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CONTENTS

PRAVO – teorija i praksa
Godina XXXVIII Novi Sad, 2021. Broj 1

S A D R Ž A J

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THE PROTECTION OF THE PREEMPTIVE RIGHTS OF SEPARATE AND PLEDGE CREDITORS IN THE CASE OF SALES OF ENCUMBERED PROPERTY BY A DIRECT AGREEMENT

ABSTRACT: The article reviews the regulations of Republic of Serbia, domestic legal practice, as well as the opinions of jurisprudence on the exercise and protection of the preemptive rights of separate and pledge creditors in a bankruptcy proceedings. There has been clarified the legal nature of the preemptive right on the subject of the secured right or lien. There were also provided the details related to the significance of the right of a creditor to set off its secured claim with the purchase price, in the case of a creditor being the best bidder (*credit bidding*). The article aims to present the manner of exercise of preemptive rights in the case of the method of sales of encumbered property/assets by a direct agreement, as well as the legal instruments the secured creditors may use in the case of its violation. There have been analysed the rules of procedure per lawsuit for annulment of a sale due to the violation of the preemptive rights. The deadline for a lawsuit, the content of the lawsuit which protects the preemptive right as well as the damage compensation right were especially considered.

Keywords: *bankruptcy, preemptive right, separate creditor, sales, direct agreement.*

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1. Introduction

Initiation of bankruptcy proceedings over the owner of property under mortgage or movables under pledge has a significant impact on a position of secured creditors, regardless of the fact it will not lead to the cessation of real and legal securities, since, as a rule, it disables execution of the procedure of individual enforcement and settlement outside bankruptcy proceedings (Kozar & Aleksić, 2018, p. 920). Legal prohibition of individual enforcement and settlement occurring as the process and legal consequence of initiation of bankruptcy proceedings shall refer to exercise of rights of separate and pledge creditors. This prohibition is named moratorium in jurisprudence (Obućina, 2017, p. 36) and court practice[1]. Bankruptcy framework in the Republic of Serbia limits their rights on one hand, and provides extensive guarantees on the other, by prescribing several specific institutes that additionally protect the rights of secured creditors in the procedures of bankruptcy debtor asset sales, which is the topic of this paper. Additional protection of rights is necessary especially nowadays, when the surge of new global recession results in hindered business conduct and collection of claims (Dukić Mijatović, 2013, p. 1).

Law on Bankruptcy-LB, (2009) differs separate and pledge creditors as two categories of secured creditors. The criteria for differentiation are whether the creditor has or does not have claims that are secured by mortgage or pledge over the assets of the bankruptcy debtor, that is, whether the bankruptcy debtor is simultaneously the debtor of the secured claim (debtor from the original transaction) or it is a third party (Dukić Mijatović & Mijatović, 2011). This right arises from the nature of stated real rights that includes securing specific claims of separate creditors (Čolović & Milijević, 2020, p. 128). "One should keep in mind that the separate creditor shall be entitled to priority in collection only from certain assets of the bankruptcy debtor, over which there is a secured right of right to settle. Such creditor shall not be entitled a general secured right over the entire assets of the debtor and all of its income, which would aggravate the position of the debtor" (Lazarević, 1956, p. 81). On the other hand, the pledge creditor has real legal security over the assets of the bankruptcy debtor but has no monetary claims towards the bankruptcy debtor that is secured by such secured right (Carić, Vitez, Dukić Mijatović &

[1] Odgovori utvrđeni na sednicama Odeljenja za privredne sporove Privrednog apelacionog suda od 8. i 9.11.2018. godine [Responses Determined at Meetings of Commercial Disputes Department of the Commercial Court of Appeals from 8 and 9 November 2018]. Bilten sudske prakse privrednih sudova [Bulletin of case law of commercial courts], 2/2019, pp. 108–109. Downloaded 2020, June 27 from https://pa.sud.rs/tekst/394/bilteni-sudske-prakse.php

Veselinović, 2016, p. 106). In legal theory, such persons are named "pledge creditors with claims towards third persons" (Radović, 2014, p. 249).

2. Termination of Previously Acquired Preemptive Rights as a Legal Consequence of Initiation of Bankruptcy Proceedings

The bankruptcy proceedings, as a process, starts with a petition of the creditor, debtor or liquidator, as authorized petitioners (Law on Bankruptcy-LB, 2009, Article 55, paragraph 1), while the adoption of the positive decision on such petition, in case the court determines one of the legal bankruptcy reasons, is named initiating bankruptcy proceedings (Kozar, Počuča, & Stanković, 2013, pp. 87-88).

One of the consequences of initiating bankruptcy proceedings, for the bankruptcy debtor, is termination previously acquired preemptive rights (Šarkić, Radulović & Počuča, 2019, p. 380). Initiating bankruptcy proceedings terminates contracted preemptive right (Article 527 of the Law of Contracts and Torts - LCT, 1978 (1978), as well as legal preemptive right, for example, preemptive right of the co-owner of property or owner of the neighboring agricultural land (Law on Bankruptcy-LB, 2009, Article 75). At the same time, legal preemptive right is established for the benefit of secured creditor, and persons related to them, on the subject of secured right or lien, in case of method of sales through direct agreement (Law on Bankruptcy-LB, 2009, Article 136g).

"Preemptive right may be defined as the right whose holder is authorized, in case of sales of items to which the preemptive right refers to, acquire such items prior to anyone else, through purchase in case conditions of sale are met that are determined by the owner of the item (seller)" (Cvetić, 2014, pp. 147-148).

Through termination of previously acquired preemptive rights collision with the legal preemptive right of secured creditors, over the subject of secured right or lien is avoided, that would occur had the stated consequence of bankruptcy proceedings initiation not been prescribed. This is the consequence of the effect of preemptive right as an absolute right, that has an *erga omnes* effect and, as a rule, is mutually exclusive, thus, the same item may not be subjected to two absolute rights of the same type and order at the same time, for the benefit of different title holders. However, should bankruptcy proceedings be terminated due to the adoption of the reorganization plan, and the assets that were subjected to preemptive right is not sold, the preemptive right shall be reestablished (Šarkić, Radulović & Počuča, 2019, p. 380).

3. Legal Preemptive Right of Secured Creditor on the Subject of Secured Right or Lien

Law on Amendments of the Law on Bankruptcy (2017) introduced Article 136d into the original wording of the law, establishing a legal preemptive right for the benefit of the separate, that is, pledge creditor, as well as persons related, on the subject of secured right or lien, in case of method of sales by direct agreement. Hence, in addition to the transaction (for example, contract or last will and testament), the source of preemptive right may be the law (Perović, 1986, p. 573), where the legal preemptive right is applied *erga omnes.* On the other hand, the contractual preemptive right is applied *inter partes* thus, only related to the contracting parties (for example, seller and buyer from the contract on sales with preemptive right) and can be applied related to third parties only in case of negligence in particular case (Perović, 1986, p. 573).

When assets that are subject to secured right or lien are sold through direct agreement, the secured creditor may, within five days from the reception of the notice of the bankruptcy administrator on proposed sale, that must include all the terms of the sale that is proposed, including the price and payment method (Law on Bankruptcy-LB, 2009, Article 133 paragraph 6), notify the court and the bankruptcy administrator that it accepts to purchase the subject of sales under conditions from the notice (or more favorable conditions for the bankruptcy debtor) (preemptive right). This additionally protects its position in situations where there are no public announcements of the sales process, when the method of sales is not public bidding or public collection of bids, without damaging the bankruptcy estate, since such creditor, provided that it wishes to use this right, shall be obligated to offer the same terms as offered by the best bidder, at minimum.

The establishment of preemptive right for the separate creditor in case of sales through direct agreement, enables the separate creditor, in case that he is of the opinion that adequate price has not been received, to purchase the subject of sales under the same (or more favorable for bankruptcy debtor) terms from the notice of the bankruptcy administrator on the proposed sales, where the secured claim may be settled against the amount of the purchase price (*credit bidding*) (Kozar, 2019). In case the right to credit bidding is not exercised, the secured creditor shall, simultaneously with the statement on purchase, be obligated to pay the price agreed with the third party, or deposit it with the court, in line with the application of rules on the price payment deadline (Law of Contracts and Torts - LCT, 1978, Article 528 paragraph 2 and Article 533 paragraph 4), since the rules on preemptive rights shall be

applied accordingly to the legal preemptive right (Dukić Mijatović & Kozar, 2019, p. 498).

Preemptive right may be exercised by the separate, or pledge creditors through related persons with the submission of evidence on such related relationship. This right has been primarily established due to requirements of banks as the most significant secured creditors to follow regulatory limitations of investments into fixed assets and investment real estate (Article 34 paragraph 2 of the Law on Banks (2005). This option is valid for other legal entities as well, that are not banks that act in the capacity of secured creditors.

4. Annulment of a Sale as Sanction for Preemptive Right Violation

Law on Bankruptcy-LB, 2009, does not prescribe sanctions, that is, legal consequences for the violation of preemptive rights of secured creditors (Kozar, 2019). Hence, it can be concluded that general rules from contract law shall be applied (Law of Contracts and Torts - LCT, 1978, Articles 527-532) that regulate preemptive rights: "1) Preemptive right may be regulated by law for certain persons. (2) Duration of the legal preemptive right shall not be limited. (3) Persons holding preemptive rights by law must be notified in writing on intended sale and its terms, otherwise they shall be entitled to request annulment of sales. (4) Rules on sales with preemptive rights shall be applied accordingly to the legal preemptive right" (Law of Contracts and Torts - LCT, 1978, Article 533).

It can be concluded that secured creditor with legal preemptive right over the subject of secured right or lien shall be entitled to request annulment of sales through direct agreement if not properly notified on the intended sales and its terms. At the same time, secured creditor must request the cessation of the item under the same terms, by way of a cumulative claim (Article 197 paragraph 1 of the Law on Civil Procedure (2011), with the request for sales annulment. Otherwise, in case the plaintiff (secured creditor) does not request the cession under the same terms, then there is no legal interest for a suit for sales annulment which is a process obstruction and a reason for dismissal (Poznić, 1987, p. 194).

Notice on intention, sales plan, method of cashing in, method of sales and sales deadlines shall be delivered 15 days prior to the execution of sales by direct agreement at the latest (Law on Bankruptcy-LB, 2009, Article 133 paragraphs 1 and 2).

Separate, or pledge creditor may file a suit for the annulment of sales contract by direct agreement in a subjective-objective period prescribed by

law for the annulment of the voidable contract, where the shorter subjective six-month period shall be calculated from the moment of plaintiff's learning about the transfer of ownership, that is, precise contract terms, while the longer objective five-year period shall be calculated from the transfer of title to a third party (Law of Contracts and Torts - LCT, 1978, Article 532). Shorter subjective deadline must be within the longer objective deadline. "Exercise of authority arising from preemptive right is related to strict legal, preclusive deadlines, whose expiry leads to the loss of preemptive right" (Cvetić, 2014, p. 148). Therefore, regardless of the fact the duration of the legal preemptive right is not limited by law (Law of Contracts and Torts - LCT, 1978, Article 533, paragraph 2), preclusive, subjective-objective deadline shall be applied to the sales annulment claim, as prescribed for the contracted preemptive right (Law of Contracts and Torts - LCT, 1978, Articles 532 and 533, paragraph 4).

The court practice from real estate sales disputes took position on the preclusive legal nature of the subjective deadline for the exercise of preemptive right protection: "With the expiration of the subjective deadline starting from the day of receiving knowledge about the conclusion of the real estate sales agreement, the owner of the neighboring plot shall lose the right and possibility to exercise the protection of preemptive right" (The verdict of the Supreme Court of Cassation, Rev. 1788/2017 from 13 September 2018)[2].

5. Submission to the Court of the Proposed Purchase Price, the Good Faith of the Purchaser, and Damage Compensation

"Depositing cash in the amount of market value of the real estate simultaneously with the suit is the basis for probable cause of the claim of the holder of preemptive right for the annulment of the real estate sales agreement and the request for selling the property to such holder under the same terms" (Legal opinion of the Civil Department of the Court of Appeals in Novi Sad from 26 May 2014)[3]. Due to the violation of priority in the acquisition of rights that is the essence of the preemptive right, in this way, priority purchase right is activated,

[2] Presuda Vrhovnog kasacionog suda, Rev 1788/2017 od 13.09.2018 [The verdict of the Supreme Court of Cassation, Rev. 1788/2017 from 13 September 2018]. Elektronski bilten Osnovnog suda u Novom Sadu [Electronic bulletin of the Basic Court in Novi Sad]. Downloaded 2020, June 29 from http://www.propisionline.com/Practice/Decision/58029

[3] Pravno shvatanje usvojeno na sednici Građanskog odeljenja Apelacionog suda u Novom Sadu, od 26.05.2014. godine [Legal opinion of the Civil Department of the Court of Appeals in Novi Sad from 26 May 2014], Bilten Apelacionog suda u Novom Sadu [Bulletin of the Court of Appeals in Novi Sad] 7/2016. Downloaded 2020, January 29 from http://www.propisionline.com/Practice/Decision/48388

which is also included in this right. The priority purchase right occurs only if preemptive right has been violated by concluding a contract with a third person (Cvetić, 2014, p. 148). "Preemptive right occurs where there is still no contract, and the priority purchase right occurs only after the conclusion of the valid sales agreement between the owner and the third party" (Orlić, 1978, p. 1114).

However, since the secured creditor shall be entitled to settle its secured claim with the purchase price, in case such creditor is the best bidder (*credit bidding*), it can be concluded that such creditor shall not have the obligation of simultaneous depositing the amount of the market value of the real estate with the court, in case such creditor intends to exercise its preemptive right in cumulation with the right to settle secured claims with the purchase price, in case such claim exceeds the amount of proposed purchase price. In such case separate or pledge creditor should deposit only the amount of costs of sales and other mandatory costs (property appraisal, advertising, legal obligations, etc.) that include the fee for the bankruptcy administrator (Law on Bankruptcy-LB, 2009, Article 136b). However, in case the secured claim is lower than the amount of the purchase price, that is, its portion providing the right for priority settlement, such creditor shall be obligated to deposit the amount of costs of sales and other mandatory costs, increased for the difference between the secured claim and full amount of the proposed purchase price.

Legal preemptive right shall be applied *erga omnes,* while the contracted preemptive right shall be applied *inter pares,* that is, it may be exercised towards a third party only in case of negligence in particular case (Perović, 1986, p. 576). "Right of priority purchase can always be exercised in case of violation of the legal preemptive right, and in case of violation of the contractual preemptive right only if the person to which the asset was sold was negligent, that is, if such person knew or should have known that preemptive right has been violated" (Cvetić, 2014, pp. 147-148). Therefore, one could accept a position that negligence of the third party (buyer) is not a precondition for the adoption of the claim of the separate, that is, pledge creditor, as the holder of the legal preemptive right for the annulment of sales and cessation of asset under the same terms. In this case the right to damage compensation towards the bankruptcy administrator and/or bankruptcy debtor would belong to a third party and it would be treated as an obligation of the bankruptcy estate (Kozar, 2018, p. 79), caused by actions of the bankruptcy administrator, by cashing in the bankruptcy estate.

Legislator explicitly prescribes that the bankruptcy administrator shall be liable with its personal property for any damages caused, through the performance of duties of the bankruptcy administrator, to participants of the bankruptcy

proceedings intentionally or with gross neglect (Law on Bankruptcy-LB, 2009, Article 31). Since the bankruptcy administrator is a natural person, with unique property, such administrator would be liable for damages with personal property, even if such legal provision did not exist (Kozar, 2012). However, the "liability of the administrator is limited to qualified forms of guilt" (Karanikić Mirić, 2019, p. 647). According to the interpretation prevailing in jurisprudence, the law prescribes a severe form of guilt as the basis for the liability of the bankruptcy administrator, meaning that the damage occurring due to ordinary negligence of the bankruptcy administrator (*culpa levis*) may not lead to determination of its liability (Slijepčević & Spasić, 2006, p. 70). According to one opinion, the damage caused to participants in the proceedings intentionally or with gross neglect shall be subject of joint liability of the bankruptcy administrator and the state, and in case damage was caused by ordinary neglect, then only the liability of the state shall exist (Kozar & Počuča, p. 135). There are contrary opinions in jurisprudence: "In Serbian law there is no liability for the bankruptcy administrator as per rules on out-of-contract liability for other parties. The state shall not be liable for damages caused by the bankruptcy administrator while performing his/her duties, regardless of whether such damage was caused to the participant in bankruptcy proceedings or third party. The bankruptcy administrator is a body of the bankruptcy proceedings, but not a body of the state. Bankruptcy administrator is not a state official either" (Karanikić Mirić, 2019, p. 638).

6. Conclusion

One of the consequences of opening bankruptcy proceedings is the establishment of the legal preemptive right for the benefit of secured creditors and persons related to them, over the subject of secured right or lien, in case of sales method by direct agreement. Credit bidding provides the right to the secured creditor to, in case of sales of assets under burden, use the amount of its claim instead of money to pay the price. In case the right to settle the claim with the amount of purchase price is not exercised, the secured creditor shall, simultaneously with the statement confirming the purchase, pay the price agreed with the third party, or deposit such amount with the court.

Preemptive right may be exercised through related parties, which enables the banks, as the largest creditors, to purchase certain assets of the bankruptcy debtor, following regulatory limitations of investments into fixed assets and investment real estate.

In case the holder of the legal preemptive right is not notified in writing on the intended sales and its terms, such holder shall be entitled to request

annulment of sales. With such request, the secured creditor must seek cessation of the item under the same terms by way of cumulative claim.

Preclusive objective six-month deadline for suit shall be counted from the moment of plaintiff learning about the transfer of ownership, that is, precise contract terms, where the suit cannot be filed after the expiration of the objective five-year deadline counting from the transfer of ownership to a third party.

Negligence of the purchaser shall not be a precondition for adoption of the claim for annulment of sales due to violation of legal preemptive right, and the cessation of the item to the secured creditor, under the same terms. In this case, the purchaser shall be entitled to damage compensation by the bankruptcy administrator. Liability of the bankruptcy administrator shall be limited to intention and gross negligence, as qualified forms of guilt, meaning administrator shall not be liable for damages caused by ordinary neglect to the purchaser of assets under burden or other participant in proceedings.

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ZAŠTITA PRAVA PREČE KUPOVINE RAZLUČNIH I ZALOŽNIH POVERILACA U SLUČAJU PRODAJE OPTEREĆENE IMOVINE NEPOSREDNOM POGODBOM

REZIME: U radu su analizirani propisi Republike Srbije, stavovi domaće sudske prakse, kao i mišljenja pravne nauke o ostvarivanju i zaštiti prava preče kupovine razlučnih i založnih poverilaca u stečajnom postupku. Objašnjena je pravna priroda zakonskog prava preče kupovine na predmetu razlučnog, odnosno založnog prava. Detaljno je objašnjen značaj prava poverioca da prebije svoje obezbeđeno potraživanje sa kupoprodajnom

cenom, za slučaj da je on najbolji ponudilac (*credit bidding).* Cilj rada je da se prikaže način ostvarivanja prava preče kupovine u slučaju metoda prodaje opterećene imovine neposrednom pogodbom, kao i pravna sredstva koja obezbeđeni poverioci mogu da koristite u slučaju njegove povrede. Analizirana su pravila postupka po tužbi za poništenje prodaje zbog povrede prava preče kupovine. Posebno je razmotren rok za tužbu, sadržina tužbenog zahteva kojim se štiti pravo preče kupovine, kao i pravo na naknadu štete.

Ključne reči*: stečaj, pravo preče kupovine, razlučni poverilac, prodaja, neposredna pogodba.*

References

1. Carić, S., Vitez, M., Dukić Mijatović, M., & Veselinović. J. (2016). *Privredno pravo* [*Commercial Law*]. Novi Sad: Univerzitet Privredna akademija, Fakultet za ekonomiju i inženjerski menadžment
2. Cvetić, R. (2014). Pravo preče kupovine u izvršnom postupku u Republici Srbiji [Preemptive Right in Enforcement Proceedings in the Republic of Serbia]. *Zbornik radova Pravnog fakulteta u Novom Sadu, 48*(4), pp. 147–160
3. Čolović, V., & Milijević, N. (2020). *Stečaj teorija-praksa* [*Bankruptcy Theory-Practice*]. Banja Luka: Udruženje pravnika Republike Srpske
4. Dukić Mijatović, M., & Kozar, V. (2019). *Postulati korporativnog stečaja u Republici Srbiji* [*Postulates of Corporate Bankruptcy in the Republic of Serbia*]. Novi Sad: Pravni fakultet za privredu i pravosuđe
5. Dukić Mijatović, M., & Mijatović, M. (2011). Pravni položaj razlučnih poverilaca u stečaju [Legal Status of Separate Creditors in Bankruptcy]. *Pravni život, 60* (11)*,* pp. 205–221
6. Dukić Mijatović, M. (2013). Pravni položaj poverilaca obezbeđenih potraživanja u finansijskom restruktuiranju i stečaju [Legal Status of Creditors of Secured Claims in Financial Restructuring and Bankruptcy]. *Pravo, teorija i praksa*, *30* (1-3), pp. 1–13
7. Karanikić Mirić, M. (2019). Vanugovorna odgovornost stečajnog upravnika [Extra-contractual Liability of Insolvency Administrators]. *Pravo i privreda*, *57*(4-6), pp. 627–648
8. Kozar, V. (2019). Prebijanje potraživanja i *credit bidding* u stečajnom postupku [Settlement of Claims and Credit Bidding in Bankruptcy Proceedings]. In: Kulić, M., (ed.), *Privrednopravni okvir i ekonomski*

razvoj država Jugoistočne Evrope. [*Legal framework and economic development of the countries of Southeast Europe*] (pp. 69–90). Novi Sad: Pravni fakultet za privredu i pravosuđe

9. Kozar, V., & Aleksić, N. (2018). Zabrana izvršenja i namirenja kao procesnopravna posledica otvaranja stečajnog postupka [Prohibition of Enforcement and Settlement as Process and Legal Consequence of Initiation of Bankruptcy Proceedings]. In: Mićović M. (ed.), *Savremeni pravni promet i usluge[Modern legal transactions and services*] (pp. 920–942). Kragujevac: Pravni fakultet Univerziteta u Kragujevcu
10. Kozar, V. (2018). Pravo preče kupovine obezbeđenih poverilaca u stečajnom postupku [Preemptive Right of Secured Creditors in Bankruptcy Proceedings]. *Pravni informator,*(1), pp. 34–38
11. Kozar, V., Počuča, M., & Stanković, I. (2013). *Opšti stečajni postupak [General Bankruptcy Proceedings*]. Beograd: Poslovni biro
12. Kozar, V. (2012). Građansko-pravni osnovi odgovornosti stečajnog upravnika i države u stečajnom postupku [Civil-Legal Basis of Bankruptcy Administrator and State Liability in Bankruptcy Proceedings]. *Pravo, teorija i praksa, 29* (1-3)*,* pp. 44–59
13. Kozar, V., & Počuča, M. (2011). Šteta u stečajnom postupku [Damages in Bankruptcy Proceedings]. In: Petrović, Z. (ed.), *Osiguranje, naknada štete i novi građanski sudski postupci* [*Insurance, Compensation for Damages and New Civil Court Procedures*] (pp. 135–149). Beograd: Intermex
14. Lazarević, A. (1956). *Osnovi izvršnog postupka sa stečajnim postupkom i prinudnom likvidacijom preduzeća* [*Basis of Enforcement Proceedings with Bankruptcy Proceedings and Compulsory Company Liquidation*]. Skoplje: Univerzitet u Skoplju
15. Orlić, M. (1978). Pravo preče kupovine [Preemptive Right]. In: Ristić, S., (ed.), *Enciklopedija imovinskog prava i prava udruženog rada*, *tom 2* [*Encyclopedia of Property Law and Associated Labor Law, Volume 2*] (p. 1114) Beograd: Službeni list SFRJ
16. Obućina, J. (2017). Odnos prethodnog stečajnog postupka i postupka sprovođenja izvršenja radi namirenja novčanog potraživanja na nepokretnostima [Relationship Between Prior Bankruptcy Proceedings and Enforcement Proceedings for Settlement of Monetary]. *Pravo i privreda,55* (1-3), pp. 36–49
17. Perović, S. (1986). *Obligaciono pravo* [*Contract Law*]. Beograd: NIU Službeni list SFRJ

18. Poznić, B. (1987). *Građansko procesno pravo* [*Civil Procedural Law*]. Beograd: Savremena administracija
19. Slijepčević, D., & Spasić, S. (2006). *Komentar Zakona o stečajnom postupku* [*Comment on the Law on Bankruptcy Proceedings*]. Beograd: Ces Mecon
20. Radović, M. (2014). Položaj založnih („hipotekarnih“) poverilaca u stečajnom postupku [Position of Pledge („Mortgage“) Creditors in Bankruptcy Proceedings]. *Pravo i privreda*, *52* (4-6), pp. 245–250
21. Šarkić, N., Radulović, D., & Počuča, M. (2019). *Posebni građanski postupci* [*Special Civil Procedures*]. Beograd: Pravni fakultet Univerziteta Union u Beogradu; JP Službeni glasnik
22. Zakon o stečaju [Law on Bankruptcy - LB]. *Službeni glasnik RS*, no. 104/09, 99/11, 71/12 (Odluka Ustavnog suda), 83/14, 113/17, 44/18, 95/18
23. Zakon o obligacionim odnosima [Law on Contracts and Torts - LCT]. *Službeni list SFRJ*, no. 29/78, 39/85, 45/89, 57/89, *Službeni list SRJ*, no. 31/93, (Uredba - za vreme ratnog stanja: 22/99, 23/99, 35/99, 44/99), *Službeni glasnik RS,* no. 18/20
24. Zakon o izmenama i dopunama Zakona o stečaju, [Law on Amendments of the Law on Bankruptcy]. *Službeni glasnik RS*, no. 113/17
25. Zakon o bankama [Law on Banks]. *Službeni glasnik RS*, no. 107/05, 91/10, 14/15
26. Zakon o parničnom postupku [Law on Civil Procedure]. *Službeni glasnik RS*, no. 72/11, 49/13 (Odluka Ustavnog suda), 74/13 (Odluka Ustavnog suda), 55/14, 87/18, 18/20

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THE ANALYSIS OF THE STRUCTURED FINANCIAL TRANSACTIONS AS ALTERNATIVE SOURCES OF FINANCING

ABSTRACT: It is undeniable that global financial institutions are facing the major changes taken place during the last few years. Starting with the continuous tightening of both legal and financial regulations, preparation for the introduction of Basel 3, consolidation of the industry itself, the introduction of new information and communication technologies, enhanced safeguards to prevent money laundering, globalization of financial functions and capital markets, the traditional structure of the financial services industry has suffered many changes. Technological changes have reduced the transaction costs and accelerated the transfer of knowledge between the countries all over the world. There have emerged the modern forms of financial instruments crossing the barriers of national markets. Complex financial transactions unite all participants in the global market and, at the same time, they form the relative prices of all goods, services and capital. This paper aims to analyze the mechanism of realization of the structured financial transactions of banks and specialized institutions as alternative sources of financing in the global financial market.

Keywords: *banks, specialized financial institutions, buyer's credit, supplier's credit, guarantee.*

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1. Introduction

The very process of globalization of the world economy encourages banks and specialized financial institutions to better position themselves on the global market. As an integral part of the process of globalization of the world economy, trade, investments and financial flows are globalized. "The financial system is a set of institutions and instruments through which the collection, concentration, transfers and allocation of financial resources is performed"(Dušanić, 2003, p.15). In the last decade, the banking sector of the Republic of Serbia has faced many challenges. Some of the factors that threatened to threaten the stability of banks in Serbia were the insufficiently fast transformation and recovery of the economy, the global economic crisis and global political instability. In the Republic of Serrbia, "at the end of 2017, the ten biggest banks held around 78.4% of the total assets, with only six banks holding a share over 5% (Comunale, Geis, Gkrintzalis, Moder, Polgár, Quaglietti & Savelin, 2019, p.62)". The banking sector has managed to maintained stability in Serbia during the economic crisis in the year 2008. On the other hand, the Republic of Serbia is in the process of adopting comprehensive reforms based on achieving the compatibility of the acquis communautaire with the European Union and other international standards(Vapa Tankosić, 2009a). Companies that wish to export to the European market will be faced with new requirements and risks that they do not have on the domestic market. Their customers will also demand protection that will protect their interests and investments. Most transactions involving global trade arrangements are a combination of a wide range of services that primarily protect the client from risk, providing adequate performance in the form of timely delivery, fulfillment of financial obligations and execution of payments(Vapa Tankosić, & Soleša, 2016). It is expected that the deep integration of international trade chains, which refers to macroeconomic policies that promote productive efficiency and competitiveness, will contribute to the development of comparative advantages(Vapa Tankosić, Redžepagić & Stojsavljević, 2013). For this purpose, the definition of research subject has its starting point in the modern conditions of global dynamic business with a growing level of competitive requirements that impose the need to analyze complex models of financial transaction support. The technique of structured transactions of banks and specialized financial institutions on the international financial markets, as an alternative method of export financing, is becoming increasingly important. Accordingly, this paper aims to analyze the structured financial transactions of commercial banks and specialized financial institutions in the international financial market.

2. Literature Review

Nowadays, financial institutions are aware that the traditional structure of the financial services industry itself has undergone many changes. In response to the 2008 crisis, the international research community investigated patterns of trade declineof which are potential causes: (1) declining global demand; (2) limited access to trade finance; (3) spreading the crisis through credit channels; and (4) the rise of protectionism (Park, Nayyar & Low, 2013, p. 199). The experience of the Swedish National Trade Committeeindicates that a successful trade finance process requires a strong political will, a clear strategic plan, close cooperation with the business community and a well-funded and long-term technical assistance program(Hellqvist, 2003). The history of financial innovation shows that the management of extraordinary risks associated with long-distance trade has led to the emergence of new financial instruments (Fingerand & Schuknech, 1999). Moravcsik (1989) emphasizes that trade credits are the financial lubricant of international trade. On the other hand, insurance of export claims can cover commercial risk, political risk, which includes currency non-convertibility and transfer restrictions, expropriation, which can cause non-payment by importers. "Various financial institutions in export financing have an impact on two main dimensions in the country in which it is located. First, it changes the structure of the financial sector and influences the behavior of other financial institutions (financial sector dimension). Second, it changes the incentive framework in the real sector (the real sector dimension)"(Chauffour, Saborowski & Soylemezoglu, 2010, p. 11). In an effort to increase the competitiveness of their economies, most countries at the state level have established specialized business financial institutions for export insurance and financing (Export credit agencies "ECAs")(Gianturco, 2001). Today's members of the Berne Union, the ECAs, have a mission to provide appropriate support to exports and thus contribute to its growth (MIGA, 2010). These specialized financial institutions act as a channel of state support for exports from the country in question(Yescombe, 2002). In our country, in order to encourage and improve exports and develop economic relations with foreign countries, a specialized agency AOFI was established in 2005 (Law on the Export and Export Finance Agency of the Republic of Serbia, 2005). However, as readily responding to fluctuations in global markets, commercial banks and financial institutions for export insurance and financing must also have an active "market player" approach rather than a "last resort insurer"(Vapa Tankosić, 2010). Changes in the global economic and financial environment and the growing role of the private sector in the economy are

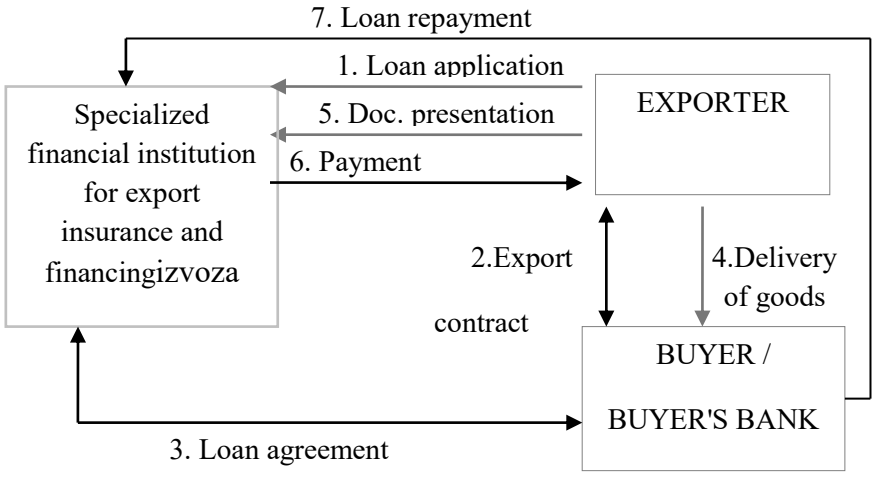
among the factors that call for a change in the business model of financial institutions for insurance and exports. Their competition is increasing every day, especially in the field of short-term receivables insurance and lending, where the private sector is increasingly active. These forms of trade finance are largely dominated by private banks, which account for 80 percent of the trade finance market. However, other actors, such as specialized financial institutions, regional development banks, multilateral financial institutions, suppliers and customers, also offer lending or insurance (Auboin, 2007).

3. Mechanism of realization of structured financial transactions of banks and specialized institutions- Buyer's credit

Buyer's Credit is loan intended to support exports, whereby the exporter's commercial bank grants a loan to the importer's bank or the importer itself, while a specialized (state) financial institution finances and secures a credit claim against commercial and political risks by issuing insurance policies in favor of the exporter's bank. The request for financing and insurance is submitted to a specialized financial institution before concluding a commercial contract. The transaction is financed in the maximum amount of 85% of the value of the commercial contract, while 15% of the value of the transaction is paid by the importer in advance. The loan to the buyer is made in such a way that the exporter, in addition to his product and service to the buyer, also offers financing to the importer. A specialized financial institution for export insurance and financing can lend to a buyer abroad: by co-financing export operations together with other banks or by independently lending to a foreign bank or a buyer abroad. The request for approval of a loan to a buyer or his bank is submitted by the exporter to a specialized financial institution for export insurance and financing, as a rule before the conclusion of the contract. Approved credit funds are paid directly to the exporter's account in the currency of the export contract, and the loan is repaid by the buyer abroad or his commercial bank. Loan repayment deadlines are defined by the OECD agreement (Vapa Tankosić, 2009b). For example, for a loan amount of USD 80,000.00 the maximum loan repayment period is 3 years, for a loan amount up to USD 175,000.00 is 4 years, for a loan amount up to USD 350,000.00 the maximum repayment period is 5 years. The credit may amount to a maximum of 100% of the value of the export contract for repayment periods of up to two years, or a maximum of 85% of the contract amount for repayment periods longer than two years. For repayment periods longer than two years, the contract must define an advance payment that must be paid before the first use of approved credit funds, in the amount of at least

15% of the contract value. The value of the contract implies the total value of the exported goods and services that the buyer has to pay (does not include local costs). Local costs include the costs of goods and services in the customer's country that are necessary to perform the contract. Given the type of goods exported, the members of the Berne Union have defined the maximum loan repayment lengths.Loan repayment by type of goods and services is defined as follows (Vapa Tankosić, 2009b): consumables with a useful life of up to 1 year and related services have a repayment period of up to 6 months; consumer goods with a useful life of over 1 year and related services have a repayment period of up to 2 years; parts and components and related services have a repayment period of up to 5 years; capital goods and related services have a repayment period of up to 10 years; financing the construction of hydro and thermal power plants, projects based on wind energy, geothermal, solar and bioenergy projects, power plant projects and projects for drinking water and drainage up to 15 years.Repayment of the loan begins when the buyer of the goods enters its physical possession in the country of import, ie. when the delivery of equipment consisting of special units individually usable, or the date when the buyer takes over the entire plant which is the subject of the contract, e.g. construction of the entire thermal power plant (unless there is a responsibility for putting it into operation, i.e. a "turnkey" contract has not been agreed). The principal can be repaid in monthly, quarterly, six-month or twelve-month equal installments.

Graph 1. Graphic representation of the Buyer's credit



Source: authors' elaboration

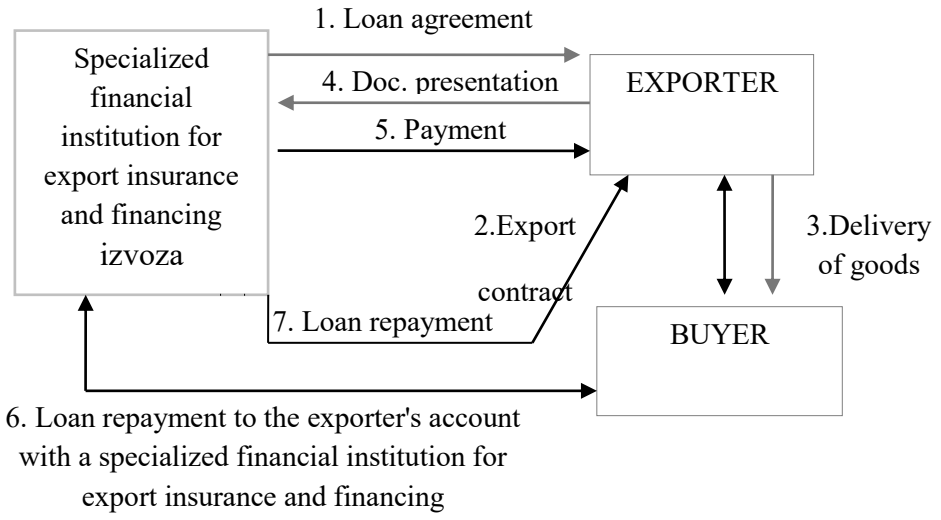
The interest rate depends on the creditworthiness of the bank, the creditworthiness of the buyer, the country of the export transaction, and can be fixed or variable. The interest rate at the time of concluding the loan agreement cannot be lower than the internationally prescribed minimum interest rate according to the EURIBOR, LIBOR or CIRR rate (CIRR-commercial reference interest rate for the currency of the export agreement sets the minimum commercial reference interest rate CIRR) Commercial Interest Reference Rate) which is published periodically (OECD, 2018, p.16): "CIRR is the commercial interest rate at which funds are placed on the domestic market, CIRR should correspond to the rate for first-class domestic borrowers, CIRR should be based on the cost of financing with fixed interest rates, CIRR shouldnot disturb competitive market conditions, CIRR should that it closely corresponds to the interest rate available for first-class foreign borrowers". For a proper execution of obligations, a specialized financial institution for export insurance and financing will require an insurance policy against political and commercial risks. The fee for processing the loan application for the end user is up to 1% one-time on the amount of the approved loan and is charged before the first use of the loan. The fee for the reservation of funds is calculated quarterly in the amount of up to 1% per year on the amount of approved and unused funds. The loan funds are paid directly to the exporter's foreign currency account.

4. Mechanism of realization of structured financial transactions of banks and specialized institutions- Supplier's credit

On the other hand, the supplier (the exporter), who is the borrower in this case, concludes a contract with the buyer abroad on the purchase of goods or services on credit. The application for credit approval to the supplier is submitted directly to a specialized financial institution for export insurance and financing, and it must contain all the elements of the transaction. The buyer abroad repays the loan to the supplier, and the supplier repays the loan to a specialized financial institution for export insurance and financing. Supplier credit is usually conditioned by the issuance of a policy of insurance of direct deliveries of goods and services against political and commercial risks, assigned to a specialized financial institution for export insurance and financing. The loan funds are paid to the supplier's account, upon fulfillment of all preconditions from the Loan Agreement. The beginning of the loan repayment period is the date when the buyer of the goods becomes its physical owner in the country of import. Repayment for durable consumer goods including related services is from 180 days to 2 years. Advance payment is not obligatory for loan repayment periods of up to 2 years. For a repayment period

longer than 2 years, an advance payment of 15% is required, payable no later than the day of the loan repayment. For equipment of high purchase value, the allowed repayment period is up to 10 years with an advance of 15%. As with the loan to the buyer and the preparation of exports, before the first use of the loan, a fee is charged for processing the loan application for the end user (up to 1% one-time on the amount of the approved loan). The fee for reserving funds is usually lower than for a loan to a buyer, it is calculated in the amount of approximately 0.25% per year, starting from the date of signing the loan agreement until the expiration of the loan. The loan funds are paid directly to the exporter's foreign currency account.It is important to emphasize that the interest rate of the credit arrangement does not have to be the same as the interest rate approved by the exporter for the commodity loan to his buyer. The exporter may participate in the crediting together with the export insurance and financing agency by approving a higher interest rate to the buyer, and if he has a surplus of inflows, after settling the obligations with the export insurance and financing agency, he may freely dispose of the same. Thus, the exporter can reimburse any costs of engaging funds through a higher interest rate than his buyer. Credit to the supplier is most often used in cases when: the importer does not want credit from the bank; the importer cannot borrow directly from banks or the exporter and the buyer have agreed in preliminary negotiations on a commodity loan by the exporter.

Graph 2. Graphic representation of the Supplier's credit



Source: authors' elaboration

There are also structured arrangements that include framework credit lines. The aim of providing framework credit lines to banks by specialized financial institutions for export insurance and financing is: to establish long-term relationships with financial institutions in countries of strategic importance for exports; enabling the competitiveness of the home country of goods and services in international markets (by approving longer repayment terms to customers abroad); increasing the liquidity of exporters and reducing the risks that exporters face when participating in international trade. Credit lines represent a somewhat more operational and faster form of lending for the sale of goods and services abroad. They function in almost the same way as a loan to a customer, only the framework credit limit and financing conditions with the customer's commercial bank abroad are determined in advance. Since relations with a commercial bank abroad are regulated in advance, this significantly shortens the loan approval process. This construction is used for the placement of consumer goods, equipment of lesser value and in cases when there are more small buyers interested in buying the goods of exporters, so it is more practical to place the funds in their commercial bank, and for it to sell them to end customers. Specialized financial institution for export insurance and financing conclude the Framework Loan Agreements with commercial foreign banks. The framework loan agreement defines the general conditions for lending to customers (clients) of foreign banks. The framework loan agreement will specify the basic loan terms, the maximum amount of all individual loan agreements that can be concluded under the Framework Loan Agreement (which will depend on the creditworthiness of the bank and the risk of the country in which it operates) and the minimum amount of each loan agreement. Upon receipt of the loan application, the specialized financial institution for export insurance and financing will enter into an individual loan agreement with a commercial bank of a foreign buyer to which the provisions of the Framework Loan Agreement will apply, and which will contain elements of an individual export transaction. The loan funds are paid directly to the foreign currency account of the exporter, after fulfilling the preconditions from the individual loan agreement, and the loan is repaid by the buyer's commercial bank, for the account of its client.

5. Conclusion

Today, in the light of an improved institutional framework, the development of global trade and financial integration, structural transformations in the organization of production, the field of traditional trade credit support

has developed significantly. International capital markets have become more sophisticated, liquid and efficient. Globalization and the financial crisis have radically increased the interdependence of countries to reconsider their trade policies and apply complex mechanisms to encourage the implementation of foreign trade arrangements. New financing instruments have been developed, international risk assessment has been improved and cooperation has been developed on financing particularly large projects and transactions of higher amounts. These forms of trade financing are largely dominated by commercial banks. The current financial situation and volatility affecting global markets require the preservation of specialized institutions that have the role of "last resort insurer" that support transactions that commercial banks cannot support on their own. They have been shown to play an important role in insuring political risks and commercial risks that occur especially in times of recession. Commercial banks typically provide a wide range of trade finance services that may not fully cover all services provided by specialized financial institutions to secure export claims. In order for such a specialized financial institution to be effective, all requirements must be met in terms of an adequate economic environment, institutional design and management structure. Foreign trade cooperation and the establishment of a clearly defined institutional system of export support certainly contributes to the growth of exports of companies from the Republic of Serbia, as well as the creation of a basis for sustainable economic development. Based on the above, having in mind the existing models of structuring financial transactions, commercial banks and specialized financial institutions, through appropriate support to foreign trade transaction mechanisms, have the opportunity to enable successful realization of economic transactions of our economic entities on the international financial market.

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ANALIZA STRUKTUIRANIH FINANSIJSKIH TRANSAKCIJA KAO ALTERNATIVNIH IZVORA FINANSIRANJA

REZIME: Nesporno je da su globalne finansijske institucije suočene sa velikim promenama koje su se odigrale u poslednjih par godina. Počev od kontinuiranog pooštrenja pravne i finansijske regulative, priprema za uvođenje Bazela 3, konsolidacije same industrije, uvođenja novih informaciono komunkacionih tehnologija, pojačanih zaštitnih mera u cilju sprečavanja pranja novca, globalizacije finansijskih funkcija i kapitalnih tržišta, tradicionalna struktura same industrije pružanja finansijskih usluga pretrpela je mnoge promene. Tehnološke promene smanjile su troškove transakcija i ubrzale transfer znanja između zemalja sveta. Pojavili su se savremeni oblici finansijskih instrumenata koji prelaze barijere nacionalnih tržišta. Složene finansijske transakcije spajaju sve učesnike na globalnom tržištu i pri tom formiraju relativne cene svih dobara, usluga i kapitala. Ovaj rad ima za cilj da analizira mehanizam realizacije struktuiranih finansijskih transakcija banaka i specijalizovanih institucija kao alternativnih izvora finansiranja na globalnom finansijskom tržištu.

Ključne reči: *poslovne banke, specijalizovane finansijske institucije, robni kredit, kredit dobavljača, garancija.*

References

1. Auboin, M. (2007). Boosting trade finance in developing countries: what link with the WTO?. *World Trade Organisation Staff Working Paper ERSD-2007-04*. DOI: 10.2139/ssrn.1086278,

2. Chauffour, J.P., Saborowski, C., & Soylemezoglu, A. I. (2010). Trade Finance in Crisis: Should Developing Countries Establish Export Credit Agencies?. *World Bank Policy Research Working Paper 5166*. DOI: 10.1596/1813-9450-5166.
3. Comunale, M., Geis, A., Gkrintzalis, I., Moder, I., Polgár, É. K., Quaglietti, L., & Savelin, L. (2019). Financial stability assessment for EU candidate countries and potential candidates. *Occasional Paper Series 233.* DOI:10.2866/447001
4. Dušanić, J. (2003). *Poslovno bankarstvo* [*Business banking*]. Srpsko Sarajevo: Konseko institute
5. Fingerand, K.M., & Schuknech L. (1999). *Trade, Finance, and Financial Crisis*, *Special Studies* 3. Geneva: World Trade Organization
6. Gianturco, D. (2001). *Export Credit Agencies: the Unsung Giants of International Trade and Finance*. Westport CT: Quorum Books
7. Hellqvist, M. (2003). *Trade Facilitation from a Developing Country Perspective*. Stockholm: Swedish National Board of Trade
8. MIGA (2010). World Investment and Political Risk. Downloaded 2020, June 12 from http://www.miga.org/documents/WIPR10ebook.pdf
9. Moravcsik, A. (1989). Disciplining Trade Finance: the OECD Export Credit Arrangement. *International Organization, 43*(1), pp. 173–205. DOI: https://doi.org/10.1017/S0020818300004598
10. OECD (2018). The arrangement on officially supported export credits. Downloaded 2020, June 14 from http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=tad/pg(2018)
11. Park, A., Nayyar, G., & Low P. (2013). *Supply Chain Perspectives and Issues: A Literature Review*. Geneva: WTO
12. Vapa Tankosić, J. (2009a). Fostering Trade in Overcoming the Global Economic Crisis. *International Journal of Euro-Mediterranean Studies* (IJEMS), *2*(1), pp. 79–97, Downloaded 2020, June 22 from https://emuni.si/wp-content/uploads/2019/02/2_079-097.pdf
13. Vapa Tankosić, J. (2009b). Dinamika razvoja međunarodne regulative u oblasti osiguranja i finansiranja izvoza uz podršku države: OECD Konsenzus [Dynamics of development of international regulations in the field of export insurance and financing with the support of the state: OECD Consensus]. *Pravo, teorija i praksa*, *26* (1-2), pp. 85–104
14. Vapa Tankosić, J., & Jevtić, A. (2010). Export Finance: A Key to Economic Recovery. In: Grabara, J., Skowron-Grabowska, B., Hanić, H., Erić D. (eds.) *Global Crisis in the Central-Eastern European Region*

Influence on financial systems and small and medium-sized enterprises (pp. 146–156). Belgrade: The Institute of Economic Sciences in Belgrade
15. Vapa Tankosić, J. (2010). Promene u poslovanju agencija za osiguranje i finansiranje izvoza [Changes in the operations of export insurance and financing agencies]. *Zbornik Matice Srpske za društvene nauke*, (133), pp. 119–131
16. Vapa Tankosić, J., Redžepagić, S., & Stojsavljević, M. (2013). Trade, Regional Integration and Economic Growth: MEDA Region and the Western Balkan Countries. In: Peeters, M., Sabri, N., Shahin, W. (eds.),*Financial Integration. Financial and Monetary Policy Studies*, 36 (pp. 215–229). Berlin, Heidelberg: Springer, https://doi.org/10.1007/978-3-642-35697-1_12
17. Vapa Tankosić, J. & Soleša, D. (2016). Strategic management models of public export credit agencies in times of crisis. In: Smoljić, M., Belaj, I. (eds.), *Development of public administration* (pp. 410–429). Vukovar: Veleučilište Lavoslav Ružička
18. Yescombe, E. R. (2002). *Principles of Project Finance*. London: Academic Press
19. Zakon o Agenciji za osiguranje i finansiranje izvoza Republike Srbije [Law on the Export and Export Finance Agency of the Republic of Serbia]. *Službeni glasnik RS*, no. 61/05

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LEGAL NATURE OF HIGHER EDUCATION INSTITUTIONS BYLAWS AND THEIR PLACE IN THE HIERARCHY OF LAW

ABSTRACT: The goals of higher education are achieved through the activities of higher education institutions, which are, in accordance with their guaranteed autonomy, performed on a basis of their bylaws and general policies. The law determines which subjects have a public authority, which subjects are competent to adopt the relevant acts as well as the general range of issues regulated by these acts. The Constitution of Republic of Serbia guarantees that everyone has the right to higher education and, in that regard, the Law on Higher Education of Republic of Serbia regulates the system of higher education, conditions, and methods of performing higher education activities including the basics of its financing and other issues. Management bodies and professional bodies of higher education institutions are specialized in adopting one type of legal acts. In this way, it is enabled these acts, according to their nature or subject matter, to be adopted appropriately. Therefore, higher education institutions, pursuant to the Law on Higher Education, regulate the area of their activities by adopting statutes, regulations, rules of procedure, and other bylaws. The aim of this paper is to point out the legal nature of higher education institutions bylaws as well as their place in the hierarchy of the legal system, and, thus, in the higher education system of Republic of Serbia.

Keywords*: Higher Education, Higher Education Institution, Bylaws, the Law on Higher Education*

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1. Introduction

The area of higher education, as a part of the international, European, educational and scientific, as well as artistic space, includes academic and vocational education. In that sense, the activity of higher education is based on the rights aimed at determining study programs, study rules and conditions of student enrollment, the right to regulate the internal organization, adoption of statutes and other bylaws important for the activity of higher education institutions, the right to elect management and other bodies, as well as the right to issue public documents, dispose of funds, use of property, but also the right to decide on the acceptance of projects on international cooperation, in accordance with the Law on Higher Education (Law on Higher Education, 2017, art. 6).

The Constitution of the Republic of Serbia guarantees the autonomy of universities, higher education institutions, and scientific institutions. Autonomy (self-legislation) theoretically necessarily implies the right to a relatively independent regulation of certain issues that are important for preserving the institutional individuality, due to which this autonomy was established (Kutlešić & Golić, 2017, p. 213). According to the constitutional guarantee, the mentioned institutions should have the possibility determined by law to independently decide on their organization and work. Their independence is not complete, because the right to self-regulation is exercised in accordance with the law, which, depending on the assessment of the legislator, leaves a narrower or broader framework of that freedom (Constitution of the Republic of Serbia, 2006, art. 72). The degree of independence is determined by the need to establish a single system, but also by the need to express the specifics that arise from this activity, in other words, it is the result of balancing between these two principles. Although different possibilities can be envisaged regarding the scope of this right, it should necessarily include the right to determine study programs, study rules and student enrollment conditions, the right to regulate internal organization, enact statutes and other bylaws, and elect management and other bodies, following the framework established by law. Moreover. the constitutional guarantee, having in mind the modern concept of higher education, should include the right to choose teachers and associates, issue public documents, dispose of financial resources, under the law, as well as the right to own and use property and the right to establish various forms of international scientific and educational cooperation and participation in projects arising from cooperation (Law on Higher Education, 2017, art. 6).

These rights are exercised with respect for human rights and freedoms, whose affirmation they serve, as well transparency towards the public. Autonomy, or "Independent behavior" is the only way in which higher education institutions can function and achieve their goals, but it also requires the obligation of the society to provide instruments that will assess the performance of autonomous institutions and means of exerting an appropriate impact on their improvement (Turajlić, 2006, p. 12).Which is performed by the adoption of certain quality standards, which they must meet in their work, and which are a condition of their existence, that are further controlled by an appropriate independent body.[1] In the higher education system of Serbia, this role falls to the National Accreditation Body (Law on Higher Education, 2017, art. 14).

An essential component of constitutionally guaranteed autonomy is the right to self-organization. Most importantly, the bodies of a higher education institution, based on the Law, within their competencies, are left with the right to adopt institutional bylaws. The competencies of higher education institutions are primarily prescribed in the Statute, as the highest general policy of the higher education institution. Considering that the activity of higher education is performed by the following higher education institutions: universities, faculties, art academies, within universities, academies of vocational studies, colleges and colleges of applied sciences, there is a difference in enactment, content, and hierarchy of different bylaws of these institutions (Law on Higher Education, 2017, art. 43).

The law created by these bodies of higher education institutions binds all entities to which the conditions provided in their acts apply, and in that regard, the institutions have their autonomous regulations. The beginnings of the understanding of autonomous law, in general, stem from the doctrine of legal pluralism, with the initial idea that in addition to state law, there is natural law, which is not related to the state and as such, stands above the state law.

2. Bylaws and General Policies

A legal act, as a set of several legal norms, is expressed and shaped in an appropriate form, and in that sense, legal norms are adopted in groups, in an organized manner, and in the prescribed form. Legal rules of conduct are the result of a set of different actions, psychological as well as material, which are regulated in a formalized procedure, whereby this collection of rules,

[1] The constitutional basis for the existence and role of such bodies is the provision on special bodies through which the regulatory function is performed referred to in Article 137, Para. 3.

regulated and shaped, is called a legal act (Kutlešić & Golić, 2017, p. 67). The characteristic of the legal system, and thus of the legal order, is reflected in the fact that it regulates its creation and thus ensures that all acts and norms that make it up are mutually consistent, acting harmoniously and fulfilling their social function (Mitrović, 2006, p. 163).

The legal order itself regulates the adoption of legal acts, where higher acts regulate not only the procedure of adoption of lower acts, but also their content, and in this regard, both important elements of each legal act are regulated - its form and content (Mitrović, 2006, p. 163). The content of a legal act consists of a norm or part of a norm that is created by an act, whereby the goal of passing an act is aimed at expressing its content, which represents the projected legal relations. However, each instrument must have its own form, a form that consists of two essential elements, the issuer of the act and the necessary procedure needed for the act to be adopted (Lukić, 1995, pp. 112-113). The form of the act is related to its content and each act must be adopted in the form that corresponds to its content.

The procedure for the adoption of legal acts is explicitly and restrictively determined, which ensures uniformity of action while minimizing the potential for different legal interpretations (Pavlović & Počuča, 2015, p. 59). Given that acts can be divided according to numerous criteria, the basic division is into general and individual legal acts. Although both acts contain norms, special significance is reflected in the general acts, because as such, they represent sources for individual acts, which, as a rule, are adopted in accordance with the general acts. As such, the general norm refers to an indefinite number of cases, and all subjects who meet the conditions provided for in the general norm are obliged to act according to it.On the other hand, an individual norm, which refers only to a certain individual, does not apply to any other subject (Lukić, 1995, p. 114).

The structure of general legal acts includes parts of one legal act, in terms of content, as well as the division of the matter, which is covered by the legal act, in certain parts of the legal act (Pajvančić, 1995, p. 28). Structuring the legal act is particularly important because, in addition to avoiding legal conflict, vagueness, it ensures transparency, coherence, and easier application of a particular act.

Bylaws adopted by the higher education institutions fulfill the previously determined properties of legal acts. Legal acts adopted by the state, primarily laws, as the most important source of law, determine the appropriate formal aspects of these acts - primarily who can issue them, but also the framework for the future content of these acts, which aims to ensure the coherence of

the system, through prescribed principles of law, higher education goals, determination of the range of issues that fall under autonomous regulation, etc.The law only determines which subjects have normative powers, which subjects are competent to adopt the relevant acts, whereas the management bodies, governing bodies, and professional bodies of higher education institutions specialize in passing certain types of acts, which enables these acts to be adopted in the best possible way, according to their need and nature.Therefore, higher education institutions, based on the Law on Higher Education, regulate their area of activity by adopting statutes, regulations, and other general acts and bylaws.

3. Legal Status of Higher Education Institutions

The basic question regarding the legal position of higher education institutions is whether they can, to what extent and with what degree of independence, adopt their own bylaws, create the so-called autonomous law, which would regulate the "internal life" of the institution (Nenadić, 2005, p. 97). To answer this question, it is necessary to point out that according to the Law on Higher Education, all decisions in the field of management, as well as governance of a higher education institution, which includes the adoption of the bylaws of the institution, like the statutes, regulations and other general acts, are adopted independently by the bodies of the institution, and their adoption does not require the consent of other entities. In this regard, the law created by the higher education institution, precisely its bodies, is binding to all entities that meet the conditions provided for in the acts of the institution and are obliged to act in accordance with them.As such, institutions have their own autonomous regulations, have a founding act, and can adopt their own bylaws.

The Constitution of the Republic of Serbia guarantees the autonomy of higher education institutions and as such, they independently decide on their organization and activity, followingthe law (Constitution of the Republic of Serbia, 2006, art. 72). Bearing in mind that this right is recognized for the sake of preserving the specifics arising from the nature of the educational and scientific activities in which they are engaged, it is clear that it is a functional autonomy, as a special form of decentralization, which includes part of the legislature and part of administrative power (Marković, 2015, pp. 401-404). The goals of higher education, which are prescribed by law, and which are aimed at the transfer of scientific, artistic, and professional knowledge, as well as providing equal conditions for acquiring higher education and lifelong learning, through a significant increase in the population with higher

education, are achieved through activities of the higher education institutions, which they perform based on general acts, both of a state level, and to a significant extent, their own autonomous regulations (Law on Higher Education, 2017, art. 3).

When it comes to autonomous law, as a theoretical concept, it is necessary to point out that it is connected with the modern understanding of legal pluralism, which, unlike the medieval teachings, is a reflection of legal particularism (territorial, personal, functional quasi-autonomy), in its modern meaning, reflects the complexity and dynamics of social relations, with a multitude of subjects of organized social life. In essence, the law is a system that develops in reality, which implies a multitude of factors that shape dynamic social relations, whose legal reflection is created by the interaction of a large number of subjects.This fact determines the situation in which the state is not the only organization that has the right to create its own law, as a system of rules with organized sanctions, but the normative system is a possibility for every social group and community (Vukadinović, 2011, pp. 165–171), and therefore, this right is given to institutions that perform higher education.

In this regard, autonomous law has two main meanings, narrower and broader, wherein the narrower sense the name autonomous law is used for social norms that have all the properties of law, including state sanction, while in another, broader sense, autonomous is viewed as the law that includes all those social norms that are not sanctioned by the state, at least not directly, but which contain important features of legality, including general and social goals, dispute resolution and organized sanctions, which are available to both state and autonomous law creators (Mitrović, 2007, p. 26). Also, the state sanction is present in certain situations, but not as an immediate one, but as a subsidiary, alternative or supplementary one.However, the existence of autonomous law, different from ordinary social rules and their orders, is based on an appropriate connection with the state, which is not exclusively related to the application of state sanctions, as an only option. The existence of the autonomy of higher education institutions by no means implies the absence of an appropriate, important and sufficient role of the state in the field of higher education.The role of the state can be observed in a much wider range of control of legality and regulation of the legal system, it encompasses a wide range of competencies, from financing, management, development, monitoring, supervision and control, care of public services, etc., resulting in a complex, multifunctional connection with autonomous bylaws, without which the existence of the system would be endangered or non-functioning.

In addition to the fact that the state regulates the system of higher education through the Law, it performs numerous administrative tasks in this area through the Ministry, as a state administration body. Also, ensuring the development and improvement of the quality of higher education is achieved through the work of the National Council for Higher Education, as a special professional body, which is responsible for setting standards for self-evaluation and quality assessment of higher education institutions, external quality control of higher education institutions, initial accreditation, accreditation of higher education institutions and accreditation of study programs (Law on Higher Education, 2017, art. 12). The Ministry of Education, Science, and Technological Development supervises the legality of the work of these institutions, in accordance with the Law on Public Administration (Law on Public Administration, 2005, art. 57, para. 1). Having in mind this diversification of tasks within the competencies of state bodies, legislative, executive, and sui generis, it is clear that the autonomy of universities and other institutions of higher education has its own framework, but also a certain space for expressing its uniqueness, among other ways, through legislative activity.

4. Higher Education Services

The services of higher education are of special importance for each country, and today it is defined as a part of a single international space. This uniqueness is ensured by the applicable principles and values on which this activity is based.Although some level of standardization, harmonization, or unification is necessarily implied in providing a single educational space on a wider, supranational level, without a doubt, the autonomy of higher education institutions is part of the list of its unique values because it implies the existence, expression, and respect of special and specific interests such as freedom of scientific thought and activity. This specificity has its formal reflection, contained in the autonomous normative regulation. Higher education, which includes academic and applied education (Law on Higher Education, 2017, art. 2), is proclaimed by the Constitution of the Republic of Serbia as one of the basic human rights, according to which all citizens have the right to access higher education, under equal conditions, whereby the establishment of higher education institutions is regulated by law (Constitution of the Republic of Serbia, 2006, art. 71).

Education, as an important factor in the development of society and humans, is a complex activity, and as such must be viewed in a complex way.The education system, and thus higher education, is an issue of special

importance for the successful development of society and is inseparable from cultural, economic, and political development, because, in addition to acquiring knowledge, it provides an increase in the social value of highly educated population, with its integral component, scientific research (Marković, 2018, pp. 1-3).

The Law on Higher Education of the Republic of Serbia, following the constitutional guarantee of human rights and autonomy of universities, regulates the system of higher education, as well as the conditions and manner of performing higher education activities, basics of financing higher education, and other issues relevant to this activity (Law on Higher Education, 2017, art. 1). The legislation provides the legal framework for the system of higher education. In this regard, the activities of higher education institutions include the organization, as well as the implementation of the study process and the implementation of teaching (Stefanović, Parezanović & Kaplarević, 2000, p. 44). In addition to performing public service, and administrative powers in the narrower sense (administrative acts, records, public documents) (Milkov, 2009, pp. 16–17), their independence includes a normative component, which is not only in the function of closer regulation of certain issues but also includes the right to independently regulate certain issues within the established legal framework.

Higher education institutions perform the activity of higher education based on public authority entrusted to them by law. Moreover, in addition to state administration bodies, as the basic holders of the administrative function, non-state entities, companies, institutions, and other organizations may also perform administrative activities, when these competencies are entrusted to them by law.Institutions, companies, and other organizations are located outside the state apparatus, they independently perform certain professional, economic, and similar activities, and thus educational activities (Milkov, 2016, p. 96). The law also regulates the system of relations between state bodies and holders of public competencies, primarily the subject and scope of supervision and supervisory competencies.

Unhindered performance of the basic activity of these non-state entities also enables a certain authority in termsof representation and imposing will on individuals and other organizations. Considering that the possibility of exercising power is not implied for non-state entities, they need explicit legal authorization to do so, they must be entrusted by law with public or administrative powers, which in turn implies the possibility to act authoritatively. They can be entrusted only with certain, precisely determined public competencies, which may include the adoption of administrative acts, by which they decide

on the rights, obligations, and legal interests of specific subjects in administrative matters. Therefore, the basis for exercising these powers can only be the law (Milkov, 2016. pp. 96–97).

In this regard, the provision of a single international space, and the optimal functioning of this public service, requires appropriate principles, according to which the basic activity of higher education is based on principles of academic freedom, autonomy, unity of teaching, research, and artistic work and innovative activities, professional work, academic integrity, harmonization with the European system of higher education and improving the academic mobility of teaching and non-teaching staff and students, ensuring the quality and efficiency of the studies, connection with pre-university education and protection of intellectual property, in knowledge transfer processes (Law on Higher Education, 2017, art. 4).

5. The Hierarchy of Higher Education Institution's Bylaws

The legal system contains the principle of hierarchy of legal acts and legal norms. All legal acts, and thus legal norms, which are contained within them, take their place in the legal order, according to the principle of hierarchy, they hold a place on a scale of higher and lower acts so that at the top are the highest, and on the base, the lower acts, under which there are only material acts, actions of execution of legal acts (Lukić, 1995, p. 156).

When it comes to the hierarchy of legal norms, and thus the hierarchy of acts, in which those norms are contained, the hierarchy of legal acts depends on their legal power. Between a vast number of legal acts, there must be a certain mutual relationship, which constitutes a complex legal order. For that reason, the question of establishing a hierarchy of norms and acts arises as a necessity, which essentially leads to the establishment of cooperation between the issuers of acts (Simović, 1998, p. 150). Besides, it is necessary to have institutional mechanisms to enforce the harmonization of legal acts according to their place in the hierarchy.

Therefore, the legal power of a legal act can be defined as a measure of influence, which one act exerts on other acts, and as a measure of mutual influence. The legal power of an act depends on its form, not on its content, although it is quite obvious that the form is dictated by the content (Vasić & Čavoški, 1996, p. 147). The hierarchy of legal acts is a reflection of the hierarchy of their issuers, and thus the formal properties of an act. In that sense, the legal hierarchy of acts is not permanent and unchangeable (Lukić, 1995, p.

157). This hierarchy is crucial for the proper functioning of the law, and thus the proper performance of higher education activities, within a single system.

Each legal act has a certain legal force, which means that each legal act has a certain place in the hierarchy of legal acts and thus has a certain degree of influence on other legal acts. In that sense, the higher the place in the hierarchy, the greater the legal power and vice versa. Therefore, legal power is a measure of the influence of the effect that one legal act has on the other (Lukić, 1995, p. 157). This power has its formal and material reflection.

The normal functioning of the legal system, and thus the realization of the interests of the state, requires that all its parts be harmoniously interconnected.In addition to horizontal harmony, it is necessary for the legal order of the country to be harmonized vertically, which means that all legal acts should be harmonized in such a way that they do not contradict each other, those with less legal force must not contradict acts of stronger legal force, all the way to the Constitution, as the highest legal act of the state (Carić, 2016, p. 15).

In this regard, it is necessary that the higher education institutions, as holders of normative powers, in regulating their relations know how to distinguish sources related to higher education and to knowingly "arrange" them according to their legal force on a certain scale, in order to properly applied the appropriate regulation to a specific case, and thus ensure the respect for legality and legal certainty in the performance of their activities (Carić, 2016, p. 15).

The hierarchy of legal acts related to higher education in the Republic of Serbia is defined and begins with the Constitution of the Republic of Serbia, the highest hierarchical act, which contains basic principles related to higher education, distribution of competencies in this area, hierarchy, and ensuring the uniformity of the legal order (Constitution of the Republic of Serbia, 2006, art. 194-195) and delegation of state competencies, followed by ratified international agreements, then the laws, with the most important legal act in this field being the Law on Higher Education. Then the bylaws are applied, adopted according to the law. The Constitution establishes the competence of the Constitutional Court to exercise broad normative control, including the harmonization of general acts of higher education institutions with the Constitution and the law (Kutlešić & Golić, 2017, p. 253).

Although formally they are among the bylaws in the case when they are adopted based on delegated legal competencies, depending on the scope of legal competencies to independently regulate certain issues, certain provisions of general acts of higher education institutions can be classified into legislation in material terms, which falls under the definition of the autonomy

of these subjects.When it comes to regulating the internal organization and determining the legal status of higher education institutions, which in this regard have certain powers in legal relations, higher education institutions in their founding and other bylaws determine or more closely regulate the basic tasks and goals, which are in line with the goals of higher education which are determined by law.

The Statute is the basic bylaw of a higher education institution, which regulates the manner of work, organization of the institution, management, and leadership, but also other issues that are important for the performance of activities and work of the higher education institution, in accordance with the Law (Law on Higher Education, 2017, art. 56). It is also important to mention that the regulations on public services are applied to the establishment and operation of higher education institutions unless otherwise regulated by the Law (Law on Higher Education, 2017, art. 43, para. 9). After the Statute, the rules of the institution follow, and then the rules of procedure of the collegial bodies of these institutions.Unlike other lower acts, certain provisions of the Statute, primarily in independent institutions, may have the character of legislation in the material sense, because they are not only or strictly implementing the law, but also have a certain creative power, the possibility of original normative creation. Among other, universities, academies of applied sciences, colleges, and colleges of applied sciences belong to independent higher education institutions. On the other hand, faculties and art academies are higher education institutions, precisely, higher education units within the university, which in legal relations act under the name of the university, which they are part of in addition to their name, following the university's Statute, which means that the university gives consent to the Statute of the higher education unit, which is part of the university. In that sense, the faculty or the art academy, but also other higher education units with the status of a legal entity, regulate their internal organization and management in their Statute in accordance with the Statute of the university (Law on Higher Education, 2017, art. 57, para. 12).

The bodies of higher education institutions are regulated by the Statute of the institution, under the law and the founding act.By appointing certain competencies of some of the bodies, the law restricts the right to self-organization, as in the case of prescribing the competencies of the management body, the University Council that adopts the Statute, at the proposal of the expert body.

Faculties are competent to adopt their general acts, usually in the form of internal rules. They must be in accordance with the bylaws of the University. They are adopted in many areas, such as: determining the manner and procedure of conducting self-evaluation, defining the manner and procedure for

determining the disciplinary responsibility of students, the manner of election and number of members of the student parliament, managing revenue, criteria for determining tuition fees, titles and employment of teaching and non-teaching staff, more detailed conditions and ways of executing the distance learning program, as well as the rules of studies.

In certain cases, provided by law, the faculty independently regulates certain issues within its competence. In this regard, the Law stipulates that the faculty may organize examinations and perform certain parts of studies, as well as organize the preparation and defense of final, master's and specialist work and doctoral dissertation, in the language of a national minority and a foreign language, in accordance with the Statute (Law on Higher Education, 2017, art. 95, para. 2).These issues fall within the scope of an independent normative scope.The bylaws also regulate the number of students who enroll in a certain study program, which cannot be higher than the number determined in the work permit, in accordance with the Statute of the faculty (Law on Higher Education, 2017,art. 105, para. 7), as well as the number and date of exams and deadlines, etc. (Law on Higher Education, 2017, art. 105, para. 7).

Certain regulations adopted by universities, as independent higher education institutions, directly create obligations for the faculties and art academies that are part of the university.They are adopted depending on how competencies are distributed between these institutions.In that sense, the procedure of preparation and conditions for the defense of the dissertation, art project, as well as criteria and conditions for transferring ECTS credits, cancelation of a study program, conditions and manner of enrolling students in accredited study programs, but also scientific research, artistic work, and evaluation of pedagogical work of teachers, are regulated by university regulations.Also, the university bylaws regulate the conditions for tenure, as well as the manner and procedure of employment and acquisition of the title of a professor, the manner of hiring visiting professors, the procedure and conditions for granting the title of professor emeritus, and the conditions and procedure for giving the teaching staff consent to work in other higher education and health institutions.

The competence of the bodies of higher education institutions also includes the adoption of another type of bylaw - the rules of procedure.The Rules of Procedure are a type of bylaw, by which the collegial bodies regulate in more detail their internal organization and work, position, and manner of exercising the rights and duties of their members.These types of bylaws are adopted by the council, senate, and student parliament, at the level

ofindependent higher education institutions, while faculties adopt the rules of procedure of their professional bodies - councils, academic council, artistic council, and student parliament.Also, in addition to prescribing the procedure for the work of permanent bodies, the rules of procedure may regulate the matter of auxiliary and temporary bodies, commissions, and boards, following the needs of the higher education institution.

The university integrates the functions of faculties and art academies, and other membersof higher education units, by implementing a unified policy, the aim of which is targeted at improving the quality of teaching, improving scientific research and artistic work, and providing support to students in academic and career development. In order to achieve these goals, the university, in addition to the above mentioned, has other competencies, which it implements in the areas of strategic planning, adoption of study programs, quality assurance and control, enrollment policy, and definition of codes of professional ethics and rules of conduct in the institution. Furthermore, the issue of international cooperation and mobility of interest to the university as a whole is regulated by the Statute of the University (Law on Higher Education, 2017, art. 58).

6. Conclusion

The legal position of higher education institutions in Serbia implies the possession of normative authorizations, that can be used to create the so-called. autonomous law of the institution, which regulates its "internal life". The Constitution of the Republic of Serbia, as the highest legal act, guarantees the autonomy of higher education institutions that independently decide on their organization and work, in accordance with the law. The Constitution guarantees autonomy, but its framework is determined by law. This framework, depending on the legislator's assessment, can be narrower or broader, with both, the danger that autonomy will be stripped of real content, for the sake of establishing a stronger, unified system, or set too wide to the extent that the existence of the system is called into question.However, this is a political issue, the resolution of which is up to the of the Parliament. Besides, the framework of that freedom is not limitless. It is determined by certain social values and generally accepted principles of policy in the field of higher education, which, although changeable, are not necessarily and completely legally regulated or determined by state bodies. The activity of higher education based on the basic principles of academic freedom, autonomy, as well as academic integrity, is of special importance for each country that aspires to be

part of a single international, educational, scientific, or artistic space. This is an essential measure of the autonomy of universities and other institutions in the field of higher education.

Under the Law on Higher Education, as the most important legal source in this field, all decisions in the area of operation, as well management of higher education institutions, which includes the adoption of institutions bylaws, like statutes, regulations, and other general acts, are independently adopted by the bodies of the institution, in accordance with the law. The law created by higher education institutions, precisely, its bodies, is binding for all subjects who meet the conditions provided in the acts of the institution. Accordingly, institutions have their own autonomous regulations, have a founding act, and can adopt their own bylaws.

Higher education institutions have, also, freedom in their scientific research and artistic work. It arises from the freedom to choose the way of interpreting the teaching content, it is also realized through the procedure of determining the underlying tasks and goals of the institution, which are in accordance with the goals of higher education established by law. This leads to the conclusion that legislative solutions do not call into question the constitutional guarantee of a university's autonomy.

Although they formally belong to bylaws, depending on the degree of independence in regulating certain issues by law, certain general acts of higher education institutions are not only used for implementing legal norms but to some extent originally regulate a certain (albeit limited) number of issues.For all higher education institutions, the Statute is the highest bylaw. It is an act of organizational character, which regulates the basic issues of the organization and work of the institution. However, the most important issues, which bring to life the legal and statutory solutions, are regulated by rules and regulations adopted by University bodies. However, there are certain limitations in their adoption or content, which higher education institutions must take into account, depending on their legal status, which is determined by the fact whether they have the status of an independent higher education institution or represent higher education institutions or higher education units within a University.

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PRAVNA PRIRODA OPŠTIH AKATA VISOKOŠKOLSKIH USTANOVA I NJIHOVO MESTO U HIJERARHIJI PRAVA

REZIME: Ciljevi visokog obrazovanja ostvaruju se kroz delatnost visokoškolskih ustanova, koju, u skladu sa garantovanom autonomijom, vrše na osnovu svojih opštih akata. Zakonom se određuje koji subjekti imaju javno ovlašćenje, odnosno koji subjekti su nadležni da donose odnosne akte, kao i opšti krug pitanja koja se tim aktima uređuju. Ustav Republike Srbije propisuje da svako ima pravo na visoko obrazovanje i u tom pogledu, Zakon o visokom obrazovanju Republike Srbije uređuje sistem visokog obrazovanja, uslove i način obavljanja delatnosti visokog obrazovanja, kao i osnove njegovog finansiranja, te druga pitanja od značaja za obavljanje ove delatnosti. Organi poslovođenja, organi upravljanja i stručni organi visokoškolskih ustanova, specijalizirani su za donošenje jedne vrste akata, čime je omogućeno da se ti akti, shodno njihovoj prirodi ili predmetu donose na odgovarajući način. Samim tim, visokoškolske ustanove, na osnovu Zakona o visokom obrazovanju, oblast svog delovanja regulišu donošenjem statuta, pravilnika, poslovnika i drugih opštih akata. Cilj rada je da se ukaže na pravnu prirodu opštih akata visokoškolskih ustanova, kao i njihovo mesto u hijerarhiji pravnog, a time i visokoobrazovnog sistema Republike Srbije.

Ključne reči*: visoko obrazovanje, visokoškolska ustanova, opšti akt, Zakon o visokom obrazovanju.*

References

1. Carić, S., Vitez, M., Dukić Mijatović, M. & Veselinović, J. (2016). *Privredno pravo* [*Commercial Law*]. Novi Sad: Fakultet za ekonomiju i inženjerski menadžment, Univerzitet Privredna akademija u Novom Sadu
2. Kutlešić, V., & Golić, D. (2017). *Uvod u pravo* [*Introduction to Law*]. Novi Sad: Pravni fakultet za privredu i pravosuđe u Novom Sadu
3. Kutlešić, V., & Golić, D. (2017). *Ustavno pravo* [*Constitutional Law*]. Novi Sad: Pravni fakultet za privredu i pravosuđe u NovomSadu
4. Lukić, R. (1995). *Teorija države i prava II. Teorija prava* [*Theory of State and Law II. Theory of Law*]. Beograd: Beogradski izdavačko – grafički zavod; Zavod za udžbenike i nastavna sredstva
5. Marković, R. (2015). *Ustavno pravo* [*Constitutional Law*]. Beograd: Pravni fakultet
6. Marković, S. (2018). Uticaj reformi visokog obrazovanja na položaj univerziteta u Republici Srbiji [The impact of higher education reforms on the position of universities in the Republic of Serbia] In: *XXIV Skup Trendovi razvoja: digitalizacija visokog obrazovanja – Trend : zbornik radova* [*Proceedings from the XXIV Conference Trends of development: Digitalization of Higher Education*] (pp. 1-3). Downloaded 2020, June 25 from:http://www.trend.uns.ac.rs/stskup/trend_2018/radovi/T1-2/T1.2-7.pdf
7. Milkov, D. (2009). *Upravno pravo – Uvodna i organizaciona pitanja* [*Administrative Law – Introductory and Organizational Questions*]. Novi Sad: Centar za izdavačku delatnost, Pravni fakultet, Univerzitet u Novom Sadu
8. Milkov, D. (2016). *Upravno pravo I – uvodna i organizaciona pitanja* [*Administrative Law I – Introductory and Organizational Questions*]. Novi Sad: Centar za izdavačku delatnost, Pravni fakultet, Univerzitet u Novom Sadu
9. Mitrović, D. (2006). *Osnovi prava*. [*Basics of Law*]. Beograd: Univerzitet Singidunum, Fakultet za turistički i hotelijerski menadžment
10. Mitrović, D. (2007). *Autonomno pravo* [*Autonomous Law*]. Beograd: Pravni fakultet, Univerziteta u Beogradu
11. Nenadić, B. (2005). Pravni položaj ogranka privrednog društva. [Legal Status of a Company Branch], *Pravo i privreda*, *5*(8), pp. 83–99
12. Pavlović, Z., & Počuča, M. (2015). *Izrada pravnih akata* [*Drafting Legal Acts*]. Novi Sad: Univerzitet Privredna akademija u Novom Sadu

13. Pajvančić, M. (1995). *Pravno normiranje* [*Legal Regulation*]. Novi Sad: Centar za izdavačku delatnost –Pravni fakultet, Univerzitet u Novom Sadu; Advokatska komora Vojvodine
14. Simović, M. (1998). O hijerarhiji pravnih normi [On the Hierarchy of Legal Norms]. *Zbornik Pravnog fakulteta u Nišu*, *38*(39), pp. 148–156
15. Stefanović, D., Parezanović, D., & Kaplarević, A. (2000). Poslovne i nastavne aktivnosti visokoškolskih ustanova u Internet okruženju. [Business and teaching activities of higher education institutions in the Internet environment]. *Management - časopis za teoriju i praksu menadžmenta,5* (17-18), pp. 44–51
16. Turlajić, S. (2006). Univerzitet i država – misija, autonomija i odgovornost [Universities and State – Mission, Autonomy and Responsibility] In: *XII skup Trendovi razvoja:Bolonjski proces i primena novog zakona* : *zbornik radova*, [*Proceedings from the XII Conference Trends of development: Bologna Process and apliccation of the new Law*] (pp. 9–13) Downloaded 2020, June 15 from: http://www.trend.uns.ac.rs/stskup/zbornik/radovi/uvodni/u1.pdf.
17. Ustav Republike Srbije [Constitution of the Republic of Serbia]. *Sl glasnik RS,* no. 98/06
18. Vasić, R., & Čavoški, K. (1996). *Uvod u pravo II* [*Introduction to Law II*]. Beograd: Draganić
19. Vukadinović, G.(2011). O pojmu autonomnog prava. [On the Notion of Autonomous Law]. *Zbornik radova Pravnog fakulteta, Novi Sad, 45*(3), pp. 163–172
20. Zakon o visokom obrazovanju [Law on Higher Education]. *Službeni glasnik RS*, no. 88/17, 27/18 – other laws, 73/18, 27/18 –other laws, 67/19 and 6/20–other laws
21. Zakon o državnoj upravi [Law on Public Administration]. *Službeni glasnik RS*, no. 79/05, 101/07, 95/10, 99/14, 47/18 and 30/18 –other laws

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ENFORCEMENT OF PUBLIC NOTARY DOCUMENTS

ABSTRACT: By passing the Law on Public Notaries, the Serbian legislator regulates the issue of the operation of public notaries, their services and activities. The modern public notary practice represents a specific legal activity which contributes to the rise of legal security and the de-congestion of courts. It also leads to a more efficient exercise of the citizens rights and the realization of their civil rights much faster and more easily. A public notary performs a public service autonomously and independently being the party's independent commissioner, and his/her participation in preparing the documents attests to their truthfulness and content. As a result, public notary documents occupy a significant place in contemporary legal transactions. According to the Law on Public Notaries, public notary documents have the property of enforceability, under certain conditions they can provide a basis to directly institute enforcement proceedings before a court of law when the stipulated conditions are satisfied. It is deemed a positive and very useful legal solution, because of which the authors will, in this paper, point out some relevant key points and specific features regarding the enforcement of public notary documents.

Key words: *public notary, public notary document, notarial act, enforceable document*

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1. Introductory considerations

Public notaries have a very long tradition, so that they have been present in all historical periods. Their roots can be found as far back as ancient Rome, where documents and other official instruments and writings played a very important part. They were protocols issued by administrations, while everyday, less important activities were recorded in the so-called home books, i.e. records. In the post-classial period, notaries were for the most part slaves, liberated slaves and quite rarely free people, whose task was to write down political speeches. In this period they were not required to have legal education, nor were they controlled by the state. On the other hand, in the third century it already became a rule for notaries to become secretaries of the emperor or the church administration. In this period, notaries were treated as senior officers (Trgovčević Prokić & Šarkić, 2013).

The notarial institution was for the first time established in our territory with the Law on Public Notaries of the Kingdom of Yugoslavia (The Law on Public notaries of the Kingdom of Yugoslavia, 1930). According to provisions of this law, public notaries were appointed by the state, which gave them public authorities. More precisely, public notaries could participate in exercising part of extra-judicial power, also performing some other duties as court commissioners. The public notary activity was connected with the exercise of public authority, which included the drawing up of documents, their certification and attestation. In addition, the legislator also envisaged the possibility for a public notary to prepare private law transactions, which required the notarial act, as well as to certify private documents, issue certificates, deposits, to act on court orders in certain procedures. The public notary activity also enabled the notaries to provide representation in parties' indisputable issues, related to the documents prepared by them. A public notary was able to perform their own duties, the duties of a court commissioner and attorneys' duties (Šarkić, 2004). On the other hand, this Law on Public notaries ceased to apply in 1944, and after World War II the profession of public notaries totally disappeared from our territories, while their duties were assumed by courts and local self-governments. The public notary institution of the Latin type was re-established by the passage of the Law on Public Notaries in 2011 (Živković & Živković, 2013). Although this Law had been applied throughout the Republic of Serbia territory since 1 September 2012, public notaries started working on 1 September 2014, after numerous alterations and amendments to the law and after the appointment of the first 93 public notaries (Šarkić, Radulović & Počuča, 2018).

The introduction of the public notary service leads to a maximum protection of legal relations, interests and statuses of citizens (Gelevski & Golić, 2008). One of the reasons for instituting the public notary service within the legal system is also a tendency towards a faster and more efficient way of realizing a final exercise of subjective rights and authorities (Jakšić, 2005). In that sense there is a general trend, aimed at avoiding costly and long-lasting court proceedings, to in a faster and simpler manner obtain documents which have the property of enforceability. This purpose is served by public notary documents which, according to the Law on Public Notaries of the Republic of Serbia, have the property of enforceability, and which provide the basis for direct institution of enforcement proceedings. Given the relevant role of public notary documents, in this paper we shall lay particular emphasis on these documents and their enforcement.

2. Public notary document types

A public notary document is a document drawn up in writing and certified by a public notary, within their powers, in a legally stipulated form which produces legally stipulated effects (Trgovčević Prokić, 2007). If any one of the specified elements is missing in a document, it may not have the status of a public document, but may have the status of a private document. Private documents on which a public notary has certified signatures, which are in fact classified as notarial certificates and certifications, or the so-called solemnized documents. The aforesaid documents have the significance of condemnatory court and administrative decisions of settlement before courts or administrative authorities (Trgovčević Prokić, 2016). According to provision of article 118 of the Law on General Administrative Procedure, a public document is defined as a document issued in the stipulated form by a government authority within the scope of its powers, which attests to what is certified or established in it (The Law on General Administrative Procedure, 2016). Speaking of the manner of drawing up, or issuing, there are three categories of notarial acts as follows: processed public notary documents, notarial certificates and notarial certifications (Đurđević, 2005). In line with provision of article 6 of the Law on Public Notaries, the legislator stipulates five types of public notary documents as follows:

1) Notarial acts - documents on legal transactions and statements drawn up by public notaries,
2) Notarial minutes – minutes on the legal and other actions performed or witnessed by public notaries,

3) Notarial certificates – certificates of facts witnessed by public notaries,
4) Notarial solemnization - non-public documents certified by public notaries, and
5) Notarial certifications - non-public documents relating to which a public notary certified a signature, or certified the authenticity of a transcript, translation or excerpt.

Depending on the type of the documents listed above, the participation of public notaries in drawing them up varies. Namely, a public notary performs notarial duties by independently taking procedural actions within its subject-matter competence, or by acting on a judicial decision. By provision of article 98 of the Law on Public Notaries, the legislator stipulated a restriction to entrusting duties to a public notary, specifying by paragraph 3 of the same article that a court shall not entrust a public notary with the duties for which the court itself is competent according to the rules of the Law governing enforcement and security interest. Šarkić and Počuča (2012) disagree with this attitude of the legislator, invoking examples from comparative legislations, and considering this provision unreasonably rigid. In addition, this could make the impression of notary-public and enforcement law being totally disconnected as the legislator specified that public notaries may not be entrusted with duties regulated by enforcement and security procedures. Besides those listed above, we also have foreign public notary documents, which under the condition of mutuality have the same legal effect as the public notary documents drawn up according to the Serbian Law on Public Notaries. However, foreign public notary documents may not have legal effects in the Republic of Serbia which they do not have according to the law of the country in line with which they are issued (article 8, paragraphs 1 and 2 of the Law on Public Notaries, 2011).

3. Public notary document as an enforceable document

A public notary document has the effect of a public document only if issued in line with provisions of the Law on Public Notaries, i.e. if its drafting and issuance comply with all the essential conditions of form and legality stipulated by the law (article 7 of the Law on Public Notaries, 2011). The legislator's attitude is supported by Stanivuk and Šarkić (2018, p. 110), who think it is correct and that the requirement relating to the existence of particular elements should be precisely and strictly formulated, in such a way that without them a public notary document may not produce any legal effects. The aforesaid is also of special importance for the fact that a public document,

among other things, serves as a proof of what is stated in it, while the probative force and presumption of truthfulness of a public document are generally refutable. Namely, it is allowed to prove that the facts in a public document were established in an incorrect way, or that the document was incorrectly drawn up (article 238, paragraph 3 of the Civil Procedure Law, 2011). On the other hand, Šarkić and Počuča (2012, p. 31) state that article 7 of the Law on Public Notaries does not correspond to reality, being totally contrary to the formal legality principle, which is applied in enforcement proceedings, with regard to enforceable documents which are enforced following the rules of enforcement proceedings. More precisely, the executive court, or enforcement officers[1] are in no way competent to review an enforceable document. And the legal provision referred to above, i.e. article 7, paragraph 1 of the Law on Public Notaries, implies that an executive court, or enforcement officer, would be empowered to review an enforceable document and suspend its enforcement if they establish that in the drawing up of a public notary document the conditions were not met which are required for a document to have the force of a public or enforceable document. In the opinion of the authors named above, this provision ought to be reconsidered given that the enforceability of a public notary document may not be refuted according to provisions of the Law on Enforcement and Security Interest. The public document property is relevant as an enforceable document is in fact a public document based on which enforcement may be requested (Šarkić & Počuča, 2017). A public notary document is an enforceable or credible document when stipulated by the law (article 7, paragraph 2 of the Law on Public Notaries, 2011). Generally speaking, the legal system of the Republic of Serbia favoured the concept in which direct enforcement may be requested on the basis of the public notary documents which have the property of an enforceable document, which is additionally supported by provisions of the Law on Enforcement and Security Interest, which stipulates enforceable documents to be those public notary documents which, according to the law governing public notary issues, have the enforceable document property.

On the other hand Šarkić and Počuča (2012, p. 27) point out that not every document drawn up by a public notary is an enforceable document. Namely, public notaries draw up acts, minutes, perform solemnization, issue

[1] It should be noted that in the Law on Enforcement and Security Interest of 2011 the legislator did not draw a terminological distinction between a professional enforcement officer and a court enforcement officer. As a result, the term public enforcement officer was introduced in the same Law in 2015 to emphasize that they carry out public authorities.

certificates and perform certifications, and only the acts specified in a legally stipulated form, provided they meet the legally stipulated conditions, may be enforceable documents. Along the same lines Stanivuk and Šarkić (2018, p. 116) advocate the view that notarial certifications should be accepted as authentic documents based on which enforcement procedures could be instituted directly. They assume that the legislator wanted to assign the enforceable property to the public notary documents in which the public notary takes an active part, i.e. draws up the documents, pays attention to their contents, instructs the parties as to the legal consequences of statements, and in which they include the explicit statement of the debtor, that in case of their liability coming due, they agree to enforcement. A public notary document has the enforceability property if it specifies the debtor's obligations of acting, non-acting, giving and suffering, if the document identifies the creditor and the debtor, the enforcement subject, the scope and manner of enforcement, and the legal basis for issuing the public notary document, if it contains the debtor's consent to enforcement, or to the fact that this document has the enforceability property, as well as that the debtor's obligation has become due (Jakšić, 2006).

According to provision of article 41 paragraph 1, point 6[2] of the Law on Enforcement and Security Interest (2015), a public notary document is a document admissible for instituting enforcement proceedings, i.e. adopting a writ of execution. By analyzing provisions of the Law on Enforcement and Security Interest, it becomes evident that according to the general rules of enforcement proceedings, the initiation of enforcement proceedings, or adopting a writ of execution is also possible in cases when we are dealing with certain public notary documents which would represent credible documents. In this way, this Law, for instance, stipulates that a credible document could include a certified document of a judgement debtor whereby they authorize a bank to transfer funds from their account to the judgement creditor's account. However, this document, or statement, is made in the form of a public notary document at a lower form level, which implies a public notary certification, and would be suitable for adopting a writ of execution. Yet, there are in theory certain doubts in this regard, with one opinion holding that this is not possible, and the opposite standpoint that this should be allowed as the parties can always resort to civil proceedings as an option to repeal the writ of execution in case when it was adopted on the basis of a credible document (Stanivuk & Šarkić, 2018).

[2] The article reads as follows: enforceable documents are the "public notary documents which have the force of an enforceable document".

According to provision of article 85, paragraph 1 of the Law on Public Notaries, a notarial act is an enforceable document if it specifies a particular obligation of performance that the parties can agree on, and if it contains an explicit statement of the obligated individual that this document may, for the purpose of realization of any performance owed, be used after the obligation due date to directly implement enforcement proceedings. Furthermore, the legislator stipulated that if the court does not carry out the enforcement proceedings, the notarial act must also include other specific elements stipulated by law (article 85, paragraph 1 of the Law on Public Notaries, 2011).

By provision of article 82 of the Law on Public Notaries, the legislator stipulated that the form of notarial acts may be applied to contracts on the disposal of the immovable property of legally incapable persons, agreements on legal support, in line with the law, mortgage contracts and lien statements if they include the explicit statement by the obligated person that, based on the mortgage contract or the lien statement, with a view to realization of any performance owed, enforcement proceedings may be directly carried out following the obligation due date, by judicial or extrajudicial means. The law does not lay down the imperative form for those contracts, so that the parties are given a wide range of options for the enforcement of public notary documents which have the property of enforceability. In the drawing up of these documents, the role of the public notary is essential. Namely, it is their duty to investigate the lawfulness of the legal transaction, to point out any identified inadequacies to the parties, to propose alterations which would ensure a greater legal security and a better protection of their interests. Furthermore, they must establish if the parties have the legal and business capacity required for undertaking a specific legal activity, and if they are authorized to undertake it. In drawing up the document, the public notary is also under obligation to warn the debtor of the enforcement consequences and the risk of undergoing enforcement on the debtor's entire property. The public notary shall include all the warnings in the relevant document. In addition, the role of a public notary is not only reflected in concluding agreements between parties, but also in certifying the enforceability of the notarial act as such (Trgovčević Prokić & Sibinović, 2016).

The notarial statement which has the enforceability property must include the debtor's consent. This consent, or statement by the debtor, must be explicit and unambiguous, in that the creditor may, following the obligation due date, carry out the direct enforcement proceedings. With that in mind, the public notary must ensure that such a statement by the debtor is made willingly and earnestly, because only then may it produce any legal effect. In addition, this statement implies that the issues in question are such that the

parties may reach an agreement about them (Šarkić & Počuča, 2017). There are no impediments to enforcing other kinds of debtors' statements and legal transactions in the form of notarial acts as well. It should be noted that in a notarial act the public notary will state the nature of the obligation that the parties agreed upon, as well as if the said obligation was fulfilled. On the basis of the parties' agreement with the aim of securing claims, a public notary may be the witness of establishing a mortgage on any real estate entered in the real estate register. A creditor may demand direct enforcement on the real estate in question upon the secured claim's coming due, if the debtor consented to that in the act (article 85, paragraph 3 of the Law on Public Notaries, 2011). In this way, a notarial act will contain a kind of security instruments, by means of which security may be achieved, the subject of the security instrument, the method of security instrument deletion from public records, subject to compliance with provisions of the law governing enforcement (Trgovčević Prokić & Sibinović, 2016). It is naturally necessary to take into account the general rules of the Civil Procedure Law (2011) which is applied in enforcement proceedings, and in turn in the procedure of enforcement of public notary documents. To be precise, a provision of article 3, paragraph 3 of the Civil Procedure Law stipulates that a court shall not allow disposals by the parties which are inconsistent with enforcement regulations, the public order, rules of morality and good morals. Along the same lines court protection may not be requested by gamblers in order to collect a gambling debt, nor may an agreement be reached by which any parent waives their right to maintenance, nor a contract on the execution of a criminal act and the compensation for its commission (Šarkić & Počuča, 2012).

3.1 The due date for the enforcement of public notary documents

A public notary is obliged to, in compliance with the free will of the parties, specify in the enforceable document the claim due date, so that a court or public enforcement officer may carry out the enforcement. Claim maturity may also be proved by certification of signatures on a private document or by solemnization, because the proving of claim maturity is subject to the legal requirement of presentation of a public or certified document. Solemnization is the verification of the contents of a private document. This term is employed in the Law on Extra-judicial Procedure (2015), while the Law on Public Notaries uses the term "certification of a non-public document", whereas other laws, such as the Law on Enforcement and Security Interest, employ the term "legally certified document". Trgovčević Prokić finds that this terminology is not

acceptable as it does not distinguish the documents in terms of their probative value (Trgovčević Prokić, 2017, p. 112).

A public notary document becomes enforceable upon the expiry of the contractual period, on the expiry of the last day agreed upon to fulfil the claim. For enforcement purposes, the public notary will, in the copy of the original document, emphasize that the period for fulfilment of the claim has expired. They shall also state the final claim fulfilment date, as well as the fact that the document has thus become enforceable. If a public notary document does not include the claim due date, it would be unacceptable for direct enforcement. If the claim due date may not be determined, i.e. the enforceable document does not specify the term for the willing fulfilment of commitments, it shall amount to eight days as of the day of delivery of the enforceable document to the judgement debtor (article 47, paragraph 1 of the Law on Enforcement and Security Interest, 2015). When conditions for voluntary compliance are met, according to the Law on Enforcement and Security Interest, the voluntary compliance period, usually lasting 15 days, begins, provided that it can be both longer or shorter if so defined by a judicial decision. If no period is stipulated by the judicial decision, enforceability shall take effect upon expiry of the 15-day period. In that regard, it is necessary to draw a distinction between enforcement and enforceability as a possibility for enforcement in terms of acceptability with regard to the condemnatory force of an enforceable document to be suitable to be enforced in line with the general rules of the Law on Enforcement Proceedings (Šarkić & Počuča, 2012). However, given that the public notary does not here attest to a verdict, but an agreement between parties, the non-existence of a specified due date prevents the realization of enforcement. As a result, this kind of notarial act may not be acceptable for enforcement and it does not have the effect of an enforceable document (Trgovčević Prokić & Sibinović, 2016). In addition, the maturity of a claim may also be determined in a corresponding civil procedure, by delivering a verdict or reaching a settlement. However, this form of settlement does not represent a desirable solution for the creditor, as the parties practically go back to the civil procedure which they wanted to avoid in the first place (Stanivuk & Šarkić, 2018).

3.2 The enforcement of a foreign public notary document

With regard to foreign public notary documents, which are directly enforceable by a foreign law, they are also directly enforceable in the Republic of Serbia if they refer to rights which are not inconsistent with the Republic of Serbia legal system, and if they contain all the elements required for enforcement by the Republic of Serbia law (article 8, paragraph 4 of the Law on Public

Notaries, 2011). It follows from the aforesaid that a notarial act which in the country of origin has the force of an enforceable document is treated in the same way in the Republic of Serbia. However, the basis for that is also the existence of all the elements stipulated by the Republic of Serbia legislation, which are essential for enforcement. This means that the legislator stipulates restrictions with regard to whether a notarial act is an enforceable document in the country of origin. It is therefore necessary for the court or enforcement officer who is to enforce the foreign public notary document, to be exceptionally knowledgeable about the regulations of the country in question, to be able to determine if it is an enforceable document. In doing so they must take into account the different legal organizations of the respective countries, any terminological confusions, and any structural issues as well (Šarkić, 2010; Živković, 2007). It could happen in certain cases, for instance, that the same notarial act was drawn up by both a domestic and a foreign public notary. In these situations the notarial act is deemed a domestic public document if certified by the seal and stamp of a domestic public notary. In any case this is in the parties' interest, so that this legal provision will positively affect the legal transactions. The aforesaid situation may occur in case of mixed marriages, or if there is a legal transaction taking place between a local and a foreign citizen (Šarkić & Počuča, 2012).

4. Conclusion

The introduction of the public notary document as an enforceable document is a very useful and positive innovation in the Republic of Serbia legislation. Namely, the possibility of instituting enforcement proceedings on the basis of public notary documents which have the enforceable capacity without previously conducting any administrative or court proceedings before other government authorities represents a benefit for private interests, or interests of the parties. Particular protection is thus provided for creditors, who can, based on public notary documents, demand enforcement to be carried out. There is a certain relief for the debtor as well, who will not be under obligation to pay the expenses of civil procedure. Furthermore, this kind of documents significantly relieves the courts and administrative authorities of certain activities, saves resources and is very efficient as well. A characteristic of public notary documents with enforceable effect is that their drawing up and contents must be strictly complied with, because if a public notary document is not drawn up in the specified form, it may not produce legal effect. In drawing up a public notary document, the public notary must pay attention to all its elements, the interests of the parties, and

the validity of the legal transaction. They must also accurately define the security instrument types, the methods of security realization in case of enforcement, as well as the security instrument object. On the other hand, the legislator also stipulated a restriction to entrusting duties to public notaries, being duties within the competence of the court, so that it is our opinion that public notaries, in view of the fact they perform their activities as impartial commissioners of the parties, guaranteeing the security of legal transactions, should also be assigned a role in enforcement proceedings.

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IZVRŠENJE JAVNOBELEŽNIČKIH ISPRAVA

REZIME: Donošenjem Zakona o javnim beležnicima srpski zakonodavac uređuje pitanje poslovanja javnih beležnika, njihovih usluga i poslova. Savremena javnobeležnička delatnost predstavlja specifičnu pravnu delatnost koja doprinosi povećanju pravne sigurnosti, rasterećenju sudova, što utiče i na efikasnije ostvarivanje prava građana, koji mogu lakše i brže da realizuju svoja građanska prava. Javni beležnik obavlja samostalno i nezavisno javnu službu i pri tome je i nezavisni poverenik stranke, a njegovo učešće prilikom sastavljanja isprava potvrđuje njihovu istinitost i sadržaj. Stoga javnobeležničke isprave zauzimaju relevantno mesto u savremenom pravnom prometu. Javnobeležničke isprave prema Zakonu o javnom beležništvu imaju svojstvo izvršnosti, pod određenim uslovima i na njihovoj bazi se može neposredno pokrenuti postupak izvršenja pred sudom kada za to postoje predviđeni uslovi, koji se smatra pozitivnim i veoma korisnim zakonskim rešenjem, zbog čega će u okviru rada autori ukazati na neke relevantne odrednice i specifičnosti koje se odnose na izvršenje javnobeležničkih isprava.

Ključne reči: *javni beležnik, javnobeležnička isprava, javnobeležničiki zapis, izvršna isprava*

References

1. Gelevski, S. & Golić, D. (2008). Javni beležnik - notar [*Public Notary*]. *Pravo - teorija i praksa, 25* (3-4), pp. 20–30
2. Jakšić, A. (2005). Notarijat kao javna služba [Notary Service as a Public Service]. In: Hiber, D. (ured.), *Javnobeležničko pravo* [*Public Notary Law*] (pp. 85–106). Beograd: Centar za publikacije Pravnog fakulteta Univerziteta u Beogradu
3. Jakšić, A. (2006). Izvršnost notarijalne isprave [The Enforceability of a Notarial Document]. In: Hiber, D. (ured.), *Javnobeležničko pravo* [*Public Notary Law*] (pp. 169–178). Beograd: Pravni fakultet
4. Stanivuk, B. & Šarkić, I. (2018). O izvršnosti javnobeležničkih isprava u Republici Srbiji [On the Enforceability of Public Notary Documents in the Republic of Serbia]. In: Šarkić, N. et al. (prir.), *Četrdeset godina izvršnog zakonodavstva u građanskim postupcima: zbornik radova* [*Forty Years of Enforcement Legislation in Civil Procedures: proceedings*] (pp. 107–123). Beograd: Pravni fakultet Univerziteta Union i Službeni glasnik
5. Trgovčević Prokić, M. (2007). *Ovlašćenja javnog beležnika* [*Public Notary Authorities*]. Beograd: Službeni glasnik
6. Trgovčević Prokić, M. (2016). Izvršna javnobeležnička isprava i sredstva obezbeđenja [The Enforceable Public Notary Document and Security Instruments]. *Evropsko zakonodavstvo*, *15* (55), pp. 124–157
7. Trgovčević Prokić, M. (2017). Javnobeležnički zapis i solemnizacija [Notarial Act and Solemnization]. *Pravni život, 66* (12), pp. 101–115
8. Trgovčević Prokić, M. & Šarkić, N. (2013). *Priručnik sa komentarom Zakona o javnom beležništvu, prilozima i obrascima* [*An Annotated Manual of the Law on Public Notaries, with appendices and forms*]. Beograd: Paragraf Co i Novi Sad: Paragraf Lex
9. Trgovčević Prokić, M. & Sibinović, Đ. (2016). Izvršna javnobeležnička isprava [Enforceable Public Notary Document]. In: Šarkić, N., (red.), *Primena novog Zakona o izvršenju i obezbeđenju: zbornik radova* [*The Implementation of the New Law on Enforcement and Security Interest: proceedings*] (pp. 289–345). Beograd: Glosarijum
10. Šarkić, N. (2004). *O javnom beležniku - notaru* [*On the Public Notary*]. Beograd: Glosarijum
11. Šarkić, N. (2010). Priznanje i izvršavanje stranih izvršnih i javnobeležničkih (notarskih) isprava [The Recognition and Enforcement of Foreign Enforceable and Public Notary Documents]. *Pravni informator, 13* (12), pp. 1–23

12. Šarkić, N. & Počuča, M. (2012). Izvršno i javno beležničko (notarsko) pravo, [Enforcement and Public Notary (Notarial) Law]. *Pravni život*, *61* (12), pp. 23–43
13. Šarkić, N. & Počuča, M. (2017). Izvršenje javnobeležničkih akata prema odredbama novog Zakona o izvršenju i obezbeđenju [The Enforcement of Notarial Acts according to Provisions of the New Law on Enforcement and Security Interest]. *Pravni život, 66* (12), pp. 83–99
14. Šarkić, N., Radulović, D. & Počuča M. (2018). *Posebni građanski postupci* [*Special Civil Procedures*]. Beograd: Pravni fakultet Univerziteta Union i Službeni glasnik
15. Živković, M. (2007). Izvršenje stranih odluka (stranih izvršnih isprava) u pravu Srbije [The Enforcement of Foreign Decisions (Foreign Enforceable Documents) in Serbia Law]. *Evropski pravnik, 2* (1), pp. 103–109.
16. Živković, M. & Živković, V. (2013). O uvođenju javnog beležništva u Srbiji [On the Introduction of Public Notaries in Serbia]. *Zbornik Pravnog fakulteta u Zagrebu*, *63* (2), pp. 433–448
17. Zakon o izvršenju i obezbeđenju [The Law on Enforcement and Security Interest]. *Sl. glasnik RS*, no. 106/15, 106/16 – authentic interpretation, 113/17 - authentic interpretation and 54/19
18. Zakon o javnim beležnicima Kraljevine Jugoslavije [The Law on Public Notaries of the Kingdom of Yugoslavia]. *Službene novine*, no. 220/30
19. Zakon o javnom beležništvu [The Law on Public Notaries]. *Službeni glasnik RS*, no. 31/11, 85/12, 19/13, 55/14 – other law, 93/14 – other law, 121/14, 6/15 i 106/15
20. Zakon o opštem upravnom postupku [The Law on General Administrative Procedure]. *Službeni glasnik RS*, no. 18/16 i 95/18 – authentic interpretation
21. Zakon o parničnom postupku [The Civil Procedure Law]. *Službeni glasnik RS*, no. 72/11, 49/13, 74/13, 55/14, 87/18 and 18/20
22. Zakon o vanparničnom postupku [The Law on Extra-Judicial Procedure]. *Službeni glasnik SRS*, no. 25/82 and 48/88 and *Službeni glasnik RS*, no. 46/95 – other law, 18/05 – other law, 85/12, 45/13 - other law, 55/14, 6/15 and 106/15 - other law

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THE PERFORMANCE OF POLICE DUTIES IN THE CONTEXT OF THE PRINCIPLES GOVERNING THE OPERATION OF THE STATE ADMINISTRATIVE AUTHORITIES

ABSTRACT: Police duties represent a part of the internal affairs performed by the Police, by applying the police authority, measures and actions. The new concept of combating crime is based on the preventive activities of the police and judiciary. In this sense, the police affairs can be approached from different aspects. The primary role of the police is in the criminal and misdemeanor procedure, but, as it can be concluded in the text of this paper, the administrative activities of the police in preventing, detecting, and solving criminal acts, misdemeanors, and other crimes are also very important. So, the paper deals with the issues that significantly helped the main topic of this research paper to be analyzed in the best possible way. This paper analyzes the issues related to the affairs of the Ministry of Internal Affairs, the organization and competence of the police, the principles of operation of the state administrative bodies, police affairs and criminal and misdemeanor procedure as well as administrative activities of the police in preventing, detecting and solving crimes and other offenses. The primary legal texts being consulted were the Law on Police and the Law on State Administration, in addition to consulting two important Rulebooks in this area - the Rulebook on police powers and the Rulebook on the manner of performing individual police duties.

Keywords: *Police Duties, State Administrative Authorities, Principles, Criminal Procedure Activities Concerning Police, Administrative Duties of the Police*

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1. Introduction

Administrative bodies have powers based on legal norms (objective law), with any discretionary activity being allowed very restrictively. In that sense, discretionary assessment and actions of administrative bodies are not absolutely exempt, nor is it considered that the administration should mechanically and strictly enforce the provisions of the law, but extremely restrictively and for reasons of expediency, the administration can be entrusted with some discretionary powers. It is explicitly stated that the administrative bodies exercise their powers in the interest of society. According to Vasiljević (2012), "in a state governed by the rule of law, the administration is law-bound, and it is only in extreme cases a free activity" (p. 20).

According to article 30, Paragraph 1 of the Law on Police "Police duties are part of internal affairs duties that are performed by the Police by way of applying police measures and actions and exercising police powers" (Law on Police, 2016). In this context, Jugović (2009) points out that "police activity is characterized by the intertwining of police and other tasks and powers in accordance with the scope and competencies. Police and other jobs and tasks are intertwined with the application of certain police and other powers, all with the aim of protecting security, human rights and performing internal affairs" (pp. 191-192). Analyzing the development of the police organization, from the traditional concept to the modern - Community policing concept, Simić and Nikač (2009) state that "the police should be: a service (efficient, effective and high-quality) and not a just force, accountable to the law and the public, transparent and recognizable, professional, people-oriented, visible and accessible, advisory and involved in the community, an organization that responds in a timely manner and acts preventively "(p. 129). Jovanović (2016) also states that "current reforms promote the view that the police is a service to citizens and a public service in the function of a safer communities, respect and protection of the right to life, physical integrity and freedom of citizens" (p. 138), and that "implementation of requirements for the improvement of the professional work of the police, the lawful application of regulations, special police powers and means of coercion" (Jovanović, 2016, p. 138) is actually the result of our country's determination to become a member of the European Union.

2. Activity of the Ministry of Internal Affairs, Organization and Competencies of the Police

Article 1 of the Law on State Administration promulgates that the state administration is a part of the executive power of the Republic of Serbia performing administrative tasks from the framework of the rights and obligations of the Republic of Serbia, and it includes ministries, administrative authorities within the ministries and special organizations (Law on State Administration 2005). Article 2 of the Law on Police stipulates that internal affairs are „ a public administration function stipulated by law, performed by the Ministry, committed to achieving and improving the safety of citizens and property, upholding the rule of law and ensuring the exercise of human and minority rights and freedoms laid down by the Constitution and statutory provisions, as well as other related tasks within the established purview and competence of the Ministry (Law on Police, 2016). Ministry of Internal affairs, according to the provisions of the Law on Ministries „performs state administration tasks related to: protection of life, protection of life, safety and property of citizens;; prevention and detection of criminal offenses and finding and apprehending the perpetrators of criminal offenses and bringing them to the competent authorities; maintenance of public order and peace; providing emergency assistance; shelters; providing the right to asembly and other gatherings of citizens; securing certain persons and facilities, including foreign diplomatic and consular missions on the territory of the Republic of Serbia; road safety, regulation and control; proposing acts related to the exercise of founding rights over the public agency responsible for traffic safety; security of the state border and control of border crossings and movement and stay in the border zone; stay of foreigners; trade and transport of weapons, ammunition, explosives and certain other dangerous substances; testing of small arms, devices and ammunition; creating conditions for access and implementation of projects within the scope of that ministry which are financed from the funds of the pre-accession funds of the European Union, donations and other forms of development assistance; fire protection; citizenship; identification number; electronic management of personal data; residence and stay of citizens; ID cards; travel documents; international assistance and other forms of international cooperation in the field of internal affairs, including readmission; illegal migration; asylum; staff training; administrative resolution in the second instance procedure on the basis of regulations on refugees, as well as other tasks determined by law “(Law on Ministries, 2020, art. 13).

Law on Police stipulates that „For performing police and other internal duties, the Police Directorate shall be established and headed by the Police Director. The Police Directorate shall comprise organizational units within its headquarters–departments, centers, units, the special unit and specialized police units, and outside its headquarters–the City of Belgrade Police Department, regional police departments, and police stations" (Law on Police, 2016, art. 22-23). Milić (2010) points out that "a police precinct is formed in the area of a police station, with or without police departments. The area of the police precinct is a part of the space where police officers of general competence perform specific tasks and activities within their competence, which is manifested in the form of action or activities of the police organization and undertaking of various measures and actions to ensure greater security in the local area" (p. 117). According to Milidragović and Milić (2019), "the organizational structure of the Police must be established to meet the security needs of the people and their property in the relevant areas, as well as to meet the obligation to act directly, concretely and urgently wherever there is a need for such action" (p. 64).

In addition to the organization, an important issue in this topic that is related to the Police[1] is certainly the issue of police competencies. We can distinguish the following competencies of the police: the affairs of the Police Directorate, the affairs of the Police Department, and the affairs of the Police Station. Table 1 explains the stated competencies of the Police. Before the table of competencies, we should mention the issues that are also relevant in this part, namely the role of the Police in the community, the actions of the Police in the case of domestic violence, as well as the actions of the Police in a state of increased risk. Article 27 of the Law on Police stipulates that "The Police shall develop cooperation and partnership with citizens and other municipal entities with the view to performing policing duties and addressing local security priorities, and shall coordinate common interests and the need to create a favorable security environment in the community, namely to build a safe democratic society." The same law stipulates that in the case of reporting domestic violence, or the threat of domestic violence, "police officers shall, in cooperation with other competent authorities, immediately take the necessary measures and actions in accordance with the law, to prevent or stop the violence which may result in the

[1] In this part, it is important to clarify what police is. So, the police, in terms of the Law on Police, represents "the central organizational unit of the Ministry, which in the performance of interior, i.e. police duties, protects and improves the safetyof citizens and property, abiding by the Constitutionally guaranteed human and minority rights and freedoms and other protected values in a democratic society, with a possibility of using the means of coercion set out in the Constitution and law" (Law on Police, 2016, art. 3).

infliction of bodily injuries or deprivation of life" (Law on Police, 2016, art. 28). Furthermore, „If circumstances or events indicate that public security may become exposed to increased risk and that human and property security may be jeopardized to a greater extent, which would require partial or full readiness of police officers and engagement of all technical resources and equipment in a part of the territory of the Republic of Serbia, the Minister shall, at the proposal of the Police Director, issue the order for carrying out tasks corresponding to the circumstances" (Law on Police, 2016, art. 29).

Table 1. Activities of the Police Directorate, Police Department, and Police Station

Activities of the Police Directorate	**Activities of the Police Department**	**Activities of the Police Station**
Prepares a strategic assessment of public safety, in cooperation with the organizational unit responsible for strategic planning;	Directly performs policing and other internal affairs tasks and implement local cooperation, in the territory of the municipality, or town, where its headquarters are located	A police station shall directly perform police duties and other internal affairs tasks and effectuate cooperation in the territory of the municipality for which it was established, within the police department.
Adopts the strategic plan of the Police	Develops the operational public security assessment	The police station shall, once a year, submit the information on its work and the security situation to the municipal assembly of the local self-government in the territory where it is located.
Participates in the development of the human resources plan, as well as in the development of professional training and capacity building programs in cooperation with the organizational unit in charge of human resources management	Adopts the police department's operational plan	

Activities of the Police Directorate	Activities of the Police Department	Activities of the Police Station
Coordinates and guides the work of police departments and organizational units within the headquarters	Harmonizes, coordinates, and guides the work of police stations/field offices and ensure the implementation of local cooperation and accountability	
Performs oversight and instructional activity in the work of police departments and organizational units within the headquarters	Performs oversight and instructional activity in the work of its organizational units	
Participates directly in the performance of certain more complex tasks within the purview of police departments	Participates, as necessary, in the performance of tasks within the police stations' purview	
Ensures the implementation of international police cooperation agreements and other international acts within its purview	Takes measures to safeguard specific persons and facilities	
Performs activities relating to international operational police cooperation	Provides regular and urgent information and reporting to the Police Directorate on occurrences and events in its area;	
Creates the required conditions for maintaining and improving the Police capabilities and preparedness for acting in situations of increased risk, emergencies, states of emergency, and war	Submits, annually, the information on its work and the security situation to the municipal assembly of the local self-government in the territory where it is located	
Carries out administrative tasks relating to citizens' status issues and issuance of public documents within its purview	Performs other tasks defined by special laws, other regulations, and general acts	
Contributes to security-police and educational-instructional activities in police work		

Source: Police Law, 2016, art. 24-26.

3. Principles of Operation of the State Administrative Bodies

According to Article 2 of the Law on State Administration, "state administration authorities are formed by law" (Law on State Administration, 2005). State administration authorities take care, in accordance with the Constitution, laws, and other acts, of the implementation of special measures in order to achieve full equality of persons and groups of persons who are essentially in an unequal position with other citizens (Kulić, 2017, p. 55). The same law determines and defines the principles of operation of state administration authorities, which are presented in the table below.

Table 2. Principles of Work of State Administration Authorities

Number	Principle	Article of the Law	The legal definition of the Principle
1	Autonomy and Legality	Article 7	State administration authorities shall be autonomous in the execution of their tasks and shall work within and in accordance with the Constitution, law, other legislation, and general acts.
2	Expertise, Impartiality, and Political Neutrality	Article 8	State administration authorities shall act in accordance with the professional rules, impartially and politically neutral and they shall be obliged to provide for everyone equal legal protection in the exercise of rights, obligations, and legal interests.
3	Efficiency in Exercise of Parties' Rights	Article 9	State administration authorities shall be obliged to enable the parties to promptly and efficiently exercise their rights and legal interests.
4	Proportionality. Respect of Parties	Article 10	When deciding on administrative procedure and undertaking administrative actions, state administration authorities shall be obliged to use means that are the most favorable for a party, providing that the means can achieve the purpose and goal of the law. State administration authorities shall be obliged to respect the person and dignity of parties.

Number	Principle	Article of the Law	The legal definition of the Principle
5	Publicity of Work	Article 11	The work of state administration authorities shall be public. State administration authorities shall be obliged to enable the public to have access to their work in accordance with the law regulating free access to information of public importance.

Source: Law on State Administration, 2005, art. 7-11

4. Police Duties

According to the provisions of the Law on Police "Police duties are part of internal affairs duties that are performed by the Police by way of applying police measures and actions and exercising police powers in order to achieve safety and protection of life, rights, and freedoms of citizens, protection of property, as well as to support the rule of law (Police Law, 2016, art. 30).

According to the provisions of the same article "Police duties include: 1) crime prevention and improvement of community safety; 2) detection and apprehension of perpetrators of criminal offenses and misdemeanors and other persons wanted by the police and bringing them before competent authorities, ensuring evidence, analyzing evidence, forensic expertise by using modern forensic methods and records; 3) detection and investigation of criminal offenses, misdemeanors and violations; 4) maintenance of public order, prevention of violence at sports events, provision of assistance in enforcements in accordance with special laws; 5) regulation, control, provision of assistance and supervision in road traffic, and other tasks set out in traffic safety regulations; 6) safeguarding of certain public gatherings, individuals, authorities, facilities and designated areas; 7) control of state borders, tasks relating to the movement and stay of foreigners, tasks related to asylum, cross-border crime, irregular migration and readmission; 8) performance of tasks set out in the regulations on weapons, private security and private investigation activity; 9) safeguarding the Ministry; 10) performance of other police duties and tasks established by law and secondary legislation adopted based on the legal powers. Also, police duties, include the tasks of managing organizational units within the Ministry (Law on Police, 2016, art. 30).

Article 31 of the same law stipulates that „The Police shall perform police duties with the aim and in such a manner as to provide everyone with equal protection of the security, rights, and freedoms, by implementing the law and the constitutional principle of rule of law," and Article 32 regulates the principles of policing, which include " professionalism, depoliticization, cooperation, cost-effectiveness and efficiency, the legality of work and proportionality in the use of police powers, as well as other principles regulating the activities of public administration authorities, and civil servants, and the procedure in administrative matters" (Law on Police, 2016).

When performing police duties, the Police shall abide by "the established and achieved standards of police procedure taking into consideration the internationally accepted standards of procedure relating to the duty to serve the citizens and the community; the response to the citizens' needs and expectations; compliance with legality and combating illegality; the exercise of human and minority rights and freedoms; non-discrimination in the performance of police tasks; proportionality in the use of means of coercion; prohibition of torture and inhuman or degrading treatment; provision of assistance to disaster victims; upholding the professional conduct and integrity; the duty to protect data secrecy; the duty to disobey unlawful orders and to report corruption" (Law on Police, 2016, art. 33).

In performing police affairs, police officers have certain duties and rights, as shown in the table below.

Table 3. Duties and rights of police officers in policing

No.	Duties and rights of police officers	Article of the Law	Explanation
1	Official weapons and means of coercion	Article 36	A police officer in the status of the authorized officer shall have the obligation and the right to carry official firearms and ammunition. Types of firearms and ammunition, as well as means of coercion, namely equipment used by police officers in the status of authorized officers, shall be prescribed by the Government

No.	Duties and rights of police officers	Article of the Law	Explanation
2	Official badge and ID card of police officers	Article 37	The Ministry shall issue an official badge and official ID card to police officers A police officer in the status of the authorized officer shall be issued an official badge with an official ID card, serving the purpose of identification and proving the capacity of the police officer during the performance of police duties or exercise of police powers. A police officer on special duty shall be issued an official ID card, serving the purpose of identification and proving the capacity of the police officer during the performance of tasks that are directly related to policing.
3	Uniform and insignia of police officers	Article 39	A police officer in the status of the authorized officer shall be assigned a uniform, insignia, and other prescribed equipment The parts, appearance, and wearing of the uniform, uniform insignia, and other equipment for police officers shall be prescribed by the Government.
4	Duty to keep confidential data	Article 40	The Police officer shall keep confidential the data acquired while performing policing duties or related thereto, in accordance with the law.
5	Duties of police officers outside working hours	Article 42	Police officers in the status of authorized officers shall perform police duties and exercise police powers also outside the working hours.
6	Duties of police officers in international police cooperation	Article 44	22Unless otherwise stipulated by an international agreement, while performing police tasks abroad, police officers may exercise the powers and use the means envisaged by an international agreement underpinning the cooperation.
7	Code of Police Ethics	Article 45	A police officer shall perform police duties in accordance with the law, other regulations, and rules of the profession and compliance with the provisions of the Code of Police Ethics.
8	Conduct and interpersonal relations	Article 46	A police officer and other employees shall, on and off duty behave in a manner that does not bring discredit to the Ministry and other employees in the Ministry.

Source: Law on Police, 2016, art. 36-46.

In this part, it is important to mention two rulebooks - the Rulebook on the manner of performing individual police work and the Rulebook on police powers.

Rulebook on the manner of performing individual police work regulates in more detail the manner of performing individual police duties determined by the Law on Police and other laws. According to Article 2 of this Rulebook „In performing police work, the police shall apply the Police Intelligence Model, which is a way of managing police work based on criminal intelligence (strategic and operational assessments of public safety, a profile of security problem, security profile of persons of interest, and other analytical products) which are the basis for making decisions in performing police duties“ (Rulebook on the manner of performing individual police work, 2018).

The Rulebook stipulates that the following is achieved through police work: 1) crime prevention and improvement of security in the community, detection and crime solving; 2) providing evidence, their analysis, criminal forensic expertise using modern forensic methods and records and detection of property derived from a criminal offense; 3) detection and solving of misdemeanors and commercial offenses; 4) detection and arrest of perpetrators of criminal offenses, misdemeanors and other wanted and their apprehension by the competent authorities; 5) maintaining public order and peace, preventing violence at sports events, providing assistance in enforcement in accordance with the law; 6) regulation, control, provision of assistance and supervision in road traffic and other activities from the regulations on traffic safety; 7) safeguardning of certain public gatherings, persons, facilities and spaces; 8) safeguarding of certain persons and objects; 9) control of the state border, activities related to the movement and stay of foreigners, activities of asylum, cross-border crime, and regular migration and readmission; 10) performing tasks determined by regulations on weapons, private security and detective activity; 11) ssafeguarding the Ministry; 12) performing other police tasks and duties determined by law and by-laws of the Ministry issued on the basis of authorizations from the law.

The Rulebook on Police Powers “prescribes the manner of application of police powers, the manner of conduct of police officers towards apprehended and detained persons, the manner of conduct of police officers in the application of criminal-tactical and forensic methods and means, closer manner of proceeding when receiving found items, manner of use of means of coercion, manner of assessment of justification and regularity of use of means of coercion and control of the use of means of coercion” (Rulebook on police powers, 2019, art. 1).

Furthermore, according to the provisions of the Rulebook, “before exercising the police authority, the police officer will in each specific case assess

whether they can safely exercise the police authority, without endangering their own and the safety of others." During the exercise of police authority, a police officer who exercises police authority, as well as a police officer who is present at the place of performance of police authority, but does not directly apply it, must always be ready to repel any attack from himself or another person or to prevent possible self-harm. or the escape of a person towards whom a police power is exercised " (Rulebook on police powers, 2019, art. 3).

The same article stipulates that "if a police officer assesses that he/she cannot safely exercise police authority, he/she shall immediately inform the organizational unit responsible for the permanent duty of his / her organizational unit or immediate supervisor and request the necessary assistance to perform his / her official task". while Article 4 stipulates that "when exercising police duties, a police officer shall prepare a report on the exercised police duty" (Rulebook on police powers, 2019, art. 3-4).

5. Criminal Procedure, Misdemeanor, and Administrative Duties of the Police During the Prevention, Detection, and Solving of Criminal Offenses and other Crimes

The criminal procedure activity of the police includes a group of various "criminalistic, criminal procedure and related activities of the police in the prevention and suppression of crime, the performance of which perform a special part of their activities and perform their criminal procedure function" (Miletić, 2004, p. 52).

According to Jovanović (2016), "public confidence in the work and efficiency of the police largely depends on the success of the police in the prevention of criminal acts and in detecting criminal acts with an unknown perpetrator and solving them. More precisely, with this activity, the police contribute to the function of criminal prosecution and the judicial function in criminal matters. This is done through police (operational) work, collecting data and evidence, which is obtained through criminal work and the application of police powers. Namely, these powers are not only criminal procedural, but also police authority, and sometimes basically the same action occurs as procedural, sometimes as misdemeanor procedure, and sometimes as administrative "(p. 142).

Other authors have a similar attitude. Namely, according to Jugović (2013), "since these powers, as well as the entire activity, is determined by a special legal regime, indirectly, through the application of police powers stipulated by the Law on Police which have the character of administrative actions, and only when they have this character, the administrative activity also occurs - therefore, insignificantly and exceptionally" (p. 67).

6. Conclusion

The new concept of combating crime is based on the preventive activities of the police and the judiciary. In this sense, police affairs can be approached from different aspects. The primary role of the police is in the criminal and misdemeanor procedure, but, as concluded in the text of this paper, the administrative activities of the police in preventing, detecting, and solving criminal acts, misdemeanors, and other crimes are also very important.

In this sense, the paper deals with issues that significantly helped to analyze the main topic of this research paper in the best possible way. This paper analyzes issues related to the affairs of the Ministry of Internal Affairs, organization and competence of the police, principles of operation of state administrative bodies, police affairs, and criminal and misdemeanor procedure, as well as administrative activities of the police in preventing, detecting and solving crimes and other offenses. The primary legal texts that were consulted were the Law on Police and the Law on State Administration, in addition to consulting two important Rulebooks in this area - the Rulebook on police powers and the Rulebook on the manner of performing individual police duties.

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OBAVLJANJE POLICIJSKIH POSLOVA U KONTEKSTU NAČELA KOJIMA JE UREĐENO DELOVANJE ORGANA DRŽAVNE UPRAVE

REZIME: Policijski poslovi su deo unutrašnjih poslova koje obavlja Policija, primenom policijskih ovlašćenja, mera i radnji. Nov koncept suprotstavljanja kriminalu zasnovan je na preventivnim aktivnostima policije i pravosuđa. U tom smislu, aktivnosti policije mogu da se analiziraju sa različitih aspekata. Primarna uloga policije jeste krivičnoprocesna i prekršajna, ali, kao što se i u samom tekstu rada moglo zaključiti, vrlo su

značajne i upravne aktivnosti policije prilikom sprečavanja, otkrivanja i rasvetljavanja krivičnih dela, prekršaja i drugih delikata. U tom smislu, rad se bavio pitanjima koja su značajno pomogla da se osnovna tema rada analizira na što bolji način. U radu su analizirana pitanja u vezi sa poslovima Ministarstva unutrašnjih poslova, organizacijom i nadležnošću policije, načelima delovanja organa državne uprave, policijskim poslovima, te krivičnoprocesnim, prekršajnim i upravnim aktivnostima policije prilikom sprečavanja, otkrivanja i rasvetljavanja krivičnih dela i drugih delikata. Primarni zakonski tekstovi koji su pritom konsultovani su Zakon o policiji i Zakon o državnoj upravi, uz konsultovanje i dva značajna pravilnika u ovoj oblasti - Pravilnika o policijskim ovlašćenjima i Pravilnika o načinu obavljanja pojedinačnih policijskih poslova.

Ključne reči: *policijski poslovi, organi državne uprave, načela, krivičnoprocesne aktivnosti policije, upravne aktivnosti policije*

References

1. Jovanović, Z. (2016). Upravna delatnost policije i značaj reforme državne uprave u Republici Srbiji [Administrative activity of the police and the importance of public administration reform in the Republic of Serbia]. *Zbornik radova Pravnog fakulteta u Nišu, 55* (73), pp. 137–151
2. Jugović, S. (2009). Mere ciljane potrage [Measures of targeted search]. *NBP – Žurnal za kriminalistiku i pravo, 14* (3), pp. 191–200
3. Jugović, S. (2013). *Upravna funkcija policije* [*Administrative function of the police*]. Beograd: Kriminalističko-policijska akademija
4. Kulić, M. (2017). *Upravno pravo – opšti deo* [*Administrative law – general part].* Novi Sad: Pravnifakultet za privredu i pravosuđe u Novom Sadu
5. Miletić, S. (2004). *Pojmovnik policijskog prava* [*Glossary of police law*]. Beograd: Službeni glasnik
6. Milić, N. (2010). Aktuelni problemi organizacije i funkcionisanja policijske ispostave [Current problems of organization and functioning of the police station]. In: Nikač, Ž. (ed.) *Pravo i forenzika u kriminalistici* [*Law and forensics in criminology*] (pp. 115–128). Beograd: Kriminalističko-policijska akademija
7. Milidragović, D. & Milić, N. (2019). Rezultati i problemi policije opšte nadležnosti u suzbijanju kriminala [Results and problems of the police of general competence in the suppression of crime]. *NBP – Žurnal za kriminalistiku i pravo, 24* (1), pp. 63-81. DOI: 10.5937/nabepo24-19545

8. Pravilnik o policijskim ovlašćenjima [Rulebook on police powers]. *Službeni glasnik RS*, no. 41/19
9. Pravilnik o načinu obavljanja pojedinačnih policijskih poslova [Rulebook on the manner of performing individual police work]. *Službeni glasnik RS*, no. 63/18 and 72/18
10. Simić, B. & Nikač, Ž. (2009). Razvoj policijske organizacije od tradicionalne ka savremenoj u funkciji suzbijanja kriminaliteta [Development of the police organization from traditional to modern in the function of crime suppression]. *NBP – Žurnal za kriminalistiku i pravo, 14* (3), pp. 117–131
11. Vasiljević, D. (2012). Disreciona ovlašćenja policije [Discretionary powers of the police]. *NBP – Žurnal za kriminalistiku i pravo, 17* (1), pp. 19–35
12. Zakon o policiji [Police Law]. *Službeni glasnik RS*, no. 6/16, 24/18 and 87/18
13. Zakon o državnoj upravi [Law on State Administration]. *Službeni glasnik RS*, no. 79/05, 101/07, 95/10, 9/14, 47/18 and 30/18 – other law
14. Zakon o ministarstvima [Law on ministries]. *Službeni glasnik RS*, no. 128/20

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COMMAND RESPONSIBILITY

ABSTRACT: As a part of the presentation in this paper, we will deal with one of a number of specific characteristics arisen while determining the criminal responsibility of perpetrators of international crimes, the one related to the institute of command responsibility, which are familiar with the statutes of both ad hoc tribunals (the Statute of the Tribunal in the Hague of 1993 and the International Criminal Tribunal for Rwanda of 1994), as well as the so - called the Rome Statute from 1998. In these statutes, it is set in such a way that, in one of its parts, it contradicts the basic criminal law institutes (the principle of individual subjective responsibility, the principle of justice). However, in accordance with the assumed international obligations, this institute was introduced to the criminal law system of Republic of Serbia on January 1st 2006, by prescribing, within Article 384 of the Criminal Code of Republic of Serbia, a real criminal offense of omission, which is also the subject of this paper.

Keywords: *command responsibility, the Rome Statute, ad hoc tribunals, the international criminal law.*

1. Introduction

The principle of individual, subjective responsibility, according to which „everyone is responsible only for their actions, according to which they have a certain psychological relationship and for which they can be subjected to socio-ethical reproach" (Stojanović, 2020, p. 24), today is one of the basic

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principles criminal law and in its settings, there is nothing controversial. However, the institute of command (strategic) responsibility, known in the international legal framework, is based on a position contrary to the provisions of this principle. Namely, this institute starts from the premise that a superior (in the political or military hierarchy) is responsible for the actions of his subordinates in situations when he knew that they either committed or would commit a crime, and he did not take measures to either prevent or punish them themselves (intentional form), as well as in situations where he did not know this, but had a good reason to know it (negligent form). It follows from the above that the institute of command responsibility is also contrary to the principle of justice, which starts from the fact that every sentence imposed must inevitably be fair and proportionate to the act committed (Stojanović, 2020, p. 26), because it equates someone who inadvertently failed to take measures. with the one who directly undertook the act of execution, or ordered it to be undertaken"(Stojanović, 2020, p. 17).

However, regardless of the fact that numerous complaints can be addressed to this institute, it is, with the presented shortcomings, also provided for in the Statute of the Permanent International Criminal Court, the so-called Rome Statute (Law on Ratification of the Rome Statute of the International Criminal Court, 2001, Art. 28). However, the Statute represents "progress" in the field of international criminal law, observing the current practice in this area and having in mind the statutes of two ad hoc tribunals (for the former Yugoslavia in 1993 and Rwanda in 1994). However, at the expense of all three courts, and regarding the decision they have in connection with this institute, an objection can be made that its negligent part (unconscious negligence) can in no way be combined with the intent required in all international crimes under jurisdiction. of these courts, and especially not with intent, whose existence is required in the criminal act of genocide (Stojanović, 2020, pp. 16-17), which "presupposes the existence of intent by directing it to achieve a certain goal, ie. it reinforces the volitional element in intent "(Stojanović, 2020, p. 107).

Given the fact that the Republic of Serbia has ratified the Rome Statute, our legislator had to introduce this institute into our criminal justice system as well (Stojanović & Delić, 2020, p. 375), but this was done in an acceptable way by prescribing the real crime of omission , which has two forms, intentional and negligent (Criminal Code of the Republic of Serbia, 2006, Art. 384).

2. Introduction of the institute of command responsibility in the criminal justice system of the Republic of Serbia

The development of the doctrine of command responsibility in the world was contributed to by the case of the Japanese General Tomoyuki Yamashita, most often mentioned in the literature, at the end of the Second World War, who was tried in 1945 by the American Military Commission. Yamashita was then in the so-called In the case of the "rape of Manila", he was found responsible and sentenced to death, regardless of the fact that he did not have effective control over the troops to which he was presumed, for which reason he was objectively unable to prevent crimes committed by his subordinates. The development of the institute of command responsibility, although we find its beginnings in the XVII century, in addition to the case of General Yamashita, and the so-called. The "Leipzig Trials" (the case of Landover Castle and the case of Dover Castle) were also contributed by the following cases from the period of the Second World War. The case of the Supreme Command, which referred to the generals of the Third Reich who were responsible for the German military campaign in the Soviet Union (uncompromising killing of civilians who resisted, captured Soviet commissars and commandos). The Taoist case, which referred to German military officials who carried out Hitler's order in the Balkans during World War II to shoot 50 civilians for every German soldier killed. The case of the Rehling company, which referred to certain German industrialists who were assigned a number of civilians who served as slave labor during the Second World War, due to the non-prevention of slave labor and the terrible conditions in which those persons worked. The case of Krupp and the case of the Ministry were very similar to the case of the Rehling company.

Following these cases, the institute of command responsibility was included in Additional Protocol I to the Geneva Conventions in 1977, but almost did not apply from 1945 until the ad hoc tribunal of the Security Council (the 1993 ICTY Statute and the ICC Statute[1]), and the Rwanda Court of 1994[2]).

[1] The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia after 1991 was established on May 25, 1993, by United Nations Security Council Resolution 827. It officially stopped working on December 31, 2017.

[2] The International Criminal Tribunal for Rwanda was established in November 1994 by United Nations Security Council Resolution 925. The scope of work of this ad hoc tribunal was to prosecute those responsible for the genocide in Rwanda and other violations of international law in Rwanda, as well as the citizens of Rwanda who, in the period from 1 January 1994 to 31 December 1994, acts committed in neighboring states. The International Criminal Tribunal for Rwanda officially ceased to function on December 31, 2015.

Article 86, paragraph 2, of Additional Protocol I, ratified by the Socialist Federal Republic of Yugoslavia, reads: "The fact that a violation of the Convention or this Protocol has been committed by a subordinate does not absolve his superiors of criminal or disciplinary responsibility." or had information that enabled them to conclude under the circumstances prevailing at the time, that he had committed or would commit such an injury and that they had not taken all possible measures within their power to prevent or suppress the injury" (Edlinger, 2013 , p. 228). For the institute of command responsibility, the provision provided in Art. 87 st. 3 which contains the obligation of the commander to initiate disciplinary or criminal proceedings against the perpetrator if there is a violation of the Geneva Conventions or Additional Protocol I.

Considering the provisions of Additional Protocol I, we conclude that they equate the direct executor and the commander with a commander who knew or did not know, but could have known that his subordinate would commit, or had committed a war crime, and did not take all possible measures within the limits of its power to prevent or suppress such an act. Furthermore, as it is noticed, within this protocol, in addition to criminal liability, disciplinary liability is also mentioned, which could be applied in cases when the superior did not know that his subordinates would commit a criminal offense, so he did not prevent it, but based on available information could conclude that, while criminal responsibility should be foreseen in a situation when the superior knew that his subordinates would commit a crime (Stojanović & Delić, 2020, pp. 373-376). However, the development of this doctrine went in the other direction (Ilić & Dinić, 2013, p. 98).

The establishment and beginning of the work of the ad hoc tribunal were aimed at achieving international justice, ie. they represented the hope that finally serious crimes committed in the framework of armed conflicts would be prosecuted and adequately sanctioned. However, in the case of ad hoc tribunals, almost everything remained at the level of "hope", because I am the way of establishing these ad hoc tribunals, ie. their establishment by a decision of the United Nations Security Council, which had no competence for such a thing, but even more an objection of selective justice, which excludes the debate on the rule of law, because the question "why tribunals only in the case of former Yugoslavia and Rwanda, and not to the numerous cases of mass grave violations of international humanitarian law that have occurred and will occur (Stojanović, 2020, pp. 16-17), argue that expectations are not justified. All this inevitably required a solution, which was found in the establishment of a permanent international criminal

court[3]. However, even this court does not have universal jurisdiction for certain crimes, but it depends exclusively on the will of individual countries. Namely, the territorial jurisdiction of the International Criminal Court exists when a criminal offense within its actual jurisdiction is committed on the territory of one of the countries that have accepted the Rome Statute, or the offense was committed by their citizen. In the case of a country which has not accepted the jurisdiction of this Statute, it is possible for it to accept the jurisdiction of the International Criminal Court only in a specific case. In addition, the court has jurisdiction when the crime is reported to the prosecutor by the United Nations Security Council, acting on the basis of the provisions of Chapter VII of the United Nations Charter.

It follows from the above that the International Criminal Court does not have the same attitude towards the citizens of any country, and thus that it is not completely free from political influence. Thus, universal, supranational international criminal law, it is clear, has not yet been established, even if both the ad hoc tribunals and the International Criminal Court represented the steps taken to that end.

Nomotechnically, the provisions of the statutes of all these courts are at a far lower level than the criminal law norms of any national criminal law. True, the provisions of the statute of the International Criminal Court are set far better than the provisions of the statutes of both ad hoc tribunals. This progress was not difficult to achieve, given the fact that of the 34 articles of the 1993 ICTY Statute, only two relate to the general part of criminal law, and that only four articles regulate the matter of a separate act. On the other hand, the International Criminal Court was established by an international treaty (not by a decision of the Security Council, as ad hoc tribunals), further, it has some elementary institutes of general criminal law, age limit for criminal responsibility, sanity, grounds for exclusion of criminal offense, attempt, voluntary resignation), the matter of the special act was regulated in more detail and precision, and the Elements of Criminal Offenses were subsequently adopted, in which way they were more precisely set (Stojanović, 2020, p. 17), which all represents a shift in a positive direction.

However, all three courts know the institute of command responsibility, and in all of them it is prescribed in a similar way, ie. in a way that numerous objections can be addressed to him, which is also the subject of our interest in this paper.

[3] The International Criminal Court was established on July 17, 1998, by the Rome Statute, which entered into force on July 1, 2002, when the court began its work.

3. Command responsibility in the statutes of the ad hoc tribunal and the statute of the International Criminal Court

Both ad hoc tribunals of the Security Council, in their statutes, as we have already stated, have a prescribed institute of command responsibility. The Statute of the Hague Tribunal from 1993 in Art. 7 st. 3, and the 1994 Statute of the International Criminal Tribunal for Rwanda in Art. 6 st. 3. Ad hoc tribunals extend the institute of command responsibility to genocide, which is not acceptable, for at least two reasons.

First, this is not provided for in the Convention on the Prevention and Punishment of the Crime of Genocide. Namely, this Convention, in Article VI, provides for the jurisdiction of the courts of the state in whose territory the act of genocide was committed, or the jurisdiction of the International Criminal Court for those states that recognize its jurisdiction. By establishing two ad hoc tribunals, the Security Council also placed the crime of genocide under their jurisdiction. However, it did so contrary to the aforementioned provision of the VI Convention, because the tribunals were established as a coercive measure of the Security Council, regardless of whether the states recognize their jurisdiction or not.

Secondly, given the nature of this crime, it is not possible at all, because in accordance with the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide, the perpetrator of this crime has a mandatory existence of genocidal intent[4], which is incompatible with the possibility with command responsibility, he is responsible for genocide in a situation where there is unconscious negligence.

Furthermore, the statutes of the ad hoc tribunal do not limit the application of the institute of command responsibility only to military officers, but more broadly to civilian superiors. In addition, command responsibility does not only apply to de jure, but also to de facto superiors, so the fact that any crime within the jurisdiction of the Tribunal was committed by a subordinate does not absolve his superior from criminal responsibility if he knew, or had reason to know that the subordinate would commit the crime or that he committed it, and the superior failed to take the necessary and reasonable measures to prevent the commission of such an act or failed to punish its perpetrators (Ilić & Dinić, 2013, pp. 98 -99).

[4] Genocidal intent means the intention to completely or partially destroy a group, and the perpetrator's guilt requires direct intent. Intention implies the existence of a voluntary element of high intensity.

As we have already stated, the statute of the permanent International Criminal Court is far more advanced, ie. more orderly and precisely set by the statute of the ad hoc tribunal of the Security Council. But, regardless of that, the statute of the permanent International Criminal Court retains the part that is disputable, ie. the commander equates with the perpetrator even when he did not know that the forces under his command are committing a crime or are preparing to commit it, as well as when he does not take the necessary measures to punish the perpetrators, ie when he fails to report the crime to the competent authorities (Article 28, point (a). Therefore, it is clear that this court also maintains that the superior is also responsible forunconscious negligence for intentional crimes, however, makes a distinction in terms of responsibility between military and civilian superiors (Article 28, item b), in the sense that in relation to civilian officers somewhat stricter conditions are set for their command responsibility, so that the existence of at least conscious negligence in relation to the act committed by subordinates.

4. Command responsibility in the Criminal Code of the Republic of Serbia

From the above, the conclusion unequivocally follows that the laws of European countries, the institute of command responsibility, were not known until recently. Furthermore, as we have already stated, this institute has disputable elements, but it is not disputable in its entirety. Namely, the institutes of criminal law that are generally accepted can be applied to one of its parts. These are cases when superiors know that their subordinates are preparing a crime, and they have the duty and the opportunity to take measures to prevent the commission of that crime, which their superiors do not do, and the crime, for that reason, is committed (direct and possible intent). In this situation, we have an intentional criminal offense of omission, in which case we can equate the superior with the perpetrator, ie. the ordering party of the criminal offense because, the truth is, there is no explicit order to commit the criminal offense, but the objective superior allowed it (by wanting it, or by agreeing to it). Accordingly, the institute of complicity committed by omission, or the institute of complicity in a broader sense, could be applied here, provided that such omission was not essential for the commission of the criminal offense.

However, the problem, as we have already stated, occurs in another part of this institute, within which only the existence of unconscious negligence is required, which is absolutely incompatible with the nature of international

crimes in the narrower sense[5], because they are always intentional. Neither criminologically nor legally dogmatically is it acceptable to equate a superior who ordered the commission of a crime and a superior who did not know that his subordinate would commit the crime (regardless of the fact that he had a good reason to know it), even when such a possibility is only allowed, but held lightly that it would not happen, or that he would be able to prevent it (unconscious and conscious negligence). There is a possibility that this is an incompetent superior, who should be replaced, disciplined, but in no way equated with the perpetrator of serious intentional crimes, because in that case it would be an objective responsibility (Stojanović & Delić, 2020, pp. 373- 376).

The issue of introducing this institute into our criminal legislation, as we have already stated, was opened by the ratification of the Rome Statute. The main problem, as we have already stated, was that this institute equated the involuntary failure to prevent the commission of a criminal offense or report its perpetrator, with the intentional commission of a criminal offense that was not prevented or reported. Our legislator overcame this by not prescribing the negligent part of command responsibility as a form of responsibility in the form of a general institute, but especially incriminating it as responsibility for the crime of failing to take measures that the superior was obliged to take and which would prevent the execution of certain criminal acts, but in no case as responsibility for those acts themselves. In this way, our national legislation has been harmonized with the Rome Statute, while the institute of individual subjective responsibility has not been violated. Thus, in the Criminal Code of the Republic of Serbia, in Chapter XXXIV, entitled: Criminal offenses against humanity and other goods protected by international law, Article 384 contains the offense: Non-prevention of criminal offenses against humanity and other goods protected by international law, which has two basic (paragraphs 1 and 2) and one negligent form (paragraph 3).

The first basic form (paragraph 1) consists in failing to take measures to prevent criminal offenses under Art. 370 to 374, Article 376, Art. 378 to 381 and Article 383 (all the listed acts are systematized within Chapter XXXIV of the Criminal Code of the Republic of Serbia). This criminal offense can be committed only by omission, so it is a real criminal offense of omission. Namely, the perpetrator fails to take the measures he could and was obliged to take in order to prevent the crime. There are two possible situations. In the first situation, the forces commanded or controlled by the perpetrator of a particular crime may prepare the commission of the crime, while in the second situation, they may

[5] In the so-called international crimes in the narrower sense include: war crimes, crimes against peace, crimes against humanity and crimes of genocide.

begin its commission. However, for a crime to exist, any of the listed crimes (Articles 370 to 374, Article 376, Articles 378 to 381 and Article 383) must be completed due to omission. In addition, it is necessary that there is a causal link between the omission of the perpetrator and the commission of the crime by subordinates. The perpetrator may be a military commander who either formally or de facto controls the persons who commit or prepare any of the listed crimes. At the subjective level, the existence of intent is necessary, as well as the knowledge that the forces commanded or controlled by the perpetrator prepare or have begun the commission of the stated criminal offenses.

In the second basic form (paragraph 2), only the civilian superior appears as the executor, unlike the first form (paragraph 1), where the military commander or the person who actually performs that function appears as the executor.

The perpetrator of both forms of this crime is punished by the punishment prescribed for the criminal offense that was not prevented.

The third form of this crime, the negligent form (paragraph 3), refers to both basic forms, and includes both conscious and unconscious negligence. In this way, our legislator went further than the solution in the Rome Statute, because even in the case of a civilian superior (Article 384, paragraph 2), an involuntary criminal offense also exists when it comes to unconscious negligence.

The prescribed punishment for this negligent form is imprisonment for a term of six months to five years.

In order to consistently apply the ratified Rome Statute in terms of command responsibility, a more serious form of the crime is also important: Failure to report the crime and the perpetrator, from Article 332 para. 3, Chapter XVIII, whose protective object is the judiciary, ie the unhindered performance of a judicial function (Čejović & Kulić, 2012, pp. 588-589).

Namely, paragraph 3 of Article 332, stipulates that conscientious failure to report a criminal act of his subordinate, which he committed in the performance of his official, military or work duty, and for which a prison sentence of thirty to forty years may be imposed by law, may executed only by an official or responsible person. The prescribed punishment for this crime is imprisonment from six months to five years.

5. Trial for command responsibility in the Republic of Serbia

When it comes to the issue of punishment for crimes committed during the wars of the 1990s, we often, unfortunately, refer to the process of joining the European Union. We say "unfortunately", because often in our society there are not enough arguments that determining responsibility for such crimes is an

obligation both legal (even before these wars very clearly established by both international and national law) and moral, which, as well as legal, does not suffers excuses. Namely, the obligation to punish these crimes would also exist if membership in the European Union was not a strategic goal of the Republic of Serbia.

Speaking of European integration, we cannot ignore the fact that the accession process itself involves a continuous assessment of progress in many areas, including a commitment to punishing those responsible for war crimes, genocide and crimes against humanity, which fall within the candidate country's general obligations. as one of the political criteria for accession to the European Union. These criteria include the issue of cooperation with the countries of the region, which is certainly influenced, among other things, by the prosecution of crimes committed during the mentioned wars. The punishment of those responsible for these crimes is also monitored through the negotiating Chapter 23, which deals with human rights, independence and an efficient judiciary.

However, the prosecution of persons on the basis of command responsibility in the Republic of Serbia has so far been largely absent. This was also stated by the European Commission in its Progress Report on Serbia for 2018, explicitly emphasizing that the Republic of Serbia has not filed a single indictment against senior military and police officials for war crimes. Similar allegations can be found in the Progress Report of Serbia for 2019. The same statement, in their statements or critical reports, is also made by the United Nations Committee against Torture, the Organization for Security and Cooperation in Europe, as well as domestic (primarily the Humanitarian Law Center) and international civil society organizations (Amnesty International and others). The reason for this situation in our country is often the legal argument that the institute of command responsibility at the time of the commission of criminal offenses in relation to which it can be applied, was not provided by national criminal legislation.

Contrary to this view, there are opinions that the legal conditions for the application of the institute of command responsibility still exist. Namely, the position is advocated, especially by the Humanitarian Law Center, that the prosecution of persons on the basis of this institute is possible through the direct application of international treaty and customary law, which the Constitution of the Republic of Serbia allows within Article 16. The second basis for the application of this institute is found in Article 30 of the Criminal Code of the Federal Republic of Yugoslavia, according to which the question of liability for inaction, ie omission of an act that the perpetrator was obliged to commit, may be raised. This inaction, ie omission of the superior's actions, refers to non-prevention of crimes of subordinates, ie failure to take measures

against them, and for whose behavior the superior guarantees. The duty of a superior to do so exists in accordance with the provisions of international law, namely Art. 86 and 87 of Additional Protocol I to the Geneva Conventions of 1977, as well as the provisions of customary international law (or generally accepted rules of international law, in accordance with our constitutional terminology), which provide for command responsibility in internal conflicts and which binds all states and individuals.

Pursuant to the above provisions, on this basis, the War Crimes Prosecutor's Office of the Republic of Serbia issued an order in 2014 to conduct an investigation against the former commander of one of the brigades of the Army of the Federal Republic of Yugoslavia in Kosovo, but it was suspended in 2017. Before this case, ie. Since its inception in 2003, the War Crimes Prosecutor's Office has indicted only high-ranking members of the armed and civilian structures of the Republic of Bosnia and Herzegovina and the Republic of Croatia, but not the Republic of Serbia, contrary to the provisions of the War Crimes Strategy. 2016-2020, adopted by the Republic of Serbia due to the obligations arising from the aforementioned Negotiating Chapter 23. With the mentioned strategy, the Republic of Serbia has committed itself to prosecuting high-ranking military, police and civilian officers in the prosecution of crimes committed during war conflicts, but accordingly With the mentioned reports of the European Commission on the progress of Serbia, our country has not realized that so far.

The application of command responsibility based on the norms of international law is an unavoidable precondition for the successful resolution of a large number of criminal cases involving command responsibility. Although the principle of legality (nullum crimen sine lege) prohibits criminal prosecution for an offense that was not explicitly prescribed as a criminal offense at the time of its commission, an explicit derogation from this prohibition is also prescribed by the European Convention on Human Rights. rights in Article 6 and the International Covenant on Civil and Political Rights in Article 15, according to which criminal offenses may be provided not only by national law but also by international law. The same, in addition to international conventions, includes unwritten generally accepted rules of international law.

Both of these international instruments also stipulate that a sentence heavier than the one that was applicable at the time of the commission of the crime must not be imposed, but they do not require that the exact punishment must be prescribed in advance. Accordingly, even if the Constitution of the Republic of Serbia in Article 34, stipulates that both the crime and the punishment must be prescribed by law at the time of the commission of the crime, according

to generally accepted rules of international law, the penalty may be imposed within the general minimum and maximum, (which would mean imprisonment for a minimum of fifteen days to between 15 and 20 years for the most serious forms of crime). This approach, from the aspect of national criminal law, is questionable, but it is accepted in international law, the practice of many states, and it has been approved by the European Court of Human Rights.

In addition, the 1992 the Constitution explicitly provided that customary international law was an integral part of the domestic legal order, reinforcing the argument about the "availability and predictability" of customary provisions on command responsibility.

In accordance with these provisions of international law, the War Crimes Prosecutor's Office in 2008 filed a request for an investigation against the now deceased Peter Egner, in connection with the organization and incitement to commit genocide and war crimes during World War II, although a positive right at the time of the commission of these alleged crimes, she was unaware of the crimes of war crimes or genocide. The investigating judge and the panel of the War Crimes Chamber approved the investigation. The judges found that the request for an investigation was not contrary to the principle of legality and the Constitution, although the investigation against Egner was conducted for crimes committed thirty years before the enactment of the Criminal Code of the Socialist Federal Republic of Yugoslavia. Therefore, if customary international law can be directly applied to prosecute war crimes or genocide, even before those acts are provided for as criminal offenses in domestic law, the same principle should be applied to international norms on command responsibility.

However, liability under Article 30 of the Criminal Code of the Federal Republic of Yugoslavia, and if it is clear that it cannot be called "command responsibility", can, as we have already stated, lead to the responsibility of superiors for crimes committed by their subordinates. Namely, the War Crimes Chamber of the High Court in Belgrade has so far applied the theory of liability for non-commission in at least one war crimes case. The case concerns "Zvornik II", in which the War Crimes Department convicted a military commander of aiding and abetting the killing and violating the bodily integrity of detained civilians, whose detention he personally ordered. The accused did not participate in the crimes themselves, which were committed by his subordinates, but the court found that the accused knowingly brought the victims into a state of helplessness by ordering their imprisonment, thus creating an obligation to protect them. According to the court, this obligation creates liability for omission both under Article 30 of the Criminal Code of the Federal Republic of Yugoslavia and under customary international law.

The case "Zvornik II" refers only to the responsibility arising from the warranty notices to the hostages. Nevertheless, this case represents an important step forward in Serbian case law towards the possibility of prosecuting and convicting superiors only on the basis of domestic provisions in force at the time the crimes were committed.

6. Concluding remarks

If we look at the institute of command responsibility within the framework of our national legislation, we come to the conclusion that it is absolutely acceptable, because it is harmonized with the current criminal law provisions, ie the achieved criminal acquis, on which the Criminal Code of the Republic of Serbia is based. However, in the statutes of both ad hoc tribunals, but also in the Rome Statute, this institute is, to put it mildly, "problematic" because it equates the commander with the executor even when he did not know that the forces under his command were committing a crime. he commits it (unconscious negligence), as well as when he does not take the necessary measures to punish the perpetrators, ie when he fails to report the crime to the competent authorities, which is contrary to basic criminal acquis and achievements (principle of individual subjective responsibility, fairness and proportionality), as well as the fact that acts that are within the jurisdiction of these courts as a form of guilt require intent, and even more (intent in the crime of genocide).

In addition to the legal objections raised, in the work, especially of the 1993 Hague Tribunal, the institute of command responsibility is often "politicized". Namely, when the supreme commander of one of the parties in the conflict was tried, the entire army was tried, as well as all those who were subordinate to that commander. On the contrary, when individuals who were in a very low position in the chain of command were tried, the army as a whole was not tried.

Furthermore, we cannot ignore the fact that the work of the ad hoc tribunal and the International Criminal Court, in addition to compromising the institute of command responsibility, also encourages the selectivity of justice, which is mainly exercised over the defeated side. gained that status, had to use more violence in relation to the defeated side. Thus, some crimes remain unprocessed, as if they did not happen (eg the Hiroshima case), while Germany after World War II, as we know, was under strong pressure from the United States to prosecute its citizens for international crimes which they did during World War II.

Second, the selectivity of justice is also expressed by the question why justice only in the case of the former Yugoslavia and Rwanda, and not in the numerous other cases that have taken place?

The establishment of a permanent International Criminal Court has not solved this problem either, because its jurisdiction depends on the "will" of each country individually, while on the other hand, as it is known, this court suffers open obstruction of its work by the United States.

Regarding the issue of the application of the institute of command responsibility in our country, the courts have ruled on several cases concerning the responsibility of the superior, but a clear position on whether the superior can be held accountable for crimes committed by subordinates, and through which legal mechanism, occupied. The War Crimes Prosecutor's Office and the War Crimes Chamber of the High Court in Belgrade have so far not accepted or rejected the possibility of applying command responsibility in the criminal justice system of Serbia. In a limited number of cases, the institute of liability for omission was applied both under Article 30 of the Criminal Code of the Federal Republic of Yugoslavia and under customary international law. However, a clear position on the issue of superior responsibility (through command responsibility or through inaction) is very much needed, in order to provide legal certainty in criminal justice and to harmonize court practice.

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KOMANDNA ODGOVORNOST

REZIME: U okviru izlaganja u ovom radu, bavićemo se jednom od niza specifičnosti koje se pojavljuju prilikom utvrđivanja krivične odgovornosti učinilaca međunarodnih krivičnih dela, onom koja je vezana za institut komandne odgovornosti, a koji poznaju statuti oba ad hoc tribunala (statut Haškog tribunala iz 1993. godine i Statut Međunarodnog krivičnog suda za Ruandu iz 1994. godine), kao i tzv. Rimski statut iz 1998. godine, i u okviru kojih je tako postavljen da se, u jednom svom delu, kosi sa osnovnim krivičnopravnim institutima (načelo individualne subjektivne

odgovornosti, načelo pravednosti). Međutim, ovaj institut, shodno preuzetim međunarodnim obavezama, u svoj kaznenopravni sistem uvela je i Republika Srbija 01. januara 2006. godine, propisivanjem, u okviru člana 384 Krivičnog zakonika Republike Srbije, jednog pravog krivičnog dela propuštanja, a što je takođe predmet obrade ovog rada.

Ključne reči: *komandna odgovornost, Rimski statut, ad hoc tribunali, međunarodno krivično pravo.*

References

1. Bejatović, S. (2019). *Krivičnoprocesnopravo* [*Criminal Procedure Law*]. Beograd: Službeni glasnik
2. Čejović., B. & Kulić M. (2012). *Krivično pravo* [*Criminal Law*]. Beograd: Službeni glasnik
3. Četvrti izveštaj o sprovođenju Nacionalne strategije za procesuiranje ratnih zločina (2019). [Fourth report on the implementation of the National Strategy for War Crimes Prosecution]. Beograd: Fond za humanitarno pravo. Downloaded 2020, February 20 from http://www.hlc-rdc.org
4. Edlinger, K. (2013). *Odabrani dokumenti iz međunarodnog humanitarnog prava* [*Selected documents from international humanitarian law*]. Beograd: Centar za mirovne operacije Vojske Srbije, Međunarodni komitet Crvenog krsta u Srbiji i ISAC fond. Downloaded 2020, June 28 from https://www.isac-fund.org/download/MHP-zbirka_2013.pdf
5. Ilić, R., & Dinić, S. (2013). Doktrine komandne odgovornosti [Doctrines of command responsibility]. In:Peković, N. (ured.), *Haški tribunal – izazovi i realnost: zbornik radova sa savetovanja u Beogradu* [*The Hague Tribunal - Challenges and Reality: Proceedings of the Conference in Belgrade*] (pp. 89-103). Beograd: Udruženje za krivično pravo i kriminologiju Srbije
6. *Izveštaj Evropske komisije o napretku Srbije za 2018. godinu* [*European Commission progress report for Serbia for 2018*]. Beograd: Ministarstvo pravde. Downloaded 2020, February 20 from https://www.mei.gov.rs/upload/documents/eu_dokumenta/godisnji_izvestaji_ek_o_napretku/izvestaj_ek_o_srbiji(1).pdf
7. *Konvencija o ljudskim pravima* [*Convention on Human Rights*]. Strazbur: Savet Evrope, Evropski sud za ljudska prava. Downloaded 2020, May 20 from https://www.echr.coe.int/Documents/Convention_SRP.pdf

8. Krivični zakonik Republike Srbije [Criminal Code of the Republic of Serbia]. *Službeni glasnik RS*, no. 85/05, 88/05-ispr., 107/05-ispr., 72/09, 111/09, 121/12, 104/13, 108/14, 94/16, 35/19
9. Krivični zakon Savezne Republike Jugoslavije [Criminal Code of the Federal Republic of Yugoslavia]. *Službeni list SFRJ*, no. 44/76, 36/77 - ispr., 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, 45/90 - ispr. i 54/90 i *Službeni list SRJ*, no. 35/92, 16/93, 31/93, 37/93, 41/93, 50/93, 24/94 and 61/01
10. *Serbia 2019 Report* [*Izveštaj o Srbiji za 2019. godinu*]. Brussels: European Commision. Downloaded 2020, February 20 from https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-serbia-report.pdf
11. Stojanović, Z. (2020). *Krivično pravo – opšti deo* [*Criminal Law – General Part*]. Beograd: Pravni fakultet Univerziteta u Beogradu
12. Stojanović, Z. & Delić, N. (2020). *Krivično pravo – posebni deo* [*Criminal Law – Special Part*]. Beograd: Pravni fakultet Univerziteta u Beogradu
13. Škulić, M. (2015). *Krivično procesno pravo* [*Criminal Procedure Law*]. Beograd: Pravni fakultet Univerziteta u Beogradu
14. Ustav Republike Srbije [Constitution of the Republic of Serbia]. *Službeni glasnik RS*, no. 98/06
15. Ustav Savezne Republike Jugoslavije [Constitution of the Federal Republic of Yugoslavia]. *Službeni list SFRJ*, no. 1/92
16. Zakon o potvrđivanju Rimskog statuta Međunarodnog krivičnog suda [*Law on Ratification of the Rome Statute of the International Criminal Court*]. *Službeni list SRJ – Međunarodni ugovori*, no. 5/01
17. Zakon o ratifikaciji Međunarodnog pakta o građanskimi političkim pravima [Law on Ratification of the International Covenant on Civil and Political Rights]. *Službeni list SFRJ*, no. 7/71

THE INSTRUCTION TO THE AUTHORS
FOR WRITING AND PREPARING MANUSCRIPTS

The Editorial board of the "Law - theory and practice" journal asks the authors to write their manuscripts to be published according to the following instruction.

In the journal there are being published the pieces of work referring to legal, economic and social disciplines. Namely, in the journal there are published: scientific articles, surveys, reviews, the analyses of regulations, the comments on the court decisions, students' papers and other additional texts. The manuscripts are to be sent in English through OJS online platform.(http://casopis.pravni-fakultet.edu.rs/index.php/ltp/about/submissions)

All manuscripts must submit to review. Each scientific paper must be reviewed by at least two reviewers according to the choice of the editorial board.

The editorial board has the right to adjust the manuscript to the editorial rules of the journal.

General information about writing the manuscript:

The manuscript should be written in the Microsoft Word text processor, Times New Roman font of the value of 12 pt, in Latin letters, with a spacing of 1,5. One is supposed to use the value of 25 mm for all margins. The scope of the manuscript can be of 12 pages at most in an A4 format including a text, tables, pictures, graphs, literature and other additional material.

The title-page of the paper should contain the title of the paper work in English, and below it there should be written the same thing in Serbian of the font size of 14 pt, Bold. After that, there is a spacing and, then, there should be stated the author's name and surname, his/her title, affiliation (the work place **with obligatory stating the name of the country too)**, an e-mail address and contact phone, the font size of 12 pt. If the author has his/her ORCID number, it should be stated immediately after his/her name and surname. For more information about ORCID iD, please visit https://orcid.org and after the registration insert your ORCID iD number.

Then, there is a spacing, and after that there should be written an abstract of the length to 250 words in English, and in Serbian below it of

the font size of 12 pt. An abstract represents a brief informative contents review of the article enabling the reader's quick and precise judgment of its relevance. The authors have to explain the goal of their research or to state the reason why they decided to write the article. Then, it is needed the methods being used in a research to be described including a short description of the results being reached in a research.

Key words are stated after one line of a spacing below the abstract written in English, and, also, in Serbian below it. There should maximally be five of them, of the font size of 12 pt, Italic. Then comes a two-line spacing and the text of the paper work.

Manuscript should be written concisely and intelligibly in a logical order which, according to the rule, includes the following: an introduction, the working out of the topic and a conclusion. The letters of the basic text should be of the font size of 12 pt. Titles and subtitles in the text are supposed to be of the font size of 12 pt, Bold.

The name and number of illustrations (diagrams, photographs, graphs) should be represented in the middle of the line above the illustration, the font size of 12 pt. The name and number of a table should also be represented in the middle of the line above the table, the font size of 12 pt. Below the illustration or table, it is obligatory the source to be stated ("Source:…"), the font size of 10 pt. If the results of the author's research are represented in the form of a graph or table, there should be stated as a source below the illustration or table: Author's research.

If the author of the text writes a thank-you note or states the project references within which the text has been written and the like, he/she does it in a special section – Acknowledgments, which, according to the ordinal number, comes after the Conclusion, and before the author's affiliation and the summery of the text written in Serbian.

Use APA style to write references (The hand book for publishing, the American Psychological Association) as an international standard for writing references. Remarks, namely footnotes, may contain additional explanations or comments referring to the text. Footnotes are written in a font size of 10 pt.

Within the APA style, the used source is stated **inside the text,** in the way the elements (the author, the year of publication, the page number where the quoted part is) are indicated in parentheses immediately before the full stop and separated by a comma.

Citing rules inside the manuscript

If the cited source has been written by one author:

When a sentence contains the author's name and his/her cited words, then, after the author's name, there is stated the year of publication of the cited text in the brackets. At the end of the sentence, it is necessary the page number on which there is a sentence from the cited text to be indicated:

There is an example:

As Besermenji (2007) points out, "it is especially present the problem of the air pollution, which is explicitly a consequence of an extremely low level of ecological awareness as well as the lack of professional education in the field of environment" (p. 496).

In the case when the author is not mentioned in the sentence, his/her surname, the year of publication of the paper work and the page number in the paper should be put in brackets and at the end of the sentence.

There is an example:

Also, "rural tourism is expected to act as one of the tools for sustainable rural development" (Ivolga, 2014, p. 331).

A note: If a citation has been made by paraphrasing or resuming, then it is not necessary the page number to be stated.

There is an example:

The environment represents everything that surrounds us, namely everything with which a human's living and producing activity is either directly or indirectly connected (Hamidović, 2012).

If the cited source has been written by two authors:

There should be put "and" or "&" between the authors' surnames depending on the fact whether the authors are mentioned in the sentence or not.

There are some examples:

Chaudhry and Gupta (2010) state that as many as 75% of the world's poor live in the rural areas and more than one-third of rural areas are in arid and semiarid regions.

Hence, "rural development is considered as a complex mesh of networks in which resources are mobilized and in which the control of the process consists of interplay between local and external forces" (Papić & Bogdanov, 2015, p. 1080).

If the cited source has been written by three to five authors:

When such a source is cited for the first time, all the authors should be stated:

There is an example:

(Cvijanović, Matijašević Obradović & Škorić, 2017)

When this source is later cited again, there should be stated only the first author's surname and added "et al.".

There is an example:

(Cvijanović et al., 2017)

If the cited source has been written by six and more authors:

By the first and all further citations, the first author's surname should be stated and added "et al.".

There is an example:

(Savić et al., 2010)

If the author of the cited text is an organization:

In the case when the author of the cited text is an organization, then its name should be put in brackets as an author of the text. If the organization has a known abbreviated name, then one has to write this abbreviated name in a square bracket, after the full name, in the first citation, while any further citation should be marked by this abbreviated name.

There is an example:

the first citation: (Serbian Academy of Sciences and Arts [SASA], 2014)

further citations: (SASA, 2014)

If the authors of the cited text have the same surname:

In the case of the authors having the same surname, there should be used the initials of their names in order to avoid the confusion.

There is an example:

The attitude made by D. Savić (2017) is presented...

If there are cited several references of the same author from the same year:

If there are two or more references cited from the same author and from the same year, then, after the fact of the year, there have to be added the marks "a", "b", etc.

There is an example:
(Dragojlović, 2018a)
(Dragojlović, 2018b)

If there exist two or more texts in one citation:

When one cites two or more texts in one citation, then, in brackets, there are stated the surnames of the authors of original texts in the order of publication and they are separated by a semicolon.

There is an example:

Obviously, living and working in rural areas has always been connected with specific material and symbolical relations to nature (Milbourne, 2003; Castree & Braun, 2006).

If there is cited the newspaper article with the stated author:

There is an example:

In *NS uživo* there was published (Dragojlović, 2021) that...

In the list of the used references, this reference should be written in the following way: Dragojlović, J. (2021). Anketirani Novosađani za vraćanje smrtne kazne u Ustav [Novi Sad residents surveyed to return the death penalty to the Constitution]. *NS uživo*, January 22.

If there is cited the newspaper article without the author being stated:

There is an example:

Published in *Politika* (2012)

In the list of the used references, this reference should be written in the following way: *Politika*. (2012). Straževica gotova za dva meseca [Straževica finished in two months]. February 1.

If the personal correspondence is cited:

The example: According to Nikolić's claims (2020),

In the list of the used references, this reference should be written in the following way: Nikolić, A. (2020). Pismo autoru [Letter to the author], 21. novembar.

If it is cited the text in press, at the end of the reference, and before the full stop, it is obligatory to add "in press".

If the court decisions, the praxis of the European court for human rights, and other sources from both national and international court praxis are cited, a reference should contain as much precise facts as it is possible: the type and number of the decision, the date when it was made, the publication where it was published.

The example in the text: (The Decision of the Superior court in Belgrade - A special department K.Po1 no. 276/10 from 26th January 2012)

The example in the text: (Borodin v Russia, par. 166.)

A note:

The sources from the court praxis **are not stated** in the list of the used literature. A full reference from the court praxis **is stated** in a footnote. While citing the European court for human rights praxis there should be indicated the number of the submitted petition.

There is an example of a reference in a footnote:

As it is stated in the Decision of the Superior court in Belgrade - A special department K.Po1 no. 276/10 from 26th January 2012 Intermex (2012). Bilten Višeg suda u Beogradu [Bulletin of the High Court in Belgrade], 87, p. 47.

Borodin v Russia, the petition no. 41867/04, the sentence ECHR, 6. 2. 2013, par. 166.

If the laws and other regulations are cited:

When citing a legal text or other regulation, in the text there should be stated a full name of law or other regulation including the year when the law or regulation was enforced.

There is an example:

(The Code of criminal procedure, 2011)

(The Book of rules on the content of the decision on conducting the procedure of public procurement made by several consignees, 2015)

This rule is also applied to laws and other regulations not being in force any longer.

There is an example:

(The Criminal law act of Republic of Serbia, 1977)

When citing the international regulations, in the text it is enough to state a shortened name of the document together with its number and year when it was accepted.

There is an example:

(Regulation No. 1052/2013) ili (Directive 2013/32)

If there is cited the text of the unknown year of publication or the unknown author's paper work:

In the paper work, such a kind of text should be cited in the way that in the place of the year there is stated "n.d." (non dated).

There is an example:

Their significance for parliamentary processes is unmeasureable (Ostrogorski, n.d.).

If there is a paper work of the unknown author used in a manuscript, there will be stated the title of the paper being cited together with the year, if it is known.

There is an example:

All these are confirmed by a mixed, objective-subjective theory (The elements of a criminal offense, 1986, p. 13).

An important note:

The cited sources (regardless the fact in which language they have been written) are not supposed to be translated into English, except the title of the paper work (publications, a legal act or bylaw) which should be translated and written in a square bracket.

The example:

1.) Matijasevic Obradović, J. (2017). Značaj zaštite životne sredine za razvoj ekoturizma u Srbiji [The importance of environmental protection for the development of ecotourism in Serbia]. *Agroekonomika*, *46* (75), pp. 21-30.

2.) Jovašević, D. (2017). *Krivična dela ubistva* [*Murder as a Crime*]. Beograd: Institut za kriminološka i sociološka istraživanja.

3.) Uredba o ekološkoj mreži Vlade Republike Srbije [The Ecological Network Decree of the Government of the Republic of Serbia]. *Službeni glasnik RS*, no. 102/10 da li ovde treba no.

4.) Zakon o turizmu [The Law on Tourism]. *Službeni glasnik RS*, no. 17/19

At the end of each text, in the section under the name of "**References**", it is obligatory to state the list of all cited references according to an alphabetical order. The titles in foreign languages beginning with definite or indefinite articles ("a", "the", "Die", ...) are ordered as if the article does not exist. The reference list should only include the works that have been published or accepted for publication.

The editorial board insists on the references of recent date, which will specially be taken into account while choosing the manuscripts to be published. At the end of each reference, it is obligatory to state a DOI number, if the cited reference contains it. If the cited reference does not contain a DOI number, the author can refer to the URL address.

The example of the stated reference together with a DOI number:

Počuča M., & Matijašević Obradović, J. (2018). The Importance of Evidence Collection in Procedures for Criminal Acts in the Field of Economic Crime in Serbia. In: Meško, G., et al. (eds.), *Criminal Justice and Security in Central and Eastern Europe: From Common Sense to Evidence-based Policy-making* (pp. 671-681). Maribor: Faculty of Criminal Justice and Security and University of Maribor Press. DOI: 10.18690/978-961-286-174-2

The example of the stated reference together with an URL address:

Milosavljević, B. (2015). Pravni okvir i praksa primene posebnih postupaka i mera za tajno prikupljanje podataka u Republici Srbiji [Legal framework and practice of application of special procedures and measures for secret data collection in the Republic of Serbia]. In: Petrović, P. (ured.), *Posebne mere tajnog prikupljanja podataka: između zakona i sudske prakse* [*Special measures for secret data collection: between law and case law*] (pp. 5-33). Beograd: Beogradski centar za bezbednosnu politiku. Downloaded 2021, January 15 from https://bezbednost.org/wp-content/uploads/2020/06/posebne_mere_tajnog_prikupljanja_podataka_-_vodic_.pdf

The examples of the used references being stated at the end of the paper work:

References:

1.Agencija za privredne registre. *Privredna društva* [*Companies*]. Downloaded 2020, January 10 from https://www.apr.gov.rs/o-agenciji.1902.html

2. *California Secretary of State*. Downloaded 2020, December 15 from https://www.sos.ca.gov/business-programs/

3. Dukić-Mijatović, M. (2011). Korporativno upravljanje i kompanijsko pravo Republike Srbije [Corporate Governance and Companies Business Law of the Republic of Serbia]. *Pravo -teorija i praksa*, *28* (1-3), pp. 15-22.

4. Dragojlović, J., & Bingulac, N. (2019). *Penologija između teorije i prakse* [*Penology between theory and practice*]. Novi Sad: Pravni fakultet za privredu i pravosuđe u Novom Sadu.

5. Dragojlović, J. (2021). Anketirani Novosađani za vraćanje smrtne kazne u Ustav [Novi Sad residents surveyed to return the death penalty to the Constitution]. *NS uživo*, January 22.

6. Gopalsamy, N. (2016). *A Guide to Corporate Governance*. New Delhi: New Age International.

7. Jesover, F., & Kirkpatrick, G. (2005). The Revised OECD Principles of Corporate Governance and their Relevance to Non-OECD Countries. *Corporate Governance: An International Review*, *13* (2), pp. 127-136. DOI: 10.1111/j.1467-8683.2005.00412.x

8. Milosavljević, B. (2015). Pravni okvir i praksa primene posebnih postupaka i mera za tajno prikupljanje podataka u Republici Srbiji [Legal framework and practice of application of special procedures and measures for secret data collection in the Republic of Serbia]. In: Petrović, P. (ured.), *Posebne mere tajnog prikupljanja podataka: između zakona i sudske prakse* [*Special measures for secret data collection: between law and case law*] (pp. 5-33). Beograd: Beogradski centar za bezbednosnu politiku. Downloaded 2021, January 15 from https://bezbednost.org/wp-content/uploads/2020/06/posebne_mere_tajnog_prikupljanja_podataka_-_vodic_.pdf

9. Počuča M., & Matijašević Obradović, J. (2018). The Importance of Evidence Collection in Procedures for Criminal Acts in the Field of Economic Crime in Serbia. In: Meško, G., et al. (eds.), *Criminal Justice and Security in Central and Eastern Europe: From Common Sense to Evidence-based Policy-making* (pp. 671-681). Maribor: Faculty of

Criminal Justice and Security and University of Maribor Press. DOI: 10.18690/978-961-286-174-2
10. Regulation (EU) No. 1052/2013 establishing the European Border Surveillance System (Eurosur), OJ L 295 of 6/11/2013.
11. Škorić, S. (2016). *Uticaj poslovnog imena privrednog društva na njegovo poslovanje - doktorska disertacija* [*The influence of the business name of the company on its business - doctoral thesis*]. Novi Sad: Pravni fakultet za privredu i pravosuđe u Novom Sadu.
12. Škulić, M. (2007). *Krivično procesno pravo* [*Criminal Procedural Law*]. Beograd: Pravni fakultet Univerziteta u Beogradu i JP Službeni glasnik.
13. Uredba o ekološkoj mreži Vlade Republike Srbije [The Ecological Network Decree of the Government of the Republic of Serbia]. *Službeni glasnik RS*, br. 102/10.
14. Veljković, N. (2017*). Indikatori održivog razvoja: Srbija i svet* [*Sustainable development indicators: Serbia and the world*]. Downloaded 2017, October 22 from http://indicator.sepa.gov.rs/o-indikatori
15. Zakonik o krivičnom postupku [Criminal Procedure Code]. *Službeni glasnik RS,* no. 72/11, 101/11, 121/12, 32/13, 45/13, 55/14 and 35/19.