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UNIVERSITY OF PRIŠTINA IN KOSOVSKA MITROVICA
FACULTY OF LAW

International Scientific Conference

PROTECTION OF HUMAN RIGHTS AND FREEDOMS IN LIGHT OF INTERNATIONAL AND NATIONAL STANDARDS

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CONTENT

An International scientific conference "PROTECTION OF HUMAN RIGHTS AND FREEDOMS IN LIGHT OF INTERNATIONAL AND NATIONAL STANDARDS" was held on May 20, 2022, at the Faculty of Law of the University of Priština in Kosovska Mitrovica, on the occasion of marking its 61st anniversary. Raising scientific awareness and spreading knowledge about different ways of respecting and protecting human rights, through the exchange of ideas and experiences of authors/participants from a large number of countries, contributes to more effective exercise of human rights and freedoms, both internationally and nationally.

The particular importance of human rights is expressed in societies where social relations are burdened by recent upheavals and conflicts, and the latent risks of recurrence. The application of human rights is to a large extent subject to the influences of politics, which in the legislative sense does not affect the international legal nature of human rights, but the degree of their application and respect. Respect for the minimum of human rights in Serbia is the only guarantee that our society will make the necessary step forward in civilization. Cooperation between states in the field of human rights protection is of fundamental importance for the functioning and survival of the international community. International human rights treaties oblige member states to achieve results, ie to protect human rights, and they are free to choose the way to fulfill their international obligations. An appropriate normative framework has been created in the Republic of Serbia, which guarantees the exercise and respect of human rights to all persons who fall under the jurisdiction of domestic authorities. Therefore, the idea of the organizers of the scientific conference is to contribute to the scientific debate on the achievements in the realization of human rights, but also the difficulties, possibilities of overcoming them, as well as to contribute to the improvement of human rights, both in law and application. 77 international representatives from the country and abroad are participating in this international scientific conference, who have presented 55 scientific papers independently or as co-authors. Having in mind that a number of papers were written and announced in English, the papers were published in two thematic collections: in Serbian and English. In addition, a number of papers will be published at the request of the author in the annual Proceedings of the Faculty of Law University of Priština in Kosovska Mitrovica.

I would like to thank all the members of the Publishing Council, members of the Editorial Board from abroad and the country, as well as reviewers of submitted works, for comments and suggestions that were crucial for the final publication and quality of thematic collections.

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THE STATUS OF THE PLEDGE CREDITOR DURING THE REALIZATION OF THE RIGHT OF PLEDGE IN THE MACEDONIAN LAW

Abstract

The paper analyses the status and rights of the pledge creditor during the process of realization of the right of pledge.

As it is shown in the paper, in Macedonian law one of the main rights of the pledge creditor, in case of default on part of the debtor, is the right to demand realization of the right of pledge by sale of the pledged object, since lex commissoria is granted only in exceptional situations. The analysis of the Macedonian legislation shows that pledge creditors are offered various alternatives to choose from concerning the realization of the right of pledge such as: notary public, enforcement agents, brokers, real-estate agency, although some of the offered alternatives aren't viable due to insufficient regulation, or due to the fact that they are permitted only when the right of pledge has been acquired by contract (contract pledge).

In the legal practice, as the paper will demonstrate, the pledge creditors usually turn to enforcement agents when conditions for realization of the right of pledge are fulfilled. Since enforcement agents act in accordance to the Enforcement Law, the realization of the pledge right is conducted in enforcement proceeding. The core of problems that arise in the enforcement proceedings lays in the fact that the provisions of the Enforcement Law are of

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general nature, they are not specifically adapted for the purpose of realization of the right of pledge, nor they need to be. As it is shown in the paper, enforcement agents are the ones that need to adapt the conduct of the enforcement proceedings so it would serve the purpose at hand – the realization of the right of pledge. With that in mind, the paper analyses the problems and issues arising in enforcement proceeding and directs to the possible solution based on the nature and regulation of the right of pledge.

Key words: civil law, property law, right of pledge.

INTRODUCTION

The decision to enter into credit relations for creditors depends largely on the fact whether their claims could be paid in full on part of their debtors (pacta sunt servanda). Having that fact in mind, legal systems input legal mechanisms that protect creditor and enable them to legally force their debtors to fulfill the debts deriving form credit relations.

Macedonian law in no exception in regard to the efforts to ensure legal protection for creditors. The Law of Obligations[1], as primary law in the area of obligations, proclaims the duty and the responsibility for all parties entering into some form of obligations to fulfill their duties:

All parties in obligations are compelled to fulfill their duties and are responsible for its fulfillment. (art. 10, par. 1)

In direction of providing legal protection of creditors there is a general rule that debtors are responsible for their debts with the entirety of their estate. The personal responsibility of the debtor for his or her debts that encumbers their entire estate enables the creditors to ask for forced payment from any part of the estate of the debtor. The limit is that the part of the debtor's estate chosen to be subject to enforcement must be sufficient in value for the creditor's claim to be fulfilled, and not disproportionally more valuable than the claim and other expenses linked to the enforcement proceedings.

Clearly the legally imposed personal responsibility of the debtors for their debts is a powerful instrument for protection of creditors with respect to their claims. The shortcoming of this instrument lays in the fact that in some occasions the entire estate of the debtor may be insufficient for payment of the debt in full. Precisely this shortcoming of the personal responsibility of the debtor is what motivates creditors to seek additional securities for their claims.

[1] Official Gazette of the Republic of Macedonia, number 18/01, 4/02, 5/03, 84/08, 81/09, 161/09 and 123/13.

The instruments for securing of claims are classified by the civil doctrine in two large groups: personal instruments for securing of claims (personal securities such as guarantees, penalties, bills of exchange and etc.) and real instruments for securing of claims (real securities such as pledge, fiduciary transfer of ownership) [2]. In comparison, it is considered that real securities are more likely to offer higher level of security for creditors than personal securities. The reason for such a conclusion is the nature of real and personal securities. Personal securities are based on supposition that the person guaranteeing for someone else's debt will be solvent at the moment when the debt comes due for payment, however that may not be the case. Much like in the case of personal responsibility of the insolvent debtor, guarantor may also become insolvent for payment of the debt. Unlike personal securities, real securities hold no risk of insolvency since the guarantee is a particular item owned by debtor or by a third party that has consented to respond for the debt of another. Real securities afford the creditor the right to demand payment from the value of the thing (item) that is the object of the real security before all other creditors. Due to the erga omnes effect of real securities, the creditor has the right to demand payment even if the ownership over the object of the real security has changed hands. Another significant advantage of real securities, over personal ones, is the fact that the creditor may demand payment from the value of the object of the real security even if the claim has prescribed[3].

Macedonian laws regulate pledge (pawn and mortgage) and fiduciary transfer of ownership as types of real securities. Between the two, pledge is the more sought-after type of real security by creditors.

[2] See: J. Дабовиќ – Анастасовска, Н. Гавриловиќ, *Личноправни и стварноправни средства за обезбедување на побарувањата*, Деловно право, мај, 2008, 133-134. А. Јаневски, *Постапка за засновање на залог според Законот за залог на подвижи предмети и права,* Зборник во чест на Арсен Групче, Правен факултет, Скопје, 2001, 139-140; N. Gavella et. al., *Stvarno parvo, Svezak drugi,* Zagreb, 2007, 101; Z.P. Rašović, *Stvarno pravo,* Podgorica, 2008, 374-375; R. Kovačević Kuštrimović, M. Lazić, *Stvarno pravo*, Niš, 2004, 269; M. Lazić, *Prava realnog obezbeđenja,* Niš, 2009, 45-46.

[3] Art. 357, Law of Obligations.

1. REGULATION CONCERNING THE RIGHT OF PLEDGE

The basic law regulating property relations in RN Macedonia – the Law of Ownership and Other Real Rights[4] regulates pledge as a real right (right in rem). This basic law is instrumental in determining the legal nature of the pledge, but has only ten provisions that actually regulate the right of pledge.

Other relevant regulation with respect to the right of pledge are various special laws that regulate certain types of pledge or pledge over certain types of things such as ships and aircrafts. We will mention the most significant ones such as: a) the Law of Contract Pledge[5], b) the Law for Securing of Claims[6], c) the Law of Obligations and Property Relations in Air Traffic[7] and d) the Law of Internal Sail[8].

a) The Law of Contract Pledge regulates the right of pledge acquired on the bases of pledge contract (contract pledge). It regulates both pawn (as pledge over movables and over rights) and mortgage (as pledge over immovables).

b) The Law for Securing of Claims regulates the right of pledge acquired on the bases of a court decision (judicial pledge)[9]. This law also recognizes two types of judicial pledge – pledge on movables and mortgage.

c) The Law of Obligations and Property Relations in Air Traffic regulates contractual, and legal pledge on aircrafts[10]. This law only regulates mortgage as a type of pledge since the aircrafts in the Macedonian legal system fall under the regime of immovable things. As for judicial pledge over aircrafts this law points to the Law for Securing of Claims.

d) The Law of Internal Sail regulates contractual and legal pledge on boats and other flotation devises[11].

[4] Official Gazette of the Republic of Macedonia, number18/01, 92/08, 139/09 and 35/10.
[5] Official Gazette of the Republic of Macedonia, number 5/2003, 4/2005, 87/2007, 51/2011, 74/2012, 115/2014, 98/2015, 215/2015 and 61/2016.
[6] Official Gazette of the Republic of Macedonia, number 87/07 and 31/16.
[7] Official Gazette of the Republic of Macedonia, number 85/08, 148/11, 10/15 and 150/15.
[8] Official Gazette of the Republic of Macedonia, number 55/2007, 26/2009, 22/2010, 23/2011, 53/2011, 155/2012, 15/2013, 137/2013, 163/2013, 42/2014, 166/2014, 146/2015, 193/2015, 31/2016 and 64/2018.
[9] Art. 11-19, Law for Securing of Claims.
[10] Art. 197-171, Law of Obligations and Property Relations in Air Traffic.
[11] Art. 121-148, Law of Internal Sail.

It is worth mentioning that provisions regulating legal pledge as a right of pledge acquired by law are found in different laws such as the Law of Obligations[12], the Law of Tax Proceedings[13], the Law for Protection of Cultural Heritage[14] and other.

2. THE CHARACTERISTICS OF THE PLEDGE AND THEIR EFFECT ON THE RIGHTS OF THE CREDITORS

Pledge as a real right has the characteristics commonly attributed to real rights (rights in rem). Due to its specific nature, being a real right used as real security, pledge also has some distinctive characteristic that are instrumental in the process of exercising this right in practice. The characteristic that are distinctive for the right of pledge must always be observed in the process of acquiring and in the process of realization of the right of pledge on part of creditors as holders of that right. These distinctive characteristics are: a) particularity, b) accessory nature, c) indivisibility, d) elasticity and e) priority.

a) Particularity of the pledge is demonstrated in two ways: by precise determination of the secured claim and by precise determination of the object of that security (the right or the thing that is pledged)[15]. Due to the effects of particularity, the pledge can't be acquired under no legal base unless it is precisely determined what is being pledged for securing of which claim belonging to which creditor[16]. It is important to note that the creditors can't ask only for general description of the object of pledge. On the contrary, the pledged thing or right need to be precisely individualized so it leaves no room

[12] Art. 647, 735, 792, 819, 842 and other.

[13] Art. 134, Law of Tax Proceedings, Official Gazette of the Republic of Macedonia, number 90/2007, 145/2007, 21/2008, 88/2008, 59/2008, 23/2009, 76/2009, 105/2009, 133/2009, 145/2010, 171/2010, 53/2011, 166/2011, 39/2012, 84/2012, 187/2013, 15/2015, 97/2015, 129/2015, 154/2015, 23/2016, 35/2018, Official Gazette of the Republic of North Macedonia, number 275/2019 and 290/2020.

[14] Art. 142, Law for Protection of Cultural Heritage, Official Gazette of the Republic of Macedonia, number 20/04, 71/04, 115/07, 18/11, 148/11, 23/13, 137/13, 164/13, 38/14, 44/14, 199/14, 104/15, 154/15, 192/15, 39/16, 11/18 and Official Gazette of the Republic of North Macedonia, number 20/2019.

[15]Р. Живковска, *Стварно право*, Европа 92, Скопје, 2005, 31-32. N. Gavella et. al., *Stvarno pravo, svezak 1*, *Narodne Novine, 2007,* 33; N. Gavella et. al., *Stvarno pravo, svezak 2, op. cit.,*136.

[16] Art. 225, par. 1, Law of Ownership and Other Real Rights. Art. 23, par. 1/3, Law of Contract Pledge.

for uncertainty as to what thing or which right has been pledged[17]. We note this because there were some adopted practices in drafting pledge contracts where it was written in general that “object of pledge are all accessories and attachments accompanying the main thing”. It is our opinion that axillary things that accompany and aid in the function of the main thing should also be individualized in the pledge contract so there is no confusion which are these axillary things. This is especially relevant for accessories, since according to Macedonian regulation they are not considered as crucial parts for the function of the main thing and therefore accessories can also independently be object of real rights[18].

There is an exception to the particularity of the pledge when contractual pledge is concerned. The Law of Contract Pledge allows for the pledge right registered in public records to be reused for securing another claim once the previously secured claim has been paid out in full. However, the new claim being secured with the same pledge right may not be greater than the previous one[19]. Another exception of the particularity, also found in the Law of Contract Pledge, is the possibility for substitution when the pledge right is transferred onto another object, because the previous one has been destroyed[20].

b) The accessory nature of the pledge is reflected in the fact that this right can only exist as long as the secured claim exists[21]. As a result of the accessory nature of the pledge once the claim is paid out, or has been discharged in some other way, the termination of the pledge right in favor of the creditor follows[22]. There are however exceptions in case of transfer of the pledge for securing a new claim, and also in cases where the claims secured by pledge are future claims or claims that depend on conditions. In the last two cases, where future or conditioned claims are concerned, when it becomes evident that the claims will not come to be, the pledge right of the creditor is terminated.

c) Indivisibility of the pledge refers to the fact that the entire pledged object is encumbered right up to the moment that the secured claim is paid in

[17] N. Gavella et. al., *Stvarno pravo, svezak 2, op. cit.*, 138.
[18] Art. 14, par. 4, Law of Ownership and Other Real Rights.
[19] Art. 45, Law of Contract Pledge.
[20] Art. 41, Law of Contract Pledge.
[21] Art. 233, Law of Ownership and Other Real Rights. Art. 41, par 1/2, Law of Contract Pledge.
[22] Р. Живковска, *Стварно право, op. cit.*, 125; R. Kovačević - Kuštrimović, M. Lazić, *Stvarno pravo, op*, cit., 272; Z. P. Rašović, *Stvarno pravo, op. cit.*, 346-349; M. Lazić, *Prava realnog obezbeđenja, op. cit.*, 57-58. N. Gavella, *Stvarno pravo, svezak 2, op. cit.*, 135-136.

full[23]. As a result of that, the partial payment of the secured claim can't lead to decreasing the encumbrance over the pledged object. From another viewpoint, the indivisibility of the pledged object also means that in case of physical division of the object, the pelage right will extend to all new parts that came to be after the division. For the creditor this means that he or she will be able to demand sale of all new parts in the process of realization of the pledge right, regardless whether they still belong to the original pledge debtor, or the right of ownership has been transferred to third parties.

d) Elasticity of the pledge right enables it to spread to the very limits of the right of ownership of the pledge debtor over the pledged object[24]. In other words, if the ownership of the pledge debtor extends to the entire object, then the pledge right of the creditor also extends over the entire object. However, if the ownership of the pledge debtor is limited to a part of the object, for he or she is a co-owner or joint owner, then the pledge right of the creditor extends only over the part of the object belonging to the pledge debtor, and not over the entire object.

As a result of the elasticity of the pledge, when object of pledge are complexed things consisting of various components (main and axillary, essential or non-essential, accessories and attachments), the pledge right encumbers all components, provided that the right of ownership of the pledge debtor extends to all of them. For example, if the pledge debtor owns the main thing but for some reason, before the pledge has been given, he or she lost the ownership over the axillary things, then the pledge can't extend to those axillary things.

Under the influence of the elasticity of the pledge, the pledge may encumber the fruits of the main thing while they form part of it. In the moment of its separation the fruit becomes separate thing which can individually be an object of real rights. It is important to bare this in mind in the process of realization of the pledge right on part of the creditor. When proceedings for realization of the pledge right have been initialized, the sale of the main thing will also include all fruits that haven't been separated up to the moment of initiation of the proceeding. That is how article 7, paragraph 2 of the Law of Contract Pledge should be interpreted:

[23] Art. 231, Law of Ownership and Other Real Rights. More about indivisibility of the pledge see: Р. Живковска, *Стварно право, op. cit.*, 125; М. Lazić, *Prava realnog obezbeđenja, op. cit.*, 63. О. Станковић, М. Орлић, *Стварно право*, Номос, Београд, 2001, 245.

[24] Art. 230, par. 1 Law of Ownership and Other Real Rights.

If the pledged object gives fruits or products, object of pledge are also the fruits and products, as well as replacements of the pledged object, if the pledge contract doesn't stipulate otherwise.

The cited provision should not be understood in sense that the creditor has a pledge right extending to all fruits born by the primary pledged object, because that would be contrary to the provision of article 27, paragraph 2 of the Law of Contract Pledge:

If the pledge object gives fruits, the pledge debtor is allowed to collect the fruits upon their separation, unless the pledge contract stipulates otherwise.

It is customary for the pledge debtor to be able to use the pledged object and to collect the fruits and other benefits that the pledged object has to give, up to the moment of realization of the pledge right of the creditor. However, there is an option for the pledge debtor to agree for the creditor to be able to collect the fruits and other benefits of the pledge object as payment of the secured claim. This agreement between the pledged debtor and the creditor is known as antichresis (pactum antichreticum). From theoretical standpoint the antichresis agreement should be exactly that – an agreement between the pledge debtor and the creditor. This is why it is unacceptable for the law to impose such a right for the creditor overshadowing the rights of the pledge debtor as the owner of the pledged object.

Elasticity of the pledge extends to all improvements and changes that occur on the pledged object after it has been pledged (building annexes, adaptations, installation of parts and other). With respect to this we would like to point out that the elasticity of the pledge extents only to improvements functionally inked to the pledge object and can't function as a separate object of real rights. For example, if the pledge object is parcel of land with a house, and after pledging it the pledge debtor has built another room in the house, then, by effect of elasticity, the pledge will extend to that room as well. This is so because the room is functionally linked to the rest of the house, and it can't function as a separate object of real rights. Another example of how elasticity of the pledge takes effect is when the pledge debtor has repurposed the pledged object. For example, if the pledged apartment has been repurposed to function as an office space, then the pledge will extend to the repurposed thing regardless of the fact that it has changed type, quality and function.

Addressing the issue how the principle of elasticity will affect building annexes on an existing pledged building, we would like to point out that it depends on the nature of the built annexes. If the built annexes represent a functional unit independent from the rest of the building (new apartments, new

office spaces) then this annexes, because they are treated by the law as independent (separate) object of real right, can't be encumbered with the pledge that already exists on other parts of the building. This is so even if the annexes are owned by the pledge debtor. In this situation we consider that the principle of particularity ways in more heavily than the principle of elasticity of the pledge.

The principle of elasticity must have some limits. Those limits are the same as the limits of the right of ownership of the pledge debtor over the pledged object. From theoretical point of view the elasticity of the pledge doesn't allow for the right of pledge to spread onto several things owned by the pledge debtor, unless it is acquired as simultaneous pledge. More importantly, the principle of elasticity doesn't allow for the pledge right to gradually spread onto other things that the pledge debtor will come to own after pledging part of his property in favor of the creditor, and it shouldn't be stipulated otherwise, nor by law, nor by contract.

One of the main reasons for placing limits on the elasticity of the pledge is to prevent the appearance of the so called "general pledge" which means pledge over every and all things belonging to the pledge debtor in favor of a single creditor[25]. This type of pledge is a legal relic long abandoned by modern legal systems because of the unnecessary and disproportional burden that places over the debtor. Furthermore, the "general pledge" is unacceptable because it ultimately leads to blatant disregard of the pledge debtor's rights over his or her property and all in favor of a single creditor. Such an unfavorable position of the pledge debtor is not compatible with the civil law that rests on the principle of equality of rights and just treatment of each party entering into civil law relations. Modern civil law systems go even a step further by guaranteeing additional legal protection of the weaker party in the relations. The weaker party in relations concerning pledge is clearly the pledge debtor.

In Macedonian law acquiring the "general pledge" is not allowed. However, there are some debatable provisions that enable the elasticity of the pledge do spread beyond the acceptable limits. Such is the provision of article 23, paragraph 4 of the Law of Contract Pledge:

Pledge right (object of pledge) encumbers all fonds of the debtor including future ones that the debtor will come to acquire, unless it is clearly

[25] И. Бабић, *Грађанско право, Књига 2, Стварно право*, Београд - Нови Сад, 2012, 269; О. Станојевић, *Римско право,* Правни факултет и Досије, Београд, 1997, 220.

agreed between the contracting parties that they are accepting for the pledge to encumber only part of the funds belonging to the pledge debtor at the moment of conclusion of the pledge contract.

The first thing that can be noted in the cited provision is the erroneous use of legal terminology. It appears that the legislator sees no difference between the pledge right and the pledged object, which are two different things. The term “pledge right” refers to the real right belonging to the creditor, and the term “pledged object” refers to the thing (or right) belonging to the pledge debtor that has been pledged. Putting aside the misuse of legal terminology, the provision is unclear as to what the formulation “funds of the debtor” entails. This particular terminology is not used anywhere else in the Law of Contract Pledge, nor it is in any way explained what the term “funds” include. This is why we ask: What does the term “funds” stand for? Judging from the way that the provision is composed it could mean literally anything. It could even refer to things and rights belonging to the pledge debtor that can be expressed in monetary value, and not just the ones belonging to the pledge debtor in the moment when the pledge is given, but also to things and rights that he or she will acquire in the future. This provision can easily lead into some form of “general pledge” that will put the pledge debtor in extremely unfavorable position, and will give the creditors the chance to abuse their already privileged position. Due to the possibility for this provision to have an undesirable effect on the rights and legal position of the pledge debtor, we consider that it should be redrafted, or stricken from the law altogether.

Another debatable provision that refers to the elasticity of the pledge right, also in the Law of Contract Pledge, is the provision of article 12, paragraph 1 of the Law:

When the pledged object is the immovable property of a company or other form of juridical person, then the pledge encumbers all its attachments and accessories.

What this provision prescribes in regard to the elasticity of the pledge right is practically unachievable. First and foremost, we would like to point out that object of pledge over immovables (mortgage) are only things that, by nature or by law, fall under the regime of immovable things. This is not the case with accessories since they are by law considered to be movable things[26]. So basically, according to Macedonian laws accessories can’t be mortgaged, only pawned.

[26] Art. 15, par. 4, Law of Ownership and Other Real Rights.

Theoretically speaking, some movable things that are by purpose designated to aid the function of particular immovable thing can be treated by law as attachments, rather than accessories of the immovable thing that they serve. When the law stipulates certain movable things to fall under the regime of attachments, rather than accessories, then and only then, they are by law considered to be immovable and can be mortgaged alongside the main immovable thing. Most commonly given example of things to have that type of legal treatment is the hotel inventory which consists of many movable items. All of them are considered as part of the hotel (part of the immovable thing), and so they fall under the regime of immovable things. Similar example we find in the treatment of agricultural machinery intended to be used on certain agricultural land for agricultural production. These machines, although movable, by law are treated as attachment to the agricultural land, and as such form legal unity with the land. Macedonian law, in its current state, has no provisions attributing this type of legal regime on movable things, but it is our opinion that it should. Such provision will enable mortgaging real estate along with the movable things that are indispensable for the use of that real estate. That way the value of the real estate will increase, and in case of sale of the mortgaged real estate for realization of the pledge right of the creditor the buyer will receive a fully functional real estate. Regarding this issue we would like to point out that not all movable things found on some real estate can fall under the regime of immovables. The things that will fall under such regime need to be in some way functionally inked to the use of the real estate. For example, if a factory is mortgaged as a real estate, then the mortgaged should also encumber all movable things such as equipment and machines that are indispensable so that the production could continue uninterrupted. If it is, let us say a chocolate factory, along with the building (the factory), the object of the mortgages will include all the equipment and machines for the production of the chocolate. However, the mortgage over the factory will not include the movable things that are not indispensable for the production, such as generic equipment like photocopier, office chairs and tables, office materials, decorations and similar equipment. To make our point even more clear, we would like to note that if a house is mortgaged, common household items like furniture and such will not be encumbered by that mortgage, or if office space is mortgaged, conference tables and similar generic equipment will not be encumbered by the mortgage.

e) Priority of the pledge has dual effect. First, the pledge right gives priority to the pledge creditor over the regular creditors[27]. This effect of priority means that the pledge creditor is authorized to be the first to get payment form the value of the pledged object before all other regular creditors. Second, the pledge right also gives priority to the pledge creditor over other pledge creditors that have acquired pledge over the same object but at a later date. The priority of the pledge creditors who obtained pledge rights over the same object is usually determined by the time they have obtained their pledge right, firs in time – first in line. However, there are some exceptions to this rule. In some special laws regulating pledge the priority of the pledge creditors is determined not only by the time that they obtained the pledge right but also dependent on the type of pledge. For example, the Law of Obligations and Property Relations in Air Traffic in article 149, paragraph 2 states that legal pledge has the priority over contract pledge on aircrafts.

The priority is essential in the process of realization of the pledge right, this is why the person authorized to carry out the proceedings for realization of the pledge right is obligated to keep track of the priority between the creditors.

3. REALIZATION OF THE PLEDGE RIGHT BY THE CREDITOR

In the legal theory the realization of the pledge right is considered to be manner of termination of the pledge. Realization of the pledge right is conducted in cases when the secured claim hasn't been paid out in time. By realization of the pledge right, the creditor is paid out from the value of the pledged object.

Looking into the Macedonian legal system we note that there is no general regulation referring to the realization of the pledge right since the basic law – the Law of Ownership and Other Real Rights has no provisions to the effect. Although precise provisions are lacking in the basic law, still, we can derive from article 225 of the Law that the pledge right can be terminated by way of realization with sale of the pledged object and payment of the claim of the creditor from the sale price or with transfer or ownership on the pledged object to the creditor instead of payment (lex commissoria). The latter variant (lex commissoria) is permitted only with the contract pledge[28]. The Law of

[27] Ch., Atias, *Les Biens, quatrième èdition*, Litec, Paris, 1999, 53.

[28] Regarding lex commissoria we note that the special law – the Law of Contract Pledge isn't in-line with the basic law – the Law of Ownership and Other Real Rights. The special Law doesn't allow for lex commissoria to be entered in the pledge contract.

Contract Pledge prescribes that realization of the pledge right is conducted by sale of the pledged thing, or by transfer of the pledged right. As for the Law of Obligations and Property Relations in Air Traffic it also regulates the realization of pledge right by sale of the pledged aircraft. The same is with the Law of Internal Sail, where it is also stated that pledge right can be realized by way of sale of the pledged boat (or other flotation device). As for the Law for Securing of Claims, regarding the realization of the pledge right it points to the Law of Enforcement[29]:

In the proceedings for securing of claims are appropriately applicable the provisions of the Law of Civil Procedure and the Law of Enforcement, if this law doesn't stipulate otherwise. (art. 7)

As for the proceedings for realization of the pledge right, by analyzing the entire legislation concerning the pledge right, we can conclude that there are various forms of realization available only for the contract pledge such as realization by notary public according to proceedings regulated with the Law of Contract Pledge, realization by enforcement agents according to the Law of Enforcement, realization by real estate agency, broker and other authorized persons[30]. As for the judicial pledge, this right is realized exclusively by enforcement agents according to the Law of Enforcement. The legal pledge is usually realized by enforcement agents, unless otherwise stipulated by special law. For example, legal pledge may also be realized in the scope of the tax enforcement procedure by the Public Revenue Office. Analyzing the process of realization of the pledge right we will keep to the material, rather than the procedural aspects of the process. From the standpoint of the material aspects in realization of the pledge right we aim to answer three basic questions: 1. Under what conditions can the pledge creditor initiate proceedings for realization of the pledge right? 2. How the realization of the pledge right may be conducted? and 3. What are the consequences of the realization of the pledge right?

1. In lack of general provisions the answer of the first question (Under what conditions can the pledge creditor initiate proceedings for realization of the pledge right?) should be looked for in the provisions of the special laws that

Instead, the special Law permits for the pledge creditor to acquire ownership over the pledged object only during the proceedings for realization of the pledge right if the sale is unsuccessful.

[29] Official Gazette of the Republic of Macedonia, number 72/2016, 142/2016, 178/2017, 26/2018, 233/2018, Official Gazette of the Republic of North Macedonia, number 14/2020 and 136/2020.

[30] Art. 59, Law of Contract Pledge.

regulate particular types of pledge, by evaluating to what degree those provisions are generally applicable. Provisions determining the conditions for initiating the proceedings for realization of the pledge right contains the Law of Contract Pledge in article 61. According to its provisions there are two conditions that need to be met: default on part of the debtor in payment of the debt and the legal base for acquiring the pledge right to have the quality of enforceable instrument. These two conditions are of general nature, so we could accept that they should be considered for realization of any type of pledge. By exception, the pledge creditor may ask for realization of the pledge right even before the default on part of the debtor if the pledge debtor has violated the right of the pledge creditor determined by law or by the pledge contract[31] or the pledged object has been devaluated and the pledge debtor has refused to give additional security to compensate for the devaluation[32]. Unlike the basic two conditions that are generally applicable for all types of pledge, these particular conditions for early realization of the pledge right are only applicable for the respected types of contract pledge.

2. The answer of the second question (How the realization of the pledge right may be conducted?) depends on the nature of the pledged object.

2.1. If the pledged object is movable or immovable thing, then the realization of the pledge right is conducted by sale of the pledge object and payment of the secured claim form the sale price. In exceptional situations, according to the provisions of the Law of Contract Pledge, the realization of the contract pledge may be conducted by lex commissoria, but only if the sale of the pledged object has been unsuccessful. It needs to be noted that the provisions of the Law of Contract Pledge, limiting the exercise of lex commissoria only in occasion when the pledged object can't be sold in public sale is a solid legal solution, since it protects proportionally the interest of both parties – the pledge creditor and the pledge debtor.

When discussing the realization of pledge right over movable and immovable things it needs to be mentioned that there is a legal gap in regulating the realization of pledge right on "ideal part" of the object[33], realization of simultaneous pledge and pledge on "future things".

[31] Art. 62, Law of Contract Pledge.

[32] Art. 128, Law of Internal Sail and ar.t 152, Law of Obligations and Property Relations in Air Traffic.

[33] The provision of the Law of Contract Pledge regulating the pledge over "ideal part" of the object is completely unclear, which makes it unapplicable in practice. See: art. 22, par. 2, Law of Contract Pledge.

When proceeding to realization over the pledged "ideal part" of the object in practice the most obvious solution is chosen – the "ideal part" of the object is sold. Although it is logical for a "ideal part" of the object to be sold, since that part is the actual pledged object, that is not necessary in the best interest of the pledge debtor or the pledge creditor. The fact that only an "ideal part" of the object and not the whole thing is sold could make the sale less attractive for potential buyers and that will certainly affect the sale price. For the pledge creditor and the pledge debtor is much more beneficial if there is division between the co-owner, before the realization proceeding are initiated. According to the Law of Ownership and Other Real Rights co-owners can ask for division of the co-owned thing at any time[34]. Any creditor of one of the co-owners is also authorized by the law to ask for division if he or she has the need to enforce payment of his or her claim against one of the co-owners[35]. Even if the provision of article 50, paragraph 7 does not refer directly to the pledge creditor and it is not directly linked with the proceedings for realization of the pledge right there is no reason why it should not apply. This provision demonstrates the clear intention of the legislator to allow creditor to be paid out after the division, when a more marketable thing is gained, rather than before the division with a sale focused only on an "ideal part" of the object. The application of the provision concerning the division of co-ownership for the benefit of payment of a co-owner's creditor has one obvious disadvantage – the creditor must wait for the division proceedings to be concluded before he can get paid. The other issue is that this may appear unjust to the other co-owners since they don't owe anybody anything. However, we shouldn't overlook the fact that when there is co-ownership over a thing, then all co-owners enter into that relationship fully aware that they may have to respect each other's right to division at any time. So ultimately it doesn't matter if the co-owner asks for division because he or she no longer wants to be a co-owner, or if he or she asks for division because he or she needs to payout his or her creditors.

Concerning the realization of simultaneous pledge, we conclude that the lack of regulation makes it impossible for it to be obtained as such or to be realized as such[36]. The practice improvises by concluding pledge contracts with

[34] Art. 50, Law of Ownership and Other Real Rights.
[35] Art. 30, par. 7, Law of Ownership and Other Real Rights.
[36] There are some provisions regarding simultaneous pledge that regulate its registration in public record, but those provisions are not applicable for the other types of pledge. See: art. 198, Law of Internal Sail. There is also a provision in the Law of Obligations and Property Relations in Air Traffic which states that the pledge creditor who has simultaneous pledge on aircrafts is authorized to demand payment from the

more objects, but the public registers register it as separate pledge rights each on a separate pledged object, and if it comes to realization of the pledge right, each pledged object is sold in separate proceedings.

The Law of Contract Pledge opens the possibility for “future things” to be pledged in the provision of article 7 paragraph 1. However, except the proclamation that pledge may also exist on “future thing” nothing more is sad or regulated by the Law. In practice this provision enabled pledging buildings under construction as “future things”. With respect to the manner and conditions for realization of the pledge right over “future things” the Law of Contract Pledge doesn’t have a single provision. The Law of Enforcement regulates enforcement proceedings over buildings under construction in article 205-a. The problem with the provisions of article 205-a is that they are not composed very well and are rather confusing as to what is being sold, the building itself or the investor’s right to build. Further, these provisions are contrary to the basic Law of Ownership and Other Real Rights and are also contrary to other special laws such as the Law of Construction and the Law of Real Estate Cadaster. Ultimately the application of the provisions of article 205-a as they are written could potentially violate the rights of pledge debtors and third interested parties participating in the construction process.

Taking all things into consideration we have to conclude that the proceedings for realization of the pledge right over “future things” can be initiated only after the future thing – the building under construction will be fully constructed and registered in a property sheet by the Real Estate Cadaster.

2.2. Regarding the realization of the pledge right over shares the provisions of the Law of Contract Pledge and the Law of Enforcement apply. It is prescribed that shares are sold on the stock market[37].

2.3. The realization of pledge right over claims and other rights with monetary value is regulated in several provisions of the Law of Contract Pledge and the Law of Enforcement. It is prescribed that the realization is conducted by monetarizing the claim or other right[38].

3. The answer of the third question (What are the consequences of the realization of the pledge right?) boils down to the conclusion that by realization the pledge right is terminated. If the claim of the creditor, after the conclusion of the realization proceedings, remains unpaid in full or in part, then the

value of each individual aircraft. See: art. 160, Law of Obligations and Property Relations in Air Traffic.

[37] Art. 77, Law of Contract Pledge. Art. 159-160, Law of Enforcement.

[38] Art. 78-80, Law of Contract Pledge. Art. 118-139, Law of Enforcement.

creditor is able to ask for payment from the rest of the estate of his or her debtor. When touching upon this issue we would like to point out that the Law of Contract Pledge contains a rather faulty provisions with respect of the creditor's rights after the realization of the pledge right. In article 69, paragraph 3 of the Law of Contract Pledge it is stated:

If the pledge creditor is not able to receive full payment after the pledged object has been sold, he is authorized to ask the pledge debtor to pay out the unpaid part of the claim.

When drafting this provision, the legislator has neglected the fact that a pledge debtor can be another person, different from the debtor that actually owes payment to the creditor. When the pledge debtor is a third party, and not the actual debtor of the claim, that person is only liable for the claim with the value of the pledged object, and not with the rest of his or her estate[39].

CONCLUSION

Macedonian laws regulate pledge (pawn and mortgage) and fiduciary transfer of ownership as types of real securities. As it is underlined in the paper, of the two, pledge is the more sought-after type of real security by creditors.

The paper analyzes the most important laws regulating the pledge right focusing on the degree of harmonization between them with respect to the pledge right. Those are: the Law of Ownership and Other Real Rights, the Law of Contract Pledge, the Law for Securing of Claims, the Law of Obligations and Property Relations in Air Traffic and the Law of Internal Sail.

Analyzing the nature and characteristic of the pledge we conclude that it has the characteristics commonly attributed to real rights (rights in rem) and also has some distinctive characteristic that we find instrumental in the process of exercising this right in practice and also in the process of realization of the pledge by the pledge creditor. These distinctive characteristics are: particularity, accessory nature, indivisibility, elasticity and priority.

With respect to the realization of the pledge right, we note that it is considered to be manner of termination of the pledge. As it is shown in the paper, realization of the pledge right is conducted when the secured claim hasn't been paid out in time so that the creditor could be paid out from the value of the pledged object.

Concerning the proceedings for realization of the pledge right, the paper shows that there are various forms of realization available only for the

[39] Art. 13, par. 2, Law of Contract Pledge.

contract pledge (realization by: notary public, enforcement agents, real estate agency, broker and other authorized persons). Judicial pledge is realized exclusively by enforcement agents according to the Law of Enforcement. The legal pledge is usually realized by enforcement agents, unless otherwise stipulated by special law.

Analyzing all laws regulating pledge it is concluded that there are two general conditions that need to be met before initiating the proceedings for realization of any type of pledge right. Those conditions are: default on part of the debtor in payment of the debt and the legal base for acquiring the pledge right to have the quality of enforceable instrument.

The paper shows that there are various manners to conduct the realization proceedings dependent of what the nature of the pledged object is.

If the pledged object is movable or immovable thing, then the realization of the pledge right is conducted by sale of the pledge object or in exceptional situations (when the sale is unsuccessful) the realization of the contract pledge may be conducted by lex commissoria. Further, the paper notes that there is a legal gap in regulating the realization of pledge right on “ideal part” of the object, realization of simultaneous pledge and pledge on “future things”. Due to the legal gap, when proceeding to realization over the pledged “ideal part” of the object in practice the most obvious solution is chosen – the “ideal part” of the object is sold. Regarding simultaneous pledge, we conclude that the lack of regulation makes it impossible for it to be obtained or to be realized as such. As for the proceedings for realization of the pledge right over “future things”, we conclude that it can be initiated only after the future thing – the building under construction is fully constructed and registered in a property sheet by the Real Estate Cadaster.

When the pledged object are shares, in the process of realization of the pledge right they are sold on the stock market.

The realization of the pledge right over claims and other rights with monetary value is conducted by monetarizing the claim or other right.

At the end, the paper concludes that by realization the pledge right is terminated. If the claim of the creditor, after the conclusion of the realization proceedings, remains unpaid in full or in part, then the creditor is able to ask for payment from the rest of the estate of his or her debtor.

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СТАТУС ЗАЛОЖНИХ ПОВЕРИЛАЦА ТОКОМ ПОСТУПКА ЗА ОСТВАРИВАЊЕ ЗАЛОЖНОГ ПРАВА У МАКЕДОНСКОМ ПРАВУ

Резиме

У раду се анализирају статус и права заложног повериоца у току процеса остваривања заложног права. Како се показује у раду, у македонском праву једно од основних права заложног повериоца, у случају кашњења дужника, јесте право да захтева остварење заложног права продајом заложеног предмета, јер се lex commissoria признаје само у изузетним ситуацијама. Анализа македонског законодавства показује да се заложним повериоцима нуде различите алтернативе у погледу остваривања заложног права као што су: јавни бележник, извршитељи, посредници, агенција за некретнине, иако неке од понуђених алтернатива нису одрживи због недовољне регулисаности, или због чињенице да су дозвољени само када је заложно право стечено уговором (уговорна залога). У правној пракси, како ће се показати у раду, заложни повериоци се најчешће обраћају извршитељима када су испуњени услови за остваривање заложног права. С обзиром да извршитељи поступају у складу са Законом о извршењу, остваривање заложног права врши се у извршном поступку. Суштина проблема који се јављају у поступку извршења лежи у чињеници да су одредбе Закона о извршењу опште природе, нису посебно прилагођене ради остваривања заложног права, нити је потребно. Како се у раду показује, извршитељи су ти који треба да прилагоде вођење извршног поступка како би то служило сврси – остваривању заложног права. Имајући то у виду, у раду се анализирају проблеми и питања која се јављају у извршном поступку и упућује се на могуће решење на основу природе и уређења заложног права.

Кључне речи: грађанско право, стварно право, заложно право.

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ON SOME CHALLENGES TO THE PRESUMPTION OF INNOCENCE AS HUMAN RIGHTS AND FREEDOMS PROTECTION ISSUE

Abstract

This article presents the study results on the issues of concept and content of presumption of innocence as well as the origins and subsequent development of the corresponding notion and principle of criminal proceedings. In addition, this article contains the author's critical remarks about compliance with legislation regarding specific categories of citizens.

Keywords: Presumption, innocence, principle, guarantees, human rights.

1. INTRODUCTION

The developments of recent decades clearly demonstrate that many seemingly immutable provisions are losing their inviolability. Without addressing global issues of international law, the author focuses on such a principle as the presumption of innocence. A presumption is an assumption of fact that is considered to be true until it is proven false.[1] In other words, it is a belief of law-abidingness (innocence of infringing the established order) until the contrary is established and proven. This universal principle is attributed to the ancient world when Roman jurists established the rule of "praesumptio boni viri" (a litigant is considered to be acting in good faith until proven otherwise).[2] In the course of the development of society and statehood in the third century AD, the presumption of innocence principle underwent a certain transformation

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[1] See: *Kratkii slovar inostrannykh yazykov* [Concise Dictionary of Foreign Languages.]. /pod red. S. M. Lokshina. M., 1978, 218 p. (in Russian); *Slovar inostrannykh slov* [Dictionary of Foreign Words] / pod red.V. V. Pchelkinoi. – M., 1989, 406 p. (in Russian).

[2] *Larin A.M. Prezumptsiya nevinovnosti* [Presumption of innocence] op. cit. M.: Nauka, 1982, 12 p. (in Russian).

and concretization. It was formulated as “ei incumbit probatio, qui dicit, non qui negat; cum per rerum naturam factum, negantis probation nulla sint” (The proof lies upon him who affirms, not upon him who denies since by nature of things, he who denies a fact cannot produce any proof).[3] At present, this approach is valid in many countries both in civil (the applicant bears the burden of proving the breach his or her rights) and in criminal proceedings (the prosecution is obliged to prove the guilt of the accused whereas a defendant shall not be required to prove one's innocence).

2. CHALLENGES TO THE PRESUMPTION OF INNOCENCE AS HUMAN RIGHTS AND FREEDOMS PROTECTION ISSUE

When speaking of the presumption of innocence, it is necessary to pay attention that despite some differences in the definitions of various interpreters, the content of the concept of 'innocence' implies no complicity in a crime or no criminal acts commission. However, in addition to the criminal law meanings of this concept, the Latin-Russian Dictionary, for example, contains one of the meanings: “scrupulousness, fairness, unselfishness.”[4] It is therefore a logical consequence that one can understand the rightness of any person in any deed as innocence. It is worth pointing out that the presumption of innocenace applied in Roman law such a principle establishing a rule. Each participant in the litigation was considered to be acting in good faith (was presumed sincere and innocent - author's note) until otherwise was proved during the criminal proceedings (i.e. until the participant lost the case and was found to be unfair or in bad faith and thus guilty) according to this rule. Although the presumption of innocence was not enshrined in legislation, it was served as a binding rule in court proceedings.

The first legislative references to the presumption of innocence of the accused can be found in the Great Charter of Freedoms of 1215 (Magna Charta Libertatum in Latin). Article 39 of The Great Charter stated that: “no free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, except by the lawful judgement of his equals (his peers) or

[3] Larin A.M. op. cit. 47 p.; *Latinskie yuridicheskie izrecheniya* [Latin legal sayings]/ sost. E. I. Temnov. – M.: Yurist, 1966, 144 p. (in Russian).

[4] See: *Dvoretskii I.H. Latinsko-russkii slovar: Okolo 50 000 slov* [Latin-Russian Dictionary: About 50 000 words] / I.H. Dvoretskii., 2nd ed., Moscow, Russkii yazyk Publ., 1976, 529 p. (in Russian). Available at: https://bookree.org/reader?file=1332106&pg=530 [Accessed 10.03.2022].

by the law of the land."[5] In the 17th century, this provision was restated in the Petition of Rights of 1628. Article 3 indicated to King Charles I that under The Great Charter of 1215 (The Great Charter of the Liberties of England) "no free man may be seized, imprisoned, deprived of his land or liberties, outlawed, banished or otherwise harassed except by the lawful sentence of his equals or by the law of the land."[6] Article 4 states that: "by the statute of King Edward III of 1355 the provision previously enshrined in the Charter received its legislative consolidation. According to it, "no man, of what estate or condition that he be, should be put out of his land or tenements, nor taken, nor imprisoned, nor disinherited nor put to death without being brought to answer by due process of law."[7]

It should be noted that the principle of presumption of innocence was applied in criminal proceedings in the Middle Ages in most European countries. For example, the accused person was enabled to bear the burden of proving his or her innocence in accordance with the Criminal Code of the Holy Roman Empire of the German Nation, the so-called Caroline (The Constitutio Criminalis Carolina) in Germany in the sixteenth to eighteenth centuries. This German criminal procedure approach continued until the end of the eighteenth century. Since the Bourgeois Revolution in France 1789-1815 there were certain changes resulting from the principle of presumption of innocence. Determination "everyone shall be presumed innocent until proved guilty" was enshrined in Article 9 as one of the fundamental principles in the Declaration of the Rights of Man and Citizen (Déclaration des Droits de l'Homme et du Citoyen) adopted on August 26, 1789.[8] This declaration was so versatile that two centuries later, in 1971, the French Constitutional Council recognised it as a legally binding instrument. Its violation has been found to be unconstitutional.

[5] *D.M. Petrushevskii. Velikaya Khartiya volnostei i konstitutsionnaya borba v angliiskom obshchestve vo vtoroi polovine XIII veka.* [The Great Charter of liberties and the English society constitutional struggle in the second half of the 13th century]. M., M. and S. Sabashnikovs Publ., 1915. (in Russian).

[6] *Petitsiya o pravakh*, 1628 *// Konstitutsii i zakonodatelnye akty burzhuaznykh gosudarstv XVII-XIX*. [The Petition of Rights of 1628. Constitutions and Legislative Acts of Bourgeois Countries XVII-XIX]. M. Gosudarstvennoe izdatelstvo yuridicheskoi literatury, 1957.

[7] ibid.

[8] *Deklaratsiya prav cheloveka i grazhdanina 1789* [Declaration of the Rights of Man and the Citizen, 1789]. Available at: http://cuf.spbu.ru/PDF/2016/doc2.pdf [Accessed 10.03.2022].

In the 1940s and 1950s, fundamental international instruments under which the presumption of innocence of the accused person was established as an international principle recognised by all criminal justice systems were signed. The Universal Declaration of Human Rights of 1948, Article 11(1) enshrined the rule: “everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.”[9] The European Convention on Human Rights of 1950, Article 6(2) established that: “everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.”[10] The International Covenant on Civil and Political Rights of 1966, Article 14(2) consolidated the provision according to which “everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law”, [11] etc.

Thus, the historical analysis makes it possible to state that the presumption of innocence as a universal principle originated and developed in European countries. Even more surprising the actions of many countries, including European ones that have shown a derogation from this principle to both Russia in general and its individual citizens in particular during the last decades.

For example, in 1995, L. Ilyina who also has Canadian citizenship, was charged with the murder of T. Michkowski, her husband. The courts in 1997 and 2001 convicted her notwithstanding the fact that there was ample evidence in the case file to prove her innocence. L. Ilyina's appeal to the Supreme Court was denied. Despite her advanced age, she spent the next 10 years in several women's prisons in Canada until she was given early parole.[12]

The case against Russian community activists (including T. Zhdanok, MEP) which had been initiated in March 2018 was dismissed due to the lack of evidence in August 2020. The defendants were charged with inciting racial discrimination, hatred and discord as well as actions against territorial integrity

[9] https://www.un.org/ru/documents/decl_conv/declarations/ declhr.shtml [Accessed 15.03.2022].
[10] https://base.garant.ru/2540800/ [Accessed 15.03.2022].
[11] https://www.un.org/ru/documents/decl_conv/conventions/ pactpol.shtml [Accessed 15.03.2022].
[12] Report of the Russian Federation Ministry of Foreign Affairs *O narusheniyakh prav rossiiskikh grazhdan i sootechestvennikov v zarubezhnykh stranakh* [On Violations of the Rights of Russian Citizens and Compatriots in Foreign Countries]. (in Russian) Internet resource available at: https://www.mid.ru/ru/foreign_policy/humanitarian_cooperation/1417810/ [Accessed 18.03.2022].

and security of Latvia.[13] The prosecution, disregarding the principle of presumption of innocence, initially pursued only the aim of proving the guilt of Russian-speaking citizens, following a prejudicial attitude towards Russian nationals.

In September 2018, M. Bochkarev, an employee of the Central Office of the Federation Council, was arrested in Oslo on unsubstantiated charges of espionage. In October 2018, he was released. In April 2019, his case was dismissed due to "insufficient evidence". The Norwegian authorities have not apologized officially.[14] At the same time, "in fact, Bochkarev was detained because someone found his behaviour strange."[15]

According to the Reuters report, in March 2022, US President Joe Biden called Russian President V. Putin as a "war criminal".[16] Many European mass media repeated this information in publications, and the author found no reports in which Biden would have been reminded of the presumption of innocence and requested to provide evidence for his statement.

An analysis of developments in recent decades allows us to conclude that double standards in the application of the presumption of innocence in many foreign countries have arisen. This principle applies to citizens of foreign countries, but does not concern Russian citizens of the Russian Federation. Thus, it can be stated that at present there is a violation of fundamental European and international Declarations, Conventions and Covenants establishing and enshrining the basic rights of citizens, including the right to be presumed innocent until proved guilty at a lawful trial.

[13] ibid.
[14] ibid.
[15] Internet resource available at: https://news.rambler.ru/crime/40934954-sotrudnika-soveta-federatsii-bochkareva-obvinili-v-shpionazhe-po-donosu/[Accessed 18.03.2022].
[16] *Baiden nazval Putina "voennym prestupnikom"* op. cit. [Biden Called Putin 'War Criminal]. (in Russian) Internet resource available at: https://www.rbc.ru/politics/16/03/2022/623239e29a794709de9e87de [Accessed 15.03.2022].

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О НЕКИМ ИЗАЗОВИМА ПРЕТПОСТАВКЕ НЕВИНОСТИ КАО ПИТАЊИМА ЗАШТИТЕ ЉУДСКИХ ПРАВА И СЛОБОДА

Резиме

У овом чланку су приказани резултати истраживања о питањима појма и садржаја претпоставке невиности, као и настанку и каснијем развоју одговарајућег појма и принципа кривичног поступка. Поред тога, овај чланак садржи критичке примедбе аутора о поштовању закона у вези са одређеним категоријама грађана.

Кључне речи: претпоставка, невиност, принцип, гаранције, људска права.

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THE EFFICIENCY OF FAITH BASED PRISON IN HUNGARY

Abstract

The purpose of this work is to introduce the effects and results of religious education in the correctional facilities in Hungary. The operation of the Prison Chaplaincy as well as the changes in the inmates' value systems are the two key topics this research focuses on. The author carried out on-site observations and conducted interviews with prison chaplains in four facilities. Additionally, he compiled data by using questionnaires – Shalom Schwartz's value scale – to assess nearly 100 inmates participating in religious education activities and other nearly 100 non-participating inmates. In addition to these two groups, the author used the same questionnaire to assess a nearly 100-member civilian congregation as a control group. It can be concluded that religious education may have an impact on their value systems and it is also capable of shifting them from the world of crime towards that of religion. Values emphasizing individual responsibility and community interest can become underlined and more accentuated. These effects show no correlation with the crimes committed. At the same time, the intensity of religious education is of relevant and decisive nature.

Key words: faith based prison, value system, religion, religion education

1. INTRODUCTION

According to the Fundamental Law of Hungary „everyone shall have the right to freedom of thought, conscience, and religion. This right shall include the freedom to choose or change one's religion or other belief, and the freedom of everyone to manifest, abstain from manifesting, practice of teach his or her religion or other belief through religious acts, rites or otherwise, either individually or jointly with others, either in public or in private life."[1] The Act on the Right to Freedom of Conscience and Religion, and the Legal Status of Churches, Denominations, and

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[1] The Fundamental Law of Hungary, Section VII, Paragraph (1) 11. Apr. 2011. Hungarian Gazette No. 2011/43.

Religious Communities pays a particular attention to the situation of the inmates, when it stipulates that: „*The exercise of the freedom of conscience and religion shall also be made possible for those (…) detained in prison, both at individual and community level."*[2]

2. THE OBJECT AND THE PURPOSE OF THE RESEARCH

Religious observance carried out in prisons can be examined from two aspects. According to the first approach, the main characteristics of the inmates' freedom of religion can be examined carefully from a constitutional legal point of view. The features must be ignored within this paper because it would be beyond the purposes of research. The other approach seeks to find an answer what role religious observance can play in the process of reintegration. The results of religious observance in prisons will be further examined below. In this context the concept and the definition of religious observance is not entirely accurate. This definition is a legal one, therefore it is primarily open to legal interpretation. It can be poorly interpreted in the language of either penology or theology. Since the research, the results of which are discussed in this paper primarily belong to the area of penology, the term religious education has been used within its scope. It needs to be explained what is meant by the concept. *Within the framework of this research, the narrower meaning of the term 'religious education'* refers to the availability *of the religious occasions to the extent necessary to achieve the goals of the church and of reintegration, as well as the regular, active, and motivated participation in these occasions.* (Tihanyi, 2018: 2010) Religious education is definitely different from other reintegration programs to the extent that while educators, psychologists, and mediators have religiously neutral goals and methods assigned to achieve such goals, the churches and their priests/pastors/clerics are, naturally, religiously committed. The basic research questions is whether in which way, and to what extent religious education can contribute to the social integration of the inmates.

The most important question as regards the measuring the effectiveness of religious education is *what are the outcomes that can be considered effective*. Answering this question can be done from several aspects. According to preliminary research, the definitions of 'outcome' can be visualized along a straight line. At one end of the straight line is the theological concept of 'repentance/conversion', which means the acceptance of the religious tenets accepted by a given church. (Burnside,

[2] Act on the Right to Freedom of Conscience and Religion, and the Legal Status of Churches, Denominations, and Religious Communities. Section 3, Paragraph (1) 31. Dec. 2011. Hungarian Gazette No. 2011/160

2007) The other end of the straight line the outcome is the entirely secular concept of ’avoidance of recidivism.’ (Ellis,T., *Ellis-Nee, C.* Lewis, C., 2016) In between, as some kind of synthesis, is the concept according to which the outcome of religious education is preventing recidivism by accepting and following religious values. *Correspondingly, it is necessary to examine during the research to which direction and to what extent the value system of those participating in religious education change compared to the value systems held by the other members of the inmate population.*

The choice of values sets out, or at least influences, the individuals’ relation to the phenomena of reality. Through these choices, the individuals’ responses and actions are similarly influenced. Essentially, the individuals’ conscious actions reflect their attitudes for values – or at least its pivotal elements (Ádám, 2015: 184). This latter statement has its limitations. Sometimes, individual interests may supersede individual values. The situations where they may occur can be emergencies, when livelihoods and safety are endangered. To a not so strong and solid value system, a conflicting yet very profitable activity may pose an enormous challenge. Not all values are equally represented in an individual’s value system. In decision-making processes, particularly in conflict situations, the dominant elements of the value system hold considerable sway. (Váriné, 1987: 253) At the same time, it is uncontested in the relevant literature that the individuals’ choices of values are reflected in their actions. This statement is not valid in each specific action, but it is as regards the direction of the entirety of the interrelated actions. For instance, one would hardly imagine that a person whose own prosperity has a considerable value for the person would not at least now and then have a generous spirit, despite the fact that their generous act at that given moment would run counter their prosperity. At the same time, it is definitely true for this person that they more frequently refuse donation requests compared with those for whom others’ prosperity is also of critical value. It is not always the case for this latter ones either, those for whom others’ prosperity is also of critical value, as they are not always willing to have their own interests overshadowed for the benefit of others. Still, it is true that comparing two persons with two different perceptions of value, considering the entirety of the interrelated actions, there are marked differences between their value perceptions. (Schwartz, 2000)

Therefore, based on former references, it seems that based on the changes in the inmates’ value systems, the orientation of their subsequent actions can be forecast. This prediction, considering the nature of conflict between values and interests, does not guarantee to avoid recidivism, but it has a potential to increase the individuals’ odds to become repeat offenders.

3. THE METHODOLOGY OF THE RESEARCH

In the framework of this present research, I rely on the value theory of Shalom Schwartz (Schwartz, 2000). Schwartz uses a pie chart to introduce us to the entire patterns of conflicts and harmonies between the values. The circular arrangement of the values illustrates and demonstrates motivational continuum. The closer the two values appear to each other, the more they have in common as regards their underlying motivations. The larger the distance between the two values, the greater the conflict is between their underlying motivations. The conflicts and harmonies between the ten universal values constitute an integrated value system. This value system can be summarized in a two-dimensional reference grid. One axis shows us the values of self-enhancement vs self-transcendence. In this segment, hedonism, power, and achievement face universalism and benevolence. The first ones emphasize following the self-interest, while the other ones pay attention to others' prosperity and interests. The other axis illustrates the values of openness to changes vs conservation. In this part the values of self-direction and stimulation face conformity, security, and tradition. The first one emphasize independent thoughts and actions, the openness to new experience. The latter ones put emphasis on restraint on actions, as well as order, and the resistance to changes. Hedonism has an exceptional position by being located between openness and individualism – that is both universal values can claim this fundamental core value.

Based on the relevant literature, Schwartz defines values as desirable goals crossing situations, which goals serve as guiding principles in people's lives. (Schwartz, 2000: 24)

Schwartz's 21-question value survey measures the relevance of values that are universal and independent from either society or culture. By using the survey, the extent to which the inmates participating in religious education followed religious value systems cannot be measured, but it can be measured whether or not their value systems showed similarities of differences in comparison with those of other inmates' and those of the members of the civilian congregations. From the findings, it cannot be inferred to what extent they had become religious. At the same time, we can infer, however, that what kind of correlation is shown between the value systems of those incarcerated inmates having criminogenic value systems, who participate in religious education compared to those of other inmates' not participating in religious education and those of the members of the civilian congregations. This answers how religious education impacts the individuals' value systems.

Based on the above, the value systems of three groups were compared. The test group included those inmates who regularly participated in religious occasions in prisons. Additionally, I set up two control groups as well. One control group

included inmates not participating in religious occasions at all, whereas the other one consisted of members of civilian congregations outside prisons. As the majority of the inmate population consists of men, and the value system may differ according to the sexes, therefore the members of all groups were exclusively men. (Prazsák, 2015: 8) The established groups were almost of identical group sizes. In order to ensure that the data obtained have countrywide validity, the sampling was carried out in four different penal institutions. Those institutions were designated where, in accordance with my preliminary collection of data, high quality religious education is carried out. In case of civil congregations, religious affiliation seemed irrelevant, as it is also irrelevant in prisons; consequently in order to seek diversity, the samples were taken from four congregations of Christian churches.

4. THE FINDINGS

In order to ensure that the formative influence of religious education be demonstrable, I chose the solution as follows: The 10 elements of Schwartz's value system were interpreted individually in a scale, whose one end presented those inmates not participating in any religious education at all, while the other end presented the members of the civilian congregations. The calculated values were based upon the calculation weighted as defined by Schwartz. The scale cannot be interpreted as being closed-end, as it could be expected that in cases of one or another value elements, the data from the tested population would not fall between those of the two control groups, but they would rather 'extend beyond' them in any direction. The subject of the examination was as to which direction and to what extent would changes be observed in test group values compared to the weighted averages of the control groups' values. To carry out the examination of the elements of the groups value systems, two criteria were used. On the one hand, it was necessary to examine the value systems characteristics of various groups on the basis of the value ranks, and on the other hand, their weighting was in the focus. The value ranks themselves reveal only that which values a given group consider important, and which they consider less important. But the fact how important these values are, or how unimportant they are, can only be interpreted based on the weighted scores of the different value groups.

Those who did not participate in religious education submitted 98, and those who participated in religious education submitted 85 measurable questionnaires. This latter group, however, seemed that it could be broken down further from the aspect of the intensity of the religious education they participated in. Based on the previous, there were 34 inmates, who were outstandingly regular participants in religious occasions compared to the remaining 51 inmates. In total, 94 measurable questionnaires were obtained from the civilian control group.

As this paper is an excerpt of the entire research findings, the introduction and the explanation of how the weighted calculations of the different value groups were done must be dispensed. The conclusions that can be drawn from the findings are briefly presented hereby.

Comparing the order of the values, and the scores given to the various value groups, it can be inferred that the weighting of the values both in the congregation in the penal institutions, and in the civilian control group cover a far wider and more varied range than those of the control group in the penal institutions. That is, the group value systems are not as differentiated as those of the two other groups. In case of the control group in the penal institutions, another interesting point is that the values located on the opposite poles of the different value axes can exist side by side quite well in the value systems. It is conspicuous that the most supported value is self-direction, whereas the most rejected one is conformity. This clearly demonstrates that the value systems of the inmates are characterized by strong self-centeredness and, parallel to this, the rejection of the expectations of their environment. It is difficult to adjudge whether the rejection of conformity is due to the rejection of the institutionalized detention system or it is against the other members of the prison population – or both. At the same time, the place of benevolence and security in the hierarchy of values are surprising. It may indeed be that the findings are but the reflections of desires and expectations stemming and resulting from their lack.

The civilian control group's positively assessed and clearly rejected values are also outlined precisely. It is also observable that some parts of the values on the same value axis are located next to each other. These values are the most-widely accepted benevolence and universalism on the self-transcendence axis, and security, tradition conformity on the conservation axis. At the same time, the values on the openness to change axis are divided. While self-direction is reputed to have relative acceptance, stimulation, on the other hand, is among the strongly rejected values. It is quite telling that the value most rejected by the group is power. This is located on the totally opposite end of those values most supported by the group. Consequently, their values located along the self-enhancement vs self-transcendence axis are sufficiently differentiated. The big difference between the two extreme values shows us that the well-being, interest and prosperity of their fellow humans is more important for the Christian community than the desire that they should exercise power. These findings are not that surprising – it is quite natural. The same can be said about the rejection stimulation, achievement and hedonism. The lack of the prevalence of self-direction could have demonstrated that in the Christian group's value system, the consideration of traditions, community, and others' interests completely overrides and supersedes the individuals' interests. Thus the value of self-direction established a balance between individuals' and others' interests.

During the first measurement, the findings were interpreted as regards the group of inmates participating in religious education as related to a homogenous group, namely no difference was made between those regularly and quite intensely participating in religious education, and those in case of whom religious education is limited to ad hoc occasions. The findings obtained here show some correlation with the value systems of the civilian control group, but these findings fall significantly below my prior expectation and hypothesis.

Investigating the reasons for the findings, the measurement was repeated, but at that time the group of inmates participating in high intensity religious education were separated from those ones who participated in an ad hoc basis. Concerning the value systems of the first group, the following statements could be made. The value systems of the congregation in the penal institution is organized in a highly differentiated way along the axis of self-enhancement – self-transcendence. From the findings it shows clearly that they definitely consider the values of self-transcendence to be sought and followed, and in a similar way they strongly reject the values of self-enhancement. Taking into account other persons' or the entire community's interests is very characteristic of their value systems. The huge disparities shown between the weights of the values indicate that the community values definitely override the individuals' self-centered values.

The comparative analysis of the statistically adjusted value elements of the congregation in the penal institution and the civilian control group allows the following main conclusions to be drawn. The prominent spot and weight of benevolence, universalism, self-direction is equivalent to those of the civil control group. The value of conformity is the only one that is rejected from the values in the conservation group. Of the rejected values by the test group, power and achievement equals, concerning their spot and weight, with those of the civilian control group. So, the acceptance of values associated with self-transcendence, and the rejection of the values associated with self-enhancement follow a similar pattern in both groups. The values associated with self-enhancement were ranked even further back in the hierarchy, since the value of achievement came immediately before power. Therefore, the explicit choice between the two opposite poles of the axis of values is even more significant. Tradition and security, though changing places with each other, occupy the same spot in the hierarchy of values, similarly to the case of the civilian control group. Conformity is strongly rejected by the test group. Its weighting is comparable to that by the civilian control group, but it is a less rejected value in their case. The spot for the value stimulations can be interesting, as this is the only exception that shows significant differences in the value systems of the two groups. What seems like the most reasonable explanation is that seeking thrills and living a varied life may be associated with the monotony of prison life.

The comparative analysis of the values by the congregation in the penal institution and the control group in the penal institution showed several significant differences. These differences were most noticeable and visible as regards the values 'power', 'conformity', 'tradition', and 'benevolence.' Power is among the strongly rejected values in both groups, but while in the case of the congregation in the penal institution power is the most strongly rejected value, in case of the control group in the penal institution, it ranks in the penultimate place 'only.' At first sight, this does not seem to be a significant difference. However, it is more meaningful to observe that the difference between the weightings calculated from the scores given by the two compared groups is huge – 2.81 times higher. And it is different in such a manner that the congregation in the penal institution reject the value of power to the utmost. A tremendously similar phenomenon can be observed in case of the value benevolence found on the other endpoint of the axis of self-enhancement – self-transcendence. In spite of the similarities in ranking, the difference between the scores indicates the significant differences between the rankings of the two groups. According to this, the value benevolence, that is others' prosperity and interests, is substantially more significant for the congregation in the penal institution. These two differences definitely point towards the fact that, along the axis of self-enhancement – self-transcendence, the value systems of the congregation in the penal institution is much closer to those of the civilian control group than to those of the control group in the penal institution. A similar phenomenon, although not as strong as the above, can be observed between the values universalism and achievement, the two other values of this axis. From the aspect of peaceful existence in a society, this value axis is probably the most essential, because it expresses the extent to which an individual cares about his/her self-interests, or to what extent this individual takes into consideration the interests of others or the community, and thus our society, instead. The two other values showing significant differences (conformity and tradition) are found in the universal value conservation. Tradition shows significant differences not only in its scale, but also in its position in the hierarchy. The religious values considered more traditional are substantially more significant for the test group. There are no significant differences found in the values self-direction, stimulation, and hedonism located in the universal value openness to change that is opposite conservation.

As expected, the comparison between the control group in the penal institution control group and the civilian control group indicated the maximum variation and divergence possible. The weighting of the following values showed significant differences: Power, universalism, achievement, stimulation, conformity, tradition, benevolence, and hedonism. In essence, it was only the weighting of the values self-direction and security that showed no significant differences.

5. THE EVALUATION OF THE RESEARCH

The members of the statistically adjusted test group regularly and actively participated in the religious education in the prison. As indicated by the questionnaires, none of them had ever had any previous presence of religious observance in their lives. The value systems of this group, in respect of both the ranking of values and their strength, show slight differences compared to the value systems of the civilian control group, but shares with them, at the same time, identical features in certain crucial points. Parallel to this, there are several significant differences are observable in comparison with the value systems of the control group in the penal institution. With the exception of the value stimulation, it can be said that the value systems of the control group in the penal institution definitely and considerably closer to the value systems of the civilian control group that those of the control group in the penal institution.

It has been demonstrated that religious education has a fundamental impact on the value systems of the inmates. This impact unequivocally converges their value systems to those of the congregations in the civilian world. Based on the differences of the first and second measurement, the following conclusions could be drawn: 1. *The changes in the value systems and the intensity of the religious education are statistically significantly associated.* Only sufficiently intense and regular religious education is capable of impacting the value systems of the inmates. 2. *The findings are influenced by the fact whether the inmates are housed in a separate unit,* where they are the least exposed to the effects of prisonization, but most exposed to the inculturation by the prison missionary activities. 3. *It is essential to properly select the inmates participating in the religious education carried out in the separate unit, in order to ensure that those who end up here should consider this opportunity of religious education an escape from the world of crime and from being a career criminal rather than a favorable treatment.* When selecting the participants, neither the crime committed, nor its punishment – in particular the time remaining to be served – can be a matter of consideration. At the same time, the individual's motivational basis, and his/her family support could be a decisive element.

If we accept the precept that the individuals' value systems could affect their actions, then the consequence inevitably follows that the social activities and actions – or at least their dominant elements – of those participating in the religious education will reflect a value system, which is more acceptable and useful to society rather than a value system of criminality, which is dangerous and deservedly rejected.

In order to ensure that the achievement are reflected in the social actions in the long term, it is necessary to provide the recently released ex-inmates will receive „continued religious education." These can be programs that facilitate integration

into congregations. A religious person’s life can be problematic alone. That is why it is important to ensure that he participants in the religious programs, upon their release from the penal institution, be integrated into the church communities. This is indicated by the fact that those who attend the religious occasions only, but do not participate in at least separate programs will be more heavily influenced by life in prison than by the religious occasions It requires no further comment that these programs should not be state-initiated, but church-initiated, instead.

Finally, it must also be mentioned that religious education does not mean a general solution applied in and addressing all situations. Namely, it cannot be said that similar progress and outcome could be achieved by it in case of any and all groups of inmates. Similarly to the selection processes used in the APAC model originated from Brazil, such a model must also be applied in the domestic religious education. This should not and must not mean arbitrariness or discrimination. This can only mean that the opportunities must be open to those volunteers only, who are open to changes and are willing to change – and could find religion as a tool for it.

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Др Микльос ТИХАНИИ[3]

ЕФИКАСНОСТ ЗАТВОРА У МАЂАРСКОЈ У ВЕЗИ СА ОСТВАРИВАЊЕМ ВЕРСКИХ ПРАВА ОСУЂЕНИКА

Резиме

Сврха овог рада је упознавање са ефектима и резултатима верске наставе у поправним установама у Мађарској. Рад затворске капеланије, као и промене у систему вредности затвореника су две кључне теме на које се ово истраживање фокусира. Аутор је извршио опсервације на лицу места и обавио интервјуе са затворским свештеницима у четири објекта. Поред тога, прикупио је податке користећи упитнике – скалу вредности Шалома Шварца – да би проценио скоро 100 затвореника који учествују у активностима верског образовања и других скоро 100 затвореника који не учествују. Поред ове две групе, аутор је користио исти упитник за процену готово 100-чланe цивилне конгрегације као контролне групе. Може се закључити да верска настава може да утиче на њихове системе вредности и да их може померити из света криминала у свет религије. Вредности које наглашавају индивидуалну одговорност и интерес заједнице могу постати подвучене и наглашеније. Ови ефекти не показују никакву корелацију са почињеним злочинима. Истовремено, интензитет веронауке је релевантне и одлучујуће природе.

Кључне речи: верски затвор, систем вредности, религија, веронаука.

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CHILD VICTIMS AND JUDICIAL PROTECTION IN SERBIA

Abstract

The aim of this study is to present and analyse findings of the recently conducted monitoring of the court jurisprudence in cases of violence and/or exploitation of children where the final decisions were rendered by Serbian courts in 2020. Beyond it provides for the comprehensive data on the crime structure and characteristics of victims and perpetrators, the study is focused on the judicial protection of child victims through the several aspects, including, but not limited to the right to legal aid, psycho-social support, ICT usage and the tailor-made approach of professionals in avoiding/decreasing secondary victimization. It also comprehensively addresses the access to compensation in criminal proceedings. Additionally, the study includes the analysis of the penal policy in analysed cases, in parallel, through the jurisprudence of the first instance court, but also through the final decisions. Finally, the author provides for a list of recommendations aimed at amendments to the penal legislation, but also to improvement of the court practice in proceedings that involved child victims.

Key words: child exploitation, sexual violence against children, child marriages, secondary victimisation, child abuse

1. INTRODUCTION

The intensity of protection must correspond to the vulnerability of the victim. Based on this assumption, the vulnerability of child victims is at the top of the scale that defines the need to prescribe and apply the high standards of protection and support provided to them. [1] This even more applies to children who suffered from sexual violence and /or other forms of exploitation. Widely recognized in

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[1] I. Stevanović, „Posebne mere zaštite deteta u krivičnom postupku“ *Zbornik Instituta za kriminološka i sociološka istraživanja*, 36 (3). 2017, 7-80.

international human rights standards[2] this need is being subject of continuous improvement through the all universal and/or regional human rights instruments dealing with rights of a child, but also with the rights of crime victims.[3]

Seventeen years have passed since the Law on Juvenile Offenders and Criminal Protection of Juveniles (hereinafter: LJOCPJ)[4] was adopted by Serbian authorities.[5] In parallel with the provisions of the Criminal Procedure Code (hereinafter: CPC)[6] this Law has introduced the set of standards aimed at additional protection of child victims in Serbia in criminal procedure. Significantly progressive in the moment of adoption[7], this law has lost pace with the growing problems in reality, but also with the newly developed international standards.[8] This gap has been recognised and reported in detail in all the relevant reports[9] and analysis[10] and partially reflected through the recommendations and measures included in various

[2] I. Stevanović, „Posebne mere zaštite deteta u krivičnom postpuku*" Zbornik Instituta za kriminološka i sociološka istraživanja*, 36 (3). 2017, 7-80.

[3] See more: I. Stevanović, N. Vujić, „Maloletno lice i druge posebno osetljive kategorije žrtava krivičnih dela (međunarodni pravni standardi i krivično procesno zakonodavstvo Srbije)". *Žrtva krivičnog dela i krivičnopravni instrumenti zaštite (međunarodni pravni standardi, regionalna krivična zakonodavstva, primena i mere unapređenja zaštite)*, Misija OEBS-a u Srbiji, Beograd, 2020, 95-109.

[4] Law on Juvenile Offenders and Criminal Protection of Juveniles, "Official Gazette RS" No. 85/2005.

[5] M. Kolaković-Bojović, „Life Imprisonment and Parole in Serbia – (Un)Intentionaly Missed Opportunity" *Journal of Criminology and Criminal Law*, 59(1), 2021, 93-108.

[6] "Official Gazette RS" 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014, 35/2019, 27/2021 – CC decision and 62/2021 – CC decision)

[7] For more info about the greatest novelties introduced by LJOCP, see: T. Karović, S. Protić, M. Kolaković-Bojović, A. Paraušić, N. Drndarević, *Analiza uticaja primene Zakona o maloletnim učiniocima krivičnih dela i krivičnopravnoj zaštiti maloletnih lica u periodu od 2006. do 2020. godine.* Institut za kriminološka i sociološka istraživanja & Misija OEBS-a u Srbiji, Beograd, 2020. Preuzeto sa https://www.iksi.ac.rs/pdf/ analiza_iksi_osce_2021.pdf

[8] See more: I. Stevanović, N. Vujić, „Maloletno lice i druge posebno osetljive kategorije žrtava krivičnih dela (međunarodni pravni standardi i krivično procesno zakonodavstvo Srbije)". *Žrtva krivičnog dela i krivičnopravni instrumenti zaštite (međunarodni pravni standardi, regionalna krivična zakonodavstva, primena i mere unapređenja zaštite)*, Misija OEBS-a u Srbiji, Beograd, 2020, 95-109; M. Kolaković-Bojović, "Accession negotiations of the Republic of Serbia with the EU within Chapter 23 and the need to amend the criminal procedure legislation", (Ilić, Goran, ed.) *Dominant directions of criminal legislation development and other current issues in the Serbian legal system*, Association of Public Prosecutors and Deputy Public Prosecutors of Serbia, Kopaonik, 2016, 232-241.

[9] Screening report for Chapter 23, available at: https://www.mpravde.gov.rs/tekst/7073/izvestaj-o-skriningu.php , accessed June 25 2018.

[10] M. Škulić, M. *Normative analysis of the position of the injured party by a criminal offense in the criminal justice system of the Republic of Serbia*, OSCE Mission to the Republic of Serbia, 2015.

national policy documents,[11] but also in those related to the EU accession processes.[12] However, for a clear picture to what extent protection of child victims have been implemented in Serbian criminal proceedings, there is a need to further explore court practice.

Following this idea, within the scope of the Project "Child Rights in Serbia – Improving Outcomes for Children in the Serbian Justice System (CRIS)", funded by the European Union and UNICEF in Serbia[13] the Institute of Criminological and Sociological Research conducted the monitoring of court jurisprudence in cases of violence and/exploitation of children. This task was aimed at identification of the main issues and challenges associated to the protection of child victims in criminal proceedings, but also focused on providing clear inputs for amendments to relevant legislation and/or improvement of practices.

2. METHODOLOGY AND SAMPLING

2.1. Methodological approach

The subject of the analysis was court jurisprudence in cases where final decision was rendered in 2020. The focus of the analysis will be placed on the position of children victims of selected criminal offences pertaining to the category of sexual and other ways of child exploitation and violence against children:

- Rape in Article 178, Paras 3 and 4,
- Sexual Intercourse with a Helpless Person in Article 179, Paras 2 and 3,
- Sexual Intercourse with a Child in Article 180,
- Sexual Intercourse through Abuse of Position in Article 181,
- Pimping and Procuring in Article 183,

[11] See: Center for the Rights of the Child (2020), Summary analysis of the Strategy for Prevention and Protection of Children from Violence for the period 2020 to 2023, available at: https://cpd.org.rs/wp-content/uploads/2020/06/Analiza-Strategija-za-prevenciju-i-zastitu-dece-od-nasilja_PDF.pdf, accessed July 15 2020.

[12] Common negotiating position for Chapter 23, available at: http://mpravde.gov.rs/files/Ch23 EU Common Position.pdf, last accessed: September 17 2017; Action plan for Chapter 23, available at: http://www.mpravde.gov.rs/files/Akcioni%20plan%20PG%2023.pdf, accessed June 1 2016.

[13] The general objective of the CRIS project (hereinafter: the Project) is to improve the position of children involved in the RS judicial system through the systematic application of procedures and regulations that protect the rights of the child and proven support in proceedings. The Project is implemented by International Rescue Committee, ASTRA and the Child Rights Centre.

- Showing, Procuring and Possessing Pornographic Material and Minor Person Pornography in Article 185 Paras 2 and 3,
- Coercion into Marriage in Article 187a,
- Cohabiting with a Minor in Article 190,
- Neglecting and Abusing a Minor in Article 193, Para 2,
- Trafficking in human beings Article 388 and
- Trafficking of minors for the purpose of false adoption Article 389

Conducting this analysis implied the need to collect and analyse the minutes of the main trials, as a verdict, bearing in mind that the epidemiological measures did not allow direct access to all case files.[14]

Monitoring of case law was conducted through the following phases:

- Phase I: Development of methodological framework and questionnaires - October 2021.
- Phase II: Addressing the courts through requests for gathering information of public importance - October 2021.
- Phase III: Analysis of documentation received from the courts and filling in the questionnaire - November 2021.
- Phase IV: Processing and analysis of data from the questionnaires and drafting of the Report - December 2021.
- Phase V: Preparation of the Final Report- December 2021-January 2022

2.2. Sample

Although the request for information was submitted in all of 91 basic courts (BC) and higher courts (HC) in the territory of RS, and although the courts have a legal obligation to submit this type of data, not only within the prescribed time but until the conclusion of the data processing procedure, 10 BC, i.e. 15% and 6 HC, i.e. 24% did not respond to the request. Nevertheless, the sample based on the practice of 85% of BC and 76% of HC is more than relevant for drawing conclusions and defining recommendations.

[14] Having in mind the need to access as many court decisions as possible, as well as extremely short deadlines for data collection and processing, the Institute for Criminological and Sociological Research (ICSR), in agreement with the ASTRA project team, decided to include the Forum of Judges of Serbia (FORUM) in the data collection process as a partner organization. Through this partnership, a three-member expert team was formed consisting of: Milica Kolaković-Bojović, PhD, Senior research associate, project manager and expert in charge of methodology; Olga Tešović, PhD, judge and president of the Basic Court in Požega, monitor of court practice and Ivana Milovanović, judge of the Higher Court in Niš, monitor of court practice.

In the mentioned sample, 26 courts, of which 21 BC[15], and 5 HC[16], which represents 32%, i.e. 20% of their total number, had legally completed proceedings in 2020 for criminal offenses that are the subject of analysis. These 26 BC and HC submitted data on a total of 58 cases to the research team, with BC Kikinda (8 cases), BC Ruma (5 cases), BC Novi Sad (4 cases) and HC Novi Sad (4 cases) leading the way, while other courts submitted up to 3 cases. In the mentioned 58 cases, criminal proceedings were conducted against 64 defendants for criminal acts committed to the detriment of 70 victims.

2.3. Challenges

In addition to incomplete response of courts and delays in submitting data, the biggest challenge for members of the research team was inadequate and incoherent application of rules on anonymization of decisions submitted for analysis, which was often not implemented in accordance with the Rulebook on replacement and omission (pseudonymization / anonymization) data in court decisions, [17] which makes it impossible to fully consider some of the key parameters.

3. FINDINGS

3.1. Crime structure

The analysis of cases on which the courts provided information showed that over 50% of proceedings were conducted for the crime of Cohabiting with a Minor under Article 190 of the Criminal Code, followed by the most common crime of Neglecting and abusing of a minor under Article 193 of the Criminal Code, with 25% share, Sexual Intercourse with a child under Article 180 of the Criminal Code with 8% share, and Showing, Procuring and Possessing Pornographic Material and Minor Person Pornography under Art. 185 of the Criminal Code with 7%, while Rape under Article 178, paragraph 3. and 4. of the Criminal Code accounts for 4.9% of all

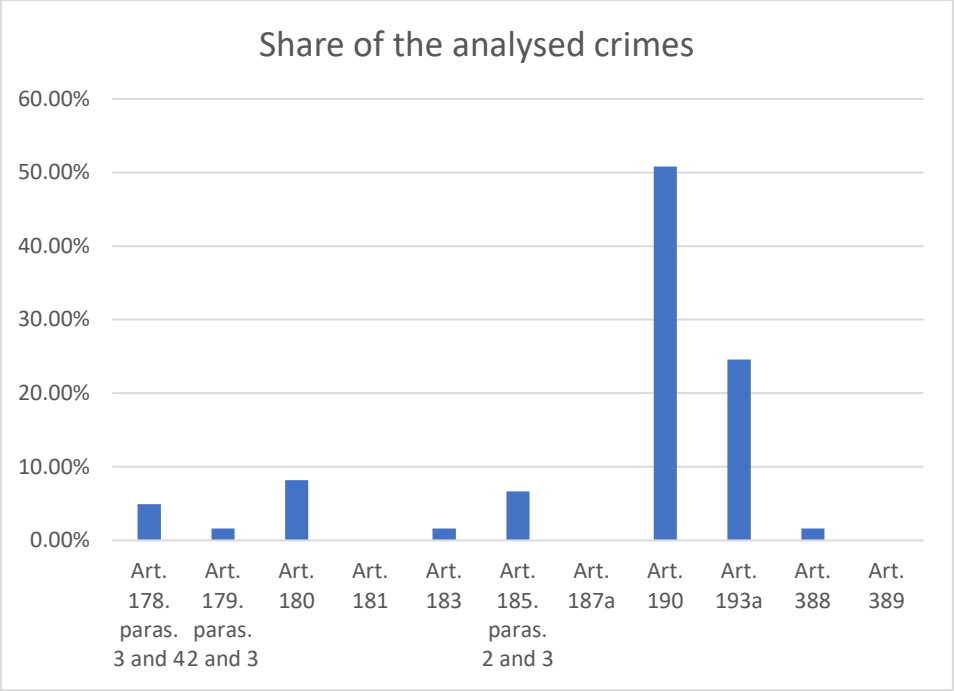
[15] BC Novi Pazar, BC Pančevo, BC Ruma, BC Požarevac, BC Zrenjanin, BC Vranje, BC Šabac BC Velika Plana, BC Pirot, BC Valjevo, BC Sombor, BC Ivanjica, BC Kikinda, BC Bor, BC Požega, BC Kragujevac, BC Novi Sad, BC Lebane, BC Subotica, Prvi BC Beograd, BC Loznica.

[16] HC Požarevac, HC Vranje, HC Zaječar, HC Sombor, HC Novi Sad.

[17] Rulebook on replacement and omission (pseudonymization / anonymization) of data in court decisions, adopted at the General Session of the Supreme Court of Cassation, at the session held on December 20, 2016

criminal offenses. All other works included in the analysis did not appear or were represented sporadically in the sample.

Chart 1: Crimes committed against minors



It is interesting that, although predominant, the crime under Article 190 of the Criminal Code is unequally represented in the courts, which indicates the need for more detailed research to show whether statistical parameters correspond to the prevalence of this crime in practice or to more proactive approach of police, social care centres' and prosecutors' offices in some cities, while in others this phenomenon is treated as part of a cultural pattern and is not prosecuted.

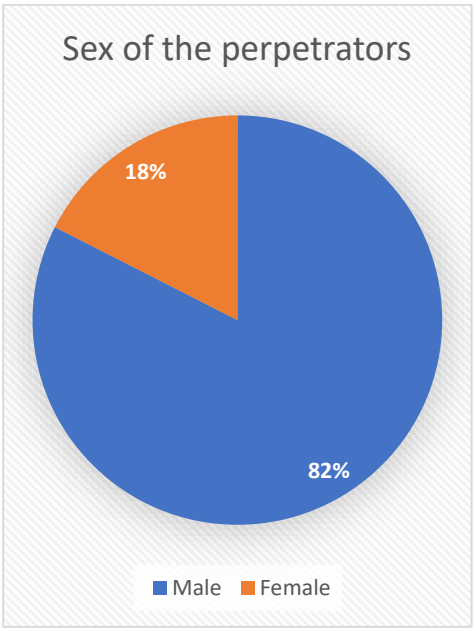
In addition, it is noticeable that in some courts the perpetrators of the crime under Article 190, par. 1 of the CC and the perpetrators of the crime under Article 190, paragraph 2, i.e. parents or guardians who enabled the establishment of such an extramarital union, were prosecuted in parallel, while in others this was not the case, although it could be concluded from the testimony of the accused and the injured party that there was a basis for that. The same comment applies to the criminal prosecution of parents, i.e. guardians whose neglect of the child led to the establishment of an extramarital union.

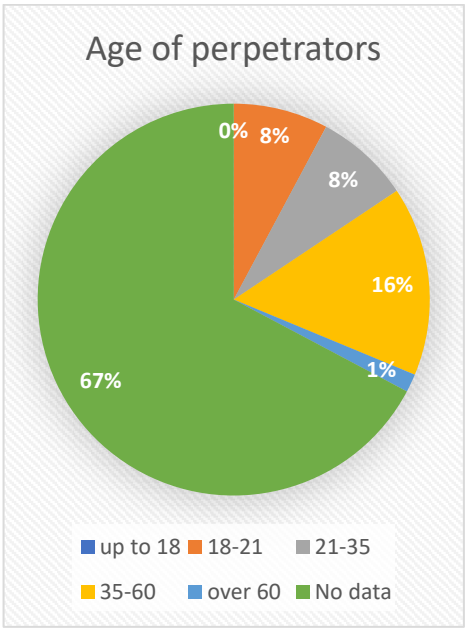
3.2. Perpetrators of crimes committed against children

When it comes to the profile of perpetrators of crimes committed to the detriment of minors, in as many as 91% of cases, proceedings were conducted against one defendant. In 7% of cases the proceedings were against two defendants, while in 2% of cases there were three defendants. It is important to note that cases with two or three defendants, as a rule, were those in which proceedings were conducted for a criminal offense under Article 193, paragraph 2 of the CC.

Regarding to the sex and age of the perpetrators, although the perpetrators are, as expected, predominantly male (82%), the representation of women as perpetrators in as many as 18% exceeds the average female representation among perpetrators of crimes in RS (about 10% of the total number of convicted persons).

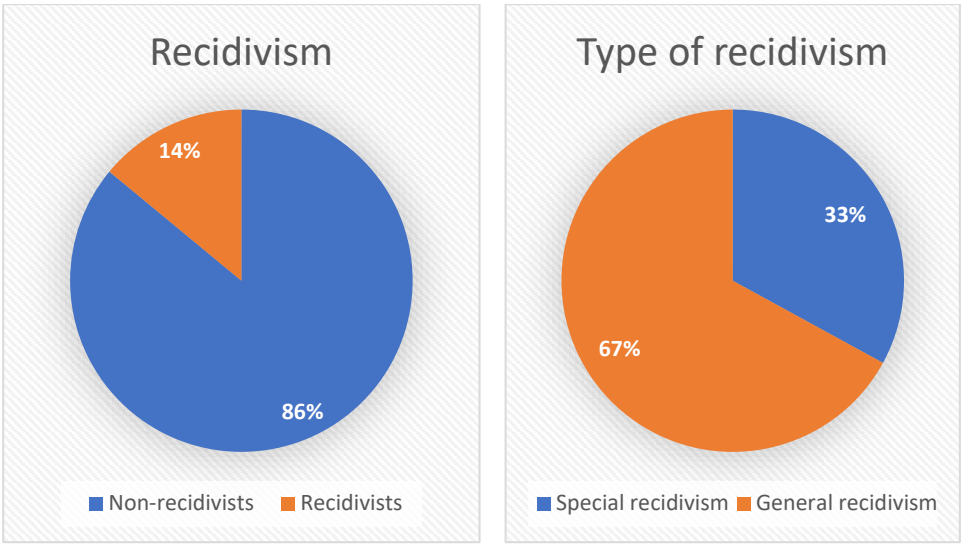
Chart 2: Sex and age of the perpetrators





Regarding the age of the perpetrators, the research team faced a significant obstacle in the form of the previously mentioned inconsistent application of the rules on anonymization of decisions, so that for as many as 67% of defendants it was not possible to obtain information on the age of the defendant. 16% of the perpetrators were middle-aged, ie aged 35-60, while 8% were the population of younger adults and defendants aged 21-35.

Chart 3: Recidivism of perpetrators



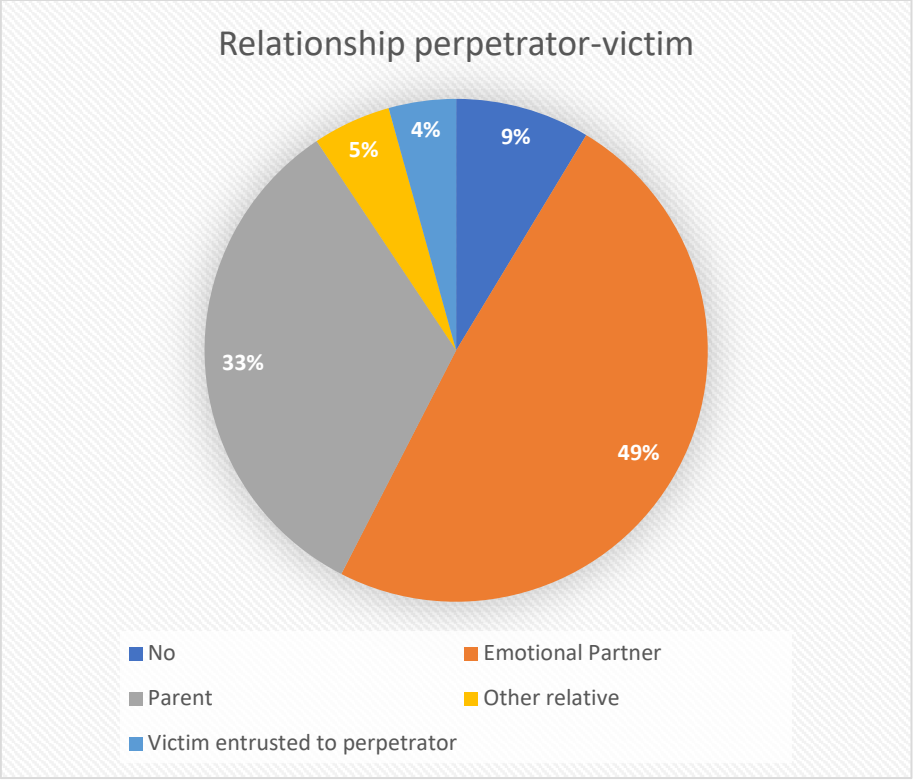
When it comes to previous convictions, 14% were recidivists, while 86% of defendants committed a crime for the first time. The subject of the analysis was also the type of recidivism, for those perpetrators who committed the criminal offense covered by the analysis as returnees, so in 33.3% it was a special recidivism, and in 67.7% of cases it was a general recidivism. It is important to note that all the perpetrators who were involved in the special recidivism were charged with the criminal offense of Abuse and Neglect of a Minor under Article 193 of the Criminal Code.

Regarding the existence of a relationship between the perpetrator and the injured party, in 9% of cases this connection did not exist. In 49% of the cases, the perpetrator was the emotional partner of the injured party, and almost without exception it was a criminal offense under Article 190 of the Criminal Code. In 19.3% of cases in which emotional partners were blamed and damaged, a joint child was born from an extramarital union founded with a minor, before or during the procedure itself. In certain cases, a minor with whom an extramarital union was established already had a child born in a previous extramarital union, which speaks in favour of the need for strong preventive action in this area and raising awareness, primarily among girls, but also in the wider community.

In 33% of cases, the perpetrator is a parent, and it is interesting to mention that the share of mothers among parents who commit crimes against their own children is 34.8%, which means that fathers are more likely to commit crimes against their children (or those acts are of such a nature that they are easier and more frequent to report / discover / prove).

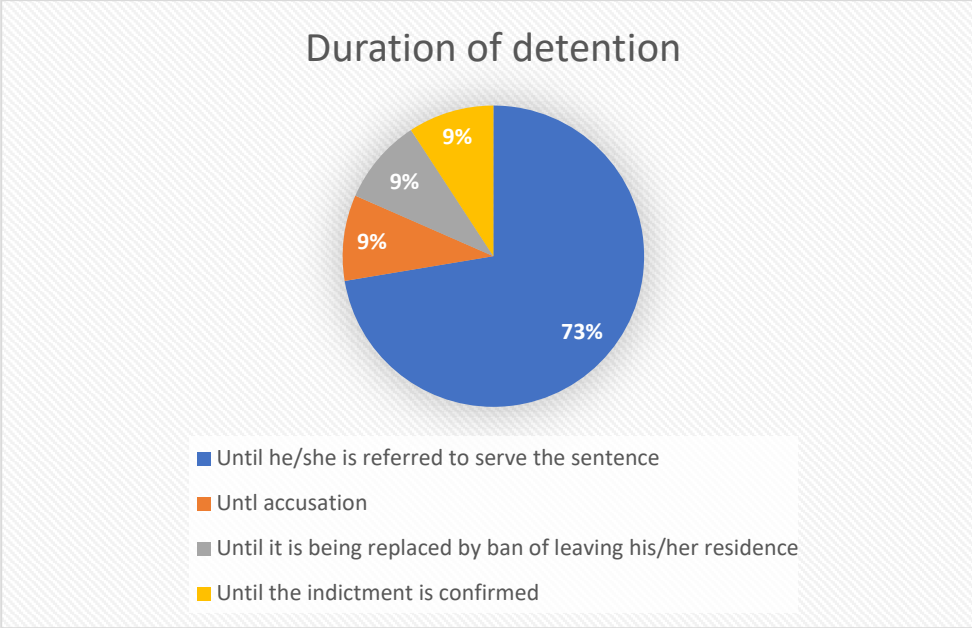
In 5% of cases, the perpetrator was another relative of the injured party, so in the role of exploiter from Article 193, paragraph 2 of the Criminal Code, grandmothers and aunts of the injured parties appeared, and crimes against sexual freedom were committed by brothers, uncles and fathers of minor victims. A special reason for concern is the fact that in several cases, minor victims suffered years of sexual violence by close family members, tried to report the violence by contacting mothers or other family members, after which they were accused of lying and continued to suffer violence. This points to the need to establish effective and easily accessible mechanisms for self-reporting of crimes by children, including digital tools.

Chart 4: Connection between perpetrator and victim



Detention was imposed to 17% of perpetrators, which corresponds to the percentage of serious crimes. Regarding the duration of detention, it was determined in all cases at the earliest stage of the procedure, and in 73% of cases it lasted until the convict was sent to serve a prison sentence.

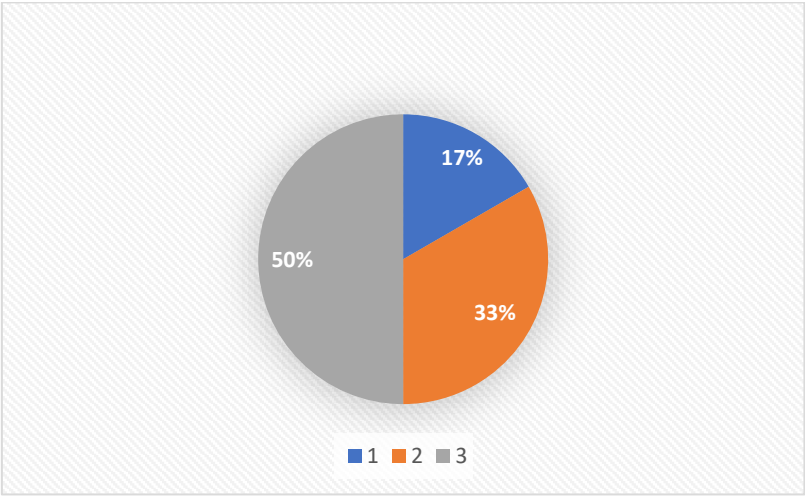
Chart 5: Application of detention



3.3. Injured party

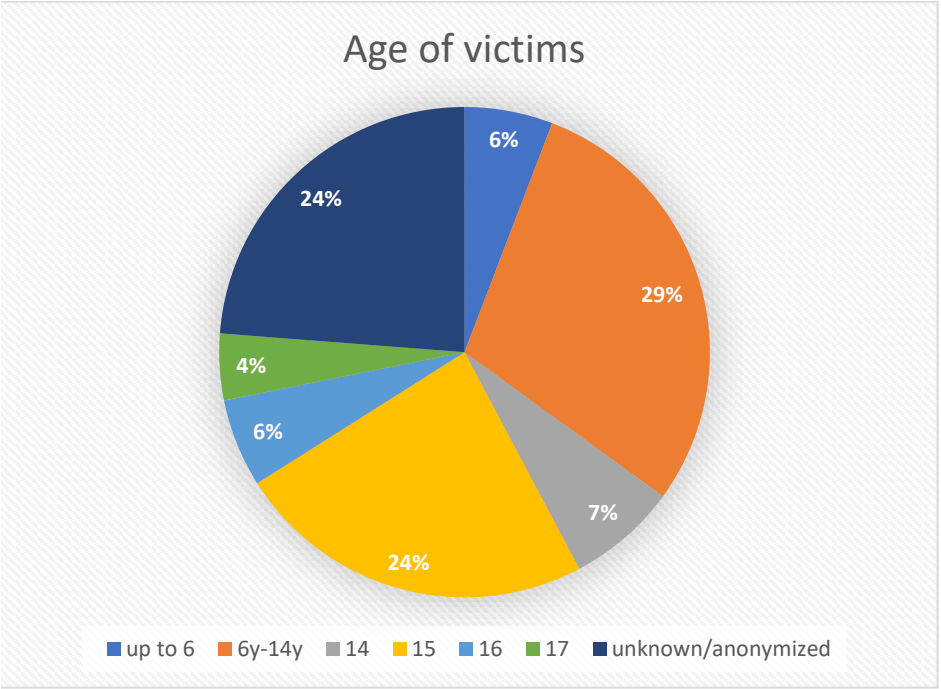
In the 58 analyzed cases, criminal offenses were committed to the detriment of 70 juvenile victims. In 84% of cases, there was just one victim, in 11% two, and in 5% of cases there were three juvenile victims.

Chart 6: Number of victims (injured)



Regarding the gender and age of the victims, the application of the rules on anonymization brought less difficulties than when it comes to defendants, so it was possible to accurately determine that 90% of the victims were female. At the same time, the most represented age category of victims were children (6-14) with 29% share, followed by 15-year-olds with 24%. The share of victims for whom age data were anonymized was also 24%. Age groups up to 6 years, 14 years and 16 years of age are equally represented by 6-7%, while 17-year-olds are 4%.

Chart 7: Age of victims



The analysis of data on the residence of the injured party showed that there is almost no difference in the prevalence of crime against minors in urban and rural areas, since 51% of crimes were committed against minors whose residence is in rural areas and 49% in urban areas.

There was a similar uniformity regarding the availability of legal aid to the minor victim, since an equal number of minor victims had a proxy in the procedure.

Within the total number of juvenile victims who had a proxy, 16% of them were represented by an elected attorney, while 84% of them were represented by a proxy appointed ex officio.

3.4. The position of the injured party at the main trial

Having in mind the previously mentioned structure of criminal offenses represented in the observed sample, it is important to note that in a large number of cases (48%) the main trial was not held. In cases in which the main trial was not held, a hearing for the imposition of a criminal sanction (43%) or a hearing under a plea agreement was held (57%).

When it comes to the presence of the injured party at the main trial, in 70% of cases the injured party was present.

In terms of the presence of a legal representative, they attended the main trial in 50% of cases, most often the parents of the minor victim and representatives of the Social Care Centres, while in one case the data on the legal representative were anonymized.

In 71.5% of cases at the main trial, the injured party had the support of family members, mostly parents, with equal representation of mothers and fathers as support. In only two cases, the victim's mother and brother had to be removed from the courtroom as they were to be examined as witnesses.

In only three cases was the injured party granted the status of a particularly sensitive witness, of which in two cases by a decision of the public prosecutor. In these cases, the status was granted to victims of trafficking (1 injured party) and intercourse with a child (two injured parties).

In 47% of cases, the injured party had professional support at the main trial, in 70% of cases it was the support of psychologists and in 10% of cases the support of a social worker from the Social Care Centres (SCC). In only one case, the injured party had the support / escort of the victim support service.

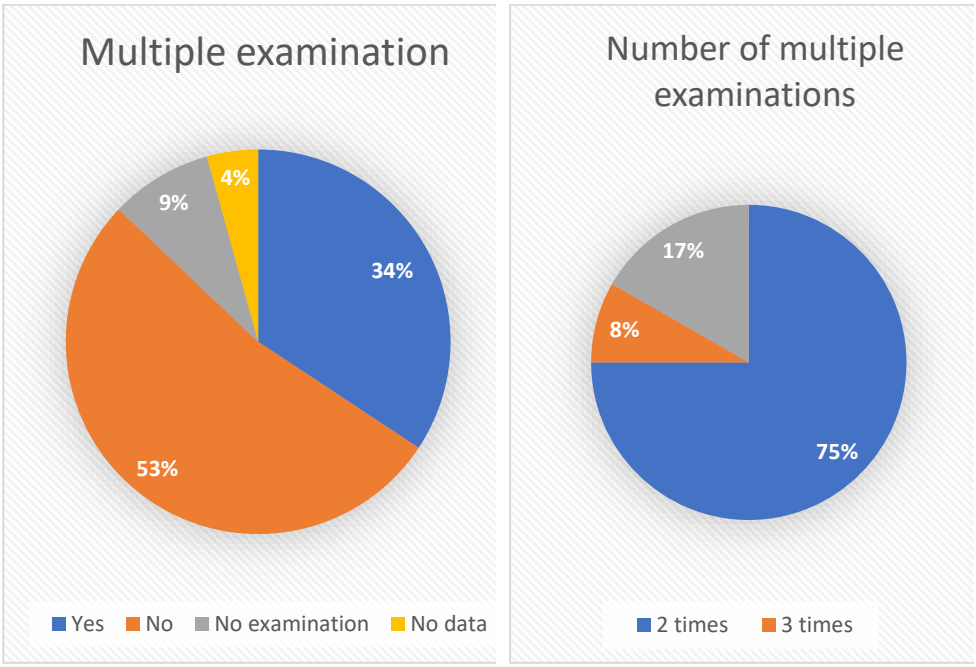
The main hearings were mostly (80%) public, and the court accepted all requests for exclusion of the public made by the public prosecutor. All public hearings were held without the presence of the media, and in only one case did the court find that media representatives tried to attend the hearing but were not allowed to do so because the main trial was not public.

Although present at the main trial in 70% of cases, the injured party was not always questioned, and the predominant reason for that is the fact that in many cases the defendant admitted to committing a crime, so the court decided to present only evidence relevant for sentencing without the defendant being questioned. This situation is largely captured by the previously described structure of crimes in the analysed sample, where an extramarital union with a minor from Article 190 of the Criminal Code dominates. In addition, the reason for not examining the minor injured party was the court's decision to read the earlier statement, and the representation of this scenario was the same as the representation of the court's decision to examine the injured party. In a small number of cases, these were victims

who could not be examined due to age (4 victims) or the mental health condition (2 victims).

As one of the frequent objections when it comes to procedures in which minors are examined in the capacity of the injured party, is multiple examination, special attention is paid to this issue. In that sense, it was noticed that 34% of juvenile victims were examined more than once. Among the multiple respondents, 75% of them were examined twice, 8% three times, while 17% of juvenile victims were examined as many as four times. What is especially worrying is that the victims of the most serious crimes of sexual violence were interrogated most times (three or four times) and that they most often repeated their statements to the police inspector, SCC professionals, public prosecutor and then at the main trial.

Chart 8: Multiple examination of victims

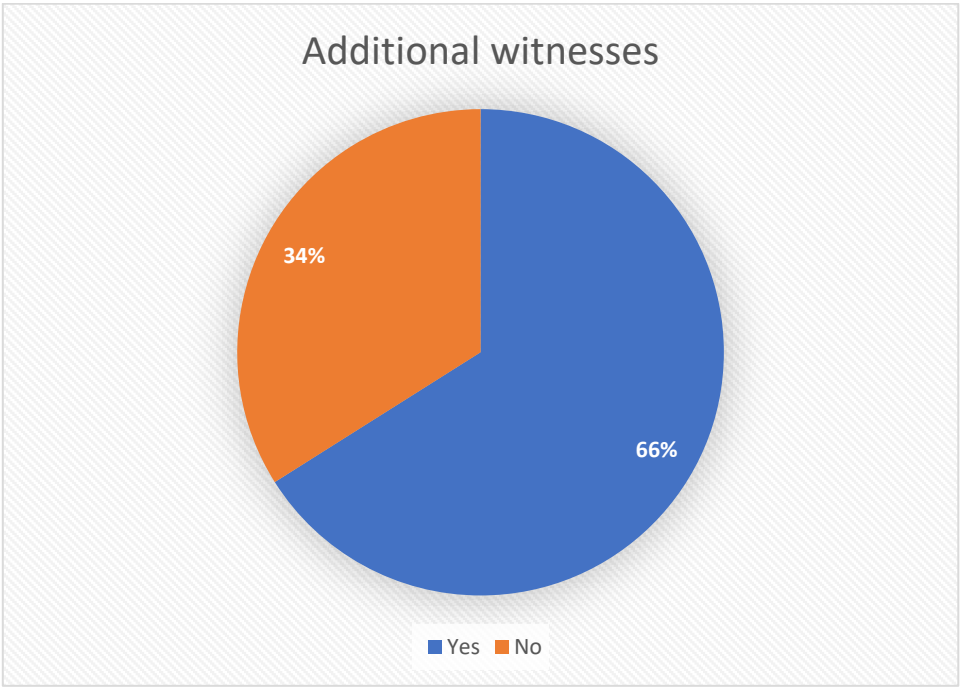


Nevertheless, only 12.5% of the victims changed their statement during the re-examination, and it is interesting that in no case were they the above-mentioned victims of serious crimes of sexual violence, but as a rule among victims damaged by the crime from Article 190 of the Criminal Code. This further speaks in favour of the futility and harmfulness of multiple interrogations of juvenile victims.

In 66% of the analysed cases, in addition to the minor victim, additional witnesses were heard at the main trial. Most often, there were SCC experts and the parents of the minor victim, while sporadically, foster parents, school principals or

school psychologists from schools attended by the minor victims and other persons from their immediate environment were also questioned.

Chart 9: Hearing of witnesses in addition to victim



When it comes to meeting and / or confronting a juvenile victim with the defendant during the main trial, in 50% of cases the juvenile victim was examined in the presence of the defendant while confrontation was not applied in any of the analysed cases, which is important considering the number of cases of juvenile victims was granted the status of a particularly sensitive witness.

Although half of the interrogations of the minor victim was attended by an expert (psychologist or social worker of SCC), only 30% of the interrogations were conducted through those experts, while in other situations they only attended the interrogation which was performed directly.

The analysed sample did not record the attorney's remarks on the manner of asking questions or entering the testimony of the injured party in the minutes, as well as the judge's interventions during the interrogation because he considered some questions irrelevant or inappropriate. The same applies to the judge's warnings to the defendant and / or his lawyer or the prosecutor's intervention because he considered some issues to be irrelevant or inappropriate. This in itself does not mean that there was no basis or need for such interventions or warnings, but in the impossibility of

monitoring the trial, ie through monitoring case law, as its substitute, this cannot be determined with certainty.

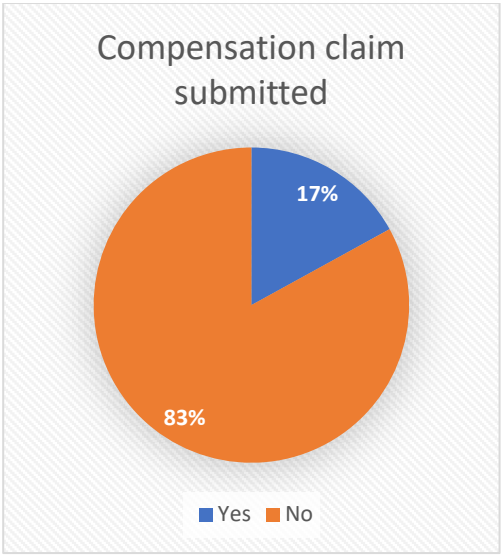
Only in two cases special measures were taken to protect the injured party, however, this data should be interpreted not only on the basis of absolute numbers, but also in light of the sample structure in terms of crime, as if they were accused in most serious crimes (trafficking in human beings, sexual intercourse with a child, etc.) concluded a plea agreement already in the investigation phase, so in these cases there were no main trials or interrogation of the injured party. In one of the two cases that included special protection measures, the victim of rape under Article 178, paragraph 3 of the CC expressed a high level of fear and security concerns, as the abuse lasted for several years, and the defendant was a member of the victim's immediate family. In both cases, the examination was performed using video link, both of which passed without technical interference, and one of them was assisted by a technician.

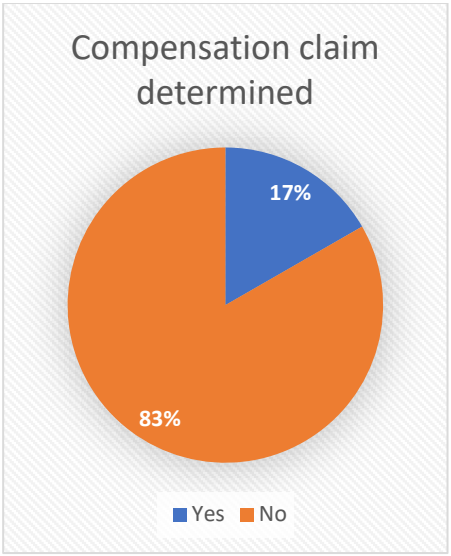
3.5. Compensation claim

Numerous analyses conducted in recent years indicate the need for more significant intervention in terms of improving the practice of realizing compensation claims. With this in mind, special attention has been paid to this issue.

The monitoring findings regarding the exercise of the injured party's right to a compensation claim showed that only 17% of the injured parties pointed out the compensation claim. Within those 17% who decided on this step, again only 17% of them determined their property claim.

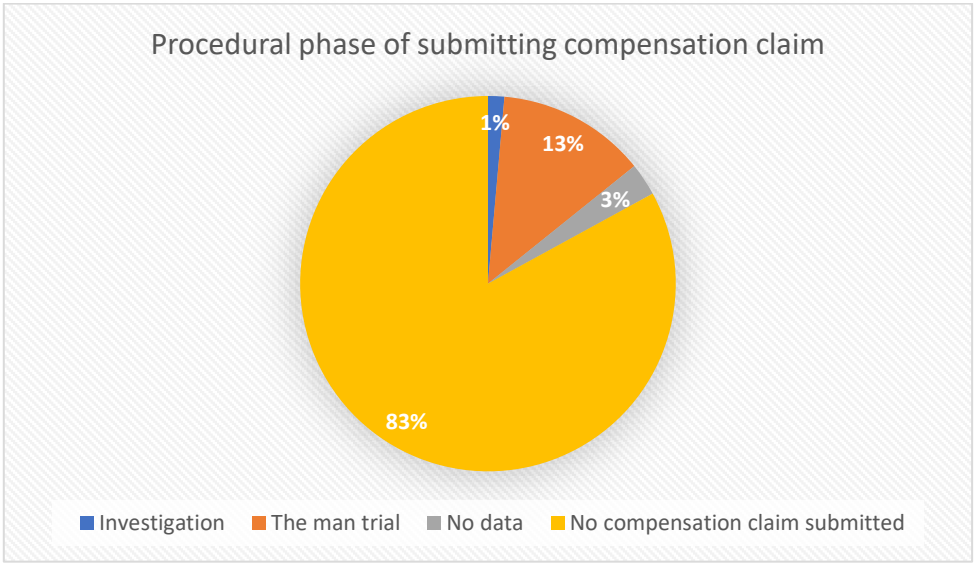
Chart 10: Compensation claim





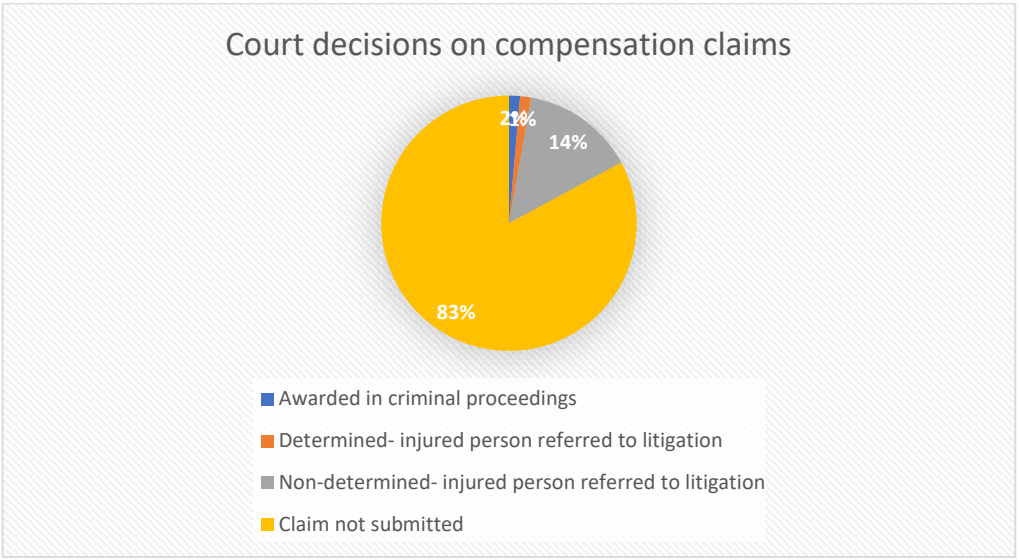
The few victims who determined the property claim demanded compensation for non-pecuniary (in one case) and non-pecuniary and pecuniary damage (in one case). The amounts ranged from 400 thousand to 1.1 million dinars. When it comes to the procedural phase of emphasizing the property claim, the injured parties who pointed out the claim in general mostly did so only at the main trial.

Chart 11: Procedural phase of submitting compensation claim



Regarding the court's decisions on the property claim, it is devastating that only one of the 70 injured parties was awarded a property claim in criminal proceedings. The key reason for that is certainly the fact that only 17% of them pointed out, and only two determined the request, which does not change the overall picture of the complete ineffectiveness of the mechanism prescribed by Art. 252-260. CPC.

Chart 12: Court decisions on compensation claims



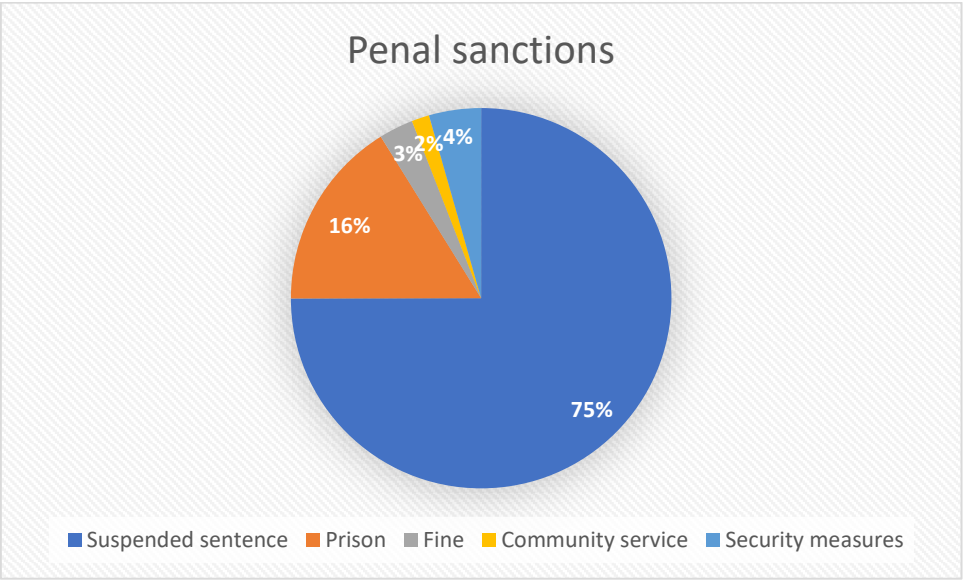
3.6. Court decisions

With the exception of one procedure which ended with the decision to suspend the criminal procedure due to the withdrawal of the public prosecutor from criminal prosecution, in relation to all other defendants the procedure ended with a conviction, i.e. a decision on imposing a security measure (only in one case).

Regarding the imposed sanctions, a suspended sentence of 75% dominates, followed by imprisonment with 16%, and then in a negligible share a fine (in one case as the main and secondary punishment), community service- imposed only to one perpetrator. In terms of the security measures, a ban on approaching and communicating with the injured party predominates, while in one case a security measure of mandatory psychiatric treatment was imposed. An appeal was filed against 13.8% of the verdicts, and the first-instance verdict was upheld almost without exception.

It is noticeable that a short probation period (mostly 1 year) is set for the criminal offense under Article 190 of the Criminal Code, which is not adequate, especially in the case of establishing an extramarital union with very young girls. For the crime under Article 193, the probation period was usually 2 years. It is also noticeable that for the criminal offense of sexual intercourse with a child (Article 180 of the CC), sentences of 5-7 years were imposed, i.e. closer to the special minimum. The opposite situation was identified for the criminal offense of rape under Article 178 para. 3 and 4. where the sentences imposed are closer to the special maximum.

Chart 13: Structure of the imposed criminal sanctions



3.7. The right to legal remedy

All decisions against which a legal remedy was allowed contained instructions on the legal remedy (appeal, i.e. objection in the case of a hearing for the imposition of a criminal sanction). In 30% of the analysed cases, the parties waived their right to appeal.

An appeal was filed against 13.8% of the verdicts, with 25% of the appeals filed by the public prosecutor and 75% by the defendant's defence counsel.

In only one case the verdict was changed by the second instance court (in relation to the sentence imposed) so that the sentence was reduced from 8 to 6 years in prison, for the criminal offense of sexual intercourse with a child under Article 180, paragraph 2, for an extended period. In all other cases, the second-instance court

upheld the first-instance verdict (with the exception of one second-instance trial for one of the two defendants, which was still ongoing at the time of the analysis). Such a high percentage of confirmed first-instance verdicts indicates the adequate quality of the actions of first-instance courts in proceedings for criminal offenses committed to the detriment of juvenile victims.

CONCLUSIONS

Considering the finding presented above, obviously, there is a need to establish sustainable, confidential and easily accessible mechanisms to empower juvenile victims to report (sexual) violence, especially in contexts where the perpetrator is a person close to the victim, including digital reporting tools and effective support and protection procedures. Once reported a crime, child victims need to be additionally supported and protected through the different mechanisms.

Among others, there is a need to amend Article 153 of the Law on Juvenile Offenders and Criminal Protection of Juveniles and / or Article 104 of the Criminal Procedure Code to introduce the possibility for a trusted person to attend the hearing of a juvenile victim, in addition to legal counsel, except in cases of when the authority assesses that there is a conflict of interest. In addition to this, it is necessary to amend the Part III of the same law, to prescribe the obligation, competencies, conditions and procedure for conducting an individual assessment of the needs of a juvenile victim for protective and support and assistance measures. [18]

In order to ensure better protection of child victims, to reduce negative effects of a hearing and to prevent secondary victimisation, it is important to regulate more precisely and to widely use ICT means for the purposes of examining juvenile victims in criminal proceedings.[19] Additional benefit of this would be the reduced number of examinations of victims in proceedings.

As previously said, one of the biggest challenges for victims, especially child victims in Serbian criminal proceedings is to access the compensation.[20] Since the

[18] Kolaković-Bojović, M., Turanjanin, V., & Tilovska Kechegi, E. (2018). „Support to victims of crime: EU standards and challenges in Serbia". *Towards a better future: the rule of law, democracy and polycentric development*, Faculty of Law, St. Kliment Ohridski University, Bitola, 2018, 125-135.

[19] See more about the capacities and perspectives of the ICT to protect child victims: I. Stevanović, M. Kolaković-Bojović, „Informacione tehnologije u službi zaštite deteta u krivičnom postupku", *Videolink i druga tehnička sredstva kao načini preduzimanja procesnih radnji u kaznenom postupku*, Misija OEBS u Srbiji, Beograd, 61-77; M. Kolaković-Bojović, A. Batrićević, "Children in Correctional Institutions and The Right to Communicate with Their Families During the Covid-19 Pandemic", Teme- Journal for Social Sciences, XLV/4, 2021, 1115-1130.

[20] M. Kolaković-Bojović, „Žrtva krivičnog dela (Poglavlje 23 - norma i praksa u Republici Srbiji)". U S. Bejatović (Ur.), *Reformski procesi i poglavlje 23 (godinu dana posle)* Srpsko

legal framework is already in place, there is a need to consistently apply the Guidelines for deciding on compensation claims in criminal proceedings and uniform forms which would enable criminal courts to make decisions on compensation claims based on good practice of civil courts on damages claims and improve the effectiveness of property claims as a remedy available to victims in context the rights of the injured party to reparation.[21] Since the court decision on compensation claim is highly dependent from the quantity and quality of evidence collected in the investigation stage, there is a need to develop and implement binding instructions issued by the Republic Public Prosecutor, based on the guidelines set out in the Guidelines of the Supreme Court of Cassation, which would improve the implementation of the public prosecutor's legal obligation to collect evidence relevant to the decision on compensation claims under Article 256 of the Criminal Procedure Code.

A comprehensive requirement of the tailor-made approach in the reduction of the secondary victimisation have as a consequence the need to conduct trainings for judges, public prosecutors and lawyers who act as proxies for victims, which would improve their awareness and professional capacities for highlighting, deciding and deciding on the property claim of the victim in criminal proceedings. This requires further strengthening the capacities of the Judicial Academy to conduct the training as in terms of the number of available courses, in in a view of the frequency of training. [22] Finally, considering the earlier mentioned, emerging structure of the analysed crimes, with the predominate share of the extramarital union with the minor, it is obvious that there is a need to improve the proactive approach of the public prosecutor's offices and social care centres in combating child marriages (establishing extramarital relationships with minors) including the prosecution of parents and / or guardians who enable the establishment and maintenance of such communities. This should also include conducting the awareness-raising campaigns among professionals, as well as for the general public, about the negative effects and the need to combat child marriages / extramarital unions with minors.

udruženje za krivičnopravnu teoriju i praksu, Beograd, 2017, 140-150. and M. Kolaković-Bojović, (2018). „Child victims in Serbia-normative framework, reform steps and EU standards" U I. Stevanović (Ur.), *Child Friendly Justice*, Institute of Criminological and Sociological Research. Belgrade, 171-182.

[21] M. Kolaković-Bojović, „Direktiva o žrtvama (2012/29/EU) i kazneno zakonodavstvo Republike Srbije", U S. Bejatović (Ur.), *Žrtva krivičnog dela i krivičnopravni instrumenti zaštite (međunarodni pravni standardi, regionalna krivična zakonodavstva, primena i mere unapređenja zaštite)* Misija OEBS-a u Republici Srbiji, Beograd, 2020, 41-54.

[22] See more: M. Kolaković-Bojović, „Jačanje kapaciteta pravosudne akademije kao preduslov održivosti kvaliteta obuke za postupanje u krivičnim postupcima prema maloletnicima", U L. Kron (Ur.), *Maloletnici kao izvršioci i žrtve krivičnih dela i prekršaja* (str.) Institut za kriminološka i sociološka istraživanja, Beograd, 2015, 395-404.

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СУДСКА ЗАШТИТА ДЕЦЕ ЖРТАВА У РЕПУБЛИЦИ СРБИЈИ

Резиме

Циљ ове студије је да представи и анализира налазе недавно спроведеног мониторинга судске праксе у случајевима насиља и/или експлоатације деце у којима су правоснажне одлуке донели судови у Србији током 2020. године. Осим што пружа свеобухватне податке о структури кривичних дела и карактеристикама жртава и учинилаца, студија је фокусирана на судску заштиту деце жртава кроз неколико аспеката, укључујући, али не ограничавајући се на право на правну помоћ, психо-социјалну подршку, коришћење ИКТ-а и прилагођеног приступа професионалаца у избегавању/смањењу секундарне виктимизације. Рад се такође детаљно бави приступом деце жртава обештећењу у кривичном поступку. Додатно, студија обухвата анализу казнене политике у анализираним предметима, упоредо, кроз судску праксу првостепеног суда, али и кроз правоснажне одлуке. На крају, аутор даје листу препорука које имају за циљ измене кривичног законодавства, али и унапређење судске праксе у поступцима који укључују децу жртве.

Кључне речи: експлоатација деце, сексуално насиље над децом, дечији бракови, секундарна виктимизација, злостављање деце.

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PRIVATE SECURITY REGULATION IN SERBIA AND CROATIA: COMPARATIVE VIEW[1]

Abstract

The paper deals with the research of the legal regulation of private security in Serbia as a candidate country for EU accession and in Croatia as an EU member state. The starting point is the hypothesis that the legal framework in the field of private security is relatively similar with minimal differences. The authors used the analytical method in the paper, which was used for the first time by Button and Stiernstedt in their work in 2018. Their method is based on the scoring system by answering certain questions and included all EU member states except Hungary and Croatia. As a result of this research, data were obtained that put Serbia and Croatia in the top ten countries that have a good legal system in the field of private security. In order to be even better, the author pointed out certain issues that need to be improved in both observed countries.

Key words: private security, regulation, Serbia, Croatia, EU.

1. INTRODUCTION

Do we need special legislation for private security? From the aspect of the functioning of modern society and the role of private security in society,

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according to Labović there are several reasons for normative regulation of private security: first, in society there is a general social need to control all business activities, and thus private security activities , which are increasingly part of the visible tasks of public safety, as they use increasing powers that can affect the inviolability and privacy of citizens; secondly, there is an increasing need in society to establish trust in relation to private security actors, and in order to achieve that trust, it is necessary to control the convenience of those who hold that position in society, and thirdly, general obedience to legal provisions is a minimum guarantee of quality security service[2], but also for the development of market economy and democracy of society as a whole[3].

According to the United Nations, regarding the legal regulation of private security, states can be divided into three categories: 1) those without state regulations, 2) those with inadequate state regulations and 3) those with efficient regulations. Most states fall into the first two categories.[4]

Comparatively, most EU member states have special legislation related to the private security sector, except for Austria, the Czech Republic and Germany.[5] There is a long tradition of regulating private security in Europe. Laws were enacted in Italy in 1940, in France in 1942, and in Switzerland in 1943. The nature of these regulatory systems, however, varies considerably from country to country.[6] One study shows that the legislators of European countries in the field of private security were most active in the period 1990-1999.[7]

[2] D. Labović, "Normative Regulation of Private Security in the Republic of Serbia - Achievements and Perspectives", *Bezbednost* No 1, 2017, Belgrade, 117.

[3] M. Daničić, Z. Skakavac, "A Normative Framework of the Private Security in Republic of Serbia", *Civitas* No 3, 2013, Belgrade, 21.

[4] United Nations Office on Drugs and Crime, *State Regulation concerning Civilian Private Security Services and their Contribution to Crime Prevention and Community Safety*, United Nations, Vienna, 2014, 21.

[5] O. Bureš, "Private Security Companies in the Czech Republic: An Exploratory Analysis", *Central European Journal of International and Security Studies* No 6, Prague, 2012, 55-57; O. Bakreski, T. Miloshevska, „Comparative Analysis of the Legislature of the Private Security Sector of Certain Countries of the European Union", *International Yearbook*, Faculty of Security, Skopje, 2014, 52-58; V. Arminoski, T. Straub, „Comparative Legal Analyze Between the Republic of North Macedonia and Federal Republic of Germany for International Criminalistic Cooperation on the Field of Private Security", *Criminalistic Theory and Practice* No 6, Zagreb, 2019, 78-81; G. Pavlović, "Privatna bezbjednost u Evropskoj uniji – pravni askpekti i aktuelno stanje", *Bezbjednost, policija, građani* No 7, Banja Luka, 2011, 184.

[6] M. Button, *Private Policing*, Willan Publishing, Cullompton, 2002, 122.

[7] G. Scheerlinck, et al., "A private security regulation index: ranking EU member states from 1931 until 2018", *Security Journal* No 33, New York, 2020, 291.

Germany does not have a systemic or departmental law that regulates the area of private security. The so-called security officers are applied to Trade regulations or the Trade Act (*Gewerbeordnung-GewO*)[8] from 1869 as well as the Regulation on the Security Industry (*Verordnungüber das Bewachungsgewerbe or Bewachungsverordnung-BewachV*)[9] from 2019. These regulations regulate the establishment of a company, the conditions for licensing legal persons through criminal records, training of security officers. Other general regulations e.g. Weapons Act (*Waffengesetz*)[10] from 2002, like many others, also applies to private security officers. In addition, there is the Regulation on Licensing of Security Companies on Overseas Vessels (*Seeschiffbewachungsverordnung – SeeBewachV*)[11] and the Ordinance on the Implementation of the Regulation on Licensing of Security Companies on Overseas Vessels (*Seeschiffbewachungs-durchführungsverordnung – SeeBewachDV*)[12].

In France, in the field of private security, Law 83-629 from 12 July 1983 on the activities of private security companies and cash in transit carriers applies, as well as the new Law on 'Daily Security' from 31 October 2001. In addition, secondary legislation consists of the Decree on Administrative Authorization and Employment of Personnel and the Decree on the Use of Materials, Documents, Uniforms and Symbols from 1986.[13]

The Netherlands has been working for 20 years to pass regulations that would regulate the area of private security. The beginning was the report of the Working Group for Security and Protection (1975, 1977), and the Law on Private Service Providers and Detective Agencies was passed in 1999. With the enactment of this law, the Netherlands has strengthened, *inter alia*, legislation on licensing, training, uniforms, grievance procedures and on day-to-day activities in the private security sector.[14]

[8] https://www.gesetze-im-internet.de/gewo/GewO.pdf, accessed on 23. November 2021
[9] https://www.gesetze-im-internet.de/bewachv_2019/BewachV.pdf, accessed on 23. November 2021.
[10] https://www.gesetze-im-internet.de/waffg_2002/BJNR397010002.html, accessed 23. November 2021.
[11] https://www.gesetze-im-internet.de/seebewachv/BJNR156200013.html, accessed on 23. November 2021.
[12] http://www.gesetze-im-internet.de/seebewachdv/, accessed on 23. November 2021.
[13] T. Weber, *A comparative overview of legislation governing the private security industry in the European Union*. Final Report of a project for CoESS/UNI Europa, European Commission, Brussels, 2002, 10; O. Bakreski, T. Miloshevska, *op. cit*., 56
[14] R. Van Steden, *Privatizing Policing*. Boom Juridischeuitgevers, Amsterdam, 2007, 94-95.

Before 1998, there was no law in Hungary that specifically regulated the private security industry, except for Government Decree 87/1995. The first rules on private security were introduced by the Police Act XXXIV from 1994, which refers to the main requirements of the service and supervision of related activities. The earliest laws as separate laws were enacted in 1998: Law IV. The following Law CXXXIII from 2005 provides the current regulations in force today. Two other regulations related to this activity are in force today, the first is the CLIX Act from 1997 on Armed Guardians, and the second is the 2012 CXX Act on Special Law Enforcement Personnel.[15]

2. SERBIAN LEGISLATIVE FRAMEWORK

Private security is seen as a 'product' of recent times but it has its roots in history. The question of security (individual or collective) has been raised since the original human communities through the ancient times and times of ancient Greece, Egypt, the Roman Empire and other civilizations.[16]

In the development of the private security system in Serbia, we distinguish several periods: a) *pre-war* - the period before the Second World War, b) *post-war* - from 1945 until 1951, c) *early socialist self-government* - from 1951 to 1963, d) *socialist self-government* - from 1963 to 1973, e) *social self-protection* - from 1973 to 1993, f) *transition* - from 1993 to 2013 and g) *current period* - from 2013.[17]

According to the available historical data, in the period between the two world wars in Serbia, primarily in Belgrade, a dozen private companies were established and operated that provided security services. The key areas of work of these companies were the security of persons, property and operations of companies and other legal entities, as well as detective work. Thus, the company 'Mikton' was founded in Belgrade in 1922 as a type of private investigative organization, and soon after that (1924) the 'Police Detective Bureau Security' was founded in Belgrade (founder Ž. Simonović, former police officer). This was followed by the establishment of other companies

[15] L. Christián, A. Sotlar, „Private Security Regulationin Hungary and Slovenia – A Comparative Study Basedon Legislation and Societal Foundations",*VARSTVOSLOVJE Journal of Criminal Justice and Security* No 20, Ljubljana, 2018, 147 https://www.fvv.um.si/rv/arhiv/2018-2/01_Christian_Sotlar_rV_2018-2.pdf

[16] Ž. Nikač, *Privatna bezbednost i detektivska delatnost: novi zakonski propisi u Republici Srbiji*. Poslovni biro, Belgrade, 2013, 16.

[17] B. Leštanin, *Privatna bezbednost*, Službeni glasnik i Akademia Oxford, Beograd, 2021, 22.

such as 'Credit-Inform, Trade Intelligence and Collection Institute' (founder M. Markovic), then 'Hermes Institute' (founder I. Kobiljo), private company 'Bezbednost – Institute for the Preservation of Apartments and Premises' (1934, founder A. Pesek, politician and businessman from Slovenia) and others.[18]

The disintegration of the SFRY foretold radical changes in social life in the states that arose after the armed conflicts. This affected both the system of private security (i.e. the system of self-protection society) and the security system as a whole. At the time of the 'tectonic' disturbances, in 1993 our legislator passed the Law on the Termination of Certain Laws and Other Regulations ('Official Gazette of the RS', No. 18/1993). Among the numerous regulations was the Law on the System of Social Self-Protection, and thus the system of private security in the Republic of Serbia passed into the 'shadow' zone. From that moment on, general regulations governing economic operations, work, employment, etc. are applied to economic entities that deal with physical and technical security. What causes the greatest controversy is the fact that the powers of security officers were not regulated, and therefore, from the legal point of view, they did not have any powers. All this is happening at a time when the state is under sanctions, when there is a decline in economic activity and the development of the 'shadow economy', the growth of crime and criminalization of society, the development of organized crime, inefficiency of public authorities etc.[19]

According to one research, a large number of returnees from the battlefield began to engage in certain activities, which could include private security, without any regulation or control by the state, which left a lot of room for illegal actions, such as exceeding authority or tax evasion, (extortion, collection of receivables, collection of debts, etc.). In parallel with this process - the number of members of the army and police was decreasing. This set of circumstances violated the general security of citizens, and not least – it damaged the reputation of the profession.[20]

[18] M. Talijan, "Prve ustanove privatne bezbednosti (policije) u Srbiji", Zbornik radova *Privatna bezbednost – stanje i perspektive*, Fakultet za pravne i poslovne studije, Novi Sad, 2008, 40-62.

[19] See also P. Petrović, "Privatizacija bezbednosti u Srbiji", *Bezbednost Zapadnog Balakana* No 4, Belgrade, 2007, 13; N. Radivojević, „Police and Private Security Sector in Serbia – from Competition to Cooperation", International Scientific Conference '*Researching Security: Approaches, Concepts and Policies*' vol. 5, Skopje, 2015, 294.

[20] CEAS, *U korak sa privatnim sektorom bezbednosti-II*. Centar za evroatlantske studije, Belgrade, 2015, 10.

The legal framework in Serbia are the Law on Private Security (‘Official Gazette of RS’, No. 104/2013, 42/2015 and 87/2018; hereinafter: LPS) and the Law on Detective Activity (‘Official Gazette of RS’, No. 104/2013 and 87/2018, hereinafter: LDA) and bylaws (regulations, ordinances) adopted on the basis of these laws. In a broader sense, in addition to these legal acts, the normative framework for performing private security activities consists of all other laws to the application of which the LPS and LDA explicitly refer, i.e. laws whose application is implied due to their generality (Labor Law, Weapon and Ammunition Law etc.).

3. CROATIAN LEGISLATION FRAMEWORK

After gaining independence in 1996, Croatia passed the Law on the Protection of Persons and Property (‘Official Gazette’ No. 83/96), which regulated the security and private detective activities, were issued conditions for the establishment and operation of private security companies, performing protection of persons and property, performing detective work, rights and obligations of private detectives as well as supervision over the work of private security entities. At the same time, this law abolished the system of social self-protection and established a new system of private security.

Law on the Protection of Persons and Property was amended twice (1996 and 2001) to be replaced in 2003 by the new Law on Private Protection (‘Official Gazette’ No. 68/03). This law was also amended twice in 2010, but in 2020 the Croatian legislator decided to pass a new Law on Private Protection (‘Official Gazette’ No. 16/20) in order to create a harmonized legal security system. Given the long legal tradition in private security, this was not a difficult task. According to Solomon, the Law on the Protection of Monetary Institutions (‘Official Gazette’, No. 56/15) should be added to this law as part of the legal framework of private security.[21]

4. METHODS

This research should answer the question of how similar the legal systems of Serbia and Croatia are in the field of private security and where they

[21] D. Solomun, „Co-Existence of the Public Security Structures and Private Security Market in the Republic of Croatia”, in Katalinić, B. (ed.) *Proceedings of the 6th International Conference ‘VallisAurea’ Focus on: Research&Innovation*, Polytechnic in Požega, Daaam International Vienna, Požega - Vienna, 2018, str. 399.

are in relation to other EU member states.Using a unique method used for the first time in 2018 by English researchers Button & Stiernstedt[22], the author will try to answer the 22 questions asked. The method involves giving answers to 22 questions and points for certain answers.Their research included EU member states but without Hungary and Croatia. Hungary and Slovenia were explored by Christián & Sotlar[23]. Bearing in mind that Serbia and Croatia were part of the same legal system until 1992 and that Croatia is a member of the EU and that Serbia is a candidate for EU accession, great similarities can be expected, but also certain differences in the legal regulation of private security.The results of the research are useful for harmonizing the legal framework in the field of private security at the EU level and beyond, as well as for comparing Serbia with other EU member states. The research can be a starting point for researching the legal framework in the field of private security in the countries of the Western Balkans.

Button & Stiernstedt, divided legal issues into two areas: Legislation and Societal Foundation within 100 points maximum. Both areas are further divided into three subareas: a) Legislation: Regulation, Coverage and Licensing; b) Societal Foundation: Professional associations, Enforcement, Training (Table 1).The purpose of the league table was to illustrate the current state of private security regulation in the Member States of the EU. This was realized by identifying a number of questions pertinent to the issue, ascribing these questions a relative weight, assigning an individual value and by adding up these values creating a league table. The questions were determined by first synthesizing the inquisitive paradigms of the following four resources: a) the 2014 UN Handbook on state regulation concerning civilian private security services; b) the Private Security Services in Europe – Confederation of European Security Services (CoESS) Facts & Figures; c) the ECORYS report on security regulation, conformity assessment and certification produced for the European Commission; d) article by Button from 2007, which in and by itself is based on the three studies of private security regulation by the CoESS and Union Network International Europe, accompanied by the latest edition of the CoESS facts and figures for private security services in Europe. In addition to these reports several other sources were subsequently used. These sources

[22] M. Button, P. Stiernstedt, „Comparing private security regulation in the European Union", *Policing and Society* No 28, London, 2018, 398-414.
[23] L. Christián, A. Sotlar, *op. cit.*, 143-162.

include various other European studies, academic research articles and reports, government websites and interviews with industry professionals.[24]

Table 1 – *Button & Stiernstedt's method*

Subarea	Maximum Points
Legislation/Regulation	4
Regulatory body	2
Role of Private Security Industry (PSI) in regulation	4
Scope of licensing regulation	2-10
Prohibitions/Restrictions	4
In-house securitypersonnel	2
Licensing firms	8
Licensing operatives	8
Types of licensing	4
License card	4
Compulsory codes of conduct	2
Special equipment and weapons	2
Working conditions	2
Professional associations	4
Complaints procedure	4
Sanctions for transgressions	4
Licensing of trainers	4
Mandatory training	14
Exam after training	2
Refresher training	4
Specialist training	4
Management/Supervisor training	4

[24] M. Button, P. Stiernstedt, *op. cit.*

5. RESULTS

In order to make it easier to compare private security in Serbia and Croatia, some of the most important characteristics of these systems must be extracted. We believe that the conditions for obtaining a license for legal entities and individuals and the authorization of security officers are the most important characteristics for comparing these two systems.

Table 2. *Serbia and Croatia* – main characteristics comparison

Main characteristics	Serbia	Croatia
Licensing terms for legal entities	1) entry in the register of economic entities in the Republic of Serbia, with the code of private security activities and security system services; 2) adopted act (rulebook, decision, etc.) on systematization of jobs, with job description and authorizations of employees for each job; 3) an act has been adopted which issues in more detail the appearance of the uniform worn by security officers and the appearance of the sign (logo); 4) appointment of a responsible person who holds a license for performing private security activities, which is issued to a natural person; 5) possession of business premises.	1) registered private security activity; 2) **an act on the appointment of a responsible person in a legal entity that must meet the conditions issued by law**; 3) **fulfilled conditions issued by law for other persons authorized to represent as well as for the founder of the legal entity**; 4) act on systematization of jobs of private security jobs with job description and authorizations of employees for each individual job; 5) general act on trademark (logo); 6) business premises in accordance with the bylaw.
Special terms	1) License for performing	Special conditions depend on

for legal entities	physical and technical protection with weapons - possession of a special space for storing weapons and ammunition, in accordance with the regulations on conditions for storing weapons and fire protection, if he/she performs private security activities with weapons; 2) License for physical and technical protection (regardless of whether it is with or without weapons) and License for security, transport and transfer of money and valuables - possession of its own or contracted Control Center and at least 10 employees of security officers with appropriate licenses for individuals; 3) License for risk assessment in the protection of persons, property and business - employed at least one security officer with a License for risk assessment in the protection of persons, property and business issued to individuals; 4) License for security, transport and transfer of money and valuables - employs at least 10 security officers with a license for	the type of approval for which it is applied, so for physical protection activities a general act on work uniform is required, for self-protection activities an act on establishing an internal security service, for weapons approval proof is required that they meet spatial and technical requirements for weapons storage.

	specialist security officers - with weapons and possession of technical means for transport and transfer of money and valuables (at least one special vehicle that is marked, with a two-way connection with the Control Center, which has a GPS, panic button, adequate protection of the value shipment and video security system); 5) License for technical protection system planning activities - employed at least one worker with secondary technical education and License for technical protection system planning activities issued to a individuals; 6) License for design and supervision of technical protection system - employed at least one person with the prescribed education in the field of technical and technological sciences and License for design and supervision of technical protection system issued to individuals; 7) License for installation, commissioning and maintenance of technical protection and training of	

	users - employed at least one worker with secondary technical education and License for installation, commissioning, maintenance of technical protection and training of users issued to an individuals.	
Licensing terms for individuals	1) **citizenship of the Republic of Serbia**; 2) registered residence on the territory of the Republic of Serbia; 3) candidate has reached the age of 18 at the time of submitting the application for a license; 4) completed high school; 5) absence of security disturbances determined by the police in the security check procedure; 6) psychophysical ability to perform private security activities; 7) completed training in accordance with the law (a separate training program is provided for each license); and 8) passed the professional exam in the Ministry of the Interior.	1) to have a permanent or approved residence in Croatia; 2) has reached the age of 18; 3) that he has not been convicted or is not being prosecuted for a criminal offense prosecuted ex officio, except for the criminal offense of causing a traffic accident through negligence resulting in bodily injury or material damage, or for the same offense in the state whose is a citizen or in which he resides; 4) that no misdemeanor proceedings have been initiated against the person, that he has not been convicted by a court of first instance or that a misdemeanor sanction has been imposed for a misdemeanor with elements of violence, especially for misdemeanors against public order and peace, protection

		from family goals, violence in the field of prevention of riots at public gatherings and sports competitions, as well as other laws that prescribe offenses with elements of violence (this rule applies to the same act in the state of which he is a citizen or resident); 5) **to speak 'actively' Croatian and Latin**.
Special licensing terms for individuals	1) License for performing physical and technical protection with weapons - completed training in handling firearms, i.e. military service with weapons; 2) License for technical protection system planning or License for design and supervision of technical protection system or License for installation, commissioning, maintenance of technical protection systems and user training - acquired at least secondary technical education.	1) license for security guard - a person who performs physical security of persons and property with limited application of authorizations issued by law (special conditions are primary education, appropriate health ability and passed professional exam for security guard); 2) license for security guard - a person who performs physical security of persons and property with the application of appropriate powers issued by law (special conditions are secondary education, special health ability, meets the requirements for holding and carrying weapons and passed the professional exam for security guards); 3) IPU security guard license - a person who has a license

		to make only the threat assessment of protected facilities, premises and persons (special conditions are the qualifications of a professional candidate or university or professional candidate, i.e. level 5 or 6, at least 5 years of work experience in criminal, investigative, military-police, intelligence-security and similar jobs, appropriate health ability and passed professional exam for IPU security guard); 4) license for security guard specialist - security guard who performs physical security of persons and property by applying the authorization with a higher degree of qualification issued by law on coercive means (special conditions are 2 years of work experience as a security guard, special health ability, meets the conditions for holding and carrying a weapon, completed training for a security guard specialist and passed the professional exam for a security guard specialist); 5) license for security guard technician - security guard who performs technical protection of persons and

		property through risk assessment, proposed protection measures, design, construction and supervision of technical protection works, technical acceptance, supervision of technical protection project documentation and revision of documentation as and the provision of intellectual services in the field of technical protection in the manner issued by law (special conditions are specific secondary education in the field of electrical engineering, etc., appropriate health ability and passed the professional exam for security technicians).
Powers	During the performance of physical protection activities, the security officer is authorized to: 1) issue a warning or order to the person or prohibit the person from entering and staying in the protected facility; 2) verify the identity of the person; 3) stop and inspect a person, objects or means of transport; 4) **temporarily confiscate items**; 5) temporarily detain a	1. verification of the identity of persons; 2. giving warnings and orders; 3. temporary restriction of freedom of movement; 4. inspection of persons, objects and means of transport; 5. **securing the crime scene;** 6. use of coercive means. Means of coercion are: 1. physical force, 2. gas spray, 3. handcuffs or other suitable means,

	person; 6) use the following means of coercion, as follows: 1) handcuffs or other suitable means, 2) physical force, 3) gas spray, 4) specially trained dogs, and 5) firearms	4. security dog and 5. firearms

Table 3 shows the results of the assessment of private security regulations in Serbia and Croatia based on legislation. The first four columns present area/subarea and questions, the fifth and sixth columns present the results for Serbia and Croatia in 2021.

Table 3. *Serbia and Croatia – comparative view*

Area/Sub area			Questions	Serbia	Croatia
Legislation	Regulation	Legislation/Regulation	regulation is specific to private security	4	4
			general legislation with specific amendments addressing private security issues		
			general legislation		
		Regulatory body	a single regulatory body is effectively responsible for all or most private security concerns	2	0
			the responsibility for private security is divided or diffuse		
		Role of PSI in regulation	formally and democratically established and run	4	2
			informal but influential		
			having a dominating role, formal or informal, and if not holding a significant role in regulation		

	Coverage	Scope of licensing regulation	Up to 10 points: for scope going beyond general standards with 2 points for each area (this refers to regulated areas falling outside of general guarding, e.g. CIT, close protection, private investigators etc.)	10	10
		Prohibitions/Restrictions	regulation contains a “speciality principle“	0	4
			without a “speciality principle”		
		In-house security personnel	privately managed staff providing security services is included in the regulation	2	2
			in-house is not included in the regulation		
	Licensing	Licensing firms	regulation contains comprehensive criteria	8	8
			regulation contains partial criteria		
			regulation contains no criteria		
		Licensing operatives	regulation contains comprehensive criteria	8	8
			regulation contains partial criteria		
			regulation contains no criteria		
		Types of licensing	different licenses may be issued for different roles and whether such differences reflect a comprehensive licensing spectrum	4	4
			different licenses may be issued for different roles and whether such differences reflect a partial licensing spectrum		
			no types of licenses		
		License card	license card meeting the official EU standard for ID cards is issued	4	4
			license card meeting the official EU standard for ID cards is not issued		
		Compulsory codes of conduct	Exists	2	2
			Not exists		
		Special equipment and weapons	firearms in private security are regulated that consequently allow or disallow guards from being armed with firearms	2	2

			Unregulated		
		Working conditions	in legislation that affects the PSI, i.e. not necessarily specific to the PSI, there are sector- specific binding agreements for working conditions	0	0
			no sector-specific binding agreements		
Social Foundation	Professional associations		there are professional associations assumed to promote higher, better and more effective standards than the statutory minimum	4	4
			no such professional associations		
	Enforcement	Complaints procedure	regulation provides specific provisions for making, managing and following up complaints against private security individuals and/or entities	0	0
			no such provisions in the regulation		
		Sanctions for transgressions	there is a possibility for the regulator to administer sanctions upon security industry or individuals under both criminal law and administrative law	4	4
			there is a possibility for the regulator to administer sanctions upon security industry or individuals under criminal law		
			no such possibility		
	Training	Licensing of trainers	a license is required to provide security personnel training	4	4
			no license is required to provide security personnel training		
		Mandatory training	121 + hours		
			100 to 120 hours		12
			80 to 99 hours	10	
			60 to 79 hours		
			40 to 59 hours		
			20 to 39 hours		
			1 to 19 hours		
			0 hours		
		Exam after training	upon successfully completing the basic	2	2

			training there is a theoretical and/or practical pass/fail exam after which private security guards are issued with a certificate of competence		
			No exam		
		Refresher training	mandatory refresher or follow-up training exists	0	0
			not exists		
		Specialist training	mandatory specialist training is required for security roles other than general guarding	4	4
			not exists		
		Management/Supervisor training	mandatory training is required for management and/or supervisory roles of private security	0	4
			not exists		
			TOTAL	78	84

6. DISCUSSION

The Croatian legal system, unlike the Serbian one, issues the obligation to have an act on the appointment of a responsible person in a legal entity that must meet the legally issued conditions and fulfill the legally issued conditions for other persons authorized to represent and the founder of the legal entity. Special conditions for legal entities in both systems depend on the type of license applied for. If we look at the conditions that must be met by individuals, we notice that the Serbian legislator requires citizenship, while Croatian does not, which is in line with Croatia's EU membership. However, the Croatian legislature is stricter and requires candidates to actively speak Croatian and use the Latin alphabet.

In terms of powers, we see that the legal systems are almost the same with the difference that, on the one hand, in Serbia a private security officer is allowed to temporarily seize items and in Croatia is not, while on the other hand, in Croatia, the private security officer is issued with the duty of securing the crime scene, while in Serbia it is not.

In both observed countries, there is a special law which regulates the area of private security. In Serbia it is the LPS, and in Croatia it is the Law on Private Security and the Law on the Protection of Monetary Institutions. The

body in charge of legal regulation started with who is in charge of proposing laws, but also of passing bylaws. In Serbia, the Ministry of the Interior is responsible for proposing laws to the Government, and the Government proposes to the Parliament, while the Minister of the Interior is exclusively responsible for passing bylaws. In Croatia, when it comes to proposing laws, the situation is identical to that in Serbia, while the Ministry of the Interior and the Ministry of Health are responsible for passing bylaws in the field of private security.

The Serbian Law on Private Security establishes a Council in which representatives of the private security industry participate, who can thus influence the legal regulation in this area. On the other hand, in Croatia there are associations in the field of private security that have an impact on legal regulation but are not formally and democratically established, but their influence is more informal. When we talk about the scope of legal regulation in both countries, the situation is identical where, in addition to the established areas, the areas of risk assessment, security planning, etc. are regulated. In Serbia, companies are allowed to engage in other activities in addition to private security, while in Croatia this is not the case.

In-house protection activities in both observed countries are regulated by the law which also regulates private security. The laws governing the field of private security in Serbia and Croatia contain comprehensive criteria for licensing companies and security officers. Different types of licenses can be issued for different roles in both countries, they reflect a comprehensive range of licensing and the license cards are in line with EU standards. A mandatory code of conduct for security officers exists in both Serbia and Croatia. As for the possession and carrying of weapons and special equipment by security officers in both countries, it is regulated by laws.[25]

According to the data available to the author, neither in Serbia nor in Croatia has a binding agreement on working conditions for security officers been signed, but there are associations for the promotion of standards beyond the minimum issued. There are no special provisions in the laws governing private security that regulate the procedure for complaining about the work of private security officers. The legislation of both states contains provisions on sanctions in both administrative and criminal terms. Training centers for security officers must be licensed in both observed states.

[25] Further readings: Ž. Nikač, G. Pavlović, *Pravo privatne bezbednosti*, Kriminalističko-policijska akademija, Beograd, 2012.

The Rulebook on Programs and Manner of Conducting Professional Training for Private Security and Steward Service ('Official Gazette of RS', No. 15/19) in Serbia issues mandatory training for security officers for 90 hours. According to the Rulebook on Training and Professional Examination for Security Guards and Protectors ('Official Gazette', no 103/04, 21/07, 86/08 and 42/13), the mandatory training for security officers in Croatia lasts 100 hours. After the training, security officers in both countries take the exam, about which there are special bylaws that regulate the areas of the exam. With the exception of the mandatory firearms inspection, there is no mandatory follow-up training in either Serbia or Croatia, while special training (e.g. in the field of dog training and their use by private security officers) exists. Training for managers/supervisors exists in Croatia, while in Serbia such training is not mandatory.[26]

If we combine the results of this research with the results of the previous two surveys[27], we get a ranking list of EU member states and Serbia, which are shown in Table 4. As we can see, Serbia is among the top ten countries with 78 points after Croatia and Greece.

Table 4. – *Top ten states in EU with Serbia*

Number	State	Points
1.	Belgium	94
2.	Slovenia	94
3.	Spain	88
4.	Croatia	84
5.	Greece	80
6.	Sweden	78
7.	Portugal	78
8.	Serbia	78
9.	Hungary	74
10.	Ireland	74

This research also has its limitations, which consist in the fact that this analytical tool has not yet been fully developed, time between first research (2018) and this study with possibility of changed legal framework in EU

[26] Further readings: Ž. Nikač, R. Radovanović, V. Zorić, „Private Security in Serbia – Legal Basis and Education memebers", *Teme* No 1, 2018, 203-223.
[27] M. Button, P. Stiernstedt, *op. cit.;* L. Christián, A. Sotlar, *op. cit.*

member states and that not all data in the field of private security were available to the author.

7. CONCLUSION

As we have seen, the Serbian and Croatian legal systems in the field of private security are quite similar with minimal differences.

In order to improve its legal framework in the field of private security, Serbia should introduce the principle of 'specialty', which means that private security companies can deal exclusively with these activities and not with other activities. It should further conclude a binding agreement (collective agreement) on working conditions for security officers. The regulations must prescribe the procedure for complaining about the work of security officers, increase the number of hours of mandatory training (over 120 hours), introduce introductory training and reintroduce special training for managers/supervisors.

On the other hand, in order to improve the legislation in the field of private security, Croatia had to introduce one state body as a regulator in this area (Ministry of Interior). Amendments to the law to increase the role of the PSI to the level of formal and democratic representation of interests in the regulatory process. As in the case of Serbia, it should conclude a binding agreement (collective agreement) on working conditions for security officers, prescribe a complaint procedure for the work of security officers and increase the number of hours of mandatory training (over 120 hours).

Regardless of the proposed improvements to the legal framework in the field of private security, it can be concluded that Serbia and Croatia occupy high places on the ranking list.

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ПРАВНА УРЕЂЕНОСТ У ОБЛАСТИ ПРИВАТНЕ БЕЗБЕДНОСТИ У СРБИЈИ И ХРВАТСКОЈ: УПОРЕДНИ ПОГЛЕД

Резиме

Рад се бави истраживањем правне регулативе у области приватне безбедности у Србији као кандидату за приступање ЕУ и Хрватској као чланице ЕУ. Полазна основа у истраживању је хипотеза да су правни оквири у обе државе релативно слични са минималним разликама. Аутори су у раду користили аналитички метод који су по први пут користили енглески истраживачи Button и Stiernstedt у свом раду 2018.године. Њихов метод базиран је бодовном систему кроз давање одговора на одређена питања и биле су обухваћене све земље чланице ЕУ осим Мађарске и Хрватске. Као резултат овог истраживања на основу обрађених података Србија и Хрватска налазе се у првих десет држава које имају добар правни систем у области приватне безбедности. Како би правни системи били још бољи аутори су нагласили одређена питања која морају бити унапређена у обе посматране државе.

Кључне речи: приватна безбедност, правна уређеност, Србија, Хрватска, ЕУ.

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THE RIGHT TO SOCIAL SECURITY – NORMATIVE CONTENT AND CONDITIONS FOR EFFECTIVE ENJOYMENT AND PROTECTION IN THE REPUBLIC OF NORTH MACEDONIA

Abstract

Social security is developed into one of the main social institutions of today's modern societies. It plays a key role in the human quest for greater protection from uncertainty, disease and deprivation that people in some period of their life are facing. Even in the most economically developed countries, it can be considered as one of the great achievements of today's society. The purpose of this study is to re-examine the issue of the right to social security and its significance. Also, the article aims at illustrating the right to social security in North Macedonia and its interventions and strategies when faced with social change. Taking into account the challenges that the society is facing the study draws some recommendations that need to be referenced at the national level of social security. The method used by the author is to analyze existing documents to collect secondary information on related issues, especially information from the legal acts in the country. The thesis and references are adapted from research works on social security, studies, policies, and activities of the legislator in North Macedonia in the process of following social security.

Key words: social protection, social security, social risk, social law, Republic of North Macedonia.

1. INTRODUCTION

A general prevailing opinion is that one of the biggest burdens in a person's life is the uncertainty that the future brings and the concern whether we will be able to provide ourselves and our loved ones with satisfactory living conditions. The concept of social security is based on that idea, to facilitate that care for existence.[1]

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[1] B. Šunderić, *Socijalno pravo*, Pravni fakultet Univerziteta u Beogradu, Beograd, 2009, 73.

It ensures a standard of living equal to or close to that which existed before the onset of social risk in the event of unemployment, maternity, accident, illness, disability, old age or other such life circumstances. In more general terms social security is a public system of income protection in case of one's loss or reduction (e.g. due to old age, invalidity, death of a family's income earner, accident at work or occupational disease, sickness, maternity or unemployment) or increased costs (e.g. for health care, raising of children or long-term care services), organized through a process of (broader or narrower) social solidarity. It serves to protect human beings from the life-threatening and degrading conditions of poverty and material insecurity. Therefore, social security is very important for the well-being of workers, their families and the entire community. It is a basic human right and a fundamental means for creating social cohesion, thereby helping to ensure social peace and social inclusion. Social security, if properly managed, enhances productivity by providing health care, income security and social services. It is an indispensable part of governments social policy and an important tool to prevent and alleviate poverty. It can, through national solidarity and fair burden sharing, contribute to human dignity, equity and social justice. It is also important for political inclusion, empowerment and the development of democracy. In conjunction with a growing economy and active labour market policies, it is an instrument for sustainable social and economic development. It facilitates structural and technological changes which require an adaptable and mobile labour force. It is noted that while social security is a cost for enterprises, it is also an investment in, or support for, people. Social security includes systems to maintain a person's income. These are social insurance and social assistance. The first based on performance check (employee labor), the second - universal receipt that is approved without proof of income. The background study illustrates the risk in both traditional social security and in an investment-based system. This study develops the concept of „political risk" as the possibility that a future legislature will change the tax and benefit provisions of pay-as-you-go social security programs when there are changes in the demographic and macroeconomic variables that support it.[2]

Today, the question arises as to how justified and to what extent state funds should be spent on the social security system. That was the question of the creator of the social security system - the German Chancellor Bismarck. Attitudes range from complete approval to negative opinions. The Bismarck model of social and health insurance is the reason for the formation of similar health funds that are often common in many countries around the world. With the trend of globalization and

[2] B. Shoven, John, and N. Slavov Sita, *Political risk versus market risk in Social Security*, NBER Working Paper No. 12135. Cambridge, MA: National Bureau of Economic Research, 2006. Available at http://www.nber.org/papers/w12135.

structural adjustment policies, social security becomes more necessary than ever. International Labour Organization believes that the social security system contributes not only to human security but also to dignity, justice, social justice, and the development of democracy. Therefore, this article will first describe the roots of the North Macedonian social security system, then it will take a look at the main changes and reforms aiming at not only preserve but somehow improve the system.

2. HISTORICAL AND THEORETICAL FRAMEWORK OF THE RIGHT TO SOCIAL SECURITY

The first nation in the world to adopt a social security program was Germany. Designed by the German Chancellor Otto von Bismarck the motive was to introduce social insurance both to promote the well-being of workers in order to keep the economy operating at maximum efficiency, and to stave off calls for more radical socialist alternatives. Coupled with the workers' compensation programme established in 1884 and the "sickness" insurance enacted the year before, this gave the Germans a comprehensive system of income security based on social insurance principles.[3]

Following the First World War, social insurance schemes developed rapidly in several regions, and social protection was included on the agendas of the newly-established international organizations, including the International Labor Organization and the International Conference of National Unions of Mutual Benefit Societies and Sickness Insurance Funds which was launched in Brussels in October 1927 and later became the International Social Security Association (ISSA). At the height of the Second World War, in 1942, the United Kingdom government published the Beveridge Plan, named after its main author, Lord Beveridge, which led to the setting up of the first unified social security system. In France, Pierre Laroque led government efforts to extend social protection to the entire population, and a national social security system was set up in 1946.[4]

In 1944 the ILO's historic Declaration of Philadelphia called for the extension of social security measures, and for the promotion, on an international or regional basis, of systematic and direct cooperation among social security institutions, the regular interchange of information and the study of common problems relating to the administration of social security.[5]

[3] Word of work, the magazine of the ILO, *From Bismarck to Beveridge: Social security for all*,https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcm_041914.pdf, 16.03.2022.
[4] Ibid.
[5] International Labour Conference, *Social security and the rule of law*, 100th Session, 2011, p. 257.

Four years later, the United Nations General Assembly adopted the Universal Declaration of Human Rights dated 1948, whose article 22 recognized that "Everyone, as a member of society, has the right to social security", and article 25 recognized that „Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control." In 1952, the International Labour Organization adopted the Social Security (Minimum Standards) Convention (No. 102), and in 2001 it launched a Global Campaign on Social Security and Coverage for all. At its 101st regular session in June 2012, the International Labour Conference adopted a new international standard for social security, the Social Protection Floors Recommendation 2012 (No. 202), which complements the International Labour Organization's strategy for social security. This Recommendation complements existing International Labour Organization standards on social security and represents a flexible but important guide for Member States in building comprehensive social security systems and extending social security coverage by prioritizing the establishment of national floors of social protection accessible to all in need. The Social Protection Floors Recommendation complements the existing Conventions and Recommendations. In particular, it assists member States in covering the unprotected, the poor and the most vulnerable, including workers in the informal economy and their families. It thereby aims at ensuring that all members of society enjoy at least a basic level of social security throughout their lives. This instrument opened a new vision of what social justice could mean in a global era, broadening the moral, legal and fiscal space for social protection in the transition to a more sustainable global economy.[6]

In 2008, the United Nations Committee on Economic, Social and Cultural Rights managed to agree on General Comment No. 19 outlining the content, the corresponding duties, as well as the potential violations of the human right to social security outlined in Article 9 of the International Covenant on Economic, Social and Cultural Rights.[7] Hence the Committee has for the first time adopted a general comment on Article 9, which stresses, from the outset, its concern about the very low levels of access to social security with a wide majority of the world population currently lacking access to formal social security, and also regulates the human dimension to the right to social security. This is presently the most authoritative interpretation of the right to social security within the United Nations human rights

[6] ILO, *Social protection floor for a fair and inclusive globalization*, Report of the Social Protection Floor Advisory Group, Geneva, 2011, p. xi.
[7] Committee on Economic, Social and Cultural Rights, General Comment 19, The right to social security (art. 9), Thirty-ninth session, 2007, U.N. Doc. E/C.12/GC/19 (2008).

system and reflects the current state of international law. It should be noted that the Committee on Economic, Social and Cultural Rights has finalized two other general comments on thematic issues strictly related to the right to social security, General Comments No. 14 and No. 18, dealing with the right to the highest attainable standard of health, and the right to work, respectively. The general comments should be interpreted in a coherent manner by taking into account the fact that the right to social security cuts across a number of provisions of the International Covenant on Economic, Social and Cultural Rights – e.g. provisions on the right to just and favorable conditions of work, to adequate standard of physical and mental health, adequate standard of living, etc. – even though it is openly indicated only in Articles 9 and 10 of the the International Covenant on Economic, Social and Cultural Rights.

In international[8] and European Union law[9] there is a clear distinction between social security and social assistance due to historical differences between subjective and enforceable social security rights and more discretionary right to social assistance. For instance, the International Labour Organization Convention no. 102 contains no provisions on social assistance, but on the other hand, in the European Social Charter Article 12 is regulating the right to social security and article 13 the right to social and medical assistance.

From the abovementioned approach, it is possible to define social security as a network of specific programs and systems of policies from the state or social organizations to support and protect individuals and the whole society, especially those who encounter risks or difficulties in life, ensuring a minimum standard of living and contributing to improving their lives, thereby promoting social development and progress.

[8] Universal declaration of human rights, article 22 and article 25; International Covenant on Economic Social and Cultural Rights, article 9; European Social Charter (ESC) and the revised ESC, article 12. For defining the content of the right to social security the ILO Convention No. 102 concerning minimum standards of social security has to be applied. Similar obligations arise also from the European Code of Social Security. Source: G. Strban, *Constitutional protection of the right to social security in Slovenia*, Studia z zakresu prawa pracy i polityki społecznej, 2016, p. 253.

[9] The right to social security (and social assistance) is enshrined in Art 34 of the Charter of Fundamental Rights of the European Union, OJ C 83/389, 30. 3. 2010. See also other articles of this Charter which may influence the content of the right to social security, e.g. Articles 1 (Human dignity), 20 and 21 (equality and non-discrimination), 23 (gender equality), 24 (the rights of a child), 25 (the rights of the elderly), 26 (Integration of persons with disabilities), 35 (the right to health care), 36 (access also to social services of general interest). *Ibid.*

3. LEGAL FRAMEWORK FOR ENJOYMENT AND PROTECTION OF RIGHT TO SOCIAL SECURITY IN THE REPUBLIC OF NORTH MACEDONIA

The Republic of North Macedonia has ratified the Convention on Social Security (Minimum Standards), 1952 (No. 102) on 11/17/1991, and adopted the Social Protection Floors Recommendation, 2012 (No. 202). The right to social security is recognised as one of the fundamental human rights in international and European Union law. It is also enshrined in many national constitutions, including the North Macedonian one. As such, it cannot be regulated as a very precise and concrete legal rule. It is one of the basic values and guidance for all legal subjects in a society. Based on the assumption that social security is a human right as well as a social and economic necessity, the Constitution of North Macedonia includes a detailed list of provisions regarding the economic and social protection of the citizens. Under Article 1 of the Constitutional Basic Provisions, North Macedonia is declared as an independent, sovereign, democratic and social state, while Article 8 of the basic provisions, as one of the basic Constitutional values of North Macedonia, is determining the principle of social justice. The social rights can be found in Chapter 2, Part 2 of the Constitution and they include right to health protection, social security (social insurance) and social protection (Articles 32- 42).[10] The citizens have right to social security and social insurance determined with law and the collective agreements. Moreover, everyone has the right to material assistance during temporary unemployment. Every citizen is guaranteed the right to health care. Mothers and children are particularly protected. Based on these guarantees the Constitution plays a very important proactive role in introducing social rights into the national legislation and in fostering their implementation.

The social security system in North Macedonia consists of the following schemes: social insurance (socijalno osiguruvanje), social protection (socijalna zashtita) and family benefits (zashtita na decata) schemes. The social insurance schemes are covering three basic types of insurances, i.e. the health care insurance (zdravstveno osiguruvanje), the pension and invalidity insurance (penziskoinvalidsko osiguruvanje) and the unemployment insurance (osiguruvanje vo slucaj na nevrabotenost). They are primordially financed on the basis of social security contributions and are of a professional nature. They are covering the professionally active persons (employees, self-employed people, farmers and civil

[10] According to the Article 35 of the Constitution of the Republic of Macedonia („Official Gazette of the Republic of Macedonia" No. 52/1991 as of 22.11.1991) "the Republic provides for the social protection and social security of citizens in accordance with the principle of social justice. The Republic is guaranteeing help to the helpless and to the citizens incapable for work. The Republic is providing special protection to the persons with disability as well as conditions for their active inclusion in the society."

servants) and their family members.. Although professional of nature, the health care insurance is covering the entire population residing in the country and guarantees equal access to health care regardless of employment and legal status of the citizens. Social protection schemes are taken care of by the state, and focus on prevention and coverage of the basic social needs. These schemes are universal in the sense that they cover all citizens and persons residing in the country and meeting the eligibility criteria determined in the Law. In order a person or a household to be eligible to receive benefits under the social security scheme, the household income is measured against a defined minimum subsistence. Some categorical assistance schemes, providing assistance to specific groups (elderly in need, handicapped) exist as well. The family benefit (child allowance – detski dodatok) schemes are separately organised. Benefits are financed through the State Budget. Although they are universal with regard to their personal scope, they mainly target working families with a low income (below minimum subsistence). Special benefit (poseben dodatok) is provided to children with special needs.[11]

Individual's access to social rights is guaranteed in a three instance procedure, the last instance is judicial protection. The procedures for attainment the rights and obligations related to health insurance are laid down in the Law on health insurance[12] and Law on general administrative procedure.[13] The procedure is being initiated upon an application of the insured persons or a member of their family. A regional service of the Health Insurance Fund is obliged to issue a decision regarding the filed application and to deliver it to the applicant thereof.[14] The applicant has a right to a complaint to the minister of health in the capacity of a second instance authority against the aforesaid decision of the Health Insurance Fund.[15] Judicial protection is provided to the insured person against the decision of the minister.[16] The individual can address his/her complaints to the Administrative Court of North Macedonia as the first instance court in accordance with the Law on Administrative Disputes.[17]

The rights related to pension and invalidity insurance are different because they are acquired depending on the period and amount of investment in the funds for pension and disability insurance. The procedure is provided through the Pension and

[11] T. Kalovska, *Social Institutions Support Programme*, Format For reporting on the present state and future of social security in the countries participating in the SISP, p.2.
[12] „Official Gazette of the Republic of Macedonia" No. 25 of March 30, 2000, and it's all amendments.
[13] „Official Gazette of the Republic of Macedonia" No. 38/2005 of May 26 2005.
[14] Law on health insurance, article 31.
[15] Ibid.
[16] Ibid.
[17] „Official Gazette of Republic of Macedonia" No. 96 from 17.5.2019.

Disability Insurance Fund, having regional units throughout the country.[18] Applications should be launched with the local branch office of the Pension and Disability Insurance Fund.[19] In case a person wants to launch an appeal against the taken decision, he/she can apply to the State Commission for Resolution of Second Instance Administrative Proceedings and Labour Relation Proceeding.[20] This is the second instance, while in a further process against the second instance decision the individual can launch an administrative dispute in front of the Administrative Court as the first instance court.[21]

Proceedings with regard to unemployment benefits are initiated on the basis of application filed by the unemployed (insured) person and the first instance decisions are brought by the administrator of the local Employment Centre (Employment Agency of the Republic of North Macedonia) where the unemployed person is registered. In the second instance, the rights determined by the Law on Employment and Insurance in Case of Unemployment[22] are dealt with by the Minister of Labour and Social Policy. In the third instance, the individual can lodge an administrative appeal with the Administrative Court as the first instance court against the decision of the minister of labour.

The Social Work Centre decides upon the rights of social protection and family (child) benefits in the first instance. The competent centre is the social work centre where the individual holds temporary or permanent residence. The Minister of Labour and Social Policy deals with the complaints in the second instance procedures. The third instance is the judicial protection which is provided by means of initialising administrative dispute before the Administrative Court of North Macedonia as the first instance court. Provisions laid down in the Law on Social Protection,[23] Law on child protection[24] and Law on General Administrative Procedure apply for administering the aforesaid proceedings.

With regards to the judicial protection, as noted above the Administrative Court decides in the first instance upon lawsuits against administrative acts of the state administration (ministries). The individuals may further file an appeal against the decisions of the Administrative Court to the Higher Administrative Court, as the second instance court. The Supreme Court of the Republic of Macedonia is the last

[18] Law on pension and disability insurance, „Official Gazette of Republic of Macedonia" No. 80/93 article 4, article 8, article 125 and article 126.
[19] Ibid, article 127.
[20] Ibid, article 10 and article 134.
[21] Ibid 135.
[22] „Official Gazette of Republic of Macedonia" No. 37/97.
[23] „Official Gazette of RSM", No. 104 from 23.5.2019.
[24] „Official Gazette of Republic of Macedonia" No. 23/13.

instance and decides upon extraordinary legal remedies against the decisions of the Higher Administrative Court.

3.1. Could North Macedonia do more to promote the right to social security?

The legal position of the individual is better protected if the country has to respect not only the principle of social security (which mayhave a broader sense, touching upon the regulation of taxes, housing benefits, labour and education rights) and fundamental rights of social security but other principles and human rights as well. Among them are the most relevant the equality and the rule of law principles (protecting also legal expectations and preventing drastic changes during the recession periods) and the right to private property. The latter might be important not only in purely internal situations but also when people move to a country with which no social security coordination instrument exists.

It is known that in Macedonian society many of the citizens work in the informal economy. These workers for the most part are not covered by the country's labour and social laws and regulations. Introducing policies support for vulnerable groups in the informal economy will encourage movement away from it. As a matter of equity and social solidarity these should be financed by society as a whole.

Another aspect is immigrations of the working force, specifically the young people that bring uncertainty in the future. North Macedonia is characterized as a distinctive migration area with intensive population emigration in the period following the visa liberalization.[25] The age distribution of immigrants, their earnings, taxes they pay, the social contributions they pay, the timing of their retirements, and the benefits they receive can have important implications for the system solvency.

In conditions of high unemployment and low material income, social security should play a vital role to provide income support to workers who have become involuntarily unemployed. The provision of cash benefits to the unemployed is one of the possibilities and should be closely coordinated with training and retraining and other assistance they may require in order to find employment. Finally social security benefits shouldn’t be designed so that they create dependency or barriers to employment. Measures to make work financially more attractive than being in receipt of social security had been found effective.

4. CONCLUSION

It seems that during the assessment of the right to social security, the most important role is played by the contents of international instruments and their

[25] Ministry of labour and social policy, *Revised economic and social reform programme 2022 - ESRP(r)*, Republic of North Macedonia, p.20.

significance in the system of international legal standards. It should be noted that, many instruments exist at both a global level (the International Labour Organization should be considered the most important organisation creating social security standards), at the European level (the most important international instruments seem to be the European Social Charter established within the legal system of the European Council, along with the European Charter of Fundamental Rights binding for member states of the European Union), and at national level.

The findings of the study indicate that, since the independence of North Macedonia, understanding of social security rights has grown in perfect synchronization with the level of socioeconomic growth in market-oriented economy settings, increasingly approaching international standards in the integration process. Therefore, social security rights may be recognized in the national legal system at a number of different levels. There is an individual right of action before the courts which means that individuals are able to participate actively in the realization of their right to social security.

It can be noticed that social security is largely based on a national social insurance system which is a part of a welfare state. Although its explicit objectives from the beginning were to go toward a universal coverage, the actual roots are the Bismarck model. As a result the whole welfare system was focused on labor, and originally based on the male breadwinner model. Most of the budget came from wages and a turnover was organized amid employers and employees unions as for to run them along with the unemployment benefits or the pension system. However, since this foundation time, many changes have occurred; some of them pushed by internal constraints, others pulled by external conditions. These changes cannot be understood without knowing some actual features of the original system. In fact, reform cannot be successful if it does not take into account what has been historically and socially built before it became necessary.

The promotion of the right to social security requires an integrated policy response involving fiscal, monetary, labour market, and modern social security policies. These choices will reflect our social and cultural values, history, institutions, and level of economic development. The highest priority should be policies and initiatives which can bring social security to those who are not covered by the existing system. As before, the Republic should have a priority role in the facilitation, promotion, and extension of coverage of social security and the system should conform to certain basic principles. In particular, benefits should be secure and non-discriminatory; schemes should be managed in a sound and transparent manner, with administrative costs as low as practicable and a strong role for the social partners. And finally, in terms of the social changes and economic crises we are facing today, it is necessary to act immediately with a plan that will give positive effects to the social security of citizens.

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ПРАВО НА СОЦИЈАЛНУ СИГУРНОСТ – НОРМАТИВНИ САДРЖАЈ И УСЛОВИ ЗА ЕФИКАСНО УЖИВАЊЕ И ЗАШТИТУ У РЕПУБЛИЦИ СЕВЕРНА МАКЕДОНИЈА

Резиме

Социјална сигурност је развијена у једну од главних друштвених институција данашњих модерних друштава. Она игра кључну улогу у људској потрази за већом заштитом од неизвесности, болести и ускраћености са којима се људи у неком периоду свог живота суочавају. Чак и у економски најразвијенијим земљама то се може сматрати једним од великих достигнућа данашњег друштва. Сврха овог рада је да се преиспита питање права на социјално осигурање и његов значај. Такође, овај чланак има за циљ да илуструје право на социјалну сигурност у Северној Македонији и његове интервенције и стратегије у суочавању са друштвеним променама. Узимајући у обзир изазове са којима се друштво суочава, студија даје неке препоруке на које је потребно обратити пажњу на националном нивоу социјалне сигурности. Метод који користи аутор је да анализира постојећа документа ради прикупљања секундарних информација о сродним питањима, посебно информација из правних аката у земљи. Теза и референце су преузете из истраживачких радова о социјалној сигурности, студијама, политикама и активностима законодавца у Северној Македонији у процесу праћења социјалне сигурности.

Кључне речи: социјална заштита, социјална сигурност, социјални ризик, социјално право, Република Северна Македонија.

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INTERNATIONAL AND NATIONAL CYBERSECURITY STANDARDS

Abstract

The increasing reliance upon information and communication technology (ICT) accompanied with contemporary world multiple crisis, indicate the need for reconsidering and critical perception of existing international and national cybersecurity standards. International tensions imply cyber risk and may escalate into cyber conflict. Cybersecurity standards appear as some of the nowday priorities. Since the use of ICT has become significant element in governmental activities a lack of effective cybersecurity standards can have serious consequences. Content analysis of various researched material: articles, books and documents illustrate cybersecurity policy and standards applied in Serbia and worldwide. Considered fast development and application of ICT in all spheres of action, these standards shouldn't be static solution. Purpose of the article is double-natured. First, article explains the degree of cybersecurity significance in international relations, importance of cybersecurity standards and agreements. Second, cybersecurity standards are serious issue that need continuous international cooperation and consideration.

Keywords: cybersecurity, policy, standards

1. INTRODUCTION

Contemporary society is moving upwards from stable peace to an unstable peace. World power centers are competing to obtain strategic resources. This striving to take control over competing leads to inevitable conflict of interests and dangerous mutual tensions among world power centers. Multiple crisis (COVID-19 crisis, economic and energy crisis, war in Ukraine and migrations) creates tensions that can quickly escalate worldwide in virtual and, potentially, physical fronts.

High-tech development inevitably leads to the redistribution of the power on the world stage. Countries lagging behind in technological

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development may loss their leading position and influence among world powers. „The speed and sophistication of cyber tools shape modern conflict“[1]. The nature of strategic resources have been changed over time. Apropos, control of vital raw materials have changed with technological development. The use of the information and communication technology (ICT) has become essential for any person, institution, and even government. Contemporary world rely on modern technology. The ICT provide a lot of possibilities in functioning of a state, to achieve strategic goals and improve the ability to connect all spheres. So, the ICT unquestionably play one of the central role in the state functioning, its crucial infrastructure functioning and emergency response in almost every field of action.

Considering the dynamics of technological development achieving protection and cybersecurity of „the networked world“[2] appears as true challenge. Cybersecurity relies on cybersecurity standards and policy wich provide equivalent answers, countermeasures and capability to counter different kind of cyber threats and attacks like cyberterrorism[3] and cybercrime[4] that may cause damage of different proportion. Perfect cybersecurity is hard to achieve. It may looks tricky because there is no unique viewpoint (researchers, users, regulator, manufacturers, IT and cybersecurity experts). But, each viewpoint forms a different part of solution, which policymakers should concerne while making cybersecurity standards. This article has important implications for policy-makers and military leaders as it demonstrates the importance of cybersecurity policy and standards.

The power and utility of software as a tool or weapon for malicious purpose is unquestionable. Some authors noticed that „cyberattacks should be considered escalatory in nature“.[5] Because, „cybersecurity is not a static solution; as attackers gain more knowledge and experience, their tactics, techniques, and procedures will morph over time“[6]. On behalf that cybersecurity standards should follow ICT trends and its dynamics.

[1] N. Kostyuk, S. Powell and M. Skach, „Determinants of the Cyber Escalation Ladder“, *The Cyber Defense Review* 3, No. 1, US, 2018, 123.
[2] M. Castells, *The Rise of the Network Society*. Blackwell Publishers, Malden, 1996.
[3] I. Luknar, „Cyber Terrorism Threat and the Pandemic“, in *The Euro-Atlantic values in the Balkan countries*, Cane T. Mojanoski (Ed. in chief), Vol. 3, 2020 a, 29-38.
[4] I. Luknar, „Cybercrime – Emerging Issue. In *Archibald Reiss Days. International scientific conference*, S. Jaćimovski (ed.), Vol. 10, 2020b, 621-628.
[5] N. Kostyuk, S. Powell and M. Skach, *op.cit.*, 128.
[6] E. Iasiello, „Is Cyber Deterrence an Illusory Course of Action?“, *Journal of Strategic Security* 7, No. 1, Florida, 2014, 67.

2. INTERNATIONAL STANDARDS

There is hudge importance of information security standards. As Watkins noticed they are „the essential starting point for any organization that is commencing an information security project.“[7]

Regulation (EU) No 1025/2012, Article 2 paragraph (1) defines standard as „a technical specification, adopted by a recognised standardisation body, for repeated or continuous application, with which compliance is not compulsory“.[8] According to International Organization for Standardization Information Technology this are international standards sorted in series:

„1) ISO/IEC 27001:2013 Information Technology— Security Techniques—Information Security Management Systems—Requirements

2) ISO/IEC 27005:2011 Information Technology— Security Techniques—Information Security Risk Management

3) ISO/IEC 27031:2011 Information Technology— Security Techniques—Guidelines for Information and Communications Technology Readiness for Business Continuity

4) ISO/IEC 27032:2012 Information Technology— Security Techniques—Guidelines for Cybersecurity.“[9]

ISO/IEC 27001:2013 is „the blueprint for managing information security in line with an organization’s business, contractual and regulatory requirements, and its risk appetite.”[10] The establishment and implementation of the international standards is influenced by the large number variables of the organization (size, structure, needs, objectives, security requirements, the organizational processes). All of these influencing variables are expected to change over time. The information security management system adequately should manage all variables to provide confidentiality, integrity and availability of information.

[7] S. G. Watkins, *Information Security and ISO27001 – an Introduction*: *A Pocket Quide*, Second Edition, IT Governance Pub., UK, 2013, 2.

[8]Regulation (EU) No 1025/2012, 2012, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32012R1025&qid=1649014278241, 3.4.2022.

[9] Cybersecurity A Generic Reference Curriculum, National Defence, Kingston, 2016, 18,https://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2016_10/1610-cybersecurity-curriculum.pdf, 1.4.2022

[10] A. Calder, *Nine Steps to Success an ISO 27001:2013 Implementation Overview*, IT Governance Publishing, North American Edition, 2017, 11.

3. THE EUROPEAN UNION AGENCY FOR CYBERSECURITY (ENISA)

The European Union has already taken important steps to ensure cybersecurity and to increase trust in digital technologies. Since 2004. when The European Union Agency for Cybersecurity (ENISA) was created, it was obligated to provide advice and solutions in order to improve cybersecurity capabilities of EU memebers. The EU adopted the Cybersecurity Strategy in 2013 to guide the Union's policy response to cyber threats and risks. „The Union's first legal act in the field of cybersecurity was adopted in 2016 in the form of Directive (EU) 2016/1148 of the European Parliament and of the Council.“[11] The European Commission has proposed the Network and Information Security Directive (NIS Directive) in 2013. It has been adopted in July 2016 by The European Parliament and entered into force in August 2016. NIS Directive was improved in order to provide three general objectives:

1) „Increase the level of cyber-resilience of a comprehensive set of businesses operating in the European Union across all relevant sectors, by putting in place rules that ensure that all public and private entities across the internal market, which fulfil important functions for the economy and society as a whole, are required to take adequate cybersecurity measures“.[12]

2) „Reduce inconsistencies in resilience across the internal market in the sectors already covered by the directive, by further aligning i) the de facto scope; ii) the security and incident reporting requirements; iii) the provisions governing national supervision and enforcement; and iv) the capabilities of the Member States' relevant competent authorities.“[13]

3) „Improve the level of joint situational awareness and the collective capability to prepare and respond, by i) taking measures to increase the level of trust between competent authorities; ii) by sharing more information; and iii) setting rules and procedures in the event of a large-scale incident or crisis.“[14]

The European Commission adopted on December 16 in 2020 the EU's Cybersecurity Strategy for the Digital Decade. The aim is to fulfiled „concrete

[11] Regulation (EU) 2019/881, paragraph 15, https://eur-lex.europa.eu/eli/reg/2019/881/oj#ntc9-L_2019151EN.01001501-E0009.
[12] The NIS2 Directive. A high common level of cybersecurity in the EU, European Parliament, European Union, 2021, 7, https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/689333/EPRS_BRI(2021)689333_EN.pdf, 3.4.2022.
[13] *Ibidem*, 7.
[14] *Ibidem.*

proposals for deploying three principal instruments –regulatory, investment and policy instruments – to address three areas of EU action – (1) resilience, technological sovereignty and leadership, (2) building operational capacity to prevent, deter and respond, and (3) advancing a global and open cyberspace.“[15] over the next seven years.

ENISA recognized „5G Ecosystem“ as network of the future and defined it: „as a multi-dimensional space comprising not only 5G technological and functional domains but also the related technology lifecycle processes and stakeholders“[16] ENISA shows progressive approach to 5G standardisation with new standards and their link with strategic objectives. To provide relevant cybersecurity of the „5G Ecosystem“, ENISA divide it into eight security domains: D1 – Governance and risk management, D2 – Human resources security, D3 – Security of systems and facilities, D4 – Operations management, D5 – Incident management, D6 – Business continuity management, D7 – Monitoring, auditing, and testing, D8 – Threat awareness.[17] Enisa offers three main recommendations to provide a high common level of cybersecurity across Europe:

1) adopt a progressive aproach to 5G standardisation (improving existing literature);

2) have a broader view on the creation of new references (usefulness and necessity; link with strategic objectives; measurability of effectiveness; consideration for new technologies; thinking beyond standardisation);

3) foster the maturity and the completness of the identification and assessment of risk.[18]

The experts observed the gaps in standardisation that appear „mainly due to the lack of a formal organisational structure that could support, enforce and finance standardised processes in the open-source community. This is particularly true for the security domains D1 (Governance and Risk Management), D7 (Monitoring, Auditing and Testing) and D8 (Threat Awareness)“[19]

[15] The EU's Cybersecurity Strategy for the Digital Decade, Brussels, 2020, 4 https://digital-strategy.ec.europa.eu/en/library/eus-cybersecurity-strategy-digital-decade-0 , 1.4.2022.
[16] 5G Cybersecurity Standards, European Union Agency for Cybersecurity (ENISA), 2022, 8 https://www.enisa.europa.eu/publications/5g-cybersecurity-standards, 3.4.2022.
[17] *Ibidem*, 15-16.
[18] *Ibidem*, 31-32.
[19] *Ibidem*, 29.

4. NATO CYBERSECURITY POLICY

NATO plays an important role in enhancing cybersecurity. At Summit in Prague in 2002, NATO placed for the first time cyber defence on its political agenda. In 2006 at Summit in Riga leaders have pointed out the need to provide cybersecurity and protection against cyber attacks. After cyber attack in Estonia in 2007, leaders of NATO Alliance have adopted Policy on Cyber Defence in 2008. After Summit in Lisabonin 2010 NATO adopted a new Strategic Concept. Then NATO approved the second Policy on Cyber Defence in 2011. During 2012 NATO reaffirmed commitment to improving cyber defence capability. Turning point in NATO cyber defence was in 2014. when is adopted the Wales Declaration in which was mention that „cyber threats and attacks will continue to become more common, sophisticated, and potentially damaging“.[20] NATO have endorsed cyber defence policy to face this evolving challenge. „Moreover, it mapped out five dimensions of the standard cyber defence process listed below:

• prevention: a continuous activity consisting of fixing bugs, updating systems, and surveilling cyberspace during (cyber) peacetime;

• detection of attempted cyber-attacks through passive measures;

• resilience: ability to absorb shock waves (through systems' redundancy, readiness, hardness, etc.);

• recovery: restoration of systems;

• defence: the adoption of active response measures“.[21] In 2016, NATO Computer Incident Response Capability (NCIRC) and the Computer Emergency Response Team of the EU (CERT-EU) concluded a Technical Arrangement on Cyber Defence in order to achieve better prevention and respond to cyber attacks, cooperate and share information and best practices. To improve cybersecurity NATO and the EU develop more than 40 international measures in December 2016. At the Warsaw Summit, NATO agreed to seven „Baseline Requirements for National Resilience against which member states can measure their level of preparedness. These requirements

[20]Wales Summit Declaration, 2014, para. 72, https://www.nato.int/cps/en/natohq/official_texts_112964.htm#cyber, 31.3.2022.

[21] C. Disma, „The evolving cyber warfare landscape“ in *The Alliance Five Years after Crimea: Implementing the Wales Summit Pledges*, M. Ozava (ed.), 2019, 73, The evolving cyber warfare landscape from The Alliance Five Years after Crimea:: Implementing the Wales Summit Pledges on JSTOR, 27.3.2022.

cover the core functions of continuity of government, provision of essential services to the population and civil support to the military“[22]. During 2017 NATO continued good cooperation with EU ministers and approved an updated Action Plan to more efficient cyber defence. In 2019 NATO approved guide with a number of tools to further strengthen its ability to respond to different kind of malicious cyber activities. In order to assure stability peaceful and secure cyberspace in 2021 NATO endorsed a new Comprehensive Cyber Defence Policy.

Table 2. NATO Baseline Requirement for National Resilience[23]

- Assured continuity of government and critical government services
- Resilient energy supplies
- Resilient food and water resources
- Resilient civil communications systems
- Resilient transportation systems
- Ability to deal effectively with uncontrolled movement of people
- Ability to deal with mass casualties

To enhance further national approaches and responses to malicious cyber activities NATO Cooperative Cyber Defence Centre of Excellence (CCD-COE) pointed out five major target areas:

• „Cybercrime
• Critical Infrastructure Protection
• Cyber Military Defence
• Intelligence and Cunter- Intelligence
• Internet Governance“[24]

The hybrid warfare is recognized as one of the most important challenges. NATO leaders agreed to set up counter-hybrid support teams in

[22] The Secretary General’s Annual Report, 2020, 26, https://www.nato.int/nato_static_fl2014/assets/pdf/2021/3/pdf/sgar20-en.pdf#page=25, 1.4.2022.
[23] *Ibidem*, 26.
[24] E. Gerlbstein, *Information security for non-technical managers*, 2013, 18, https://sunsreynat.files.wordpress.com/2014/07/information-security-for-non-technical-managers.pdf, 1.4.2022

July 2018. As Artur Suzik mentioned in „National Cyber Security Framework Manual“: „cybersecurity is not an isolated objective, but rather a system of safeguards and responsibilities to ensure the functioning of open and modern societies“[25] NATO has implemented changes (structural, procedural and technical) to make member states more resilient to cyber-attacks including at the same time international humanitarian law. NATO deepened cooperation and dialogue with the EU.

5. OSCE CYBERSECURITY POLICY

OSCE admitted that ICT have become new and complex dimension to interstate relations. All States share concern to reduce the risks of cyber conflict and the use of the Internet for terrorist purposes. Ben Hiller, Cyber Security Officer at the OSCE in 2018. argue that „diplomacy can play a crucial role in preventing unintended cyber conflicts“.[26] OSCE cybersecurity policy is focus on international communication and cooperation. In March 2016 OSCE „decided to elaborate a set of draft confidence-building measures (CBMs) to enhance interstate co-operation, transparency, predictability, and stability, and to reduce the risks of misperception, escalation, and conflict that may stem from the use of ICTs.“[27] The first set of CBMs were established in 2013 to prevent possible tensions resulting from cyber activities. Second, in 2016 in order to strengthen critical infrastructure against various cyber threats and to enhance more effectively mitigate cyber-attacks on critical infrastructure.

OSCE related to cyber/ICT security is „recommending a fourpronged approach to global cyber stability between States: 1. Enhance transparency, co-operation, and stability between States in cyberspace through confidence-building measures (CBMs); 2. Develop acceptable norms of state behavior in cyberspace and clarify how international law applies in this domain; 3. Enhance international co-operation; 4. Build national/ international capacities to deal with cyber challenges.“ [28] For sure, OSCE is playing a important role in enhancing cybersecurity.

[25] A. Klimburg, National Cyber Security Framework Manual, NATO CCD COE Publication, Tallinn 2012, XI.
[26] B. Hiller, Live with OSCE Expert. Featuring, https://www.osce.org/secretariat/383376, 3.4.2022.
[27] Permanent Council Decision No. 1202, 10 March 2016, https://www.osce.org/pc/227281, 12.3.2022.
[28] Transnational Threats Department. Cyber/ICT Security, https://www.osce.org/files/f/documents/c/c/256071.pdf, 3.2.2022.

6. SERBIA CYBERSECURITY

Serbia made critical steps in law regulating to protect from cybersecurity risks. On January 2016 The Republic of Serbia adopted „The Law on Information Security".[29] Within Regulatory agencies for telecommunications and postal services, in accordance with the Law on Information Security was established Computer Emergency Response Team (CERT). CERT is founded in order to offer rapid reaction in case of incidents and to provide collection on security risks in information and communication systems, as well as to work on improvement of cybersecurity through exchange of information. On behalf cybersecurity in Serbia noticed: „despite the unquestionable necessity of adopting a law that regulates the field of information security, certain areas are left insufficiently defined in the existing framework, which leaves space for individual interpretation, but may also present a potential security risk"[30]

The Republic of Serbia adopted several strategies to define main principles of information and communication system development, a priority areas that include ICT and its security, to regulate technological advancement and fight against cybercrime, etc. Here are some of adopted Strategies:

• Strategy for the Development of Information Society and Information Security in the Republic of Serbia for the period from 2021 to 2026[31]

• Strategy for the Development of Electronic Communications in the Republic of Serbia from 2010 to 2020[32]

• Strategy for the Development of Digital Skills in the Republic of Serbia for the period 2020-2024.[33]

• Strategy for the Fight against High-Tech Crime for the period from 2019 to 2023.[34]

[29] Law on Information Security. "Official Gazette of the Republic of Serbia", no. 6/2016.

[30] I. Riyma, *Guide through information security in the Republic of Serbia*, OSCE Mission to Serbia, Belgrade 2018, 28,
https://www.osce.org/files/f/documents/d/2/404252.pdf, 27.3.2022.

[31] Strategy for the Development of Information Society and Information Security in the Republic of Serbia for the period from 2021 to 2026. „Official Gazette of the Republic of Serbia", no.86/2021.

[32] Strategy for the Development of Electronic Communications in the Republic of Serbia from 2010 to 2020. „Official Gazette of the Republic of Serbia", no.68/2010.

[33] Strategy for the Development of Digital Skills in the Republic of Serbia for the period 2020-2024. „Official Gazette of RS", no.21/20.

• Strategy for the Development of Artificial Intelligence in the Republic of Serbia for the Period 2020-2025.[35]

• Strategy for the development of new generation networks until 2023.[36]

Serbia made efforts to establish a comprehensive framework of cyber security, but

7. COMON CRITERIA (CC) FOR CYBERSECURITY EVALUATION

There is no international agreement on the rules that should apply about limit of cyber conflict. In general, „such malicious actions could trigger damaging military conflict“[37]. „The majority of experts see little chance of applying traditional arms control regimes to cyberspace“.[38] This is further complicated because there is a very fine line between cyber war and cyber espionage.

Comon Criteria (CC) for Information Technology Security Evaluation[39] describes the set of general actions the evaluator is to carry out. It is conjunction of evaluation methods. The CC describes the various parts of the standard summarized in three parts:

1. „Introduction and general model“ - defines the general concepts and principles of IT security evaluation.

2. „Security functional components“ - serve as standard templates upon which to base functional requirements for target of evaluation; the IT countermeasures whose correctness will be assessed during the evaluation.

3. „Security assurance components“ - presents seven pre-defined assurance packages which are called the Evaluation Assurance Levels (EALs).

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[34] Strategy for the Fight against High-Tech Crime for the Period from 2019 to 2023. „Official Gazette of RS”, no.71/18.

[35] Strategy for the Development of Artificial Intelligence in the Republic of Serbia for the Period 2020-2025. „Official Gazette of the RS”, no.96/19.

[36] Strategy for the development of new generation networks until 2023. “Official Gazette of RS”, no.33/18.

[37] J.A. Lewis, *Confidence-building and international agreement in cybersecurity*, Confronting Cybersonfilct, disarmament forum, 2011, 51, https://citizenlab.ca/cybernorms2012/Lewis2011.pdf, 1.3.2022.

[38] K. Ziolkowski, *Confidence Building Measures for Cyberspace – Legal Implications*, NATO Cooperative Cyber Defence Centre of Excellence, Tallin, 2013, 8.

[39] Common Criteria for Information Technology Security Evaluation, Version 3.1, revision 5, Part 1: Introduction and general model, 2017, 37, https://www.commoncriteriaportal.org/cc/, 30.3.2022

Table Road map to the Common Criteria[40]

	Consumers	Developers	Evaluators
Part 1	Use for background information and are obliged to use for reference purposes. Guidance structure for PPs.	Use for background information and reference purposes. Are obliged to use for the development of security specifications for TOEs.	Are obliged to use for reference purposes and for guidance in the structure for PPs and STs.
Part 2	Use for guidance and reference when formulating statements of requirements for a TOE.	Are obliged to use for reference when interpreting statements of functional requirements and formulating functional specifications for TOEs.	Are obliged to use for reference when interpreting statements of functional requirements.
Part 3	Use for guidance when determining required levels of assurance.	Use for reference when interpreting statements of assurance requirements and determining assurance approaches of TOEs.	Use for reference when interpreting statements of assurance requirements.

„There is agreement that cyber activities are a legitimate military activity".[41] In order to progress „measures should be adopted that reduce the likelihood of vulnerabilities, the ability to exercise (i.e. intentionally exploit or

[40] *Ibidem*, 38.
[41] J.A. Lewis, *Op.Cit.* 56

unintentionally trigger) a vulnerability, and the extent of the damage that could occur from a vulnerability being exercised. Additionally, measures should be adopted that facilitate the subsequent identification of vulnerabilities and the elimination, mitigation, and/or notification that a vulnerability has been exploited or triggered.“[42]

CONCLUSION

Malicious cyber threats are a serious state concern, especially because rapidly expanding application of the ICT in funcioning of the critical state infrastructure. This paper provides a brief review of the international standards and cybersecurity policy of ENISA, NATO, OSCE and Serbia. Article highlighted the concept of international and national responsibility in enhancing the cybersecurity. In cybersecurity the ultimate goal is to achieve safe and effectively cyber domain for all its users. Security standards and measures have considered in the context of dynamic current events. Cybersecurity policy should concerne resistance to all types of attacks, as well as to be predisposed by the unique characteristics of the internet. Governments worldwide must work on cybersecurity to offer measures that will increase the level of protection against cyber threats. Increased digitisation and connectivity increase cybersecurity risks. Cyber threats remains one of the top priority. There are risks of malicious cyber activities that are not covered by standards. There is contant need for cybersecurity evaluation. Article presented some comon criteria for cybersecurity evaluation. Because the complexity of the issue, countries need a comprehensive vision that goes beyond standardisation. Finally, it is important to stress that, the international standards should not be treated as an exhaustive list of measures that guarantee security. Countries should continue to adapt and develop its cyber capabilities at the political, military and technical level.

[42] Common Criteria for Information Technology Security Evaluation, *Op.Cit.* 16.
16 C-W. Can, C-C. Chang, „Key Exchange Protocols for Multiparty Communication Services“, *Proceedings of the First International Symposium on Cyber Worlds*, IEEE, Tokyo, 2002.

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МЕЂУНАРОДНИ И НАЦИОНАЛНИ СТАНДАРДИ САЈБЕРБЕЗБЕДНОСТИ

Резиме

Све веће ослањање на информационе и комуникационе технологије (ИКТ) које је праћено вишеструком савременом светском кризом указује на потребу за критичким промишљањем постојећих међународних и националних стандарда сајбербезбедности. Међународне тензије подразумевају сајбер ризик који може да ескалира у сајбер сукоб. Стандарди сајбербезбедости су један од приоритета данашнице. Обзиром да је употреба ИКТ постала значајан елемент у владиним активностима, недостатак ефикасних стандарда сајбербезбедности може имати озбиљне последице. Анализа садржаја различитог истраживаног материјала: чланака, књига и докумената приказује политику сајбербезбедности и стандарде који се примењују у Србији и свету. Имајући у виду брз развој и примену ИКТ у свим пољима друштвене делатности, поменуте стандарде не можемо схватити као статичну солуцију. Сврха чланка је двојака. Прво, чланак објашњава степен важности коју сајбербезбедност има у међународним односима, као и значај стандарда и споразума. Друго, стандарди сајбербезбедности су озбиљан изазов који захтева континуирану међународну сарадњу и разматрање.

Кључне речи*:* сајбербезбедност, политика, стандарди

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TYPES OF ADMINISTRATIVE ACT IN NRM

Abstract

Administrative activity means performing administrative and professional activities such as: resolving in administrative procedure, performing administrative supervision, drafting laws, adopting administrative acts, etc. Administrative acts differ in type, form and legal nature. The main feature of the administrative acts is unilateralism, which means that they can be adopted only by authorized adopters, these are the state administration bodies and other state bodies as well as legal entities that have public authorizations. The basic property of administrative acts is authoritarianism, which means that it can be adopted without the will of the natural or legal person (party), ie without its consent. Administrative acts are the general, specific, i.e individual administrative acts, material acts or actions and administrative agreements. With the general administrative acts, the rights and obligations of the citizens can be determined only if they are previously determined by law. Specific or individual administrative acts are acts that prescribe an individual and specific rule for a certain case and a certain person. Material acts or actions do not produce immediate legal consequences, but can serve as a basis for the realization of certain legal situations. While administrative contracts are a special type of administrative acts that occur between a public body and a legal or natural person (party), whose subject is performing a public service under the competence of a public body when it is prescribed by law, and is in public interest and with the rights of third parties are not restricted. The division of administrative acts is of particular importance because each of them has its own special characteristics and purposes. An administrative act is valid until it is repealed, annulled or amended by administrative remedies such as an appeal, objection or ex officio.

Keywords: administrative acts, administration, law, authoritarianism, public interest

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1. INTRODUCTION

Administrative acts are the most important and most common type of legal acts adopted or undertaken by the administration in performing administrative activities. The term administrative act (acte Administratio) originates from France and indicates the need for the administration to have its own special legal institute. The administrative act in France at the beginning of the 19th century was defined as a strong expression of power and as such was not subject to control by the courts. After a century, there was a change in the definition of the administrative act and it began to lose its classical meaning, ie the administrative bodies in adopting administrative acts no longer used force and power, but increasingly sought to ensure the right and protection of the parties, this was especially evident in the period of the transformation of the administration, ie. the public service administration and over time the administrative act becomes a basic instrument of the modern administration. The adoption of an administrative act implies the resolution of administrative matters, and the execution may be voluntary or forced.

2. ADMINISTRATIVE ACTS

Administrative or administrative activity means performing administrative and professional activities such as: resolving in administrative procedure, performing administrative supervision, drafting laws, adopting administrative acts, etc.
Administrative acts differ in type, form and legal nature. The main feature of the administrative acts is unilateralism, which means that they can be adopted only by authorized adopters, these are the state administration bodies and other state bodies as well as legal entities that have public authorizations.
Other important features of administrative acts are the form and content. The form represents the mode in which the content of the administrative act is expressed and is determined by legal regulations. The content serves to facilitate the achievement of the purpose for which the act was adopted.

The administrative act can be in oral and written form, if it is in oral form the administrative body should issue a written document to the party within eight days. In writing, the decisions are most often and they must contain an introduction, enacting clause, explanation, instructions, name of the body that issued it with number and date of the decision, signature of the official and seal of the body.[1]

The basic property of administrative acts is authoritarianism, which means that it can be adopted without the will of the natural or legal person (party), ie without

[1]B. Davitkovski, A. Pavlovska, Daneva, *Administrative law*, University "Ss. Cyril and Methodius" - Skopje, 2020, p. 49

its consent.Administrative acts are: general, specific, ie. individual administrative acts, material acts or actions and administrative agreements.[2]

3. TYPE OF ADMINISTRATIVE ACTS

- **General administrative acts**

Product for the performance of normative activity by the management, ie administration are general bylaws (regulations). The normative activity is in principle intended for the parliament, and the administrative bodies can adopt only bylaws on the basis of authorizations by the Assembly and the Government. [3] With the general administrative acts, the rights and obligations of the citizens can be determined only if they are previously determined by law.

The administrative bodies can adopt the following general administrative acts: rulebooks, orders, administrative instructions and expert instructions.[4]

- The Rulebook is the most important general administrative act. The administrative bodies adopt rulebooks for the purpose of enforcing the laws, they elaborate certain provisions for the already adopted laws, regulations or general acts, ie the manner of their execution is determined, but not in the whole regulation, but only for its individual provisions. The rulebook, as a general administrative act, can regulate the internal organization of the administrative body, such as the rulebook for job systematization.[5]

- The order orders or prohibits certain actions in a certain situation that has a general mandatory meaning for all citizens in a certain territory. For example, an order for evacuation of the population from a certain area in case of a natural disaster, an order for mobilization in case of war, an order for vaccination of the population, etc.[6]

-Administrative instructions contain rules for actions of administrative bodies or rules for performing administrative work.The administrative or administrative instructions provide connection between the administrative bodies in the successful execution of the laws and other regulations or general acts, ie they are internal connecting acts between the administrative bodies.[7]

[2]B. Davitkovski, A. Pavlovska, Daneva, *Administrative law*, University "Ss. Cyril and Methodius" - Skopje, 2018, p. 271
[3]*Ibid.*
[4]*Ibid* ,272.
[5]*Ibid.*
[6]*Ibid.*
[7]*Ibid,* 273.

- The professional instructions contain rules for professional organization of the service and for professional work of the employees in the administration, as well as rules for the manner of performing certain administrative tasks. These guidelines provide liaison, cooperation and mutual assistance for successful execution of activities within a certain administrative department (branch of administration).[8]

- **Specific administrative acts**

Specific or individual administrative acts are acts that prescribe an individual and specific rule for a certain case and a certain person.

Therefore, a specific administrative act is such a legal act of the administrative body that resolves a specific case in an authoritative way.[9]

In the specific legal situation, a right is recognized or an obligation is imposed, so in the specific case - the party can use that right, ie he is obliged to perform the obligation because otherwise behind the performance of the obligation there is compel by the state government.[10]

Basic characteristics of specific administrative acts are: concreteness, authoritarianism, unilateralism, legal action, based on law and enforceability.[11]

- Specificity - the administrative act refers to a specific legal situation, which is not permanent and recurring, but one-time and unique;[12]
- Authority - this feature of the administrative act means that a certain behavior can be imposed on a person that the person would not choose at his own will, ie. the decision in the act has a forced character;
- One-sidedness - indicates that the administrative acts are the result of the declaration of will of an entity;
- Legal effect - the administrative act produces direct changes in relation to the legal order, ie. establishes, abolishes or changes certain legal conditions;
- Based on the law - a legal basis is necessary for the adoption of an administrative act;
- Enforcement - an administrative act that determines the obligations of the party, can be enforced.

❖ Types of specific administrative acts:

✓ Constitutive and declarative;

✓ Positive and negative;

[8]*Ibid.*
[9]*Ibid,* 274.
[10]Z. Jovanovski, Colonel, *Administrative Law,* Textbook for students - cadets with practical examples - Tetovo, 2019, p. 44
[11]B. Davitkovski, A. Pavlovska, Daneva, (2018), *Ibid,* 275.
[12]Z. Jovanovski, Colonel, *Ibid.*

- ✓ Free or legally bound;
- ✓ Individual and collective;
- ✓ Acts adopted in a special procedure;
- ✓ Ex officio or at the request of the party.

The first type of administrative acts are constitutive (creative, creation) which establishes, changes or abolishes a legal relationship, and declarative means determining the already existing legal relationship and situation. The difference between them is that the constitutive act creates a legal relationship that did not exist before, ie already causes changes in the existing act by changing or repealing it, while the declarative act determines that the legal conditions are met on the basis of which the legal situation can to create, modify or remove.

Constitutive acts have legal effect from the moment they are adopted or announced, they have no retroactive effect (backwards). Constitutive acts are: orders, recognition of abilities and properties and recognition of rights.[13] With orders, the governing bodies issue specific orders or prohibitions to individuals or a group of specific persons to do or not to do something, for example: a call for a military exercise, a decision to pay taxes, etc.[14] Recognition of abilities and properties - these acts recognize the legal ability of legal entities, for example, registration of a chamber of doctors in the central register. While recognizing certain properties are for example: natural beauties of a lake, mountain, etc.[15] Recognition of rights - these acts recognize various personal rights of individuals or legal entities, for example, the right to a pension. The declarative administrative acts are valid from the moment when it is declared that the legal conditions for change of the legal situation and the legal relationship have occurred. They have a retroactive effect (backwards) so the decision can be made later and will be valid from the moment it is declared that the legal conditions for change are met, for example: retroactive increase of salaries or pensions.[16]

-Positive and negative administrative acts - when the issuer of the act may react differently according to the request of the party, ie. to accept and give the right to the party then they are positive administrative acts, on the contrary the issuer of the act can reject the request or resolve the request negatively and then that act is negative.

-Free or legally bound - are the administrative acts that depend on the degree of freedom of the administrative body. In the case when that freedom is strictly prescribed, under what conditions, when, with what content will the administrative act be adopted, it is an act adopted ex officio, ie obliged by law. Such acts are social

[13]B. Davitkovski, A. Pavlovska, Daneva, (2018), *Ibid,* 277.
[14]*Ibid.*
[15] *Ibid,* 278.
[16]*Ibid.*

assistance, scholarships, etc. While in free acts, the governing body provides a freedom of decision, but with restrictions, ie it is taken into account that it is in accorda nce with the public interest, with the legal authority and with the goal that should be achieved with that act, example: permission for possession and carrying of weapons.

-Individual and collective - in the case of individual acts, the adopter of the act is one authorized bearer, and in the case of collective acts, the act is adopted with the participation of two or more authorized bearers.When adopting collective acts, there are different forms of cooperation between the bodies that adopt those acts, such as: a decision made by two or more bodies, a decision made by one body in accordance with another body, a decision made by one body with the approval of another and a decision taken by one with the requested opinion of another body.[17]

*A decision presented by two or more bodies, sometimes for one administrative case it is necessary to decide two or more administrative cases, ie governing bodies. They will agree with each other and only one of them will issue the decision, for example, a decision for exchange of apartments between people from two cities.[18]

*Decision adopted by one administrative body in accordance with another, where the consent issued by the body may be preliminary or additional. After obtaining the consent, the other body can make the decision.[19]

*A decision taken by an administrative body and requesting approval from another means that both administrative bodies are in the same position in the decision-making, but may also signify control by a higher administrative body over the work of the lower administrative body in resolving the administrative subject.[20]

*A decision rendered by one with an opinion requested from another administrative body, means that one body must request an opinion from the other administrative body before resolving the case, otherwise it will not be able to make the decision.[21]

- Acts adopted in a special procedure - indicates the decisions and conclusions that are the most important type of administrative acts. It should be emphasized that there is a difference between them, ie. the decision decides on the subject of the procedure while the conclusion decides on the issues related to the procedure and the issues that arise as ancillary in the execution of the procedure that are not decided by a decision.

- Ex officio or at the request of a party - acts adopted ex officio may be based on law or legal regulation and indicate the obligations of the parties, for example, to pay

[17] *Ibid,* 281.
[18] *Ibid,* 282.
[19] *Ibid.*
[20] *Ibid.*
[21] *Ibid.*

taxes, fines, etc., or in the public interest, for example, to cede real estate due to the need for a public authority. While at the request of a party, these acts are adopted because the party needs, for example, permission or approval for a job.

- **Material acts**

The last way of direct execution of the laws consists in undertaking material actions, such as keeping registers, recognition of properties, etc. They do not produce immediate legal consequences, but can serve as a basis for the realization of certain legal situations. There are three groups of material act: material acts of confirmation, material acts of notification and material acts of ascertainment.[22]

- Material acts of certification are divided into two groups as: material acts of records and certificates.

- The material acts of records are intended to be used in providing data such as: birth registers, marriage registers, voter lists, etc. While the certificates issued by the bodies that keep official records have the validity of public documents. In order to be a credible evidence, the certificate must meet two conditions: the certificate must be issued in writing by the competent authority and must refer to the occurrence, capacity or fact for which official records are kept. Example: certificate of citizenship, certificate of passed exams, diploma.

- Material acts of notification are: announcements, reports, statements, warnings, etc. by the administrative bodies in the interest of the parties.
- Material acts of ascertainment are: the minutes, the statements, ie the submitted applications or complaints by the citizens.

4. ADMINISTRATIVE AGREEMENTS

The governing bodies conclude numerous agreements with the parties, some of them have commercial or obligation character and in these agreements the public body is in an equal position with the party and are called civil agreements, and some are concluded due to public interest or public service, such agreements are under jurisdiction of the governing body and in that case both parties are not in the same position, because the governing body has prerogatives regarding the party and these agreements are called administrative agreements.[23]

These reasons are the basic differences between civil contracts and administrative contracts. Administrative agreements are a special type of

[22]Z. Jovanovski, Colonel, *Ibid,* 47.
[23]*Ibid,* 42.

administrative acts that occur between a public body and a legal or natural person (party), whose subject is performing a public service under the competence of a public body when it is prescribed by law, and is in the public interest and with it the rights of third parties are not restricted.[24]

5. IMPORTANCE OF ADMINISTRATIVE ACTS

Administrative acts in the Republic of Macedonia are regulated by the Law on General Administrative Procedure (LGAP), according to this law administrative acts are those acts or actions of public bodies, which are adopted on the basis of a law, which decides on the rights, obligations and legal interests of the parties in an administrative procedure. The administrative act may have legal consequences from the moment when it is delivered to the party to whom it refers and influences and may produce legal consequences from the moment stated in the enacting clause of the written administrative act.

An administrative act is valid until it is repealed, annulled or amended by administrative remedies such as an appeal, objection or ex officio. The validity may terminate after the expiration of the specified period of time or after the fulfillment of the purpose of the act.[25]

6. CORRECTION OF ERRORS IN ADMINISTRATIVE ACTS

The public body that issued the administrative act may at any time correct the errors in the names, numbers, spelling and other inaccuracies in the administrative act or in its certified transcripts. A special administrative act is issued for correction. The note for the correction is written in the original of the administrative act, as well as in all certified transcripts that have been submitted to the parties.[26]

7. CONCLUSION

The division of administrative acts is of particular importance because each of them has its own special characteristics and purposes. With the general administrative acts, the rights and obligations of the citizens can be determined only if they are previously determined by law, they are adopted and valid for all, with

[24]*Ibid*, 125.
[25]Draft-law on General Administrative Procedure, Ministry of Information Society and Administration - Skopje, July, 2014. Retrieved on January 4, 2022.
[26]https://repozitorij.velegs-nikolatesla.hr ›PDF› view Forma i sadržaj upravnog akta - Veleučilište "Nikola Tesla" u ... PDF Downloaded on 08.01.2022.

specific or individual administrative acts, a single and specific rule is prescribed for a certain case and a certain person. . Material acts or actions do not produce immediate legal consequences, but can serve as a basis for the realization of certain legal situations. While administrative contracts are a special type of administrative acts that occur between a public body and a legal or natural person (party) whose subject is performing a public service under the competence of a public body when it is prescribed by law, and is in public interest and with the rights of third parties are not restricted. Administrative acts are of great importance, both for the administrative bodies and for the legal or natural persons. In the scientific paperwe mentioned that the basic characteristics of administrative acts are one-sidedness and authoritarianism, but these properties should not mean that the administrative body should use its position, but on the contrary should apply those administrative actions that are favorable to the party, and thus will achieve the goal set by law. The administrative bodies should perform their activities in a way that will be appropriate to the position of the parties, which means that the activity in resolving the administrative matters should be harmonized with their constitutional-legal position, ie it should emphasize that the administrative bodies have the role of service to the parties, ie will enable better communication, will inform them in a timely manner, etc. , and thus will ensure the effective realization of their rights and interests, but at the same time will provide assistance and protection. The administrative bodies, with the administrative acts, regulate the relations with the public, the economic, the cultural, the socio-political life, the public peace and the security of the state. While administrative remedies are not only an instrument needed by the parties with which they defend their rights in relation to an administrative body, they are also an instrument for self-control of the administrative bodies because they give them the opportunity to identify system errors and thus improve administrative work.

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ВРСТЕ УПРАВНИХ АКАТА У РСМ

Резиме

Управна или управна делатност подразумева обављање управних и стручних послова као што су: решавање у управном поступку, вршење управног надзора, израда закона, доношење управних аката и др. Управни акти се разликују по врсти, облику и правној природи. Основна карактеристика управних аката је једностраност, што значи да их могу доносити само овлашћени доносиоци, а то су органи државне управе и други државни органи, као и правна лица која имају јавна овлашћења. Основно својство управних аката је ауторитарност, што значи да се може донети без воље физичког или правног лица (странке), односно без његове сагласности. Управни акти се схватају као општи, специфични, тј. појединачни управни акти, материјални акти или радње и управни уговори.

Општим управним актима права и обавезе грађана могу се утврдити само ако су претходно утврђене законом. Посебни или појединачни управни акти су акти који прописују појединачно и посебно правило за одређени случај и одређено лице. Материјална дела или радње не производе непосредне правне последице, али могу послужити као основ за реализацију одређених правних ситуација. Док су управни уговори посебна врста управних аката који настају између јавног органа и правног или физичког лица (странке), чији субјект обавља јавну службу из надлежности јавног органа када је то законом прописано, а у јавног интереса и са правима трећих лица нису ограничени. Подела управних аката је од посебног значаја јер сваки од њих има своје посебне карактеристике и намену. Управни акт важи док се не укине, поништи или измени административним лековима као што су жалба, приговор или по службеној дужности.

Кључне речи: управни акти, управа, закон, власт, јавни интерес.

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IS THERE A BORDERLINE BETWEEN HUMAN RIGHTS AND FREEDOMS AND THE ARBITRARINESS OF INDIVIDUALS?

Abstract

Defined as social norms that depict basic values common to all people where ever they are, human rights become a way of determining the character of the political system within the state. There are some human rights that are absolute and under no circumstances cannot be violated. How ever some may be violated or restricted in order to preserve "higher good". While still on pandemic conditions all over the world, some debates occurred lately, whether some violation of human rights and freedoms were simply violations that should be punished by law, or there is a legitimate violation because of protection of public health.

Key words: Human rights and freedoms, limitations, individual rights**.**

1. INTRODUCTON

Human rights are usually defined as „norms that aspire to protect all people everywhere from severe political, legal, and social abuses"[1], or as „basic values common to all cultures, and must be respected by countries worldwide"[2],or else as „inalienable fundamental rights to which a person is inherently entitled simply because she or he is a human being"[3]. Human rights are equally applicable to all human beings, just because they are human, ie, they exist, and are inalienable. It is known that we have six families, or six

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[1] Nickel, James, Human Rights, The Stanford Encyclopedia of Philosophy (Fall 2021 Edition), Edward N. Zalta (ed.).Available on: https://plato.stanford.edu/archives/fall2021/entries/rights-human, retrieved in: March, 2022.

[2] Magdalena Sepulveda, Theo van Banning, Gudrun D. Gudmundsdottir, Christine Chamoun and Willem J.M. van Genugten, Human Rights reference Book, University for Peace, 2004, 6.

[3] Ibid.

generations of human rights, according to the Universal Declaration of Human Rights[4]: security rights, due process rights, liberty rights(specific freedoms, that are people entitled to, such as religion, beliefs), political rights, equality rights and social rights. There is also seventh generation of human rights, dedicated to minority and group rights, and the eighth, dedicated to environmental rights and combating with pollution. The last two generations of human rights was recognized later than Universal declaration, by subsequent international conventions.

Human rights always have high priority; hence their violation is an attack not only on a specific individual or group whose rights have been violated, but on the state and the system as a whole, and in a broader perspective, and on humanity as a whole. Non-responsivness of the state authorities in such situations makes this situation even worse and reduces the trust of citizens in state institutions, especially that they cannot adequately protect them and punish violators. Human rights are, sort of speak, litmus paper for checking the system within the state and the faith of citizens in those with whom they share the same state and in the state itself.

There are human rights that accompany a person from the moment of his conception, even before birth. On the other hand, some rights could be acquired only at a certain age, or if someone finds himself in certain life situations. For example, the right to life is an inviolable right, due to the importance of which the death penalty has been abolished in many countries, as a sanction for the most serious crimes. On the other hand, if someone exercises the right to work, ie, gets a job, numerous other rights, obligations and privileges for the holder of that right derive from that right. Those who are unemployed, while unemployed, will not have the same rights that arise from employment.

The existence, content, nature, universality[5], justification, and legal status of human rights are rather important. Therefore, a special science has

[4] Available on: https://www.un.org/en/about-us/universal-declaration-of-human-rights, retrieved in March 2022.

[5] There are some debaties whether human rights are indeed universal. “The Universal Declaration envisaged a world in which every man, woman and child lives free from hunger and is protected from oppression, violence and discrimination, with benefits of housing, health care, education and opportunity. This encapsulates the global culture of human rights that we strive towards, and should therefore be a unifying rather than a divisive force within and among all cultures”, says Navanethem Pillay in his article “Are Human Rights Universal?”, available on:
https://www.un.org/en/chronicle/article/are-human-rights-universal, retrieved in March, 2022.

been created that deals with the study of all these aspects, improving the mechanisms of human rights protection and raising awareness of the importance of human rights in action always and everywhere. It is combined of moral philosophy, general philosophy, sociology and lot more scinces which can provide answers to the questions of the origin, existence and protection of human rights. Many aspect of existence of human rights are often provoked, even if we maybe couldn't imagine it possiblesuch as: metodology of human rights and their creation or recognition; ways of their exercizing and distinguishing generations of human rights; establishing effective human rights mechanisms and adequately punishing those who violate someone's rights.[6] So, all this was created in order to protect principle that created civilized world we hope to know today and also to gather all existing knowledge about human rights. From this point of view, we would like to reconsider limitations of rights and fredoms that are possible, due to some specific circumstances or else, wheter the limitations are not possible at all.

2. HOW MUCH PROTECTION OF HUMAN RIGHTS IS ENOUGH

Not all human rights principles enjoy the same level of protection. Some human rights are positioned as the highest in their „rank" or delievered as kind of justification for some practices(both individual and collective) that are not punishable by the law but are again equally unacceptable.[7] The right to freedom of opinion, if not misused, may be used as mechanism of insulting, belittling or committing any other offense as defined by law. The right to freedom of opinion is at the same time the feedback of the individual to the world around him, and it is important to exist.

There are three types of human rights, according to the possibility to be limited in any way:

1. *Absolute rights* are not subject to limitations or qualifications. The right not to be tortured is considered to be an absolute right that cannot be restricted

[6] Some theorists and philosophers argue whether is possible for human rights to exist only as philosophical, normative or as political construct? Giving the political contextto the existence of human rights means making them a means of justifying any political struggle against dissidents and at the same time making them suitable for constant abuse.

[7] The Possibilities and Limits of International Human Rights Law to Foster Social Inclusion and Participation:
http://www.pass.va/content/scienzesociali/en/publications/acta/participatorysociety/carozza.html

under any circumstances[8].Also ban on slavery and on retroactive criminal laws are absolute rights, inalienable. The absolute character of these rights means that it is not permitted to restrict these rights by balancing their enjoyment against the pursuit of a legitimate aim, even if in state of emergency.

2. *Limited rights*- their enjoyment may be curtailed in specific circumstances. Most rights are subject to limitations that are necessary and reasonable in a democratic society for the realization of certain common goods such as social justice, public order and effective government or for the protection of the rights of others .[9] Limitations of rights are restrictions that are necessary to balance competing or conflicting rights, or to harmonize rights with other public objectives. They are not a response to emergency situations.Derogations from rights are temporary additional limits, or suspensions of rights, imposed during a state of emergency or during any specific situation that can be dangerous to many people and for the maintenance of the system in the country.

Sometimes human rights from different generation, such as right to liberty and security, are often found as conflicting concepts[10] . Conflicts that arise between exersizing individual and collective rights, are difficult to resolve, because any side can be hurt, and always one sid emust suffer in a

[8] As listed in art. 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture". Convention was adopted on 10th December 1984, by General Assembly of UN(Resolution 39/46). Available on:
https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading.Other absolute rights are :
-Freedom from torture and other cruel, inhuman or degrading treatment or punishment (according to Art. 7 International Covenant on Civil and Political Rights (ICCPR));
-Freedom from slavery and servitude (Art.8(1) & 8(2) ICCPR);
-Freedom from imprisonment for inability to fulfil a contractual obligation(Art. 11 ICCPR);
-Prohibition against the retrospective operation of criminal laws (Art. 15 ICCPR);
-Right to recognition before the law(Art. 16 ICCPR).

[9] Finally, some rights are subject to what could be termed 'inherent' limitations. The right of an accused person in a criminal case to be tried without "undue delay" is an example. What is a reasonable delay is to be assessed in the circumstances of each case, taking into account the complexity of the case (which in terrorism cases may be considerable), the conduct of the accused, and the manner in which the matter was dealt with by the investigating and judicial authorities. These limitations are not articulated in the texts of human rights treaties, rather have been developed by national and international courts and other treaty monitoring bodies applying human rights norms to specific cases before them.

[10] Piet Hein van Kempen, Four Concepts of Security- A Human Rights Perspective, Human Rights Law Review 13:1 (2013), 1-23.

way. Balancing those interests can be pretty hard. According to Art 5. of the European Convention of Human Rights, right to liberty and security can be limited, or else, some cases of „breaching“ of this right are not considered breach for real, because there is a greater cause to be protected, such as public health, preventing a person from committing other crimes or fleeing law enforcement, in which cases can be caused greater harm may than if the person were left to enjoy his or her full freedom as provided for in this Article[11]:

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
(a) the lawful detention of a person after conviction by a competent court;
(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

From the content of this article we see that exceptions to the full enjoyment of liberty and security are established in specific situations, when the full liberty of an individual or group would be more detrimental to the rest of society than if the same individual or group have restricted exercise of their right. In order to prevent infringement of the rights or freedoms of others, this right can be limited, because the community has a greater meaning.

3. *Qualified rights* can be limited under more general circumstances, for example, to balance the potentially conflicting rights of different parties or to

[11] European Convention of Human Rights, as amended by Protocols Nos. 11,14 and 15; supplemented by Protocols Nos. 1, 4,6, 7, 12, 13 and 16, adopted in Rome, Rome, 4th November 1950. Available on:
https://www.echr.coe.int/documents/convention_eng.pdf, link retrieved: March 2022.

reconcile individual rights with common goods. Under the European Convention on Human Rights, these include the right to respect private and family life and the right to freedom of expression, freedom of association, freedom of assembly and freedom of movement, and the requirement of publicity of court hearings.

Human rights may be limited because of certain reasons, which include:

1. *protecting the rights of others* – for example in a state of emergency , in order to preserve public health, could be limited freedom of opinion[12], freedom of assembly[13], alongside with freedom of speech, freedom of movement[14] and other human rights and freedoms.

2. *protecting public health*[15] as well as the safety of citizens in any context are of the utmost importance when restricting the rights of others. Since security and health in most constitutions in the world are set as the highest values in democratic societies, they have received the highest possible protection and readiness of the state to limit or completely abolish some rights to protect the health and safety of citizens and public order itself. This situation we had in Republic of Serbia, during the state of emergency in 2020.

3. *protecting public morals* also can be a reason for limiting some rights and freedoms. For example, Egypt's 2012 Constitution prohibited „insult or abuse of all religious messengers and prophets“[16], while at the same time claims to guarantee freedom of thought and opinion. Some legal systems ban publicly highlighting pornographic magazines at newsstands or broadcasting violent and pornographic scenes on TV channels with a national frequency at certain times during the day[17].

[12] Seems irrelevant that someone thinks if Covid- 19 exists or not, so his/her opinion on this topic and possibility to share them with others is limited.

[13] During the state of emergency, the assembly of people was fully prohibited in certain part of the day, and later, was limited, more about it later in this article.

[14] People who violated the ban on movement during a certain part of the day while in republic of aserbia was state of emergency, were detained for violations of this ban.

[15] Governmental public health actions must "protect and advance the health of the population as a whole, while at the same time protecting basic human rights and social values." Andrea Boggio, Matteo Zignol, Ernesto Jaramillo, Paul Nunn, Geneviève Pinet, and Mario Raviglione, Limitations on human rights: Are they justifiable to reduce the burden of TB in the era of MDR- and XDR-TB?, *Health and Human Rights 10/2*,123.

[16] Controversial Articles in the 2012 Egyptian Constitution, available on: https://carnegieendowment.org/2013/01/04/controversial-articles-in-2012-egyptian-constitution-pub-54936, retrieved in March 2022.

[17] For example, Art.68 of Law on electronic media in Republic of Serbia says that "It is forbidden to show pornography, scenes of brutal violence and other program content

When limiting any human rights and freedom, one must meet the following conditions:

- the limitation must be provided by law;
- the limitation must be done in order to protect national security, the maintenance of public order or public health or morals(which are general interests to preserve in any country);
- it also must respect the essence of the rights;
- it must be necessary- meaning, that similar effect cannot be accoplished with any other mechanism, it is just the *ultima ratio* that must be done to protect the higher good;
- it must be proportional- non discriminatory, with respect of the principle of equality(if there are restrictions of any rights, the restriction applies to all without exception).

Those questions represent the test of necessity in assessing the legality of any proposed measures[18].Only if all of these questions can be answered affirmatively,a restriction of a non-absolute right would be permissible under international human rights law.

In further text we will pay attention to specific cases of restriction of certain human rights during the state of emergency in the Republic of Serbia during 2020. These restrictions were taken precisely for the protection of what has been proclaimed to be „higher good“, and that is public health(although some actions taken by the government bodies were not seen as well-intentioned by part of the public).

3.HUMAN RIGHTS IN SERBIAN CONSTITUTION

The Constitution of the Republic of Serbia[19] sets freedom and its numerous forms as the highest value(s). In Art.1 of the serbian constitution we find mentioning freedom in the following way:

The Republic of Serbia is the state of the Serbian people and all citizens who lives in it , based on the rule of law and social justice, principles of

that can seriously harm the physical, mental or moral development of minors”. Закон о електронским медијима, "Сл. гласник РС", бр. 83/2014, 6/2016 - др. закон и 129/2021.

[18] European Data protection Supervisor: Assessing the necessity of measures that limit the fundamental right to the protection of personal data: A Toolkit; 11 April 2017, 6. Available on: https://edps.europa.eu/sites/edp/files/publication/17-06-01_necessity_toolkit_final_en_0.pdf, retrieved in March 2022.

[19] Устав Републике Србије, "Сл. гласник РС", бр. 98/2006 и 115/2021.

democracy, human and minority rights and freedoms and belonging to European principles and values.

Although not directly mentioned, *freedom* is implicitly mentioned in this article several times, by stating the principles of the rule of law(among others, it includes the concept of civil rights and freedoms), principles of civil democracy (based on freedom of choice in many variations), and belonging to European principles and values (where freedom is a key value and a concept). We can say that freedom(as abstract concept) is a key human right, in any form taken.

The rule of law is further specified in Article 3 of the Constitution, as it is defined as based on inalienable human rights (Art. 3 para. 1) which means that one must have right to free and direct elections, constitutional guarantees of human and minority rights and guarantees of independent judiciary (Article 3, paragraph 2). Furthermore, the mentioned constitutional guarantees of human and minority rights are set up as way of preserving human dignity and helping to protect full freedom and equality of every individual (Art.19 of the Constitution).

The Constitution of the Republic of Serbia itself has almost a third of its articles dedicated to the theme of freedom, directly or indirectly. Of the 206 articles, 63 articles directly mention human and minority rights and freedoms, and at least another 15 articles mention freedom indirectly[20].

Serbian Constitution has a built-in test of necessity in assessing the legality of any proposed restriction measures, as mentioned in previous chapter . Especially regarding the limitation of the right of assembly, limitation is mentioned in Art.54, which states that the freedom of public assembly may be restricted by law if so necessary to protect public health, morals, the rights of others or security of the Republic of Serbia. Similar limitation also applies to the right to personal liberty stating that personal liberty cannot be above something that is important to the whole community. Article 202 of the Constitution clearly states that restrictions of human and minority rights guaranteed by the Constitution could be possible during the state of emergency and state of war, and only to the extent and to which it is extreme necessary. Measures of deviation from the established level of human and minority rights, further stated in paragraph 2 of this same article, may not be connected with

[20] Further analisys can be found in: Драгана Ћорић, Промена хијерархије вредности у току ванредног стања у Републици Србији 2020. године, *Зборник радова Правног факултета у Приштини*, Косовска Митровица, 2021. 115-136.

distinction based on race, sex, language, religion, nationality affiliation or social background[21].

The risk of endangering individual freedom is the risk that each individual takes upon himself at the moment of the decision to live in a community and obey its rules. Life without community is not promising, and it is often painful and more challenging than life in community. Ever since Rousseau's social contract[22], which defined both the risks (of living in the community and living outside the community), individuals are expected to be willing to give up their unlimited freedom to do whatever they want, whenever they want, if they want to become members of a community and be more protected than living outside that community.

But when an individual is not ready to accept certain rules of conduct in the community but continues to insist on respecting only his individual and unlimited rights, conflict arises. Awareness that the exercise of their rights completely endangers other people usually has a sobering effect on many people, they often stop exercising their own rights because they empathize with the rest of the community.

However, the fear for life , cumulated with distrust in institutions within the community leads to individual disobedience and thus the collapse of the concept of protection of the highest goods in a country, such as the protection of public health. Decades of distrust in institutions, created by insight into many cases of inadequate treatment of competent authorities in some situations which was subsequently not properly punished culminated during the state of emergency in 2020. That was just happening during the state of emergency in Republic of Serbia, in 2020.

3.1. Limitations of some freedoms in 2020. in Republic of Serbia

The World Health Organization, because of protecting public health and wanting to take appropriate actions to prevent further spread of SARS COVID-19 virus, on March 11, 2020, declared a state of pandemic all over the world[23]. This decision was made on the basis of the information available at that moment and having in mind that the first registered case in China was at

[21] Although limitations were made on the basis of age, but it will be discussed later in this paper.

[22] Jean Jacques ROUSSEAU, *Društveni ugovor* ,Školska knjiga, Zagreb, 1978.

[23] WHO Director-General's opening remarks at the media briefing on COVID-19 – 11 March 2020, доступно на: https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020

the end of 2019, and that from that day on, the prevalence of this virus has been recorded in as many as 114 countries in the world with 118,000 cases of this disease and over 4,000 deaths that have been reported.

Just four days after the global declaration of a pandemic and after the first field reports on the growth of patients with this new disease, on March 15th, in 2020, a state of emergency was declared in the Republic of Serbia[24] on the basis of authorizations from Art. 200 of the Constitution of the Republic of Serbia, which states:

When public danger threatens the survival of the state or citizens, the National Assembly of the Republic of Serbia declares a state of emergency.

Insufficiently determined mode of virus transmission (whether exclusively by droplets, by air, a longer staying in rooms with patients or those who are infected, speed of spread, etc ...) as well as reports that are arrived from all over the world about the rapid increase in the number of patients, even deaths, have made the coronavirus a "public danger" , that can endanger large numbers of residents. So, this decision of the serbian states' bodies was legal and legitimate.

For the purpose of this paper we will shortly examine the following constitutional articles and how they were restricted , and also was it necessary to do:

Art. 39 Freedom of movement;

Art.54, which deals with peaceful assembly of citizens (and also is connected with human right of free movement).

Many other rights and freedoms are related to the previously mentioned two human rights and thus there have been public interpretations that many more rights are violated at the same time, such as the right to life (Art.24 of the Constitution), inviolability of physical and mental integrity(Art. 25 of the Constitution), etc.

Those rights have experienced its limitations and „supposed“ violations[25] during the state of emergency in 2020 for one good reason: protection of public health, while it is placed high on a hierarchy of values

[24] Одлука о проглашењу ванредног стања"Службени гласник РС", бр. 29 од 15. марта 2020.

[25] We say here „supposed“, because it was a matter of individual perceptio,n of individuals that their rights were violated, but actually exersizing of those rights were just restricted because of the higher cause, protection of public health. Some individuals reacted like they were discriminated, disregareded or somehow excluded from the community because of their different opinion.

that the state can protect. Some theorist say that everything was done accorind to law, on the constitutional basis, but some wouldn't agree with that[26] .

One of the requirements of the so-called test of the necessity of restricting human rights) under the cricumstances of the state of emergency) is that restriction(s) must be proportional, non discriminatory, with respect to the principle of equality- which means that restriction would apply to everyone equally. However, during a state of emergency , a distinction of people on the basis of age was made especially when it comes to the right of free movement.

The elder people were considered to be a particularly endangered category of the population, due to their so-called associated (chronic)diseases and reduced immunity. Reports that came from Italy[27] and Spain[28] indicated a high mortality rate among this category of population, which in combination with the weakened health care system in the Republic of Serbia contributed to prescribing one of the most controversial measures in this period -complete ban on movement over 65 at any time of day.They were sort of imprisoned for weeks ,without the possibility of contact with other persons (or with possibility to have a short meeting with one of the relatives or neighbors, in order to obtain the ordered food or medicine). At one point, they were allowed to supply themselves with food products in the period from 4.00 to 7.00 a.m.[29]. Also, they were allowed for short walk, every day ,in the period from 6 p.m. to 01 a.m. on the next day[30]. The walk should last not more than 60 minutes, up to 600 meters in diameter of places of their residence.

[26] See further on this argumentation: Ivan Milić, Povodom izmena i dopuna Zakona o zaštiti stanovništva od zaraznih bolesti - šta novo donosi tzv. korona zakon, *Zbornik radova Pravnog fakulteta*, Novi Sad 2021, vol. 55, br. 1, 253-271, and Ivan Milić, O tzv. policijskom času za vreme vanrednog stanja proglašenog zbog epidemije zarazne bolesti COVID-19, *Zbornik radova Pravnog fakulteta*, Novi Sad,2020, vol. 54, br. 2, 745-762.

[27] All data available on: https://www.worldometers.info/coronavirus/country/italy/, retrieved in March 2022. Also: https://www.statista.com/statistics/1106372/coronavirus-death-rate-by-age-group-italy/ , retrieved in March 2022.

[28] Some medical and statistic data can be found in: https://mdpi-res.com/d_attachment/viruses/viruses-13-02423/article_deploy/viruses-13-02423-v2.pdf, retrieved in March 2022.

[29] Art.1 paragraph 2 item 2 of the Decree on measures during a state of emergency (*Уредба о мерама за време ванредног стања*, "Службени гласник РС", бр. 31 од 16. марта 2020, 36 од 19. марта 2020, 38 од 20. марта 2020, 39 од 21. марта 2020, 43 од 27. марта 2020, 47 од 28. марта 2020, 49 од 1. априла 2020, 53 од 9. априла 2020, 56 од 15. априла 2020, 57 од 16. априла 2020, 58 од 20. априла 2020, 60 од 24. априла 2020, 126 од 23. октобра 2020.)

[30] This activity should be taken while the total ban on movement was on.

We could say that there was very obvious violation of the freedom of movement and that this measure was strong breach of test of necessity especiallz regarding the part of non discrimination of people in this conditions. It is obvious that discrimination was made upon the reason of age of certain group of the citizens[31]. But having in mind statistics on the mortality of that group of people, good intentions of the state to protect them from the penetration of the virus into that part of the population and the inability to do so in another, more humane and adequate way, we can accept this measure as legitimate.

A similar thing happened with the restriction of *the right to free assembly of citizens*. Again, in order to prevent fast and easy transmission of the virus , state bodies prohibited public gatherings throughout the territory Of the Republic of Serbia, in public places, indoors and outdoors:

- *when there are more than 5 people gather at the same time (family membres were excluded from this measure), with a physical distance between two people for at least 1.5 m , ie. on every 4 m² one person may be present*[32].

Some authors point out that there has been confusion in the interpretation of the provision of the Constitution of the Republic of Serbia which establishes freedom of thought, conscience and religion as one of the human rights from which there are no deviations possible, even in a state of emergency. Following that constitutional solution, there were those who advocated that the prohibition of freedom of movement endangers the exercise of freedom of religion, as an absolute right, which is why to those who want to attend the Easter liturgy that should be allowed (even if there is a ban on

[31] Some authors say that „the constitution-maker failed to ban all form of discrimination (in circumstances of deviation from human rights) but , has already stated only the following grounds: race, sex, language, religion, nationality and social origin. Darko Simović, Vanredno stanje u Srbiji: ustavni okvir i praksa povodom pandemije COVID-19, *Fondacija Centar za javno pravo*, available on: http://fcjp.ba/analize/Darko_Simovic10-Vanredno_stanje_u_Srbiji-ustavni_okvir_i_praksa_povodom_pandemije_COVID-19.pdf,8. Retrieved in March 2022.

[32] Special *Order prohibiting gatherings in the Republic of Serbia in public places indoors and outdoors* was changed several times during the state of emergency. Firstly, the number of persons who were supposed to be in the same room was not more than 500 people. From april Until May 6th, 2020, this Order was in force. According to this order it was completely forbidden for people to gather , except in situations of gathering that are of special interest for the work and functioning of state bodies and services, for which special approval is issued by the Minister of Interior. *Наредба о забрани окупљања у Републици Србији на јавним местима у затвореном и отвореном простору,* "Службени гласник РС", број 100 од 16. јула 2020.

movement established for preventive and epidemiological reasons)[33].But, in serbial legal system, this right is not absolute, but is possible to restricted it , (according to the Art.43 paragraph 4 of The Constitution of Republic of Serbia), in specific cases, such as protection of human life and health, morality, freedom and rights of citizens guaranteed by the Constitution, public security and public order or because of preventing the incitement of religious, national or racial hatred. So, to conclude, there was no infridgment of the right of free movement, or freedom of thought, conscience and religion, because protection of public health is established as „higher" reason for those restrictions to be made. The restriction here was not made with intent to prevent believers from participating in religious rites, within the religious community , which they freely decided to belong to, but to preserve public health- in this case health of all, wheter they are believers or not, which is the constitutional reason for restricting this right.

INSTEAD OF CONCLUSION

According to the analysis of Belgrade centre for Human Rights, the freedom of movement was „was undoubtedly the right that was restricted the most in Serbia"[34], that much that there was a constitutional complaint filled to Constitutional Court, to review the constitutionality of the Decree on the State of Emergency Measures and the Order Restricting and Prohibiting Movement of Individuals in the Territory of the Republic of Serbia. This complaint was rejected, since it was debated after the abolition of the state of emergency, and thus, the act whose constitutionality was to be debated was no longer valid and its validity was confirmed by the subsequent adoption by the National Assembly. Legal theorists, practitioners, and other activists still have a question mark above their heads, wheter those restrictions were good absolutely , or wheter they were good but at what cause and what damage have they done.

The already existing distrust of citizens in the institutions of the system has increased , primarily due to the lack of understanding of the causes of the pandemic and the acceptance that the enemy we are fighting in a pandemic is

[33] Darko Simović, 21.

[34] Restrictions of the Freedom of Movement of Serbia's Citizens during the COVID-19 Pandemic amongst the Most Drastic in Europe, available on: http://www.bgcentar.org.rs/bgcentar/eng-lat/restrictions-of-the-freedom-of-movement-of-serbias-citizens-during-the-covid-19-pandemic-amongst-the-most-drastic-in-europe/, retrieved in March 2022.

not ourselves or the state, but a virus that is currently unknown. On the other hand, maliciousness in the interpretation of certain moves and legal acts passed by the state was not absent. If the whole process of restricting human rights is viewed exclusively unilaterally, it seems that great violations of human rights occurred in the Republic of Serbia during the state of emergency. However, when all these restrictions are placed in the context of pandemic circumstances, the test of the necessity of introducing such restrictions, we conclude that all measures awere adopted in good faith and with the will to protect the most sacred things in a person's life. The negligence that otherwise exists in the preservation of human health, the easy taking of any health imbalance could have avenged us as a state similar to what was happening in Italy.

These examples prove how much it is necessary to keep in mind all the circumstances of that situation, ie actions, when interpreting a situation. Two years of living in a pandemic conditions and fighting with such an enemy, personally convinced the author that it is easier for people to believe that something is being done to their detriment and not for their benefit, ie protection of them and their health. The individualistic approach that some advocated, which was reflected in the approach „ nothing will happen to me, I live healthy and different“, showed that in a number of cases that people endangered themselves and the people around them and produced consequences that could have been avoided if they had acted on the recommendations of the state.

Our analyzes can lead to the search for mistakes made in such processes. However, if we changed the approach and observed what was done well, how many lives were saved and that a part of the population had to endure more or less restrictions on their rights, we would return to Rousseau's explanation of the social contract from the beginning of this article.

Global Strategy for Women’s, Children’s, and Adolescents’ Health 2016–2030 set three main objectives:

1. Survive: End preventable mortality.
2. Thrive: Enhance health and well-being.
3. Transform: Expand enabling environments[35].

   We can say that those objectives were also the backbone of the state's activities during the 2020 state of emergency.

[35] Rebekah Thomas, et alia, Assessing the Impact of a Human Rights-Based Approach across a Spectrum of Change for Women’s, Children’s, and Adolescents’ Health, Health and Human Rights 17/2, 11.

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ДА ЛИ ПОСТОЈИ ГРАНИЦА ИЗМЕЂУ ЉУДСКИХ ПРАВА И СЛОБОДА И САМОВОЉЕ ПОЈЕДИНАЦА?

Резиме

Дефинисана као друштвене норме које осликавају основне вредности заједничке свим људима где год да се налазе, људска права постају начин одређивања карактера политичког система у држави. Постоје нека људска права која су апсолутна и ни под којим околностима се не могу кршити. Како год, неки могу бити прекршени или ограничени да би се очувало „више добро“. Још у условима пандемије широм света, у последње време су се водиле дебате да ли је неко кршење људских права и слобода једноставно кршење које би требало да буде кажњено законом, или постоји легитимно кршење због заштите јавног здравља.

Кључне речи: Људска права и слободе, ограничења, права појединца.

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HUMAN RIGHTS MINING: THE RIGHT TO DIGITAL LITERACY

Summary

The very notion of digital literacy has been broadly discussed in the literature and depending on the discipline, differently defined. In this paper we are not referring to the definition of the notion since our intention is to explore the digital literacy in the realm of legal rights rather than as social phenomena. Furthermore, we are not defining the content and the scope of this presumed right. Our focus is on the more fundamental question: Do we need the right to digital literacy? The answer to this question is decisive for the existence of the right itself. In order to reach it, we have indirectly used legal method and techniques typical for exploration of the rights from the group labeled as 'new rights'. In this regard, the right to digital literacy has been contextualized to the right to education and its transformation into digital environment. Thus, the main hypothesis is that the right to digital literacy is cyber-equivalent of the right to education. Accepted syllogism of the hypothesis is that we do need to have the right to digital literacy in the information society, for the same reasons we need to have the right to education in the world of atoms. Main findings of the research are that the right to education is purposed to provide personal benefits to individuals and utility to the industry/society; the right to digital literacy is corresponding to that purpose in the present day circumstances; and categorization of digital literacy as a human right is the only appropriate approach bearing in mind its importance in informatics society.

Key words: new rights, digital literacy.

1. INTRODUCTION

The development of the information and communications technologies (ICTs) made significant impact to all segments of life and business. Suchlike

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social changes introduced fertile soil for the development of new societal structures requiring prompt and comprehensive legal response. In order to meet challenges posed, legal doctrine employed its usual working method and tried to extend application of the present norms and instruments onto ICTs. Along to this process there were some less successful attempts to conceptualize new legal frameworks for digital environment 'from scratch' based on present core ethical and societal values corresponding to specific situations and circumstances.[1] Either way, scholarly started to develop the discourse on 'new rights'[2] as well as on 'digital rights'.[3] Former concept is broader and it encompass development of whole set of rights from the field of public good rights, rights to housing and land, the right to health, the right to a clean environment and rights of the environment, status rights, animal rights, including new technology rights,[4] while the latter concept is focused only to rights needed in digital environment and as such it could be characterized as subgroup of the former.

Common feature of both concepts is thought about the process of the new rights formation because both concepts are facing the lack of textual reference to rights from their scope. However, if a human right is missing formal or even judicial recognition, it still might exist either as a new human right either as a 'truncated' human right. New human rights are understood as 'those rights that, when first conceived, are not expressly recognised in any human rights treaty and are not in any other way recognised as rights in a legal sense. This understanding implies that, at first, new human rights are merely candidates for legal recognition and, initially, no more'.[5] New human right might hold its status temporarily or permanently. A 'truncated' human right is also substantively novel right as compared to other established human rights,

[1] B.Custers, New digital rights: Imagining additional fundamental rights for the digital era, Computer Law & Security Review, Volume 44, 2022, https://doi.org/10.1016/j.clsr.2021.105636.

[2] Von Arnauld, A., Von der Decken, K., & Susi, M. (Eds.). (2020). *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric*. Cambridge: Cambridge University Press. doi:10.1017/9781108676106

[3] https://ec.europa.eu/newsroom/dae/redirection/document/82703

[4] B.Custers, New digital rights: Imagining additional fundamental rights for the digital era, Computer Law & Security Review, Volume 44, 2022, https://doi.org/10.1016/j.clsr.2021.105636.

[5] Von der Decken, K., & Koch, N. (2020). Recognition of New Human Rights: Phases, Techniques and the Approach of 'Differentiated Traditionalism'. In A. Von Arnauld, K. Von der Decken, & M. Susi (Eds.), *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric* (pp. 7-20). Cambridge: Cambridge University Press. doi:10.1017/9781108676106.002

that already commenced its legal emergence in public international law and attained relevant level of recognition through ongoing process. But, it is yet to be fully formed in the text of a new treaty or in an optional protocol to already existing human rights convent or convention, or discovered by treaty bodies. As compared to new human rights, truncated human rights are closer to full recognition and what they are missing is just a time or an event to finally occur.

Following to abovementioned frameworks we should investigate if the right to digital literacy could be claimed as a new (or truncated) human right and if so, is it implied or derived right or is it maybe a self-standing right. But, instead to follow this path we are going to set our research goals differently. Herein the main research question is: Do we need the right to digital literacy? The hypothesis is that the right to digital literacy is cyber-equivalent of the right to education in the world of atoms and we need to have it for the same reasons we need to have latter right. In order to answer to the research question and to test hypothesis three part research has been conducted. In the first part, this paper presents features of the right to education. The reason to start from this right are twofold. First, it is already established right with clear guarantees, content and the scope. Second, it is the most referent for the presumed the right to digital literacy i.e. its transformation into digital environment. Within this part of the research we have presented sources of so called general and so called special right to education focusing on guarantees of the right concerned.

The idea was to define the purpose of the right to education as we could explore if the right to digital literacy corresponds to it. During the course of discussion we have reached the conclusion that the right to education is purposed to provide benefit for persons and societal utility. Thus, personal benefit and social utility were determinants for the answer to the main question of this inquiry within third part of the paper. But prior to it, in the second part of the paper we have discussed the relation between the Internet and human rights. The evolution of this relation has been briefly described but the focus was kept on the right to the Internet account and the right to the Internet access account.

The main reason to keep it that way is in the fact that both of these approaches are closely related to the right to digital literacy and presenting preconditions for enjoyment of the human rights *on* the Internet and protection of the rights *of the* Internet – two additional accounts on the relationship between the Internet and human rights.

2. THE RIGHT TO EDUCATION

Following to the development of information and communication technologies (ICTs) and their rising impact on everyday life, the notions ‘digital right(s)’ and ‘digital literacy’ were broadly discussed in the recent scholarship and addressed by relevant international organizations. But even so, it is hard to find those notions merged in the single concept of ‘the right to digital literacy’ both in the literature and documents of international organizations. The reasons might be of the political as well as of the practical nature. Namely, the right to digital literacy cannot be found in the human rights texts and as such its content and the scope might not be so clear. This further imposes vague obligations on the States and potentially makes this right ineffective. Still, enumerated obstacles are not preclusive against human rights existence. Lack of the textual introduction as well as unclear obligations of the States are common features of the human rights from the group of so called derived or implied rights. For this reason it would be too early to conclude that the right to digital literacy does not already exist together with accompanying obligations. In order to properly understand the issue posed herein we should have a clear answer to the question: Do we need the right to digital literacy?

Accepted syllogism of the main hypothesis is that we do need to have the right to digital literacy in the information society, for the same reasons we need to have the right to education in the world of atoms. Suchlike interconnection is necessary both for the doctrinal and functional reasons. In the doctrinal sense, the right to digital literacy could be characterized as so called ‘new right’. In that sense, rights from this group are usually derived out of the scope of one or more established human rights and ought to be applicable in the megabyte world. In the functional sense, we consider that purpose of the right to digital literacy is cyber-equivalent to that of the right to education in the atomic world. This opinion was also expressed by Riel who finds that digital literacy derives from the traditional concept of literacy.[6] Therefore, exploration of the right to digital literacy is inseparable from the context of the human right to education and consequently, its transformation into digital environment.

Following to this line of the research, first we can note that the right to education is twofold right. It exists as a general right and as a specific right within human rights system and both are relevant for current inquiry. General right to education is safeguarded through universal human rights instruments

[6] J. Riel The digitally literate citizen: How digital literacy empowers mass participation in the United States, DOI: 10.13140/RG.2.1.2319.1768, 7

such as the Universal Declaration of Human Rights (UDHR, 1948),[7] the International Covenant on Economic, Social and Cultural Rights (1966), the UNESCO Convention against Discrimination in Education (1960),[8] as well as through regional human rights instruments such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) in its Article 2 of Protocol No. 1, and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador, 1999)[9] and the African Charter on Human and Peoples' Rights (1981).[10]

Specific right to education is substantively equal to general right to education, only the former right is focusing its guarantees to overcome specific challenges facing different groups when exercising the latter right. At universal scale relevant instruments are the International Covenant on the Elimination of All Forms of Racial Discrimination (1965),[11] the Convention on the Elimination of All Forms of Discrimination against Women (1979),[12] the Convention on the Rights of the Child (1989),[13] the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990),[14] and the Convention on the Rights of Persons with Disabilities (2006).[15] Considering that racial groups, girls and women, migrants and persons with disabilities are facing specific challenges in the field of education it sensible to consider that situation is no different when it comes to the enjoyment of the right to digital literacy. Furthermore, vulnerability to digital divide affecting elderly, uneducated or poor people as well as residents of enclaves, rural or remote areas might extend the list of groups in need for specific guarantees of the concerning rights.

It should be stressed herein that the right to education is not reduced to elementary schooling.[16] It also covers another levels and forms of education

[7] http://www.un.org/en/universal-declaration-human-rights/
[8] UNESCO Convention against Discrimination in Education
[9] https://www.iidh.ed.cr/multic/default_12.aspx?contenidoid=63b402e3-3136-45c4-9b08-49a42ae95487&Portal=IIDHen
[10] African Charter on Human and Peoples' Rights
[11] International Covenant on the Elimination of All Forms of Racial Discrimination
[12] Convention on the Elimination of All Forms of Discrimination against Women
[13] Convention on the Rights of the Child
[14] the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
[15] Convention on the Rights of Persons with Disabilities
[16] Sulak v. Turkey, Commission decision http://hudoc.echr.coe.int/eng?i=001-2669

such as secondary education,[17] higher education[18] and specialized courses.[19]Bearing in mind developed case law and academic thought, we could consider that the content and the scope of both aspects of the right to education are well defined. Be it general or specific, the right to education confers persons a right to equal access education available in schooling system of the State at a given time.

Apparently, the idea is to provide equal access and to leave no one behind, why? Again, comprehensive answer might be in the purpose of this particular right. Article 26 of the UDHR could shade some light on this since according to its section 2 the purpose of the education is to enable 'full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms' as well as in promotion of 'understanding, tolerance and friendship among all nations, racial or religious groups (…).[20] Norm on compulsory (and free) elementary education that was introduced in section 1 of the same article could be interpreted in the light of the promoted educational purpose and legitimized as beneficial for individual and useful for society. Even though such evolutionary interpretation could be objected by the fact that first compulsory education laws were enacted at the same time when demand of revolutionized industry for well-trained labor force grew,[21] its positive effects on general literacy and reduction of the widespread child labor practices,[22] cannot be denied. For this reasons, we can conclude that both persons and industry have their interests harmonized in education which is unequivocally beneficial for former and useful for latter. Therefore, personal benefit and social utility should be determinants of the answer to the aforementioned question about the need for the right to digital literacy. But, before we use those measurements in that end, we need to explore relation between human rights and the Internet.

3. THE INTERNET AND HUMAN RIGHTS

As to the relation between human rights and the Internet we can see that discourse is progressing from its beginning stage that was dominantly

[17] Cyprus v. Turkey [GC], § 278 http://hudoc.echr.coe.int/eng?i=001-59454
[18] Leyla Şahin v. Turkey [GC], § 141; http://hudoc.echr.coe.int/eng?i=001-70956
[19] Guide on Article 2 of Protocol No. 1 to the European Convention on Human Rights https://www.echr.coe.int/documents/guide_art_2_protocol_1_eng.pdf
[20] http://www.un.org/en/universal-declaration-human-rights/
[21] See Katz, Michael S, A History of Compulsory Education Laws**.** *Fastback Series***,** (1976) No. 75. Bicentennial Series.
[22] https://www.findlaw.com/education/education-options/compulsory-education.html

centered around the question ‘is there a human right *to* the Internet’ and its upgraded version that referred to the ‘right to the Internet access‘ to the advanced stage which concerns ‘human rights *on* the Internet’ or even ‘rights *of the* Internet’. For the purpose of our inquiry it is enough to analyze human right to the Internet approach and especially the right to Internet access approach. The main reason is in the fact that both of these approaches are closely related to the right to digital literacy and presenting preconditions for enjoyment of the human rights *on* the Internet and protection of the rights *of the* Internet. Without digital literacy all other human rights in cyberspace are declaratory and perhaps counterproductive regardless to their conceptual basis.

Human right to the Internet approach was grounded on the UDHR. Namely, Article 19 of the UDHR in its section referring to the right to ‘seek, receive and impart information and ideas through any media and regardless of frontiers’, offered convenient ground to discuss the Internet and human rights within this framework. In line to this perception is the United Nations’ the Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression from 2011 which recognized the Internet as an instrument of realization of wide spectrum of human rights and added that:

> Each State should thus develop a concrete and effective policy, in consultation with individuals from all sections of society, including the private sector and relevant Government ministries, to make the Internet widely available, accessible and affordable to all segments of population.[23]

This quotation contains substantive elements of any ‘right’ which indeed should be widely available and accessible. Simultaneously, formulation ‘without discrimination’ that is typical for human rights vocabulary has been replaced with notion ‘to all segments of population’. This is not mere terminological shift, rather it reflects intention to overcome new forms of inequality brought by ICTs. As such, this notion introduces distinctive trait of the right to the Internet. For those reasons, we find this Report as a formal soft law source of the concerning right. This further confirms its recognition at the universal level to the certain extend. However, in his analysis of the scholarly Skepys (2012) identifies (and rejects) five arguments that are usually invoked

[23] HRC, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, 16 May 2011, UN Doc. A/HRC/17/27. Para 85.

in favor of the claim that there is a human right to the Internet. Those are 'The Communication Argument' and 'The Expression Argument' bought of which are essentially derivative to the freedom of expression; 'The Autonomy Argument' which falls within the ambit of the right to private life as safeguarded through the human rights instruments; 'The Equality Argument' that could be equitized to non-discrimination human rights guarantees; and self-descriptive 'The Assembly Argument'.[24] Even though Skepys rejects all five arguments based on the sound reasons, still his analysis demonstrated that the right to the Internet is well conceptualized. But regardless to the certain level of formal recognition given by the universal policy organ and academic conceptualization, recent scholarship is shifting its focus from the right *to* the Internet onto the right to Internet *access*. It could be said that the right to the Internet access gained broader positive law, academic, and judicial recognition.[25]

At universal level requirement to guarantee 'access to the Internet' could be found at the Report of the Organization for Security and Cooperation in Europe (OSCE)[26] from 2011 in the context of the states' obligation to ensure citizens' right to participate in the information society. At regional scale in Europe, the right to the Internet access could be allocated in different instruments of the Council of Europe as well as of the European Union. Within the Council of Europe access to ICTs was directly interconnected to the ability of individuals to exercise their human rights under the Declaration of the Committee of Ministers on human rights and the rule of law in the Information Society (2005)[27] This Declaration further enumerates the list of the eight rights and freedoms safeguarded through the Convention that are the most affected by the ICTs and as such, the most relevant to take into consideration when adopting policies for the further development of the Information Society. One

[24] See . L. Best, 'Can the Internet Be a Human Right' (2004) 4 Human Rights & Human Welfare 23; K. Mathiesen, 'The Human Right to Internet Access: A Philosophical Defense' (2012) 18 International Review of Information Ethics 9; K. Mathiesen, 'Human Rights for the Digital Age' (2014) 29 Journal of Mass Media Ethics 2. Remarks on the right to the Internet.

[25] See Pollicino

[26] OSCE Representative on Freedom of the Media, Freedom of Expression on the Internet: A Study of Legal Provisions and Practices Related to Freedom of Expression, the Free Flow of Information and Media Pluralism on the Internet in OSCE Participating States (Vienna: OSCE, 2012), p. 15, available at www.osce.org/fom/105522?download=true

[27]https://www.coe.int/t/dgap/goodgovernance/Activities/Public_participation_internet_governance/Declaration-Information-Society/011_DeclarationFinal%20text_en.asp

of those rights is referred as 'the right to education and the importance of encouraging access to the new information technologies and their use by all without discrimination.'[28] Suchlike formulation clearly interconnects the right to education with access to ICTs. Obligations of the Member States in this regard are requiring them to enable access to adequate ICTs as the right to education together with other listed rights and freedoms could be fully exercised. In general, the Declaration is transforming already established human rights and freedoms into digital environment and requires equal standards online and offline. However, the Declaration does not recognize the Internet access as a self-standing right neither it distinguishes the Internet from the ICTs.

Another significant reference to the right to Internet access could be found at very title of the Resolution 1987 (2014) of the Parliamentary Assembly.[29] Herein the right to Internet access was derived out of the right to freedom of expression which is 'both a fundamental right in itself and an essential means of accessing other fundamental human rights, including the right to education,(…)'[30] This clearly links the right to education to the right to Internet access and implies its transformation into digital environment.

The EU approach to the ICTs is very complex and it was reflected through different policy instruments. Perhaps the most important policy instruments are 'the Digital Agenda for Europe (DAE)'[31] and 'the Digital Single Market Strategy',[32] bought of which are reflecting strong social interest in the process of digitalization. In order to achieve ambitious goals set forth in those instruments, the EU enacted supplemental instruments such as the New Skills Agenda for Europe.[33] According to Jasmontaite and de Hert[34] 'important

[28] *Ibid*.
[29] Parliamentary Assembly of the Council of Europe, Resolution 1987 (2014) on 'The right to Internet access'. Text adopted by the Assembly on 9 April 2014. Available at https://pace.coe.int/pdf/caa07e868c5803196c789208a2eae4bc9bcccb29fef819ae9a276cf84010997e/resolution%201987.pdf
[30] https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32009L0140
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[32] https://eufordigital.eu/discover-eu/eu-digital-single-market/
[33] https://ec.europa.eu/social/main.jsp?catId=1223&langId=en
[34] Jasmontaite and de Hert, 'Access to the Internet in the EU: a policy priority, a fundamental, a human right or a concern for eGovernment?' at RESEARCH HANDBOOK ON HUMAN RIGHTS AND DIGITAL TECHNOLOGY (eds. Ben Wagner, Matthias C. Kettemann and Kilian Vieth), Edward Elgar Publishing Limited, 2019, DOI:10.4337/9781785367724

ingredients of this policy are digital literacy programmes.'[35] Herein we can see continuity of harmonized interaction between the personal interests and that of the industry in the field of education/literacy. Further reflections of this interaction could be followed through the States obligations introduced in Article 3-bis of the Directive 2009/140/EC[36] which regulates '[m]easures taken by Member States regarding end-users access to, or use of, services and applications through electronic communications networks.' Namely, general principles of Community law, as well as rights and freedoms of the Convention were substantive and procedural bases for the Directive concerned.

The Internet access approach also acquired recognition at national level within of some of the European countries such as France, Estonia, and Finland that have introduced it as a human right.[37] In this group are also countries like Greece and Portugal that have constitutionally codified access to the Internet as a fundamental right, or Italy that have codified the right to access the Internet as civil right.[38] The right to internet access is coupled with services in some legislations such as Spain.

Unlike the situation with 'right *to* the Internet' there is no convincing academic disagreement in respect to the existence of the 'right to the Internet access'. The discussion is rather about the nature of that undisputable right. Oyedemi (2015),[39] is offering perspectives on the Internet access as concept that might be characterized as a citizen's right, human right, or civil right, either of which is considered to be necessary for the citizens to actively participate in today's digital society and democracy. In more detailed analysis, Pollicino is investigating if the access to the Internet is an autonomous right or only a precondition for enjoying other rights and freedoms such as freedom of

[35] See European Commission, ISA, Joinup, Communities, 'Promoting Digital Literacy in Portugal through a Multi-Stakeholder Initiative', https://joinup.ec.europa.eu/community/epractice/case/promoting-digital-literacy-portugal-throughmulti-stakeholder-initiative; Digital literacy programmes, especially those targeted at segments of the population with limited or no digital skills (e.g. the 'Grandparents & Grandchildren' initiative, www.geengee.eu/geengee/, references retrieved from Jasmontaite and de Hert *Op.cit* pp 165.

[36] *Ibid*.

[37] Toks Oyedemi (2015) Internet access as citizen's right? Citizenship in the digital age, Citizenship Studies, 19:3-4, 450-464, DOI: 10.1080/13621025.2014.970441

[38] Pollicino, O. (2020). The Right to Internet Access: Quid Iuris? In A. Von Arnauld, K. Von der Decken, & M. Susi (Eds.), *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric* (pp. 263-275). Cambridge: Cambridge University Press. doi:10.1017/9781108676106.021

[39] *Op. cit.*

expression.[40] In this regard, he distinguishes between human rights discourse (judicial enforcement provided under international law) and fundamental rights discourse (protection is awarded through the state's constitution) and concludes that there is a human right to the Internet access which is, however, just 'another medium through which freedom of speech or democratic participation in the information society are exercised and protected.' [41]

Although she also recognizes that there is no autonomous right to internet access under positive international human rights, Çalı argues that there is a strong case for an instrumental justification of a new legal human right to 'meaningful internet access ' due to the opportunities and risks it continuously generates.[42] Furthermore, she is proposing extension of the scope of an existing human right through an implied rights doctrine as one of the modes of deriving a new autonomous human right in international law, relying it on hybrid modes of legal-normative justification.

4. THE NEED FOR THE RIGHT TO DIGITAL LITERACY

As we could see, mentioned authors are recognizing the necessity of the right to the Internet access for active participation in today's digital society and democracy. Also, there is interesting point requiring meaningful Internet access. Meaningful Internet access is understood as an enabler of adequate participation and additionally, it should make the Internet beneficial and safe to use(ers). In the context of this research we could sensibly consider that without digital literacy there can be no adequate participation neither the Internet access can be beneficial and safe. Thus, the right to (meaningful) Internet access cannot meet its purpose without digital literacy – a substantive element of the right to education in information society. In this line, Gilster emphasize importance of critical evaluation of what is found on the Web over mere

[40] *Ibid.*

[41] Pollicino, O. (2020). The Right to Internet Access: Quid Iuris? In A. Von Arnauld, K. Von der Decken, & M. Susi (Eds.), *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric* (pp. 263-275). Cambridge: Cambridge University Press. doi:10.1017/9781108676106.021

[42] Çalı, B. (2020). The Case for the Right to Meaningful Access to the Internet as a Human Right in International Law. In A. Von Arnauld, K. Von der Decken, & M. Susi (Eds.), *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric* (pp. 276-284). Cambridge: Cambridge University Press. doi:10.1017/9781108676106.022

technical competence required to access it.[43] Critical thinking is the core skill of digital literacy according to this author.[44]

As to the digital literacy and participation rights, its importance could be observed indirectly, from the aspect of the correlation between the right to education and other human rights. Case law of the European Court of Human rights (the Court), offers significant information about it. According to the Court, the right to education correlates to the "freedom of thought, conscience and religion" from the ambit of Article 9 of the Convention and freedom of expression from the ambit of Article 10 of the Convention. [45] Education also affects 'private and family life" from the ambit of the Article 8 of the Convention,[46] as well as personal autonomy from the same article.[47] Those correlations are effective in the digital environment too.

More directly, digital skills such as literacy are needed today for social, civil and political participation. It is so due to the large impact of different online platforms in all three aspects of participation in democratic society. In that sense, Riel is describing the expanding scope of influence of digital participation on government action, for expressing ideas and building social capital.[48] According to him, digital literacy, which he understands as the ability to use electronic tools to retrieve, evaluate, and create new information, 'has become essential for engagement in various mass participation and social activities in the United States, including those activities within the domains of social membership, civic, political, and online participation.'[49] In order to support this statement he further explains that public institutions increase their use of information technologies which intensifies in the ongoing process of digital transformation, schools had integrated the teaching of digital skills into the curriculum, 'political campaigns are increasingly digitally mediated, and as civic discourse includes bits and bytes and not just face-to-face conversations.'[50] Also, the U.S. Educational Testing Service report (ETS,

[43] Gilster, P. (1997) Digital literacy. New York: John Wiley & Sons Inc.
[44] Ibid.
[45] Kjeldsen, Busk Madsen and Pedersen v. Denmark, § 52, http://hudoc.echr.coe.int/eng?i=001-57509
[46] Catan and Others v. the Republic of Moldova and Russia [GC], § 143, http://hudoc.echr.coe.int/eng?i=001-114082
[47] Enver Şahin v. Turkey, § 72 http://hudoc.echr.coe.int/eng?i=001-180642
[48] J. Riel The digitally literate citizen: How digital literacy empowers mass participation in the United States, DOI: 10.13140/RG.2.1.2319.1768, 7
[49] *Ibid*.
[50] *Ibid*. 25

2002)[51] identified participative component 'Create' among the other four components (access, manage, integrate, and evaluate), that represent a continuum of skills and knowledge of digital literacy. Also, in the EU it is considered that digital skills are need to citizens in order to be able 'to study, work, communicate, access online public services and find trustworthy information.'[52]

As to the digital literacy and benefits, we have already seen that both individuals and the industry are entitled to its enjoyment in the context of education. This was well displayed through the project that involved students aged 6–9 at an Academy School on the south coast of England intended to explore 'the kinds of digital literacy 'competence' the stakeholders[53] wanted to see developing' within schooling system.[54] Undoubtedly, persons are benefiting by gaining digital skills needed for personal well-being and labor market while the industry is benefiting from digitally skilled employees for its growth. Inseparableness of mutual benefit between the industry and persons can be traced through the EU policy and legal tools that are purposed to help create a safe and open digital space for EU citizens and businesses.[55] The European Commission has set targets in the European skills agenda and the digital education action plan to ensure that 70% of adults have basic digital skills by 2025.[56] These initiatives aim to reduce the level of 13-14 year-olds who underperform in computing and digital literacy from 30% (2019) to 15% in 2030.[57] According to the Business Europa[58] the digital single market has the potential of contributing €415 billion a year to the EU economy. Also it can create 100,000s of new jobs and bring improvements in technology able to improve society on the whole, healthcare system, agriculture, education, infrastructure and public finance.[59]

[51] http://www.ets.org/Media/Research/pdf/ICTREPORT.pdf
[52] https://digital-strategy.ec.europa.eu/en/policies/digital-skills-and-jobs
[53] A technology provider, Academy governors, a Housing Association, a County Council, community workers and Techknowledge, Julian McDougall, Mark Readman & Philip Wilkinson (2018) The uses of (digital) literacy, Learning, Media and Technology, 43:3, 263-279, DOI: 10.1080/17439884.2018.1462206, 263.
[54] Julian McDougall, Mark Readman & Philip Wilkinson (2018) The uses of (digital) literacy, Learning, Media and Technology, 43:3, 263-279, DOI: 10.1080/17439884.2018.1462206
[55] Digital Services Act - Consilium (europa.eu)
[56] https://digital-strategy.ec.europa.eu/en/policies/digital-skills-and-jobs
[57] *Ibid.*
[58] https://www.businesseurope.eu/policies/digital-economy
[59] *Ibid.*

As to the relation between digital literacy and safety, it could be well displayed through the relation between human (error) behavior and cybersecurity breaches. Bearing in mind that many countries such as the United States of America, Russia, and China, including the EU have conferred a priority status to cybersecurity in their national defense policies,[60] it is clear how grave human errors might be in this regard. Also, human error might compromise confidentiality and privacy of personal data and bring to failure one of the main objectives of cybersecurity. Unfortunately, this is quite frequent scenario. In his analysis on 'human error: understand the mistakes that weaken cybersecurity'[61] El-Bably reports that '43% of US and UK employees have made mistakes resulting in cybersecurity repercussions for themselves or their company.'[62] The most of data breaches are due to human error.[63] More precisely, 95% of all cyber incidents are human-enabled including cyber-attacks, data breaches, and ransomware attacks.[64] All of this strongly confirms that average citizens as well as digitally skilled employees need to increase the level of their (basic or advanced) digital literacy.

We consider that the right to digital literacy is the only appropriate respond to that need. It is so especially when digital literacy is need for access public services, education, health and other services from public sector domain including citizens political, cultural and other rights because it is reasonable to claim the obligation of the State to enable access to cultural, economic and political structures of society.

5. CONCLUSION

This research demonstrated that that the right to education is purposed to provide personal benefits to individuals and utility to the industry/society; the right to digital literacy is corresponding to that purpose in the present day

[60] A. Y. El-Bably, "Overview of the Impact of Human Error on Cybersecurity based on ISO/IEC 27001 Information Security Management", *JISCR*, vol. 4, no. 1, pp. 95-102, Jun. 2021.
[61] *Ibid*. 96
[62] *Ibid*. 96-97
[63] 90% in the UK, see 'The foundations and principles of the confidentiality of the information management system' ISO/IEC 27001, International Organization for Standardization, pp. 143-144.
[64] Nobles, Calvin. "Botching Human Factors in Cybersecurity in Business Organizations" HOLISTICA – Journal of Business and Public Administration, vol.9, no.3, 2018, pp.71-88. https://doi.org/10.2478/hjbpa-2018-0024

circumstances; and categorization of digital literacy as a human right is necessary bearing in mind its importance in informatics society. In the part of the research addressing the right to education we saw that the right to education exists as a general right and as a specific right within human rights system. Insight into specific right to education demonstrated its substantive match to general right to education and design to overcome specific challenges facing different groups. Be it general or specific, the right to education confers persons a right to equal access education available in schooling system of the State at a given time. Based on this and relying onto Article 26 of the UDHR we have interpreted that both persons and industry have their compliant interests in education which is unequivocally beneficial for former and useful for latter. Therefore, personal benefit and social utility appeared as determinants of the answer to the research question about the need for the right to digital literacy.

The research in its second part about the Internet and human rights firmly confirmed existence of the right to the Internet access both at regional level in the Europe and within national statutory of European countries. Scholarly interpretation of the right to the Internet access added adjective 'meaningful' to its content. The meaningful access to the Internet was understood as an enabler of adequate participation, and guarantee of the beneficial and safe character of the Internet. Further discussion elucidated that without digital literacy there can be no adequate participation neither the Internet access can be beneficial or safe. Thus, the right to (meaningful) Internet access cannot meet its purpose without digital literacy – a substantive element of the right to education in information society. This brought us to the conclusion that the right to digital literacy could be characterized as an implied right at least to the right to the Internet access.

The discussion about the need for the right to digital literacy, framed within realm of personal benefit and social utility was extended with discussion about digital literacy and participation rights in order to emphasize the importance of digital literacy for personal well-being and enjoyment of other rights. It was demonstrated that digital literacy is necessary for social, civil and political participation due to the large impact of different online platforms in all aspects of participation in democratic society. Also, it was demonstrated through real world data how persons are benefiting by gaining digital skills needed for personal well-being and labor market while the industry is benefiting from digitally skilled employees for its growth. Relationship between digital literacy and personal wellbeing further was discussed in the context of safety, displayed through the human (error) behavior and cyber

security breaches. The conclusion in this regard is that average citizens as well as digitally skilled employees need to increase the level of their (basic or advanced) digital literacy which appears to be in proportion to security i.e. wellbeing.

Since digital literacy is need for access public services, education, health and other services from public sector domain including citizens political, cultural and other rights it is reasonable to claim the State have obligation to guarantee it to citizens.

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РУДАРЕЊЕ ЉУДСКИХ ПРАВА: ПРАВО НА ДИГИТАЛНУ ПИСМЕНОСТ

Резиме

О самом појму дигиталне писмености се у литератури нашироко говори и у зависности од дисциплине различито је дефинисан. У овом раду се не бавимо дефиницијом појма јер нам је намјера да истражимо дигиталну писменост у домену позитивних права, а не као друштвени феномен. Штавише, не дефинишемо садржај и обим овог претпостављеног права. Наш фокус је на фундаменталнијем питању: Да ли нам је потребно право на дигиталну писменост? Одговор на ово питање је пресудан за постојање самог права. Да бисмо до њега дошли, индиректно смо користили правни метод и технике типичне за истраживање права из групе која је означена као „нова права“. С тим у вези, право на дигиталну писменост је контекстуализовано са правом на образовање и његовом трансформацијом у дигитално окружење. Дакле, главна хипотеза је да је право на дигиталну писменост сајбер-еквивалент права на образовање. Прихваћени силогизам хипотезе је да нам заиста треба право на дигиталну писменост у информационом друштву, и то из истих разлога због којих морамо имати право на образовање у свијету атома. Главни закључци истраживања су да право на образовање има за циљ да пружи личне користи појединцима и користи индустрији/друштву; право на дигиталну писменост одговара тој сврси у данашњим околностима; а категоризација дигиталне писмености као људског права је једини одговарајући приступ имајући у виду њен значај у информационом друштву.

Кључне речи: нова права, право на дигиталну писменост.

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PROTECTION OF THE FREEDOM TO VOTE IN THE REPUBLIC OF SERBIA – ELECTION ADMINISTRATION IN THE LIGHT OF THE NEW ELECTORAL LAWS**

Abstract

Two months before the elections scheduled for 3rd of April 2022, the Republic of Serbia got new electoral laws. The laws came about after months of negotiations between the government and the opposition. The government, as the proposer of the law, emphasises that nothing has been fundamentally changed, but that those laws should contribute to greater democracy and transparency of the election process. In this paper, the author will try to present the extent to which there have been changes in the election administration. This area is significant because it has undergone the biggest and most important changes. Also, the author supports the thesis that this time the chance to substantially modernise and systematise this matter in the Republic of Serbia has been missed just like the previous time when there were changes in the electoral legislation (2020).

Key words: election administration, electoral laws, Republic of Serbia, Venice Commission.

1. INTRODUCTION

By the beginning of 2022, the electoral legislation in the Republic of Serbia (hereinafter: Serbia) was old and uncodified. Three laws were in force:

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the Law on the Election of Members of Parliament (hereinafter: Old MP Law)[1] from 2000, the Law on Local Elections (hereinafter: Old LE Law)[2] from 2007, the Law on the Election of the President of the Republic (hereinafter: Old President Law)[3] from 2007. The last significant changes to the Old MP Law and Old LE Law took place in the spring of 2020 (February and May), before the parliamentary and local elections (held on the 21st of June 2020), when the election threshold has been reduced from 5 to 3%.[4]

New parliamentary, local and presidential elections are scheduled for the 3rd of April 2022. On the 4th of February 2022, the National Assembly has adopted a set of electoral laws – the Law on the Election of Members of Parliament (New MP Law)[5], the Law on Local Elections (New LE Law)[6], the Law on the Election of the President of the Republic (New President Law)[7], as well as other election-related laws[8]. This set of election laws was adopted as a result of several months of negotiations between the government and the opposition. For instance, even though the electoral threshold was lowered from 5% to 3% before the parliamentary elections took place in 2020, which was supposed to lead to a more representative parliament, exactly the opposite happened. The ruling coalition (SNS-SPS)[9] won 220 out of 250 MP seats, and the only opposition party (SPAS)[10] joined the largest political party soon after the elections leaving the Serbian parliament basically without opposition (some of the opposition political parties boycotted elections). For these reasons, two

[1] Zakon o izboru narodnih poslanika [Law on the Election of Members of Parliament], Official Gazette of the RS, 35/00, 57/03, 72/03, 18/04, 85/05, 101/05, 104/09, 28/11, 36/11 and 12/20.

[2] Zakon o lokalnim izborima [Law on Local Elections], Official Gazette of the RS, 129/07, 34/10, 54/11, 12/20, 16/20 and 68/20.

[3] Zakon o izboru predsednika Republike, [Law on the Election of the President of the Republic], Official Gazette of the RS, 111/07 and 104/09.

[4] See: Ђ. Марковић, „Делимичне изборне реформе у Републици Србији“, *Архив за правне и друштвене науке*, 1-2/2020, Београд.

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[6] Zakon o lokalnim izborima [Law on Local Elections], Official Gazette of the RS, 14/22.

[7] Zakon o izboru predsednika Republike, [Law on the Election of the President of the Republic], Official Gazette of the RS, 14/22.

[8] Zakon o izmeni Zakona o sprečavanju korupcije [Law on Amendment to the Law on Anti-Corruption], Official Gazette of the RS, 14/22; Zakon o finansiranju političkih aktivnosti [Law on Financing Political Activities], Official Gazette of the RS, 14/22.

[9] SNS – Srpska napredna stranka [Serbian Progressive Party], SPS – Socijalistička partija Srbije [Socialist Party of Serbia].

[10] SPAS – Srpski patriotski savez [Serbian Patriotic Alliance].

dialogues were held in parallel during the summer and autumn of 2021.[11] The Inter-Party Dialogue was the first one and it was co-facilitated by the European Parliament members. It ended with a document entitled "Measures to Improve the Electoral Process".[12] And the second one was the Inter-Party Dialogue without foreign mediation which ended with an "Agreement on Improving the Conditions for Holding Elections".[13] The above mentioned laws was later adopted based on these two documents.

Although they are more extensive than the previous ones in terms of content, these laws do not bring anything essentially new as confirmed by the Government itself that was also the proposer of the law. Thus, in the explanatory note of the Draft of the New MP Law, the Government points out that "[...] previous legal solutions that can be considered the basic postulates of the electoral process (Republic of Serbia as one constituency, voting for electoral lists from which the mandates of MPs are allocated to candidates as per their order on the list, application of the greatest divisors method when allocating mandates, electoral threshold of 3%, etc.)" have been retained.[14] Essentially, the laws represent an improved version of the old laws to some extent. However, large and not so insignificant innovations refer to the parts of the law concerning election administration: "The law brings significant innovations in terms of organisation and work of election administration bodies, especially in terms of transparency of their work and a wider range of

[11] Predlog Zakona o izboru narodnih poslanika, [Draft Law on the Election of Members of the Parliament], http://www.parlament.rs/upload/archive/files/lat/pdf/predlozi_zakona/2022/86-22%20-%20Lat..pdf, 20. 3. 2022.
Analiza sporazuma o unapređenju uslova za održavanje izbora, https://crta.rs/analiza-sporazuma-o-unapredjenju-uslova-za-odrzavanje-izbora/, 20. 3. 2022.

[12] The Inter-Party Dialogue with the National Assembly of Serbia concludes its second phase ahead of the upcoming local, parliamentary and presidential elections, https://www.europarl.europa.eu/globaldemocracysupport/en/mediation-and-dialogue/latest-news, 20. 3. 2022.

[13] Sporazum sa vlašću: Dveri i DJB potpisali, ali nisu sasvim zadovoljni, https://www.danas.rs/vesti/politika/sporazum-sa-vlascu-dveri-i-djb-potpisali-ali-nisu-sasvim-zadovoljni/, 20. 3. 2022.

[14] Obraloženje Predloga zakona o izboru narodnih poslanika [Explanatory Notes of the Draft Law on the Election of Members of Parliament], http://www.parlament.gov.rs/upload/archive/files/lat/pdf/predlozi_zakona/2022/86-22%20-%20Lat..pdf, pp. 59, 22. 3. 2022. Compare: Obraloženje Predloga zakona o lokalnim izborima [Explanatory Notes of the Draft Law on Local Elections], http://www.parlament.gov.rs/upload/archive/files/lat/pdf/predlozi_zakona/2022/83-22%20-%20Lat..pdf, 34, 22. 3. 2022.

political actors involved having additional permissions regarding the control of the regularity of the election procedure.“[15]

The Venice Commission (hereinafter: VC) in its report from 2020 points out that: “The composition of election commissions is one of the most controversial aspects of electoral legislation in many emerging or new democracies throughout the world. Even with formally independent electoral management bodies, the commissions’ composition may strongly favor the government or pro-governmental forces. Thus, the commissions’ composition should be guided by the principles of maximum impartiality and independence from politically motivated manipulation.“[16] Therefore, during the legislative formation special attention must be given to this issue. In addition, since the election administration is considered an “institutional aspect of the right to free elections“ which should enable „equality of chances and results of elections as well as free formation and expression of the will of voters“, we will deal with this issue in details.[17] The New MP Law has the status of the main law which provisions apply accordingly in the case of local and presidential elections[18], so this paper will emphasise exactly the solutions provided by this law, while the other two laws will be analysed on how much they differ from the New MP Law.

2. THE ELECTION ADMINISTRATION – GENERAL RULES

According to the Old MP Law, the election administration consisted of the Republic Electoral Commission (hereinafter: REC) and polling boards (hereinafter: PBs). Much has been written about the coordination issues between REC and PBs over the past two decades[19], and as the proposer of the law, the Government pointed this out as one of the arguments for passing the law: „To overcome the lack of the connection between the REC as the main

[15] *Ibid*. See also: Obraloženje Predloga zakona o izboru predsednika Republike, [Explanatory Notes of the Draft Law on the Election of the President of the Republic], http://www.parlament.gov.rs/upload/archive/files/lat/pdf/predlozi_zakona/2022/88-22%20-%20Lat..pdf, 17, 22. 3. 2022.

[16] Report on Electoral Law and Electoral Administration in Europe, CDL-AD (2020)023, 6, para. 26.

[17] Т. Маринковић, *Расправа о праву на слободне изборе*, Досије, Београд, 2019, 165.

[18] See: Art. 8 para. 1 of the New LE Law and Art. 8 para. 1 of the New President Law.

[19] Preporuke za izmenu izbornog zakonodavstva u Srbiji, http://www.cesid.rs/wp-content/uploads/2020/11/Preporuke-za-izmenu-izbornog-zakonodavstva-u-Srbiji.pdf, 15, 18. 3. 2022.

electoral body and over eight thousand PBs, the REC established various coordination mechanisms in the electoral process by its acts (by empowering its members and deputy members to perform certain technical activities as coordinators, by educating working bodies at the level of local self-government units, as well as by providing technical support in the conduct of certain election activities, mainly the submission of election material to polling stations).“[20] As pointed out, the biggest changes brought by the new laws refer to the area of election administration, which has become three-level instead of two-level.[21] The New MP Law stipulates that elections are conducted by REC, Local Electoral Commissions (hereinafter: LECs) and PBs (Art. 7). All these bodies work in the standing composition between elections and in the extended composition during the elections.

2.1. Republic Electoral Commission

The composition and election method of the REC have remained largely the same as before. In the standing composition it consists of the chairperson and 16 members appointed by the National Assembly at the proposal of parliamentary groups proportionally to their representation in the total number of MPs belonging to parliamentary groups (Art. 17 para. 1 and Art. 18 para. 1). It is nothing new that no parliamentary group may nominate more than half of the members of the REC (Art. 18 para. 2), but what is new is that there is a provision specifying the appointment of members by a parliamentary group that has more than half of the total number of MPs – it shall nominate the chairperson and 7 members of the REC, while the remaining members shall be nominated by other parliamentary groups proportionally to their total representation in the total number of MPs belonging to parliamentary groups (Art. 18 para. 3). This safeguard clause (protective in relation to the parliamentary minority) was created as a result of the last two parliamentary convocations in which one coalition of parties won the majority and therefore had the opportunity to form a government on its own, which was not so common before. In the extended composition, the REC consists of members which shall be appointed by the REC (its standing composition) at the proposal

[20] Obraloženje Predloga zakona o izboru narodnih poslanika [Explanatory Notes of the Draft Law on the Election of Members of Parliament], http://www.parlament.gov.rs/upload/archive/files/lat/pdf/predlozi_zakona/2022/86-22%20-%20Lat..pdf, 60, 22. 3. 2022.
[21] Т. Маринковић, *op. cit.* 171.

of the submitter of the electoral list (Art. 22 para. 1). The President and all members of the REC in permanent and expanded composition have their deputies appointed by the same bodies and in the same way as the members.

2. 2. Local Electoral Commissions

One of the biggest innovations is the introduction of the Local Electoral Commission (LECs) as a new body within the election administration which did not exist under the old law. Nastić points out that one of the oldest recommendations (ever since 2000) given by the OSCE/ODIHR to Serbian electoral legislation concerns the need to introduce a "middle level of administration" linking REC and PBs to "reduce logistical problems" which would enable "a higher degree of political pluralism by providing multi-party representation at all levels of the election administration".[22] Taking this into account, at first glance, it seems that the introduction of LECs has finally met the mentioned recommendations, however the great dilemma remains – whether the most adequate way has been chosen.

When it comes to the composition and procedure of appointing LEC members in the standing composition, the New MP Law (Art. 27 para. 2) refers to the New LE Law (Art. 18): Chairperson and members of the LEC shall be appointed by the local self-government unit Assembly (hereinafter: Assembly). The number of LEC members depends on the size of the local self-government unit, so those with a maximum of 50,000 registered voters have 6 members, those with a maximum of 100,000 registered voters have 8 members, those with a maximum of 500,000 registered voters have 10 members, and finally those with more than 500,000 registered voters have 12 members. The New LE Law prescribes a safeguard clause similar to the one provided by the New MP Law (Art. 20 para. 2 and 3): no councilors' group may nominate more than half of the members to the electoral commission in the standing composition, while the councilors' group that has more than half of the total number of councillors shall nominate the Chairperson and members, whose number, altogether including the Chairperson, shall not be higher than half of the total number of members of the electoral commission, while the remaining members shall be nominated by other councillors' groups proportionally to their representation in

[22] М. Настић, „Улога ОЕБС-а у посматрању избора у Србији", у зборнику: *Како, зашто и кога смо бирали од 1990. до 2020. године* (ур. М. Јовановић и Д. Вучићевић), Службени гласник и Институт за политичке студије, Београд, 2020, 1054.

the total number of councillors belonging to councillors' groups. However, in addition to this general rule, there are two other rules for special cases. The first case occurs when in the local self-government unit Assembly only one councilors' group posses all seats. It shall nominate Chairperson and members, whose number, altogether including the Chairperson, shall not be greater than half of the total number of members of the electoral commission (Art. 20 para. 5). The remaining members shall be nominated among the employees in the municipal or city administration who have experience in conducting elections and who are proposed by the head of the municipal or city administration. The second case occurs when in the local self-government unit Assembly two councilors' groups possess all seats. In that case, the larger councilors' group shall nominate the Chairperson and members, whose number, altogether including the Chairperson, shall not be higher than half of the total number of members of the electoral commission. The head of municipal or city administration shall nominate one member and one deputy member among the employees in the municipal or city administration who have experience in conducting elections. The remaining members shall be nominated by the smaller councilors' group (Art. 20 para. 6).

If the LEC in the standing composition for some reason would not be formed in this way, Article 28 of the New MP Law would apply. In that situation, it is prescribed that the LEC shall have a Chairperson and 6 members appointed by the REC at the proposal of the parliamentary groups proportionally to their representation in the National Assembly. And if a parliamentary group fails to submit a proposal for this appointment, the appointments will be made by the REC and proposed by the head of the administrative district (Art. 29 para. 3). It is unclear why the legislator opted for exactly this state official, but this option certainly does not contribute to political pluralism and democracy, because it is very likely that this person will be close to the ruling majority.

Here, too, there is a safeguard clause according to which a parliamentary group with more than half of the total number of MPs shall nominate the Chairperson and 2 members of the LEC, while the remaining members shall be nominated by other parliamentary groups proportionally to their representation in the total number of MPs belonging to parliamentary groups (Art. 28 para. 3). A member of the LEC in the extended composition is appointed by the LEC and proposed by the submitter of the electoral list. (Art. 30). The President and all members of the LEC in standing and extended

composition have their deputies appointed by the same bodies and in the same way as members are appointed.

2. 3. Polling Boards

From the hierarchy aspect, polling boards (hereinafter: PB) represent authority of the lowest rank when it comes to conducting elections, but from the aspect of practical importance, their significance is immeasurable, as they are found on site, at polling stations themselves and observe the process of voting, count votes etc. As per previous legislation as well as the New MP Law, a PB in the standing composition consists of a president and 2 members (Art. 35), while in its extended composition it also comprises a representative of each submitter of the electoral list (Art. 39). The novelty represented here is seen in the way members are appointed. Permanent members of a PBs are nominated by the LEC from the candidates proposed by parliamentary groups in numbers proportional to their representation in the National Assembly, while the members of a PBs in the extended composition are named by the LEC based on the proposal made by the submitter of the electoral list. Earlier, the REC used to nominate both (Art. 34, para. 8 of Old MP Law). The members and their deputies are nominated by the LEC based on the proposal made by the head of the municipal or city administration, if the parliamentary group fails to do so (Art. 37, para. 2). In terms of proportional representation, special criteria for appointment of the PB in the standing composition are provided. The REC shall prescribe the order of positions for the territory of each LEC (Art. 36, para. 4), considering, among other things, the fact that "no parliamentary group may nominate both the Chairperson and deputy Chairperson of the polling board at one polling station" (Art. 36, para. 3). Just like the formation of both the REC and LEC, there is a special clause here too that requires the parliamentary group that has more than half of the total numbers of MPs to nominate in one half of the polling boards a Chairperson and two deputy members and in the other half nominate a deputy Chairperson, one member and another member's deputy, while the remaining positions shall be allocated to other parliamentary groups proportionately (Art. 36, para. 2). A member and his/her deputy member of the polling board in the extended composition is appointed by the LEC at the proposal of the submitter of the electoral list (Art. 39, para 1)

2. 4. Special Cases

2. 4. 1. Election Administration in the Penal Institutions

The old legislation, significantly criticised in the public, referred to the composition of PBs within penal institutions according to which the REC nominated members of the PBs in both the standing composition and the extended composition, which practically meant that, depending on the composition of the REC, it was possible to have no representatives of opposition that would oversee the regularity of the voting process in penal institutions. Since there are approximately 10,000–11,000 prisoners in Serbia[23], it is clear that this number of voters in penal institutions is not to be underestimated. The New MP Law introduces significant improvements in this aspect. When it comes to the PBs in the standing composition, the situation remained unchanged; the REC appoints member and deputy member at the proposal of the Ministry in charge of justice, and none of them can be a person employed in that ministry or have voting rights within that institution (Art. 38, para. 2). The novelties introduced here concern a member and deputy member of the PBs in the extended composition, which are now appointed by the REC based on the proposal made by the submitter of the electoral list (Art. 39, para 2). According to the previous solution, those were appointed independently by the REC (Art. 72b, para. 2 Old MP Law) without the involvement of the representatives of electoral lists, which was criticised by the public as the opposition could not oversee the work of the PBs in penal institutions, which made ways for breaches and abuses.

2. 4. 2. Election Administration in the Diplomatic and Consular Missions of the Republic of Serbia abroad

When it comes to the work of PBs abroad, the solutions are almost identical to the ones introduced previously. The REC nominates members and their deputy members in both the standing composition and the extended composition. In the first case, the REC makes the decision based on the proposal made by the Ministry in charge of foreign affairs, while in the other one, it does so based on the proposal made by the submitter of the electoral list

[23] Zašto Srbija ima više zatvorenika od postojećih kapaciteta zatvora?, https://www.slobodnaevropa.org/a/za%C5%A1to-srbija-ima-vi%C5%A1e-zatvorenika-od-postoje%C4%87ih-kapaciteta-zatvora/31199572.html, 25. 3. 2022.

(Art. 38, para. 1; Art. 39, para 2). A smaller change refers to the fact the members of the standing composition are nominated preferably among voters residing abroad (Art. 38, para. 1).

3. ELECTION ADMINISTRATION – THE LOCAL ELECTION RULES

In theory, local elections should be the most important type of election, as their results are in direct relation with the "quality of citizens' lives in local communities." In practice, the public perceives them as "hierarchically less important than parliamentary and presidential elections"[24]. From that emerges a dilemma about when and how much the provisions that concern local elections specifically will be applied, that is when they will be discussed, because if national parliamentary elections take place at the same time as the local ones, the rules that regulate national parliamentary elections have advantage, which will be analysed later in the text. Having this in mind, it is implied that a Serbian lawmaker deems local election as election of lesser importance.

The authorities that conduct elections in the local self-government unit consist of an electoral commission and polling boards. The electoral commission is formed under the same rules already described for the LEC. However, in this case, only the New LE Law is applied, so there is no room for enforcing Art. 28 of the New MP Law. Regarding the polling boards that are used only in local elections, they have a chairperson and two members (and their deputies) in the standing composition, which are named by electoral commissions based on the proposal made by councillors' groups proportional to its representation in the National Assembly (Art. 28 New LE Law).

In this case too there is a safeguard clause that demands that "No councillors' group may nominate both the Chairperson and Deputy Chairperson of the polling board at one polling station" and that "a councillors' group that had more than half of the total number of councillors shall nominate, in one half of the polling boards, a chairperson and two deputy members, and in the other half of the polling board, a Deputy Chairperson, one member and another member's deputy, while the remaining positions in the polling boards shall be allocated to other councillors' groups proportionately to their representation in the Assembly [...]" (Art. 29, para. 2 and 3). Polling boards in the extended

[24] М. Јовановић, П. Матић, „Избори одборника скупштина општина и градова у Србији 1990-2020. године“, у зборнику: *Како, зашто и кога смо бирали од 1990. до 2020. године*, ур. М. Јовановић и Д. Вучићевић, Службени гласник и Институт за политичке студије, Београд, 2020, 682.

composition consist of members and deputy members that are appointed by the electoral commission based on the proposal of the submitter of the electoral list (Art. 31). Like the New MP Law, the New LE Law too features a solution that authorises the electoral commission to appoint members and their deputies nominated by the head of the municipal or city administration if a councillors' group fails to do so (Art. 30, para. 2).

These legal solutions are more or less the same as the ones that existed in the previous legislation, though the new ones define more precisely the number of the EC members in the standing composition as per their size, reduce the number of the members of PB in the standing composition from 4 to 2, and introduce safeguard clauses to enable an even political representation in these bodies, which does not always have to carried out. Specifically, the government, as the proposer of the law, has pointed out that this type of solution, as it includes deputy members in the allocation, can have certain imperfections, that is, can lead to "[...] the situation that the least-authorized proposer is given only the position of a deputy member in the electoral committee. This solution further implies that the completion of the composition of an electoral committee also implies political consultations and agreements [...]"[25]. It is unclear why such a solution was adopted if it became obvious right away that it can lead to such issues when applied.

4. THE SIMILAR AND COMMON RULES IN THE ALL-ELECTION LAWS

As there are a lot of overlaps in the new laws, that is, identical or similar provisions, here we will try to present some that are either the same or refer to all the three laws to avoid repeating ourselves. The fact that we must dedicate a separate part of the text to provisions that are repeated illustrates sufficiently how much Serbia needs the unification of electoral legislation. In relation to that, it would be good for us to remind ourselves about the provisions Reynolds and Reilly suggested to the creators of the electoral system long time ago, which say that electoral rules should be simplified whenever and wherever it is possible[26]. Serbian lawmaker rarely stuck to that rule.

[25] Obraloženje Predloga zakona o lokalnim izborima [Explanatory Notes of the Draft Law on Local Elections], http://www.parlament.gov.rs/upload/archive/files/lat/pdf/predlozi_zakona/2022/83-22%20-%20Lat..pdf, 36.

[26] M. Jovanović, „Izborni sistem Srbije – šta i kako menjati?", u zborniku: *Kako do boljeg izbornog sistema*, (ur. Srećko Mihailović), Socijaldemokratski klub i Centar za slobodne izbore i demokratiju, Beograd, 2006, 54.

4. 1. Decision Making Rules

All the electoral authorities decide by a majority of the total number of votes of members (Art. 12 New MP Law), and during the elections of their members equal representation of genders is taken into account (Art. 11, para 1; Art. 19) as well as people with disabilities (Art. 11, para 1)[27]. Every member and deputy member of the REC must have a BA degree in law to be appointed a member or of the REC (Art. 16 New MP Law). When it comes to the LEC, the chairperson and deputy chairperson must have a BA degree in law (Art. 28, para 5 New MP Law, Art. 19 New Law). For the chairperson and deputy chairperson of a PB, there is no strict obligation, but rather a recommendation to, if possible, give priority to a person that has completed a training for work in the polling board and has experience in conducting elections (Art. 35, para 3 New MP Law, Art. 28, para 3 New LE Law).

In both the New MP Law and the New LE Law there are categories of minor and serious errors. They are stated in order, whereas the first category is divided in five subcategories, and the other one in six. In the case of minor errors, the LEC issues a decision on correcting the result protocols based on the report on checking the result protocols of the polling board (Art. 109, para. 1 New MP Law, Art. 49, para. 1 New LE Law). In the case of serious errors, the LEC can respond in three ways: first, to issue a decision to correct the result protocols; second, to issue a decision establishing that voting results cannot be determined at a certain polling station; and third, to issue a decision annulling voting ex officio (Art. 110 para. 2 New MP Law, Art. 50 para. 2 New LE Law). In this case, the LEC also inspects the election material (Art. 110, para. 1 New MP Law, Art. 50, para. 1 New LE Law).

4. 2. The Simultaneous Holding of Various Types of Elections

Special rules apply in cases when local elections take place on the same day as the national ones (for the President of the Republic and/or the MP elections). In those cases, the elections are conducted by the same PBs at the same polling stations in the standing composition formed in accordance with the New MP Law (Art. 89 and Art. 91, para. 1 New LE Law). There is an exception to this rule that requires a nationally mixed unit of local self-government PB in standing composition consisting of a chairperson, three

[27] See also: Art. 13 para. 1 and Art. 14 of the New LE Law.

members and their deputies (Art. 91, para. 2). The LEC appoints a chairperson, two members and three deputy members based on the proposals made by parliamentary groups proportional to their representation in the National Assembly (Art. 91, para 3), while the LEC appoints deputy chairperson of the polling board and one member based on the proposal made by councillors' groups in the National Assembly proportional to their representation in that institution (Art. 91, para 4).

Each submitter of the proclaimed electoral list and every nominator of candidates have the right to nominate a member and a deputy member to the PB in the extended composition, but if the same political party, coalition, or group of citizens does so, it can nominate only one member and one deputy member (Art. 92). Special rules are proscribed for the assessment of the identity of coalitions, or groups of citizens (Art. 93), for the treatment of a political party that stands for one election independently and in the other within a coalition (Art. 94), as well for the position of those members in the extended composition (Art. 95).

If presidential and parliamentary elections take place on the same day, the elections are held at the same polling stations and conducted by the same PB, with the rules from the New MP Law being applied to the election administration (Art. 29 New President Law). The rules about the extended composition, assessment of the identity of coalitions or group of citizens etc. are almost identical to the ones defined in the New LE Law (Art. 32, 33, 34 New President Law). These solutions can be partially commended given that the Old President Law there was a legal gap concerning the situation when elections take place on the same day. Still, had there been one wholesome law, these numerous repetitions of the same rules, as well as the need to have two and sometimes all the three laws read at the same time, would have been avoided as members of the electoral administration would certainly find it confusing paving the way for errors.

4. 3. Transitional Provisions

Now that we have become familiar with some of the most important changes concerning the election administration, we should emphasise that a slightly different composition of the above-mentioned bodies will be enforced in the presidential, parliamentary and local elections scheduled for the 3rd of April 2022. Namely, all the three laws feature in their transitional provisions an article with an identical title and content: *Temporary increase in the number of*

members of electoral management bodies in the standing composition[28]. The change has been introduced due to a specific composition of the National Assembly, where there are almost no members of the opposition, which means the structure of the election administration would have been questionable, so the new rules should apply only for the upcoming elections to ensure an increased chance of the election administration's bodies to have an attitude that would allow them to decide more objectively and impartially. As the title itself says, the provisions refer to an increase in the number of members of electoral management bodies in the standing composition, with the REC gaining six new members and their deputies, appointed by the National Assembly based on the proposal made by the Speaker of the National Assembly (hereinafter: Speaker), LECs per one more member and deputy member, appointed by the REC at the proposal of the Speaker; and finally, PBs per one more member and deputy member, appointed by the REC at the proposal of the Speaker (Art. 179). All these appointments must be completed in an exceptionally short period of seven days following the law's entry into force[29]. In short, these provisions uncover all the absurdity of introducing such laws without essential changes in the electoral system. Without an adapted electoral system, who can guarantee that such a ratio between different political forces will not be repeated in the future without an option to enforce the provision on increasing the number of members of electoral management bodies? Or will the laws be changed again right before elections to create the illusion of having a democratic system?

5. CRITICAL REVIEW OF THE PRESENTED NOVELTIES

The VC highlights that "the stability of the law is crucial to the credibility of the electoral process". "Therefore, it should be avoided that fundamental elements of electoral law – like the composition of election commissions [...] are changed frequently or just before elections," which is why it is recommended for such changes to take effect at least a year before an election[30]. Clearly this was not respected in enforcing the laws analysed here. Therefore, although the government emphasises that these modifications do not

[28] See: Art. 179 of the New MP Law, Art. 35 of the New President Law, Art. 98 of the New LE Law.
[29] Compare: Art. 177 and 179 of the New MP Law, Art. 35 of the New President Law, Art. 96 and 98 of the New LE Law.
[30] Report, *op. cit.*, 5, para 18.

affect the "essential aspects of elections"[31], from the stance quoted by the VC it is obvious that it's not entirely true. However, the VC's criteria have been set very high and therefore underscore that even when legislative changes "implement international recommendations, late amendments to the electoral legislation limit the time needed for electoral preparations, including training and voter education, and make it difficult to apply the electoral legislation properly and uniformly. [...] Furthermore, late changes to the electoral rules may be detrimental to a thorough and inclusive legislative process. They may even be perceived as politically biased, thus, undermining confidence in the elections."[32] It is clear that this kind of attitude points out that, despite the content of the changes, even when they are the most positive (although electoral engineering can never predict for sure what kind of consequences can be caused[33]), a prompt change of electoral legislation represents a value for itself.

A long time ago it was noticed that Serbia needs a unified electoral legislation and to have all or at least the majority of electoral rules regulated by one law. The VC itself unequivocally emphasises: "Further reforms should be careful not only to add more and more provisions to the electoral law(s), but also to simplify electoral regulations and to bring them together in a single, consistent legal framework.".[34] This was a chance for lawmakers to create one law instead of three while introducing novelties to the system. That way the unnecessary repetition of the almost identical provisions, the necessity to have more laws read at the same time depending on the type of election held etc. would have been avoided. Even from a nomotechnique point of view, these laws are not at a particularly high level. The articles of the laws that refer to the election administration are long, unwieldy, and often unclear when read for the first time, and they overlap, which can all easily lead to confusion. Therefore, we can only imagine how it will be handled in practice.

The provisions concerning the LECs create space for diverse structures of local electoral commissions. Potentially, there can be up to seven different types of LECs, which can be divided by the number of their members,

[31] Obraloženje Predloga zakona o izboru narodnih poslanika [Explanatory Notes of the Draft Law on the Election of Members of Parliament], http://www.parlament.gov.rs/upload/archive/files/lat/pdf/predlozi_zakona/2022/86-22%20-%20Lat..pdf, 59.
[32] Report, *op. cit.*, 5, para. 20.
[33] Đ. Sartori, *Uporedni ustavni inženjering – Strukture, podsticaji i ishodi*, „Filip Višnjić", Beograd, 2003, 94 and 95.
[34] Report, *op. cit.*, 5, para. 15.

composition and election process, which itself can endanger compatibility and uniformity in actions, and therefore affect the final result of elections. The most problematic parts are the Paragraphs 5 and 6 of the Article 20, which regulate the cases when one or two councillors' groups dominate the National Assembly. In both situations, the majority of members of the LECs in the standing composition are exclusively the members determined by a political party that governs that local self-government unit, either directly through a local assembly, or indirectly though the municipal or city administration (appointed by the Assembly, where that political party has the majority). Such a formula can hardly enable impartiality and political independence, especially because decisions are mostly based on the total number of votes, which leads to the LECs in the extended composition having the majority of members close to the ruling political option in that local community. The scenario in which the parliamentary or councillors' group fail to submit a proposal for the appointment of member (or its deputy) in due time, that decision falls upon the head of the administrative district or the head of the municipal or city administration, needs no further comment[35]. In that case, the ruling group's domination would be complete.

The solution currently in force in the Republic of Croatia seems far more neutral.[36] The members and their deputies in Croatian electoral units in the standing composition are judges and prominent lawyers appointed by State Electoral Commission (Art. 58, para. 3). The same goes for the municipal or city electoral commissions (Art. 67, para. 2)[37]. At the same time, the State Electoral Commission is based on a tripartite model, which means that a third of the members come from the Supreme Court of the Republic of Croatia, a third from the parliamentary majority, and a third from the parliamentary minority[38]. Hence, the Croatian model seeks to create and preserve both institutional and personal independence of the election administration.

[35] See: Art. 29 para. 3 and Art. 37 Para 3 of the New MP Law and Art. 30 para. 2 of the New LE Law.

[36] This was the case in Serbia in the early 1990s. See: Đ. Vuković, „Nedostaci izbornog procesa u Srbiji", u zborniku *Partije i izbori u Srbiji* (ur. Čedomir Čupić), Fondacija Friedrich Ebert Stiftung i Fakultet politi kih nauka – Centar za demokratiju, Beograd, 2011, 264.

[37] Zakon o izborima zastupnika u Hrvatski sabor [Law on the Election of Members of Croatian Parliament], Official Gazette of the RH, 116/99, 109/00, 53/03, 69/03, 167/03, 44/06, 19/07, 20/09, 145/10, 24/11, 93/11, 120/11, 19/15, 104/15, 98/19.

[38] Art. 4, 5 and 7 of the Zakon o Državnom izbornom povjerenstvu Republike Hrvatske [Law on the State Electoral Commission of the Republic of Croatia], Official Gazette of the RH, 44/06, 19/07.

Compared to that, the Serbian solution, which requires only the president and its deputy in LECs to have a BA in law, seems like too weak a guarantee (Art. 19. of the New LE Law).

There is also a dilemma whether the provisions for minor errors and serious errors should be part of the laws or if they should be reduced to minimum by a different composition of the electoral management bodies and introducing training courses for their members. More competent members of these bodies and standardised trainings, which is also recommended by the VC[39], should reduce the emergence of both smaller and bigger oversights, which can probably never be eradicated completely, but it is highly questionable if they should be placed in the law. This way lawmakers show they have no idea how to handle the oversights and they opt for legalising them.

"Electoral administration in democratic systems must be effective, politically neutral and publicly responsible. Partisan impartiality and political neutrality, taking right and unequivocal actions, and responsibility towards the voters and democratic public in general are conditions for credible elections.".[40] In Serbia's case, this statement sounds like an ideal that is hard to achieve even now when a new, improved electoral legislation is in force. Members of the election administration will stay unprofessional, and the status of electoral management bodies will remain unchanged, that is, they will not gain any real independence[41].

6. CONCLUSION

The electoral legislation in Serbia has been changed but has not been modernised enough or aligned with the current social needs. A chance to create a wider debate and enforce an essential and detailed reform has been missed. This way the reform of the election administration is not possible without a wider framework.[42] Had there been discussions about introducing several electoral units, for example, like it existed in the 90s, there might have been

[39] Report, *op. cit.*, 7, para. 32.
[40] M. Kasapović, *Izborni leksikon*, Politička kultura, Zagreb, 2003, 132.
[41] М. Пајванчић, „Правни оквир избора у Србији", у зборнику: *Како, зашто и кога смо бирали од 1990. до 2020. године*, (ур. М. Јовановић и Д. Вучићевић), Службени гласник и Институт за политичке студије, Београд, 2020, 48 and 49.
[42] See: M. Jovanović, „Izborni sistem Srbije – dve decenije posle", u zborniku: *Partije i izbori u Srbiji 20 godina,* (ur. Slaviša Orlović), Fondacija Friedrich Ebert Stiftung, Fakultet političkih nauka – Centar za demokratiju, Beograd, 2011.

different answers. This way, the reform has been realised only half-way. There have been certain improvements, but they are not enough. The electoral legislation will remain uncodified and therefore confusing and unclear. The mechanisms for political influence on the composition and decision-making of the electoral management bodies have not been removed either. Even the highest-ranking bodies that conduct elections will not gain highly professional members. The biggest question remains whether all the participants in elections will be familiar with legislative changes and apply them in an adequate way in such a short time. Considering this, it is easily expected the citizens of Serbia will face similar, if not harder problems concerning the process of conducting elections. At the end of 2020, a scientific conference "Elections in Serbia 1990–2020" was held and resulted in a published collection of paper works of almost 1,300 pages.[43] The authors presented an analysis of the elections that had taken place in the previous three decades, as well as the recommendation for improving the electoral system. It seems that political officials are not yet willing to read such analyses. And when that will be, that probably depends as much on them as on those who vote.

[43] *Како, зашто и кога смо бирали од 1990. до 2020. године*, (ур. М. Јовановић и Д. Вучићевић), Службени гласник и Институт за политичке студије, Београд, 2020.

Table 1. Novelties of the Law on the Election of Members of Parliament

	LAW ON THE ELECTION OF MEMBERS OF PARLIAMENT			
	OLD LAW		**NEW LAW**	
REPUBLIC ELECTORAL COMMISSION (REC)	APPOINTMENT PROCEDURE	BODY COMPOSITION	APPOINTMENT PROCEDURE	BODY COMPOSITION
	National Assembly at the proposal of parliamentary groups	**REC the standing composition** (chairperson and 16 members)	National Assembly at the proposal of parliamentary groups	**REC the standing composition** (chairperson and 16 members)
	The submitter of the electoral list appoints representatives (REC's approval)	**REC the extended composition** (the standing composition + representative of the submitter of the electoral list)	REC at the proposal of the submitter of the electoral list	**REC the extended composition** (the standing composition + representative of the submitter of the electoral list)
LOCAL ELECTORAL COMMISSION (LEC)	APPOINTMENT PROCEDURE	BODY COMPOSITION	APPOINTMENT PROCEDURE	BODY COMPOSITION
	/	/	Assembly (of the local self-government unit) or REC at the proposal of parliamentary groups	LEC the standing composition (proportional to the size of the local self-government unit: chairperson + 6, 8, 10 or 12 members) or (chairperson + 6 members)
	/	/	LEC at the proposal of the submitter of the electoral list	LEC the extended composition (the standing

				composition + representative of the submitter of the electoral list)
	APPOINTMENT PROCEDURE	BODY COMPOSITION	APPOINTMENT PROCEDURE	BODY COMPOSITION
POLLING BOARDS (PB)	REC (at the proposal of parliamentary groups)[44]	**PB the standing composition** (chairperson and 2 members)	LEC at the proposal of parliamentary groups	**PB the standing composition** (chairperson and 2 members)
	The submitter of the electoral list appoints representatives	**PB the extended composition** (the standing composition + representative of the submitter of the electoral list)	LEC at the proposal of the submitter of the electoral list	**PB the extended composition** (the standing composition + representative of the submitter of the electoral list)
POLLING BOARD IN THE PENAL INSTITUTIONS	APPOINTMENT PROCEDURE	BODY COMPOSITION	APPOINTMENT PROCEDURE	BODY COMPOSITION
	REC	**PB the standing composition** (none of them may be a person working in that Ministry or voting within the institution)	REC at the proposal of the Ministry in charge of justice	**PB the standing composition** (none of them may be a person working in that Ministry or voting within the institution)

[44] According to the REC's *Instructions* for conducting the elections. Obraloženje Predloga zakona o izboru narodnih poslanika [Explanatory Notes of the Draft Law on the Election of Members of Parliament], http://www.parlament.gov.rs/upload/archive/files/lat/pdf/predlozi_zakona/2022/86-22%20-%20Lat..pdf, 62,

	REC	**PB the extended composition** (the standing composition **+** memberas apointed by REC**)**	REC at the proposal of the submitter of the electoral list	**PB the extended composition** (the standing composition **+** representative of the submitter of the electoral list**)**
POLLING BOARD IN THE DIPLOMATIC AND CONSULAR MISSIONS OF THE REPUBLIC OF SERBIA ABROAD	APPOINTMENT PROCEDURE	BODY COMPOSITION	APPOINTMENT PROCEDURE	BODY COMPOSITION
	REC at the proposal of the Ministry in charge of foreign affairs	**PB the standing composition** (the chairperson appointed from among employees of the diplomatic and consular missions + 2 members)	REC at the proposal of the Ministry in charge of foreign affairs	**PB the standing composition** (the chairperson appointed from among employees of the diplomatic and consular missions + 2 members preferably from among voters residing abroad)
	REC at the proposal of the submitter of the electoral list	**PB the extended composition** (the standing composition + representative of the submitter of the electoral list)	REC at the proposal of the submitter of the electoral list	**PB the extended composition** (the standing composition + representative of the submitter of the electoral list)

Table 2. Novelties of the new Law on the Local Elections

	LAW ON LOCAL ELECTIONS			
	OLD LAW		**NEW LAW**	
ELECTORAL COMMISSION (EC)	APPOINTMENT PROCEDURE	BODY COMPOSITION	APPOINTMENT PROCEDURE	BODY COMPOSITION
	Assembly of the local self-government unit at the proposal of councillors' groups	**EC in the standing composition** (chairperson and at least six members)	Assembly of the local self-government unit at the proposal of councillors' groups	**EC in the standing composition** (proportional to size the local self-government unit: chairperson + 6,8,10 or 12 members)
	EC at the proposal of the submitter of the electoral list	**EC in the extended composition** (standing composition + the proclaimed list representative)	EC at the proposal of the submitter of the electoral list	**EC the extended composition** (the standing composition + representative of the submitter of the electoral list)
POLLING BOARDS (PB)	APPOINTMENT PROCEDURE	BODY COMPOSITION	APPOINTMENT PROCEDURE	BODY COMPOSITION
	EC	**PB in the standing composition** (chairperson and at least four members)	EC at the proposal of councillors' groups	**PB in the standing composition** (chairperson and two members)
	EC at the	**PB in the**	EC at the	**PB in the**

	proposal of the submitter of the electoral list	**extended composition** (standing composition + the proclaimed list representatives)	proposal of the submitter of the electoral list	**extended composition** (standing composition + the proclaimed list representatives)

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ЗАШТИТА СЛОБОДЕ ИЗБОРА У РЕПУБЛИЦИ СРБИЈИ – ИЗБОРНА АДМИНИСТРАЦИЈА У СВЕТЛУ НОВИХ ИЗБОРНИХ ЗАКОНА

Резиме

У предвечерје ванредних парламентарних, редовних председничких и локалних (понегде) избора, Народна скупштина Репбулике Србије је почетком фебруара 2022. године донела нове изборне законе: Закон о избору народних посланика, Закон о избору председника Републике и Закон о локалним изборима. Иако су закони формално нови, суштински, они не доносе ништа ново у погледу оних фактора који непосредно утичу на резултате избора (изборни систем, цензус, изборне јединице и сл.), тако да је са тог аспекта реч о старим законима само у новом руху. С друге стране, када је у питању изборна администрација, односно органи који се баве организацијом и спровођењем избора, постоје значајне новине. На првом месту реч је о увођењу локалних изборних комисија, као споне између Републичке изборне комисије и бирачких одбора. У раду су приказане најзначаније новине у овој области уз критички осврт добре изборне праксе коју препоручује Венецијанска комисија. У раду је изнета бојазан да овакве делимичне и несистематске промене изборног законодавства неће суштински допринети заштити изборног права, а због кратког рока да се изборни актери упознају с новим, неретко компликованим правилима, може да дође управо до супротног ефекта. Аутор истиче да је Србији и њеним грађанима, три деценије од увођења вишестраначја, потребно унификовано и потпуно реформисано изборно законодавство у складу са највишим демократским стандардима, прилагођено потребама друштва, које су у нашој стручној јавности одавно препознате.

Кључне речи: изборна администрација, изборни закони, Република Србија, Венецијанска комисија.

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AUT DEDERE AUT JUDICARE IN INTERNATIONAL AND DOMESTIC LAW

Abstract

Maxim *aut dedere aut judicare* means that the state where the criminal is found should either extradite him or prosecute him. In this paper, the author will explain the origin of this maxim and its meaning. The first part of the paper is devoted to international law and the sources of law. The main question is whether this maxim become the part of international customary law and which of the options has the primacy. The second part is dedicated to domestic law and, in particular, one case in the jurisprudence of Serbia that has left a mark. It has shown how much human rights must be respected, but also how important political will is.

Key words: aut dedere aut judicare, extradition, international criminal law.

1. INTRODUCTION

State sovereignty and equality are the fundamental principles of international law and they could be found in the United Nations Charter. They serve to protect each state from the interference. The jurisdiction is a tool that helps state with protecting its sovereignty. As for the basis of jurisdiction, there are territorial, nationality, protective, passive personality and universal principle. The universality principle allows state that does not have any connection with the crime to exercise its jurisdiction, due to the severity of the offense. The universality jurisdiction is, among other things, often used to describe the right and the obligation of the states to prosecute or extradite when certain categories of crimes are involved.

One of the main objectives of the international criminal law is to punish the offender and to provide justice. Therefore, the guiding principle of the maxim that is the headline of this paper was that it does not matter in the territory of which state the offender is prosecuted and punished, what matters is that the justice is done. The

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maxim *aut dedere aut punire* was originally formulated by Hugo Grotius in 1625. In his famous book "De iure belli ac pacis" he wrote that king should either extradite or punish the offender. Of course, we should keep in mind that the scope of the maxim was limited to "crimes which in some way affect human society", which we could interpret today as international crimes.[1] His argument was that there is a general obligation to extradite or punish in respect to all offenses by which another state is particularly harmed, event that the state has a natural right to punish the offender and no other state should interfere.[2] Nowadays, this principle is used with the term "prosecute" instead of "punish", due to the presumption of innocence that all suspects have.[3] Historically, this principle was used as a part of duty to cooperate among the states in the preservation of their national order and in preservation of world public order and just recently, it began to apply to international crimes.[4] So, as the Special Rapporteur Mr. Galicki noted in his Preliminary Report, the formula "extradite or prosecute" is commonly used to refer to the alternative obligation regarding the treatment of an alleged offender, which is contained in a number of multilateral treaties aimed at ensuring the international cooperation in the suppression of certain types of criminal conduct.[5]

Extradition can be defined as the surrender by one state or country to another of an individual accused or convicted of a crime outside its own territory and within the territorial jurisdiction of the other, which, being competent to try and punish him, demands the surrender. This is the definition from the Black's Law Dictionary.[6] The oldest extradition treaty was made between the Egyptian Pharaoh Ramses II and the Hittite Prince Hattusili. The modern practice began to develop in the eighteenth century.[7] After that, the principle *aut dedere aut judicare* can be found in the Nuremberg and Tokyo Tribunals and then in the Statutes for the International

[1] M. Plachta, "*Aut Dedere Aut Judicare* : An Overview of the Modes of Implementation and Approaches", *Maastricht Journal of European and Comparative Law*, 6 (4), 1999, 331.
[2] M. J. Kelly, "Cheating justice by cheating death: the doctrinal collision for prosecuting foreign terrorists – passage of *aut dedere aut judicare* into customary law & refusal to extradite based on the death penalty", *Arizona Journal of International and Comparative Law*, 20 (3), 2003, 496-497.
[3] A. Caliguri, "Governing International Cooperation in Criminal Matters: The role of the *aut dedere aut judicare* Principle", *International Criminal Law Review*. 18, 2018, 245.
[4] M. C. Bassiouni, "The Penal Characteristics of Conventional International Criminal Law", *Case Western Reserve Journal of International Law*, 15 (1), 1983, 35.
[5] International Law Commission, The Obligation to Extradite or Prosecute (*aut dedere aut judicare*), Document A/CN.4/571. Preliminary report by Mr. Zdzislaw Galicki, Special Rapporteur, para 4. https://legal.un.org/ilc/documentation/english/a_cn4_571.pdf.
[6] M. J. Kelly, "Cheating justice by cheating death: the doctrinal collision for prosecuting foreign terrorists – passage of *aut dedere aut judicare* into customary law & refusal to extradite based on the death penalty", *Arizona Journal of International and Comparative Law*, 20 (3), 2003, 495.
[7] M. J. Kelly, *op. cit.*, 495.

Criminal Tribunal for Yugoslavia and the International Criminal Tribunal for Rwanda from 1993 and 1994.[8]

2. *AUT DEDERE AUT JUDICARE* IN CONTEMPORARY INTERNATIONAL LAW

It is believed that the principle *aut dedere aut judicare* still does not have the status of a customary norm. However it exists in over seventy international treaties. In order to determine the status of a customary norm, two elements are required, by virtue of Article 38, 1(b) of the Statute of the International Court of Justice. These are general practice and *opinio iuris sive necessitatis*. Most authors of contemporary doctrine think that the principle does not meet these conditions. Some authors consider that *aut dedere aut judicare* has reached the level of a what is called a "general principle of international law", but there are even some authors who would place this principle in the ranks of *jus cogens* norms. *Jus cogens* norms are also known as peremptory norms and are the norms that have the highest status in the international law.[9] Usually the norms that prohibit the international crimes, such as genocide or war crimes, have that status. A violation of such norm would give rise to an obligation that is *erga omnes* and that is to either prosecute the offender or to extradite. Still, it does not mean that there is customary law.[10]

However, there are some views that this principle is becoming part of a customary law. The narrow approach of the argument is that the duty to extradite or prosecute may become customary norm with the respect to the offense defined in one treaty and the broad approach is that the duty has become a customary norm with respect to a class of international offenses or with respect to international offenses in their entirety. This broad approach is becoming increasingly popular. It has three manifestations. The first one is that it applies the duty to those offenders who commit war crimes or crimes against humanity. The second one is that it also includes acts of international terrorism and the third one is that it extends to all international crimes.[11] The question whether *aut dedere aut judicare* became a part of customary international law was also discussed in the work of the International Law Commission. It can be concluded that there is no uniform tendency among states as to the existence of a customary rule, even though the work of the International Law

[8] E. C. W. Mack, "Does Customary International Law Obligate States to Extradite or Prosecute Individuals Accused of Committing Crimes Against Humanity?" *Minesota Journal of International Law*, 24(1), 2015, 75.
[9] M. Plachata, *op.cit.*, 333.
[10] M. Zgonec-Rožej & J. Foakes, "International Criminals: Extradite or Prosecute?" *Chatham House* briefing paper, 2013, 3.
[11] M. J. Kelly, *op. cit.*, 497-498.

Commission actually didn't provide any useful contribution to the customary nature of the principle.[12] It was included in the Draft Code of Crimes against Peace and Security of Mankind which was adopted by the International Law Commission in 1996, but it was never adopted by the states. Draft Article 9 proposed the obligation to extradite or prosecute when it comes to the core crimes with the purpose to ensure that individuals that are responsible for serious crimes be brought to justice, but it seems that it was matter of progressive development rather than a codification.[13] M. C. Bassiouni is one of the scholars who is best known in this field and, during the 1990s, he argued that this obligation does have customary status when it comes to international crimes. Unfortunately, his argument was based on the argument that the customary status was derived from nature of the crimes that is *jus cogens* and nature of the obligation that is *erga omnes* and there are two reasons why this is not suitable. First of all, the two mentioned terms and concepts do not lead to formation of customs in international law, and second of all, it doesn't seem possible that the obligation to extradite or prosecute is grounded upon the general principles of international law, that some scholars proposed.[14]

One of the most debatable questions when it comes to principle *aut dedere aut judicare* is whether these are alternative obligations or one of them has the primacy. Thus, if obligations to extradite or to prosecute are equivalent, this would mean that the state has the right to decide which of them it would pursue. However, if they are not seen as equal, then the obligation to extradite is primary one, which would mean that the duty to prosecute would arise only if the there is a bar to extradition in domestic legislation. That would also mean that the state where the crime happened has the primary responsibility to either prosecute or punish the perpetrator, but, when it comes to the state where the criminal is hiding, they only have the second obligation.[15]

When it comes to treaties, we will not discuss bilateral treaties in this paper. They are certainly an important source of law in this field. Rather, we will focus on multilateral conventions. There are several convention models.[16] The first one allows state of the *forum deprehensionis* to have freedom of choice, either to prosecute or to extradite the offender that is found in its territory. The problem is that this model only works if the bilateral relations do exist between two states. First time this was

[12] A. Caliguri, *op. cit.*, 262-263
[13] M. Zgonec-Rožej & J. Foakes, *op.cit.*, 4.
[14] R. Van Steenberghe, "The Obligation to Extradite or Prosecute – Clarifying its Nature", *Journal of International Criminal Justice*, 9, 2011, 1092.
[15] M. Plachata, *op.cit.*, 334-335.
[16] The convention models are explained in detail in: A. Caligiuri, "Governing International Cooperation in Criminal Matters: The Role of the *aut dedere aut judicare* principle", *International Criminal Law Review*, 18, 247-256.

formulated was in The Hague Convention for the Suppression of Unlawful Seizure of Aircraft from 1970 in the famous article 7. This article said that: The Contracting State in the territory of which the alleged criminal is found shall, *if it does not extradite him*, be obliged, without exception whatsoever and whether the offence was committed in its territory, to submit the case to its competent authorities fort the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary crime of a serious nature under the law of that State.[17] This clause is also known as the "Hague formula" and it is known as the model for most of the contemporary multilateral conventions. It is included in many more conventions, such as the ones that are for the suppression of terrorist offences, torture, forced disappearance of persons and etc. It used to be perceived that the two obligations, to prosecute and to extradite, are of equal weight. However, the state *forum deprehensionis* actually only has the obligation to prosecute. There is even a view, that continues this, that to extradite is only an option, if two states have the extradition treaty.

The second treaty model is the one where the primary obligation of the state where the offender is found is to extradite. Only in case of a refusal of the extradition, the obligation to prosecute arises. The International Convention for the Suppression of Counterfeiting Currency of 1929 was the first one where this model was used. This model was built based on the solidarity system and that the states should cooperate in order to punish the perpetrator, usually within one regional organization. There are also some treaties that provide that obligation to prosecute arises only if the suspect has the nationality of the requested state or if that state is more competent. That means that if the extradition is not possible, only the state that has certain interest or interest of a public order will be competent.[18]

The third model is the one where there is a third option and that is to deliver the offender to the international criminal tribunal, rather than to prosecute or extradite him and the first time this was drafted was in the Convention for the creation of an International Criminal Court back in 1937. Nowadays, this model is incorporated in the 2006 Convention against Enforced Disappearances and the 2007 African Charter on Democracy, Elections and Government.

When it comes to legal regulation, the issue of *aut dedere aut judicare* was a topic at the International Law Commission. Back in 2004 there was a recommendation of the Working-Group on the long-term programme of work. The following year the International Law Commission decided to include it and appointed Mr. Zdislaw Galicki as a Special Rapporteur. He submitted his preliminary report in

[17] Convention for the suppression of unlawful seizure of aircraft. Signed at The Hague on 16 December 1970. Article 7. https://treaties.un.org/doc/db/Terrorism/Conv2-english.pdf.
[18] R. Van Steenberghe, *op.cit.*, 1111-1112.

2006. In that report, he considered the universality of suppression, universal jurisdiction and the obligation to extradite or prosecute and the scope of that obligation. The preliminary plan of action was established.[19] The Second Report was dedicated to the similar topics, but also to the topic of the sources of the obligation to extradite or prosecute.[20] In the third report, the comments and information from Governments were received and the proposal on draft rules was given. The proposal addressed the scope of application of the draft articles, use of terms, and a treaty as a basis for the obligation to extradite or prosecute.[21] In his fourth and last report, Mr. Galicki reported on the discussions in the Sixth Committee and consideration of the sources of the obligation to extradite or prosecute. He established that the leading position when it comes to sources take the international treaty and international custom.[22] In 2009, the Commission had comments and information received from Governments. That year, the Commission established an open-ended Working Group on this topic under the Chairship of Mr. Alain Pellet who presented the oral note. The Working Group had proposed a general framework for the Commission to discuss.[23] In the following years, the Working Group on the obligation to extradite or prosecute was chaired by Mr. Enrique Candioti and Mr. Kriangsak Kittichaisaree. Since Mr. Galicki was no longer member of the Commission since 2012, no Special Rapporteur was appointed in his place. In 2014, the Commission adopted the final report on the topic and decided to conclude its consideration of the topic.[24]

3. *AUT DEDERE AUT JUDICARE* IN DOMESTIC LAW

As for domestic law, in 2009 in Serbia the Law on Mutual Legal Assistance in Criminal Matters (*Zakon o međunarodnoj pravnoj pomoći u krivičnim stvarima*) was adopted. There are four options mutual legal assistance. These are extradition of

[19] International Law Commission, The Obligation to Extradite or Prosecute (*aut dedere aut judicare*), Document A/CN.4/571. Preliminary report by Mr. Zdzislaw Galicki, Special Rapporteur, https://legal.un.org/ilc/documentation/english/a_cn4_571.pdf.
[20] International Law Commission, The Obligation to Extradite or Prosecute (*aut dedere aut judicare*), Document A/CN.4/585. Second report by Mr. Zdzislaw Galicki, Special Rapporteur, https://legal.un.org/ilc/documentation/english/a_cn4_585.pdf.
[21] International Law Commission, The Obligation to Extradite or Prosecute (*aut dedere aut judicare*), Document A/CN.4/603. Third report by Mr. Zdzislaw Galicki, Special Rapporteur, https://legal.un.org/ilc/documentation/english/a_cn4_603.pdf.
[22] International Law Commission, The Obligation to Extradite or Prosecute (*aut dedere aut judicare*), Document A/CN.4/648. Fourth report by Mr. Zdzislaw Galicki, Special Rapporteur, https://legal.un.org/ilc/documentation/english/a_cn4_648.pdf.
[23] International Law Commission, Yearbook of the International Law Commission 2009, Volume II, Part Two, Chapter IX, https://legal.un.org/ilc/reports/2009/english/chp9.pdf.
[24] International Law Commission Report, A/69/10, 2014, chapter VI, paras 57-65, https://legal.un.org/ilc/reports/2014/english/chp6.pdf.

the offender, taking over and transferring the criminal prosecution, execution of a criminal conviction and others. The international legal assistance is based on the principle of reciprocity and confidentiality of data. The extradition is permitted if it is for the purpose of criminal prosecution of the offense that can be sentenced to at least one year in prison or for the execution of the sentence for which the court of state that is asking had declared a sentence of not less than four months. The law explains the procedure of extradition before the investigating judge, an extrajudicial panel and the Minister of Justice.[25]

There was one case in Serbian jurisprudence that has left a mark in this particular area, a case of Cevdet Ayaz. The UN Committee Against Torture had decided that Serbia violated the Convention Against Torture by extraditing Mr. Ayaz in 2017. Mr. Ayaz was born in 1973 and his family lives in Turkey.[26] He is ethnically a Kurd. After he turned 18, he became a member of People's Labour Party, but moved to Iraq in the 1990s because of the situation in Turkey. He moved back in 1997 thinking that the political situation improved. Mr. Ayaz was never a member nor a supporter of groups prone to violence or political parties that were illegal or terrorist. In 2000 he went for a mandatory military service in the Turkish army and on April 6th 2001, when he was returning from the base, his bus was stopped by gendarmes and he was taken to the police station. From April 6th to 18th he was subjected to severe torture methods by the policy and finally was forced to sign confession papers on which he signed that he was one of the leaders of the Revolutionary Party of Kurdistan. He later said that he was never a member of such party. After eleven years of investigation, on November 27th 2012 he was sentenced to 15 years in prison, but before his time in prison began, he fled Turkey and travelled through Azerbaijan, the Islamic Republic of Iran, Montenegro, the Russian Federation and Ukraine. He was arrested trying to cross the border between Serbia and Bosnia and Herzegovina.[27]

Based on an arrest warrant issued by Interpol, he was arrested on November 30th, 2016, in Mali Zvornik and the hearing was held with the pre-trial judge in Šabac. Mr. Ayaz said that he left Turkey on March 30th, 2016, and that he is afraid of the serving the sentence in Turkey and that he would like to stay in Serbia. In December 2016 the Embassy of Republic of Turkey in Belgrade sent a note to Ministry of Justice in Serbia where it asked for the extradition of Mr. Ayaz so that he can continue serving the rest of his sentence, which is 10 years and 5 months out of 15

[25] Закон о међународној правној помоћи у кривичним стварима, „Службени гласник РС", бр. 20/2009.
[26] Dževdet Ajaz: Žrtva Vlade Srbije, *Danas*, 4.12.2019., https://www.danas.rs/ljudi/dzevdet-ajaz-zrtva-vlade-srbije/, приступљено 22.3.2022.
[27] Committee against Torture, Decision adopted by the Committee under article 22 of the Convention, concerning Communication No. 857/2017, 2.9.2019., para. 2.1.-2.8.

years, for the the crime of providing accommodation for those who have committed organized crime. High Court in Šabac determined that the assumptions for the extradition are fulfilled. After the Court of Appeal in Novi Sad revoked the first instance decision, High Court in Šabac again said that all the assumptions for the extradition were fulfilled, even though Court in Novi Sad determined that the appropriate translator was not there and that the crime does not exist in criminal code of Republic of Serbia. The Court of Appeal chamber had a meeting in April 2017, when Mr. Ayaz said that he is the president of the political party called the Liberation Party of Kurdistan which is a registered one. He said that he had been exposed to torture in Turkey, by using the electricity, disabling normal breathing and that he was made to sign a text where he pleaded guilty for the crime he did not commit. The Court of Appeal in Novi Sad revoked once again the decision due to the lack of appropriate translator and the lack of knowledge of the crime in case. But High Court in Šabac again decided that all the assumptions for the extradition were there. The defender of Mr. Ayaz on October 10th 2017 delivered to the court the judgment of the European Court of Human Rights from June 22nd 2006 which said that the Turkey violated articles 5, paragraphs 3 and 4 of the European Convention of Human Rights during the procedure which was before declaring judgment, mostly several days detention in police custody without judicial control, denial of the right to effective and effective remedy, when it comes to Mr. Ayaz as well. Due to the fact that his maximum duration in detention has expired, on November 11th 2017 his detention was abolished and he was ordered not to leave Banja Koviljača territory and his passport was taken from him, but he was released. But, instead of realising him, he was sent to a shelter for foreigners in Padinska Skela, without any official decision. For the fourth time, the High Court in Šabac declared all assumptions fulfilled. The defender said that the UN Committee against torture asked Serbia not to extradite until it considers her appeal, so in December 2017 the Committee declared order on temporary measures and that extradition of Mr. Ayaz to Turkey would make a violation of international obligations. The same was sent to Ministry of Justice of Republic of Serbia. Minister of Justice had issued a decision on December 15th 2017 based on which Cevdet Ayaz was extradited to Turkey on December 25th 2017.[28] The Ministry of Justice claimed that the decision from the UN Committee that Serbia should not extradite due to the possibility of torture in Turkey had arrived late, on December 18th, and the decision of his extradition was signed on December 15th.[29]

[28] S. Beljanski, "Sud u službi politike – slučaj izručenja Dževdeta Ajaza", *Glasnik Advokatske komore Vojvodine.* 2/2019, 228-232.

[29] Turski državljanin izručen uprkos preporuci Komiteta UN, *N1*, 26.12.2017., https://rs.n1info.com/vesti/a352061-turski-drzavljanin-izrucen-uprkos-preporuci-komiteta-un/, приступљено 22.3.2022.

The United Nations Committee against Torture made a decision on September 2nd 2019 that Serbia violated articles 3 and 22 of the Convention against torture. Due to the violation, the Committee considers that Serbia has an obligation to provide redress for the complainant, that would include adequate compensation of non-pecuniary damage resulting from the physical and mental harm caused. Also, Serbia should explore ways and means how to monitor the conditions of Mr. Ayaz detention in Turkey, so that it can ensure he is not subjected to treatment contrary to article 3 of the Convention, and also should inform the Committee about the results of such monitoring.[30]

4. CONCLUSION

This paper has shown that in this area, as in many others when it comes to the public international law, the political factor plays an enormous role. There are several examples of this. The principle *aut dedere aut judicare* was conceived as one that would be useful for mutual legal assistance and cooperation between states. It has existed for centuries and states have even signed many bilateral treaties considering extradition. But, when the time came for a multilateral convention to be made, the lack of political will on the part of the governments prevented its creation. The work of the International Law Commission remained inconclusive. The case of Mr. Ayaz also showed that, no matter what, human rights and freedoms must be respected, no matter what. It was discussed whether the decision of the Ministry of Justice of Republic of Serbia been made under political pressure and due to bilateral relations between Serbia and Turkey. Regardless of whether or not this is the case, it leads us back to the conclusion that international law is inseparable from international politics. It is of utmost importance to keep in mind that basic human rights must be implemented, no matter what.

[30] Committee against Torture, Decision adopted by the Committee under article 22 of the Convention, concerning Communication No. 857/2017, 2.9.2019., para. 10 and 11.

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AUT DEDERE AUT JUDICARE У МЕЂУНАРОДНОМ И УНУТРАШЊЕМ ПРАВУ

Резиме

Максима *aut dedere aut judicare* значи да је држава на чијој територији окривљени нађе дужна да га или изручи или да спроведе судски поступак. У овом раду, ауторка ће објаснити порекло ове максиме и њено значење. Први део рада посвећен је међународном праву и изворима права. Главно питање на које се тежи одговорити јесте да ли је овај принцип постао део међународног обичајног права и која од ове две обавезе има приоритет. Други део рада посвећен је унутрашњем праву и, конкретно, једном случају у судској пракси Србије који је оставио обележје. Он је показао да људска права увек морају да се поштују и колико је политичка воља важна.

Кључне речи: *aut dedere aut judicare*, изручење, међународно кривично право.

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The paper must be computer processed using the WORD program, on A4 page format, in Times New Roman font (font size 12pt, line spacing 1.5), written in Serbian, in Cyrillic (Serbian, Cyrillic Serbia). If the paper is written in one of the foreign languages in wider use in international communication, it is necessary to contain a summary and key words in the Serbian language.

The scope of the paper is one author's sheet, which, according to the previous instructions, amounts to 16 pages of computer-processed text.

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