheless, Avramović rightly observes that not even this tripartite division can be an accurate depiction of the relationship between the church and the state in Europe.[5]

Related to this, Vukomanović[6] adds a fourth model to the tripartite scheme, the model of established historical and traditional religions. Within the context of this model the state acknowledges a number of religious organisations and gives them their equal rights, while other organisations have restricted rights. Nonetheless, this expanded model can not stand for the accurate depiction of the legal solutions with regard to the development of church and state within the context of European countries.

Within their book *Chalenges of Pluralism,* Stephen Monsma and Christopher Soper present three models of the mentioned relationship. The first model is the division of church and state so that religion and politics are seen as distinct areas and state is neutral toward religion, and the best example of this model is the U.S. context. The second model is the model of the established church: "The state provides the church with recognition, accommodation, and often financial support; the church provides the state with an aura of legitimacy and tradition, recognition, and a sense of national unity and purpose".[7] Said authors distinguish formally (constitutionally) established churches and informally established churches, which gain their status by means of state favouritism and the cultural domination that this church has in the community. The best examples of second model are England, Denmark and Norway while Germany could be perceived as a state with two informally founded churches, Catholic and Luteran. The Third model is the pluralist model. Within this model, "society is understood as made up of competing or perhaps complementary spheres".[8] The domains of education, family, economy, religion and governance have special activities and responsibilities and have the autonomy to achieve them.

Alfred Stepan distinguishes three models in his analysis of secularism: separatist model of the U.S., the model of the established religion of Germany, Great Britain, Denmark and Iceland and the model of positive accomodation of the Netherlands.[9] Gerhard Robbers forms a tripartite scheme of the relationships between the church and the state. According

[5] S. Avramović, 107.

[6] M. Vukomanović, *Religija*, Zavod za udžbenike i nastavna sredstva, Beograd 2004.

[7] S. Monsma, 11

[8] *Ibid*, 11

[9] A. Stepan, 116.

to his scheme, there are three basic models: the systems of state church, the systems of strict separation and the system of common goals.[10] Although Monsma, Stefan and Robers label their three models differently, it is obvious that they have in mind the division similar to the tripartite model: state church – cooperative separation – separation of the church and the state.

Silvio Ferrari also distinguishes three models of church-state relationship: "The classification of church-state systems in Western Europe is traditionally based on a tripartite; they are identified variously as separation systems, concordatarian[11] systems, and national church systems".[12] Ferrari admits that this classification is: "overemphasizes the formal aspects of church-state relations and it does not pay enough attention to their content".[13] With respect to legal regulations for registration of religious organizations Lavrič and Flere discern four major types of countries: 1) post-communist countries with very difficult and complicated registration procedures; 2) countries with antiquated or multi-tier system for registration of religious entities; 3) countries with state or established church; 4) French model, established with intention to control religion.[14]

Maurice Baribier used the concept of laicity (the constitutional separation of the church and state) to formulate a four-partite divide: secular state – France; quasi secular state – Italy, Spain, Portugal; semi secular state – Belgium, Germany, Ireland, Luxembourg, The Netherlands; and non secular state: Denmark, England, Greece.[15]

Mark Chaves and David E. Can have offered a more nuanced methodology.[16] Although they still see the relationships between the church and the state one dimensionally, they study this dimension through six variables: 1) the existence of one recognized state church; 2) the existence of a number of denominations that are recognized by the state, while others are not; 3) the state is tasked with the initiation of the state officials; 4) the state pays the wages of the state officials; 5) the existence of taxation for the benefit of the church conducted by the state; 6) the state gives direct financial support for the church.

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[10] M. Minkenberg, 192

[11] Concordatian system is in those states that have signed concordat with Vati can.

[12] S. Ferrari 1995, 421.

[13] *Ibid*, 421

[14] M. Lavrič, S. Flere, "Divergent Trends in Legal Recognition of Religious Enti ties in Europe: The Cases of Slovenia and Hungary", *Politics and Religion* 2/2015, 286 304.

[15] M. Minkenberg, 192.

[16] *Ibid*, 193

Summing up the values for each variable they reach a tripartite scheme: 1) full establishment church (Denmark, Finland, Norway, Sweden); 2) partial establishment (Austria, Spain, Portugal, Belgium, Germany, Great Britain, Italy, and Switzerland); 3) separation (Ireland, the Netherlands, France).

All of the models of the relationships between the church and the state presented up until this moment perceive this relationship one-dimensionally. In the passages below the views of the authors that perceive this relationship in two dimensions will be presented. Wait Bader analyzes two dimensions: establishment of religion and religious pluralism. The dimension of establishment is concerned with the institutionalization of one or more religions within a particular society so that there are constitutional, legal, administrative, political and cultural establishment. Pluralism is centrally concerned with the number of religious organization with which the state enters into a special relationship so that we can distinguish: monism, constitutional pluralism and strict separation. By combining constitutional formation and the type of pluralism Bader reaches a five-partite divide of the relationship between the church and religious organizations: 1) firmly established state church – Greece; 2) loosely established church – England and the Scandinavian states; 3) plural formation (constitutional pluralism) – The Netherlands, Belgium, Austria, Germany; 4) non constitutional pluralism of the state; 5) private pluralism – USA.[17]

Although this classification seemingly uses two dimensions, in essence it is all about two variables that determine the same dimension. In addition to this, the depicted classification is very complex, insufficiently clarified and poor with regard to its applicability in practice. A more developed and adequate theoretical approach was given by D. Barett.[18] He perceived the relationship between the church and the state through two dimensions. The first dimension involved the religious character of the state so he divided the state in three groups according to this criterion: religious (where the majority belongs to a particular confession) secular and atheistic states.

Three criteria for the classification in one of these groups are: 1) the way the states see their relationship towards religious organization from formal and legal point of view in Constitutions, laws and programs of political parties; 2) to what extent the states are interested in religions or claim to have the right to interfere in religious issues; 3) to what extent these formally recognize accept religions and churches.

Within the second dimension Barrett perceives to what extent the state promotes, aids and limits the religion, so he classifies the states

[17] V. Bader, 55 91

[18] J. Madeley, 10 16

within ten categories. The classification offered by Barrett is good, because it does not take into account only one dimension, but there are clear problems, theoretical and with regard to the classification of particular countries. Within the context of the dimension of the relationship of the state towards religious organizations for various positions there are different indicators. For some of these financial assistance is used as an indicator, whereas for others it is political and ideological relationship of the state towards religious organizations (support, denial of action, hostile attitude and repression). In the sense of the classification of various states in a specific field particular solutions are conspicuously questionable. Belgium and Slovenia are classified as religious states although they are not such according to their formal and legal organization, whilst Sweden is classified as a secular state according to the table for 2000, although the state enacted a specific law designed to enhance the relationship towards the church. Similarly FR Yugoslavia has been classified as an atheist country according to the data for the year 2000. Neither FR Yugoslavia, nor its republics have enacted constitutions and laws in the period 1991 to 2000 to limit neither religious freedoms of the religious communities nor the overall attitude of the state has been geared towards promoting atheism.

Javier Martinez-Torron and Cole Durham present a two dimensional model of the study of the relationship between the church and the state in various countries. The first dimension is centrally concerned with the position of religious organizations with regard to corporate freedoms and has two extremes: the absence of religious freedoms and the optimal religious freedoms. The second dimension studies neutrality of the state towards religious organizations. In the middle of the spectrum is the neutrality, that is to say, the non identification of the state with religious organizations.[19] In essence this means that the state treats all of the religious organizations equally, and that they have the equal right to action. On one pole of the relationship is the state that actively supports religious freedoms of the religious organizations, and on the other pole it denies even the negative freedoms of religious organizations. When the graph that depicts this is connected with a curve, this curve has the U shape. Hence, ideal types of this relationship range from theocracy and state church, trough cooperation and secularism and towards the hostility and the prosecution of religion. Although interesting from a theological viewpoint, this classification is not appropriate for the study of the relationship between the church and religious organizations in the 21st century, because all of the states except Vatican occupy a small part of the graph, which denies the possibility of further classification of such a relationship. Jonathan Fox has further developed Durham's classification scheme and applied it to the empirical study of separation of state and religion in 152

[19] J. Martinez Torron, C. Durham, 8 10.

countries through four variables (which have a total of 60 components), for every year during 1990–2002 period. In the end, all countries were ranked on the ordinal scale into one of nine categories: 1. Established religion; 2. Multiple official religions; 3. Civil religion; 4. Cooperation; 5. Supportive; 6. Accommodation; 7. Separationist; 8. Inadvertent insensitivity; 9. Hostile.[20]

4. AN ATTEMPT FOR THE DEVELOPMENT OF THE NEW THEORETICAL AND METHODOLOGICAL MODEL OF THE STUDY OF THE RELATIONSHIP BETWEEN THE STATE AND RELIGIOUS ORGANIZATIONS IN EUROPE

At the very beginning the limitations of our research approach should be highlighted. In the first instance it is opportune to outline that the theoretical model that is depicted is focused on the analysis of the states with developed pluralism and democracy as a political system. Democratic political system within this context involves liberal (minimalist) view of democracy, and as the indispensable precondition for a political system to be classified as such we presuppose the existence of free, multiparty elections. According to the classification of the organisation Freedom House that would include free and partially free states. The stability of a free, democratic political system guarantees the relative stability of the legal and constitional order, and one part of the legal and constitutional order is a part that is under scrutiny in this investigation. On the other, by pluralist political system we understand that there is a freedom of expression of political viewpoints within a state, whether these are ideological, religious or philosophical.

The second part of limitations in the application of our theoretical and methodological model comes from our focus on states with overwhelmingly Christian religious tradition and population. In order for this model to be applicable to other states as well, some changes are necessary, that would be dependent on the specific characteristics of a particular religion. This expansion of the field of study will be the subject of further and more ambitious part of this research. Nevertheless, apart from the given shortcomings, it is clear that our model can be applied to other liberal and democratic states outside the European continent.

The considered analyses of the relation between the church and state examined within the last chapter differ from each as much with regard to their complexity, as with their theoretical approach, but they have in common that they depict this relationship in one dimension. Even those analyses, which have the authors that claim that they have adopted the

[20] J. Fox, 537

study in two dimensions are distinguished by intrinsic one dimensionality. Our interpretive frame starts from the supposition that there are two dimensions of separation in the domain of what the authors label as the relationship between the church and state. In that sense, it is important to separate the dimension that studies the relationships between states and concrete religious organisations from the dimension of relationship with religion as a system of beliefs, rituals, ethical precepts and worldviews. In order to clarify this, we will take into account two striking examples. The USA have, within their Constitution, and in the decisions of the constitutional court, adopted an approach that sees the strict separation of the state from religious organisations. On the other hand, the U.S. actively promote religion: The president gives an oath over the Holy Bible, the same situation is also in the courts, on the dollar note it reads "In God we trust" and so on. SFR Yugoslavia was the state that introduced, with the federal law enacted in 1976, strict separation of the state from religious organisations. At the same time the ruling ideology promoted atheism and was openly hostile to the public expression of religious object, except in religious objects and graveyards. Only with the analysis of the Contitution and court decisions we could classify both F.R. Yugoslavia and USA, using Barrett's scheme (religious-secular-atheist) as secular. Nonetheless, if we analyse the relationship of the state towards religion, we could classify the U.S. as religious and SFR Yugoslavia as atheist. With our theoretical approach we are trying to remove the shortcomings in the classification of all particular states (because the situation in all of the enumarated states does not correspond to the ideal types enumerated up until the present date).

Let us first start with the dimension of the relationship between the state and particular religious organisations. We will label this dimension as laicisation of the state. As we have hinted before, the separation of the state from the church has two separate dimensions – the state is divided from religious organisations and religious organisations are autonomous in their action. In addition to this, it is important to conceptually separate the equal treatment of religious organisations and the separation of religious organisations from the state. This in essence means that the state could be separated from religious organisations, but not neutral towards them. The best examples of both neutrality and separation of religious organisations towards the state can be seen within the U. S. context, where the conditions for the registration of religious organisation are the same as for the civic associations, and no religious organisation receives assistance from the state except for the tax brakes that is guaranteed to all of them and are the same for all of them. No state in Europe that we have studied so far, whose authority has been legally and constitutionally divided from that of the religious organisations, has been neutral towards religious organisations – either down to the inequality of the legal status

or financial assistance provided to only some of the organisations. The second dimension, which we will label as secularization of the state[21] refers to the promotion or the protection of religion by the state. While some religious organisations are in favour of the laicisation of the state (especially those that do not have the privileged status), no religious organisation can be expected not to promote religion, because it is the essence of their existence. Nonetheless, each state must decide whether or not it wants to promote the religious world views, be neutral or promote non religious views or atheism. The state safeguards religion through laws by denying the possibility of blasphemy, the laws that deny the possibility of verbal abuse of God or religion, or by the prohibiting promotion of atheism.[22] European countries do not prohibit the public proclamation of atheism, but some have laws against the blasphemy, although they apply them rarely. Promotion of religion can be done in various ways: by organising catechism in public schools, by the request to give a public oath for some future incumbents or in courts, introduction of religious rituals in schools and public institutions, introduction of a number of religious holidays and so on. The absence of such measure of protection will be interpreted as the secularisation of the state.

5. METHODOLOGY

The goal of our empirical research has been to test to what extent our hypotheses can be applied to European countries. Our choice of countries to be studied has been guided by three criteria. The first criterion was to study the most populous countries of Europe. The second criterion was to involve countries with different traditions, those with the tradition of the state church, as well as those with the tradition of atheism or laicity (the former state socialist countries). The third criterion was the reliability of the available data. For each of the countries we read through articles in peer reviewed journals and book chapters that exclusively deal with the relationship between the state and religious organisations in these countries. At the very end we analyzed these countries: Albania, Belgium, Bulgaria, Denmark, France, Greece, The Netherlands, Croatia, Italy, Ger-

[21] Complete literature and primary legal and constitutional documents that have been used in this research, as well as the data we have collected with variables for all of the countries, will not be presented here due to space constraints. The fulfillment of this condition would imply the process of writing up of a short monograph, and the form of monograph, rather than an article aimed at a peer reviewed journal. We believe that this fact does not lower the quality of the text, because according to the data in table 4. (where data for all of the countries are presented), and table 5 (where the key to the coding of primary data is given) it is possible to interpret the state of affairs for each country.

[22] Some Islamic countries prohibit the open promotion of atheism, E. G. Iran, Egypt, Pakistan, Saudi Arabia and so on.

many, Norway, Poland, Romania, Russia, Slovenia, Serbia, Spain, Sweden, Great Britain. These countries do not have the same internal political structure. Federal states give stronger discretionary rights to federal units in defining their relationship with religious organisations, while unitary states have the same regulatory framework for the whole territory. In that sense, Great Britain represents the biggest problem because of the complicated structure and the absence of a written constitution. In England the state religion is the Church of England, its head is the British monarch, in Scotland Church of Scotland is the national church, while Wales and Northern Ireland do not have official churches. In order for our data to be comparable in the case of the Great Britain, we concentrated on the regulatory framework that exists only in England. This is a shortcoming, but in the opposite case we would have to exclude Great Britain from this research, which is even more problematic a solution than the one we chose. Germany is a federal state where federal units have small sovereignity in regulating their relationship with religious organisations, but these are not of crucial importance for our research. France and Greece are specific among unitary states. In France, the law on the relationships between the church and state dates back to 1905. It is still in force, but this is not valid for Alsace and Loraine, that were not parts of France during its adoption, so that the data on France are not valid for those two particular territories. Greece gave specific discretionary power to the area of Trakia, and gives privileges to Muslim community that at the rest of the territory only has the orthodox majority[23], so the data are valid for Greece without Trakia.

From the great number of areas that are regulated by the legal framework in these 19 countries, we focussed on a small number of them, and on those that we consider the most important, as well as those for which richest data are available. As the most important dimension for the laicisation of the state, following areas were analyzed and each one of these comes as an independent variable:

1. The existence of a constitionally determined official church;
2. Autonomy of the inner working of the church organisation;
3. Equality of legal status of religious organisations before the law;
4. Rigidity of registration of religious organisations;
5. The highest level of legal status that the most protected religious organisation has in each country;
6. Fiscal and financial relationship of the state towards religious organisations.

[23] D. L. Selier, *La vie politique des européen,* Économica, Paris 1998.

Studing the dimension of the secularization of the state has been guided by the following indicators:

1. If the state is legally and constitutionally bound to certain religions;[24]
2. The existence of the state protection of moral integrity of religious communities and religion;
3. The existence of prayer in public schools and institutions;
4. The number of religious holidays that a country has as state holidays;
5. The existence of religious symbols in public institutions;
6. The existence of religious education (catechism) in public schools;
7. The position of religious schools;

The presentation of variables for both dimensions can be found in the table 1.

Table 1. Dimensions with variables

Variable	Laicisation of the state	Variable	Secularisation of the state
A	Constitutionally founded church	**G**	If the state is constitutionally or legally bound to a religion
B	Autonomy of internal action of religious organisations government and parliament do not make decisions that impact the inner organisation and functioning of the church	**H**	The protection of moral in tegrity
C	Equality of the legal state of religious organisations number of legal levels	**I**	Prayers in public schools and institutions
D	Rigidity in registration of religious organisations	**J**	Religious holidays as state holidays
E	The highest level that the most privileged religious organisa tion has	**K**	Religious symbols in public institutions

[24] The difference between the variable 1 in first dimension and variable 1 in the second dimension is that variable 1 in first dimension refers to the connection of the state to particular religious organization, while the other refers to the connection of the state with religion as a system of beliefs.

Variable	Laicisation of the state	Variable	Secularisation of the state
F	Fiscal and financial relation ship between the state and re ligious organisations	**L**	Religious instruction in public schools
		M	The status of religious schools

After the data collection from predetermined areas we decided to ascribe quantitative value to qualitative data as follows. This can be found in table 2.

Table 2. Variables, solutions for variables and ascribed numerical values

Ascription of value to variable	Variable	Solution to the variable	N1
A	Constitutionally established church	State church	1
		National, traditional and popular church	2
		There is no mentioning of reli gion within the constitution, ex cept to the guarantee of religious freedoms	3
B	Autonomy of the inner working of church organisations, the govern ment and churches do not make decisions that impact the inner working of religious organisations	Church law forms the part of the legal system of the country, con stitution is enacted by the par liament, church officials are ap pointed by the state (monarch, president, government of the parliament)	1
		Church law does not represent a part of the legal system of a state, parliament issues the church con stitution, church officials are ap pointed by the state	
		Church law does not constitute a part of the legal system of the country, the church constitution is not enacted by the parliament, the most important church offi cials are appointed by the state	3

Ascription of value to variable	Variable	Solution to the variable	N1
		Church law is not a part of the legal system of the country, the constitution of the church is not enacted by the parliament, reli gious organisations are inde pendent in the appointment of their officials	4
C	Equality of legal position of reli gious organisations a number of levels of legal solutions	There are more than two levels of legal status of religious or ganisations and each lavel has diferent rights and privileges	1
		There are two levels of legal status of religious organisations where one has stronger privi leges than other	2
		All registered religious organi sations have the same rights	3
D	Rigidity in registration of religious organisations	Registered religious organiza tions must fulfill strict condi tions or sign a special conctract with a state	1
		Registered religious organisa tions must have 100 members and exist for 10 years, or there are clear hindrances to registra tion although they fulfill other conditions	2
		The conditions for registrations are liberal and most of the or ganisations pass the process of registration	3
E	The highest level that the most privileged organisation has	State, national or privileged church	1
		One or more churches that the state provides guarantee by con stitution and law for financial assistance, especially with re gard to catechism	2
		Registered religious organisa tion has privileges apart from tax brakes	3

Ascription of value to variable	Variable	Solution to the variable	N1
		Registered religious organisation's only privilege is the tax brakes	4
F	Fiscal and financial relationship between the state and religious organisations	The state is bound by law or the Constitution to finance only one religious organisation	1
		The state finances and offers tax brakes for two or more of the privileged religious organisations	2
		The state finances all of the religious organisations proportionally	3
		The state gives tax exemption to all of the religious organisation but does not finance their work	4
G	Whether the state is legally or constitutionally bound to specific religion	The constitution establishes national or traditional religion	1
		Some religions have traditional status by the law	2
		The constitution calls on God or Holy Trinity	3
		The Constitution and laws do not recognize any religion as national or traditional	4
H	The protection of moral integrity	There are laws against blasphemy for only one organisation and these are being applied	1
		There are laws against blasphemy for only one organisation and these are not being applied	2
		There are laws against blasphemy for all of the organisations or against God	3
		There are only laws against the spread of religious hatred	4

Ascription of value to variable	Variable	Solution to the variable	N1
I	Prayer in public schools and insti tutions	The prayer is compulsory in all schools and Parliament	1
		Prayer is complusory in schools but not in state institutions	2
		The prayer is allowed in schools	3
		Prayer is prohibited in schools and state institutions	4
J	Religious holidays as state holi days	Number of religious holidays passes 10	1
		Number of religious holidays is 6 10	2
		Number of religious holidays is 3 5	3
		Number of religious holidays is 1 2	4
K	Religious symbols in public insti tutions	Religious symbols (cross, cruci fixion, icons and etc.) must be exposed in public institutions and schools	1
		Religious symbols can be ex posed in public institutions and schools	2
		Religious symbols can not be exposed in schools but can be in state institutions	3
		Religious symbols can not be exposed in state institutions and schools	4
L	Catechism in public schools	Catechism is compulsory and is theological in character	1
		Catechism is compulsory and theological but pupils can be ex empted from attendance	2
		Catechism or religiologius edu cation is compulsury, and one must be chosen	3

Ascription of value to variable	Variable	Solution to the variable	N1
		Religious education or alternate study program (secular, human istic or civic in type) is compul sory and one must be chosen	4
		Religious education is optional but is a part of public schools	5
		There is no religious education in public schools	6
M	The position of religious schools	Private religious schools exist and are financed by the state	2
		Private religious schools exist but are not financed by the state	4

After codification of the solution for each particular variable, for all the states, we ascribed numerical value for each variable and state, and the results obtained are displayed in table 3.

Table 3. The display of variables for each state

	A	B	C	D	E	F	G	H	I	J	K	L	M	SUM[25]
ALB[26]	3	4	2	3	2	4	3	4	4	3	4	6	4	46
RUS	3	4	1	3	2	2	2	3	4	4	4	4	4	40
GER	3	4	2	2	2	2	3	3	1	4	2	4	2	34
GBR	1	1	2	3	1	2	1	4	2	3	3	4	2	29
ITA	3	4	2	1	2	2	4	3	3	2	1	2	2	31
ESP	3	4	1	1	2	2	4	3	3	2	2	3	2	32
FRA	3	4	2	2	4	2	4	4	4	3	4	6	2	44
POL	3	4	2	2	3	1	3	3	2	1	1	4	2	31
ROU	3	4	1	2	2	2	4	4	4	2	2	2	2	34
NLD	3	4	3	3	4	3	4	4	1	3	2	4	2	40

[25] The column sum's only purpose is to give a sum of values and has no other theoretical or empirical significance.

[26] From purely technical reasons, we list only the three lettered abbreviations of the countries listed in the table.

BEL	3	4	2	1	2	2	4	4	4	2	3	4	2	37
GRC	2	1	2	1	1	2	1	1	1	2	1	1	2	18
SWE	1	1	2	3	1	3	2	4	4	2	4	4	2	33
BGR	2	4	2	3	1	3	1	4	4	3	4	5	4	40
SRB	3	4	2	2	1	2	2	4	3	3	2	4	4	36
DNK	1	1	2	3	1	1	1	2	1	1	4	2	2	22
SVK	3	4	2	2	2	3	4	4	4	2	4	6	4	44
NOR	2	4	2	3	1	3	1	2	3	2	4	3	4	34
HRV	3	4	1	2	2	2	4	4	3	2	2	5	2	36

After this for each variable three subdimensions have been made. Variables A and B, if merged, form the subdimension of laicisation of legal system; Variables C, D and E are the subdimension of equality of the legal status of religious organisations whilst the subdimension F forms the subdimension of neutrality of the state. Dimension of secularization is divided into three subdimensions: variables G and H constitute the subdimension of the protection of religion, I, J and K constitute subdimension of public religious symbolism, and L and M constitute the subdimension of promotion of religious education.

We have conducted the addition of numerical values for each particular country. On the basis of this addition each country has been ascribed numerical value for each subdimension. For each subdimension the values ranged from one to four, whereby one meant the least pronounced secularisation/ laicisation, and four the most pronounced. Although the number was different for each particular variable, this proces simplified the coding of data. The proces of ascription of values has been explained in the table 4.

Table 4. Key to the ascription of variables

Ascribed value to the subdimension	1	2	3	4
Laicisation of constitutional and legal system	Sum of variables 2	Sum of variables 3 to 4	Sum of variables 4 to 6	Sum of variables 7
Equality of the legal position of religious organisations	Sum of variables 3	Sum of variables 4 to 6	Sum of variables 7 to 9	Sum of Variables 10

Ascribed value to the subdimension	1	2	3	4
Economic neutrality of the country	Sum of variables 1	Sum of variables 2	Sum of variables 3	Sum of variables 4
Protection of religion	Sum of variables 2	Sum of variables 3 to 4	Sum of variables 5 to 7	Sum of variables 8
Public religious symbolism	Sum of variables 3	Sum of variables 4 to 7	Sum of variables 8 to 10	Sum of variables 11
Promotion of religious education	Sum of variables 3	Sum of variables 4 to 6	Sum of variables 7 to 9	Sum of variables 10

After the ascription of numerical values for subdimensions for each country, for each country we have done addition so that we could get final values for each country and subdimension. For each country, the range of possible values went from 3 (the least pronounced characteristic) to 12 (the most pronounced characteristic). Values are given in table 5.

Table 5. The values of dimension for each country.

	Laicisation	Secularisation
ALB	11	11
RUS	9	9
GER	9	7
GRB	6	8
ITA	8	7
SPA	8	7
FRA	9	12
POL	8	7
ROU	8	9
NDL	11	8
BEL	8	9
GRE	6	4
SWE	7	8
BLG	9	10
SRB	8	9
DEN	5	6

SLO	10	11
NOR	8	8
CRO	8	9

At the end there is a final table. Within the dimension of laicisation the lowest value is 5, so with this in mind we formed the categories for this dimension: the state is not laicised – sum 5 to 6; partially laicised state – sum 7 to 8; the laicisation of the state is pronounced – sum 9 to 10; fully laicized state – sum 11 to 12. Within the dimension of secularisation the categories are formed as follows: non-secularized state – sum 3 to 4; partially non-secularized state – sum 5 to 7; partially secularized state – sum 8 to 10; fully secularized state – sum 11 to 12:. The position of each country when the categories are cross-tabulated is shown in table 6.

Table 6. Position of European countries with regard to secularization and laicization of the state

	The state is not laicized	Partially laicized state	The laicization of the state is pronounced	Fully laicized state
Non secularized state	Greece			
Partially non secularized state	Denmark	Italy, Spain, Poland	Germany	
Partially secularized state	Great Britain	Sweden, Romania, Belgium, Serbia, Norway, Croatia	Russia, Bulgaria	Netherlands
Fully secularized state			France, Slovenia	Albania

6. CONCLUSION

With the development of our theoretical and methodological approach we have developed a classificatory scheme which, when two dimensions are cross-tabulated, gives 16 ideal types. Some of these types do not exist in actual reality (when the state is not laicized, but is secularizated, or when the state is fully laicized but is insufficiently secular-

ized). After an inquiry into the legislative of 19 countries they are classified in 10 fields out of possible 16. If we included in our inquiry other 30 remaining states of Europe, perhaps some empty boxes in the table would be filled. Nonetheless, these boxes are found on the bottom left and top right corner and this indicates that studied characteristics (laicization and secularization of the state) are not independent from each other.

Our theoretical stance has not been that these two characteristics are independent, but that they need to be investigated separately, and by different variables.[27] The advantage of our approach is that there are clear and verifiable indicators through which variables are measured, which enables easy and outright positioning on the table of each country.

A great majority of the states under scrutiny in this research have changed their legislative with regard to the state and church law. Italy (1984), Sweden (2000) and Norway (2012) have made state churches defunct; Russia, Poland, Albania, Croatia, Serbia, Slovenia, Bulgaria and Romania have become parliamentary democracies, they have abandoned their atheist approach, and have *en block* adopted legal solutions that correspond to the concept of cooperative separation of the state and religious organisations. Cooperative separation is indeed the ideological concept for the great majority of the studied states (except Greece and Albania). Nonetheless, this expression, that best describes practice and goals of the majority of European states, is insufficiently precise. On the one hand, it does not make apparent which type of cooperation we have in question, which are the areas of cooperation and which purpose we have in mind (every cooperation has a purpose). On the other hand, it is not apparent which areas the concept of separation refers to.

There are many advantages of this theoretical and methodological approach. It is applicable to many countries in the Europe and the world, it has clearly defined variables and indicators by which the intensity of both dimensions are measured, enabling easy and clear positioning of each state. As has been indicated earlier, although the two dimensions-laicism and secularism-are intimately interlinked, they need to be studied separately, because in the opposite case, as is the case with schemes with one dimension, it is not possible to separate the subtleties and differences that exist with legal solutions for each of the dimensions for the European states.

[27] Pearson's coefficient of correlation for these two dimensions for 19 states is 0,66 which means moderately strong correlation and makes the independent study of these two dimensions justifiable.

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THE ADOPTION OF THE UNITED NATIONS CONVENTION ON THE USE OF ELECTRONIC COMMUNICATIONS IN INTERNATIONAL CONTRACTS IN SERBIA A WAY TO FACILITATE CROSS-BORDER TRADE

In the recent decades e commerce has gained momentum. However, certain obstacles, such as cross country legal differences, prevent e commerce from flourish ing. In an attempt to overcome these hurdles, the United Nations Commission on International Trade Law prepared a uniform framework, which the United Nations General Assembly adopted in 2005 as the Convention on the Use of Electronic Com munications in International Contracts. The article addresses the Convention's main features and compares them to the Serbian laws in the area of e commerce. Further more, the article highlights how the Convention could inspire reform of certain na tional regulatory solutions that currently complicate or prevent international trade. Finally, the article discusses the beneficial effects that the adoption of the Conven tion's principles in domestic legislation would have on economy and the ICT sector.

Key words: *Convention on the Use of Electronic Communications in Interna tional Contracts. Electronic commerce. Electronic signature. Possible reform of the current state of the law.*

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1. INTRODUCTION

The Organization for Economic Co-operation and Development ("OECD") defines "e-commerce" as "transactions for the sale or purchase of goods and services conducted over computer networks by methods specifically designed for the purpose of receiving or placing of order".[1] "E-commerce" may also be understood as commercial transactions, which are carried out by means of electronic data interchange and other means of communication.[2] This article will attach the latter, slightly more "flexible" meaning to the term.

Despite the numerous positive effects of e-commerce it reduces operational costs, enlarges market scope, and strengthens competition by lowering barriers to entry[3] various obstacles still prevent e-commerce from flourishing. One of those obstacles is cross-country legal differences.[4] Many international organizations have actively searched for suitable solutions from the time when e-commerce began to gain momentum. The United Nations Commission on International Trade Law (the "UNCITRAL") is one of them.

As the core legal body of the United Nations system in the field of international trade law, UNCITRAL focuses on the modernization and harmonization of rules on international business by, *inter alia*, "preparing or promoting the adoption of new international conventions, model laws and uniform laws [...]."[5] In the late 1980s UNCITRAL undertook the task of formulating uniform private law standards for electronic commerce.[6] The first legislative text to be produced was the Model Law on Electronic Commerce, 1996 (complemented in 1998; the "MLEC"), followed by the Model Law on Electronic Signatures, 2001 (the "MLES"). Considering their wide acceptance, both model laws are deemed "global legislative standards in their fields, and the principles underpinning them constitute the pillars of global electronic commerce law"[7] Nevertheless, these

[1] OECD Directorate for science, technology and industry; Committee for information, computer and communications skills, "Electronic and Mobile Commerce" DSTI/ICCP/IE/IIS(2012)1/FINAL, 26 July 2013, 6 ("OECD Document").

[2] Model Law on Electronic Commerce, Preamble.

[3] OECD Document, 7.

[4] *Ibid.,* 26.

[5] Article 8 (c), UN General Assembly Resolution 2205 (XXI) on the Establishment of the United Nations Commission on International Trade Law, *http://www.uncitral.org/uncitral/en/about/origin.html*, last visited 15 July 2014.

[6] J.A. Estrella Faria, "The United Nations Convention on the Use of Electronic Communications in International Contracts An Introductory Note," *International and Comparative Law Quarterly* 55/2006, 689.

[7] L.G. Castellani, "The United Nations Convention on the Use of Electronic Communications in International Contracts at Ten: Practical Relevance and Lessons Learned," *Journal of Law, Society and Development* 3/2016, 132.

texts have a "limit" inherent to their "soft law" nature.[8] In particular, states, when enacting their provisions, may vary them and thus diminish uniformity. That is why in 2002 UNCITRAL began the work on the Convention on the Use of Electronic Communications in International Contracts, which was adopted by the UN General Assembly in 2005 (the "Convention" or the "e-CC").[9]

2. THE SCOPE OF THE CONVENTION

The e-CC applies to cross-border business-to-business ("B2B") transactions, thus excluding consumer contracts. The restricted scope of the Convention's application is unsurprising, considering that roughly 90% of the value of e-commerce transactions comes from B2B.[10] Moreover, consumer protection rules are domestic in nature, meaning that they vary from jurisdiction to jurisdiction.[11] Other UNCITRAL texts, such as the UN Convention on Contracts for the International Sale of Goods, 1980 (the "CISG")[12], contain similar exclusions (e.g. Article 2(a)).

Similar to other UNCITRAL texts, the e-CC applies to contracts concluded between parties whose places of business are in different States.[13] It is not necessary, however, for both States to be *contracting* States as long as the rules of private international law lead to the application of the e-CC.[14]

Considering that the Convention aims at providing solutions acceptable to "States with different legal, social and economic systems",[15]

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[8] *Ibid.*

[9] The Convention was adopted by Resolution A/RES/60/21 of 9 December 2005.

[10] OECD Document, 4.

[11] K.W. Chong, J. Chao S, "United Nations Convention on the Use of Electronic Communications in International Contracts: A New Global Standard" *Singapore Academy of Law Journal* 18/2006, 135.

[12] Article 2 CISG.

[13] Article 1 (1) e CC.

[14] UNCITRAL e CC Explanatory Note,14, para 6.

[15] The e CC Preamble. Besides individual states, pursuant to Article 17 (1) e CC regional economic integration organizations, may sign, ratify, accept, approve or accede to the Convention. However, only an organization that "has competence over certain matters governed by" the e CC may ratify the Convention. By acceding to the e CC, a "regional economic integration organization becomes a contracting party in its own right and has the right to submit declarations excluding or including matters in the scope of application of the Convention pursuant to articles 19 and 20." Theoretically, it is possible that both individual states and a regional economic integration organization submit declarations, which would create considerable uncertainty. However, in practice, such situations are unlikely to arise because Article 17 (2) "already imposes a high standard of coordination by requiring the

Article 21 allows for exclusion of certain matters from the Convention's scope through declarations. For example, Singapore, among other contracts, excluded from the Convention's application contracts for the sale or other dispositions of immovable property.[16] Instead of making a declaration, however, it might be wiser, to consider adjusting the domestic legal framework with the principles of the Convention, thus eliminating the duality of regimes.

3. THE STATE OF THE LAW ON E-COMMERCE IN SERBIA

The legal framework for e-commerce in Serbia has existed for over a decade now, yet e-commerce has yet to achieve its full potential. The National Assembly has enacted three main laws: the Law on Electronic Signature ("LES"),[17] the Law on Electronic Commerce ("LEC")[18] and the Law on Electronic Document ("LED").[19] They were written with the relevant European Union directives in mind: E-signatures Directive of 1999 and E-commerce Directive of 2000.[20] The former directive, however, has since been repealed.[21]

The eIDAS Regulation became effective on July 1, 2016. Under eIDAS, certificates for electronic signatures are no longer issued to legal persons.[22] This is different from what the previous framework, which

regional economic integration organization to declare the specific matters for which it has competence". Hence, in practice, "differing declarations from member States would be lim ited to matters in which no exclusive competence had been transferred" to the regional or ganization. See UNCITRAL e CC Explanatory Note, 84, paras 263 265.

[16] UNCITRAL, *http://www.uncitral.org/uncitral/en/uncitral texts/electronic com merce/2005Convention status.html*, last visited 1 July 2016.

[17] Law on Electronic Signature, *Official Gazette of the Republic of Serbia,* No. 135/2004 ("LES").

[18] Law on Electronic Commerce, *Official Gazette of the Republic of Serbia*, No. 41/2009 and 95/2013 ("LEC").

[19] Law on Electronic Document, *Official Gazette of the Republic of Serbia*, No. 51/2009 ("LED").

[20] Foreign Investors Council, *White Book: Proposals for Improvement of the Busi ness Environment in Serbia* (eds. Prof PhD Mihailo Crnobrnja, Foreign Investors Council) 2013, 94, *http://fic.rs/admin/download/files/cms/attach?id 420*, last visited 15 July 2014; Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures ("E signatures Directive"); Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce in the Internal Market ("E commerce Directive").

[21] Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC ("eIDAS").

[22] Article 3(9), (10) eIDAS.

served as the basis for the Serbian LES, [23] envisioned. The eIDAS further introduces electronic seals,[24] a term non-existent in Serbian law. Finally, and most importantly, the trust services provided by trust service providers established in non-EU countries are considered legally equivalent to qualified trust services provided by EU qualified trust service providers *only* where there is an agreement between the EU and the non-EU country.[25] The bottom line is that the Serbian legislation is based on an outdated EU directive and is, therefore, no longer compliant with the current state of EU Law.

The e-CC, on the other hand, is compatible with the current EU framework on e-commerce. First, it is reconcilable with the terms of eIDAS. While eIDAS focuses on public trust framework and does not encourage recognition of non-EU signatures, especially those originating from public bodies, it leaves freedom of contract for commercial operations. Second, it is compatible with the E-commerce Directive of 2000.[26] Admittedly, the focus of this Directive is the regulation of information society services, not the regulation of international contracts. However, Article 9, which deals with the formation or validity of electronic contracts, requires Member States to ensure conclusion of contracts electronically. Moreover, it requires Member States to "ensure that the legal requirements ... neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness or validity ..." solely because they were concluded by electronic means.[27] This is the essence of the principle of non-discrimination, one of the pillars of the e-CC. Finally, "the lack of any conflict in the European Community as far as the application of the [MLEC] is concerned"[28] also indicates compatibility. Among the 67 States that had adopted MLEC, three are EU Member States.[29] Had the laws of these countries been non-compliant with the EU law, "the European Commission would have had the legal obligation to interfere and to enforce revisions."[30] The lack of such action leads to a

[23] Article 2 (13) states that certificates for electronic signatures may be issued to, *inter alia,* legal persons.

[24] Article 3(24) eIDAS.

[25] Article 14 (1) eIDAS.

[26] J. B. Lambert, "The U.N. Convention on Electronic Contracting: Back from the Dead?", *Michigan State University College of Law Journal of International Law*, forth coming, 6, *https://papers.ssrn.com/sol3/papers.cfm?abstract id 2812427.*

[27] *Ibid.*

[28] W. Kilian, "The Electronic Communications Convention: A European Union Perspective", *The United Nations Convention on the Use of Electronic Communications in International Contracts: An In Depth Guide and Sourcebook* (eds. A. H. Boss, W. Kil ian), Kluwer Law International, The Netherlands 2008, 413.

[29] Ireland, France and Slovenia. See: *http://www.uncitral.org/uncitral/en/uncitral texts/electronic commerce/1996Model status.html.*

[30] W. Kilian, 413.

reasonable conclusion that the e-CC, which builds on the MLEC, is compatible with the EU framework.[31]

If Serbia were to accede to the e-CC, a duality of regimes would be established: the Convention would apply to international transactions, while domestic transactions would be governed by national laws, inspired by outdated EU directives. The duality of regimes would impose on merchants a burden of determining the place of business of the other party, and, consequently, the nature of the contract (whether it is considered a domestic or an international transaction).[32] Furthermore, even when they determine the kind of their contract, the parties may be unaware of the differences in legal treatment, which may come as an unpleasant surprise at a later stage of their relationship.[33] Ultimately, the duality of regimes would entail additional business compliance costs, because merchants wishing to engage in electronic commerce would need to ensure compliance with both legal regimes.[34] For these reasons, it is most efficient to adopt the Convention for cross-border transactions and amend the existing legislation accordingly, so that the Convention's principles apply to domestic contracts as well.[35] For example, Australia, as one of the countries that has not yet adopted the e-CC formally,[36] has in fact done so by creating or amending national laws in accordance with the Convention's provisions.[37]

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[31] J. B. Lambert, 7. Some scholars are, nonetheless, concerned about Article 17 (4), which in their opinion opens the door to duality of regimes. Article 17 (4) states that any conflicting rules of any regional economic organization trump the provisions of the Convention. In prioritizing the former, "UNCITRAL recognized that measures to promote legal harmonization among member States of a regional organization might create a situ ation that was in countries where sub sovereign jurisdictions ... had legislative authority over private law matters. It was felt that for matters subject to regional legal harmoniza tion, the entire territory covered by a regional economic integration organization deserved to be treated in a similar way as a single domestic legal system". The exception in Article 17 (4) does not operate automatically. Rather, the priority status of regional rules needs to be set out in a declaration submitted under Article 21. See UNCTRAL e CC Explanatory Note, 85,86, paras. 268, 270.

[32] K. W. Chong, J. Chao S., 145.

[33] *Ibid.*

[34] *Ibid.*

[35] *Ibid.*, 134.

[36] *http://www.uncitral.org/uncitral/en/uncitral texts/electronic commerce/ 2005Convention status.*

[37] L. G. Castellani, "The Contribution of a Uniform Legislative Framework for Electronic Transactions to Promoting Economic Development in the Pacific", *Compara tive Law Journal of the Pacific* 17/2011, 24.

4. THE ELECTRONIC COMMUNICATIONS CONVENTION MAIN PRINCIPLES AND THEIR INTERPLAY WITH SERBIAN LEGISLATION

Although the e-CC builds upon the MLEC and MLES, it does not blueprint their provisions; rather it improves and updates them to take into account technological developments since 1996.[38] Contrary to the two-tier approach to electronic signatures taken in MLES, the e-CC promotes the principle of technology-neutrality. Other principles on which the Convention and other UNCITRAL texts on electronic commerce are based include the principle of functional equivalence, principle of non-discrimination and the principle of party autonomy.

4.1. Principle of functional equivalence

The e-CC attempts neither to replace traditional legal notions with new ones nor to define a computer-based equivalent to any particular kind of paper document. Instead, it purports "to identify the circumstances under which the same function envisaged by the law may be fulfilled by the exchange of communications in electronic form."[39] The e-CC "singles out basic functions of paper-based form requirements, with a view to providing criteria which, once they are met by electronic communications, enable such electronic communications to enjoy the same level of legal recognition as corresponding paper documents performing the same function". Consequently, the drafters of the e-CC in Article 9 (which concerns form requirements) adopted the principle of technology neutrality.[40] Serbian laws, while in principle allowing technology neutrality, seem to favor public key infrastructure technology (explained in section 4 subsection 1.3.) and thus embrace the two-tiered approach. It is usually stated that legislation adopting a two-tiered system "grants electronic signatures functional equivalence with handwritten signatures, based on technologically neutral criteria".[41] However, from the language of the LED it is apparent that it departs from the principle of functional

[38] K. W. Chong, J. S. Chao, 119.

[39] J. A. Estrella Faria, "Drafting and Negotiating History of the Electronic Com munications Convention", *The United Nations Convention on the Use of Electronic Com munications in International Contracts: An In Depth Guide and Sourcebook* (eds. A. H. Boss, W. Kilian), Kluwer Law International, The Netherlands 2008, 22.

[40] T.J. Smedinghoff, "Article 9. Form Requirements", *The United Nations Con vention on the Use of Electronic Communications in International Contracts: An In Depth Guide and Sourcebook* (eds. A. H. Boss, W. Kilian), Kluwer Law International, The Neth erlands 2008, 139.

[41] *Promoting confidence in electronic commerce: legal issues on international use of electronic authentication and signature methods*, United Nations, Vienna 2009, 41.

equivalence, since, instead of focusing on the function of the form it imposes technical criteria that an electronic document must satisfy.

The provisions relevant for comparison are Article 9(2) e-CC and Article 4(2) LED. Article 9(2) e-CC requires an electronic communication to meet two conditions in order to have the same effect as a "writing" in the paper world. First, an electronic communication must be "accessible". Second, it must be "usable for subsequent reference". On the contrary, Article 4(2) LED provides that the written form is met when an electronic document is signed with a *qualified* electronic signature.[42]

Certainly, the standards envisaged in Article 9 e-CC are minimum[43] and is likely that the countries would provide for additional requirements. However, requiring a qualified electronic signature as a counterpart of "writing" might be too much of an impediment for foreign parties. Moreover, "it may be more appropriate to gradually vary security requirements similarly to the way degrees of legal security are varied in the paper world".[44] Namely, qualified or digital signatures are the equivalent of notarized signatures, which are one level above plain handwritten signatures.[45]

4.2. Principle of non-discrimination

Article 8(1) e-CC envisages that a communication or a contract shall not be denied validity or enforceability just because it is in the form of an electronic communication. The rule of non-discrimination in this article "embodies the principle of functional equivalence, and confers legal recognition to electronic functional equivalents of communication or contracts.[46] Serbian legislation affirms this principle.[47]

4.3. Principle of technology neutrality

The e-CC provides for the "coverage of all factual situations where information is generated, stored or transmitted in the form of electronic communications, irrespective of the technology or the medium used".[48] This principle ensures that the legislation remains capable of accommo-

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[42] Qualified electronic signatures in Serbian law are equated with "digital signatures" in comparative law. See: D. Prlja, M. Reljanović, Z. Ivanović, *Internet i Pravo*, Beograd 2012, 110.

[43] UNCITRAL e CC Explanatory Note, 16, para 14.

[44] J. A. Estrella Faria (2008), 23.

[45] C. M. Laborde, *Electronic Signatures in International Contracts*, Peter Lang, Frankfurt am Main 2010, 43.

[46] K. W. Chong, J. S. Chao, 120.

[47] Article 3 LES; Article 4 LED; Article 9 LEC.

[48] UNCITRAL,e CC Explanatory Note, 26, para 47.

dating future developments and does not become outdated quickly.[49] Moreover, this approach allows the parties to choose the technology that is appropriate for their needs.[50]

The area where the relevance of this principle is visible the most concerns electronic signatures. They are supposed to perform the same functions as handwritten signatures though adapted to the specifics of electronic transactions.[51] The formats in which an electronic signature can exist vary from a name typed directly on to a document, a manuscript signature that is scanned into a document to a digital signature, created using public key cryptography.[52] A click on the "I agree" button may also be considered as an electronic signature.[53] According to the principle of technology neutrality, all of these types of signatures will satisfy the requirement of a signature in the paper world if a method is used to identify the signing party and that method indicates his/her intention with respect to the information contained in the electronic communication. [54]

Although this principle facilitates trade, numerous countries declined to follow it. Austria, Argentina, Belgium, Bermuda, Chile, China, Croatia, Czech Republic, Finland, France, Germany, Hong Kong, Hungary, India, Ireland, Mexico, Netherlands, Norway, Poland, Portugal, Romania, Republic of Korea, Russia, Singapore, South Africa, Spain, Switzerland, Taiwan, Turkey, etc. prefer the "two-tiered" or "two-prong" approach.[55] Under this approach, all types of electronic signatures are allowed, however the legislation assigns greater legal effect to certain electronic authentication methods. These signatures, created using public key cryptography, are also called digital signatures. In Serbian Law they are

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[49] *Promoting confidence in electronic commerce: legal issues on international use of electronic authentication and signature methods*, United Nations, Vienna 2009, 37.

[50] *Ibid*.

[51] C. M. Laborde, 29.

[52] S. Mason, *Electronic Signatures in Law*, Lexis Nexis, United Kingdom 2003, 78.

[53] *Ibid.*

[54] Article 9 (3) e CC.

[55] S. Mason, *Electronic Signatures in Law,* Lexis Nexis, United Kingdom 2012, 156, 163; "Global Guide to Electronic Signature Law: Country by Country Summaries of Law and Enforceability" *https://acrobat.adobe.com/content/dam/doc cloud/en/pdfs/ado be global guide to electronic signature law.pdf*.

The two tiered approach, although different from the minimalist approach, which gives a minimum legal status to all forms of electronic signature, is still regarded as tech nologically neutral. The two tiered principle is the complete opposite of a technology specific approach. When the legislator follows a technology specific principle, it usually demands PKI based applications, justifying that by higher levels of security. See: *Promot ing confidence in electronic commerce: legal issues on international use of electronic authentication and signature methods*, United Nations, Vienna 2009, 40.

referred to as "qualified electronic signatures".[56] Since the LES recognizes both qualified and unqualified electronic signatures (though more importance is attached to the latter), it may be concluded that the Serbian legislator has also opted for a two-tiered approach.

Using public key infrastructure ("PKI") means encrypting messages. Encryption, first, ensures that only people who possess the necessary "key" can access the information contained therein. Second, it prevents alterations of the message content. It is presumed that signatures based on public key cryptography are the most secure type of signature for electronic transactions.[57] Indeed, Article 2 LES defines a "qualified electronic signature" as an electronic signature which guarantees *with certainty* the identity of the signatory, the integrity of electronic documents and prevents subsequent denial of responsibility for their content, and which fulfills the conditions stipulated in the Law. However, the "complexity of the public key infrastructure clashes with the simplicity inherent to electronic transactions."[58] In order to use a qualified electronic signature one must, first, utilize the means necessary for the formation of that signature and, second, possess a qualified electronic certificate, issued by a certification authority.[59] Although the LES was adopted by the Serbian Parliament in 2004, it was not until 2008 that certification authorities were created.[60]

Currently, there are twelve certification authorities, among which are the Chamber of Commerce of the Republic of Serbia, the Post of Serbia, the Ministry of Internal Affairs and E-Smart Systems Company.[61] The validity of these certificates ranges between 1 and 5 years.[62] Regarding the relationship between foreign and domestic certificates, there is an inconsistency between the legal framework and reality. While the law equates certificates issued by foreign certification authorities with domes-

[56] D. Prlja, M. Reljanović, Z. Ivanović, 110.

[57] C. M. Laborde, 54.

[58] *Ibid.*, 42.

[59] G. Pavlović, "Implementacija elektronskog potpisa u Srbiji", *Telekomunikacije stručno naučni časopis Republičke agencije za elektrnske komunikacije* 2016/1, *http:// www.telekomunikacije.rs/archive/first issue/g pavlovic: implementacija elektronskog potpisa u srbiji.119.html*, last visited 15 August 2015.

[60] PKI Sistem i Sertifikaciono telo Pošte*, http://www.ca.posta.rs/default.htm*, last visited 15 August 2015.

[61] R. Prodanović, I. Vulić, "Comparative Analysis: PKI in Serbia," *http://www.in fotech.org.rs/blog/wp content/uploads/43.pdf*, last visited15 August 2015.

Certificates issued by E Smart Systems certification authority are the ones mostly used for e commerce; certificates issued by other bodies are used for e government, e business, etc.

[62] *Ibid.*

tic ones under certain conditions,[63] it is doubtful whether there has been any actual cooperation between domestic and foreign bodies.

One practical example where different requirements for electronic signatures raise an issue regards the form (and, consequently, the existence) of an arbitration agreement. Arbitration has, undoubtedly, become a frequently used tool in international transactions. Therefore, it is of utmost importance to determine whether arbitration agreements may be concluded electronically, and, in the affirmative, whether there are any requirements with respect to the parties' signatures. The Law on Arbitration,[64] which applies to both domestic and international arbitrations,[65] requires a written arbitration agreement.[66] An arbitration agreement is considered to be in writing if it is contained in documents that the parties have *signed*.[67] Now, if this was the last paragraph of the provision, concluding an arbitration agreement in electronic form would be very cumbersome. This is because Article 10 LES states that only a *qualified* signature produces the same effect and has the same probative force as the signature in relation to data in paper form. This would then mean that the parties could not conclude an arbitration agreement in electronic form prior to obtaining electronic certificates, and that in itself would entail a whole different procedure.

Fortunately, the Serbian legislator has specifically addressed the issue of electronic arbitration agreements in Article 12(3) of the Law on Arbitration. Pursuant to this provision, an exchange of electronic messages, which provides written evidence of the parties consent, constitutes a valid arbitration agreement, even if the parties had not signed these messages. Consequently, if an arbitration agreement is concluded between a Serbian party and a business entity from a State whose legislator provides for the same rule, no problem arises. However, the problem would arise if the other State requires a signature. In that case, would the parties then have a valid arbitration agreement? Article 9(3) e-CC would spare the parties the unnecessary headache. In short, the requirement of written form would be satisfied if a reliable method, which identifies and indicates the party's intention in respect to the content of an electronic communication, was used.

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[63] If the certificate originates from a country with which Serbia has a bilateral agreement, or the foreign certification authority has received a decision regarding registra tion of the certification authority from a domestic certification authority. See Article 35 of the Law on Electronic Signature. Article 35 states that foreign and domestic certificates are equated in case of 1) a bilateral international agreement regarding recognition of qual ified electronic certificates or 2) registration as a local certification authority.

[64] Law on Arbitration, *Official Gazette of the Republic of Serbia* No. 46/2006.

[65] Pursuant to Article 2 (1) the parties to an international arbitration may decide otherwise.

[66] Article 12 (1).

[67] Article 12 (2).

5. AREAS IN WHICH THE ELECTRONIC COMMUNICATIONS CONVENTION MIGHT INSPIRE DOMESTIC LEGAL REFORM

Firstly, the e-CC introduces one of the topics that was not addressed in the MLEC: conclusion of a contract via "automated message systems".[68] An "automated message system" is "a computer program or an electronic or other automated means used to initiate an action or respond to data messages or performances in whole or in part, without review or intervention by a natural person each time an action is initiated or a response is generated by the system".[69] Article 12 e-CC provides that contracts concluded without human interference, i.e. contracts concluded between an automated message system and a natural person, or between automated message systems, are equally enforceable as those concluded between natural persons. Serbian law does not specifically address that subject. A "contract in electronic form" is described as a contract concluded between natural and/or legal persons.[70] This does not necessarily exclude the possibility of contracts between automated message systems, however, in the name of certainty, it might be wise to supplement domestic legislation with a similar article.[71]

Secondly, Article 14 e-CC provides a rule in case of error in an electronic communication exchanged with the automated message system of another party. It is the only provision "that changes substantive law rather than dealing with the effects of the medium of communication".[72] Article 14 states that, if the party whose automated message system has not enabled the other party to *correct* an error, than the party who committed an error may "*withdraw* the portion of the electronic communication in which the input error was made". Serbian law imposes no such duty. It is worth stressing that the application of this article is restricted to 'input errors' made by natural persons when communicating with a machine rather than another natural person.[73] Moreover, Article 14 does not affect the application of domestic rules regarding errors.

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[68] Article 12 e CC.

[69] Article 4 (g) e CC.

[70] Article 3 (7) LEC.

[71] See A/CN.9/546, para. 124. Providing for contract conclusion via automated message systems might raise some additional issues, like the question of liability for un wanted and unintended modifications. While a legitimate concern and an interesting topic for debate and further research, it will remain outside of the scope of the present paper.

[72] J. D. Gregory, J. Remsu, "Article 14. Error in Electronic Communication", *The United Nations Convention on the Use of Electronic Communications in International Contracts: An In Depth Guide and Sourcebook* (eds. A. H. Boss, W. Kilian), Kluwer Law International, The Netherlands 2008, 198.

[73] *Ibid.,* 200.

Additionally, the e-CC contains detailed rules regarding the time of dispatch and receipt of an electronic communication.[74] It is assumed that an electronic communication is received when it is capable of being retrieved by the addressee. Article 15 LEC contains a similar rule, stating that electronic communications are received once they are accessible to the addressee. The e-CC, however, goes one step further and explains when it is "presumed to be capable of being retrieved". If the electronic address is designated, then the communication is received when it reaches the addressee's *electronic address*.[75] If the address is not designated, the recipient must become aware that the message was sent. These clarifications certainly relieve the parties of the trouble of determining the time of receipt and might be a useful addition to the present LEC.

Lastly, the e-CC reaffirms the principle of technology neutrality. This principle may inspire the national legislator to modify the rules on electronic signatures. In addition to causing uncertainties in arbitral proceedings, the requirement of a qualified electronic signature poses problems to foreign parties who wish to bring their claims before national courts. For example, a foreign entrepreneur commences court proceedings against a Serbian party. All memorials, pursuant to Article 98 (1) of the Law on Civil Procedure, must be in writing. One of the necessary elements of a memorial is the signature of the submitting party.[76] Now it is true that written form requirement may be fulfilled by electronic mail,[77] however it is also true that pursuant to Article10 LES the signature must be qualified. A qualified signature, as it was already mentioned, means that the signor possesses a qualified electronic certificate. In order to receive this certificate one must possess a Unique Master Citizen Number ("JMBG"),[78] which is inherent to Serbian citizenship. Hence, the possibility to make electronic submissions in court proceedings is not available to a foreign entrepreneur because he cannot obtain a qualified electronic certificate. Moreover, a foreigner is also precluded from giving the power of attorney electronically. Namely, the power of attorney must be in written form,[79] which may be satisfied by an electronic document as well, if it

[74] See: Article 10 e CC.

[75] A somewhat different approach was taken by the CISG Advisory Council. The Advisory Opinion 1 n the comment to Article 15 states that a communication is deemed received when it reaches the addressee's server.

[76] Article 98 (3) of the Law on Civil Procedure, *Official Gazette of the Republic of Serbia* No. 72/2011, 49/2013, 74/2013, 55/2014 ("LCP").

[77] Article 98 (2) LCP.

[78] Article 11 (4), the Ordinance on the technical and technological steps for creat ing a qualified electronic signature and the criteria to be fulfilled by the means of creating qualified electronic signature, *Official Gazette of the Republic of Serbia* No. 26/2008 and 13/2010.

[79] Article 90 LCP.

is signed by a qualified electronic signature.[80] For lack of a qualified electronic certificate, a foreign entrepreneur would be put in an uncomfortable position. The prospects of having to use regular post and thus face longer proceedings in the event of dispute, as well as the impossibility of giving the power of attorney electronically, are certainly not encouraging foreign entrepreneurs to engage in business relations with Serbian parties.

The Serbian legislator has recognized the problem which foreigners face with respect to qualified electronic signatures. In March 2015 the legislator has, by amending the Ordinance on technical and technological steps for creating a qualified electronic signature, allowed foreigners to obtain qualified electronic certificates despite the lack of a JMBG. Nevertheless, the scope of this amendment is very limited, since the JMBG is not required only for the purposes of signing financial reports.[81] For other purposes, like participation in court proceedings, JMBG is still a prerequisite for the qualified electronic certificate.

While the e-CC does not purport to change national laws of procedure, the principle of technology neutrality, which underlies the Convention's provisions, coupled with practical necessity, might encourage the national legislator to extend the 'waiver' of the JMBG requirement to other situations as well, thus embracing the principle of technology neutrality.

6. THE ELECTRONIC COMMUNICATIONS CONVENTION AND OTHER UNCITRAL TEXTS IN SERBIA

Article 20 e-CC makes the e-CC provisions applicable to the use of electronic communications in connection with the formation or performance of a contract to which other UNCITRAL conventions apply. Serbia has adopted several UNCITRAL texts, e.g. the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the "NY Convention"), the Convention on Contracts for the International Sale of Goods (the "CISG") and the Convention on the Limitation Period in the International Sale of Goods, 1974. All of those treaties were created in the past millennium when modern technology was either non-existent or was still making its baby steps. Some of the provisions of these treaties require adjustments in order to accommodate the needs of contemporary trade.

[80] Article 4 (2) LED.

[81] Article 1(2) of the Ordinance on addendums of the ordinance on the technical and technological steps for creating qualified electronic signature and the criteria to be fulfilled by the means for creating qualified electronic signature, *Official Gazette of the Republic of Serbia* No. 23/15.

Two possible ways to make those treaties compatible with the use of new technologies exist. The first one requires the formal amendment of the treaty. This process, due to the conventions' wide recognition,[82] would be extremely time-consuming. The second, more effective approach, requires the establishment of "general rules of functional equivalence for electronic and written requirements".[83] The e-CC may be considered as a set of "general rules" and, hence, its adoption would be a logical step on the road to facilitating cross-border trade.

Parties applying the CISG would benefit from the e-CC. Although the general rule is the 'freedom of form', the parties' contract may be subject to written form either by virtue of their agreement or due to the applicability of the law of a declaring state.[84] Article 12, which allows countries to declare that the principle of informality will not apply, is the only mandatory provision of the Convention, since the parties to a contract "may not derogate from it or vary its effect". The e-CC is relevant for numerous CISG provisions, but in particular for Arts. 13 and 29 (2). The former provides a definition of "writing", which, understandably, today is considered outdated. The mention of "telegram and telex" should be understood only as *exempli causa* and, hence, the term writing should include electronic communications.[85] Similarly, Article 29 (2), which provides that contracts in writing cannot be modified orally should also be extended to include electronic communications. However, considering that in lack of "hard law" rules it is uncertain "to what extent equivalence between electronic and written form may be achieved through the application of domestic law on electronic commerce to the contract of sale",[86] it would be desirable to enact a complete legal framework that would in a uniform way settle these issues. Such a framework is the e-CC.

Due to the misleading Serbian translation of the provision, the e-CC may also be helpful when it comes to Article 39 CISG and to the form of the notice of non-conformity. While the English version ("give notice") implies no particular form, from the reading of the Serbian version ("*poslati obaveštenje*" – "send notice") one may conclude that the

[82] There are 156 parties to the NY Convention, while the CISG has been adopted by 85 countries.

[83] L. G. Castellani (2009), 188.

[84] To this date there are 8 countries that have made the Article 96 declaration: Argentina, Armenia, Belarus, Chile, Paraguay, Russian Federation, Ukraine and Viet Nam. See: *http://www.uncitral.org/uncitral/en/uncitral texts/sale goods/1980CISG status.html; http://www.unis.unvienna.org/unis/en/pressrels/2015/unisl219.html*

[85] S. Eiselen, "Electronic Commerce and the UN Convention on Contracts for the Sale of Goods (CISG)," *EDI Law Review* 6/1999, 35.

[86] L.G. Castellani (2009), 188.

notice must be in writing.[87] Arbitral tribunals have faced this question and, based on the Serbian formulation, held that the notice of non-conformity must be in writing.[88] Certainly, having in mind Arts. 7 and 101 of the CISG, as well as Article 33 of the Vienna Convention on the Law of Treaties, the English version, as one of the official versions of the CISG, should prevail.[89] Nevertheless, as long as this incoherence remains, the e-CC will be of assistance.

Considering that commercial disputes are often resolved in arbitration, the parties to sales contracts would benefit from the e-CC because it would dispel any ambiguity regarding the form of an arbitration agreement. This is because the term "contract" is given a broader sense in the e-CC than in the CISG, as it encompasses arbitration agreements.[90] The fact that the e-CC applies to arbitration agreements is particularly helpful, since the question of form of arbitration agreements is excluded from the scope of application of Article 11 CISG. [91] Therefore, the prevailing opinion is that, even though the contract of sale may be oral, the arbitration agreement has to be put down in writing. This pre-condition stems from Article II (2) of the NY Convention, which provides that the written form requirement is satisfied by "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams".

One might argue that the e-CC is not needed, because states parties to the NY Convention have a recommendation on how to interpret the relevant articles on form of an arbitration agreement.[92] Others might say that the issue has been resolved by amending the Model Law on International Commercial Arbitration. Indeed, in 2006 the requirements as to the form of arbitration agreements set out in the Model Law were modified. The new version of the Model Law provides two variants of Article 7, which deals with the issue of form. One version mentions no form re-

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[87] M. Đorđević, "Konvencija UN o ugovorima o medjunarodnoj prodaji robe u srpskom pravu i praksi Iskustva i perspective," *Anali Pravnog fakulteta u Beogradu (Anali PFB)* 2/2012, 271–272.

[88] T 09/01 (23 February 2004); T 10/04 (6 November 2005); T 18/01 (27 Novem ber 2002).

[89] V. Pavić, M. Djordjević, "Application of the CISG Before the Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce Looking Back at the Latest 100 Cases", *Journal of Law and Commerce* 2009, 37.

[90] UNCITRAL e CC Explanatory Note, 14, para 5.

[91] Although there is an opposite view in legal doctrine. See J. Walker, "Agreeing to Disagree: Can We Just Have Words? CISG Article 11 and the Model Law Writing Re quirement", *Journal of Law and Commerce* 25/2005–2006, 163.

[92] Recommendation regarding the interpretation of article II, paragraph 2, and ar ticle VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958.

quirements at all, while the other prescribes a writing requirement which is met by "an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference." This solution is satisfactory, yet, the same problem follows this Model Law as does the MLEC and MLES: its "soft law" nature. Consequently, only a binding instrument as the e-CC is suitable to address this issue.

7. POTENTIAL CONTRIBUTION OF THE ELECTRONIC COMMUNICATIONS CONVENTION TO SERBIA'S ECONOMY AND ICT SECTOR

According to the *Doing Business Report* of the World Bank, Serbia is currently 59th out of 189, which is a slight improvement since 2015 when it was 68th.[93] One of the reasons for this ranking are the time-consuming and costly procedures of enforcing contracts;[94] the country's ranking in this area has not changed since 2015 – 73rd.[95] According to the Networked Readiness Index of the World Economic Forum, based on the political and regulatory environment, Serbia ranks 110 out of 143. The e-CC is not a magic wand, however it would certainly facilitate cross-border e-commerce by providing a harmonized set of rules.

Small and medium enterprises (the "SMEs") play a crucial role in Serbian economy. SMEs form 99.8% of all business entities.[96] Their share in the trade is 67.6%; in gross domestic product (GDP) 34%, in gross social value (GSV) – 54.1%.[97] 4.3% of SMEs are exporters.[98] Considering that the e-CC has the potential to improve their position, it may be perceived as contributing to the fulfillment of goals set in the *Strategy for Support and Development of Small and Medium Enterprises and Competitiveness (2015–2020).* One of the most important aims is the internalization of the business of SMEs, which the e-CC would likely be able to achieve since it applies to cross-border B2B transactions.

The e-CC also has the potential to increase e-commerce between Serbian traders and partners from particular countries, like Montenegro

[93] World Bank Group, Doing Business, *http://www.doingbusiness.org/data/exploreeconomies/serbia*, last visited 1 July 2016.

[94] According to the Doing Business Report, the approximate duration of enforcing contracts is 635 days.

[95] Doing Business 2016: Serbia, 83 *http://www.doingbusiness.org/~/media/GIAWB/Doing%20Business/Documents/Profiles/Country/SRB.pdf*, last visited 1 July 2016.

[96] Strategy for Support and Development of Small and Medium Enterprises and Competitiveness (2015 2020*), Official Gazette of the Republic of Serbia* No.35/2015, 10 ("Strategy for SMEs").

[97] *Ibid.*, 9.

[98] *Ibid.,*10.

and the Russian Federation. According to the data of the Serbian Chamber of Commerce from 2013 Montenegro ranked as the fifth export destination[99] while Russia took the fourth place.[100] These countries, besides being important trade partners, are also parties to the e-CC.[101] Having a set of uniform rules, which govern transactions, would certainly facilitate existing business relations and promote new ones.

Adopting the e-CC would also contribute to the growth of the information society in the country. The development of information technologies and their use in all areas has been on the country's agenda for decades.[102] The Government's *Strategy for the Development of an Information Society in the Republic of Serbia until 2020*[103] indicates e-commerce as one of the key factors that drive the development of an information society. That is why it follows on to provide that legal obstacles to e-commerce should be removed in order to achieve that purpose.[104] Consequently, by directly affecting e-commerce the Convention would indirectly positively affect Serbia's information society. In a similar manner the Convention would contribute to the realization of the goals set by the *Strategy of Development and Support for the Industry of Information Technologies*.[105]

8. CONCLUSION

Legislators and policy-makers around the world attempt to create a legal framework for domestic and international trade, which would not hinder or diminish the gains promised by the use of new technologies.[106] The e-CC is a perfect example of such attempts. Its principles of technology neutrality and functional equivalence make it the "most modern electronic commerce legislation".[107]

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[99] *http://www.pks.rs/Predstavnistva.aspx?id 3&t 4&jid 1.*

[100] *http://www.pks.rs/Predstavnistva.aspx?id 7&t 4&jid 1.*

[101] The Convention entered into force on 1 August 2014 in Russian, and on 1 April 2015 in Montenegro. See: *http://www.uncitral.org/uncitral/en/uncitral texts/electronic commerce/2005Convention status.html*.

[102] S. Lilić, "Nauka, pravo i savremenan tehnologija", *Univerzitet na pragu XXI veka*, Beograd 1990, 156.

[103] *Official Gazette of the Republic of Serbia* No. 55/05, 71/05 correction, 101/07, 65/08.

[104] *Official Gazette of the Republic of Serbia* No. 55/05, 71/05 correction, 101/07, 65/08, 4.

[105] *Official Gazette of the Republic of Serbia* No. 55/05, 71/05 correction, 101/07, 65/08, 16/11, 68/12, 72/12.

[106] J. A. Estrella Faria (2008), 21.

[107] L. G. Castellani, "Policy Considerations on the Electronic Communications Convention," *Sungkyunkwan Journal of Science & Technology Law* 3/2009, 193.

The e-CC was prepared as a contribution "to clarifying the legal value of electronic communications exchanged in the context of international contracts, including those falling under the regime of other trade treaties."[108] The Convention aims to, first of all, facilitate the use of electronic communications in international trade law, including in pre-existing treaties. The e-CC makes last century's treaties, such as the NY Convention and the CISG, compatible with the new millennium's technologies. Secondly, the Convention purports to increase uniformity in the enactment of the MLEC and MLES, as well as to update their provisions. Furthermore, the e-CC provides guidance on some issues that previously had either not been considered at all or had not been clearly settled (e.g., contract conclusion via automated message systems, correction of errors of automated message systems, time of dispatch and receipt of an electronic communication). Finally, the e-CC attempts to create uniform core electronic commerce legislation in countries lacking or having incomplete legislation on this issue.[109]

The current Serbian legislation is based on outdated EU directives. The new legal framework of the EU, in particular the eIDAS Regulation, discourages recognition of non-EU signatures. Until the day Serbia joins this community of 28 states, Article 9 (3) e-CC might serve as the bridge between EU and non-EU for cross-border recognition of e-signatures exchanged for commercial purposes. Admittedly, no simple recipe for success exists, and every solution has its advantages and disadvantages. Nonetheless, the e-CC has the potential to facilitate and bring more certainty to cross-border trade, thus giving the necessary boost to the Serbian economy and contributing to the achievement of other goals set by the Government.

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[108] *Ibid.,* 187.

[109] *Ibid.,* 188.

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KOPAONIK SCHOOL OF NATURAL LAW PERCEPTION OF DIGNITY AND LEGAL DISCOURSE IN EUROPE

This article explores divergences between the legal perception on dignity held by the Kopaonik School of Natural Law, which is compliant to the Draft of Serbian Civil Code and the legal discourse that is effective at the level of the Council of Eu rope and/or the European Union. The main feature of the former is the recognition of the dignity status only to persons, and not beyond that formal category. Suchlike position on human dignity has been examined from the perspective of contemporary legal theory; the regional legal texts in Europe which emphasize the instruments re ferring to the field of biomedicine; the case law of the European Court on Human Rights (hereinafter: the Court); and the case law of the European Court of Justice (hereinafter: ECJ). The objectives of the research are to demonstrate that insular understanding of the agents of dignity is not tenable. The conclusion reached through the discussion is that restrictive normative tendencies on dignity agents cannot es cape a criticism that includes the lack of an adequate definition; elitist undertones; discriminatory foundations; and the incompatibleness with international obligations of Serbia.

Key words: *dignity*. *marginal life*. *the Muslims*. *biomedicine.*

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1. INTRODUCTION

This paper addresses the perception of dignity as it was presented in the introductory addressing at the 26th Annual Conference (hereinafter: the Conference) of the Kopaonik School of Natural Law[1] by distinguished professor Perović, the President of the Kopaonik School of Natural Law.[2] The reason to focus on this particular perception, which was entirely upheld in the relevant conclusions and messages of the Conference,[3] arises from its compatibility with the Article 84 of the Draft of Serbian Civil Code which safeguards dignity only to persons, that is, after birth. Accordingly, the critique of the perception concerned simultaneously refers to the narrowness of the Draft of Serbian Civil Code.

The Conference was devoted to the issue of human dignity. On that occasion, at the beginning of his addressing entitled "Natural Law and Dignity", Perović expressed his faith in "dignity as a set of human virtues". Through the relevant parts of his exposition, he addressed (1) general issues relating to dignity; its application and problems in this respect referring to dignity as "an all-encompassing institute of human virtues"; (2)the historical development of philosophical and legal-normative aspects of dignity referring to the main features of the Roman slave-holding civilization, Hellenic philosophical idea and philosophy of dignity in the New Era; (3) current legal standards as reflected in the international conventions that safeguard human dignity with a list of the most important documents and areas of application; and (4) a definition of dignity referring to its substance and its protection by means of legal and moral imperatives. As far as the latter point is concerned, Perović defined dignity as: "untouchable and inalienable all-encompassing institute of human virtues that are constantly kept in practice in an organised sociability."[4] While explaining the features that amount dignity, he attributed the cen-

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[1] The Kopaonik School of Natural Law is an organisation comparable to the legal congress. In general, no coherent legal views are shared by its members.

[2] Professor Perović is also the chairman of the Commission for Drafting of the Civil Code. Odluka o obrazovanju Komisije za izradu Građanskog zakonika, (*Službeni glasnik*, br. 104/06), *http://arhiva.mpravde.gov.rs/lt/articles/zakonodavna aktivnost/grad janski zakonik/*, last visited 19 June 2016.

[3] According to Governmental Commission for Drafting of the Civil Code previ ous conclusions and messages of the Kopaonik School of Natural Law initiated its ap pointment in 2006. See: *Draft of Civil Code of Republic of Serbia. General part.* Serbian Government, Belgrade 2014, 3, *http://www.kopaonikschool.org/dokumenta/A Opsti.deo. pdf*, last visited 22 June 2016.

[4] S. Perović, *Final Document. General statements. Introductory Address. Mes sages*. Of the twenty sixth annual Conference of the Kopaonik School of Natural Law, Pravni život (Legal Life, Journal for legal practice and theory), Belgrade 2013, 33. *http:// www.kopaonikschool.org/dokumenta/Zavrsni ENG 2013 WEB.pdf*, last visited 13 No vember 2015.

tral place to the "human virtues". He maintains "The essence and substance of dignity, as already mentioned, are made out of human virtues and each of them is specific but, taken together, they make the integrity of the institute of dignity."[5] What are the exact virtues that amount dignity notion is the question which Perović considers a philosophical one, and recognizes that answer depends on "different systems dictated by various spaces, time dimensions producing different conceptions about the Good (virtue) or evil (scorn), and by acts and facts, by doing or failing to do."[6]

The most troubling with Perović's understanding of dignity is a consideration that protection and the duty of respect dignity depend on the degree of virtues. In this regard, he states that "There is also a question of degree of virtues to be included in the notion of dignity since this is important for its protection and the duty of respect."[7] Accordingly, dignity admits of degrees and it could be granted only to humans with appropriate cognitive abilities that enable them to adopt and manifest relevant virtues. Considering that Perović attaches recognition of the virtues to the "organised sociability", relevant virtues are only those that are *socially affirmed.* Although Perović's perception of dignity could be supported by some overseas scholars, I ascribe this approach to the Kopaonik School of Natural Law (the Kopaonik School of Natural Law Perception of Dignity, hereinafter KPD) for it departs from comparable theoretical positions to a certain extent and as such it vindicates insular frameworks of domestic legislation.

The first part of the paper refers to two main features of the KPD, the *set of human virtues* and the *socially affirmed* criterion for the determination of dignity agents. The former is briefly analyzed from the perspective of dignity status of the so-called marginal cases such as retarded human beings; the latter is analyzed from the aspect of Kantian theory of dignity, and from the perspective of dignity status of a recently marginalized religious group – the Muslims. The discussion further addresses the very conceptualization of the KPD comparing it with a settled bifurcation between objective and moral dignity. The first part ends with a discussion about the failure of the KPD to distinguish between agents of dignity and agents of personhood.

The second part of the paper examines KPD's positions from the perspective of the contemporary theory about first era issues and from the perspective of the regulation in the field of second era issues.[8] First era

[5] *Ibid.,* 34.

[6] *Ibid.*

[7] *Ibid.*

[8] Trifurcation of the challenges/threats in the field of the right to life protection to the first, second and third era issues has been presented in the unpublished research "Right

issues consider classic dilemmas in respect of the beginning of moral and legal subjecthood, protection, and relations between the right to life and abortion which arise out of natural reproduction. Within this subsection, I deal with the question whether birth makes a relevant moral distinction between humans in contemporary theory. Second era issues consider a new dilemma with regard to artificial fertilization and its relations to moral and legal subjecthood and granted protection. Within this subsection, I discuss the case law of the EJC concerning the conflict between the quest for prenatal life destruction for the purpose of a legitimate scientific enquiry and the dignity status of prenatal life itself.

The main hypothesis of this research is that human dignity is not inherent in socially desirable virtues or formal categories but in life itself. If successful, this paper will demonstrate that Serbian restrictive normative conceptualisation of dignity and its agents is flawed.

2. KOPAONIK SCHOOL OF NATURAL LAW PERCEPTION OF DIGNITY

Like Perović, Jordan argued that dignity consists of "a collection of intangible, distinctively human goods" and this collection requires "moral virtue, appreciation of beauty, awareness of oneself as a unique individual, participation in human community, receptivity, and personal agency," and admits of degrees.[9] Mattson and Clark also note the use of dignity to denote a "virtuous comportment or behaviour".[10]

2.1. Dignity as a set of socially affirmed human virtues

Understanding of dignity as a *set of human virtues* departs from dominant understanding(s) that dignity arises from the "characteristics crucial to humans" such as self-consciousness; the ability to reason; and the freedom to decide on one's own way of life.[11] The first way of understanding attaches dignity to a certain (*socially affirmed*) behaviour, the manifestation of *virtues* while the second one to intrinsic proprieties. On one hand, this could be the KPD advantage over competing concepts

of embryos to be protected under European regional law" by Dragan Dakić. It was suc cessfully defended on 3th June 2014 at the Institute for German, European and Interna tional Medical Law, Public Health Law and Bioethics of the Universities of Heidelberg and Mannheim.

[9] J. C. Matthew, "Bioethics and Human Dignity", *Journal of Medicine and Phi losophy* 2/2010, 184.

[10] D. Mattson, S. Clark, "Human dignity in concept and practice", *Policy Sciences* 4/2011,303 319.

[11] See: L. Nordenfelt, "The varieties of dignity", *Health Care Analysis* 2/2004, 69 81.

which ascribe intrinsic worth to the features, capacities or *virtues* that are presumably crucial to someone's status, because it escapes a paradox that follows from the lack of paradigmatic features that all human beings possess.[12] On the other hand, the KPD rules out congenitally severely retarded human beings; the human beings who have suffered severe brain damage or dementia; and the human beings who have become irreversibly comatose from the dignity status as they are unable to demonstrate any virtue. This is the logical consequence of the essential inability to recognize and respect anything or anybody different from us or from what we do and how we do it (for instance, if animals don't communicate using speech like we do, we consider them to be morally inferior[13], as well as women for different reasons[14]). For, the KPD provides grounds for discovering "new forms of bigotry, and new groups of persons whose moral status has been unjustly diminished,"[15] in the future.

Introducing *socially affirmed* criterion contradicts to Kant's famous phrase that each person must be treated as an end in himself, and never simply as a means because *virtues* imply usefulness and devotion either to the society, either to others or both. "Holding to the [Kantian] principle of human dignity precludes, therefore, the instrumentalization of human beings for economic, social, religious, or political ideals."[16] For, according to the KPD, the person is not the end in him/her; he is reduced to the means of the fulfilment of the *affirmed* goals reflected in preferable *virtues*. This will not be applied if one society proclaims selfishness as the ultimate *human virtue,* and ascribes dignity exclusively to it.[17]An illusionary bypass of this logical error has been made by employing the Aristotelian *principle of the medium* (the average) as the determinant of virtue.[18] However, when applied in the field of dignity, this principle rests on utilitarian calculations. In this way, it is contradictable to the (inherent) Kantian model of dignity, as well.[19]

Another group of humans affected with a *socially affirmed virtues* criterion are the Muslims. In the secular society, a visible expression of

[12] M. Neal, "Not Gods But Animals: Human Dignity and Vulnerable Subject hood", *Liverpool Law Rev* 3/2012, 179.

[13] R. G. Frey, *Interests and Rights: The Case Against Animals*, The Clarendon Press, Oxford 1980.

[14] See: M. A. Warren, *Moral Status: Obligations to Persons and Other Living Things*, Oxford University Press, Oxford 2000, note 4.

[15] *Ibid*., 9.

[16] N. Knoepffler, M. O'Malley, "Human dignity: Regulative principle and abso lute value", *International Journal of Bioethics* 3/2010, 63 76.

[17] For further discussion refer to: P. Singer, *How are we to live? Ethics in an age of self interest*, Random House, Melbourne 1994.

[18] S. Perović, 21 44.

[19] N. Knoepffler, M. O'Malley, 63 76.

religious beliefs sometimes conflicts with that of secular philosophy and virtues affirmed within it. This could be well displayed through the case law of the Court following to the French blanket ban on the wearing of the full-face veil in public places (hereinafter: the Bill). In the drafting process, the competent parliamentary commission criticized "a practice at odds with the values of the Republic", as expressed in the maxim "liberty, equality, fraternity".[20] In regard to the virtue of fraternity, the commission considered that a full-face veil represents its denial since it constitutes the negation of contact with others and a flagrant infringement of the French principle of living together (*le "vivre ensemble"*). Following to that, the commission made a proposal to adopt a resolution reasserting Republican values and condemning the wearing of the full-face veil as contrary to such values. The "Explanatory memorandum" to the Bill followed the proposal of the commission.[21]

Before the Court, French government argued that blanket ban on the wearing of the full-face veil was necessary in a democratic society in order to fulfill the "protection of the rights and freedoms of others" by ensuring "respect for the minimum set of values of an open and democratic society". According to the government, the effect of concealing one's face in public places is to break the social tie and to manifest a refusal of the principle of "living together" (*le "vivre ensemble"*).[22] Although the Court ruled out most of the government "protection of the rights of others" arguments, it, however, found that the impugned ban could be regarded as justified in its principle solely in so far as it sought to guarantee the conditions of "living together";[23] and that the ban imposed by the Bill could be regarded as proportionate to the aim pursued, as an element of the "protection of the rights and freedoms of others".[24] Thus, the Muslims who have built their identity on their religious practice fall short of *socially affirmed virtue–"le vivre ensemble"* and according to the KPD they fall short of dignity. Considering that dignity constitutes the main barrier to the misuse of humans in the biomedical research, could they be subjected to the biomedical experiments or they could not as they might have some *socially affirmed human virtues* to some degree? What about enslaving them to a degree that is proportional to the percentage of their dignity?

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[20] *S.A.S. v. France***,** Applicationno.43835/11, Merits from 1 July 2014. para 17.

[21] *Ibid*., 25.

[22] *Ibid*., 82.

[23] *Ibid*., 142.

[24] *Ibid*., 157.

2.2. Incomplete conceptualisation of KPD

The KPD is not adequately conceptualised since it does not distinguish between the "subjective" and the "objective" dimensions of dignity i.e. Human Dignity and Dignity as Social Status,[25] or what Andorno calls inherent and moral dignity.[26] Due to that failure, the KPD proposes general gradation of dignity which is not defensible. Some consider that Cicero's work where he asserts that "the dignity that human beings have solely because they are human, not animals" implies this very distinction.[27] The distinction between inherent (Kantian concept) and moral dignity has been well known in recent decades. Gewirth distinguishes the dignity which all humans are said to have it equally from the dignity that depends on the behaviour of the particular person.[28] Nordenfelt attributes dignity to humans for no other reason than that they are human beings.[29] Dignity refers to "the intrinsic importance of human life" and requires that "people never be treated in a way that denies the distinct importance of their own lives."[30] Palk considers that this concept of dignity "possesses a passive character in that it is associated with the unearned worth of human beings."[31] Also, there is a broad consensus that inherent dignity does not admit degrees as it is inseparable from the human condition (intrinsic worth), is the same for all, cannot be gained or lost.[32] If we attach dignity only to a "certain cluster of virtues or excellences", and not to the value that is inherent, anything else is arbitrary determined and "could be claimed to be anything such as wealth or belonging to the 'right' race or sex . . . "[33]

From the inherent worth of human being, there has been derived the collective dignity of humanity which also has intrinsic worth and

[25] L. Nordenfelt, 69 81.

[26] R. Andorno, "Human Dignity and Human Rights as a Common Ground for a Global Bioethics", *Journal of Medicine and Philosophy*, 3/2009, 223 240.

[27] M. Rosen, *Dignity: Its History and Meaning*, Harvard University Press, Cam bridge – Massachusetts 2012, 12.

[28] A. Gewirth, *Human rights: Essays on justification and applications*, University of Chicago Press, Chicago 1982.

[29] L. Nordenfelt, 69 81.

[30] R. Dworkin, *Life's dominion: Anargument about abortion, euthanasia and indi vidual freedom,* Vintage, New York 1994.

[31] A. C. Palk, "The implausibility of appeals to human dignity: an investigationin to the efficacy of notions of human dignity in the transhumanism debate" *South African Journal of* Philosophy, 1/2015, 42.

[32] H. Spiegelberg, "Human dignity: A challenge to contemporary philosophy", *Human dignity. This century and the next* (eds. R. Gotesky, E.Laszlo), Gordon and Breach, NewYork 1970, 39 62.

[33] T. Regan, *The case for animal rights*, University of California Press, Berkeley 1983, 233–234.

therefore also deserves to be protected.[34] This derived collective dignity is understood as the background for the regulation of biotechnological developments that may affect basic features of the human species, like reproductive cloning and germ-line interventions. It amounts to a sort of "species solidarity." Rendtorff argues that the use of dignity refers to worth that is not only intrinsic, but fundamentally equal.[35] The KPD certainly amounts inequality between humans based on their capacities or motives to adopt or to manifest the proclaimed *virtues*. In this regard, Dupre, who recognizes the choice of including and—crucially—excluding certain people from a quality of life and degree of human rights "protection that 'normal' people can expect to enjoy", argues that "in this sense, dignity is tightly connected to equality and non-discrimination, as well as to the quality of democracy arising out of this."[36]

Unlike inherent dignity, that what was noted as moral dignity is not intrinsic. Like general proposition of the KPD, moral dignity is more specifically related to *behaviour* and stems from person's ability to freely choose *socially affirmed human virtues*. For, unlike inherent dignity, which is the same for all, moral dignity is not possessed by all individuals to the same degree.[37] Moral dignity is the one that humans may exhibit, lack or lose depending on every-day choices they make, whereas inherent dignity permanently belongs and inherently to every human as such.[38] These two dimensions of dignity are not "exclusive but complementary, in the same way that 'rights' and 'duties' or 'freedom' and 'responsibility' are complementary concepts."[39] Also, Riley considers that "dignity's commonality in legal discourse and its polymorphous nature...is not well served by the language of 'concepts versus conceptions"'.[40] It should be noted however that Feldman warned against the assumption "that the idea of dignity is inextricably linked to a liberal-individualist view of human beings as people whose life-choices deserve respect."[41] Neal considers that suchlike understanding of dignity as "a legal value may invite judg-

[34] D. Birnbacher, "Ambiguities in the concept of Men schenwürde", *Sanctity of life and human dignity* (ed. K. Bayertz), Dordrecht 1996, 107 121.

[35] J. D. Rendtorff, "Basic ethical principles in European bioethics and biolaw: Autonomy, dignity, integrity and vulnerability – towards a foundation of bioethics and biolaw", *Medicine, Health Care and Philosophy* 5/2002, 235–244.

[36] C. Dupré, "Dignity, Democracy, Civilisation" *Liverpool Law Rev* 3/2012, 263 280.

[37] R. Andorno, 231 232.

[38] A. Gewirth.

[39] R. Andorno, 233.

[40] S. Riley, "Human dignity: Comparative and conceptual debates", *International Journal of Law in Context* 2/2010, 117 138. Public Law 61 71.

[41] D. Feldman, "Human dignity as a legal value – Parts I and II", *Public Law* 2000, 61 71.

ments about which life-choices are not compatible with dignity, leading to state restriction of such choices."[42] Moral dignity could be normatively conceptualized but this implies the application of different particularisms in its interpretation. Perhaps it could be exclusively attributed only to persons.[43] Contrary to this, inherent or, as I prefer, objective dignity needs to be normatively recognized, otherwise laws fail short of legitimacy; its factual fundamentality claims for its normative universality.[44]

Further on, the KPD makes confusion between personhood and dignity, two substantively different categories. These two categories have different content and function. From the historical context, personhood is human chauvinistic legal fiction that has been introduced in an end to safeguard domination of the one elitist group over the rest of people. It is grounded on the different prejudices toward the powerless (slaves, blacks, women, indigenous people, Jews, Slavic, animals and so forth). It is nothing more than a mere selfie of the privileged ones that have succeeded in institutionalizing their accumulated power. According to Strawson, there is "the logical primitiveness of the concept of a person."[45] Rawls also rejects the claim that personhood is a necessary condition for having moral rights.[46] Contrary to personhood, human dignity "values us because of, rather than in spite of, or regardless of, our universal vulnerability."[47] It was introduced in the positive law after the ultimate failure of the Personhood grounded on the *socially affirmed virtues* which occurred during the Nazi age. Inherent dignity is the close reflection of Schweitzer's concept of Reverence for Life,[48] in the positive law. The function of dignity is to constitute personhood and not vice versa. As a category that arises from life, which is as such grounded in the natural law, and presents substantive basic norm,[49] dignity cannot be reduced to any formal category, including a person. The acceptance that dignity rests upon the *degree of socially affirmed virtues* that one obtained implies the categorization of humans to those who are fully dignified and those with lesser percentage of it. Therefore, the members of a human family who fall short of "grace, bearing and aristoc-

[42] See: M. Neal,177 200.

[43] See: P. Lee, R. P. George, "The Nature and Basis of Human Dignity", *Ratio Juris* 2/2008, 173 193.

[44] For discussion about "Factual and Normative Claims to Universality" refer to M. Jovanovic, "Are There Universal Collective Rights?", *Human Rights Review* 1/2010, 19 24

[45] P. F. Strawson, "Persons", *Essays in Philosophical Psychology* (ed. D. F. Gus tafson), Anceor Books, New York 1964,402.

[46] J. Rawls, *A Theory of Justice*, Harvard University Press, Cambridge 1971, 12.

[47] M. Neal, 177 200.

[48] See: A. Schweitzer, *Out of My Life and Time: An Autobiography,* Holt, Rinehart & Winston, New York 1933, 233.

[49] M. Neal, "Respect for human dignity as 'substantive basic norm", *International Journal of Law in Context* 1/2014, 38.

racy'[50] in character simultaneously fall short of dignity and they impose no duty of respect for. Despite contemporary efforts to develop the ability to detect dignity violations beyond those committed during the WWII, the KPD falls below the presumed minimum of detective abilities. In fact, the KPD reinforces the very essence of the philosophy that has resulted in white males ruling out everyone but themselves from the legal standing. The KPD template has not been removed from etymological Latin roots where the word *dignitas* denotes a social status commanding respect. *Virtue*-based universality implies moral imperialism because it rests on a level of social or ethical consensus that simply does not exist.[51] Suchlike "universality" of dignity also fails to distinguish itself from discriminatory foundation that is innate in Hellenistic philosophy.

3. APPLICABILITY OF THE KPD TO THE PRESENT DAY CONDITIONS

The recognition of rights only to person is kind of legal tradition in Serbia.[52] In order to challenge this ultimate position of domestic legal thought, professor Milan Palević and Dragan Dakić argued that contemporary recognition of the dignity of prenatal human life is going to have constrictive reflections to access abortion on the European continent.[53] They relied this claim on the case law of the Court which had previously elucidated that Article 2 and Article 3 of the Convention on Protection of Human Rights and Basic Freedoms (hereinafter: the Convention or European Convention) referred to the unborn with implied limitations. In regard to that, within the section II – RIGHT TO FREEDOM, subsection *Freedom of Personality*, the Concluding Plenary Session of the Conference announced the message with the following relevant statement: "Until the child is born we may not speak of it as a holder of rights since foetus and the embryo are only a life in the process of origination; they may be protected only against unlawful abortion."[54] Having in mind that

[50] S. Riley, 117 138.

[51] See: T. Caulfield, A. Chapman, "Human Dignity as a Criterion for Science Pol icy", *PLOS Medicine* 2/2005, 736 737.

[52] This also refers to the recognition of the dignity. See: D. Franeta, *Ljudsko dos tojanstvo kao pravna vrednost,* Pravni fakultet Univerziteta u Beogradu, Beograd 2015, 48 55.

[53] M. Palević, D. Dakić, "Perspektive zaštite prenatalnog života na Evropskom kontinentu", *Pravni život* 2013,139 154.

[54] "Final Document. General statements. Introductory Address. Messages. Of the twenty sixth annual Conference of the Kopaonik School of Natural Law", *Pravni Zivot* 2013, 57, *http://www.kopaonikschool.org/dokumenta/Zavrsni ENG 2013 WEB.pdf.*, last visited 13 November 2015.

the message was derived from "general support"[55] and this is, however, a political and not a scientific argument, I do not intend to discuss it further. Instead, I am going to discuss if the birth makes ultimate moral distinction between humans in contemporary theory like it does according to Kopaonik School of Natural Law.

3.1. Birth as determinant of legal and moral status

In accordance with the KPD, there is the statement of the message concerning this part of the research: "until the child is born we may not speak of it as a holder of rights (...)."[56] In the concerning statement, birth is taken as the boundary line between "a life in the process of origination" and the paradigmatic holder of moral rights – a person. Prior to the scientific development which clarified when human life begins, this confusion was common in philosophical debates. Personhood Theory in general made no distinctions between the morally significant notion "person" and the notion "human being". For instance, Thomson states: "Most opposition to abortion relies on the premise that the fetus is a human being, a person, from the moment of conception."[57] Also, and more explicitly, Wertheimer says: "First off, I should note that the expressions 'a human life,' 'a human being,' 'a person' are virtually interchangeable in this context."[58] Such confusion "constructed as denying the individual's 'humanity'", Sapontzis noted as burdensome to moral theory and practice.[59] He calls it "a historical accident".[60] Therefore, the essential argument of Personhood Theory in favour of abortion permissibility was a false belief that a *conceptus* is not a member of *Homo sapiens* which precludes it from the concept of moral status. Like that outdated and generally abounded approach of Personhood Theory, the statement draws the line at the right to life for societal and legal purposes that conflicts with "boundaries in biological reality."[61] Following scientific development which clarified that human life is created at *syngamy*,[62] Personhood Theory clearly di-

[55] *Ibid*, 47.

[56] See: *Ibid,* 57.

[57] J. J. Thomson, "A Defence of Abortion", *Philosophy and Public Affairs* 1971, 47.

[58] R. Wertheimer, "Understanding the Abortion Argument" *Philosophy & Public Affairs* 1/1971, 69.

[59] S. F. Sapontzis, "A Critique of Personhood", *Ethics*, 9 1 (1981), 610, note 8.

[60] *Ibid*, 613.

[61] J. Glover, *Causing Death and Saving Lives*, Penguin, London 1977, 127.

[62] K. M. Downs, "Embryological Origins of the Human Individual", *Controversies in Science & Technology* 2/2008, 3. Philosophers accepts that fact and developing their discussions with no attempts to denial it, see: D. Parfit, "We Are Not Human Beings", *The Royal Institute of Philosophy* 2012, 7.

vided itself to the system of humanism and the system of personism. After it has been conformed to the scientific facts, the theory of birth is reflected through Europe, where the recognition of legal status of a human at the moment of his or her birth is the common legal standard.[63] However, in accordance to the word of developmental biology, this legal standard does not entirely preclude human beings in the prenatal stage from moral status or even right to life.[64] It should be emphasised herein that legal recognition of the right to life before birth does not mean *per se* recognition of legal capacity i.e. personhood to the unborn.[65] For, contemporary theory and practice distinguish between right to life agents and the agents of personhood.[66], [67]

If we neglect the apparent failure of the statement to distinguish between right to life agents and the agents of personhood as well as between a human being and a person, we can grant that the authors of the message have intended to follow a subversion of the theory of birth. Unlike determinants suggested by different personistic theories, birth cannot be regarded as a characteristic of a personhood candidate. It is not a *virtue* or capacity of an entity whose personhood relays on it. It is a biological event arising from mother's corporal abilities. Theory of birth rests on two main arguments; the first refers to the membership in our social community, while the second refers to the structural position that is changed through this event.

The first argument claims that from the moment of birth, a human being starts to socialize and interact with other members of a social community. The capacities for self-awareness which rests on "human experiences" also starts to develop. Warren considers social interaction and self-awareness as essential to personhood. According to her, the person normally comes into existence only in and through social relationship.[68] If we find that social abilities of a new-born do not differ from those of an unborn just before birth, it means either birth has no personhood significance or infanticide is something equal to abortion. In this regard, some agree that birth can make no difference to moral standing. Tooley claims that neither

[63] C. Enders, "A right to have rights the German Constitutional concept of human Dignity", *NUJS Law Review* 3/2010, 258.

[64] German Federal Constitutional Court, February *25,* 1975 (BVerfGE39,1) and May 28,1993(BVerfGE88,203).

[65] See: Section 1 *Beginning of legal capacity* of German Civil Code, *http://www. gesetze im internet.de/englisch bgb/englisch bgb.html#p0025*, last visited 13 November 2015.

[66] Same at: E. Wicks, "The Meaning of 'Life': Dignity and the Right to Life in International Human Rights Treaties", *Human Rights Law Review* 2/2012, 209.

[67] For critic on such distinction refer to A. Plomer, "Foetus right to life, The case Vo v France", *Human Rights Law Review* 2/2005, 317, 319.

[68] M. Warren, "The Moral Significance of Birth" *Hypatia* 4/1989, 46 64.

late abortion nor early infanticide is seriously wrong because an entity cannot have a *strong right to life* unless it is capable of desiring its own continued existence.[69]Also, Giubilini and Minerva argue that the so– called 'after-birth abortion' (killing a newborn) should be permissible in all the cases where abortion is, including the cases where the newborn is not disabled. They rely such claim on the following arguments: (1) both fetuses and newborns do not have the same moral status as actual persons; (2) the fact that both are potential persons is morally irrelevant and (3) adoption is not always in the best interest of actual people.[70]

The arguments of the cited authors are sufficient to disclose considerable objections to the moral significance of birth, and a sequent possibility of the extension of prenatal rights over children' lives. Also, it is obvious that accepting this theory would introduce a location criterion as a decisive fact for the right to life agency. When a woman delivers a viable infant while his twin sister remains in the womb, then he will be granted with right to life protection while his sister won't. It should be noted herein that even Thomson considers that the foetus has already become a human "person well before birth."[71] According to Warren, it is not a change of location what makes birth morally significant, it is "its emergence into the social world"[72] which calls for a *stronger* protection of the new-born. However, the social abilities of the new born are equivalent to those of an *in vivo* or *in vitro* embryo. The social interaction, which the new born causes, has the same content as it has had at the moment when the mother became aware of her pregnancy. For, I don't see how suchlike embracement into our social community could distinguish between the new-born and *in vivo* or *in vitro* embryos in a morally significant way. Birth is a kind of social initiation which is important to some people, as baptism or circumcision are to some other people.

The second argument conforms to biological reality according to which birth marks the point from which the structural position of a human being is definitely changed. It is no longer solely dependent on bodily functions of the irreplaceable individual. Theory of birth in the EX-YU legal discourse predominantly relies on the gestational connection which brings the structural disposition of prenatal human life. Essentially, it rests on the assumption that the one who dominates has the unlimited power over the powerless. Such position, of course, cannot be grounded on any main

[69] M. Tooley, *Abortion and infanticide*, Oxford University Press, Oxford 1983, 41.

[70] A. Giubilini, F. Minerva, *After birth abortion: why should the baby live*? *http:// jme.bmj.com/content/early/2012/03/01/medethics 2011 100411.full.pdf+html*, last visited 29 August 2015.

[71] J. Thomson.

[72] M. Warren (1989), 46–64.

stream ethical theory;[73] it is the construction of different isms. Singer says "If a being suffers, there can be no moral justification for refusing to take that suffering into consideration".[74] Warren accepts that the interests of an entity with capacity for suchlike sentience require some consideration in utilitarian calculations, or that it be treated as an end and never merely as a means.[75]According to Harris, vulnerability is constitutive element of dignity.[76] The Convention Institutions granted that gestational connection imposes limitations (but not preclusion) to unborn life protection when conflicts to the mother's interests.[77] According to some, this is a unique gestational connection which justifies women's typically greater control over reproduction.[78] According to Karnein, the power of the gravid woman to deny her assistance precludes embryos from the right to life protection.[79] Simultaneously, this author does not deny that persons need protection most "when they are still early embryos."[80]

The application of suchlike help-dependant criterion is troubling in respect to premature infants who also require help to maintain vital functions. As noted by Wicks, this makes personhood and belonging protection dependent upon the state of modern technology and its availability to a particular fetus.[81] In that regard, she states that it "seems to be something absurd about a moving boundary, so that we might say 'last year this fetus would not have been a person at this stage, but since they re-equipped the intensive care unit, it is one'".[82] Apparently, technological progress brings various possibilities and increscent awareness about moral significance and even moral status of healthcare robots.[83] One of the

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[73] J. H. Solbakk, "Vulnerability: A futile or useful principle in health care ethics?", *The Sage and book of health care ethics* (eds. R. Chadwick, H. ten Have, E. M. Meslin), 2011.

[74] P. Singer, *Animal Liberation: A New Ethics for Our Treatment of Animals,* Harper Collins, New York 1975, 5.

[75] M. Warren (1989) 4.

[76] George Harris, *Dignity and vulnerability: Strength and quality of character,* University of California Press, Berkeley Los Angeles 1997.

[77] *R. H. v Norway,* Application No. 17004/90, Decision of 19 May 1992.

[78] See: S. Sheldon, "Gender Equality and Reproductive Decision Making", *Femi nist Legal Studies* 12/2004, 303, 312.

[79] A. Karnein, *A Theory of Unborn Life: From Abortion to Genetic Manipulation*, Oxford University Press, Oxford 2012, 17.

[80] A. Karnein, 61.

[81] E. Wicks, *The right to Life and Conflicting Rights of the Other,* Oxford Univer sity Press, Oxford 2010, 19.

[82] E. Wicks (2010), 125.

[83] D. J. Gunkel, The Rights of Machines: Caring for Robotic Care Givers at Ma chine Medical Ethics (eds. S. P. van Rysewyk, M. Pontier), Springer International Pub lishing Switzerland 2015,151 166,

possibilities that arose from the time laps between fertilization and gestation is the replaceability of the unwilling genetic mother. For, *in vitro* embryos do not depend on bodily functions of the irreplaceable individual, and certainly they are in a better structural position than those *in vivo*. Also, by means of lavage, it is possible to remove an embryo from the woman's body (for pre-implantation genetic diagnosis or even transfer to another recipient), which also affects its legal status.[84] If we grant that personhood and belonging protection depend upon the state of modern technology, then, according to Warren who opposes that possibility, we are forced to "make a hazardous leap from the technologically possible to the morally mandatory".[85] The significance of birth is reduced only to normative, and as we are getting closer to an artificial replacement for the unborn child's connection to a woman's body, birth may no longer have even suchlike significance, "and conception may take its place."[86]

Theory of birth faces firm critiques from both camps of the abortion debate. The defensibility of help-dependant criterion could be observed from the analogous perspective referring to the question when protection ceases to exist. It is not far from reality that someone's bodily parts and organs, except brains, could be successively replaced with artificial devices.[87] Although this entity is not able to survive without assistance, Warren claims that we would be morally obliged to accord them a moral status and belonging right to life protection due to their mental and behavioural capacities that are comparable to ours.[88] Also, comatose patients are in a radical help-dependant position. In neither of these situations, a structural disposition precludes the powerless from the right to life protection or from moral status.

3.2. The KPD in the context of regional legal texts in Europe

To consider that only the person merits the rights arising from dignity (such as the right to be protected from inhumane and degrading treatment or prohibition of slavery), as it has been argued by the KPD and reflected in the Article 84 of Serbian Draft of the Civil Code,[89] implies that all human and non-human non-persons are not dignity agents. Contrariwise, according to Andorno, inherent dignity plays a central role in

[84] M. Ford, "Evans v United Kingdom: What Implications for the Jurisprudence of Pregnancy?", *Human Rights Law Review* 1/2008, 182.

[85] M. Warren (1989).

[86] A. Karnein, 24.

[87] L. R. Baker, "Big Tent Metaphysics", *Abstracta SPECIALISSUE I*, 2008, 9.

[88] M. Warren (2000).

[89] See Draft of the Civil Code *http://www.kopaonikschool.org/dokumenta/A Op sti.deo.pdf*, last visited 13 November 2015.

legal instruments relating to bioethics.[90] Graaf and Deldenargue consider that Kantian and relational dignity is useful in medical ethics.[91] If we, contrary to this discourse, take that man is the measure of all things[92] in transhumanists sense, then the KPD may receive some support from that camp of debate on bioethical issues.[93] In this regard, the Universal Declaration on the Human Genome and Human Rights (UDHGHR)[94] that was omitted from Perović's list of the most important legal texts which safeguard dignity[95] states that "the human genome underlies the fundamental unity of all members of the human family as well as the recognition of their *inherent dignity* and diversity. In a symbolic sense, it is the heritage of humanity". Thus, transhumanism has been rejected in the most explicit way. Another moment which should be stressed herein is Hippocrates' influence on the development of the norms dealing with bioethics.[96] The UDHGHR seeks to unite reflections on the practice of medicine derived from Hippocrates with those conceptualized within international human rights law.[97]

It could be considered that the protection of dignity is the governing objective of all major regional instruments in Europe. Although the European Convention does not contain any reference to dignity protection in its wording, the Convention institutions stressed that the main purpose of Article 3 is the protection of human dignity.[98] Also, the significant legal source, which addresses dignity protection, is the EU Charter of Fundamental Rights which in Article 1 declares that human dignity is inviolable and requires both respect and protection. The EU Charter provides a special protection to dignity in the field of medicine and biology, as important to European constitutionalism. Borowsky sees the EU Charter of Fundamental Rights as a potential instrument to improve the legal protection for embryos which, at European level, (he argues) has so far not been particularly strong.[99] According to Starck, the resolution of the Eu-

[90] R. Andorno, 231.

[91] R. van Der Graafand, J. J. M. van Delden, "Clarifying appeals to Dignity in Medical Ethics from an Historical Perspective", *Bioethics* 23,3 (2009), 151 160.

[92] S.Perović, 22.

[93] See: C. S. Lewis, *The abolition of man,* Harper Collins, New York 2001, 84 85.

[94] Adopted unanimously and by acclamation by the General Conference in 1997 and endorsed by the United Nations General Assembly in 1998.

[95] S. Perović, 31.

[96] See: Explanatory Memorandum of the Preliminary Draft Declaration on Uni versal Norms on Bioethics, 21 February 2005 para.12.

[97] *Ibid.*

[98] *Tyrer v.The United Kingdom*, Application No.5856/72, Merits from 25 April 1978.

[99] C. Starck, "Embryonic Stem Cell Research according to German and European Law", *German Law Journal* 7/2006, 638.

ropean Parliament (strictly speaking, non-binding declarations of legal policy) from 15 January 1998 reflects the acknowledgement that the human person is created by the fusion of the cell nuclei and that this person's human dignity is entitled to protection from this moment in time.[100] When it comes to dignity and its protection at regional scale, however, the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (Convention on Biomedicine)[101] and its additional protocols are of crucial importance. Although this Convention has been binding for Serbia since December 1st, 1999 and it presents the only regional source that has the word "dignity" in its title, Perović missed to refer to it, as well.[102] The reason for that could be in the fact that the Convention on Biomedicine has a modest impact on domestic legislation in Serbia.[103]

The Convention on Biomedicine in the first paragraph of Article 1 imposes the protection of the dignity and identity of *all human beings*. The drafters of the Convention on Biomedicine used the phrase "all human beings" and this could open doors to debating whether such term refers to embryos *in vitro,* similar to that whether the term "everyone" in the Convention refers to the unborn. In this context, Beyleveld and Brownsword argued that the term "all human beings" in this Article requires contracting parties to protect the dignity and identity of all human beings, and it is intended by the drafters to be broader than "everyone" in the Convention. This claim could be firmly grounded on the positions of the Convention institutions, which have recognized that an embryo belongs to human race.[104] Such recognition could qualify *in vitro* embryos for protection of dignity afforded to all human beings equally. In regard to the application of Convention on Biomedicine to prenatal life, Beyleveld and Brownsword conclude that "Article 1 breaks a clear compromise: while those signatories who cannot agree that the *conceptus* is a bearer of human rights are to be allowed to persist with this belief, all signatories are required to accept that, in the name of human dignity, the *conceptus* is a protected entity".[105] Further, the Explanatory Report on the Convention on Biomedicine states "a generally accepted principle that human dignity and the identity of the human being [must] be respected as soon as life [begins]".[106] In support of the claim for dignity status of prenatal

[100] *Ibid*, 636.

[101] It was opened for signature on 4April1997 in Oviedo, came into force on 1 December1999.

[102] S. Perović, 31.

[103] See: D. Franeta, 54.

[104] *Vo v France* Application No 17004/90, Merits, 8 July 2004 para 84.

[105] D. Beyleveld, Roger Brownsword, *Human Dignity in Bioethics and Biolaw*, Oxford University Press, Oxford 2001, 32.

[106] The Explanatory Report to the Convention on Biomedicine para 19.

life, there firmly stands Additional Protocol to the Convention on Biomedicine concerning Biomedical Research that protects the dignity and identity of all human beings[107] and it refers to research on foetuses and *in vivo* embryos.[108] Following the opinion on the ethical aspects of research involving the use of human embryos in the context of the 5th Framework Programme (23 November 1998), The European Group on Ethics in Science and New Technologies at the European Commission has examined controversies on the concept of the beginning of life and 'personhood' and submitted opinion that "human embryo, whatever the moral or legal status conferred upon it in the different European cultures and ethical approaches, deserves legal protection." Hence, Kersten sensibly concludes that all living beings,who are the product of human procreation, are entitled to the protection of human dignity, whether the act of procreation was performed naturally or extra corporeally with human (germ line) cells.[109] With no intention to undermine the importance of the meaning and conceptualization of dignity,[110] the answer to the question whether dignity presents a legal principle[111] or a fundamental right[112] cannot affect dignity status of the human non-persons. This claim receives a sound support from the Court's statement that prenatal human life requires "protection in the name of human dignity, without making it a 'person' with the 'right to life' for the purposes of Article 2."[113] The practical effects of the prenatal life's dignity status are reflected through the regulations and the practices in biomedical research.

3.2.1 Legitimate scientific inquiry versus dignity of prenatal humans

To date, the practical importance of dignity has appeared to be insignificant when it is faced with a curette or any other primitive tool. Insignificance is a common trait of the achievements of civilization when faced to primitivism. As handling tools have been transformed into sophisticated instruments, and primitivism is articulated with conscientiousness and knowledge, the importance of dignity is transforming from theoretical and illusory into practical and accessible. The limits to the protective range of

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[107] Adopted by the Committee of Ministers on 30 June 2004.

[108] See: Article 1 and Article 2 of the Protocol.

[109] J. Kersten, *Das Klonenvon Menschen,* Jus Publicum, Tübingen 2004, 403, 554.

[110] See: A. Schulman, *Bioethics and the Question of Human Dignity*, University of Notre Dame Press 2009, *http://www3.nd.edu/~undpress/excerpts/P01307 ex.pdf*, last vis ited 29 August 2015.

[111] German Federal Constitutional Court, 16 January 1957 (BVerfGE6,32,36) and 15 February 2006 (BVerfGE 115,118,152).

[112] German Federal Constitutional Court, February *5,* 2004 (BVerfGE109, 133, 181).

[113] *Vo v France* Application No 17004/90, Merits, 8 July 2004 para 84.

dignity are bordered with the interests arising from the expectations of the scientific and research potential of embryonic stem cells. In the field of biomedicine, the dignity status of embryos conflicts with the freedom of research that was introduced in the international law,[114] but both with implied limitations. For, the effect that the application of dignity produces in the field of biomedicine has been observed by a number of scholars who have different viewpoints. One camp of the discussion argues that the operation of dignity is a limiting factor to biomedical progress.[115] However, dignity truly has the potential to amount a barrier to using embryos as mere objects,[116] and prevent any research on them other than for their own benefit. In line to that, Articles 16, 17 and 18 of the Convention on Biomedicine set up a series of conditions to protect research subjects,[117] and forbid embryo creation for research. The Convention on Biomedicine states that "where the law allows research on embryos *in vitro*, it shall ensure adequate protection of the embryo" (Art. 18(1)).

In regard to embryonic stem cell research, national legislations in Europe are divided between two concepts which provide different extents of embryo protection. Such concepts have their origin in cultural particularities, historical circumstances, political views, etc. French stem cell regulation and its chronology is a good example to support this claim.[118] The highest level of protection is afforded to the embryo by the regimes which consider it as a person in the traditional sense, or provides it with a right to life from conception.[119] At the other end of the spectrum is the view that the embryo is unworthy of any protection and may be used for any means, including as a laboratory artefact. This approach, which reflects the KPD, is not adopted by any European state.[120] The second re-

[114] For further discussion refer to Amrei Sophia Muller, "Remarks on the Venice Statement on the Right to Enjoy the Benefits of Scientific Progress and its Applications (Article15(1)(b)ICESCR)", *Human Rights Law Review* 10 (2010), 765 784.

[115] See: R. Macklin, "Dignity is a Useless Concept", *British Medical Journal* 2003, 1419; R. M. Green, *Babies by Design: The Ethics of Genetic Choice,* Yale University press, 2007, 4; G. Kateb, *Human Dignity*, Harvard University Press, Harvard 2011, 1 3.

[116] See: Opinion No.15 of the European Group on Ethics Regarding Ethical As pects of Human Stem Cell Research and Use.

[117] This source simultaneously recognizes need for such research for the sake of progress, see: Article 13.

[118] S. Hennette Vauchez, "Words count: How interest in Stem cells has made the embryo available – a look at the French law of bioethics", *Medical Law Review* 17/2009, 59 61.

[119] Irish Constitution (BunreachtnahÉireann) art. 40(3)(3) *http://www.irishstatute book.ie/en/constitution/*, last visited 28 August 2015. German Law for Protecting Embry os, 1990, *Federal Law Gazette,* (BGBl.IS.2746), *http://www.gesetze im internet.de/eschg/ BJNR027460990.html*, last visited 28 August 2015.

[120] See: S. Halliday, "A comparative approach to the Regulation of Human Embry onic Stem Cell research in Europe", *Medical Law Review* 12/2004, 42.

gimes accept a middle way approach, "introducing gradualist approach", whereby the protection afforded to the embryo is dependent upon its stage of development.[121] Accordingly, the spectrum of national legislation in Europe encompasses a regulation which permits embryo research and their creation for such purposes as well as the procurement of human embryonic stem cells from supernumerary embryos in certain circumstances;[122] it also prohibits the procurement of human embryonic stem cells from any embryos including supernumerary or otherwise.[123] However, neither of those regimes denies dignity status to prenatal life. In the literature, Europe is recognized as a "pro-regulation" region,[124] with zones of regulated prohibition rather than regulated permission.[125] Dignity status of prenatal life has been used as a justification for restrictive approach to embryonic stem cells research. For instance, in an attempt to regulate time laps between procreation and pregnancy and prevent the misuse of artificially created embryos, *The Law for Protecting Embryos* (ESchG) was passed to protect embryos *in vitro* from the moment of fertilization, providing prenatal life with a wider scope of protection from moment in time prior to the relevant law on abortions recognizes that pregnancy has begun.[126]

The next issue which is affected by the embryo's dignity status concerns the patentability of the inventions originating from embryonic stem cell research. The important legal text for further discussion is the Directive on the Legal Protection of Biotechnological Inventions (Directive, 98/44/EC).[127] The Directive introduces human dignity into European Union patent law in the field of biotechnological inventions. It presented an important complication for the regulatory construction of the Directive.[128] The Article 6(2) (c) of the Directive excludes the uses of embryos for commercial and industrial purposes since those practices are consid-

[121] *Ibid.*

[122] Netherlands, The Embryos Act 2002 (*Wet houdende regels inzake handelingen met geslachtscellen en embro's: Embrowet* (2002)).

[123] For instance, German Law for Protecting Embryos. (1990). *Federal Law Ga zette,* (BGBl.IS.2746). *http://www.gesetze im internet.de/eschg/BJNR027460990.html*, last visited 29 August 2015.

[124] R. Brownsword, "Regulating human genetics: New dilemmas for a new millen nium", *Medical Law Review* 12/2004, 15.

[125] See: S. Halliday, 40.

[126] A. Karnein, see also: German Criminal Code (1998), *Federal Law Gazette,* (I, p. 945, p. 3322) § 218 of the German *StGB*, *http://www.iuscomp.org/gla/statutes/StGB. htm#218*, last visited 29 August 2015.

[127] *http://eur lex.europa.eu/legal content/EN/TXT/PDF/?uri CELEX:31998L0044 &from EN*, last visited 11 August 2015.

[128] Refer to M. Varju, J. M. Sandor, "Patenting stem cells in Europe: The challenge of multiplicity in European Union Law", *Common Marker Law Review* 3/2012, 1020.

ered to be contrary to *ordre public* or morality.[129] The European consensus on this may be also represented by the Convention on Biomedicine and its provisions on human dignity and the non-commercialization of the human body (Arts. 1 and 21).[130] Practical and authoritative meaning of those principles has been reflected through the case law of the ECJ. In *Brustle v Greenpeace*,[131] three questions were evoked and all of them refer to different aspects of prenatal life's dignity status. First, how the term 'human embryos' should be interpreted under the Directive; second, whether commercial exploitation for scientific research comes under the definition of 'uses of human embryos for industrial or commercial purposes'; and third, whether an invention, which uses an embryo at any stage, is precluded from patentability. The first question is particularly important for this research since it defines the agents of dignity in the entirely opposite way as compared to that of the KPD and the Draft of Serbian Civil Code.

Despite the lack of consensus regarding the status of an embryo and definitions of the embryo across EU Member States, the ECJ was of the opinion that it was its role to make a legal decision regarding the definition of the term "embryo" in the context of the Directive.[132] The ECJ considered that any activity which affected human dignity must not be patentable and, due to its concern with the protection of human dignity, it was of the view that it should give a wide definition to the term "human embryo".[133] As a result, the ECJ defined that a "human embryo" includes a "fertilised egg, a non-fertilised human ovum into which the cell nucleus from a mature human cell has been transplanted or a non-fertilised human ovum whose division and further development have been stimulated by parthenogenesis" as they are capable of developing into a human being.[134] According to this verdict, the potential to commence the process of developing into a human being is that what counts for moral and dignity status, regardless of the stage of development and the question whether such potential is natural or artificial.[135] Along with fertilized eggs, the judgment expands a judicial commitment to the protection and

[129] See also: Article 53 (a) of the European Patent Convention.

[130] See: M. Varju, J. M. Sandor, 1020.

[131] Case C 34/10, October 18 2011, *http://curia.europa.eu/juris/document/document.jsf?text &docid 111402&pageIndex 0&doclang EN&mode lst&dir &occ first &part 1&cid 138779*, last visited 29 August 2015.

[132] *Ibid.*, para. 30.

[133] *Ibid.*, para. 34.

[134] *Ibid.*, para. 36 and 38.

[135] *Ibid*, para 50. The artificially synthesized entities i.e. bearers of artificial devel opmental potential are precluded from this definition in the latter verdict of the EJC in the case C 364/13 International Stem Cell Corporation, December 18 2014, *http://curia.europa.eu/juris/liste.jsf?num C 364/13*, last visited 13 June 2016.

a dignity status even to the human cells that are at the stage as early as *totipotency.* At that stage, human stem cell lines, zygote, blastomeres, embryoblast have the potential to generate all types of differentiated cells and potential for self-organisation (gastrulation, basic body plan and individuation).[136] For, even those ontological stages of human life that are lower than the stage of the embryo or the stage of the foetus are dignity agents. Considering that the Court recognized embryos as members of human race, and that the ECJ defined when they begin their existence, we could conclude that in the rest of Europe, according to judicial pronouncements of regional judicial bodies that are compliant to the common opinion of the developmental biology, human beings start to exist from the moment of *syngamy*. Furthermore, in the light of the scientific developments, the ECJ recognized that neither the sole moment of fertilization nor the moment of transplantation of the cell nucleus into the ovum are exclusively relevant for the purposes of creation of a human life. As science develops, it is to be expected that very soon we will be able to induce commencing potential in more and more rudimentary forms of cell formation or even single cell. Consequently, in the opinion of the ECJ, such potential takes precedence over the research potential of embryonic stem cells. Dignity status safeguards the bearers of the commencing process against the use for scientific purposes, other than for scientific purposes which are useful for them.[137]

4. CONCLUSION

The KPD cannot escape a criticism that includes the lack of an adequate definition, elitist undertones, and discriminatory foundations, as well as a large conflict potential and the incompatibleness with international obligations of Serbia. A historical lesson should be accepted: dignity cannot rest on *socially affirmed virtues*. Furthermore, dignity cannot be limited only to the *set of human virtues*. Both human and non-human non-persons are the agents of dignity. Although we may be confused in this regard by cultural particularities, historical circumstances, political or ideological views, subjectivism, etc., we cannot neglect scientific development, normative activities and the course in the case law of the regional judicial bodies that took place in the last few decades and shaped European legal landscape. In respect to the dignity status of human non-persons, we cannot overlook theoretical, normative and judicial regulation of the field of biomedicine. The common opinion of all of these three

[136] Data taken from: H. W. Denker, "Potentiality of embryonic stem cells: an ethical problem even with alternative stem cell sources", *J Med Ethics* 32/2006. Table 1.

[137] See: Case C 34/10, October 18 2011 para 42 and 46.

sources of law is that dignity status of prenatal life has a great protective potential in the field of biomedicine. From the aspect of legal sources, at least in the European Union, dignity status of prenatal life is not disputable. There is a theoretical disagreement about protective range of that status and not about the status itself. Even so, an undisputable protective range of dignity safeguards prenatal life against (the uses of) destruction for industrial or commercial purposes, and commercial exploitation for scientific research. States' margin of appreciation is excluded in this regard. For it appears that prenatal life receives a greater protection through dignity than through the presumed right to life, but the protection of dignity cannot be achieved without the protection of the right to life.

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Boris Begović, PhD*

Philip T. Hoffman, *Why Did Europe Conquer the World?*, Princeton University Press, Princeton & Oxford, 2015, 272

At the very beginning of his book Hoffman offers some advice: if you imagine a time machine travel that could carry you back to the year 900, avoid western Europe at all costs, because at that time, it was "poor, violent, politically chaotic, and by almost any yardstick, hopelessly backward" (p. 1). Something like Afghanistan is today, he adds. However, a thousand years later, in 1914, the once pitiful Europeans had taken over the world. They had gained, directly and indirectly, control of 84 percent of the globe. The question "why" is the topic of the book – not only in the title. Almost every sentence in the book is written with the aim of answering to this simple question, to provide an explanation of why it happened. Unquestionably a book that is very focused – a quality that is not so widespread these days.

For military historians, the answer is clear and simple: the Europeans simply had superior technology. But then the question remains: why did the Europeans achieve superior military technology, the one that embraced everything that made military victory more likely, from weapons to training and administration? The explanation of this technological superiority, embodied in gunpowder technology, is provided within the framework of economic history, applying the new methodological accomplishments of economic theory – the tournament model. For economists, a tournament is a sort of competition that, under the right conditions, can drive contestants to exert enormous effort in hope of winning the prize. It describes and explains incentives and behaviour in "winner takes all" situations.

Hoffman's model is based on several assumptions, all of them fit well with medieval and early modern Europe. First, rulers go to war when the prize of the victory in the war is greater than the cost of losing the war, plus the fixed and variable costs of waging the war. The fixed costs

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are costs of setting armed forces and setting the fiscal system needed for funding the military operations. The variable costs are all the costs of mobilising resources for waging the war, i.e. military expenditures, including the political costs for the ruler generated by the conscripts and taxpayers. The greater the difference between the prize and the total costs, the more frequently wars can be expected. Second, a specific military technology is improved only through war, and that is achieved only through learning by doing. There is no research and development, and technological progress depends on the frequency of wars and the size of the total resources allocated, not overall, but those spent on specific military technology, e.g. gunpowder technology. More wars and more resources produce more technological progress. Third, there is a path dependency: improvements accomplished by the rulers in the previous round will make their militaries more effective in the future. Fourth, there are spill-over effects between the rulers, i.e. technological progress achieved by one ruler can be transferred to the other, his adversary, in the process of technology transfer, although with some barriers to that transfer from various sources. Finally, the implicit assumption is that there are no spill-over effects between civilian and military technologies, and only military technological progress is observed in the model.

Based on the tournament model and its predictions (both formalised in the appendices of the book, for mathematics-loving economists), four necessary conditions for advancing gunpowder technology are specified: (1) There must be frequent war, but war is not enough; (2) Rulers' expenditures on war must be lavish; (3) Rulers must use gunpowder heavily, and not older military technologies; (4) Rulers must face few obstacles to adopting military technology innovations, even from adversaries.

Only the simultaneously satisfying of all these conditions together will produce sustainable technological progress in gunpowder technology, it being the cutting-edge military technology in the early modern period of history. Hoffman vividly demonstrates that early modern western Europe satisfied all these conditions. First, wars were a trademark of Europe during that period. The main reason was that the continent was fragmented into many small states, with no hegemon whatsoever. Not only were these states small, but they were also symmetrical. Hence, both prizes and costs of the rulers were symmetrical. The prize for victory was glory – very high on the preferences ladder for the rules of that time – and triumph over enemies of the faith, whatever that means exactly. The costs for the rulers in the case defeat were not great, due to, among other things, kinship among rulers. The victorious rulers did not dethrone, let alone decapitate their defeated cousins. Fixed costs of armed forces were already covered, due to the specific European post-Roman history, where barbarians and nomadic tribes plundered the continent, and variable costs

were reasonable due to good taxation systems, division of power between rulers and gentry (who provided the human resources for the war), and early financial innovations enabling rulers to borrow. Accordingly, second condition was also met, as the rulers not only frequently led their armed forces to war, but also, due to the reasonable variable costs, lavishly funded campaigns. As to the third condition, an important feature of gunpowder technology in early modern times was that it was not efficient against nomads and their agility. However, western European rulers of the time were separated from nomads, with eastern Europe providing the buffer, hence they only fought each other, relying heavily on gunpowder technology. Finally, there were very few obstacles for military technology transfer in western Europe, i.e. for a ruler to adopt innovations from the others, including adversaries. Distances in territorially small Europe were reasonable and there was the similar cultural pattern, based on Christendom that enabled easier communication, which was necessary for technology transfer.

On the other hand, the four conditions were not met in other parts of Eurasia. First, these regions were dominated by large countries, hegemons, such as the Chinese, Ottoman, Russian, and Mughal empires. Their sheer size and capability to muster enormous resources for the war proved to be a deterrent for other states and their rules to consider waging war; no one would have dared to challenge the hegemon. As Hoffman put it "with a hegemon, Europe would then have lived in peace, but the military innovation would have halted" (p. 66). Furthermore, crashing victory of one side in the civil war, like Tokugawa's triumph in Japan, provided a domestic hegemon that no one dared to challenge, hence the domestic equilibrium was peace. Second, these large states featured rather ineffective fiscal systems, so the variable costs were high, without the possibility of huge war expenditures, hence there was no room for innovation in military technology through learning by doing. Thirds, although these large countries were safe in regard to possible invasion by other states, they were all exposed to the threat of nomads and their raids. The Great Wall of China is a vivid testament to that threat. Considering that in the time gunpowder technology was not effective against nomads, as opposed to traditional weapons, there was no incentive for Asian rulers to use that technology, at least not heavily, removing the foundation for its improvement based on learning by doing. Finally, obstacles for gunpowder technology transfer in Asia were substantial, not only due to great distances, but also due to the cultural barriers, which did not exist in Europe. Perhaps China is the most convincing case for the findings of this model, since the "Chinese had a huge head start in using the gunpowder technology, but eventual the western Europeans caught up and surpass them" (p. 79). Although the technology state of the art of the civilian sector, i.e. how close the civilian industries were to the technology possibility fron-

tier, is not mentioned as a segment of the model (the implicit assumption is that there is no spill-over between the military and the civilian sector), Hoffman sometimes, such as in the case of Russia, uses exactly the civilian sector backwardness argument. This is not surprising, since Peter the Great understood this obstacle very well.

Although the lack of a formal model of relations between the progress of civilian and military technology is perhaps the only shortcoming of the book, it is evident that in early modern Europe technological progress in the military sector was much more intensive than in civilian sector, and for Hoffman it is evident that Europe was at the forefront of military gunpowder technology, well before the Industrial Revolution. In one of the vary few cases when data was available (the first firearms production in Frankfurt in the early 15th century), it was demonstrated that during a 30-year period total factor productivity (TFP) growth was 3.0 percent a year – astounding not only by the standards of the late Middle Ages (with rather a stagnant TFP), but also by modern standards.

The core segment of the book focuses on the ultimate causes of why Europe satisfied the conditions for military technology progress, as formulated by the tournament model. According to Hoffman, Europe was fragmented not because of its geography, or because of the kinship ties between the rulers, but because of its political history and three major segments: cultural evolution, Christendom, and political learning. As to the cultural evolution, its pattern was decided by the collapse of the Roman Empire and political chaos with prevalent plundering by nomadic hordes. This provided strong incentive for militaristic values to be elevated to the top of the social values scale. It was the warriors of the late antiquity that metamorphosed into medieval knights, and the threat of the barbarian tribes created strong incentives for effective collective action, which solved the free rider problem. For the societies of early Europe, war was a priority. Western Christianity was a bond that held western Europeans together, but the church was independent from political authorities and the popes did not like competition in profane matters – they "took advantage of Europe's fragmentation and then accentuated it" (p. 132). Obviously, the popes' fear from another and lasting Charlemagne and the Carolingian Empire was fervent. Finally, European rulers innovated ways to decrease the costs of mobilising the resources for war – political learning. Financial innovations amplified the results of political learning and further decreased the variable costs of waging the war. Nonetheless, political learning did not come out from a blue, nor were European rulers wiser than others. It was the incentives they were exposed in times of war that caused them to be learning and innovating.

After answering the main questions on the origin of Europe's military superiority, Hoffman focuses to two specific issues. One is the char-

acter of Europe's conquest of the World, based on private expeditions, i.e. public-private partnerships, to use modern wording. The advent of limited liability and joint stock companies proved to be beneficial to these, essentially the efforts of private entrepreneurs that resulted in the European colonial emperies. At the end of the day, it was appropriate risk dispersion that made these empires possible.

The second question is more interesting: it is about the change of the tournament model in the early 19th century, roughly coinciding with the end of the Napoleonic Wars. The model was turned upside down: glory was no longer important in Europe, let alone religion or other indivisible prizes. On the other hand, rulers faced huge costs if they lost the war – Napoleon's exile to St. Helena was a credible signal. Accordingly, it become much easier to negotiate peaceful settlement of disputes between states, especially considering that at that time the decision-making process already included much broader interests, not only the interest of the ruler. Furthermore, with the development of efficient fiscal institutions and the advent of universal conscription, the variable costs of military expenditures decreased, hence these expenditures soared, both in absolute terms, and measured as a percentage of the national GDP. The last and perhaps the most important change was that military technological progress became based on research and development of new technologies in peacetime, not based on learning by doing in wartime. Hence, lavish military expenditures were recorded in peacetime – this was armed peace. Hoffman rightfully points out that this constellation created the 19th century cold war. Ultimately, the early recommendation *Si vis pacem, para bellum* was fully implemented.

The subtitle of the conclusion of the book ("The Price of Conquest") is enticing, promising to open quite a new area of consideration of Europe's now fully explained military superiority, but provides only a minor reminder to some old debates in economic history, such as the one on the origins of the Industrial Revolution. The subtitle does not correspond to the content of the conclusion of the book.

Hoffman's book is an excellent example of the massive explanatory power of contemporary economic historiography. The considerations in the book are based on the formal model and the model is based on clear assumptions. Contrary to economic theory, both the assumptions and the predictions of the model are submitted to the reality check. And this methodological approach successfully explained why Europe conquered the World. The counterfactual narrative, indispensable in modern economic historiography, supports the main findings. The model could possibly be improved if explicit modelling of the relations between civilian and military sector were to be included in the late medieval and early modern times, as they have been introduced in the explanation of 19th-century developments.

The book *Why Did Europe Conquer the World?* provides a clear and consistent answer to the question from its title, in an outstanding manner, exemplary for the future work of economic historians. Was that outcome worthwhile? For Europe and for the World? Well, these should be topics for future books.

Tamara Matović, LLM*

Legal History at the 23rd International Congress of Byzantine Studies[1]

This summer Belgrade hosted the 23rd International Congress of Byzantine Studies, which gathered more than 1200 scholars from different fields of research, directly or indirectly connected to Byzantine and Medieval studies.

During the last five years, the main organizers – Serbian National Committee for Byzantine Studies and *Association Internationale des Études Byzantines,* with the Institute for Byzantine Studies of SASA, have envisioned and scheduled the Congress under the patronage of the President of Republic of Serbia and UNESCO, including the strong support and generous help of many institutions, among which is the Faculty of Law, University of Belgrade.

Along with the participants of the round tables and thematic sessions, who explored variety of subjects of Byzantine studies, legal historians and their themes also gave important contribution to the Congress.

The motto of the 23rd Congress "Byzantium – a world of changes" marked the scientific activity in various ways. The Round table connected to different issues from the scope of Byzantine legal history, was scheduled for 22 August. It gathered well-known names from this field of research. The main subject of this *Table ronde* was change as an element of Byzantine law, interpreted in the light of different aims, as it was remarked in the introductory part by Daphni Penna (*Δάφνη Πέννα*), from the University of Groningen. University of Palermo's Guiseppe Falcone discussed nature of the Greek translation of *Constitutio Imperatorum.* Thomas Ernst van Bochove, from the Univeristy of Groningen, revisited issues concerning the list of sources found in *Florentine Index auctorum,*

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[1] The 23rd International Congress of Byzantine Studies was held in Belgrade, from 22 to 27 August 2016.

but missing in *Digesta.* His university colleague*,* Frits Brandsman, talked about relation between Byzantine jurisprudence and their ancestor's one, in the light of "old *scholia*" *i. e.* old interpretations found in *Basilica*. Remarkable presentation was one of the Elefteria Papagianni (*Ελευθερία Παπαγιάννη*), profesor at the National and Kapodistrian University of Athens, who spoke about changed perspective on divorce all through the Byzantine legal history, with detailed list of relevant sources. Daphni Papadatou (*ΔάφνηΠαπαδάτου*) from the Aristotle University of Thessaloniki, demonstrated the relation between society and customs in "making" the Byzantine law. Marios Tantalos (*Μάριος Τάνταλος*), PhD candidate at National and Kapodistrian University of Athens, discussed Roman and Byzantine provisions on dowry, specially in regard to its alienation, and looked at regulations from *Senatus Consultum Veilleianum* in later Byzantine documents. Lydia Paparriga Artemiadi (*Λυδία Παπαρρήγα-Αρτεμιάδη*), director of the Research Center for the History of Greek Law of Academy of Athens, dealt with application of stipulations by the contemporaries, and the issue of prevalence of provisions. The last speaker in this session was Lisa Bénou, *Association Pierre Belon, Fondation Maison des Sciences de l'Homme*, Paris, with review on subjects of judicial and administrative organisation in the times of *Paleologoi,* known for its obscureness, demanding for its comparative analysis.

On the very same day the audience could follow the work of the Round table related to crimes against the State and the Church. Günter Prinzing of Johannes Gutenberg-University of Mainz provided exhaustive overview of the problem of slavery in the Byzantine empire, referring to legal sources. Wolfram Brandes of the Max Planck Institute for European legal history, the convener of the Round table, presented the concept of conspiracy in the legislature of Justinian I. A similar subject was addressed to by Andreas Gkoutzioukostas (*Ανδρέας Γκουτζιουκώστας)* of the Aristotle University of Thessaloniki. The presentation was exampli-fied with the news from the sources concerning Michael Traulas's plot against the emperor Leo V. Kirill Maksimovich (Goethe University Frankfurt on Main) talked about anathema in Byzantine church. The Round table discussion was ended by Martin Marko Vučetić, in subject of treason, and Paolo Angelini, from the Faculty of Law KU Leuven, in subject of high treason, stipulated in Syntagma of Matheus Blasteres.

One Round table was dedicated to matters of legal praxis in times of *Paleologoi.* On 23 August the audience gathered to hear the session convened by Inmaculada Pérez Martín, member of the Spanish National Research Council, and Raul Estangüi Gómez from the University Paris I. These two scholars together presented the life and work of Constantine Harmenopoulos, supporting it with rarely studied sources. Olivier Deloui, coming from The National Center for Scientific Research,UMR 8167

Orient et Méditerranée, the editor of the famous Byzantine journal *Revue des études byzantines,* showed the lost manuscript which he had bought in Orleans. The manuscript dates back to 16th century; it is attributed to monk Macarius, and contains Canon rules, probably written after the prior model − the one collected by Matheus Blastares. Ekaterini Mitsiou (*Αικατερίνη Μήτσιου),* researcher in the Institute for Byzantine and Modern Greek Studies, University of Vienna, with an inovative approach spread light at mobility of population in Byzantine times, researching on Patriarchal registers, with the news on tribunals and trials. Elefteria Papagianni in this session discussed the institute of custody (*epitropeia)* in the time of Patriarch Matthew I, relying on decisions of Patriarchal tribunal. Academician Mirjana Živojinović provided facts in relation to authenticity of charters attributed to the Nemanjić dynasty, conserved in the archives of the Hilandar Monastery. Cristina Rognini from the University of Palermo researched the topic from medieval Southern Italy, confronting the adopted Greek provisions and legal praxis from the time range of the IX to XI centuries.

Thematic session entitled "Civil and Canon Law in Byzantine empire" was held on 26 August. It was chaired by prof. Srđan Šarkić from the University of Novi Sad and Paolo Angelini from the KU Leuven. Besides the two chairmen, the group consisted of six more scholars. The session was opened by Chrysavgi Athanasiou, PhD candidate at University Paris IV, with the communication concerning the punishment of exile, specially the one described by the word *ἀειφυγία,* found in one Novella of the Emperor Constantine VII Porphyrogennetos. Ana Vankova (*Анна Ванкова*) from the Institute of World History of Russian Academy of Sciences discussed legal status of early Byzantine monk. Demetrios Nikolakakes (*Δημήτριος Νικολακάκης*) talked about the right of asylum, particularly in regards to relations between the Church and the empire. Paolo Angelini talked about reception of Byzantine criminal law in the Serbian medieval law, through the Syntagma of Matheus Blastares. Prof. Šarkić provided information on Byzantine division of things, its impact on Serbian medieval law, with the reference to the division originating from Roman private law. Periandros Epitropakis *(Περίανδρος Επιτροπάκης)* presented a small part of his Master's thesis concerning legal status of a Temple in Greek law. Tristan Schmidt, Johannes-Gutenberg University of Mainz, drew attention to hunting and animal fights, especially in the XII century, on the grounds of contemporary comments of previous ecclesiastical sources. The last presenter was Eireni Christinaki (Ειρήνη Χριστινάκη) from the National and Kapodistrian University of Athens, who questioned instigation in light of different sources, Canons and their comments from the Byzantine times.

Special contributions were made in sessions which included multidisciplinary themes. We will mention the *Table ronde* entitled *"L'auteur à Byzance: de l'écriture à son public*" convened by Paolo Odorico, with the remarkable communication of E. Papagianni in subject of the work of Demetrios Chomatenos, XIII century Ochrid's Archbichop. In the session devoted to Eastern influences in Byzantium, we listened to the interesting presentation of Valerio Massimo Minale from the University of Milano, who researched on the Byzantine poem about *Diogenes Akritas* and his life, including the analysis of several legal elements found in it. In the session connected to medieval diplomatics and documentary practices, Tamara Matović, research assistant at the Institute of Byzantine Studies of Serbian Academy of Sciences and Arts, talked about legal significance of a document in Byzantine law. The session organised for researching the Latin Cyprus included communication dedicated to the influence of Western law on Byzantine law and *vice verca*. Eventually, assistant professor from the Faculty of Law, University of Belgrade, Nina Kršljanin, delivered presentation concerning the beautified and emphasized portrayal of Byzantines in Serbian source from the XV century – The life of despot Stefan Lazarević, written by Constantine the Philosopher.

On Friday, 26 August, at the special session of the Congress dedicated to the future of Byzantine studies, one Russian project was presented. It is the *Expert system* "Byzantine law and acts", convened by Yuri Vin, and suppored by the Institute of World History of Russian Academy of Science. Its aim is to digitalize Byzantine legal sources, in order to ease the approach for researchers of the Byzantine law. It consists of several databases of Byzantine and Slavic texts, fully searchable, as well as related video interviews.

* * *

This review is aimed at presenting a small part of scientific results achieved at 23rd International Congress of Byzantine Studies in the field of legal history. Despite the fact that the "golden age" of legal history has maybe passed – this Congress has proved that researchers interested in medieval and Byzantine law, equipped with interesting and convenient scientific topics, are still among us. Additional observation on the Congress can be made: it would be nice if on some other occasions we could hear and discuss more about some new editions of legal sources − this being done or at least assisted by legal historians.

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The *Belgrade Law Review* (*Annals of the Faculty of Law in Belgrade*) is an international, peer-reviewed journal. All submitted articles will be evaluated by two external reviewers. The peer review is double blind.

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Articles should not be longer than 16 pages with 28 lines with 66 characters in line, i.e. 28.800 charters, font Times New Roman 12.

If the text exceeds allowed length, it will be returned to the author in order to make necessary shortening. Reviewers shall not be determined until the length of the texts does not fulfil this requirement.

Author's academic title, along with his/her first and last name should be placed in the upper left corner, while the institution of employment or other affiliation, position and email address should be given in the footnote indicated by asterisk.

An abstract of the article of maximum 100–150 words should be included together with 3–5 keywords suitable for indexing and online search purposes. Authors are obliged to submit list of references, font 11. The list should include only cited monographs and articles with the source address (URL) if available. First should be given the author's last name, then first letter of the author's name (with a full stop after it) and after that other data in accordance with the reference style.

It is in author's interest that title and key words reflect the content of the article as closely as possible. The entire article shall be subjected to the proofreading and peer review.

The title should be centred, typed in capital letters, font size 14. The subtitles should also be centred, typed in capital letters, font size 12 and numbered consecutively by Arabic numbers.

If the subtitle contains more than one part, they should also be designated with Arabic numbers, as follows: 1.1. – with lowercase letters in

recto, font 12, 1.1.1. – with lowercase letters in verso, font 12, etc. with smaller font.

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1. Books: first letter of the author's name (with a full stop after it) and the author's last name, title written in verso, place of publication in recto, year of publishing.

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The publisher's location should not be followed by a comma. If the publisher is stated, it should be written in recto, before the publisher's location.

Example: H.L.A. Hart, *Concept of Law*, Oxford University Press, Oxford, 1997, 26.

If a book has more than one edition, the number of the edition can be stated in superscript (for example: 1994[3]).

Any reference to a footnote should be abbreviated and numbered after the page number.

Example: H.L.A. Hart, *Concept of Law*, Oxford 1997, 254 fn. 41.

If there is more than one place of publication written in the book, only first two should be listed, separated by a dash.

Example: S. Boshammer, Gruppen, Rechte, Gerechtigkeit, Walter de Gruyter, Berlin – New York 2003, 34–38.

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.

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Example: J. Raz, 65.

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.

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Example: A. Buchanan, „Liberalism and Group Rights", *Essays in Hon our of Joel Feinberg* (eds. J. L. Coleman, A. Buchanan), Cambridge University Press, Cambridge 1994, 1–15.

7. Statutes and other regulations should be provided with a complete title in recto, followed by the name of the official publication (e.g. official gazette) in verso, and then the number (volume) and year of publication in recto. In case of repeated citations, an acronym should be provided on the first mention of a given statute or other regulation.

Example: Personal Data Protection Act, *Official Gazette of the Republic of Serbia*, No. 97/08.

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: 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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