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Michael Stolleis, PhD*

LEGAL PLURALISM IN THE 19TH AND 20TH CENTURY**

Legal pluralism as a pre-modern and well-known phenomenon seemed to be domesticated by the "modern state" with its sovereign position as creator of the law. Today the phenomenon is back. Today lawyers struggle not only with multiple levels of normativity (national law, European law, international law, legal networks without a state) but also with the cultural diversities of interpretation and practice.

Key words: *Multi-normativity*. – *Legal pluralism*. – *Sovereignty*. – *Cultural diversity of law*.

What legal history and sociology of law, international law and legal theory are currently experiencing is a great "awakening". New perspectives are becoming apparent everywhere:

The vision of a state and a community of states in a regulated world, which are organized by "one law", has dissolved in an instant. For a long time lawyers dreamed of thinking that way. The notion that the law could merge nationally as well as internationally into a rational order, was the dream of not only taxonomists of natural law in the 17th and 18th century, but also of the 19th century positivism thinkers of pyramidally organized legal systems and the Pure Theory of Law by Hans Kelsen. If this had been reasonable, all human conflicts could be solved legally. Ultimately, all litigations and courts would vanish. A glance at a "codex", composed in universal language, would suffice.

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If you think of it this way, a utopian character is instantly recognizable. Utopia could also be called absurdity because the diversity of interests, values, collective identities, physical characteristics, languages, rhythms, lifestyles and life blueprints, and the diversity of power, in particular, cannot be resolved. If you wanted to suppress diversity, one could only do it with force and, as we know from the experiences of the 20th century, this would be a futile undertaking. It is not easy to dissuade people from their "peculiarities" through sheer pleas or legal instructions. The world is and will remain diverse. Conformity achieved through force would be a homogenous and unbearable hell.

However, historical facts reveal that attempts to erase identities have been made time and again. A concept of something "different" is still a constant challenge for human beings. Even children want to be just "like everyone else"; they want the same clothes and the same toys. Anyone who is "different" has to face the fact that sooner or later they will be ostracized by the others or forced to fit in. Adults are not any better: mainstream societies isolate themselves from minorities; they prosecute and destroy them. Under the 18th century central idea of *égalité*, they want to eliminate everything that is different.[1] Traditional disparities in status, age, profession, opportunities, income (and so on) should no longer be apparent. Idealistically put, everyone was supposed to be subordinate to the force of the state, as a common "house of all societal interests" of the citizens. This is still true even today: equality is natural, inequality requires special legitimizing reasoning.

If you look back at the legal history of the modern era, you will realize that since the 15th and 16th centuries the "modern state" has emerged as the winner of the diverse corporative society of the late Middle Ages. The desire of the people in power to dominate led to the formation of the centrally governed state. The aristocracy lost its leading role during warfare: they either became impoverished or they became officers, diplomats, and officials. In the 16th century, the cities in Central and Eastern Europe lost their leading position due to financial and trade crises, as well as the occupation of the Eastern Mediterranean by the Ottomans. Meanwhile, the conquest and colonial western powers (Spain, Portugal, England, the Netherlands and France) conquered the world and got rich, under their respective state commands. The Roman Church lost its monopoly to Lutheranism and the Reformed Churches. Ever since we have known of the multiplicity of churches, religious communities and many small ideological groups.

[1] M. Stolleis, "Historische und ideengeschichtliche Entwicklung des Gleichheitssatzes", *Gleichheit und Nichtdiskriminierung im nationalen und internationalen Menschenrechtsschutz* (Hrsg. R.Wolfrum), Heidelberg 2003, 7–22.

In other words: the modern state established itself and its control through legislation, above all different social orders. The state gained all power through the term "inner sovereignty": aristocracy, cities, and churches had to obey the state, more precisely the "universal law" derived from it. In 1789, the *régime féodal* in France was brought down; in Germany and other European countries the privileges of the aristocracy were limited (patrimonial courts, entailed estates, tax exemption, latitude in military service, inequality of voting rights, etc.), and after medieval guilds were dissolved, the only thing left was the strong *state*. Its counterbalance was the liberal *society*. Because of this, the national public law confronted the law of socially free individuals, *ius publicum et privatum.* Public law consisted of constitutional law and administrative law on the one hand, and on the other hand of international law, as the law between sovereign states. Private law was the law of contracts, which were concluded between (theoretically) free individuals.

However, there were many things, perhaps even the majority, that were not so right about this simplified image. There were areas in which the state could not engage or where the old legal pluralism was maintained. A few examples:

(1) The churches defended their *proprium* of belief by claiming that they (and their legal order) were older than the modern state and that no one could decide externally what the heart of their faith was. This was their "spiritual" task only.

(2) Merchants and craftsmen held their ground. This was either because of the customs, the common law which had been in effect for centuries, the *lex mercatoria*, or the old customs of the guilds (in a renewed form), which allowed them to decide independently who was a foreman, journeyman or apprentice. All the old legal instruments of the medieval guilds appeared again in the late 19th century in the form of parliamentary legal acts.

(3) In agricultural societies there were (and partly still are today) certain rules related to family law, inheritance law, and land law. One example is the prerogative of the oldest son to inherit the farm, his duty to care for his parents and siblings, inequalities between male and female heirs, but also the older formations of land law (collective ownership, family property). This is visible especially in the countries of Southeast European.[2]

[2] M. Stolleis (Hrsg.), *Konflikt und Koexistenz. Die Rechtsordnungen Südosteuropas im 19. und 20. Jahrhundert*, *Band I – Rumänien, Bulgarien, Griechenland*, Frankfurt am Main 2015; Th. Simon (Hrsg.), *Konflikt und Koexistenz. Die Rechtsordnungen Südosteuropas im 19. und 20. Jahrhundert*, *Band II – Serbien, Bosnien-Herzegowina, Albanien*, Frankfurt am Main 2017.

These were, in a manner of speaking, relics of the Ancien Régime. Due to the 19th century excitement about technical and scientific progress, about the expansion of the democracy and the abolition of corporative inequalities, it was believed that those relics would slowly disappear. And this actually happened. With industrialization, the labor movement emerged as well as the host of workers, and consequently the modern mass society, as described by Gustave Le Bon towards the end of the 19th century. Beyond the nations, a technical universal culture developed in the 20th century, which flooded the old social and legal forms with an irresistible force. Indigenous, so-called primitive people did not stand a chance against that. The revolution of electronic communication, which started in the last third of the 20th century, flooded all territorial and legal limits with an unspeakable force. Immediately attempts were made to establish normative barriers against this – so far without great success.

Perhaps I exaggerated slightly when I talked about the triumph of the modern sovereign state over all traditional, cultural and social diversities. I have mentioned examples for "relics" of the Ancien Régime, but this leads to the illusion that the path from the premodern pluralism of law to the uniform legal system, controlled by the state, is a one-way street.

This, however, is not the case. Legal pluralism has been deliberately created and used within the modern egalitarian parliamentary regime. It was evident early on in the 19th century that the state cannot and should not determine everything. Wise counsellors kept arguing that one should provide society with room to develop and empower it to decide its own matters. This facilitates society's adaptation to new circumstances and results in a more pronounced identification with the state. Evidence of this development can be found in the examples below.

(1) A free society, which also stresses economic liberalism, regards contracts as the primary form of trust. The contract is the actual legislator, determining what is just in the relationship between the parties involved. These contracts are signed between seller and buyer, family members, cooperative associations and commercial partnerships, as well as companies and their employees. In doing so, a legal network is constructed within society; they are legislators in their own realm. The 19th century's new constitutions provided room for these developments by guaranteeing basic rights, such as freedom of trade and liberalism, freedom of land acquisition, religious freedom, and freedom to emigrate. Society claimed its "private autonomy", especially out of economic motivation.

(2) When old governments had to rebuild their lands during the crises after the French Revolutionary Wars, they recalled that the once free and wealthy cities owed their prosperity to the fact that they regulated themselves. As such, cities in post-1806 Prussia were given back their

self-administration, which they had lost during the absolutism period. While retaining control at the national level, cities were allowed to govern their own budgets, personnel, planning laws, etc. These rights were passed on to rural districts and smaller communities in the late 19th century. In other words: the state withdrew and allowed for local legal pluralism by way of self-government.

(3) Universities were treated in a similar fashion. The old, independent universities of the Middle Ages became increasingly state controlled in the modern era and had to give up their *autonomy*. Given the large-scale university reforms of the early 19th century, their own jurisdiction was taken away, but they were granted an idealistically understood *scientific freedom*. This resulted in the state's role in external financing and steering, while universities were granted the *self-administration in matters of science*, following Wilhelm von Humboldt's famous educational model.[3]

(4) Similarly, the state relinquished many areas during the industrialization, which should have been state-governed but were determined to be managed more beneficially by society at large, while keeping the state's supervision. Examples include (a) technical control boards,[4] (b) industrial norming institutions,[5] (c) new social securities, which developed their own self-administration,[6] (d) self-administration of associations for lawyers and notaries, medical doctors, and craftsmen. In all of these areas, professions joined forces and established internal "laws" which were, however, controlled and approved by the state. The same applied to associations which shaped the 19th century and had to have their statutes approved by the state. As was previously the case, this example demonstrates state-controlled autonomy, a modern legal pluralism.[7]

[3] W. von Humboldt, "Über die innere und äussere Organisation der höheren wissenschaftlichen Anstalten", *Gesammelte Schriften*, Band X, Berlin 1903–1936, 250–260.

[4] I. vom Feld, *Staatsentlastung im Technikrecht. Dampfkesselgesetzgebung und –überwachung in Preußen 1831–1914*, Frankfurt am Main 2007.

[5] M. Vec, *Recht und Normierung in der Industriellen Revolution*, Frankfurt am Main 2006.

[6] H. Heffter, *Die Deutsche Selbstverwaltung im 19. Jahrhundert. Geschichte der Ideen und Institutionen*, Stuttgart 1969[2]; M. Stolleis, "Selbstverwaltung", *Handwörterbuch zur Deutschen Rechtsgeschichte* (Hrsg. A. Erler, E.-Kaufmann), Band IV, Berlin 1990, 1621–1625; M. Stolleis, *History of Social Law in Germany*, Heidelberg – New York 2014, 51.

[7] P. Collin *et al.* (Hrsg.), *Selbstregulierung im 19. Jahrhundert. Zwischen Autonomie und staatlichen Steuerungsansprüchen*, Frankfurt am Main 2011; P. Collin *et al.* (Hrsg.), *Regulierte Selbstregulierung im frühen Interventions– und Sozialstaat*, Frankfurt am Main 2012; P. Collin *et al.* (Hrsg.), *Regulierte Selbstregulierung in der westlichen Welt des späten 19. und frühen 20. Jahrhunderts*, Frankfurt am Main 2014.

In this way, a complex balance developed during the course of the second part of the 19th century and especially in the 20th century, between the state-guaranteed "unity of the legal order", on the one hand, and the state-incentivized legal pluralism, on the other hand. Modern societies, facing the pressure exerted by the demand for the equality of citizens, prefer to regulate everything juristically. However, they simultaneously realized that it is more effective and politically prudent that not everything be regulated by the state, moreover, to provide society its free spaces.

Due to the construct of private autonomy, society is able to regulate everything via *contracts*, while the state establishes prohibitive signs: contracts were not permitted to be unconscionable, exploitative or to be in violation of national, European, or international law. Thus, the privateers (and their egoism) were restrained within this framework.

Where society adheres to these limitations, further areas of a "regulated self-regulation" (the modern version of state-controlled self-administration) ensue. Therefore, the modern state does not distinguish between private and public law as apodictically as the 19th century state. The lines between these two forms have since blurred to an extent at which the distinction between public and private becomes impractical. Therefore, there exists not only a historical legal pluralism, which has to be overcome with all its imbalances, but also a calculated and much more important modern legal pluralism. The long postulated "unity of the legal order" thereby turns into a phantom.

In a practical sense, this means that the modern state is forced to develop new mechanisms to resolve conflicts between societal groups and their "semi-autonomous" partial legal orders. The points of interest are thus: (a) which institution is responsible for resolving the conflicts, (b) where does the "functional self-regulation" have to be restrained to prevent chaos, corruption and mismanagement, (c) where does diversity contradict the shared constitutional vision of equality and non-discrimination? Where does one have to intervene when facing religious, language-based, racial or sexual discrimination?

The impression of a modern rich legal pluralism is multiplied plentifully when looking beyond the still existing nation-state. One does not have to look further than the jurisdictional plurality, in terms of national orders within the European Union, to realize that there are more differences than similarities. A contemporary central point of discussion within Europe is the question of the extent of the levelling effects of European law and how much legal pluralism should be granted to these states (key word: subsidiarity principle). So, states organized as federal systems have to distinguish several levels: (1) communalities with self-administration, (2) single states within a federal system, (3) central states with a certain catalogue of competences, (4) the European Union. In

Germany, the expression *Mehrebenensystem* is now accepted. However, useless to say, the coining of an elegant term does not solve the problems automatically.

This diversity is especially pronounced when looking beyond European legislation to international law. Of course, there are as many diverse legal frameworks as there are states – 193, counting member states of the United Nations. At the same time, the global regulations of large organizations that created state-independent law have emerged (communication, Facebook, Google, International Sport, NGOs of all kind). Accepted regulations are applied worldwide by arbitration tribunals.[8]

It follows that legal pluralism did not only dominate the pre-state stage of the Middle Ages, but continued to do so and even expanding, despite the development of the modern state. Old jurisdictional forms were dismissed and remodeled into new ones, or replaced by preferences for non-state legislation, even in the 19th century, which is widely regarded as the classic century of state-regulated jurisdictional positivism. Ever since state and society have reconnected to form the *interventional state* of the industrial revolution and the period of war in the last third of the 19th century, legal pluralism has formed a part of the modern state's image. This does not only hold internally, in the case of the contemporaneous state, but also in the context of international law and the regulations of transnational organizations or economic complexes. We cannot escape legal pluralism in our history or the present. Our challenge as jurists is to clarify and regulate collision as well as to determine the frontiers of plurality where the basic rights of individuals and groups are in jeopardy. Legal vacuums cannot be tolerated.

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[8] More details in M. Stolleis, *Public Law in Germany: A Historical Introduction from the 16th to the 21st Century,* Oxford 2017, 191.

Simon, Th. (Hrsg.), *Konflikt und Koexistenz. Die Rechtsordnungen Südosteuropas im 19. und 20. Jahrhundert*, *Band II – Serbien, Bosnien-Herzegowina, Albanien*, Frankfurt am Main 2017.

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MIXTURE OF LEGAL IDENTITIES: CASE OF THE DUTCH (1838) AND THE SERBIAN CIVIL CODE (1844)**

The paper aims to examine the differences and similarities between the Dutch Civil Code of 1838 and the Serbian Civil Code of 1844. Although the historical circumstances of the two countries, their legal culture and their legal systems at the time of codification were significantly different, the author points to some similarities between their private law codes. Based on that comparison he distinguishes a more general problem of early modern codifications in the 19th century, namely the issue of legal transfer's logic, causes and outcomes. Both in the cases of the Dutch and the Serbian codifications the predominant stereotype in literature are that they were more or less copies of the model codes (the French Code Civil of 1804 and the Austrian Civil Code of 1811, respectively). The author points out that only recently some diverse intonations started to appear on this matter, related to the two codifications. He stresses that in both cases legal borrowings were in many aspects inventive, innovative and influenced by a variety of other sources. The author based his conclusion on a comparative analysis of different legal identities present in the Dutch and Serbian codes. On that ground he revises the concept of mixed legal systems and suggests that mixture of legal identities should be more flexible, less demanding and open-ended notion.

Key words: *Comparative legal traditions. – Legal transplants. – Legal transfer. – Mixed legal systems. – Private law codifications.*

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1. INTRODUCTORY REMARKS

Legal development in the 19th century was marked by remarkable civil codification movement all across Europe and by their subsequent legal borrowings all around the world. The "first generation" of modern private law codes originated in France (*Code civil* of 1804, hereinafter: CC) and in Austria (*Allgemeine bürgerliche Gesetzbuch für die gesamten deutschen Erbländer der Österreichen Monarchie* of 1811, hereinafter: ABGB).[1] Other European states decided to enact their own civil codifications much latter. Countries, nations and areas where either Napoleon or the Habsburgs were dominant usually applied the CC or ABGB in some form as their own codifications. This occurred not only due to military and political pressure by the mighty monarchies but also due to the immense prestige of the two civil codes.[2] The reception of the CC was often connected with conviction that there was no better *ratio scripta* in civil law than the one enacted by the lawgivers in France, the cradle country of the natural law principles. Therefore in the first half of the 19th century some countries (although still not many of them) took the CC for their own codification, with or without minor changes. The Austrian model was not so widely accepted but it still was quite influential within countries embraced by the Habsburg Monarchy rule or by its overall cultural influence. In any case, the first part of the 19th century did

[1] I use prefix "modern" to distinguish a few significant codes enacted before the CC and ABGB in the second half of the 18th century, such as long-lasting *Allgemeines Landrecht für die Preußischen Staaten* of 1794 (often labeled as the *Prussian Civil Code*, hereinafter: ALR). It remained in force during the 19th century in German states. But it was not a "modern" code: it had about 17.000 paragraphs and comprehended not only civil law but also parts of administrative, constitutional law and other legal issues. It reflected different kind of approach then modern civil codifications of 19th century, tending to embrace the whole legal system in a written collection of legal norms.

W. Brauneder, "Europas erste Privatrechtskodifikation: Das Galizische bürgerliche Gesetzbuch", *Naturrecht und Privatrechtskodifikation* (Hrsg. H. Barta, R. Palme, W. Ingenhaeft), Wien 1999, 303–320 regards the *Galizische bürgerliche Gesetzbuch* of 1797 as the first private law code in Europe, prepared for the Austrian province Galicia in Poland. However, it was not more than a "preparatory" code for the ABGB, as witnessed by the same author in another article, W. Brauneder, "The 'first' European Codification of Private Law: the ABGB", *Zbornik Pravnog fakulteta u Zagrebu* 63(5–6)/2013, 1019–1026. H. P. Glen, *Legal Traditions of the World*, Oxford University Press, Oxford 2007, 158 is decisive that the French civil code of 1804 denotes beginning of modern European civil identities.

[2] A. Watson, *Legal Transplants – An Approach to Comparative Law*, The University of Georgia Press, Athens, Georgia 1993, 97. The author stresses that in general the most important cause for legal transplants is imposition of foreign law due to political power of the donor country or voluntary reception based on the authority of the donor system. His statement that legal transplants may sometimes happen by chance attracted significant criticism.

not bring many more inventive civil codifications except the French and the Austrian model.

The next and the biggest wave of civil codifications took place quite a bit later, mainly during the second half of the 19th century. The "second generation" of civil codes appeared when many countries decided to undertake the codification challenge. They mainly followed the prevailing French model and in very few cases the Austrian example. Many countries accepted heritage of the Romanistic Legal Family (e.g. certain Swiss cantons, Belgium in 1851, Italy and Romania in 1865, Portugal in 1867, Spain in 1889, Maghreb and some other African countries, countries in South and Central America, but also previously Louisiana in the USA and Quebec in Canada), while only some of them were influenced by the Germanic Legal Family tradition.[3]

At the beginning of the 20th century "the third generation" of private law codifications arrived, having been inspired by the two most influential ones – the German Civil Code of 1896/1900 (*Bürgerliches Gesetzbuch*, hereinafter: BGB) and the Swiss Civil Code of 1907/1912 (*Schweizerisches Zivilgesetzbuch*, *Code civil suisse*, *Codice civile svizzero*, hereinafter: SZGB). Those two donor codes were followed by many recipient legal systems all across Europe and in other parts of the world.

Rare exceptions, appearing between the first and the second wave of private law codifications, already during the first half of the 19th century, were presented in some Swiss cantons codes, the Dutch Civil Code of 1838 (*Burgerlijk Wetboek*, hereinafter: DCC) and the *Civil Code for the Princedom of Serbia* (Građanski zakonik za Kneževinu Srbiju), also known as the Serbian Civil Code of 1844 (hereinafter: SCC). Although they are often qualified more or less as copies of the French model (the DCC) or the Austrian model (the SCC), some different voices on his point started to appear relatively recently. Nobody denies the strong impact of the CC on the Dutch civil codification and decisive influence of the ABGB on the Serbian Civil Code. But more than a hundred years passed before scholars started to point to specific features of the Dutch and the Serbian civil codes, confirming that they were not mere replicas or shortened translations of the original codes, but that they had been much more innovative than usually perceived. The goal of this article is to make a parallel analysis of the two codes and check to what extent they were reproductions of their donor models, how much they represent a mixture of other sources and different legal identities, and what lessons theory of legal transfer and mixed legal systems may learn from these examples.

[3] K. Zweigert, H. Kötz, *An Introduction to Comparative Law* (translated by T. Weir), Clarendon Press, Oxford 1998, 74–131, 132–179.

2. THE DUTCH CIVIL CODE OF 1838

2.1. Historical circumstances

Although the DCC of 1838 was quite unique in early European private law codification (one could say it was the third creative civil code after the CC and the ABGB) there are quite a few scholarly articles about it in more accessible languages. Literature about the DCC in Dutch language is also not as abundant as one might expect.[4] Even the most comprehensive and representative book on Dutch law mentions the DCC of 1838 in a few sentences only.[5]

The Netherlands had a long legal tradition before the DCC appeared in 1838. This important legal heritage influenced later historical development of Dutch law, but it is usually quite neglected in terms of DCC evaluation.[6] The reason is probably the general impression that the CC was predominant basis for the DCC and that the Dutch law as a whole was strongly influenced by French law when Napoleon imposed the CC on the Netherlands. However, since the glorious Dutch Revolt and formation of the United Dutch provinces within the Dutch Republic, in the 16th and 17th centuries, various local systems of customary law flourished. Owing to the tremendous development of legal doctrine and theory, particularly to a great contribution of Hugo Grotius (1583–1645), as well as to later works of Jochannes Vout, Ulrik Huber and their comments of the Justinian codification, a specific mixture of traditional custom and Roman law became known as Roman-Dutch law.[7]

However, during the French Revolution the Batavian Republic was established in the Netherlands (1795–1806). As a result of the enthusiastic

[4] One of the rare examples is G. Meijer, S. Y. Th. Meijer, "The Influence of the Code Civil in the Netherlands", *European Journal of Law and Economics* 14(3)/2002, 227–236. They quote only a few texts in Dutch about the DCC. The second more detailed contribution is J. Lokin, "Die Rezeption des Code Civil in den nördlichen Niederlanden", *Zeitschrift fur Europaisches Privatrecht* 4/2004, 932–946. There is also a short but instructive text: A. Fontein, "A Century of Codification in Holland", *Journal of Comparative Legislation and International Law* 21(3)/1939, 83–88.

[5] J. Chorus, P. H. Gerver, E. Hondius, *Introduction to Dutch Law*, Kluwer Law International, Alphen aan den Rijn 2006, 14.

[6] An important exception is the contribution by historian M. van der Burg, "Cultural and Legal Transfer in Napoleonic Europe: Codification of Dutch Civil Law as a Cross-national Process", *Comparative Legal History* 3/2015, 92.

[7] R. Feenstra, R. Zimmermann (eds.), *Das römisch-holländische Recht: Fortschritte des Zivilrechts im 17. und 18. Jahrhundert*, Duncker & Humblot, Berlin 1992; G. C. J. J. van den Bergh, *Die holländische elegante Schule: Ein Beitrag zur Geschichte von Humanismus und Rechtswissenschaft in den Niederlanden 1500–1800*, Klostermann, Frankfurt 2002; S. Avramović, V. Stanimirović, *Uporedna pravna tradicija*, Pravni fakultet Univerziteta u Beogradu, Beograd 2015, 253–4.

and widespread support of the Dutch people for the French Revolution, it was installed as a "sister-republic" of France instead of the old Dutch Republic. The idea of the Dutch law codification was born soon and the first attempt to codify Dutch civil law appeared in 1798. The Amsterdam law professor Hendrik Constantijn Cras presided over the Drafting Commission. He rapidly prepared a draft which combined natural law, Roman law and customary law.[8] However, in 1800 Napoleon formed the Commission of four distinguished French lawyers (Jean-Étienne-Marie Portalis, Jacques de Maleville, Félix-Julien– Jean Bigot de Préameneu and François Denis Tronchet) and quite promptly enacted in March 1804 his famous French Civil Code, known also as *Code Napoléon* since 1807.

About the same time, at the political level, a monarchy was formed in 1806, the Kingdom of Holland, instead of the "sister-republic", and ruled by Napoleon's brother, Louis Bonaparte, who became the first modern monarch of the Netherlands. He asked Johannes van der Linden, secretary of Cras' Drafting Commission, to prepare a civil code for the new kingdom. Van der Linden was deeply impressed by Pothier and translated several his works, among them *Traité des Obligations*.[9] But he was hesitant to accept Roman law, as well as "unsure and diverging" local customary law. He also rejected many parts of Cras' previous project code and of the CC, therefore the outcome was "a remarkable legal mixture".[10] However, Napoleon wanted to impose the CC to the small country of 1.8 million inhabitants "who do not need a separate legal system", and ordered his brother to obtain a Dutch translation of the CC with some limited adaptations. Although Dutch lawyers and the people highly respected French law and the CC, they were eager to preserve their institutions and customs. However, Louis Napoleon appointed a lawyer from Rotterdam, Arnold van Gennep, as the president of the new commission. Quite quickly, 1 on May 1809 the code was adopted by royal decree as the *Wetboek Napoléon, ingerigt voor het Koningrijk Holland* [Code Napoléon Fitted up for the Kingdom of Holland], and Roman-Dutch law was mostly put aside. Van Gennep succeeded in including in the Code certain important adjustments, particularly in family law. Consequently, the Code of 1809 was basically the CC with some alterations and limited changes, but it remained an important piece of heritage for future Dutch private law development. It was particularly important in strengthening the opinion that civil codification is a necessary means to express and maintain national identity.

[8] M. van der Burg, 96. For information about the history of the Dutch civil law before the DCC of 1838, see J. Lokin, 932–943.

[9] G. Meijer, S. Y. Th. Meijer, 229.

[10] M. van der Burg, 98.

The Code of 1809 did not last for long. Napoleon annexed the Netherlands in 1810 (the so-called Réunion à l'empire), and it became a part of the centralized state, legal system and codification. After Napoleon's military defeat in 1813, when Dutch independence was restored, the private law codification impetus survived. The path for the new codification was politically, psychologically and professionally paved. However, many old controversies still remained and some new problems appeared.

2.2. A winding road towards the new Civil Code of 1838

The new independent state of the Netherlands was established by the Constitution of March 1814. In Article 100 it prescribed that civil codification is necessary. However, Article 2 of the revised Constitution, of August 1815, set up that all laws of the existing legal order remained valid. In that way French law was "Netherlandized" and vice-versa.[11] The new drafting commission was formed already the following month. It included three members who had previously prepared the *Code Napoléon Fitted up for the Kingdom of Holland* of 1809, and they took it as a basis for their new endeavor. One of the members, J.M. Kemper, who was Cras' pupil, was against that approach, having been dissatisfied with strong impact of the CC on the previous code. So the old idea about the code based predominantly on the old Dutch law was revived.[12]

In addition to initial disagreements in the Drafting Commission, a new political development complicated the issue even further. According to the Vienna Congress of 1815 the Northern and Southern regions were united in the Kingdom of the Netherlands, with Willem I as king. This brought about a new issues of discrepancies between the legal traditions of the North and South, as these regions had developed quite separately.[13] Kemper was inclined to the Northern legal tradition and the solutions following that direction, while the initiatives of the Southern (later Belgium) were against it and favored the French CC. It was more than a decade before the new draft was adopted by the Parliament, in 1830. However general dissatisfaction in the Southern provinces exploded that same year in the so-called Belgian Revolution, demanding secession of the south provinces. The conflicts and political provisorium lasted until 1839, when the Netherlands finally recognized the Belgian state.[14]

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[11] J. Lokin, 939.

[12] G. Meijer, S. Y. Th. Meijer, 230. A. Héroguel, *Problèmes de traductions dans les droits civils français et néerlandais*, L' Harmattan 2000, 81–82.

[13] On political development in that period: M. Lok, M. van der Burg, "The Dutch Case: The Kingdom of Holland and the Imperial Departments", *The Napoleonic empire and the new European political culture* (eds. M. Broers, P. Hick. A. Guimerá), Palgrave Macmillan, Basingstoke 2012.

[14] G. Meijer, S. Y. Th. Meijer, 230.

In the meantime, according to the 1815 Constitution, French-influenced civil law remained in force in the Netherlands. Finally, after all turbulences, the DCC was introduced in 1838, when the Netherlands finally acquired its final territorial and national profile. The struggle between the French pattern and national-influenced code was resolved in such a way that the CC influence strongly prevailed, mixed with some elements of the national customary law and Roman law traditions.[15] A proper introduction to the rest of our research is statement that the DCC of 1838 "shows all good and bad sides of a copy of the masterpiece."[16]

3. THE SERBIAN CIVIL CODE OF 1844

3.1. Literature and destiny of the SCC

As was the case with the DCC, the Serbian Civil Code of 1844 was quite neglected in literature in non-native languages and it remained nearly unknown to foreign researchers. It was only quite recently that a more extensive contribution on the SCC appeared in English, within a Max-Planck Institute project,.[17]

The dominant attitude in Serbian literature, both older and contemporary, is one of much criticism and disparaging the qualities of the SCC. The first wave of criticism came soon after its enactment and was mostly based on the objection that it unsuccessfully and hugely accepted the ABGB. However, part of attacks was directed personally against Jovan Hadžić who drafted the SCC, due to his conservative approach in actual linguistic reform and his conflicts with prominent and influential Serbian language reformer Vuk Karadžić.[18]

The second torrent of unfavorable comments was even stronger. It was launched by prestigious Serbian legal scholars in the first decades of the 20th century when the need arose to revise the SCC or to create a new one. By this time the SCC was more than 60 years old and when a new

[15] *Ibid*.

[16] P. Scholten, *Mr. C. Asser's Handleiding tot de beoefening van het Nederlandsch Burgerlijk Recht*, Kluwer Law International, 1974[3], 177 (according J. von Lokin, 41).

[17] S. Avramović, "The Serbian Civil Code of 1844: a Battleground of Legal Traditions", *Konflikt und Koexistenz. Die Rechtsordnungen im 19. und 20. Jahrhundert*, *Band II – Serbien, Bosnien-Herzegowina*, *Albanien* (Hrsg. Th. Simon), Max-Planck-Institut für europäische Rechtsgeschichte, Frankfurt am Main 2017, 379–482. There were only a few very short informative articles in foreign languages, mostly lacking profound analysis, *ibid*., 381, n.7.

[18] P. Šeroglić, "Pregled Zakonika Gradjanskog za knjaževstvo Serbiju, 25. marta 1844. obnarodovanog", *Bačka vila* 4/1845, 114–187; D. Matić, *Objasnenija Građanskog zakonika za knjaževstvo Srbsko*, I–III, Beograd 1850–51. See also S. Avramović (2017), 88–89.

modern generation of civil codes was enacted (the German BGB and Swiss SZGB). The SCC was also surpassed in some issues by modern developments, but some old sensible issues also were reopened, such as unfavorable legal position of women and dissolution of the large communitarian families (*porodična zadruga* in Slavic terminology). However, the political will, determination and adequate academic courage for more radical changes were missing. The commission for revise the SCC was formed in 1909 and never completed their task. The SCC was blamed for all shortcomings of the civil law legislation. The worst qualification was that "our Civil Code is a first-class legal curio, with so many unclear notions, without a system, with a lack of precise terms, that it represents a real disgrace for the legal community of Serbia."[19] Very influential was also the observation by authoritative Serbian legal scholar and historian Slobodan Jovanović, who said that Jovan Hadžić "appears only as a well-educated copyist", and that the SCC is abridged edition of the ABGB.[20]

However, World War I thwarted further legal reforms. One of the results of the War was the formation of a new united state, called the Kingdom of Serbs, Croats and Slovenians (Kingdom of Yugoslavia from 1929) instead of the former Kingdom of Serbia. Similarly as in the Netherlands after 1830, the issue of different national legal traditions complicated attempts to enact a new civil code. Different parts of the country belonged to diverse legal heritages, so the SCC remained valid predominantly in Serbia. The Drafting Commission for preparing the unified civil codification was formed in 1930 and the criticism of the SCC in literature was nearly unanimous. It became quite outdated as it was not seriously innovated for nearly an entire century. Scholars were divided between several solutions, including the idea the that new codification should follow model of the *General Property Code for the Principality of Montenegro* of 1888, written by a prominent follower of the historical school, Valtazar Bogišić, who had included much of the national customary law.[21] However, prevailing attitude was that the

[19] D. Aranđelović, *Rasprave iz privatnog prava*, Beograd 1913, 145, n.10 (translated by the author). D. Aranđelović, "O izmeni našeg Građanskog zakonika", *Branič* 9(1)/1904, 449 also states that "our Civil Code is the worst of all codes ever issued in liberated Serbia. The issues that it regulates are so endangered by legislative ambiguity and numerous loopholes, that a new, good civil code is our necessity."

[20] S. Jovanović, "Jovan Hadžić", *Iz naše istorije i književnosti*, Srpska književna zadruga, Beograd 1931, 45.

[21] M. Konstantinović, "Jugoslovenski građanski zakonik", *Anali Pravnog fakulteta u Beogradu* 3–4/1982, 384–396 (republished from *Pravni zbornik* 1(2–3)/1933). More on drafting private law codification in Montenegro, M. Luković, "Valtazar Bogišić and the General Property Code for the Principality of Montenegro: Domestic and Foreign Associates", *Balcanica* 39/2008, 175–188. See also multilingual collection of papers in

ABGB should remain the model code. A great discussion followed and it lasted till World War II.

Consequently the SCC survived for several more years. However, after World War II, in 1946, the new Communist regime of the Federative People's Republic of Yugoslavia enacted the law prescribing that legislation from the "capitalist" period, including the SCC, was to be rescinded. As it was impossible to reform the civil law in a short time, the same law allowed legal principles from previous legislation to be applied if they did not contravene constitutional principles, actual provisions and socialist ethics. Nonetheless, the pre-communist legislation could not be regarded as a source of law or be quoted as such. Thus the principles of the SCC can still be used and quoted in court decisions today, in cases of gaps or a lack of clarity in current legislation, but this happens very rarely.[22]

3.2. The complicated pregnancy and difficult birth of the SCC

The Serbian state and law were born as early as the 13th century. Stefan Nemanja was founder of the Medieval Serbian dynasty, and his oldest son Stefan became the Grand Prince of Serbia in 1196, whilst in 1217 he received the royal title from the Pope, therefore called Stefan the First-Crowned. The youngest son of Stefan Nemanja, Rastko (ordained Sava), in 1219 obtained recognition of the Serbian Orthodox Church from the Patriarch of Nicaea and he received the title of Archbishop. That same year he created a voluminous codification called *Zakonopravilo* or *Nomocanon* (later known as *Krmčija*, when it was used in Bulgaria, Romania and Russia). It was a combination of church and civil norms, mostly influenced by Byzantine law, adapted to Serbian societal needs and in some cases influenced by elements of national customary law. *The Nomocanon of St. Sava* was written in folk language and was composed of 70 extensive chapters, covering around 400 pages. It remained in use in Serbia all through the Middle Ages,[23] even when the country fell under Ottoman rule, in the 15th century.

Serbia gained autonomy through a rebellion in 1804, commonly referred to as the First Serbian Uprising or the Serbian Revolution, led by Karađorđe (Black George), founder of the Karađorđević dynasty.[24] Since

two volumes dedicated to the hundredth anniversary of Bogišić's death, Breneselović, L. (ed.), *Spomenica Valtazara Bogišića*, I–II, Službeni glasnik, Beograd 2011.

[22] More: S. Avramović (2017), 465.

[23] *Nomocanon of St. Sava* was used within the Serbian Orthodox Church as the chief source of law during the Middle Ages but parts of it are still in use today. Some norms from the *Nomocanon* were also included in the SCC.

[24] This term is attributed to German historiographer Leopold von Ranke according to the title of his book *Die Serbische Revolution* published in 1829, English translation:

then the nation-building process was developed rapidly. When the First Serbian Uprising was crushed in 1813, the Second Uprising in 1815, led by Miloš Obrenović marked continuation of the Serbian Revolution and enabled Serbia to function as a liberated, *de facto* independent principality. It was normatively fixed in 1830s in few documents issued by the Ottoman Porte, which recognized Serbia's complete internal independence in legislative, executive and judiciary matters, including recognition of the hereditary dynasty of Prince Miloš Obrenović. He was aware that the development of national legal system is an important part of comprehensive independence and at his initiative the first Serbian constitution was enacted in 1835.[25]

Prince Miloš also wanted to produce a civil code for the young country as token and proof that it deserves not only autonomy but full independence. Already in 1829 he ordered his son's teacher, Georgios Zachariades, to translate the CC, which was the most popular donor code at the time. However it was a very bad translation: Zachariades did not know Serbian very well, French was not his preferred language, so he used the German translation of the CC and, above all – he was not a lawyer. That same year Prince Miloš formed a parallel drafting commission with the same task. It consisted of Vuk Karadžić, an educated language scholar with a European background and great reputation, Archpriest Mateja Nenadović, the author of the first Serbian legal text during the First Serbian Uprising, three political leaders and an administrative officer. However, they too used the German translation of the CC since the members of the Commission were more familiar with that language.[26] The entire endeavor slowed down. In 1834 Prince Miloš received a section of the CC and found that the translation was quite poor. He changed the drafting Commission and involved his secretary, Dimitrije Davidović, who was a polyglot, and also knew French. In a letter to the Commission dated April 1834, Davidović stated for the first time that the ABGB was shorter and more intelligible. He advised the Commission to compare the Austrian provisions to those translated from French, and to take from the two codes the shorter and more comprehensible formulations. It was too demanding and complicated a job for the Commission. Prince Miloš understood that the internal Serbian professional capacities were not sufficient to prepare an appropriate codification project.

Leopold Ranke, *A History of Serbia and the Serbian Revolution* (transl. A. Kerr), J. Murray, London 1847.

[25] S. Avramović, "Sretenjski ustav – 175 godina posle"*, Anali Pravnog fakulteta u Beogradu* 1/2010, 36–65.

[26] There are traces in the literature on grotesque failures in translating some legal terms. More about the problems with Zachariades and the Commission in 1929, see S. Avramović (2017), 390–395.

The Prince made a radical move and in 1836/7 invited two distinguished Serbian lawyers from Novi Sad, which was then a part of the Austrian Empire, to help codifying the law in Serbia.[27] After initial joint efforts, Vasilije Lazarević became in charge of the criminal code, while Jovan Hadžić, who was also a distinguished writer and linguist, dealt with the civil law codification. He had studied law in Vienna and acquired his *doctor iuris* title from the University of Pest in 1826. He was also a practicing lawyer in Novi Sad and a city senator. His initial task was to check the CC translation and suggest improvements to it. However, from the very beginning Hadžić was inclining to the Austrian legal tradition, which can easily be explained by his cultural profile, professional orientation, as well as pragmatic and political reasons.[28] Prince Miloš was not strongly opposed to that initiative, particularly as he probably had in mind the importance of commercial and political connections with Austria. He was also informed that the ABGB was about one thousand articles shorter than the CC and that it could be adapted more easily and quickly.

Prince Miloš warned Hadžić that he would encounter at least two hot issues: inheritance rights and legal position of women, as well as complicated landed property customary law and organization of the family. In other words, the choice was not only between French and Austrian model codes, but also between the old and the modern legal traditions. Those circumstances held up the codification activities yet again. The political situation in the country caused additional delay. Prince Miloš abdicated in 1839 as he was dissatisfied with the new Constitution of 1838, which limited his authority. After a short rule of his second son, young prince Michael, the Obrenović dynasty was overthrown by the old powerful Serbian politicians in 1842. The Karađorđević dynasty came into power, represented by the politically quite weak Prince Alexander. The State Council, a collective body of old politicians, became the actual chief political authority.[29] The political change gave new momentum to the codification and facilitated the switch to the ABGB as the model code. The draft of the SCC was soon prepared. The Council became in charge of its analysis and acceptance, particularly on the most sensitive issues. So the State Council changed articles 396 and 397,

[27] Many Serbs inhabited Habsburg Monarchy north of the Sava and Danube rivers, particularly during the first Great Migration of Serbs in 1690. It was result of cruelties carried out by the Turks, in revenge for the Serbs siding with the Habsburg Monarchy against Ottoman forces during their long conflict in the Balkans in the 17th century. The Austrian Emperor granted more than 37.000 Serbian families the right to territorial autonomy within a separate *voivodeship* (province), which was named Voivodina in 1848.

[28] *Ibid*., 398–400.

[29] *Ibid*., 404–410.

contrary to Hadžić's proposal and will, giving priority to sons over daughters in inheritance according the customary law. Also, the final solution of Article 920 was that married women were considered equal to minors in their legal capacity during the lifetime of their husbands. With those and some other changes, the SCC was adopted in March 1844, having been mostly influenced by the ABGB as opposed to the CC. However, it contains quite many different solutions and influences of various legal traditions (including some solutions from the CC), so it should not be qualified as a mere copy or a shortened translation of the ABGB. The following analysis will attempt to offer argumentation that both the DCC and the SCC were much more original and inventive than it is commonly recognized.

4. THE DUTCH AND SERBIAN CIVIL CODE: LEGAL REPLICAS OR CREATIVE ASSORTMENT?

The cliché in scholarly literature and in academic manuals is that the DCC is replica of the CC, while the SCC has an even worse reputation of being an unsuccessful translation of the ABGB. However, there are many more discrepancies between the donor codes and the two recipients than usually observed. We will examine first the case of the DCC and then of the SCC.

4.1. Variances between the DCC and the CC

In their analysis whether the DCC should be regarded as a copy of the CC or not, Gerrit Meijer and Sjoerd Meijer focused on the form, structure and content of the donor and the recipient codes.[30] For the sake of easier comparison the same approach will be followed in analysis of the SCC and ABGB relationship.

4.1.1. Form and structure of the DCC and CC

G. Meijer and S.Y.Th. Meijer stress that the DCC basically follows the pattern applied in the CC. However they attest that the layout of the DCC is not directly based on the CC and that the DCC is more based on the Kemper's Commission's proposal of 1820. It abandoned a lot of the French influence but was not accepted by the Parliament, mostly due to political reasons and relationship between Northern and Southern parts. But in 1838, when Belgium separated, the Northern approach was again a bit more reluctant in accepting the CC model as a whole.

[30] G. Meijer, S. Y. Th. Meijer, 232.

The most visible formal difference is that the CC is divided into three books, while the DCC has four, the allocation of titles and legal institutions of the second and third book is often different, etc.[31] Above all, the DCC is shorter, containing 2,030 articles as opposed to the CC's 2,281.

Although it mostly follows Justinian's *Institutions* structure, the DCC favors strict differentiation between real rights (*ius in rem*) and personal rights (*ius in personam*), which was not applied in the CC, where the right of property plays a central role. Detailed analyses of the differences, particularly regarding the law of property and obligations, were described in detail long ago, but only in Dutch language.[32] Despite of many diversions, the DCC is still strongly influenced by the CC in form.

4.1.2. Diversities in content of the DCC and CC

There are many more specific features considering different institutions and details between the two codes than in their form. Meijers extract a few elements to illustrate the DCC specific features.

4.1.2.1. Omitted institutions

Some institutions typical for the CC do not exist in the DCC, such as the institution of *civil death*, rooted in the political development of French Revolution, which is absent, as quite odd to the Dutch society. The DCC also avoided the institution of *acte respectieux* (act of respect) which existed in the CC, requiring consent of the father in cases when a bridegroom was younger than 25, although he had reached general majority age of 21 (in case of the bride no consent of parents was necessary if she had reached general majority age). Another example was *conseil judiciaire* (counsel for intellectually limited persons) regarding persons who could be subjected by the first level courts to a kind of custody of another person or group of persons. Such a person could not conclude particular contracts on the grounds of their intellectual limits but would be capable of undertaking other legal acts or contracts. It was not accepted in the DCC due to differences in legal and social perceptions. Some institutions were misplaced from the CC model as in the meantime they were eliminated from the French legislation itself in following decades after the CC was adopted, such as *tutor ad hoc* (guardian for an occasion).

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31 A. Héroguel, 85–87.

32 C. Asser, *Het Nederlandsch Burgerlijk Wetboek vergeleken met het Wetboek Napoleon*, De Gebroeders van Cleef, 's Gravenhage 1838; J. van Kan, "Het Burgerlijk Wetboek en de Code Civil", *Gedenkboek Burgerlijk Wetboek 1838–1938* (ed. P. Scholten, E. M. Meijers), Tjeenk Willink, Zwolle 1938, 243–276.

4.1.2.2. Former law additives

According to G. Meijer and S.Y.Th. Meijer, some national rules served as supplements to the provisions of the CC or were inserted instead of the French legal concepts. The most prominent example is the deed of transfer in public registers, as a condition for transfer of ownership of immovable property, which was not necessary in the French law. Dutch drafters were of opinion that ownership on immovable property can only be transferred by evidence in public registers. Due to Roman-Dutch law way of thinking, real rights like the long lease of land and the right of superficies are included in the DCC, although they did not exist in the CC. Also the DCC is different from the French provisions in mortgage priority rights, the right of pledge with regard to preferred debts,[33] considering hypothec, etc. There are also some particular institutions that exist in the DCC although they were not present in the CC, but those instances are not very frequent.

4.1.2.3. Common French and Dutch legal heritage

The Dutch scholars who oppose the stereotype that the DCC is mainly a copy of the CC rightly stress that both legal traditions were deeply influenced by Roman law and some other shared roots. This may reinforce the impression that the DCC is completely influenced by the CC, even though basically both legal systems are influenced by the same predecessors. There are at least a few important common origins of the French and the Dutch legal traditions which provide a common legal heritage.

Roman law unquestionably forms a universal common legal tradition of the European countries and of the continental civil law legal systems.[34] The only issue might be whether Roman law principles arrived in recipient codes directly or by transfer from donor codes. That topic will be also examined in the next chapter of this article (4.2.2.2.). Roman law of the CC strongly affected the DCC law of obligations and law of property, while it had less influence on family law.

Canon law was an important element of *ius commune* during medieval times throughout Western Europe, including France and the Netherlands. Canon law rules influenced family law more than other fields. Meijers specifies the solemnization of a marriage as one of the examples that did not infringe on former Dutch law. Civil marriage as the only valid form of marriage was the heritage of the French Revolution and religious marriage became secondary, with no legal effect.

[33] G. Meijer, S. Y. Th. Meijer, 233; A. Héroguel, 91.

[34] Among the most convincing and influential books on that topic: R. Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, Oxford University Press, Oxford 1996.

Customary law was different in many regions, territories and cities even within the same country during medieval times, as *ius proprium* but the advantages of a written law (particularly in the *pays de droit écrit* in France), activity of the courts and legislation modified it throughout Europe in the direction of common customary law.[35] In case of France and the Netherlands, early customary law of the German tribes, especially of the Franks, played an important role in their development. Examples of customary law origins are particularly present in the law of inheritance and the law of matrimonial property, such as in cases of ante-nuptial or post-nuptial agreements and the direct succession of heirs.[36]

French legal concepts were also a part of Dutch traditions, particularly during the period of Napoleonic influence, but also during the French Revolution. This enabled an easy and comfortable legal transfer which was not, in many points, regarded as a French influence but was accepted as a part of Dutch legal tradition. In other words, the issue of drafting the DCC was not which code would be selected as the model; it was only controversial how many and in which sectors genuine Dutch legal tradition would be included in the codification.

In any case, although impact of the CC was increasing, due to certain distinctive features it would not be adequate to treat the DCC just as a copy of the French model code.

4.2. The SCC relation towards the ABGB

The birth of the SCC was very different from the DCC rise; the road towards civil codification in the 19th century Serbia was more complicated. The country was just undergoing revival after the long-lasting Ottoman rule, the state was in the process of transition from autonomous status towards full independence, society was lacking refined intellectuals, the educational institutions had just started functioning, customary law was widely applied, the judiciary was still quite immature, and idea of civil law codification was rudimentary. Nevertheless, due to the clear vision of Prince Miloš that a developed legal system is precondition for national identity and sovereignty building, Serbia received its first constitution in 1835 and its private law codification already in 1844.

After several years lost in searching the the most proper donor code, the SCC was finally shaped according to the ABGB model. However, as well as in case of the DCC, there were certain different features important in defining the degree of borrowing.

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[35] O. F. Robinson *et al*., *European Legal History: Sources and Institutions*, Oxford University Press, Oxford 2005, 107–115.

[36] G. Meijer, S. Y. Th. Meijer, 235.

4.2.1. Form and structure of the SCC in comparison with the ABGB

Differences in form and structure between the SCC and ABGB are even more remarkable than in case of the DCC French borrowings.

4.2.1.1. Size of the Code

The first impression is an amazing discrepancy in volumes: the ABGB consists of 1502 articles while the SCC has only 950. The SCC was one of the briefest among the contemporary civil codifications. Although Jovan Hadžić was accused for merging and omitting some ABGB articles, he willingly made a shorter but still quite comprehensive code. He eliminated certain complex institutions, unsuitable for the undeveloped Serbian society of that time. He also added a lot, such as an entire chapter dedicated to the most sensitive customary type of joint family organization (*Slavic zadruga*) and other original additions. Consequently it is not a "condensed edition" of the ABGB, but rather its modification in accordance with society's need.

4.2.1.2. Introductory chapter

The SCC begins with another additional material that does not exist in the ABGB. It has 35 introductory articles, as opposed to only 14 in the ABGB. Although the first 14 articles are mostly similar to the ABGB, the rest are very distinctive and unique, as they treats general principles of law and justice. This part of the introductory chapter covers both private law and political significance: some liberal principles and political rights such due process of law, inalienability of natural rights, the prohibition of slavery, the principle of equality, etc. were skillfully incorporated so that they served to clarify the elementary principles of private law. Such double-faceted introductory part makes the SCC not only dissimilar to the ABGB but quite unique in comparative legal history.[37]

4.2.1.3. Structure

The SCC generally follows the institutional system like the ABGB. However, Hadžić remodeled and rearranged the ABGB structure in some aspects. For example Hadžić puts donation in the case of death within the norms regarding the laws of inheritance (Art. 469), while the ABGB regulates it in the chapter on gifts (§603). In the contract of sale some articles from the ABGB are combined into a single article (§1080 and 1081 are covered by SCC Art. 667), some are abbreviated, others are omitted (§1073 and 1074). In some places new norms are inserted (Art. 672 and 675), while in others the sequence of norms was changed. Most

[37] S. Avramović (2017), 421–428.

modifications were due to a tendency to abbreviate the text and make the SCC shorter.[38]

4.2.1.4. Form of the SCC norms

Although Hadžić was a well-educated lawyer with excellent knowledge of comparative law, he evidently tended to direct the codification at the users, the population of the undeveloped country of Serbia. He wanted to offer a popular code, comprehensible to the average citizen and peasant. Therefore he often shaped norms of the SCC in a form of examples, rather than as abstract legal rules. For example he defines *possessio* by words: "He who holds a thing in his hands has possession..." (Art. 223). The corporal thing is explained as "If things are perceptible by sight and affect other senses, they are called corporeal things, such as land, house, vineyard, orchard, tool, fruit, clothing, etc.", in contrast to ABGB §292 which offers a definition from classical Roman law ("Corporeal property is that which is tangible"). When he speaks about immovable he again uses language of examples: "such as a house, field, pasture, vineyard, orchard, etc." (Art.293 and 295). This is all quite different from the formulations in the ABGB, with sophisticated juristic definitions.

4.2.2. Differences in content between the SCC and ABGB

In terms of content the SCC is much more different from its model code then the DCC. It is primarily a consequence of the different historical background, legal sources and specific social circumstances.

4.2.2.1. The CC influence

The SCC did not follow entirely the ABGB model, as it additionally accepted certain solutions from the CC (which was the initial desired donor code in Serbia). The only issue is whether the transfer came from the original or through the ABGB, as Franz von Zeiller surely followed the CC in part.[39] Therefore some similar norms can be found in the CC, ABGB and SCC, particularly in the introductory sections. A striking example are ABGB §12 and SCC Art.11 which correspond fully to CC Art.5, aimed at eliminating the common law tradition of precedents and promoting a law-based system. There are many more examples of similar norms in the SCC and CC.[40] After the amendments of 1864 the Serbian civil law gradually moved closer to the French legal tradition.

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[38] S. Aličić, "Sistematika odredbi o obligacionim odnosima u Srpskom građanskom zakoniku u svetlu sistematike Justinijanovih *Institucija*", *Zbornik Pravnog fakulteta u Novom Sadu* 38/2004, 395–406. S. Avramović (2017), 431.

[39] M. Reiner, "Franz von Zeiller und der Code Civil Napoleons", *Mélanges Fritz Sturm* (eds. J.-F. Gerkens *et al*.), I, Université de Liège, Liège 1999, 867–879.

[40] B.T. Blagojević, "Uticaj francuskog Građanskog zakonika na srbijanski Građanski zakonik", *Pravna misao* 1940, 477–534; B. T. Blagojević, "L'influence du

4.2.2.2. The Roman law reception

It was observed long ago that Hadžić introduced Roman law into Serbia thanks to the ABGB. However Serbian medieval law was influenced by Roman-Byzantine law which mostly vanished during the Ottoman rule, except in the Serbian Orthodox Church. So, as for the Roman law influence on the SCC the issue is whether it was transferred in 19th century Serbia via ABGB, through the medieval tradition or as a direct borrowing by Hadžić. The perception of the ABGB as the sole intermediary of Roman law reception in Serbia was firstly questioned by prominent Serbian legal scholar Slobodan Jovanović. He stated that the solutions on the communitarian family type of *zadruga* were based on perceptions deriving from Roman law independently of the ABGB.[41] Later contributions on many other legal institutions confirmed the view that Hadžić often opted for the direct reception of Roman law without ABGB interference (findings by Danilović, Malenica, Aličić, Knežić, Polojac, Vuletić, etc.).[42] Therefore today it seems undisputable that the Roman law influence came both through the ABGB and as a direct transfer by the legislator.

4.2.2.3. Role of customary law

During the Ottoman rule customary law was the sole legal source. It became one of the chief problems for the legislator of the SCC. Hadžić was on one side strongly criticized for disregarding customary law and his tendency to modernize Serbian law too early. Prince Miloš also wanted to have a codification predominantly rooted in customary law. Hadžić was also accused of wanting to destroy old form of communitarian family life and property in *zadruga* as he favored a kind of co-ownership dressed in Roman law colors instead of collective ownership, etc. He also wanted to introduce equality between sons and daughters in inheritance law and promote a better legal position of woman, but his solutions were not accepted by the State Council and the old discriminatory norms remained in the SCC. Nevertheless, Hadžić was blamed for that failure and "was cursed by the women on the city streets". Otherwise, he tried to keep the customary law whenever it was acceptable. He succeeded in creating

Code civil sur l'elaboration du Code civil serbe", *Revue internationale de droit comparé* 6(4)/1954, 733–743; S. Avramović (2017), 433–435.

[41] S. Jovanović, 48.

[42] These and other contributions with similar approach appeared in the commemorative collections of papers: M. Jovičić (ur.), *150 godina od donošenja Srpskog građanskog zakonika 1844–1994*, SANU, Beograd 1996; R. B. Kovačević Kuštrimović (ur.), *150 godina od donošenja Srpskog građanskog zakonika 1844–1994*, Pravni fakultet Univerziteta u Nišu, Niš 1995; M. Polojac, Z. S. Mirković, M. Đurđević (ur.), *Srpski građanski zakonik 170 godina*, Pravni fakultet u Beogradu, Beograd 2014. S. Avramović (2017), 436–440.

quite a modern civil codification, keeping to some extent unavoidable elements of customary law that were deeply rooted in the national identity.[43]

4.2.2.4. Church law impact

The SCC recognizes church marriage as the only valid form and it was a contract stipulated by the priest. Marriage law was mostly regulated according to medieval *Nomocanon* of St. Sava and other church law sources. Hadžić was well aware that there was no chance to intervene in family law due to strong historical influence of the Church, so he decided to keep the competence in marriage law within the secular legislation, but that the norms should be in accordance with Church law principles. Differences between provisions in the SCC and ABGB are clearly visible in marriage and family relationships, in the definition and concept of marriage, regulation of betrothal, kinship, adoption, etc.[44] The presence of so many norms related to Church law produce in consequence a sharp discrepancy between the donor and recipient code, as family law was the most resistant to changes in the SCC.

4.2.2.5. Sharia and Ottoman law remnants

Several centuries of the Ottoman rule in Serbia had left traces at all levels, including the legal heritage. Sharia law was applied alongside domestic customary law. Some Sharia institutions, particularly those concerning landed property, became part of everyday life in the 19th century. The SCC tried to introduce the concept of land register books, like in Austria. Also, acquisition of property was connected both to *titulus* (usually a contract) and *modus acquirendi* (an additional formality), like in Roman and Austrian law. However, the new land register books were not established for decades, and the Sharia institution of the *tapu* (title deed) system remained evidence of property for a long time. So-called *intabulation books* for the registration of hypothec and other similar rights persisted as well. A specific type of landed property named *miljak* in Serbian (probably as a derivate from Turkish *milk, mulk*) was accepted by the SCC as a kind of unlimited rights over immovable property. The SCC retained several other less-frequent Ottoman institutions.[45] Although Hadžić believed that the SCC would modernize the landed property evidence by borrowing the land register books from the Austrian tradition, the Sharia remains stayed alive for many decades.

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[43] For more details see S. Avramović (2017), 441–447.

[44] See more in *ibid*., 449–451.

[45] *Ibid*., 452–457.

4.2.2.6. Introduction of national legal terms

Hadžić was faced with relatively undeveloped legal national terminology and he had to offer new terms for modern legal institutions that were sometimes unknown to the general population. He also simplified complicated German linguistic structures and constructions, trying to make their sense clearer to the public. He frequently used synonyms and doublets to be more intelligible to his readers, for example as in Art. 424: "A testament, will, or last wish is the disposition by an individual of his entire property or part of it in case of death". He also used Latin terms which he transformed into Serbian (such as *fideikomis, legat, sekvestar, tutor, servituti*, etc.) and contributed a lot to the development of Serbian legal terminology. In that way the SCC performed a type of educational mission in the modernization of the national legal language. Such a task was not necessary when the DCC was drafted.

5. BEFORE CONCLUSION: WHAT DOES MIXED LEGAL SYSTEM MEAN?

A mere fifty years ago, mixed systems were treated as legal aberrations and were scarcely discussed. The focus was on a coherent ordering of *les grands systèmes*, and no space was found in taxonomies for composites and hybrids.[46] This is why we are still trying to find the place of the DCC and SCC among some of the "great legal systems" and to declare them offspring of either the CC or the ABGB. Fortunately, as Palmer says, there is growing awareness that mixed systems, whether restrictively or expansively defined, are a widespread and recurrent reality. However, at the same time Palmer and other scholars are trying to make a new taxonomy of mixed legal systems by using the term "mixed jurisdiction" (usually covering a combination of common and civil law as a new, "third family"). The new approach to comparative law started to complicate the notion of mixed legal systems and therefore there is no consensus among legal comparatists on its meaning.

According to some research "mixed systems" appear in ten categories: mixes of civil law and common law (3.47% of the world population); civil law and customary law (28.54%); civil law and Muslim law (3.14%); common law and customary law (2.94); common law and Muslim law (5.25%), civil law, Muslim law and customary law (3.62%); common law, Muslim law and customary law (19.17%); civil law, common law and customary law (0.8%); common law, Muslim law and

[46] V. V. Palmer, "Mixed Legal Systems", *The Cambridge Companion to Comparative Law* (ed. M. Bussani, U. Mattei), Cambridge University Press, Cambridge 2012, 368.

civil law (0.23%); and of civil law, common law and Talmudic law (0.09%). The number of jurisdictions that fall into the "mixed systems with civil law" category are 65 (19.12% of the world's legal systems), "mixed systems with common law" are 53 (15.59 %), "mixed systems with customary law" are 54 (15.88%) and "mixed systems with Muslim law" are 33 (9.70 %).[47]

However, it seems that not a single legal system can evade legal transplants: it is only a matter of quantity. Even the parent legal systems and fundamental, original donor codes like the CC or ABGB were also influenced by different sources, at least by Roman law,[48] their own customs, natural law principles, etc. Often a variety of sources are perplexed as external factors of influence. Basically every legal system and every codification is more or less a type of mixture of different legal identities. The prevailing component merely shapes its main facet. Consequently, hybridity is a universal fact.[49] Therefore existing taxonomies lose their significance and applicability as there are hundreds of diverse mixed legal systems. Some classifications might be relevant when the codification/legal system absorbs a few ingredients, but often there are many more components included and many legal traditions are perplexing. Also, the resulting blend should not necessarily carry a pejorative meaning of mish-mash legal product. Therefore *mixture of legal identities* should be a more relaxing and less demanding term, as it does not imply a (mixed) *system* and it is an open-ended concept. It enables comparisons between different codifications and legal traditions, avoiding definitions, taxonomies and classifications.

6. CONCLUSION

In chronological terms, the DCC of 1838 and SCC of 1844 sit between the first and second generation of modern civil codifications. They appeared significantly earlier than the codes of bigger, more developed and historically less turbulent countries. They followed the decisive phases in the formation of their nation-states. The two civil codes were regarded as a sign of national maturity, a token of independence and part of the nation-building process. They reflect a kind of legal nationalism, regardless of the fact that they basically borrowed two foreign civil

[47] E. Örücü, "What is a Mixed Legal System: Exclusion or Expansion?", *Electronic Journal of Comparative Law* 12(1)/2008, 4–5.

[48] Just a tiny observation that Roman law itself was in a sense composite legal system as it absorbed *ius gentium* into its own body of *ius civile*.

[49] V. V. Palmer, "Mixed Legal Systems... and the Myth of Pure Laws", *Louisiana Law Review* 67(4)/2007, 1208–1211.

codifications. Despite the authority of the CC and the ABGB, the main issue, both in the Netherlands and Serbia, was to what degree to combine the donor code with inherited legal traditions. In both cases family law was the most sensitive ground and resistant to innovations.

Nevertheless both the DCC and SCC are more or less considered a copy of their prototype codifications, the extensive analysis has shown that they diverge largely from the donor codes in form, structure and content. Both the DCC and SCC combined the legal tradition of the donor country with at least three or more legal traditions, or parts thereof. They could be quite numerous and heterogeneous, as in case of the SCC (national custom, Church law, Roman law, Code civil, Sharia rules). Consequently the SCC differs more from its respective donor code than the DCC does. Independently of how many ingredients the legal mixture contains, they could operate simultaneously within a single system more or less successfully, depending on cleverness of the drafters and compliance of the policy makers. A hybrid legal formation such as the SCC escapes taxonomies as it cannot be included in any existing classification of mixed legal systems. When the codification is so unique, albeit the given donor code is basically predominant, the most adequate description deserves a less formal and less demanding label: a mixture of legal identities. The persistence and deep traces that the DCC and the SCC have left in the legal systems of the two countries attest that such a mixture is not necessarily an unsuitable odd legal mish-mash.

Last but not least, the SCC drafting history confirms Watson's thesis that even chance and coincidence can sometimes cause legal transplants. The poor knowledge of the French language by the Serbian drafters provided an opportunity for the Austrian model to become the chief source of the Serbian private law codification, within a specific mixture of diverse legal identities.

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LEGAL CERTAINTY AND TAXATION: THE PROBLEM OF RETROACTIVE INTERPRETATION

This article shows that the principle of legality of a tax norm is not exhausted in its "source" component (i.e. that the norm is enacted by parliament) but also encompasses the "content" element – a set of requirements for it to be deemed as good law. It is not just retroactivity of a law that is an issue, but legal certainty is also jeopardized by retroactive interpretation implying changes in interpretation of the same norm by authorities who understood it for a long period in a different sense. A threat to legal certainty also exists when a provision that was dormant for years is suddenly applied. A case study shows that the Serbian Parliament issued an authentic interpretation of a tax norm to assert essentially a different interpretation compared to the one well-established in the past, in order to solve a particular case, while a court used that interpretation to pass judgment in a pending case. Within the EU we find notable cases where not only are norms attributed a certain meaning from their inception, even though 60 years may have passed from their initial introduction to the possibility of the existence of a "new meaning" being suggested for the first time, but taxpayers are made to suffer the consequences of the new interpretation. Had the legislator been able to pay more attention to the content of the bills and apply a more comprehensive approach to current issues, the legal certainty, in terms of avoiding "innovative" retroactive interpretations, could be preserved.

Key words: *Good law. – Retroactivity. – Authentic interpretation. – Urgent procedure. – Retroactive interpretation.*

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1. INTRODUCTION

The principle of *nullum tributum sine lege* is widely accepted and is enshrined in many constitutions worldwide.[1] A rare exception is the Constitution of Germany wherein "the legal basis for taxation rests on the combination of two other constitutional provisions: the provision guaranteeing personal freedom, which cannot be restricted except by law, and the provision requiring a legal basis for any act of administration, including any administrative act of tax assessment and collection".[2] However, this principle has two interconnected aspects, which will be analyzed in this article: the source and the content of tax legislation.

The first aspect of the *nullum tributum sine lege* principle ("source") relates to the old slogan of the American Revolution "No taxation without representation."[3] The introduction of taxes should be the prerogative of the parliament to whose members the electorate has entrusted the exercising of its ultimate sovereignty. The executive branch of government should merely clarify tax laws enacted by the parliament (in the sense where further clarification is required to ease the implementation of the relevant legislation) and only when the parliament saw the need to grant it the authority to do so. Although variations to this aspect of the *nullum tributuim sine lege* principle do exist in comparative law (e.g. taxation introduced by virtue of government decrees issued on the basis of delegated legislative competence), it can be found in most democratic jurisdictions in the world today.

The notion that a person's tax obligations should be regulated by statutes, enacted by virtue of the secondary exercise of his or her sovereignty, leads us to the issue of the retroactivity of tax legislation. A person cannot be expected to obey laws of whose existence he/she was not aware due to the simple fact that they did not exist at the time he/she was supposed to respect them. The prohibition of retroactivity is not without exceptions, but what is absolute is that retroactivity of legislation must be explicitly provided for.[4] The problem of retroactivity is a

[1] A.P. Dourado, "General Report – In Search of Validity in Tax Law: The Boundaries Between Creation and Application in a Rule-of-Law State", *Separation of Powers in Tax Law* (ed. A.P. Dourado), EATLP International Tax Series, IBFD, Amsterdam 2010, 30–31.

[2] F. Vanistendael, "Legal Framework for Taxation", *Tax Design and Drafting*, Vol. I (ed. Victor Thuronyi), Washington, D.C.: IMF, 1996, 17.

[3] The slogan first appeared some years before the beginning of the American Revolutionary War (1775–1783) and was used in regard to the introduction of the 1765 Stamp Act (repealed by the British Parliament after much protest in the American Colonies, in 1766).

[4] For example, there is no constitutional prohibition of retroactivity of laws in the U.S. The Supreme Court considers it permissible if it is rationally linked to a legislator's

borderline case, since it can be viewed from both the source and the content perspective. It is inherently connected with the principle of legal certainty. However, in discussing the quality of the content of a piece of legislation, one will be analyzing the aspect of legal certainty which is related to the possibility of clearly interpreting a particular provision. When it comes to retroactivity, interpretation as such is not the issue: legal certainty is endangered due to the fact that we are not provided timely instruction on the consequences of our actions – the norm as such is not present at all.

Referring to the second aspect of the *nullum tributum sine lege* principle ("content"), in its 1979 decision the European Court of Human Rights (ECtHR) defined the qualitative elements that a norm must contain in order to be considered as law: "In the Court's opinion, the following are two of the requirements that flow from the expression 'prescribed by law'. Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice".[5]

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legitimate goal. *United States v. Carlton*, 512 US Supreme Court 26, 35 (1994). *See also* E.K. Lunder, R. Meltz, K.R. Thomas, "Constitutionality of Retroactive Tax Legislation", 2012, Congressional Research Service, [Online] at *https://fas.org/sgp/crs/misc/R42791.pdf*, 2–3, last visited 9 November 2017. In 1996 the US Congress amended Section 7805(b) of the Internal Revenue Code (IRC) and prohibited Treasury Department regulations relating to the sections of the IRC enacted after 1996 to have retroactive effect (except in the case of preventing abuse). *See* S.W. McCormack, "Tax Abuse According to Whom?", *Florida Tax Review* 1/2013, 4. On the other hand, Article 15 (2) of the Constitution of Romania prescribes that a law shall only act for the future, except for the more favorable criminal or administrative law. Between these extremes one may find e. g. the Constitution of Croatia whose Article 90 prohibits retroactivity with the exception that only individual provisions of a law may have a retroactive effect for "exceptionally justified reasons," or the Constitution of Serbia where Article 197 specifies that a deviation from the general prohibition of retroactivity may be allowed only for individual provisions of a law if so required by general public interest.

[5] ECtHR, Case 6538/74 *The Sunday Times v. United Kingdom*, 26 April 1979, para. 49.

The legal certainty that the ECtHR was referring to implies the following requirements, as stated by Fuller:[6] (1) general character of rules; (2) their promulgation; (3) non-retroactivity;[7] (4) clarity; (5) rules must not require contradictory actions; (6) applicability; and (7) the laws should not be changed too frequently (constancy).[8] The protection of legitimate expectations triggered by a law may also be added to the abovementioned aspects of the principle of legal certainty.[9]

However, one should note that, contrary to the principles of legality (*nullum tributum sine lege*) and equality, in most jurisdictions worldwide (with the notable exception of European countries) "legal certainty is not an absolute desideratum... Important though it may be, the principle of certainty as such is not enshrined in most of the contemporary constitutions or in international treaties with provisions that are binding on all persons. The courts therefore cannot test Acts of Parliament against this fundamental legal principle".[10] Only its non-retroactivity dimension (followed by the promulgation requirement[11]), which should be placed within the source-of-legislation issues, as a rule, finds its place in the constitutional provisions, thus being directly exposed to the judicial testing. However, within the ECtHR's approach the courts are required to test whether a law meets the abovementioned requirements regarding its formulation, which should be made with sufficient precision thus enabling a citizen to regulate his/her conduct, i.e. to foresee the consequences which a given action may entail, to a degree that is reasonable under the circumstances.

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[6] L. L. Fuller, *Moralnost prava [The Morality of Law]*, University of Belgrade Faculty of Law, Belgrade 2001, 55–56.

[7] Although Fuller (p. 70) states that "a retroactive law is truly a monstrosity", he also admits that situations may arise in which granting retroactive effect to legal rules, "not only becomes tolerable, but may actually be essential to advance the cause of legality" (Fuller, 71).

[8] Although Fuller deals with these requirements in light of the principle of legality, these are all also aspects of legal certainty. *See* H. Gribnau, "Equality, Legal Certainty and Tax Legislation in the Netherlands. Fundamental Legal Principles as Checks on Legislative Power: A Case Study", *Utrecht Law Review* 2/2013, 70.

[9] K. Tipke, *Die Steuerrechtsordnung*, Verlag Dr. Otto Schmidt, Köln 2000, 147.

[10] H. Gribnau (2013), 54. The Court of Justice of the European Union (CJEU) has interpreted the principles of legal certainty and legitimate expectations as integral parts of EU law (Case 345/06 *Gottfried Heinrich*, 10 March 2009, para. 44). The same approach is followed by the Court of First Instance of the European Communities (Case T-347/03 *Eugénio Branco, L^da v. Commission*, 30 June 2005, para. 102).

[11] ECtHR decided that, provided the taxpayer is a legal entity (as opposed to an individual) and thus able to rely on the advice of consultants, the claim that a norm with tax implications was published in a financial bulletin rather than in the *Official Gazette* is not justifiable (Case 26449/95 *Špaček, s.r.o. v. The Czech Republic*, 9 November 1999, para. 59).

Thus, in order to be deemed a law, tax norms must not only comply with the source criterion, but their content must also meet certain qualitative standards as well. In summary, in order for a tax norm to be deemed a *good law* the following conditions have to be met: (1) it should be provided for in a statute enacted by parliament, or in a regulation issued by the executive branch of government on the authority granted to it by the parliament; (2) it should not, unless explicitly provided for, have a retroactive effect; and (3) it should at the very minimum meet the quality standards set by the ECtHR (relevant for legislation in Europe).

2. AIMS AND METHODOLOGY OF THE RESEARCH

In this article, we will deal with the problem of endangered legal certainty caused by radical changes in the interpretation of enacted tax norms with ambiguous wording, by the sudden "awakening" of norms that had not been applied for many years following their enactment, or by retroactive authentic interpretations. The empirical basis for the analysis has been found in a number of states in Southeast Europe – both EU candidate countries (Serbia) and EU member states (Greece). Thus the topic at hand is most certainly a regional one, at the very least. However, the recent approach applied by the European Commission in state aid cases, which emanated from its investigations, launched in 2013[12] regarding the tax ruling practices of members states,[13] shows that some of the outlined issues have a far broader impact and thus deserve our attention.

The methodology applied will consist of investigating the standards of legal certainty established by the ECtHR, and comparing their application in Serbia and select comparative jurisprudence. A case study from Serbia's jurisprudence, with wide implications for understanding the risks involved in retroactive interpretations of tax norms, will be analyzed and correlated with the right to a fair trial, as understood by the ECtHR.

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[12] *http://ec.europa.eu/competition/state_aid/tax_rulings/index_en.html*

[13] Commission Decision (EU) 2016/2326 of 21 October 2015 on State aid SA.3837 (2014/C ex 2014/NN) which Luxembourg granted to Fiat (notified under document C(2015) 7152), *Official Journal of the European Union*, L 351, 22 December 2016; Commission Decision (EU) 2017/502 of 21 October 2015 on State aid SA.38374 (2014/C ex 2014/NN) implemented by the Netherlands to Starbucks (notified under document C(2015) 7143), *Official Journal of the European Union*, L 83, 29 March 2017; Commission Decision (EU) 2017/1283 of 30 August 2016 on State aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) implemented by Ireland to Apple (notified under document C(2017) 5605), *Official Journal of the European Union*, L 187, 19 July 2017; Commission Decision (EU) 2018/859 of 4 October 2017 on State aid SA.38944 (2014/C) (ex 2014/NN) implemented by Luxembourg to Amazon (notified under document C(2017) 6740), *Official Journal of the European Union*, L 153, 15 June 2018.

3. OPEN ISSUES RELATED TO THE SOURCE AND CONTENT OF TAX LEGISLATION

Once the "source-content" link of a tax norm has been established, two dilemmas deduced from the empirical examples emerge.

The first dilemma can be formulated through the question whether the requirement that, in order to be considered as law, a particular tax norm must be enacted by parliament (or stipulated in regulations issued on the authority granted by parliament) has both an objective and a subjective component.

If a provision is adopted by the parliament, following all formal rules of parliamentary procedure, but where it can be deduced that it is questionable that the members of parliament understood the rules that they were enacting, the issue arises whether such a provision can still be regarded as a *good law*. In other words, should there be an evident will (or an intellectual) element in the business of enacting (tax) legislation and if it can be proved that it is missing, is this sufficient grounds to claim that a rule is not based in law?

While we are able to find examples where a legal norm which has been duly enacted by parliament has no coherent meaning,[14] the issue of the legality (in the constitutional sense) of such provisions may be dealt with through the content criterion. However, there are numerous examples of rules where the legislator is *prima facie* making a clear statement, where he is providing the taxpayer with an instruction that can be understood and followed, but a more detailed analysis of the way in which the norm has been introduced shows that the legislator objectively did not understand (or to be more precise, could not have understood) the legislation he enacted. For example, if the time allotted to debating and analyzing the amendments to a certain law can be measured in just minutes, while these amendments are highly technical in nature, it can be objectively stated that most if not all members of parliament were unaware of what they were voting on. Comparative analysis shows that the executive branch of government has the dominant influence in the process

[14] The now abolished Corporate Income Tax Law of the Federation of Bosnia and Herzegovina (*Official Gazette of the Federation of Bosnia and Herzegovina*, No. 97/07) Art. 5(2) provided a definition of the agency PE which stated: "An agent who independently acts in the name of the non-resident and what [the use of the term "what" is deliberate as the wording of the law simply does not connect the agent with the part of the sentence after the comma – *D. P., S. V. K.*] is connected with the activities of concluding contracts in the name of and for the non-resident, maintains a stock of goods which it delivers in the name of the non-resident, shall be deemed a permanent establishment of a non-resident." ("Poslovnom jedinicom nerezidenta smatra se zastupnik koji samostalno djeluje u ime nerezidenta, a vezano je za aktivnosti sklapanja ugovora u ime i za nerezidenta, drži zalihe proizvoda koje isporučuje u ime nerezidenta.")

of drafting and ultimately adopting tax legislation in numerous jurisdictions worldwide.[15] As "members of parliament generally lack (technical) know how, experience and time to be able to draft bills, tax bills included,"[16] this work is predominantly done by the executive branch of government. Furthermore, not only are legislative proposals prepared outside parliament, while its members are not provided the means to place government proposals under adequate scrutiny, but they are also quite frequently passed using "urgency" procedures, which limit the debate process to, in certain cases, only a couple of days.[17]

Most jurists' first instinctive reaction is that the described problems are to be dealt with within the ambit of the political sphere and that the courts are powerless to combat such abuses. On the other hand, if the ECtHR can curtail the power of the legislature and demand a degree of quality of the content of the norms it enacts, one may wonder whether it is not logical that we require at least some evidence of an effort being made to understand these provisions prior to the "show of hands" (i.e. not the quality of the content, but the quality of the form).

Furthermore, if it is evident that a piece of tax legislation has been introduced without any comprehensive debate (e.g., through urgent legislative procedure, wherein several legislative proposals are jointly tabled before the parliament and where the ensuing debate lasts only a few minutes), and was supported with only laconic argumentation prepared by the executive branch of government, which can provide little,

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[15] J. Heinrich, I. Prinz, "Austria", *Separation of Powers in Tax Law* (ed. A.P. Dourado), EATLP International Tax Series, IBFD, Amsterdam 2010, 57–58; B. Peters, E. van de Velde, "Belgium", *Separation of Powers in Tax Law* (ed. A.P. Dourado), EATLP International Tax Series, IBFD, Amsterdam 2010, 66–67; J.G. Nielsen, "Denmark", *Separation of Powers in Tax Law* (ed. A.P. Dourado), EATLP International Tax Series, IBFD, Amsterdam 2010, 89–90; E. de Crouy-Chanel, A.M. de la Motte, "France", *Separation of Powers in Tax Law* (ed. A.P. Dourado), EATLP International Tax Series, IBFD, Amsterdam 2010, 98; L. Del Federico, R. Castigione, F. Miconi, "Italy", *Separation of Powers in Tax Law* (ed. A.P. Dourado), EATLP International Tax Series, IBFD, Amsterdam 2010, 129–130; H. Gribnau (2013), 56.

[16] H. Gribnau, "Netherlands", *Separation of Powers in Tax Law* (ed. A.P. Dourado), EATLP International Tax Series, IBFD, Amsterdam 2010, 158.

[17] A. Ágh, "Parliaments as Policy-Making Bodies in East Central Europe: The Case of Hungary", *International Political Science Review* 4/1997, 417–432; P. Kopecký, "Power to the Executive! The Changing Executive-Kegislative Relations in Eastern Europe", *The Journal of Legislative Studies* 2–3/2004, 142–153; K.H. Goetz, R. Zubek, "Government, Parliament and Law-making in Poland", *The Journal of Legislative Studies* 4/2007, 517–538; V. Pettai, Ü. Madise, "The Baltic Parliaments: Legislative Performance from Independence to EU Accession", *The Journal of Legislative Studies* 3–4/2006, 291–310; D. Vuković, "Hollowing Out of Institutions: Law-Making and Policymaking in Contemporary Serbia", Paper presented to the 8th Central and Eastern European Forum for Young Legal, Political and Social Theorists: Central and Eastern European Socio-Political and Legal Transition Revisited – Theoretical Perspectives, Budapest 2016.

if any, detailed insight into the nature, scope and intended impact of the proposed and subsequently adopted norms, concerns may be raised as to whether that piece of legislation can be the subject of subsequent interpretative laws or authentic interpretations. In other words, it is disputable that parliament (particularly a different one in terms of its members from the parliament which enacted the respective provision) can issue interpretative laws or authentic interpretations in circumstances where it is evident that there are no substantial sources on which to base the presumption of the legislative intent.

The second dilemma refers to the notion of retroactive interpretation of tax norms, in contrast to the notion of retroactivity of tax legislation *per se*, which has been much deliberated on. The scenario to concentrate on is the one where the same norm was interpreted one way for a period of time and then the authorities started understanding it in a different sense. Pursuant to this change in perspective, the authorities audit a taxpayer and apply the new interpretation in determining the tax consequences of an event that took place at the time when the old interpretation was dominant (the statutes of limitation for tax audits usually allows tax administrations to go back several years). It should be noted that the norm itself remained static and that we cannot talk of either retroactivity or retrospectivity of tax legislation in their proper sense.[18]

The issue of retroactive application of tax laws requires that the problem of dormant tax legislation is also addressed. The "reform fever" which many a legislator has caught, combined with the absence of sufficient administrative capacities, often leads to the introduction of legislation that is neither understood, nor have any advance preparations been made for its implementation at the level of the tax administration (e.g. transfer pricing or permanent establishment provisions in an economy in transition). Such norms may remain virtually unnoticed in a country's statutes for many years (thus the use of the term *dormant*), wherein an urgent need for more tax revenues (as witnessed in these austerity times) may lead to their unexpected and sudden application by the authorities in an audit process. Therefore, one may wonder whether a law that has been "dormant" for some time (there are examples of provisions where there has been a time gap of more than 15 years between their enactment and first application by the authorities)[19] is still a *good law* and whether the unannounced commencement of auditing of its application by the tax

[18] We define *retroactivity* as the situation where a law is applied to a taxable event that had occurred before the law entered into force. The term *retrospectivity* refers to the situation where a law is being applied to the future consequences of a taxable event that had occurred before the law entered into force (without a grandfathering clause).

[19] For example, Serbian transfer pricing rules, which were introduced in 1991, but were first substantially applied by the Serbian Tax Administration in a tax audit procedure in 2008.

authorities is comparable to the introduction of retroactive legislation. A similar question may be raised when it is not an alternative interpretation that is being applied (different in comparison to an established one), but when a completely new aspect of a norm is being discovered (when a principal provision of e.g. human rights law/constitutional law finds an application in an area of law previously thought to be unaffected by it, such as tax law).

4. THE ABUSE OF AUTHENTIC INTERPRETATIONS: A SERBIAN CASE STUDY

It was in the second half of 2017 that the Court of Appeals in Belgrade overturned a judgment of the first instance court in a case that presents an outstanding opportunity to analyze most of the aforementioned open issues related to the source and content of tax legislation.[20]

Namely, a corporate taxpayer in 2008 relied on an interpretation found in an Opinion of the Serbian Ministry of Finance issued in 2002[21] to determine its corporate income tax obligations. At the time the opinions of the Serbian Ministry of Finance were not binding for the taxpayers or the Serbian Tax Administration, but they were relied upon to clarify areas of law that presented interpretative dilemmas. The interpretation found in the 2002 Opinion of the Serbian Ministry of Finance was widely respected and was cited as a *good law* in the 2007 *Manual for the Application of the Corporate Income Tax Law*, which was issued by the Director of the Serbian Tax Administration, as a binding internal guide for its inspectors.[22]

It was not until 2010 that the Serbian Corporate Income Tax Law was amended in a way that made the 2002 Opinion obsolete.[23]

The respective corporate taxpayer was audited in 2012 by the Serbian Tax Administration and a deficiency was found in the application of the provisions to which the 2002 Opinion applied. The Serbian Tax Administration essentially took the position that the relevant provisions should have been interpreted differently (in line with the spirit of the 2010 amendments to the Corporate Income Tax Law) and completely

[20] Judgment of the Court of Appeals in Belgrade, Kž1 Po 1 2/17 of 6 September 2017.

[21] Opinion of the Serbia's Ministry of Finance No. 430–07–306/2002–04 of 2 October 2002.

[22] *Priručnik za primenu Zakona o porezu na dobit preduzeća [Manual for the Application of the Corporate Income Tax Law]*, Ministry of Finance – Tax Administration, Belgrade 2007, 240.

[23] Law on Amendments of the Corporate Income Taw Law, *Official Gazette of the Republic of Serbia*, No. 18/10.

disregarded the existence of the 2002 Opinion. The Serbian Tax Administration not only assessed additional tax obligations on the corporate taxpayers, but also brought criminal charges for tax evasion against a number of individuals related to the corporate taxpayer.

The criminal court of first instance faced a significant problem as there was simply no evidence that in 2008, at the time the relevant taxable event took place, there were any publicly available sources that would suggest that the taxpayer should have acted differently from the way it did. Furthermore, the evidence suggested that at the time the Serbian Tax Administration adhered to the same interpretation as did the taxpayer when determining its tax obligations.

In an attempt to find a solution to the presented problem, the criminal court of first instance approached the Serbian Parliament for an authentic interpretation of the relevant legal provisions which was issued, after some procedural difficulties, on 3 November 2015.[24]

Despite the fact that in Serbia authentic interpretations of legislative provisions issued by the Serbian Parliament have the same status as a statutory law, thus being general legal acts, no attempt was made to disguise the fact that this authentic interpretation was issued for the purposes of the particular case.[25] However, what was even more worrying was the fact that the quality of the content of the authentic interpretation was completely unacceptable. In order to substantiate such a grave assessment we will offer two examples:

Namely, by virtue of the 2010 changes and amendments to the Corporate Income Tax Law the title of this act was changed: by applying

[24] *Official Gazette of the Republic of Serbia*, No. 91/2015. The court's request was not considered, on constitutional grounds, since the number of subjects entitled to initiate such procedure is limited, but the authentic interpretation was nevertheless issued at a subsequent request made by a member of parliament.

[25] *See* Para. 12 of the Authentic Interpretation of Articles 27, 28, 40 and 71 of the Corporate Income Tax Law (*Official Gazette of the Republic of Serbia*, No. 25/01, 80/02, 80/02, 43/03, 84/04 and 18/10) and Article 41 (3) of the Law on Tax Procedure and Tax Administration *(Official Gazette of the Republic of Serbia* No. 80/02, 84/02, 23/03/ 70/03, 55/04, 61/05, 85/05, 62/06 and 61/07), which states: "The withholding tax shall apply to a non-resident legal entity, in accordance with Article 40, paragraph 1 of the Law, and in the sense of the provision of Article 71, paragraph 1 of the Law, the resident legal entity is obliged to calculate and pay the respective tax (in the name of and to the account of the non-resident taxpayer) at the rate of 20%, unless otherwise provided by a double taxation treaty (*the foreign legal entity is registered as a private limited liability enterprise in the Netherlands Antilles* [emphasis added – *D.P., S.V.K.*])." ("Obveznik poreza po odbitku u skladu sa članom 40. stav 1. Zakona je nerezidentno pravno lice, a u smislu odredbe člana 71. stav 1. Zakona, rezidentno pravno lice je dužno da obračuna i plati predmetni porez (u ime i za račun nerezidentnog obveznika) po stopi od 20%, ukoliko međunarodnim ugovorom o izbegavanju dvostrukog oporezivanja nije drukčije uređeno (strano nerezidentno pravno lice je registrovano kao privatno preduzeće sa ograničenom odgovornošću u Holandskim Antilima)").

a literal translation from Enterprise Profits Tax Law (*Zakon o porezu na dobit preduzeća*) to Legal Entities' Profits Tax Law (*Zakon o porezu na dobit pravnih lica*). Nevertheless, despite the fact that the authentic interpretation refers to the version of the Corporate Income Tax Law which encompasses the 2010 changes and amendments, it refers to the respective law under its old name.

Although one might claim that the first example is just a legalistic pedantry without any substantial implications, the second one is more to the point.

Paragraph 10 of the authentic interpretation states "Withholding tax on income from Article 40, paragraphs 1, 2, 3 and 12 of the Law, shall be calculated, withheld and paid to the designated accounts for every taxpayers and every individually generated or distributed income, on the day the income has been generated or distributed."

The term "Law" from the cited paragraph refers to the Corporate Income Tax Law, as it stood with all the changes and amendments up to and including the ones from 2010. Surprisingly, we find that after the 2010 changes and amendments to the Corporate Income Tax Law, Article 40 had only six paragraphs. In other words, paragraph 10 of the authentic interpretation by the Serbian Parliament refers to a provision – Article 40, paragraph 12 of the Corporate Income Tax Law, which at the relevant moment in time simply did not exist. Actually, it was only in 2013 that paragraph 12 was introduced to Article 40 of the Corporate Income Tax Law.[26]

5. THE QUALITY OF CONTENT OF THE AUTHENTIC INTERPRETATION

Despite all the evident flaws in the content of the 2015 authentic interpretation of the provisions of the Serbian Corporate Income Tax Law, the criminal court of first instance relied upon it to issue guilty verdicts, while the Court of Appeals in Belgrade overturned the decision primarily on the basis of a breach of the constitutional principles regarding the separation of powers between the legislative branch of government and the judiciary.

However, in light of the questions raised in section 3 of this article, one cannot help but be further puzzled by the evident sloppiness of the Serbian legislator in drafting the text of the authentic interpretation. In

[26] Article 10 of the Law on Amendments of the Corporate Income Tax Law, *Official Gazette of the Republic of Serbia*, No. 47/2013.

other words, how is it possible that a tax law of such a low normative standard is passed by the nation's highest legislative body?

Although in the cited 1979 *Sunday Times v. United Kingdom* decision the ECtHR did elaborate on the standards that the content of a norm must meet in order to be recognized as law (within the prescribed-by-law meaning),[27] the question arises as to whether there is a required standard of form (i.e. of the procedure in which the legislation is passed) for it to be endowed with the attributes of law. For example, the authentic interpretation not only fails to provide any arguments to substantiate the position taken, but it also does not refer to any part of the debate that took place when the norm in question was initially adopted and even fails to cite the argumentation provided by the government in support of its proposal, which was subsequently adopted by Parliament in 2001, when the norms subject to authentic interpretation were introduced into the Serbian tax system.[28]

6. THE DOMAIN OF APPLICATION OF AUTHENTIC INTERPRETATIONS

The "no taxation without representation" requirement is generally directed *vis-à-vis* pretensions of the executive branch of government to enact tax rules. However, whenever a legislator establishes that the subjects applying the law constantly show disorientation and variation with respect to its application, it is entitled to address its binding interpretation to them. It may take the form of "interpretative laws", like

[27] In a more recent tax case (23759/03 and 37943/06 *Shchokin v. Ukraine*, 14 October 2010, para. 51 and 56), the ECtHR stated that the concept of *law* requires firstly that the measures should be based on domestic law. It also refers to the quality of the law in question, requiring that it be accessible to the persons concerned, precise and foreseeable in its application. The Court concluded that it is not satisfied with the overall state of domestic law, existing at the relevant time, on the matter in question (the application of a tax administration's instruction supported by a presidential decree rather than of a ministerial decree, deemed to be an act of parliament resulting in an increased tax burden). It noted that the relevant legal acts had been manifestly inconsistent with each other. As a result, the domestic authorities applied, at their own discretion, opposite approaches as to the correlation of those legal acts. In the Court's opinion the lack of the required clarity and precision of the domestic law, offering divergent interpretations on such an important fiscal issue, upset the requirement of the "quality of law" under the Convention and did not provide adequate protection against arbitrary interference by public authorities with the applicant's property rights. To summarize: the ECtHR found that a part of the tax legislation of a country (Ukraine) was so unclear as to be unlawful.

[28] A cynic may note that perhaps the reason for such an attitude lay in the fact that there was nothing in the parliamentary debate that took place when the norms in question were introduced into Serbian legislation, nor in the argumentation provided by the government to support the approach adopted in the authentic interpretation.

e.g. in Italy[29] or Greece,[30] where these pieces of legislation are prescribed (indirectly or directly) by constitutions, or of "authentic interpretation of laws", like in Slovenia, Croatia or Serbia, where the measure is simply regulated by the parliament's rules of procedure. But in the latter situation the authentic interpretation has the same legal force as the statute, with the effects being retroactive in both situations.[31]

That conclusion raises the issue of the impact of an authentic interpretation on a pending case. The aforementioned authentic interpretation, issued by the Serbian Parliament on 3 November 2015, did not serve only the purposes of the criminal proceedings, but was transplanted *ad litteram* in the judgment of the Administrative Court in Belgrade[32] trying the tax case based on identical factual situation. In addition to making the error of relying on the authentic interpretation of a piece of legislation that entered into force several years after the disputed taxable event occurred, the Court overlooked the existence of the established jurisprudence of the ECtHR with respect to the impact of an authentic interpretation on pending cases. In its judgment in the case *Stran Greek Refineries and Stratis Andreadis v. Greece*, the ECtHR found that "the principle of the rule of law and the notion of fair trial enshrined in Article 6 of the Convention preclude any interference by the legislature with the administration of justice designed to influence the judicial determination of the dispute." By enacting an authentic interpretation (in the form of an interpretative law) "the State infringed the applicants' rights under Article 6 (1) by intervening in a manner which was decisive to ensure that the – imminent – outcome of proceedings in which it was a party was favourable to it."[33] An administrative judicial dispute in tax matters *per se* would not fall under the procedure of "the determination of [a person's] civil rights and obligations or of any criminal charge against him," which is stipulated in Article 6 of the European Convention on

[29] Consiglio di Stato, sez. IV, decisione 21/12/2009 n° 8513, *http://www.altalex.com/documents/ massimario/2010/02/01/legge-retroattiva-legittimita-precisazioni-limiti*, last visited 5 November 2017.

[30] Article 77 of the Constitution, *http://www.wipo.int/edocs/lexdocs/laws/en/gr/gr220en.pdf*, last visited 5 November 2017.

[31] "The Court reaffirms that while in principle the legislature is not precluded in civil matters from adopting new retrospective [*retroactive*, in the sense indicated in footnote 18 – *D.P., S.V.K.*] provisions to regulate rights arising under existing laws, the principle of the rule of law and the notion of fair trial enshrined in Article 6 preclude any interference by the legislature – other than on compelling grounds of the general interest – with the administration of justice designed to influence the judicial determination of a dispute." (ECtHR, Case 38703/97 *Agoudimos and Cefallonian Sky Shipping Co. v. Greece*, 28 June 2001, para. 30).

[32] Judgment of the Administrative Court in Belgrade, No. 5 U. 14047/13 of 3 November 2016.

[33] ECtHR, Case 13427/87, 9 December 1994, paras. 49 and 50.

Human Rights as a domain where the right to a fair trail must not be violated. However in *Janosevic v. Sweden*[34] the ECtHR took the position that when the issue of deterrent and punitive surcharges is involved in proceedings related to a tax decision, Article 6 of the European Convention on Human Rights should also refer to such judicial disputes. A surcharge with these features was imposed in this tax case.

To conclude: Although we do not contest the assertion that authentic interpretations of laws are inherently retroactive,[35] in light of the jurisprudence of the ECtHR, we find that an authentic interpretation given for the purpose of solving a specific issue in a specific manner is unacceptable, because it determines the outcome of the dispute in a pending case, thus violating the right to a fair trial.

7. CONCLUSION

Although we may be tempted to think that most of the abovementioned issues are related to societies in transition, where legal culture and the adherence to the rule of law principle are yet to fully mature, more recent developments in EU law lead us to conclude that the questions raised in this article have broader relevance. Namely, in 2013 the European Commission started investigations into the practices of various Member States when issuing tax rulings to taxpayers in order to determine whether these countries were providing prohibited state aid to a select few (primarily large multinational corporations). The norm that was and still is being tested is embodied in Art. 107(1) of the Treaty on the Functioning of the European Union[36] which states:

"Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market."

The cited rule has been one of the corner stones of European law and has been present in the primary law of the European Communities since their very formation in 1957.[37] However, in 2016 the European Commission published guidance on the interpretation of a rule almost 60 years old, which implies that certain tax principles – principles which are

[34] ECtHR, Case 34619/97, 23 July 2002, paras. 68–71.

[35] Cf. Teodor Antić, "Vjerodostojno tumačenje zakona" [Authentic Interpretation of the Law], *Zbornik Pravnog fakulteta Sveučilišta u Rijeci* 1/2015, 623.

[36] *Official Journal of the European Union* C 326, 26 October 2012.

[37] *See* Art. 92(1) of the 1957 Treaty Establishing the European Economic Community (the Treaty of Rome).

a part of direct tax law and with respect to which the European Union has no prerogatives – were always somehow enshrined in state aid provisions.[38] In other words, despite the fact that neither European primary nor secondary legislation expressly obliged Member States to apply the so-called "at arm's length" principle when determining corporate tax obligations stemming from related party transactions, they had (we may logically conclude since 1957) the duty to do so on the basis of the state aid rules. Furthermore, the European Commission suggests that the interpretation of the "at arm's length" principle for the purposes of EU state aid rules may differ, (although it does not say how or when) from the well-established understanding of this principle in international tax law (e.g. the OECD Transfer Pricing Guidelines).[39]

The European Commission supported its approach by invoking the jurisprudence of the Court of Justice of the European Union,[40] but numerous authors, with whom we would have to agree, provide arguments to the contrary.[41] At this moment in time the Court of Justice of the European Union is facing cases in which Member States have been challenged by the European Commission for not applying an existing rule in a way in which, when taxable events occurred, no one had understood to be a possibility.[42] The position of the U.S. Treasury in respect to EU state aid cases clearly resonates what has been proposed with respect to the Serbian case of retroactive interpretation: "...[P]ublic guidance – including Commission decisions and notices as well as EU case law – suggested that the tax rulings issued in the State Aid Cases were consistent with the Commission's application of State aid rules to transfer pricing cases. Moreover, Member States made tax assessments pursuant to these rulings for a long period of time – in some cases for well over ten years

[38] *Commission Notice on the notion of State Aid as referred in Article 107(1) of the Treaty on the Functioning of the European Union,* 2016/C 262/1, para. 172.

[39] *Ibid*., para. 173.

[40] Judgment of the Court of Justice of 22 June 2006, *Belgium and Forum 187* v. *Commission*, Joined Cases C-182/03 and C-217/03, ECLI:EU:C:2006:416.

[41] For example, R. Mason, "Special Report on State Aid – Part 3: Apple", *Tax Notes*, 6 February 2017; H. L. E. Verhagen, "State Aid and Tax Rulings – An Assessment of the Selectivity Criterion of Article 107(1) of the TFEU in Relation to Recent Commission Transfer Pricing Decisions", *European Taxation* 7/2017; U. S. Department of the Treasury, *White Paper. European Commission's Recent State Aid Investigations of Transfer Pricing Rulings*, Washington, D. C., 24 August 2016, *https://www. treasury.gov/ resource-center/tax-policy/treaties/Documents/White-Paper-State-Aid.pdf*, 15 September 2018.

[42] For example Case T-892/16: Action brought on 19 December 2016 – Apple Sales International and Apple Operations Europe v. Commission; Case T-892/16: Action brought on 19 December 2016 — Apple Sales International and Apple Operations Europe v Commission, *Official Journal of the European Union* C 53, 20 February 2017; Case C-678/17: Action brought on 5 December 2017 – European Commission v. Ireland, *Official Journal of the European Union,* C 22, 22 January 2018.

– with no enforcement action by the Commission or any other indication from the Commission that its approach to analyzing tax rulings under State aid law was about to change. This could have reasonably reinforced an understanding among all parties that the legal determinations of Member States were consistent with EU law and practice. None of the companies under investigation had identified the risk of State aid investigations in audited financial disclosures made prior to June 11, 2014 (the date that the Commission announced and opened its formal investigations of Ireland, Netherlands, and Luxembourg concerning Apple, Starbucks, and Fiat, respectively). Moreover, it is our understanding that, until the Commission had started its inquiries and investigations, neither internal review nor third-party review and audit of the affected firms by tax and audit professionals gave rise to any determination that their tax treatment could potentially be subject to State aid rules."[43]

It is a worrying trend that the executive branch of government, even in the most developed parts of the world, attempts to confront problems that warrant a solution with a perhaps even more ominous weapon of retroactive interpretation, which undermines the essential principle of legal certainty. While perhaps it may be unfair that wealthy taxpayers managed to minimize their tax obligations due to inadequate legislation, it would be more prudent to apply the wisdom of being wary of succumbing to populist instincts and defending the ancient *dura lex sed lex* principle. Furthermore, it is with this standard in mind that the legislators (with the essential help of the executive branch of government) should attempt to find more durable solutions to accomplish the legitimate goals of fair taxation.

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[43] U.S. Department of the Treasury, *White Paper. European Commission's Recent State Aid Investigations of Transfer Pricing Rulings*, 15.

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THE CAPACITY OF THE ADMINISTRATIVE COURT IN SERBIA TO DEAL WITH ASYLUM CASES

This paper explores the capacity of the Administrative Court in Serbia to adjudicate asylum cases, which have been in its jurisdiction since the Court's establishment in 2010. The analysis of its asylum case law is divided into three phases, based on both temporal and substantive criteria. It demonstrates that the best period in handling asylum cases was 2014–2015, during which judgments of the Court significantly improved the decision-making of administrative authorities. Nevertheless, this research has identified several issues that have negatively influenced the work of the Administrative Court in the field of asylum law: the Court's excessive inherited caseload, the influx of new claims, a small number of asylum-related cases, the insufficient number of judges, the extremely broad jurisdiction of the Court, as well as a lack of specialized panels within the Court. The last problem is identified as the major one and the authors propose concrete steps that should be undertaken in order to increase the capacity of the Administrative Court to deal with asylum cases. Lessons learned from Serbia, as a country in the middle of the Western Balkan migration route, can be useful for all other countries along it.

Key words: *Administrative Court. – Republic of Serbia. – Asylum. – Safe third country. – European Convention on Human Rights.*

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1. INTRODUCTION

For many years, refugees and migrants from different parts of the world have been trying desperately to reach Europe. The escalation of this phenomenon in 2015 has been called the European migrant (refugee) crisis.[1] While the migrants' desired destinations are Germany and Scandinavia, the daunting route they face takes them mainly through the Western Balkans.[2] Serbia is right in the middle of that route and for a long time it has been mainly used as a transit country. However, in March 2016, when neighboring countries (Hungary and Croatia) decided to erect fences and introduce strict border controls, the route was closed, leaving many migrants 'trapped' in Serbia.[3] In September 2018, there were around 4,000 migrants in Serbia,[4] and some of them had decided to apply for asylum.

Prior to the breakup of Yugoslavia in 1991, there was no national comprehensive asylum system and decisions were left to the discretion of national authorities who made *ad hoc* decisions on international protection, mostly for asylum seekers from Hungary (after the Soviet intervention in this country in 1956) and Chile (after the assassination of Chilean president Allende in 1973).[5] In subsequent cases, the Yugoslav and Serbian authorities allowed asylum seekers to contact UNHCR

[1] M. Barlai *et al.* (eds.), *The Migrant Crisis: European Perspectives and National Discourses,* Studien zur politischen Kommunikation, LIT Verlag, Berlin-Münster-Wien-Zürich-London 2017; L. Buonanno, "The European Migration Crisis", in D. Dinan, N. Nugent and W. E. Paterson (eds.), *The European Union in Crisis*, Palgrave, London 2017, 100 – 129; C. McDonald-Gibson, *Cast Away: Stories of Survival from Europe's Refugee Crisis,* Portobello Books, London 2017; M. E. Johnson, *The European Migrant Crisis: Unprecedented Displacement on an International Scale,* CreateSpace Independent Publishing Platform, 2015.

[2] For more about the Western Balkan countries, and their aspiration towards EU membership, see: M. Davinić, "The EU Enlargement and Accession Procedure – The Case of Western Balkan Countries", *Zeitschrift für Europarechtliche Studien* 4/2017, 513–526.

[3] M. Davinić, "The Role of Public Administration of the Republic of Serbia in Managing the Migrant Crisis", in M. M. Boguslawskij *et al.* (eds.), *Migrationsrecht im östlichen Europa, Die Kieler Ostrechts-Notizen,* Institut für Osteuropäisches Recht der Universität Kiel, Kiel 2017, 29–37; *see also*: I. Krstić, "Response of Western Balkan Countries to Migration Crisis", *Zeitschrift für Europarechtliche Studien* 4/2017, 527–540.

[4] During 2018 the number of refugees and migrants in Serbia has stabilized at approximately 4,000. Around 90% of them have been provided accommodation in 15 governmental centers. The rest are refusing to enter the facilities and are sleeping out in the open, mainly in Belgrade, and near the border areas with Hungary, Croatia and Bosnia and Herzegovina. UNHCR, *Serbia Update 17–30 September 2018*, available at: *https://reliefweb.int/sites/reliefweb.int/files/resources/66098.pdf*, last visited 2 October 2018.

[5] M. Stojić Mitrović, "Serbian migration policy concerning irregular migration and asylum in the context of the EU integration process", *Issues in Ethnology and Anthropology* 4/2014, 1107.

representatives,[6] who provided them with accommodation and humanitarian assistance, and worked to find their country of final destination.[7] During the last decade of the 20th century, authorities provided humanitarian aid to citizens from the former Yugoslav republics, who were automatically recognized as refugees, which meant that civil servants and judges did not have much experience in interpreting the complex international norms in this area. The legal framework changed with the adoption of the Law on Asylum in 2007, which established a comprehensive asylum system in Serbia.[8]

A foreigner who is seeking international protection in Serbia must first submit his or her asylum application to the Asylum Office, a first instance body within the Ministry of Interior's Border Police Directorate. From that moment he/she is considered an asylum seeker. The Asylum Commission decides in the second instance the appeals against decisions of the Asylum Office. The last resort is the judicial procedure before the Administrative Court, which reviews the legality of administrative acts. Since 2012, the UNHCR has called for the abolition of the Asylum Commission, proposing the introduction of direct judicial control of first instance decisions, by the Administrative Court, further saying that the Commission is not a specialized and independent body.[9] In order to assess whether Serbia should follow EU Member States in introducing direct judicial control, the authors reviewed the capacity of the Administrative Court to deal with asylum cases.

This paper is divided into several parts. In the opening chapters the authors explain the asylum procedure and concept of administrative dispute in Serbia. The central part focuses on the asylum case law of the Administrative Court, which is divided into three phases, based on

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[6] This was the result of unwrittenagreement between Yugoslavia and UNHCR, concluded in 1976. *Ibid.,* 1108.

[7] I. Krstić, M. Davinić, *Pravo na azil – medjunarodni i domaći standardi [The Law on Asylum – International and Domestic Standards]*, University of Belgrade Faculty of Law, Belgrade 2013a, 311. For more on this issue see Danilo Rakić (ed.), *Ljudska prava izbeglica, interno raseljenih lica, povratnika, azilanata i žrtava trgovine ljudima u Srbiji i Crnoj Gori [Human Rights of Refugees, Internally Displaced Persons, Returnees, Asylum Seekers and Victims of Human Trafficking in Serbia and Montenegro]*, Group 484, Belgrade 2006, 150–155.

[8] Law on Asylum, *The Official Gazette of the Republic of Serbia*, No. 109/07.

[9] In 2012 the UNHCR found that the Asylum Commission is not independent due to the following: it uses the facilities of the Border Police Department, the Head of the Asylum Commission is also the Assistant to the Head of Directorate of Border Police; most members of the Asylum Commission are police officers or other civil servants with no or limited specific training and expertise on asylum matters. *See* UNHCR, *Serbia as a country of asylum, Observations on the situation of asylum-seekers and beneficiaries of international protection in Serbia*, August 2012, 14, available at: *http://www.refworld.org/docid/50471f7e2.html%3E,* last visited 2 October 2018.

temporal and substantive criteria. This part is followed by a summary of the opinions of judges, expressed a questionnaire distributed to them in June 2017. Finally, the authors summarize the findings, identify the main gaps in the application of relevant international standards and EU *acquis* in the field of asylum, and propose activities that would enhance the capacity of the Administrative Court and its judges to provide better judicial review in asylum cases.

2. THE ASYLUM PROCEDURE IN SERBIA

The asylum procedure, as a special administrative procedure in Serbia,[10] is governed by the Law on Asylum and Temporary Protection, adopted in March 2018.[11] However, as this Law entered into force only recently, on 3 June 2018, the new case law has not been covered by this study. The authors processed the jurisprudence from 2010 to 2017, that was the result of the 2007 Law on Asylum, which came into effect in April 2008.[12] As a subsidiary act of general application, the Law on General Administrative Procedure applies to all issues not defined by this law.[13]

The asylum procedure is initiated by submitting an asylum application to officers of the Asylum Office, in the prescribed form and within 15 days from registration; this deadline may be extended in justified cases, at the

[10] For more on the asylum procedure in Serbia, see: I. Krstić, M. Davinić, "The Efficiency of Serbian Asylum Procedure", in M. Bungenberg, T. Giegerich, T. Stein (eds.), *Asyl und Migration in Europa – rechtliche Herausforderungen und perspektiven*, ZeuS Sonderband 2016, Nomos, Europa Institut, Baden-Baden 2016, 207–219.

[11] Law on Asylum and Temporary Protection, *The Official Gazette of the Republic of Serbia*, No. 24/2018.

[12] For more on the provisions of this piece of legislation and their compliance with relevant international law, see: Belgrade Center for Human Rights, *Human Rights in Serbia in 2010*: *Legal Provisions and Practice compared to International Human Rights Standards*, Series reports 15, Belgrade 2011, 226–231, available at: *http://www.bgcentar.org.rs/bgcentar/eng-lat/wp-content/uploads/2013/04/Human-Rights-in-Serbia-A-Comprehensive-Report-for-2010-in-Serbian-and-English-2011.pdf*, last visited 2 October 2018.

[13] The Law on General Administrative Procedure*, The Official Gazette of the Republic of Serbia,* No. 18/2016; Provisions of the Law on General Administrative Procedure are of subsidiary nature and are applied to issues which are not regulated by special administrative proceedings (e.g. asylum procedure). However, the provisions of special administrative proceedings must comply with the basic principles of general law, and cannot reduce the level of protection of the parties' rights and legal interests guaranteed by this legislation. *See*: Art. 3 of the Law on General Administrative Procedure; D. Vučetić, "Distinctive Features of Special Administrative Proceedings in Health Care Matters", in M. Lazić, S. Knežević (eds.), *Legal, Social and Political Control in National, International and EU Law,* Faculty of Law, University of Niš, Niš 2016, 181–182.

request of the asylum seeker.[14] The Asylum Office renders a decision either by upholding the application, thereby recognizing the right to international protection (refugee status or subsidiary protection),[15] or by rejecting the application and ordering the third country national to leave the territory within a specified deadline, unless he/she can stay in Serbia on other grounds. Also, the Law on Asylum prescribes the reasons for dismissing the application on several procedural grounds,[16] the safe third country reason being the main one. Safe third country is defined as

> "the state from the list adopted by the Government, which respects international principles of refugee protection contained in 1951 Refugee Convention and 1967 Protocol, in which asylum seeker stayed or passed by immediately before entering territory of the Republic of Serbia, in which he/she had a possibility to seek an asylum, and in which he/she would not be exposed to torture, inhuman or humiliating treatment or returning to country where his/her life, safety and security would be endangered."[17]

The Asylum Office may also render a decision terminating the asylum procedure in some cases, primarily if a third country national decides not to pursue the asylum application.[18]

The Asylum Office decisions can be appealed before the Asylum Commission [19] within 15 days from the day decision is delivered[20] or

[14] Art. 25, par. 1 of the Law on Asylum.

[15] According to Art. 2 of the Law on Asylum, refugee status means "the right to residence and protection granted to a refugee who is on the territory of the Republic of Serbia, with respect to whom the competent authority has determined that his/her fear of persecution is well-founded." The same article defines subsidiary protection as "a form of protection the Republic of Serbia grants to an alien who would be subjected, if returned to the country of origin, to torture, inhumane or degrading treatment, or where his/her life, safety or freedom would be threatened by generalized violence caused by external aggression or internal armed conflicts or massive violation of human rights."

[16] Art. 33, par. 1 of the Law on Asylum.

[17] Art. 2 of the Law on Asylum. *See also* I. Krstić, M. Davinić, "Zloupotreba koncepta sigurne treće zemlje [The Misuse of the Concept of Safe Third Country]", in R. Vasić, I. Krstić (eds.), *Development of Serbia's legal system and harmonization with the EU law*, University of Belgrade Faculty of Law, Belgrade 2013b, 97 –116.

[18] Furthermore, termination of the asylum procedure can be caused if third country national fails to appear at the hearing without due cause, refuses to give a statement, fails to inform the Asylum Office about change of address within three days, otherwise prevents the service of summons or other documents, or leaves the territory of the Republic of Serbia without the approval of the Asylum Office. *See* Art. 34, par. 1 of the Law on Asylum.

[19] For more on appeals in the Serbian administrative system, see: V. Cucić, "Administrative Appeal in Serbian Law", *Transylvanian Review of Administrative Sciences* 32/2011, 50–73; V. Cucić, "Appeals in Special Administrative Domains", *Transylvanian Review of Administrative Sciences* 34/2011, 63–79; D. Milovanović, M.

within 2 months of submitting application, if no decision was handed down (so-called "silence of administration").[21] The nine-member Asylum Commission passes its decisions by majority vote. The procedure before the Asylum Commission is regulated by the Law on the General Administrative Procedure, which prescribes general grounds for dismissing, rejecting or upholding an appeal. If the Asylum Commission upholds the Asylum Office's decision to dismiss a case on procedural grounds (mainly because a transit country is on the list of safe third countries), it will reject (not dismiss) the appeal. This difference in approach between administrative authorities is not only linguistic, but rather it shows incoherence between the Law on Asylum with the Law on General Administrative Procedure. Therefore, the authors suggest that all aspects of the case of asylum seeker be taken into account, and that the safe third country list should not be applied automatically. In the event that the Asylum Office determines that a particular country from the list is really safe for an asylum seeker, it should reject the application, rather than dismiss it automatically.

The Asylum Commission consists of nine members, all appointed by the Government, for a period of 4 years.[22] The Law on Asylum prescribes cumulative conditions for being a member of the Commission: a citizen of the Republic of Serbia, a lawyer with at least five years of professional experience, and a human rights specialist. This formulation does not guarantee that the member of the Asylum Commission will have necessary competence to handle asylum cases since it does not require specific knowledge in the field of asylum, which can affect the quality of decisions. Also, the Law on Asylum prescribes that the Asylum Commission is independent in its work, but additional guaranties of independence are not provided. The way that this works in practice can be illustrated by the composition of the current Asylum Commission, as it comprises mostly of governmental officials with close ties to the police.[23] Three out of nine members come from the Ministry of Interior, five from other ministries, while only one commissioner comes from academia and is independent from the Government (the co-author of this paper).[24]

Davinić, V. Cucić, "Efficiency of the Administrative Appeal (The Case of Serbia)", *Transylvanian Review of Administrative Sciences* 37/2012, 95–111.

[20] Art. 20, par. 1 of the Law on Asylum.

[21] Art. 173 of the Law on General Administrative Procedure.

[22] The Government of the Republic of Serbia passed a Decision on the Appointment of Commission Members No. 119–1643/2008, dated 17 April 2008, in order to appoint a first mandate of the Commission.

[23] The previous composition is equally illustrative: the President of the Asylum Commission was an assistant chief of the Border Police Department (which supervises the Asylum Office, as the first instance authority).

[24] Government Decision 24 no: 119–2520/17, 23 March 2017.

This casts doubt on the independence of the Commission,[25] and is certainly not a proper solution. Nevertheless, we will later elaborate that the Court is still not ready to have a greater role in asylum cases. Thus, the Commission cannot be abolished yet as the second instance authority, and there is a need for its greater independence.

3. THE ADMINISTRATIVE COURT AND THE CONCEPT OF ADMINISTRATIVE DISPUTE IN SERBIA

The Administrative Court in Serbia was established on 1 January 2010 as a national court of special jurisdiction that adjudicates in administrative disputes and performs other tasks set forth by the law.[26] The Court 'inherited' more than 20,000 cases from the former Supreme Court and district courts in Serbia, which dealt with administrative disputes, and has a constant influx of new cases.[27] However, this huge number of cases is not matched by the appropriate number of judges; the President and 40 judges can hardly handle this caseload.[28]

The Court performs the judicial review in three-member judicial panels, which deliver decisions by majority vote, but there are no specialized panels or chambers. The Court assesses the procedural and

[25] Belgrade Center for Human Rights, *The Right to Asylum in the Republic of Serbia*, Belgrade, 2017, 44.

[26] Art. 11, 13, and 29 of the Law on Organization of the Courts, *The Official Gazette of the Republic of Serbia*, No. 116/08, 104/2009,101/2010.

[27] In 2016 alone, 21,548 new cases were submitted to the Administrative Court. This increasing inflow of new cases is a consequence of the continuous extension of the Court's jurisdiction, stipulated in new legislation (restitution, election cases, protection of labor rights of municipal public servants, etc.). *See*: Republic of Serbia, Supreme Court of Cassation, *Godisnji izvestaj o radu sudova u Republici Srbiji za 2016* [*Annual Report on the Performance of the Courts in the Republic of Serbia for 2016*], March 2017, 6, 8, available at: *http://www.vk.sud.rs/sites/default/files/attachments/GODISNJI%20IZVESTAJ%20O%20RADU%20SUDOVA%20U%20REPUBLICI%20SRBIJI%20ZA%202016.%20GODINU_V6_0.pdf*, last visited 2 October 2018; There are more than 200 laws and many more bylaws applied by judges of Administrative Court in their work. *See* the list of all laws applied by the Administrative Court: *Information Bulletin of the Administrative Court 2010–2016,* Administrative Court, Belgrade 2016, 42–53, available at: *http://www.up.sud.rs/uploads/pages/1459337890~~Information%20Bulletin%20on%20Work%20of%20the%20Court%20March%202016.pdf*, last visited 2 October 2018.

[28] Art 6. of the Decision on the number of judges per courts, *The Official Gazette of the Republic of Serbia*, No. 88/2015. *See*: *http://www.up.sud.rs/cirilica/uredjenje*, last visited 2 October 2018; Additionally, the Rulebook on Internal Organization and Job Classification of the Administrative Court prescribes the Administrative Court has 123 employees, consisting of 101 civil servants and 22 civil appointees. *See*: *http://www.up.sud.rs/uploads/useruploads/sistematizacija/SISTEMATIZACIJA-2016.pdf*, last visited 2 October 2018.

substantial legality of final administrative or individual decisions, for cases not given any other judicial protection.[29] A final administrative or individual decision is one issued during the second-instance proceedings, or the first-instance proceedings where there is no right of appeal.[30]

A plaintiff in an administrative dispute may be a natural person or legal person, claiming that some of his/her rights or statutory interests have been violated by an administrative or individual act. An administrative dispute can also be initiated by a public prosecutor or state attorney's office when the public interest or the property rights of the Republic of Serbia have been violated.[31] On the other hand, the defendant in an administrative dispute is always an authority whose administrative or individual act is being disputed, or an authority who, upon request or appeal of a party, has failed to issue an administrative act ("administrative silence").[32] An interested party is a person who would suffer a detrimental effect in the event that the administrative act is annulled,[33] thus being always on the side of a defendant.

An administrative dispute is initiated by filing a claim. In general, a claim can be submitted within 30 days of the day that an administrative act has been delivered to the party, or within the shorter period, set forth by the law.[34] The Court either upholds the claim or rejects the claim as groundless and it delivers the judgment to that effect.[35] Alternatively, the Court can find the claim inadmissible without entering into its merits.

The Court usually decides cases in limited jurisdiction, which means that after it upholds a claim and annuls the act, it returns the case to the competent authority for retrial.[36] However, the Court has also full jurisdictional power to replace an administrative authority's decision with its own, if the nature of the matter permits it and if the established facts provide a reliable basis for this. The exception exists when an administrative act is the result of discretionary power of the given authority, or if the law prohibits full jurisdiction. On the other hand, the

[29] Art. 3 of the Law on Administrative Disputes, *The Official Gazette of the Republic of Serbia*, No. 111/2009.

[30] Art. 14 of the Law on Administrative Disputes.

[31] Art. 11 of the Law on Administrative Disputes.

[32] Art. 12 of the Law on Administrative Disputes.

[33] Art. 13 of the Law on Administrative Disputes. *See also* Administrative Court Jurisdiction, available at: *http://www.up.sud.rs/english/jurisdiction*, last visited 2 October 2018.

[34] Art. 18 of the Law on Administrative Disputes. *See also* Administrative Court/ Transparency, available at: *http://www.up.sud.rs/english/questions-of-citizens*, last visited 2 October 2018.

[35] Art. 40 of the Law on Administrative Disputes.

[36] Art. 42 of the Law on Administrative Disputes.

Administrative Court is required to decide with full jurisdiction in cases where the repetition of the proceeding before the administrative authority would bring irreparable harm to the claimant and the Court has already established the facts of the case on its own.[37]

The judgment issued in an administrative dispute cannot be appealed.[38] However, parties have two extraordinary legal remedies at their disposal: the motion to review a court decision,[39] and the reopening of the procedure.[40]

The Court decides on the basis of facts established in the oral hearing.[41] An oral hearing is especially required in the case of complex disputes, for the better understanding of the matter, in cases where parties with opposite interests participated in the administrative proceedings, or when the Court establishes the facts in order to resolve the dispute in full jurisdiction.[42] However, the Court adjudicates without an oral hearing when the subject matter is such that it clearly does not require a direct hearing of the parties and special establishment of facts, or if the parties expressly accept this.[43] Thus, oral hearings "which should be the basic procedural instrument for establishing the factual ground in an administrative dispute, are still very rare."[44]

In general, hearings are public, and all adult citizens, as well as representatives of the media, have the right to attend them. However, the

[37] Art. 43 of the Law on Administrative Disputes. The Court should decide in full jurisdiction also in a case of obvious discrepancy between the true facts and the facts established in an administrative decision, or failure by the administrative authority to observe a previous annulment of its decision by the Court. *See*: V. Milutinović, T. Jovanić, "Serbia's New Law on protection of Competition", in D. Campbell (ed.), *Comparative Law Yearbook of International Business*, Kluwer Law International, Alphen aan den Rijn 2010, 104.

[38] Court judgments are binding and relatively unchangeable (there are no ordinary legal remedies), which reinforces the stability of the situation created or confirmed by them. D. Vasiljević, "Mandatory Character of Court Rulings and Their Execution According to new Serbian Law on Administrative Disputes", *NBP – Journal of Criminalistics and Law* 3/2010, 17.

[39] A party or authorized public prosecutor may file, in limited cases, motion to review a final judgement of the Administrative Court before the Supreme Cassation Court. *See* Art. 49 –55 of the Law on Administrative Disputes.

[40] A procedure concluded by a final judgment or a decision of the Court, may be reopened in the cases prescribed by law. Art. 56 –65 of the Law on Administrative Disputes. *See also* Information Bulletin of the Administrative Court, 2010–2016, 41.

[41] Art. 2 and 33 of the Law on Administrative Disputes.

[42] Art. 34 of the Law on administrative disputes. *See also* Information Bulletin of the Administrative Court, 2010–2016, 41.

[43] Art. 33 of the Law on Administrative Disputes.

[44] Z. Lončar, "Administrative Court Control in the Republic of Serbia", in M. Lazić, S. Knežević (eds.), *Legal, Social and Political Control in National, International and EU Law,* University of Niš Faculty of Law, Niš 2016, 131.

panel of judges may exclude the public from the entire hearing or from part of the hearing, for reasons of protection of national interest, public order and morals, as well as to protect the interests of juveniles or the privacy of the participants in the process.[45]

4. THE ADMINISTRATIVE COURT ASYLUM CASE LAW

An asylum seeker who is not satisfied with the decision delivered by the Asylum Commission is entitled to file a claim with the Administrative Court. The new 2018 Law on Asylum and Temporary Protection provides that final (negative) decision will not become enforceable until the judicial review is completed.[46] Previously this had been just an option for the Court.[47] Bearing in mind that according to Article 13 of the European Convention on Human Rights and standards enshrined in the jurisprudence of the European Court of Human Rights, for a legal remedy to be considered effective the suspensive effect must apply automatically rather than be left to the discretion of the Court,[48] the new solution stipulated in Article 96, par. 2 of the Law on Asylum and Temporary Protection must be welcomed.

Since the establishment of the Administrative Court, the main obstacles in focusing greater attention on asylum issues have been its general workload and a relatively small number of asylum-related cases. By the end of 2017, the Administrative Court had delivered around 60 decisions in asylum cases. Much of the Court's caseload belongs to cases requiring urgent procedure, while paradoxically asylum cases do not belong here (neither under the law nor the Court's in-house regulations). Still, reasonable time standard seems to be followed as asylum judicial procedures usually last between 15 days and 10 months.

The analysis of the case law shows that several phases can be identified in dealing with asylum cases, which will be analyzed in the following text.

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[45] Art. 35 of the Law on Administrative Disputes. *See also* Administrative Court – Transparency, available at *http://www.up.sud.rs/english/transparency*, last visited 2 October 2018.

[46] *See* Art. 23, par. 1. of the Law on Administrative Disputes; Art. 96, par. 2 of the Law on Asylum and Temporary Protection.

[47] According to Art. 23, par. 2 of the Law on Administrative Disputes, the Court may defer the enforcement of the final administrative act if such enforcement would cause the claimant damages that are difficult to reverse and the suspension is not in contravention of public interest and would not cause major or irreparable damage to the opposing party.

[48] *See*, *e.g. Gebremedhin (Gaberamedhien) v. France*, App. No. 25389/05, judgment from 26 April 2007, para. 66; *Hirsi Jamaa and Others v. Italy* (GC), App. No. 27765/09, judgment dated 23 February 2012, para. 200.

4.1. Initial Phase in Handling Asylum Cases (2010–2012)

The first judgment in an asylum case was delivered by the Administrative Court in June 2010. In this case, the asylum seeker claimed that his mental and physical health was not taken into consideration when reviewing his case, and that the denial of the refugee status prevented him from receiving medical assistance.[49] The Court abolished the decision and returned the case for re-decision, not because of substantive ground, but due to procedural reasons, finding a violation of Article 69 of the Law on General Administrative Procedure, which stipulates that a collegiate body must keep a special record of the deliberation and voting when passing a decision in the procedure.

In 2011, eight judgments in asylum cases were handed down by the Administrative Court and all claims were rejected. No less than seven cases concerned the application of the safe third country principle,[50] in which the asylum application was rejected on procedural grounds and without the assessment of the merits of the case. In all these cases, the Court rejected the claims relying on the provision which prescribes that an asylum application will be dismissed without examining the eligibility of an asylum seeker for the recognition of asylum if the administrative authority has established "that the asylum seeker has come from a safe third country, unless he/she can prove that it is not safe for him/her".[51]

The first judgment was delivered in June 2011. It was based on the fact that the asylum application of an Uzbek national, who had come to Serbia from Russia, was rejected on the grounds that the asylum seeker had spent 10 years transiting through safe third countries. The administrative authority did not examine the substance of his application.[52]

The Government adopted the List of Safe Third Countries in 2009,[53] and it was the position of the Administrative Court that the list should be applied automatically. However, this list can only be an illustration of human rights situations in different countries, and must always be interpreted, bearing in mind the current situation in particular country, and the possible consequences for the applicant. In particular, the Court considered irrelevant claims that the asylum procedure in a safe

[49] Administrative Court, 14 U.5754/10, judgment from 11 June 2010.

[50] The first document that mentions the application of this principle is the Resolution on a Harmonised Approach to Questions concerning Host Third Countries, 1992. For more on the application of this principle see: Krstić, Davinić, (2013b), 97–116.

[51] Art. 33, par. 1 (6) of the Law on Asylum.

[52] Administrative Court, 8 U 3815/11, judgment dated 7 July 2011.

[53] The decision determining the list of safe countries of origin and safe third countries, *Official Gazette of the Republic of Serbia,* No. 67/2009.

third country was inefficient and that there was no integration policy.[54] A similar position was taken by the Court in another case, where the asylum seeker stayed in Turkey and Greece, before transiting through FYROM.[55] The applicant claimed that he was not in a situation to apply for asylum in those countries given the position of asylum seekers and migrants there, which was documented in numerous reports by international organizations. However, the Administrative Court held that an asylum seeker stayed in Turkey for 3 months, and in Greece for eight months, having enough time and opportunities to apply for asylum there.[56] In another case, the Court also considered Romania and Montenegro to be safe third countries.[57]

Nevertheless, in one case, the Court did not rely on the application of a safe third country principle, but found the claim unfounded, as the asylum seeker from Somalia provided many contradictory statements, which were not a result of suggestive questions raised during the hearing.[58] Three years later (2014), the Constitutional Court adopted a constitutional appeal,[59] and held that the Administrative Court in this judgment violated the right to a fair trial of an asylum seeker, for failing to provide reasons in the judgment.[60] The Constitutional Court also found that the Administrative Court had not assessed evidence provided by international organizations, states, NGOs and media, which reported a high level of violence in Somalia. The Constitutional Court emphasized that it was important to consider *ex officio* if a person deserves subsidiary protection, after the Administrative Court concludes that a refugee status cannot be

[54] For a review of this judgment, see Belgrade Center for Human Rights, *Human Rights in Serbia in 2011*, Belgrade 2012, 188, available at: *http://www.bgcentar.org.rs/bgcentar/eng-lat/wp-content/uploads/2013/04/Human-Rights-in-Serbia-A-Comprehensive-Report-for-2011-in-Serbian-and-English-2012..pdf*, last visited 2 October 2018.

[55] Administrative Court, 1 U 3554/11, judgment dated 6 October 2011. These three countries (Turkey, Greece and FYROM) were most often considered in asylum cases. *See also* Administrative Court, 13 U 11129/11, judgment dated 1 December 2011.

[56] *Ibid*; in another case, an asylum seeker stayed in Turkey for 5 years and in Greece for 5 months. Administrative Court, 15 U 10336/11, judgment dated 10 November 2011.

[57] Administrative Court, 2 U. 3555/11, judgment dated 14 December 2011.

[58] Administrative Court, 11 U. 7727/11, judgment dated 20 October 2011.

[59] *See* Constitutional Court, Uz – 6596/2011, decision dated 30 October 2014. A constitutional appeal may be lodged against individual acts or actions performed by state bodies or organizations entrusted with public powers, which violate or deny human or minority rights and freedoms guaranteed by the Constitution, if other legal remedies for their protection have already been applied or not specified (Constitution of the Republic of Serbia, Art. 170).

[60] The Court found that in this case Art. 32, par. 1 of the Constitution had been violated.

granted. Therefore, relying on this decision of the Constitutional Court, the Administrative Court annulled its own decision and ordered the Asylum Commission to assess all evidence and to decide if applicant is eligible for subsidiary protection, bearing in mind the current situation in his country of origin.

In 2012, the Administrative Court rejected all seven claims based on denial of asylum application. In the first case, the Administrative Court confirmed the decision of the Asylum Commission to reject the asylum application of a family from Iraq on the basis of the safe third country principle, as they had stayed in Turkey for two weeks, 25 days in Greece, and six days in FYROM, and had not apply for asylum there. The Court did not take into consideration the statement of the asylum seekers that Turkey did not accept refugees from their country of origin, and that conditions in Greece were very difficult for refugees.[61] The same position was held in other cases, in which the Administrative Court ignored the claim of the extremely difficult position of migrants and refugees in the mentioned countries, and the fact that Serbia did not require any assurances that they would have access to asylum procedure if returned to any of these countries.[62]

Another decision dealt with procedural safeguards: the plaintiff claimed guarantees regarding the right to translation were violated.[63] Namely, the official translator for Persian language (Farsi) was engaged, translating from Serbian into Farsi and vice versa, while another foreigner was translating to the asylum seeker from Farsi into Pashtu (his native language), and vice versa.[64] However, the Administrative Court found that guarantees regarding the right to translation were not violated as a foreigner who helped the translation was chosen by the asylum seeker, and there was no remark in the record that the asylum seeker did not understand any of the questions posed to him. The Court also elaborated that his claim was correctly dismissed on the grounds of the safe third country principle.

The application of the safe third country principle led some organizations to the conclusion that the right to asylum is illusory in Serbia, due to the fact that cases are not examined on their merits, and that the prohibition of non-refoulement is not observed in practice, as the

[61] Administrative Court, 14 U 4132/11, judgment dated 2 February 2012.

[62] Administrative Court, 1 U. 1902/12, judgment dated 4 July 2012; Administrative Court, 11 U. 4921/12, judgment dated 15 November 2012; Administrative Court, 23 U. 3831/12, judgment dated 11 October 2012.

[63] Art. 11 of the Law on Asylum and Art. 16, par. 3 of the Law on General Administrative Procedure.

[64] *See* Administrative Court, 16 U 3829/12, judgment dated 10 May 2012.

authorities automatically apply principles set out in the Law on Asylum.[65] At the same time, the UNHCR published observations finding many deficiencies in the asylum system due to which Serbia cannot be considered a safe third country.[66] The UNHCR especially underlined that the Administrative Court generally conducts its review based solely on procedural grounds, without assessing the substance of asylum claims related to the existence of a well-founded fear of persecution.[67]

Nevertheless, the positive approach of the Administrative Court is reflected in its position that the party was exempted from payment of court fees, bearing in mind its financial situation.[68] This decision is very important as there is no provision of automatic exemption of court fees for asylum seekers, but the Court recognized their vulnerable position. In another case, the Administrative Court dismissed the claim that the asylum procedure was illegally suspended, as an asylum seeker left the Asylum Center without notification. He was later returned to Serbia under the readmission agreement with Croatia, where he illegally crossed the border.[69] The Administrative Court relied properly on provisions of the Law on Asylum,[70] which stipulate that the procedure for granting asylum will be suspended *ex officio* if an asylum seeker leaves the Republic of Serbia without the approval of the Asylum Office.

Despite some positive trends, it must be concluded that the Administrative Court during this period relied heavily on the safe third country principle, without examining the consequences for each individual if returned to a particular country. Furthermore, the Court did not decide any asylum case with full jurisdiction, and did not hold oral hearings, basing its judgments solely on the facts provided by administrative authorities. Finally, the Court did not mention in its judgments the relevant international law, especially the European Convention on Human Rights, as the claimant in several cases asserted a violation of this instrument.

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[65] *See, e.g.,* Belgrade Center for Human Rights, *Human Rights in Serbia in 2012*, Belgrade 2013, 268, available at: *http://www.bgcentar.org.rs/bgcentar/eng-lat/wp-content/uploads/2013/12/Human-Rights-in-Serbia-2012.pdf*, last visited 2 October 2018.

[66] UNHCR, *Serbia as a country of asylum: Observations on the situation of asylum-seekers and beneficiaries of international protection in Serbia*, August 2012, available at: *http://www.refworld.org/docid/50471f7e2.html*, last visited 2 October 2018.

[67] *Ibid*, 14.

[68] Administrative Court, III-4 U. 24223/10, judgment dated 13 July 2012. The Court relied on Art. 10 of the Law on Court Fees, *The Official Gazette of the Republic of Serbia*, No. 28/94, 53/95, 16/97, 34/2001, 9/2002, 29/2004, 61/2005, 116/2008, 31/2009,101/2011, 93/2012, 93/2014, 106/2015.

[69] Administrative Court, 6 U. 4245/12, judgment dated 13 December 2012.

[70] Art. 34, par. 1 (4) of the Law on Asylum.

4.2. Intermediate Phase in Dealing with Asylum Cases (2013–2015)

In 2013 the Administrative Court delivered nine judgments in asylum cases, in all of which the claims were rejected. The issue of indirect translation was again raised in 2013.[71] Here, the asylum seeker claimed that another foreigner was translating for him from English to Somalian and vice versa, and that this practice represents violation of Article 18 of the Law on Asylum, which prescribes that data obtained in the course of the asylum procedure constitutes an official secret and access to it is allowed only to persons authorized by law. The Court properly rejected this claim, finding that the foreigner was an authorized person according to Article 11, par. 2 of the said Law, which stipulates that an asylum seeker may engage an interpreter of his/her own choice.

The trend of rejecting claims on procedural grounds, invoking the safe third country principle, continued.[72] Nevertheless, in a judgment from March 2013,[73] the Administrative Court mentioned for the first time the claim that Greece cannot be considered safe third country following the ECtHR's judgment in *M.S.S. v. Belgium and Greece*.[74] However, the Court erred in holding that the judgment of the ECtHR can be relevant only if an asylum seeker claims that one of his/her human rights guaranteed by the ECHR has been violated in an administrative or judicial proceeding in Serbia.[75] The ECHR is a part of the Serbian legal system and has supremacy over national legislation, according to Article 16, par. 2 of the Serbian Constitution,[76] which means that all laws, including the Law on Asylum, must be interpreted with standards enshrined in the jurisprudence of the ECtHR.

In another case, for the first time the plaintiff raised not only the issue of an application of the *M.S.S.* judgment, but also the UNHCR's

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[71] Administrative Court, 20 U 6399/12, judgment dated 15 March 2013. *See also* Administrative Court, 9 U 17468/12, judgment dated 13 February 2013.

[72] *See* Administrative Court, 21 U 3553/11, judgment dated 28 February 2013, as well as Administrative Court, 5 U 3830/12, judgment dated 12 September 2013.

[73] Administrative Court, 1 U. 540/13, judgment date 20 March 2013.

[74] This case concerns the transfer of an Afghan national from Belgium to Greece under the Dublin II Regulation. The Court found that Greece violated Art. 3 of the ECHR of hard living conditions, and Art. 13 regarding deficiencies in the Greek asylum procedure and the risk of expulsion to his country of origin. Also, Belgium was found responsible for sending him to Greece and thus, exposing him to the risk of being sent to his country of origin, and exposing him to hard living conditions in this country. *See* ECtHR, *M.S.S. v. Belgium and Greece* (GC), App. No. 30696/09, judgment from 21 January 2011.

[75] The same argument was given in Administrative Court, 3 U. 1371/13, judgment dated 20 March 2013, Administrative Court, 23 U. 1280/13, judgment dated 28 March 2013, Administrative Court, 4 U. 9049/14, judgment dated 1 September 2014.

[76] Constitution of the Republic of Serbia, *The Official Gazette of the Republic of Serbia*, No. 98/2006.

observations on Serbia as a country of asylum, as well as the Constitutional Court's finding that the safe third country principle cannot be applied automatically and that it must be assessed taking into consideration UNHCR reports on a situation in the given country.[77] In its decision, which was challenged by the plaintiff, the Asylum Commission explained that the situation in Greece had improved after the delivery of the ECtHR's judgment. It also underlined that the ECtHR's judgments are applicable only if the issue in question is the same or relevantly similar to the one examined in the ECHR judgment. The Administrative Court assessed the situation extensively and concluded that the asylum seeker had not proven that Greece was not safe for him.[78] The Court came to a similar conclusion in cases relating to the situations in FYROM[79] and Turkey.[80]

These cases illustrate that the Court had started to focus on the issue of whether the countries on the government list were personally safe for asylum seekers, although in a majority of cases it found that a person had not presented enough evidence to prove that they were not safe for her/him. This was a positive trend, taking into account that the Court previously automatically rejected the claims, on the grounds that the given country was on the safe third country list.

The turning point in the case law of the Administrative Court was 2014, when the Asylum Commission's decisions were overturned for the first time. There is one judgment which is of particular importance, as the Court held that the Asylum Commission had not fulfilled its obligation to assess all the allegations in the appeal and performed a "mere blanket" review of the arguments, concluding that one of the safe third countries that the asylum seeker passed through had been safe for her personally.[81] In another case, the Court agreed with the plaintiff that the Asylum Commission had failed to explain why it had upheld the first-instance decision and why it had dismissed arguments raised in the appeal.[82]

In 2015 the Administrative Court upheld the claims in six cases, which is the record. In most of them (five cases), the Administrative Court annulled the decision of the Asylum Commission due to violation of Article 235, par. 2 of the Law on the General Administrative Procedure, finding that the rationale of a Commission's decision did not contain the reasons why the claims were rejected.[83] Furthermore, the Administrative

[77] Constitutional Court, Uz 1286/2012, decision dated 29 March 2012.

[78] Administrative Court, 21 U. 3553/11, judgment dated 28 February 2013.

[79] Administrative Court, 20 U. 6399/12, judgment dated 15 March 2013.

[80] Administrative Court, 3 U. 6450/13, judgment dated 30 May 2013.

[81] *See* Administrative Court, 7 U. 3834/12, judgment dated 7 February 2014.

[82] Administrative Court, 8 U. 18705/13, judgment dated 21 February 2014.

[83] *See* Administrative Court, 21 U. 15736/13, judgment dated 9 March 2015; Administrative Court, 12 U. 17279/13, judgment dated 10 July 2015; Administrative

Court held that it is important to review all the facts in asylum cases in order to satisfy requirements from the ECHR, which is an integral part of the legal system in Serbia.[84] The Court also recognized the importance of the application of Article 15 of the Law on Asylum, which guarantees the provision of care for persons with special needs,[85] as in the given case the person had serious a psychological disorder, yet a guardian was not provided during certain parts of the procedure.[86]

Only in one case in 2015 did the Court reject the claim. In that case, a French citizen argued that his own life and the life of his daughter were endangered by Albanians living in France, owing to his website where he showed sympathy for Serbian people who live in Kosovo. However, the Court found that France is to be considered a safe country of origin,[87] and particularly emphasized that the asylum seeker did not ask the French authorities for protection.[88]

What we conclude about this phase is that in the majority of cases the Court did not automatically apply the safe third country concept and that it started to rely on certain relevant international sources. Furthermore, the Court started to overturn the Asylum Commission decisions, requesting to assess all evidences in asylum cases. It is also important to underline that the Court's case law from 2015 significantly improved the quality of decision-making of the administrative authorities dealing with asylum cases, which is reflected in their more balanced approach to the safe-third country principle. This conclusion was also drawn by NGO's dealing

Court, 25 U. 6368/15, judgment dated 8 October 2015; Administrative Court, 19 U. 14706/14, judgment dated 15 October 2015; Administrative Court, 19 U. 8792/14, judgment dated 15 October 2015.

[84] *See* Administrative Court, 19 U. 8792/14, judgment dated 15 October 2015.

[85] These categories are: minors or persons completely or partially deprived of legal capacity, children separated from parents or guardians, persons with disabilities, elderly people, pregnant women, single parents with minor children and persons who were subjected to torture, rape or other serious forms of psychological, physical or sexual violence.

[86] *See* Administrative Court, 21 U. 15736/13, judgment dated 9 March 2015.

[87] According to Art. 2 of the Law on Asylum, safe country of origin is "a country from a list established by the government whose national an asylum seeker is (...), which has ratified and applies international treaties on human rights and fundamental freedoms, where there is no danger of persecution for any reason which constitutes grounds for the recognition of the right to refuge or for granting subsidiary protection, whose citizens do not leave their country for those reasons, and which allows international bodies to monitor the observance of human rights."

[88] The Administrative Court found that administrative bodies correctly applied Art. 33, par. 1 (4) of the Law on Asylum. This provision stipulates the following: "The Asylum Office shall dismiss an asylum application without examining the eligibility of an asylum seeker for the recognition of asylum if it has established: ... 4) that the asylum seeker can receive protection from a safe country of origin, unless he/she can prove that it is not safe for him/her."

with asylum cases.[89] However, despite these positive trends, the Court did not decide cases with its full jurisdiction. Furthermore, it held that oral hearings were unnecessary and the matters under dispute were resolved relying only on the facts provided by the administrative authorities.

4.3. Most Recent Phase in Handling Asylum Cases (2016–2017)

The most recent phase was marked with the closure of the Balkans route in March 2016, which also influenced the more restrictive approach of the Administrative Court in dealig with asylum cases. In 2016 the Court rejected six claims and upheld only one.[90] Furthermore, it dismissed one claim in a distinctive case. Namely, a claim was filed by the Asylum Office against the Asylum Commission's decision granting subsidiary protection to a married couple from Libya. Here the Administrative Court dismissed the claim finding that Asylum Office, as the first instance body, was not competent to appeal decisions of the second instance authority.[91] It is obvious that the first-instance authority cannot challenge the higher, appellate authority's decision before the Administrative Court, given that they belong to the same branch of government and that they are in a hierarchical relationship.

Only in one case was the claim upheld, when the Court found procedural errors in the decision of the first-instance body, but failed to discuss whether Montenegro can be considered a safe third country for the asylum seeker.[92]

As previously mentioned, the Court rejected claims in all other cases. In one case,[93] the Administrative Court confirmed that it was lawful to reject the asylum application of a Libyan family for security reasons and to deport them to the country of origin, despite numerous reports and the UNHCR position urging states "to suspend forcible returns to Libya, including Tripoli, until the security and human rights situation

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[89] *See* Belgrade Center for Human Rights, *Pravo na azil u Republici Srbiji u 2015 [The Right to Asylum in the Republic of Serbia in 2015]*, Belgrade 2016, 62, available at: *http://azil.rs/azil_novi/wp-content/uploads/2016/12/Azil-2016-SRP.pdf*, last visited 2 October 2018.

[90] Belgrade Center for Human Rights, *Right to Asylum in the Republic of Serbia in 2016*, Belgrade 2017, 55, available at: *http://www.bgcentar.org.rs/bgcentar/eng-lat/wp-content/uploads/2017/03/Right-to-Asylum-in-the-Republic-of-Serbia-2016–2.pdf*, last visited 2 October 2018.

[91] Art. 11 of the Law on Administrative Disputes entitles natural or legal persons to file a claim in cases where an administrative act has violated their rights or legally vested interests.

[92] Administrative Court, 16 U. 5572/16, judgment dated 14 July 2016.

[93] Administrative Court, 16 U. 6304/16, judgment dated 26 May 2016.

has improved considerably."[94] The applicants had been temporarily residing in Serbia since 2010, and in 2015 the Ministry of Interior cancelled their residence permits on grounds of national security, ordering them to leave Serbia. Following this decision, they submitted asylum applications which were rejected due to security reasons and the fact that they allegedly intended to misuse asylum proceedings with the aim of avoiding deportation. Also, it was found that they did not face any risk in Libya, proven by the fact that they had visited country of origin twice, in 2013 and in 2014. The Administrative Court ignored the UNHCR intervention in the case and rejected the claim. Therefore, the Belgrade Center for Human Rights, a NGO providing free legal aid to asylum seekers, requested an interim measure by the ECtHR, which was issued on 1 July 2016, suspending the family's return to Libya.[95]

In all the other cases where it rejected claims, the Court confirmed that asylum seekers could submit an asylum application in safe third countries in which they had stayed or transited. The impression is that the Court did so more strictly than in previous years, relying on the 2009 government list, which had not been amended in 8 years, despite major changes in some of the countries from the list. The Court reasoned that different international and national NGO reports did not constitute evidence *per se* that a given country cannot be considered safe, but that in each case the asylum seeker needed to prove that he/she would be personally at risk of being subjected to ill-treatment or returned to the country where his/her life, liberty or security would be at risk.[96] We consider this argument of the Court to be balanced and justified. However, in some cases the Court held that the authorities are not under obligation to assess whether a certain state is considered safe, but are under the duty to acknowledge them as such because they are on the government list. [97]

This trend continued in 2017 when the Court rejected several claims, on the ground that Hungary,[98] Bulgaria[99] and FYROM[100] are

[94] UNHCR, *UNHCR Position on Returns to Libya – Update I*, October 2015, para. 28, available at: *http://www.refworld.org/docid/561cd8804.html*, last visited 2 October 2018.

[95] *A. and Others v. Serbia*, App. No. 37478/16, 30 June 2016; Belgrade Center for Human Rights, *Right to Asylum in the Republic of Serbia in 2016*, 57.

[96] *See, e.g.*, Administrative Court, 17 U. 8414/16, judgment dated 2 September 2016.

[97] Administrative Court, 21 U. 8539/16, judgment dated 7 October 2016.

[98] Administrative Court, 4 U. 3027/17, judgment dated 7 April 2017.

[99] Administrative Court, 7 U. 12672/16, judgment dated 12 January 2017; Administrative Court 25 U. 12673/16, judgment dated 20 January 2017; Administrative Court, 1 U. 13344/16, judgment dated 23 March 2017.

[100] Administrative Court, 9 U. 14748/16, judgment dated 9 May 2017; Administrative Court, 7 U. 14749/19, judgment dated 9 June 2017.

considered safe third countries. The Court did not pay too much attention to UNHCR reports on these countries,[101] as well as on the ECtHR judgment *Ilias and Ahmed v. Hungary*, dated 14 March 2017.[102] This case concerned two Bangladeshi nationals who transited through Greece, FYROM and Serbia before reaching Hungary, where they immediately applied for asylum. They were held in a transit zone for 23 days and then sent back to Serbia, based on a Hungarian Government's Decree from 2015, listing Serbia as a safe third country. The ECtHR found serious deficiencies in the Hungarian procedure regarding provision of necessary protection against a real risk of ill-treatment. The Court also observed that in 2012 the UNHCR urged states not to return asylum seekers to Serbia as the country lacked a fair and efficient asylum procedure and there was a real risk that asylum seekers would be returned to FYROM.[103]

It is obvious that the positive trend from 2014 and 2015 did not continue in 2016 and the first half of 2017, when the Court started to apply the concept of a safe third country more restrictively than before. Yet, it is an obligation of public authorities, including the Court, to assess all evidence in the case, especially relevant and reliable reports of different international organizations, in order to come to conclusion on whether a certain country, even one from the Government's list, is safe or not for a particular asylum seeker.

This trend was discontinued in September 2017, when the Court abolished two decisions of the Asylum Commission concerning citizens of Cuba who left their country of origin fearing persecution on the grounds of sexual orientation.[104] The Court emphasized that the government list cannot be applied automatically, and that asylum bodies need to take into account UNHCR reports, as well as reports of NGOs dealing with human rights protection of refugees in the given country.

Nonetheless, the Court continued to refuse to hear the cases in full jurisdiction, claiming that it was important to repeat the procedure in order to satisfy lawfulness and comprehensiveness of the decision-making process. However, in some cases, it annulled the decision of the Asylum

[101] For example UNHCR, *Hungary as a country of asylum – Observations on restrictive legal measures and subsequent practice implemented between July 2015 and March 2016*, May 2016, available at: *http://www.refworld.org/docid/57319d514.html*, last visited 2 October 2018; UNHCR, *The Former Yugoslav Republic of Macedonia as a country of asylum: Observations on the situation of asylum – seekers and refugees in the Former Yugoslav Republic of Macedonia*, August 2015, available at: *http://www.refworld.org/docid/55c9c70e4.html*, last visited 2 October 2018.

[102] ECtHR, *Ilias and Ahmed v. Hungary*, App. No. 47287/15, judgment dated 14 March 2017.

[103] *Ibid,* para. 121.

[104] Administrative Court, 3 U. 11867/17, judgment dated 7 September 2017; Administrative Court, 3 U. 11868/17, 7 September 2017.

Commission for a second time, delaying adoption of a final decision in an already lengthy procedure. Finally, thus far the Court has not handled asylum cases on the merits of their asylum applications, regarding the existence of a well-founded fear of persecution. This approach would require more specialization and knowledge on relevant international and European standards on asylum and migration.

5. BUILDING THE CAPACITY OF THE ADMINISTRATIVE COURT FOR HANDLING ASYLUM CASES

As mentioned before, there are no specialized panels at the Administrative Court. The analyzed practice shows that judges of the Court lack specialization in asylum law, especially knowledge of relevant rules of international law, which is needed more than in any other field within the jurisdiction of the Court.

Since 2010 there have been several trainings organized on the topic of asylum. However, training sessions on asylum issues for all judges of the Court are very rare. The reason for this is the fact that only give days per year are designated for different trainings, and some other topics definitely have priority, bearing in mind the very broad jurisdiction of the Court. Thus far, only one training in this area was organized for all judges, in the second half of 2015, after the outbreak of the migrant crisis. Other trainings were organized on an *ad hoc* basis, for 4 to 5 judges, focusing on the application of the ECHR in asylum-related matters.[105]

In order to gain insight into opinions on asylum matters, the authors sent a questionnaire to judges of the Court. The questionnaire consisted of 10 questions and 10 judges responded to it. The majority of judges (90%) responded positively that the trainings that they participated in were useful for them, while only one judge said that trainings should be more practically oriented. Also, three judges additionally commented that more asylum-related trainings should be organized due to current migration situation and the need to protect the human rights of migrants.

All judges responded that it is possible to provide specialized panels within the Court if the number of judges increases, while some of them (40%) added that this would be possible if a two-tier administrative justice system were to be introduced in Serbia. They all believe that

[105] For example, three judges participated in an international conference on the common EU asylum system, which was held in Oslo (Norway) in May 2016. The event was organized by EASO and International Association of Refugee Law Judges. *See* European Asylum Support Office (EASO), *Newsletter – May 2016*, 11, available at: *https://www.easo.europa.eu/sites/default/files/newsletters/EASO%20Newsletter%20May%202016%201500.pdf,* last visited 2 October 2018.

specialization is necessary, bearing in mind the very broad jurisdiction of the Court. Some judges (30%) also said that specialization would contribute to the more efficient work of the Court, especially in urgent matters. However, while some judges (40%) responded that specialization in asylum issues is necessary, a majority of judges (60%) believe that it is not necessary, as there is an insignificant number of asylum cases thus far.

Regarding the full jurisdiction, the opinion of judges varied: the majority of them (60%) were of the opinion that full jurisdiction for asylum cases is not possible or necessary. They gave different reasons for that: case overload, small number of judges, and lack of specialization. Some of them went even further, elaborating that the main role of the Court is not to decide on administrative matters, as this is the duty of the administrative bodies, trained in these matters. They add that the role of the Court is to assess whether an administrative body acted lawfully in the decision-making process.

Half of the judges responded that it would be beneficial to organize training on techniques of interviewing asylum seekers, bearing in mind their vulnerability and special status. One judge said that she was not sure, bearing in mind that from January to July 2017, they had only 3 asylum cases. Another judge explained that judges, due to their vocation, must be educated and trained in asylum matters, while a third judge reasoned that it would be necessary only for judges specializing in asylum matters. Two judges did not explain their negative answer.

A great majority of judges (80%) responded that it would be useful to have additional trainings on some other issues, but they did not specify the exact areas, with the exception of three judges who named the following topics: temporary measures, relevant EU directives, and the jurisprudence of the ECtHR. Four judges also said that it would be useful to have a handbook on migration, with a selection of human rights terms. Additionally, one judge particularly underlined the need to have trainings and materials that would present relevant domestic and international case law.

Eight judges (80%) responded to the question related to the possible abolishment of the Asylum Commission. All of them believe that the Asylum Commission is still necessary and competent to handle asylum cases. Some judges did not refer to the Asylum Commission, but explained that it is important to preserve the two-instance administrative proceedings, especially prior to the introduction of a two-tier administrative justice system.

Regarding possible introduction of this system, where the appeal would be a regular legal remedy against the first-instance judgment, a great majority of judges (90%) responded positively to this question.

However, two judges added that it is not be necessary for all legal areas and that the experience of other countries would be a valuable source of information in this matter.

Furthermore, all judges responded that the number of judges is the weakest point in the operation of the Court, as is the breadth of the Court's jurisdiction, lack of specialization, and absence of systemic education of court assistants, especially in legal writing. One judge also said that one of the pitfalls in the work of the Court is the insufficient number of assistants, while two judges referred to the election of judges and the need for their better qualification for the given task.

Some general conclusions can be drawn from the questionnaire: asylum is not perceived as a matter of particular importance to the Court. Specialization is necessary but possible only following the fulfilment of certain conditions. Abolition of the Asylum Commission is currently not an appropriate solution, and a two-tier administrative justice system is desirable but not for all legal areas. The Court has limited capacities to handle asylum cases in full jurisdiction, mainly due to lack of specialized panels. Finally, additional training is necessary, but it should be more practically oriented, focusing on relevant domestic and international case law.

6. CONCLUDING REMARKS AND RECOMMENDATIONS

The Administrative Court has been dealing with asylum cases since 2010, when it was established, as a national administrative court of special jurisdiction. The analysis of the case-law presented in this paper demonstrates that the best period in dealing with asylum cases was 2015, during which judgements of the Court significantly improved the quality of decision-making by the administrative authorities. However, in 2016 and first half of 2017 the Court again took a more restrictive approach, applying almost automatically the third safe country concept and avoiding to decide on the substance of the asylum claims concerning the existence of a well-founded fear from persecution.

There are several reasons for this approach of the Court in asylum matters: it has a very broad jurisdiction and relatively small number of asylum cases, which is why many judges do not see asylum as a priority. Also, judges lack specialization in asylum law, especially related to relevant international and European standards. Specialization of judges of the Court is of utmost importance since they apply more than 200 different pieces of legislation and many more bylaws. Research showed that until the end of 2016, 34 out of the 40 judges were assigned asylum cases, some of whom decided only one, while others ruled in eight cases. As a

consequence, different judge panels have different knowledge in the field of asylum. Nevertheless, the average number of asylum cases per judge is 4 to 5, which is not enough to develop knowledge and skills to adjudicate this complex matter. This is the main reason why the authors believe that it is still premature to abolish a second-instance administrative body, the Asylum Commission, as a necessary "filter" between the Asylum Office and the Administrative Court, despite certain deficiencies in its establishment and functioning. Additionally, as some judges have pointed out, this would be possible only after several reforms: the introduction of a two-tier administrative justice system, an increase in the number of judges, an increase in the number of educated and well-trained assistants, as well as the introduction of specialized judge panels.

It is troublesome that the Court has a practice of ruling on the disputes without holding oral hearings, and that it has never decided an asylum case with full jurisdiction. The authors believe that excessive caseload and the lack of specialized panels are the main reasons for such practices.

In order to increase the capacity of the Court to conduct oral hearings in asylum cases, the authors suggest organizing a training session on developing techniques of interviewing sensitive plaintiffs. An review of the conducted trainings has shown that the judges did not have adequate opportunities to develop their practical skills. The proposed training should also include sensitive communication techniques and breaking with stereotypes and prejudices towards different cultures and their customs.

Judges particularly highlighted the need to have tools for the very complex and living jurisprudence of the ECtHR in asylum cases. They are not equipped to follow this jurisprudence by themselves, as they are overloaded with cases. A further important barrier is the lack of adequate knowledge of the English language. Taking into consideration that the jurisprudence of the ECtHR is evolving and that it is impossible to follow it without proper knowledge of English, it is recommended that judges are offered a course in legal English which would enhance their capacity to read judgments directly.

However, in a meantime, the authors suggest preparation of a handbook on the application of the asylum-related jurisprudence of the ECtHR for the judges, and further support on complex issues related to migration and asylum. Additionally, the authors recommend preparation of a glossary with terms used in migration, asylum and refugee law. This glossary would consist of the most important terms, defined according to national law. Each term would also be explained from the international perspective, mentioning some leading cases and the principles that are derived from them. This would allow judges to assess whether domestic

law stipulates a lower level of protection, which should then be corrected in the decision-making process.

Finally, it is of great importance that judges are capacitated to obtain evidence by investigating different sources for themselves, such as information provided in reports published by the UNHCR and relevant international and local organizations. As a result, they would better understand the consequences of the application of safe third country principle in each case, and why it is important to consider the merits of asylum cases. Only by achieving this would they be capable of protecting the human rights of asylum seekers, not only in a lawful, but also in a balanced and just way.

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DO TFEU PROVISIONS ON FREE MOVEMENT OF GOODS APPLY TO PRIVATE PARTIES – EXPANDED VERTICAL OR HORIZONTAL DIRECT EFFECT?

The paper aims to establish whether and to what extent the TFEU provisions on free movement of goods apply to legal relations established between two or more private parties. To that end, a stringent analysis of the case law related to this particular issue is provided, aimed at supporting the initial hypotheses that, notwithstanding sporadic but only implicit inclination in its judgments towards establishing the direct horizontal effect of the free movement of goods, the CJEU has constantly and resolutely abstained from recognizing the existence of such an effect – the same effect that it acknowledged decades ago, regarding the free movement of workers and freedom to provide services. Before this analysis, overview is provided of the status quo regarding the horizontal direct effect of the free movement of workers and services, which was needed not only for understanding the differences in the CJEU's approach to various fundamental freedoms but also to outline the general framework in which the horizontal direct effect of fundamental freedoms currently exists, too. Finally, based on the case law analysis, the conclusion is offered that in terms of the recent developments in the field of free movement of goods the CJEU has opted for further expansion of the concept of vertical direct effect in order to both avoid establishing the horizontal direct effect of the freedom of movement of goods and safeguard the functioning of internal market against certain impediments generated by private parties.

Key words: *Free movement of goods. – Vertical direct effect. – Horizontal direct effect. – Private parties. – CJEU case law.*

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1. INTRODUCTION

1.1. Judicial activism of the CJEU and (horizontal) direct effect of TFEU free movement provisions as its consequence

It seems today as if the Court of Justice of the European Union (CJEU) has always been known not only for applying contemporary EU law but also for creating new rules and legal concepts of EU law by creatively interpreting existing ones. The proponents of such perception of the CJEU's mandate – as well as of acting in accordance with it – would say that the court was virtually obliged to do so in order to correct the shortcomings inherent to European legislature, whereas the opponents of this so-called "judicial activism of the CJEU" would say that these were and still are clear examples of an overstepping of the court's mandate.[1] Be that as it may, it also seems that for the past five decades the CJEU has predominantly relied on the one single doctrine in order to justify the gradual extension of its own "regulatory reach". This is, of course, the doctrine underlying the *effet utile* rule of interpretation, i.e. the principle of effectiveness of EU law, referred to as the "meta-rule" of interpretation of the CJEU even by the ones questioning its justifiability in the said context and disapproving its regular implementation,[2] which allowed the court to (creatively) interpret any regulation, with the aim of achieving its best possible effect. Therefore, for more than half a century it has stood as an efficient tool in the hands of the European judges, repeatedly utilized to gradually institute "big, long-term policy changes through a series of low-visibility events."[3] Arguably the two most

[1] There are numerous academic papers and other sorts of academic literature published on the general topic of the judicial activism of the CJEU and fundamental changes in EU law resulting from it. For this reason, only a lesser part is referenced hereinafter. See, e.g., J. H. H. Weiler, "The Court of Justice On Trial", *Common Market Law Review* 24/1987, 555–589; T. Tridimas, "The Court of Justice and Judicial Activism", *European Law Review* 21/1996, 199–210; T. C. Hartley, "The European Court, Judicial Objectivity and the Constitution of the European Union", *The Law Quarterly Review* 112/1996, 95–109; A. Arnull, "The European Court and Judicial Objectivity: A Reply to Professor Hartley", *The Law Quarterly Review* 112/1996, 411–423; De Freitas L. V., "The Judicial Activism of the European Court of Justice", *Judicial Activism: An Interdisciplinary Approach to the American and European Experiences* (eds. L. P. Coutinho, M. La Torre, S. D. Smith), Springer International Publishing, Cham – Heidelberg 2015, 173–180; E. Muir, M. Dawson, B. de Witte, "Introduction: The European Court of Justice as a Political Actor", *Judicial Activism at the European Court of Justice* (eds. M. Dawson, B. de Witte, E. Muir), Edward Elgar Publishing, 2017, 1–10; M. Blauberger, S. K. Schmidt, "The European Court of Justice and its political impact", *West European Politics*40(4)/2017, 907–918.

[2] See, e.g., S. Mayr, "Putting a Leash on the Court of Justice? Preconceptions in National Methodology v Effet Utile as a Meta-Rule", *European Journal of Legal Studies* 5(2)/2012, 7–21.

[3] This is, in fact, one of the possible definitions of the so-called "incrementalism" in the CJEU approach to introducing new legal rules and legal concepts into the existing

significant cases decided by the CJEU in this regard were Van Gend & Loos,[4] the case establishing the principle and the underlying doctrine of direct effect of the EU law, and Costa v. ENEL,[5] which inaugurated the second key principle of EU law: the principle of its supremacy over national legal orders.[6]

The principle of supremacy (primacy) of EU law over national legal orders is not in the primary focus of this paper;[7] however, the principle of direct effect of EU law is at the centre of it. Namely, with its judgment in Van Gend & Loos the CJEU achieved that, from then onwards, private physical or legal persons from any Member State could rely on certain provisions of EU law – the number of which is constantly being enlarged[8] – to regulate legal relations between such persons and one of the Member States.[9]

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legal order, so as to render it more functional and efficient. See M. Shapiro, "The European Court of Justice", *The Evolution of EU Law* (eds. P. Craig, G. De Búrca), Oxford University Press, Oxford 1999, 324. For a more detailed and more contemporary discussion on the notion of the CJEU's incrementalism in implementing EU law, see U. Sadl, "The Role of Effet Utile In Preserving the Continuity and Authority of European Union Law: Evidence From the Citation Web of the Pre-accession Case Law of the Court Of Justice of the EU", *European Journal of Legal Studies* 8(1)/2015, 18–45.

[4] Case 26/62, *NV Algemene Transport– en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* (5 February 1963) EU:C:1963:1.

[5] Case 6/64, *Flaminio Costa v E.N.E.L.* (15 July 1964) EU:C:1964:66.

[6] In one of the most inspiring descriptions of the significance of these two cases, decided by the CJEU, de Waele wrote that these two cases "are universally thought to be the twin pristine heralds of a court treading higher ground, leaving behind traditional conceptions of what international judges do and are capable of." See H. de Waele, "The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment", *Hanse Law Review* 6(1)/2010, 1–26;

[7] On the other hand, it should be underlined that these two principles are interdependent in so many different ways, particularly so in the context of the indirect effect of EU law, as well as in the context of horizontal direct effect, which is a further variation of the initial notion of direct effect and represents a subject of primary concern in this paper. See, e.g., R. van Leuken*, Private Law and the Internal Market: Direct Horizontal Effect of the Treaty Provisions on Free Movement*, Intersentia, Cambridge 2017, 21.

[8] Furthermore, there is evidence today that not only certain written rules but also the non-codified principles of EU law have been recognized as having horizontal direct effect. See M. de Mol, "Kücükdeveci: Mangold Revisited – Horizontal Direct Effect of a General Principle of EU Law: Court of Justice of the European Union (Grand Chamber) Judgment of 19 January 2010**,** Case C–555/07", *European Constitutional Law Review* 6(2)/2010, 293–308.

[9] For more detailed elaboration of Van Gend and Loos and its consequences on the future development of EU law, for instance, see T. Storey, C. Turner, *Unlocking Company Law*, Routledge, Abingdon, Oxon – New York 2014[4], 153; M. Rasmussen, "Revolutionizing European law: A history of the Van Gend en Loos judgment", *International Journal of Constitutional Law*, 12(1)/2014, 136–163.

For more than a decade after the judgment in *Van Gend & Loos* was rendered, the notion of direct effect equalled the nowadays notion of vertical direct effect.[10] Finally, the scope of application of this important principle of EU law was decisively broadened in *Defrenne v. Sabena*,[11] the case renowned for providing for the first time an unambiguous and straightforward expression of intent, made by the CJEU regarding the establishment of what was later to become known as the horizontal direct effect of EU law.[12] Practically simultaneously with *Defrenne v. Sabena*, the first sign of the same effect of the fundamental freedoms in the internal market were provided in the CJEU's case law.[13] However, from then onwards the CJEU has not only demonstrated a different approach with regard to different freedoms but its judgments have been known to vary noticeably from one case to another, pursuing the protection of the exact same fundamental freedom. This altogether led to the emergence of some of the most challenging contemporary dilemmas regarding the interpretation and application of EU law,[14] with one of those being the central issue of this paper.

[10] Vertical direct effect is the legal concept according to which nationals of Member States can claim individual rights before the courts in the Member States originating directly from the provisions of EU law. For a more detailed elaboration of the origins and development of the principle of vertical direct effect, for instance, see M. Rasmussen, "How to enforce European law? A new history of the battle over the direct effect of Directives, 1958–1987" *European Law Journal* 23/2017, 290–308.

[11] Case C–43/75, *Gabrielle Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena* (8 April 1976) EU:C:1976:56.

[12] Namely, unlike the Walrave & Koch case (see infra note 23), in which the CJEU deliberately constrained the effect of the free movement of workers provisions to a very specific type of private parties, in *Defrenne v Sabena* it explicitly stated with regard to Article 119 of the EEC (introducing the principle of equal pay between men and women) that there is "fundamental distinction to be drawn between Article 119 and the other provisions which the Court has held to be directly applicable" and finished off in the final order of the judgment with the notable statement according to which the national courts have a duty to ensure the protection of the rights that Article 119 EEC vests in the individuals, "in particular in the case of those forms of discrimination which have their origin in legislative provisions or collective labor agreements, as well as where men and women receive unequal pay for equal work which is carried out in the same establishment or service, whether private or public." For a more detailed elaboration and definition of the principle of horizontal direct effect, see A. Hartkamp, "The Effect of the EC Treaty in Private Law: On Direct and Indirect Horizontal Effects of Primary Community Law", *European Review of Private Law* 18(3)/2010, 527–548.

[13] See *ibid*., Part 2.

[14] See E. J. Lohse, "Fundamental Freedoms and Private Actors — towards an 'Indirect Horizontal Effect'" *European Public Law* 13(1)/2007, 159–190.

1.2. Aims and objectives

As implied in its title, the aim of this paper is to establish whether and to what extent the TFEU provisions on free movement of goods apply to legal relations established between two or more private parties. To that end, an analysis of the relevant case law related to this particular issue is undertaken further below, i.e. in the third part of this paper. The analysis itself aims to support the initial hypotheses, hereinafter presented, that – notwithstanding sporadic but only implicit inclination in its judgments towards establishing direct horizontal effect of the free movement of goods – the CJEU has constantly and resolutely abstained from recognizing the existence of such an effect, the same effect that it acknowledged decades ago regarding the free movement of workers and services. Based on the case law analysis, the conclusion is also offered that in terms of the recent developments in the field of free movement of goods, the CJEU has opted for further expansion of the concept of vertical direct effect in order to avoid establishing the horizontal direct effect on the freedom of movement of goods, at least for the time being, but still to protect it against certain impediments generated by private parties through linking their actions to Member States.

Before the focus is entirely turned to free movement of goods, part two of the paper provides an overview of the *status quo* regarding the horizontal direct effect of the free movement of workers, as well as of the free movement of services and right of establishment, which are fundamental freedoms recognized by most as having very limited but still evident horizontal direct effect.[15] This was needed not only in order to provide the opportunity for comparisons, important in terms of understanding the differences in the CJEU's approach to different fundamental freedoms, but also to outline the general framework in which the horizontal direct effect of fundamental freedoms currently exists. On the other hand, the fourth and arguably the most specific fundamental freedom,[16] the free movement of capital, remains outside the scope of the

[15] There is still strong opposition, particularly so on the national level, to recognizing and accepting the concept of direct effect of the TFEU provisions establishing fundamental freedoms on relations between purely private parties. For instance, there is a fairly general consent in German jurisprudence that such an effect does not and should not exist. See *ibid*., 164.

[16] To begin with, the freedom of capital movement had become operational considerably later than the other three – starting on 1 November 1993, when the Maastricht Treaty entered into force. Also, in comparison to other fundamental freedoms, another considerable difference would be that this fundamental freedom offers protection also to natural and legal persons from third countries, which makes the potential introduction of its horizontal direct effect additionally hazardous. See J. A. Usher, "The Evolution of the Free Movement of Capital", *Fordham International Law Journal* 31(5)/2007, 1533–1570.

paper, since there is a rather general consensus that this freedom has no horizontal effect.[17]

2. A GLANCE AT THE BROADER PERSPECTIVE: THE HORIZONTAL DIRECT EFFECT OF FUNDAMENTAL FREEDOMS OTHER THAN FREE MOVEMENT OF GOODS

2.1. Further clarification of the principle of the horizontal direct effect

In order to create the basis for the analyses and conclusions to follow, it is important to define more clearly the concept of the horizontal direct effect of the TFEU free movement provisions.[18] In particular, this author finds that it is of fundamental importance to precisely frame, i.e. define, the notion of private party in this specific context, since the entire concept revolves around legal relations between such persons, both natural and artificial. To that end, formally private but *de facto* public entities, which are most noticeably private legal entities vested with the right of exercising specific public authority (*jure imperii*) and other entities, sometimes referred to as "emanations of the state", are not hereinafter considered private parties in the context of the horizontal direct effect, at least not when exercising such authority.[19] Hence, the notion of private party is confined herein to that which could be termed "purely private party", which is generally in line with the legal reasoning followed by the CJEU itself in the cases related to the horizontal direct effect, as is evident from the analysis of case law presented hereinafter.

2.2. The horizontal direct effect of the free movement of workers and free movement of services

Regarding the free movement of workers and free movement of services, whereas the latter tends to generally include the right of establishment,[20] one must first notice that the key judgments in cases

[17] See*, e.g.*,V. Savković, "The Alleged Case of Golden Shares in Montenegro: A Candidate Country's Experience as an Incentive for Including Acta Jure Gestionis within the Range of Restrictions on Free Movement of Capital", *Review of Central and East European Law* 41(2)/2016, 117–156.

[18] Though, it should be underlined that the CJEU itself never uses this term but rather refers to this concept by underlining that some provisions of EU law may be invoked by one private party against another. See C. Krenn, "A Missing Piece in the Horizontal Effect 'Jigsaw': Horizontal Direct Effect and the Free Movement of Goods", *Common Market Law Review* 49(1)/2012, 177–216, 178.

[19] For a more detailed analysis of the notion of emanation of the state under the CJEU case law, for instance, see M. Wiberg, *The EU Services Directive: Law or Simply Policy?*, T.M.C. Asser Press, The Hague 2014, 141–147.

[20] For the purposes of this paper the general notion of the free movement of services is understood broadly so as to include the right (i.e. freedom) of establishment,

allowing the horizontal direct effect of these freedoms for the most part follow the same line of legal reasoning.[21] It seems, though, that the free movement of workers had been the one freedom leading the way from the start.[22] Therefore, the focus will first be on the brief chronology of the key developments related to its horizontal direct effect.

It all started with Walrave & Koch,[23] the first and most notable case in which the horizontal direct effect of the free movement provisions was partially recognized by the CJEU. More precisely, the key statement made by the CJEU in its judgment was that the prohibition of discrimination on the basis of nationality between workers of the Member States "does not only apply to the action of public authorities but extends likewise to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services."[24]

After this initial precedent, an additional broadening of the horizontal effect of the free movement of workers provisions was seen in Bosman,[25] after which both discriminatory and non-discriminatory legal instruments created by private parties, with the view to regulating gainful employment in a collective manner, were included within the range of impermissible restrictions on the free movement of workers.[26]

Further development regarding the horizontal direct effect of the free movement of workers was seen in Angonese.[27] Namely, the court has

since these two are closely interlinked. Furthermore, even the CJEU often avoids drawing the line between the two and opts to simultaneously apply both rules, i.e. freedoms, particularly so in cases establishing the horizontal direct effect of these freedoms in specific cases (see A. Cuyvers, "Freedom of Establishment and the Freedom to Provide Services in the EU", *East African Community Law: Institutional, Substantive and Comparative EU Aspects* **(**eds. E. Ugirashebuja *et al*.), Brill, Leiden – Boston 2017, 376–391).

[21] See J. Stuyck, "The European Court of Justice as a motor of private law", *European Private Law* (ed. C. Twigg-Flesner), Cambridge University Press, Cambridge 2010, 108. Such approach, of course, should be generally regarded as a sound practice, given the need for legal certainty in an important area of EU law, such as the establishment and protection of fundamental freedoms of the internal market. Regretfully so, this is not always the case in terms of other fundamental freedoms, as is demonstrated further below, in regard to the free movement of goods.

[22] See, S. Robin-Oliver, "The evolution of direct effect in the EU: Stocktaking, problems, projections", *International Journal of Constitutional Law* 12(1)/2014, 165–188.

[23] See Case C–36/74, *B.N.O. Walrave and L.J.N. Koch v Association Union Cycliste Internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo* (12 December 1974) EU:C:1974:140.

[24] *Ibid*., par. 17.

[25] See Case C–415/93, *Union Royale Belge des Sociétés de Football-Association ASBL v Jean-Marc Bosman* (15 December 1995) EU:C:1995:463.

[26] *Ibid*., par. 103.

[27] See Case C–281/98, *Roman Angonese v Cassa di Risparmio di Bolzano SpA* (6 June 2000) EU:C:2000:296.

taken the general position that abolition of obstacles to freedom of movement of persons constitutes a specific application of the general prohibition of discrimination by stating that "the prohibition of discrimination on grounds of nationality laid down in Article 48 [currently Article 45 TFEU] of the Treaty must be regarded as applying to private persons as well."[28] In doing so, the CJEU made it clear that it finds free movement of workers to be both vertically and horizontally effective. However, the question remained unanswered whether Article 45 TFEU is considered to produce direct effect on relations between private parties, if the measure contested for having a restrictive effect is not of discriminatory nature. This question, of course, did not concern the legal instruments created by private parties with the view to regulating gainful employment in a collective manner that was already considered by the court in Bosman as "eligible" for representing impermissible restrictions, notwithstanding the non-existence of discriminatory nature of the restriction.

The latest broadening of the scope of the non-discriminatory impermissible restrictions on free movement of workers was seen in Casteels,[29] the case in which the CJEU added to that "circle" mandatory collective labor agreements, regulatory instruments of similar nature but nevertheless different than private regulation on gainful employment in a collective manner. However, arguably even more important development, with regard to Casteels, was the CJEU's long-anticipated direct statement "promising" the imposition of the full horizontal direct effect of Article 45 TFEU. Namely, in addition to rendering a decision regarding a particular set of circumstances, the court also stated that "Article 45 TFEU militates against any measure which, even though applicable without discrimination on grounds of nationality, is capable of hindering or rendering less attractive the exercise by European Union nationals of the fundamental freedoms guaranteed by the Treaty."[30] Hence, apparently the CJEU has expressed its readiness to abandon the so-called doctrine of exceptions, which has been underlying the contemporary approach to the horizontal direct effect of fundamental freedoms since the very beginning.[31]

As for the free movement of services and right of establishment, as already mentioned,[32] ever since Walrave & Koch,[33] the CJEU has been

[28] See Judgment in Angonese, par. 36.

[29] See Case C–379/09, *Maurits Casteels v British Airways plc.* (10 March 2011) EU:C:2011:131.

[30] *Ibid*., par. 22.

[31] See H. Schepel, "Constitutionalising the Market, Marketising the Constitution, and to Tell the Difference: On the Horizontal Application of the Free Movement Provisions in EU Law", *European Law Journal* 18(2)/2012, 177–200.

[32] See *supra* note 19.

[33] This case and the corresponding judgment established that both free movement of workers and freedom to provide services have direct horizontal effects regarding the

recognizing their horizontal direct effect by utilizing identical or similar arguments, i.e. the same line of legal reasoning as in cases of free movement of persons.[34] This trend has continued throughout the decades until several new precedents were observed recently, establishing particular "exceptions" in which the horizontal direct effect of the free movement of services and of the freedom of establishment is allowed. Most notably, these are Viking,[35] a case dealing with the freedom of establishment, and Laval,[36] the case that led to further extension of the horizontal direct effect of the free movement of services. In both cases the court included the collective actions of trade unions within the range of restrictions of these two freedoms.[37] Also, in both of these cases the trade unions were acknowledged as genuine private entities which were acting within their rights and no direct or indirect link with Member States was established nor pursued by the Court.

3. HORIZONTAL DIRECT EFFECT OF THE FREEDOM OF MOVEMENT OF GOODS? – ANALYSIS OF THE CASE LAW

The freedom of movement of goods is the most controversial of the four fundamental freedoms of the internal market in terms of the (non-) existence of horizontal direct effect. As others would put it, the CJEU provided a few "glimpses" of the horizontal direct effect of the free movement of goods during the tribunal's early history,[38] however, since than it repeatedly demonstrated its persistence in depriving this particular fundamental freedom of such effect, at least until some recent cases which reinvigorated old debates on the subject. However, first things first, let us proceed with the most relevant case law, in chronological order.

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legal relations established under private rules, aimed at collectively regulating gainful employment and services.

[34] See J. Stuyck, 108.

[35] Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* (11 December 2007) EU:C:2007:772.

[36] Case C–341/05, *Laval un Partneri Ltd vt Svenska Byggnadsarbetarefbsrbundet and Others* (18 December 2008) EU:C:2007:809.

[37] Still, it seems that the CJEU insisted on the existence of a direct link between the collective actions of the trade union and their endeavors to conclude collective agreements, regulatory instruments, which were earlier affirmed by the court as potential restrictions to free movement of persons and services. See R. van Leuken, 90–96. For further elaboration of these two cases, see C. Barnard, "Viking and Laval: An Introduction", *Cambridge Yearbook of European Legal Studies* 10/2008, 463–492.

[38] See C. Krenn, 179; D. Vuletić, "Direct Horizontal Effect of the Free Movement of Goods and Reshaping of The European Economic Constitution. Back to the Future?", *InterEULawEast* 1(2)/2014, 53–70.

The case that initially gave rise to debates on whether the CJEU finds that there is a horizontal direct effect of the free movement of goods provisions is Dansk Supermarked.[39] The case was initiated by the motion for a preliminary ruling arising out of the dispute between two Danish companies, Imerco and Dansk Supermarked. Imerco ordered a contingent of china services to be retailed in Denmark exclusively by its subcontractors and made an agreement with a British manufacturer that it could sell the residual, i.e. substandard pieces, but not in Denmark or other Scandinavian countries. The British manufacturer honored its contractual obligation and sold the substandard pieces in Britain. However, some portion was acquired lately by Dansk Supermarked for the purpose of further retailing in Denmark. Since Dansk Supermarked refused to withdraw the goods from its stores, Imerco filed for an injunction based on the infringement of the Danish Law on Marketing, based on which the injunction sought was issued by the first instance court and confirmed by the appellate court. In its appeals, filed before the appellate court and the Supreme Court of Denmark, Dansk Supermarked relied on Article 30 EEC (Article 34 TFEU) establishing the freedom of movement of goods by prohibiting restrictions on imports and all measures of equivalent effect. Hence, the actual preliminary question put forward by the Supreme Court of Denmark before the CJEU was whether the provisions of the EEC Treaty, or measures in implementation thereof, preclude the application of the Danish laws on copyright, trademarks and marketing to the case?[40]

In this well-known case, the "famous" statement made by the CJEU in its decision – the one that started the debates on the horizontal direct effect of the free movement of goods – was that "it is impossible in any circumstances for agreements between individuals to derogate from the mandatory provisions of the Treaty on the free movement of goods."[41] Furthermore, the court added that "an agreement between individuals intended to prohibit the importation of such goods may not be relied upon or taken into consideration in order to classify the marketing of such goods as an improper or unfair commercial practice."[42] Hence, apart from essentially finding that Article 30 of the EEC Treaty must be interpreted to mean that the implementation of Danish law may not prohibit that which is otherwise the recognized (allowed) exercise of the freedom of movement of goods, the CJEU seemingly implied its willingness to consider contractual agreements as potentially impermissible restrictions on free movement of goods in the internal market. However, as bluntly

[39] Case 58/80, *Dansk Supermarked A/S v. A/S Imerco* (22 January 1981) EU:C:1981:17.

[40] *Ibid*., par. 6.

[41] *Ibid*., par. 17.

[42] *Ibid*.

put by Van Leuken,[43] since the case was instigated with the motion for a preliminary ruling by the court on the subject of non-contractual liability, the issue of whether the court had introduced the horizontal direct effect remained open for further discussion.

Shortly after Dansk Supermarked, the CJEU rendered another decision which gave rise to debates on whether the freedom of movement of goods should join those fundamental freedoms for which (limited) horizontal direct effect had already been established. It was the ruling delivered in Buy Irish,[44] i.e. an infringement procedure in which the Ireland was the party to the proceedings as the alleged infringer of its duty to uphold the free movement of goods in the internal market. More specifically, the case was provoked by the "Buy Irish" campaign that was conducted by an Irish company, effectively dominated by the Irish Government. Even the campaign, aimed at increasing the consumption of domestic products on account of the imported goods, was created and partially funded by the state. Hence, hardly surprisingly, the European Commission initiated procedure before the CJEU for the alleged breach of Article 30 EEC (Article 34 TFEU) by the Ireland. Consequently, the court simply found in its final order that by organizing a campaign to promote the sale and purchase of Irish products within its territory, Ireland has failed to fulfill its obligations under Article 30 EEC (Article 34 TFEU).[45] Before that, however, the court had found in the reasons of the judgment that, notwithstanding the fact that the campaign was entirely executed by a private company, the campaign, i.e. the restrictive measure involved, was attributable directly to a public entity, i.e. the Government of Ireland in that particular case.[46]

On the other hand, a considerably different set of circumstances, but essentially the same doctrinal approach of the CJEU, was seen in Spanish strawberries,[47] another famous free movement of goods case. Namely, in an infringement procedure initiated by the European Commission against France, the CJEU had to decide on whether passivity of the French Government, in regard to the roadblocks and other violent protest actions by French farmers directed against agricultural products from Spain, may be considered violation of its duties under the TFEU free movement provisions. The court simply – and rightfully so – found that by failing to undertake all necessary and proportionate measures, in

[43] See R. van Leuken, 120.

[44] Case 249/81, *Commission of the European Communities v Ireland* (24 November 1982) EU:C:1982:402.

[45] *Ibid*., final order of the judgment.

[46] *Ibid.*, par 29.

[47] Case C–265/95, *Commission of the European Communities v French Republic* (9 December 1997) EU:C:1997:595.

order to prevent the free movement of fruit and vegetables from being obstructed by actions of private individuals, the French Government had failed to fulfill its obligations under the TFEU free movement provisions.[48] Hence, although occurring in a considerably different context, the CJEU once again found a way to hold a Member State responsible for actions of private actors obstructing the free movement of goods in the internal market.

In following the above approach, the CJEU demonstrated that which was slowly becoming a pattern in its case law – and not only in terms of the freedom of movement of goods. Namely, it would rather gradually expand the notion of public entity and the range of its duties under the freedom of movement of goods regime, than "venture" into drawing clear borderlines between public and private law instruments, which would probably speed up the establishing of the horizontal direct effect in the case of this fundamental freedom.

Further demonstration of the CJEU's reluctance to introduce the horizontal direct effect of the freedom of movement of goods was witnessed in the streak of cases decided by this tribunal since the mid-1980s.[49] It is the opinion of this author, aside from some of the above described cases which the European Commission brought against different Member States, in which the CJEU merely indirectly implied its reluctance to accord the direct horizontal effect to free movement of goods provisions, the said streak involves two types of cases. The first type includes those cases in which preliminary questions actually concerning purely private law instruments, as potentially impermissible restrictions to free movement of goods, were raised before the CJEU. Such are the cases Haug-Adrion,[50] Bayer AG et al. v. Süllhöfer,[51] and VZW Vereniging van Vlaamse Reisbureaus.[52] In Haug-Adrion, the court simply avoided examining private law instrument against the free movement of goods provisions, while at the same time examining them against the TFEU (EEC) provisions on free movement of persons and free movement of services. On the other hand, it examined national legislation, based on which the contested private law instrument was adopted (general terms and conditions of an insurance company) against provisions on the free movement of goods, which was a clear indication that the CJEU finds the

[48] *Ibid*., final order of the judgment.

[49] See L. W. Gormley, "Private Parties and the Free Movement of Goods: Responsible, Irresponsible, or a Lack of Principles?" *Fordham International Law Journal* 38(4)/2015, 992–1016; See R. van Leuken, 115 – 127.

[50] Case 251/83, *Eberhard Haug-Adrion v Frankfurter Versicherungs-AG* (13 December 1984) EU:C:1984:397.

[51] Case 65/86, *Bayer AG et al. v. Süllhöfer* (27 September 1988) EU:C:1988:448.

[52] Case 311/85, *VZW Vereniging van Vlaamse Reisbureaus v. VZW Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten* (1 October 1987) EU:C:1987:418.

particular private law instrument not to have a horizontal direct effect. The court proceeded similarly in Bayer AG et al. v. Süllhöfer. Finally, in VZW Vereniging van Vlaamse Reisbureaus the CJEU clarified its already evident position, by expressly stating that it finds the freedom of movement of goods to concern exclusively public measures as potential restrictions.[53]

The second type of cases includes those in which the subject matter was not whether a given private law instrument should be considered as an impermissible restriction on the free movement of goods. On the contrary, the issue was whether provisions belonging to the body of public law could be considered as impermissible restriction on free movement of goods in the internal market, but the court nevertheless made explicit remarks on the TFEU (EEC) free movement of goods provisions, in which it reiterated its standpoint: these rules apply to public measures and not to the conduct of undertakings and private actors in general. Such were the cases *Jan van de Haar and Kaveka de Meern BV*[54] and *Sapod Audic v. Eco-Emballages SA*.[55]

Finally, we come to Fra.bo,[56] a much debated case,[57] as well as the latest among the cases that gave rise to expectations that the freedom of movement of goods may be accorded horizontal direct effect in the near future. In a prelude to this already famous case, Fra.bo SpA, an Italian company producing copper fittings for water pipes, found itself dissatisfied for not managing to meet the standards adopted by German company (DVGW), authorized under the German law to prescribe them and issue compliance certificates as *de facto* preconditions to entering the German market. This caused the litigation which led to the motion for a preliminary ruling on the issue of whether the activities of DVGW, in such legislative and regulatory context, represent restrictions on free movement of goods.

Unlike some previous cases involving companies or organizations (seemingly) belonging to private sectors,[58] the CJEU explicitly recognized

[53] *Ibid*., par 30.

[54] Joined cases 177 and 178/82, Criminal proceedings against Jan van de Haar and Kaveka de Meern BV (5 April 1984) EU:C:1984:144, see par. 11 and 12.

[55] C–159/00, *Sapod Audic v Eco-Emballages SA* (6 June 2002) EU:C:2002:343, see par. 74.

[56] Case C–171/11, *Fra.bo SpA v Deutsche Vereinigung des Gas– und Wasserfaches eV (DVGW) – Technisch-Wissenschaftlicher Verein* (12 July 2012) EU:C:2012:453.

[57] For instance, see A.C. van de Kooij, "The Private Effect of the Free Movement of Goods: Examining Private-Law Bodies' Activities under the Scope of Article 34 of the Treaty of the Functioning of the European Union", *Legal Isues of Economic Integration* 40(4)/2013, 363–374; H. van Harten, T. Nauta, "Towards Horizontal Direct Effect for the Free Movement of Goods? Comment on Fra.bo" *European Law Review* 38(5)/2013, 677–694.

[58] Most notably, Buy Irish.

the company allegedly imposing restrictions as "a non-profit, private law body whose activities are not financed by the Federal Republic of Germany."[59] Moreover, it also established that Germany has no decisive influence over its standardization and certification activities.[60]

On the other hand, the CJEU also established the following. First, German legislature assumes that products certified by DVGW are compliant with national legislation.[61] Second, DVGW was the only body offering the possibility for obtaining a compliance certificate in this case.[62] Third, since German consumers were strongly relying on this certificate, obtaining it was a *de facto* precondition for entering the German market.[63] Correspondingly, it was concluded by the tribunal that "Article 28 EC must be interpreted as meaning that it applies to standardization and certification activities of a private-law body, where the national legislation considers the products certified by that body to be compliant with national law and that has the effect of restricting the marketing of products which are not certified by that body."[64]

In the opinion of this author, what the CJEU actually did in Fra.bo was what it has been doing in the past decades, particularly so in terms of interpretation and implementation of the freedom of movement of goods. By resorting once again to creative interpretation, it opted to bring justice, while at the same time avoiding to introduce radical changes to contemporary EU law.[65] In doing so, the CJEU simply further expanded the concept of the vertical direct effect of the TFEU provisions on free movement of goods by broadening the notion of impermissible state measures, i.e. restriction on the free movement of goods. As for the scope of the expansion, it could be argued that its extent is quite significant, meaning that the freedom of movement of goods after Fra.bo could potentially apply to any private body capable of hindering free movement of goods in a near-identical manner to that of the Member States, but it could also be argued that the expansion was limited to merely one additional and quite specific set of circumstances. Put differently, since it was the first significant development regarding the effect of the free movement of goods provisions on legal relations between the private

[59] See judgment in *Fra.bo*, par. 24.

[60] *Ibid*.

[61] *Ibid*., par. 27.

[62] *Ibid*., par. 28.

[63] *Ibid*., par. 30.

[64] *Ibid*., par, 34.

[65] This is, of course, not to imply that the court lacked courage to shape EU law with occasional precedents introducing new legal concepts and new legal principles created in order to make the existing body of EU law more complete and efficient (*see supra* note 1).

parties in decades, it is quite understandable that there are authors perceiving Fra.bo as an announcement of the "horizontal shift" in the CJEU's policy towards the scope of the application of the free movement of goods provisions.[66] However, this author belongs to those who believe the decision in Fra.bo to be just another carefully taken step by the CJEU in expanding the concept of the vertical direct effect in terms of the free movement of goods.[67] The fact that the greatest efforts of the Court were once again invested in establishing the existence of *de facto* public nature (and status) of the involved private company seems to strongly support for such standpoint.

Finally, the above findings concerning Fra.bo case should also be viewed in light of the most recent cases in which the horizontal direct effect has been established with regard to other fundamental freedoms, such as are the already elaborated cases Viking, Laval or Casteels. Namely, unlike Fra.bo, the CJEU did not establish any links between the private actors creating restrictions to free movement nor did it pursue them in these cases. This demonstrates that the difference still exists in the tribunal's approach to whether free movement of goods applies directly to legal relations of (purely) private parties, which *prima facie* implies that the CJEU may still not be ready to accord horizontal direct effect to this particular freedom. However, the findings of this author slightly differ.

It has been noticed that the CJEU's motives for not according horizontal direct effect to freedom of movement of goods remain unclear,[68] which gives rise to numerous speculations on what could be the reasons, as well as how it should be proceeded in terms of implementation criteria and should the court move forward with establishing such an effect.[69] On the other hand, as explained in the first part, it was not the aim of this paper to establish the said reasons or make proposals on how the court should proceed in light of the present dilemma. The aim was to diligently review the case law on the issue, as well as to

[66] R. van Leuken, 128; H. Schepel, "Freedom of Contract in Free Movement Law: Balancing Rights and Principles in European Public and Private Law" *European Review of Private Law* 21(5/6)/2013, 1211–1230, 1214; H. van Harten, T. Nauta, 677–694.

[67] See C. Baranard, *The Substantive Law of the EU. The Four Freedom*, Oxford University Press, Oxford 2016, 77; F. Weiss, C. Kaupa, *European Union Internal Market Law,* Cambridge University Press, Cambridge 2014, 47; D. Chalmers, G. Davies, G. Monti, *European Union Law*, Cambridge University Press, Cambridge 2014, 770; C. Krenn, 181.

[68] For instance, see A.C. van de Kooij, 367.

[69] For instance, see D. Waytt, "Horizontal Effect of Fundamental Freedoms and the Right to Equality after Viking and Mangold, and the Implications for Community Competence", *Croatian Yearbook of European Law & Policy* 4/2008, 1–48; R. van Leuken, 125–132; D. Vuletić; A.C. van de Kooij; C. Krenn.

compare it with the tribunal's *ratio decidendi* in the case law, recognizing the horizontal direct effect of other fundamental freedoms, in order to provide firm grounds for conclusions on the (non-)existence of the same effect with regard to free of movement of goods and the corresponding standpoint of the CJEU. Nevertheless, based on the case law analyses provided above, the following conclusion seems to be well-founded.

Until today, the cases presenting the CJEU with the opportunity for establishing the horizontal effect of the free movement of goods were simply not as challenging as were those involving free movement of workers and services. Put differently, it would seem that, regarding the free movement of goods, the court lacked the same "incentive" to venture into establishing its horizontal direct effect. Therefore, although involving different fundamental freedoms, the cases analyzed in the second part of the paper – such as Walrave & Koch, Angonese, Castels, Viking or Laval – may also be viewed as an indication that, should the occasion arise in which there would be no other way to rationalize its view that a given private party had created an impermissible restriction on free movement of goods, the CJEU could resort to recognizing the horizontal direct effect of this fundamental freedom. Moreover, despite representing an example of the Court's creativeness in avoiding the introduction of the horizontal direct effect by expanding the notion of the vertical direct effect of the free movement of goods, the Fra.bo case could also be legitimately regarded as a "step towards the inevitable." Namely, in addition to the aforesaid, this case also has demonstrated how far the CJEU is prepared to go in order not to permit a measure that it finds to be an impermissible restriction on the free movement of goods to be allowed to withstand.

4. CONCLUSION

According to the analyses presented in this paper, the CJEU still doesn't recognize the horizontal direct effect of the free movement of goods. Namely, despite the lack of clarity in its earliest cases, since then, the court has been explicit in this regard on more than a few occasions and we are yet to witness an even remotely explicit withdrawal from such a position. On the other hand, in the above discussed Fra.bo case – the most recent one related to the issue – the court did find that a "private-law body" can impose restrictions on free movement of goods that are impermissible from the standpoint of EU law. However, although admitting that German company DVGW is a private body, the court put forth a very strong effort to establish that this private body was put in the position – to a large extent by the German state itself – of a *de facto* public body. In doing so, the court demonstrated hesitation to move away from its decades old position that the freedom of movement of goods concerns public measures and not the conduct of undertakings and private

actors in general. Therefore, it would seem that the CJEU still prefers expanding the concept of the vertical direct effect of the TFEU free movement of goods provisions to recognizing their horizontal direct effect.

On the other hand, the conclusion was also put forward in this paper that both the case law recognizing the existence of the horizontal direct effect of other fundamental freedoms, as well as the Fra.bo case, which further expanded the boundaries of the vertical direct effect of the free movement of goods, may very well be regarded as indication of the CJEU's preparedness to reconsider its longstanding position on (non-) recognition of the horizontal direct effect of the free movement of goods. Of course, provided that the "right opportunity" presents itself in the foreseeable future.

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THE LEGAL NATURE OF THE SLOVENIAN SPECIAL TAX ON UNDECLARED INCOME

This paper deals with Slovenian special tax on undeclared income and attempts to determine its legal nature by presenting and analysing the regulation. The author believes that this public levy is actually not a tax since it lacks the financial purpose that each tax should have, according to the jurisprudence of the Slovenian Constitutional Court. Since the rate at which the special tax on undeclared income is levied exceeds the tax rates applied on declared income, and therefore the taxpayer's burden is higher, the author claims that the discussed tax is actually a mixture of compensation for the lost tax revenue and a legal sanction, with both deterrent and retributive (punitive) purpose, which is imposed on the taxpayer for not declaring the income.

Key words: *Tax. – Undeclared income. – Estimation. – Compensation. – Sanction.*

1. INTRODUCTION

Countries all around the world are constantly fighting tax avoidance in order to minimize their tax gap, using different measures. It is an ongoing battle between the taxpayers and the governments. Sometimes the latter (perhaps out of despair, due to lack of self-efficacy) introduce unorthodox legal measures. One such measure is a special tax on undeclared income, according to Article 68.a of the Slovenian Tax Procedure Act[1] (hereinafter: TPA). Regardless of its name, this public

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[1] Tax Procedure Act, *Official Gazette of the Republic of Slovenia*, No. 13/2011 – officially consolidated text, 32/2012, 94/2012, 101/2013, 111/2013, 25/2014, 40/2014, 90/2014, 91/2015, 63/2016, 69/2017 and 13/2018.

duty is not levied on all undeclared income, but only on undeclared income the origins of which are unknown, so it should be called a special tax on undeclared income of unknown origin.[2] In order to avoid confusion and an excessively long description, this paper uses the official terminology.

The current legal regime raises a number of different constitutional law issues, but this article will discuss only one of them: the legal nature of the special tax on undeclared income. In an attempt to resolve this issue, firstly the content of the article governing the special tax is presented and a brief comment provided. Next, the constitutional law analysis is carried out by listing the necessary features of each tax according to the Slovenian Constitutional Court case law, finding that one (i.e. financial purpose) is missing. To determine its non-tax legal nature, the single obligation is broken down into two parts: a compensation for the lost tax revenue and a legal sanction with a deterrent and retributive (punitive) purpose. The conclusion contains the most important findings and possible legal consequences if the author's view is correct.

2. THE LEGAL ARRANGEMENT OF THE SPECIAL TAX

Although Article 68.a of the TPA came into effect on 1 January 2014, similar provisions were part of the Slovenia's tax system prior to this.[3] On the mentioned date the regulation became stricter for taxpayers. Two changes should be noted: the rise of the tax rate from the one that is calculated using the progressive personal income tax scale to a fixed 70 per cent, and the furtherance of the prescription period from five to ten years. The legislator has stringent the legislation with a questionable transition period (only for taxpayers with procedures pending on 1 January 2014 the previously, the former legislation is used), which is the reason why the Administrative Court has lodged a request for assessment of constitutionality of the transition period.[4]

To be able to analyse the legal nature of Slovenian tax on undeclared income, its essential characteristics must be described.[5] As will be seen

[2] J. Podlipnik, "Razmerje med splošnimi določbami o cenitvi davčne osnove in davkom od nenapovedanih dohodkov", *Poslovodno računovodstvo* 3–4/2017, 329–332.

[3] For a brief historical overview see J. Podlipnik, "Obdavčitev nezakonitega in neprijavljenega dohodka", *Podjetje in delo* 6–7/2013, 1134–1135.

[4] Pending Constitutional Court case U-I-113/17.

[5] Although Slovenia is not the only country in the world with a special tax on undeclared income, countries with such arrangements are rare. Poland and Macedonia are the only two examples, besides Slovenia, that the author is aware of. The Polish Personal Income Tax Act (Ustawa o podatku dochodowym od osób fizycznych, *Official Gazette of the Republic of Poland* from 2018, position 200 – consolidated text) regulates this matter

in the next chapter, one of them is of particular importance for its legal nature.

Article 68.a (tax assessment on undeclared income) of the TPA reads as follows:[6]

(1) In addition to the cases referred to in Article 68 of this Act, the tax authority (hereinafter: TA) may determine the object of taxation by estimation, in the event that it finds that:
   – a taxpayer – a natural person disposes of private consumption funds, including assets that considerably exceed the income he/she declared,
   – the TA is otherwise acquainted with information on the assets held by the taxpayer – natural person, his/her expenses or the information about the property he/she has acquired.

(2) In the cases referred to in the preceding paragraph, the tax shall be levied from the tax base equal to the established difference between the value of the assets, minus the liabilities arising from the acquisition of assets, assets or consumption of assets, and the income from which the tax was assessed or calculated or income, of which taxes are not paid.

(3) The procedure under this Article shall be introduced for one or more calendar years, during the period of the last ten years preceding the year in which that procedure was introduced.

(4) The tax base determined according to the second paragraph of this Article shall be calculated and paid at 70 per cent of the rate considered to be a definitive tax.

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in Articles 25b to 25g. As far as this contribution is conserved, it is important to emphasize that Polish Constitutional Tribunal found (judgement, No. P 90/08 of April 12, 2011, *Official Gazette of Republic of Poland*, No. 87, position 493) that the 75 per cent tax rate, which is higher than the highest marginal tax rate on declared (disclosed) income (30 per cent), is not a repressive sanction but compensation for lack of late payment – (delay) interests (A. Nita, A. Światłowski, "Synergy or Chaos: Administrative Versus Penal Sanctions in Polish Tax Law", *Tax Law vs Tax Frauds and Tax Evasion* (eds. V. Babčák, A. Románová, I. Vojníková), Pavol Jozef Šafárik University in Košice, Košice 2015, 71–72). The Macedonian Personal Income Tax Act (Zakon za personalniot danok na dohod, *Official Gazette of Republic of Macedonia*, 80/1993, 3/1994, 70/1994, 31/1996, 40/1996, 71/1996, 28/1997, 8/2001, 50/2001, 52/2001, 2/2002, 44/2002, 96/2004, 120/2005, 52/2006, 139/2006, 6/2007, 160/2007, 159/2008, 20/2009, 139/2009, 171/2010, 135/2011, 166/2012, 187/2013, 13/2014, 116/2015, 129/2015, 199/2015, 23/16 and 190/2017) regulates such special tax in Articles 94.a–94.d. The tax rate is 70 per cent, which is much higher than tax rate on declared income which is 10 per cent. The author of this paper is not aware of the Macedonian Constitutional Court having ruled on the constitutionality of this special tax.

[6] Author's translation.

(5) The tax base determined in the second paragraph of this Article shall be reduced in the event that the taxpayer proves that it is lower.

(6) Notwithstanding the provisions of the laws on taxation, when calculating the tax base on income from activities or profit from capital for fiscal years, by the periods for which the tax is levied under this article, the taxable amount shall not be reduced due to the exercise of undisclosed tax losses, or unused parts of the negative difference between the value of equity at disposal and the value of equity at acquisition (loss) established in the periods for which the tax was levied under this article.

The essential (substantial) elements that need to be prescribed by the parliament in the form of a law (principle of legality in the field of tax law)[7] according to (German) tax law theory[8] and the jurisprudence of the Slovenian Constitutional Court are: tax object (Germ. *Steuerobjekt*), taxpayer (tax subject, Germ. *Steuersubjekt*)), tax base (Germ. *Steuerbemessungsgrundlage*) and tax rate (Germ. *Steuersatz*).[9] Article 68.a of the TPA contains all of them: the object of taxation is (undeclared) part of taxpayers income, taxpayers are people (individuals, natural persons), regardless of whether they are income tax residents or not,[10] the tax base is determined in monetary form, and the tax rate is proportional (70 per cent).[11]

Article 68.a (1) of the TPA states additional conditions that need to be fulfilled in order that the tax on undeclared income could be assessed by the tax administration. Prescribing such additional conditions is not customary when tax norms are formed. It can basically be said that the TA is entitled to levy the tax on undeclared income, if it believes that the individual has not declared all of his/her income, by analysing his/her consumption and the assets he/she has acquired. The legislator directly states that in this case the tax object can be estimated. But can tax object really be estimated by conduction a so-called best judgement,

[7] D. Popović, *Nauka o porezima i poresko pravo*, Savremena Administracija, Beograd 1997, 298–301.

[8] K. Tipke, *Die Steuerrechtsordnung*, Volume I, Dr. Otto Schmidt, Köln 2000^2, 129.

[9] Decision of the Constitutional Court U-I-215/11, Up-1128/11, 10 January 2013 (*Official Gazette of the Republic of Slovenia*, No. 14/2013).

[10] K. Erjavšek, *Obdavčitev nenapovedanih dohodkov posameznikov s posebnim poudarkom na skladnosti 70-odstotne davčne stopnje z Ustavo Republike Slovenije*, Master's thesis at University of Maribor Faculty of Law, Maribor 2016, 34–35.

[11] According to Administrative Court the tax rate is punitive by nature, because it exceeds the tax rate that applies to declared income.

estimated or discovery[12] assessment? I believe not, because only the tax base can be determined by estimation (Germ. *Schätzung*);[13] the tax object cannot be estimated, because this would cause taxation on mere suspicion, which would be contrary to rule of law (in tax law) and basic freedoms.[14]

Let us assume that the wording in Article 68.a of the TPA is poor, because the legislator did not differentiate between the tax object and the tax base.[15] Is Article 68.a of the TPA really a legal basis for tax-base estimation? In order to answer this question, the term estimation of the tax base should first be defined. The TPA (Article 68 (2)) defines estimation as a special procedure whose purpose is to determine such facts that enable the TA to determine the probable tax base. Because the TA cannot determine the crucial (legal) facts directly, since taxpayers violated their obligations to cooperate (Germ. *Mitwirkungspflichten*), those facts are determined alternatively through clues (Germ. *Indizien*) which indicate what are most probably the crucial (legal) facts.[16] These probable facts are then applied to the "ordinary" relevant substantive tax rule, which prescribes how to calculate the tax base (legal rules in personal income tax law, corporate income tax law, value added tax law, etc.). When the estimated tax base is determined, the tax rate can be applied and the amount of (estimated) tax is calculated. Since crucial (legal) facts can only be determined with certain degree of probability,[17] the amount of the levied tax can be higher or lower than the actual amount of tax liability according to the actual circumstances, which are incomprehensible. It is important to emphasize that the purpose of the tax base estimation is not to penalize taxpayers for violating their obligations to cooperate,[18] but rather to ensure the principle of equality in taxation,[19] by indirectly determining the crucial (legal) facts, with the highest possible degree of

[12] D. W. Williams, G. Morse, *Principles of Tax Law*, Sweet & Maxwell, London 2012[7], 61–62.

[13] W. Jakob, *Abgabenordnung*, C. H. Beck, München 2010[5], 71–72.

[14] R. Seer et al., *Steuerrecht*, Dr. Otto Schmidt, Köln 2013[21], 1112–1113.

[15] The definition of estimation in Article 68 (2) of TPA confirms this assumption, as the legislator states that the purpose of estimation is to determine the probable tax base. This provision does not state anything about (determining the probable) tax object.

[16] W. Jakob, 71–72.

[17] This degree should be as high as possible, depending on the clues that can be identified.

[18] M. Wakounig, *Davčno inšpiciranje in ocena davčne osnove*, MFB Consulting, Ljubljana 1998, 18–19 and W. Doralt, H. G. Ruppe, T. Ehrke-Rabel, *Grundriss des österreichischen Steuerrechts*, Volume II, Manzsche Verlags– und Universitätsbuchhandlung, Wien 2011[6], 519.

[19] M. Brinkmann, *Schätzungen im Steuerrecht*, Erich Schmidt Verlag, Berlin 2012[2], 25.

probability.[20] Equality in taxation would be compromised if the taxpayers who failed to comply with the rules were exempt from taxation because their tax base could not be calculated directly.[21]

If the purpose of tax base estimation is to assess the amount of tax which is as close as possible to the actual amount of tax, the assessment of the tax on undeclared income, according to Article 68.a of the TPA, cannot be considered a best judgement assessment. At least two reasons support this statement. First, the facts that the TA must determine, in order to calculate the tax base, are not clues that will help determine probable crucial (legal) facts. Rather, they are crucial (legal) facts themselves, according to Article 68.a (2). It is not possible to discuss tax base estimation according to the abovementioned definition, if legally relevant facts are not indirectly determined through clues, because they are prescribed as crucial (legal) facts for another tax – the one that the taxpayer has failed to declare. A different (new) tax, with a higher tax rate, is the second reason why it is not correct to talk about tax base estimation. Tax base estimation is used to levy the original tax and not another tax that did not exist when the legally prescribed facts occurred. The amount of tax assessed with the help of tax base estimation cannot regularly be higher than the original tax, but only as the consequence of the incapability of indirectly determining the crucial (legal) fact, not the stricter substantive rules (e.g. governing the tax rate).

3. THE CONSTITUTIONAL LEGAL NATURE OF THE DISCUSSED TAX

The Constitution of Republic of Slovenia[22] (hereinafter: Constitution) mentions the term tax in Articles 90, 146 and 147, but does not define it by stating the features that a compulsory contribution must have in order to be considered a tax. This lack of a definition in the Constitution has been replaced by the jurisprudence of the Slovenian Constitutional Court. According to the Court's position, taxes are those compulsory contributions that cumulatively fulfil the following conditions: they are (state or local) budgetary funds,[23] that have a

[20] A. Pahlke *et al*., *Abgabenordnung Kommentar*, C. H. Beck, München 2009[2], 1225.

[21] The purpose of the rules that enable tax base estimation is to resolve the so called *non liquet* situation (W. Jakob, 69).

[22] *Official Gazette of the Republic of Slovenia*, No. 33/1991–I, 42/1997, 66/2000, 24/2003, 69/2004, 69/2004, 69/2004, 68/2006, 47/2013, 47/2013 and 75/2016.

[23] Decisions of the Slovenian Constitutional Court U-I-181/94 of 20 March 1995 (*Official Gazette of the Republic of Slovenia*, No. 21/1995), U-I-62/95 of 16 February

monetary form,[24] they are compulsory and the taxpayer does not directly receive anything in return,[25] they may be introduced only by law in parliamentary procedure,[26] or in the case of local communities, the relevant law must provide the legal basis for the introduction of a local tax,[27] and they have a necessary financial purpose[28] (the intent to collect financial resources),[29] although other social (nonfinancial) purposes (e.g. deterring undesirable behaviour of taxpayers and promoting desired behaviour) are permissible.[30]

The last of the listed features is essential for this paper. No doubt that a declaration of income is mandatory by law, that failure to comply with this legal obligation is undesirable and an additional financial liability can have an impact on the behaviour of taxpayers, but can the tax on undeclared income serve a financial purpose? The answer to this question is negative, since the government cannot desire that the taxpayers violate (tax) norms. The financial source that stems from a breach of regulations cannot have a financial purpose. If misdemeanour fines (e.g. fines for driving under the influence of alcohol or above the speed limit) are not considered taxes because they lack financial purpose, then any other financial obligations imposed exclusively for infringement of regulations, regardless of their legal naming, cannot be taxes.[31] So called prohibitive taxes (Germ. *Erdrosselungssteuern, Prohibitivesteuern,*

1996 (*Official Gazette of the Republic of Slovenia*, No. 14/1996) and U-I-397/98 of 21 March 2002 (*Official Gazette of the Republic of Slovenia*, No. 35/2002).

[24] Decisions of the Slovenian Constitutional Court U-I-257/09 of April 14, 2011 (*Official Gazette of the Republic of Slovenia*, No. 37/2011), U-I-215/11, Up-1128/11 of 10 January 2013 (*Official Gazette of the Republic of Slovenia*, No. 14/2013) and U-I-173/11 of 23 May 2013 (*Official Gazette of the Republic of Slovenia*, No. 49/2013).

[25] Decisions of the Slovenian Constitutional Court U-I-9/98 of April 16, 1998 (*Official Gazette of the Republic of Slovenia*, No. 7/1998), U-I-307/98 of 5 December 2002 (*Official Gazette of the Republic of Slovenia*, No. 112/2002) and U-I-181/01 of 6 November 2003 (*Official Gazette of the Republic of Slovenia*, No. 113/2003).

[26] Decision of the Slovenian Constitutional Court U-I-34/93, U-I-33/93 of 19 October 1994 (*Official Gazette of the Republic of Slovenia*, No. 74/1994).

[27] Decision of the Slovenian Constitutional Court U-I-424/98 of 8 November 2001 (*Official Gazette of the Republic of Slovenia*, No. 96/2001).

[28] Decisions of the Slovenian Constitutional Court U-I-91/98 of 16 July 1999 (*Official Gazette of the Republic of Slovenia*, No. 61/1999) and U-I-397/98 of 21 March 2002 (*Official Gazette of the Republic of Slovenia*, No. 35/2002).

[29] H. W. Arndt, H. Jenzen, T. Fetzer, *Allegmeines Steuerecht*, Verlag Franz Vahlen, München 2016[3], 47.

[30] Decisions of the Slovenian Constitutional Court U-I-260/04 of April 20, 2007 (*Official Gazette of the Republic of Slovenia*, No. 45/2007) and U-I-158/11 of 28 November 2013 (*Official Gazette of the Republic of Slovenia*, No. 107/2013).

[31] H. B. Brockmeyer *et al*., *Abgabenordnung Kommentar*, C. H. Beck, München, 2012[17], 12.

Steuern mit Nullaufkommen)[32] are not actually taxes, as they lack financial purpose. The taxes with a social function (e.g. ecological taxes, tobacco taxes) aim to reduce socially undesirable actions to a socially desirable level and not to prevent them completely.[33]

If a tax on undeclared income is not a tax, what is its constitutional legal nature? It seems that a single monetary obligation consists of two parts.

First part: Slovenian tax legislation does not state that when the tax on undeclared income is levied, the "original" tax obligation ceases to exist.[34] Hence, it is (at least in theory) possible that the same person is burdened with the "original" tax as well as the tax on undeclared income. This does not occur in practise, as the TA is not able to discover the origin of the income in order to tax it as it should be taxed. To prevent double "taxation" it would be wise if the legislator explicitly prescribed that the "original" tax liability ceases to exist once the tax on undeclared income is levied. The part of the tax on undeclared income that "replaces" the original tax is by its legal nature compensation for the loss of the original tax revenue.

Second part: since the rate that is applied on the undeclared income is always higher than the "original" income tax rates,[35] the amount that is levied is higher than the "original" tax, therefore the legal nature of this surplus must be determined. It seems that the answer depends on the legislator's intent to collect more than tax plus interests.[36] The executive branch of the government, which proposed the law, stated that from the point of view of equality under the law, it is neither proportional nor

[32] A. Eiling, *Verfassungs– und europarechtliche Vorgaben an die Einführung neuer Verbrauchsteuern*, Herbert Utz Verlag, München 2014, 131–133.

[33] S. Homburg, *Allgemeine Steuerlehre*, Verlag Franz Vahlen, München 2015[7], 5.

[34] According to Article 44 (4) of TPA tax obligation ceases to exist with its fulfilment, or in other ways determined by this Act. These other ways are prescription (Germ. *Verjährung*), tax remission (Germ. *Steuererlass*), etc.

[35] If a separation is made taking into account the (direct) progressivity of taxation, there are two types of income according to Slovenian Personal Income Tax Act (*Official Gazette of the Republic of Slovenia*, No. 13/2011 – officially consolidated text, 9/2012, 24/2012, 30/2012, 40/2012, 75/2012, 94/2012, 52/2013, 96/2013, 29/14, 50/2014, 23/2015, 55/2015, 63/2016 and 69/2017): the income that is taxed synthetically and the income that is taxed analytically. The first group is taxed using the (directly) progressive tax scale with five brackets, from 16 to 50 per cent being the marginal tax rate. The second group is usually taxed with a fixed 25 per cent tax rate, with the exception of capital gains, where tax rate falls according to the time of holding capital, from 25 per cent to zero.

[36] In comparison to the reasoning of the Polish Constitutional Tribunal, in the case of Slovenia, in addition to tax, interests are also levied to taxpayers (Judgement of the Supreme Court of Republic of Slovenia X Ips 285/2012, 14 March 2013), so the higher tax rate cannot represent compensation for late payment.

admissible that a taxpayer who has not fulfilled his/her tax obligations within the time limit and in the manner prescribed by law is treated the same way as the one who has. For these reasons, a tax rate of 70 per cent is introduced.[37] According to this, the only reason for the different (i.e. stricter) treatment before the law is violation of tax regulations. This does not directly mean that this surplus is a punishment (retributive purpose)[38] for violating tax regulations, because it could have a preventive (deterring, non-retributive) purpose.[39] Although the latter is not mentioned in the proposal of the TPA, it can be said that it does. On the other hand it seems that it also has a retributive function, since the proposer of the TPA stated that the taxpayer has various options to eliminate irregularities in regard to the fulfilment of tax obligations. If he/she does not use them and continues to avoid compliance, taking into account that there is a major disparity between the acquired assets or consumption and the revenues declared to the TA in these procedures, it is appropriate that this incompatibility should be subject to high taxation.[40] Because the Slovenian Tax Administration is not concerned with discovering the origin of the income, taxpayers cannot be held responsible for misdemeanours or criminal offenses. Instead, they are punished with additional financial burden – a tax surplus. This supports the view that this surplus has a retributive function.[41] The same view seems to be supported by European Court of Human Rights (hereinafter: ECHR) case law. In Jussila v. Finland[42] the ECHR dealt with the Finnish tax proceeding in which tax surcharges were levied and ruled that this was a criminal proceeding. Hence tax surcharges are criminal sanctions because of their deterrent and punitive (retributive) purpose.

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[37] Predlog Zakona o spremembah in dopolnitvah Zakona o davčnem postopku, EVA: 2013–1611-0077, 10 July 2013, 10.

[38] According to Slovenian criminal law theory, there are two complementary functions of legal sanctions: retributive and preventive (L. Bavcon *et al.*, *Kazensko pravo – splošni del*, Uradni List Republike Slovenije, Ljubljana 2003[4], 386).

[39] Like surcharges (Germ. *Zuschläge*) in German tax law (D. Birk, M. Desens, H. Tappe, *Steuerrecht*, C. F. Müller, Heidelberg – München 2014[17], 87–88).

[40] Predlog Zakona o spremembah in dopolnitvah Zakona o davčnem postopku, EVA: 2013–1611-0077, 10 July 2013, 10.

[41] Since further elaboration of this issue would exceeded the purpose of this contribution, I can only state that the legal arrangement of this retributive function is (constitutionally) problematic, since the retributive side of the punishment should be proportionate to the intensity of the violation and the culpability of the perpetrator (L. Bavcon *et al.*, 386). By assessment of tax on (allegedly) undeclared income none of these circumstances is identified, since the only criterion is the amount of allegedly undeclared income.

[42] *Jussila v. Finland*, no. 73053/01, 23 November 2006.

4. CONCLUSION

This analysis shows that tax on undeclared income according Article 68.a of the TPA is not really a tax, but in fact partly compensation for the lost income tax revenue, partly a sanction with a deterrent and retributive purpose. The first part is unproblematic, since compensation may also be decided in (special) administrative procedure. The second part is more intricate, because constitutional procedural requirements are more demanding when it comes to procedures in which penalties can be imposed. Presumption of innocence (Article 27), principle of legality in criminal law (Article 28), and legal guarantees in criminal proceedings (Article 29) are constitutional basic human rights and liberties that need to be respected in all penal procedures, not only those of strictly criminal nature. It is doubtful whether undeclared income tax procedures according to the TPA fulfil these requirements. It seems that especially presumption of innocence is questionable, since taxpayers must prove beyond a reasonable doubt how they financed the acquisition of property and consumption. On the other hand, the TA usually calculates the undeclared income tax base on a number of assumptions. If the Slovenian Constitutional Court will share the author's view on the constitutional legal nature of the undeclared income tax, this unorthodox measure will be declared (at least partly) unconstitutional.

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JUDICIARY IN THE SERBIAN CONSTITUTION OF 2006 AND A CRITICAL REVIEW OF DRAFT AMENDMENTS**

This article analyzes the position of judiciary in the Constitution of the Republic of Serbia. Legal norms on the organization of judiciary are one of the most important segments of constitutional matter, having in mind that for the functioning of democracy it is important to ensure complete independence of the judiciary from so-called "political authorities" – legislative and executive. The independence of the judiciary can only be ensured by the constitution. However, the Serbian Constitution of 2006 has taken a different stand on this part of constitutional matter, giving the legislator a wide authority to regulate substantive issues relating to the judiciary (election and dismissal of judges), which largely subordinates judicial power to the legislative. First, the constitutional norms on judiciary will be analyzed in this paper. The Serbian Constitution contains five key issues related to the independence of judiciary. Further analysis will include proposed amendments to the Constitution. Ministry of Justice's Working Version of the Draft Amendments to the Constitution has not adequately solved any of five problems. Finally, useful conclusions about the position of the judiciary in the Republic of Serbia will be drawn.

Key words: T*he Serbian Constitution of 2006. – "Ministry of Justice's Working Version of the Draft Amendments to the Constitution". – Separation of powers. – Judiciary. – Judicial independence*.

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1. INTRODUCTION

One of the basic requirements for rule of law is an independent judiciary. Unlike the two political powers – legislative and executive – whose relationship rests on "checks and balances", the judicial branch has to be independent of any political influence. This can be ensured only by the constitution, as both legislative and executive branches are subjected to the constitution. So the supreme law must protect the judicial branch from the possibility of influence by the political powers. This means that the constitution itself must turn off any possibility of the legislative or executive violating the constitutionally guaranteed status of judiciary. An independent judiciary "maintains the balance" in the system of government, since its role is to prevent the abuse of authority. That is why James Bryce concluded long time ago that there is no better proof of the validity of a rule than the work of its judicial system.[1]

In order to ensure a proper position of the judiciary in the constitutional system, the Serbian Constitution of 2006 provides ample of constitutional principles regarding judicial power: autonomy and independence of courts, constitutionality and legality, obligatory nature of court decisions, collegiality of conducting trials, system of mixed jury, public hearing before a court, permanent tenure of judicial office, judicial immunity and incompatibility of judiciary function with other functions, actions or private interests (Art. 142, 145, 146, 149–152 of the Constitution).

However, the Serbian Constitution of 2006 has not properly regulated the matter that regulates the independence of the judiciary, because it entrusted the legislator with too much power in the field of substantive issues relating to the judiciary, especially in relation to the election and dismissal of judges. Thus, the Constitution greatly subordinated the judiciary to the political branches. Excessive powers of the National Assembly could produce unacceptably high politicization of the judiciary and even jeopardize its independence in the future.

2. JUDICIARY IN SERBIAN CONSTITUTION OF 2006

Serbian Constitution of 2006 contains five key issues related to the independence of judiciary. The first one is the incorrect definition of the principle of separation of powers, which stipulates that the judiciary, which should be independent from political authorities, is in relationship of "balance and mutual control" with them (Art. 4.3). "Mutual control" and "independence" are mutually exclusive principles. Another issue is

[1] Dž. Brajs, *Savremene demokratije*, III, Beograd 1933, 88.

the great influence of political authorities, primarily the National Assembly, in the election of judges. Thirdly, the author of the constitution has failed to prescribe a basis for termination of judicial office and dismissal of judges, so the legislature has too much influence on the judiciary, because the National Assembly has complete freedom to provide grounds for termination of judicial office and dismissal of judges. The fourth issue is politicized composition of the High Judicial Council, which is defined as an "independent and autonomous body" (Art. 153 of the Constitution), but it is apparent that there is nothing left of this proclaimed independence and autonomy, since all eleven of its members are elected, in a direct or indirect manner, by a political authority – the National Assembly. Finally, the name of the highest court in the Republic, i.e. the Supreme Court of Cassation (Art. 143 of the Constitution), is contradictory.

2.1. Separation of powers and independence of the judiciary

The basic achievements of modern constitutionalism are the two principles: the principle of popular sovereignty and the principle of separation of powers. Modern rule of law, therefore, rests on two grounds: first, all the power comes from the citizens, and they exercise it either directly or through their freely elected representatives, and second, three main functions of state power (legislative, executive and judicial) have different holders. When the principle of the separation of powers is accepted, the three basic functions of state power are exercised by three branches, among which there is no organizational or functional subordination. "The principle of separation of powers is said to be nothing but the principle of the division of labor applied to the organization of the state."[2] The legislative and executive power have political content, because their holders are elected or appointed on the basis of political criteria. On the other hand, the judicial authority requires extraordinary professionalism and legal education for its exercise, and because of that judges should be selected primarily on the basis of professional criteria. Judicial independence is the concept that judiciary needs to be kept away from other branches of government. The constitution must condemn any possibility of parliament, the government or the head of state in any way violating the independent status of the judiciary.

The Serbian Constitution of 2006 accepts the principle of rule of law (Art. 3). That principle is defined in its "classical" form, as it was determined by prominent British constitutionalist Albert Venn Dicey long ago,[3] because the Constitution stipulates that it shall be exercised through

[2] R. Marković, *Ustavno pravo*, Beograd 2014, 177.

[3] A.V. Dicey, *An Introduction to the Study of the Law of the Constitution*, Palgrave Macmillan UK, London 1979, 193–194.

free and direct elections, constitutional guarantees of human and minority rights, separation of powers, independent judiciary and observance of the Constitution and the Law by the authorities. When it comes to the separation of powers (Art. 4), the Serbian Constitution provides that "government system shall be based on the division of power into legislative, executive and judiciary", while relations between three branches of powers shall be based on "balance and mutual control", but judiciary shall be independent. This provision clearly shows that the principle of separation of powers is accepted in its "soft" form, typical for a parliamentary system of government. But the constitutional provision on mutual control between different authorities is in direct contravention with the following paragraph of Article 4 of the Constitution, which prescribes that the judicial power is independent. Namely, one branch cannot be at the same time independent and under the control of other two branches of government. "In fact, it should be said that the relationship between legislative and executive power is based on 'balance and mutual control', and that the judicial power is independent (...)".[4] In that case, the norm contained in Article 145 of the Constitution, which stipulates that judicial decisions cannot be subject to extrajudicial control, and that "the court's decision can be reconsidered an authorized court in the a legal proceeding prescribed by the Law," would receive its full meaning.

2.2. Election of judges – between law and politics

Creators of the 2006 Constitution tried to maintain the appropriate solutions of the 1990 Constitution of the Republic of Serbia, and at the same time eliminate its shortcomings. However, they succeeded only partially. Some parts of the constitutional matter remained intact, and among those that were changed are norms on the organization of the judiciary.

One of the main shortcomings of the Serbian Constitution of 1990, which has often been heavily criticized, is the election of judges by the National Assembly. In this way, the Constitution has largely subordinated the judicial power to the political one. According to the current constitutional norm, the election of judges for the permanent performance of judicial function is entrusted to a special body of judicial administration –the High Judicial Council. However, the problem is that judges "beginners" – judges elected for the first time to office, whose mandate lasts three years – are elected by the National Assembly (although, at the proposal of the High Judicial Council – Art. 147 of the Constitution). In this way, the role of the High Judicial Council in the process of election of judges is largely marginalized, since after three years that body can

[4] R. Marković, "Ustav Republike Srbije iz 2006 – kritički pogled", *Anali Pravnog fakulteta u Beogradu* 2/2006,9.

elect a judge for permanent office only from among candidates previously elected by the political authority, i.e. parliament. The situation is further exacerbated by the constitutional norm according to which the National Assembly elects the presidents of all courts, including the president of the Supreme Court of Cassation (Art. 144 of the Constitution). It is clear that despite the introduction of a special body that should ensure the independence of the judiciary, i.e. the High Judicial Council, the current Constitution of Serbia fails to eliminate the influence of political authorities on the election of judges and this influence remains significant.

One way to promote judicial independence is by granting life tenure or long tenure for judges, which ideally frees them to decide cases and make rulings according to the rule of law and judicial discretion. The Constitution of 2006 introduced an exception to the principle of permanent tenure (Art. 146.2 of the Constitution), because a person who is elected a judge for the first time is be elected for the period of three years. The principle of permanent tenure of judicial office is one of the strongest means of protecting the judiciary from the executive, which often has pretensions to the election of judges and the decision-making process. Permanent tenure of office gives judges the ability to resist the influence of political authorities and to perform the function professionally. When a judge strives for his/her own position because of the possibility of re-election, he/she cannot be independent in the application of law, but, consciously or unconsciously, hears the will of political and financial powers. However, part of theory considers that this deviation in the case of newly elected judges has its purpose and it is not always seen as a disadvantage. Moreover, the European Court of Human Rights has taken the view that the solution, according to which judges should undergo a "trial period", does not threaten the independence of judges, but that this period should be slightly longer – five or six years.[5] In contrast, in its opinion on the Constitution of Serbia of 2006, the Venice Commission commended the duration of the probationary term of office for judges, stressing that its suggestions had been adopted.[6] However, regardless of the length of the period, this solution has one undeniable shortcoming: judges on "probation" are trying to recommend themselves to the High Judicial Council, a body dependent on parliament.

2.3. Termination of judicial office and dismissal of judges

In general, one of the main problems in the current Serbian Constitution is that the constitution-maker had no sense of the issues to

[5] *Le Compte, van Leuven and De Meyere v. Belgium* (1981) and *Incal v. Turkey* (1998)

[6] European Commission for Democracy through Law, Opinion on the Constitution of Serbia, CDL-AD(2007)004, paragraph 64.

be regulated in detail by the Constitution. Therefore, some important institutions are not defined precisely enough, while on the other hand, the Constitution has found the place for certain norms that should be the subject of laws or regulations. When it comes to the judiciary, a good illustration of this problem is the absence of provisions that would regulate termination of judicial office and dismissal of judges. The framers of the Constitution, without any logic, left the regulation of these issues to the legislator. "The manner in which the Constitution regulated termination of mandate and dismissal of judges indicates that regulation of these issues is largely left to the law, and that important and extremely sensitive issues for status of judges and status of courts in the constitutional system did not get the status of constitutional matter."[7] Constitution stipulates that "the proceedings, grounds and reasons for termination of a judge's tenure of office, as well as the reasons for the relief of duty of the President of Court shall be stipulated by the Law" (Art.148.3). In this way, the Constitution has undoubtedly made a step backwards to the previous Constitution and weakened the independent position of courts and judges, whose "fate" is now in the hands of parliament. According to R. Marković, "the deconstitutionalization of the grounds for termination of judicial office and dismissal of judges weakens the position of the judiciary as an independent branch of power in the system of government."[8] The independence of the judiciary is highly endangered by this solution.

2.4. The politicization of the High Judicial Council

The High Judicial Council, although constitutionally defined as "an independent and autonomous body which shall provide for and guarantee independence and autonomy of courts and judges" (Art. 153.1), is not freed of the influence of political factors on its work. This is clearly seen from the current norms that govern the composition of this body, which has 11 members: three members *ex officio* and eight elected members. The High Judicial Council consists of the president of the Supreme Court of Cassation, the minister responsible for justice and the president of the authorized committee of the National Assembly, as members *ex officio*, and eight electoral members elected by the National Assembly, in accordance with the law. Two out of three members are purely political officials – the minister responsible for justice and the president of the authorized committee of the National Assembly. The third *ex officio* member, the president of the Supreme Court of Cassation, as well as other eight "elected" members (six judges holding permanent seats and two "respected and prominent" lawyers with at least 15 years of

[7] M. Pajvančić, *Komentar Ustava Republike Srbije*, Beograd 2009, 188.

[8] R. Marković (2014) 22.

professional experience, one of which is a solicitor, and the other a professor at the faculty of law) are elected by political authority, i.e. the National Assembly. In summary, the High Judicial Council is heavily influenced by the parliament, which is a political body, since all its members are elected in parliament, in on way or another. The influence of political factors is enhanced by presence of a member of the Government (minister responsible for justice) and representative of the National Assembly (president of the authorized committee of the National Assembly). The original idea of constitutional framers was probably to establish a body that would impartially and independently make decisions in order to preserve the principle of independence of judiciary. However, this idea has lost its significance with the members of the High Judicial Council being chosen by the parliament and with the introduction of two purely political officials in its makeup.

2.5. The Supreme Court in the Republic of Serbia

The Serbian Constitution of 2006 has devoted little space to the organization of courts, assuming only that "judicial power in the Republic of Serbia shall belong to courts of general and special jurisdiction" (Art.143.1), whereby "provisional courts, courts-martial or special courts may not be established" (Art. 143.3). The Constitution delegates to the legislature the right to closely regulate the status of courts, because "establishing, organization, jurisdiction, system and structure of courts shall be regulated by the Law" (Art. 143.2). The only court whose existence is explicitly foreseen in the Constitution is the Supreme Court of Cassation, which is defined as "the supreme court in the Republic of Serbia" (Art. 143.4). The seat of the Supreme Court of Cassation is in Belgrade (Art. 143.5). The position of the highest court in the country is regulated by the Constitution only in principle, and the details are left to the legislator. The only question regulated in detail by the Constitution is position of the president of the Supreme Court of Cassation (Art. 144). President of the Supreme Court of Cassation is elected by the National Assembly, following the proposal by the High Judicial Council and the received opinion of the meeting of the Supreme Court of Cassation and competent committee of the National Assembly. The president of the Supreme Court of Cassation is elected for the period of five years and may not be reelected. Although it is not common in comparative law to precisely regulate organizational and technical issues related to courts in the constitution, it would be useful if this matter was regulated more comprehensively in order to give guidance to the legislature for defining details.

However, in these few provisions on the organization of courts, the framer of the Constitution made one almost intolerable terminological

omission: the name of the highest court in the country – the Supreme Court of Cassation – is contradictory. Merging both terms ("supreme" and "cassation") into one name is extremely rare, unnecessary and contradictory, because both terms indicate the basic role of the highest court, that is either to abolish or reverse the decisions of lower courts. In comparative law, namely, there are two basic models of the organization of the highest court in the country. The first model (Supreme Court model) implies that the highest court decides on merits of the dispute, i.e. it resolves the dispute in a proper manner. The second model (Court of Cassation model) does not involve deciding on merits by the highest court, but only deciding on lawfulness of a lower court judgment, with the right to annul an unlawful judgment and return the case for a retrial. By calling the highest court of the Republic of Serbia the Supreme Court of Cassation, framer of the Constitution "combined" these two seemingly incompatible models and placed the legislator into an awkward position.

3. MINISTRY OF JUSTICE'S WORKING VERSION OF THE DRAFT AMENDMENTS TO THE CONSTITUTION

The Ministry of Justice's Working Version of the Draft Amendments to the Constitution of the Republic of Serbia covered four of the five problems mentioned, but failed to offer a valid solution for any of them.

3.1. Separation of powers

The Working Version of the Draft Amendments does not mention the constitutional principle of separation of powers. If they wanted to appropriately correct the problematic constitutional norms on the judiciary, the authors of the constitutional amendments would have had to start from the constitutional principle of separation of powers. However, when analyzing proposed solutions regarding the election of judges and their dismissal, as well as the composition and manner of work of the High Judicial Council, it seems that the constitutional provision on the control of the judiciary by the political authorities (Art. 4.3 of the Constitution) expresses the position of the judiciary properly.

3.2. Election of judges

Ministry of Justice's Working Version of the Draft Amendments to the Constitution returns to the principle of absolute permanence of tenure of judicial office and provides that all judges are elected by the High Judicial Council. A judicial tenure lasts from the moment of appointment until retirement. In this part, proposed solutions deserve praise. However,

there are two key problems concerning the election of judges: the politicized composition of the High Judicial Council, and a "special training in a judicial training institution established by the law" as a mandatory condition for appointment to judicial office.

According to the current Constitution, the composition of the High Judicial Council is under the unacceptable influence of the National Assembly. The Working Version of the Draft Amendments proposes that the High Judicial Council is composed of ten members, of whom five judges elected by their peers and five are "prominent lawyers" elected by the National Assembly (Amendment IX). But this second half of members would have majority, because it is proposed that the president of the Council should have a "golden vote": the High Judicial Council adopts decisions by the votes of at least six members of the Council or the votes of a minimum of five members of the Council including the vote of the president of the High Judicial Council (Amendment XII), and "the president of the High Judicial Council shall be elected among members who are not judges" (Amendment XI). Therefore, members elected by the political authorities would have a key dominance over judges elected by their peers. This will be discussed in detail in section 3.4.

"Special training" in a "judicial training institution established by the law", as a mandatory condition for appointment to judicial office, is a key mechanism through which the political authorities, in particular the executive branch, would keep the judiciary under direct control. The Working Version of the Draft Amendments proposes that "as a judge in the courts with exclusively first-instance jurisdiction may only be elected a person who has completed special training in a judicial training institution established by the law" (Amendment IV, para. 2). Therefore, the Working Version of the Draft Amendments grants the "judicial training institution" a monopoly in "training" of future judges. Since there are no more provisions on the "judicial training institution", the National Assembly would have "carte blanche" to regulate its organization and functioning, as well as the ability to put it under direct control of the executive (as it is case with the existing Judicial Academy). In this way, the political authorities would in fact decide which candidates will receive "special training" at the "judicial training institution", thus essentially deciding which candidates will be elected in the future by the High Judicial Council. So the "judicial training institution" would make the first and the final selection of future judges and the High Judicial Council would be forced to "confirm" this "preliminary election" later, because the High Judicial Council would be limited to candidates who have completed that "special training". In this case judicial function would not be available to all law graduates under equal conditions, and this is not the way to ensure that lawyers with the highest level of expertise and integrity become judges.

3.3. Termination of judicial office and dismissal of judges

The Working Version of the Draft Amendments to the Constitution (Amendment IV, para. 4 and 5) tries to eliminate the lack of the current Constitution and to prescribe ("constitutionalize") the grounds for termination of judicial office and dismissal of judges. At first glance, the proposed solution is an improvement of the current constitutional text, as it fills a large constitutional gap. However, after analyzing of its content, it is clear that this is only another means by which the judiciary is placed under the control of political authorities.

The Working Version of the Draft Amendments proposes that a judicial tenure last from the moment of appointment until retirement (principle of permanent tenure), and "a judicial tenure of office shall terminate earlier upon personal request, in case of permanent disability for judicial function or in case of dismissal." Termination upon personal request and case of permanent disability for judicial function are common grounds for termination of judicial office (Amendment IV, para. 4).

When it comes to the dismissal of judges, conditions for such termination of judicial office have to be defined precisely and must exclude every form of arbitrariness. Otherwise, the position of the judiciary as an independent branch of government would be jeopardized. According to the Working Version of the Draft Amendments "a judge shall be dismissed if he/she has been sentenced of imprisonment for a criminal offense; if he/she has been convicted for an act that renders him/her unworthy for the judicial function; if he/she incompetently performs the judicial function, or in case of imposing a disciplinary measure of termination of judicial function" (Amendment IV, para. 5). The last ground for dismissal, the disciplinary measure of termination of judicial function, would be a mechanism through which every judge could be dismissed at the initiative of political authority, since the Working Version of the Draft Amendments proposes that "disciplinary proceedings and the procedure for the dismissal of a judge and a president of the court may also be initiated by the minister in charge of the judiciary" (Amendment VIII, para. 3).

In short, in addition to the fact that the executive power would essentially decide on who *will be* a judge (when enrolling candidates in the "judicial training institution"), it would have a major impact on who *will not be* a judge through the procedure for dismissal of judges, in case of imposing a disciplinary measure of termination of judicial function. Besides, it is conceivable that the law might provide minor disciplinary offense as a ground for dismissal. These mechanisms of political control of the judiciary would completely jeopardize the principle of the independence of judiciary in the Republic of Serbia.

3.4. The High Judicial Council

The composition of the High Judicial Council is undoubtedly one of the most criticized provisions of Serbian Constitution of 2006. For more than a decade, numerous objections have been made regarding the election of all its members by the National Assembly. So it was expected that constitutional framers would find a solution to make the Council truly independent. Unfortunately, the Working Version of the Draft Amendments did not meet these expectations. It prescribes (Amendment IX) that "the High Judicial Council shall be composed of ten members of whom five judges elected by their peers and five prominent lawyers elected by the National Assembly." Therefore, instead of the current norm, according to which the National Assembly chooses all the members of the High Judicial Council, the Working Version proposes a solution where the National Assembly chooses half of its members. It is clear that such solution keeps this body under strong influence of the parliament. However, in the current structure of 11 members of the High Judicial Council there are seven judges, who make up a majority of its composition, and according to the proposed solution they would make only half, and only by number, but not by influence.

So-called "prominent lawyers" do not have to be truly "prominent" among lawyers, because they become "prominent" after being elected to the parliament. In other words, the National Assembly promotes "ordinary" lawyers into "prominent" ones. Amendment IX stipulates: "The National Assembly shall elect five members of the High Judicial Council upon the proposal of the competent parliamentary committee after having conducted a public competition, by a three-fifth vote of all deputies. In case they are not all elected in this manner, the remaining deputies shall be elected within the next ten days by a five-ninth vote of all deputies, otherwise the election procedure is repeated after fifteen days, for the number of members who have not been elected." It appears that the procedure for choosing "prominent" lawyers is too complicated and does not ensure selection of truly respected members of the legal profession. Public competition is certainly not the way to come by the most distinguished lawyers, and its inclusion in the constitutional text represents an unnecessary spread of constitutional matter.

When analyzing the provisions on the president of the High Judicial Council and the decision-making process in that body, it becomes clear that the emancipation of the High Judicial Council from the influence of political authorities was not a goal of the Working Version of the Draft Amendments; the aim is obviously to preserve political influence on the judiciary, but in a hidden form. The Working Version suggests that "president of the High Judicial Council shall be elected among members who are not judges" (Amendment XI), as well as that "the High Judicial Council shall adopt decisions by the votes of at least six members of the

Council or the votes of minimum five members of the Council including the vote of the president of the High Judicial Council, at a session where at least seven members of the Council are present" (Amendment XII). Therefore, in the case of equal distribution of votes, the vote of the president of the High Judicial Council is doubled. By giving the "golden vote" to the president of the High Judicial Council, the Working Version of the Draft Amendments has given a decisive advantage to members elected by the political authority. Furthermore, it should be emphasized that such confrontation of judges and "prominent lawyers" within the High Judicial Council is an extremely bad solution, because the decisions of this body should be undisputed and passed by a qualified majority. Therefore, the proposed solution is a complete failure.

3.5. The Supreme Court in the Republic of Serbia

The Working Version of the Draft Amendments (Amendment VI) suggests that the name of highest court in the Republic of Serbia should be changed to the Supreme Court. Here, at first glance, it seems that the Working Version proposes a solid solution. However, when the Working Version is analyzed deeper, it becomes clear that it is just an illusion. Unlike the current solution, according to which "the seat of the Supreme Court of Cassation shall be in Belgrade" (Art. 143.5 of the Constitution), the Working Version has omitted to define the provision on the seat of the Supreme Court (Amendment VI). The working version also proposes the complete deletion of the norms on the types of courts (Art. 143 of the Constitution), so it is clear that the Working Version has failed in the domain of court organization.

4. CONCLUDING REMARKS

There is a discrepancy between proclaimed principles of separation of powers and independence of the judiciary in the Republic of Serbia. The laws governing the judicial authorities did not at any time support these two constitutional principles.[9] The constitutional position of the judiciary in Serbia today is such that it can hardly be regarded as independent, which is one of the basic elements of rule of law.[10] Hence, the constitutional reform should correct the mistakes made in the Constitution.

The Working Version of the Draft Amendments did not adequately solve any of five key issues related to the judiciary. Firstly, the separation of powers as one of the principles of the Constitution is not even

[9] R. Marković (2014), 517.

[10] M. Pajvančić, 15–16.

mentioned in the Working Version. Secondly, the election of judges is entrusted exclusively to the High Judicial Council, but that body is still not independent from political authorities. Additionally, a "special training" in the "judicial training institution" fully ties the hands of the High Judicial Council and completely trivializes the system of election of judges. Thirdly, the Working Version of the Draft Amendments proposes the "constitutionalization" of the legal grounds for termination of judicial office and dismissal of judges, but in a completely inappropriate manner. It envisages the "disciplinary measure of termination of judicial function" as one of the grounds, whereby disciplinary procedure can be initiated by the executive government. Fourthly, a completely changed composition of the High Judicial Council is proposed, but in its ten-member composition, the members elected by the National Assembly would prevail, which means that this body would continue to be under the decisive influence of the political authority. And fifthly, the Working Version proposes that the name of the highest court should be changed to the "Supreme Court", but it does not determine where its seat will be, and the existing provisions on the types of courts are erased and "deconstitutionalized".

In summary, the Working Version of the Draft Amendments contains too many possibilities for the influence of political authorities on the judiciary. The principle of the independence of the judiciary would undoubtedly experience a complete collapse thanks to strong control mechanisms in the hands of political authorities. Therefore, it seems that such a draft of constitutional amendments is incorrigible. The only valid and desirable solution would be to completely withdraw the Working Version of the Draft Amendments from procedure and to draft a completely new bill.

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BINDING EFFECT OF PROVISIONAL MEASURES AS AN INHERENT JUDICIAL POWER: AN EXAMPLE OF CROSS-FERTILIZATION

The inherent powers of international courts and tribunals are a necessary consequence of properly exercising judicial functions in the context of a legal system lacking a central legislative power, setting the limits of these functions through firm legal rules. The power to grant binding provisional measures is the most extreme example of international judiciary reaching for inherent powers, since this process disregards ordinary textual interpretations of judicial statutes. At the same time, this process is an example of cross-fertilization between different judicial regimes in international law, where tribunals for the law of the sea influence general international courts, which in turn influence investment and human rights tribunals. The limits to these inherent powers must provide that state consent, as the central tenet of international legal order, remains unaffected. The fact that this practice has not met with resistance from states indicates that international courts and tribunals have assumed this inherent power with propriety and logic.

Key words: *Provisional measures*. – *Inherent powers*. – *Cross-fertilization*.

1. INHERENT POWERS AND CROSS-FERTILIZATION

1.1. General Definition of Inherent Powers

The inherent powers of any court are derived from its nature.[1] The court of law must perform certain procedural functions in order to give practice directions, to prevent abuse of court proceedings, to stay

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proceedings, to correct an injustice caused by an earlier order, or to exercise control over the persons before it.[2] More specifically, observers have identified four inherent powers flowing from the judicial function: (1) the power to interpret the submissions of the parties in order to isolate the issue(s) in the case and identify the object(s) of the claim; (2) the power to determine whether the court is competent to hear a particular matter; (3) the power to determine whether the court should refrain from exercising the jurisdiction that it has; and (4) the powers to decide all issues concerning the exercising of its jurisdiction, including ruling on issues about evidence, burden of proof, due process, and questions of law relevant to the merits of the dispute.[3]

The inherent powers of a court are a necessary consequence of its established capability to settle a dispute in front of it, i.e. to claim jurisdiction over a dispute. Judicial decisions operate in the framework of legal rules that define points of reference (material law which should be interpreted and applied to particular facts of the case) and operation modalities (formal law, or rules of legal procedure). These points of reference and operation modalities are consigned to a specific field of relations that courts regulate through their judicial activity. This is called the jurisdiction of the court.

1.2. Inherent Powers of International Courts and Tribunals

Turning to the jurisdiction of international courts, we must bear in mind that this jurisdiction operates in the field of relations that are international by nature. International relations are characterised by a lack of a central legislative power, which in municipal relations sets the limits of judicial power through firm legal rules.[4] Furthermore, the subjects of international social relations are by and large states, acting as sovereign and equal entities, creating, through the exercise of their sovereign will, most of the legal rules that regulate these social relations. Two important

[1] I. H. Jacob, "The Inherent Jurisdiction of the Court", *Current Legal Problems* 23(1)/1970, 24.

[2] For more see C. Brown, *A Common Law of International Adjudication*, Oxford University Press, Oxford, 2009, 56, where the author claims that the inherent powers of international courts and tribunals actually have their origins in the practice of English courts.

[3] For a more general discussion see D. Shelton, "Form, Function, and the Powers of International Courts", *Chicago Journal of International Law* 9/2009, 545.

[4] As the ICTY Appeals Chamber noted in *Tadić* "International law, because it lacks a centralized structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralized or vested in one of them but not the others. In international law, every tribunal is a self-contained system (unless otherwise provided)," (ICTY, *Prosecutor v. Tadić*, 35 ILM 32, 39, 1996).

consequences derive from these specificities of international relations. First, the jurisdiction of international courts is inevitably consent-based. Second, the rules as points of reference and operation modalities are underdeveloped and incomplete. However, international courts still have to perform their judicial functions in order to satisfy the purpose for which they were created. Therefore, they sometimes reach for certain powers that were otherwise not expressly conferred to them as necessary for the proper fulfilment of their purpose. These are the so-called inherent jurisdictional powers.

This functional justification[5] for the existence of inherent powers finds support in judicial decisions. The International Criminal Tribunal for former Yugoslavia (ICTY) Appeals Chamber in the *Blaškić* case held that the "International Tribunal must possess the power to make all those judicial determinations that are necessary for the exercise of its primary jurisdiction."[6] This is in accordance with the interpretation of the International Court of Justice (ICJ) in its famous *Nuclear Tests* decision, where it referred to the need to safeguard its judicial function: "It should be emphasized that the Court possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand, to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute, to ensure the observance of the 'inherent limitations on the exercise of the judicial function' of the Court, and to 'maintain its judicial character' ... Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes just indicated, derives from the mere existence of the Court as a judicial organ established by the consent of states, and is conferred upon it in order that its basic judicial functions may be safeguarded."[7]

The World Trade Organization (WTO) Appellate Body also stated that "WTO panels have certain powers that are inherent in their adjudicative function."[8] The Appellate Body in *Mexico-Soft Drinks*

[5] Functional justification of inherent powers is often confused with the notion of implied powers. This is understandable since the two terms are only semantically different. Equally as inherent powers, implied powers of international courts and tribunals are considered to be conferred on the court by the terms of a constitutive instrument, but they are not made express, rather they are conferred by implication. As Lauterpacht noted, this doctrine essentially rests on the principle of effectiveness in treaty interpretation (*see* H. Lauterpacht, *The Development of International Law by the International Court*, Cambridge University Press, Cambridge 1982, 227–228).

[6] ICTY, Appeals Chamber Judgment, *Prosecutor v. Blaškić*, 110 ILR 688, 698, 1997.

[7] ICJ, *Nuclear Tests (Australia v. France),* I.C.J. Reports 253, 1974, 259–260.

[8] WTO, *Mexico – Taxes on Soft Drinks*, WT/DS308/AB/R, para 45.

appears to have preferred the application of inherent powers in relation to the *compétence de la compétence* doctrine, which enables courts to regulate their own procedure. As a pair of authors point out "The inherent powers approach appears to be a less strained interpretation of the Covered Agreements, although it still requires careful scrutiny of those agreements before applying any principle, as occurred in *Mexico*."[9]

An analogy in international law may be made in this respect to the implied powers of international organizations. In the *Reparations for Injuries Suffered in Service of the United Nations* advisory opinion, the ICJ held that the United Nations impliedly has all the powers necessary for the fulfilment of its functions.[10]

1.3. Inherent Powers and Cross-fertilization in International Law

The issue that I want to explore in the course of this article is how international courts and tribunals reach for inherent jurisdictional powers. There are many instances in which this mechanism can be observed. Aside from remedies[11] and evidence,[12] provisional measures are the most

[9] A.D. Mitchell, D. Heaton, "The Inherent Jurisdiction of WTO Tribunals: The Select Application of Public International Law Required by the Judicial Function", *Michigan Journal of International Law* 31/2010, 570–571.

[10] ICJ, *Reparations for Injuries Suffered in Service of the United Nations,* Advisory Opinion, 1949 I.C.J. Reports 174, 182.

[11] The competence of international courts and tribunals to award remedies is based on the inherent power to provide for the orderly settlement of all matters in the dispute. Therefore, these bodies have not declined their jurisdiction to award compensation, satisfaction or reparation even without express authorizations in their constitutive instruments. The Permanent Court of International Justice (PCIJ) has assumed this power already in the *Chorzow Factory* case, connecting reparation with the need to eliminate all the negative consequences produced by the wrongful act which has been adjudicated and to provide as far as possible the restitution of the state of affairs which would have existed had the wrongful act not been committed (*Case concerning the Factory at Chorzów*, Judgment, PCIJ Reports 1982, Series A, No. 17, 6). ICJ has followed this practice and ordered in various instances various forms of reparations, designed to efface all the consequences of the breach of an international legal obligation. Some arbitral tribunals have followed suit in cases where they have even encroached upon the judicial decisions of municipal courts, for example the tribunal in the *Martini* case did when it ordered the annulment of a domestic court judgment. Remedies are certainly part of inherent judicial function since the purpose of a dispute settlement procedure is to repair the wrongs that occurred with the breach of a legal rule, thus strengthening the legal order and focusing on cessation of further breaches. This was noticed as far back as in the case of *Caroline* arbitration. However, it can be observed that international courts and tribunals have carefully avoided the possibility of inherently assuming power to award punitive remedies, since this would not be in accord with the sovereign equality of states.

[12] In order to make whatever findings may be necessary for the purposes of settling a dispute, every court of law, including international one, must act upon the full knowledge of the factual background of the dispute. This knowledge is gained through the procurement of evidence. The evidential procedures in front of international courts and

extreme example of international courts and tribunals reaching for inherent powers. As will be seen in the course of the article, sometimes the interpretation of the constitutive instruments is so wide that it disregards the ordinary textual interpretation of the statute to give binding effect to provisional measure.

I would like to point out at the same time that this practice represents an example of the process of judicial cross-fertilization in international law. Philippe Sands uses this term to denote the emergence of an increasingly homogeneous body of rules applied by international courts and tribunals, relating to issues of procedure and remedies, both in cases where their constitutive instruments make provision for certain procedures and remedies, and also in cases where there are lacunae in their statutes and rules.[13] Therefore, I will show, using the example of the interpretation of the binding effect of provisional measures, how international courts and tribunals tend to follow each other's practice concerning the interpretation of inherent powers.

2. PROVISIONAL MEASURES AND THEIR BINDING QUALITY

A provisional measure of protection, also known as an *interim measure*, is a procedural mechanism, which protects the interest in preserving the status quo while a case is pending before the court. Provisional measures seek to "protect the respective rights of the parties and ensure that the final judgment is not rendered ineffective."[14] In the *Fisheries Jurisdiction* case, for example, the ICJ issued a provisional measure to prevent Iceland from immediately implementing its proposed regulations, because application of the regulations would "prejudice the rights claimed by the United Kingdom and affect the possibility of their full restoration in the event of a judgment in its favour."[15]

One can argue that to claim the possibility to grant a binding provisional measure as an inherent power of the court is necessary to

tribunals are usually under-regulated. This is a good opportunity therefore to call upon inherent jurisdictional powers so as to fill in the gaps left by the expressly transferred powers.

[13] P. Sands, "Treaty, Custom and the Cross-fertilization of International Law", *Yale Human Rights and Development Journal* 1/1998, 85.

[14] K. Oellers-Frahm, "Expanding the Competence to Issue Provisional Measures-Strengthening the International Judicial Function", *On Public Authority and Democratic Legitimation in Global Governance* (eds. A. von Bogdandy, I. Venzke)*,* 2017, 393.

[15] ICJ, *Fisheries Jurisdiction Case (United Kingdom v. Iceland),* 1972 I.C.J. Reports 12, 22.

ensure that its jurisdiction on the merits shall not be frustrated.[16] Certainly a provisional measure is an order of urgent nature and it precludes the occurrence of events that might otherwise prejudice the rights and obligations being under dispute. Therefore international courts and tribunals are willing to order them with a slightly lower threshold of subject matter relevance than is needed for decisions on merits. Notwithstanding this, I will show on several examples that international courts and tribunals have often acted *ultra vires* their competences expressly conferred on them in claiming this inherent power.

2.1. The ICJ and the Effective Interpretation of its Statute

Article 41 of the Statute of the ICJ allows the Court to "indicate", on the basis of circumstances of the case, provisional measures which ought to be taken in order to preserve respective rights of the parties.[17] This is therefore a jurisdictional power expressly conferred upon it by the member parties to its statute. Term *indicate* would suggest that provisional measures are only recommended to the parties and therefore are not binding. Article 41(2) uses an even weaker wording when it refers to "measures suggested".[18] However, the ICJ has from the very beginning of its practice regarded the power to award provisional measures as *inherently binding.*

At first it seemed from the ICJ's reasoning that the binding effect was reserved only for disputes in the field of armed conflict. In the *Armed activities in Nicaragua* case, the Court stated that: "[w]hen the situation requires that measures under [article 41] should be taken, it is incumbent

[16] As Fitzmaurice remarked, the power to indicate interim measures falls into the same category as its *compétence de la compétence*. While the latter enables the International Court to function at all, the former is intended to prevent its decisions from being stultified. Following this reasoning, Fitzmaurice suggested that

"[t]he whole logic of the jurisdiction to indicate interim measures entails that, when indicated, they are binding – for this jurisdiction is based upon the absolute necessity, when the circumstances call for it, of being able to preserve, and to avoid prejudice to, the rights of the parties, as determined by the final judgment of the Court.

To indicate special measures for that purpose, if the measures, when indicated, are not even binding (let alone enforceable), lacks all point." (G. Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Cambridge University Press, Cambridge 1986, 542).

[17] Statute of the International Court of Justice, *https://www.icj-cij.org/en/statute*, 20. August 2018, art. 41(1).

[18] According to Thirlway, Article 41 in combination with *travaux préparatoires*, suggests that provisional measures are not binding, "for if the parties to the Statute intended to endow the Court's orders with binding force, they were in position to draft the relevant provisions accordingly, which they did not do," (H. Thirlway, *The Law and Procedure of the International Court of Justice*, Oxford University Press, Oxford, 2013, 21).

on each party to take the Court's indication seriously into account, and not to direct its conduct solely by reference to what it believes to be its rights. Particularly is this so, in a situation of armed conflict where no reparation can efface the results of conduct which the Court may rule to have been contrary to international law."[19]

However, in the *LaGrand* case, the Court clarified that the binding character of provisional measures is inherent to its judicial function. This was especially important in view of the fact that Germany had argued that the measures are binding while the United States had taken the view frequently expressed by States so far that the language and history of Article 41 of the ICJ Statute and Article 94 of the Charter of the United Nations show the contrary. The Court for its part does not deal with the term "indicate". It rather puts the main emphasis on the ensuing half-sentence according to which provisional measures "ought" to be taken. From a grammatical point of view this is somewhat confusing, since the drafting history of the ICJ Statute shows the discussion around much stronger French term *ordonner* had ended in replacing this word by *indiquer*, which is a synonym for indicate. However, later on, the Court reached a much more logical conclusion that the object and purpose of the Statute is in favour of the binding force of provisional measures.

"The object and purpose of the Statute is to enable the Court to fulfill the functions provided for therein, and in particular, the basic functions of judicial settlement of international disputes by binding decisions in accordance with Article 59 of the Statute. The context in which Article 41 has to be seen within the Statute is to prevent the Court from being hampered in the exercise of its functions because the respective rights of the parties to a dispute before the Court are not preserved. It follows from the object and purpose of the Statute, as well as from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court. The contention that provisional measures indicated under Article 41 might not be binding would be contrary to the object and purpose of that Article."[20]

This "object and purpose" interpretation,[21] is in line with our conception of inherent powers as a functional necessity for the operation

[19] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Merits, judgment of 27 June 1986, I.C.J. Reports 1986, 14, 144.

[20] ICJ, *LaGrand Case (Germany v. United States of America),* 2001 I.C.J. Reports 466, 502–503. See also S. Rosenne, *The Law and Practice of the International Court 1920–2005*, Martinus Nijhoff, Brill, 34–40.

[21] The Court in reality adopted the stance prescribed by Article 33 of the 1969 Vienna Convention on the Law of Treaties which gives priority to the text more favourable

of a court of law. In the later instances of indication of provisional measures there were no disputes regarding their binding effect.

For example, in the *Temple of Preah Vihear* case, Cambodia and Thailand have been engaged in a long-standing territorial dispute over land in the vicinity of the temple of Preah Vihear, which is located near the countries' shared border. In July 2011, the ICJ, in connection with a request for interpretation of its 1962 judgment, indicated provisional measures, ordering the respondent to withdraw its forces from the territory of the disputed monastery, thus creating a demilitarized zone around the temple and steering both countries to cooperation with the help of the Association of Southeast Asian Nations (ASEAN). As one author notes: "The establishment of this demilitarized Zone, which included territory not subject to overlapping claims, was hotly contested among judges on the court, raising broader questions about the scope of the court's authority to issue provisional measures. Additionally, the court's inclusion of ASEAN as a body to facilitate resolution of the dispute fashioned the provisional measures into a channel for integrated dispute resolution, pairing adjudication with mediation."[22]

In 2011 as well, the ICJ gave its decision on provisional measures in the Nicaragua/Costa Rica dispute, agreeing to a request by Costa Rica, calling on Nicaragua to withdraw its troops or any personnel engaged in building the disputed canal, felling trees or dumping sediment from the disputed area. The ICJ further indicated that neither state should send any civilian, military or police personnel into the disputed area until the boundary dispute is resolved. An exception was made for civilian officials from Costa Rica to ensure protection of the wetlands.[23]

In one of the most recent cases, the ICJ returned to questions that occurred in *LaGrand.* On May 18, 2017, the Court granted provisional measures in the *Jadhav* case brought by India against Pakistan.[24] In line with *LaGrand*, the Court approached the request for interim relief in a death penalty case. The Court ordered Pakistan to stay the execution of Kulbhushan Jadhav, an Indian national, pending a final decision in the proceedings instituted by India. It reiterated that orders on provisional measures are binding on the parties to whom they are addressed.

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to the object and purpose of a treaty. *See more* A. Orakhelashvili, "Questions of International Judicial Jurisdiction in the LaGrand Case", *Leiden Journal of International Law* 15/2002, 116.

[22] A.C. Traviss, "Temple of Preah Vihear: Lessons on Provisional Measures", *Chicago Journal of International Law* 13(1)/2012, 12.

[23] ICJ, *Certain activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua,)* Request for indication of provisional measures, Order of 8 March 2011, I.C.J. Reports 2011, p. 6.

[24] ICJ, *Jadhav Case (India v. Pakistan),* Order on Provisional Measures (May 18, 2017), *http://www.icj-cij.org/files/case-related/168/168–20170518-ORD-01-00-EN.pdf*, 20. August 2018.

It is interesting to note that these provisional measures, if disregarded by addressees, can be enforced by the UN Security Council by virtue of functional interpretation of articles 41(2) of the Statute and 94(2) of the Charter of the United Nations. It is doubtful whether this would actually happen since the record of SC enforcement of ICJ decisions is so far non-existent.[25]

2.2. The ITLOS and Express Statutory Authority

The ICJ was not alone in assuming inherent powers concerning provisional measures. The tribunals for the law of the sea have been enabled by the provisions of the United Nations Convention for the Law of the Sea (UNCLOS)[26] to prescribe binding provisional measures, and used it extensively especially in relation to prompt releases of ships[27], or preservation of marine resources[28]. Article 290 of the UNCLOS gives the power to "prescribe" provisional measures. This difference to the ICJ's statute is further reinforced by paragraph 6 of Article 290, which states "the parties to the dispute shall comply promptly with any provisional measures prescribed under this article". The logical implication of these provisions is that the provisional measures under Article 290 of the Convention are binding on the parties to whom they are addressed. I agree partially with authors who claim that the ICJ was prompted by the ITLOS's ability to grant binding provisional measures to try to "remain an attractive forum for cases involving requests for provisional measures."[29] In addition, I regard the ICJ's unequivocal interpretation of provisional measure's effect in *LaGrand* as an example of cross-fertilization from the jurisprudence of the law of the sea to general international law jurisprudence.

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[25] See further in C. Paulson, "Compliance with Final Judgments of the International Court of Justice since 1987", *The American Journal of International Law* 98(3)/2004), 434–461, who writes that "states have not been subject to Security Council sanctions for non-compliance."

[26] United Nations Convention on the Law of the Sea of 10 December 1982.

[27] In the *MIV SAIGA* case, ITLOS ordered the respondent to "refrain from taking or enforcing any judicial or administrative measures against the ship, its Master and the other members of the crew, its owners or operators, in connection with the incidents leading to the arrest and detention of the vessel and the subsequent prosecution and conviction of the Master" (ITLOS, *MIV SAIGA (No. 2),* provisional measures, order of 11 March 1998, para 21(1) (a)).

[28] In the *Southern Bluefin Tuna* case, ITLOS noted that the parties were agreed that the stock of southern bluefin tuna was "severely depleted and [was] at its historically lowest levels and that this [was] a cause for serious biological concern", Order of 27 August 1998, para. 71.

[29] C. Romano, "The Southern Bluefin Tuna Dispute: Hints of a World to Come ... Like It or Not", *Ocean Development and International Law* 32(4)/2001, 313.

2.3. The ICSID tribunals and "Creative" Statutory Interpretation

While the previous example of the ICJ's behaviour might be widely construed as *praeter legem* jurisprudence, investment arbitration tribunals under the International Convention for Settlement of Investment Disputes (ICSID) convention have pushed this even further, one might say even *contra legem,* when they started substituting recommendatory nature of provisional measures from the Convention's text with binding nature in their decisions.

The ICSID Convention expressly authorizes a tribunal to "recommend" provisional measures. The relevant provision is Article 47: "Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party."[30] The negotiating history of the Convention also testifies that tribunals were supposed to issue only non-binding provisional measures.[31]

Despite all these express limitations, ICSID tribunals have consistently found that such measures are very much binding. The Tribunal in the *Maffezini* case, for example, felt free to claim that the word *recommend* used in Article 47 and Rule 39 of the ICSID Arbitration Rules, is equivalent to the word *order* and that "the tribunal's authority to rule on provisional measures is no less binding than that of a final award."[32] This claim has been consistently followed, as for example in the case of *Pey Casado*, where the Tribunal gave a good example of cross-fertilization practice when it pointed out the fact that Article 47 of the Convention was not an innovation but was inspired by Article 41 of the Statute of the ICJ.[33] According to the Tribunal, decisions of the ICJ and its predecessor, Permanent Court of International Justice, should therefore be taken into consideration when interpreting Article 41.[34] This decision did not escape critique from several commentators,[35] which in

[30] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966, ICSID Convention).

[31] ICSID, *History of the ICSID Convention: Document Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, ICSID Publication, 1968, Washington, D. C., vol. II, docs 132, 987.

[32] ICSID, *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2 (28 October 1999) para. 9.

[33] ICSID, *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on Provisional Measures (25 September 2001) para. 2.

[34] *Ibid*, paras. 2, 18–19, 20–6.

[35] For the overview see D.F. Donovan, "Provisional Measures in the ICJ and ICSID: Further Dialogue and Development", *Contemporary Issues in International*

turn did not prevent repeated decisions by ICSID tribunals to endorse the same view. Therefore we can speak currently of a certain *jurisprudence constante* on the binding force of provisional measures in the framework of the ICSID.[36]

2.4. Human Rights Courts as Pioneers

Although I will present them at the end of this analysis, regional human rights courts in their practice blazed the trail that other international courts and tribunals have consequently only followed. The Inter-American Court of Human Rights was the first among the international tribunals explicitly to hold that its provisional measures orders are binding and mandatory, only a year before the *LaGrand* decision. In the *Constitutional Court* case, in which judges of the Peruvian Constitutional Court had been illegally removed from office, the Inter-American Court held that the American Convention provision "makes it mandatory for the state to adopt the provisional measures ordered by this Tribunal."[37] It grounded its decision in "a basic principle of the law of international state responsibility, supported by international jurisprudence, according to which States must fulfil their conventional international obligations in good faith (*pacta sunt servanda*)."[38] In the words of one author: "The Court's pronouncement in the Constitutional Court case is unequivocal, permitting no measure of doubt as to the Court's resolution of this question."[39]

Although The European Court of Human Rights (ECtHR) in *Cruz Varas* assumed that "no assistance can be derived from general principles of international law since [...] the question whether interim measures indicated by international tribunals are binding is a controversial one and

Arbitration and Mediation: The Fordham Papers 2012 (ed. A.W. Rovine), Martinus Nijhoff, Brill 2013, 100.

[36] See *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Procedural Order No. 1 (1 July 2003) paras. 2, 4; *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Claimant's Request for Provisional Measures (17 May 2006) para. 32; *Perenco Ecuador Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*, ICSID Case No. ARB/08/6, Decision on Provisional Measures (8 May 2009) para. 66–77; *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Claimant's Request for Provisional Measures (13 December 2012) para. 120; *City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador),* ICSID Case No. ARB/06/21, Decision on Provisional Measures (9 November 2007) para. 92.

[37] IACtHR, *Constitutional Court (Peru)*, Provisional Measures, Order of Aug. 14, 2000, Inter-Am. Ct. H.R. (ser. E), 14 (2000).

[38] *Ibid*.

[39] J. M. Pasqualucci, "Interim Measures in International Human Rights: Evolution and Harmonization", *Vanderbilt Journal of Transnational Law* 38(1)/ 2005, 23.

no uniform legal rule exists."[40] After the *LaGrand* decision it retracted this and held in *Mamatkulov and Abdurasulovic v. Turkey* that states must comply with ordered provisional measures "and refrain from any act or omission that will undermine the authority and effectiveness of the final judgment."[41] Therefore, the ECtHR informed Turkey that it should delay extradition of the applicants (members of an Uzbek opposition party, arrested in Turkey pursuant to international arrest warrants charging them with homicide and a terrorist attack against the President of Uzbekistan) pending the Court's decision in the case. Although most states previously voluntarily complied with ECtHR's indications of interim measures, Turkey did not. The European Court, relying on general principles of law and citing the jurisprudence of several international courts and enforcement bodies, held that Turkey's failure to comply with the Court's indication of interim measures resulted in a breach of its obligations under the European Convention.[42] It unequivocally stated that a state party must comply with interim measures, arguing that when a state ratifies a treaty and accepts the competence or jurisdiction of the tribunal charged with the enforcement of the rights protected in the treaty, the state must comply in good faith, not only with the substantive provisions of the treaty, but also with its procedural and regulatory provisions.[43]

3. LIMITS OF THE INHERENT POWER TO GRANT BINDING PROVISIONAL MEASURES

However important for proper exercise of judicial function, inherent powers still must have limits defined by the need for maintenance of the judicial character of international courts. Although the theory known as *compétence de la compétence,* i.e. that every court can decide on its own competence to decide a dispute, was confirmed by the ICJ in the case of *Nottebohm,*[44] there still exist certain limitations to these inherent powers, whose existence is vital in order for the court to refrain from assuming the role of lawmaker and to maintain its judicial character.

The main question is whether inherent powers might move beyond state consent, as is obviously the case in instances where provisional

[40] ECtHR, *Cruz Varas v. Sweden*, Judgment of 20 March 1991, ECHR (Ser. A201) 4, 34.

[41] See ECtHR, *Mamatkulov & Abdurasulovic v. Turkey*, App. Nos. 46827/99, 46951/99 (Eur. Ct. H.R. Feb. 6, 2003), 110.

[42] *Ibid*, 111.

[43] *Ibid*, 109.

[44] With an important caveat of "the absence of agreement to contrary," see ICJ, *Nottebohm*, 1953 I.C.J. Reports 111, 119.

measures were assumed by international courts and tribunals to have binding, effect although that was not the express meaning attached to them in the constitutive instruments of these bodies. This dilemma was recently explored by ICJ Judge Cançado Trindade in his questions put to Nicaragua and Colombia in *Sovereign Rights and Maritime Spaces in the Caribbean* case. Nicaragua offered the understanding that inherent powers, irrespective from what is provided distinctly in statutes of international tribunals, ensue from their very existence, and they are all endowed with the *compétence de la compétence*, while Colombia took the view that inherent powers are exercised when necessary, in the interests of the sound administration of justice and that they do not amount to *compétence de la compétence*.[45]

Firstly, it is an established international legal principle, confirmed by the ICJ in the Northern Cameroons case, that the judiciary is not always bound to exercise its jurisdiction.[46] Although this limitation is concerned more with the general bar to the exercise international jurisdiction, I find that Brownlie's remark that reasons of judicial propriety are one example of this,[47] is especially applicable to the case of binding provisional measures. Provisional measures should be indicated only if rights otherwise claimed would be prejudiced and the possibility of their full restoration affected.

Secondly, the particular functions of each international court or tribunal will determine the scope of its inherent powers.[48] Obviously when granting binding provisional measures, all international courts and tribunals serve the same function – indication of measures that are not even binding (let alone enforceable), lacks all point.

Thirdly, when constitutive instruments do not expressly exclude the exercise of a certain procedural power, the procedures actually provided for it must not be inconsistent with the exercise of that power. This is the reason why it would be inconceivable for WTO bodies to claim powers to grant binding provisional measures. As Brown notes, "the non-availability of retrospective remedies in WTO dispute settlement might permit the inference to be drawn that WTO panels do not have an

[45] ICJ, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia),* Judgment of 17 March 2016, Separate opinion of Judge Cançado Trindade, 48, *https://www.icj-cij.org/files/case-related/155/155–20160317-JUD-01-01-EN.pdf*, 20. August 2018.

[46] ICJ, *Northern Cameroons (Cameroon v. United Kingdom)*, Judgment of 2 December 1963, 1963 I.C.J. Reports, 29.

[47] J. Crawford, *Brownlie's Principles of Public International Law*, Oxford University Press, Oxford, 2012, 457–483.

[48] P. Gaeta, "Inherent powers of International Courts and Tribunals", *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (eds. L. C. Vohrar et al), 2003, 370.

inherent power to preserve the rights of the parties during the pendency of the proceedings, for there is no right to compensation for any damage to the complainant state which occurs prior to the adoption of the report".[49]

4. CONCLUSION

In between interpreting its judicial role inherently so as to provide itself with the powers necessary to ensure the exercise of its jurisdiction on the merits, and on the other hand maintaining its judicial character and staying within the confines of its judicial function, an international court is walking a thin line. The court is not a creator of law, even in the international legal system where the central legislator is conspicuously missing. The court is an interpreter and applier of an imperfect legal framework, which needs constant improvement and concretisation to successfully perform its function: keeping international relations ordered and peaceful. In this course of activity it sometimes decides the case by reaching for powers inherent to the essence of a judicial function. This decision therefore forms a kind of a *jurisprudence constante* from which it rarely, if ever, departs.[50]

Provisional measures are an example of this jurisprudence. From the various analysed international judicial regimes, only the UNCLOS system expressly provides the power to grant binding provisional measures. The ICJ has used the rule of interpretation for treaties to bypass the not-so-clear textual provision and claim the same power for itself. As the main judicial organ of the most important international organization, it was both influenced by the practice of the tribunals for the law of the sea, and in turn influenced the investment tribunals and regional courts for human rights to follow suit, although they lacked any express competence in their constitutive instruments granting binding measures. Only the WTO system remains so far immune from the effects of this cross-fertilisation, due to its particularities in the dispute settlement mechanism.

The fact that this practice has not met with resistance from subjects of international law that have been affected by these decisions, speaks for itself about its propriety and logic.

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[49] C. Brown, 135.

[50] As the ICJ has itself indicated, the departure from such jurisprudence would occur only if the needs of international life fundamentally request it, ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Preliminary Objections, Judgment, I.C.J. Reports 2008, 412.

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JUSTIFIED EPISTEMIC AUTHORITY (IN LEGAL INTERPRETATION)

The paper analyzes one of the main influences on the results of legal interpretation – epistemic authority. An account of authority is given along with a distinction between two basic types of authority, followed by a brief explanation of practical authority. Epistemic authority and derivative epistemic authority in particular are explained, in order to propose the conditions under which the influence of epistemic authority on judicial interpretation is justified. The general conclusion of the paper is the following: A court or judge Y is rationally justified to defer to the ascription of meaning (interpretation) p to a legal text q of person X, if court or judge Y has good reasons to believe that X has more knowledge, skills, experience or training in ascribing meaning to (interpreting) q.

Key words: *Authority. – Legal interpretation. – Epistemic authority. – Practical Authority*.

1. INTRODUCTION

Legal interpretation – the ascription of meaning to legal texts – is subject to many influences. At times, the very source of law that the judge interprets dictates its own interpretation by mandating definitions of words, phrases, and specifying the usage of language in any other way. These definitions and specifications purport to tell judges how to act by mandating that a word will be ascribed a determinate meaning given by the source of law; they share the authority of the source of law in which

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they are contained. The main trait of the authority of the formal sources of law is that they give their subjects so-called protected reasons for action; they purport to guide the action of subjects by excluding all the other reasons that the subject might have (not) to act in a certain way.

However, this is not the main source of influences on legal interpretation. Despite the recent proliferation of norms that define the key terms in statutes, legislative bodies are often too engaged in political and strategic reasoning to include extensive regulation of intricacies of judicial interpretation. Legal scholarship and judicial practice have traditionally exercised significant influence on legal interpretation of judges. Today, they are supplemented by judicial dialogue between national and international courts. These sources of influence are quite different from the influence that formal sources of law have on legal interpretation. They do not mandate an action and by themselves they have no practical authority. Still, they can and often do have a specific kind of authority – authority over belief.

Scientific work done by a legal expert in intellectual property, a judgement of a court dealing for a long time with issues of political corruption, the practice of courts from other jurisdictions that is much more elaborate than the domestic practice, at times greatly influence judicial interpretations by giving judges reason to believe that one interpretation is the right one, a better one, or even the only reasonable one. The authority exercised by these persons and institutions is called *epistemic authority*.

In order to explain these two types of authoritative influences on legal interpretation I will (a) give an exposition of authority and distinguish between its two basic types, (b) give a brief explanation of practical authority, (c) explain epistemic authority, and finally, I will (d) propose the conditions under which the influence of epistemic authority on judicial interpretation is justified.

2. AUTHORITY

According to Joseph Raz, since authority has a bearing on what we ought to do, or what we ought to believe, the best account of authority should be able to explain its role in our practical reasoning.[1] From the perspective of practical reasoning, authority can be defined as a property of entity *X* that enables (mostly verbal) behaviors of *X* to act as reasons[2]

[1] J. Raz, *The Authority of Law*, Oxford University Press, New York 1979, 10.

[2] Reasons being facts that "count in favor" of doing or believing something A. Marmor, *Social Conventions*, Princeton University Press, Princeton, New Jersey 2009, 5.

for person *Y*.[3] We say that *X* has authority over *Y* if *X* is able, with dominantly verbal utterances, to change *Y*'s reasons for doing or believing something.[4] Authority is, then, the ability to give rise to new reasons for action or belief or the ability to change reasons for action or belief.[5]

In one plausible account shared by a large number of contemporary writers there is at least one necessary feature to authority – *content independence*.[6] A proclamation or directive is authoritative not in light of its content, but in light of its source.[7] We are inclined to say that something or someone is an authority if its expression is able to change our reasons for acting or believing, not in virtue of the content of the expression but in virtue of the source of the expression.[8] We could therefore state that *X* has authority over *Y* if *X*'s utterance of *p* gives *Y* new reasons or changes his existing reasons for acting or believing, not in virtue of the content of *p,* but in virtue of *p* being uttered by *X*.

3. KINDS OF AUTHORITY

The distinction between various types of reasons in our practical reasoning, like reasons for emotions, attitudes, norms and institutions and so on, can in principle be condensed to two fundamental types – *reasons for action* and *reasons for belief*.[9] This leads us to the mentioned distinction, routinely made in contemporary epistemology and jurisprudence[10] – the distinction between epistemic (sometimes called theoretical) and practical authority.[11] As Raz points out, "there are

[3] J. Raz (1979), 12.

[4] *Ibid.*, 19.

[5] *Ibid.*, 16.

[6] See K.E. Himma, "Practical Authority", forthcoming in *Handbook of Legal Reasoning and Legal Argumentation* (eds. G. Bongiovanni *et al.*), Springer-Verlag, 2018, *https://ssrn.com/abstract=2957215*, last visited 23 April 2017.

[7] F. Schauer, "Authority and Authorities", *Virginia Law Review* 94/2008, 1935.

[8] An important difference that J. Raz makes in this regard is the difference between having authority and being an authority. I could have the authority to use the scanner in my Institute without being an authority for anyone. The central case of authority for J. Raz is the authority over persons (J. Raz (1979), 20–21).

[9] J. Raz, *Practical Reason and Norms*, Oxford University Press, Oxford 1999[3], 15.

[10] H. M. Hurd, *Moral Combat*, Cambridge University Press, Cambridge 1999, 62–63.

[11] Hurd takes epistemic authority to be a general term that includes advisory authority, influential authority and theoretical authority *ibid*., 63. Richard Foley tends to call this kind of authority intellectual authority (R. Foley, *Intellectual Trust in Oneself and Others*, Cambridge University Press, Cambridge 2001, 83). J. Raz is inclined to call it

practical authorities whose authority is based entirely on their being theoretical authorities."[12] According to him, theoretical and practical reasons have "the same basic structure", but that the main difference is that "they provide reasons for different things."[13] There is at least one core difference between epistemic and practical authority — the two kinds of authority give reasons for different things. While practical authority is thought of as giving reasons for action, epistemic authority is understood as giving reasons for belief.[14]

4. EPISTEMIC AUTHORITY

We are fundamentally social beings when it comes to acquiring beliefs and knowledge. We are, it seems, inescapably epistemically dependent in a degree that even warrants the question about whether we are able to have any knowledge if we exclude what others have taught us.[15] Since there can't be any real debate about whether our beliefs are, as a contingent matter of fact, influenced by others, the main question is whether we are justified in holding beliefs in virtue of someone else having those same beliefs and sharing them with us. To explain epistemic authority is to do the same thing that Raz expects from an explanation of

theoretical authority (J. Raz (1979), 8; J. Raz, *The Morality of Freedom*, Oxford University Press, Oxford 1988, 29), and L.T. Zagzebski uses the term epistemic authority (L.T. Zagzebski, *Epistemic Authority: A Theory of Trust, Authority, and Autonomy in Belief,* Oxford University Press, Oxford 2012). The possible terminological confusions and subsequent or antecedent conceptual confusions will be made clearer in the remainder of the paper.

[12] J. Raz (1979), 8; J. Raz (1988), 28–29.

[13] *Ibid.*, 53. J. Raz, *Ethics in the Public Domain*, Oxford University Press, Oxford 1995, 212. One kind of authority that is often mentioned but won't be a topic in this paper is called persuasive authority. H. P. Glenu notes in a 1987 paper that the concept lacks formal definition (H. P. Glenu, "Persuasive Authority", *McGill Law Journal* 32 (2)2/1987, 264), but still states metaphorically that it is "the authority which attracts adherence as opposed to obliging it" (*ibid.*, 263).

[14] Even though there is significant agreement in legal literature on this subject, the exact differences between theoretical and practical authority are not uncontroversial. H. Hurd believes that all kinds of epistemic authority function evidentially. They give us "a reason to think that there are other reasons (...) to act as recommended" H.M. Hurd, 63. What follows is that the utterances of an epistemic authority are content dependent reasons for action, or, more rigorously formulated: "X has epistemic authority for Y if and only if, as a result of X's stating that Y ought to do act A, Y has a reason to believe that the balance of (content-dependent) reasons dictates that Y ought to do A." On this account, an utterance of an epistemic authority merely makes more probable that we should act accordingly, since it only points us to other antecedently existing reasons to act in a certain manner.

[15] E. Fricker, "Second-Hand Knowledge", *Philosophy and Phenomenological Research* LXXIII(3)/2006, 592.

authority in general – namely, to explain the role of authority in our inferences explained.[16]

Despite the fact that every belief has a social aspect, it is thought that the social aspects of belief formation cannot answer the question of whether our beliefs are reliable or justified. Social aspects of knowledge are unable to tell us if the practice of forming our beliefs (doxastic practice) is reliable (if it has verific propensity).[17] Doxastic practices that are reliable produce evidence, and the evidence in turn gives justified reasons for belief. The fact that another person and a group of persons have a shared opinion are not in themselves evidence.[18] It thus seems that the opinion of another person or a group of persons can never substitute a belief-forming practice with verific propensity. If this is so, the most that can be stated regarding beliefs formed by means of epistemic authority is: *Y* sometimes can have good reasons to believe that *X* has good evidential reasons to believe *p*. On this account, the knowledge that Y gains from an utterance of another person, *X*, is always secondhand, since it implies that *Y* has a commitment to believe that *X* is expressing knowledge,[19] which entails that the knowledge transmitted by another person that we trust can, or could be checked, verified in some other way that doesn't imply utterances of other persons and "say-so" in general.[20]

Some distinctions are necessary. When we talk about any kind of authority, we have in mind something more than sheer influence. Another person could spell out for me the procedure to arrive to a belief, and the belief itself in which case I could say that he influenced me to undertake the procedure that leads me to a belief, but the procedure and the belief are the result of my own faculties. The issue of authority is posed when I trust the other person's opinion either because it comes from another person, or because there is some other reason to trust the opinion of the other person.[21] Epistemic authority can thus be twofold: fundamental and derivative. *X* has fundamental epistemic authority over *Y* if *p* is believed by *Y* in virtue of it being uttered/believed by *X*. *X* has derivative epistemic authority over *Y* if *p* is believed by *Y* in virtue of other independent reasons for thinking that *X* is reliable when uttering something. In the case of fundamental authority, we believe *p* because it was uttered/

[16] J. Raz (1979), 10.

[17] W. P. Alston, "Belief-Forming Practices and the Social", *Socializing Epistemology* (ed. F. Schmitt), Rowman & Littlefield Publishers, Lanham, Maryland 1994, 33–34.

[18] J. Hardwig, "Epistemic Dependence", *The Journal of Philosophy* 82(7)/1985, 337.

[19] E. Fricker (2006a), 592.

[20] *Ibid.*, 608.

[21] R. Foley, "Egoism in Epistemology", *Socializing Epistemology* (ed. F. Schmitt), Littlefield Publishers, Lanham, Maryland 1994, 53.

believed (excluding cases of insincerity) by *X*; in the case of derivative authority we believe *p* because of some properties of *X* that make us believe that *X* is reliable in claiming *p*.[22]

5. DERIVATIVE EPISTEMIC AUTHORITY

We tend to treat the opinions of other persons that possess relevant knowledge or skills as reasons for belief.[23] The most common way of thinking about an epistemic authority is to view it as a kind of expertise: we say that a practicing lawyer has epistemic authority in the domain of litigation in civil or criminal suites, or that a medical doctor has epistemic authority when it comes to common illnesses.[24] The word "expert" should be understood as relative to the person that believes something in virtue of the expert telling her that it's so. In this thin definition, an expert is simply a person that is epistemically in a better position than the other person to "have, or make a judgement to form a conscious belief" regarding something.[25] It seems uncontroversial enough that it justified to confer derivative epistemic authority to an MD when it comes to your health or to a lawyer when it comes to court proceedings. If I have no idea what is causing the pain in my abdomen, the only reasonable thing to do is to defer to a medical doctor; if I'm completely oblivious about the functioning of civil litigation in Serbia (in most cases), it is perfectly reasonable for me to confer derivative epistemic authority in these matters to my lawyer. Still, justifying the deference to epistemic authorities will depend on the knowledge that we possess about the issue at hand. From a justificatory standpoint, we can distinguish at least three types of situations:

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[22] *Ibid.*, 54.

[23] From the perspective of contemporary epistemology and social epistemology epistemic authority could be treated as a subsection of testimony and testimonials-based belief. This would however depend on the definition of testimonial belief. One of the prominent positions on testimony is the claim by Elizabeth Fricker that testimony is connected with telling in general see: J. Lackey, "Introduction", *The Epistemology of Testimony* (eds. J. Lackey, E. Sosa), Oxford University Press, Oxford 2006, 2.

[24] H.G. Gadamer devotes most of his discussion about authority to derivative epistemic authority and writes: "It is primarily persons that have authority; but the authority of persons is ultimately based not on the subjection and abdication of reason but on an act of acknowledgement and knowledge—the knowledge, namely, that the other is superior to oneself in judgment and insight and that for this reason his judgment takes precedence—i.e., it has priority over one's own" H.-G. Gadamer, *Truth and Method* (translated by J. Weinsheimer, D. G. Marshall), Continuum, London – New York 2006, 281.

[25] E. Fricker, "Testimony and Epistemic Autonomy", *The Epistemology of Testimony* (eds. J. Lackey, E. Sosa), Oxford University Press, Oxford 2006, 233.

(1) When *Y* has no opinion about *p*, it is rational for *Y* to defer to the opinion of *X* if there are reasons to think that *X* is more knowledgeable about *p* than *Y*. *Y* "has good reasons to believe that" *X* "has good reasons to believe" *p*.[26] Consequently, *Y* is justified in holding the opinion that *X* holds. In situations in which we have no knowledge whatsoever about an issue, it can be rational to defer to opinions of other persons about the issue, even if we don't have particularly good grounds to believe that they are particularly knowledgeable on the issue. If we have good reasons to believe that another person is more knowledgeable about the issue than the first person we trusted, we can justifiably defer to the other person's opinion. This is in line with our intuitions and our practices of forming beliefs. A news report on an accident that we haven't witnessed will lead us to form a provisional but justified belief about the information provided to us by the person reporting about the incident. Since we don't have any knowledge about the situation it is rational to give *prima facie* derivative epistemic authority to the person reporting. A testimonial of eyewitnesses that might contradict the statements of the reporter will justifiably make us change our opinion about the matter, since it is reasonable to assume that the eyewitnesses have more knowledge about the accident than the reporter. Likewise, we have reasons for accepting the authority of an MD or a lawyer since we rarely have consciously formed opinions about matters in which we have little knowledge, skills or training.

(2) The reliance on the opinions of others is often not justified on the grounds that I can't get some beliefs directly at all, but on the grounds that I can get them directly but in a less trustworthy manner.[27] When *Y* has beliefs about *p*, it can still be rational for him to substitute some or all of his beliefs about *p* for beliefs about *p* that *X* holds. In an example borrowed from Elizabet Fricker, my shortsightedness can make a person that I'm with an "expert" in matters that require good vision.[28] If we have formed justified opinions about certain matters about our health or about the legal system, one could say that, in principle, we would be able to arrive to a justified belief by finding the evidence ourselves. The reasons that we have for believing the opinion of somebody else may well be derivative, but they can't simply be substituted for personal examined reasons. Even if one conducts the same inquiry that the MD or a lawyer conducted before giving a diagnosis or advice, he would still lack the training and experience required for evaluating the results of the inquiry. Conversely, a person determined to go to law school in order to gain knowledge about a case might lack the means to conduct the inquiry necessary to reach an evidence-based belief. So, having our own

[26] J. Hardwig, 338.

[27] L.T. Zagzebski, 12.

[28] E. Fricker (2006b), 234.

independently formed opinions that are in conflict with the opinions of others, doesn't by itself delegitimize conferring epistemic authority to others on various grounds, the main one being the fact that the other person has more knowledge, training, has devoted more time to investigating the issue or has just put more effort into it.[29] In this stronger sense, an expert is a person with "specific differentiating characteristics" related to her skills, training or knowledge, be it derived from "genetic endowment" or "special training and education."[30]

In both (1) and (2) a problem arises from the fact that if we are not able to judge the merit of an expert opinion, I'm, in most cases, not able to judge on their expertise. Deference to the opinion of another person seems rationally justified as a matter of derivative authority in both of those cases, even if the person who is trusted is only contingently an expert. In these cases, nothing prevents us from shifting from the opinions of others to personal examined opinions if we manage to gain the skill, training or knowledge required to form a belief for ourselves. Even if we can, at times, rely on our own knowledge and expertise in order to ascertain whether a person is really an expert, most of the time we are rationally bound to defer to either other persons who have more knowledge about experts in the field or to other experts, lists of experts etc. This issue leads us to the third possibility to explore in relation to epistemic authority.

3) While it may be that ordinarily epistemic or theoretical authority is associated with an expert in relation to a layman, it would be very wrong to think that this is the only relation of epistemic authority. The situation in which we have epistemic peers seems to be completely devoid of relations of epistemic authority. But ideal peer disagreement, in which two persons are experts in the exact same domain, is more of an exception than a rule. An example from the domain of legal interpretation would be the example of a judge compared to a scholar. Both could be very proficient in law in general terms, but it could still be justified for the judge to defer to the scholar. The scholar is usually highly specialized in a particular field, and the judge is often a "generalist jurist" that doesn't know the nuances of a particular field of study. In the sense of knowledge about the relevant subject matter the judge and the scholar are in fact not peers, even though their relative position makes it seem so. The derivative epistemic authority of the scholar is in this case justified by the fact that the knowledge of the judge is not detailed or granular enough in a specific field of research that the scholar has devoted his career to studying.

4) Finally, we can easily imagine a situation in which a layman isn't sure about which expert opinion to follow; indeed, we don't even

[29] R. Foley (1994), 65.

[30] E. Fricker (2006b), 235.

have to imagine the situation in which the opinions of experts in a certain field contradict one another.[31] From a layman's perspective, the disagreement of experts doesn't change much in regards of the basic rationality of him deferring to an expert opinion. Even if the opinion of an expert is not as good as the opinion of another expert, it is still rationally justified to defer to the lesser opinion and to grant the lesser expert derivative epistemic authority. The option might as well be a result of contingent factors like the availability of experts, the general quality of experts in a certain area, and so forth. But the contingent matter of the quality of expert opinion doesn't change the main thesis: namely, that derivative epistemic authority is justified under those conditions.

6. GENERAL CONCLUSIONS ABOUT THE NATURE OF EPISTEMIC AUTHORITY

Having in mind the analysis of epistemic authority, we can identify some of its basic features. Utterances of an epistemic authority do not require compliance but are believed by subjects to the authority in question.[32] In order for someone or something to have epistemic authority its utterances have to be able to give *content-independent reasons for belief*. This is a trait that epistemic authority conceptually shares with practical authority. There are, however, important differences between the two.

Primarily, it is rare and difficult, if not impossible, to command a belief.[33] Epistemic authorities do not give reasons by giving orders, and the utterances of epistemic authorities are not intended as exclusionary reasons for belief in the same way in which utterances of practical authorities claim to give exclusionary reasons for action.[34] Practical

[31] K. Lehrer, "Social Information", *The Monist* 60(4)/1977, 476.

[32] L. Green, *The Authority of the State*, Clarendon Press, Oxford 1988, 29.

[33] At least not in a literal fashion. Robert Nozick though claims that we can be coerced to believe, at least in philosophy: N. Robert. *Philosophical Explanations*, Belknap Press, 1981, 4; L.T. Zagzebski, 24.

[34] J. Raz claims that theoretical advice preempts the other reasons for belief that one would otherwise have, and in this way, it resembles practical authority (J. Raz, *Between Authority and Interpretation*, Oxford University Press 2009, Oxford 155). L.T. Zagzebski defends the claim that epistemic authority gives exclusionary reasons for action by relying on Raz's analysis of practical authority. The preemption thesis can be reformulated to include epistemic authorities in this way: "The fact that the authority has a belief p is a reason for me to believe p that replaces my other reasons relevant to believing p and is not simply added to them" (L. T. Zagzebski, 107). Most of the discussions are based on the supposition that epistemic authority is in fact practical authority based on expertise. This is the case with discussions of S. Darwall and Hurd (S. Darwall, "Authority and Reasons: Exclusionary and Second-Personal", *Ethics* 120(2)/2010,

authority involves "power, whether it be the power to command another or act for him."[35] Since epistemic authority is not a normative power in the Razian sense and in this way, it is *powerless*. The right to issue deontic propositions and the duties of other persons to obey those propositions are not based on his superior knowledge, because "there are no epistemic laws, epistemic courts, or epistemic punishments" that would enforce compliance with an utterance of an epistemic authority.[36]

Another important feature of epistemic authority is that it exists if Y explicitly or tacitly *acknowledges* that authority of X.[37] Richard T. De George gives interesting examples of acknowledgement to prove a point that "no one can be forced to acknowledge another as an epistemic authority." Faculty members may well legitimately ask of someone else to consider them an epistemic authority, but they cannot one force someone else to consider them an epistemic authority.[38]

Epistemic authority is *substitutional* – "its purpose is to substitute the knowledge of one person in a certain field for the lack of knowledge of another."[39] It should be noted that the former analysis shows that while substitution is possible in principle, it is often unattainable. John Hardwig is certainly right when he emphasizes the importance of our time constraints and constraints in talents, resources and knowledge for personal examining every belief that we hold.

Finally, the relations of epistemic authority are often *formalized or institutionalized* within a society. De George stresses that an epistemic authority is formally produced in a society by being certified as such by peers; he then acts as an epistemic authority for subjects of epistemic authority only if accepted by them.[40]

7. CONCLUSION: WHEN IS IT JUSTIFIED TO DEFER TO EPISTEMIC AUTHORITIES IN LEGAL INTERPRETATION?

One crucial question still remains open. Judicial interpretation is considered to be an activity that is done independently by the judge,

274; H. M. Hurd. In this vein Darwall for example writes that expertise alone doesn't give anyone "the standing to issue authoritative directives that create preemptive reasons".

35 R. T. De George, "The Function and Limits of Epistemic Authority", *Southern Journal of Philosophy* 8(2)/1970, 199.

36 L. T. Zagzebski, 138.

37 R. T. De George, 200.

38 *Ibid*., 203.

39 *Ibid.*, 201. *See also*: C. Jäger, "Epistemic Authority, Preemptive Reasons, and Understanding", *Episteme* 13(2)/2016, 170.

40 *Ibid.*, 202.

subject only to the authority of the sources of law. Can it then be justified to defer to the interpretations of other persons in ascribing meaning to legal texts or is every instance of reliance on the opinions of others in interpreting law illegitimate for a judge in contemporary political systems characterized by the separation of powers. The empirical question of the amount of deference to epistemic authorities cannot be tackled in this paper, and it is still to be researched by sociology and psychology of law. Still, insofar as there can be greater knowledge, expertise and experience in matters of interpreting legal texts, it seems possible that a general formula of legitimate epistemic authority can be put forward. In the same way in which it would be unjustified to follow one's own hunch when it comes to, for example, the interpretation of quantum mechanics, or the evolution of a species of bird, or, for that matter, the reliability of DNA evidence in a criminal proceeding, it would be unjustified to trust, without exception, one's own faculties when it comes to interpreting legal texts. The reasonableness of the deference to an epistemic authority would be dependent on certain qualities of the source of authority, namely his knowledge, skills, experience or training in the interpretation of certain legal texts, or all of these qualities together. A tentative formula encapsulating the justification conditions of epistemic authority would then be:

> Court or judge *Y* is rationally justified to defer to the ascription of meaning (interpretation) *p* to a legal text *q* of person *X*, if court or judge *Y* has good reasons to believe that *X* has more knowledge, skills, experience or training in ascribing meaning to (interpreting) *q*.

When a judge faces something that he perceives as an interpretative problem, the activity of ascribing meaning to the legal text is, in many ways, dependent on various epistemic authorities. In much the same way, it can be reasonable to a layman to defer to an opinion of an expert, it is often justified for an official to defer to an opinion of another official, an institution or an opinion of a prominent scholar.[41]

[41] C. R. Sunstein and A. Vermeule show that some of the contemporary doctrines of legal interpretation heavily premise unsubstantiated trust in institutional and epistemic capacities of judges: "It is reasonable to believe that judges are not well-equipped to engage in theoretically ambitious tasks" C.R. Sunstein, A. Vermeule, "Interpretation and Institutions", *SSRN Electronic Journal* 29/2002, *http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=231075*, last visited 28 July 2018, 40–43.

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THE "NEW" PATERNALISM IN CONSUMER CREDIT REGULATION: WHEN, WHY, AND HOW?

The paper provides a critical assessment of a new approach to consumer credit regulation called the "new" paternalism, the aim of which is to protect consumers from various biases identified within behavioral economics, while at the same time preserving the consumer's freedom of choice. Consumer credit contracts, in particular credit cards, have evolved into an ever-growing complexity of contract terms, with a tendency to accelerate the short-term benefits and postpone the long-term costs for consumers arising out of the contract. Since both rational-choice and behavioral economics theory provide a rationale for such a contractual design, the first part of the paper confronts their predictions to argue that they are to some extent complementary and that a consumer credit regulation should not strictly align with one or the other, but rather reconcile them. The paper then discusses in more detail the features and tools of the regulatory approach of the "new" paternalism, applicable more broadly to consumer protection and encompassing three closely related ideas of libertarian, asymmetrical and weak paternalism. It also compares the theoretical foundations of the "new" paternalism to the "old" paternalism, on the one hand, which implies protecting consumers by effectively making choices instead of them, and "laissez-faire" approach, on the other hand, which entirely neglects consumers' behavioral biases. Finally, the paper addresses the issue of which regulatory tools of the new paternalism are pertinent to the credit card market, and further considers their expected effectiveness and limitations.

Key words: *Behavioral paternalism. – Consumer credit. – Credit cards. – Contract efficiency. – Behavioral law and economics.*

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> "*Economists will and should be ignored if we continue to insist that it is axiomatic that constantly trading stocks or accumulating consumer debt or becoming a heroin addict must be optimal for the people doing these things merely because they have chosen to do it.*"[1]
>
> Ted O'Donoghue and Matthew Rabin

1. INTRODUCTION

The idea of the new paternalism has emerged with the aim of providing new regulatory tools that would address the issue of behavioral biases in consumer markets, which steer consumers away from welfare-enhancing choices. Findings in behavioral economics have demonstrated that the behavior of economic agents often deviates from the predictions of the rational choice model with detrimental consequences on consumer welfare. Consumers who are prone to behavioral biases are not able to accurately estimate the costs and benefits arising out of the contract and thus are in need of some sort of regulatory guidance as to how to satisfy their preferences. Consumer credit is one of the areas where these issues are recurring, especially with respect to the use of credit cards. The aim of this paper is to critically examine to what extent the solutions offered within the regulatory approach of the new paternalism should be a basis for rethinking consumer protection in this market.

The remainder of the paper proceeds as follows. Section 2 describes the most common features of consumer credit contracts, with special emphasis on credit cards, and reviews the existing theoretical explanations within two competing frameworks of rational choice and behavioral economics. Section 3 provides an overview of recent regulatory trends in consumer protection regulation, developed under the theoretical umbrella of the new paternalism. It also discusses the advantages of the new paternalism over the two alternative regulatory approaches: the "strong" paternalism and "laisser-faire". Section 4 considers the possibility of applying the regulatory techniques of the new paternalism to credit cards and further discusses their expected effectiveness and limitations. Section 5 concludes the paper.

[1] T. O'Donoghue, M. Rabin, "Studying Optimal Paternalism, Illustrated by a Model of Sin Taxes", *American Economic Review* 93(2)/2003, 186.

2. CONSUMER CREDIT CONTRACTS: WHEN SHOULD BORROWERS BE PROTECTED FROM THEMSELVES?

Consumer credit (consumer debt) entails extending loans to individuals, with the purpose of purchasing "commodities or services for personal consumption or to refinance debts incurred for such purposes."[2] In consumer contract law more broadly, the term *consumers* usually entails "individuals transacting in their personal capacity – outside the course of their trade, business, or profession."[3] Consumer credit is most often associated with credit provided through the use of credit cards, although it also includes other types of consumer debt, such as lines of credit and certain personal loans.[4] Issuers of consumer credit can be merchants of goods and services bought using the line of credit, or more often the financial institutions that act as financial intermediaries. Most consumer loans represent unsecured debt which is either used for a specific purpose and repaid in installments (e.g. for purchasing a car, furniture or larger appliances), or general purpose non-revolving or revolving credit, which enables the consumer to use the funds repeatedly within the approved limit amount. An installment (non-revolving) credit also implies that both the amount borrowed and the repayment plan are specified at the time of the approval of the loan, while in the case of revolving credit the consumers are able to choose the repayment dynamics as long as they make a minimum monthly payment. Nevertheless, slow repayments increase the outstanding balance on which interest is paid, ultimately leading to greater borrowing costs.

From the economic perspective, different types of consumer credit share a common purpose of allowing consumers to smooth their consumption over time.[5] This is consistent with the insight that people's earnings usually follow a common cycle. They are relatively low at the

[2] *https://www.britannica.com/topic/consumer-credit*, last visited 5 October 2018.

[3] J. Armour *et al*., *Principles of Financial Regulation*, Oxford University Press, New York 2016, 205. The question as to who can be treated as a consumer in different regulatory contexts and different jurisdictions is beyond the scope of this paper. For the definition of a consumer, in the context of financial services in the Republic of Serbia, see Article 9(2) of the Law on the Protection of Financial Services Consumers, *Official Gazette of the Republic of Serbia*, No. 36/2011 and 139/2014. Similar definitions can be found in EU law. *See* Article 3(a) of the Directive 2008/48/EC [2008] OJ L133/66 on Credit Agreements for Consumers and Article 2(1) of the Directive 2011/83/EU on Consumer Rights [2011] OJ L304/64.

[4] Mortgage (loan) contracts, although concluded by individuals acting in their personal capacity with the aim of acquiring a real estate, are usually excluded from the definition of consumer credit given that they also have an investment component.

[5] Consumption smoothing stems from the permanent income hypothesis, which implies that individual consumption at a given point in time is determined not just by the current income but also by the expected future income. *See* M. Friedman, *A Theory of the Consumption Function*, Princeton University Press, Princeton 1957, 20–37.

early stage of one's career and not sufficient to satisfy consumption needs, gradually increasing over time, only to reach a stage where there is a surplus that one can save and invest, to eventually stagnate or decrease in retirement. Without borrowing, people would live much better in the middle stage of their earnings cycle than in the young age.[6] Thus, consumer credit allows people to "borrow from future good times, to help make it through current tough times."[7] Moreover, consumer credit helps people overcome unanticipated drops in income, such as due to job loss or unforeseeable expenses.[8]

While, at least in principle, the consumer credit is expected to increase long-term consumer welfare, extending credit to consumers entails a number of risks for the lenders, stemming from adverse selection and moral hazard problems, against which they take precautionary measures. The most obvious such measure is adjusting the interest rate for the additional default risk assumed. From a historical perspective, as tools for screening for borrowers' risk gradually advanced and heterogeneous consumers' needs became more pronounced, financial products, including consumer credit, gradually became much more sophisticated.[9] The refinement of consumer credit went in two main directions: increasing complexity of products and product attributes, primarily fees and interest rates, and the specific intertemporal distribution of benefits and costs over the lifespan of the contract, which assumes significant cost deferral.[10] These changes became particularly apparent with respect to credit card borrowing, which accounts for the greatest share of consumer borrowing.[11] Thus, the analysis will focus on consumer credit available through the use of credit cards.

Credit cards serve as a tool for extending credit on a revolving basis.[12] Their widespread use, which gained prominence in the 1990s, is

[6] D. S. Evans, J. D. Wright, "The Effect of the Consumer Financial Protection Agency Act of 2009 on Consumer Credit", *Loy. Consumer L. Rev.* 22/2009, 283.

[7] P. M. Skiba, "Regulation of Payday Loans: Misguided", *Wash. & Lee L. Rev.* 69/2012, 1026.

[8] D. S. Evans, J. D. Wright, "The Effect of the Consumer Financial Protection Agency Act of 2009 on Consumer Credit", *Loy. Consumer L. Rev.* 22/2009, 284.

[9] Innovations in the sphere of risk analysis lead to a democratization of borrowing in the 1980s by significantly reducing liquidity constraints. For an overview, see D.S. Evans, J.D. Wright, 288–308.

[10] O. Bar-Gill, *Seduction by Contract: Law, Economics, and Psychology in Consumer Markets*, Oxford University Press, Oxford 2012, 52.

[11] On retail financial services in the EU, see "Financial Products and Services", *Special Eurobarometer 446 – April 2016, https://data.europa.eu/euodp/data/dataset/S2108_85_1_446_ENG*, last visited 25 October, 2018.

[12] Credit cards are also used as a quick and efficient method of payment. While certain cardholders use them for payment purposes only, the transaction role of cards remains outside the scope of this paper.

a result of two convenient product features: "all-purpose feature" and "credit feature".[13] The former allows its users to acquire goods and services from various merchants who accept this payment method, while the latter enables them to postpone the payment of the outstanding balance. The simplest credit card contract has to specify the fees for issuing the card and subsequent maintaining services, the borrowing limit, the minimum monthly payment, and the annual interest rate paid on the outstanding balance.[14]

However, the expansion of credit card borrowing led to the growing complexity of the contract terms. Simple issuing and maintenance fees were supplemented by a number of additional fees, which can be divided into two categories: service fees and penalty fees.[15] The aggregate measure of these fees is not necessarily indicative of the borrowing costs for an individual, given that not everyone relies on the same services. Moreover, some fees are contingent on the fulfillment of certain conditions, e.g. in the case of late payment fees. The size of the fees can vary as well, depending on the amount of the outstanding balance.[16] Interest rates had a similar trend: in addition to the annual interest rate, which itself can follow the movement of an index, such as the consumer price index (CPI), introductory (teaser) rates and default rates, among others, have become very common.[17] Finally, the complexity lies in the way balances are calculated, which has created further uncertainty regarding the total amount of interest paid. Credit card contracts sometimes include a number of auxiliary benefits for consumers, such as loyalty rewards and discounts from partner vendors, which the consumer should weight against the abovementioned costs.

In addition to increasing complexity, credit card contracts often imply a specific intertemporal distribution of benefits and costs stemming from the contract. Namely, the benefits are concentrated in the present time and the costs are deferred to the future. Although deferred costs represent the very essence of borrowing, this contract feature is

[13] O. Bar-Gill (2012), 58.

[14] The credit card industry operates at two levels: the brand level, which implies competition between different credit card brand owners, and the issuing level, which implies competition between financial institutions that contract directly with consumers. The brand level of the credit card industry, and consequently, the contracts between brand card owners and financial institutions, remain outside the scope of this paper.

[15] These fees can include the following: "application fees, set-up fees, annual fees, membership fees, participation fees, cash-advance fees, balance transfer fees, foreign-currency-conversion fees, over-the-limit fees, expedited-payment or phone-payment fees, no-activity fees, fees for stop payment requests, fees for statement copies, fees for replacement cards, and wire-transfer fees." O. Bar-Gill (2012), 66.

[16] *Ibid*.

[17] *Ibid*.

exacerbated through contract terms that are less salient to consumers, and which are contingent on a set of future circumstances. For instance, it is very common to charge a very low or zero introductory (teaser) interest rate, succeeded by a high annual rate following the expiration of the introductory period. In the same vein, cards issuers often charge no annual or transaction fees, even though there are fixed costs associated with credit card services, but "collect sizeable fees from consumers who either run late on their monthly payments or exceed the credit limit."[18]

Economic theory offers two distinct explanations as to why these developments occurred. One explanation can be found within the rational choice model of consumer behavior, which relies on the premise that, in competitive markets, any kind of product differentiation reflects distinct cost structures or heterogeneous consumer preferences.[19] The other explanation stems from behavioral economics, which acknowledges that individuals are not perfect maximizers of their utility functions, and that complex cost-deferring contract terms are used to exploit rather than to empower consumer choice. While not mutually exclusive in principle, if one allows for the existence of both rational and boundedly-rational borrowers, the two competing theories raise different concerns regarding credit card regulation, which is further discussed below.

Rational choice theory assumes that consumers have stable intertemporal preferences and that they make choices that maximize their utility, given the constraints that they face and the available information. This means that, when confronted with a large number of products to choose from, with each product having multiple dimensions, they are able to weigh each product dimension and form an aggregate value of expected costs and benefits.[20] In the context of credit cards, it is assumed that they do not face problems dealing with complexity – calculating the total cost arising from multiple fees and interest rates or estimating the probability of the occurrence of certain contingencies, e.g. being late with a monthly

[18] *Ibid*., 72.

[19] In the context of credit cards and consumer credit more broadly, individuals are very different in terms of their intertemporal preferences, which depend on their subjective discount rates.

[20] Rational choice theory does not necessarily assume that consumers meticulously study all the contract attributes if high complexity generates high search costs. While it might be rational to neglect certain contract features if the costs of doing so exceed the expected benefits, rational consumers infer that less salient attributes are unfavorable to them, and thus price them efficiently. This phenomenon is known as "rational apathy". *See* M.G. Faure, H.A. Luth, "Behavioural Economics in Unfair Contract Terms", *Journal of Consumer Policy* 34(3)/2011, 340. Similarly, in the case of information asymmetry, when sellers are better informed than buyers about product attributes, buyers discount the value of the product up to the point where sellers are incentivized to unravel information. *See* D. Dranove, G.Z. Jin, "Quality Disclosure and Certification: Theory and Practice", *Journal of Economic Literature* 48(4)/2010, 935–963.

payment or exceeding the credit limit. From the rational-choice perspective, the greater complexity of credit card contract features is a result of greater efficiency, which can be twofold. First, a large number of fees merely reflects various services offered by the lender, whereas not all borrowers use all services.[21] Charging separate fees for distinct services leads to cost-efficient pricing and avoids cross-subsidization, which is unavoidable when a unique fee is charged to all borrowers.[22] In other words, multiple fees and interest rates are the result of unbundling costs associated with various services. Secondly, growing complexity allows for risk-sensitive pricing. Late fees and penalties, as well as high default rates, are merely an attempt by issuers to differentiate between heterogenous borrowers who pose different risks of not repaying the debt. Consumers who exceed their credit limit or pay late are more likely to default, which is not observable *ex ante*.[23]

Rational choice theory also assumes that consumers have time-consistent intertemporal preferences. This implies that their preferences over future consumption streams exhibit a constant discount rate.[24] Their intertemporal impatience when comparing the present moment with the future is the same when comparing two periods in the future. Constant intertemporal impatience, i.e. constant discount rate, allows individuals to follow through with the plans they make in the present. Hence, they can accurately estimate the probability of bearing future contingent costs. In the context of credit cards, it means that, at the time of entering into a contract, consumers are able to make accurate estimates of their future credit utilization patterns: their borrowing needs and the probability that they will not be able to pay off their debt on time, which would trigger late fees and penalties. Put differently, when deciding whether to pay the outstanding credit balance and how much, consumers do not deviate from the plans they made at the time of entering into the contract. As a consequence, consumers should have no preference for immediate rewards and delayed costs, such as when low or zero introductory interest rates and annual fees are compensated by high annual (post-introductory) interest rates and late fees, as long as the total present value of the cost of borrowing remains the same. Hence, the demand side of the credit cards market cannot explain the widespread practice of postponing credit costs; however, neither can the offer side of the market. Lenders bear costs in connection with issuing credit cards and enabling transactions, which

[21] O. Bar-Gill (2012), 76.

[22] *Ibid*.

[23] *Ibid*.

[24] The economic model of exponentially discounted utility was developed by Samuelson (1937). *See* P. Samuelson, "A Note on Measurement of Utility", *Review of Economic Studies* 4/1937, 155–161.

justifies charging annual and transaction fees. Moreover, lenders themselves pay interest on funds that they use to extend credit to consumers, which covers the entire period during which the funds are used. Thus, within this framework, there is no plausible efficiency explanation for zero annual and transaction fees and introductory (teaser) interest rates. While it is true that late fees and penalties do reflect the increased costs associated with handling late payment and the increased risk of default, it remains unclear why they are used to cross-subsidize the credit card use of individuals who pay on time and do not exceed their credit limit. Thus, rational choice theory provides an unsatisfactory explanation as to why credit card contracts frequently exhibit deferred cost features.[25]

Behavioral economics offers an alternative explanation for the increasing complexity of credit card contracts and the associated uneven intertemporal distribution of costs and benefits. Behavioral economics departs from rational choice in one major way: in addition to the accuracy of their predictions, economic models should be judged in terms of the realism of their assumptions. Two behavioral economics assumptions affect the predictions as to how consumers make decisions in terms of borrowing and how this, in turn, affects the design of credit card contracts. First, their bounded rationality, which implies limited memory, limited attention, and limited information processing capabilities, induces them to maximize the perceived total benefit arising out of the contract, which is different from the actual total benefit.[26] The divergence between the perceived and the actual benefits and costs occurs because consumers who face complexity neglect contract attributes and price dimensions that are not salient to them.[27] For instance, one can reasonably assume that credit card holders pay more attention to annual and transaction fees or introductory interest rates than late fees and penalties and long-term interest rates. In other words, salience is likely to decrease the longer the time horizon and the higher the contingency of costs stemming from the contract. Thus, bounded rationality implies that the divergence between perceived and actual costs and benefits will be greater the larger the number of the contract dimensions that consumers have to analyze and

[25] Rational choice theory does offer an explanation as to why interest rates can remain high in the presence of high switching costs, even though the cost of funds decreases. However, this is not a valid answer to the question as to why the intertemporal distribution of interests and fees is not aligned with the costs incurred by the lender. *See* D.L. Brito, P.R. Hartley, "Consumer Rationality and Credit Cards", *Journal of Political Economy* 103(2)/1995.

[26] Behavioral economics devotes a lot of attention to how people make decisions when facing constraints on their information-processing capacity. *See* A. Tversky, D. Kahneman, "Judgment Under Uncertainty: Heuristics and Biases", *Science* 185(4157)/1974.

[27] O. Bar-Gill (2012), 9.

the more deferred and contingent the costs are. Lenders, on the contrary, are able to profit from consumer misperception, since they are able to artificially increase the demand for their products without increasing actual benefits or decreasing actual costs.[28] Hence, they are incentivized to design a multi-dimensional cost structure in which high costs lie with shrouded attributes.[29]

The second behavioral economics assumption, which provides an explanation for the deferred costs feature of the credit card contract, is a self-control problem. A number of behavioral economics studies have shown that, contrary to the rational choice model, consumers exhibit short-run impatience which induces instantaneous gratification. Short–run impatience (also known as present bias or quasi-hyperbolic discounting) means that individuals behave as if their discount rate is higher when comparing the present moment to the future than when comparing two periods in the future.[30] This leads them into preference reversals or time-inconsistency, i.e. their behavior deviates from their long-run intentions.[31] In other words, when the time of gratification arrives, consumers utility arising out of it is higher than what the long-term preferences would have implied. This bears a number of implications for the credit card market. Credit card contracts have two main price components. One price component reflects the fixed costs that a lender incurs to issue the credit card and provide related services and it is usually paid upfront, in the form of annual fees. The other price component is variable and depends on the future utilization pattern of the cardholder. The more a card is used i.e. the greater the outstanding balance is or the longer the consumers carry the balance, the larger the total amount of interest due is. The variable price component is, thus, paid in the form of long-term interest, and late fees and penalties. At the time of the conclusion of the contract, consumers with time-inconsistent preferences will tend to underestimate how much they will borrow and for how long they will carry the balance, which leads to the underestimation of the variable price component. As a consequence, the contractual design of credit cards

[28] *Ibid*., 10.

[29] Shrouding high price components and cross-subsidizing more salient ones can be a profitable strategy even in highly competitive markets. *See* X. Gabaix, D. Laibson, "Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets", *The Quarterly Journal of Economics 121*(2)/2006.

[30] *See* D. Laibson, "Golden Eggs and Hyperbolic Discounting", *The Quarterly Journal of Economics* 112(2)/1997.

[31] Deviation from long-run intentions can take the form of over-consuming leisure goods (when rewards are immediate and costs are delayed) or under-consuming investment goods (when costs are immediate and rewards are delayed). Credit cards have all the features of leisure goods. *See* S. DellaVigna, U. Malmendier, "Contract Design and Self-Control: Theory and Evidence", *The Quarterly Journal of Economics* 119(2)/2004, 377.

"targets consumer misperception of future consumption and underestimation of the renewal probability."[32] The issuers, thus, typically require no annual fee, which is otherwise paid upfront, and charge interest rates above marginal costs.[33] One could argue that the deferred cost structure is not so harmful to consumers, as long as they "debias" their beliefs regarding the actual cost of borrowing *ex post*, after having experienced paying late fees and penalties or seeing the pace at which their outstanding balance grows, due to making only the minimum payment. In other words, once they become aware of it, they could cut their expenses in the current period in order to decrease their outstanding balance and accruing interest. However, the question is how long it will take them to update their beliefs and how much interest and fees are accumulated by that time, which, in turn, could prevent them from paying off the outstanding balance for a long time, even if they "tighten their belts". Moreover, it is also likely that they will run into self-control issues in several consecutive periods, every time underestimating their future consumption.

In sum, behavioral economics predictions with respect to the credit card market entail some serious efficiency considerations. Subsidized annual fees and introductory rates at the expense of long-term interest rates and late fees cause consumers to underestimate the total costs of borrowing. This might lead them into excessive borrowing and financial distress. Hence, the question arises as to how the regulation of credit card borrowing could improve the market outcomes.

3. THE "NEW PATERNALISM" IN CONSUMER PROTECTION: WHY DID CONVENTIONAL REGULATORY APPROACHES FAIL?

Behavioral biases are not specific to the consumer credit market. Quite the contrary, an increasing number of studies of financial retail markets is bringing evidence that consumer behavior departs from the predictions of the rational model. The evidence is even more abundant in more general consumer markets. "Behavioral failures" in these markets

[32] *Ibid*., 353.

[33] In accordance with behavioral economics predictions, a recent empirical study provides evidence that consumer present bias increases the probability of borrowing. *See* S. Meier, C. Sprenger, "Present-biased preferences and credit card borrowing", *American Economic Journal: Applied Economics* 2(1)/2010. While the self-control problem might be the most pronounced, there are two other alternative explanations within behavioral economics that explain the deferred cost feature of credit card contracts: "underestimation of contingencies bearing future hardship" and "forgetfulness". O. Bar-Gill, "Seduction by Plastic", *Nw. U. L. Rev* 98/2004, 1400–1401.

have led to some normative stances that regulatory intervention should enhance consumer welfare by protecting consumers from their own mistakes and misperceptions, with a minimal cost of the regulatory intervention.[34] The "new" paternalism, which incorporates closely related ideas of asymmetric, libertarian and weak paternalism, has been built on criticism of a "laissez-faire" approach to regulation, which ignores behavioral biases, and also strong paternalism, which constrains the choices of both rational and irrational individuals.[35]

The starting point in rethinking consumer market regulation should be another look at the parties' autonomy of will in light of behavioral biases. The freedom of contract paradigm relies on the assumption that, in the absence of a market failure, parties who enter into a contract voluntarily will both be made better off.[36] Not only the contract itself but also each contractual clause would maximize the overall welfare of the contracting parties, given that even clauses that are unfavorable to one party can be priced accordingly.[37] The minimal room for regulatory intervention is limited to cases of pronounced information asymmetries between the parties and the externalities that their contractual relationship can produce for third parties. While the freedom of contract argument makes a strong claim against more pervasive regulatory intervention, it is only plausible to the extent to which the parties to the contract accurately estimate the costs and benefits arising out of the contract and the particular clauses. However, behavioral economics findings indicate that consumer predictions of the welfare effects of a contract sometimes fall short, even if they are provided the necessary information, i.e. even in the absence of information asymmetry. The misperception of costs and benefits of certain contract attributes, due to behavioral biases, steers consumers away from welfare maximizing behavior and undermines the value of contractual freedom as the ultimate welfare-promoting principle. Hence, the "laissez-faire" approach to consumer protection, which justifies regulatory intervention only in the case of certain market failures, needs to be revisited.

On the other end of the regulatory spectrum lies the idea that regulatory intervention is justified, even when it is against the consumer's

[34] "Regulation that "treads on consumer sovereignty by forcing, or preventing, choices for the individual's own good," is denoted as paternalistic regulation. The notion of helping individuals make better choices is what distinguishes paternalism from the other two types of regulation: regulation aimed at redistribution, and regulation aimed at countervailing externalities. C. Camerer *et al*., "Regulation for Conservatives: Behavioral Economics and the Case for Asymmetric Paternalism", *University of Pennsylvania Law Review* 151(3)/2003, 1211.

[35] R. Kapeliushnikov, "Behavioral Economics and the 'New' Paternalism", *Russian Journal of Economics* 1(1)/2015, 82.

[36] O. Bar-Gill (2004), 1415.

[37] *Ibid*.

will, for instance, by *de facto* taking away the freedom of choice if "an individual is assumed incapable of identifying her own true interests."[38] This "hard" version of consumer paternalism, which dates well before the emergence of behavioral economics as a discipline (also denoted as "old paternalism"), implies that a paternalistic state or regulator is invited to define instead of individuals "what their true welfare is."[39] By entirely ignoring consumer preferences, this regulatory approach encounters three serious limitations. The first limitation stems from the fact that this sort of regulatory intervention targets the entire population of consumers, who can have heterogeneous preferences. What might seem to be a welfare-decreasing behavior for a few or even the majority within a population might not hold true for all. Thus "hard" paternalism runs into the problem of protecting boundedly rational people at the expense of others. Second, the question arises as to why the regulator should have the final say in defining what the true interest of consumers is and how this true interest is articulated. For instance, even if excessive borrowing or smoking seems to produce detrimental consequences in the long run, it is hardly justifiable to ban such behavior. Third, government officials may also be prone to errors. Thus, allowing a consumer to opt out of some presupposed choices, made by regulators, can serve as a safeguard against such erroneous solutions.[40]

The new regulatory approach to consumer protection, based on behavioral economics findings, attempts to reconcile the two approaches by admitting that consumer choices are not always aligned with their long-term welfare, but at the same time, relying on consumers' preferences as a normative standard. Put differently, "the 'new' paternalism "is aimed at helping people achieve what they want" or what they would have achieved themselves if not constrained by cognitive and other behavioral limitations.[41] Three closely related ideas have developed along this line of reasoning: asymmetric paternalism,[42] libertarian paternalism,[43] and weak paternalism.[44] Asymmetric paternalism implies that regulations should "create large benefits for those who make errors, while imposing little or no harm on those who are fully rational."[45] The idea of asymmetric

[38] R. Kapeliushnikov, 89.

[39] *Ibid*., 90.

[40] C. R. Sunstein, "Boundedly Rational Borrowing", *U. Chi. L. Rev.* 73/2006, 255.

[41] R. Kapeliushnikov, 90.

[42] *See* C. Camerer *et al*.

[43] *See* C. R. Sunstein, R. H. Thaler, "Libertarian Paternalism Is Not an Oxymoron", *The University of Chicago Law Review* 70(4)/2003.

[44] *See* C. Jolls, C. R. Sunstein, "Debiasing through Law", *The Journal of Legal Studies* 35(1)/2006.

[45] C. Camerer *et al*., 1212.

paternalism is built on the premise that mistakes identified within behavioral economics, while being common or prevalent, are not universal. Thus, it is undesirable to put an unnecessary burden on those individuals who are behaving in a way that enhances their welfare.[46] One typical example of asymmetric paternalism is the cooling-off period, which imposes a waiting period before making a buying decision, in order to help people overcome their self-control problems. The cooling-off period may also help people with bounded rationality to the extent that postponing a decision allows them to examine certain contract terms in greater detail.

Similarly, libertarian paternalism attempts to "steer people's choices in welfare-promoting directions without eliminating freedom of choice."[47] The idea behind it is that the way a choice is presented can have an important impact on the choice made. This is known as a nudge – "a choice architecture that alters people's behavior in a predictable way without forbidding any options or significantly changing their economic incentives".[48] The core example is default rules, used in the sense of preselected options and rules that are applicable unless individuals choose otherwise, i.e. when no alternative is specified by them.[49] The idea is that defaults can move the individual's choice in the direction that will improve their well-being while at the same time allowing people to opt out. Those individuals whose preferences do not align with the default option must make a conscious decision to choose a different set of rules. It has been shown in different areas that people tend to stay with the default option, which is presumably in their best interest.[50]A number of reasons explains why the defaults are "sticky": the power of suggestion, inertia, endowment effect, and ill-informed preferences.[51] Since opting out, at least in principle, "imposes trivial costs on those who seek to depart from the planner's preferred option,"[52] there is a considerable overlap between libertarian and asymmetric paternalism.

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[46] *Ibid*., 1214.

[47] C. R. Sunstein, R. H. Thaler (2003), 1159.

[48] R. H. Thaler, C.R. Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness*, Penguin Books, New York 2009, 6.

[49] This use of the term *default* is in line with the terminology endorsed in behavioral economics literature. It has no connection to *default* in the sense of a failure to fulfill an obligation such as to repay a loan.

[50] An area where default rules have led to tremendous success is automatic saving plans, which significantly increased savings rates. *See*, *e.g.*, J.J. Choi *et al*., "Defined Contribution Pensions: Plan Rules, Participant Choices, and the Path of Least Resistance", *Tax Policy and the Economy* 16/2002.

[51] *See* C. R. Sunstein, R. H. Thaler (2003), 21–24.

[52] *Ibid*., 4.

Finally, the third, and the least intrusive form of paternalism is called "debiasing through law" or weak paternalism.[53] It advocates that the best way to respond to problems of bounded rationality is "not by insulating legal outcomes from its effects, but instead by operating directly on the boundedly rational behavior and attempting to help people either to reduce or to eliminate it."[54] The problem of limited consumer understanding and making welfare-decreasing choices does not merely reflect a lack of information, but rather how individuals interpret available information and to what extent it appears relevant to them. In other words, if consumers tend to underestimate the probability of certain events occurring, either due to optimism bias or present bias, risk warnings or information on negative consequences linked to these events is simply neglected. Weak paternalism tries to take advantage of available empirical studies on how to "debias" people from the effects of bounded rationality and impose these debiasing strategies as a legal obligation on the other contracting party. For example, it has been shown that people are more likely to take certain risks seriously if the warnings are "making an occurrence available to consumers by exposing them to a concrete instance of the occurrence" (debiasing through the availability heuristic).[55] Similarly, consumers are more likely to appreciate the risks at stake if the information is framed in a way that particularly stresses the potential negative consequences rather than just allowing the other contracting party to choose the way information is presented (debiasing through framing).[56] This is particularly important if the other contracting party is providing certain information in response to legal requirements, while her interests would incentivize her to hide or minimize the risk perceived by consumers. In sum, weak paternalism, unlike libertarian paternalism, does not create a presumed consumer choice such as through defaults, and, therefore, interferes even less with the consumer freedom of contracting. However, to the extent that framing always entails leaving out certain information, it can de facto produce an effect of a nudge.

While the "new" paternalism in all its forms, which are not always easily differentiable, introduces certain advantages over more conventional forms of consumer market regulation, there is a number of caveats associated with its implementation. First, given their persuasive powers, nudges and other types of subtle influences on consumer behavior are not as benign as advertised. If defaults are suggestive enough to actually interfere with consumer preferences or they change the incentives of individuals, then the freedom of choice is threatened in a similar manner

53 *See* C. Jolls, C.R. Sunstein.

54 *Ibid*., 200.

55 *Ibid*., 210.

56 *Ibid*., 216.

as in the case of "strong" paternalism. Secondly, empirical evidence on debiasing strategies and their effects is still scarce as compared to the number of consumer markets in which they are applicable. As a consequence, the debiasing strategy that proved to be a success in one context can turn into a failure in a different one. Finally, the ideas of the new paternalism, while providing solid guidance, are still in many aspects insufficiently specific for practical implementation, as will be discussed in the context of the credit card market in the next section.

4. USE DISCLOSURES AND BEYOND: HOW TO TAILOR NEW PATERNALISM TO THE CREDIT CARD MARKET?

Recent trends have revealed that credit card contracts are becoming more and more complex, with a tendency to accelerate short-term benefits and defer long-term costs. While rational choice theory accounts for why an increase in complexity has occurred, it falls short of explaining why the costs tend to be concentrated along the non-salient and long-term contract dimensions. Although behavioral economics offers a somewhat more plausible explanation, it also raises the concern that complicated cost structure and cost deferral can result in excessive borrowing. The question is whether regulatory intervention can steer consumer choices in the welfare-enhancing direction and what sort of regulation is deemed the most cost-effective.

From the point of view of a "laissez-faire" approach, one of the sources of potential welfare loss is insufficient or inadequate information about product attributes. Thus, the regulator should extend a helping hand in the form of mandatory disclosure of information. However, this least-intrusive method of regulatory intervention proves to be ineffective since mandating more information merely aggravates the "information overload", which is the cause of cognitive biases. For instance, a requirement that lenders specify every single fee they charge, together with all the details regarding the methodology when and how these fees are calculated, and various other contract dimensions, can affect the consumers' ability to select and process the most relevant information. The cognitive shortcuts that consumers use when dealing with complexity might lead them to the neglecting of some important contract attributes. The idea that "more-is-not-the-merrier" when it comes to information disclosure is reinforced by the fact that it is in the interest of the lender that "important facts remain hidden, buried in fine print, or unintelligible".[57] This is the reason why it has become prevalent in different jurisdictions worldwide to require lenders to disclose an aggregate measure of the cost

[57] C. R. Sunstein, 260.

of borrowing (annual percentage rate – APR). However, such a regulatory solution is not without other caveats. It is easily conceivable that some contingent sources of income for the lender, such as late fees, would remain outside the scope of the APR regulation, and that, consequently, the lender would exploit this loophole at the expense of boundedly rational consumers.[58] Moreover, one of the reasons why the complexity of the contract design leads to underestimation of costs is that many of the services offered by the lender are either optional or contingent on the occurrence of certain events in the future, which are hard to predict at the time of entering into the contract. This makes it difficult for any sort of aggregate measure to realistically capture the total cost of borrowing for all individuals. Finally, the borrower's misperception of the total cost arising out of the contract is also related to the present bias, which leads to the underestimation of the costs that are dependent on the utilization patterns. If the borrower underestimates how much she will borrow in the future and how long she will carry the balance, even the most comprehensive APR that focuses on product attributes would not lead to an efficient outcome.[59] For the same reason, any type of generic warning against excessive borrowing is unlikely to produce an effect since it would not help borrowers to overcome their underestimation bias.[60]

However, the described limitations do not justify resorting to the legal tools available under the regulatory umbrella of the "old" paternalism. One such tool would be capping long-term interest rates in order to limit borrowers' indebtedness. An obvious consequence of price controls would be an inefficient reduction of the credit supply. Not only is such a measure likely to affect both rational and boundedly rational borrowers, but it would primarily target the riskiest borrowers to whom extending credit would no longer be profitable. Since the riskiest borrowers are often the ones with the lowest income, price controls would also restrain the credit supply to people who need it the most. Another unintended consequence of this sort of regulatory intervention would be creating perverse incentives for lenders to extend credit to consumers through other unregulated types of consumer credit, or alternatively, to raise another price dimension which is not subject to price control. Banning certain fees that aggravate consumers' misperception about the costs of borrowing is also likely to encourage an increase in another price component.

[58] *Ibid*.

[59] Economic theory provides an explanation as to why the lender does not have an incentive to voluntarily provide the borrower with the product-use information as opposed to product-attribute information. *See* O. Bar-Gill, O. Board, "Product-Use Information and the Limits of Voluntary Disclosure", *American Law and Economics Review* 14(1)/2012, 243.

[60] O. Bar-Gill (2004), 1418.

Hence, one should search for a solution among policy tools of the "new" paternalism with the aim of steering consumers choice in the welfare-enhancing direction without creating an unnecessary burden for rational individuals who are not prone to behavioral biases. Several regulatory interventions that have been suggested in literature fall within "weak" paternalism or the idea of debiasing through law. It has been proposed to extend the mandatory disclosure regulation to cover both information on product attributes and product use.[61] For example, the regulation can impose on lenders the obligation to disclose the number of late payments or the frequency of exceeding the credit limit by an average consumer in one year, or the average amount that a consumer pays in late fees and over-the-limit fees in one year.[62] The product-use information allows a consumer to make more accurate estimates of the actual costs of borrowing and, thus, to be in a better position when deciding whether to enter into a contract in the first place and, more importantly, how much debt to repay during the current period. This regulatory tool represents an example of debiasing through availability since the incidence of an occurrence such as late fees or over-the-limit fees becomes available by exposing consumers to past data. Moreover, the product-use disclosure is also likely to reintroduce more efficient distribution of costs and benefits across the time during which the credit is used, given that lenders are not able to artificially inflate demand by deferring costs. In addition to average-use information for the population as a whole or a given group, regulators can require lenders to make individual-use information available.[63] Some evidence suggests that individual-use information, when available, is more persuasive, given that consumers suffer from optimism bias, which leads them into thinking that the average statistics is not pertinent to them.[64] While attenuating consumers' misperception about the true cost of borrowing, the disclosure of the product-use information does not resolve the problem of complexity of the cost structure nor does it directly target the self-control bias. Moreover, there is a danger that lenders will try to undermine these disclosures by making other contract features, such as teaser rates, more salient. Another debiasing-through-law policy option is the "minimum payment nudge". Lenders can be required to issue a warning on a monthly bill regarding how much time it would take the consumer to pay off the debt entirely if she continues to pay only the minimum payment and information on how much she could save with a faster repayment plan.[65] The minimum

[61] O. Bar-Gill, O. Board, 255–263.

[62] *Ibid*., 259.

[63] *Ibid*., 260–262.

[64] *Ibid*., 261.

[65] O. Bar-Gill (2012), 111.

payment nudge was introduced by the Card Act in the US in 2009.[66] A recent empirical study suggests that it has led to consumer savings.[67]

Finally, a number of proposed regulatory tools can be qualified as nudges and defaults. One default can be established by imposing the obligation on credit card issuers to first offer to consumers a simple standardized contract, such as the one with a one-dimensional price, and allow consumers to subsequently opt-in for credit card products with more complex attributes.[68] Whilst the idea of a "plain vanilla" credit card product seems appealing at first, there are considerable practical caveats to its effective use. As long as the lender is allowed to offer other contract alternatives to a consumer, which of the contracts is offered first seams to bear little importance.[69] Another implicit default option would be to unbundle the transaction and credit functions of the credit card, where the consumer would use only a debit card for transactions, which protects her from paying interest due to forgetfulness or procrastination.[70] The effect of this regulatory option is most likely negligible, given that the interest paid due to forgetfulness or procrastination is a tiny portion of the total interest paid due to issues of self-control. Lastly, it has been suggested to introduce the automatic deduction of credit card payments from a specified checking account.[71] This default option would also provide credit card users with the possibility to opt out at the time of the conclusion of the contract, or at the later stage. While the automatic deduction plan seems like an effective commitment device for those with self-control issues, it is an open question whether consumers who have sufficient funds in one of their checking accounts use the expensive credit card borrowing in the first place.

5. CONCLUSION

This paper has examined the possibility of applying recent normative prescriptions of behavioral economics to consumer credit

[66] The Credit Card Accountability Responsibility and Disclosure Act of 2009, *Public Law 111 – May 22, 2009*.

[67] *See* S. Agarwal *et al*., "Regulating Consumer Financial Products: Evidence from Credit Cards", *The Quarterly Journal of Economics* 130(1)/2014, 35–42.

[68] J. D. Wright, D. H. Ginsburg, "Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty", *Nw. UL Rev.* 106/2012, 1057.

[69] In the US, The Card Act from 2009 requires opting in for over-the-limit fees. Otherwise lenders can choose between declining a transaction that surpasses the limit and charging no fees. According to Agarwal *et al*. (2015), over-the-limit fees fell considerably due to this requirement. *See* S. Agarwal *et al*., 25.

[70] C. R. Sunstein, 266.

[71] *Ibid*.

regulation, with a special emphasis on credit card contracts. It shows that both rational choice and behavior economics theory can offer complementary explanations for some of the defining features credit card contracts have developed over time: increasing complexity and a specific intertemporal distribution of costs and benefits. While heterogeneous consumer preferences and risk-sensitive pricing could credibly explain some of the contract complexities, the strategy of shrouding high costs along non-salient and long-term contract dimensions, in line with behavioral economics predictions, appears equally convincing. Moreover, behavioral economics literature has made a strong case as to why self-control problems prompted by a deferred cost structure can lead some but not all consumers to borrow excessively.

These findings suggest that the regulatory approach should attempt to reconcile the two theoretical frameworks by guiding the behavior of boundedly rational consumers in a welfare-enhancing direction, while at the same time preserving the freedom of choice of rational individuals who are able to choose the best means to their ends. The argumentation provided in the theory of "new" paternalism offers a good starting point for requestioning the conventional regulatory approaches to consumer protection: principles of "laissez-faire" and the "old" paternalism. The paper recognizes that, despite the well-founded arguments as to why the "new" paternalism should be embraced over the other two regulatory alternatives on an abstract level, there are still considerable challenges *vis-à-vis* its implementation in the credit card market.

None of the solutions proposed in literature, which range from debiasing through law to nudges and defaults, are able to address the issues of bounded rationality and self-control in a comprehensive manner. The paper discusses why standard APR disclosures prove to be ineffective given the optional character of certain fees and different credit card utilization patterns. The product-use disclosure suggested in the new paternalism literature, while making consumers better aware of the long-term hidden costs, is not able to help them to overcome the self-control bias. The minimum payment nudge also attenuates this bias only indirectly, by stressing the long-term savings from paying off the outstanding balance in a timely manner. Some of the default options analyzed in the paper, such the automatic deduction plan, appear more promising as they offer consumers a commitment device to follow through with their long-term repayment plans, but they are limited to situations in which the consumer has sufficient funds in her checking account.

For these reasons, the paper is cautious with respect to policy prescriptions, which would require future law and economics scholarship to address several questions. First, more empirical analysis is needed to assess to what extent consumers are sensitive to nudges and debiasing

techniques in financial markets, and more specifically in the credit card market. Second, seemingly benign, the "new" paternalism raises the question of the costs of regulatory intervention: both direct, i.e. the burden put on financial intermediaries and financial authorities that monitor them, and indirect, in terms of a danger of creating rules that would affect the preferences and incentives of rational consumers. Finally, the challenge lies in designing detailed rules that would effectively transpose the abstract principles of the "new" paternalism into readily applicable regulations. The first step towards this aim is to review in greater detail the regulatory solutions in jurisdictions that have already embraced some of the ideas of the "new" paternalism.

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Sima Avramović, PhD*

ALAN WATSON
(1933–2018)

It was with regret and sorrow that we received the news that Alan Watson (William Alexander Jardine Watson), Co-Editor-in-Chief of the *Annals of the Faculty of Law in Belgrade – Belgrade Law Review* since 2008, passed away on 7 November 2018.

One of the most celebrated legal scholars of the second half of 20th and early 21st century, renowned as an eminent comparative lawyer, legal historian, Roman law expert, a person with immense knowledge of many legal systems and many languages, died as the holder of the Ernest P. Rogers Chair at the University of Georgia School of Law. He also served as Professor of Civil Law in the University of Edinburgh from 1968 to 1980 and remained there as an Honorary Professor. He was holder of several honorary degrees, from the universities of Edinburgh, Glasgow, Palermo, Pretoria, Stockholm and Belgrade.

Alan Watson was born in Hamilton (Scotland) and was educated at the universities of Glasgow, Edinburgh and Oxford, at all of which he later taught. He used to proudly point out that in 1957, at the oral exam in civil law, the external examiner, renowned professor of Roman Law David Daube, asked him if he would like a job at Oxford, as his assistant. So he became a lecturer at Wadham Colleague, moving two years later, with tenure, to a Fellowship at Oriel, acquiring additionally position of the Head of Law Department. In 1965 he returned to the University of Glasgow as Douglas Professor of Civil Law and moved after three years to the University of Edinburgh. He was also engaged at the same time at

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Tulane University Law School in 1967, University of Virginia Law School in 1970–1974, and University of Cape Town in 1974–1975. In 1979 he continued his career at the University of Pennsylvania. Finally, partially for family reasons, he moved to the University of Georgia in 1989, as Professor of Law and Distinguished Research Professor.

He published many books and articles on Roman law, comparative law, Scottish, English and U.S. legal history, slave law in ancient Rome and the Americas, and law in the Gospels. He has been described as "the greatest man with texts since Irnerius in the 11th century", "probably the greatest living scholar of Roman legal history", and "the foremost scholar of comparative legal history in North America". He gained world fame with his book *Legal Transplants: An Approach to Comparative Law*, as the inventor of the term and concept of legal transplants which became omnipresent in legal literature until today. His approach was severely criticized by Marxists, sociologists and many other scholars, particularly due to his thesis that law is on a large scale borrowed from a very different place and survived to a very different time. He admitted that economic development, social circumstances, religious outlook and other factors play a significant role in the evolution of law, but he constantly stressed that transplanting is the most fertile source of legal development. "Most changes in most legal systems are the result of borrowing." All the more, he strongly promoted the idea that chance sometimes plays an important role in lawmaking processes through transplanting. Those almost heretical thoughts brought him a lot of antagonism, but his theory survived the test of time: it came to be one of the most widely adopted concepts in contemporary comparative law and it is still inevitable in explaining how law is changing. Today when a comparative lawyer or a legal historian says "legal transplants", Alan Watson is the first association.

The second most important scholarly symbol connected to Alan Watson is the English translation of the *Digest of Justinian*, in two volumes, published by the University of Pennsylvania Press in 1985. It remained the most reliable edition of the *Digest* and the only complete translation in English of the most relevant Roman law source. Due to his organizational skills and excellent knowledge both of civil and common law, Watson was able to accomplish the complete undertaking and to revise the whole edition, being prepared to and capable of facing the tough problem of the different legal terminology of the two legal families.

Alan Watson was also General Editor of the prestigious *Spirit of the Laws* series of books, revealing the nature of legal systems throughout the world (The University of Georgia Press). The title of the series was evidently associated with Rudolf von Ihering's *Geist des römichen Rechts* (1852 onwards) and with the notion of "spirit of the people" (*Volksgeist*), favored by the historical school of jurists and Karl Friedrich von Savigny.

The basic point of the series was not to study rules and institutions of a particular legal system but to understand the approaches and the values of those who created the law. Watson's leading idea was to disclose relationships between the laws in different legal systems and society, religion and moral perspectives, the degree of complexity and abstraction, attitudes towards possible sources of law (particularly to customary law), importance of authority, and values enshrined in law – all in line with his preferred legal transplants theory. He was himself the author of the first volume *The Spirit of Roman Law* while other books of the series include Chinese law, Biblical law, Talmudic law, canon law, common law, Hindu law, customary law, Japanese law, and international law. Watson's series denote an important landmark in comparative legal history and valuable heritage for future generations of scholars.

Of the several dozen books that he published, one is connected to the University of Belgrade School of Law which he visited quite often. Once he complained that he wrote a book on American legal education but that he could not find a publisher in the U.S. as the title and its content were quite provocative (very typical of Alan). The publishing house *Dosije*, hosted by the University of Belgrade School of Law, accepted his manuscript. The book appeared in 2005 with the title *The Shame of American Legal Education* (the second edition was published in the U.S.A. by *Vandeplas Publishing* in 2006)**.** In that book Watson wrote a new blasphemy, so characteristic for his habitus: "American legal education is shamefully bad. Casebooks are endemic, especially in the first year, teaching by terror. Abridged cases are presented, shorn of context, with little support law. Students are to find legally appropriate responses, without being given the law, but professors are provided *gratis* with 'Teachers Manuals' that provide the acceptable answers! Tenure is granted mainly on two law review articles. The acceptable reviews are edited by students who have no expertise, and articles are almost always bloated, with any insight concealed. The articles, though, play almost no part in legal education. Much of importance is omitted from the standard curriculum: sources of law, relationship of law to society, and factors of legal development... But my purpose is not negative. I hope to achieve reform." In the Epilogue of the 2005 edition he also wrote: "The present failings do not lie with the intellectual weaknesses or idleness of the students, but with the whole system of education. I state openly and without exaggeration my considered opinion that first-year law students at the University of Belgrade, where the law is an undergraduate degree, have more sophisticated understanding of the relationship of law to society, the historical underpinnings of the law, the impact of foreign law, and the operation of law in society, than have American law school graduates."

During his frequent visits and lectures at the University of Belgrade Law School he became one of the most beloved foreign professors by the students, and the love was mutual. He had particular affinity for their vivid interactive communication, foreign language skill and their sense to interpret law in the social context. So he decided to create the *Alan Watson Foundation* to award papers written on the topics related to legal transplants at annual competitions (more information available at *http://awf.ius.bg.ac.rs/*). Additionally he developed many friendly relationships with students and his fellow law professors, and he became their advisor in many academic efforts. For his contribution to legal history, comparative law and other scholarly fields, as well as for his overall support to the School of Law in Belgrade, he received PhD *honoris causa* title from the University of Belgrade in 2008.

In 2008 Alan Watson accepted invitation to become Co-Editor-In-Chief of the *Annals of the Faculty of Law (Belgrade Law Review)* and he contributed a lot to its quality, including an article that he published here in Serbian, which became latter a part of books that he was preparing. He also became an honorary member of the *Forum Romanum*, the society of students and law professors who hold sessions every Friday evening at the University of Belgrade School of Law since 1970. Meetings are usually followed by lectures on different topics, mostly on legal history and history in general, comparative law and all legal disciplines, poetry, music, overall culture, sciences and all issues that might be of interest and useful for the *Forum Romanum* members. Alan Watson was our favorite guest who gave at least a dozen lectures there.

He shared in both the best and the worst moments of our lives, including challenges during the bombing and sanctions imposed to Serbia during 1999. His letters of encouragement, attempts to find ways around the sanctions to send us books, efforts to explain to his American friends why the bombing did not solve the problems, his immediate visit to Belgrade when the air-campaign was over, his support to renewal of intellectual and academic connections with many colleagues abroad made a deep mark on our relationships. This is why his photo found its place in the *Forum Romanum* room only a few days after he passed away, keeping the long-lasting memory of Alan Watson.

Alan will be remembered as one of the most popular and prominent scholars of Roman and comparative law, the originator of the notion of "legal transplants", author of many significant books and studies, *doctor honoris causa* of the University of Belgrade, the founder of the *Alan Watson Foundation*, and for many other achievements. However, most of all he will be remembered by his Belgrade students and colleagues as an extremely warm person and a very loving friend. *Requiescat in pace.*

Mario Telò, PhD*

BARBARA DELCOURT (1967–2017)**

[11-09–2017] The GEM and GEM-STONES international PhD school and research community as well as the Institut d'Études Européennes are extremely saddened by the announcement of Prof. Barbara Delcourt (ULB) passing away on 9 September 2017. We express our sincere condolences to her husband, Prof. Olivier Corten, and to her two sons, Martin and Hugo.

For more than 8 years, GEM and GEM STONES greatly benefited from Barbara's important and stimulating contribution, be it by way of theses supervision, conferences or workshops.

Barbara's career started at her university, the ULB, thirty years ago. Her brilliant thesis, on the post-Yugoslavian wars, was published by the Editions de l'Université de Bruxelles. She immediately started an exceptional career as assistant, rapidly followed by her nomination as full professor before becoming Director of the REPI and president of the Political Science Department at the ULB.

Barbara published a dozen important books and many scientific articles, both in French and in English. Her main centres of interest, in the context of her teachings and research at the ULB, were: UN crisis-management and international administration, European external relations

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** The text has been previously published on the website of the GEM-STONES, European Joint Doctorate, *https://gem-stones.eu/news-and-events/news-archive-2017–2018*.

and foreign policy, European governance and state sovereignty, as well as theories of security.

We would like to stress the innovative and passionate nature, as well as the high quality, of her contribution to the discipline of International Relations. The GEM Community in particular will remember her strong commitment and stimulating intervention as an internationally proactive colleague. This was above all illustrated by her engagement in the supervision of the theses of many PhD students.

Thank you very much, Barbara!

Institute for European Studies, Université libre de Bruxelles

BARBARA DELCOURT (1967–2017)*

It is with great sadness that we learned on 10 September 2017, that Barbara Delcourt, professor at the Faculty of Philosophy and Social Sciences of the Université libre de Bruxelles, had passed away.

As director of REPI (Recherche et Enseignement en Politique Internationale), Barbara Delcourt, with her critical spirit and her great intellectual acuteness, nourished the academic debates on the European Union's external actions and its role in the world. Her work has been a source of inspiration for numerous academics, students and PhD candidates, at the ULB as well as other universities, who have conducted research on the issues of international conflict management, security theories, governance and sovereignty in the European public space, as well as, on a larger scale, on issues linked to the epistemology and ontology of international relations.

Since her appointment at the ULB in 1994, Barbara Delcourt showed a tireless commitment to our Alma Mater. She was particularly committed to the IEE and its research and teaching activities in European Studies. It is at the Institute where she held office and where she loved to work.

Barbara was a woman of conviction and commitment, as her numerous publications indicate, notably one of her last ones "With Love from Manchester. Ce que produit la 'guerre contre le terrorisme'", which she co-signed last June with Julien Pomarède and Christophe Wasinski.

* The text has been previously published on the website of the Institute for European Studies, Université libre de Bruxelles.

Faithful to herself and her ideals until the end, Barbara was an extremely dynamic colleague, whose ideas, projects and professional activities were plentiful, as illustrated by, among others, her missions in Haiti.

The IEE and all of its members will remember her as a generous, frank, honest colleague, available to others, caring and giving.

We, members of the academic, scientific and administrative branches of the Institute, express our most sincere sympathy to her family, Olivier, Martin and Hugo.

We will all miss you, dear Barbara!

INSTRUCTIONS TO AUTHORS

The *Belgrade Law Review* (*Annals of the Faculty of Law in Belgrade*) is an international, peer-reviewed journal. All submitted articles will be evaluated by two external reviewers. The peer review is double blind.

Articles should be submitted in electronic form to *anali@ius.bg.ac.rs* or via Journal Management and Publishing System University of Belgrade Faculty of Law available at: *http://ojs.ius.bg.ac.rs/*.

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.

Only original articles, which do not represent a part of defended doctoral thesis, published monograph or book, and which are not published by or submitted to another journal should be submitted for publishing. The author encloses the declaration about this when submitting the text. Otherwise, editorial board holds the right to terminate further cooperation with the author in future.

Code of ethics is available on the web page of the journal.

The Editorial Board reserves the right to adapt texts to the law review's style and format.

Annals of the Faculty of Law in Belgrade is quarterly law journal (with three national issues and one international issue − No. 4) published at the end of March, June, September and December.

Deadlines for submitting articles are: January 31 − for the first issue, April 30 − for the second issue, July 31 − for the third issue and October 31 − for the fourth (international) issue.

REFERENCE STYLE

1. Books: first letter of the author's name (with a full stop after it) and the author's last name, title written in verso, place of publication in recto, year of publishing.

If the page number is specified, it should be written without any supplements (like p., pp., f., dd. or others).

The publisher's location should not be followed by a comma. If the publisher is stated, it should be written in recto, before the publisher's location.

Example: H.L.A. Hart, *Concept of Law*, Oxford University Press, Oxford 1997, 26.

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.

4. Repeated citations to the same author should include only the first letter of his or her name, last name and the number of the page.

Example: J. Raz, 65.

If two or more references to the same author are cited, the year of publication should be provided in brackets. If two or more references to the same author published in the same year are cited, these should be distinguished by adding a,b,c, etc. after the year:

Example: W. Kymlicka (1988a), 182.

5. If more than one page is cited from a text and they are specified, they should be separated by a dash, followed by a period. If more than one page is cited from a text, but they are not specifically stated, after the number which notes the first page and should be specified "etc." with a period at the end.

Example: H.L.A. Hart, 238–276.

Example: H.L.A. Hart, 244 etc.

6. If the same page of the same source was cited in the preceding footnote, the Latin abbreviation for *Ibidem* should be used, in verso, followed by a period.

Example: *Ibid.*

If the same source (but *not* the same page) was cited in the preceding footnote, the Latin abbreviation for *Ibidem* should be used, in verso, followed by the page number and a period.

Example: *Ibid.*, 69.

When the article from the collected papers is cited, after the name of the collection of papers in verso, names of the editors should be provided in brackets. If there is more than one editor, before their names sign "eds." should be written and if there is only one editor sign "ed." should be written, or the abbreviation in the other appropriate language (for instance: "Hrsg." in German).

Example: A. Buchanan, "Liberalism and Group Rights", *Essays in Honour 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 Serbia*, No. 58/04, 85/05 and 115/05.

8. Articles of the cited statutes and regulations should be denoted as follows:

Example: Article 5 (1) (3); Articles 4–12.

9. Citation of court decisions should contain the most complete information possible (category and number of decision, date of decision, the publication in which it was published).

10. Latin and other foreign words and phrases as well as Internet addresses should be written in verso.

11. Citations of the web pages, websites or e-books should include the title of the text, source address (URL) and the date most recently accessed.

Example: European Commission for Democracy through Law, Opinion on the Constitution of Serbia, *http://www.venice.coe.int/docs/2007/CDL-AD(2007)004-e.asp*, last visited 24 May 2007.

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