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THE PERFECT SILENCE: AN EMPIRICAL STUDY  
ON HOW IGNORANCE AND LACK OF CRITICAL  
DEBATE EFFECT THE PROCESS OF ENACTING TAX  
LEGISLATION IN SERBIA\*\*\*

*In this paper the authors deal with the crucial question of the ability of the Serbian institutions and society to apply adequate scrutiny with respect to the enactment of tax legislation. After providing a description of the current Serbian law-making and public consultations framework, and analyzing the relevance of the transitional nature of the Serbian political environment on the approach to the business of legislating, the authors choose three case studies which lead to the conclusion that it is the lack of even basic knowledge regarding taxation, at the level of the members of parliament and the media, combined with the silence and inertness of Serbian professional circles to participate in public debates on tax policy, that is enabling many questionable norms to enter Serbian legislation without any notable opposition or deliberation. Finally, the authors propose certain measures that could improve the public consultations process.*

Key words: *Fair and sustainable taxation. – Democracy. – Lawmaking. – Policy-making. – Tax policy. – Professional expertise. – Corruption.*

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## 1. INTRODUCTION

Fair and sustainable taxation is a political ideal whose origins can be traced as far back as the ancient verses of *The Mahabharata*:

“A king should milk his kingdom like a bee gathering honey from plants. He should act like the keeper of a cow who draws milk from her without boring her udders and without starving the calf. The king should (in the matter of taxes) act like the leech drawing blood mildly. He should conduct himself towards his subjects like a tigress in the matter of carrying her cubs, touching them with her teeth but never piercing them therewith. He should behave like a mouse which though possessed of sharp and pointed teeth still cuts the feet of sleeping animals in such a manner that they do not at all become conscious of it. A little by little should be taken from a growing subject and by this means should he be shorn. The demand should then be increased gradually till what is taken assumes a fair proportion. The king should enhance the burthens of his subjects gradually like a person gradually increasing the burthens of a young bullock(...) The king should never impose taxes unseasonably and on persons unable to bear them. He should impose them gradually and with conciliation, in proper season and according to due forms. These contrivances that I declare unto thee are legitimate means of king-craft.”<sup>1</sup>

Such ideals cannot be achieved in contravention of the democratically expressed will of the people. They primarily require the application of the principles of fair taxation, which are fundamentally dependent on the acquiescence of the electorate.<sup>2</sup> Comparative legislation testifies that the principles of “no taxation without representation” and “people’s sovereignty in tax matters” are widely accepted.<sup>3</sup> If this is true, the key question with that we face is what kind of consent is in place

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<sup>1</sup> *The Mahabharata*, Book 12: Santi Parva, Part I: Rajadharmanusasana Parva, Section LXXXVIII, translation by K. M. Ganguli, <http://sacred-texts.com/hin/m12/m12a087.htm>, accessed 11 February 2019.

<sup>2</sup> Para. 23 of the Eighth Report of Session 2010–2011 issued by the Treasury Committee of the UK House of Commons, titled *The Principles of Tax Policy* states: “A tax system which is felt to be fundamentally unfair will quickly lose political support. However, judgements about the fairness of policy details are politically contested and a major way in which parties distinguish themselves from one another. This can obscure the fact there is a significant amount of consensus on fairness. The differences are often matters of degree and emphasis. For example, although there are arguments about the extent to which taxation should redistribute resources directly, there is general support for some redistribution.” (<https://publications.parliament.uk/pa/cm201011/cmselect/cmtreasy/753/753.pdf>, accessed 11 February 2019).

<sup>3</sup> See A. P. Dourado, “General Report – In Search of Validity in Tax Law: The Boundaries Between Creation and Application in a Rule-of-Law State” in *Separation of Powers in Tax Law – 2009 EATLP Congress, Santiago de Compostela*, (ed. A. P. Dourado), EATLP International Tax Series Vol. 7, 2010, 30–31.

in the case of tax laws? Is the purely formal consent of the electorate enough? Or should we aim for the ideals of participatory democracy? It is parliament that must enact tax legislation, thus giving it the constitutional seal of approval. However, it is not uncommon that legislative proposals, tabled by the government, are not discussed in detail or subjected to much scrutiny by the members of parliament.<sup>4</sup> Hence, is the consent of the rather ignorant legislators, who sit in the parliaments and on whom the electorate relies on to enforce its sovereignty, enough?

One may further wonder whether we need active participation of the general public in lawmaking? In other words, if the legislative process, as well as in the process of drafting legislation, contains no mechanism for effective public debate and scrutiny, or if the application of such a mechanism is inadequate, the increasingly complex tax legislation becomes plagued by a democratic deficit and confined to a small circle of civil servants and high-ranking politicians. The increasing complexity of the contemporary social, economic and consequently tax system, commonly recognized nowadays, is making the tax laws opaque to the average taxpayer and they are unable to evaluate whether their tax liabilities are generated by a fair set of rules.<sup>5</sup> In such an environment the temptation of corruption, understood in the broadest sense as the misuse of public office for private gain,<sup>6</sup> may become too great to resist. This may also undermine the fundamentals of the whole democratic system of government, as Heymann poignantly stated: “If the choice to much of the population appears to be one between elected figures serving the interests of narrow but wealthy constituencies or authoritarian governments serving much broader interests, democracy is very much at risk.”<sup>7</sup>

The issue of social and political complexity goes beyond the field of taxation and in some accounts it undermines democracy itself. However, our analysis will be limited to the complexity of tax issues, understood

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<sup>4</sup> See E. de Crouy-Chanel, A. Maitrot de la Motte, “France”, in *Separation of Powers in Tax Law – 2009 EATLP Congress, Santiago de Compostela*, (ed. A.P. Dourado), EATLP International Tax Series Vol. 7, 2010, 99; K. Kimura, “Japan”, in *Separation of Powers in Tax Law – 2009 EATLP Congress, Santiago de Compostela*, (ed. A.P. Dourado), EATLP International Tax Series Vol. 7, 2010, 139; H. Gribnau, “Netherlands”, in *Separation of Powers in Tax Law – 2009 EATLP Congress, Santiago de Compostela*, (ed. A.P. Dourado), EATLP International Tax Series Vol. 7, 2010, 158; G. Erdos, “Depicting National Tax: Hungary”, in *Tax Legislation – Standards, Trends and Challenges* (eds. W. Nykiel, M. Sek), Wolters Kluwer SA, Warsaw 2015, 287.

<sup>5</sup> See L. Zelenak, “Complex Tax Legislation in the TurboTax Era”, 1 *Columbia Journal of Tax Law* (2010), 93.

<sup>6</sup> See S. Rose-Ackerman, “Corruption and Democracy”, 90 *Am. Soc’y Int’l L. Proc.* (1996), 83. Cf. M. Patrick Yingling, “Conventional and Unconventional Corruption”, 51 *Duq. L. Rev.* (2013), 264.

<sup>7</sup> P. B. Heymann, “Democracy and Corruption”, 20 *Fordham Int’l L.J.* (1996–1997), 328.

as the comprehensibility of tax legislation, which requires the ability to understand a) the subject matter with which the legislation is dealing (content) and b) the language used to draft the legislation (text).<sup>8</sup> This has been addressed by a wide spectrum of institutional mechanisms that enable public deliberation on tax issues, spanning from institutionalized public hearings and public and government commissions to general public discussion that includes various actors such as political parties, media, think tanks etc.<sup>9</sup> However, in all these cases the underlying assumption is that there are (1) institutional mechanisms and (2) a professional community capable of participating into the discussion or feeding it.<sup>10</sup> By building upon new institutionalism in sociology and economy, one emphasizes the importance of institutions in shaping social interests, social actions and particular policy outcomes.<sup>11</sup> On the other hand, professional expertise is an essential element in highly complex social and institutional environments and our analysis will point out various models of professional inclusion in the democratic and/or deliberative lawmaking process.

In order to shed additional light on the nexus between tax legislation and the democratic lawmaking process, our analysis will primarily be based on three Serbian case studies that share the following features: (1) the tax issues in question were rather simple and not as highly complex as literature typically assumes; (2) in each case, there was a single group of actors who benefited from the particular tax policy while the general public or the state budget were on the opposite end; (3) they were set in an environment characterized by the lack of deliberative institutions and limited professional resources, which hindered public oversight of the lawmaking process. While the authors will rely on these recent country-specific examples, they will attempt to derive from them principle issues that can be transmitted to other jurisdictions, particularly those plagued by the same deficiencies from which Serbia suffers. Our research will attempt to outline the primary deficiency points within the

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<sup>8</sup> See F. H. Pedersen, "Advancing the Study of Tax Complexity with the Usability Model", 12 *Hous. Bus. & Tax L.J.* (2011–2012), 303, citing B.C. Martindale et al., "Tax Law Complexity: The Impact of Style", 29:4 *J. Bus. Comm.* (1992), 383.

<sup>9</sup> J.M. Mössner, "Tax Legislation in Germany – Procedures, Actors, Results, Critics", in *Tax Legislation – Standards, Trends and Challenges*, (eds. W. Nykiel, M. Sek), Wolters Kluwer SA, Warsaw 2015, 96–97.

<sup>10</sup> e.g. regarding the involvement of academics in the German legislative process, Mössner states that "everybody quotes but nobody minds them." *Ibid.*, 96.

<sup>11</sup> See E. Amenta, "State-Centered and Political Institutional Theory: Retrospect and Prospect" in *The Handbook of Political Sociology: States, Civil Societies, and Globalization* (eds. T. Janoski et al.), Cambridge University Press, Cambridge, 2005; M. Brinton, V. Nee (eds.), *The New Institutionalism in Sociology*, Russell Sage Foundation, New York, 1998; P. Hall, R. Taylor, "Political Science and the Three New Institutionalisms", *Political Studies*, 44/1996, 936–957.

democratic legislative process, as well as to point out, using comparative legal method, solutions (or combinations thereof) that best remedy the determined deficiencies.

## 2. THE CONTEXT: LAWMAKING AND PUBLIC CONSULTATIONS

Serbia is a late-comer to the camp of Central and East European transitional countries. After a period of delayed or postponed post-socialist transformation (1990–2000), it has undergone a series of reforms that have resulted in a system that is often phrased as political or state-centered capitalism, characterized by (1) the dominance of the state over the society and the economy (with a significant share of GDP being produced by the public sector) and (2) political control over the media, independent regulatory bodies and the judiciary, which has resulted in their inability to process major corruption-based scandals.<sup>12</sup> Furthermore, the system suffers from a strong influence of the business elite on government decisions, which has often been designated as state capture by powerful economic and political elites.<sup>13</sup> Furthermore, both our first (the 2006 Family Affair) and third case study (the Mystery of the Tax Rate in 2012) are referred to in existing academic literature as examples of corruptive state-capture by powerful interests.<sup>14</sup>

Serbia has a semi-presidential system featuring a relatively weak parliament and a politically dominant executive government. Empirical studies have provided evidence of deficiencies in the lawmaking process at three key stages: weak internal capacities of the parliament with its role being reduced to a mere transmitter of decisions reached by the executive branch, externalization of the lawmaking process within the

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<sup>12</sup> See S. AntoniĆ, *Elite, građani i slaba država*, Službeni glasnik, Belgrade 2006, 31; M. Lazić, J. Pešić, *Making and unmaking state-centered capitalism in Serbia*. Čigoja, Belgrade 2012, 11.

<sup>13</sup> See S. Cvejić (ed.), *Informal Power Networks, Political Patronage and Clientelism in Serbia and Kosovo\**, SeConS, Belgrade, 2016; L. Cohen, J. Lampe, *Embracing Democracy in the Western Balkans: From Postconflict Struggles toward European Integration*, Woodrow Wilson Center Press and The Johns Hopkins University Press, Washington, D.C. and Baltimore, 2011; M. Mendelski, “They Have Failed Again! Donor-Driven Promotion of the Rule of Law in Serbia”, *Südosteuropa* 61/2013, 79–113. However, it should be noted that the described state capture in one of its variations is evident even in the most developed democracies in the world today, see: T.K. Kuhner, “The Corruption of Liberal and Social Democracies”, 84 *Fordham L. Rev.* (2015–2016), 2453.

<sup>14</sup> See G. Ilić-Popov, D. Popović, “Poreska struktura i korupcija”, *Anali Pravnog fakulteta*, 1/2014, 17–19.

executive branch, and weak public participation.<sup>15</sup> These three points will be discussed in details in the following paragraphs.

National Assembly of the Republic of Serbia (NARS) has minor influence on the actual content of legislation because it is dominated by strong political parties, while its role in lawmaking and policymaking is additionally constrained by its internal procedures, budgetary dependence, and a weak administrative and professional structure.<sup>16</sup> On the other hand, lawmaking activities are very intensive. This is a characteristic of all EU accession countries and Serbia is no exception in adopting a fast-track legislative procedure in order to meet the requirements of harmonization with the *acquis*.<sup>17</sup> As a consequence, legislation may be passed using a special “urgent” procedure, which shortens the debate process, sometimes to only a couple of days. Almost half of the laws enacted in Serbia in the 2001–2019 period (44%) have been passed using the urgent procedure which left members of parliament with *less than a day per law* for discussion and voting. During some periods (e.g. in 2014) this figure reached as much as 88% of all enacted laws. Research shows that members of the NARS testified that on some occasions they had only a few minutes to discuss a particular law. Often several legislative proposals were jointly discussed at the plenary session, thus leaving members of parliament even less space and time for deliberation. In conclusion, meaningful parliamentary deliberation and discussion remain virtually absent for one in two enacted laws in Serbia.<sup>18</sup> Sadly, most the recent trends in Serbian parliamentary practice<sup>19</sup> only contribute

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<sup>15</sup> For a detailed account *cf.* D. Vuković “The Hollowing Out of Institutions: Law- and Policymaking in Contemporary Serbia” in *Central and Eastern European Socio-Political and Legal Transition Revisited* (eds. B. Fekete, F. Gárdos-Orosz), Peter Lang, 2018, 155–175.

<sup>16</sup> For a detailed discussion of Serbian legislative procedures *cf.*: M. Pajvančić, *Parlamentarno pravo*, Konrad Adenauer Foundation, Belgrade 2008; V. Pavlović, S. Orlović (eds.), *Dileme i izazovi parlamentarizma*, Faculty of Political Sciences and the Konrad Adenauer Foundation, Belgrade 2007; D. Milovanović et al., *Studija o unapređenju zakonodavnog procesa u Republici Srbiji*, Belgrade 2012 (available at [http://www.transparentnost.org.rs/images/publikacije/GIZ%20srpski%20zasticena%20verzija%20\(1\).pdf](http://www.transparentnost.org.rs/images/publikacije/GIZ%20srpski%20zasticena%20verzija%20(1).pdf)).

<sup>17</sup> See A. Ágh, “Parliaments as Policy-Making Bodies in East Central Europe: The Case of Hungary”, *International Political Science Review/Revue internationale de science politique*, 4/1997, 417–432; P. Kopecký. “Power to the Executive! The Changing Executive-legislative Relations in Eastern Europe”, *The Journal of Legislative Studies*, 10/2004, 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*, 12/2006, 291–310.

<sup>18</sup> D. Vuković (2018), 165.

<sup>19</sup> Submission of irrelevant amendments by the members of the ruling parties, which are duly withdrawn prior to voting on the respective legislation, in order to deny opposition representatives time for debate.

to the increasing lack of any debate on legislative proposals tabled by the executive branch of government.

Similar to many jurisdictions, the executive branch of government dominates the lawmaking process.<sup>20</sup> Typically, individual ministries or government authorities are responsible for initiating the legislative process and setting up working groups that are responsible for drafting legislative proposals. These working groups are usually composed of civil servants and external members: representatives of the professional community and civic society (e.g. external experts, university professors, NGOs etc.). Research data suggests that one of the main arguments in the selection process of members of legislation working groups is utilitarian: i.e. to secure financing of the working group, social or political support, the majority in the group is for a particular issue, etc.<sup>21</sup> This opens up space for rather strong influence of external actors, as it remains unclear whose interests are being represented by the members of the working group.

One of the reasons behind this externalization of lawmaking and policymaking are the limited institutional and professional capacities of the government ministries. The capacities of the executive branch of government in Serbia (i.e. the civil service) have suffered a decline throughout the transition process that has lasted nearly two decades. It has been weakened by a brain drain and its inability to attract highly-skilled professionals.<sup>22</sup> These remarks are particularly true with respect to the Serbian Tax Administration (STA).<sup>23</sup> On the other hand, the internal

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<sup>20</sup> Cf. J. Heinrich, I. Prinz, "Austria", in *Separation of Powers in Tax Law – 2009 EATLP Congress, Santiago de Compostela*, (ed. A.P. Dourado), EATLP International Tax Series Vol. 7, 2010, 57–58; B. Peters, E. van de Velde, "Belgium", in *Separation of Powers in Tax Law – 2009 EATLP Congress, Santiago de Compostela*, (ed. A.P. Dourado), EATLP International Tax Series Vol. 7, 2010, 66–67; J. G. Nielsen, "Denmark", in *Separation of Powers in Tax Law – 2009 EATLP Congress, Santiago de Compostela*, (ed. A.P. Dourado), EATLP International Tax Series Vol. 7, 2010, 89–90; E. de Crouy-Chanel, A. Maitrot de la Motte, *op. cit.*, 98; L. del Fedreico, R. Castigione, F. Miconi, "Italy", in *Separation of Powers in Tax Law – 2009 EATLP Congress, Santiago de Compostela*, (ed. A.P. Dourado), EATLP International Tax Series Vol. 7, 2010, 129–130; H. Gribnau, "Equality, Legal Certainty and Tax Legislation in the Netherlands – Fundamental Legal Principles and Checks on Legislative Power: A Case Study", 9 *Utrecht L. Rev.* (2013), 56.

<sup>21</sup> See Vuković (2018), 160

<sup>22</sup> See J. Laušev, "Public Sector Pay Gap in Serbia during Large-Scale Privatisation, by Educational Qualification" *Economic Annals*, 47/2012, 7–24. Although salaries in the public sector have increased after 2000, the salaries of the highly qualified employees in the private sector are higher than in the public sector, while this is not the case with employees with lower qualifications. This diminishes the attractiveness of the public sector for the most qualified workforce.

<sup>23</sup> See S. Kostić, "Administrativni okvir kao ključna prepreka usklađivanju srpskog poreskog prava sa pravom Evropske unije" in *Usklađivanje poslovnog prava*

structure of the executive branch is not conducive to effective lawmaking and policymaking. It was, and still is, hierarchically structured and functions in a rather old-fashioned authoritarian way with top leaders initiating and designing policies. There were attempts to reform public administration, but a lot remains to be done: recruitment decisions are still based on political affiliation and are at the managers' discretion, while the socio-economic position of public servants deteriorated after the reductions in salaries that came as a result of more recent austerity measures.<sup>24</sup>

Lawmaking procedure also envisages public participation. Mechanisms that are intended to secure participative democracy in Serbia range from public consultations during the preparation of legislation to permanent (tripartite) consultation forums such as the Socio-Economic Council. Government ministries are obliged to conduct public consultations in cases where the draft law significantly changes the legal regime in a particular field or regulates issues of particular interest for the general public.<sup>25</sup> However, these cases are not defined: it is unclear in which cases a legal regime is significantly changed or when the general public is particularly interested in a certain matter. The regulation provides no meaningful guidance as to how the consultations ought to be held and more particularly the way in which the government ministries should handle the inputs gained from such public consultations. In addition to being ineffective, many of these mechanisms were often perceived as politically abused.<sup>26</sup> The same applies to the mechanisms of public hearing, whereby government should be given the opportunity to present

*Srbije sa pravom Evropske unije (2016)*, (ed. V. Radović) University of Belgrade Faculty of Law, Belgrade 2016, 400–415.

<sup>24</sup> Cf. J. Džinić, "Public administration reform in Serbia", *Hrvatska i komparativna javna uprava: časopis za teoriju i praksu javne uprave*, 11/2011, 1075–1105; S. Eriksen, "Institution Building in Central and Eastern Europe: Foreign influences and Domestic Responses", *Review of Central and East European Law*, 32/2007, 333–369; T. Verheijen, A. Rabrenovic, "Civil Service Development in Central and Eastern Europe and the CIS: A Perfect Storm?" in *Comparative Civil Service Systems in the 21<sup>st</sup> Century* (eds. F. M. van der Meer, J.C.N. Raadschelders, T.A.J. Toonen), Palgrave Macmillan, 2015, 25; *Basic Measurement Report: The Principles of Public Administration. Serbia*. OECD/SIGMA, Paris 2015, available at [www.sigmaweb.org](http://www.sigmaweb.org).

<sup>25</sup> Art. 77 of the Law on Public Administration, *Official Gazette of the Republic of Serbia*, Nos. 79/2005, 101/2007, 95/2010, 99/2014.

<sup>26</sup> See D. Milovanović et al. *op. cit.*; D. Vuković, *Kako nastaju zakoni u Srbiji: uloga društvenih interesa i institucija u zakonodavnom procesu*, SeConS and University of Belgrade Faculty of Philosophy Institute for Social Studies, Belgrade 2013; J. Jelinčić, S. Đurović (eds.), *Evropeizacija Srbije – Građansko društvo*, Fund for Open Society, Belgrade, 2011; J. Vukelić, "Neposredno učešće građana u donošenju odluka na lokalnom nivou vlasti u Srbiji", *Sociologija*, 3/2009, 291–312.

its policy solutions and collect various inputs.<sup>27</sup> As expected, this trend is easily reflected in the process of drafting and enacting tax legislation.<sup>28</sup>

### 3. THE EMPIRICAL FRAMEWORK – THREE CASE STUDIES

The case studies which were used as the empirical basis all share a simple pattern of vested interests, with a single group – or even a subgroup – of social actors being the primary beneficiaries of the newly introduced policies, with the general public or the state budget being on the opposite side of the equation. In each of these cases the authors conducted (1) a qualitative analysis of media coverage, targeting four largest Serbian daily newspapers and key electronic and internet-based media;<sup>29</sup> (2) a study of relevant legal and policy documents and scientific literature; (3) a detailed analysis of transcripts of parliamentary sessions where the draft laws relevant for our empirical framework were on the agenda; as well as (4) a series of six semi-structured interviews with key tax experts in the country.<sup>30</sup> The aim of this segment of our analysis was to determine the key features of the particular tax issue and to analyze public and political debates surrounding it.

#### 3.1. A 2006 Family Affair

In late 2004 an inconspicuous provision was added to the Serbian Personal Income Tax Law (PITL) regarding the determination of the basis for the purpose of capital gains taxation:

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<sup>27</sup> Cf. S. Vukadinović, “Značaj i primena javnog slušanja na nacionalnom i lokalnom nivou”, *Pravni zapisi*, 1/2015, 26–51; S. Vukadinović, “Javno razmatranje u funkciji prevazilaženja demokratskog deficita, javna rasprava i razgraničenje od javnog slušanja”, *Pravni zapisi*, 1/2016, 20–54. These mechanisms were introduced into Serbian parliamentary life in 2009. In the first several years they were used more frequently (e.g. 11 times in 2009, 16 in 2011, 29 in 2013) than today (6 times in 2016 and 1 in both 2017 and 2018).

<sup>28</sup> See G. Ilić-Popov, S. Kostić, “Depicting National Tax Legislation: Serbia”, in *Tax Legislation – Standards, Trends and Challenges*, (eds. W. Nykiel, M. Sek), Wolters Kluwer SA, Warsaw 2015, 377.

<sup>29</sup> The analysis covered the four daily newspapers with the largest circulation (*Politika*, *Danas*, *Blic* and *Novosti*) and 16 internet portals chosen to represent a variety of opinions and political profiles. These included the Internet portals of major TV stations (e.g. RTS, B92), news agencies (Tanjug), and dailies and weeklies (*Novi Magazin*, *Press*, etc.).

<sup>30</sup> Altogether 12 potential respondents were selected based on the following criteria: (1) they are tax experts teaching at public or private universities, (2) they have recently published on tax issues in relevant national or international publications and (3) they have no permanent professional affiliation with STA, MoF or other relevant public institution dealing with taxes or with the tax consultancies, a total of 6 interviews were held, with 1 rejection.

“If a right, share or security were acquired by a taxpayer through a gift or a contract on maintenance for life, as the acquisition value from Article 74, paragraph 1 of this Law shall be deemed the market value of the right, share or security which was used or could have been used as the basis for property transfer tax at the moment of their acquisition by the taxpayer.”<sup>31</sup>

No comprehensive reasoning was provided by the Serbian Government (SG) why this rather unique solution was introduced<sup>32</sup> to replace the one, customarily found in comparative legislation,<sup>33</sup> which called for the carry-over of basis from the donor to the donee.<sup>34</sup> Since under Serbian law gifts between spouses and those made by parents to their children were and still are exempt from Gift Tax,<sup>35</sup> this transfer of property cannot lead to a taxable capital gain. Serbian taxpayers were quick to realize the tax planning opportunity emanating from the introduced rule and the introduction of the mentioned amendment to the PITL coincided with a disproportional increase in the number of requests to transfer ownership of securities by virtue of gift contracts.<sup>36</sup>

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<sup>31</sup> Art. 42 of the Law on the Changes and Amendments to the Personal Income Tax Law, *Official Gazette of the Republic of Serbia*, No. 135/04. (translated by author)

<sup>32</sup> The Proposal of the Law on the Changes and Amendments to the Personal Income Tax Law, *Official Gazette of the Republic of Serbia*, Nos. 24/01, 80/02 submitted by the Serbian Government to the Serbian Parliament in 2004, [http://www.srbija.gov.rs/vesti/dokumenti\\_pregled.php?id=43283](http://www.srbija.gov.rs/vesti/dokumenti_pregled.php?id=43283), accessed 11 February 2019.

<sup>33</sup> See V. Thuronyi, *Comparative Tax Law*, Kluwer Law International, The Hague, 2003, 266.

<sup>34</sup> Art. 75 of the Personal Income Tax Law, *Official Gazette of the Republic of Serbia*, Nos. 24/01, 80/02 stipulated: “If a right, share or security were acquired by the taxpayer through a gift, as the acquisition value from Article 74, paragraph 1 of this Law shall be deemed the value at which the donor acquired the same right, share or security.” (translated by author)

<sup>35</sup> Art. 20(1)(1) of the Property Taxes Law, *Official Gazette of the Republic of Serbia*, Nos. 26/01, 45/02, *Official Gazette of the Federal Republic of Yugoslavia*, No.42/02, *Official Gazette of the Republic of Serbia*, Nos. 80/02, 80/02, 135/04, 61/07, 5/09, 101/10, 24/11, 78/11, 57/12, 47/13, 68/14.

<sup>36</sup> See S. Kostić, “Oporezivanje kapitalnih dobitaka fizičkih lica ostvarenih prodajom imovine stečene poklonom”, *Pravni život*, 10(II)/ 2006, 914. The author cites the Opinion issued by the Serbian Securities Commission No. 5/0–18–860/05–05, dated 15 April 2005, in response to a request by the Serbian Central Securities Depository and Clearing House, which makes evident that the introduction of the mentioned amendment to the Serbian Personal Income Tax Law coincided with a disproportional increase in the number of requests to transfer ownership of securities by virtue of gift contracts. The tax planning was quite elementary, assuming that an individual initially bought shares for 100 while the value of these shares rose to 200. Instead of selling the shares and generating a taxable capital gain of 100, the individual could simply gift these shares to their spouse, where such a transfer would not be taxable at all. The donee spouse could literally on the next day sell the shares for the same amount and would benefit from being able to apply

In its opinion, issued on 18 July 2006, the Serbian Ministry of Finance (MoF) stated, without any statutory basis, that for the purposes of determining the capital gain on the sale of shares acquired by virtue of a gift made between spouses and those who are in the first order of inheritance in relation to the donor, the acquisition value of the shares should be considered as equal to zero.<sup>37</sup> Despite the fact that the MoF took such a radical position, the NARS enacted the Law on the Changes and Amendments to the Personal Income Tax Law<sup>38</sup> on the very next day, 19 July 2006, without altering the evidently problematic provision regarding the basis for capital gains taxation purposes of property acquired through gifts.

After a turbulent period during which the Serbian Supreme Court had to overturn the occasional application by the STA of the unsubstantiated interpretation found in the cited opinion of the MoF,<sup>39</sup> in 2009 the NARS reinstated the approach to the determination of basis for capital gains purposes of property acquired through gifts found in the PITL prior to the 2004 amendments.<sup>40</sup> The explanatory section of the legislative proposal submitted by the SG to the NARS states that the introduced amendment (transfer of basis from the donor to the donee instead of using as the acquisition value the market value of the property at the time of donation) represents a mere clarification of the rules.<sup>41</sup> Despite a highly combative political environment, Serbian parliamentarians showed no interest to this particular amendment and it was adopted without any substantial debate.

In this case we find a controversial tax measure in place from 2004 to 2009, that was beneficial to a limited circle of individuals. The MoF attempted to alter the workings of the measure by an opinion that was overturned by the Supreme Court's jurisprudence. In the end, the 2009 reinstatement of the approach found in the Personal Income Tax Law prior to the 2004 amendments were represented by the SG as a mere "clarification of the rules." During this period only a limited

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for capital gains taxation purposes the acquisition value identical or very close to the selling price of the shares, thus avoiding capital gains taxation.

<sup>37</sup> Opinion of the Serbian Ministry of Finance, No. 414–00–118/2006–04 dated 18 July 2006.

<sup>38</sup> *Official Gazette of the Republic of Serbia*, No. 62/2006.

<sup>39</sup> Serbian Supreme Court judgment No. U. 9152/07 dated 19 June 2008.

<sup>40</sup> Art. 11 of the Law on the Changes and Amendments to the Personal Income Tax Law, *Official Gazette of the Republic of Serbia*, No. 31/09.

<sup>41</sup> The Proposal of the Law on the Changes and Amendments to the Personal Income Tax Law, *Official Gazette of the Republic of Serbia*, Nos. 24/01, 80/02, 135/04, 62/06, 65/06 submitted by the Serbian Government to the Serbian Parliament in 2009, [http://www.srbija.gov.rs/vesti/dokumenti\\_pregled.php?id=101854](http://www.srbija.gov.rs/vesti/dokumenti_pregled.php?id=101854), accessed 11 February 2019.

set of publicly available reactions appeared in academic papers.<sup>42</sup> The opposition parliamentarians were mute on the issue during the debate on the respective measures, both in 2004 and in 2009. Finally, the authors were not able to identify media coverage of the issues in major outlets and all in all the SG was able to suffer no political consequences.

### 3.2. The 2010 Overpaid Air Traffic Controller

On 9 April 2010 virtually all Serbian media reported that according to the STA the wealthiest personal income taxpayer in the country for 2009 was an air traffic controller from Belgrade.<sup>43</sup> Such a headline cannot be fully appreciated without being aware of three crucial factors.

The first one is tax-technical: Serbia has in essence a schedular personal income system, wherein every particular item of income is subjected to a specific tax form (e.g. employment income to Salary Tax, capital gains to Capital Gains Tax, etc.). However, following the archaic *Romanic* model, if an individual's annual income from (almost) all sources exceeds a certain statutory threshold, they are subjected to an additional layer of taxation in the form of the Annual Personal Income Tax (APIT).<sup>44</sup> Thus, the air traffic controller from the beginning of our story, at least in principle, reported the highest individual annual income in Serbia in 2009.

The second factor is socio-economic: from a highly egalitarian society, during the last several decades Serbia rapidly transformed into a country with the greatest income inequalities and risk-of-poverty rates when compared to EU countries.<sup>45</sup> The socio-economic position of the middle classes was significantly worsened, particularly its income. In the post-2000 period it managed to partly recover, but in the period after

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<sup>42</sup> e.g. S. Kostić, (2006), G. Ilić-Popov, D. Popović, "Oporezivanje kapitalnih dobitaka u srpskom poreskom pravu: tri razloga za zabrinutost poreskih pravnika", in *Razvoj pravnog sistema Srbije i harmonizacija sa pravom Evropske unije* (ed. S. Taboroši), University of Belgrade Faculty of Law, Belgrade 2008, 51–57.

<sup>43</sup> e.g. "Kontrolor leta najviše zaradio" (Air Traffic Controller is the Highest Earner) Radio Television of Serbia (RTS), 09 April 2010, available at <http://www.rts.rs/page/stories/sr/story/125/Dru%C5%A1tvo/620481/Kontrolor+leta+najvi%C5%A1e+zaradio.htm>, accessed 11 February 2019; "Porez na platu kontroloru leta – 36,8 miliona dinara" (Tax on the Air Traffic Controller's Salary – 36.8 million RSD), *Politika*, 08 April 2010, <http://www.politika.rs/scc/clanak/130530/Porez-na-platu-kontroloru-leta-36-8-miliona-dinara>, accessed 11 February 2019

<sup>44</sup> See D. Popović, *Poresko pravo*, University of Belgrade Faculty of Law, Belgrade 2018, 305.

<sup>45</sup> See J. Žarković Rakić, "Kako se Srbiji dogodila visoka nejednakost u raspodeli dohotka", *MONS* 1/2017, <http://mons.rs/kako-se-srbiji-dogodila-visoka-nejednakost-u-raspodeli-dohotka>, accessed 11 February 2019.

the 2008 economic crisis its financial position has been declining again.<sup>46</sup> On the other side, during the transition a small number of individuals became extremely wealthy, with a large share of the new economic elite emerging through the conversion of political into economic capital.<sup>47</sup> If one takes into account that this process took place in a historical setting which included several regional armed conflicts, international sanctions and domestic political unrest, it is hardly surprising that the general population had a rather negative view of the newly-created economic elite, which was awarded the term “tycoons” (similarly to the “oligarchs” in the Russian Federation). Finally, the identities of the individuals who were perceived to be the most affluent members of Serbian society were and are public knowledge. In other words, the names, and in most cases the principal businesses they are involved in, of their richest compatriots are household items for most citizens of Serbia.

Taking into account these factors, it becomes quite perplexing that the only public reaction to the mentioned headline came on the same day (9 April 2010) in the form of a statement by the Serbian Air Traffic Controllers Association in which they lament on the fact that the salaries of air traffic controllers are nowhere near the amounts which could be assumed from the information which was reported by the media.<sup>48</sup> In other words, the only discussion which arose from the mentioned headline was related to the question whether air traffic controllers in Serbia are overpaid, which seems to be of secondary relevance when facing all the potential tax issues arising from only a superficial analysis.

In this case the media unquestioningly published information presented to it by the STA, while the STA did not feel the need to explain the rather puzzling information that it was revealing. Strikingly, it appears that the STA was correct in its approach, as the published information did not lead to even a hint of debate, let alone a public outcry. The answer to this “puzzle” lies in the combination of widespread tax evasion and the tailoring of Serbian tax legislation in a way that allows the wealthiest Serbian resident individuals to legally avoid paying the APIT. Namely, when the APIT was introduced, in 2001,<sup>49</sup> two notable types of income were excluded from the computation of total annual personal income

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<sup>46</sup> For the first 2018 results on the socio-economic position of the middle classes, cf. D. Vuković and S. Cvejić, “Attitudes to the Rule of Law in Contemporary Serbia: A Coherent Legal Culture”, *Jahrbuch für Ostrecht* 1/2019 (forthcoming).

<sup>47</sup> See M. Lazić, *Čekajući kapitalizam*, Službeni glasnik, Belgrade, 2011.

<sup>48</sup> “Reagovanje Udruženja kontrolora letenja Srbije” (Reaction of the Association of Air Traffic Controllers of Serbia), *Politika*, 09 April 2010, <http://www.politika.rs/sr/clanak/130643/Reagovanje-Udruzenja-kontrolora-letenja-Srbije>, accessed 11 February 2019.

<sup>49</sup> *Official Gazette of the Republic of Serbia*, No. 24/01.

subject to this form of tax: interest and capital gains.<sup>50</sup> As of 2005, dividends have been given the same treatment as interest and capital gains for APIT purposes.<sup>51</sup> While it is absolutely true that one can provide arguments in defense of Serbia's policy choice to exclude interest, capital gains and dividends from the APIT, it is also beyond any doubt that sound critical arguments with respect to the same issue can be raised as well. In Serbia, within the political spectrum, we have heard neither.<sup>52</sup>

To sum up, this case deals with a legislative text that excludes from the APIT capital gains, interest and later on dividends. These legislative proposals were and still are publicly available. At least one of them, i.e. the one from 2004 which lead to the exclusion of dividends from the scope of APIT, was found to contain some, however lapidarian, easily debatable reasoning.<sup>53</sup> The APIT clearly does not reach the wealthiest individuals in the society. Again, absolutely no public or political debate on this controversial issue was found, not even one caused by intellectual irritation at reading the broadly announced headline that an air traffic controller generated the highest taxable income for 2009 in a country of over 7 million inhabitants, which include several known multimillionaires and a couple of suspected billionaires (in USD).

### 3.3. The Mystery of the Tax Rate in 2012

As the global financial crisis developed, one of the (rather late) responses of the SG was to attempt to increase state revenues by raising existing and introducing new taxes. In the autumn of 2012 the working

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<sup>50</sup> Art. 87(4) of the Personal Income Tax Law, *Official Gazette of the Republic of Serbia*, No. 24/01.

<sup>51</sup> Art. 46 of the Law on the Changes and Amendments to the Personal Income Tax Law, *Official Gazette of the Republic of Serbia*, No. 135/04.

<sup>52</sup> Available Serbian academic sources which allows us to understand the policy choices applied when excluding the mentioned types of income from the APIT focus their attention on the particular case of dividends from the perspective of avoidance of their economic double taxation and adherence to the ability to pay principle. See: D. Popović, *Poresko pravo*, 250–251, 321– 322 and D. Popović, “Sistem javnih prihoda u Srbiji – bekstvo od tržišne orijentacije”, *Bilten G 17*, March 2000, 5.

<sup>53</sup> In the Proposal of the Law on the Changes and Amendments to the Personal Income Tax Law, *Official Gazette of the Republic of Serbia*, Nos. 24/01, 80/02 submitted to the Serbian Parliament in 2004 the Serbian Government argues that dividends should be excluded from APIT as they are already taxed twice, at the level of the company distributing the dividends and at the shareholder level. What the Serbian Government failed to address is at least the nature of the APIT (e.g. a third layer of tax or a corrective element), while it did not mention that a measure to mitigate the economic double taxation was already present at the level of the schedular Tax on Capital Income, under which for resident taxpayers 50% of the received dividends were exempt from taxation (Art. 63(3) of the Personal Income Tax Law, *Official Gazette of the Republic of Serbia*, Nos. 24/01, 80/02, 135/04).

group of the MoF that prepared the draft amendments to the Corporate Income Tax Law (CITL)<sup>54</sup> presented its proposals to the public, which included the first Serbian special anti-avoidance rules (SAARs) targeting tax havens. The envisaged SAARs were quite simple and at their core called for a 47% withholding tax on royalties, interest, service and rental fees paid by resident taxpayers to entities from blacklisted tax haven jurisdictions. In the case of dividends and capital gains, the applicable tax rate was to be 32%. The MoF was to be given the authority to determine the list of tax haven jurisdictions to which the SAARs would apply. The working group of the MoF presented to the public the elements and reasoning behind the respective tax rates.

The proposed legislation underwent an approximately month-long public consultations process and received considerable attention from the Serbian media: 12 articles in print dailies and weeklies were identified, as were 16 articles in on-line media. These media reports were mainly based on news agency reports and conveyed press releases, while in-depth analytical pieces could only be found in the major and oldest daily newspaper *Politika*. In many cases the reporting showed a notable lack of understanding of basic tax concepts. Despite all that, the media reports emphasized the increase of the Corporate Income Tax rate from the then applicable 10% to the expected 15% (or 12% as some media reported), as well as the introduction of norms that would subject to higher tax rates transactions with *off-shore* destinations seen as the primary channel for capital flight from Serbia. The media also reported that this tax rate was to be 32% for dividends and 47% for royalties, interest, payments for the use of movable and immovable property, and service fees.<sup>55</sup>

After more than a month of public debate, during which there was no objection made regarding the level of the SAAR withholding tax rates, by the end October 2012 the MoF came out with the final proposal of the amendments to the CITL, in which, surprisingly, the SAAR withholding tax rate was lowered to 25%. The MoF final proposal, as well as the legislative proposal tabled by the SG before the NARS, contains no

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<sup>54</sup> *Official Gazette of the Republic of Serbia*, Nos. 25/01, 80/02, 80/02, 43/03, 84/04, 18/10, 101/11.

<sup>55</sup> “Deficit manji za 95 milijardi dinara” (Deficit Decreased by 95 Billion RSD), *Politika* 25 October 2012, <http://www.politika.rs/scc/clanak/237728/Deficit-manji-za-95-milijardi-dinara>, accessed 11 February 2019; “Nacrt zakona o porezu na dobit” (Draft Law on Corporate Income Tax), B92, 25 October 2012, [http://www.b92.net/biz/vesti/srbija.php?yyyy=2012&mm=10&dd=25&nav\\_id=654805](http://www.b92.net/biz/vesti/srbija.php?yyyy=2012&mm=10&dd=25&nav_id=654805), accessed 11 February 2019; “Povećanjem poreza na dobit firmi dodatnih do 20 milijardi” (Additional 20 Billion RSD Through Increase in Corporate Income Tax), Press Online, 4 October 2012, <http://www.pressonline.rs/info/biznis/245587/povecanjem-poreza-na-dobit-firmi-dodatnih-do-20-milijardi.html>, accessed 11 February 2019.

explanation of how and why the 25% tax rate was chosen.<sup>56</sup> While most Serbian media reported on the publication of the final proposal of the amendments to the CITL, not a single one noticed the change in course regarding the level of the SAAR withholding tax rate.<sup>57</sup>

By the end of November 2012 the draft law reached the national parliament. It was part of a joint (unified) discussion with a list of laws related to economy, including most importantly the 2013 Budget Law. The discussion in the NARS lasted for five days, but only 6 members of parliament (MP) did at least mention the amendments to the CITL. However, not a single MP noticed, let alone questioned, the reasoning behind the lowering of the SAAR withholding tax rate in the final legislative proposal.

Hence, our third case study shows how the SG was able to prepare an initial draft legislative proposal with high SAAR withholding tax rates. The draft law received wide media coverage. Later during the process, the rates were lowered with no justification and again the Serbian media widely reported on the final legislative proposal, but never once mentioned the shift in policy that was evident when comparing it to the draft legislative proposal. Finally, the NARS adopted the respective measure without any arguments being raised during its plenary sessions addressing the change in the measure. This is even more surprising, bearing in mind that this was a topic that has been receiving notable attention in the Serbian political environment since at least the turn of the first decade of the 21<sup>st</sup> century.<sup>58</sup>

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<sup>56</sup> The Proposal of the Law on the Changes and Amendments to the Corporate Income Tax Law, *Official Gazette of the Republic of Serbia*, Nos. 25/01, 80/02, 43/03, 84/04, 18/10, 101/11 submitted by the Serbian Government to the Serbian Parliament in 2012, [http://www.srbija.gov.rs/vesti/dokumenti\\_pregled.php?id=175502](http://www.srbija.gov.rs/vesti/dokumenti_pregled.php?id=175502), accessed 11 February 2019.

<sup>57</sup> “Novi zakoni iz oblasti finansija i privrede” (New Laws in the Domains of Finance and Economy), RTS, 25 October 2012, <http://www.rts.rs/page/stories/sr/story/13/Ekonomija/1198940/Novi+zakoni+iz+oblasti+finansija+i+privrede.html>, accessed 11 February 2019; “Uvodi se oporezivanje usluga po odbitku od 25 odsto” (Introduction of a 25% Withholding Tax for Services”, RTV 25 October 2012, <http://www.naslovi.net/2012-10-25/rtv/uvodi-se-oporezivanje-usluga-po-odbitku-od-25-odsto/4003842>, accessed 11 February 2019; “Na usluge iz poreskih rajeva 25 odsto poreza” (25 Percent Tax on Service from Tax Havens), Mondo 25 October 2012, <http://mondo.rs/a265372/Info/Ekonomija/Na-usluge-iz-poreski-rajeva-25-odsto-poreza.html>, accessed 11 February 2019; “Nacrt zakona o porezu na dobit” (Draft Law on Profit Tax), [http://www.b92.net/biz/vesti/srbija.php?yyyy=2012&mm=10&dd=25&nav\\_id=654805](http://www.b92.net/biz/vesti/srbija.php?yyyy=2012&mm=10&dd=25&nav_id=654805), accessed 11 February 2019.

<sup>58</sup> One of the first examples where the issue of tax havens was brought into the spotlight of the Serbian political spectrum was on 27 May 2010 when Serbian President Mr. Boris Tadić, in addressing the XIV Congress of the Confederation of Autonomous Trade Unions of Serbia, explicitly mentioned cross-border tax avoidance as a priority issue. <http://www.blic.rs/vesti/politika/tadic-patriotizam-je-otvaranje-novih-radnih>

#### 4. SIMPLICITY AND POLITICAL ACCOUNTABILITY

The lack of public reactions and political consequences in all three cases is no surprise bearing in mind the institutional and human capacities in the field. Unlike many other jurisdictions, Serbia has underdeveloped mechanisms for public scrutiny of policies adopted by the government. When it comes to tax issues, public and professional debates are confined to only a few forums such as the Serbian Fiscal Society or the Foundation for the Advancement of Economics.

Political institutions were not able to play the role in the facilitation of a meaningful policy dialogue or critical debate. First of all, the political and law- and policymaking relevance of parliament is not impressive. Although such a state of affairs could be perhaps attributed to the unenviable finances of the NARS, i.e. the research and advisory resources made available to the members of parliament, either by the institution itself or by their respective political affiliations, we see an identical problem being recognized in numerous, vastly more affluent jurisdictions than Serbia.<sup>59</sup>

The gap was not filled by the media either. The Serbian media scene is characterized by the lack of influential independent media and the strong influence of politics and economy on media reporting. The ownerships structure is non-transparent and media often get involved in political campaigning.<sup>60</sup> What we have witnessed in all three analyzed

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*mesta/8w9jhwq*, accessed 11 February 2019. Ilić-Popov and Popović deem this particular case as being between pure lobbying and corruptive state capture. See. G. Ilić-Popov, D. Popović, "Poreska struktura i korupcija", *Anali Pravnog fakulteta* 1/2014, 19.

<sup>59</sup> e.g. in Denmark Nielsen notices that "...the complexity and level of detail of tax law bills particularly in recent years do raise the question whether the members of parliament are in reality able to comprehend the many complex questions involved in new tax legislation." J.G. Nielsen, *op. cit.*, 90. In France "discussions either in the Committee or in the House are often quite disappointing with few in-depth commentaries and some broad (too broad) positions" E. de Coury-Chanel, A. Maitrot de la Motte, *op. cit.* 99, while in Japan "few members of the Financial Committee of the parliament themselves have the required expertise to draft complex tax bills..." K. Kimura, *op. cit.*, 139. Even in the case of a country such as the Netherlands, which can boast a globally recognized highly-developed tax culture, Gribnau recognizes that "members of parliament generally lack (technical) know how, experience and time to be able to draft bills, tax bills included. Members of parliament have hardly any staff members with experience in the field of tax law who can deal with its intricate complexities." H. Gribnau, *op. cit.*, 158.

<sup>60</sup> Anticorruption Council, *Izveštaj o pritiscima i kontroli medija u Srbiji* ([Report on Pressures and Control of Media in Serbia), Anticorruption Council of the Government of the Republic of Serbia, Belgrade, 2011, <http://www.antikorupcija-savet.gov.rs/izvestaji/cid1028-1681/predstavljen-izvestaj-o-pritiscima-i-kontroli-medija-u-srbiji>, accessed 11 February 2019; D. Vuković, "The Role of Civil Society in Fostering Government Accountability in Contemporary Serbia: On the Limits of Depoliticized Social Activism", *Sociologija*, 4/2015, 637–661.

cases is that not only were the mainstream media immune from even a premise of investigative or opinionated journalism, but this was also the case with even the extremes in the Serbian fourth estate, which do not shy from completely unacceptable practices and from whose smearing campaigns no one is fully protected, being completely salient.

Finally, we turn our attention to the last subject that might be able to raise simple as well as complex tax policy issues in public – the professional community. The Serbian academic and professional community was as a rule mute on the issues, particularly at the time the measures described in our case studies were in the process of enactment, and the authors had difficulty finding presentations of its opinions. In other fields, from social policy to development of civil society, cooptation of the professional middle classes was identified,<sup>61</sup> meaning inclusion of professionals (academics, researchers, independent professionals, etc.) into various governance structures and/or redistributive arrangements. In essence, it comes down to a simple but historically grounded pattern of close links and overlapping between political elites and professional middle classes. From the early days of the Kingdom of Serbia, in the 19<sup>th</sup> century, prominent writers, scientist, university professors, lawyers and medical doctors played an active role in political life. They were engaged as civil servants, ambassadors, members of parliament and government minister thus creating a particularly influential social stratum.<sup>62</sup> This trend has continued in present day Serbia, but it also includes membership in advisory bodies, management boards, commissions, working groups and various other paid and unpaid positions, which are usually within the privy of the government to bestow.<sup>63</sup> While it is beyond dispute that the involvement of the *intelligentsia* in public service has made a profound contribution to the modernization of Serbia since its inception as a modern state, in the 19<sup>th</sup> century, established domestic and international research confirm that the cooptation of the professional stratum in state

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<sup>61</sup> See D. Vuković, “Capturing Resources: The Role of Professional Communities and Middle Classes in Fostering Social Reforms within Serbia”, *Sociologija*, 2/2016, 253–279.

<sup>62</sup> See D. Stojanović, *Kaldrma i asfalt: urbanizacija i evropeizacija Beograda 1890–1914*, Udruženje za društvenu istoriju, Belgrade 2008, 180–193.

<sup>63</sup> There is actually more than only a handful of positions and they range from highly visible ones (High Judicial Council, Fiscal Council, Regulatory Authority for Electronic Media, Serbian Broadcasting Corporation etc.), memberships in management bodies of hundreds of public enterprises (one conservative estimation is that they annually cost EUR 32 million) cf. “Upravni odbori državu koštaju tri milijarde dinara” (“Management Boards Cost RSD 3 Billion Annually”), *Politika*, 16 August 2014, <http://www.politika.rs/sr/clanak/187844/Управни-одбори-државу-коштају-три-милијарде-динара>, accessed 11 February 2019), to hundreds and even thousands of commissions about which we have no systematized data or knowledge, apart from unsystematized data provided by the Anticorruption Agency’s Registry of Public Officials.

and administrative structures has adversely impacted their ability, or more precisely willingness, to openly criticize government actions.<sup>64</sup>

In these circumstances, three rather simple tax cases received no relevant political, media or public professional attention, ensuring that they are tabled by the SG and ultimately adopted into law. Their unopposed safe passage was made possible by the ignorance of most of the political decision makers and media representatives, together with a placid attitude of the academic and professional circles. Namely, while the authors have found examples of academic research by a number of authors who criticize the norms described in our three case studies, what is notably lacking is timely and vocal opposition from professional and academic circles during the process of enactment of the respective legislation. Our contention is that the fundamental lack of knowledge and understanding of tax issues by most members of the Serbian political class as well as the Serbian media, combined with unwillingness of the professional community to become more engaged in critical public discourse, has actually lowered the cost of corruption, i.e. limited the number of targets whose opinion and actions have to be *guided* in order to achieve a certain result.

## 5. INSTITUTIONAL SOLUTIONS

The authors strongly believe in an institutional setting that produces particular outcomes in terms of both policy solutions and individual and group behavior. Having this in mind, they drafted a proposal on the fundamentals of how to address the issues that have been identified so far.

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<sup>64</sup> The cooptation of the professional stratum and the impact of government patronage on the willingness to openly criticize its actions is not something found only in Serbia, but has been recognized globally. In Poland A. Kaminski stated that: “one way of obliterating the distinction between public and private consists in the creation of autonomous institutions, ‘foundations’ or ‘agencies’ of unclear status, with broad prerogatives supported by administrative sanctions, and limited public accountability. The real aim of these institutions is to transfer public means to private individuals or organizations or to create funds within the public sector which can then be intercepted by the initiating parties.” A. Kaminski, “Corruption under the Post-Communist Transformation: The Case of Poland”, *Polish Sociological Review*, 2/1997, 100. Moreover, in some countries it has become a part of popular culture, e.g. in the UK one of the more common ways of bestowing government patronage is by virtue of appointment to paid positions in various semipublic administrative bodies outside the civil service that receive financial support from the government. The popular term for such administrative bodies is *Quango* (an acronym for quasi autonomous nongovernment organization) while media articles which deal with government patronage as a rule include in their title the cynical note “It takes two to Quango!” – the title of one of the episodes of the acclaimed political satire *Yes Minister*; by J. Lynn and A. Jay, ridiculing government patronage and obtaining silence from the professional and academic classes.

The approach, which relies on the work previously done in jurisdictions with a parliamentary tradition far senior to Serbia's,<sup>65</sup> would be to adjust the public consultations process in a way that will induce the audience, primarily members of parliament, as well as the media, to mind what they hear.<sup>66</sup> This could best be accomplished by introducing an adversary element in the consultations process. The idea that institutionalized conflict is a useful tool to combat political corruption is quite old and lies at the core of the principle of division of power in modern societies i.e. in the checks and balances which govern our political systems.<sup>67</sup> Competitive political systems help prevent corruption by raising the cost of corruption.<sup>68</sup> Although, while altering the foundations of the political system (e.g. giving more power to the legislature through a shift from a system of proportional representation to a majoritarian one) requires not only amendments to legislation, but also reaching a wide political consensus,<sup>69</sup> changes in the public consultations procedure can be carried out quicker and entail only minute costs compared to the potential benefits.

As an example of possible novelties in the public consultations process, the explanatory memorandums that accompany proposed legislation should be subjected to analysis and written commentary by a body of experts formed by the respective parliamentary committee dealing with tax matters (i.e. a "rebuttal of the explanatory memorandum"), prior to such proposals being submitted to the NARS. Such a body of experts should be formed by the parliamentary committee, by consensus, but if no such consensus can be achieved, the opposition representatives should be entitled to form such a body. Furthermore, all members of such parliamentary committees should be entitled to independently form bodies of experts to whom they would entrust the detailed analysis of proposed legislation. Explanatory memorandums and consequential comments by the mentioned bodies of experts should not be purely descriptive in nature. Rather their authors would have to be legally obliged to elaborate on the policy that the legislation wishes to accomplish and the procedures necessary for its successful implementation. The parliamentary budget

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<sup>65</sup> See J. Freedman, "Managing tax complexity: the institutional framework for tax policy-making and oversight", Working Paper 15/08, Oxford University Center for Business Taxation, May 2015, 6–9 (available at <http://eureka.sbs.ox.ac.uk/5432/1/WP1508.pdf>).

<sup>66</sup> For more on the significance of regulatory transparency see R. Stone, "Legal Design for the 'Good Man'", 102 *Va. L. Rev.* (2016), 1820–1821.

<sup>67</sup> See Z. Teachout, "The Anti-Corruption Principle", 94 *Cornell L. Rev.* (2008–2009), 369–372.

<sup>68</sup> See S. Rose-Ackerman, *op. cit.*, 86.

<sup>69</sup> As such a change would have fundamental impact on the position of political parties and the actual independence of parliamentary representatives.

should be increased to reflect the costs of such expert bodies, while all of this material should be made publicly available and easily accessible.

On the other hand, it should be mandatory to hold parliamentary hearings of those advocating the government's proposal (i.e. representatives of the MoF in most cases of proposed tax legislation) and of independent expert members of the bodies set up by the relevant parliamentary committee criticizing it. Such hearings should be public and supported by broad media coverage. It is essential that such hearings enable the opposing sides to openly question the other's position and for corresponding replies to be made. Thus, the members of parliament and the media would not need to deduce for themselves the potential issues related to government's proposals, but would benefit from established and presumably founded and constructive criticism.

The obligation to hold public hearings should be made unconditional<sup>70</sup> and the duration of the process should be sufficiently extended.<sup>71</sup> Furthermore, public consultations, outside the privy of the parliament, must be as open as possible and they should also be made mandatory in the case of any tax legislation amendment. The government should be obliged to report to the parliamentary committee all suggestions, criticism or praise received in the public consultations process and provide additional explanation how and why suggestions and criticism were addressed. The parliamentary committee should have the power to fine government officials and ministers if they are found to be in contempt, by virtue of the lack of quality of their responses. Needless to say, such committees must not have a government majority while the rules on the public consultations procedure should be exclusively regulated by the highest statutes (i.e. laws), thus preventing the executive branch of the government to change them with ease. However, our analysis of the state of the Serbian tax community shows that we must side with J. Freedman's opinion that little should left of informal platforms which may be susceptible to vested interests – expertise and debate must be, in the case of Serbia, returned to the NARS and the elected representatives of the people. Thus, an institutional solution within the ambit of the NARS is a necessity.<sup>72</sup>

Finally, we must question the appropriateness of the urgent legislative procedure in tax matters and advocate for minimum debate time to be guaranteed in order to make full use of the public consultations and parliamentary hearings process.

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<sup>70</sup> Even in the USA when the duty to provide supportive explanatory documentation is subject to an interpretative rule the relevant authorities find it quite easy to avoid such an obligation. See L. Zelenak, *op. cit.*, 117–118.

<sup>71</sup> See e.g. Art. 41(7) of the Rules of Procedure of the Serbian Government states that the public consultations process should last for at least 20 days which is clearly insufficient in most cases.

<sup>72</sup> See J. Freedman, *op. cit.*, 9.

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