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ON CERTAIN SPECIFIC FEATURES OF TAX PROCEDURE AS A TYPE OF ADMINISTRATIVE PROCEDURE

ABSTRACT: Due to numerous specific characteristics, but also the importance of regular functioning of Republic of Serbia in terms of financing public expenditures, our legislator pays a special attention to the tax system, tax administration and tax procedure. The activity of our legislator in this area is extremely intensive, so the changes in tax regulations have become more frequent, and public authorities, whether in the form of laws or some bylaws, often intervene in the area of the tax system. On the other hand, the rules of tax legislation, both material - in terms of the very bases of tax obligations, and procedural must be clear, in the way the citizens can determine and settle their tax obligations. In addition, in the interest of legal certainty, the legislator should not frequently change substantive and procedural tax regulations, and he should move within certain limits. Having that in mind, the legislator has limited himself by defining the tax procedure as a special administrative procedure, which is regulated by a special law, whereby the protective provisions provided by the Law on General Administrative Procedure must be kept in mind. Deviations from the rules of general administrative procedure are, of course, necessary and justified, but only to a certain extent, which is determined by the peculiarity and importance of the tax system, which

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results in special rules for establishing the obligation, determining the amount and fulfilling tax obligations. Guided by the peculiarities of tax legislation, the authors point out the deviations of the tax procedure from the general administrative procedure in terms of principles, initiations, nature of legal acts and other specific issues.

Keywords: *tax procedure, administrative procedure; special administrative procedure; principles of tax procedure; administrative act; tax administrative act.*

1. On the relationship between tax procedure and general administrative procedure

Tax procedure is a special administrative procedure, the subject of which is resolving tax matters, as one type of administrative matters. The tax procedure is conducted for the purpose of determining the tax liability of a natural or legal person or other taxpayer, as well as for the purpose of determining the amount of tax and for the purpose of fulfilling the tax liability. In relation to the above, the relationship between tax and general administrative procedure is the relationship between the special and the general (Kulić, 2012, p. 106).

The need for special forms of administrative procedure is justified by a wide range of administrative areas, as well as the specifics of each of them. For these reasons, the Law on General Administrative Procedure (hereinafter: LGAP) sets, ie seeks to set a minimum of rules common to all different administrative activities and, accordingly, different administrative procedures. Certainly, even the most perfect legislator and the legal regulation on general administrative procedure cannot provide solutions for all possible features of various special administrative procedures, and our legislator and LGAP are far from perfect.[1] Hence, Article 3 of the LGAP already prescribes "*Certain issues of administrative procedure may be regulated by a special law only if it is necessary in certain administrative areas, if it is in accordance with the basic principles determined by this law and does not reduce the level of protection of rights and legal interests of the parties guaranteed by this law.*"

Therefore, the LGAP itself provides for the possibility of deviating from its provisions. However, the legislator who enacted the LGAP did not give the next legislator, nor the executive power, the free hand to prescribe deviations at their will. On the contrary, relatively clear conditions are set when deviations

[1] On the shortcomings of the "new" LGAP from 2016, see extensively Milkov, 2017.

from the rules of general administrative procedure are allowed and justified. Thus, the legislator has set himself the framework in which the future legislator must adhere to when prescribing special rules of special procedures.[2] In administrative areas for which a special procedure is prescribed by law, the provisions of that law are followed and those provisions must be in accordance with the basic principles established by this law (Dimitrijević, 2019, p. 232). First, as it clearly follows from the provision of Article 3 of the LGAP, special administrative procedures cannot be fully regulated by a special law, but it is possible and allowed only to regulate certain issues of administrative procedure in a different way. The next restriction refers to the formal act and the issuer of that act which may provide for the rules of a special administrative procedure. Namely, only the law in the formal sense, ie the parliament as its enactor, can prescribe deviations from the rules of general administrative procedure. This is certainly reasonable and justified, having in mind that the legislator has defined the rules of general administrative procedure, and only he can foresee deviations from them. In addition, as Milkov (2017) rightly observes, the legislature is the most democratic body, and bearing in mind that the rules of general and special administrative procedure cover a wide range of people, ie almost every citizen, only the parliament is authorized to adjust the general administrative procedure to the specifics of certain administrative areas, when necessary (p. 76).

[2] Here, the authors point out the existence of unresolved issues regarding the concept of "systemic laws" created through the case law of the Constitutional Court (see for example: Separate opinion of Tamas Korhec in case IUz-185/2018), which, in fact, is a kind of law - named as systemic laws - rises above other laws, to the level of "supra-laws", and below the Constitution, although the intention of the enactor of the Constitution on the possibility of differentiation of laws can be found neither explicitly nor implicitly in the text of the Constitution. In practice, there may be problems in determining the law to be applied, because on the one hand there may be a law that may, by its nature, be a systemic law, while on the other hand there may be a special or later regulation that would derogate from "ordinary" law, but not "systemic law". For the purposes of this paper, the authors assume that the LGAP is a so-called "systemic law", and takes precedence over the provisions of special laws governing special administrative areas, ie, those provisions of the special law which provide for lesser rights and protection of rights and legal interests than those provided by the LGAP will not apply. The authors, however, note that the consistent application of the provision from Article 3 of the LGAP and the position on the so-called "Systemic laws" came as the only acceptable in administrative proceedings: the norm of a special law governing special administrative proceedings may derogate from the rules of general administrative procedure contained in the LGAP, but this derogation can not reduce the level of protection of rights and legal interests parties to administrative proceedings. *Ergo*, a special regulation could provide only greater rights or a wider scope of rights. Practice shows the error of this understanding and such prescribing of legal rules.

Thus, the LGAP in Article 3 allows the introduction of special rules of special administrative procedure. However, only with the adoption of the appropriate law, which deviates from the rules of the LGAP, comes the true realization of this article. In that sense, Article 3 of the Law on Tax Procedure and Tax Administration (hereinafter: ZPPPA), in paragraph 1, determines the primacy of the provisions of that law in relation to all other laws that regulate "issues in this area",[3] while paragraph two provides that "*unless otherwise provided by this law, tax procedure is carried out according to the principles and in accordance with the provisions of the law governing the general administrative procedure*." This provision establishes a two-way link between the ZPPPA and the LGAP, by imposing a framework within which permitted deviations from the general administrative procedure must comply, while the ZPPPA directly and unequivocally returns references to the LGAP for all issues not regulated. by that law. In relation to all other special administrative procedures, the tax procedure is regulated in the most detail. This regulation has been ammended in recent years, almost as a rule, several times a year, with new procedural provisions, which are often contrary to the rules of the Law on General Administrative Procedure (Lončar, 2016, p. 1236).

The issue of disagreement of special laws regulating certain issues of certain special administrative areas with the provisions of the Law on General Administrative Procedure has not been resolved to date, although the deadline for harmonization of special regulations with the provisions of the LGAP expired in June 2018.

2. Tax procedural principles

When conducting tax proceedings, the principles of tax procedure contained in the Law on Tax Procedure and Tax Administration must be kept in mind, but also the principles of general administrative procedure contained in the LGAP, given the fact that they have to be applied to the tax procedure.

[3] Thus, according to the author, the ZPPPA itself becomes a "systemic law" in relation to all other tax laws. This is how the problem of systemic law is created here as well; The LGAP establishes primacy with its general principles, while the ZPPPA establishes primacy by explicit provision. The question arises as to which provision should be applied if the provision of a special regulation - here ZPPPA - is less favorable for the party than the provision, ie protection, provided by the Law on General Administrative Procedure. In principle, it seems that this conflict should be resolved by applying the provision that is more favorable for the party, and a special question then arises, whether it is always feasible or acceptable.

The legal significance of these principles in the tax procedure is reflected in the fact that the tax authority must interpret the provisions of tax regulations in the sense and spirit of these principles (compare with: Kulić, 2018, p. 122).

ZPPPA states the following principles of tax procedure:[4] 1) the principle of legality; 2) the principle of temporal validity of tax regulations; 3) the principle of providing insight into the facts; 4) the principle of keeping official secrets in tax proceedings; 5) the principle of conducting in a good faith; 6) the principle of fact.

2.1. The principle of legality

The principle of legality of the activities of the tax administration, ie tax authorities, as proclaimed in Article 4 of the ZPPPA, is the first principle of the tax procedure that this Law proclaims. This principle fully corresponds to the Law on General Administrative Procedure, which also states the principle of legality among its principles first. The principle of legality of the whole government administration, including the tax administration, is a further embodiment of the provision of Article 198 of the Constitution of the Republic of Serbia, which states that individual acts and actions of state bodies and local self-government units must be based on law (Kulić & Minić, 2011, p. 3).

The principle of legality is one of the fundamental principles of tax procedure, as well as, after all, general administrative procedure (Kulić, 2012, p. 107). As a key feature, or even a precondition of every administrative procedure, including *tax* procedure, it was not necessary to prescribe this principle separately by a special tax law – ZPPPA. However, we are of the opinion that, due to its extreme importance when it comes to the actions of the administration[5], the repetition of this principle of work of the (tax) administration in the ZPPPA is justified and acceptable, and does not represent an unreasonable burden on the text of the law. The principle of legality implies that the tax authority decides tax matters on the basis of tax laws as well as on the basis of other regulations adopted on the basis of authorizations contained in those laws.[6] The tax authority is obliged to exercise all rights and obligations from the tax-legal relationship in accordance with the law, and is obliged to determine all the facts that are important for the adoption of a

[4] Provisions of Article 4 to Article 9 of the LCPA.

[5] As Milkov summarizes *"The administration can and must do only what is explicitly provided by law" which further "indicates the complete restraint of the administration by the law."* (Milkov, 2017, p. 86).

[6] Compare with the text of the provision of Article 4, paragraphs 1-3 of the ZPPPA.

lawful and correct tax administrative act, paying equal and due attention to the facts to the detriment of the tax debtor (Kulić, 2012, p. 108). Kulić takes the position here that this is, in fact, the principle of truth, which is provided for in the LGAP, and which is a requirement to establish objective truth in the tax procedure, to correctly and completely determine all facts and circumstances that are important for the adoption of a legal and proper tax administrative act.[7]

The effect of the principle of legality is reflected in the obligation of the tax authority to pass a tax administrative act based on the law in the tax procedure, ie the tax authority is imperative to strictly adhere to the provisions of material and procedural tax regulations, which regulate the competence and conduct of the tax authority, as well as the rights of tax debtors themselves and other taxpayers. Violation of the principle of legality enables a party in the procedure to use legal remedies - an appeal in a tax procedure and a lawsuit in an administrative dispute. The sanction for violation of this principle consists in the authority and duty of the second instance tax authority, ie the Administrative Court, to annul or amend the tax administrative act which violates the substantive tax regulations or provisions governing the tax procedure, and in case of violation of tax regulations of particularly significant importance, then such a tax administrative act may be declared null and void by the application of extraordinary legal remedies (Kulić, 2012, p. 123).

From the aspect of the principle of legality, it should be noted that it is also expressed in tax matters in which the tax authority is authorized to decide on the basis of discretionary powers, ie at its discretion. Discretionary powers exist when the tax authority is authorized by the tax regulation to decide in the way that it considers the most expedient among several possible options when resolving a specific tax matter (Kulić & Minić, 2011, p. 4). According to the ZPPPA, in cases where the tax authority is authorized to act on the basis of discretionary powers, it is obliged to act in accordance with the purpose of those powers and within the law.

From the presented characteristics of the principle of legality in tax procedure, it can be clearly determined that there are no, essentially observed, such features of this principle, either at the abstract level or in

[7] At the same time, it should be noted that this *principle* of truth is not absolute, and that there are certain exceptions to the application of the principle of truth. Thus, one of the exceptions is envisaged in the case when the tax base is determined by assessment, by the method of parification from Article 58a of the ZPPPA.

terms of its specific application, which differs from the general principle of legality of administration proclaimed by the LGAP itself. In this sense, it seems clear that this principle does not deviate from the rule contained in the LGAP itself; it neither reduces nor raises the level of rights or protection of the rights of a party in a special administrative procedure. The only justification for introducing this principle in the ZPPPA can be found in its fundamental importance for a lawful and reliable tax procedure and its importance for society as a whole. Any other reason would not justify the unnecessary burden of the legal text of the already overburdened and extensive ZPPPA.

2.2. The principle of temporal validity of tax regulations

Starting from the general principle of validity of regulations, and in close connection with the principle of legality, the tax liability is determined in accordance with those regulations that were in force at the time of the tax liability, unless, in accordance with the Constitution and law, certain provisions of law to have a retroactive effect. In that sense, Article 196 of the Constitution of the Republic of Serbia stipulates that laws and other general acts shall enter into force at the earliest on the eighth day from the day of their publication in the Republic Official Gazette. There are exceptions to this constitutional rule, so laws and other general acts can enter into force and come into force before or after the expiration of eight days. When it comes to tax laws, it often happens that the passage of time from publication to the beginning of their application, the so-called. *vacatio legis*, be longer than eight days, because it is necessary that, on the one hand, tax debtors are better acquainted with the provisions of these laws, and on the other hand, it is necessary to make certain personnel and organizational-technical preparations for their application (Kulić & Minić, 2011, p. 13). Although legal certainty requires that laws be effective only for the future, it is possible that tax laws have retroactive effect, and pursuant to Article 197, paragraph 1, of the Constitution of the Republic of Serbia, which stipulates that laws and all other general acts may not have retroactive effect. However, it follows from the restriction set by paragraph 2 of the same article of the Constitution that tax laws can have retroactive effect only when three conditions stipulated by the Constitution are cumulatively met: 1) that retroactivity is introduced by the tax law itself; 2) that retroactivity refers only to certain provisions of that law and 3) that retroactivity was introduced on the basis of the general

interest determined during the enactment of the law.[8] However, regardless of the extremely rare exceptions, those tax regulations that are in force at the time of the tax obligation, ie at the time of conducting the tax procedure, are to be applied in the tax procedure.

2.3. The principle of enabling insight into facts

According to Article 6 of the ZPPPA, before passing the tax administrative act which determines the obligations and rights of the tax debtor, the tax authority is obliged to, at the request of the tax debtor or taxpayer, provide the tax debtor with insight into the legal and factual basis for passing the tax administrative act. By prescribing that principle, the legislator wanted to enable tax debtors to be fully aware of the factual situation on the basis of when the tax authority issues a tax administrative act, so that they can better protect their rights (Kulić, 2018, p. 124). This principle, clearly, was proclaimed in order to strengthen the protection of the interests and position of the party in the tax procedure. However, this type of protection can be reasonably questioned, bearing in mind that it is provided only at the request of the party, and it easily happens that, when the body initiates proceedings ex officio, the party does not even know that proceedings are being conducted against it, but the party finds out about the proceedings only when thefirst-instance decision is delivered[9] to the party, and the party cannot invoke protection and participation in the procedure, which is so strongly proclaimed.[10] This principle should be distinguished from the party's right to a statement, which, as a principle, is prescribed by Article 11 of the LGAP.

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[8] Kulić and Minić (2011) cite here, as an example, the Law on One-Time Tax on Extra Income and Extra Property acquired by exploiting special benefits (2001) , by which the legislator in Serbia in 2001 wanted to tax extra income and extra property acquired by exploiting special benefits in the period from January 1, 1989 to the entry into force of the Law on strength. We are of the opinion, however, that such a law, according to the rules of the current Constitution of the Republic of Serbia, could be declared unconstitutional. State intervention with such intensity and covering such a long period of time, no matter how justified and understandable from the tax aspect, would be excessive and untimely interference of the state, which completely and permanently violates legal security. This is a serious issue and a serious danger for all *ex post facto* of the law.

[9] Unlike the "new" LGAP, where the legislator, with unprecedented legal gymnastics, introduced the concept of "notification", ZPPPA still envisages that the act should be delivered.

[10] Unfortunately, as a notorious fact, it is accepted in theory and practice that the work of tax authorities, and above all the Tax Administration, which decides in the first instance, suffers from chronic non-transparency and inaccessibility to the citizens it should serve. It is a completely different question whether this is just a consequence of the sluggishness of one state body and its employees, or whether it is a deliberate action.

2.4. The principle of keeping official secrets in tax proceedings

From the nature and importance of the subject of the tax procedure, as necessary, this principle of the tax procedure derives. Namely, the tax debtor is obliged to submit tax returns in the tax procedure and to submit complete and accurate data on his business to the tax authority in another way in order to correctly determine the tax liability based on them (similarly to Kulić, 2012, p. 109). Unauthorized use or disclosure of such information may jeopardize the interests of the tax debtor as well as the public interest. Therefore, it is envisaged that certain information will be considered an official secret. They are considered an official secret in the tax procedure and are kept as such different types of data and information specified in Article 7 of the ZPPPA. Violation of official secrets endangers the interests of tax debtors and the public interest of the Republic, which prevails over the interest in access to information of public importance that is an official secret, and the disclosure of which could have severe legal or other consequences for interests protected by the Law on Tax Procedure and Tax Administration (Kulić, 2012, p. 109).[11] In any case, the legislator justifiably provided that all information, tax returns and other data and documents in the tax procedure should be considered an official secret. Disclosure of these data and making them available to a wider circle of persons and the public represents a serious violation of the right to privacy (right to private life), but the interests of the Republic of Serbia can also be seriously endangered. Certainly, it is clear that the stated principle of ZPPPA provides a higher degree of protection than the one proclaimed by Article 15 of the LGAP, which refers to the principle of access to information and data protection.

2.5. The principle of good faith

ZPPPA envisages, ie Article 8 proclaims, the principle of acting in good faith. What can be noticed is the deviation of our legislator from the usual terminology of our legal heritage. Namely, the standard "in good faith" is common, primarily in Anglo-Saxon legal systems, but also, by taking over, in European community law. However, it did not exist in our legal regulations until recently, and it is not widespread even today. Our legal system is far "closer" to the standard of conscientiousness and honesty. Apart from the reasons for novelty and originality, there can be no clear reason for the

[11] For more details on the principle of official secrecy in tax proceedings, see: Article 7 of the LCPA.

legislator to deviate from the accepted standard and introduce a new standard in the regulation, the content of which is not defined in domestic practice.

Kulić rightly concludes that this principle, in fact, indicates that the parties in the tax procedure (tax authority and tax debtor) are obliged to act in good faith (*bona fides*), which implies good intentions, honesty and conscientiousness. According to the explicit provision of Article 8, paragraph 2 of the ZPPPA, the frequency and duration of tax control should be limited to the necessary extent. In other words, the tax authority should avoid frequent and too long controls of tax debtors (Kulić, 2012, p. 111).

2.6. The principle of facticity

Tax facts are determined according to their economic essence, which means that the subject of taxation are facts that indicate the existence of a certain economic power in the taxpayer. Hiding or misrepresenting the economic essence of the legal form could violate the principle of fairness in taxation. In other words, the economic essence of the obligation or the economic element of the business prevails over the legal form or possible legal shortcomings. However, the application of this principle is relevant in situations that are not explicitly regulated by tax laws. When using such authorization, the tax authority is obliged to take care that legitimate legal transactions, regulated by the rules of obligations or other branches of private law, are not endangered (Kulić, 2018, p. 126). Therefore, if there are no evasive motives in the taxpayer, the tax authority will not apply the principle that the economic essence is more important than the legal form. If, on the other hand, the party concludes a simulated legal transaction, which, in fact, conceals another legal transaction, the basis for determining the tax liability will be the dissimulated legal transaction (Kulić, 2012, p. 111). Thus, the essence of this principle is reflected in the fact that the state, through its tax authorities, having a legitimate interest, seeks to prevent, or at least significantly complicate, the possibility of circumventing tax regulations in order to evade tax liability, either by avoiding it completely or significantly reducing it. The state has a legitimate economic and legal interest in having the tax determined and collected according to the real economic value of the transaction, and this principle is an instrument for realizing these interests.

3. Initiation of Tax procedure

The issue of initiating tax proceedings is regulated comprehensively by the provisions of the ZPPPA, in the second part of this Law. The rules of general administrative procedure are applied in a subsidiary manner to the initiation and conduct of tax proceedings, as in all other matters of tax proceedings.

Thus, Article 33, paragraph 1 of the ZPPPA stipulates that "*Tax proceedings are initiated by the Tax Administration ex officio, and exceptionally at the request of the party.*"

However, the LGAP also envisages a third way of initiating administrative proceedings. Namely, Article 94 of the LGAP provides for the possibility of initiating a procedure with a public announcement. Thus, according to paragraph 1 of this Article, "*the body may initiate proceedings by public announcement against a large number of persons unknown or unable to determine, if they can have the status of a party to the proceedings, and the request of the body is substantially the same for all"* , and , according to paragraph 2." *The procedure is initiated when the public announcement is published on the web presentation and on the bulletin board of the body.*" However, as we have seen, the ZPPPA does not envisage the possibility of initiating in such way a tax procedure, but it still contains a reference norm to the LGAP. In such a state of affairs, the question may be asked whether the tax procedure can, in some case, be initiated by a public announcement. We believe that the answer to this question must be negative. This for several reasons. First, the tax liability always refers to a well-defined person - the taxpayer, or to a well-defined thing whose owner is known. It is not inherent in the tax procedure to be initiated against a person who is not known to the authority. On the other hand, the choice of the legislator to list only two ways of initiating tax proceedings in Article 33 of the ZPPPA: ex officio and at the request of a party, should be understood as the legislator opted for these two ways, so willingly and consciously excluding the possibility tax procedure by public announcement. In the end, the narrower possibilities of the tax authority in terms of initiating the tax procedure protect the rights of citizens more, and such an interpretation is the most favorable for them. Therefore, it should be considered that the tax procedure, despite the referring norm of the ZPPPA to the similar application of the LGAP, cannot be initiated by a public announcement.

3.1. Initiation of Tax procedure ex officio

Initiation of the procedure ex officio implies that the competent body initiates the procedure on its own initiative, and without any external incentive. However, this decision to initiate tax proceedings ex officio does not mean that it is not possible or allowed external influence on the body to initiate ex officio proceedings. In that sense, initiating proceedings ex officio does not mean the absolute exclusion of all other persons from this activity (Milkov, 2017, p. 169). Namely, in accordance with the general rules of the LGAP, body that initiates the proceedings must take into account possible written submissions of the natural and legal entities and warnings of the competent authorities, but towards these entities the competent authority has no formal obligation (Milkov, 2017, p. 170).

The tax procedure is initiated ex officio when required by the tax law or some other regulation based on the tax law, or when the tax authority determines or learns that, given the existing facts, a procedure should be initiated to protect the public interest. From the way of conducting the tax procedure determined ex officio, it seems that for conducting the procedure it is necessary to fulfill one of the two alternatively set conditions or situations: 1) when it is provided by some tax regulation and, according to the available facts, it is not necessary to the body specifically determines the need to protect the public interest and 2) when the body determines that or finds out that, given the factual situation, it is necessary to protect the public interest (similarly to Milkov, 2017, p. 169). This understanding is a logical consequence of the plain interpretation of the said provision.[12] However, contrary to the linguistic interpretation of the norm, and having in mind the principle of legality from ZPPPA and LGAP, it should be taken that the procedure can be initiated *ex officio* only when there is an explicit legal basis for that, because every administrative activity must have a legal basis. Therefore, the initiation of proceedings ex officio in this second case requires the fulfillment of all requirements: both that it is provided by law and that in this case it is determined that the initiation of proceedings is in the public interest (similar to Milkov, 2017, p. 169). It is true that it could easily be argued that the conduct

[12] Article 90, paragraph 2 of the LGAP reads: *"The procedure is initiated ex officio when it is determined by the regulation* ***or*** *when the body determines or finds out that, given the factual situation, it is necessary to protect the public interest." (Underlined by the authors).* So, strictly speaking, having in mind the word "or", according to the usual meaning of the word, it could be argued that the second situation would allow the proceedings to be conducted ex officio and without an explicit basis in law. This position would be completely legally unacceptable and indicates only the clumsiness of the authors of certain key regulations.

of the procedure for determining and collecting taxes is always in the public interest, bearing in mind that taxes are, in themselves, public revenues, which finance the regular functioning of the state and its institutions and institutions. of special importance for the wider society (schools, hospitals, etc).

3.2. Initiation of Tax procedure at the request of the party

The second way of initiation of the tax procedure, in accordance with the Article 33, paragraph 1 of the ZPPPA, is "at the request of the party."[13] It's inherent in this way of initiating the procedure that the procedure is initiated by the Tax Administration at the request of the party in order to recognise a certain right to the party (Kulić, 2012, p.150) or possibly reduced or terminated an obligation. In the case of matters for which the proceedings are not conducted ex officio, or which are conducted on request, then the request of the party is a *conditio sine qua non* and for initiating and conducting tax proceedings. The LGAP explicitly stipulates that the procedure cannot be initiated ex officio in those administrative matters in which, according to the law or the nature of the matter, the procedure can be initiated only at the request of the party, otherwise such a decision would be null and void.

However, it is possible that the tax authority, at the request of the party, finds that there are no conditions for initiating a tax procedure. Then, according to the explicit provision of Article 33, paragraph 3 of the ZPPPA, the tax authority will make an order. The appeal is always allowed against this order.[14] Pursuant to the

[13] Milkov finds a terminological difference between the "new" LGAP, according to which the procedure is "initiated by the party's request", and the provisions of the previous LGAP, and which corresponds to the provision of Article 33 of the ZPPPA, according to which the procedure was initiated "at the request of the party". Milkov further argues that the consequence of the fact that according to the previous LGAP (which is valid for the current ZPPPA) was the body that initiated the procedure, while the party only submitted a request, and according to the rule from the "new" LGAP, the procedure is initiated by the very submission of the party's request (Milkov, 2017, p. 170). Although this observation of prof. Milkova is completely correct, we do not think that this terminological distinction has significant practical consequences. Sometimes it seems acceptable that the procedure started with the submission of the request, because if an activity of the body is requested upon the submitted request, in order to consider the procedure initiated, then we would have a situation that in the period from the request the procedure was neither initiated nor initiated, but the procedure would be in vacuum.

[14] It should be noted that there was no need for the legislator to add the words "against which an appeal is allowed." This is because, unlike the rules of general administrative procedure, in tax proceedings an appeal against a conclusion is always allowed, unless explicitly excluded by law. Therefore, nomotechnically, it is unnecessary to state everywhere that an appeal is allowed, but only when it is not allowed. This way, the already burdened text of the ZPPPA is unnecessarily burdened.

provisions of the ZPPPA, the tax authority will make the following order when: 1) the applicant does not have party capacity, 2) the applicant is not actively legitimized in a particular tax matter, because it is not about protecting his rights or legal interests, 3) the case is not about the tax matter, 4) when a specific tax matter has already been legally resolved, except in the case of repeating the procedure and when the request is submitted to an incompetent authority.[15]

After initiating the procedure, the party may withdraw the request, during the entire procedure in which case the tax authority issues a order suspending the procedure (Kulić, 2012, p. 151).[16] However, after giving a statement on the withdrawal of the request, and until the tax authority makes a decision on the suspension of the procedure, the party may revoke its withdrawal from the request.[17]

3.3. Initiation of Tax procedure

The regulation of the moment and manner of initiating the tax procedure is regulated somewhat differently than provided for in the LGAP.

Namely, Article 90, paragraph 3 of the LGAP stipulates that *"before initiating proceedings ex officio which is not in the interest of the party, the body obtains information and takes actions to determine whether the conditions for initiating proceedings are met and, if so, issues an act initiating proceedings*

[15] However, it could be argued that in case the request is submitted to a really incompetent body, the rule should be applied according to which the administrative body, if it is not competent to decide on an administrative matter, will forward the request to the really competent body. Such an interpretation would be in the spirit of Article 143, paragraph 2 and Article 153, paragraph 2 of the ZPPPA, as well as the general principle of the LGAP on assistance to foreigners.

[16] An appeal against this order is also allowed. Kulić, on the other hand, believes that, exceptionally, and by applying the rules of the LGAP, tax proceedings can be conducted even after the party's request is waived, if further proceedings are necessary in the public interest (Kulić, 2012, p. 151). This is difficult to reconcile with the rule that tax proceedings cannot be initiated without the request of a party, unless it is a matter of which the proceedings are conducted ex officio. In addition, it is difficult to imagine a situation in which there are public interests in conducting tax proceedings, which are otherwise conducted at the request of the party. This is also in accordance with Article 90, paragraph 5 of the LGAP.

[17] The party may withdraw the request even after the first instance decision, and before the expiration of the deadline for appeal, when the tax authority will make a decision to suspend the procedure, with annulment of the first instance decision, if the party's request was positively or partially positively resolved (Kulić, 2012, p. 151). On the other hand, according to the rules of general administrative procedure, according to the provisions of Article 98, paragraph 1 of the LGAP, the party may withdraw the request until it is notified of the decision of the second instance body. Therefore, it seems that the LGAP in this respect provides for a lower degree of protection of rights than the rules of the LGAP.

(conclusion, order, etc.). The act on initiating the procedure is not passed if the body makes an oral order" and Article 91, paragraph 3 of the LGAP stipulates that *a "procedure initiated ex officio and not in the interest of the party is considered initiated when the party is notified of the act initiating the procedure.*" On the other hand, according to paragraph 1 of the same article, when it comes to proceedings at the request of a party, the proceedings are considered initiated by submitting a request.

Therefore, when it comes to initiating the procedure ex officio (which is not in favor of the party), the LGAP envisages that an act on initiating the procedure should be adopted[18] and delivered to[19] the party, and the procedure is then considered initiated.

On the other hand, according to the explicit provision of Article 33, paragraph 2 of the ZPPPA, it stipulates that "the tax *procedure is initiated when the Tax Administration performs any action in order to conduct the procedure.*" First of all, ZPPPA does not make a difference when and how the tax procedure is initiated against who initiated it - whether at the request of the party or ex officio. Secondly, while the LGAP binds the initiation of the procedure for the adoption of the "act on the initiation of the procedure", the ZPPPA considers the procedure initiated when any action is taken in order to conduct the procedure. From that, it can be concluded that in the LGAP the emphasis is on the formal-legal element, while in the LGAP the emphasis is on the factual element - taking any action in order to conduct the procedure. This procedure reduces the protection of the rights and legal interests of the party in the procedure, and the deviation of the ZPPPA from the rule that it is necessary to adopt a formal act initiating the procedure could be considered inconsistent with Article 3 of the LGAP.

4. Legal nature of Tax act and Tax administrative act

The tax procedure is also characterized by specific acts, at least in the name, if not in essence, issued by the tax authority. Thus, the explicit provision of Article 34 of the ZPPPA regulates the issue of tax act and tax administrative act. According to that provision, "a tax act is a tax decision, order, order for tax control, invitation for tax control, record on tax control and other act which initiates, supplements, changes or completes an action

[18] On the critique of this solution, see: Milkov, 2017, p. 171-172.

[19] According to the LGAP, this is a notification that is made according to the rules of delivery. On the critique of the construction of information, see: Milkov, 2017.

in tax procedure."The provision stipulates that the tax administrative act, by which the Tax Administration decides on individual rights and obligations of the tax debtor from the tax law relationship, is a tax decision and an order. Thus, all tax administrative acts are, at the same time, tax acts, but not all tax acts are, at the same time, tax administrative acts.

Starting from such defined positive legal definitions, Kulić (2012, p. 174) defines a tax act as an act of a tax authority which, by applying tax regulations, determines the rights and obligations of a tax debtor or other natural or legal person, or takes some action in tax proceedings. At the same time, it should be pointed out that another act which initiates, supplements, changes or completes an action in the tax procedure is also considered a tax act. In that sense, it is possible that the tax administration during the procedure, for the implementation of certain actions, can, for example, make orders and decisions that can be characterized as the so-called "Procedural decisions." Thus, today the decision are used to decides on tax-administrative matters, but it also enters the domain of matters previously exclusively reserved for orders - and that is deciding on procedural issues (similar to Vučetić, 2021, p. 75). The concept of procedural decision and their nature is controversial in our theory, although in practice, in essence, no major problems are encountered.

The tax administrative act, on the other hand, is an act by which the tax authority in the tax procedure applies tax and other regulations to a specific case in order to determine the rights and obligations of the tax debtor. Tax administrative acts are, therefore, a tax decision and an orderd. The tax administrative act is a unilateral statement of the will of the tax authority in cases provided by tax laws, which authoritatively decides on individual tax matters. A tax administrative act is, therefore, a specific legal act that refers to a specific case and to a specific tax debtor, who was a party in the tax procedure in which the act was passed (similarly to Kulić, 2012, p. 174).

The condition for the act of the tax authority to have the character of a tax administrative act is that it, by direct application of tax regulations, creates, changes or abolishes tax relations, ie that it creates, changes or abolishes the rights and obligations of tax debtors The tax administrative act is also binding on the tax debtor to whom the tax authority that issued the act refers. The tax administrative act is passed in writing, while other tax acts are passed in writing when it is prescribed by law or at the request of the tax debtor.

Tax decision is the most important tax act. It is the main tax act, and it is an act which decides on the subject of the tax procedure, ie it resolves a

specific tax matter, and which the tax authority adopts on the basis of decisive facts determined in the tax procedure. The adoption of the tax decision is the most important phase of the tax procedure by which the tax authority seeks to satisfy both the public interest and the interests of the party that participated in the tax procedure by applying applicable tax regulations (Kulić, 2012, p. 174). From the above, it can be concluded that, apart from the title of the act itself, there are no special essential differences between the tax and the "ordinary" administrative decision.

The order is, as a rule, a preliminary, auxiliary, secondary and accessory decision (Milkov, 2017, p. 180) . The conclusion reached in the tax procedure is a tax administrative act which decides on certain issues related to the tax procedure, as well as on issues that appear as secondary in connection with the implementation of the procedure, and which are not decided by a decision (Kulić, 2012, p. 177). Therefore, the nature, ie the purpose of the conclusion itself, mostly corresponds to the regulations of the LGAP. However, the key difference is the ability to appeal the order. Namely, the provision of Article 146, paragraph 4 of the LGAP stipulates that the conclusion cannot be challenged by a special appeal or a lawsuit in an administrative dispute, but only by an appeal and a lawsuit against the decision. In this respect, the LGAP leaves no room for the opposite. However, according to the explicit provision of Article 34, paragraph 4 of the ZPPPA, an appeal against the order is always allowed, unless specifically excluded by law. Therefore, it can be said that the provision of ZPPPA is inconsistent with the provision of the LGAP. However, the fact is that in the tax procedure it is possible to decide, with an order, on important issues for the party in the procedure, the legislator acted reasonably when he enabled the appeal against the order as a tax act. We are also of the opinion that the provision of the ZPPPA is not in conflict with the provision of the LGAP. Both because such a provision of the ZPPPA gives greater and broader rights than those provided by the LGAP, which is in accordance with Article 3 of the LGAP. Previous notwithstanding, it's true that allowing an appeal against almost every individual action of the tax authority, in practice, can be burdensome for the tax authority.

5. Appeal in Tax procedure

As the embodiment of the right to a legal remedy guaranteed by the European Convention on Human Rights and the Constitution of the Republic of Serbia, the right to appeal is recognized to every taxpayer who considers that the adoption of a tax administrative act deprived him of a right (similar to

Kulić, 2012, p. 229). Unlike the general rules contained in the „new" LGAP, which provides for the possibility of filing both written objection and appeals, in tax proceedings an appeal is the only regular remedy.

The state, which through the tax authority appears as one of the subjects in the tax-legal relationship, independently determines the content and scope of mutual rights and obligations with the taxpayer, as the other subject of that relationship. Due to this unequal position of participants in the tax-legal relationship, it is necessary to provide legal protection to the weaker participant - the taxpayer, especially because his economic strength may be unjustifiably or even illegally reduced (Ivanović Knežević, 2013, p. 83).

An appeal in a tax procedure is a legal remedy by which an authorized person disputes the legality or regularity of a first-instance tax administrative act passed in a tax procedure (Kulić, 2012, pp. 229–230). Therefore, an appeal can be filed only by those tax acts that are tax administrative acts, ie against the tax decision and orders. Similar to the rules of general administrative procedure, pursuant to the provisions of Article 140 of the ZPPPA, an appeal against a tax administrative act may be lodged against a first-instance tax administrative act, unless otherwise provided by law, but an appeal may also be filed if the decision on the party's request is not reached within time limit. This is about the so-called "Silence of the administration", which implies the inactivity of administrative bodies at the request of the party, and which entails numerous consequences (Torbica, 2021, p. 143).

An appeal, unless otherwise prescribed by law, may be filed within 15 days from the day of receipt of the tax decision. Appeals against first-instance tax administrative acts are decided by the Minister in charge of finance, or a person authorized by him. However, the ZPPPA provides for certain specific rules regarding the appeal in the tax procedure, which, it can be said, significantly deviates from the rules contained in the LGAP, by providing for less favorable provisions per party, thus ignoring the framework set by Article 3 ZPPPA. These rules, above all, refer to the suspensive effect of the appeal and the possibility of filing an appeal against the conclusion.

Thus, by the explicit provision of Article 147, paragraph 1 of the ZPPPA, the appeal, as a rule, does not delay the execution of the tax administrative act, ie the tax decision, against which it was filed. Thus, the first-instance tax decision is enforceable, ie it has to be enforced, even though the appeal is allowed and timely filed. Having in mind the fact that, according to the provision of Article 154 of the LGAP, the appeal has a suspensive effect, except exceptionally, it can be clearly concluded that prescribing the rule that the appeal has no

suspensive effect reduces the level of protection of rights and legal interests of the party. Article 3 of the LGAP (similar to Lončar, 2016, p. 1237). This is just another indicator in a series that indicates the inability of the legislator to create a coherent and complete system of rules of administrative procedures. Strictly speaking, if we take into account the position of the Constitutional Court on the so-called "Systemic laws", in the dispute the provisions of the systemic law which is more favorable for the party, and the provisions of the special law which contains, for the party, less favorable provision, this conflict would have to be resolved in favor of the systemic law.

Article 147, paragraph 3 of the ZPPPA stipulates that the second instance body must decide on the appeal itself within 60 days from the day of submitting the appeal. If the second-instance body, acting on the appeal, annuls the first-instance tax decision and returns the case to the first-instance body for reconsideration, the first-instance procedure is obliged to act on the order of the second-instance tax authority within 40 days of receiving the second-instance decision (in the LGAP the deadline is to decide within 30 days). An administrative suit may be initiated against the final tax administrative act, unless otherwise provided by law. The lawsuit has no suspensive effect.

When it comes to the possibility of filing an appeal against the order, in the tax procedure against the order, as a tax administrative act, as a rule, an appeal can be filed, under the same conditions and in the same way as against the tax decision. As it has already been pointed out, an appeal against the order is always allowed, unless it is explicitly excluded by law. Also, as it has already been pointed out, the provisions on the admissibility of an appeal against an order are not incompatible with the provisions of the LGAP, given the fact that the level of protectionf of the party's interest is higher than the one provided by the LGAP. An appeal against the order shall be filed within the same time limit, in the same manner and to the same body as the appeal against the tax decision, unless otherwise prescribed by law. However, the Law on Tax Procedure and Tax Administration prescribes in which cases an appeal against an order is not allowed (for example: against an order by which the tax authority competent according to the place where the tax return is filed decides on the request to extend the deadline for filing a tax return, against the Order deciding on the request for restitution, except when the request for restitution was filed due to missed deadline for appeal against the tax decision, against the order on the complaint on the assessment of the listed items in the procedure of forced collection). In cases when a special appeal is not allowed against the conclusion, the party in the tax

procedure and other persons who have a legal interest in it have not been left without legal protection, because these conclusions can be challenged by an appeal against the main tax decision. Like any other, this complaint has no suspensive effect.

6. Conclusion

As can be clearly seen, of all the special administrative procedures, the tax procedure is the most comprehensively regulated, ie it contains many special rules that deviate from the rules of general administrative procedure. Starting from the principles, but also the types of administrative acts that are passed during the tax procedure, the manner in which the procedure is initiated, the effect and possibilities of filing an appeal, the peculiarities of the tax procedure, its purpose and significance for the state permeate most special provisions.

What appears to be a key problem is the relationship between the rules of general administrative procedure and special - tax procedure. In the first place, the main reason for this problem is the ambitious desire of the legislator who passed the „new" LGAP from 2016 to establish a minimum protection of the rights and legal interests of the parties in the procedure, and not to allow derogations from the protections it provides. In such a state of affairs, within the tax procedure, we come across numerous provisions that regulate certain issues significantly differently. Due to the specific position in which the position of the Constitutional Court puts us in relation to the so-called „Systemic laws", a way must be found in which the conflicting provisions of different laws could be applied simultaneously. This authors, guided by the *ratio legis* legislator of Article 3 of the LGAP, propose that, as a starting principle for resolving this issue, all conflicts of norms of different provisions of the general and special administrative procedure shall be interpreted and applied in the way that is most favorable for the party.

De lege ferenda the legislature should make every effort to harmonize the rules of special administrative procedures, and especially the tax procedure, with the basic principles and other rules of the general administrative procedure, which should have been done on June 1, 2018. It is possible that some future legislators will be wiser and more consistent.

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O ODREĐENIM SPECIFIČNOSTIMA PORESKOG POSTUPKA KAO VRSTE UPRAVNOG POSTUPKA

REZIME: Zbog brojnih osobenosti, ali i značaja za redovno funkcionisanje Republike Srbije, u smislu finansiranja javnih rashoda, posebnu pažnju naš zakonodavac poklanja poreskom sistemu, poreskoj administraciji i poreskom postupku. Aktivnost našeg zakonodavca u ovoj oblasti je izrazito intenzivna, te su promene poreskih propisa učestale, a javna vlast, bilo u formi zakona ili kakvog podzakonskog akta, često interveniše u oblasti poreskog sistema. S druge strane, pravila poreskog zakonodavstva, kako materijalnog – u pogledu samih osnova poreskih obaveza, tako i procesnog moraju biti jasna kako bi građani svoje poreske obaveze mogli opredeliti i izmiriti. Pored toga, u interesu pravne sigurnosti, zakonodavac ne bi trebao često menjati materijalne i procesne poreske propise, te bi se morao kretati u okviru određenih granica. Imajući to u vidu, zakonodavac je ograničio samog sebe tako što je poreski postupak opredelio kao poseban upravni postupak, koji je uređen posebnim zakonom, pri čemu se moraju imati u vidu zaštitne odredbe predviđene Zakonom o opštem upravnom postupku. Odstupanja od pravila opšteg upravnog postupka su, svakako, neophodna i opravdana, ali samo u izvesnoj meri, koja je određena osobenošću i značajem poreskog sistema, što rezultira posebnim pravilima utvrđivanja, opredeljivanja visine i izvršenja poreske obaveze. Vodeći se osobenostima poreskog zakonodavstva, autori ukazuju na odstupanja poreskog postupka od opšteg upravnog postupka u pogledu načela, pokretanja, prirode pravnih akata i drugih osobenih pitanja.

Ključne reči: *poreski postupak, upravni postupak, posebni upravni postupak, načela poreskog postupka, upravni akt, poreski upravni akt.*

References

1. Dimitrijević P. (2019) *Upravno pravo: opšti deo* [*Administrative law: General part*]. Niš: Medivest
2. Ivanović Knežević, J. (2013). Žalba u poreskom postupku [Appeal in Tax Procedure]. *Pravo - teorija i praksa*, *30* (4-6), pp. 83–95
3. Kulić, M. & Minić, M. (2011). Načela poreskog postupka kao posebnog upravnog postupk [Principles of tax procedure as a special administrative procedure]. *Nauka, bezbednost, policija*, *16* (1), pp. 1–16
4. Kulić, M. (2012). *Poresko pravo* [*Tax Law*]. Novi Sad: Pravni fakultet za privredu i pravosuđe u Novom Sadu
5. Kulić, M. (2018). *Upravno pravo: poseban deo* [*Administrative Law: Special part*]. Novi Sad: Pravni fakultet za privredu i pravosuđe u Novom Sadu
6. Lončar, Z. (2016). Posebni upravni postupci [Special administrative procedure]. *Zbornik radova Pravnog fakulteta u Novom Sadu*, *50* (4), pp. 1231–1249
7. Milkov, D. (2017). *Upravno pravo II: upravna delatnost* [*Administrative law II: administrative activity*]. Novi Sad: Pravni fakultet Univerziteta u Novom Sadu
8. Torbica, M. (2021). "Ćutanje uprave" u upravnom postupku koji se vodi pred katastrom nepokretnosti i vodova ["Silence of the administration" in the administration procedure that is being instituted before the Real Estate Registry and Cable Duct Cadaster]. *Pravo - teorija i praksa, 38* (2), pp. 143–155
9. Ustav Republike Srbije [Constitution of Republic of Serbia], *Službeni glasnik RS*, br. 98/06, 115/21
10. Zakon o opštem upravnom postupku [General Administrative Procedure Act]. *Službeni glasnik RS*, br. 18/16 i 95/18 - autentično tumačenje
11. Zakonu o poreskom postupku i poreskoj administraciji – ZPPPA [Law on tax procedure and tax administration]. Sl*užbeni glsnik RS*, br. 80/02, 84/02 - ispr., 23/03 - ispr., 70/03, 55/04 ... 91/15 – autentično tumačenje, 112/15, 15/16, 108/16, 30/18, 95/18, 86/2019 i 144/20
12. Vučetić, D. (2021). Delotvornost procesnih rešenja u prvostepenom upravnom postupku [Effectiveness of procedural solutions in the first instance administrative procedure]. *Zbornik radova Pravnog fakulteta u Nišu*, *60* (91), pp. 75–96

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DEMOCRATIZATION OF PROPERTY RELATIONS

ABSTRACT: The process of democratization of property relations has affected, first of all, the European area, and then the other parts of the world. Having been established with a clear economic and social content, without the ideological burden, the employees shareholding and participation have the conditions to expand, strengthen their power and become one of the important factors in the structure of the modern society. In our area, the process of the transformation of social ownership began with the employees shareholding. Company employees were given the right to buy internal shares under privileged conditions. That was the main form of transformation. There was trust in the company to initiate, organize and manage the process of transformation in its own interest. The funds obtained through the issuance of shares, selling a part of the company or the whole company, according to the express provisions of the law, belong to the company or its complex form. Later, already during 90s, ideological properties were unjustifiably attributed to the employees shareholding and participation, which led to their complete exclusion from the economic and legal system. By subsequent regulations, privatization was almost exclusively reduced to selling, thus excluding all other possible different forms of privatization. This approach lost the sight of the basic economic objectives of privatization: there was no acquiring of new capital or new investment cycle; there were neither new

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business entities capable of receiving and fertilizing the capital emerged, nor the privatization represented an incentive for dynamic development of economy and employment. Economic enterprises were extinguished, and unemployment increased. And now, in a much less favorable economic and social climate, it is reasonable to raise the issue of whether there are still conditions to engage the inner forces that would take upon themselves the responsibility for getting out of the crisis, by introducing the employees shareholding and privatization. A prerequisite for this is certainly the creation of a legal framework for the establishment and development of the employees shareholding and participation. This would simultaneously bring us closer to the legal system of the European Union and its member states, in which the employees shareholding and participation are widely established and legally regulated institutions.

Keywords: *the employees shareholding, participation, consultation, co-determination, transition.*

1. Introduction

The second half of the 20th and the first decades of the 21st century are characterized, more than anything else, by technological advancement in all areas, to levels that seemed unattainable not long ago. Among breaking news, almost every day, those which are about great progress and extraordinary achievements have had a place of honor. The conclusion that could be drawn from this seems simple and absolutely clear – human society is making great strides in all areas. The ability of an individual and of community to create and produce more and in better ways (higher quality) is increasing enormously day by day. The total amount of wealth is increasing to unimaginable proportions. This kind of progress is the result, first of all, of accumulated and organized knowledge that keeps giving evidence of its ability to reliably guarantee the continuity and durability of this process. In other words, scientific and technological capacities, and thus the production of various goods to meet the needs of individuals and their communities, will increase on a daily basis.

The abovementioned, indisputable statement should reliably lead to optimism based on real and proven possibilities. However, when the conditions and relations in modern society are taken into account, without special analysis, we can ascertain that optimistic assessments about the further development of society are not based on the actual state of affairs. On the contrary, it is not difficult to see that contradictions are building up day

by day, and the state of insecurity and uncertainty can be marked as a general characteristic of the current state of affairs and relations; of course, in different ways in different social structures and different parts of the world. There are indeed numerous reasons for this assumption.

The contradiction is clearly expressed: on the one hand, there is extraordinary technological advancement in all areas, and on the other, the escalation of the crisis in the relations between people and their organized communities, states. Specifically: "poverty, loneliness, dissatisfaction, inequality and insecurity of an increasing number of people is a trend, same as technological growth and development" (Veljković & Kranjc, 2009).

Therefore, technological development is linked to the escalation of crisis, so answers are sought to the questions of whether and why technological development generates a crisis. The answers cannot go in the direction of stopping the technological process, but in the direction of establishing a different organization that will democratize the achieved results and make them available to a growing number of members of society. By following this approach, we arrive, once again, at the relationship between labor and capital, at the way wealth is created and distributed.

2. Remarks on globalization

Changes in the structure of property relations have always had and still have a special significance. Therefore, there is a reason to point out one aspect that is, in our opinion, significant. An issue of theoretical and practical significance arises: whether these processes, which take place within the structure of property relations, affect the very content of property as an economic category and legal institution; whether the fundamental, historical, inviolable right to property has already been exhausted and whether it has lost its ability to drive and guarantee economic prosperity while also being the basis of human freedom; whether this right has become just an external framework for the process of globalization, which actively and fundamentally changes all the essential characteristics of civil society, including the very foundation on which that society is based, which is private property and the right to property (Gams, 1987, p. 86).

In this part, we arrive at questions which, at a first glance, would not be justified: whether in modern conditions, viewed on a global scale, free competition and a free market exist at all, whether they function, whether they still remain an essential characteristic of economic relations which are the basis of the economic system on a national, regional and global scale.

The justification of this question mostly derives from the analysis of the creation and operation of large, global, transnational corporations that have become a dominant feature of modern economic relations. The emergence of large transnational corporations presents an apparent contradiction. They emerged as a result of free competition on the free market, and then they certainly and openly became its negation. A free market does not reliably ensure that their interests are met. They seek to preserve only the external characteristics of free competition and the free market, but at the same time they try and succeed in placing it under their control in order to achieve their own long-term, economic goals. In this way, free competition gradually turns into monopoly, and freedom into servitude. Large, transnational corporations very successfully overcome the borders of national states, do not accept territorial restrictions and operate in all areas where they can expect a favorable economic outcome. They become conglomerates, which simultaneously operate in various areas of the economy, and demonstrate self-sufficiency, the ability to move capital around within themselves depending on the current driving force of certain economic branches or areas. At the same time, in the area where they operate, they appear as "big vacuum pumps" for capital, successfully collect funds from all entities regardless of the form of property, including state capital, and thus create conditions for long-term dominance in the economic as well as in every other aspect. Their superiority is not just reflected in their financial power or in their ability to handle enormous financial resources, but also in their monopoly in the field of science and technology. Most of the big discoveries, especially in the field of technology (military industry) are the result of the work of scientific teams of large corporations. Thus, large corporations control capital, sources and resources, manage exchange and consumption, and are gradually but surely becoming a decisive factor in economic development on a national, regional and global scale (Dušanić, 2015, p. 39).

Free private initiative, under the conditions of the operation of large transnational systems, objectively, has been left a narrow space, mainly in activities for which large corporations have not expressed interest, if such areas still exist. Everywhere, private initiative is in the "embrace" of large corporations. The reach of entrepreneurs is very limited. The moment their development touches and meets the corporations' plans, they must accept the rules of those corporations or simply disappear from the market.

At the same time, the position of the modern nation-state is definitely changing. In history, there have never been greater guarantees for its independence and sovereignty, but simultaneously a greater collapse and

removal of these very characteristics. “The power of globalism, through trade agreements, deregulation and privatization, will seriously weaken the ability of nation-states to act with any political independence. The resulting power vacuum will be filled by an obvious contemporary alternative - a multinational company” (Stol, 2011, pp. 102–103).

3. On free market

A democratic civil state, among other things, guarantees equality. The law is the same for everyone, whether it protects or punishes. It is the way to ensure human freedom. “Freedom is the right to do everything that the laws allow. If a citizen could do what is forbidden, there would be no more freedom, because others would have the same right” (Smajlagić, 1970, p. 273).

On those foundations, back in the first phase of civil state development, liberal capitalism established a reliable concept: private property, free market, free competition and, based on that, the freedom of an individual, citizen, in an orderly democratic society. The role of the state is limited by the protection of these values. It does not interfere in economic relations; it only creates and ensures the environment and conditions for the free competition in the free market to be established and function on the basis of private property. In this way, a reliable mechanism is created: “The consumer is protected from coercion by the supplier by the presence of other suppliers with whom they can do business. The supplier is protected from coercion by the consumer by having other consumers to whom they can sell. The employee is protected from coercion by the employer by having other employers for whom they can work” (Fridman, 2016).

The mechanism established in this manner is able to deal with occasional disturbances with its own power (the invisible hand of the market) and thus continuously ensure economic prosperity. Liberal capitalism is built upon those foundations, and likewise theories about its irreplaceability, because it is only on those foundations, i.e. on the foundations of private property, free competition and the free market, that it is possible to achieve and reliably guarantee human freedom in all its most important aspects.

It really seemed that way, especially in the second half of the 19th century and at the beginning of the 20th. However, the “golden age” of liberalism has passed. Over time, monopolies legally emerged from free competition. Every concentration and centralization of economic power, with its reverse effect, destroys the foundation on which it rests; it disrupts

and ruins the free market and free competition: "the contradictory nature of transnational companies manifests itself in the fact that, in terms of time, they are the result of free competition, that is, of trade laws that led to the concentration and centralization of capital, and at the same time represent the negation of competition, a substitute of the market" (Svetličić, 1986, p. 57).

There is a growing number of arguments that the time of great, "free" entrepreneurs, who marked the period of the first phase of developed capitalism, has passed and belongs to history. "The assumptions about capitalism as a society of free entrepreneurship, based on private property, therefore a society of free competition in a free market, have long since belonged among outdated theories. Not only do such assumptions have no basis in reality, but they are also not approved by economists except for a nostalgic and romantic minority" (Galbraith, 1978, p. 25).

Therefore, there is no dispute about the value of free competition and a free market, but rather about whether these values, in the present time, in the time of globalization, with the existence of an enormous centralized economic power in the form of global transnational systems, have survived at all, whether they exist at all, and whether there are conditions for them to be renewed, reaffirmed and re-established, as well as to what extent that can be done.

4. Employee shareholding and participation

The process of democratization of property relations affected, first of all, the European area, and then other parts of the world. It has long ceased to be only a subject of theoretical discussions. It has become one of the essential characteristics of the current conditions and relations in a large number of economically developed countries.[1]

The number and variety of forms of broad employee participation in management (practically in all parts of the world) has been continuously increasing. Christopher Eaton Gunn (1986) *points to the large number and variety of forms of employee participation in management*, noting that these forms are present to a greater or lesser extent in practically all parts of the world while, at one point, emphasizing the experience of Yugoslav self-management. It was this variety of forms that was good for the unexpectedly

[1] It would not be justified if we attributed this process to the experiences and influence of Yugoslav self-government, but it would also not be fair if, in the approach itself, we removed any influence it had on the contemporary trends of democratization of property relations.

rapid development of employee shareholding and participation, especially in the European area. This process, on a larger scale, began in France. During the Fifth Republic, on the initiative of General De Gaulle, contracts of association and employee participation in management were introduced as early as 1959. By the end of 1994, 17.5 thousand companies in France, with 4.7 million employees, had signed agreements on employee participation in profit. In Germany, this process started after the Social Democratic Party came to power, during the time of William Brandt. In 1969, different models of employee participation and co-determination were introduced, and it is commonly believed that this contributed to the rapid progress and expansion of the German economy (Republika - Glasilo građanskog samooslobađanja, 2016).

The analysis of individual forms is not the focus of this topic. For the purposes of the topic, it is enough to say that certain forms of employee participation in decision-making in different parts of the world, including the USA, have some support, but only in accordance with the specifics and economic opportunities, depending on the overall conditions in the country where they are implemented.

5. Employee shareholding

In the USA, back in the 1960s, the "Employee Share Owners plan" was launched, being the brainchild of Louis Kelso, professor of economics and financial law, so that "today, over 10 million Americans have the status of an employee, co-owner of the company" (Peščanik - Suvlasnici sopstvene egzistencije, 2016). The plan is simple: if the company gets into a difficult economic situation due to certain circumstances, instead of bankruptcy, increasing unemployment and costs of unemployment, the state would offer the employees the factory they work in for purchase under favorable conditions.

The plan led to unexpected results precisely because it was based on convincing economic arguments and free from any kind of ideological approach. In the altered economic circumstances, under the pressure of large-scale cheap goods imports from Asia, certain companies were threatened with collapse and bankruptcy. This would result in many employees being dismissed and the number of social issues increasing. The creator of the plan, Louis Kelso, professor of economics and financial law, developed an idea according to which instead of collapse and bankruptcy, workers-employees are offered to accept ownership and risk, to take the factory into their own

hands and thus avoid losing their jobs. This approach was beneficial for the state: instead of compensating the unemployed, the state would direct the money to subsidized interest, for buying employee shares. At the same time, in order to generate interest and reduce employee risk, the state exempted the employee-shareholders from a large part of the tax. Under such favorable conditions, most workers accepted the risk and saved their companies. This approach very quickly lost the characteristics of an experiment and, with surprising success, grew into a movement. In January 2014, new regulations came into force in Great Britain, which practically doubled the tax benefits for those who owned shares in their own company. The shares are offered to employees under very privileged terms: no capital gains tax, no contributions for pension and health insurance, payment in installments. Certain conditions were also set: employees cannot invest in shares less than £2,000, with the maximum non-taxable portion amounting to £80,000. However, all these benefits remained permanent for small and medium-sized companies, and were mostly annulled in large corporations.

This gave good results, so that an accelerated increase in employee share ownership in the European Union was recorded: "the capital owned by employees/shareholders in the EU amounts to 266 billion euros" (Peščanik - Suvlasnici sopstvene egzistencije, 2016), which is a very impressive sum. This sum may not be large if compared to the total volume-amount of capital on the market, but it is certainly a reliable indicator that employee share ownership has grown from an initial experiment into a broad-based, organized and legally regulated form of managing economic activities. This form of management has its advantages both in periods of dynamic economic development and in periods of crisis. That's why, established like that, with a clear economic and social content and without ideological burdens, employee share ownership has the conditions to further strengthen its power, expand and become one of the significant factors in the structure of modern society. As we have already stated, worker share ownership is no longer an ideological issue, but a matter of rational social behavior.

Therefore, it is important to highlight that, in 2003, the European Union adopted the Action Plan for Stimulating Employee Share Ownership (ESO) and introduced a monitoring instrument (EOI – Employee Share Owners Index). In this way, employee share ownership was institutionalized and became part of the economic system at the level of the entire European Union. This also indicates the direction in which the European Union is developing and in which it wants to develop: not as a union of concerns, but as a union of social justice.

6. Participation

Participation in European countries does not take place according to a predetermined model. In contrast, there are many different forms of organizing, which basically have a common content - decision-making or employee participation in decision-making. In France, 51% of companies have certain forms of participation, and in 36% of companies there are works councils. Employee participation in various forms of consultation and co-determination in European countries, and especially at the EU level, is widely established, regulated by law and institutionalized. Thus, it became an integral part of the economic, political and legal systems of the European Union:

a.) On March 11, 2002, the European Parliament and the Council of the European Union adopted Directive no. 2002/14/EC establishing a general framework for consulting and informing employees in the European community. The Directive is binding for all members of the community. According to the Directive, member states are obliged to prescribe appropriate measures in the event that the employers or employee representatives "do not comply with the provisions of this Directive." Likewise, the Directive obliges members to provide for appropriate "effective, proportionate and dissuasive sanctions" in the event that employers or employee representatives violate the provisions of the Directive. The directive (Article 1) defines the purpose of its adoption: to establish minimum requirements regarding employee rights, regarding the right to information and consultation in companies or business units. It is therefore a matter of a minimum binding framework where each of the member states has the right to establish employee information and consultation by national laws beyond the scope of the minimum framework contained in the Directive.

b.) Along with the emergence of European Companies, there was a need to organize certain forms of employee participation in management within the framework of a Societas Europaea ("European Society" or "European Company") which operates on the territory of two or more European Union countries, at least to the extent that they existed in the companies that are part of a, now expanded, European Company. That is why, in October 2001, the Council of Europe adopted Directive no. 2001/86/EC supplementing the Statute for a European company. This Directive is a companion document to the Statute for a European company (SE), and it refers to the

involvement of employees. It is important to note the simultaneousness. Simultaneously with the formation of the European Company, discussions on finding suitable forms of employee consultation and co-determination should begin. It is important to emphasize that the established concept of co-determination legally and factually encompasses all economic entities, including the largest corporations. This is especially significant if we take into account the characteristics of large corporations, which have been discussed. It is evident that a balance is necessary. On the one hand, corporations should not be limited in their growth, size and financial power, but at the same time, they should comply with the EU rules and consistently respect the principles on which the EU was founded.

United Europe is a unique project of solidarity and peace. Solidarity and peace are not to be taken for granted. They must be achieved. Economic efficiency and results can and should be primary, because the realization of the entire project depends on them. However, if all aspects of life are subordinated to this goal of always achieving the best possible economic results, almost regardless of the ways in which that is done, those very economic results will become their opposite, a source of increased tension and possible conflicts followed by consequences that are difficult to predict. "I am convinced that internal peace can last only if there is social justice, which is the basis for the internal stability and solidarity of society" (Blatnik, 2014). So, not a Europe of concerns, but a Europe of social justice.

7. Employee shareholding and participation in Serbia – conclusions

As for the situation regarding employee shareholding in Serbia, during the unjustifiably long, contradictory and economically unsuccessful process of property transformation, there were examples that, in terms of their origin and content, indicated the justification for trying this type of privatization. The number of companies that ended up in a difficult economic situation was not small. In a large number of these economic entities, it was clear that improvement cannot be expected based on already established, existing legal and economic instruments: "acquiring" a strategic partner; restructuring; reorganization in bankruptcy, etc. as a rule, at very low prices until the sale of the company's assets and finally bankruptcy; and numerous emplyees lost their jobs. Unemployment and social tensions grew. There have also been cases

where employees propose, ask, demand (beg) to be given certain benefits for buying a share and then for the company to be left in their hands so they can manage it, accepting the risks, with the belief that those who know the company best will, thanks to their own experience and hard work, enable the company to successfully operate again. However, there was no response and they were not given such an opportunity. For example, the employees of "a.d. Vršački vinogradi", after the failed privatization, addressed a letter to the President of the Republic and the Minister of Economy and Regional Development, and asked to take measures for the legal and economically justified recovery of the company. Among other things, the employee shareholding model was offered "as a way of democratizing property and forms of internal control", as well as creating conditions for certain forms of employee participation in management and profit. The letter was sent in 2009, but they never got a response and "Vršački vinogradi" went bankrupt.

The whole process, if it were to be carried out successfully, could be powerful enough to diminish the increasingly pronounced particularistic tendencies. However, the conditions in which the transition process began were significantly altered. Real political power was already concentrated at the level of the republics, which, among other things, completely took on the legislative role. The disintegration of the legal system was becoming more intense and the legal security for economic entities and citizens was greatly harmed. The fragmentation of the market was established and then legalized. Capital flows came to a stop, the idea of creating a capital market on the Yugoslav territory was killed, the payment system collapsed, the monetary system collapsed; and in particular, all business systems that operated on the territory of two or more republics broke down. Independent political structures, in such a situation, in conditions of open mutual conflict, needed a "reliable" pillar of support. In the absence of other means, irrational nationalism, including its extreme forms, was instrumentalized. This approach is based upon the thesis: The major, most significant causes of crisis escalation, including its extreme forms, are in the area of economic relations. That which is national and religious are only their secondary expressions.

Thus, the state that, in the period from 1950 to 1989, was the only one in the world to build economic and political relations on the basis of self-governance, ceased to exist. Now it is common go briefly over that period with only a few observations, without delving into its real characteristics. Self-management is commonly labelled as an economically unsuccessful system. There is data that tells a different story. The total debt of the countries created on the territory of the former Yugoslavia is 9 times greater than the

indebtedness of Yugoslavia at the time of its disintegration; Analyst Phil Butler states that before the breakup, Yugoslavia occupied the 24th place in the world in terms of GDP, which none of its successor states can reach in the foreseeable future; the average growth rate in the period from 1956 to 1965, i.e. in the period of already developed self-management, was 9.4%, while in the period from 1957 to 1960, it was as much as 11.3 %, so according to that criterion it was among the countries with the highest GDP growth in the world. The fact remains that there was considerable foreign aid in that period, but this factor is far less important than the ability of the system to create, accept, and then successfully invest financial resources in development programs (Peščanik - Suvlasnici sopstvene egzistencije, 2016). According to all valid criteria, at the time of its disintegration, Yugoslavia belonged to developing European countries. The economic crisis was not specific to Yugoslavia, other countries also had it, and, viewed from the economic aspect, Yugoslavia had the potential to successfully overcome that crisis. However, it did not manage to resist particularistic interests.

As far as participation is concerned, for now, it is quite evident that Serbia (along with Macedonia and Montenegro) is one of the few countries in Europe that is completely removed from these, now widely represented, general trends of employee involvement in in certain forms of information, consultation and decision-making. The absence of initiatives in that direction is particularly characteristic.

Possible activities towards initiating certain forms of co-determination have no basis in the existing legal system; they cannot rely on certain norms of the applicable law. Evidently, it is not a question of a gap in the law, but of an assessment that there is no reason, at least for now, for this area to be regulated by law. In this respect, we are certainly different from European countries and especially from all EU member countries, where the process of legal regulation of various forms of worker-employee participation in information, consultation and decision-making, is very intensive.

Democratic processes, when real, inevitably include the sphere of economic relations, since without that, a very significant segment of social relations remains outside democratic currents. Therefore, it makes sense to directly connect the establishment and development of certain forms of information, consultation and co-determination with issues of economic and legal security. by accepting participation in certain forms of decision-making, employees simultaneously assume a part of the responsibility for the successful realization of certain goals. Issues of economic and legal security simply cannot remain outside that scope. This approach would lead to the

engagement of a larger number of entities, with justified expectations that could lead to change in this important area.

Finally, it should be emphasized that discussions on this topic have practical significance. The existing, already developed practice of European and other countries, and then our experiences, which, as has been said, also have a certain general importance, can represent an incentive and support for legal regulation, followed by implementation of certain forms of employee shareholding, information, consultation and co-determination in Serbia.

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DEMOKRATIZACIJA SVOJINSKIH ODNOSA

REZIME: Proces demokratizacije svojinskih odnosa, zahvatio je, pre svega, Evropski prostor, a zatim i druge delove sveta. Postavljeni sa jasnim ekonomskim i socijalnim sadržajem, a bez ideoloških opterećenja, radničko akcionarstvo i participacija imaju uslova da se prošire, ojačaju i postanu jedan od značajnih činilaca u strukturi savremenog društva. Proces transformacije društvene svojine, na našem prostoru, otpočeo je radničkim akcionarstvom. Radnicima zaposlenim u preduzeću, dato je pravo na kupovinu internih deonica, pod privilegovanim uslovima. To je bio osnovni oblik transformacije. Pošlo se od poverenja u preduzeće da otpočne, organizuje i vodi proces transformacije u sopstvenom interesu. Sredstva pribavljena putem izdavanja akcija, prodajom dela preduzeća ili preduzeća, prema izričitim odredbama zakona, pripadaju preduzeću ili njegovom složenom obliku. Kasnije, već 90-ih godina, radničkom akcionarstvu i participaciji neopravdano su pripisana ideološka svojstva, pa je došlo do njihovog potpunog izostavljanja iz ekonomskog i pravnog sistema. Privatizacija je skoro isključivo svedena na prodaju, izostavljajući i isključujući, sve druge moguće, različite oblike privatizacije. Takvim

pristupom izgubljeni su iz vida osnovni ekonomski ciljevi privatizacije: nije došlo do pribavljanja novog kapitala, niti novog investicionog ciklusa; nisu nastali novi privredni subjekti sposobni da prime i oplode kapital, niti je privatizacija bila podsticaj za dinamičan razvoj privrede i zapošljavanja. Privredna preduzeća su se gasila, a nezaposlenost povećavala. I sada, u znatno nepovoljnijoj ekonomskoj i socijalnoj klimi, opravdano je otvoriti pitanje da li još uvek ima uslova da se uvođenjem radničkog akcionarstva i privatizacije aktiviraju unutrašnje snage koje bi na sebe preuzele deo odgovornosti za izlazak iz krize. Prethodni uslov za to, svakako je stvaranje pravnog okvira za uspostavljanje i razvoj radničkog akcionarstva i participacije. Time bi se istovremeno približili pravnom sistemu Evropske unije i njenim članicama, u kome su radničko akcionarstvo i participacija široko postavljeni i pravom uređeni instituti.

Ključne reči: *radničko akcionarstvo, participacija, konsultovanje, saodlučivanje, tranzicija.*

References

1. Blatnik, A. (2014). *Rasprava: EU neoliberalni projekt, Evropa koncerna* [*Discussion: EU neoliberal project, Europe of concerns*]. Downloaded 2014, November 21 from http://www.politika.rs/vesti/najnovije-vesti/Vranicki-EU-neoliberalni-projekat-Evropa-koncerna.sr.html
2. Dušanić, J. B. (2015). *Neoliberalizam* [*Neoliberalism*]. Beograd: Catena Mundi
3. Fridman, M. (2016). *Odnos ekonomske i političke slobode* [*The relationship between economic and political freedom*]. Downloaded 2016, October 13 from http://katalaksija.com/2006/11/17/odnos-ekonomske-i-politicke-slobode/
4. Gams, A. (1987). *Svojina* [*Property*]. Beograd: Institut za društvene nauke
5. Galbraith, J. K. (1978). *Industrijska država* [*Industrial country*]. Zagreb: Stvarnost
6. Gunn, C. E. (1986). *Workers Self - Menagement in the United States*. Ithaca and London: Cornell university press
7. Peščanik (2016). *Suvlasnici sopstvene egzistencije* [*Co-owners of their own existence*]. Downloaded 2016, December 12 from http://pescanik.net/suvlasnici-sopstvene-egzistencije/

8. Republika - Glasilo građanskog samooslobađanja (2016). O radničkoj participaciji u upravljanju privredom [About workers' participation in the management of the economy]. Downloaded 2016, March 22 from http://www.republika.co.rs/468-469/14.html
9. Smajlagić, N. (1970). *Historija političkih doktrina* [*History of political doctrines*]. Zagreb: Naprijed
10. Svetličić, M. (1986). *Zlatne niti transnacionalnih preduzeća* [*Golden threads of transnational companies*]. Beograd: Ekonomika
11. Stol, Dž. R. (2011). *Propast globalizacije i preoblikovanje sveta* [*The collapse of globalization and the reshaping of the world*]. Beograd: Arhipelag
12. Veljković, B., & Kranjc, M. (2009). Nove tehnologije u upravljanju privrednim društvima [New technologies in the management of companies]. In: Stanković, M- (ured), *VIII Simpozijum savremene tehnologije i privredni razvoj* [*VIII Symposium of modern technology and economic development*] (pp. 322–330) Leskovac: Tehnološki fakultet

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HUMAN RIGHTS AND THE SOCIAL POSITION OF CITIZENS IN ANCIENT ROME

ABSTRACT: The paper analyzes the status aspects of human rights during the period of existence of the Roman state. Considering the fact that it was the empire lasted for several centuries, the position of a human in it and his/her rights changed. The modern understanding of human rights originates from the period of the end of the 18th and the beginning of the 19th century, when The School of Natural Law laid the foundations of the understanding of human, natural rights, which did not exist in that form during the ancient period. The primary social differentiation of the population in ancient Rome was based on a simple division of people into free ones and slaves. From this premise, they built the foundations of their rights as well as their social, legal and political positions. In theory, Roman history is chronologically divided into four periods: The period of Kings, The period of the Republic, the Principate and the Dominate. In those periods, the social structure differed significantly. The aim of this paper is to show the position of the population in each of these periods, their rights and mutual relationships. The Roman law represents the cradle of contemporary continental law, and the germ of human rights was "sown" exactly in that period, which, for this reason, deserves to be the subject of a deeper professional analysis.

Keywords: *human rights, the right to life, slavery, Roman law, freedom.*

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1. Introduction

Human rights are the basis of every democratic society and that is why democracy and human rights are mutually conditioned and dependent. Just as there are no human rights in non-democratic societies, there is no democracy without the guarantee of elementary human rights to every individual, because at the root of the word: democracy (Greek: demos - means people, kratein - means to rule) there is the premise of the people's freedom to rule themselves, but and others. This principle is inherent in all modern democratic social arrangements. However, was it like that in the past?

The Roman state represents the forerunner of today's Western civilization. It did not arise all at once, but the process proceeded gradually, with the expansion of the territory and the reception of "values" that each of the conquered countries mastered over time: ancient Greece was known for philosophy, the theory of the state and law, and especially for trade and shipbuilding; Carthage perfected the system of large land holdings - latifundia; Etruria was widely known for craftsmanship, and Egypt for agriculture. By conquering these slave states, Rome took their best experiences, filtered and kept the best, further improving them. Using the advantages that every large and powerful state has, such as Rome, along with the constant expansion of borders, the construction of roads and facilitated trade between distant parts of the empire, the conditions were created for the creation of a strong and stable state that would conquer most of the known world, spreading its culture, letter and law.

2. Human rights and the right of man as an individual in ancient Rome

Does every person have the same rights? A question for which it was considered that the school of natural law still offered adequate answers. However, is it really so? Zaharijević believes that "individual rights of one person" and "human rights" are not synonyms, nor are they identical terms, because "human rights have been limited to certain human entities that claim more than others the right to humanity" (Zaharijević, 2008, p. 127). This would tacitly mean that not all people are the same. During antiquity, these "greater people" were the Greeks and Romans, and today the nations of Western civilization give themselves the freedom to consider themselves more "cultured" and "civilized" than other nations. A terrorist attack in Paris or London arouses empathy, solidarity and compassion among the population

that identifies with the victims, while the same attacks in Ankara, Beirut or Damascus, sometimes with many times more victims, remain without reaction in the media and on social networks. In both cases, the victims are innocent people, but in one case, empathy is dominant, and in the other, indifference. In both situations, an elementary human right is threatened - the right to life, which is obviously not valued or respected without prejudice.

Status, in general, represents one's position in society or in law, and the root of the word comes from the Latin word "statuere" which means: to establish or place (someone, something). How important status law was in ancient Rome can be seen from the place of their regulation in Roman law textbooks. Thus, Gaius in his Institutiones (*Institutiones*) already at the very beginning divided the law into three segments: the law relating to persons, to things and to lawsuits (*Omne ius quo utimur vel ad personas pertinet, vel ad res, vel ad actiones*) (*Gaius. Inst*. 1.2) and already in the first book set forth the norms that regulate the position of certain categories of the population. A similar system is presented in Justinian's Institutions.

The connection between the status and position in society of Roman citizens and their elementary human rights is directly conditioned. Unlike today's population, which is absolutely equal in all rights (human, civil, cultural, social, political...), there was no equality among the population in Rome, which means that not all the inhabitants of the empire were equal in human rights. The position of women was significantly different from their current status. "Woman only received full legal and business subjectivity towards the end of Roman history" (Mitić, 1983, p. 106). constantly exercised the authority of a certain person, either the father of the family (*pater familias*), or the husband (if the marriage was concluded with *manus*), or the husband's father of the family if the husband was not an independent person and the marriage was concluded with *manus*" (Bogunović, 2021, p. 540). Justinian's codification in the first book of Institutions (*Imperatoris Iustiniani Institutionum Liber Primus*) divides all people into free and slaves (*Summa divisio de iure personarum haec est, quod omnes homines aut liberi sunt aut servi*) (*Gaius – Inst.* 1.9) (Stojčević & Romac, 1971, p. 485). Malenica believes that this statement is undoubtedly correct. "Slavery and freedom are two poles in status law. While a free man is the subject of rights, thus the bearer of rights and obligations, a slave is the object of rights, he is in the property of a free man" (Malenica & Deretić, 2011, p. 177). According to Milošević, "... Roman law did not have any of the general concepts of status law or appropriate terminology. In the first texts, the term *persona* ("person", originally a theatrical mask) means every person, regardless of whether he has

legal capacity and to what extent. It is similar with the term *caput* ("head"): a free man is *caput liberum*, and a slave is *caput servile*. *Homo* ("man") was the usual name for a slave in legal formulas, although jurists normally emphasize that a slave is a thing, not a man" (2005. p. 110).

However, not all free inhabitants of Rome had the same status and rights. The three characteristics that followed the position of each resident and on which it depended whether someone would have legal capacity were defined in the old ius civile. a) *The status libertatis* defined the position of the individual in society, determining whether he was a free man or a slave. b) *The status civitatis* determined the position of citizens and divided them into Roman citizens, The Latins (inhabitants of the Apennine peninsula) and Peregrinus (foreigners, those without) and c) *Status familiae* which determined whether someone lives according to his own right or is under the authority of the head of the family (*pater familias*) and lives according to his right. "The pater familias was the oldest man who was not elected, but that position naturally belonged to him. That man lived according to his own right - *sui iuris*, and his authority over persons and things within the family was absolute and unlimited and was called - *patria potestas*. In relation to him, all other persons were subordinated and had the status of persons *alieni iuris*, i.e. those who live under someone else's law. This form of family was characteristic of the "first four centuries of the republic, while in the last century it gradually disappeared" (Stefanović, 2020, p. 236).

The status of the population also differed in different periods of Roman history. Different periodizations can be found in science, depending on the criteria used to divide history, so these periods also vary from author to author. That is why every periodization contains subjective elements of looking at the most important events in history. The most common division is the one that divides the entire Roman history into four periods: the Period of Kings, the Period of the Republic, the Principate and the Dominate. In each of these periods, the status of citizens and their rights differed in relation to the period that preceded it or came after it.

2.1. Period of Kings

The period of the kings (753 BC - 509 BC) is the time of the creation of the Roman state, from the founding of the city of Rome (*ad urbe condita*) in 753 BC until the establishment of the Republic. This is the period of transformation of the Roman clan organization into a state. The period in which the settlement created on the seven Roman hills turns into a polis - slave

town - state, similar to those in ancient Greece. In this period, the remnants of the gentile system are still strong, so the entire structure of government was inherited from the pre-state period: *rex* (king), assembly and senate. The company is located in the so-called "military democracy", family relations are slowly disappearing, classes are emerging, and slavery is in the beginning, marginalized and has a patriarchal form. The internal political life is dominated by the conflict between patricians and plebeians. This turbulent period of Roman history was marked by numerous wars and internal struggles between patricians and plebeians. Wars were fought with neighboring nations due to plunder or with the intention of expanding Rome territorially by conquering foreign territories.

The conflict between patricians and plebeians indirectly affected their human rights. Unlike the wars that had an external character, this was an internal conflict and essentially class-based, led by the plebeians' desire to improve their social position and equalize in economic status and political rights with another class - the patricians, who did everything to maintain their privileged position in society. This struggle lasted intensively during the period of the kings and during the early republic. Deretić believes that "the plebeians demanded that they participate equally with the patricians in the distribution of the spoils of war (this primarily refers to land acquired through conquests - *ager publicus*); that they participate in government and that everyone is equal before the court, i.e. that the same law applies to everyone. The extent of the division between these two social classes also results from the fact that their division is also present in the religious sphere" (Deretić, 2011, p. 473). Bujuklić (2007) agrees with this statement and states that "the Plebeians had their own gods (Ceres, Liber, Libera) and a sanctuary located outside the city itself, at the foot of the Aventine; it was built in 493 BC by order of the holy books of the prophetess Sibyl (libri Sybillini) in order to please the gods in the time of severe famine that took over the city" (p. 442).

Patricians (lat. *patricii*, from *pater* - father) trace their origins to the old gentile organization, which over time evolved into a gentile aristocracy, appropriating political, economic and military power. In order to preserve their privileged position, the patricians wanted to create an organized state apparatus that would facilitate their appropriated power, but also keep the plebeians and slaves in a submissive position. Plebeians (lat. *plebs*, from *pleo* - crowd) were part of the ancient Roman population, but disenfranchised compared to the patricians. The plebeians, together with the patricians, participated in the conquest campaigns, but they received a minimum of war booty. They had the right to conclude deals (*ius commercii*), which directed them to engage

in trade and crafts, given that they were not allowed to use gentile land. Titus Livius states that Romulus gave each family head (most probably plebeians as well) small holdings of two jugers of land (about half a hectare), which was not enough for one family to survive (Livius & Foster, 1969, p. 44). Compared to the patricians, the plebeians were deprived of their rights to a considerable extent, so they could not enter into a legal marriage with the patricians (*ius conubii*), nor did they have elementary political rights, i.e. they did not could participate in the work of the curiat assembly and the senate (*ius honorum*). Although they were free, the plebeians were economically, politically and socially distanced and disenfranchised compared to the patricians, and as a result the plebeian struggle for a better social position and gradual equalization with the patricians arose. During the 5th and 4th centuries BC, there was a fierce struggle of the plebeians for the acquisition of elementary civil rights: the economic demands related to their aspirations to participate equally in the division of the conquered land (*ager publicus*), and on the political level, they demanded that they be guaranteed participation in authorities.

During the time of the kings, slaves were in a more favorable social position compared to other periods of Roman history. According to Bauman (2021) "Slavery is generally considered the greatest impediment to the formulation of a general theory of human rights for Ancient Rome" (p. 115). Until the 3rd century B.C. slavery had a patriarchal character, which means that slaves had the same position as other family members, and served as auxiliary labor force. Slaves were still few in number and were not the primary bearers of production, and their position was not particularly difficult and unfavorable. The sources of slavery during this period were capture in war or as a result of unpaid debts.

Clients (from the verb *cluere* – to obey, to be obedient) were the fourth social class in the age of kings. Rich Roman citizens, as patrons, were in a specific relationship with their clients. It was a relationship marked by mutual rights and obligations, a relationship of protection, dependence and gratitude. The clients, like their patrons, were free people, but since they were not members of the clan, they could not conclude legal deals with the Romans, nor did they have political rights. The patron gave gifts in money and food to the clients, represented them in court and protected them, the clients expressed their gratitude by cheering the patron in public places, collected a ransom for the patron if he fell into debt slavery and paid his fines. The patron's position in society depended on the number of clients, and a greater number of clients meant greater reputation and status in society.

2.2. The period of the Republic

The period of the republic (509 BC - 27 BC) was the time of the rise of slave-owning Rome and the struggle of the plebeians for a more favorable social, economic and political position in society. During this period of Roman history, the city-state that Rome was in the beginning became an empire that dominates the Mediterranean. Patriarchal slavery is transformed into classical slavery, and the closed household economy is replaced by a commodity economy. Slaves represented the main labor force on whose exploitation the empire was based, and law, thanks to the work of assemblies and praetors, was approaching its peak.

The demands of the plebeians and their struggle to equalize in economic and political rights with the patricians continued in the period of the republic. The demands meant the following: land allocation, debt cancellation, greater political rights and a better social position, i.e. absolute equalization with the patricians. During this period, the division of the population into patricians and plebeians was gradually lost" (Deretić, 2011, p. 474). By electing to be represented by the tribunes, the position of the plebeians improved considerably because the plebeian tribunes became untouchable and could use the "right of veto" ("I forbid!"). High positions in the state administration, available only to patricians, gradually became available to plebeians as well. From 421 BC plebeians were elected quaestors; In 367 BC, the law *Lex Licinia de consaltu* was passed, according to which one of the consuls had to be a plebeian; two years later, in 365 BC, plebeians became Kurile aediles; from 356 BC censors; from 351 BC dictators; and from 350 BC plebeians enter the senate, equally with patricians. From 337 BC plebeians became praetors, and the title of highest priest (pontifex maximus) became available to them from 254 BC. Based on the Hortensius Law (*Lex Hortensia*) from 287 BC all the decisions of the plebeian assemblies became generally binding for all the Roman people, with which the plebeians officially began to participate in the legislative power. Perhaps the most significant in the process of equalizing patricians and plebeians was the passing of the Canuleia Law (*Lex Canuleia*) in 445 BC. It abolished the ban introduced by the Law of the XII Table, which prevented the conclusion of marriage between patricians and plebeians. With the adoption of this law, plebeians also received ius conubii, that is, the right to enter into valid marriages with patricians.

The old division of the population into patricians, plebeians and slaves lost its importance during the period of the republic, so that now the population was divided into: nobles, equestres, urban and rural plebs. Nobilis (*nobilitas*,

from Latin: *nobilis* - noble) were members of the new aristocracy, and they arose from the old, family aristocracy and together with the enriched plebeians (homo novus - new people), formed the most influential and powerful layer of the Roman citizenry in the period of the republic. Equestrians (from Latin: equus - horse) were a class of wealthy citizens and the only difference compared to the nobles was that they did not have famous ancestors because they came from the plebeians. Their newfound wealth came from speculative trade, banking, usury and trades. The city plebs (*plebs urbana*) was made up of the poorest population: plebeians who did not get rich, freed slaves, bankrupt patricians, foreigners who came to Rome and permanently settled there, pauperized small and medium landowners. All of them were free citizens, with the right to vote, but without property. Constantly dissatisfied with their social status, proud of their freedom, but intolerant of any form of work and with the political power they exercised through the plebeian assembly, this social class represented a constant threat to the social order. The rural plebs (*plebs rustica*) consisted of artisans and small farmers (lat. agricola, peasant). After the Punic Wars, slave-owning relations took on their classic, ancient form: the economy was based on the work of slaves, slaves were seen as a thing (lat. *instrumentum vocale* - a thing that speaks), and not as human beings.

2.3. The period of the Principate

The period of the Principate (27 BC - 284 AD) was a period of decline in the power of Rome, in which the republic as a state system was replaced by a monarchy, while the organization of government was much simpler compared to the previous period. The coming to power was no longer based on the will of the people but on the army, with whose help the emperors came to the throne. The praetorian guard guarded the princeps and secured the imperial palace and the city of Rome. The ruler - princeps (Latin: *princeps* - the first) becomes the lifelong holder of tribune and consular authority, has the highest judicial authority and is also the supreme priest - pontifex maximus. The Roman state reaches its maximum territorial expansion and is at its peak, and law reaches its zenith (so-called “classical” Roman law). During the Principate, a large number of slaves concentrated in one place represented a constant danger of revolts, and divisions in Roman society at the end of the republic period were more pronounced than ever before.

In the period of the Principate, the following social classes existed: senatorial class, knights (equestrians), clerks, freedmen, plebs, peregrines and slaves.

a) The senatorial class was created from nobles from the period of the republic and enriched plebeians, the so-called of "new people" (*homo novus*), who entered the senate thanks to Cornelius Sulla and Gaius Julius Caesar. This class, although it lost in the civil war to the equestrians, remained extremely influential, although it increasingly lost its power and importance. In order to enable the newly rich to become senators, Octavian Augustus introduced a monetary tax of one million sesterces. In this way, the representatives of the old aristocratic families were gradually pushed out of the senate, to be replaced by rich equestrians. Soon, the old patrician families almost completely disappeared, and the senatorial class became the privileged class of the richest landowners.

b) Equestrians, i.e. knights, came out as winners from the civil war and had the support of the princeps, but they were also the most important pillar of the princeps' power. For them, Octavian predicted a census of 400,000 sesterces (Jocić, 1990, p. 50). The composition of the equestrian class, in addition to the descendants of knights from the period of the republic, included: freedmen who became rich, former soldiers, but also all those who were rich enough to fulfill the census. The princeps often appointed members of this class to prominent positions in the state administration, in order to create a balance with the senatorial class.

c) As a consequence of the increasing bureaucratization of the state, officials emerged as a special class. Unlike the magistrates from the period of the republic, who were elected for a term of one year, the officials were appointed by the princeps for life, they were directly subordinate to him, and he paid them from his coffers.

d) The freedmen are created as a result of the mass emancipation of slaves during the period of the Principate. "A freed slave is called a libertinus, in contrast to a freeborn, who is called an ingenuus" (Stojčević, 1988, p. 83). Most of the freedmen were later turned into coloni (Latin: *colonus*), free farmers who remained to work on the land of their former master. However, a considerable number of freedmen managed to reach high state positions thanks to Emperor Claudius (Tiberius Claudius Nero Germanĭcus, 10 BC - 54 AD) who made it possible for them. The freed class was the most productive

in Roman society, but also in the provinces. These were mainly: merchants, artisans, ship owners, governors of provinces, servants at the princeps' court, etc.

e) The plebs, as in previous periods, were the poorest Roman population, who lived in the principate at the expense of the princeps. From his treasury, he paid for grain that was distributed free of charge to the plebs, organized circus shows and gladiatorial fights, gave them gifts... and all with the intention of reducing the dissatisfaction of the idle masses. According to some estimates, around 200,000 people received their daily allowance of grain. With the crisis that occurred in the 3rd century, the position of the urban poor drastically worsened. That is why a part of them was forced to leave Rome and settle on the surrounding latifundia. Coloni would later emerge from them, while the population that remained in the cities began to engage in small trades, hired work, clerical work, etc.

f) The Peregrines were a special class whose Romanization began in the period of the Republic, and that process was finally completed in the Principate. With the Edict of Caracalla (also called *the Edict of Caracalla or the Antonine Constitution* – 212 AD), peregrines, as well as all other free citizens, received Roman citizenship, thus the peregrine category disappeared from the social division of the population of the Roman Empire.

2.4. The Dominate

The Dominate (284 BC - 565 AD) was the period of ruin and disintegration of slave-owning Rome, and it lasted from the coming to power of Diocletian until the death of Justinian (Kurtović, 2015. p. 233). In this period, a special form of government was introduced - the tetrarchy, in which two rulers hold the title of Augustus, and their two assistants hold the title of Caesar. In the Dominate, the entire power was concentrated in the hands of the emperor (normative, administrative and judicial), and the senate was no longer an organ of government but only the city council of the city of Rome. With the Edict of Milan in 313, Christianity became a recognized religion, which declared religious equality and ended the persecution of Christians, which had lasted for three hundred years. During the reign of Theodosius, in 395, the empire was divided into the western and eastern parts. This was a period of crisis, decline and collapse of a civilization, which was also reflected in the law of that period ("post-classical" Roman law).

During the period of Dominate, society was divided by classes: the upper class was called honestiores, and the lower class was called humiliores. They differed from each other in economic, political and legal status. The upper class enjoyed economic and judicial privileges, while the members of the lower classes were tied to their professions, political rights were unavailable to them, and the sanctions for committed criminal acts were harsher.

a) Honestiores were also called magnates, and they consisted of: large landowners, civil servants in high positions and members of the wealthy senatorial class. The senatorial title was hereditary and acquired by birth, i.e. by descent. However, the emperor granted the non-hereditary title of patricius to the most prominent officials and the largest landowners. Thus, the number of senators who actually did not perform the senatorial function, but only bore that title honorably and enjoyed the benefits that title carries: lower taxes or exemption from paying taxes, autonomous collection, etc.
b) Humiliores consisted of the lower layers of the population: lower civil servants (officiales), members of city councils - *curiales* and *decuriones* who organized the collection of taxes in their area and answered to the state for it. Even lower social classes were organized into associations in which membership was compulsory and hereditary: merchants, artisans (bakers, butchers, shipbuilders, blacksmiths, masons, carpenters, etc.). The purpose of tying them to occupation and place of residence was reflected in the state's need to ensure the supply of cities and the army with elementary needs.

Coloni (Latin: *colonus*) were the lowest social class, initially free, and later, people tied to the land. The coloni were most often recruited from the ranks of freed slaves, former soldiers and free small landowners. Owners of latifundia leased small plots to them, and in return they paid rent in money or goods. When Diocletian came to power, he introduced a special form of tax in kind and the main income in the state treasury - the *anon*, which charged the coloni the most. He based the capitatio-iugatio tax system on the anon, whose two basic elements were the head tax and the land tax. The tax was determined on the basis of two criteria: the size and fertility of the land plot (iugum) and the economic power of the man, the taxpayer (Latin: *caput* - head). If no one cultivated the land, it could not be taxed. Also, no man who does not own a piece of arable land could be a taxpayer. That is why it was in the interest of the state that every plot of land is cultivated and that as many people as possible have a piece of land that they cultivate.

In 332, Constantine passed a constitution that binds the coloni to the land they cultivate, and the sanction for running away from the property was to be thrown into chains. Although the coloni were considered free people (*ingenuus*) and had the right to marry (*ius conubii*) and the right to trade (*ius commercii*), in practice they were seen as slaves of the land (*servus ipsius terrae*). The position of the coloni was only an introduction to the feudalization that would occur in Western Europe in the Middle Ages.

Slaves in the period of domination continued to exist as labor on latifundia or as servants in houses, but in much smaller numbers than in previous periods. The importance and role of slaves in the economic life during the domination has significantly decreased, because they are no longer the basic labor force on which the economy rests, but auxiliary. The position of the slaves did not differ much from the position of the coloni, who were also under the patronage of the landowners, with the fact that the obligation to pay the rent for the coloni was predetermined, while it was not for the slaves. The number of freed slaves is increasing, they are given land to cultivate and turn into coloni. Since Emperor Constantine, it was forbidden for slave owners to kill their slaves, to separate children from their families by selling them, and to separate women from their husbands. The Christian church was of great importance in the affirmation of a more humane attitude towards slaves, which influenced their more favorable position with its religious and moral principles.

3. Conclusion

The right to freedom and life did not arise until after the bourgeois revolutions. Revolutions only shaped these rights and introduced them into legal frameworks, guaranteeing them to every person. Stanojević (2000) observes that "... the peoples of the ancient East do not have the concept of freedom. The political order of the eastern despots left no room for freedom, and that is why there is no such word. Only the Greeks and Romans created this term: "*elefteria*" in Greek and *libertas* in Latin. For the Romans, freedom is a thing of inestimable value (*libertas inaestimabilis res est*), the dearest of all things (*omnium rerum favorabilior*)" (p. 118).

It seems that the struggle for basic human rights is currently at its zenith, however, this is only an illusion. Can this struggle ever be greater than during the existence of slaves, without any status or rights. All slave uprisings in ancient Rome were a cry for human rights, a desperate struggle of the disenfranchised for a status that would give them rights and a position worthy

of a man. Each period of Roman history is marked by social stratification and the creation of classes according to different criteria. Sometimes it was origin, sometimes economic position, and in some situations political influence. Ancient Greece and Rome are considered the cradle of modern democracy based on basic human rights. This is the reason why human rights are the *conditio sine qua non* and foundation of every democratic society in the XXI century.

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LJUDSKA PRAVA I DRUŠTVENI POLOŽAJ GRAĐANA U ANTIČKOM RIMU

REZIME: U radu se analiziraju statusni aspekti ljudskih prava tokom perioda postojanja rimske države. Obzirom da se radi o imperiji koja je trajala više vekova, položaj čoveka u njoj i njegova prava su se menjali. Savremeno shvatanje ljudskih prava potiče iz perioda kraja XVIII i početka XIX veka kada je škola prirodnog prava postavila temelje shvatanja o ljudskim, prirodnim pravima, koja u tom obliku nisu postojala tokom antičkog perioda. Primarna društvena diferencijacija stanovništva u starom Rimu zasnivala su se na jednostavnoj podeli ljudi na slobodne i robove. Iz te premise oni su gradili temelje svojih prava i svoj društveni, pravni i politički položaj. Rimska istorija se u teoriji hronološki deli na četiri perioda: doba kraljeva, period republike, principat i dominat. Društvena struktura se u ovim periodima značajno razlikovala. Cilj ovog rada je da se prikaže položaj stanovništva u svakom od ovih perioda, njihova prava i međusobni odnos. Rimsko pravo predstavlja kolevku savremenog kontinentalnog prava, a klica ljudskih prava je "zasejana" u baš ovom periodu koji iz tog razloga zaslužuje da bude predmet dublje stručne anallize.

Ključne reči: *ljudska prava, pravo na život, ropstvo, rimsko pravo, sloboda.*

References

1. Bauman, R. (2012). *Human rights in ancient Rome*. London: Routledge
2. Bogunović, M. (2012). Žena u rimskom pravu: subjekt ili objekt prava? [Woman in Roman law: subject or object of law?]. *Zbornik radova Pravnog fakulteta*, *Novi Sad*, *46* (2), pp. 539–550, DOI: 10.5937/zrpfns46-2411
3. Bujuklić, Ž. (2007). *Forum Romanum, Rimska država, pravo religija i mitovi* [*Forum Romanum, Roman state, law, religion and myths*]. Beograd: Pravni fakultet Univerziteta u Beogradu, Javno preduzeće „Službeni glasnik“
4. Gaj, (1982). *Institucije*. [*Institutions*]. Beograd: Nolit
5. Deretić, N. (2011). Uporedna analiza: ‘prava čoveka’ u rimskoj državi i savremena ‘ljudska prava’ [Comparative Analysis: ’Civil Rights’ in the Roman State and Contemporary ’Human Rights’]. *Zbornik radova Pravnog fakulteta*, *Novi Sad, 45* (3), pp. 469–496, DOI: 10.5937/zrpfns1103469D
6. Jocić, L. (1990). *Rimsko pravo* [*Roman law*]. Novi Sad: KR Slavija
7. Kurtović, R. (2015). Istorijski razvoj ljudskih prava sa posebnim osvrtom na ljudska prava u rimu. [Historical development of human rights with special focus on human rights in Roman times]. *Pravne teme*, *3* (05), pp. 218–235
8. Livius, T., & Foster, B. O. (1969). Livy/5 Books XXI-XXII/transl. by BO Foster. *Livy in fourteen volumes*
9. Malenica, A. & Deretić, N. (2011). *Rimsko pravo* [*Roman law*]. Novi Sad: Univerzitet u Novom Sadu, Pravni fakultet, Centar za izdavačku delatnost
10. Milošević., M. (2005). *Rimsko pravo* [*Roman law*]. Beograd: Nomos
11. Mitić, M. (1983). *Rimsko statusno i porodično pravo sa elementima procedure* [*Roman status and family law with procedural elements*]. Beograd: Svetozar Marković
12. Stefanović, N. (2020). Patria potestas u rimskom pravu [Patria potestas in Roman law]. *Kultura polisa*, 27 (41), pp. 235–244
13. Stanojević, O. (2000). *Rimsko pravo*. [*Roman law*]. Beograd: Pravni fakultet Univerziteta u Beogradu
14. Stojčević, D. (1988). *Rimsko privatno pravo* [*Roman private law*]. Beograd: Savremena administracija
15. Stojčević, D., & Romac, A. (1971). *Dicta et regulae iuris*, Beograd: Savremena administracija
16. Zaharijević, A. (2008). Od prava čoveka ka ljudskim pravima: čovek–nacija–čovečanstvo. [From the rights of man to the human rights Man – Nation – Humanity]. *Filozofija i društvo/Philosophy and Society*, (1), pp.111–151

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LEGAL BASES OF THE POLICE PARTICIPATION IN EMERGENCY SITUATIONS

ABSTRACT: Police officers who belong to the General Police Directorate of Republic of Serbia, in addition to the numerous powers and tasks they perform, based on the Law on Police, have the obligation to participate in protection and rescue operations. Besides the aforementioned law, the police are recognized as a part of the protection and rescue forces by the Law on Risk Reduction and Emergency Management. The role of the police in emergency situations is very important, and the scope of work of the police officers is expanding over time and becoming more and more diverse, and thus more complex. The police engages in the execution of tasks aimed at the security protection of citizens' property and lives, such as rescue and evacuation from endangered areas, providing first aid, delivery of food, medicine, etc.

Keywords*: emergency, police, law, jurisdiction, protection and rescue, police officer.*

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1. Introduction

An emergency situation is a state that arises by declaration from the competent authority when the risks and threats or the resulting consequences for the population, the environment and material and cultural assets are of such scope and intensity that their occurrence or consequences cannot be prevented or eliminated by the regular action of the competent authorities or services. which is why it is necessary to use special measures, forces and means to mitigate and eliminate them with an enhanced work regime (Law on Disaster Risk Reduction and Emergency Management, 2018). Any form of emergency situation can threaten human lives, cause great material damage and losses, but also degrade or completely destroy the environment.

Considering the existing circumstances and the time and possible size of the affected areas, and the fact that the existing structures determined to prevent an emergency situation, but also to rehabilitate the possible consequences, cannot fully respond to those requirements, it is therefore necessary to involve other social and state institutions entities, such as a police organization (Šikman & Amidžić, 2014). The regulations relatively clearly define the duties and obligations of the police and they relate to the provision of assistance to state administration bodies, local self-government bodies, as well as legal and natural persons in case of general danger caused by natural disasters, but also other forms of endangering citizens and society in general.

The question now is to what extent the police are normatively, organizationally, professionally and staff trained to deal with emergency situations. Also, the competence and preparedness for an efficient and effective way of transitioning to working conditions in emergency situations is questionable, with the fact that tasks and obligations are carried out in a convenient way and that the potential disruption of the information system is compensated by the application of measures and procedures that best suit the context of emergencies situation.

The role of the police during and after emergency situations is a very current topic, considering its role during regular situations. Although police officers are faced with a variety of extraordinary events every day, most of them are not so significant in terms of endangering the lives of citizens, but also of police officers, such as, for example. emergency situations (Cvetković, 2014). In their work, researchers Rojek and Michael (2007) conducted qualitative research, which included an examination of the behavior, attitudes

and perceptions of police officers about their activities during the elimination of the consequences of the hurricanes in Louisiana and Mississippi in 2005. Generally speaking, there are tasks that the police will undertake regardless of the emergency situation. These tasks can be every day and partly routine, but they can also be uncharacteristic and unexpected. Some of the uncharacteristic tasks of police officers during emergency situations would be: securing buildings from which citizens were evacuated, securing and delivering food and water to evacuees, etc.

2. Affairs and tasks of the police in emergency situations

Researcher Kennedy gave an overview of what a police organization should look like and who assigned it significantly during an emergency situation and what is their relationship to, for the police, characteristic activities. According to his opinion, police officers undertake various affairs and tasks: protection of life and property of citizens, regulation and control of traffic, control of a large number of people, rescuing and searching for the injured, issuing warnings and notifications, participating in evacuation.

Most researchers agree that at different stages of an emergency situation, the police will take the full range of emergency measures that will be needed to eliminate the immediate danger to people and property. Among other things, they will take certain measures and actions that the competent authority is unable to do (Law on Police, 2016). Bearing in mind the police duties prescribed by the existing Law on Police, one can easily see the duties that will be performed in emergency situations. Both uniformed and non-uniformed police officers are involved in eliminating the consequences of emergency situations. However, if special circumstances require it, employees for special or specific duties, whose jobs are directly related to police affairs.

It is very important to think about how police officers will perform their duties in emergency situations. From there, it is questionable how police officers will perform patrol and officer's activities in an environment that is not typical of the forms of danger they are used to. This implies that in such an environment, which is in high-risk conditions, investigations are carried out, they provide first aid to injured people, but with a probable lack of resources, especially human resources. These are the reasons for a different approach to the organization and require managers to come up with special plans, perform appropriate theoretical and practical training, acquire adequate equipment, etc.

2.1. Police in emergency situations

Regardless of the type and scope of the emergency, police officers will have specific tasks. In the event of an intense and short-term emergency, the police will be dedicated to the following tasks: traffic and people control, search and rescue, property protection. In emergency situations that tend to grow and increase in intensity, the police first participates in issuing emergency warnings, participates in evacuation, implements active and passive property protection measures, intervenes and regulates traffic.

During an emergency situation, the police organization must also undergo minor organizational and structural changes. Namely, the police organization as a state administration body has a clearly established, templated communication system, a clearly established way of decision-making, along with a clearly established culture of subordination and responsibility. However, in order for such an organization to effectively respond to the impending danger, it is necessary to adapt to the newly created circumstances. Strategic, and partly coordinating (middle) management should mobilize the entire human potential for the execution of tasks, regardless of the usual schedule of work and tasks. Working hours must be completely changed and adapted to the nature and requirements of the emergency situation. In this sense, it is clear that the police organization is an adaptable organization to the given conditions and can effectively respond to the assigned tasks and tasks. Regardless of the preparedness of police officers and their training, the level of operation, the application of appropriate measures and the execution of assigned tasks, they would still encounter serious problems and situations imposed on them by the environment and context of an emergency situation. The police are forced to function in a completely changed milieu of the environment. In that case, the police work in conditions of high risk, which occasionally tends towards uncertainty, pressed by short deadlines, but also by the loss of autonomous action. All of this affects the administrative structure of the police organization, communication channels, and finally decision-making, which is perhaps the most significant variable factor in the work of the police during emergency situations. It is this impact that can be considered, if it is seen in different stages such as: warning, mass engagement, reorganization and cleaning (Quarantelli, 1997).

During the warning, the decision depends on the available time for warning and evacuation. If there is enough time to implement the necessary measures and actions, the problems in decision-making will be minimal, but in reality, time is much less, and thus the problems in decision-making increase - the level of

stress, as well as the emotional jump. In this stage, decision making is generally well organized, but only if it is well planned, and well-prepared contingency plans. The most important measures that need to be implemented are alerting the population, evacuations and property protection of citizens who were forced to leave their residences and households. From this point of view, it is all very simple, but in practice it can be a serious problem. In such conditions, police officers will have to make a large number of important decisions independently (Cvetković, 2014).

In the stage of mass participation of police officers, which starts at the moment when the consequences of an emergency situation are present, it is expedient to make a large number of decisions from one's own and others' scope of work. Conflicts often occur between different organizations due to unclear division of labor, i.e. unclear responsibilities and scope of work in emergency situations. Thus, there may be a conflict of jurisdiction between the commissioner and members of the civil protection and members of the police station, because in such condition's priority is given to civil protection. It very often happens that individuals in the police make arbitrary decisions, which are not their responsibility. This happens because, due to the situation, their managers are not able to supervise their work completely, although they are responsible for the work of their subordinates. Likewise, superior police officers, under pressure from higher authorities, often issue a large number of orders that are not typical for the police. Under these conditions, the normal flow of decision-making will be interrupted. It often happens that the optimal distribution and deployment of police forces is not achieved, so many tasks important for this stage are neglected, such as regulating and controlling traffic, guarding the property of citizens who have evacuated, etc.

After this stage (after a few hours from the beginning of the emergency), the stage of reorganization begins. This is when duties are formalized, shifts are reorganized and police officers perform tasks that are not typical for them and do not belong to their established scope of work. At the end of this period, police officers return to their familiar jobs and tasks in the patrol and police-walk area and the security sector. Reasonable decisions are made, and most activities are mostly under control. Police officers in these conditions will mainly be tasked with preserving property and preventing theft, although this problem is mostly secondary in emergency situations. What appears to be a rational decision is to commit more police personnel and assets to security tasks.

Within the fourth stage, which usually starts after a day and can last longer. By the beginning of this stage, most of the police officers have already

returned to their usual jobs and tasks, according to the daily work schedule. The participation of the police in this stage is minimal and mainly focused on traffic regulation, increased supervision of the security sector, etc. Therefore, the jobs characteristic of police officers continues with a special emphasis on a different context.

2.2. Police involvement during the Covid-19 pandemic

The need for police involvement was especially expressed during the Covid-19 epidemic. In accordance with the regulations, during the state of emergency, there is a possibility to restrict certain human rights of citizens, and the powers of the police are expanded. The actions of the police in a state of emergency must be exclusively proportionate to the goal of the measures taken, as well as fully subordinated to the rule of law (Stevanović, et al. 2012). After the end of the state of emergency, the police should maintain public order and peace with the condition that they have great public trust. If that trust is debatable on any grounds, serious problems can arise in the work of the police.

During a state of emergency, the police perform tasks and tasks from their scope of work, with organizational-structural changes and changes in functioning, in accordance with the regulations that regulate the issues of such states and the most urgent transition to normal ones (Stevanović, 2019). The police adapt its function to the turbulent social conditions, in a way that intensifies the appropriate methods and forms of work. In those social situations, she primarily engages in the execution of tasks and tasks from her scope of work for the protection of people and property (Declaration on the Police).

In a state of war, state of emergency and state of emergency, by decisions of the competent authorities, which were made in accordance with the Constitution and the law, the scope of the police can, exceptionally, be temporarily expanded. This implies that certain units of the police organization (mostly those for special purposes) and police officers can (not a rule) be temporarily engaged in the performance of traditionally non-police tasks (Stevanović, 2019). This primarily refers to the possibility of engaging special purpose police units in support of members of civil protection and fire-rescue units (First Supplementary Protocol, Law on Disaster Risk Reduction and Emergency Management).

The possibility of expanding police authorizations in a state of emergency is related to the implementation of regulations and decisions of

competent authorities on measures that, in those states, deviate from human and minority rights guaranteed by the Constitution. Both when deciding on these measures and when implementing them, it is necessary to respect the prescribed restrictions, among which the most important are: the declaration of the appropriate state as a prior legal issue, the selectivity and limitation of the measures (some human rights cannot in any case be limited or to suspend), non-discrimination of measures, limitation of their duration and respect for the principles of necessity, necessity and proportionality in their application (Constitution of the Republic of Serbia, 2006). The competent state authority is obliged to inform the public about the public declaration of a state of emergency and the state of emergency situations, as well as about the material, temporal and spatial scope of the implementation of declared emergency measures. The state is obliged to inform other states, through the UN Secretary General, about the human rights that have been suspended or limited, about the reasons why this was done and, in particular, about the inclusion of police forces in the armed forces in war (Stevanović, 2019).

During the corona epidemic, the role of the police has obviously changed. In addition to performing regular duties and tasks related to the preservation of public order and peace, suppression of crime, security of the state border and others, the police was engaged in the implementation of the ban on movement and the control of isolation measures. The legal acts, on the basis of which the restrictive measures were introduced, have been transformed several times. This leads to the conclusion that there was no clear plan to contain the epidemic and adapt to the situation, since there was a lack of medical information about Covid-19 (Đokić et al., 2020).

At the beginning of the crisis, the police had the task of informing citizens who arrived in Serbia from abroad about the home quarantine, that is, about the obligation to stay at home for 14, then 28 days. After that, the police monitored compliance with the implementation of this measure, especially after the introduction of the state of emergency. In case of violation of the measure, the police submitted criminal charges to the prosecutor's office. The police are allowed to issue orders to the infected or those who are suspected of being infected to stay at their address of residence or residence, with the obligation to report to the competent health institution. Citizens are checked to see if they are in home isolation by calling them on a landline, and sometimes by going to their home address.

Persons who violated the measure of health supervision and quarantine were punished. That worked better than informing citizens who had traveled from abroad before the declaration of the state of emergency that they had

to stay at home. This is a consequence of relativizing the problem and slow decision-making to prevent the spread of the infection.

In every legal system, the choices and dilemmas faced by the authorities in the conditions of dangerous epidemics, which also applies to the police, are classified into five main categories: the implementation of quarantine or a complete blockade; finding alternatives to the arrest and detention of criminal suspects; support and assistance to medics; dealing with new forms of crime, such as the sale of counterfeit medical and protective equipment; and police information on social networks, especially in countries where insulting the government or causing social unrest is a criminal offense (Stone, 2020).

Police officers must clearly identify how to properly communicate with the community and enforce regulations. They should be prepared to answer many questions, such as those about the availability of testing kits, travel restrictions, quarantine and isolation, and personal safety measures. The role, but also the obligation, of all security services is to keep their members focused on informing the public about current restrictions and encouraging citizens to comply with state and local health recommendations and regulations (Jones, 2020).

The authorities must have an insight into how clear the guidelines of the police officers are on the prescribed procedures regarding the isolation and quarantine of infected members of the community. Police officers should be briefed on how to detain or isolate a person suspected of being infected, including how to deal with situations where a person does not follow orders. The police should clearly define how they will handle arrests during an epidemic, especially in the event of a total lockdown. It is also necessary to determine the location to which people who do not follow the health orders would be evacuated. These locations should ensure compliance with physical distancing regulations, as well as other requirements, depending on the nature of the infection (Kekić & Milenković, 2020).

Thus, with regard to the previous pandemic, inspectors of the Service for Combating Organized Crime (Služba za borbu protiv organizovanog kriminala – SBPOK) filed criminal charges against suspects for abuses during the procurement of vaccines against „swine flu" at the end of 2009. After the pre-trial proceedings, which were conducted with the Prosecutor's Office for Organized Crime, the police collected material evidence of embezzlement, interviewed witnesses and obtained extensive documentation from all competent institutions. Special tasks and tasks performed by Serbian police units in the conditions of an infectious epidemic relate to: maintaining order and controlling entry and exit from hospital and quarantine facilities, providing

transportation and escorting drivers with medical supplies and pharmaceutical vehicles, and providing disinfection points and access points. endangered areas, announced by the Government of Serbia. The border police closely cooperates with the customs service, phytosanitary inspection and veterinary inspection. The border police must ensure the smooth passage of goods, materials, vehicles and people, but when an epidemic of an infectious disease is declared on the territory of Serbia, various restrictions are introduced. The ALERT system informs EU countries that there is a risk of infectious diseases on the territory of Serbia.

The legislation of the Republic of Serbia recognizes the criminal acts of spreading fake news and causing panic. Furthermore, the Criminal Code provides for the criminal offense of violating the prohibition of isolation in case of large epidemics. These were the central tasks of the MUP during the pandemic. Anyone who did not find himself at the address where he should be in home isolation was notified to the sanitary inspector and the competent prosecutor's office, and in accordance with their decisions, he was further processed in the sense of whether he will be held liable for misdemeanor or criminal charges. Supervision of persons infected with the corona virus or suspected of being infected was carried out by the inspection bodies of the Ministry of Health, while the control of persons to whom a decision on isolation was issued was carried out by the police. The police were also in charge of enforcing the temporary restriction of freedom of movement, the so-called curfew (Kekić & Milenković, 2020).

One of the problems faced by the police during the COVID-19 epidemic is the prescribed criteria on the basis of which the MoI issued curfew permits, as they are suspected of being misused for political purposes. Although it is prescribed that the Ministry of Interior issues movement permits, in practice they were also issued by other ministries, public companies or municipal headquarters for emergency situations, which caused additional confusion, both among citizens and police officers. Often, the police did not properly respond to calls from citizens who reported curfew violations. There is also doubt about the politically neutral behavior of the police.

Frequent changes in regulations made the work of security agencies, especially the police and the prosecutor's office, difficult, which performed most of the work in the field related to the specific tasks of controlling the movement of the population and implementing health surveillance and quarantine measures. Due to legal inconsistency and almost daily changes in regulations, police officers and prosecutors were not completely sure, and often did not even know which regulation was in force that day, or which rules

were in force at the time of the procedure. In his work as a policeman, he often had to act on the basis of statements from press conferences, and not on the basis of an act published in the Official Gazette. It was similar in the practice of the prosecution.

3. Regulating the participation and role of the police in emergency situations

The Ministry of Internal Affairs (MoI) is counted among the subjects of the system of disaster risk reduction and emergency management, and as a potential holder of the system. Within it, the Ministry of Interior performs numerous tasks of state administration, including authoritative representation in individual situations, i.e. performing administrative activities.

Emergency Management Sector was formed within the MoI to perform extensive and very complex and diverse tasks aimed at protecting and saving people, material goods and the environment, reducing and eliminating the consequences of natural disasters, technical, technological and other accidents and dangers such as which are: floods, snowfalls, avalanches, hail storms, earthquakes or landslides, fire and explosions, accidents and unexploded ordnance, chemical, physical or biological accidents. For this purpose, the Sector performs tasks of a normative, administrative, organizational-technical, preventive, preventive-technical, educational, informative-educational, organizational-planning and other nature. In its composition, the Sector has: 1) departments formed according to the functional principle at the headquarters of the Sector (Department for General Legal Affairs and International Cooperation; Department for Preventive Protection, Department for Fire and Rescue Units, Department for Risk Management and Department for Civil Protection), 2) National training center for emergency situations and 3) regional administrations (or departments) organized according to the territorial principle (Handbook for preparing professional exams for employees of the MoI RS, 2013).[1]

Within the system of disaster risk reduction and emergency management, the General Police Directorate has a special role. That role stems from „jurisdiction, the ability to quickly adapt to the circumstances, the distribution of forces on the entire territory, the continuous performance of security tasks,

[1] The National Training Center for Emergency Situations is no longer part of the Emergency Management Sector, but is an organizational unit of the Sector for Human Resources as part of the Police Training Center.

the number of personnel, equipment and overall organization, mobility and experience, as well as the possibility of effective professional training (Mlađan, 2015, p. 237).

3.1. Needs for engaging the police in emergency situations

If we look at the definitions and classification within the existing laws, the General Police Directorate can be classified as part of the emergency forces, and the Ministry of Internal Affairs as subjects of the disaster risk reduction and emergency management system (Law on Disaster Risk Reduction and Emergency Management, Article 13, paragraphs 3 and 1). The previous law that regulated this area - the Law on Emergency Situations from 2009 stipulated that the Ministry would ensure the participation of the police and other units of the Ministry in the implementation of measures and the realization of tasks in the field of protection and rescue (Lončar et al., 2019).

The current Law on Police establishes that „police officers undertake urgent measures necessary to eliminate immediate danger to people and property, when these measures cannot be taken by other competent authorities in a timely manner, of which they immediately notify those authorities.“ In case of general danger caused by natural disasters, epidemics or other forms of threat, police officers provide assistance to state administration bodies, bodies of territorial autonomy and local self-government, legal entities and individuals. When undertaking the aforementioned tasks, police officers also participate in performing rescue functions and providing first aid to people and, in this regard, use the prescribed equipment and carry out training of police officers who perform these tasks (Law on Police, Article 61). For this reason, the General Police Directorate „creates the necessary conditions for maintaining and increasing the capacity and readiness of the Police to act in a state of increased risk, emergency situations, state of emergency and war (Law on Police, Article 24).“

The aforementioned provisions address that the role of the police in emergency situations is of a secondary (auxiliary) nature. Therefore, the engagement of the police is based on urgent response in emergency situations, until the competent authority (Emergency Management Sector) is able to adequately respond to the danger (Lončar et al., 2019). As already stated, the police during emergency situations continue to perform their own regular police tasks and duties. Thus, from a theoretical point of view, police action can be divided into three phases: before, during and after an emergency situation. The first phase is considered a preparatory phase and it is necessary

to take immediate measures and move from the regular regime to the regime of performing tasks and tasks in extraordinary conditions. In the second phase, a larger number of police officers participate, depending on the intensity and includes emergency situations (Subošić, 2019). In this phase, the work of police officers is very concentrated (especially members of police stations, that is, branches, in whose territorial jurisdiction a state of emergency has been declared). The third phase is related to the completion of the rescue mission and similar activities and depends mostly on the form and strength of the consequences of the emergency situation (Mlađan, 2015).

Floods in 2005 and 2014, but also the earthquake in Kraljevo in 2010, forest fires in 2007, and the Covid-19 epidemic in 2020 and 2021 and other natural disasters and emergency situations clearly illustrated the need for auxiliary police. The auxiliary police force is already mentioned in the Law on Police from 2005. Although the Government, with its regulations and the adoption of the new Law on Police from 2016, provided for the establishment of auxiliary police, this institute still does not exist. It used to be called the reserve police force. The difference between these two organizational bodies is that the reserve composition of the police was filled on a voluntary basis, while the auxiliary police should be based on the principle of obligation (Miletić, 2009).

The Law on Police prescribes that the auxiliary police is formed to carry out police work in cases where it is necessary to compensate for the activation of a larger number of police officers to carry out work and tasks: high risk intensity, natural and other disasters and accidents, security of the state border and other situations where security is threatened and the question of the quantity of security personnel is in the upper hand. Auxiliary police are also engaged in cases where the local self-government and the MUP have a common interest and verify this by a special agreement (Law on Police, Art. 249). Therefore, the auxiliary police can be engaged in the event of an emergency, or in natural and other disasters.

Members of the auxiliary police, during engagement, have full rights, but they also have duties like all other police officers. The Director of Police proposes, and the Minister of Internal Affairs decides on the use of auxiliary police for the execution of police duties and tasks. Although in the last twenty years two Police Laws (2005 and 2016) and two Regulations (Regulation on service in the auxiliary police and the rights and duties of auxiliary police officers, 2009 and Regulation on service in the auxiliary police, 2016) the auxiliary police as an organizational unit of the administrative body has not yet been formed, and probably will not in the near future. There are various

interpretations and opinions about the concept of auxiliary police, especially that auxiliary police, considering the existing circumstances in society, should be based on a principle that is close to mandatory, because it is difficult to expect it to be based on voluntariness.

3.2. Regulation of police participation during the Covid-19 pandemic

During the pandemic, there are numerous examples of the presence and participation of the police in providing assistance to the medical service and other state administration bodies in the performance of their duties. The police, in addition to the emergency ones, continued with regular jobs and tasks. One of the new responsibilities was that „a person who does not comply with the order of a medical doctor, ..., upon notification of a health institution, is forcibly isolated in the presence of a representative of the administrative body responsible for internal affairs (Decree on measures to prevent and suppress the infectious disease Covid-19, Article 2)." Also, the control of the implementation of the quarantine measure is also regulated by the mentioned Regulation and the Ministry does this in cooperation with the representatives of the ministry responsible for health affairs and the institute/institute for public health.

During an emergency situation, the issue of the participation of police representatives within the emergency headquarters is also regulated. In addition, the chiefs of those staffs are representatives of the Ministry of Internal Affairs, namely organizational units whose scope includes disaster protection and rescue operations, i.e. representatives of the Emergency Management Sector. Also, the members of the headquarters are the heads of organizational units whose scope includes internal affairs, that is, representatives of the police organization (Regulation on the composition, manner and organization of work of the headquarters for emergency situations).

The Ministry of Internal Affairs issued movement permits to persons regulated by the Decree on Measures during a State of Emergency. The Ministry of Internal Affairs (more precisely, the police), in agreement with the Ministry of Health, was authorized to temporarily restrict or prohibit the movement of persons in public places, as well as to order certain persons or groups of persons infected or suspected of being infected with the infectious disease CCovid-19 to stay at the address of their residence, i.e. residence. Of course, the restriction was valid until the absence of the virus among the mentioned persons was determined.

The government based on Art. 200 of the Constitution of the Republic of Serbia adopted the Decree on measures during a state of emergency, i.e. of the

Covid-19 pandemic, which was stipulated in the third article: „The Ministry of the Interior can order the closure of all accesses to an open space or facility and make it impossible to leave that space or facility without special approval, as well as order mandatory stay for certain persons or to groups of persons in a certain area and certain facilities (reception centers for migrants, etc.).“

4. Conclusion

The police, as an organ of state administration, has a huge responsibility towards the rest of the state apparatus, but above all towards society and citizens. In this sense, its role in emergency situations is very important. In order to justify its role, the police organization, in addition to regular jobs and tasks, also performs extraordinary ones, which are not typical for it. In order for it to be able to do something like that, it is necessary that all duties are based on regulations, which enable it to be sufficient, but limit arbitrariness in its work during emergency situations. In addition to the Law on Police, which provides a clear inventory of jobs and tasks performed by the police in regular and extraordinary circumstances, police work is also regulated by other regulations.

The Law on Emergency Situations clearly established the place of the Ministry of Internal Affairs as part of the intervention and activation of forces and resources in emergency situations. The police can be classified as a force for emergency situations, and the entire Ministry of the Interior as entities for disaster risk reduction and emergency management, which is established by the Law on Disaster Risk Reduction and Emergency Management.

In addition to the above, there are other regulations that regulate the role, as well as jobs and tasks after the declaration of an emergency. First of all, we should mention the new institute provided for by the Law on Police, which refers to the auxiliary police, which has not been formed and is not expected in the near future. There are two reasons that influenced her not being educated: the first is the given social and political tensions and circumstances, and the second is the principle on which the auxiliary police is based, which is voluntariness, which in the opinion of many theorists is a waste of time, but is also unattainable. The regulations, which govern the participation of the police in emergency situations, confirm its role as subsidiary, which means that the role of the police is secondary, because what the headquarters for emergency situations and civil protection cannot do, the police does.

During the Covid-19 epidemic, the police played a significant role in assisting other forces in disaster risk reduction and emergency management. Some of the mentioned regulations are: Regulation on measures to prevent

and suppress the infectious disease Covid-19, which explains in more detail the rights and emergency obligations of the police, but also the Regulation on the composition, method and organization of the work of the headquarters for emergency situations, where the tasks and obligations are determined members of the police as members of emergency staffs.

Of course, the police also relies on some other regulations during operations in emergency situations, but these regulations are of a secondary nature. In the future, some other organizations are expected to be part of the protection and rescue forces. This is primarily expected from members of the communal militia, auxiliary police and perhaps the private security sector.

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PRAVNE OSNOVE UČEŠĆA POLICIJE U VANREDNIM SITUACIJAMA

REZIME: Policijski službenici, koji pripadaju Direkciji policije Republike Srbije, pored brojnih ovlašćenja i poslova koje obavljaju, na osnovu Zakona o policiji, imaju obavezu da učestvuju i u poslovima zaštite i spasavanja. Pored navedenog Zakona, policija je prepoznata kao deo snaga zaštite i spasavanja i Zakonom o smanjenju rizika i upravljanju vanrednim situacijama. Uloga policije u vanrednim situacijama je veoma značajna, a obuhvat delokruga rada policijskih službenika se vremenom proširuje i postaje sve raznovrsniji, a time i kompleksniji. Policija se angažuje za izvršavanje zadataka usmerenih na bezbednosnu zaštitu imovine i života građana poput spasavanja i evaluacije iz ugroženih područja, pružanje prve pomoći, dostavu hrane, lekova i sl.

Ključne reči: *vanredna situacija, policija, zakon, nadležnost, zaštita i spasavanje, policijski službenik.*

References

1. Cvetković, M., V. (2014). Uloga policije u prirodnim katastrofama [The role of the police in natural disasters]. In: Mrvić-Petrović, N., Todić, D., Mlađan, D., (eds), *Elementarne nepogode i vanredne situacije: zbornik radova* [*Natural disasters and emergency situations: collection of works*], (pp. 215-242). Beograd: Intermex: Institut za uporedno pravo: Kriminalističko-policijska akademija
2. *Deklaracija o policiji* [*Declaration on the police*](1979). Rezolucija Parlamentarne skupštine Saveta Evrope, br. 690
3. Đokić, K., Đorđević, S., Ignjatijević, M., Pejić-Nikić, J., & Stakić, I. (2020). *Sektor bezbednosti u vanrednom stanju: testiranje demokratije* [*The security sector in a state of emergency: testing democracy*]. Beograd: Beogradski centar za bezbednosnu politiku
4. Jones, J., D. (2020). The Potential Impacts of Pandemic Policing on Police Legitimacy: Planning Past the COVID-19 Crisis, *A Journal of Policy and Practice*, *14* (3), pp. 579-586
5. Kekić, D., & Milenković, M. (2020). Activities and tasks of the Serbian police in the conditions of the epidemic of infectious diseases. In: *Thematic conference proceedings of international significance, International Scientific Conference "Archibald Reiss Days",* (pp. 281-290). Belgrade: University of Criminal Investigation and Police Studies
6. Kennedy, W., Michael, B., & Stephen, V. (1969) *The police department in natural disaster operations*, The disaster research center, department of sociology, University of Delaware
7. Lončar, Z., Radivojević, N., Radošević, R., & Mirković, V. (2019). Saradnja policije i privatnog obezbeđenja u vanrednim situacijama u Republici Srbiji: stanje i mogućnosti [Police and private security cooperation in emergency situations in the Republic of Serbia: situation and possibilities], *Zbornik radova Pravnog fakulteta u Novom Sadu*, *53* (1), pp. 113–131
8. Mlađan D. (2015). *Bezbednost u vanrednim situacijama* [*Safety in emergency situations*], Beograd: Kriminalističko-policijska akademija
9. *Priručnik za pripremanje stručnih ispita zaposlenih u MUP RS* [*Handbook for preparing professional exams for employees of the Ministry of Internal Affairs of the RS*] (2013). Beograd: Ministarstvo unutrašnjih poslova i Kriminalističko-policijska akademija
10. Quarantelli, L. (1997). *Disaster crisis management: A summary of research findings. Journal of management studies*, *25* (4), pp. 373–385

11. Rojek, R., & Michael, S. (2007). Law enforcement lessons learned from hurricane Katrina, *Review of policy research*, *24* (6), pp. 589–608
12. Stevanović, O. (2019). *Bezbednosni menadžment* [*Security management*], Beograd: Kriminalističko-policijska akademija
13. Stevanović, O., Subošić, D., & Mijalković, S. (2012). Odbrambena funkcija policije kao sadržaj nauka odbrane [The defensive function of the police as a content of defense sciences]. *Vojno delo*, *64* (2), pp. 225–235
14. Subošić, D. (2019). *Organizacija i poslovi policije* [*Organization and police operations*]. Beograd: Kriminalističko-policijska akademija
15. Šikman, M., & Amidžić, G. (2014). Nadležnost i uloga policije u vanrednim situacijama u Republici Srpskoj [Jurisdiction and role of the police in emergency situations in the Republic of Srpska], *Bezbednost*, *56* (3), pp. 129–147
16. Uredba o merama za sprečavanje i suzbijanje zarazne bolesti COVID-19 [Regulation on measures to prevent and suppress the infectious disease COVID-19]. *Službeni glasnik RS*,br.33/22, 48/22, 53/22 i 69/22
17. Uredba o merama za vreme vanrednog stanja [Regulation on measures during the state of emergency]. *Službeni glasnik RS*, br. 31/20, 36/20, 38/20, 39/20, 43/20, 47/20, 49/20, 53/20, 56/20, 57/20, 58/20, 60/20 i 126/20-OUS
18. Uredba o sastavu, načinu i organizaciji rada štabova za vanredne situacije [Regulation on the composition, manner and organization of the work of the staffs for emergency situations]. *Službeni glasnik RS,* br. 27/20
19. Uredba o službi u pomoćnoj policiji [Regulation on service in the auxiliary police]. *Službeni glasnik RS*, br. 109/16
20. Uredba o službi u pomoćnoj policiji i pravima i dužnostima pomoćnih policajaca [Regulation on service in the auxiliary police and the rights and duties of auxiliary police officers]. *Službeni glasnik RS*, br. 27/06 i 109/09
21. Zakon o policiji [Law on Police]. *Službeni glasnik RS*, br. 6/16, 24/18 i 87/18.
22. Zakon o smanjenju rizika os katastrofa i upravljanju vanrednim situacijama [Law on Disaster Risk Reduction and Emergency Management]. *Službeni glasnik RS*, br. 87/18

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ON CERTAIN CRIMINAL-LEGAL SPECIFIC CHARACTERISTICS OF CORRUPTION IN REPUBLIC OF SERBIA

ABSTRACT: Corruption is a negative social phenomenon being present in all societies and states, and which can be found in all layers and relationships within a society. Corrupt practice, as an ubiquitous negative social phenomenon, certainly has its political, sociological, criminological, legal and other aspects. Bearing in mind the fact that the widespread corrupt practice significantly erodes the foundation of society, the allowance of its both survival and deepening necessarily results in the abandonment of democracy, democratic values, legal certainty and the rule of law. Therefore, every legislator, including the legislator in Republic of Serbia, prescribes various material and procedural legal measures trying to suppress corruption in the country. This paper looks at certain criminal law specific features of the incrimination of corruption at both the international and national level, but also at certain procedural aspects of prosecuting corruption crimes. In this sense, there is involved the competence of the specialized prosecuting and judicial authorities, including special evidentiary actions that are regularly used in discovering and prosecuting corrupt criminal offenses.

Keywords: *corruption, giving and receiving bribes, organized crime, abuse.*

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1. Introduction

Corruption, as a relatively old social phenomenon, could be said to mean spiritual and moral corruption, complete disregard for honor and dignity, offering or receiving money in order not to fulfill a duty, or to act contrary to conscience or the law (similarly Đurić, 2010). Basically, corruption itself is reduced to any abuse of power of a public character, for the purpose of achieving some individual, personal or private interest (Bjelajac, 2008). In this context, corruption, that is, corrupt acts, from a historical point of view, are closely related to other criminal activities, and especially to organized crime. It can be said that corruption, as a form of organized crime, is at the same time one of its most important characteristics, which directly connects the organized criminal group with the authorities (Bošković, 2000, p. 5).

Bearing in mind that corrupt practice represents one of the main obstacles in the process of democratization of society and the introduction of the rule of law, as a fundamental value, into the course of a society, it is the criminalization of corruption, i.e. the fight against it, placed high on the list of priorities of democratic states, but also of international community as a whole. Therefore, guided by a common interest and goal, the international community incriminated various emerging forms of corrupt activity, both on a universal level, under the auspices of the United Nations, and at regional levels within the Council of Europe, the Organization of American States, the African Union, etc. Moving largely within the framework set by the UN Convention against Corruption, but also by the conventions of the Council of Europe, our legislator intervened relatively intensively and extensively in criminal material and criminal procedural legislation, with the aim of suppressing corruption.

This paper points out certain criminal-legal specifics of corruption, especially the incrimination of corruption at the international and national level, as well as certain corrupt acts prescribed by the current criminal legislation, but also certain procedural aspects of prosecuting corrupt criminal acts, in terms of jurisdiction of prosecuting authorities as well as judicial authorities, but also with regard to special evidentiary actions that are regularly used in the detection and prosecution of corrupt crimes.

The aim of the paper is to provide a concise description of the criminalization of corrupt practices on the international level and at the level of domestic legislation, as well as various procedural measures and special organizational mechanisms that the domestic legislator has foreseen for the successful fight against corruption in the Republic of Serbia. The methods

that were used in the preparation of this work are the normative method, the comparative method that examines solutions at the international level, but also the historical-legal method that gives a brief overview of the regulation of the fight against corruption in the Republic of Serbia.

2. Criminalization of Corruption in International and Domestic Legal Frameworks

Since corruption, corrupt practice and organized crime represent a problem that equally affects every national legislator, as well as the international community as a whole, measures to combat corruption are undertaken in parallel at the national and international level. Bearing in mind the fact that issues of corruption and organized crime have long and largely crossed state borders and are rising to the supranational and universal level, the interest and activity of the international community to intervene, set legal frameworks, in the form of various conventions, and undertakes specific measures to combat corruption and organized crime are legitimate. The cooperation of states, international organizations and other entities is not only justified, but also necessary if there is a real will and intention to fight corruption. This is simply a necessary consequence of the fact that the effects of corruption and organized crime cross national borders.[1]

Thus, this issue is actively dealt with by the United Nations, the European Union and the Council of Europe, but also by other supranational and international organizations, which activity is reflected in the adoption of various conventions and recommendations in the field of corruption, including especially the giving and receiving of bribes by officials and other holders of any public functions, etc. In this sense, among the most important documents in this area can be mentioned: a) Convention on preventing and suppressing corruption, which was adopted at the level of the African Union, from 1999, b) Civil law Convention against

[1] Thus, for example, the agreement between the governments of the countries of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of controls at common borders (known as the Schengen Agreement) was concluded on June 14, 1985 (and then the corresponding Convention on implementation of the Schengen agreement of June 19, 1990, in part three entitled: "Police and security" in articles 39-91) in chapter one, among "Short-term measures" in article 9, determined the obligation for the contracting parties to intensify and strengthen cooperation between their customs and police authorities, especially in the fight against crime, and especially against tax and customs evasion and embezzlement (Mitrović & Račić, 1996, p. 11). With this, the first in a series of steps, the position was clearly taken that the issue of organized crime, corruption and similar corrupt practices transcends national borders and is a common problem of the Union.

corruption, adopted within the framework of the Council of Europe, in Strasbourg 1999, c) Criminal Law Convention against Corruption, adopted within the framework of the Council of Europe in Strasbourg in 1999, d) Inter-American Convention against Corruption, adopted in Caracas in 1996, e) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted within the framework of the Organization for European Cooperation and Development in 1997, f) UN Convention against Corruption, g) UN Convention against Transnational Organized Crime with Protocols and h) UN Declaration against Corruption and Bribery in International Business Transactions.

Therefore, starting from the mentioned documents, it is clear that the activity of the states, both on the appropriate regional and global level, was intensive and comprehensive in order to suppress organized crime and corruption as decisively as possible.

However, without disputing the importance of other acts, special importance should be given to the UN Convention against Corruption. This is because this Convention is the only legally binding universal instrument for the fight against corruption. The far-reaching and comprehensive approach of the Convention and the mandatory nature of many of its provisions make it a unique tool for finding answers to the issue of corruption as a global problem. Also, this Convention has a special impact due to the fact that 189 countries are signatories to this Convention, but also because of its provisions that obligate countries to international cooperation, exchange of experience, knowledge, data, etc. in order to fight corruption.[2]

For the international legal definition of corruption, the provision of the UN Convention against Transnational Crime is important, according to which, in Article 8, corruption is defined as a form of manifestation or a form

[2] However, what will not be found on over 60 pages of this Convention, is a provision that contains the definition of corruption for the purposes of international law or the course of the act, but only states certain acts and actions that should be considered corruption in each jurisdiction. Such regulation can be accepted as justified due to the fact that a partially defined definition of corruption is found in the previously adopted UN Convention against Transnational Organized Crime, but also the fact that it is an act for which its universality is essential. Namely, as the intention was to achieve the widest possible consensus and the involvement of states in this Convention, it was not necessary to introduce a strict and clearly defined definition of corruption, but, with reference to the UN Convention against Transnational Organized Crime, the freedom was left to the contracting states to relatively freely defines the concept of corruption, all with the aim of achieving the widest possible consensus and uniform rules. Similar rules are contained in regional documents, which is a logical consequence of the fact that the UN Convention against Transnational Organized Crime was adopted after other regional acts related to organized crime and corruption.

of criminal offense within the framework of organized transnational crime (Derenčinović, 2005, p. 187). According to this definition, corruption is a criminal offense that is committed with the intention (premeditated) in the form of undertaking the following activities: a) promising, offering or giving a civil servant, directly or indirectly, an inappropriate benefit that is intended for him personally or for another person or entity, in order for that official to act or refrain from acting in the performance of his official duties (giving a bribe) and b) seeking or accepting by a civil servant, directly or indirectly, an inappropriate benefit given to him personally or to another person or entity, in order for that official to act or refrained from acting in the performance of his official duties (accepting bribes). It also imposes an obligation on the contracting states to incriminate the instigators and accomplices in these corrupt actions (similarly to Bjelajac, 2008, p. 51).

When it comes to the above-mentioned international legal framework for the fight against corruption, it should be noted that the Republic of Serbia has ratified the most important international acts, which include: the UN Convention against Corruption, the UN Convention against Transnational Organized Crime, the Council of Europe's Criminal Law Convention on Corruption, the Civil Law Convention against corruption of the Council of Europe and the Convention of the Council of Europe on laundering, seizing and confiscating proceeds of crime (Jovašević, 2009, p. 86).

In accordance with these acts, that is, the general framework set by these conventions, the Republic of Serbia, fulfilling its international obligations, has criminalized corruption with its national legislation, that is, it has covered various forms of corrupt acts with different criminal acts.

Moving within the framework and respecting the basic principles set by the international legal regulations related to corruption and organized crime, Serbian legislator, both in respect of the framework of substantive and procedural law, provided for special rules related to criminal acts of a corrupt nature, which refer to criminal proceedings regarding the prosecution of criminal offenses with elements of corruption and organized crime.

When it comes to criminalizing corruption, it should be noted that the current Criminal Code (Criminal Code, 2005) does not mention the concept of corruption at all.[3] What's more, the word "corruption" can be found in only

[3] It should be noted that the National Assembly of the Republic of Serbia adopted the National Strategy for the Fight against Corruption for the period from 2013 to 2018 on July 1, 2013. This document sets the basic goals and methods of fighting corruption. However, after the expiration of this document, a new one was not adopted. The strategy is available at https://www.mpravde.gov.rs/tekst/22534/-nacionalna-strategija-za-borbu-protiv-korupcije-arhiva.php ; visited on 6/26/2022.

one place in the entire text of the Code - in Article 46, paragraph 2, point 3, which refers to the possibility of conditional release of a person convicted in proceedings conducted in accordance with jurisdiction determined by the law governing the organization and jurisdiction of state bodies in combating organized crime, corruption and terrorism.[4] Unlike the current Criminal

[4] At this point, we should point out the nomotechnical illogicality regarding certain provisions of Article 46 of the Criminal Code, which regulates the issue of parole. Namely, paragraph 1 of this article prescribes the conditions when parole is allowed - "The court will conditionally release a convicted person who has served two-thirds of his prison sentence, if he has improved during the course of his sentence so that it can be reasonably expected that he will freedom to rule well, and especially not to commit a new criminal offense by the end of the time for which the sentence was imposed. When assessing whether the convicted person will be released on parole, his behavior while serving the sentence, performance of work duties, taking into account his ability to work, as well as other circumstances that indicate that the convicted person will not commit a new criminal offense while on parole will be taken into account. A convicted person who has been punished twice for serious disciplinary offenses during his sentence and who has been deprived of the benefits granted cannot be released on parole. However, paragraph 2 of the same article further prescribes "If the conditions from paragraph 1 of this article are met, the court may release the convicted person on parole" and lists different cases, i.e. convictions for certain criminal offenses when parole is possible, where an additional condition is prescribed somewhere and somewhere not. Thus, in the case of a person who has been sentenced to life imprisonment, it can be conditionally released if he has served twenty-seven years , while in the case of a person who has been convicted of crimes against humanity and other goods protected by international law (Art. 370 to 393a), criminal offenses against sexual freedom (Articles 178 to 185b), the criminal offense of domestic violence (Article 194, paragraphs 2 to 4), the criminal offense of unauthorized production and distribution of narcotic drugs (Article 246, paragraph 5), criminal offenses against the constitutional order and security of the Republic of Serbia (Articles 305 to 321), the criminal offense of accepting a bribe (Article 367) and the criminal offense of giving a bribe (Article 368) , as well as the one convicted by special departments of the competent courts, in procedures conducted in accordance with the jurisdiction determined by the law that governs the organization and jurisdiction of state bodies in combating organized crime, corruption and terrorism, no additional condition is required, except for the general ones set forth in paragraph 1. It seems that the intention of the legislator was that in "oridnary" cases that are not part of the enumerative listing of criminal offenses in paragraph 2 of the same article, the approval of parole should be, if not automatically, then as a rule and with significantly less discretion of the court regarding the possibility of not granting parole. On the other hand, with a pure linguistic interpretation - *"If he fulfills the conditions from paragraph 1 of this article, the court can conditionally release the convicted person"* (underlined by the author) - it seems that with regard to the criminal offenses listed in paragraph 2 of this article, the fulfillment of the conditions prescribed by paragraph 1 of that article is not enough for parole, but the court seems to have a wide discretion in terms of granting parole - this follows from the usual meaning of the word "may" (similarly Stojanović, 2021, p. 231). Giving this kind of discretionary power, i.e. freedom to the courts regarding the granting of parole in the listed criminal offenses is not unacceptable, but, in our opinion, the legislator should have been clearer in prescribing this possibility, especially in regard to prescribing possible guidelines or criteria that the courts should have in mind when they use this discretionary power of theirs. It is a completely different criminal-legal question, whether parole in this cases should be possible in these crimes.

Code, the Criminal Code that was valid in the period from 2001 to 2006 knew the concept of corruption. Admittedly, even in this Code, there was no general definition of corruption, but as a concept it was found within the chapter "Criminal acts against corruption" and the name of certain criminal acts (Petrović, 2015, p. 30). However, the current Criminal Code does not recognize the term corruption even to that extent.

Analyzing the different chapters of the Criminal Code, one can see the difference between those criminal acts that in their being contain elements of corruption (corruption crimes) and criminal acts that can be committed in connection with corruption.[5] According to the current regulation of the Criminal Code, criminal offenses with elements of corruption primarily mean criminal offenses from chapter thirty-three of the Criminal Code, which is entitled "Criminal offenses against official duty", but also certain other criminal offenses from other chapters of the Criminal Code, such as chapter twenty others - "Criminal acts against the commerce" (Dragojlović & Milošević, 2018, p. 385.). Corruption crimes primarily include:

- Receiving a bribe from Article 367 of the CC,
- Giving a bribe from Article 368 of the CC,
- Abuse of official position from Article 359 of the CC,
- Trade in influence from Article 366 of the CC,
- Violation of the law on part of a judge, public prosecutor and his deputy from the article 360 CC,
- Accepting bribes in the performance of commerce activities from Article 230 of the CC,
- Giving a bribe in the performance of commerce activity from Article 231 of the Criminal Code,
- Abuse of the position of a responsible person from Article 227 of the CC,[6]
- Giving and receiving bribes in connection with voting from Article 156 of the CC.

[5] The criminal acts that can be committed in connection with corruption, which are listed in Chapter XXXIII of the CC, include: unscrupulous work in the service from Article 361 of the CC, illegal collection and payment from Article 362 of the CC, misuse of budget funds from Article 362a of the CC, fraud in the service from Article 363 of the CC, embezzlement from Article 364 of the CC, service from Article 365 of the CC and disclosure of official secrets from Article 369 of the CC (Human Rights Committee, 2013, p. 14)

[6] For a detailed review of the issue of abuse of the position of the responsible person, see: Dragojlović, J., & Grujić, G. (2018). Krivično delo zloupotrebe položaja odgovornog lica [The criminal act of abuse of the position of the responsible person]. *Pravo – teorija i praksa*, *35* (4-6), pp. 30–44.

Our legislator, therefore, started from international regulations, that is, from the respective conventions of the United Nations and the Council of Europe, which our country ratified. Thus, positive criminal legislation divides corrupt acts, basically, against the object of protection, that is, the good that is protected. So, as can be seen, the domestic legislator followed the principles contained in international conventions related to issues in the domain of corruption, and that is why, in principle, he separated official criminal acts and those that are not. Making a division against the protective object, it is obvious that official criminal acts are those acts directed against the official duty. These are, in terms of receiving and giving bribes, criminal offenses from Articles 367 and 368 of the Criminal Code, while the other three criminal offenses do not constitute official criminal offenses in their basic form, i.e. their protective object is not an official duty, but some other good (such as freedom elections, i.e. voting rights, etc.). In any case, our legislator chose not to incriminate corruption as such, giving a general definition of it, but decided to include a wider range of corrupt behavior with a larger number of criminal acts, from different chapters of the CC.

Presenting detailed views on each of the mentioned corrupt criminal acts greatly exceeds the scope of this paper, however, it should be pointed out that, in terms of the criminalization of corrupt acts of receiving and giving, our legislator followed international legal frameworks, and separately criminalized corrupt acts committed by officials and, more broadly, holders of public authority, and, on the other hand, corrupt acts of receiving and giving bribes committed by private legal subjects, i.e. private persons who do not exercise public authority (Stojanović, 2021, pp. 1097–1121).

3. Some Specific Organizational and Procedural - Legal Issues in Prosecuting Corruptive Criminals

Since, in terms of material criminal legislation, he introduced a corrupt element into the nature of certain criminal acts, our legislator also prescribed certain special rules that refer to the prosecution of these criminal acts, all with the aim of detecting and prosecuting these acts as effectively as possible, that is, suppressing corruption as a whole as effectively as possible.

Back in 2002, our legislator adopted the Law on the Organization and Competence of State Bodies in Suppression of Organized Crime, Corruption and Other Particularly Serious Crimes. Bearing in mind the previously mentioned international regulations, it can be seen that our legislator started taking special measures relatively early in the fight against, that is,

incriminating, detecting and prosecuting corruption. This Law, which has been amended and supplemented many times, established rules for the fight against organized crime and corruption, which were mostly maintained or slightly corrected by the new law. Thus, in 2016, our legislator passed a new special law - the Law on the Organization and Competence of State Bodies in the Suppression of Organized Crime, Terrorism and Corruption. The purpose of Organization and Competence of State Bodies in the Suppression of Organized Crime, Terrorism and Corruption is to regulate the organizational structure and cooperation of state authorities with the aim of more effective detection, prosecution and trial for criminal acts of organized crime, terrorism and corruption. The Law is of an organizational nature, with certain procedural provisions (Krstić, 2017, p. 69). Organization and Competence of State Bodies in the Suppression of Organized Crime, Terrorism and Corruption systematizes state bodies, in principle, into two categories, depending on the criminal acts for which they will be responsible for detection, prosecution and trial; and it does so by dividing them into: state authorities for the suppression of organized crime and terrorism and state authorities for the suppression of corruption.

For criminal acts of corruption, with the exception of those for which state bodies are in charge of combating organized crime and corruption, this Law designates special departments of higher public prosecutor's offices for combating corruption, the Ministry of internal affairs - the organizational unit responsible for combating corruption and special departments of higher courts for the suppression of corruption. The organization of public prosecutor's offices and higher courts for conducting criminal proceedings for corrupt crimes and their territorial centralization in four cities on the territory of the Republic of Serbia - Belgrade, Novi Sad, Kraljevo and Niš are very specific. Namely, powers to act in corruption cases in the area of local jurisdiction*, exempli causa,* for the Appellate Public Prosecutor's Office in Belgrade has the Higher Public Prosecutor's Office in Belgrade, i.e. the Special Department of the High Court in Belgrade for the area of the Court of Appeal in Belgrade, and this type of legislation is not typical in terms of existence harmonization with the general Law on Court Organization and the regulation of public prosecution by type in the Law on Public Prosecution and the Law on Seats and Areas of Courts and Public Prosecutions. By the nature of things, higher public prosecutor office it includes multiple lower basic public prosecutor's offices, and so far it is by no means in terms of scope and type work could also include other higher public prosecutions from the area of a certain appellate public prosecution, whereby, by analogy, the same applies in regards to the

courts, because are appellate courts are, by rank, higher courts than high courts (Krstić, 2017, p. 70). The same happens with Novi Sad, Kraljevo/Kragujevac and Niš.[7] As far as the organization of the courts is concerned, the first-instance court for the trial of criminal offenses of organized crime and corruption is the Special Department of the Higher Court in Belgrade for Organized Crime, which is headed by the president of that department. All judges in the Special Department are appointed or assigned by the president of the High Court in Belgrade, with the fact that the president of the department must have at least ten years of professional experience in the field of criminal law, and the other judges must have at least eight years, and preference is given to those who possess the necessary professional knowledge and experience in areas of the fight against organized crime and corruption. Apart from these basic qualifications related to professional experience, no other criteria are provided for the appointment of judges. Exceptionally, it is possible for judges to be sent by the High Council of the Judiciary from other courts in the Republic of Serbia to work in the Special Department with written consent. The mandate of judges is limited to six years, with the fact that due to the principle of permanence of the judicial function, the complexity of the case and the large volume of work, limiting the duration of the exercise of the judicial function is superfluous. The Special Department of the Appellate Court in Belgrade is responsible for deciding in the second instance in cases of organized crime, terrorism and corruption. The term of office of the president and judges of that

[7] It must be emphasized here that, when it comes to prosecutions of special jurisdiction, formally and legally, it was not necessary to prescribe complicated rules about public prosecutor office of special jurisdiction that would be in the rank of a certain other public prosecutor's office (the rank of a higher public prosecutor). This is because the constitutional prohibition from Article 143 of the Constitution exists only in relation to the establishment of special (extraordinary) courts, but does not say anything about the prosecutor office. Therefore, constitutionally and legally, it would be acceptable to establish a special prosecutor's office that would not be part of the regular prosecutor office's system, and would not be in the same rank as the higher public prosecutor's office and would not be responsible to the directly higher - appellate - public prosecutor's office. Bearing in mind the complexity and specificity of the issues that represent the competence of specialized prosecutor's offices, it would be completely justified, even necessary, to remove any unnecessary potential pressure or supervision. On the other hand, the organization of the court in the form of a Special Department of a Higher Court is necessary in order, on the one hand, to enable specialization in trials for individual, in this case corrupt, criminal acts, and on the other hand to comply with the constitutional ban on the establishment of extraordinary courts. It seems, however, that this compromise solution is not the best, bearing in mind the frequent disagreements of special departments and appellate courts on various issues, especially regarding measures to ensure the presence of the accused. This moreover bearing in mind that the legislator could have established, for example, the Criminal court for Corruption, as court of special jurisdiction, such are commerce courts or probate courts.

Special Department is identical in terms of duration to that of the judges of the first instance court, with the fact that the special conditions for assignment, i.e. referral, are stricter, as at least twelve or ten years of professional experience in the field of criminal law is required, with preference given to candidates who have professional knowledge and experience in the matter of organized crime. The Special Division of the High Court in Belgrade and the Special Division of the Court of Appeals in Belgrade, within the framework of their jurisdiction, have exclusivity in dealing with criminal offenses of organized crime. Therefore, no other court of lower, same or higher instance has the competence to decide or try defendants for criminal acts of organized crime and terrorism, while the new Organization and Competence of State Bodies in the Suppression of Organized Crime, Terrorism and Corruption also established Special Departments of Higher Courts for the suppression of corruption in Belgrade, Novi Sad, Kraljevo and Niš, which are the courts of the first instance, while the corresponding chambers of appeal courts rule in the second instance (Krstić, 2017, pp. 73–74).

On the other hand, the Code of Criminal Procedure (2011) also contains some special rules related to the prosecution of crimes of corruption and organized crime. First of all, within the transitional and final provisions of the Code of Criminal Procedure, Article 608, it is foreseen that the provisions of the new Code of Criminal Procedure will start to be applied starting on January 15, 2012, when it comes to proceedings for criminal offenses for which by a special law it was determined that the public prosecution of special jurisdiction acts, while the Code of Criminal Procedure for other, "ordinary" criminal offenses, began to be applied only on October 1, 2013. This emphasis already, in itself, indicates the special importance that the legislator gave to the suppression of corruption and organized crime, especially bearing in mind the provisions on special evidentiary actions.

The Code of Criminal Procedure also contains specific rules that refer to procedures related to corrupt criminal acts, the prosecution of which is the responsibility of the prosecutor's office of special jurisdiction, starting with the provisions on the composition of judicial panels[8] and the resolution

[8] Thus, Article 21, paragraph 1, point 3 of the Code of Criminal Procedure stipulates that in the first-instance proceedings for criminal offenses for which a special law is determined to be handled by the Public Prosecutor's Office of Special Jurisdiction, a panel of three professional judges shall judge, i.e. without a jury-judges, while paragraphs 2 and 3 of the same article stipulates that in the second and third degree in the proceedings for which, by a special law is determined to be handled by the public prosecutor's office of special jurisdiction, a panel of five professional judges will judge.

of conflicts of jurisdiction.[9] Although, in addition to these special rules, some others of lesser importance are prescribed in terms of the presence of evidentiary actions (Code of Criminal Procedure, 2011, article 300), the completion of the investigation (Code of Criminal Procedure, 2011, article 310, paragraph 2), and the rules on the preparation of a court decision in these proceedings (Code of Criminal Procedure, 2011, article 427), the most important are, beyond any doubt, the rules that refer to special evidentiary actions in criminal proceedings. Namely, Article 162 of the Code of Criminal Procedure, according to the principle of enumeration, lists criminal offenses for which special evidentiary actions can be ordered. Thus, Article 162, paragraph 1, point 1 prescribes a blanket legal norm according to which special evidentiary actions can be determined for criminal offenses "for which a special law determines that the public prosecutor's office of special jurisdiction shall act." Although prescribing the possibility of determining special evidentiary actions in crimes for which prosecution is the responsibility of the special prosecutor's office is completely justified and necessary, such blanket norming could still be questioned from the aspect of the general legal principle of legality in criminal law, which, in itself, is *lex stricta.* This is because the legislator can, by changing the special regulation - the Law on the Organization and Competence of State Bodies in the Suppression of Organized Crime, Terrorism and Corruption - completely freely determine, expand and narrow the number and nature of criminal offenses to which this provision can apply. It would be more acceptable, in our opinion, if the circle of criminal acts to which special evidentiary actions can refer is determined by the procedural regulation that provides for these evidentiary actions - which is the Code of Criminal Procedure.

In addition, from a nomotechnical point of view, the provisions of the Code of Criminal Procedure on special evidentiary actions are not the best prescribed. Namely, point 1 of the mentioned article stipulates that special evidentiary proceedings are always allowed for those crimes for which a special law determines that the public prosecutor's office of special jurisdiction should act, while point 2 enumerates criminal offenses from the Criminal Code for which, in addition to those from point 1, may determine special evidentiary actions. Thus, point 2 of the same paragraph lists, among

[9] Unlike the general rule that a conflict of jurisdiction between public prosecutors is resolved by the joint immediately superior public prosecutor, a conflict of jurisdiction between public prosecutors of special jurisdiction or a public prosecutor of special jurisdiction and another public prosecutor is resolved by the Republic Public Prosecutor (Article 47 of the Code of Criminal Procedure).

others, the criminal acts of abuse of office (Article 359 of the Criminal Code), influence peddling (Article 366 of the Criminal Code), accepting bribes (Article 367 of the Criminal Code), giving bribes (Article 368 of the Criminal Code). However, as Article 2, paragraph 1, item 3 of the the Law on the Organization and Competence of State Bodies in the Suppression of Organized Crime, Terrorism and Corruption already stipulates that this law refers to "criminal acts against official duty (Articles 359 and Articles 361 to 368 of the Criminal Code) and criminal offenses giving and receiving bribes in connection with voting (Article 156 of the Criminal Code)" it was not necessary to additionally burden the text of the Code of Criminal Procedure by re-listing these acts in Article 162, paragraph 1, point 2 of the Code of Criminal Procedure. This failure of the legislator is not without potential practical consequences. Namely, Article 162, paragraph 2 stipulates that the special evidentiary action of the *Undercover Investigator* can be determined only for criminal offenses from point 1 of paragraph 1 of that article, that is, only for those offenses for which the action of the public prosecutor's office of special jurisdiction is foreseen. As the criminal acts of abuse of official position from Article 359, as well as the giving and receiving of bribes from Articles 367 and 368, are covered by the enumeration in Article 162, paragraph 1, point 2 of the the Code of Criminal Procedure, but they are also, at the same time, according to the provisions of Article 2 of the Law on the Organization and Competence of State Bodies in the Suppression of Organized Crime, Terrorism and Corruption, and for which the public prosecution of special jurisdiction acts, they are at the same time part of the provisions of point 1 but also point 2. Therefore, bearing in mind the fact that criminal law is *lex stricta*,[10] and in case of ambiguity it should be interpreted in favor of the accused, it can be justified to ask the question whether in that case a special evidentiary action of an undercover investigator could be determined. Despite the clumsy legislator, it should not be considered that the application of this special evidentiary action is excluded in these criminal acts, because it would go against the spirit and *ratio legis* of the provisions of the Code of Criminal Procedure and the Law on the Organization and Competence of State Bodies in the Suppression of Organized Crime, Terrorism and Corruption.[11]

[10] The assumption is that the legislator, when it comes to criminal law, was perfect, and he prescribed everything he wanted, just the way he wanted (similarly Stojanović, 2017, p. 20).

[11] Regardless of that, if the acting public prosecutor would base his request for a special evidentiary action of an undercover investigator for criminal offenses from Articles 359 and 361-368 of the CC on Article 162, paragraph 1, point 2 of the Code of Criminal Procedure, such a request would have to be rejected by the acting court as impermissible.

From the above, it can be concluded that, due to the seriousness and specificity of corrupt criminal acts, our legislator prescribed special organizational and criminal procedure rules when it comes to prosecuting corrupt criminal acts. Such a prescription by our legislator is completely understandable and justified, and is in accordance with the global trend and in accordance with international legal regulations.

However, it is surprising that our legislator failed to treat the criminal offense from Article 360 of the Criminal Code - Violation of the law by a judge, public prosecutor and his deputy - as a criminal offense of corruption or organized crime, in the sense of the Law on the Organization and Competence of State Bodies in the Suppression of Organized Crime, Terrorism and Corruption, i.e. not placing it under the jurisdiction of public prosecutor of special jurisdiction, nor does it enable the use of special evidentiary actions in relation to that criminal act. Bearing in mind the generally accepted fact that corruption is also present in the judiciary itself, and at the global level, which causes special damage to a democratic society and the rule of law, it seems that this failure of the legislator was reckless and difficult to accept.

4. Concluding Considerations

Corruption, that is, the overall corrupt practice, as one of the manifestations of organized crime, represents a very undesirable and dangerous social phenomenon, with a high degree of social danger, which is very difficult to detect and prove.

As a rule, this form of criminal activity is difficult to detect and recognize, which makes it difficult to take effective measures to prevent and suppress corrupt practices in a timely manner. We can conclude that for society, the entire legal order and the effectiveness of the rule of law, a particular danger is represented by the corrupt acts of representatives of the state government, officials and responsible persons in various positions and in various institutions.

It seems that the complete eradication of corruption as a negative social phenomenon is almost impossible, but the aspiration of both the national authorities and the international community must be to reduce corruption to the lowest possible level, that is, to suppress it as much as possible. In this sense, in order to reduce corruption in our country to the smallest possible extent, it is necessary that each individual first respects ethical principles, i.e. constant education and training is needed, as well as the application of ethics by each individual, but also the constant concern of the state, monetary and

legislative authorities with the aim of preventing, detecting and suppressing this negative social phenomenon.

Certainly, it can be concluded that, when it comes to the normative framework, i.e. measures at the level of legislative activity, our country, by adopting broad incriminations of corrupt criminal acts, by establishing specialized prosecutor's offices and special departments of courts for the prosecution of corruption, and prescribing the wide possibility of special evidentiary actions in the procedure of proving corrupt criminal acts, establishes a strong normative anti-corruption system. However, regardless of special criminal (both material and procedural) and organizational rules in the fight against corruption, it seems that the existing normative framework is not sufficient. First of all, the state should invest greater efforts in the practical implementation of the prescribed normative framework, and adopt a new strategy for the fight against corruption, which it will vigorously and consistently implement. *De lege ferenda*, the legislator must also bring the judiciary under the anti-corruption regime, i.e. must also prescribe the crime from Article 360 of the Criminal Code as a corrupt criminal offense, and place it under the jurisdiction of special authorities for the prosecution of these criminal offenses in the sense of the Law on the Organization and Competence of State Bodies in the Suppression of Organized Crime, Terrorism and Corruption, and it must also enable special evidentiary actions to be undertaken in relation to these criminal acts. Only in this way can the domestic authorities restore trust in the judiciary, eliminate corrupt elements in the ranks of the judiciary and prosecutor's office, which is the only way to ensure further successful suppression of corruption in Serbia.

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O POJEDINIM KRIVIČNO-PRAVNIM SPECIFIČNOSTIMA KORUPCIJE U REPUBLICI SRBIJI

REZIME: Korupcija je negativna društvena pojava koja je prisutna u svim društvima i državama, a koja se može naći u svim slojevima i odnosima unutar jednog društva. Koruptivna praksa, kao sveprisutna negativna društvena pojava, svakako, ima svoje politikološke, sociološke, kriminološke, pravne i druge aspekte. Imajući u vidu činjenicu da raširena koruptivna praksa u znatnoj meri nagriza osnovu društva, to dozvoljavanje njenog opstanka i produbljivanja nužno rezultuje napuštanje demokratije, demokratskih vrednosti, pravne sigurnosti i vladavine prava. Zato, svaki zakonodavac, uključujući i zakonodavca u Republici Srbiji, propisuje različite materijalna i procesno pravne mere kojim se nastoji suzbiti korupcija u zemlji. Ovaj rad se osvrće na pojedine krivičnopravne specifičnosti inkriminisanja korupcije na međunarodnom i nacionalnom nivou, ali i na pojedine procesne aspekte gonjenja za koruptivna krivična dela, i to u pogledu nadležnosti specijalizovanih organa gonjenja i pravosudnih organa, ali i u pogledu posebnih dokaznih radnji koje se u otkrivanju i gonjenju koruptivnih krivičnih dela redovno koriste.

Ključne reči: *korupcija, davanje i primanje mita, organizovani kriminal, zloupotreba.*

References

1. Bjelajac, Ž. (2008). Korupcija kao vid organizovanog kriminala [Corruption – a mean of Organized Criminal]. *Pravo - teorija i praksa*, *25* (3-4), pp. 47–54

2. Bošković, M. (2000). *Aktuelni problemi suzbijanja korupcije* [*Current problems in suppression of corruption*]. Beograd: Policijska akademija
3. Derenčinović, D. (2005). *Komentar Konvencije UN protiv korupcije* [*UN Convention against Corruption: Commentary*]. Zagreb: Pravni fakultet Sveučilišta u Zagrebu
4. Djurić, A. (2010). The Bribe in Criminal Code Serbia. *Pravo - teorija i praksa*, *27* (1-2), pp. 14–32
5. Dragojlović, J., & Grujić, G. (2018). Krivično delo zloupotrebe položaja odgovornog lica [The criminal act of abuse of the position of the responsible person]. *Pravo – teorija i praksa*, *35* (4-6), pp. 30–44. DOI: 10.5937/ptp1806030D
6. Dragojlović, J., & Milošević, I. (2018). Krivična dela davanja i primanja mita u obavljanju privredne delatnosti [Criminal offence of giving and taking bribe in the economic activities]. *Kultura polisa*, *15* (35), pp. 383–392
7. Jovašević, D. (2009). *Krivična dela korupcije* [*Criminal acts of corruption*]. Beograd: Službeni glasnik
8. Krivični zakonik [Criminal code]. *Službeni glasnik RS*, br. 85/05, 88/05 – ispr., 107/05 – ispr., 72/09, 111/09, 121/12, 104/13, 108/14, 94/16 i 35/19
9. Krstić, G. (2017). Specijalizacija državnih organa u suzbijanju organizovanog kriminala, terorizma i korupcije sa posebnim osvrtom na odnos između javnog tužilaštva i policije [Specialization of State Authorities in combating Organized Crime, Terrorism and Corruption with special impact in relationship between prosecutors office and police]. *Nauka, bezbednost, policija*, *22* (3), pp. 67–88. DOI:10.5937/nabepo22-15376
10. Mitrović, D., & Račić, O. (1996). *Pravo Evropske unije* [*Law of European Union*]. Beograd: Službeni glasnik
11. Nacionalnu strategiju za borbu protiv korupcije za period od 2013. do 2018. godine [The National Strategy for the Fight against Corruption for the period from 2013 to 2018]. *Službeni glasnik RS*, br. 57/13
12. Petrović, N. (2015). *Korupcija kao oblik organizovanog kriminala – magistarski rad* [*Corruption as form of organized crime – master's thesis*]. Niš: Pravni fakultet Univerziteta u Nišu
13. Stojanović, Z. (2017). *Krivično pravo: opšti deo* [Criminal law: general part]. Beograd: Pravna knjiga
14. Stojanović, Z. (2021). *Komentar Krivičnog zakonika* [*Commentary on Criminal Code*]. Beograd: Službeni glasnik

15. Ustav Republike Srbije [Constitution of Republic of Serbia]. *Službeni glasnik RS*, br. 98/06 i 115/21
16. Zakon o organizaciji i nadležnosti državnih organa u suzbijanju organizovanog kriminala, korupcije i drugih posebno teških krivičnih dela [Law on the Organization and Competence of State Bodies in Suppression of Organized Crime, Corruption and Other Particularly Serious Crimes]. *Službeni glasnik RS*, br. 42/02, 27/03, 39/03, 67/03, 29/04, 58/04 - dr. zakon, 45/05, 61/05 i 72/09
17. Zakon o organizaciji i nadležnosti državnih organa u suzbijanju organizovanog kriminala, terorizma i korupcije [Law on the Organization and Competence of State Bodies in the Suppression of Organized Crime, Terrorism and Corruption]. *Službeni glasnik RS*, br. 94/16 i 87/18 – dr. zakon
18. Zakonik o krivičnom postupku [Code of Criminal Procedure]. *Službeni glasnik RS*, br. 72/11, 101/11, 121/12, 32/13, 45/13, 55/14, 35/19, 27/21 – odluka US i 62/21 odluka US
19. Komitet pravnika za ljudska prava. (2013). Za efikasnije pravosuđe protiv korupcije [For more efficient judiciary against corruption]. Beograd: YUCOM

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LIABILITY OF THE SELLER FROM THE CONTRACTUAL RELATIONSHIP REGARDING CERTAIN DEFICIENCIES WITHIN THE SAMPLE AND MODEL SALES CONTRACT

ABSTRACT: The seller's responsibilities for particular contractual defects, as a distinct, separate and very complex institute, are regulated by the Law of Contract. The authorized subject of the Law of Contract is free to decide on entering the contractual obligation. The goal of the subjects, in the context of concluding a contractual relationship, is its realization. However, in addition to the stated common interest of the contracting parties, in practice, there is very often a situation when one of the contracting parties does not perform the contract in full, or performs it, but the subject of the contractual relationship is not consistent with the contract. The sales contract, together with its modalities, are regulated by the Law of Contract legal provisions regulating the institute of seller's liability in the context of defects in the contractual relationship within the sample and model sales contract are not precisely and clearly regulated. The necessity and obligation to define the institute of seller's responsibility for defects of items from the contractual relationship within the sample and model sales contract, is reflected in a precise and linguistically clear definition of seller's liability for eviction and material defects. The proposed

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solutions in the paper could be a great contribution to legal science, but legal practice too.

Keywords: *the seller`s responsibility for certain defects according to the contractual relationship, the sample and model sales contract, the Law of Contract, the deadline for filing complaints for non-conformity of goods.*

1. Introduction

With the technical and technological development of trade, especially online trade, the institute of seller's responsibility for the shortcomings of goods has experienced its greatest prosperity. Through the research of this interesting issue, it is concluded that the question of the seller's responsibility for the shortcomings of goods has been growing since the slave-owning society. Namely, the slaves who had certain deficiencies , such as a weaker vision, a disability that is reflected in the limited ability of physical work, pointed this out on the board they wore around their necks. In this way, the seller of the goods/slaves was protected from possible return of the goods in case they did not correspond to the intended purpose.

The Law on Obligations regulates the seller's responsibilities regarding the lack of items both within the sales contract and the provisions governing the modalities of the sales contract, such as the sample and model sales contract. The modalities of the contract of sale that exist in legal transactions, but are not named, are subject to the general provisions within the provisions governing the contract of sale. The complexity of the obligatory relationship that arises from the conclusion of the contract is reflected in its termination (Kovačević, 2012, p. 72).

As the contract of sale is the most widespread contract today and as almost every individual concludes it at least once a day, especially by implied actions, it is the subject of work analysis important both from a theoretical and practical aspect.

Section 2 of the Law on Obligations regulates the seller's liability for material and legal defects of the thing, ie when the thing has a material or legal defect of the thing, deadlines for raising objections, hidden defects of the thing, etc.

Authorized subjects enter into numerous legal relations (Jakovljević, 2019, p. 85). The conclusion of any contract creates rights and obligations on both sides, which are regulated by law. The seller's obligations are to deliver the goods in the manner and within the agreed time, and to provide

protection to the buyer from defects, and the buyer's obligations are to receive the goods according to the agreed place and manner, pay the price and notify the seller of the lack of goods. In order for the sales contract to be valid, it is necessary that it contains essential elements, ie essential ingredients. The Law on Obligations stipulates that the essential elements of the contract of sale are goods, ie the right and the price.

In the civil law sense, a good is a commodity (Radulović, 2020, p. 13). In the legal sense, a good is a bodily object, a spatially limited material part of nature, which can be perceived by the senses, which can be subjected to human authority, which serves people to meet their needs, and exists in the present or there are realistic assumptions that it will occur in the future (Stanković & Orlić, 1982, p. 7). The price is the monetary equivalent for the good that the seller sells to the buyer and must be expressed in money (Marković, 1997, p. 419). The price is determined when it is stated in the contract in one total amount or per unit of measure, and can be determined when relevant data are agreed according to which the price will be determined later (eg average market price at a quantum market in a certain city on the 90th day contract, as the day of payment) (Ognjanović, 2010, p. 32). The contract is concluded when the contracting parties agree on the essential elements of the contract (Article 26 of the Law on Obligations).

2. Sales contract by sample and model (in general)

Sample and model sales is a modality of the sales contract that is named. The Law on Obligations did not define the concept of this modality of the contract of sale, but it prescribed the case of the seller's liability for material defects or for non-performance of the contractual obligation.

Sale by sample and model deviates from the basic type of sales contract (see Article 454 et seq.) In that the buyer here determines the subject of the contract and its properties according to the sample (pattern) or model that should be used exclusively to create or compare with the purchased item and its properties (Perović & Stojanović, 1980, p. 184).

A model is a three-dimensional creation of an item (eg brick, car, boots, stove, etc.) in its original size or in a relatively reduced form, which accurately reflects the properties of the item, and the sample is a smaller quantity of items to which it will deliver the quantity of all sold items (Babić & Petrović, 2004, p. 37).

Therefore, the sale by sample and model can be defined as a modality of the sales contract by which the creditor undertakes to make or only hand

over goods according to the cause or model shown to the buyer, and the buyer undertakes to pay the seller a certain amount of money.

Selling by pattern or model is a very common modality of sales contract in everyday life. It is often used when going to a tailor to cut a piece of clothing, or when buying a car, bathroom tiles, kitchen or yard, buying furniture, etc.

It is about selling things according to a sample or model, where the buyer gets an insight into the final look of the product, after which it is finally decided whether he wants to conclude a contract with the seller or not.

If the buyer decides to buy items according to a sample or model, the contracting parties usually determine the delivery time or the deadline within which the product should be produced. If the buyer chooses tiles for the yard and the seller has a sufficient quantity for the buyer in the warehouse, then there is no need to set a deadline. However, if the seller has yet to produce or import the goods, then the delivery time becomes an essential element, as the buyer or seller himself, or both parties, make it so.

With this modality, as with the contract of sale, the buyer acquires ownership by handing over the goods. In case of damage to the goods, the seller bears the risk until the goods are handed over to the buyer, as defined by law.

3. Responsibility of the seller with regard to defects in the sales contract according to the sample and model

Section 3, Article 538, paragraph 1, of the Law on Obligations prescribes the liability of the seller in case of sale of goods that do not comply with the sample or model. Liability in that case is regulated by the rules of liability of the seller for material defects, and in other cases by the regulations on liability for failure to fulfill obligations. Article 478 of the Law on Obligations prescribes the responsibility of the seller in the case when the goods contains some of the legally prescribed defects of the thing. Namely, according to the mentioned article, the seller is responsible for material defects of goods that she had at the time of transfer of risk to the buyer, regardless of whether he was aware of it, and for those material defects that occur after the transfer of risk to the buyer if are a consequence of a pre-existing cause. Article 508, paragraph 1 of the Law regulates the liability of the seller in case of eviction, where it is prescribed that the seller is liable if there is a third party right on the sold item that excludes, reduces or limits the buyer's right, and the buyer is not informed or agreed to take the thing encumbered with that right.

Interesting is Article 538, paragraph 2, Law on Obligations, which regulates the seller's liability in the contract of sale by sample and model where it stipulates that the seller is not responsible for lack of conformity if the sample or model submitted to the buyer only for information and approximate determination of property, without promise compliance.

Here, the legislator protects the seller from liability due to a small deviation of the goods in relation to the sample or model, if the buyer is given the item for inspection only for information and without promising that the item will be identical.

We are of the opinion that this legal provision does not apply when any deviation is in question, but only in the event that objectively two or more identical copies of the product cannot be produced.

The legislator justifiably allows deviations in the context of the conformity of things to a sample or model and in some way mitigates the responsibility of the seller when there really is a basis.

For example, if the buyer intends to buy natural stone tiles with a design such as that natural stone has in itself, in black and white combination, where black dominates, the seller is allowed to deviate in a specific situation.

The buyer would not have the right to invoke the provisions of the seller's liability due to the non-conformity of the item to the pattern or model because it is dominated by more white color, because the material is natural and difficult to change. If it were to be changed, then it is no longer a question of that pattern or model, and in such situations a minor deviation is justified.

Minor deviations are allowed by law when it comes to smaller samples that are given as an example for making larger items, such as when choosing a fabric for a set that the customer decides to make. If, at the time of collection, the color differed in a slight shade or pattern, it would be considered permissible.

It should be noted that the law did not explicitly prescribe the allowed deviation, but stated it as a situation when the seller did not promise compliance or when he submitted the sample or model to the buyer only as a notice. Therefore, the creditor is obliged to inform the buyer about the same before he decides to buy the item. Subsequent notification is meaningless.

If the deviation is greater, the seller will be liable without deviation and the buyer will not be obliged to pay the amount to the seller, unless he allows a subsequent deadline for production. In any case, he will be entitled to compensation if he has suffered it.

General customs for trade in goods defined the quality according to the sample of goods in Article 141, where it is stated that the authentic is the sample that is sealed and on which the label is signed by the parties, or a sample

submitted by one party under its seal. This solution should also be adopted by the Law on Obligations, because in this way the parties gain security in legal transactions so that what is agreed is recorded in writing, and in case of non-fulfillment of the contract can be easy to prove the inconsistency of things in court proceedings.

The general customs for the trade of goods stipulate that if the quality of the goods is determined according to the sample, the delivered goods must correspond to the sample in everything. We are of the opinion that the Law on Obligations should adopt this legal provision as well. Prescribing the seller's liability for defects in items in the contract of sale by sample and model through only one provision is not precise enough.

The responsibility of the seller in fact depends on his sincere statement to the buyer whether he can produce or deliver the item in accordance with the sample or not. If the seller sincerely acts and announces that the item would have a minor deviation during production, and the buyer agrees to such delivery, ie delivery of items, the buyer would not have the right to point out the non-conformity of items to the model or sample.

Otherwise, if the buyer is conscientious and the seller is unscrupulous, the buyer will have the right to hold the seller liable for non-conformity of the model or sample.

The parties to the contract should conclude a written contract where they would specify the specification, ie the characteristics of the model they want to make, together with the seller's statement on the possibility of realization of the requested. In that sense, the mentioned proposal of the solution should be adopted by the Law on Obligations in order to have a binding character. A contract that would not contain the seller's statement on the realization of the requested, should not be considered a validly concluded contract of sale by sample and model.

Annex 1

Judgment of the Higher Commercial Court, Pž. 427/2009 of 16 April 2009 years

Law on Obligations, Art. 480 and 481

Manner of submitting notifications, sentences:

In the notification of the defect of the item, the buyer is obliged to describe the defect in more detail and invite the seller to inspect the item. If the notice of defect sent by the buyer in a timely manner to the seller by registered letter, telegram or other reliable means is late or does not reach the seller at all, he considers that the buyer has fulfilled his obligation. The buyer

is obliged to notify the seller of the defects by giving written notice within a specified period. The notice should be forwarded to the seller by registered letter, telegram or in some other reliable way, so that, among other things, he can, in case of a dispute, prove the timely complaint and its content.

From the explanation: „The first instance court correctly concluded that the complaint, which the defendant submitted to the plaintiff on 18.12.2006. year, which was submitted to him by a third party SZTR Commission S. from P, was made by a third party, probably the defendant's distributor, and it was not signed by the litigants. From the contents of the minutes, it cannot be concluded with certainty that the subject of the complaint is the first goods that the plaintiff delivered to the defendant according to the defendant's invoices, especially having in mind that the complaint was made on December 18, 2006. years, more than a year from the receipt of goods on the disputed invoices.

The position of the first instance court is correct that a closer identification of the goods is necessary for a complaint about the quality of the goods, ie characteristics that prove that they are the goods that were delivered. The first-instance court correctly concluded that there is no relevant evidence that the complaint of the goods from 18.12.2006. submitted to the prosecutor. The defendant also did not prove that it was a sale of goods according to a sample or model or that the goods were delivered to the defendant for information and approximate determination of the quality of things, without promising compliance in terms of Article 538 paragraph 2 of the Law on Obligations.

The first instance court correctly concluded that even if it were accepted that it was a sale according to a sample or model, from Article 538, paragraph 1 of the Law on Obligations, the plaintiff would not be responsible for the quality of goods, since the defendant did not act in accordance with the said legal provision. If the item handed over to the buyer by the seller does not comply with the sample or model, the seller is liable under the regulations of the seller's liability for material defects of the item.

The provision of Article 480 of the Law on Obligations Art. 1 and 2 stipulates that the seller is not responsible for defects, when the item does not have the necessary properties for its regular use or for trade, if the item does not have the required properties for special use, for which the buyer procures it, and which was known to the seller, or it must have been known to him, if at the time of concluding the contract they were known to the buyer or could not remain unknown to him. It is considered that the buyer could not remain unaware of the shortcomings that a caring person with average knowledge and experience of a person of the same profession and profession as the customer could easily notice during the usual inspection of things.

The provision of Article 481, paragraph 1 of the Law on Obligations stipulates that the buyer is obliged to inspect the received item in the usual manner, or to inspect it as soon as possible according to the regular course of things, and to notify the seller of visible defects within eight days, and in the case of contracts in the economy without delay, otherwise he loses the right that belongs to him on that basis.

On the disputed fact whether the goods were advertised in accordance with the law, the first instance court concluded by applying the rule on the burden of proof on the basis of Art. 220 and 223 of the Law on Civil Procedure. The defendant stated that the received goods contained indications that it was not first class, but second and third class, he did not state that he inspected the goods, and from his allegations as well as from the complaint it can be determined that the delivered tires were old and damaged, which represents shortcomings that could not remain unknown to the defendant. Defendant did not provide evidence that he informed the seller in a timely manner of the deficiencies he was referring to, nor did he provide evidence to establish whether he informed the plaintiff of the deficiencies at all, or whether he did so within the time limit. the court correctly decided when it adopted the claim, and in that sense the appellate allegations of the defendant are unfounded.

The provision of Article 484 of the Law on Obligations stipulates that in the notification on the lack of items, the buyer is obliged to describe the defect in more detail and invite the seller to inspect the item. If the notice of defect sent by the buyer in a timely manner to the seller by registered letter, telegram or other reliable means is late or does not reach the seller at all, he considers that the buyer has fulfilled his obligation to notify the seller.

The first-instance court correctly concluded that the defendant did not provide evidence that he informed the plaintiff within a certain period of time about the deficiencies through a written notice, which he could send to the defendant by registered letter, telegram or other reliable means. The first-instance court correctly determined that the defendant returned a certain amount of goods, but this does not constitute evidence that the same return relates to the defendant's claim, bearing in mind that the defendant did not provide evidence of payment, and in that sense .

As the defendant did not prove that he settled the debt, nor that he made a timely complaint about the goods, ie that he filed a timely complaint about the quality, the first instance court correctly concluded that the defendant also loses the right under Article 488, paragraph 1 of the Law to request a price reduction… because he did not timely and properly inform the seller

about the defect. By correctly applying Article 262, paragraph 1, Article 277, paragraph 1, Article 324, paragraph 1 and Article 454, paragraph 1 of the Law on Obligations, the first instance court correctly applied the substantive law to the established factual situation, when it adopted the claim regarding principal debt and default interest on the maturity of the defendant's account."

4. Concluding remarks

The contract on sales according to the sample and model is among the most frequently concluded modalities of the contract on sale, and by specifying unclear legal solutions, legal protection is provided to subjects in legal transactions, which reduces the scope of work of courts. The law of the Republic of Serbia can boast of rules that do not deviate much from international ones, especially when it comes to the sales contract, as well as its modalities.

However, the above does not mean that we should stagnate in terms of adopting new, current solutions, although these are agreements whose domain covers not only the borders of the state, but also beyond.

As contract and model contract is a common contract, determining and defining the seller's responsibility for defects is an important issue that should be clearly defined. Having in mind the previous critical review of certain legal provisions, in this part of the paper, we are of the opinion that one potential modality of the sales contract should be added as a proposal, which modalities of the sales contract would facilitate legal transactions and specify the seller's responsibility for defects. It is a modality of the sales contract called "sales contract according to a sample and model with specification".

Namely, although it seems that the sales contract with the specification is very similar to the sales contract by sample and model, they differ in that the sales contract by sample or model shows the buyer a model or sample of things, and the buyer specifically, for the time of concluding the contract knows the shape, size, color and other characteristics of the thing he is buying, that is, he knows its final appearance. The sales contract with the specification determines the type and quantity, as well as the subject, but the specifics subsequently. Example: if the customer wants to make a handbag, he determines that it will be one piece, its dimensions, probably also the material, e.g. skin. Within the set deadline, the buyer undertakes to perform the specification, in the sense that he will determine the skin color, quality, some additional designed details, etc.

Thus, it can be seen that there is a difference between these two modalities of the sales contract. We are of the opinion that it is very possible for one complex contract to emerge from these two contracts. This would be when the buyer would buy things according to a sample or model and demand from the seller a deadline within which he will state certain additional details of the item.

This modality of the sales contract and its legal regulation leaves the possibility for the seller to determine the specifics of the item within the deadline with a subsequent agreement with the buyer, which would allow the seller to inform the buyer about possible and minor changes he would encounter. Also, in that case, the buyer would have the opportunity to withdraw from the contract within the agreed period, if the buyer is not able to deliver the requested items to the buyer. It could be interpreted that this loosens the contract according to the sample and model, since the seller is uncertain whether the contract will be realized at all, however, we are of the opinion that such an attitude would be neglected over time because concluding such a complex contract, seller and buyer, approached with some certainty. Another point should be added here, and that is that the costs that the seller would have in collecting information of importance to the buyer in making the desired item should be specified. Otherwise, the buyer would always be at a profit and would have nothing to risk, which could make his negotiations "more daring". If the position was added that the buyer would be obliged to pay the actual costs, if the main contract is not realized, the buyer would approach a more careful and precise explanation of the requested items.

In accordance with all the above, it is concluded that the contract of sale according to the sample and the model is a frequent contract and that the clarification of unclear and linguistically imprecise legal provisions should be approached very seriously. The proposed solutions in the paper should be considered in more detail, and maybe some should be adopted, especially having in mind the scarce professional literature on this issue.

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ODGOVORNOSTI PRODAVCA IZ UGOVORNOG ODNOSA U POGLEDU NEDOSTATAKA STVARI KOD UGOVORA O PRODAJI PO UZORKU I MODELU

REZIME: Odgovornosti prodavca za nedostatke stvari, kao zaseban, izdvojen i vrlo kompleksan institut, regulisane su obligacionim pravom. Ovlašćeni subjekt obligacionog prava je slobodan pri odlučivanju o stupanju u obligacioni odnos. Cilj subjekata u kontekstu zaključenja ugovornog odnosa, jeste njegova realizacija. Međutim, pored navedenog zajedničkog interesa ugovornih strana, vrlo često se u praksi događaju situacije da jedna od ugovornih strana ne izvrši ugovor u celosti ili ga pak izvrši, ali predmet ugovornog odnosa nije saobrazan ugovorenom. Ugovor o prodaji, zajedno sa svojim modalitetima, regulisani su Zakonom o obligacionim odnosima. Zakonske odredbe koje regulišu institut odgovornosti prodavca u kontekstu nedostataka stvari iz ugovornog odnosa kod ugovora o prodaji po uzorku i modelu nisu dovoljno precizno i jasno regulisane. Neophodnost i obaveznost definisanja instituta odgovornosti prodavca za nedostatke stvari iz ugovornog odnosa kod ugovora o prodaji po uzorku i modelu, ogleda se u preciznom i jezički jasnom definisanju odgovornosti prodavca za materijalne nedostatke stvari. Postavljeni predlozi rešenja u radu bi mogli predstavljati veliki doprinos za pravnu nauku, ali i praksu.

Ključne reči: *odgovornost prodavca iz ugovornog odnosa u pogledu nedostataka stvari, ugovor o prodaji po uzorku i modelu, Zakon o obligacionim odnosima, rok za podnošenje prigovora za nesaobraznost robe.*

References

1. Babić, I., & Petrović, Z. (2004). *Obligaciono pravo: posebni deo* [*Obligatory law: special part*]. Beograd: Nomos
2. Jakovljević, M. (2019). Ugovori u privredi i njihova forma [Contracts in the economy and their form]. *Pravo teorija i praksa*, *36* (1/3), pp. 85–97
3. Kovačević, N. (2012). Aktivna legitimacija za raskid ugovora o doživotnom izdržavanju. [Active legitimacy for termination of the contract on lifelong support]. *Pravo teorija i praksa*, *29* (4–6), pp. 60–74
4. Marković, L. (1997). *Obligaciono pravo*. [*Obligatory law*]. Beograd: NIU Službeni list SRJ
5. Ognjanović, S. (2010). *Obligaciono pravo: posebni deo* [*Obligation law: special part*]. Novi Sad: Pravni fakultet za privredu i pravosuđe Univerziteta Privredna akademija u Novom Sadu
6. Perović, S., & Stojanović, D. (1980). *Komentar Zakona o obligacionim odnosima* [*Commentary on the Law of Obligations*]. Kragujevac: Pravni fakultet u Kragujevcu i Kultruni centar Gornji Milanovac
7. Radulović, D. (2020). *Stvarna prava: imovinsko-pravni odnosi* [*Real rights: property-legal relations*]. Novi Sad: Pravni fakultet za privredu i pravosuđe u Novom Sadu Univerzitet Privredna akademija
8. Stanković, O., & Orlić, M. (2014). *Stvarno pravo*, deveto izdanje [*Real Law,* Ninth Edition]. Beograd: Nomos
9. Zakon o obligacionim odnosima [The Law on Obligations]. *Službeni list SFRJ,* br. 29/78, 39/85, 45/89 - odluka USJ i 57/89, *Službeni list SRJ*, br. 31/93, *Službeni list SCG*, br. 1/2003 - Ustavna povelja i *Službeni glasnik RS*, br. 18/20
10. Opšte uzanse za promet robom [General customs for trade in goods]. *Službeni list FNRJ,* br. 15/54 *i Službeni list SFRJ,* br. 29/78 - dr. zakon

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THE PROBLEM OF SYNTHESIZING FINANCIAL STATEMENTS IN REORGANIZATION DURING THE BANKRUPTCY PROCESS

ABSTRACT: The subject of the paper is solving the problems arising from the use of highly synthesized financial statements. The paper presents a model by which highly synthesized financial data can be used for the needs of reorganization in bankruptcy management. Financial and accounting data are frequently synthesized, i.e. organized in such a way that they largely hide the details of the business. The act of synthesis is needed in order a general picture of a company's business to be created. Financial statements such as balance sheets and income statements represent typical examples. In the paper, there are used several research methods to formulate the models for the efficient use of highly synthesized financial statements. The basic method used in the research was the case study method, then the modelling method, and, as an auxiliary method, there was used the documentation analysis method. The case study analyzed the main indicators being important for the bankruptcy. We analyzed six companies which were in the process of reorganization in bankruptcy, and the analysis identified common characteristics served as the starting points

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for the next method. The next method used was the modelling method. This method was a logical continuation of the previous method by which a new model was formulated. As a tool in modelling, there were used the block diagrams, which graphically showed all important elements and relations. The auxiliary method used was the documentation analysis method. It is a historical method and an integral part of the previous two methods. The aim of the paper is to increase the efficiency of the use of highly synthesized financial statements in bankruptcy management.

Keywords: *bankruptcy, reorganization in bankruptcy, financial reporting, information system.*

1. Introduction

The paper presents a model that uses highly synthesized financial data in bankruptcy with special emphasis on reorganization. The most business decisions are based on the certain business parameters which are recorded in the financial statements. Each business transaction is recorded and entered into the accounting system from which the financial statements are later created. Due to the large amount of the generated information during the business, transformation and summarization must take place but the only way to create the financial statements is the one that gives a general picture of the business.

The subject of this paper is solving problems arising from the use of highly synthesized financial statements. Namely, making decisions based on bad assessments can further jeopardize the already shaky business.

Synthesis is an established practice and is an integral part of every financial and accounting system. Balance sheets and income statements are characterized by the fact that they give a rough picture of the business condition of an organization. A system established in this way gives good results in most cases, especially when the business is successful. The problem arises when business is threatened, especially when organizations go toward bankrupt.

The aim of this paper is to increase the efficiency of the use of highly synthesized financial statements in bankruptcy. More precisely, using highly synthesized financial statements that are accurate and up-to-date. The ultimate goal is to create a decision-making system based on the actual state of the business.

Then, rough indicators are not of much greater importance, and thus the task of the management in bankruptcy is far more complex.

Modern business requires the use of robust accounting systems based on computer technology, so that the synthesized reports can be easily interpreted and returned to their original form. Various organizational and business techniques for organizational recovery often neglect the development of the organization's information system, which includes the accounting system. It follows from this that a lot of the financial transactions are performed outside the established system, they are shown in the final account, taxes are paid, etc. but they are recorded outside the established accounting programs. The reason for this may be, among other things, the inability of the organization to service its debts of the information system maintenance, the departure of key people who know how to use the current accounting system and similarly.

2. Bankruptcy process and reorganization

Bankruptcy itself can have two outcomes, depending on whether it is possible to reach an agreement with the creditors. One outcome of the bankruptcy goes toward closing of the company by selling the entire property and by settling the creditors. „Bankruptcy occurs when a debtor's assets are reduced to such an extent that his debts exceed the real basis on which they are based" (Dukić-Mijatović, 2010, p. 15). So, servicing the debts from the current operations is hardly possible, and settling creditors from the entire property is also impossible. When a company goes bankrupt, debts are often above the amount of total capital. The second outcome is the reorganization, which aims primarily at regulating the mutual relations between creditors and the bankruptcy debtor. For this outcome, it is necessary to reach an initial plan and agreement with the creditors. This outcome is also strictly defined by the law, so that it must be met through legal and organizational conditions.

The question that arises is whether it is possible to bypass bankruptcy as a category that is quite rigid, the answer can be inferred from numerous studies. As an example of the previous statement, the research done on the example of the American economy will be cited, as one of the conclusions is the following: „At first glance, it seems that it is in the interest of the applicants to agree on an informal reorganization of the company before unnecessary costs occur. Nevertheless, empirical studies show that a large percentage of companies choose formal bankruptcy" (François & Raviv, 2017, p. 165). The mentioned research was done on the example of the American economy, but the logical conclusion is that the results would be similar in our conditions.

Some branches of industry have experienced the major shocks under the influence of the technological changes. For example, digital video viewing

services have virtually shut down large chains that engaged in physical renting the video media. „The digital transformation has obscured traditional categories of production and consumption“ (Kale, 2018, p. 4). „In declining industries, there is a high degree of fear for the future sustainability on the part of employees, a high degree of integration is closely linked to high coordination costs and unbreakable moments for employees“ (Bauer, Dao, Matzler & Tarba, 2016, p. 11). What can be noticed in companies that are in the domain of declining branches of the industry is the emergence of a large migration of the best staff.

There are many reasons for the bankruptcy, some bankruptcies are intentionally caused, while others arose due to objective reasons. In any case, it is difficult to state all the reasons for initiating bankruptcy. According to the authors behind the work „The crime of causing bankruptcy – specifics and features“ (Dragojlović, Milošević & Stamenković, 2019), a large number of bankruptcies arise due to the transition and / or poor management. This view is not unique and is shared by many domestic authors. Namely, during the privatization, there were cases where the values of companies were reduced through poor management and then bankruptcy was initiated.

However, the collapse of one company is not of a local character. “By committing the criminal acts in the economy, the whole society is destabilized, which is why it is especially interested in its protection with both preventive and repressive measures, among which the Criminal Law measures occupy a significant place” (Dragojlović, Milošević & Stamenković, 2019, p. 27). From this, it can be concluded that the state itself is extremely interested in sanctioning those who intentionally lead companies into bankruptcy. And besides this, there is a growing trend of favouring reorganization in relation to bankruptcy.

3. Accounting - financial system

The accounting and financial system is an integral part of every company. Without these two parts it is difficult to imagine the business. With the advent of modern information systems, many accounting and financial functions have been automated. However, despite facilitating the work of the accounting and financial sector in terms of administration, these businesses are still heavily influenced by the human factor.

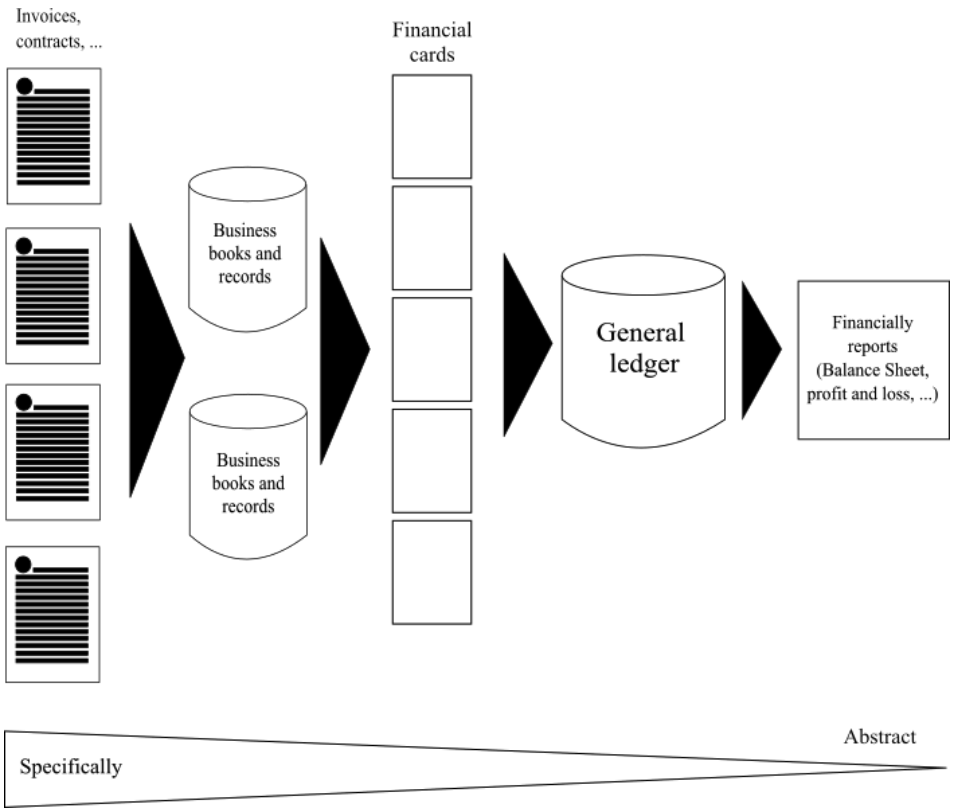
According to one of the definitions, accounting is: „The process of identifying, measuring and communicating economic information in order to

assist in making decisions and decisions by information users“ (Collier, 2003, p. 3). The emphasis here is on monitoring the business process and measuring it.

The second definition is very similar: „Accounting is an information system that measures business activities, processes information into reports and communicates results to decision makers. Accounting is the language of business“ (Nobles, Mattison & Matsumura, 2015, p. 28). It should be emphasized that the first definition was taken from the literature cited by the American Association of Accountants, namely the first definition is from 1966. The second definition is a bit younger and has a slightly more modern undertone.

Today, the collection and processing of data has been significantly facilitated, but the interpretation of the obtained data is still a labor-intensive process highly dependent on the creative abilities. In the previous period, many jobs within the company were used to transfer information from senior management to lower hierarchical levels. All this leads to the fact that information systems have been given a new destructive role that inadvertently changes the business model. „As companies become more digital, it becomes apparent that what companies can do depends on what their information systems and data management can“ (Turban, Pollard & Wood, 2018, p. 4). Today, a lot depends on the power of a company's information system, new models are emerging, and new applications of information technology are evident every day.

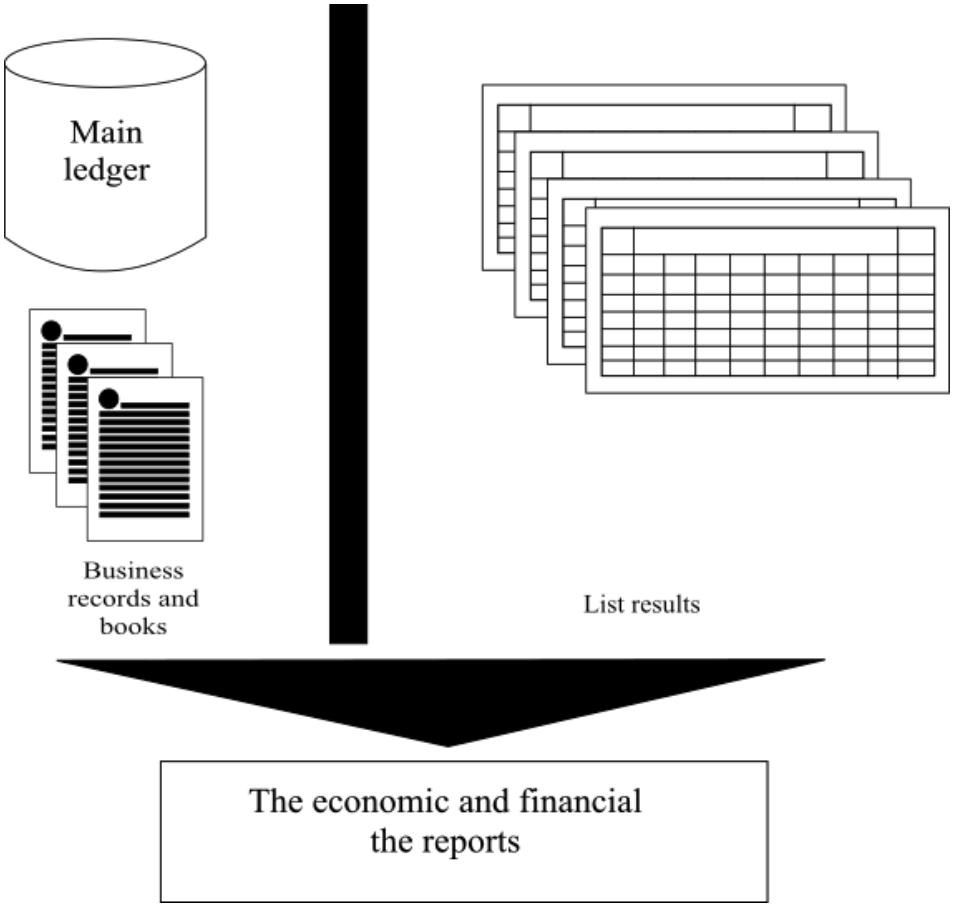
The previous picture 1. shows a rough scheme for synthesizing the final accounts. Namely, business books are formed from concrete data and information, which most often unite certain important elements of business. For example, books of suppliers, customers, etc. can be kept separately. This was done in the previous period to facilitate data processing manually. Through the process of abstraction, “superfluous” details are removed in order to finally obtain highly abstract, ie synthesized reports that can more easily monitor business. The balance sheet and income statements are perhaps the most important, but they also have the least details needed to analyse the business of a company. Namely, these reports belong to the highly synthesized reports that combine numerous categories and show only the general picture of the financial operations.



Picture 1. The problem of synthesizing final accounts.
Source: Author's research.

Monitoring the work of the company is done with the help of various indicators, among which are the financial and accounting reports of the great importance. However, we also have shortcomings in this field, such as the emergence of the creative accounting practice. „Creative accounting implies all the actions of managers, employees or third parties that lead to the presentation of the desired, rather than the actual picture of the financial and profitable position of the company" (Bešlić, 2013, p. 149). With bad reporting, the company's management wants to mislead its partners, both external and internal.

"In our domestic scientific and professional literature," Business Analysis "or" Business Analysis "has been largely replaced by the concept of" Balance Sheet Analysis "or" Financial Report Analysis ". It is indisputable that this analysis is important and unavoidable, because it is a basis for deciding on the



Picture 2. EFR creation.
Source: Author's research.

fate of the capital of investors " (Malešević & Čavlin, 2009, p. 25). However, the financial aspects of the analysis are not enough.

The division of the financial statements according to the methods of analysis can be divided into two major groups, namely: qualitative and quantitative financial analysis. When we talk about the quantitative analyses, we mean "classical" analyses, which contain clearly and quantitatively processed data. On the other hand, qualitative analyses are related to the interpretation and elaboration of business ventures. Quantitative analyses can yield far different results than qualitative analyses, but freedom of interpretation can lead to erroneous results.

Financial analysis and accounting are the universal language of economics by which information can be easily and simply shared. From the reports that come from the domain of the finance, you can learn a lot of information such as the intentions of the company, business success, direction of further development and the like.

After the inventory and assessment performed by the bankruptcy trustee, a document called "Economic and Financial Report" (EFR) is created. This document is a rough assessment of business opportunities and the bankruptcy estate. In this segment, a detailed assessment of the assets performed by a certified appraiser under the new law is still not required. The EFR is presented to creditors so that they are aware of the state of the bankrupt company.

EFI is essentially a document standardized by the Rulebook on setting national standards for bankruptcy estate management (2018). Hereinafter, the Rulebook on Determining National Standards for Bankruptcy Estate Management will be called the National Standard. The purpose of the national standard is to set the framework in which the bankruptcy estate is managed, ie the way in which bankruptcy trustees approach the bankruptcy process. The national standard prescribes the norms that must be met.

4. Research

For the needs of the work, companies that are in the process of reorganization in bankruptcy were researched, and the following research methods were used:

The case study, here we mean the Harvard variant, which serves for the development of the critical thinking, comparative analyses, classifications and the like. They give the common characteristics of the observed object of research.

Modelling method with emphasis on graphical presentation of the obtained results of the previous method, in this way the system boundaries, essential elements, relations and fields of action of the system are presented.

Documentation analysis was used as an auxiliary method, this method permeates the previous two and is one of the historical methods.

Organizations that are in the process of reorganization were researched:

- Akcionarsko društvo Tigar Pirot,
- Akcionarsko društvo fabrika hartije Božo Tomić Čačak,
- Ikarbus A.D. Beograd,
- Građevinsko preduzeće Mostogradnja A.D. Beograd,
- Simpo A.D. Vranje,
- Dunav akcionarsko društvo Smederevo.

Each analyzed company will enter a certain knowledge about the reorganization process itself. Each company analyzed had its own dynamic growth, development and ultimately decline. Through the analysis of documentation, primarily reorganization plans, i.e. pre-prepared reorganization plans, then financial reports and additional documents, a comparative analysis is formed.

With the help of this analysis, it is possible to quickly see the common characteristics with the special emphasis on the financial reporting. Also, an analysis of the company's capacity in terms of collecting, processing and sharing financial information was performed.

A special focus in the research is on the interpretation of financial indicators by management, as well as the way they are presented. This analysis provides the basic elements of building the model presented in the next part of the paper.

From the previous analysis, it can be determined that the main carrier of financial information is mainly a mixture of electronic and paper forms. That is, the internal information system, in addition to the use of computers, was formed according to the system of "information archipelagos". This means that only certain parts of the organization are covered by the information system, and it is often the case that business with external partners is conducted using a combination of paper and electronic forms.

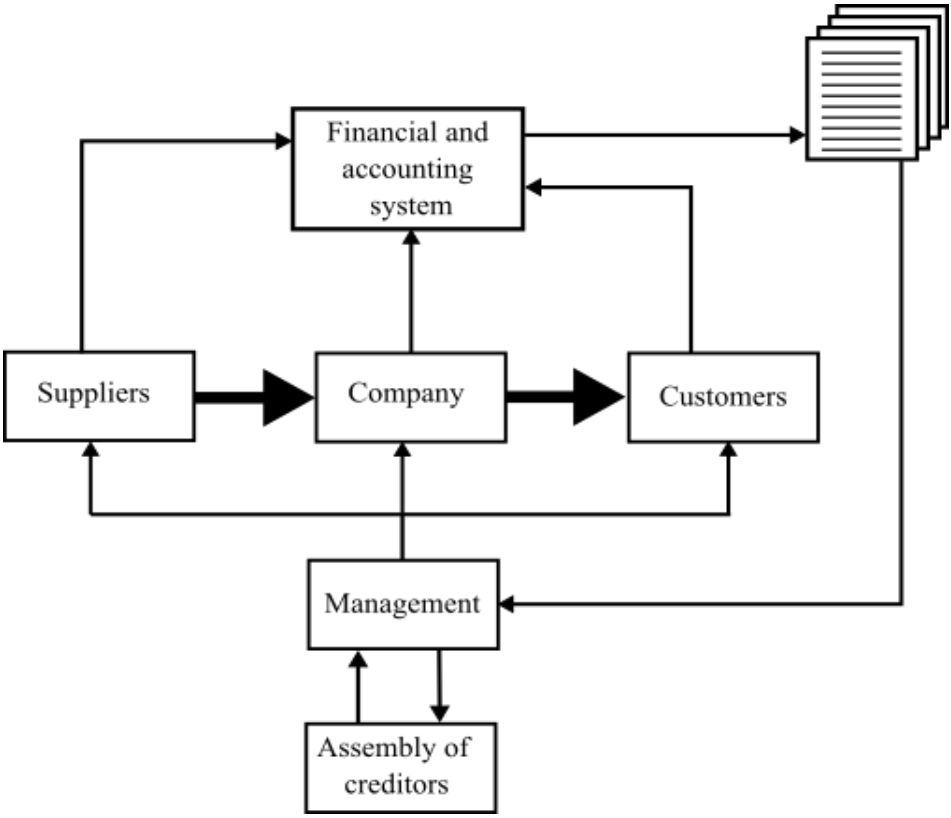
The problem arises primarily in the insufficient efficiency of information collection as well as in the appearance of out-of-date information of a financial nature. An additional problem identified in the research process is the emergence of "creative" bookkeeping, ie making decisions based on misinformation.

Based on what has been said so far, a model based on feedback with the use of modern web technologies is given. The model provides a high degree of data up-to-dateness and transparency.

Table 1. Comparative analysis

	Akcionarsko društvo Tigar Pirot	Akcionarsko društvo fabrika hartije Božo Tomić Čačak	Ikarbus A.D. Beograd	Građevinsko preduzeće Mostogradnja A.D. Beograd	Simpo A.D. Vranje	Dunav akcionarsko društvo Smederevo
Activity	Holding company activity	Manufacture of paper and paperboard	Manufacture of motor vehicles	Construction of bridges and tunnels	Manufacture of other furniture	Renting and operating of own or leased real estate
Summary of UPPR-a	Conversion of receivables into company capital. Reorganization of affiliated companies. Withdrawal of bills of exchange and issuance of new ones.	Modification of the production program through the conquest of a new product. Production of electricity and heat. A significant loan from the majority owner is expected. Withdrawal of bills of exchange and issuance of new ones.	Reduction of the capital of the bankruptcy debtor with withdrawal of issued shares and issuance of new ones. Payment of creditors with new shares of the company. Withdrawal of bills of exchange and issuance of new ones.	Conversion of receivables into company capital Withdrawal of bills of exchange and issuance of new ones.	Partly settling creditors with money, and partly with company shares. Reorganization of production. Withdrawal of bills of exchange and issuance of new ones.	Settlement of current business debts. Withdrawal of bills of exchange and issuance of new ones.
Type of UPPR-a	Financial	Business / production	Financial	Financial	Partly financial partly business / production	Business / production
Type of accounting system	Computerized On-line platform	Computerized Localized system	Computerized Localized system	Computerized Localized system	Computerized On-line platform	Computerized Localized system
The main information media	Mostly electronic forms	Mostly paper forms	A mixture of electronic and paper forms	A mixture of electronic and paper forms	A mixture of electronic and paper forms	A mixture of electronic and paper forms

Source: Author's research.



Picture 3. Model of analysis of synthesized financial information.
Source: Author's research.

The model is based on feedback and information systems inside and outside the company. Without the use of the adequate information systems, the presented model could hardly be possible. In this model, financial statements are considered outputs that are subject to detailed analysis. Bold lines between suppliers, companies and customers indicate material flow, all other flows are essentially informational.

5. Conclusion

Without constant checks of the actual state of business, companies that are in reorganization in the bankruptcy procedure must have a more realistic picture of business. The assembly of creditors can very quickly vote for bankruptcy if the debtor does not stick to the plans. In order to create the

most realistic picture of the business, it is necessary to apply information technologies and respect the procedures related to information handling. A mitigating circumstance is that the technologies needed to build such a model are widely used and do not require a drastic increase in costs.

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PROBLEM SINTETIZACIJE FINANSIJSKIH IZVEŠTAJA U REORGANIZACIJI PRILIKOM VOĐENJA PROCESA STEČAJA

REZIME: Predmet rada je rešavanje problema koji proizilaze iz upotrebe visoko sintetizovanih finansijskih izveštaja. U radu je prikazan model kojim se visoko sintetizovani finansijski podaci mogu koristiti za potrebe reorganizacije prilikom vođenja stečaja. Finansijsko-računovodstveni podaci su najčešće sintetizovani, odnosno tako organizovani da u velikoj meri sakrivaju detalje poslovanja. Čin sintetizacije je potreban kako bi se stvorila opšta slika o poslovanju jednog preduzeća, finansijski izveštaji poput bilansa stanja i uspeha su karakteristični primeri. U radu je korišćeno nekoliko istraživačkih metoda pomoću kojih se formulisao model za efikasnu upotrebu visoko sintetizovanih finansijskih izveštaja. Osnovna metoda koja je korišćena u istraživanju jeste metoda studije slučaja zatim metoda modelovanja, a kao pomoćna metoda korišćena je analiza dokumentacije. Studijom slučaja analizirani su glavni pokazatelji koji su važni za stečaj. Analizirano je šest preduzeća koja su u procesu reorganizacije u stečaju. Analizom su utvrđene zajedničke karakteristike koje su poslužile kao početne tačke za narednu metodu. Sledeća metoda koja je korišćena jeste metoda modelovanja, ova metoda je logični

nastavak prethodne metode kojom se formulisao novi model. Kao alat u modelovanju upotrebljene su blok šeme kojom su grafički prikazani svi bitni elementi i relacije. Pomoćna metoda koja je upotrebljena jeste metoda analize dokumentacije, ovo je istorijska metoda i sastavni je do prethodne dve metode. Cilj rada je usmeren na povećanje efikasnosti upotrebe visoko sintetizovanih finansijskih izveštaja prilikom vođenja stečaja.

Ključne reči: *stečaj, reorganizacija u stečaju, finansijsko izveštavanje, informacioni sistem.*

References

1. Dukić-Mijatović, M. (2010). *Vodič kroz stečajni postupak: osvrt na stečajno zakonodavstvo bivših jugoslovenskih republika* [*A guide to bankruptcy proceedings: a review of the bankruptcy legislation of the former Yugoslav republics*]. Novi Sad: Mala knjiga
2. François, P., & Raviv, A. (2017). Heterogeneous beliefs and the choice between private restructuring and formal bankruptcy, *The North American Journal of Economics and Finance*, *41*, pp. 156–167, https://doi.org/10.1016/J.NAJEF.2017.04.006
3. Kale, V. (2018). *Creating Smart Enterprises: Leveraging Cloud, Big Data, Web, Social Media, Mobile and IoT Technologies*,New York: Auerbach Publications
4. Bauer, F., Dao, M. A., Matzler, K., & Tarba, S. Y. (2017). How industry lifecycle sets boundary conditions for M&A integration. *Long Range Planning*, *50* (4), pp. 501–517, DOI: 10.1016/j.lrp.2016.09.002
5. Dragojlović, J., Milošević, I., & Stamenković, G. (2019). Krivično delo prouzrokovanje stečaja: specifičnosti i obeležja [Criminal offense of causing bankruptcy: specifics and features]. *Pravo - teorija i praksa*, *36* (1/3), pp. 16–30, DOI: 10.5937/ptp1901016D
6. Collier, C., P. (2003). *Accounting for Managers: Interpreting accounting information for decision-making*, San Francisco: John Wiley & Sons
7. Turban, E., Pollard, C., & Wood, G. (2018). Information Technology for Management: On-Demand Strategies for Performance, Growth and Sustainability, Eleventh Edition, Wiley: Hoboken
8. Bešlić, D., & Bešlić, I. (2013). Stečaj privrednog društva kao posledica manipulativnog finansijskog izveštavanja [Bankruptcy of the company as a consequence of manipulative financial reporting]. *Škola biznisa*, (3/4), pp. 148–159

9. Malešević, N., Đ., & Čavlin, S., M. (2009). *Poslovna analiza* [*Business analysis*]. Novi Sad: Fakultet za ekonomiju i inženjerski menadžment u Novom Sadu
10. Pravilnik o utvrđivanju nacionalnih standarda za upravljanje stečajnom masom [Ordinance on the establishment of national standards for the management of the bankruptcy estate]. *Službeni glasnik RS*, br. 62/18
11. Nobles, T., Mattison, B., & Matsumura, M., E. (2015). *Horngren's Accounting*, Tenth edition, Boston: Pearson

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A CONSTITUTIONAL DISPOSITION OF CULTURAL MALE CIRCUMCISION AS A HERITAGE RIGHT

ABSTRACT: South Africa's constitutional framework entrenches a variety of legislative imperatives that protects culture as a right. Sections 30 and 31 of the Constitution, 1996 were specifically enshrined to resonate with the spirit and purport of the need to protect cultural rights. Some statutory enactments such as Children's Act 38 of 2005 and Limpopo Initiation Schools Act 6 of 2016 are also highly respectful of cultural rights thereby enabling cultural families and communities to subject their children to practice any such cultural activities of their choice, but to the extent that it is practicable. It is argued that while South Africa's post-1994 constitutional apparatus are fundamentally rights-based orientated and thus require the state and every legal and juristic persons to be bearers of such a responsibility of protecting human rights, the state is correspondingly obligated to protect cultural rights as a constitutional entitlement in order for citizens to enjoy heritage as a right, either as a group or individuals with cultural orientation. Constitutionally speaking, the state is prohibited from engaging in acts that unjustly interferes with free enjoyment of heritage as a right. The article adopted a traditional legal doctrinal methodological approach, which is best suited for interpreting legislative instruments to capture a variety of plausible meanings and implications to a real life legal situation.

Keywords: *cultural rights; cultural male circumcision; human rights; administrative justice; heritage right.*

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1. Introduction

The practise of cultural male circumcision, otherwise widely referred to as traditional male circumcision is part of South Africa's long-held history of cultural practises and traditions that shaped the lives of the natives in many ways. Hence, if thoroughly engaged, cultural male circumcision could strengthen perspectives associated with cultural studies and their underpinning theories. This is because cultural studies have the ability to buttress potential for new models of cultural production and policy development (Chrisman, 2018, p. 147), while also being capable of influencing formulation of regulatory legislative framework. For the purpose of this article, cultural male circumcision is conceived as a concept that has far-reaching constitutional and administrative implications, at least from a human rights perspective. Constitutionally speaking, its continued existence translate into confirmation of a protection and realisation of the right to culture, while on the other hand, the continued exploitation for economic reasons by non-law abiders represents major threats to its existence and to a variety of rights entrenched in the Bill of Rights.

Both sections 30 and 31 of the Constitution of the Republic of South Africa, 1996 (*hereinafter, the Constitution*) respectively entrenched cultural rights.[1] This entails that any person who wishes to exercise a cultural activity or rite of passage in terms of the own preference may cite sections 30 and 31 as legitimately protected constitutional doctrines that enable them to enjoy cultural rights without being unduly disturbed. In simple terms, and constitutional speaking, by virtue of these provisions, everyone has the right to culture and cultural identity, including where applicable, the right to practice and enjoy the practice of what has widely become known as a traditional male circumcision. In accordance with Section 2 and of the Constitution, this entails that no arbitrary limitation of the right to culture can be permitted. To contextualise it, section 2 provides that the Constitution is the supreme law of the Republic, and that any law or conduct that is inconsistent with it is

[1] Section 30 – Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.
Section 31 – (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of the community:
(a) to enjoy their culture, practise their religion and use their language and
(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
– (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

invalid and must be declared as such. Further, it provides that all obligations imposed by the Constitution must be fulfilled. To further contextualise and explain the implications of the constitutional injunction of constitutional supremacy doctrine on human rights, it is important to state that Chapter 2 of the Constitution makes provision for the Bill of Rights. In terms of section 7, the Bill of Rights is captured as the cornerstone of democracy, and the state is bound to respect, protect and promote and fulfil all rights in the Bill of Rights, subject only to the limitations clause in terms of the law of general application. In terms of section 8, the Bill of Rights is binding on the legislature, the judiciary, the executive, and all organs of state, and applies to all natural and juristic persons to the extent that it is applicable.

Against the above backdrop, it is important to countenance with the immediate implications of the concept of constitutional supremacy as an administrative concept, and its direct interaction with the idea of entrenching the constitutional application of the Bill of Rights. This is particularly significant in terms of how these critical foundational constitutional ideals impact on enjoyment of rights in practices of cultural activities as enshrined in sections 30 and 31. In this regard, it is worth mentioning that the practise of traditional male circumcision is one such a cultural activity that has for years been a subject of serious scrutiny. In the main, and understandably so, specific attention has been on critical aspects associated with contraction of diseases, multiple death cases and various forms of critical injury (Kepe, 2010, p. 732). It is for this reason that some perspectives have emerged, and are critically questing how cultural male circumcision must be perceived especially when it adversely affect the best interest of the child through causing irreparable physical harm and loss of self-worth (Morei, 2017, p. 4).

2. Rationale and Research Approach

This article is predicated on arguing that South Africa's legal system recognises and protects customary law (Nhlapo, 2017, p. 1), which in turn provides the bedrock of reasoning within which cultural practices that culminated in constitutional cultural rights are protected. It has been observed that the practice of cultural male initiation has become the center of attention in various social sciences and legal studies. Indeed, various perspectives have emerged, including those informed by medical scholarship, sociology and social work and legal practitioners amongst others. It is against this backdrop that this article advocates that while there is generally a need to safeguard human wellbeing of those that opt to go through the rite of passage, there is

also a corresponding need to protect cultural male circumcision as a heritage right. It is accepted that while male circumcision is performed in various ways, it ought to be understood as a heritage shrine. Its significance is further buttressed by the fact that circumcision is now embraced as another tool to fight against the spread of HIV and Aids, which remains one of South Africa's major health hazards. Hence, the national Department of Health has been at the forefront of leading campaigns to encourage men to undergo circumcision in order to aid the effort of easing the pressures beleaguering the health system.

In context, cultural male circumcision is understood as a process of removing the foreskin on the male reproductive organ, often preferred to be performed on teenage boys. In most geographical locations inhabited by the natives, the practice is performed at designated areas, mostly away from homes, where the initiates spend weeks in the mountains, and being initiated through various activities. Such designated areas are referred to as initiation schools, thus making it a cultural rite practiced amongst various cultural groups and tribes. Although various tribes observe and practice cultural male circumcision in various ways, it is generally understood that the objective is widely the same. Most South African experiences describe it as ritual circumcision, and ascribe unto it, a prime heritage status, especially amongst Muslim and African communities that accept it as a part of an initiation into manhood (Deacon & Thomson, 2012, p. 5). Hence, Deacon and Thomson went on to highlight that owing to this reason, many African men across the African continent have been circumcised in a traditional context.

This article adopts a traditional legal doctrinal research approach, which is reliant on secondary data obtained through legislative legal instruments and research articles on the subject of cultural male circumcision. The article propagates for calibration of thoughts, in terms of which scholarly approaches influences society to embrace the view that rights-based approaches ought to realise that civil and political rights that are affected by malpractices associated with male circumcision must go beyond lamenting the existence of the initiation schools and begin to see cultural male circumcision not only as a human right but as a heritage right too.

3. A Brief Descriptive Background

Cultural male circumcision has been practiced over many decades. It is also accepted to be the oldest and most commonly performed surgical procedure across the globe (Mavundla, Netswera, Bottoman, & Toth, 2009, p. 395). However, on where its exact location of origin is remains a matter

of contest, although it has been acclaimed that it evolved as a religious rite performed on royalty, while others believe it was used to exert social domination over other tribes (Warner & Strashin, 1981, p. 968). In certain quotas, it has been argued that circumcision might have started as an early public health measure for preventing balanitis caused by accumulation of sand under the foreskin in the ancient societies (Bhattacharjee, 2008, p. 1). Hence, various theories exists surrounding the need for providing explanations with regards to how circumcision originated and what purpose it was actually meant to serve in the society. From the above, it can be discerned that indeed, the practice of circumcision has been in existence for decades (Austin, 2010, p. 318). In South Africa, the practice of cultural male circumcision has been linked with ritual-rites that have long been considered as part of upbringing for young boys in grooming them for future challenges. It has since crept permanently into every sphere of life to an extent that the practice became amongst the important aspects of our upbringing, being practiced arguably for both educational and developmental purposes. South Africa's history shows that cultural circumcision has also been perceived as useful for various reasons such as being an aid to achieve optimal hygiene where regular bathing was impractical.[2] As a custom, it is accepted to have offered advantages that superseded disadvantages to tribes that practiced it and thus led to its spread.[3]

4. Legal Instruments on Cultural Circumcision as a Heritage

The International Covenant on Cultural and Peoples' Rights (the ICCPR) is the primary international law that provides the bedrock within which legal norms on the recognition and protection of cultural rights of every persons across the globe are realised. Therefore, section 30 and section 31 of the Constitution, 1996 buttresses the views encapsulated in the ICCPR when it comes to discussions around cultural rights. In this context, an important stipulation is that every person is guaranteed of freedom to choose and participate in culture and cultural activities of their choice, while retaining the right to also partake in cultural activities of a community to which they belong (Mswela, 2009, p. 177). It is in this spirit that we ought to accept that no matter how repugnant a certain cultural practice may seem, be it accepted that only those that regard it as their heritage should have the determining say

[2] History of male circumcision, at *http://en.wikipedia.org/wiki/History_of_male_circumcision*, Donwnloaded 2021 June 10.
[3] *Ibid.*

when deciding social policy. Because cultural male circumcision often affects children, it is important to also note that the United Nations Convention on the Rights of the Child of 1989 is crucial. This is particularly important because article 24 makes provisions for cultural practices, which must in the end be balanced against children's rights to bodily integrity, health, social security, basic education, equality and so forth.

To properly locate the place of culture and heritage within the domain of human rights protections, it is important to look at how the African Charter on the Rights and Welfare of the Child of 1990 (*hereinafter, the African Charter*). A closer scrutiny of the African Charter would demonstrate that the Charter is in favour of recognising and protecting the right to culture, cultural practices and heritage of the natives in many ways (Sloth-Nielsen, 2012, p. 73). When interpreting human rights-based approaches to human development, it is also important to recognise that while the international legal instruments mandate states to enact statutory framework that protects everyone against harmful cultural activities, it should also be noted that these legal norms also recognise and protect cultural practices as a heritage right. Not only are states are required to create an enabling environment within which heritage rights are safeguarded.

There are three notable pieces of legislation through which to interpret South Africa's perspective when coming to cultural rights and heritage. Such statutory framework includes the Traditional Circumcision Act 6 of 2001, Children's Act 38 of 2005 and Limpopo Initiation Schools Act 6 of 2016 (which was formerly called the Northern Province Circumcision Schools Act 6 of 1996). Each of these pieces of legislation give effect to a variety of constitutional provisions to effectuate the need to protect all rights in Bill of Rights. The fact sections 30 and 31 of the Constitution protects the right to culture implies that no haphazard limitation of the rights therein is permitted. In particular, the state is prohibited from interfering with the right to practise a preferred cultural custom called traditional circumcision, and this enables communities to opt to freely practice and enjoy their cultural rite without intervention from the state of any other person or entity (Maseko, 2008, p. 192).

While South Africa's legislation is generally predicate don rights-based approaches to human development, it is also discernible that a variety of such legislative provisions are customs conscious. It is the view of this article that such provisions largely recognise and protects the right to culture against undue infringement, either by the state or any entity. For instance, section 2 of the Limpopo Initiation Schools Act 6 of 2016 recognises and protects the sacred nature of cultural male circumcision through contextualising the

meaning of a traditional community and a traditional practice. This it does in the context of demarcating what may be considered as a sacred custom, worthy of a heritage status. However, the Limpopo Initiation Schools Act is not without issues especially when it comes to balancing preferences in terms of cultural and custom related permutations and the superimposed norms that are of imperial heritage.

South Africa also relies on the Children's Act to further define what may be considered acceptable in terms of global standards of children's rights protection. This is particularly relevant when approached from a point that appreciates that South Africa's children remain vulnerable to exploitation. While it has been argued by some that the primary relevance of Children's Act on male circumcision is premised on the need to curb the scourge of the reported deaths and general health hazards that adversely affect children's ability to develop. The importance of Children's Act is that it provides an overarching framework within which all matters that affect children can be resolved. This it achieves by formulating a clearly defined framework, which prescribes the regulatory instruments within which children may be and or not be subjected to a cultural circumcision. In general, section 12 of Children's Act describes instances where children may be permitted to undergo circumcision (Sloth-Nielsen, 2012, p. 79). By accepting that social and cultural circumcision of children may only be undertaken with in the context of specific social and cultural practices, the Act accepts that the right to culture is inherently interlinked with heritage. There is also a widespread interplay between the complex legislative imperatives and the long-held views about customs as customary rites and heritage of the natives.

5. Cultural Circumcision and its Historical Heritage Status

A cursory look into the historical archives would show that the practice of cultural circumcision occupies a crucial historical position in various sociological and anthropological groupings and positions of the natives in South Africa. Hence, it has been and is still regarded as a crucial custom rite that give broader meaning to cultural educational institutions where those that go through the rite are introduced to useful manly customary values that are necessary in shaping their societal disposition and their roles as men. In various cultural groups, it is accepted as a symbol of transiting from boyhood to manhood (Douglas & Maluleke, 2018, p. 584). There is also a widespread historical anecdotal evidence demonstrating that cultural male circumcision was used to socialise men into accepting the responsibility of protecting

women and children. This part is particularly crucial yet overlooked in almost all reports that are only focused on the unfortunate contemporary economic exploitative trends.

It is the thesis of this article that every traditional community or nation has a duty to pride itself about its own history in order to appropriately self-identify and remain truthful to invaluable group identification. This is aligned with the social identity theory, which describes a process where a group of individuals who accordingly possess common knowledge that they belong to a certain social category or group (Stets & Burke, 2000, p. 225), and thereafter appropriate specific value unto what defines their interrelations as a pursuit for a common goal. The issue of cultural circumcision would appear as requiring a similar approach. Put differently, this involves issues of respecting, upholding and preserving the national identity and heritage of those that consider it as a heritage matter. As a heritage phenomenon, cultural male circumcision plays an essential function in preserving constitutionally entrenched cultural rights that are often expressed through traditional activities. It has been reported that this custom is concerned with transferring cultural and traditional knowledge to generations of the future. When exercised in accordance with the Constitution, 1996, no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights. This entails that every person is allowed to participate in cultural practices according to their preferences but within the limits of the law.

Bolstering its heritage status is a contemporary health benefit. It has since been widely accepted that cultural male circumcision also plays a fundamental role in providing greater health benefits especially in the context of alleviating risks associated with the spread of HIV/Aids, which remains one of the biggest health risks in South Africa. Most scholars and professionals in the medical profession have stated that it lowers risks of HIV transmission in men and other sexually transmitted diseases (Verquet, 2013, p. 1; Garenne, 2008, p.16), while reducing HIV transmission by 60% in men (WHO, 2012; Williams et al, 2006, p. 1032). Indeed, observational studies have restated the view that circumcision is associated with reduced sexual transmission of HIV in many instances (Doyle & Hill, 2011, p. 1). This is particularly with regards to transmission from female-to-male during sexual activity (Ibid) with reports and various studies emphasising the validity of arguments that male circumcision plays a significant role at least in the trials that have been conducted (Tobian et al., 2009, p. 2). As a result, the Department of Health encourages all men of appropriate to circumcise.

6. Conclusion

The object of this article was to show that cultural male circumcision continues to be a fiercely thoughtful human rights issue in South Africa. Not only does it affect the commonly discoursed civil and political rights, and socio-economic rights such as the right to dignity, right to equality, right to privacy, right to welfare and so forth. Its scope of application traverses across all rights in the Bill of Rights. Hence, the article argues that while foundational rights-based approaches have been focusing on the state enforcing normative legislative directives, communities that practise cultural circumcision as a heritage right also have a legitimate entitlement to demand that the state should protect the practice as a constitutionally entrenched heritage right. In this regard, it means the state is obligated to create an environment within which the traditional communities are able to enjoy the custom as a heritage entitlement. The article adopted a considerably different approach to reasoning in that it accepts that while South Africa's post-apartheid constitutional apparatus are fundamentally rights-based orientated and thus require the state and every legal and juristic persons to be bearers of such a responsibility of protecting human rights, it is argued that the state is also obligated to exercise restraint and care when engaging in acts that interferes with free enjoyment of heritage as a right. It is asserted that there are direct constitutional permutations that supports the view that the state's often stereotyped approach to cultural male circumcision is at odds with the constitutional injunction predicated on the need to also protect cultural rights as critical heritage entitlements.

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USTAVNA ODREDBA KOJA SE TIČE OBREZIVANJA MUŠKARACA KAO KULTUROLOŠKOG NASLEDNOG PRAVA

REZIME: U ustavni okvir Južne Afrike utemeljeno je mnoštvo pravnih obaveza koje štite kulturu kao pravo. Članovi 30 i 31 Ustava iz 1996. godine su posebno uneti da bi se usaglasili sa duhom i smislom potrebe da se zaštite

kulturološka prava. Neke zakonske uredbe kao Akt 38 o deci iz 2005. godine kao i Akt 6 o školama inicijacije Limpopoa iz 2016. godine takođe veoma uvažavaju kulturološka prava time što omogućavaju kulturološkim porodicama i zajednicama da svoju decu podvrgnu upražnjavanju bilo koje kulturne aktivnosti po njihovom izboru, ali u meri do koje je to izvodljivo. Tvrdi se da sve dokle je ustavni aparat Južne Afrike posle 1994. godine fundamentalno orijentisan ka pravima i na taj način zahteva da svako pravno i pravosudno lice bude odgovorno za zaštitu ljudskih prava, država je shodno tome u obavezi da zaštiti kulturološka prava kao ustavno pravo da bi građani mogli da uživaju u nasleđu kao pravu, bilo kao grupa ili pojedinci sa kulturološkom orijentacijom. Ustavno govoreći, državi je zabranjeno da se putem akata nepravedno meša u slobodno uživanje nasleđa kao prava. U radu je usvojen tradicionalni metodološki pristup pravne doktrine, što najbolje odgovara interpretaciji pravnih instrumenata kojima se obuhvata niz verodostojnih značenja i implikacija koje se odnose na pravnu situaciju u stvarnom životu.

Ključne reči: *kulturološka prava, obrezivanje muškaraca kao kulturološki fenomen, ljudska prava, upravno pravosuđe, nasledno pravo.*

References

1. Austin, P. F. (2010). Circumcision. *Current Opinion in Urology, 20* (4), pp. 318–322
2. Bhattacharjee, P. K. (2008). Male circumcision: An overview. *African Journal of Paediatric Surgery, 5* (1), pp. 32–36
3. Doyle, J. G. & Hill, G. (2011). Sub-Saharan African randomised clinical trials into male circumcision and HIV transmission: Methodological, ethical and legal concerns. *Journal of Law and Medicine, 19* (2), pp. 316–333
4. Chrisman, L. (2018). Cultural studies in the new South Africa. In: *Postcolonial contraventions* (pp. 145-156). Manchester: University Press
5. Deacon, H., & Thomson, K. (2012). The Social Penis. Traditional Male Circumcision and Initiation in Southern Africa, 1800 – 2000: A literature review. Centre for Social Science Research, Aids and Society Research Unit.
6. Doyle, D. (2005). Ritual Male Circumcision: A Brief History *Journal-Royal College of Physicians of Edingburgh, 35* (3), pp. 279–285
7. Douglas, M., & Maluleke, T. X. (2018). Traditional Male Circumcision: Ways to Prevent Deaths due to Dehydration. *American Journal of Men's Health, 12* (3), pp. 584–593

8. Garenne, M. (2008). Long-term population effect of male circumcision in generalised HIV epidemics in Sub-Saharan Africa. *African Journal of AIDS Research, 7* (1) pp. 1–6
9. Kepe, T. (2010). Secrets that kill: Crisis, custodianship and responsibility in ritual male circumcision in the Eastern Cape Province, South Africa. *Social Science & Medicine 70*, pp. 729–235
10. Mavundla, T. R., Netswera, F. G., Bottoman, B., & Toth, F. (2009). Rationalization of Indigenous Male Circumcision as a Sacred Religious Custom. *Journal of Transcultural Nursing, 20* (4), pp. 395–404
11. Maseko, T. (2008). The Constitutionality of the State's Intervention with the Practice of Male Traditional Circumcision in South Africa. *Obiter, 29* (2), pp. 191–208
12. Morei, N. (2017). Cultural Practices and children's Rights: The Case of Male Initiation in South Africa. *Africology: The Journal of Pan African Studies, 10* (2), pp. 1–17
13. Moses, S., Bailey, R. C., & Ronald, A. R. (1998). Male circumcision: assessment of health benefits and risks. *Sexually Transmitted Infections, 74* (5), pp. 368–373
14. Mswela, M. (2009). Cultural Practices and HIV in South Africa: A Legal Perspective. *Potchefstroom Electronic Law Journal, 12* (4), pp. 172–213
15. Nhlapo, T. (2017) Customary Law in Post-apartheid South Africa: constitutional confrontations in culture, gender and 'living law. *South African Journal on Human Rights, 33*(1), pp. 1-24
16. Sloth-Nielsen, J. (2012). A Foreskin too far? Religious, "medical" and Customary Circumcision and the Children's Act 38 of 2005 in the Context of HIV/Aids. *Law, Democracy and Development, 16* (1), pp. 69–88
17. Stets, J. E., & Burke, P. J. (2000). Identity Theory and Social Identity Theory. *Social Psychology Quarterly, 63*(3), pp. 224–237
18. Rapatsa, M. (2015). South Africa's Post-1994 Transformative Constitution and its Human Rights Narrative: A View on Perfecting Traditional Male Circumcision. *Socioeconomica, 4* (8), pp. 395–406
19. Tobian, A. A., Serwadda, D., Quinn, D., Kigozi, T. C. et al. (2009). Male circumcision for the prevention of HSV2 and HPV Infections and Syphilis. *New England Journal of Medicine, 360*(13), pp. 1298-1309.
20. Verquet, S. (2013). Efficient and equitable HIV prevention: A case study of male circumcision in South Africa. *Cost Effectiveness and Resource Allocation, 11* (1), pp. 1–7
21. Warner, E. & Strashin, E. (1981). Benefits and Risks of circumcision". *Canadian Medical Association Journal, 125* (9), pp. 967–992

22. Williams, B. G., Lloyd-Smith, J. O., Gouws, E. et al. (2006). The potential Impact of Male Circumcision on HIV in Sub-Saharan Africa. *PLoS Medicine, 3*(7), pp. 1032–1040.
23. World Health Organization, 'Male Circumcision Policy, Practices and Services in the Eastern Cape Province of South Africa' Case Study of the Eastern Cape (2008).
24. World Health Organisation, 'Voluntary medical male circumcision for HIV prevention', (2012). Donwnloaded 2021 June 10, http://www.who.int/hiv/topics/malecircumcision/fact_sheet/en/

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DIVERSION MODEL OF RESPONDING TO JUVENILE DELINQUENCY AND THE ROLE OF THE SOCIAL WELFARE SYSTEM[1]

ABSTRACT: Advocating for the widest possible diversionary response to juvenile delinquency is a general trend and a key tendency of modern juvenile criminal law. Scientific research and the focus on the best interests of the child strongly support the aforementioned facts. However, there is arisen a question concerning the fact how the general and abstract support for diversion and suspension of criminal proceedings, and transferring the juvenile offenders to the social welfare system, is reflected in everyday practice. Therefore, the paper starts with some introductory considerations about the concept and positive aspects of the diversion model, followed by the review of certain criticisms addressed to it. We devote the central part of the paper to the analysis of data related to Serbia and the social welfare service in Belgrade, in order to test the hypothesis of insufficiency of support for the diversion model in practice. The aim of this paper is to conceptualize recommendations for improving the practice of dealing with juvenile offenders in the juvenile justice system. We used an

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analytical-synthetic approach with the use of content analysis, normative, comparative and descriptive-statistical method.

Keywords: *diversion model, juveniles, social welfare, law.*

1. Introduction

The term diversionary reaction comes from the English word diversion, which means turning or redirecting. Diversion can be defined as the application of different modalities of treatment as part of efforts to distance juveniles from the justice system, while providing content significantly different from those typically associated with the judicial response (Osgood, & Weichselbaum, 1984). The diversionary approach also implies emphasising the restorative aspect, and including the victim in an informal reaction (Davies, 1976, p. 760). An important feature of the diversionary approach is that it does not annul the responsibility of the juvenile for the crime, although it enables the avoidance of formal proceedings and legal consequences that may arise from it (Farrell, Betsinger & Hammond, 2018).

Diversion is located halfway between the complete absence of a formal reaction and the complete criminal proceeding (Rutherford & McDermott, 1976, p. 26). True diversion prevents the youth from being formally processed by the juvenile justice system. When juvenile comes in contact with justice authorities, diversion means modifying the formal proceeding by simplifying and shortening it. Diversionary treatment is divided into that which implies the complete absence of any intervention regarding delinquent behaviour, and diversionary treatment through which the police or other competent authority directs the juvenile to diversion program (Elrod & Ryder, 2011, p. 178).

Although there is no consensus on defining the scope of diversionary response to juvenile delinquency,[2] it is indisputable that insisting on diversion and cessation of criminal proceedings is a solution advocated by almost all relevant international documents on prevention and response to juvenile delinquency, like the UN Standard Minimal Rules on Juvenile Justice (Beijing Rules, 1985) and the UN Standard Minimal Rules for Measures Alternative to Institutional Treatment (Tokyo Rules, 1989). National systems fully accept this form of reaction, trying to determine the broadest possible framework in

[2] For the purposes of this paper, the term juvenile delinquency is defined in narrow formal legal definition, according to which juvenile delinquency implies the commission of criminal acts by juveniles (Nikolić-Ristanović & Konstantinović-Vilić, 2018, p. 218).

which it could be implemented, usually with the active participation of the social welfare system. Diversion of criminal proceedings against juveniles is a standard part of the reaction to juvenile delinquency in Germany, Italy, France, as well as in the USA, Japan, New Zealand and many other countries. Therefore, the diversionary approach is one of the key tendencies in modern juvenile criminal law everywhere in the world (Kovačević, 2015).

Diversionary approach is based on a labelling theory and the theory of differential association (Kelly & Armitage, 2015, p. 119; Farrell, Betsinger & Hammond, 2018). After criminal proceeding, juvenile most often experiences a restriction of legitimate possibilities, so he/she can accept the delinquent's etiquette and repeat delinquent behaviour in the lack of other perspectives. Differential association theory explains how juvenile learn behavioural patterns in frequent and intense communication with others, which speaks to the negative aspects of the juvenile's association with delinquent peers in juvenile justice system. Therefore, the diversion model aims at removing the negative effects of criminal proceedings and institutionalisation, but also at determining personal responsibility and dealing with the consequences of crime. The diversion model considers both the empirically and scientifically confirmed claim that delinquent behaviour is, in most cases, only a transient phenomenon (Robins, 1978), and that an unbalanced reaction can bring more harm than good. That is why it tries to avoid contacting juveniles with the police, the prosecutor's office, and the court, diverting juveniles to social workers and other professionals outside the justice system. The application of diversionary measures also aims to relieve the juvenile justice system of cases classified as petty crime, which frees up resources for dealing with those juveniles whose behavior requires a more complex response. Diversionary approach enables better connection of juveniles with local resources, and thus more meaningful satisfaction of individual needs and strengthening of the relationship between the community and young people (Bukvić & Popović-Ćitić, 2016).

In practice, diversion appears in a number of modalities. It can be simply giving up criminal prosecution, verbal reprimand by the police, prosecutor or court, but also signing complex agreements that can predict in detail the juvenile's future obligations and consequences that he will bear if he does not adhere to the agreement. Diversionary treatment often implies various reliefs and privileges for a juvenile who adequately and timely fulfills his obligations, primarily in the form of reducing obligations and their duration. However, the scope and content of diversionary programs that will be used in practice largely depend on the available resources. Thus, some diversion

programs focus on the juvenile's engagement and contribution, while other programs contain professional assistance and support. Some of the services that can be provided are: family therapy, multisystem therapy, treatment of addiction and mental disorders, mentoring programs, educational programs, assistance in finding employment or part-time jobs, material assistance and enabling recreational and sports activities.

2. Critiques of the diversion model

The literature does not list only praise for the diversion model. Almost five decades ago, Lemert emphasised that, although it is aimed at preventing stigmatisation and traumatisation of juveniles, the diversionary approach also implies a kind of marking, and that it can influence the creation of a negative image of a juvenile offender, negative self-esteem and strengthening the pattern of delinquent behaviour (Lemert, 1971). Even then, this well-known sociologist wrote that the centre of diversion should be lowered to the local level and more informally well-designed forms of work, instead of focusing on professional institutional diagnostics and treatments that often give diversion a negative connotation.

There is more and more talk about the effect of "net-widening", because the diversionary approach often increases the number of juveniles subjected to intervention, although the main purpose of diversion is to distance as many minors from the formal system of reaction. Thus, some researchers have concluded that a diversionary approach results in more or less invasive interventions for juvenile with whom the justice system would have no reason or basis to deal with (Pratt, 1986; Farrell, Betsinger & Hammond, 2018). This phenomenon can be associated with the pronounced intertwining of the criminal and social sectors, and kind of criminalisation of the poor (Leskošek, 2017). The involvement of a larger number of actors in the selection and use of diversionary measures, especially those that are not under the auspices of the judicial system, can cause arbitrariness, and then abuse and injustice (Bugarski, 2015).

The problem of "net-widening" is followed by the issue of legality of diversion, given that the diversionary approach implies shortened procedures and absence of formalities, losing sight of the fact that certain bureaucratic forms exist to protect defendants. Thus, we come to a paradoxical situation in which juvenile defendants, as a vulnerable and protected category, are sometimes less protected than adults. These problems are significant for countries whose legal systems originated based on the Anglo-Saxon legal

tradition, and in which juvenile can be held accountable for various forms of deviant behaviour, status offenses and similar broadly defined behaviours for which adults are not responsible. In countries whose legal systems are based on continental legal tradition, at least there is no ambiguity regarding the catalog of crimes and misdemeanours for which minors can be held accountable. However, European countries are not spared the problems of disrespecting the rights of accused juveniles, because it can happen that a juvenile without adequate information admits a crime and accepts various agreements to ensure the use of diversion instead of "real" criminal proceedings (Džamonja Ignjatović & Hrnčić, 2017, p. 65).

No less important are the objections concerning the often unfavourable attitude of the public about the diversionary model of reacting to juvenile delinquency. Namely, implementing the diversion model without examining public attitudes and without educational efforts aimed at a broad front, public may perceive this model as another way to easily forgive juveniles for non-compliance and provide social welfare measures to those who do not deserve them. In addition to the above, some authors express fears that the diversion model may have a stimulating effect on recidivism, given that the juvenile will not actually be intimidated by the experience resulting from the application of the diversion measure (Džamonja Ignjatović & Hrnčić, 2017, p. 60) which further causes distrust and public outrage.

Another problematic aspect of the diversion model relates to participation of the private sector implementing various programs and measures. It cannot be denied that the private sector needs to ensure sustainability of its activities through admission of new service users, and that there can be a conflict of interest and an increased risk that the services provided will not be satisfactory. Truth be told, it should be noted that the literature points out that, besides financing private service providers, a diversionary approach is more cost-effective than conducting criminal proceedings and executing criminal sanctions, i.e. that cost-benefit analysis supports diversion (Wilson & Hoge, 2013, p. 514).

One of the shortcomings of the diversionary approach is its non-uniformity, that is, many variations which can imply inconsistency and improvisation on the ground (Farrell, Betsinger & Hammond, 2018). Excessive creativity in implementation can jeopardise diversion goals. This is conditioned by the scarcity of relevant evaluations that would speak about the (in)effectiveness of the diversion approach, given that it is very difficult to establish which criteria should meet the diversion program in order to compare with each other. In such circumstances, there is no appropriate

set of standards on the basis of which the outlines of a more or less unique diversion model would be formed. Non-uniformity is at the same time an advantage of the diversion model because it enables an approach adapted to the individual case.

The effects of the diversionary model of response to juvenile delinquency are still not sufficiently researched. Wilson and Hoge (2013) in a meta-analytical study, analysed the findings of 45 scientific studies on the effects of 75 different diversion programs. Although authors emphases that, because of methodological problems, their conclusions are not generalisable, they conclude that diversion is more successful in combating recidivism than the reaction through the judicial system. However, it is interesting to note that there is no significant difference in recidivism between the diversionary modalities that involved provision of various professional services and treatment, on the one hand, and the diversionary modalities that involved giving up prosecution, on the other. Patrick and Marsh (2005) research showed there was no significant difference in the rate of recidivism between juveniles subjected to standard criminal proceeding and those on diversion, although the diversionary approach proved more effective in meeting the individual needs of juveniles.

3. Diversion model in Serbia - normative framework and practice

Diversion model of responding to juvenile delinquency was introduced in Serbia with the 2006 Law on Juvenile Criminal Offenders and Criminal Protection of Juveniles (Official Gazette of RS, No. 85/05, hereinafter referred to as: Law on Juveniles) introducing educational orders as measures of *sui generis* (Radulović, 2006). However, in a broader sense, a diversionary approach in Serbia has existed for decades. Even before the Law on Juveniles, the public prosecutor could assess the expediency of initiating proceedings against a juvenile under certain conditions (Bejatović et al., 2012, p. 57) applying the principle of opportunity.

According to Art. 58 of the Law on Juveniles, for criminal offenses punishable by imprisonment for up to five years or a fine, the public prosecutor for juveniles may decide not to initiate criminal proceeding, although there is evidence to suggest that the juvenile committed a criminal offense, if the public prosecutor considers it would not be purposeful to conduct criminal proceeding against juvenile, given the nature of the crime and the circumstances it was committed, the juvenile's previous life and his personal

characteristics. If the execution of a sentence or educational measure is in progress, the public prosecutor for juveniles may also decide not to initiate criminal proceeding for another criminal offense of a juvenile, if given the gravity of that criminal offense, there would be no point conducting criminal proceeding and imposing a criminal sanction. In these two cases, we have a simple diversion - the criminal proceeding is diverted by setting no conditions and applying no measures. When deciding, the public prosecutor has to consult the Centre for Social Welfare, as a custodial authority who provide a report on the personality and social circumstances of the juvenile.

Complex diversion or diversion with intervention occurs when applying educational orders. According to Art. 62 of the Law on Juveniles, the public prosecutor for juveniles may condition the decision not to initiate criminal proceeding with the consent and readiness of the juvenile to accept and fulfil one or more educational orders. If the juvenile fulfils the educational order, according to a report submitted by custodial authority, the public prosecutor for juveniles rejects the criminal charges. The educational order can be used even after the criminal proceeding has started, in which case the court applies this measure in order to suspend the criminal proceeding. Vasiljević-Prodanović (2017) argue that the legislator should have more precisely determined the purpose of the educational orders and to emphasise the educational influence on juvenile so that he would not commit criminal acts in the future. Non-initiation or suspension of criminal proceedings, as determined by law, cannot be considered a purpose, but actually the content of this measure: "criminal proceeding is not initiated or it is suspended if all objective and subjective conditions provided by law are met". This is the essence of diversion with intervention, "which implies determining obligations to the juvenile in order to develop his personal responsibility, unlike simple diversion which consists only in eliminating criminal proceeding, without applying additional measures" (p. 120).

The educational order may last for a maximum of six months. Obligations for juvenile offender include: 1) settlement with the injured party in order to compensate the damage, apology, work or in some other way to eliminate, in whole or in part, the harmful consequences of the act; 2) attending school or going to work regularly; 3) unpaid work in humanitarian organisations or affairs of social, local or environmental content; 4) subjecting to testing and abstinence from alcohol and drug abuse; 5) inclusion in individual or group treatment in an appropriate health institution or counselling centre.

Law on Juveniles stipulates conditions for the application of educational order in such a way as to enable the diversion or suspension of criminal

proceedings in as many cases as possible. However, the question arises whether and to what extent this legal possibility is actually used in practice. In order to answer this question, we analised the data collected by the Statistical Office of the Republic of Serbia, as well as the data provided by the City of Belgrade Centre for Social Welfare. Knowing the general social circumstances in Serbia and circumstances in juvenile justice system, we started from the assumption that the diversionary approach is used to a considerable extent as a response to juvenile delinquency, with the most often application of simple diversion and only a few modalities of complex diversion.

According to statistical data shown in Table 1, from 2016 to 2020 in Serbia public prosecutors for juveniles have not initiated / suspended preliminary proceedings on average in 61.1% of all criminal cases reported by police. In other words, the largest number of juvenile criminal cases did not go further than the prosecutor's office. The main reasons for prosecutors rejecting crime reports or suspending proceedings were the expediency and the existence of circumstances that exclude criminal prosecution. This data shows us that simple diversion (without intervention) is represented to a considerable extent in juvenile justice system of Serbia. However, we can see educational orders were used by prosecutors in a small number of all decisions not to prosecute juvenile or suspend criminal proceedings (on average 13.6%).

Table 1. Public prosecutor's office for juveniles statistics in Serbia from 2016 to 2020

	2016	2017	2018	2019	2020
Crime reports on juvenile perpetrators	3643	3465	2744	2903	2524
Preliminary proceedings not initiated / suspended	2040	2166	1640	1829	1626
Educational orders used by public prosecutor for juveniles	241	330	230	244	224

Source: Statistical Office of the Republic of Serbia

The data in Table 2 show that juvenile courts suspended criminal proceedings in an average of 19.5% of all submitted motions for pronouncing criminal sanction to juvenile. The highest number of suspensions of criminal proceedings (507 cases) was recorded in 2020, but in that year, the courts used the lowest percentage of educational orders (7.7% of cases) to divert juveniles from formal criminal proceedings. The largest number of educational orders was implemented in 2017, although that year only 11.5% of all crime reports

on juvenile perpetrators were disposed that way. As was expected, the public prosecutors used most of the educational orders for juveniles. For example, out of 277 educational orders used in 2019, the court used educational orders in 33 cases.

Table 2. Juvenile court statistics in Serbia from 2016 to 2020

	2016	2017	2018	2019	2020
Submitted motions for pronouncing criminal sanctions	2505	1992	1849	2002	1750
Proceedings suspended by juvenile court	468	355	296	318	507
Educational orders used by juvenile court	63	68	59	33	39

Source: Statistical Office of the Republic of Serbia

To gain a more meaningful insight at these numbers, we should look at the extent of the diversionary response to juvenile crime in other countries. Thus, in Germany, up to 70% of the total number of juvenile cases are resolved by applying diversionary measures (Dunkel, & Heinz, 2017), while in Belgium, 80% of juvenile cases are dealt this way (Dunkel, 2014, p. 37). We should not lose sight that there are significant differences in the scope and structure of used educational orders in different parts of Serbia. Thus, it was noticed that during the past years a larger number of educational orders was used in cities such as Belgrade, Novi Sad, Niš and Kragujevac, where international and non-governmental organisations implemented various projects, while in Eastern and Southeastern Serbia there was a scarce application of educational orders (Centar za prava deteta, 2015).

For analysing the structure of educational orders implemented in Belgrade, we used the data of the City of Belgrade Centre for Social Work from 2015 to 2018. As a custodial authority, Centres for Social Work propose, organise, coordinate implementation of educational orders, report on their enforcement (Bugarski, 2015), and thus have the most comprehensive knowledge about the use of educational orders.

Table 3. Types and number of educational orders in Belgrade from 2015 to 2018

Type of educational order / Year	2015	2016	2017	2018
Restorative order (settlement with the injured party in order to compensate the damage)	25	13	11	9
Attending school or going to work regularly	7	6	11	6
Unpaid work in humanitarian organisations or affairs of social, local or environmental content	18	15	5	5
Subjecting to testing and abstinence from alcohol and drug abuse	2	1	1	2
Individual or group treatment in an appropriate health institution or counselling centre	13	20	15	22
Total	65	55	43	44

Source: City of Belgrade Centre for Social Work

During 2015, the most commonly used educational order was restorative order - compensation for damages and an apology to the injured party, which was expected because juveniles mostly commit minor property crime. From year to year, the use of other educational orders gradually increased, in parallel with a better acquaintance of all official actors and the public with this institute of juvenile criminal law. Thus, in 2016, 2017 and 2018, the most frequently used educational order was inclusion in individual or group treatment in an appropriate health institution or counselling center. We should not lose sight of the fact that the data relating to Belgrade may differ significantly from the data relating to other regions of Serbia, given the far greater number of various health care institutions and counselling centres in Belgrade compared to other cities. This is undoubtedly important for custodial authority, public prosecutor and the court in deciding what educational order to use in each specific case.

There is a noticeable decrease in the number of educational orders for unpaid work in humanitarian organisations or affairs of social, local or environmental content during 2017 and 2018. We can only assume that this is because of significant organisational and technical requirements for implementing this educational order (organisations have to draft regulations detailing rights and obligations of parties involved, engage supervising person, submit reports, etc.). It is important to note that projects for the improvement of juvenile justice in Serbia were financed by various donations in the period from 2011 to 2017. With the cessation of funding, some activities related to implementing educational orders ended. In one period, the City of Belgrade Centre for Social

Work had memoranda of cooperation with City secretariats (for social and child welfare, culture, education, environmental protection) and organisations of Red Cross, the City Centre for Physical Culture and the Association of Citizens IAN (International Aid Network). Day Care Centre of IAN in the meantime ceased to operate due to lack of funds. We can conclude that, in the period of our research, the activity of the civil sector in the implementation of educational orders is very modest, which calls into question the possibility of meaningful implementation of these measures at the local level.

We can notice a low number of educational orders related to substance misuse during the period from 2015 to 2018. Part of the explanation is the assumption that, because of the level of addiction and behaviour problems juveniles have, prosecutors and courts are more inclined to impose educational measures. However, some authors and professionals in the field argue that resources to treat juvenile addiction are scarce, and health care institutions in Serbia encounter significant formal and essential problems in the treatment of persons under the age of 16 (Bugarski, 2015, p. 100). Bearing in mind the data on the number of drug-related juvenile criminal offenses (total of 223 criminal charges during 2018), implementing one or two educational orders related to the treatment of addiction in a city of millions such as Belgrade is insufficient. In addition, experts suggest that educational orders should encompass other forms of addiction (Republički zavod za socijalnu zaštitu i International Management Group, 2012), given common knowledge that gambling, video game addiction, and other forms of addiction are in expansion among the youth population.

Although almost a decade and a half has passed since the introduction of educational orders in Serbian juvenile justice, non-existence of by-laws that would resolve numerous doubts and specify who and in what way undertakes certain actions in the application of educational orders is still a relevant problem (Cerović, 2018, p. 262). In the meantime, the gaps have been somewhat filled thanks to project activities that have resulted in the design of appropriate procedures and the establishment of mechanisms that still function in practice today. Under the patronage of the Kingdom of Norway, in the period from 2010 to 2014, the project "Improving the availability of justice in Serbia" was implemented, within which research on the application of educational orders was conducted in ten major cities in Serbia. Then, in the period until 2017, the project "Strengthening the justice and social welfare system in order to improve child protection in Serbia" was implemented - IPA project, under the patronage of the European Union (Cerović, 2018, p. 264). Thanks to the project activities, the Draft of Standards and Procedures for the Application of Educational Orders was designed, but to this day it remains only a proposal.

As a result of the project, key role of social welfare system in the application of educational orders is recognised.

The following problem is lack of stable sources of funding that restrict strengthening of capacities and mechanisms for implementing educational orders (Satarić & Obradović, 2014). Problem with project financing is that the activities can last as long as the inflow of funds lasts, so that a significant number of established services did not take place, and the providers of those services disappeared from the field. Given that budget finances public institutions, this issue is important for the civil sector, from which, for example, a lot was expected in the management of day care centers. Day care centres for children and youth with behavioural disorders can be a kind of basis for implementing educational orders, and it is bad that there are still obstacles to licensing and standardising day care centres organised by civil society organisations (Bukvić, 2016, p. 305). In this sense, it is necessary to more clearly plan the conditions for funding licensed civil society organisations.

The next problem refers to the often inadequate cooperation between stakeholders in the juvenile justice, social welfare, health and education systems. This is, among other things, a consequence of an imprecise division of roles, and the well-known dependence of the system on personal enthusiasm and communicativeness of managers and employees. The lack of human resources at the centres for social work is especially important problem (Žegarac, 2016, p. 46), given that the reformed social welfare system is based on the dominant role of case manager who is expected to implement integrative social work, to encourage and train users to change their life and make it better (Ajduković & Urbanc, 2009, p. 510). The situation is such that centres for social work there have no experts dealing only with juvenile delinquency (Satarić & Obradović, 2014), because they have to meet the needs of various categories of users. Case manager at the Centre for Social Work may have from 100 to 300 cases a year, which include children without adequate parental care, children with developmental disabilities, children during divorce, children with behavioural problems and juveniles in conflict with the law, as well as cases that require urgent intervention to protect against abuse and neglect (Hrnčić & Radoičić, 2018, p. 84). In such circumstances, a juvenile in conflict with the law finds it difficult to break out in the first place on the list of priorities. The solution to this type of problem could be to specialise and empower professionals at social work centres to care for juveniles with behavioural problems, instead of a situation in which all professionals deal with all categories of users.

The problem of insufficient participation of the civil sector in the application of educational orders is related to the weak representation of

educational orders in smaller communities. As already mentioned, the ability of civil society organisations to work in this area currently mainly depends on occasional funding opportunities. In a system where there is no participation of civil society organisations, juveniles are referred to centralised state institutions, so that the application of the measure minimally contributes to the reintegration of minors from smaller communities in their places of residence. By the logic, larger institutions are located in larger cities, which leads to the unavailability of a significant number of services to juveniles from smaller communities. The question is whether such a system allows the local community to be informed that the juvenile is trying to conscientiously perform its obligations, and whether the implementation of the educational order in any way contributes to integration of juveniles in the local environment (Cerović & Šarac, 2017, p. 21). This problem can be solved by making case managers more intensively trained to provide services such as individual and group counselling, mediation and socio-educational activities.

The lack of a systematic approach in educating official actors is another significant problem in implementation of educational orders. Members of the civil sector rarely have the opportunity for continuous education, although the acquisition and modernisation of knowledge and skills is one of the key standards in dealing with juvenile delinquency. Employees in the centres for social work, despite adequate formal education, have only basic knowledge about the rights of the child. There are also shortcomings in skills for immediate work with juveniles (Žegarac, 2016, p. 46). Keping in mind that there are relevant scientific and professional organisations in Serbia, resolution of the problem could by intensifying cooperation between these organisations and the system involved in implementation of educational orders.

Furthermore, there is a problem of the impossibility of applying certain educational orders. Thus, Hrnčić and Radojičić (2018) noted that case managers in the centres for social work often opt for those educational orders for which there are personnel, technical and other conditions, instead of orders that would be appropriate to the needs of juveniles. There is no simple solution to this problem, but that sufficient resources should be allocated. On the other hand, only those orders that can be implemented should be provided by law.

Finally, we face the almost complete lack of extensive research on the effectiveness of educational orders, especially their effects on recidivism. Results of several partial researches show positive effects of educational orders on recidivism. Thus, Bugarski (2015) studied the implementation of educational orders in Novi Sad in the period from 2011 to 2014, and found that no cases of recidivism were recorded in that period, and that juveniles, parents

and official actors were mostly satisfied with the process of implementation of educational orders. Džamonja Ignjatović and Hrnčić (2017) in their study on educational orders in Belgrade, Novi Sad, Kragujevac and Niš state that both juveniles and their parents were generally satisfied with the implementation of the measures, and that they find it useful. On the other hand, Hrnčić and Radojičić (2018) found that centres for social work propose criminal sanctions and measures with incomplete respect for the criteria prescribed by the Law on Juveniles, which calls into question the expediency of those sanctions and measures. It is necessary to intensify the research, because science cannot make constructive proposals for solving problems that have not been examined in detail.

4. Conclusion

The diversionary model of responding to juvenile delinquency is a standard for which almost all international documents in juvenile justice plead, and which is undoubtedly accepted in most national systems of juvenile criminal law. Although in comparative practice we do not hear only praises at the expense of the effects achieved by implementing diversionary measures, this still does not call into question the need for their future more intensive and branched application. Namely, the modern paradigm of looking at the child and his position in a developed and humane society requires that the diversion model be a necessary segment of reaction to juvenile delinquency. Diversionary measures are aimed at satisfying the juvenile's needs, improving his life circumstances and creating a better perspective.

Statistical data on the prosecutor's use of diverson in juvenile criminal cases shows that simple diversion (without intervention) is represented to a considerable extent in juvenile justice system of Serbia. However, educational orders were used by prosecutors in a small number of all decisions not to prosecute juvenile or suspend criminal proceedings. Judges even less often decide to divert criminal proceedings by applying educational orders. Observing the implementation of educational orders in Belgrade, we noticed a decrease in the use of some educational orders (unpaid work), while educational orders related to substance abuse are almost never implemented.

Analysing the scientific and professional literature and the opinions of experts dealing with juvenile delinquency, we isolated several key issues obstructing the application of educational orders: the lack of by-laws that would resolve numerous doubts regarding the competence and methodology of using educational orders; lack of financial resources and uncertainty

regarding the responsibility for their provision; insufficient cooperation between entities responsible for the implementation of educational orders; scarce participation of civil society organisations; lack of a systematic approach in the education of key actors; lack of research on the effectiveness of educational orders, especially in terms of combating recidivism; and the almost complete impossibility of applying certain types of educational orders.

There is no yet fully developed a sustainable system for implementing educational orders in Serbia. There are several recommendations for improving the development of this system in our country. It is necessary to complete the legal framework that will recognise the key role of social welfare system in the application of educational orders, strengthen human, material and organisational capacities, provide stable sources of funding, improve cooperation between stakeholders in the juvenile justice, social welfare, health and education systems, and encourage participation of the civil sector.

In order for limited resources not to be wasted, it is especially important to conduct well-designed evaluative studies. Diversion model has potential to be a part of a successful policy of dealing with juvenile delinquency in Serbia. Therefore, the future of responding to juvenile delinquency, with the selective conduct of criminal proceedings, rests on targeted testing and evaluation of existing and new diversion strategies that will focus on the needs of juveniles.

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DIVERZIONI MODEL REAGOVANJA NA MALOLETNIČKU DELINKVENCIJU I ULOGA SISTEMA SOCIJALNE ZAŠTITE

REZIME: Zalaganje za što šire okvire diverzionog reagovanja na maloletničku delinkvenciju predstavlja opšti trend i ključnu tendenciju savremenog maloletničkog krivičnog prava. Naučna istraživanja i fokusiranje na ostvarivanje najboljeg interesa deteta snažno podupiru ovakav razvoj događaja. Ipak, postavlja se pitanje kako se načelna podrška

za što češće skretanje i obustavljanje krivičnog postupka, uz prenošenje tereta reakcije na sistem socijalne zaštite, oslikava na stanje u praksi. Stoga je rad koncipiran tako da nakon uvodnih razmatranja o pojmu, prirodi i pozitivnim aspektima diverzionog modela sledi osvrt na izvesne kritike koje mu se upućuju. Centralni deo rada predstavlja analiza podataka koji se odnose na Srbiju i aktivnosti Gradskog centra za socijalni rad Grada Beograda u implementaciji vaspitnih naloga, u cilju provere hipoteze o neusaglašenosti načelne podrške diverzionom modelu sa postupanjem u praksi. Cilj rada jeste i koncipiranje preporuka za unapređenje prakse postupanja prema maloletnim učiniocima u sistemu maloletničkog pravosuđa. Primenjen je analitičko-sintetički pristup, uz upotrebu analize sadržaja, normativnog, komparativnog i deskriptivno-statističkog metoda.

Ključne reči: *diverzioni model, maloletnici, socijalna zaštita, zakon.*

References

1. Ajduković, M., & Urbanc, K. (2009). Integrirajući pristup u socijalnom radu kao kontekst razumijevanja integralnog plana skrbi [An integrating approach in social work as a context for understanding an integrated care plan]. *Ljetopis socijalnog rada, 16* (3), pp. 505–535. Downloaded 2022, January 28 from https://hrcak.srce.hr/47806
2. *Bejatović, S. et al. (2012). Primena načela oportuniteta u praksi, Izazovi i preporuke* [*Application of the principle of opportunity in practice, Challenges and recommendations*]. Beograd: Udruženje javnih tužilaca i zamenika javnih tužilaca Srbije
3. Farrell, J., Betsinger, A., & Hammond, P. (2018). *Best Practices in Youth Diversion: Literature Review for the Baltimore City Youth Diversion Committee.* University of Maryland School of Social Work
4. Bugarski, T. (2015). Vaspitni nalozi kao diverzioni model postupanja i njihova primena u praksi Višeg javnog tužilaštva i Višeg suda u Novom Sadu [Educational Orders as a Diversionary Treatment Model and their Use in the Practice of the Higher Public Prosecutor's Office and the High Court in Novi Sad]. *Zbornik radova Pravnog fakulteta u Novom Sadu, 49* (1), pp. 89–116. DOI:10.5937/zrpfns49-8004
5. Bukvić, L., & Popović-Ćitić, B. (2016). Unapređenje primene vaspitnih naloga kroz saradanju sa organizacijama civilnog društva [Improving the implementation of educational orders through cooperation with civil society organizations]. *Kultura polisa, 15* (36), pp. 299–313.

Downloaded 2022, January 26 from http://rfasper.fasper.bg.ac.rs/handle/123456789/2835

6. Centar za prava deteta (2015). *Drugi i treći alternativni periodični izveštaj o primeni Konvencije o pravima deteta u Republici Srbiji (2008-2014)* [*The second and third alternative periodic reports on the implementation of the Convention on the Rights of the Child in the Republic of Serbia (2008-2014)*]. Beograd: Igam
7. Cerović, I., & Šarac, N. (2017). *Priručnik o intervencijama sa maloletnicima u sukobu sa zakonom i njihovim porodicama* [*Handbook on interventions with minors in conflict with the law and their families].* Beograd: Republički zavod za socijalnu zaštitu
8. Cerović, I. (2018). Application of diversions in the context of justice for children, system reform in the republic of Serbia In: Stevanović, I. (ed.) *Pravda po meri deteta [Justice according to the child],* (pp. 255–270). Beograd: Institut za kriminološka i sociološka istraživanja
9. Davies, D. (1976). The Pitfalls of Diversion: Criticism of Modern Development in an Era of Penal Reform. *Osgoode Hall Law Journal, 14* (3), pp. 759–767
10. Dunkel, F. (2014). Juvenile Justice Systems in Europe - Reform developments between justice, welfare and 'new punitiveness'. *Criminologijos studijos*, (1), pp. 31–76.
11. Dunkel, F., & Heinz, W. (2017) Germany. In: Decker, S. & Marteache, N. (eds). *International Handbook of Juvenile Justice*, (pp. 305–326). Cham: Springer
12. Džamonja Ignjatović, T., & Hrnčić, J (2017). Praćenje ishoda sprovođenja vaspitnih naloga za mlade u sukobu za zakonom [Monitoring the outcome of the implementation of educational orders for young people in conflict with the law]. *Zbornik Instituta za kriminološka i sociološka istraživanja*, *36* (1), pp. 59–78
13. Elrod, P., & Ryder, P. (2011). *Juvenile Justice, A Social, Historical and Legal Perspective.* Sudbury (Massachusetts): Jones and Bartlett Publishers
14. Hrnčić, J., & Radoičić, A. (2018). Analiza prakse predlaganja sudu vaspitnog naloga ili vaspitne mere od strane centra za socijalni rad [Analysis of the practice of proposing to the court an educational order or educational measure by the Centre for Social Work]. *Godišnjak Fakulteta političkih nauka, 19,* pp. 69–88
15. Lemert, E. (1971). Instead of Court, Diversion in Juvenile Justice. Chavy Chase: National Institute of Mental Health

16. Leskošek, V. (2017). Novi oblici nadzora u socijalnom radu i socijalnoj politici: primer Slovenije [New forms of surveillance in social work and social policy: Example of Slovenia]. *Ljetopis socijalnog rada, 24* (3), pp. 399–414, DOI:10.3935/ljsr.v24i3.184.
17. Kelly, L., & Armitage, V. (2015). Diverse diversions: Youth justice reform, Localized practices and a "New interventionist diversion"? *Youth Justice, 15* (2), pp. 117–133, DOI:10.1177/1473225414558331
18. *Kovačević, M. (2015).* Diverzioni koncept postupanja prema maloletnim učiniocima krivičnih dela: opšta razmatranja i osvrt na Srbiju [Diversion concept of treatment of juvenile offenders: General considerations and a review of Serbia]. *Pravni zapisi*, *6* (1), pp. 110–125. DOI:10.5937/pravzap0-7621
19. Nikolić-Ristanović, V., & Konstantinović-Vilić, S. (2018). *Kriminologija* [*Criminology*]. Beograd: Prometej
20. Osgood, W., & Weichselbaum, F. (1984). Juvenile diversion: When practice matches theory. *Journal of Research in Crime and Delinquency, 21* (1), pp. 33–56, https://doi.org/10.1177/0022427884021001003
21. Patrick, S., & Marsh, R. (2005). Juvenile Diversion: Results of a 3-Year Experimental Study, *Criminal Justice Policy Review, 16* (1), pp. 59–73, https://doi.org/10.1177/0887403404266584
22. Pratt, J. (1986). Diversion from the juvenile court. *The British Journal of Criminology,* 26 (3), pp. 212–233
23. *Radulović, Lj. (2008).* Vaspitni nalozi kao posebne mere reagovanja prema maloletnim učniocima krivičnih dela [Educational orders as special measures of reaction towards juvenile criminals]. *Revija za kriminologiju i krivično pravo, 46* (1), pp. 27–41
24. Republički zavod za socijalnu zaštitu i International Management Group (2012) *Podrška reformi maloletničkog pravosuđa: redlog Standardi i procedure za primenu vaspitnih naloga* [*Support to Juvenile Justice Reform: Proposal Standards and Procedures for the Implementation of Educational Orders]. Beograd*
25. Republički zavod za statistiku Srbije (2019). Maloletni učinioci krivičnih dela u Republici Srbiji 2018 [Juvenile offenders in the Republic of Serbia 2018]. Beograd: Republički zavod za statistiku Srbije
26. Republički zavod za statistiku Srbije (2020). *Maloletni učinioci krivičnih dela u Republici Srbiji 2019* [*Juvenile offenders in the Republic of Serbia, 2019*]. Beograd Republički zavod za statistiku Srbije

27. Republički zavod za statistiku Srbije (2021). *Maloletni učinioci krivičnih dela u Republici Srbiji 2020* [*Juvenile offenders in the Republic of Serbia, 2020*]. Beograd: Republički zavod za statistiku Srbije
28. Robins, L. (1978). Sturdy childhood predictors of adult antisocial behavior: Replications from longitudinal studies. *Psychological Medicine*, 8 (4), pp. 611–622. DOI: 10.1017/s0033291700018821.
29. Rutherford, A., & McDermott, R. (1976). *National Evaluation Program Phase I Summary Report - Juvenile Diversion.* Washington: National Institute of Justice
30. Satarić, N., & Obradović, D. (2014) *Analiza primene vaspitnih naloga i alternativnih krivičnih sankcija u sistemu maloletničkog pravosuđa u Srbiji [Analysis of the application of educational orders and alternative criminal sanctions in the juvenile justice system in Serbia].* Beograd: International Management Group-IMG
31. Vasiljević-Prodanović, D. (2017). *Osnove sistema izvršenja krivičnih sankcija [Fundamentals of the system of execution of criminal sanctions].* Beograd: Univerzitet u Beogradu, Fakultet za specijalnu edukaciju i rehabilitaciju
32. Wilson, H., & Hoge, R. (2013). The effect of youth diversion programs on recidivism a meta-analytic review. *Criminal Justice and Behavior, 40* (5), pp. 497–518. https://doi.org/10.1177/0093854812451089
33. Žegarac, N. (2016). *Social service workforce mapping in Serbia. Child Hub.*

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REORGANIZATION AS A BUSINESS PHILOSOPHY

ABSTRACT: The most common problems faced by business societies are the inability to pay or carry out the obligations to third parties, i.e. their creditors. When an economic entity is unable to settle its obligations, creditors and third parties cannot regularly collect their receivables and then bankruptcy occurs.

Changes in business conditions in the world, especially if business conditions deteriorate, will raise the issue of opening and efficiency of bankruptcy proceedings. The condition for initiating a pre-bankruptcy proceedings is insolvency, where, as a rule, debts are greater than the value of the debtor's assets. Today, the economic entity, in accordance with the provisions of the applicable Law on business societies, is responsible for all its obligations with its assets. So, when it becomes unable to pay, it has mainly two alternatives, bankruptcy or possibly, the possibility of reorganization if its creditors deem it to be more expedient. The aim of bankruptcy is to remove those economic entities which do not achieve even the minimum of profitability doing their business and which are incapable of normal work and business. The overhaul of the bankruptcy debtor is a newer institute of our bankruptcy law. It includes the transformation of debtors at several levels such as legal-organizational, management and financial. The Institute of Restructuring is based on the debtor's contract

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with creditors, giving him/her an opportunity to recover economically and avoid bankruptcy, i.e. deletion from the registry of legal entities, and it enables more favourable settlement of receivables.

Keywords: *reorganization, bankruptcy, plan, economy, subject.*

1. Reorganization of the debtor in bankruptcy - new institute of our Bankruptcy Law

Bankruptcy is seen in our environment as a definitive end of the company, but also an opportunity for creditors to collect part of their receivables. From the economic and legal aspect of bankruptcy proceedings, the economic and legal efficiency of the duration of bankruptcy proceedings, costs, efficiency and the amount of collection of receivables, financial reporting regulations and bankruptcy audits should be operational. If there is a justified economic condition, priority should be given to the reorganization in order to preserve the assets of the bankrupt debtor, preserve business partners, save jobs, and the restructured economic entity gets the opportunity to resume operations after the restructuring. Bankruptcy proceedings are a court case that by its nature is conducted exclusively before the court, not before the governing body (Kljakić & Kukrić, 2017, p. 42).

The most important normative act regulating the nature of this matter is the Law on Bankruptcy (Bankruptcy Law, 2009). Continuous review and harmonisation of all bankruptcy regulations, as well as constant work to find new and better bankruptcy solutions, is a good basis for creating favourable conditions for doing business in one country. All amendments to the Bankruptcy Law have been made with the clear aim of improving the efficiency of judicial, creditor, bankruptcy authorities.

In order for bankruptcy to have a purpose, it must be implemented in a timely and efficient manner, with the aim of exerted influence on management, as well as sanctioning them if they avoid opening bankruptcy in any way, in order to preserve assets and creatively implement restructuring and a pre-prepared restructuring plan.

The continued activity of legislation, especially from the beginning of this century to the present day, has forced the practice to respond to the same, to bring its views and interpretations of these acts closer to the participants in bankruptcy proceedings and thus facilitate their implementation.

The final outcome of bankruptcy proceedings is the cessation of operations of a business entity that has significant and often immeasurable consequences

when it comes to business banks or insurance companies. However, there is usually no complete information about the consequences of bankruptcy, often the truth is withheld or publicly ignored what actually happened. Especially the consequences should not be ignored on employees, management, but also the entire community and the state. The unavailability of information in this area is particularly noticeable, because mostly, in the process of scientific research into the consequences and causes of bankruptcy, a closed door is encountered.

The idea of introducing this institute first emerged in the countries with the most developed economies. Thus, the institutionalisation of the reorganization in today's sense, first done in 1978, was the first to be done, when the Bankruptcy Reform Act was enacted and the institute of reorganization was set up in chapter 11 of the Bankruptcy Reform Act. (Bankruptcy Law, 2009. art. 2). This Law has served as the starting point for regulating this institute. Since this area of bankruptcy law is still in the development phase, we note that modern bankruptcy legislation pays great attention to the regulation of this institute. To that end, we must commend the activities of a domestic lawmaker aimed at the foundation and elaboration of this institute in the Law, in order to adapt existing solutions to the needs of the practice.

The motive for the existence of this institute is primarily aimed at preventing the premature shutdown of the company, because the sustainability of business entities is of great importance to one state, whether private or state economic entities. The advantage of the restructuring procedure should be given over the bankruptcy proceedings, because the reorganization process inciting hope, primarily for the survival of a legal entity that deals with financial difficulties and ultimately allows creditors to participate in the making of rational solutions to settle their claims and achieve a more favourable settlement than the one they would achieve in the bankruptcy proceedings.

Viewed from the creditors' perspective, bankruptcy proceedings often seem more acceptable than an overhaul, and the restructuring plan must not foresee a more unfavourable settlement of creditors' claims than the one they would achieve in the bankruptcy proceedings.

The reorganisation can be misused and used to prolong bankruptcy and thus damage creditors. The general view is that bankruptcy proceedings protect the interests of creditors, while the reorganisation favours the interests of debtors. In this way, another opportunity was given to the debtor contributing to the overall economic situation in one state. Reorganiis only attempted if there is a real possibility of a financial recovery (Spasić, 2007, p. 42).

The Bankruptcy Law sets the bankruptcy goal as "the most favourable collective settlement of bankruptcy creditors by achieving the highest possible

value of the bankrupt debtor, i.e. his assets." Bankruptcy proceedings can be carried out through an overhaul or bankruptcy; practically this provision is also the starting point when conducting both proceedings. In addition to this understanding of the goal of the reorganization, there is also the legal definition of the reorganization as a reconciliation of creditors under the adopted restructuring plan, by redefining debt-religious relations, the status changes of debtors or otherwise envisioned in the restructuring plan. The Law does not discuss the explicit continuation of the business entity's operations as one of the objectives of the reorganization. Among the reasons are that there are other mechanisms for implementing organisational changes in the economic entity, while the reorganisation is carried out in precisely established conditions, i.e. in case of bankruptcy. Therefore, unless there is a bankruptcy reason, there are no grounds for opening bankruptcy proceedings, nor even a reason for conducting an overhaul.

In this way, it has been made clear that the restructuring of the bankruptcy debtor is initiated due to the debtor's inability to settle creditors' claims. The opening of bankruptcy of an economic entity should be justified from the aspect of market privatization, to protect and stimulate healthy economic entities, to survive and the unburdened to continue to offend, and the ultimate goal is to eliminate bad and unproductive economic entities that are inefficient and harmful to employees, and the overall economy of a country and beyond. It is necessary to focus on the realization of set goals that lead to efficient procedure, practical and operational implementation of the restructuring plan for all participants in the bankruptcy proceedings, that the cost is minimal, time short, and the settlement of creditors to the maximum.

Today, modern bankruptcy legislation rests not on the liquidation and elimination of insolvent economic entities, but on the reorganization and continuation of the business entity's operations (Riesenfeld, 1995). Viewed from a legal-economic point of view, an overhaul would be more favourable and acceptable as an option in most cases.

The reorganization does not have a long tradition, because in the previous socialist self-governing order it did not exist in its modern form. We see the overhaul as a comprehensive process of auditing and rehabilitation of the bankruptcy debtor's operations, resulting in the survival of the economic entity in a more or less revised form. It is a complex economic legal process, from the moment the decision was made on whether it can be implemented at all, to reconfiguring the concept of doing business that would allow the debtor to overcome the problem and become successful.

From an economic point of view, the reorganization has a far more effective outcome than bankruptcy and liquidation, because in this case the economic entity survives, continues to operate without the burden of insolvency, indebtedness, retains jobs, preserves property, continues to do business provides income for employees, and by neatly executing obligations to the state contributes to the development of the community as a whole. This certainly indicates that this procedure should be promoted, improved by the legal framework concerning this area, made it clearer, applicable and simplified to the maximum.

Defining it often very "broadly", as the process of demolishing old and building new activities, capabilities and organizational forms (Landesman, 1993, p. 9), the overhaul is seen as one of the key preconditions for successful implementation of the transition process.

Also, the reorganization is defined as the process of making management decisions and taking a series of actions, all in order to achieve changes to the existing structure, strategy and position of the company. It is a process aimed at seeking strategies for improving positions through eliminating weakness and crisis, creating and maintaining competitive advantages, changes in the organizational structure and efficient functioning of all systems in the company (Eric & Stošić, 2013, p. 11).

This solution was confirmed and affirmed both in practice and in the domestic and international public, which rated it as one of the most modern and high quality solutions when it comes to bankruptcy laws in general (Dukić-Mijatović & Kozar, 2019, p. 22).

Bankruptcy creditors are protected when it comes to a bankrupt debtor operating in the majority state capital. However, it said bankruptcy proceedings are not being conducted against the Republic of Serbia, territorial autonomy and local self-government units, funds or organizations of pension, disability, social and health insurance, legal entities founded by the Republic of Serbia. This means that bankruptcy creditors can claim their claim to the legal entities under which bankruptcy proceedings are conducted from the Republic of Serbia, i.e. units of territorial autonomy and local self-government (Dukić-Mijatović & Kozar, 2019, p. 22).

1.1. Restructuring trends in Serbia

Since 2000 various activities have been undertaken in our country in the area of enterprise reform and improvement of corporate restructuring. As the implementation of these processes is related to a number of outstanding

issues, wanderings and resistance, it has had its own reflection on characteristic tendencies and achieved results.

Although due to numerous specificities it is very ungrateful to make certain generalizations, nevertheless, it seems that the experience from the restructuring process in our country after 2000, has been compared with the characteristic trends in this area in the world.

At one point, unlike most transition countries where intensive restructuring processes took place in our country, this process was quite muted. In the area of restructuring in Serbia, both in terms of public enterprises and in terms of enterprises slated for privatisation, modest results have been achieved.

According to data from the National Bank of Serbia from the beginning of 2013, 717 public enterprises operated in our country (National Bank of Serbia [NBS], 2021).

As for state-owned enterprises, according to the IMF, "more efforts are needed in Serbia to strengthen corporate governance and ensure professional leadership in these enterprises". Let's remind ourselves of the promise made to the IMF that Serbia will complete this process by July 2020 year. But let's remember that reforms have begun since 2014 and Serbia, according to an IMF analysis of 2018, found itself at the very back of the list of Central and Eastern European countries, governed by state capital enterprises. As much as we ask for data on the value of EPS, such data is still not transparent. Mind you, Serbia has committed to changing its legal status by the end of 2020, which in the current conditions of the crisis in the country and beyond is almost impossible. However, if something happens in this area, there will be no substantial changes, i.e. change in legal status, while other changes will not occur (Danas, 2020).

The largest number are businesses at the municipal level (mainly public-utility enterprises), as well as smaller infrastructure public enterprises at the republic and provincial levels. In the area of restructuring of state-owned enterprises after 2000, the company has been in the midst of restructuring its operations since 2000, certain but modest positive effects were achieved. Namely, in a number of these companies, the process of organizational restructuring was conducted, mainly through non-core activities. Some companies have changed the legal form from public companies to joint stock companies and the process of corporatization has begun. In this way, the results achieved vary significantly from company to company.

The organizational changes included the implementation of the so-called "safe guards". redundancy programs, as changes in management (unfortunately, most often dictated by political parties in power). There have been significant increments made in the area of economic and financial

consolidation, through the reprogramming and acquisition of debts by the state, regulating old debts, reducing subsidies, and more. Nevertheless, public enterprises are mostly unprofitable.[1]

Excess employees are constantly burdening the business of public enterprises, but nevertheless, while the economy is shrinking, the number of employees is increasing. That's how 2012 the number of employees in the economy decreased by 1.4%, while in public enterprises it increased by 0.6% (Agency for Business Registers, [APR], 2021).

In the state sector in Serbia, in the second quarter of 2019, there were 599,668 employees, down from 2018 year by 1.2%, according to data from the Republic Statistical Office. The total number of employees in the first quarter of 2020 stood at 2,186,834 persons. Compared to the same quarter of the previous year, total registered employment increased by 1.8%, or 38,886 persons (Republican Bureau of Statistics, [RBS], 2021).

The legal basis for implementing the restructuring would be the Law on Privatization and a later regulation on the procedure and manner of restructuring of privatization economic entities. Under this decree, the reorganization includes: status changes, changes in the legal form, changes in the internal organization and other organizational changes; write-off of principal debt, corresponding interest or other receivables, in whole or in part; debt relief in whole or partly to settle creditors from assets made from the sale of capital or assets of the company; and other changes, in accordance with this regulation (Regulation on the procedure and manner of restructuring of privatization entities, 2006).

The basic idea of introducing individual social enterprises into the reorganization was their easier privatization. The basic form of "restructuring" of this corporate corps was financial reorganization – which, as noted, was basically reduced to protecting the company from debt collection from an earlier period. At the same time, financial reorganization did not involve any

[1] The State Audit Institution found in public company financial statements in previous years that the loss of these 10 companies amounted to nearly 400m euros, down from 2012. Year. This was certainly contributed by the fact that the entire Serbian economy grew by 2.5% last year, and the losses of public enterprises were lower than the previous year. In addition to Srbijagas, the biggest loss was made by Serbian Railways of 68.5m euros, which is still twice as much as the previous year. On the other hand, Air Serbia and Jat Airways, respectively, doubled their losses from 2012 to 2014. 74.3 million euros. In the end, Serbia's roads also ended up with a loss of 9.2m euros, but that is as much as seven times less than a year earlier; Nova Ekonomija (2014). Najveća državna preduzeća prošle godine izgubila 400 miliona eura [Last year, the largest state-owned enterprises lost 400 million euros]. Downloaded 2021 June 15 from https://novaekonomija.rs/vesti-iz-izdanja/najveca-drzavna-preduzeca-prosle-godine-izgubila-400-miliona-evra

significant investment in fixed assets, but only occasional subsidies for payment of part of the earnings, energy procurement, etc. The substantial restructuring of the business was left to be realized by the new owners after privatization.

A significant number of these businesses have implemented reorganization of the workforce – reducing the number of employees through so-called "workforce restructuring". surplus programs (based mainly on so-called passive employment policy measures, in which state-funded severance and monetary compensation were the main instrument for solving this problem). Unfortunately, severance funds were largely not in the function of new employment, but primarily ongoing consumption, and active measures of employment policy were underused.

Restructuring processes are also being conducted in a broad corps of already privatized and private enterprises. Faced with business problems (usually financial difficulties related to repayment of assumed liabilities) and these businesses are comprising their healing/ restructuring programs. In recent times, reorganization or organizational transformation programs are generally formulated (primarily pre-prepared restructuring plans).

By analyzing these plans, one can come to the conclusion that many of these programs look more like a wish list than a genuine plan of action that can lead to real improvements in business performance. Projections and plans for future business are usually overly optimistic and unrealistic.

As a rule, only cosmetic changes to the existing business and production portfolio are foreseen – no new business initiatives, markets and/or products, but also radical procedures related to property disinvestment or contraction of certain non-profit activities.

Very little attention is paid to how to make the necessary changes happen. At the same time, creditors (who adopt these plans) are forced to accept long-term payments of their receivables, hoping to recover some of their funds in this way.

The strong impact on initiating the restructuring process in the world, and in our country, has macroeconomic developments. Especially significant impact, they have had and still have, the negative effects of the global financial crisis, which strongly influence the shaping of restructuring in our country.

Similar to the practice in the world, due to declining demand, there has been a contraction in the volume of many businesses' operations, leading to a sharp decline in the number of jobs. From 2008 until 2013, the number of employees in Serbia has been reduced by over 250.000, the most in the private sector. Namely, a large number of real and service sectors of Serbia, in times of crisis, were forced to reduce their production and reduce the number of employees (Ministry of Finance Republic of Serbia, 2021).

Reorganization is in our country, as in the world, as a rule, accompanied by numerous, often fierce resistance, especially internal stakeholders. Particularly big problems exist in companies "in restructuring" where protests by workers over unpaid wages, unrelated work, health insurance provision, abuses and/or management incompetence are common, etc.

Unable to solve their problems, employees rarely resort to radicalising strikes through blocking roads, railways, bridges, etc. In such circumstances, "all eyes" are on the state, often top state officials, who are asked for a (favourable) solution to the accumulated problems in the short term.

In this way, the demands of employees, as well as the activities of decision-makers, are often directed towards social programs and redundancy payments. This leads to a "firefighting" protest, but not a solution to the problem of the company, whose activity is shutting down and/or through liquidation.

Unfortunately, infrequently, despite significant efforts, restructuring processes do not have the desired effects. Nor after 12 years of activities in restructuring a large number of companies, which in the previous period were holders of the production, export and development of local self-governments (FAP Korporacija Priboj, IMT Beograd, IMR Beograd, PIM Ivan Milutinović Beograd, Holding Industrija Kablova Jagodina, IMK 14. October Kruševac, First Petoletka Trstenik, Majevica Backa Palanka, BIP Beograd, Mostogradnja Beograd, Jumko Vranje, Fabrika vagona Kraljevo, JP Resavica, MIN Niš, Utva avioni Pančevo, Železvoz Smederevo, Sloboda apparatus Čačak, Nevena Leskovac, Ikarbus Zemun, Budimka Požega, etc.) no corresponding results have been achieved (Ministry of Finance Republic of Serbia, 2021).

There are a number of very different cases of corporate restructuring. Consequently, several different forms of restructuring can be discussed:

- Strategic reorganization, which is aimed at changing the business portfolio, management system, cost reprogramming, etc., fundamental changes in the business and formation of new relationships.
- Financial reorganization – is aimed at solving the problem of illiquidity, different ways to reduce the level of indebtedness.
- Organizational reorganization, which involves complex activities related to changes in the organizational structures of the company and changes in the number and structure of employees.
- Management reorganization – is aimed at radical changes in the management process.
- Ownership reorganization – aimed at radical changes in the ownership structure, including ownership transfers.

- Market reorganization – aimed at redefining the market, business area, remodeling the offer, then modifying marketing strategies, and, of course, altering marketing roles in the mix of business functions.
- Technical and technological structures, removal of "bottlenecks", modernization of equipment, application of results of scientific research activities, etc. (Ministry of Finance Republic of Serbia, 2021).

Intensive restructuring processes of the company have become one of the characteristics of modern business. Restructuring processes are also being carried out in transition countries, including Serbia. In many respects, they differ significantly from activities in the field of corporate restructuring in developed countries around the world.

Restructuring processes have become an integral and vital element of the business undertaken by a huge number of businesses around the world. The restructuring process is not limited to companies facing problems in business, reorganization is a process that can be implemented by successful businesses if they want to improve their business performance.

Since the comparison of the Institute of Restructuring and Bankruptcy, similarities are evident in the implementation of the restructuring procedure, which is being implemented in bankruptcy. However, the differences are numerous, primarily because the restructuring is decided by the Privatization Agency, while the reorganization is decided by the creditors by a vote and by the court, by their primary intention is the recovery of the bankrupt debtor (Dukić-Mijatović & Kozar, 2019, p. 22). "The Restructuring Programme obliges all competent authorities, who are obliged to commit the subject of privatization and buyer of capital to the payment of receivables in the manner provided for by the Restructuring Programme. From the outlined, we conclude that the Programme in Restructuring in relation to the Restructuring Plan has a greater legal force" (Dukić-Mijatović & Spasić, 2008). The applicable Law on Privatization (Law on Privatization of RS, 2014) does not foresee the reorganization and inability to implement forced execution against the privatization entity, as one of the legal consequences of the reorganization under Article 20ž of the previous law.

Article 20ž of the previous Privatization Law (Privatization Law, 2001) stipulated that from the day of the decision on restructuring to the date of the decision on completion of the restructuring, it cannot be against the subject of privatisation, i.e. over its property, to determine or implement forced execution or any measure of execution procedure to settle the claim. The restructuring decision had the power of executive identification. In essence, it is a kind of

delay of execution that was set for the collection of monetary receivables on the funds held in the account of the executive debtor, i.e. the postponement of security measures, for the period from the day of the restructuring decision to the day of the decision on completion of the restructuring (Kozar, 2008, p. 25; Goat Man et al., 2010, pp. 64–66), which is a deviation from the general rules and principles of urgency under the Law on Enforcement and Security (Law on Enforcement and Security, 2015) which in Article 15 stipulates that the executive procedure and the security procedure are urgent, but delaying execution at the suggestion of the executive debtor is also possible under Article 122. Law on Execution and Security, but only once during the executive proceedings, and if the executive debtor makes it probable that he would suffer irreparable or severely compensated damages as a result of the execution, which is greater than the one suffered by the executive creditor due to the delay, and if the delay justifies the particular reasons that the executive debtor proves to the public or by law certified identification (Dukić-Mijatović & Kozar, 2019, p. 22).

"Collection of creditor receivables" details the procedures of forced execution and forced collection against privatisation entities that were in restructuring on the day of the entry into force of this Law. Requests for payment of creditors' receivables, submitted in accordance with the Law on Amendments to the Law on Privatization (Law on Amendments to the Law on Privatization, 2014), the Agency will record and determine the amount of receivables for each creditor within 60 days from the date of the decision on the privatisation model in terms of this law, and make a proposal for settlement of receivables that it will submit to creditors (Dukić-Mijatović & Kozar, 2019, p. 22).

During the financial restructuring, debt reconciliation (moratorium) is imposed. Debt reconciliation is a temporary suspension of compliance and a prohibition on the initiation of executions, i.e. delaying execution towards the company or entrepreneur regarding creditors participating in financial restructuring [2] (Dukić-Mijatović & Kozar, 2019, p. 22).

The restructuring plan is a complex elaboration consisting of a preparatory and realization basis, as well as contributions. In the project, the debtor's condition should be realistically and objectively displayed in a way that creditors can make a decision based on this plan (Regulation on

[2] Debt reconciliation (moratorium), is not a mandatory phase during the out-of-court financial restructuring process, and its legal effect is based on the debt relief agreement, which is concluded between creditors and debtors in writing, not on the provision of the law. Therefore, the new law differs from the previous Law on Negotiated Financial Restructuring of Companies, which prescribed the moratorium as a mandatory phase of proceedings.

procedure and manner of restructuring of privatization entities, 2005, art. 2). The bankruptcy law specifies the contents of the preparatory basis. It is recommended to specify possible settlements, this is key and it depends on whether it is accepted or not. Realization, the second phase on which the restructuring plan is based.

1.2. Frequency of restructuring in Serbia

Status changes, changes in the legal form, changes to the internal organization and other organizational changes are made in accordance with the law governing the legal position of companies. It is of great importance that creditors decide to continue doing business, otherwise there is no possibility for the debtor's survival. At some point, the question will be whether the creditors are able to make a decision or not, because it often happens that they cannot come together, that they cannot agree regardless of whether their interest is common. This is sometimes a problem, there is a good look for reorganization, but it is not accepted for the reasons above. It is very widespread to understand that the restructuring of front-line businesses includes radical changes in the scope and financial structure of assets and/or passives, as well as fundamental changes in business portfolio and marketing strategies. In one understanding, reorganizing a company involves qualitative changes in control or structure of ownership, internal organization, employee structure, or marketing focus (Useem, 1992, p. 46).

The Institute of Restructuring in our legal system exists outside the bankruptcy proceedings and privatization procedures, according to the provisions of the Law on Agreed Financial Restructuring. During the financial restructuring, debt reconciliation can be introduced, which produces a legal effect on the day of the conclusion of the debt settlement agreement (Dukić-Mijatović & Kozar, 2019. p. 25).

"The privatisation of social capital in Serbia is supported by international financial capital institutions, such as the World Bank and the International Monetary Fund (IMF). The World Bank has financially helped reorganise a number of major social enterprises in the privatisation process, such as the Bor Mining and Smelting Basin (RTB Bor). The holding company was privatised on 18 December 2018 year. Chinese company Zijin Meining bought 63% of the bor mining and smelting capital at a cost of $350m. Mandatory investments totaling $1.26 billion were agreed, 75% of which in the first three years. The buyer has committed to saving all 5.000 jobs, as well as investing an additional

$200m to resolve RTB Bor's debts, whose coverage is envisioned in a pre-prepared restructuring plan" (Obradović, 2019).

The restructuring process has long been delayed, many processes should have been conducted through bankruptcy or liquidation, because there are no more grounds to prolong the unprofitable operations of these business entities through subsidies. However, reorganization cannot only be reduced to bankruptcy, liquidation and dismissal of employees while providing social programs based on so-called "bankruptcy" and bankruptcy. passive measures of employment policy (primarily redundancy payments).

Significantly more would be achieved through offensive restructuring directions, through greater selective investments in modernization of certain production capacities that have a chance of successful market operations and promotion with renowned partners from abroad. However, money (everyone is talking about) is needed only to start healing the business, but the success of these activities depends on creating a more favorable economic environment, educated and competent management and quality restructuring programs based on successful examples from world practice.

2. Conclusion

The beginning of privatisation in Serbia did not bring expected economic growth based on improving the efficiency of the business, but only the redistribution of assets and the economic power of individuals. From this perspective, privatisation had to have negative results as a result, because in all this the approach was wrong — in the privatisation process, the state favoured its revenues, at the expense of economic development and employment levels. The biggest victims of privatisation were workers who lost their jobs and wages, as well as the sale of businesses for one dinar. After the dissolution of the SFRY, there was a need for new laws regulating all areas of the country's economic life, including bankruptcy. For this reason, it has been rapidly working to enact new legal solutions that are less or less in line with European Union legislation, which has certainly contributed to improving our legal framework in which the entities operate. It is not wrong if we interpret bankruptcy as a new opportunity to continue activities to the bankrupt debtor through a pre-prepared restructuring or restructuring plan in the basic form, which is the second goal of bankruptcy proceedings that provide economic protection of social proportions.

Significantly impaired business legal status is affected by financial imbalances, unprofitable operations, high level of indebtedness and

unsatisfactory level of ownership capital. In fact, for all the invisible boundaries that exist between these two areas, it is not easy to separate economic aspects from the legal aspects of bankruptcy.

Viewed from a legal perspective, it is desirable to maximise the economic value of the total assets of the bankrupt debtor, in order to effectively settle creditors through liquidation or reorganisation, i.e. through debt rehabilitation and the recovery of the company. The most logical and purposeful form of economic aspects of bankruptcy is according to the time of creation of the same during the period of business difficulties of the company and the economic aspects of bankruptcy after the conclusion of bankruptcy.

By analyzing the development of bankruptcy institutes in some parts of the world, we can come to the conclusion that this institute has gradually evolved to create what is now, with relatively effective models of application in bankruptcy practice. Very often, the question is how effective we are in relation to the environment and some countries that have already gone through all these steps and completed such complex procedures that can take so long, how much we can learn from them and how valuable their experiences are to us.

One of the principles of bankruptcy proceedings is the principles of equal settlement of all creditors. In this section, everything is clear, the Law on Bankruptcy says that equality, the proportion of settlement, is achieved through payment lines when bankruptcy is carried out by bankruptcy, and through classes of claims formed on the basis of payment lines when bankruptcy is carried out by reorganization. This certainly means that the Law on Bankruptcy has established some lines under which the payment of receivables is made if the property is cashed in. Regardless of all the deficiencies of our bankruptcy law according to the Duing business list, the quality of Serbia's bankruptcy law is relatively high, while indicators indicating the quality of law enforcement remain low due to problems with implementation. All this was done through a change in bankruptcy regulations, with the aim of improving the business environment and boosting the domestic economy, which should result in a better placement of Serbia on the next Duing business list.

Editing bankruptcy settlement proceedings encourages further investment, reduces space for abuses and enables the country's further economic growth. Bankruptcy reform is enabled through changes in bankruptcy regulations, as well as other sectoral regulations affecting the course of bankruptcy proceedings, as well as the introduction of good practice that would encourage stronger cooperation between bankruptcy bodies and bankruptcy creditors, transparency

of proceedings, raising the liability of the bankruptcy manager, more rational cost control and optimization of deadlines for taking certain actions.

In legal regulating bankruptcy proceedings, it is not in itself enough to ensure the smooth functioning of economic developments in one country. The application of regulations requires people to implement them, and in this sense a strong, independent and efficient judicial apparatus is needed. Our bankruptcy legislation is still in the development phase even though great progress has been made, including the part concerning the reorganization institute. The overhaul preserves legal subjectivity and ensures that the legal entity continues its economic activities seamlessly. The process of implementing the reorganization plan is very complex, and requires dedication and expertise in carrying out certain activities.

The bankruptcy debtor's timely response to financial difficulties and his firm decision to sustain the business, which from his point of view is the goal of submitting the plan. In order to achieve all of this, a strong professional staff from the appropriate area is required to first analyze the causes of financial difficulties, the current state of operations and the completeness of the reorganization process.

Today, the reorganisation processes are conducted in a broad corps of already privatised companies. Many companies, in the face of problems in business, comprise their healing programmes, i.e. reorganization. Analyzing the plans comes to the conclusion that many of these programs look more like a wish list than a genuine plan of action that can lead to real improvements in business performance. Projections and plans for future business are usually overly optimistic and unrealistic. All of these plans, as an unwritten rule, envision only cosmetic changes to the existing business and production portfolio – no new business initiatives, markets and/or products, but also radical procedures related to property disinvestment or contraction of certain non-profit activities. Very little attention is paid to how to make the necessary changes happen. The reorganization is in our country, as well as in the world, as a rule, accompanied by numerous resistances, especially internal *steakholders*. Particularly big problems exist in companies *"in reorganization*" due to unrelated work experience, unsecured health insurance, abuse and/or incompetence of management, political influences of individuals, etc.

Much has been invested in the reorganisation process, however, despite all these efforts, there are modest results that are far from desired. However, it is unrealistic to single out cases for any reason, each case is a story for itself. Because if we look at the work of our companies, we can conclude that a large number of them have just undergone bankruptcy proceedings, i.e.

the restructuring procedure so that it can continue to operate, so bankruptcy proceedings do not mean the end of the existence of an economic entity

It is of great importance that creditors decide to continue doing business, otherwise there is no possibility for the debtor's survival. Bankruptcy proceedings are carried out by a court determined by the law governing the jurisdiction of the courts. The jurisdiction of the court is prescribed by the Law on Regulation of Courts, among other things, the Commercial Court in the first instance judges bankruptcy disputes. The court that initiates bankruptcy against the debtor, or the restructuring procedure, is responsible for performing all other actions in the proceedings.

A quality and well-prepared restructuring plan, in situations where it can be implemented, increases the opportunity for the company to recover and return to the path of business success. The Institute of Pre-prepared restructuring plan is regulated according to the reputation of developed legal systems and by internationally recognised legal standards. The deadlines for adopting the plan are relatively short and precisely defined, so the procedure should take several months in optimal case. The company, backed by creditors, gets the opportunity to permanently resolve the most sensitive issues relevant to its financial survival.

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REORGANIZACIJA KAO POSLOVNA FILOZOFIJA

REZIME: Najčešći problemi sa kojima se privredna društva suočavaju su nemogućnost plaćanja ili izvršavanja obaveza prema trećim licima tj. svojim poveriocima. Kada privredni subjekt nije u mogućnosti da izmiri svoje obaveze, poverioci i treća lica ne mogu redovnim putem da naplate svoja potraživanja i tada dolazi do stečaja.

Promene uslova poslovanja u svetu, pogotovo ako se uslovi poslovanja pogoršavaju, aktuelizovaće pitanje otvaranja i efikasnost stečajnih postupaka. Uslov za pokretanje predstečajnog postupka je insolventnost, gde su dugovi, po pravilu, veći od vrednosti imovine dužnika. Danas, privredni subjekat, u skladu sa odredbama važećeg Zakona o privrednim društvima, za sve svoje obaveze odgovara svojom imovinom, tako da u situaciji kada postane nesposoban za plaćanje ima uglavnom dve alternative, bankrotstvo ili eventualno, mogućnost reorganizacije ako njegovi poverioci procene da je to celishodnije. Cilj stečaja je da se pod uticajem ekonomskih zakona tržišta uklanjaju iz privrednog života oni privredni subjekti koji svojim poslovanjem ne postižu ni minimum rentabilnosti i koji su nesposobni za normalan rad i poslovanje. Reorganizacija stečajnog dužnika je noviji institut našeg stečajnog prava, transformacije dužnika i to pravno-organizacione, upravljačke i finansijske. Institut reorganizacije zasniva se na ugovoru dužnika sa poveriocima, pružajući mu priliku da se ekonomski oporavi i izbegne bankrotstvo tj. brisanje iz registra pravnih lica, a omogućava povoljnije namirenje potraživanja.

Ključne reči: *reorganizacija, stečaj, plan, privreda, subjekt.*

References

1. Agencija za privredne registre [*Agency for Business Registers*]. Downloaded 2021 June 15 from www.apr.gov.rs
2. Danas (2020). *Reforme javnih preduzeća* [*Reforms of Public Enterprises*]. Downloaded 2020 May 05 from https://www.danas.rs/vesti/drustvo/savic-reforma-javnih-preduzeca-u-srbiji-nece-se-skoro-zavrsiti/
3. 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 u Novom Sadu
4. Dukić-Mijatović, M., & Spasić, S. (2008). Raskid ugovora o prodaji u postupku privatizacije i naknada štete, [Termination of the contract of sale in the privatization process and compensation for damages]. In: Radovanov A., et al. (eds.), *Promene u pravnom sistemu Republike Srbije* [*Changes in the legal system of the Republic of Serbia*] (pp. 57-75) Novi Sad: Pravni fakultet za privredu i pravosuđe u Novom Sadu

5. Erić D., & Stošić I. (2013). *Korporativno restrukturiranje,* [*Corporate restructuring*]. Beograd: Institut ekonomskih nauka, Beogradska bankarska akademija, Čigoja
6. Kljakić, R., & Kukrić, J. (2017*).* Uloga stečajnog suda u postupku reorganizacije [The role of the bankruptcy court in the reorganization proceedings]. *Pravo teorija i praksa*, *34* (10-12), pp. 42–48. DOI: 10.5937/Ptp1712042K
7. Kozar, V. (2008). Uticaj restrukturiranja i obaveznog otpuštanja duga u postupku privatizacije na izvršni postupak [Impact of restructuring and mandatory debt release in the privatization process on the enforcement process], *Radno - pravni savetnik*, (1) pp. 19-26
8. Kozar, V., Petrović, Z., & Počuča, M. (2010). *Zastupanje pravnih lica u sudskim postupcima* [*Representation of legal entities in court proceedings*]. Beograd: Poslovni biro
9. Landesman, M. (1993). *Industrial policy and transition in East-Central Europe*, WIIW, 196, Beč
10. Ministarstvo finansija [*Ministry of Finance Republic of Serbia*]. Downloaded 2021 June 06 from www.mfin.gov.rs/pages/article.php?id=7161.
11. Narodna banka Srbije [*National Bank of Serbia*]. Downloaded 2021 June 05 from https://nbs.rs/sr_RS/indeks/
12. Nova Ekonomija (2014). Najveća državna preduzeća prošle godine izgubila 400 miliona eura [Last year, the largest state-owned enterprises lost 400 million euros]. Downloaded 2021 June 15 from https://novaekonomija.rs/vesti-iz-izdanja/najveca-drzavna-preduzeca-prosle-godine-izgubila-400-miliona-evra
13. Obradović, M. (2019). *Privatizacijska pustoš u Srbiji: Hronika ideološkog rata protiv javnog dobra* [*Privatization devastation in Serbia: Chronicle of ideological war against the public good*]. Platforma za teoriju i praksu društvenih dobara, Downloaded 2021 May 05 from https://zajednicko.org/blog/privatizacijska-pustos-u-srbiji-hronika-ideoloskog-rata-protiv-javnog-dobra
14. Republički zavod za statistiku (2021). *Registrovana nezaposlenost* [*Republican Bureau of Statistics*]. Downloaded 2021 May 05 from https://www.stat.gov.rs/sr-latn/oblasti/trziste-rada/registrovana-zaposlenost
15. RiesenfeldS.A.,(1995).*Rehabilitationandreorganizationofinsolventestates*, Britannica, Downloaded 2021 May 05 from https://www.britannica.com/topic/bankruptcy/Rehabilitation-and-reorganization-of-insolvent-estates

16. Spasić, S. (2007). Sporna pravna pitanja i praktični problemi u postupku reorganizacije [Disputed legal issues and practical problems in the reorganization process], *Pravo teorija i praksa*, *24* (9/10), pp. 42–62
17. Uredba o postupku i načinu restrukturiranja subjekata privatizacije [Regulation on procedure and manner of restructuring of privatization entities]. *Službeni glasnik RS*, br. 52/05, 96/08, 98/09, 44/13 I 59/13
18. Useem, M. (1992). *Corporate Restructuring and Organizational Behavior: Transforming Organizations*, Nenj Sork: Oxford University Press
19. Zakon o stečaju Republike Srbije [Law on Bankruptcy of the Republic of Serbia]. *Službeni glasnik RS*, br. 104/09, 99/11, 71/12, 83/14, 113/2017, 44/18 i 95/18
20. Zakon o izvršenju i obezbeđenju [Law on Execution and Security]. *Službeni glasnik RS*, br. 106/15, 106/16, 113/17
21. Zakon o privatizaciji [Law on Privatization]. *Službeni glasnik RS*, br. 38/01, 18/03, 45/05, 123/07, 123/07 - dr. zakon, 30/10 - dr. zakon, 93/12, 119/12, 51/14 i 52/14 – US
22. Zakon o privatizaciji Republike Srbije [Law on privatisation of the Republic of Serbia]. *Službeni glasnik RS*, br. 83/14, 46/15, 112/15 i 20/16 - autentično tumačenje
23. Zakon o izmenama Zakona o privatizaciji [Law on Amendments to the Law on Privatisation]. *Službeni glasnik RS*, br. 51/14

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LEGAL TREATMENT AND PRACTICAL EXPERIENCE IN AIR QUALITY MONITORING FOR THE CITY OF NOVI SAD

ABSTRACT: Air quality is a very important parameter both for one human and for all living beings on earth. Adequate protection and improvement of the environment and air is the area of a great importance on which Republic of Serbia has to work continuously. Tracking (or monitoring) the state and quality of the environment includes a series of actions aimed at obtaining the reliable data on the condition of the environmental pollution. By the Regulation of establishing the List of air quality categories according to zones and agglomerations on the territory of Republic of Serbia for the year 2018, it was determined that air quality in the agglomeration "Novi Sad" is in the first category, which means that the air is clean or slightly polluted (pollutant substances did not cross the limit values). Bearing in mind the importance of the topic, at the very beginning of this article, the problem of air pollution is more closely defined with reference to the legal treatment of protection and the improvement of the environment in general and air as a separate category. This article is primarily focused on the analysis of practical experiences regarding air quality monitoring for the City of Novi Sad.

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Keywords: *air quality, Air Protection Act, Environment Protection Act, monitoring, Novi Sad.*

1. Introduction

Tracking of the condition and quality of the environment (that is, monitoring) is carried out with the primary goal of obtaining reliable information about environmental parameters at a specific location.

The environment in its essence is one of the pillars of sustainable development, and a healthy environment is one of the basic human rights.

According to the Article 3 of the Environmental Protection law (2004) of the Republic of Serbia: "Environmental quality is the state of the environment that is manifested by physical, chemical,biological, aesthetic and other indicators, environmental pollution is puttingthe polluting substances or energy into the environment, caused by human activity or natural processes that have or may have harmful consequences on the quality of the environment and human health, while environmental degradation is the process of impairing the quality of the environment which is caused by natural activity or human activity or is a consequence of taking non of the measures for eliminatingthe causes of quality deterioration or damage to the environment, natural or by work created values".

According to Počuča and Matijašević-Obradović (2020), air quality is a very important parameter both for one human and for all living beings on earth. Air quality indicators are: air temperature, direction and strength of air currents, basic ozone level, nitrogen level dioxide, level, structure and size of fine particles, level of benzene, level of other chemical substances, changes in stratospheric ozone and an increase in ultraviolet radiation" (p. 21). Air quality is generally considered "impaired at the moment of emission of harmful substances that otherwise did not exist in the regular composition of the air, but also an enormous increase in substances that already exist in the air in a certain, insignificant amount (eg carbon dioxide, methane, etc.), and whose harmful effect occurs only with an enormous increase in their quantity" (Matijašević-Obradović & Zarubica, 2020, p. 241).

Tracking (or monitoring) the condition and quality of the environment "includes a series of actions aimed to obtain reliable data on the state and pollution of the environment. These actions are measuring the presence of pollutants, processing the results and reporting" (Monitoring the state and quality of the environment, 2022).

Monitoring is carried out by "systematic measurement, examination and evaluation of indicatorsof environmental state and pollution, which includes

the monitoring of natural factors, changes instate and characteristics of the environment, including cross-border monitoring, namely: air, water, soil, forests, biodiversity, flora and fauna, climate elements, ozone layer, ionizing and non-ionizing radiation, noise, waste, early warning of accidents with monitoring and assessment of the development of environmental pollution, as well as international contract obligations" (Monitoring the state and quality of the environment, 2022).

In this article, at the very beginning, the problem of air pollution is more closely defined with reference to the legal treatment of protection and improvement of the environment in general and air as a separate categories. The primary attention in this paper will be focused on the analysis of practical experiences of air quality monitoring for the City of Novi Sad.

2. Air pollution and legal treatment of protecting and improving the environment and air

Adequate protection and improvement of the environment is a field that the Republic of Serbia should work on continuously. This is especially important when considering that pollution and environmental degradation in our country is a problem that has been very conspicious in recent decades. How Besermenyi (2007) states in his work, "the problem of air pollution is particularly present, which is primarily a consequence of an extremely low level of environmental awareness, as well as a lack of professional education, in the field of environment" (p. 495).

Polluted air has a negative impact on many spheres of human life and work. Yet, health isues are something that definitely needs to be in the first place when we talk about harmful influence of the contaminated air we breathe. Kukolj (2020) states that "according to the data of the World Health Organization, polluted air kills seven million people every year globally, while it is estimated that only in Europe, about 550,000 people die annually, of which approximately 6,600 deaths in the Republic of Serbia" (p. 7).

According to Jovančević and associates (2020), "for air quality monitoring in the state, the Environmental Protection Agency is in charge, which represents the republic organization responsible for hydrological and meteorological affairs and authorized legal entities. Regarding the local network of measuring stations, according to the Air Protection Act, this network consists of additional measuring stationsand/or measuring places that the competent authority of the autonomous province and the competent authoritythe local self-government unit determines based on measurements or evaluation procedures for zones

I agglomerations for which there is no data on the level of pollutants, in accordance with the needs and possibilities" (p. 15).

Article 7 of the Regulation of Monitoring Conditions and Air Quality Requirements (2010) regulates that "the level of air pollution in the territory of Serbia is monitored by measuring concentrations of sulfur dioxide, nitrogen dioxide and nitrogen oxides, suspended particles (PM10, PM2.5), lead, benzene, carbon monoxide, ground ozone, arsenic, cadmium, mercury, nickel and benzo(a)pyrene in air with automatic measuring instruments and/ or taking samples and analising".

Assessment of air quality from Article 21 of the Regulation on conditions for monitoring and requirements of air quality (2010) contains data on: 1) the level of pollution when the value of tolerance is exceeded , zones and agglomerations where those values were measured by dates and periods of duration; 2) the level of pollution when the limit value is exceeded, zones and agglomerationswhere those values were measured and dates and periods of duration; 3) causes of exceeding tolerance and/or limit values; 4) exceeding critical levels, zones and agglomerations where those values were measured and dates and periods of duration; 5) zones and agglomerations in which the values of polluting substances are below the limit values; 6) arithmetic mean, median, 98th percentile, measurement uncertainty, minimum value, maximum value, detection limits and quantification limits; 7) the average annual value of concentrations ground ozone precursors; 8) the methods applied during air quality assessment".

This approach is in accordance with Article 2 of the Law on Environmental Protection (2004) of the Republic of Serbia, which states that "the environmental protection system consists of measures, conditions and instruments for: 1) sustainable management, preservation of natural balance, integrity, diversity and the quality of natural values and conditions for the survival of all living beings; 2) prevention, control, reduction and remediation of all forms of environmental pollution".

Also, Article 10 stipulates that "sustainable management and protection of natural values of the environment is established by this law, special laws and other regulations that determines: 1) assessment of the impact of plans, programs and projects on the environment; 2) integrated pollution prevention and control; 3)protection of nature; 4) protection of air, water, soil, forests, geological resources; 5) management of chemicals; 6) waste management; 7) ionizing I non-ionizing radiation; 8) protection against noise and vibrations; 8a) control of the risk of a major accident which includes hazardous substances; 8b) cross-border traffic and trade of wild species".

In accordance with the previously presented Article 10 of the Law on Environmental Protection (2004) of the Republic of Serbia, the provisions of the Air Protection Act (2009) will be presented in more detail, as a special and very important law in this area.

According to the provisions of Article 3 of the Air Protection Act (2009), air is "air in the outdoor troposphere that does not include indoor air'.

Organized monitoring of the state and quality of the environment began in Serbia in the year 2002. The first provisions on monitoring the state and quality of the environment are included in the Law on environmental protection in 2004.

Air protection, in accordance with Article 2, is achieved by: "1) establishing, maintenaningand improving the unique air quality management system on the territory of the Republic of Serbia; 2) preserving and improving air quality through establishing and implementing measures in areas of protection in order to prevent or reduce harmful consequences for human health and/or environment ; 3) by avoiding, preventing and reducing pollution that affects and damages ozone layer; 4) by monitoring, obtaining and evaluating important data on air quality based on measurements and standardized methods; 5) providing availability of air quality data; 6) by performing obligations in accordance with the confirmed international agreements; 7) international cooperation in the field of protection and improvement of air quality and by ensuring the availability of that data to the public".

According to the Article 7, "in the Republic of Serbia, air quality is evaluated based on the level of polluting substances depending on the lower and upper limits of assessment, namely: 1) in all zones and agglomerations in which the level of polluting substances exceeds the upper assessment limit for those polluting substances, data obtained by fixed measurements that can be supplemented with data obtained by modeling techniques and/or indicative measurements; 2) in all zones and agglomerations where the level of pollutants is below the estimated upper limit established for those polluting substances, for estimatingair quality we can use combination of fixed measurements and modeling techniques and/or indicative measurements; 3) in all zones and agglomerations where the level of polluting substances is below the estimated lower limit established for those polluting substances,modeling and/or assessment techniques can be used to assess air quality".

According to the Article 9, "in order to effectively manage air quality, a unique functional system is established for monitoring and controlling the level of air pollution and maintenaningdatabases on air quality (air quality monitoring). Republic of Serbia, autonomous province and unit of local

self-government, within the scope of its competence established by law, are providing monitoring of air quality".

According to the level of pollution, starting from the prescribed limit and tolerance values, andbased on the measurement results, the following categories of air quality are determined: "1) first category - clean or slightly polluted air where the limited values are not exceeded for any pollutant; 2) second category - moderately polluted air where the limit values are exceeded for one or more pollutants, but tolerance values of any pollutant are not exceded; 3) third category - excessively polluted air where the tolerance values are exceeded by one or more polluting substances" (Article 21).

The Air Protection Act (2009) is also establishing that "in the zone and/or agglomeration where it was determined that the air quality is of the first category, preventive measures were implemented toprevent air pollution to exceed limit values. Also, in the zone and/or agglomeration in which it is determined that the air quality is in the second category, measures are implemented to reduce air pollution, in order to reach the limit values, as well as to reduce them to be below the limit values. Finally, in the zone and/or agglomeration where the air quality has been determined to be in the third categorie, measures are implemented to reduce air pollution, for the sake of achieving short-term tolerance values and securing long-term limit values" (Article 22).

Finally, according to the Article 40, "measures of prevention and reduction of air pollution and improvement of air quality includes: 1) prescribing limit values of emissions of polluting substances from stationary pollution sources; 2) prescribing limit values of emission of pollutants from mobile sources of pollution; 3) alignment with the maximum national emissions established for certain pollutants; 4) determing the allowed amounts of certain polluting substances in certain products; 5) reduction of greenhouse gas emissions; 6) gradual reducing the substances that damage the ozone layer; 7) other measures for pollution prevention and reduction".

3. Practical experiences regarding air quality monitoring for the City of Novi Sad

According to the Environmental Protection Program of the City of Novi Sad for the period from year 2015 to year 2024 (2015), "in order to effectively manage air quality, in the territory of the City of Novi Sad, a unique functional system of monitoring and controlling the degree of air pollution has been established (air quality monitoring). Air quality monitoring on the territory of the City of Novi Sad is enabled by the state, provincial and local network.

The state network consists of two automatic air quality measurement stations, namely Novi Sad-Liman and Novi Sad-Spens, and autonomous provincehasone station for automatic air quality measurement, Novi Sad–Shanghai. A local network of measuring points for measuring the level of pollutants in the air has been established by the Air Quality Control Program for the territory of the City of Novi Sad, in accordance with Regulation on conditions for monitoring and air quality requirements, with the consent of the competent ministry".

According to the official data of the City Administration for Environmental Protection, "air quality, as one of the basic parameters of the condition of the environment, is monitored on the territory of the Cityof Novi Sad since 1971" (Air quality monitoring of the City of Novi Sad, 2022).

The air quality control program for the territory of the City of Novi Sad "establishes a local network of measuring points for measuring the level of pollutants in the air, that is, assessing the air quality, the number and arrangement of measuring points, as well as the extent, type and measurement frequency" (Air quality monitoring of the City of Novi Sad, 2022). The following table presents the local network of measuring points for measuring the levels of pollutants in the air in the territory of the City of Novi Sad.

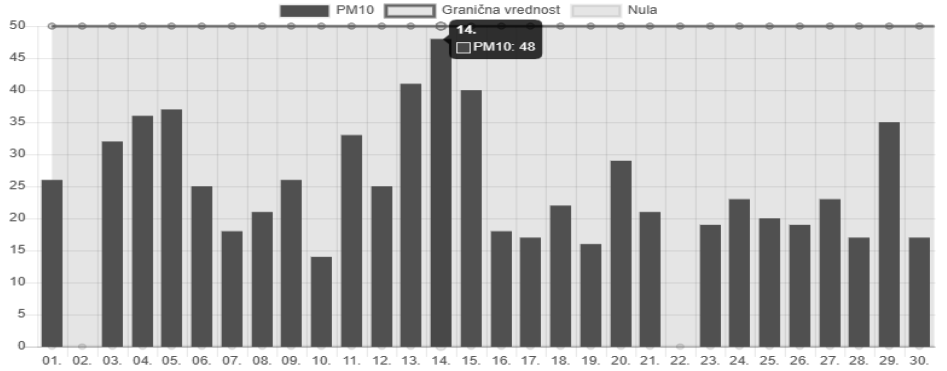
Table 1. local network of measuring points for measuring the level of pollutants in the air for the territory of the City of Novi Sad

	Merno mesto (MM)	Skraćeni naziv
1	Ugao Rumenačke ulice i Bulevara Jaše Tomića, Novi Sad	MM1
2	Mesna zajednica Kać, Kralja Petra I broj 2, Kać	MM2
3	JKP "Vodovod i kanalizacija", PPDV Sunčani kej 41, Novi Sad	MM3
4	SOS DEČJE SELO "Dr Milorad Pavlović", Kamenički park 1-14, Sremska Kamenica	MM4
5	NEOPLANTA AD NOVI SAD, Industrijska zona Sever, Primorska 90	MM5

Source: Air quality monitoring for the city of Novi Sad

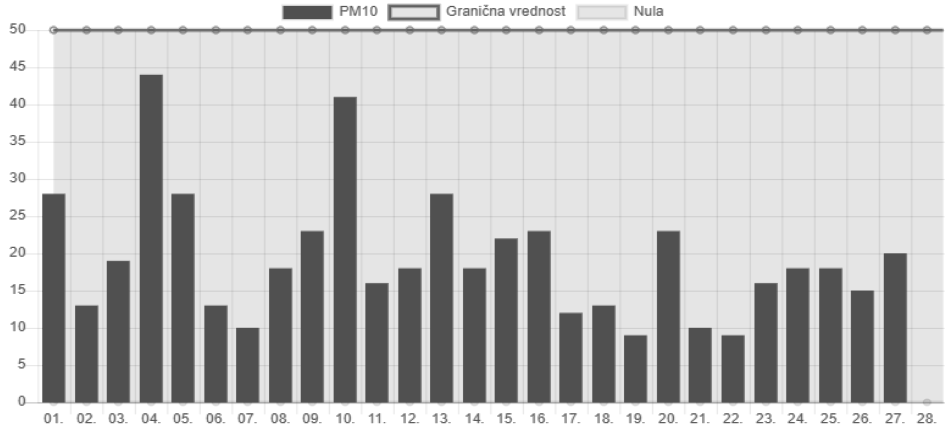
As part of this analysis, we will review the practical experiences regarding air quality monitoring for the City of Novi Sad, which is based on concentration of PM10 (suspended particles) (μg/m³/hour) in the air, amounts of soot and metals), and keeping in mind the last available reports, for the measuring unit placed on the Corner of Rumenačka Street and BoulevardJašaTomić, Novi Sad - MM1, JKP (ili public communal company) "Water supply and sewerage", PPDV Sunčanikej 41, Novi Sad - MM3 and NEOPLANTA AD NOVI SAD, Industrial zone Sever, Primorska 90 - MM5

Graph 1. Concentration of PM10 (µg/m³/hour) in the air during the month of April 2022 for measuring place Corner of Rumenačka Street and Bulevar Jaša Tomić, Novi Sad - MM1



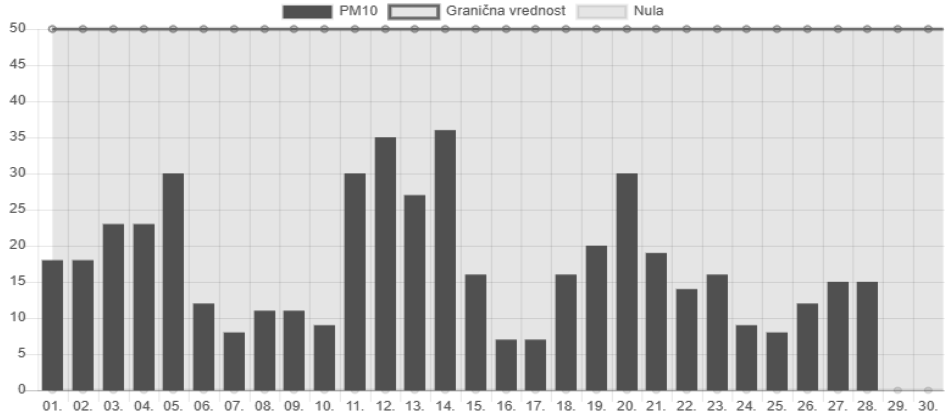
Source: City Administration for Environmental Protection. Measuring point Corner of Rumenačka Street and JašaTomić Boulevard, Novi Sad - MM1 [Measuring point Corner of Rumenacka Street and JašaTomić Boulevard, Novi Sad - MM1].Downloaded 2022, June 15 from https://envirovisad.rs/air_points/mm1/years/2022

Graph 2. Concentration of PM10 (µg/m³/hour) in the air during February 2022 for measuring point JKP "Vodovodikanalizacija", PPDV Sunčanikej 41, Novi Sad - MM3



Source: City Administration for Environmental Protection. Measuring point of jkp "Water and sewerage", PPDV Sunčanikej41, Novi Sad – MM3 [Measuring point JKP "Water and sewerage", PPDV Sunčani quay 41, Novi Sad – MM3]. Downloaded 2022, June 15 from https://envirovisad.rs/air_points/mm3/years/2022

Graph 3. Concentration of PM10 (μg/m³/hour) in the air during the month of April of 2022 for measuring place NEOPLANTA AD NOVI SAD, Industrial zone Sever, Primorska 90 - MM5



Source: City Administration for Environmental Protection. Measuring point NEOPLANTA AD NOVI SAD, Industrijskazona Sever, Primorska 90 – MM5 [Measuring point NEOPLANTA AD NOVI SAD, Industrial zone North, Primorska 90 – MM5]. Downloaded 2022, June 15 from https://envirovisad.rs/air_points/mm5/years/2022

Comparing the data for the observed period (February 2022 - April 2022) for the indicator - the concentration of PM10 (μg/m³/hour) in the air, the amount of soot and metals), it can be observed that the amount of PM10 is the most represented within the measuring unit Corner of Rumenačka Street and Boulevard JašaTomić, Novi Sad - MM1. However, all the parameters on the graphs are individually recording variable values on a daily basis, and it is not possible to determine any of the three observed measuring points asthe dominant one, according to the level of polluted air.

4. Conclusion

One of the general goals of the environmental protection policy of the City of Novi Sad is precisely this improvement of the monitoring system and reporting about the state of the environment. According to the guidelinesOf Environmental Protection Program, although the City of Novi Sad has a developed monitoring system of the environmental elements, in order to improve it is necessary, among other things, to achieve the goal - improved air quality control indicators.

In terms of this goal, it was emphasized thatvithin the current legal regulation, which stipulates air protection, and as part of international obligations, air quality should be monitored in populated places, industrial and uninhabited areas, air quality in protected natural goodsand the areas that contain protected immovable cultural assets, air quality in areas under the influence of certain sources of pollution, including mobile sources and allergenic pollen.

By the Regulation of establishing the List of air quality categories by zone and agglomerations on the territory of the Republic of Serbia for the year 2018 (2020), it was determined that "air quality in the agglomeration "Novi Sad" is in category I, which means that the air is clean or slightly polluted (pollutant substances did not cross the limit values). The situation was the same in previous years."

Bearing in mind the importance of the topic, in this article, at the very beginning, the problem of air pollution is more closely defined with reference to the legal treatment of protection and improvement of the environment in general and air as a separate category. The primary focus in this paper was the analysis of practical experiences of air quality monitoring for the City of Novi Sad, after which we stated all of the previous conclusions.

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ZAKONSKI TRETMAN I ISKUSTVA U PRAKSI POVODOM MONITORINGA KVALITETA VAZDUHA ZA GRAD NOVI SAD

REZIME: Kvalitet vazduha je vrlo važan parametar kako za čoveka tako i za čitav živi svet na zemlji. Adekvatna zaštita i unapređenje životne sredine i vazduha jeste oblast na kojoj u Republici Srbiji treba kontinuirano raditi.

Praćenje (ili monitoring) stanja i kvaliteta životne sredine obuhvata niz radnji koje kao cilj imaju dobijanje pouzdanih podataka o stanju i zagađenju životne sredine. Uredbom o utvrđivanju Liste kategorija kvaliteta vazduha po zonama i aglomeracijama na teritoriji Republike Srbije za 2018. godinu utvrđeno je da je kvalitet vazduha u aglomeraciji „Novi Sad" I kategorije, što znači da je vazduh čist ili neznatno zagađen (nisu prekoračene granične vrednosti nivoa ni za jednu zagađujuću materiju). Imajući u vidu značaj teme, u radu je, na samom početku, bliže opredeljen problem zagađenja vazduha uz osvrt na zakonski tretman zaštite i unapređenja životne sredine uopšte i vazduha kao zasebne kategorije. Primarna pažnja u radu usmerena je na analizu iskustava u praksi povodom monitoringa kvaliteta vazduha za Grad Novi Sad.

***Ključne reči**: kvalitet vazduha, Zakon o zaštiti vazduha, Zakon o zaštiti životne sredine, monitoring, Novi Sad.*

References

1. Besermenji, S. (2007). Zagađenje vazduha u Srbiji [Air pollution in Serbia]. *Journal of the Geographical Institute "Jovan Cvijić" SASA*, 57, pp. 495–501
2. Gradska uprava za zaštitu životne sredine. Merno mesto Ugao Rumenačke ulice i Bulevara Jaše Tomića, Novi Sad – MM1 [Measuring point Corner of Rumenacka Street and Jaša Tomić Boulevard, Novi Sad - MM1]. Downloaded 2022, June 15 from https://environovisad.rs/air_points/mm1/years/2022
3. Gradska uprava za zaštitu životne sredine. Merno mesto JKP "Vodovod i kanalizacija", PPDV Sunčani kej 41, Novi Sad – MM3 [Measuring point JKP "Vodovod i kanalizacija", PPDV Sunčani kej 41, Novi Sad - MM3]. Downloaded 2022, June 15 from https://environovisad.rs/air_points/mm3/years/2022
4. Gradska uprava za zaštitu životne sredine. Merno mesto NEOPLANTA AD NOVI SAD, Industrijska zona Sever, Primorska 90 – MM5 [Measuring point NEOPLANTA AD NOVI SAD, Industrial zone North, Primorska 90 - MM5]. Downloaded 2022, June 15 from https://environovisad.rs/air_points/mm5/years/2022
5. Jovančević, I., Avramović, T., & Pantić, O. (2020). *Kvalitet vazduha u Republici Srbiji: od merenja ka merama* [*Air quality in the Republic of Serbia: from measurement to measurement*]. Beograd: Beogradska otvorena škola

6. Kukolj, S. (2020). *Zagađenje vazduha i Covid-19* [*Air pollution and Covid-19*]. Beograd: Beogradska otvorena škola
7. Matijašević-Obradović, J., & Zarubica, S. (2020). Participation of the Activity Classification Sectors in the Emission of Pollutants, with regard to Criminal Legislation. *Economics of Agriculture, 67* (1), pp. 239–252
8. *Monitoring kvaliteta vazduha Grada Novog Sada* [*Monitoring the air quality of the City of Novi Sad*]. Downloaded 2022, June 12 from https://environovisad.rs/vazduh
9. Počuča, M., & Matijašević-Obradović, J. (2020). Međusobna uslovljenost životne sredine i turizma – značaj monitoringa kvaliteta vazduha Grada Novog Sada u razvoju i unapređenju turizma [Mutual conditionality of the environment and tourism: The importance of monitoring the air quality of the City of Novi Sad in the development and improvement of tourism]. *Pravo – teorija i praksa*, *37* (2), pp. 17–34
10. *Praćenje stanja i kvaliteta životne sredine* [*Monitoring the state and quality of the environment*]. Downloaded 2022, June 10 from https://staniste.org.rs/wp-content/uploads/2016/07/05-Monitoring-PD-srb.pdf
11. *Program zaštite životne sredine Grada Novog Sada za period 2015-2024* [*Environmental protection program of the City of Novi Sad for the period 2015-2024*]. Downloaded 2022, June 10 from http://www.novisadinvest.rs/sites/default/files/dokumenti/Program%20zastite%20zivotne%20sredine%20GNS%202015-2024.pdf
12. Uredba o uslovima za monitoring i zahtevima kvaliteta vazduha [Decree on conditions for monitoring and air quality requirements]. *Službeni glasnik RS*, br. 11/10, 75/10 i 63/13
13. Uredba o utvrđivanju Liste kategorija kvaliteta vazduha po zonama i aglomeracijama na teritoriji Republike Srbije za 2018. godinu [Decree on determining the List of air quality categories by zones and agglomerations on the territory of the Republic of Serbia for 2018]. *Službeni glasnik RS*, br. 88/20
14. Zakon o zaštiti životne sredine [Law on Environmental Protection]. *Službeni glasnik RS*, br. 135/04, 36/09, 36/09 - dr. zakon, 72/09 - dr. zakon, 43/11 - odluka US, 14/16, 76/18, 95/18 - dr. zakon i 95/18 - dr. zakon
15. Zakon o zaštiti vazduha [Air Protection Act]. *Službeni glasnik RS*, br. 36/09, 10/13 i 26/21 - dr. zakon

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THE FORMS OF ECONOMIC CRIME IN A BANKRUPTCY PROCEEDINGS

ABSTRACT: In modern conditions of business conduct of economic entities, the importance of bankruptcy and a bankruptcy proceedings is unambiguously emphasized. The conditions preceding to bankruptcy as an institute of economic law are a consequence of the economic and financial position of a certain economic entity. At the very beginning, the paper gives a brief overview of the conceptual definition of bankruptcy and its goals. The primary focus of the paper rests on the forms of economic crime in a bankruptcy proceedings, which in part includes a brief overview of the concept and characteristics of economic crime as an extremely complex and important form of modern crime. Having in mind the main subject of the paper, the valid criminal legislation of Republic of Serbia envisages two criminal offenses against the economy which can be committed in connection with and/or relating to bankruptcy. These are causing bankruptcy (from Article 232) and causing false bankruptcy (from Article 232a).

Keywords: *bankruptcy, bankruptcy proceedings, economic crime, Bankruptcy Law*

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1. Introduction

A large number of business entities establish various debtor-creditor relations in their day-to-day operation, such as taking loans from banks, buying on lease, settling debt using credit cards, deferred payment, etc. In this light, a debt to the bank or some other entity does not have a negative connotation for as long as the debt is settled (through due installments) regularly (i.e. when due) and all creditor claims are duly and completely settled. As Dragojlović and associates (2019) point out, "in modern conditions of business conduct, debts have become an inseparable part of economic life and a significant source of financing of economic activities" (p. 18).

The institute of bankruptcy becomes very interesting and important in situations when the conditions for the implementation of provisions of the Bankruptcy Law (2009) are cumulatively met. According to Radović (2017), "there are two necessary and fundamental assumptions for the implementation of specific bankruptcy law rules – plurality of creditors and financial difficulties for the debtor" (p. 30).

Taking the first condition in closer consideration, the essence of the implementation of the institute of bankruptcy becomes apparent, and that is a larger number of creditors. Bankruptcy in itself has no justification if there was only one creditor in a specific situation. Guided by the principles of collective settlement of creditor claims and their equal treatment, bankruptcy becomes an unavoidable institution when a large number of creditors' claims in specific circumstances cannot be settled due to an unfavorable economic situation of the debtor (which is in fact another condition for the implementation of the institute of bankruptcy). Namely, "in such situations, when the debtor becomes insolvent, and no other option of settling a creditor's claims is adequate enough (because it, for example, provides settlement of only one, but not other creditors), the institute of bankruptcy is of great importance since it provides the possibility to secure settlement of all debtor's creditors through the procedure stipulated and regulated by law" (Rašević, 2022, p. 99).

At the very beginning, the paper shall provide a brief overview of the conceptual definition of bankruptcy and its goals. The primary focus of the paper shall rest on the forms of economic crime in bankruptcy proceedings, which shall in part include a brief overview of the concept and characteristics of economic crime as an extremely complex and important form of modern crime.

2. Conceptual definition of bankruptcy

There are numerous theoretical definitions (as well as divisions) of bankruptcy in legal theory which essentially refer to the possibility, or more precisely, the impossibility of settling creditors' claims.

In principle, as Čolović and Milijević (2004) state, "bankruptcy is a condition declared by the court in which there is a debtor, on one hand, who has suspended payments or whose assets are insufficient to settle the claims of all creditors and, on the other hand, a group of creditors whose claims are jeopardized by the suspension of payment or over-indebtedness of their joint debtor" (p. 27).

According to Jovanović-Zattila (2003), bankruptcy is "an institution of joint, proportionate and simultaneous settlement of creditors on the property of the bankruptcy debtor. It protects creditors from each other and the debtor from creditors who attempt to settle their claims at any cost" (p. 3).

Thus, "the debtor due to insolvency or over-indebtedness is not able to settle its due financial obligations" (Rašević, 2022, p. 101). According to Milosavljevic (2016), "insolvency is manifested by the debtor's suspension or interruption of payment of due obligations, while over-indebtedness represents a special condition of assets of the debtor in which its total assets are not sufficient to settle its debts. In both cases, the debtor manifests an inability for payment" (p. 57).

Kozar and Dukić-Mijatovic (2015) emphasize that "bankruptcy as an institution should be distinguished from bankruptcy proceedings as a set of legal rules which regulate the conduct of participants in the proceedings" (p. 1).

Also, bankruptcy and bankruptcy proceedings should be distinguished from bankruptcy process relations which "arise from the opening of the previous bankruptcy proceedings and last until the end of the bankruptcy proceedings. Bankruptcy process relations arise between the bankruptcy judge and other entities involved in the bankruptcy proceedings" (Milosavljević, 2016, p. 58).

According to Cvetković (2004), "an efficient bankruptcy system is a necessary part of market economy because it provides security to creditors, recovery of companies with financial difficulties and faster return of blocked funds to use." In a quality bankruptcy procedure, everyone wins –the creditors the employees and the society as a whole. Bankruptcy proceedings result in the recovery of the company and therefore, through efficient redistribution of seized funds, it constitutes a prerequisite for faster and more successful recovery of the entire economy " (p. 2).

Pursuant to the provisions of Article 1 of the Bankruptcy Law (2009), "bankruptcy is carried out by bankruptcy or reorganization. Bankruptcy means settling creditors from the value of the entire property of the bankruptcy debtor, i.e. the bankruptcy debtor as a legal entity. Reorganization entails settling creditors according to the adopted reorganization plan, in particular by redefining debtor-creditor relations, status changes of the debtor or otherwise as stipulated by the reorganization plan." Article 2 of the Bankruptcy Law (2009) stipulates that the goal of bankruptcy is "the most favorable collective settlement of bankruptcy creditors by realizing the highest possible value of the bankruptcy debtor, i.e. its property".

It is very important to mention the principles of bankruptcy which are regulated by the provisions of Articles 3-10 of the Bankruptcy Law (2009). Legislative treatment of the status concept of bankruptcy includes the following principles: "the principle of protection of bankruptcy creditors (bankruptcy enables collective and proportional settlement of bankruptcy creditors); the principle of equal treatment and equality (in bankruptcy proceedings, all creditors receive equal treatment and equal position of creditors of the same payment order or class in the reorganization procedure); the principle of economy (bankruptcy proceedings are conducted in such a way as to enable the realization of the highest possible value of the bankruptcy debtor's property and the highest possible degree of settlement of creditors in the shortest possible time and with the least possible costs); the principle of judicial conduct of the procedure (after the opening, the bankruptcy procedure is conducted by the court ex officio); the principle of imperativeness and preclusive effect (bankruptcy proceedings are conducted in accordance with the provisions of the Bankruptcy Law. For issues which are not specifically regulated by this legal text, relevant provisions of the law governing civil proceedings apply accordingly); principle of urgency (bankruptcy proceedings are urgent. Delays and interruptions are not allowed in bankruptcy proceedings); the principle of two degrees (bankruptcy proceedings are two-degree unless the law excludes a legal remedy); the principle of publicity and information (bankruptcy proceedings are public and all participants in bankruptcy proceedings have the right to timely access the data related to the conduct of the proceedings, except for the data which constitute a trade or official secret)".

In accordance with the above, "the main indicators of efficiency of bankruptcy proceedings are the degree of settlement, duration and costs of bankruptcy proceedings" (Zimmermann, Obućina & Milovanović, 2015, p. 11).

However, regardless of the fact that the state has regulated by the appropriate law the conditions and manner of initiating and conducting

bankruptcy proceedings before the appropriate court, various forms of crime in this area still arise in practice. This is where the specific form of criminal behavior comes to the fore, which we collectively call economic crime. As the issue of the forms of economic crime is important for the area of bankruptcy, before the analysis of how and in what way it is possible to commit abuse in the bankruptcy procedure, the conceptual definition and basic characteristics of economic crime shall be mentioned.

3. The concept and characteristics of economic crime

Criminal behavior of individuals and groups can, in principle, be defined as the gravest social deviation.

According to Bjelajac (2013), "crime is a term which denotes a typical example of social deviation and reflects a collective name for violation of positive legal social norms and behaviors which are accompanied by sanctions." The formal aspect of crime is embodied in human activity, and the material aspect of crime, i.e. its content, implies jeopardizing social values. The social reaction to a crime is manifested through criminal sanctions" (p. 29).

Crime is a "very complex phenomenon which is equally detrimental in all societies and at all levels of development. To understand the concept of crime, it must be considered in a multidisciplinary manner, i.e. by applying knowledge from different theoretical disciplines" (Matijasevic, 2012, p. 52). In this statement, it must be emphasized that "multidisciplinary approach to considering crime is not a matter of choice and instead represents a necessary approach to this complex social phenomenon" (Bjelajac & Matijašević, 2014, p. 534).

Economic crime is a complex form of crime characterized by a multitude of conceptual definitions and different approaches regarding the number and type of crimes covered by this area. Thus, the basic characteristic of economic crime is great phenomenological diversity conditioned by the diversity of cultural, economic and legal aspects in different epochs, in the territory of different countries, as well as continents.

It can be said that economic crime in Serbia in recent decades is characterized by complex crimes, especially in the areas of finance, accounting, banking, bankruptcy, international trade, as well as in the privatization process. Although often referred to as the modern form of crime, economic crime is not a new form of criminal behavior. Still, what certainly makes it modern is the legislative and scientific treatment which the area of economic crime has received only in recent years. Namely, economic crime has long been considered a general crime and even a part of property crimes.

It should be emphasized that globalization and availability of modern technologies have over time led to an increase in the number of forms of economic crime, as well as modifications of the content of existing forms, which has made it even more complex and socially dangerous.

The modern definition by Banović (2002) defines economic crime as "a set of all delinquent behaviors (acts or omissions) which occur in economic relations and in connection with those relations, by legal and natural persons, which, as subjects of these relations, have appropriate powers over the property on which those relations are based, and which delinquent behaviors directly damage the property and injure or jeopardize economic relations" (p. 28).

Bošković and Marković (2015) state that "economic crime is a type of delinquency and a typology of criminal phenomena conditioned by violations of regulations in economic and financial business conduct. In their opinion, it is a phenomenon which is subject to different definitions, depending on the criteria for the classification of crime and scientific-methodological approach. Some concepts start with the provisions of criminal law regarding the acts against the economy and others with the object of protection by criminal law, i.e. from acts aimed towards abuse and other types of illegality related to the organization and functioning of the economic system and financial operations. This includes only acts which represent a criminal act and feature as a factor of delinquency within the economic organization and system. Undoubtedly, different approaches to this concept and phenomena mostly stem from the diversity of political and economic systems in the world. The other aspect of the problem arises because economic crime signifies different types of crimes, both those against the economy and those against official duties, and partly also crimes against property" (p. 209).

Although there is a great phenomenological diversity in the area of economic crime which makes it difficult to determine a single definition which would correctly define all the characteristics and conceptual determinants of this type of crime, an especially important area for different types of abuse is precisely the area of bankruptcy. As previously mentioned, regardless of the fact that the state has regulated the conditions and manner of initiating and conducting bankruptcy proceedings before the appropriate court through an appropriate legal text, various forms of crime in this area still arise in practice, as shall be discussed in the next chapter of the paper.

4. Forms of economic crime in bankruptcy proceedings

In practice, there are various forms of criminal activity in and related to bankruptcy proceedings. Among typical forms of abuse, Bošković (2009) lists: "devaluation of capital, its incorrect evaluation or incorrect presentation of real value; an agreement between individuals from the bankruptcy authorities and persons participating in the bankruptcy proceedings as potential buyers; by agreement of individuals from the bankruptcy authorities, valuable assets are separated from the bankruptcy estate, allowing purchase at lower prices; concluding transactions harmful for the property of a company in bankruptcy" (p. 123–124).

According to the opinion of a majority of theorists, economic crime mainly consists of crimes against the economy and crimes against official duties (Carić & Matijašević, 2017). Crimes against the economy are "those activities that mean attacking or jeopardizing the economy as the basis of social relations and further building of society" (Čejović & Kulić, 2014, p. 463). The economy as a protective object of criminal acts "means the immediate process of performing an economic activity. It follows that criminal acts from this group mean an attack on the economy as a daily economic activity, as a production process" (Matijasević-Obradović & Kovačević, 2019, p. 178).

Our Criminal Code (2005) envisages two criminal offenses against the economy which may be committed in connection with and/or relating to bankruptcy. These are causing bankruptcy (from Article 232) and causing false bankruptcy (from Article 232a).

Article 232 of the Criminal Code incriminates the criminal offense of Causing Bankruptcy as follows: "Whoever in a business entity which has the status of a legal entity causes bankruptcy and thus damages another by irrational spending of funds or their alienation at an unjustifiably low price, excessive borrowing, assuming disproportionate obligations, reckless conclusion of contracts with insolvent persons, failure to timely collect claims, destruction or concealment of property or other actions which are not in accordance with conscientious business conduct shall be punished by imprisonment for a term of six months to five years."

According to the legal definition, a criminal offense is committed by a person who intentionally causes bankruptcy by committing one of the alternatively prescribed actions. The act of a criminal offense may include activities prescribed by law:

1) irrational spending of funds or their alienation at an unjustifiably low price,

2) excessive borrowing,
3) assuming disproportionate obligations,
4) reckless conclusion of contracts with insolvent persons,
5) destruction or concealment of property,
6) committing other acts which are not in accordance with conscientious business conduct and which may also include default, i.e. non-fulfillment of obligations the perpetrator is obliged to perform (e.g. on grounds of legal or contractual obligations, etc.).

In the provision of Article 232, default was formulated through an alternatively prescribed criminal act - failure to timely collect the claims.

The perpetrator of this criminal offense can only be a responsible person in the company or another business entity which has the status of a legal entity. The consequence of the criminal offense consists in causing bankruptcy and thus causing damage to the company or another business entity which has the status of a legal entity. At the time of initiating bankruptcy proceedings, the criminal offence is considered completed. The punishment prescribed by the legislator for this criminal offence is imprisonment for a term of six months to five years.

Article 232a of the Criminal Code criminalizes the criminal offense of Causing False Bankruptcy as follows: "(1) Whoever in a business entity which has the status of a legal entity, in an intention for the entity to avoid payment of obligations causes bankruptcy of that entity by an apparent or actual reduction of its assets, by:

1) concealing, falsely selling, selling below market value or assigning free of charge all or a part of the property of the business entity;
2) concluding fictitious debt agreements or recognizing non-existent claims;
3) concealing, destroying or altering business records which the business entity is legally obliged to keep in such a way that they cannot show business results or the state of assets or obligations or presenting this state it as such that bankruptcy can be initiated thereon by making false documents or otherwise, shall be punished by imprisonment for a term of six months to five years.

(2) If, due to the acts from the previous paragraph, severe consequences occurred for the creditor, the perpetrator shall be punished by imprisonment for a term of two to ten years."

According to the legal definition, the basic form of a criminal offense is committed by a person who intentionally, in view of avoiding settlement of

obligations by a company or another business entity which has the status of a legal entity, causes bankruptcy of that entity by apparent or actual reduction of its property, by committing one of alternatively legally stipulated actions:

1) concealing, falsely selling, selling below market value or assigning free of charge all or a part of the property of the business entity;
2) concluding fictitious debt agreements or recognizing non-existent claims;
3) concealing, destroying or altering business records which the business entity is legally obliged to keep in such a way that they cannot show business results or the state of assets or obligations or presenting this state as such that bankruptcy can be initiated thereon by making false documents or otherwise.

The act of committing the basic form of the act consists in committing (concealment of property, false sale of property, its free assignment, conclusion of fictitious debt agreements, recognition of non-existent claims, concealment or destruction of business books, making false documents, etc.).

The perpetrator of this criminal offense can only be a responsible person in a company or another business entity which has the status of a legal entity. The consequence of the criminal offense consists in causing false (apparent) bankruptcy by false or actual reduction of its property. The punishment prescribed by the legislator for the basic form of the criminal offense is imprisonment for a term of six months to five years.

The provisions of paragraph 2 of this Article of the Criminal Code also stipulate a graver form of crime. The graver form of the act exists if the commitment of the basic form of the act has caused severe consequences for the creditor. In case of a graver form of the crime, the perpetrator shall be punished by imprisonment for a term of two to ten years.

5. Conclusion

In the modern conditions of business conduct for economic entities, the importance of bankruptcy and bankruptcy proceedings is unambiguously emphasized. The conditions which precede bankruptcy as an institute of economic law are a consequence of the economic and financial condition of a certain economic entity. Therefore, it is understandable that the most significant consequences of bankruptcy actually by nature have a character of property law - they affect both the debtor's property (because an insolvent debtor is eliminated from business by bankruptcy proceedings) and the property of all

creditors (because one of the basic principles of bankruptcy is proportional settlement of all creditors from a specific debtor-creditor relation).

At the very beginning, the paper gives a brief overview of the conceptual definition of bankruptcy and its goals. The primary focus of the paper rests on the forms of economic crime in bankruptcy proceedings, which in part include a brief overview of the concept and characteristics of economic crime as an extremely complex and important form of modern crime.

The main characteristic of economic crime is its great phenomenological diversity which is conditioned by the diversity of cultural, economic and legal aspects in different epochs, in the territory of different countries, as well as continents. Economic crime mainly consists of crimes against the economy and crimes against official duties. In practice, however, various forms of crime appear in this area.

Having in mind the main subject of the paper, the valid criminal legislation of the Republic of Serbia envisages two criminal offenses against the economy which can be committed in connection with and/or relating to bankruptcy. These are causing bankruptcy (from Article 232) and causing false bankruptcy (from Article 232a).

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OBLICI PRIVREDNOG KRIMINALITETA U STEČAJNOM POSTUPKU

REZIME: U savremenim uslovima poslovanja privrednih subjekata, nesumnjivo se ističe značaj i važnost stečaja i stečajnog postupka. Uslovi koji prethode stečaju kao privrednopravnom institutu posledica su ekonomskog i finansijskog stanja određenog privrednog subjekta. U radu je, na samom početku, učinjen kraći osvrt na pojmovno određenje stečaja i njegove ciljeve. Primarna pažnja u radu usmerena je na oblike privrednog kriminaliteta u stečajnom postupku, što je jednim delom

obuhvatilo i kraći osvrt na pojam i karakteristike privrednog kriminaliteta, kao izuzetno složene i značajne forme savremenog kriminaliteta. Imajući u vidu osnovnu temu rada, aktuelnim krivičnim zakonodavstvom Republike Srbije predviđena su dva krivična dela protiv privrede koja se mogu učiniti u vezi i/ili povodom stečaja. Reč je o prouzrokovanju stečaja (iz člana 232) i prouzrokovanju lažnog stečaja (iz člana 232a).

***Ključne reči**: stečaj*, *stečajni postupak, privredni kriminalitet, Zakon o stečaju.*

References

1. Banović, B. (2002). *Obezbeđenje dokaza u kriminalističkoj obradi krivičnih dela privrednog kriminaliteta* [*Providing evidence in the criminal processing of economic crime*]. Beograd: Viša škola unutrašnjih poslova
2. Bjelajac, Ž. & Matijašević, J. (2014). Značaj borbe protiv korupcije i organizovanog kriminala u procesu pridruživanja zemalja Zapadnog Balkana Evropskoj uniji [The importance of the fight against corruption and organized crime in the process of accession of the Western Balkan countries to the European Union]. In: Đukanović, D., Trapara, V. (ured.), *Evropska unija i Zapadni Balkan: izazovi i perspektive* [*The European Union and the Western Balkans: Challenges and Perspectives*] (pp. 533–553). Beograd: Institut za međunarodnu politiku i privredu
3. Bjelajac, Ž. (2013). *Organizovani kriminalitet, imperija zla* [*Organized crime, evil empire*]. Novi Sad: Pravni fakultet za privredu i pravosuđe
4. Bošković, M., & Marković, M. (2015). *Kriminologija sa elementima viktimologije* [*Criminology with elements of victimology*]. Novi Sad: Pravni fakultet za privredu i pravosuđe
5. Bošković, M. (2009). *Privredni kriminalitet* [*Economic Crime*]. Bar: Fakultet za poslovni menadžment
6. Carić, M., & Matijašević-Obradović, J. (2017). *Privredni kriminalitet* [*Economic crime*]. Novi Sad: Pravni fakultet za privredu i pravosuđe, Univerzitet Privredna akademija
7. Cvetković, M. (2004). *Komentar predloga Zakona o stečaju* [*Commentary on the Draft Bankruptcy Law*]. Beograd: CLDS
8. Čejović, B., & Kulić, M. (2014). *Krivično pravo* [*Criminal Law*]. Novi Sad: Pravni fakultet za privredu i pravosuđe, Univerzitet Privredna akademija

9. Čolović, V., & Milijević, N. (2004). *Stečajni postupak, teoretska razmatranja, zakonski propisi, sudska praksa i obrasci za praktičnu primenu* [*Bankruptcy proceedings, theoretical considerations, legal regulations, case law and forms for practical application*]. Banja Luka: Udruženje pravnika Republike Srpske
10. Dragojlović, J., Milošević, I., & Stamenković, G. (2019). Krivično delo prouzrokovanje stečaja – specifičnosti i obeležja [Criminal act of Causing Bankruptcy - specific characteristics and features]. *Pravo – teorija i praksa*, *36* (1-3), pp. 16–30
11. Jovanović-Zattila, M. (2003). *Poverioci u stečaju: doktorska disertacija* [*Bankruptcy creditors: doctoral thesis*]. Beograd: Pravni fakultet
12. Krivični zakonik [Criminal Law]. *Službeni glasnik RS*, br. 85/05, 88/05 - ispr., 107/05 - ispr., 72/09, 111/09, 121/12, 104/13, 108/14, 94/16 i 35/19
13. Kozar, V., & Dukić-Mijatović, M. (2015). Consolidated bankruptcy of related persons. *Pravo - teorija i praksa*, *32* (7-9), pp. 1–9
14. Matijašević, J. (2012). The importance of preventive acting in the field of crime suppression with the reference to strategic acts of the Western Balkan countries. *The Review of International Affairs*, *63* (1148), pp. 52–70
15. Matijašević-Obradović, J., & Kovačević, M. (2019). Forms of Economic Crime in Bankruptcy proceedings with reference to the current criminal legislation in the area of causing Bankruptcy. *Vojno delo, 71* (4), pp. 172–182
16. Milosavljević, A. (2016). *Imovinskopravne posledice pokretanja stečajnog postupka u domaćem i uporednom pravu: doktorska disertacija* [*Property law consequences of initiating bankruptcy proceedings in domestic and comparative law: doctoral thesis*]. Novi Sad: Univerzitet Educons, Fakultet za evropske pravno-političke studije
17. Radović, V. (2017). *Stečajno pravo: knjiga prva* [*Bankruptcy Law: Book one*]. Beograd: Pravni fakultet – Centar za izdavaštvo i informisanje
18. Rašević, M. (2022). The legal treatment of the initiation and implementation of bankruptcy against legal entities in Republic of Serbia. *Pravo – teorija i praksa*, *39* (1), pp. 98–110
19. Zakon o stečaju [Bankruptcy Law]. *Službeni glasnik RS*, br. 104/09, 99/11 - dr. zakon, 71/12 - odluka US, 83/14, 113/17, 44/18 i 95/18
20. Zimmermann, F., Obućina, J., & Milovanović, I. (2015). *Pobijanje pravnih radnji stečajnog dužnika* [*Refuting the legal actions of the bankruptcy debtor*]. Beograd: Agencija za licenciranje stečajnih upravnika

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.) Matijašević 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

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.