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Book (a single author)	Goldstein, A., (1994). *The ecology of aggression*, Plenum Press, New York.	(Goldstein, 1994:80)
Book (a number of authors)	Konstantinovic-Vilic,S.,Nikolic-Ristanovic, V., Kostic, M., (2009). *Kriminologija (Criminology),* Nis, Pelikan print.	First in-text citation: (Konstantinovic-Vilic, Nikolic-Ristanovic, Kostic, 2009: 35). A subsequent in-text citation: (Konstantinovic-Vilic, et all., 2009: 77)
Joint authorship (a group of authors)	*Oxford Essential World Atlas* (7th ed). (2012). Oxford, UK: Oxford University Press	(Oxford, 1996: 100)
An article or a chapter in a book with an editor	Kostic, M., Miric, F., (2009).Ustanove za izvršenje krivičnih sankcija-pozitivno zakonodavstvo i strana regulativa-stanje i perspektive,(Facilities for execution of criminal sanctions -positive legislation and international regulations, state and perspectives) / In Djukanovic, P. (ed), *Proceedings of penology* /. - Banja Luka, Penological organization of KPZ, 2009, Vol.1, No.1, pp. 10-32.	(Kostic, Miric, 2009: 295)
Journal article	Papageorgiou,V., Vostanis, P., (2000).Psychosocial characteristics of Greek young offenders, *The Journal of Forensic Psychiatry*, Vol.11., No.2., 2000, pp.390-400	(Papageorgiou et all, 2000: 397)
Encyclopedia	(2009). *The Oxford International Encyclopedia of Legal History*. Oxford, UK: Oxford University Press	(Oxford, 2009:33)
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Court decisions	Case Ap.23037/04 *Matijasevic* v. Serbia	Footnote: Case Ap.23037/04 Matijasevic v. Serbia
Online sources	Ocobock, P., Beier, A.L., (2008). *History of Vagrancy and Homeless in Global Perspective*, Ohio University Press, Swallow Press, Retrieved 31 November, 2015, from http://www.ohioswallow.com/book/Cast+Out	In-text citation: (Ocobock, Beier, 2008)

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EDITORIAL

Dear Readers,

It is my great pleasure to have the opportunity to briefly present the papers published in the second issue of the scientific journal ***Facta Universitatis: Law and Politics*** for the year 2021. As was the case in the previous issue, the papers cover different but very important topics: the mechanisms of civic participation in the local government affairs, various environmental issues ranging from the right to water as a human right to the normative framework for the prevention of air pollution, the impact of modern mechanisms (nudge, sludge, shove, budge) on reducing administrative burdens, the classical administrative procedure law issues related to the administration silence in decision-making of administrative bodies, and violence against people with disabilities. All papers are characterized by a clear and concise writing style, application of adequate and modern research methodology, comprehensive overview of the most important primary and secondary sources, all of which shows that the authors have invested a great effort in examining the subject matter under consideration. Acting in the capacity of the Editor, I am pleased to present these papers to a worldwide readership. I hope that they will contain useful information to the broad scientific and professional public, as well as to the general public interested in possible directions for resolving these important issues.

Aleksandar S. Mojašević, LL.D., Associate Professor of the Faculty of Law, University of Niš and **Ljubica Nikolić,** LL.D., Full Professor of the Faculty of Law, University of Niš, have submitted the paper titled "*Nudge, Shove, Budge, Sludge and Administrative Burden: Terminological Demarcation and Practical Implications*". The paper focuses on providing clear conceptual demarcation line between these behavioural concepts in the context of reducing administrative burdens. After providing their definitions, the authors analyze the use of these behavioral mechanisms in the development and implementation of various public policies, focusing on the use of these mechanisms in reduction of administrative burdens.

Maja Nastić, Associate Professor of the Faculty of Law, University of Niš, submitted an original scientific paper titled "*Human Right to Water: Between Constitution and Market Interests*". The author points out that the right to water has to be included in the latest generation human rights and guaranteed by the highest national legal acts, primarily the national constitutions. The author draws attention to the dual nature of this right, its economic and strategic importance, which results in the legislators' obligation to balance human rights with economic interests. The author's analysis includes the most important international standards in this area, primarily envisaged in the United Nations documents, and the European standards which have been defined in the jurisprudence of the European Court of Human Rights. The analysis also includes the legal systems of several developed countries where the right to water is explicitly recognized in their constitutions. In addition to its scientific contribution, this article has a practical value as an overview of existing legislative solutions which may be used by the legislators of those states whose constitutions still do not explicitly recognize this human fundamental right.

Filip Mirić, LL.D., Research Associate, Associate at Postgraduate Study Services, Faculty of Law, University of Niš, and **Aleksandra Nikolajević**, MA, Teaching Assistant, Sociology Department, Faculty of Philosophy, University of Niš, submitted the paper titled "*Violence*

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Against Persons With Disabilities: The "Dark Number" Of Crime". The authors explore this negative social phenomenon from the criminological and sociological perspective, focusing on disability as a victimization factor**,** different forms of violence, and the rising "dark number" of crime of violence against people with disabilities, with specific reference to violence against people with mental disabilities in residential institutions. The authors point out to possible social responses, embodied in the comprehensive and integrative approach to the problem of violence against people with disabilities, and recommend activities for protecting crime victims, creating a supportive climate for combating violence, improving the position of people with disabilities and empowering people from these vulnerable social groups.

Teodora Veličković, LL.M. Student of the Faculty of Law, University in Niš, submitted the paper "*Development of the United Nations and the European Union Policy on Air Pollution*". The author focuses on air pollution as a growing environmental problem and an issue of exceptional environmental importance for humanity. Relying on the historical, normative and teleological method, the author explores the broad environmental law normative framework and examines the legislative documents and acts dealing with the prevention of air pollution. In particular, the second part of the paper presents the most important international legal documents on ozone depletion in the context of increasingly serious climate changes. The third part focuses on the legislation pertaining to protection of ambient air and specific regulations envisaging relevant protection measures. The final part provides an overview of the jurisprudence of international courts, the protection they provide in their judgments and their impact on the development of environmental law. Considering the growing number of court cases, the author hopes that economic and political interests will not prevail over environmental rights.

Marija Marinković, LL.M. Student, Faculty of Law, University of Niš, submitted the paper „*Mechanisms of Citizen Participation in the Local Government: The Normative Framework of the Republic of Serbia*". The author deals with the fundamental principles of the good governance doctrine and its implementation in the Serbian legislative framework regulating the organization and activities of local self-government units in the Republic of Serbia. In addition to the traditional mechanisms of direct citizen participation in the activities of the local self-government, whose wider application is related to the upcoming amendments to the Referendum and People's Initiative Act, the author focuses on public debate and public hearings and elaborates on other equally important mechanisms of civic participation in performing local level activities: consultations, public meetings, interviews, information requests, petitions, surveys, proposals, electronic communication, social networks etc. The author concludes that these mechanisms indirectly contribute to transparency as the second main pillar of good governance.

Bojan Blagojević, LL.M., Attorney-at-law of the Bar Association Niš, submitted the paper titled „*Legal Protection Against Administrative Silence*". The paper examines a traditional administrative procedure law issue of administrative silence, which occurs when an administrative body fails to respond to the a party's request. The author focuses on two main two main approaches in resolving such a legal situations: first, when the administrative body is considered to have rejected the party's request (negative silence) and, second, when the party's request is considered to have been adopted (positive silence). The author analyzes the practical consequences that such legal solutions lead to, with reference to various cases that had their epilogue in the judgments of the Administrative Court of the Republic of Serbia. The author concludes that the normative regulation of this institute should be additionally strengthened in

order to prevent possible abuses and to contribute to the development of the rule of law and citizens' trust.

Last but not least, we would like to extend our appreciation and gratitude to our distinguished reviewers whose professional attitude to double-blind peer review has significantly contributed to the quality of this scientific journal.

Editor-in-Chief
Prof. Dejan Vučetić, LL.D.

Niš, 15th December 2021

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Original Scientific Paper

NUDGE, SHOVE, BUDGE, SLUDGE AND ADMINISTRATIVE BURDEN: Terminological Demarcation and Practical Implications *

UDC 321.022:351/354
330.1:159.9

Aleksandar S. Mojašević, Ljubica Nikolić

Faculty of Law, University of Niš, Serbia

Abstract. *In this paper, the authors provide a precise terminological demarcation of the following behavioral concepts: "nudge", "shove", and "budge". Based on these concepts and three defined criteria (freedom/coercion, internalities/externalities, and behavioral insights), the authors explain various behavioral public policies and their practical implications: 1) the behavioral public policy of libertarian-paternalistic orientation (the "nudge policy"); 2) the policy of coercive paternalism; and 3) the behavioral regulation of externalities. Then, the authors provide a terminological distinction between the concept of "sludge" and "nudge", and discuss their potential misuses. Finally, based on the level of "frictions", the authors distinguish between the concepts of "administrative burden" and "sludge", as well as the types of public policies that are recommended for their reduction, particularly "sludge audits". The conclusion is that all these public policies are very close, slightly different in terms of the subject matter of regulation and the intensity of encroachment on the freedoms of individuals, but that they all have a common root in behavioral insights.*

Key words: *Behavioral Economics, nudge, shove, budge, sludge, administrative burden, behavioral public policies*

1. BASIC BEHAVIORAL CONCEPTS – DEMARCATION

In the introductory chapter, we make a distinction between the three basic behavioral concepts: 1. "nudge" (and the related concept of "choice architecture"); 2. "shove"; and 3. "budge". Their demarcation will serve as an introduction to the explanation of various behavioral public policies that emerge from these concepts.

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1.1. The concept of "nudge" and "choice architecture"

In English, ***nudge*** has multiple meanings. As a verb, it means: 1) to push something or someone gently, especially with an elbow; or 2) to encourage or persuade someone to do something in a way that is gentle rather than forceful or direct. As a noun, it means: 1) the act of pushing someone or something gently; or 2) something that encourages or persuades someone to do something in a gentle way (CUP, 2021).[1]

The concept of nudge has been popularised by the famous book *Nudge: Improving Decisions about Health, Wealth, and Happiness*, authored by Richard Thaler and Cass Sunstein, which was first published in 2008. Considering that this book has not been translated into Serbian, and that this concept is not sufficiently known in our country,[2] there is no adequate translation of the term "nudge" into Serbian. One of the rare translations that can be found in domestic papers (Vukov, 2015: 65) is "*usmeravanje"* or "*teorija usmeravanja*" (gently urging in the right direction). Based on the application of behavioral insights in public policies, a parallel use of the term "*usmeravanje*" (urging) and "*gurkanje*" (nudging) has been proposed in another book (Mojašević, 2021: 77).[3]

Now, we can define this term. Nudge simply means *guiding people towards the right choices or better decisions*. Practically speaking, it is like a kind of GPS which directs us towards a certain goal, provided that we have the freedom to reach the goal in another way or to give it up. The concept defined in this way requires answers to several questions. First, what kind of right choices or better decisions are in question? Secondly, from whose point of view are these decisions considered to be better? The answer to the first question is simple and it is contained in the title of the aforesaid book *Nudge: Improving Decisions About Health, Wealth, and Happiness* (2008). For example, these could be decisions about reducing obesity or increasing our financial security. On the second question, Thaler and Sunstein (2008: 5) give a precise answer: *from the point of view of the decision makers themselves in the way they evaluate better decisions or make choices*. The implicit assumption behind this reason is that people do not make perfect decisions; they are prone to predictable cognitive biases (systematic cognitive errors) in reasoning and decision-making.[4] Precisely due to the existence of cognitive biases, "someone from the outside" is needed to help people make better decisions. That "someone" can be a decision maker in the public sphere (i.e. state authority) or private sphere (e.g., management of private company).

Finally, we can quote a formal (and probably the most well-known) definition of this concept: *nudge is any aspect of the architecture of choice that changes people's behavior in a predictable way, without prohibiting any option or significantly changing their economic incentives* (Thaler, Sunstein, 2008: 6). This definition also requires an explanation of ***the choice architecture,*** which means *organizing the context in which decisions are made* (Thaler, Sunstein, 2008: 3). There is a wide area of application of this concept: politicians, employers, parents and others can play the role of choice architects. For example, politicians can create the design of ballots; employers can create different pension plans for their employees; parents can

[1] CUP (2021): Cambridge Dictionary (online): https://dictionary.cambridge.org/dictionary/english/nudge
[2] This tendency has been changing in recent years as more authors are acknowledging the importance of behavioral economics and behavioral science.
[3] The first term (*"usmeravanje"*) is more formal and technical, but the second one ("*gurkanje*") is more vivid and suitable for the popularization of the field of behavioral economics and behavioral science in Serbia.
[4] There are numerous cognitive biases in different areas (for the legal area, see: Mojašević, Nikolić, 2018); some of them will be elaborated in this paper.

determine alternative education or leisure strategies for their children, etc. The choice of these alternatives, made by the "architects" (politicians, employers or parents), certainly influences the final decisions of those who decide in the given context (voters, employees, or children). So, as in real architecture, *there is no neutral design* (Thaler, Sunstein, 2008: 3).

1.2. The concept of "shove" and "budge"

The second concept which is very close to nudge is the concept of ***shove***. In English, this term means *to push someone or something forcefully*.[5] While "nudge" means to push someone *gently*, "shove" means to push someone *forcefully*. By comparing these meanings, the gradation is obvious and has significant practical implications in the field of policy creation and implementation, which will be explained in the next chapter in more detail. For now, it suffices to know that this concept implies the application of *regulation*[6]; by definition, it violates the freedom of individuals, i.e. it imposes certain behavior on them that they might not practice. Basically, this element gives this concept a forced, binding, intrusive (imposing) character.

The third very important concept which is close to the previous concepts is ***budge***. It means *to move or cause someone or something to move*.[7] So, while "nudge" means to push someone *gently and* "shove" to push someone *forcefully*, "budge" means to *move someone*. The concept of *budge* also implies the application of *regulation* that violates the freedom of individuals, but the difference in relation to *shove* is in the subject matter of regulation. It regulates *externalities*,[8] not internalities[9] (see in the next chapter).

If we have understood the essential difference in meaning between these three concepts, we can now move on to explaining the types of public policies that have been derived from them.

2. Three Forms of Paternalistic Interventions

Three different but related types of paternalistic interventions were derived from these three concepts: 1) **libertarian paternalism,** derived from nudge; 2) **coercive paternalism,** derived from shove; and 3) **behavioral regulation of externalities,** derived from budge. These are all *behavioral interventions*, that is, interventions that have people's behavior as the subject matter of direction or regulation. Given that ***public policy***, as a direction of action and a set of measures of state bodies towards achieving certain economic and social

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[5] CUP (2021): Cambridge Dictionary (online): https://dictionary.cambridge.org/dictionary/english/shove

[6] *Regulation* is a framework of behavior and business operations of economic entities that aims to increase the wider social benefits. It is made up of a system of laws and administrative procedures that serve the realization of public interests (Karaulac, 2008: 5). In a *narrower sense*, regulation is equated with *normative framework* (Serb. *regulativa*), the adoption of rules by bodies entrusted with public authority, which affect the business of economic entities. In a *broader sense*, regulation is a *process* because, in addition to adoption of laws and other rules, it includes setting standards, direct forms of *ex ante* and *ex post* control, and all other components of the regulatory regime, forms and methods of restricting or directing business to meet the public interest (Jovanić, 2014: 33).

[7] CUP (2021): Cambridge Dictionary (online): https://dictionary.cambridge.org/dictionary/english/budge

[8] *Externalities* in economics mean the transfer of costs or benefits to other economic entities without their consent (Nikolić, Mojašević, 2016: 164). Classic examples of negative externalities are pollution or virus transmission. Vaccination would be a positive externality.

[9] *Internalities* denote harmful (or beneficial) behaviors that concern only the individual who practices them, such as smokers or savers.

goals and changes,[10] includes *inter alia* behavioral interventions, the name ***behavioral public policy*** has been created. Thus, Behavioral Public Policy (abbr. BPP) means *the application of behavioral insights[11] in the creation and implementation of various public policies* (Mojašević, 2021: 75). Now we realize that there are three forms of behavioral public policies to which we may give full meaning.

2.1. Libertarian paternalism

Libertarian paternalism (abbr. **LP**) or behavioral public policy of libertarian-paternalistic orientation represents a soft form of paternalism. It is an ideology of state intervention that is based on the two previously mentioned concepts: *nudge* and *choice architecture*. Some authors (Mitchell, 2004) consider libertarian paternalism to be an oxymoron.[12] Simply put, the term "libertarian paternalism" contains two contradictory and incompatible terms: the former implies freedom and autonomy of individuals, and the latter implies coercion. However, the creators of this ideology, Thaler and Sunstein, have a different opinion. Namely, the paternalistic aspect of choice architecture means that decision makers (choice architects) have the power to influence people's behavior to make their lives better, longer, or healthier (Thaler, Sunstein, 2008: 3). These people have the right to choose another course of action; they are only directed toward a certain generally accepted desirable behavior. The implicit assumption behind this reasoning is that people need the help of third parties to achieve these desirable goals. This external benevolent and unobtrusive intervention is the core of libertarian paternalism. A classic example refers to a *retirement plan (program)* including the workers' choice to opt out of the scheme. It implies that employers in the private and public sectors automatically enroll workers in a retirement savings plan. If workers do not want to participate in this plan, they can opt out, but employers are obliged to inform them about this option in advance. As workers have an "opt-out option", their freedom of choice is preserved. This program targets internalities, i.e. it helps workers save more for retirement. The program is also based on the application of the "default rule", a well-known concept in behavioral economics. In addition to the basic rule, the "nudge" policy includes reminders and warnings (e.g., a reminder that you have not paid a phone bill, or a warning that the tax authority will charge a penalty if the property tax is not paid on time). A common feature of all these "nudge" instruments is that they do not impose significant costs on people who are subjected to them.[13]

2.2. Coercive paternalism

Coercive paternalism (abbr. **CP**) is grounded in the concept of shove. As mentioned, this paternalistic intervention is based on regulation and it is anti-liberal and intrusive by nature. Thus, unlike libertarian paternalism, it is a *hard* form of paternalism. But, there are two

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[10] This is a broader definition of public policy that is also accepted in the Serbian Planning System Act, "*Official Gazette of RS",* No. 30/2018.

[11] *Behavioral insights* mean empirical knowledge about what motivates people, how they make decisions, and how they make moral judgments (Zamir, Teichman, 2018: 7).

[12] For a more detailed description of the critique of libertarian paternalism, see: Mojašević, 2021: 90–98; Mojašević, 2020: 135−139.

[13] There are exceptions. For example, health warnings on cigarette packs might create significant emotional costs; sometimes, there is a "thin line" between nudge and material incentives. Thus, we might say that *in principle* the nudge policy should not impose large costs.

similarities between these interventions. In principle, both target *internalities*[14] and both are based on behavioral insights. Sunstein (2013: 207) has perhaps best portrayed the difference between these two types of paternalism, stating that libertarian paternalism is about *means* while coercive paternalism is about *goals*. A classic example of the CP in the field of health is *a smoking ban*. Prescribing a prohibition of certain conduct is based on the fact that an individual who has had resistance to this policy will eventually accept that policy and, moreover, identify with it. The application of this policy is not arbitrary, but based on the findings and predictions of ***the self-determination theory*** (Ryan, Deci, 2000), which divides behaviors into *autonomous* and *controlled*. The prohibition of smoking or others behaviors falls into the category of controlled behaviors and arises from *extrinsic motivation,* which comes from an external reward or punishment.[15] This reward or punishment can be prescribed by legislative or regulatory acts, or it can be a consequence of social pressure to behave in a certain way.

2.3. Behavioral regulation of externalities

Behavioral regulation of externalities (abbr. **BRE**) is grounded in the concept of budge. This paternalistic intervention has one thing in common with the previous two policies: it is based on behavioral insights. But, behavioral regulation of externalities differs from libertarian paternalism (LP) and coercive paternalism (CP) in two elements: 1) this policy is regulatory (as the name suggests); and 2) it targets *externalities*, not internalities. Classic examples are a ban on selling sweets or a ban on gambling. Let's elaborate on the first example. Some confectionery manufacturers could give a significant amount of money to sellers to display their products near the checkout counter (to make them salient).[16] If customers buy a larger quantity of products that they otherwise would not buy, and especially if children consume these products, there is a justification for the application of a certain policy that would prevent that. In other words, such behavior of sellers creates a basis for the application of behavioral regulation of externalities, in this case, in order to prevent obesity, protect dental health, and other benefits for our health.

We can now summarize the similarities and differences between these three policies, which are shown in Table 1 for the sake of simplicity.

Table 1 Behavioral public policies (BPP) – demarcation

Type of policy	acronym	concept	freedom (F)/ regulation (R)	internalities (I)/ externalities (E)	behavioral insights (BI)
Libertarian paternalism	LP	nudge	F	I	BI
Coercive paternalism	CP	shove	R	I	BI
Behavioral regulation of externalities	BRE	budge	R	E	BI

Source: author

[14] There are deviations because this intervention sometimes enters the field of externalities, thus approaching the third form of paternalism – *behavioral regulation of externalities*.

[15] The opposite motivation is *intrinsic* and it comes from an inner sense of satisfaction that we have done something right. These are *morally motivated behaviors* that are different from *introjected motivated behaviors* (a consequence of external pressure).

[16] Our attention is generally drawn to new things and those that we consider important; examples include: 1) *flashing lights on the highway or near schools*; 2) *items that are easily accessible and prominent*, such as products that are placed on a special shelf in the store; 3) or *simple messages*, like quick and effective advertisements, or slogans about the importance of keeping distance or wearing a mask during a pandemic (see more about this behavioral instrument in: *Mindspace Report*, 2010: 23–24).

3. The Concept of "Sludge"

The concept of ***"sludge"*** is very close to nudge. What does the concept mean? A (descriptive) definition of sludge was offered by Sunstein (2020a: 3): "*it is the form of excessive or unjustified frictions that make it difficult for consumers, employees, employers, students, patients, clients, small businesses and many others to get what they want or to do as they wish"*. Therefore, sludge is a "excessive friction", unnecessary material or mental burden that is not in line with people's desires and motives. Several questions arise concerning the demarcation between sludge and nudge, sludge and administrative burden, as well as a source of sludge and its concrete manifestations.

3.1. Nudge and sludge – demarcation

What is the connection between sludge and nudge? Sludge could be the abuse of nudge, i.e. using nudge for bad purposes. In Sunstein's words (2020a: 6), a sludge is an "evil nudge". A classic example is when sellers advertise products or services only for the sake of profit maximization, and not for the material well-being of consumers. In the Internet era, they might use interfaces that take advantage of cognitive biases (such as "anchoring"[17], the framing effect,[18] or the sunk costs fallacy[19]) to confuse users or to manipulate them to take some actions – the so-called "dark pattern" (see: Luguri & Strahilevitz, 2021). Thaler (2018) cites an example of investors fraud committed by Bernie Madoff;[20] then the example when sellers offer a rebate to customers who buy a product, but then require additional steps (e.g., to send a copy of the receipt by mail) that most people forget to do or do not want to bother with. Actually, redemption rates usually range between 10% and 40%, but it is interesting that people are over-optimistic[21] that they will redeem forms (for more detail, see: Tasoff & Letzler, 2014). Sunstein (2020a: 1–3) also cites several vivid examples, and we single out three of them: 1) a request to fill out lengthy online form to register a complaint about defective automobiles (with detailed information on the origin of the purchase and how the automobile was used); 2) unclear and confusing announcement of privacy policy when visiting a new site as a condition to continue reviewing that site; 3) complicated registration on the site to apply for an article review (as a result of which the potential reviewer decides to give up). We can also add an example from our medical practice, when we are asked for

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[17] "**Anchoring** is a particular form of priming effect whereby initial exposure to a number serves as a reference point and influences subsequent judgments" (Samson, 2021: 167). Simply put, the anchoring effect means that we rely on insignificant information (the so-called anchor) when making decisions. The anchoring process usually takes place unconsciously.

[18] **The framing effect** is at the heart of the prospect theory (Kahneman, Tversky, 1979) and its new version – the cumulative prospect theory (Tversky, Kahneman, 1992). This effect implies people's tendency to make different decisions (risky or less risky) depending on the framework (positive or negative) in which they do so. In the positive framework (the frame of gains) they show risk aversion, while in the negative framework (the frame of losses) they prefer risk.

[19] These are costs that have been incurred and, as such, cannot be "reimbursed". **The sunk cost fallacy** means that people continue a behavior or endeavor as a result of previously invested resources (Arkes & Blumer, 1985). Related concepts are the status quo bias and the loss aversion.

[20] Bernard L. "Bernie" Madoff is an American financier manager responsible for one of the largest financial frauds in the history of investment. He used *Ponzi scheme,* a fraudulent investing scam promising high rates of return with little risk to investors (see: Investopedia (20021): Ponzi scheme; https://www.investopedia.com/terms/p/ponzischeme.asp).

[21] **Optimistic bias** implies the human tendency to see things in a more positive way. It is a widespread and robust phenomenon, especially evident in the assessment of future outcomes (see, for instance, Sharot, 2011).

a medical referral in a situation when we want to perform medical examination by a specialist doctor or, even worse, when a medical examination is urgent. These additional steps and procedures increase our material and mental costs and significantly affect our decisions. The problem arises when we are "led" to these additional steps, which makes the concept of "nudge" meaningless or abused.

There are numerous examples of "sludge" in the public sector. In our country, for example, submitting financial reports at the end of the business year can be associated with numerous difficulties related to accessing the site, requests for various types of verifications, the overloaded system, etc. In American tax law practice, there is an example (Thaler, 2018) where taxpayers face an unnecessary and complicated procedure (filling out a form) to obtain a tax return. Many of them failed to complete that form, thus depriving themselves of the exercise of that right. Thaler (2018) concludes that "sludge" can either encourage behavior that is not in our best interest (such as too risky investing) or discourage behavior that is in our best interest (such as claiming a tax credit or rebate on products or services).

3.2. The manifestations and the source of "sludge"

Specific manifestations of "sludge" include: excessive paperwork burdens; excessive waste of time to exercise some rights or to do some jobs; various types of obstacles to exercising a right or performing a job (such as: complicated procedures, complex sites, multiple questions or vague words or phrases, manipulative words or advertisements, etc.) (Sunstein, 2020a: 8). We see that sludge generates different costs, such as information costs, opportunity costs (especially considering time), psychological costs (frustrations or humiliation), etc. Sometimes, it is very difficult to overcome these costs. Consider just the case of an elderly person who needs to fill out an online form, facing significant information costs as well as potential frustration and humiliation. As a result, he/she may give up. In the US, there is a very low take-up rate for different state or federal programs, such as claiming for certain tax benefits (see: Bhargava & Manoli, 2015).

We can see from these examples that "sludge" is a significant obstacle to free decision-making and taking various actions. But, the question is *what is the source of "sludge"*? The source of "sludge" lies in our cognitive biases, the most prominent of which are the status quo bias (or inertia), the present bias, and the procrastination.[22] *The status quo bias* is the human tendency to maintain the current situation, resulting in resistance to change. Another name for this bias is *inertia,* which is present even when the costs of change (transition costs) are low and when the importance of the decision is great (Samson, 2021: 190, 178). We might recall the example of rebate on products or services and explain "sludge" by this bias or by procrastination. *The present bias* generally means impatience or the need for immediate gratification in the decision-making process (Samson, 2021: 184).[23] As future seems like an "unknown territory", we are often tempted to postpone our administrative tasks for "tomorrow" despite the serious consequences of the delay. The present bias might explain why we often do not want to fill out various forms, especially if they are complicated or unclear. It is obvious that this bias is related to procrastination.

On the other side of the "sludge" is the "sludger", the one who intends to exploit our biases to satisfy his/her interests and desires. This role is most often played by an economic

[22] Of course, there are other cognitive biases, such as already mentioned over-optimism of loss aversion.

[23] For example, an individual prefers to receive 10 Euros today compared to 15 Euros tomorrow. But, an individual would be willing to wait for an extra day in the future when faced with the same choice.

entity that wants to maximize profit by behaving opportunistically or, even worse, in a Machiavellian fashion. In addition, there is a possibility that he/she does it *unintentionally*. This case is especially present in the public sector when bureaucrats or legislators impose some administrative burden out of "best intentions", which turn out to produce unwanted negative consequences. In this regard, the question arises whether the administrative burden is always bad, or whether it serves some good purposes. Further on, we elaborate on this issue.

3.3. "Sludge" and administrative burdens

It has been said that sludge is an "excessive friction". But, the question remains how "excessive" it is, and whether its "excessive" nature is always and necessarily bad. This raises a normative question that can be answered by linking it to the concept of ***administrative burden***. First, we need to see what the administrative burden is and what its components are.

Herd & Moynihan (2019: 2) state that "*the administrative burden relates to the costs of business regulation or basic bureaucratic encounters, such as renewing a driver's license"*. Those costs include: 1) *learning costs* (costs of searching for information about public services); 2) *compliance costs* (costs of complying with rules and requirements); 3) *psychological costs* (stressful experience, loss of autonomy, stigma arising from bureaucratic encounters).[24] In addition, a distinction should be made between the administrative burden and administrative costs (RSPP, 2020: 123). ***Administrative costs*** are costs that arise due to the obligation to comply with the regulation; they comprise the costs that regulated entities have due to the very nature of their activities (*business as usual costs*), which they would have without the requirements imposed by the regulation and the administrative burden. ***The administrative burden*** is a part of administrative costs that arises exclusively due to the obligation to comply with the regulation. The administrative burden usually entails imposing unnecessary or excessive obligations on citizens and businesses entities (so-called *unnecessary administrative burden*).

Any contact of citizens with the state can produce these "frictions", and the question is how to reduce them. Herd & Moynihan (2019: 2) believe that it can be done either by simply reducing them (e.g., by increasing trust in citizens) or by shifting responsibilities from individuals to the state (e.g., by forming different databases). Herd & Moynihan (2019: 2–12) also elaborate on why administrative burdens matter, and single out *three* main dimensions. Namely, administrative burdens concern the exercise of some basic rights, such as the right to vote or the right to health care and social protection. People assess the quality of public services, as well as the competence of the government, by whether or not they face administrative burdens, and to what extent. Administrative burdens influence our educational decisions (e.g., which faculty we will choose to enroll in). They even determine whether we are members of a society or not (especially when it

[24] Herd & Moynihan (2019: 23) specify the structure of these costs: 1) ***learning costs***: *time and effort* expended to learn about the program or service, ascertaining eligibility status, the nature of benefits, conditions that must be satisfied, and how to gain access; 2) ***compliance costs***: a) *provision of information and documentation* to demonstrate standing; b) *financial costs* to access services (fees, legal representation, travel costs, etc.); c) avoiding or responding to discretionary demands made by administrators; 3) ***psychological costs***: a) *stigma* arising from applying for and participating in an unpopular program; b) *loss of autonomy* arising from intrusive administrative supervision; c) *frustration* at dealing with learning and compliance costs, unjust or unnecessary procedures; d) *stress* arising from uncertainty about whether a citizen can negotiate processes and compliance costs.

comes to immigrants). So, administrative burdens are *consequential* by nature. Beside that, they are *distributional;* they affect some groups more than others, and often reinforce social inequalities. Just consider how the administrative burdens concerning the right to vote affect different groups of people, for instance, people with disabilities or the poor. Finally, administrative burdens are *constructed* in such a manner that they are the product of administrative and political choices. Politicians can use administrative burdens as a tool to promote certain ideological goals. The current immigration crisis in Europe confirms this thesis (just consider how Hungary introduced all the barriers to the passage of immigrants).

We can see that the concept of administrative burden is broader than the concept of "sludge". First of all, the administrative burden does not necessarily have to be "excessive". Therefore, unlike "sludge" which always has a negative connotation, the administrative burden might have a positive role. Sunstein (2020a: 12–15) has summarized the reasons that may justify administrative burdens:

1) *self-control problems* – for instance, *a cooling off policy* might prevent people from making decisions in "hot states" of consciousness that are present at the time of marriage, divorce, or when purchasing weapons;
2) *privacy and security* – private and public institutions often ask for some personal information: date of birth, place of residence, ID number, bank account number, amount of income, credit history, data on prior conviction or prosecution, etc. Providing such information, with (or sometimes without) our consent, may be in our best interest since it preserves our personal or material security. Of course, there is the question of misusing this information or asking for too much information (see: Sunstein, 2020b) but, in principle, giving these information might prevent the worst-case scenario;
3) *acquiring useful data* – companies acquire useful information about consumers to provide better services, or state officials request information from people about their employment training or educational funding to promote public and private accountability;
4) *eligibility and qualifications* – the beneficiaries of certain government programs must be eligible to use them, or private companies must have relevant information on workers' qualifications. Information on eligibility and qualifications sometimes *but not always* implies an unnecessary administrative burden (especially considering that private and public institutions might obtain information on their own, using, for instance, machine learning).

By and large, the government has a legitimate interest in imposing some administrative burdens (costs) on citizens. The same can be said for private institutions. After all, whether administrative burdens are excessive or not, and whether they shift into "sludge" or not, is the empirical question. We can conclude that sometimes there is a thin line between low and high frictions, and that high frictions could serve good purposes whereas low frictions could serve bad purposes. For instance, the high frictions might be the "deliberation-promoting nudge"[25] (such as *cooling off*), while at the same time they often represent the "sludge" or the "evil nudge" (e.g., a long period of waiting for a visa or ID card). On the other side, if consumers have defaulted to an expensive health care program, it would be a "harmful nudge".

[25] The *deliberation-promoting nudge* navigates us to rely on the thoughtful and rational *System 2* of our cognitive apparatus when making decisions, instead of the intuitive and faster *System 1* (see: Kaneman, 2015).

3.4. How to measure administrative costs or burden?

The specific technique for measuring the administrative costs/burden imposed by regulations, primarily on economic entities, is ***the standard cost model** – abbr.* ***SCM*** (RSPP, 2020: 106). This model is usually a part of a broader cost-benefit analysis that considers the effect on the costs of aligning economic entities with public policy or more often regulation. *The SCM does not provide an answer if a regulation or a public policy measure is necessary or not* (RSPP, 2020: 106).

The SCM breaks down the prescribed administrative procedures and requirements into procedures and necessary activities that regulated entities must perform. Then, based on the data on the time limits required to meet these requirements, as well as the data on the costs they create, it measures the administrative costs, i.e. the administrative burden. For the purpose of the SCM, costs are divided into: 1) *financial costs* (e.g., administrative fees or fees for the use of some public goods); 2) *structural costs of implementing regulations* (e.g., costs of complying with certain production standards or installing anti-pollution filters); and 3) *administrative costs* which are divided into necessary administrative costs and the administrative burden.[26] In addition, the SCM takes into account *information requests*, including obligations towards the state or a third party arising from an administrative procedure or a request regarding the collection, delivery, or storage of data in the form and manner prescribed by regulations. In order to meet the requirements, it is necessary to undertake *administrative activities*. Using the SCM, the costs of performing these activities are estimated.[27] For example,[28] let's assume that a person in a regulated company needs five hours to perform five steps that include an administrative request (getting to know the request, filling out forms, collecting data, etc.). Suppose that the price of labor is 600 RSD and that the additional costs (e.g., transportation costs, telephone costs, etc.) total 1,000 RSD. In that case, the *cost of the administrative procedure* would be 4,000 RSD.[29] If this request refers to 1,000 regulated economic entities per year, the total administrative cost would be four million RSD. Now, if it is estimated that the person in a regulated company would need two hours *without* handling an administrative request, the total cost would be 2,200,000 RSD.[30] This hypothetical example shows a clear distinction between the administrative burden and administrative costs[31] (for more detail, see: RSPP, 2020: 106–112).

3.5. The policy against "sludge" and administrative burdens

We have already said that administrative burdens should be generally reduced by increasing trust in citizens or shifting responsibilities from individuals to the state. We have also explained how they should be measured but we did not say anything about *how* to reduce administrative burdens/"sludge".[32] Sunstein (2020a: 15–18) proposed **"Sludge**

[26] In the previous section, we have explained the difference between administrative costs and administrative burden.
[27] The Republic Secretariat for Public Policies of the Government of the Republic of Serbia (abbr. **RSPP**) enables the calculation of administrative costs and potential savings/additional costs (see: https://rsjp.gov.rs/sr/kalkulator/).
[28] This is an adapted version of an example taken from (RSPP, 2020: 109).
[29] 5 hours x 600 RSD + 1,000 RSD = 4,000 RSD (Serbian dinars).
[30] 2 hours x 600 RSD + 1,000 RSD = 2,200 RSD x 1,000 entities = 2,200,000 RSD.
[31] The difference between them is: 4,000,000 RSD – 2,200,000 RSD = 1,800,000 RSD.
[32] The Register of Administrative Proceedings (RAP) has been recently established in Serbia (see: https://rap.euprava.gov.rs/privreda/home), as an introductory step in the preparation for their optimization within the E-Paper Program for Simplification of Administrative Procedures and Regulations, managed by the Republic

Audits”. Reducing the “sludge” is of great importance because it not only decreases costs for public and private institutions but also has significant effects on improving the quality of citizens' life, and even save lives (in the medical sphere). In this regard, Sunstein (2020a: 16) gives three clever suggestions. First of all, he suggests **periodical “reviews”** of the existing administrative burdens to see if they are justified and to remove the outdated, pointless or too expensive ones. Secondly, the least burdensome method (the one generating the lowest costs) should be chosen to achieve certain social or private goals, the so-called **cost–effectiveness analysis** (abrr. **CEA**).[33] Thirdly, he suggests applying the standard **cost-benefit analysis** (abbr. **CBA**); if the benefits outweigh the costs, then the administrative burdens have to be justified.[34] In addition, Sunstein (2020a: 16) proposes not only to use the classic economic analysis of social costs and social benefits but also to assess the **proportionality**.[35] In other words, there is a need to determine whether substantial administrative burdens are established and, if so, whether they serve significant purposes? The negative answer to this question would reveal the “sludge”. The potential answer may also be informative and stimulate the “sludge” reduction in the future. In other words, public and private institutions may learn about the benefits of reducing the “sludge”, which would serve as an incentive to reduce sludge. But, it should be borne in mind that they can sometimes use “sludge” to achieve certain political goals (in the public sphere) or to beat competitors (in the private sphere).

We can now summarize the differences between the administrative burden, nudge, and “sludge” in Table 2.

Table 2 Administrative burden, nudge, and sludge – demarcation

Concept	Type of frictions	Policy/technique
nudge	low high	simplifications, automatic enrollment deliberation-promoting nudge
administrative costs (burden)	low ***high (“sludge”)***	/ **Sludge Audits (CEA, CBA, SCM, PP)**

Source: Author

Secretariat for Public Policies/RSPP (see: https://rsjp.gov.rs/wp-content/uploads/Program-ePAPIR_final_usvojeno_110719.pdf).

[33] “*Cost-effectiveness analysis* is a method that compares the costs of different public policy options (alternatives) that create the same or approximately the same type of benefits (results, outcomes or effects), and which is used when the benefits are difficult to monetize” (RSPP, 2020: 123).

[34] According to the *Manual Cost Benefit Analysis – Republic of Serbia* (2010: 129), “*cost-benefit analysis* represents a conceptual framework applied to any systematic, quantitative appraisal of a public or private project to determine whether, or to what extent, that project is worthwhile from a social perspective”. This practically means that the investment is valuable and can be financed from public funds if the socio-economic benefits outweigh the socio-economic costs.

[35] Kovač (2021: 11) states that “[…] according to **the principle of proportionality** (abbr. **PP**), *regulations are only adopted to the extent strictly necessary to achieve the set goal, which in public law relations is the balance between the public interest and the rights of individual parties*”. The PP is closely related to the concept of **effectiveness** (srp. *delotvornost*) – a qualitative concept which means the relationship between set goals and achieved results (Jerinić, Vučetić, Stanković, 2020: 323). In addition, in **the impact assessment** (abbr. **IA**), the PP means that the analysis of the effects of public policy and regulations has to be conducted only for those segments for which public policy and regulations have *significant effects*. In other words, it is not necessary to spend time and other resources when it is not purposeful, i.e. when the effects (financial, economic, social, environmental, etc) are not significant (RSPP, 2020: 9, 37).

4. CONCLUSION

In this paper, the authors have provided a terminological clarification of the following mutually related concepts: nudge, shove, budge, sludge, and the administrative burden. The first three concepts (nudge, shove, and budge) represent the basis for the application of three close but distinct types of behavioral interventions, whose impacts differ: libertarian paternalism (weak), coercive paternalism (strong), and behavioral regulation of externalities (the strongest). These interventions are often intertwined and it is sometimes difficult to draw a clear line between them. Thus, their application depends on the subject matter of regulation and the context in which the regulation is implemented. In addition, a clear demarcation line is given between "nudge" and "sludge", the latter of which is defined as "excessive frictions". In fact, "sludge" represents the use of "nudge" for bad purposes (the so-called "evil nudge"), for instance, solely to maximize profits to the detriment of consumer interests. Also, we made a distinction between necessary administrative costs and the administrative burden, which is designated as the imposition of unnecessary or excessive obligations on citizens and businesses entities. Finally, the question of reduction of the administrative burden/sludge was raised. In this regard, the recommended policy for the detection and minimization of "sludge" is "sludge audits". There are four elements of this policy. The first is to periodically review the existence of administrative burdens. The second is to determine whether social or private goals have been achieved by choosing the method that generates the lowest costs. The third is to determine whether the administrative burden is in line with the cost-benefit standard. The fourth is to assess whether the administrative burden is proportional to the goals it aims to pursue. So, the administrative burden might be useful if it is in line with cost-benefit analysis and the principle of proportionality (if it serves a significant purpose). If it is established that it does not serve such a purpose, it can be clearly said that the administrative burden is **"sludge"**; thus, it has to be reduced.

The conclusion is that there are different public policies according to what they target (internalities or externalities), if and to what extent they encroach on the freedoms of individuals, and whether their implementation serves good or bad purposes. But, in principle, what they all have in common is, *inter alia*, that they are grounded in *behavioral insights*.

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TERMINOLOŠKO RAZGRANIČENJE I PRAKTIČNE IMPLIKACIJE BIHEVIORISTIČKIH KONCEPATA: Nudge, Shove, Budge, Sludge, Administrative Burden

U ovom radu autori daju precizno terminološko razgraničenje sledećih biheviorističkih koncepata: „blago usmeravanje ili gurkanje" (engl. nudge), „guranje" (engl. shove) i „pomeranje" (engl. budge). Na osnovu ovih koncepata i tri definisana kriterijuma (sloboda/prinuda, internalije/eksternalije i bihevioristički nalazi), autori objašnjavaju različite biheviorističke javne politike i njihove praktične implikacije: 1) biheviorističke javne politike libertarijansko-paternalističkog usmerenja (politike usmeravanja), 2) politike prinudnog paternalizma, i 3) biheviorističke regulacije eksternalija. Potom, autori pružaju terminološku distinkciju između koncepta „mulja" (engl. sludge) i „usmeravanja" (engl. nudge), te raspravljaju o njihovim potencijalnim (zlo)upotrebama. Konačno, na osnovu nivoa „frikcija", autori razgraničavaju i koncepte „administrativnog opterećenja" (engl. administrative burden) i „mulja" (engl. sludge), kao i vrste javnih politika koje se preporučuju za njihovo smanjenje, od kojih se izdvaja provera (revizija) „mulja" i administrativnog opterećenja (engl. slugde audits). Zaključak je da su sve navedene javne politike veoma bliske, po predmetu regulacije i intenzitetu zadiranja u slobode pojedinaca neznatno različite, ali da sve imaju zajednički koren u biheviorističkim nalazima.

Ključne reči: *Bihevioristička ekonomija, „gurkanje" (nudge), „guranje" (shove), „pomeranje" (budge), „mulj" (sludge), administrativno opterećenje, biheviorističke javne politike*

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HUMAN RIGHT TO WATER: BETWEEN THE CONSTITUTION AND MARKET INTERESTS *

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Abstract. *Given the importance of water for the survival of humankind and the entire living world, and considering that many parts of the world are running out of water, the human right to water has gradually become an issue of considerable concern worldwide. We should also bear in mind that water has an economic value. It is often figuratively called "the blue gold'' or "the oil of the 21st century'', which makes it a precious commodity and an object of market exchange. In such circumstances, it is necessary to make a strong turn and establish the human right to water in the highest legal documents. In this paper, the author points to the importance of incorporating the right to water in the constitutionally guaranteed rights. The constitutional regulation and protection of this human right would create conditions to protect the general public interest, which should prevail over the individual commercial interests in water privatization. The starting point for this analysis will be the existing normative framework which has been established at the international level, involving the key role of the UN. Exercising the right to water will also be explored from the perspective of the ECtHR jurisprudence. The paper will also point to the examples of constitutional provisions in the countries which have recognized this right.*

Key words: *human rights, right to water, constitution, water as an economic good*

1. INTRODUCTION

The importance of water and its role in the life of every human being has been recognized since ancient times[1]. The digital age and the changes it has brought to all spheres of our lives have added even more value to water. The development of civilization,

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[1] The right to water is believed to be dating back to 6,000 BC. Archaeologists found evidence of water storage sites as early as the 4th millennium B.C.E. (See: Beail-Farkas, 2013: 771).

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population growth and rapid technological development have led to increased need for water; on the other hand, they have produced a very negative effect on this resource, in terms of its pollution and scarcity. This supports the prediction of the United Nations that, within 30 years, one of four inhabitants of our planet will live in a country with chronic or occasional shortages of drinking water (Arden, 2016: 772). Considering that water could cost more than oil in near future, it is not surprising that water is increasingly called "the blue gold" or "the oil of the 21st century". This clearly indicates its economic value, which makes it a commodity and an object of market exchange. The frightening predictions, which we do not want to believe, speak of water wars in the near future.

The basic question is what we can do at the normative level now in order to prevent such developments. Is it time to talk about the right to water as a human right, which should find its place in the Constitution? By regulating this right and its adequate protection in the Constitution, can we create conditions where the essential citizens' interest for the preservation of this natural resource will prevail over its economic dimension and the accompanying market interests?

The starting point for such an analysis will be the existing normative framework, established at the international level, in which the UN has played a key role. The exercise of the right to water will be evaluated from the European perspective and the jurisprudence of the European Court of Human Rights. Special attention will be paid to constitutional solutions in comparative law. Then, we will analyze the economic dimension of water and how to maintain a balance between these two components.

2. The Human Right to Water

In the context of human rights discourse, the right to water can be viewed from two angles: we can talk about the right to water as a derivative right, or recognize the right to water as an independent, autonomous right. The right to water understood as a derivative right is a right that has no independent existence, but is derived from the existing rights. It is of an accessory nature, and this right can be invoked only in connection with the enjoyment of one of the guaranteed rights and freedoms. The human right to water has traditionally been constructed as a necessary condition for exercising other human rights, such as the right to life or the right to health; it can also be observed in the context of environmental rights. The full exercise of the right to life requires the recognition of basic living conditions. Water is, indisputably, its essential component. The right to water observed in connection with the right to health implies the provision of adequate hygiene, which implies the obligation of the state to prevent threats to health arising from unsafe and toxic water conditions. Thus, the right to health includes not only access to clean and safe drinking water but also water in terms of waste cleaning and protection against pollution (Bluemel, 2004: 969). The main disadvantage of such regulations is that the protection of the right to water is exercised casually rather than as the ultimate priority. The scope of protection of the right to water depends on the extent to which water scarcity affects the fundamental right. Recognition of the right to water as an independent right is of a more recent date. Confirmation of such an attitude can be found in numerous international and constitutional documents worldwide.

2.1. International legal guarantees on the right to water

Insight into the relevant international law documents tells us that the right to water was first implicitly recognized in the context of exercising other human rights. The Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) do not contain explicit guarantees on the right to water. However, the importance of this right is recognized in the context of the right to life, the right to dignity, the right to an adequate standard of living, and the right to health. The right to water is mentioned in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979) in the context of the State Parties' obligation to adopt appropriate measures to eliminate discrimination against women in rural areas.[2] We also find corresponding provision in the Convention on the Rights of the Child (1989), which obliges the contracting parties to recognize the right of the child to enjoy the highest attainable standard of health and to facilitate for the treatment of illness and rehabilitation of health (Article 24 CRC).

The right to water was first explicitly mentioned at the United Nations Conference on Water (Mer de la Plata, 1977), whose goals were to assess the state of water resources, to ensure an adequate supply of quality water to meet the socio-economic needs of the planet, to increase water use efficiency, and to promote national and international resolve to avoid a global water crisis before the end of the 20th century.

A huge step forward was made by the adoption of General Comment no. 15 (2002): The Right to Water, which was issued by the UN Committee on Economic, Social and Cultural Rights. This document emphasizes that water is a limited natural resource and a public good of fundamental importance for human life and health. Regarding the normative content of the right to water, it emphasizes that the right to water contains both freedoms and entitlements.

The right to water falls into the category of guarantees which ensure an adequate standard of living. Water and water supply must be available to all, without discrimination, within the jurisdiction of the Member State. Although it is a soft law instrument, great progress has been made in regulating the right to water at the international level. It covers four main aspects of the right to water: quality, availability, accessibility, and allocation of water resources. The quality dimension does not imply access to unlimited amounts of water, but only to those that are necessary for basic needs. It refers to clean and safe water. Regarding the accessibility criteria, it is emphasized that water must be available to everyone and located in the immediate vicinity. Accessibility means that the right to water is at disposal to all communities, that water bills are in line with one's financial situation, and that no one can be deprived of water for basic needs. The right to water must be available to all under equal conditions, without any restrictions; special protection is provided for marginalized groups, such as women, children, minorities, refugees, asylum seekers, internally displaces persons, migrant works and detainees.

General Comment No. 15 on the right to water adopted by the UN Committee on Economic, Social and Cultural Rights recognized the normative content of the right to

[2] Article 14.2. CEDAW: reads: "State Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right : (...) (h) to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications."

water. It refers to availability, quality and accessibility (physical accessibility, economic accessibility, economic accessibility, non-discrimination and availability of information). It also reaffirmed the obligations of the Contracting States, which include the obligation to respect the right to water, the obligation to protect it, and the obligation to ensure the implementation of this right.[3]

Referring to the General Comment and other relevant acts, the UN General Assembly adopted the Resolution on the Human Right to Water and Sanitation (2010).[4] The right to safe drinking water and sanitation is recognized as a human right that is essential for the exercise the right to life and other human rights. This Resolution was the first document that recognized the right to water and sanitation as an autonomous human right. It called on states and international organizations to provide resources, build capacities and ensure technology transfer, through international assistance and cooperation, especially in developing countries, in order to scale up efforts to provide safe, clean and affordable drinking water, and sanitation for all. The UN Human Rights Council took a step further by adopting the HRC Resolution 18/1 of 28 September 2011,[5] which reaffirmed the primary responsibility of States to take steps to ensure the implementation of the right to safe drinking water and sanitation by all appropriate measures.[6]

When it comes to the regulation of the right to water in the regional documents, we will refer to the European Convention on Human Rights (ECHR) and jurisprudence of the ECtHR. The ECHR does not provide explicit guarantees on the right to water. Yet, given that the ECtHR interpreted this Convention as a living instrument, and in line with the doctrine of effective implementation, the ECHR provides indirect protection of the right to a healthy environment and the right to water. The applicants most frequently invoke the right to life (Art. 2), which the Court accepts as indirect protection of the environment (Davinić, Krstić, 2012: 423). In addition, the ECtHR deals with environmental issues as a component of the right to respect for family and private life (Art. 8), freedom of expression (Art. 10), property rights (Art.1 P-1), and procedural guarantees, such as the right to a fair trial (Art.6) and the right to an effective remedy (Art. 13). In the case of *Zander vs. Sweden*, the Court rejected the state's argument that the provision of domestic law dealing with compensation for damage to property from environmentally hazardous activities was a matter of public law rather than a "civil right''. The Court noted that the applicants' claim directly concerned their ability to use the water from their drinking well, which was one aspect of their right as owners of the land on which they were located.[7] Following this

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[3] In particular, *the obligation to respect* implies that states do not interfere and do not violate the enjoyment of the right to water. States are obliged not to relocate water resources in a manner that violates this right. This obligation is of negative nature and should prevent obstruction of access to water when such a right is exercised. The state must not stop water supply in an underdeveloped area with poorer population, in order to improve water supply in a rich area. *The obligation to protect* refers to taking the necessary measures, including legislative ones, to prevent non-compliance with the right to water. It implies an effective system of legal remedies, as well compensation in case of human rights' violations. The obligation to ensure the implementation of this right refers to taking basic measures so that people can enjoy the right to water. Once water is fairly distributed for personal and household use, the state can determine the use of water resources for other purposes, such as agricultural or industrial needs.

[4] Resolution A/RES/64/292 of the United Nations General Assembly, July 2010

[5] Resolution A/HRC/RES/18/1 of the Human Rights Council, 28 September 2011

[6] The Human Rights Council expressed its concern that approximately 884 million people lacked access to improved water sources and more than 2.6 billion people did not have access to improved sanitation (Preamble, para.10).

[7] Case of *Zander vs. Sweden* (application no 14282/88), para. 27

judgment, the Court demonstrated that the guarantees of the rights contained in the ECHR can also apply to cases where the right to clean water has been called into question.[8]

We will pay special attention to the most recent case, the case of *Hudorovič and others v. Slovenia*.[9] The applicants alleged that the State had failed to provide them with access to basic public services, such as drinking water and sanitation, contrary to the requirements of Articles 3 and 8 of the Convention. The question of what constitutes adequate access to drinking water was the key issue examined by the Court. The Court made it clear that access to safe drinking water is not, as such, a right protected by Article 8 of the Convention.[10]. However, the fact is that we cannot survive without water and that access to safe drinking water is of key importance for health and human dignity which are at the core of private life and home enjoyment, protected by Article 8. The Court was fully aware of the fact that "the level of access to water and sanitation largely depends on complex and country-specific assessments of various needs and priorities for which funds should be provided". The Court confirmed that the states should have wide discretion in evaluating those priorities and legislative choices they make.[11]

The issue of access to drinking water has aroused great interest among citizens, who are aware of the importance of this resource and the necessity of its preservation. We should mention the European Citizens' Initiative (ECI) "Right2water'', which collected 1.9 million signatures (online) in support of improving access to safe drinking water for all Europeans. This is the first European citizens' initiative that called for implementing the EU legislation and policies envisaged by the European Parliament and the Council. [12]

On 16 December 2020, the European Parliament adopted the revised Drinking Water Directive[13], which entered into force on 12 January 2021. Some of its key features are: increasing water quality standards, combating emerging pollutants, introducing measures to ensure better access to water, especially for vulnerable and marginalized groups, measures to encourage tap water, measures to reduce water leakages and enhance transparency in this sector. The Directive introduces a preventive approach to reduce pollution at source by presenting the "risk-based approach", which is based on the analysis of the whole water cycle, from source to distribution (EC, 2021b). [14]

2.2. Human right to water: constitutional guarantees

The catalog of human rights established in the first written constitutions has gradually expanded over time by adding new rights, in keeping with the changes that have taken place in the society. This shows that human rights are not established once for all but they are flexible enough to respond to new challenges.

[8] Case of *Dubetska and Others* (appl.no. 30499/03); case of *Dzemyuk v. Ukraine* (appl.no. 42488/02).
[9] Case of *Hudorović and other v. Slovenia* (appl.no. 24816/14, 25140/14)
[10] Para. 166 of the ECtHR Judgment in *Hudorović and other v. Slovenia, S*trasbourg,10 March 2020
[11] Para. 144 of the ECtHR Judgment in *Hudorović and other v. Slovenia, S*trasbourg,10 March 2020
[12] The ECI initiative was formally presented to the Commission in December 2013 with the following request: Water is a public good, not a commodity. The EU institutions and Member States are obliged to ensure that all people enjoy the right to water and sanitation and have universal access to these public goods. Water supply and water management should not be subject to internal market rules, and water supply services should be exempt from liberalization. EC(202a): Drinking Water; https://ec.europa.eu/environment/water/water-drink/information_en.html
[13] Council Directive 98/83/EC of 3 November 1998 on the quality of water intended for human consumption, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31998L0083
[14] EC (2021b): Revised Drinking Water Directive 2020; https://ec.europa.eu/environment/water/water-drink/review_en.html

The constitutional guarantees on the right to water have developed hand in hand with the development of international regulation on this matter. The right to water was initially recognized as a derivative right, in the context of other related rights already in place. In the next phase, the right to water was recognized as an independent right. Introducing new rights in the existing constitutional catalogue of human rights is never easy. This process may be accompanied by conflicting views and heated debates over whether this is necessary and how it will affect existing human rights. The right to water has not been an exemption.

The derivative nature of the right to water has been recognized in numerous constitutions. Assuming that water is necessary for human life, it is understandable why this right is often seen as an element of the right to life. The right to life is the oldest human right and ranks among the highest-priority human rights. People have the right to life and resources that keep them alive, primarily the right to water. Due to the absolute necessity of water for human life, this right is treated as a natural right, which derives from human nature but also from historical conditions, basic needs or notions of justice (Beail-Farkas, 2019: 772). Human rights and human environment are inseparable. In order to live, people must have air (to breathe), water (to drink), food (to eat) and a place to live. If any of these elements are contaminated or destroyed, human existence is also endangered. The interdependence of the right to life and a healthy living environment means that these two rights influence each other as a necessary condition for enjoying these rights. A healthy environment is a condition for human life and, consequently, for the right to life (Orlović, 2014: 169).

The right to water can be observed in the context of environmental rights, i.e. the right to a healthy environment. Thus, *the Constitution of Belgium*[15] determines that everyone has the right to lead a life in keeping with human dignity, which *inter alia* includes the right to the protection of a healthy environment (Art. 23). *The Constitution of Norway*[16] stipulates that "every person has a right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources should be managed on the basis of comprehensive long-term considerations which will safeguard this right future generations as well. In order to safeguard their rights, citizens are entitled to information on the state of the natural environment and on the effects of any encroachment on nature that is planned or carried out" (Art. 112). *The Constitution of Slovakia*[17] recognizes the right to protect the environment and foster cultural heritage It determines that every person has the right to favourable environment but, at the same time, each person has to protect and improve the environment. The state is responsible for the economic use of natural resources, for ecological balance and the efficient environmental policy (Art. 44). Similarly, *the Spanish Constitution*[18] stipulates that everyone has the right to enjoy an environment suitable for personal development, as well as the duty to preserve it. The public authorities should protect the rational use of all-natural resources in order to protect and improve the quality of life and to preserve and restore the environment, relying on essential collective solidarity. Criminal or administrative sanctions will be imposed on those who violate these provisions, as well as the obligation to compensate for the damage

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[15] Article 23, the Constitution of Belgium, https://www.dekamer.be/kvvcr/pdf_sections/publications/constitution/GrondwetUK.pdf

[16] Section 112,the Constitution of Norway; https://lovdata.no/dokument/NLE/lov/1814-05-17?q=grunnloven#KAPITTEL_5

[17] Article 44, the Constitution of Slovakia; https://www.constituteproject.org/constitution/Slovakia_2014.pdf

[18] Article 45, the Constitution of Spain; https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf

(Art. 45). Bearing in mind its responsibility to future generations, the *German Constitution*[19] establishes that "the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by the executive and judicial action, all within the framework of the constitutional order (Art. 20). In the Republic of Croatia, the human right to water derives from the right to a healthy life and state obligation to ensure conditions for a healthy environment, as well as from social clause guaranteeing the right to assistance to the weak, helpless, poor and others, aimed at providing for their basic living needs due to unemployment or inability to work (Sarvan, 2017:59).

Taking into account that the future and the very existence of humanity are inextricably linked to the natural environment, France went a step further by amending the Constitution in 2005 and incorporating the 2004 Environmental Charter. *The Charter for the Environment*[20] declares that every person has the right to live in an environment which is balanced and respectful of health. Every person is obliged to participate in preserving and improving the environment, to preclude any damage that may be caused to the environment, to limit or rectify the consequences of such damage (Articles, 1, 2, 3, 4). Every person has the right of access to the environment information in possession of public authorities, and to participate in the public decision-making process that are likely to affect the environment, under the conditions and to the extent prescribed by law (Article 7). The Charter also lays down the groundwork for public policies that promote sustainable development and alignment of environment protection and enhancement mechanisms with economic development and social progress (Article 6).

The constitutitonalization of the right to water is a new phenomenon in modern constitutionality, which has become relevant in recent years. *The Constitutional Act Amending Chapter III of the Constitution of the Republic of Slovenia*,[21] which was adopted on 17 November 2016 and entered into force on 25 November 2016, introduced the right to drinking water, stating that everyone has the right to drink water and that water resources shall be a public good, managed by the state. The primary function of water resources is to supply the population with drinking water and water for household use, which shall not be a market commodity (Article 70a). Hence, water resources cannot be sold. This seems to have been one of the main motives for the constitutional regulation of the right to water (Vučić, 2017:527).

Here, we will pay special attention to African and Latin American countries which have been facing the lack of water as well as the consequences arising from the participation of private capital in the management of water services. In Africa, the pioneer of constitutional regulation of the right the water is *the Constitution of the Republic of South Africa* (1996). It stipulates that everyone has the right to access sufficient food and water. The state must take reasonable legislative or other measures, within its available resources, to achieve the progressive realisation of each of these rights. Notably, South Africa is a country facing major water supply problems, Due to the lack of water, many parts of the country are facing severe droughts; in addition, one of the negative legacies of the Apartheid is the extremely uneven distribution of water supply. Thus, the Constitution does not impose an absolute obligation of the state to provide minimum amounts of water to all but calls upon the state

[19] Article 45, Basic Law of the Federal Republic of Germany; https://www.btg-bestellservice.de/pdf/80201000.pdf

[20] Articles 1-7, the French Charter for the Environment; https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/charter_environnement.pdf

[21] Article 70a, the Constitutional Act Amending Chapter III of the Constitution of the Republic of Slovenia, *Official Gazette of the Republic of Slovenia* No. 75/16.

to act reasonably with its resources (Arden, 2016:776). It is worth mentioning that South Africa has made progress in water policy and expanded the water infrastructure. Over a period of ten years, since the constitutional recognition of the right to water, access to water has been provided for about 10 million people (Beail-Farkas, 2013:79).

On the African continent, the right to water has also been recognized by the Constitutions of Uganda, Ethiopia and the Gambia. *The Constitution of the Federal Democratic Republic of Ethiopia* (1994)[22] recognizes the right to water in Article 90 (titled "social objectives"). It is stipulates that, to the extent the country's resources permit, policies should aim to provide all Ethiopians access to public health and educations, clean water, housing, food and social security (Art. 90). *The Constitution of Uganda* (1995) recognizes the importance of clean and safe water. It determines that the state takes all practical measures to promote a good water management system at all levels (Art. 21)[23]. *The Constitution of Gambia* (1997) affirms the role of the state in facilitating equal access to clean and safe water, as one of the social goals (Art. 216)[24].

In Latin America, the right to water is closely linked to water management and the protection of human rights. Some countries have amended their constitutions to explicitly recognize the right to water: Mexico (2012), Bolivia (2009), Ecuador (2008), and Uruguay (2004). Notably, the recognition of the right to water in the *Constitution of Bolivia* followed as a result of a strong and determined struggle of citizens against the commercial exploitation of water resources by private corporations.[25] Today, more than 9.7 million people have access to water[26], as the Constitution stipulates that every person has the right to water and food (Art. 16).

Since the number of constitutions recognizing the right to water is not large at the moment, it is difficult to talk about standards in the constitutionalization of this matter. But, certainly, it can be noted that the guarantees of this right are accompanied by corresponding states' obligations and insisting on the public ownership of water sources. The process of envisaging the right to water as an independent right is generally perceived as a significant step forward in the field of human rights. Constitutional recognition of this right implies being aware of new values and taking into account new threats to human life. The inclusion of the right to water in the corpus of constitutionally guaranteed rights makes this right judicially protected, which can have positive consequences both from the standpoint of ensuring the exercise of the basic human needs and in terms of the living environment. The constitutionalization of the human right to water actualizes the principle of the rule of law in social relations pertaining to the supply of drinking water and sanitary needs, and emphasizes the responsibility of the state to respect, protect and ensure the implementation of the human right to water as fundamental social values (Sarvan, 2017: 65).

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[22] Article 90, the Constitution of the Federal Democratic Republic of Ethiopia; https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/41544/63844/F-300752700/ETH41544%202.pdf

[23] Article 21, the Constitution of Uganda; https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/44038/90491/F206329993/UGA44038.pdf

[24] article 216, the Constitution of Gambia; https://www.aripo.org/wp-content/uploads/2018/12/Constitutionof Gambia.pdf

[25] In the city of Cochabamba in central Bolivia, the management of a private consortium increased the price of water by more than 200%, which generated strong opposition and mass mobilization of the indigenous population, known as "Cochambama wars for water". Consequently, the high water tariffs were suspended, which marked a victory against the commodification and exploitation of Bolivia's water resources. (See: Palević, Rapajić, 2016:39).

[26] This number includes 86% of the population; 95% of the population in urban areas and 67% in rural areas have access to water. This is a significant improvement compared to the pre-2005 period when only 68% of the population had access to water in urban areas and 44% of the population in rural areas (See: Bluemel, 2004: 984).

Guaranteeing the right to water at the constitutional level should be accompanied by the existence of the necessary preconditions for its adequate and effective legal protection. The character of this right as a true subjective right enables each individual to demand that his/her right be respected and adequately protected. However, this does not necessarily lead to an adequate quality of protection. To be specific, the degree of protection of rights largely depends on the general level of human rights' protection, the institutional framework for the protection of rights, and the economic development of the state as a very important factor in ensuring human rights' protection. The economic strength of a country is one of the great advantages in solving environmental problems and can have multiple positive effects on the enjoyment of human rights. The right to water is the right of present generations, which is inherited from past generations and which should be passed on and preserved for future generations.

3. Water as an Economic Good

Thus far, water has been observed as a human right, but we should also observe its economic dimension. As a fundamental natural resource and a source of life, water has long been treated as a common good, which should be available to all members of society. Therefore, public resources at the state or local level were in charge of managing water resources. However, as the need for water has increased over time with the development of the society and economy, its economic dimension has become increasingly prominent, particularly in current circumstances of limited water resources. Thus, the current emphasis is on water resources. The understanding of water as an economic good is encouraged by the intention to determine its economic values by reducing its misuse and contributing to its rational use. This has resulted in "the transformation of social relations pertaining to the use of water resources" (Nikolić, Midorović, 2016: 1083). It has generated various models of private partnership participation in the water supply industry, supported by the World Bank, the IMF and other important economic and financial organizations. The privatization of the water sector in many underdeveloped countries was a precondition for obtaining loans and assistance from the IMF and the World Bank (Sarvan, 2014:631). Given that the basic interest of a private company is profit, in this case it implies a full reimbursement of costs incurred by using water for various purposes. There are two ways to involve the private sector in the water supply system: a) full privatization, or b) public- private partnership, as a more desirable form because the public authority remains the owner with some kind of control (Fitzmaurice, 2007: 558). Public-Private Partnership (PPP) is the framework of joint action including the public sector and the private capital, whose primary goal is to secure the proper functioning of public services and the implementation of the public interest activities (Cvetković, 2016: 541). The involvement of the private sector in the economic activity of drinking water supply and wastewater disposal systems has a long-standing history. In the 19th century, private companies held 94% of the water services market while, in 2000, this share was only 15%; in 2014, only 10% of water services in the world were provided by private companies (Saravan, 2014:617). Private companies were primarily driven by making profit and they were not willing to invest capital in activities aimed at improving the quality of water supply services. For this reason, public suppliers prevail nowadays in the field of water supply..

Given that water has economic value, we may wonder whether this means that water is both a commodity and an object of exchange on the market? (Palević, Rapajić, 2016: 47). The perception of water as the economic good offered greater water supply opportunities in many areas but, in some cases, it resulted in gross discrimination of the population due to high water prices and negative consequences for the social order. So, if water supply is reduced to a public service, it may produce far-reaching negative consequences in the country.

There is a number of international documents where water is perceived as an economic good. The first such document is the *Dublin Statement on Water and Sustainable Development* (1992), which states that water has economic value in all its uses, and should be recognized as an economic good. Water management as an economic asset is seen as a significant way to achieve efficient and equitable use and protection of water resources. However, water supply can cost more than some poor communities can afford. In order to ensure an even distribution of water, the Dublin Statement declares that the concept of water as an economic good must be limited to the concept of water as a human good. Treating water as an economic good without restriction and full costs can lead to inequality (Bluemel, 2004: 963).

The economic dimension of water was also recognized in the Report of the *UN Conference on Environment and Development (Agenda 21).*[27] Given the importance of water in all aspects of life, the general goal is to ensure adequate water supplies of good quality, while preserving the hydrological, biological and chemical functions of the ecosystems."Water resources management is based on the perception of water as an integral part of the ecosystem, a natural resource and a social and economic good, whose quality and quantity determine the nature of its use…In developing and using water resources, priority has to be given to satisfying the basic need and preserving ecosystems…Water users should be charged appropriately" (UNSD, 1992: 196-197).

The third international document in this series is the *Johannesburg Declaration on Sustainable Development* (2002), adopted at the World Summit on Sustainable Development (WSSD). The Declaration points out that the need to improve water resources and to promote their distribution among competitive needs in a way that gives priority to meeting the basic needs of people. It also included the demand for the preservation and restoration of ecosystems and their functioning, the preservation of quality of drinking water, and a balanced use of water in industry and agriculture. Regarding water as an economic good correlates international investment treaties with human rights and, *prima facie,* connects the incompatible elements (Muharemović, 2019:184). The impact of business (investment) can be observed in the following situations: when the company is involved in the water supply process; when the company is a water user, especially where water is a limited resource; and when the business competes with other users when business activities themselves affect sources water (e.g. when industry causes water pollution) (Guaghran, 2012: 53). Today, in the world of international law, it is impossible to view activities pertaining to investment, development, the private sector, the environment, political and social participation, and human rights as unrelated areas. Violations of the right to access to drinking water are increasingly being called into question before international investment arbitrations on account of the foreign investors' conduct. In the last decade, there have been twelve publicly available cases, ten against Argentina and the two against Bolivia and Tanzania (Muharemović, 2019:194).

[27] UN Sustainable Development/UNSD (1992) UN Conference on Environment & Development (UN CED *Agenda 21),* Rio de Janerio, Brazil, 3-14 June 1992.

4. THE RIGHT TO WATER IN THE CONSTITUTIONAL SYSTEM OF SERBIA

In the Serbian constitutional system, the right to water is not recognized as an independent right, but it is derived from the right to the healthy environment. In line with the tradition of previous constitutions, *the Constitution of Serbia* (2006)[28] includes the right to healthy environment (clean air, clean water and clean land) in the catalogue of constitutional rights. Article 74 specifies: "Everyone shall have the right to healthy environment, and the right to be timely and fully informed about the state of the environment. Everyone, especially the Republic of Serbia and autonomous provinces, shall be accountable for the protection of the environment. Everyone is obliged to preserve and improve the environment."

The constitutional rank of this right implies the application of basic principles established by the Constitution in the field of human and minority right. These principles are the direct implementation of guaranteed rights, the purpose of constitutional guarantees, the restriction of human and minority rights, and the prohibition of discrimination. The constitutional rank of the right to a healthy environment is particularly important from the aspect of the protection of this right. In that sense, the applicable provisions are contained in Article 22 of the Constitution, which stipulates that everyone whose human and minority rights guaranteed by the Constitution have been violated or denied has the right to judicial protection and the right to eliminate the consequences arising from the violation. The constitutional rank of this right also enables the protection of this right in the procedure instituted by filing a constitutional appeal.

It is worth noting that Serbia has more than 400 sources of healthy and drinking water of the highest quality, only 20% of which is exploited. Moreover, 286 types of mineral, thermal and thermo-mineral waters have been registered in Serbia. For this reason, the competent UN commission included Serbia among the first 50 countries in the world that have large reserves of healthy and drinking water. However, in the future, Serbia may have a problem with a lack of drinking water due to pollution and inadequate wastewater regulations. The lack of explicit constitutional recognition of the right to water has led to the predominance of its economic component. It may be best illustrated by the fact that foreign companies have been granted concessions to exploit our water resources. Almost 80% of bottled water produced in Serbia is in the hands of foreign companies. Thus, our country missed a great opportunity to turn the country into a strategically important and rich country by relying on the richest natural resource.

The right to water is particularly relevant in the context of preserving mountain rivers and contesting the construction of mini-hydropower plants. Citizens raised a legitimate request to be asked about things that directly affect their lives. Without instituting a prior public debate, the National Assembly adopted amendments to the Waters Act in July 2021, which included many harmful provisions and caused great dissatisfaction among citizens and ecological organizations. Thereupon, the President of the Republic vetoed and returned the law to the Assembly because it was not harmonized with the constitutional legal order of the Republic of Serbia.

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[28] The Constitution of the Republic of Serbia, *Official Gazette RS,* no. 98/2006; (Art. 74 Healthy Environment).

5. CONCLUDING REMARKS

For the benefit of all mankind, water must first be seen as a human right. The situation in which water supply is treated as a public service is inconsistent with its essence as the basic means of subsistence. To exercise the right to water, the main emphasis should be on strengthening, creating and maintaining a strong infrastructure that can supply water to a growing population. It is necessary to ensure the availability of water for both human needs and commercial use but to avoid friction between these two contradictory segments of water use (Tripathy, Mohapatra, 2009: 318).

In order to ensure the implementation of the right to water for all, there must be a compromise between the interests of the states, corporations, and individuals. In this context, a reminder of Rousseau and Locke's attitudes seems appropriate. Pursuant to Rousseau's concept of a social contract, people surrender some part of their human rights and freedoms to the government in order to ensure better protection of the rights that are viewed as a common good. Speaking about property in the Second Debate on Government, Locke mentioned water and emphasized that natural resources should belong to all people. Both Rousseau and Locke promoted the idea that each person should take as many resources as they need. Such an approach is especially important when it comes to the right to water. When water is scarce and many people do not have access to drinking water, states are responsible for enacting laws and procedures that will ensure safe drinking water for all, which will take precedence over other uses. Following Locke's suggestion, states can impose penalties on corporations, as well as on households, that consume excessive amounts of water in dry periods. These funds can then be used to supply drinking water to those members of society who do not have access to clean water (Watrous, 2011:124). This approach may establish a kind of balance between water needs.

In practice, private corporations may be more powerful than sovereign states. However, investors should be held accountable when their activities violate the right to healthy drinking water and sanitation. In such cases, the "public interest'' argument may be the first step that allows states to hold private investors accountable in proceedings instituted before the competent dispute resolution body. Moreover, given that higher public interests are fully recognized by international norms, principles and standards, this argument may be used to reject the investor's request before the institution for resolving international disputes. By protecting the public interest, the arbitral tribunal may raise the issue of access to justice to a higher level. Investment agreements between private investors and the state should not be a "*carte blanche*" for investors; they have to take into account the general interest of the community and respect the basic principles. One of the greatest challenges is to strike the right balance between international investment treaties and environmental obligations. In this context, international arbitrations and companies cannot view water merely as a commercial commodity. Human rights are not a matter of philanthropy but legally binding norms, which make corporations accountable for any violation of the guaranteed rights and freedoms. The observance of human rights is not voluntary; it aims to ensure the welfare of the society but also so safeguard universally agreed and generally accepted human rights (Cavallo, 2013: 49-50). In the circumstances when this right is not sufficiently developed at the international level, its constitutional recognition could contribute to the general protection of water resources and their more efficient use. In that process, its constitutional valuation is expected to be above market interests.

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LJUDSKO PRAVO NA VODU: IZMEĐU USTAVA I TRŽIŠNIH INTERESA

Polazeći od značaja koji voda ima za čitav živi svet i za čovečanstvo, a imajući u vidu da u mnogim delovima sveta vode ponestaje, sve češće i sve više govorimo o ljudskom pravu na vodu. Voda istovremeno ima i ekonomsku vrednost. Ona se često figurativno označava kao „ plavo zlato'' ili „nafta 21. veka'', sto je čini robom i predmetom razmene na tržištu. Stoga, u takvim uslovima, neophodno je napraviti snažana zaokret i garantovati pravo na vodu najvišim pravnim aktom. U radu, autor ukazuje na značaj uključivanja prava na vodu u korpus ustavom garantovanih prava. Ustavnim regulisanjem, a samim tim i ustavnom zaštitom ovog prava mogu se stvoriti uslovi da interes svih građana prevagne nad individualnim tržišnim interesima za privatizaciju vode. Polaznu osnovu za ovakavu analizu predstavljaće postojeći normativni okvir, koji je ustanovljen na međunarodnom planu, a koji obuhvata ključnu ulogu OUN. Ostvarivanje prava na vodu biće istraženo i iz ugla prakse Evropskog suda za ljudska prava. U radu se takođe ukazuje na primere ustavnih odredbi onih država u kojima je ovo prava izričito priznato.

Ključne reči: *ljudska prava, pravo na vodu, ustav, voda kao ekonomsko dobro*

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VIOLENCE AGAINST PERSONS WITH DISABILITIES: THE "DARK NUMBER" OF CRIME

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Abstract. *People with disabilities are a particularly vulnerable to victimization by violence. This risk increases due to their dependence on other family members. This negative phenomenon has to be observed not only from the criminological perspective but also from the sociological perspective because violence does not happen outside the society. In this paper, the authors will indicate the "dark number" of crime of violence against people with disabilities, with specific reference to violence against people with mental disabilities in residential institutions. The aim of this paper is to point out to possible social responses to violence against people with disabilities.*

Key words: *violence, people with disabilities, victimization, prevention*

1. INTRODUCTION

Violence is an integral part of almost every society. It is a phenomenon which has been present since the first societies and civilizations. Hobbes considered that the natural state of affairs was marked by constant conflicts, subordination and imposing the will of the stronger (Milosavljević, 2013: 72). Many eminent thinkers endeavoured to address the question how to establish a society and relevant mechanisms to restore order and ensure protection and stability of all its members (Rousseau, 1993; Machiavelli, 1983). In the historical perspective, various attempts have been made to create effective mechanisms for combating insecurity and violence against the most vulnerable members of the social community.

Contemporary societies strive to combat violence through their criminal justice systems. Notably, in many criminal legislations, the crime of violence is not incriminated as a separate criminal offense, but there are criminal offenses in which violence is envisaged as an essential

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element of the criminal offense (*corpus delicti*) or as a *modus operandi* (Konstantinović-Vilić, Nikolić-Ristanović, Kostić, 2012: 106). Although anyone can become a victim of a crime with elements of violence, there are categories of people who are more susceptible to victimization by this type of crime due to their personal characteristics or health condition. The vulnerable groups falling into these risk categories are elderly people, internally displaced persons, minors, and people with disabilities. When it comes to physical and sexual violence, the very nature of disability makes it impossible to offer active resistance to the abuser and, sometimes, to recognize violence (e.g. economic violence).

There are numerous international legal documents that provide protection to persons with disabilities from exploitation, violence and abuse. The most important one is the UN Convention on the Rights of Persons with Disabilities (CRPD, 2006), which promotes and protects the human rights, freedoms and inherent dignity of people with disabilities. In particular, Article 16 CRPD regulates in detail the measures for the protection of persons with disabilities from violence, abuse and exploitation (Tatić, 2006: 14). Despite the solid legal framework for the protection of the rights of persons with disabilities, their reality is often different. Thus, it is necessary to investigate the phenomenon of violence against persons with disabilities.

In search of an adequate social response to this negative and undesirable social phenomenon, the authors of this paper point out to the emerging forms of violence against persons with disabilities, with specific reference to the role of disability itself in the victimogenesis of the crime of violence against persons with disabilities.

2. Forms of Violence against People with Disabilities

Forms of violence against persons with disabilities do not differ from the forms of violence that other social groups are exposed to. They include physical, psychological, sexual, and economic violence, violence in the workplace (mobbing), and multiple violence (Konstantinović-Vilić, Nikolić-Ristanović, Kostić, 2009: 111). Each of these types of violence will be briefly presented further on in this part of the paper.

Physical violence *against persons with disabilities* is any form of threat to their physical integrity. This is the most obvious form of violence because it leaves visible consequences in the form of bodily injuries of varying degrees. In the past, especially during World War II, people with disabilities were deprived of their lives because of their disability. The most notorious example is the Nazi "*Aktion T4*" Program in Nazi Germany, where 70,273 institutionalized people with physical or mental disabilities were killed from October 1939 to August 1942 (Mirić, 2015a: 117). In addition to the aforesaid systemic violent actions against persons with disabilities, another dangerous phenomenon are individual cases of violence within institutions. In such cases, the perpetrators are largely the employees of those institutions whose professional obligation is to take care of the persons with disabilities and ensure their well-being and safety. We often learn about cases of physical violence and abuse involving vulnerable categories of citizens from media reports. Women with disabilities residing in residential institutions are particularly exposed to this type of violence. Marijana Čanak states that *"In Serbia, 18,250 people live in some form of collective accommodation, and over 11,000 people report having some form of disability. Half of these people are girls and women. Life in the institution and guardianship additionally puts them at risk of various forced interventions, such as physical restraint, isolation, excessive use of drugs, taking contraceptives without*

consent, sterilization, forced abortions and separation from the child "(Čanak, 2017)[1]. Therefore, we can conclude that the problem of violence against persons with disabilities is extremely complex and multidimensional, for which reason all social actors must be actively involved in solving it. Victimization of persons with disabilities is much more than a mere social problem. Although physical violence is most visible because it leaves manifest marks on the victim's body, psychological violence can have far-reaching consequences for the psychological/mental well-being of individuals because it leaves traces on the soul and in the psychic life of the victims.

Psychological (emotional) violence *against persons with disabilities* includes dehumanization and humiliation of these persons who are subjected to verbal or nonverbal treatment that undermines their self-esteem: lying, mockery, criticism, derogatory remarks, threats, social isolation, visit bans, humiliation, etc. (Milić Babić, 2009: 599). This type of violence is especially devastating because it is aimed at the victim's psyche, in terms of shaping one's self-perception ("*me in the mirror*"). In particular, psychological violence is more difficult to prove because it does not leave visible consequences on the victim's body, while its effects are multiple. The power of words is clearly depicted in the proverb: "A word is mightier than a sword"; it reflects the destructive effect of psychological violence, whose consequences are deeper and much more severe than physical injuries. Why is this type of violence so dangerous? Our psychological domain consists of our temperament, character, emotions, desires, hopes (etc.); at the same time, every individual "copes" with problems differently and has different dispositions for reaction to external stimuli. When our personality (internal integrity) is violated, trauma and other psychopathological conditions often occur, which can lead to a depressive state, including psychosis. When it comes to psychological violence, people with disabilities are more vulnerable than the general population. One of the most important reasons is the manifestation of the disability itself, which makes them more susceptible and "accessible" in the eyes of the perpetrators. Certainly, it is not always the case. Combating psychological violence against persons with disabilities is part of a broader and continuous social process of combating violence in society. *Inter alia*, criminal law has responded to psychological violence by enacting numerous legislative acts and incriminating unlawful or harmful conduct, with the aim of protecting one's "peace of mind". Medical research has long recorded and scientifically proven the connection between the injured psyche and the sick body by indicating to psychosomatic diseases. However, combating psychological violence in society is much more than that; it is a question of consciousness and conscientiousness) of every single individual (Mirić, 2021).[2]

Sexual violence against persons with disabilities includes unwanted touching and all types of sexual assault, such as: rape, sodomy, nudity and photography (Milić Babić, 2009: 600). Some studies on this issue show that this type of violence is widespread. A study on sexual violence against women with intellectual disabilities conducted by Elman (2005) showed that the rate of sexual victimization in this group of women was 4 to 10 times higher than in women without intellectual disabilities. Elman emphasizes that, in 70% of cases, women with disabilities were victims of sexual violence at some point in their lives (Milić Babić, 2009: 601). To our knowledge, no empirical research has been conducted in

[1] Source: http://portaloinvalidnosti.net/2017/07/sprecavanje-nasilja-nad-zenama-sa-invaliditetom-u-rezidencijalnim-ustanovama

[2] Source: https://uklonimobarijere.rs/psihicko-nasilje-nad-osobama-sa-invaliditetom/,

Serbia on the prevalence of this form of violence against persons with disabilities, and it can be assumed that the "dark number" of this form of crime is large, primarily due to the victims' fear to report the perpetrators. In Serbia, the problem of legal qualification of sexual violence against persons with disabilities often arises in court practice. Namely, sexual violence against persons with disabilities can be qualified as "intercourse with a helpless person" (Article 179 CC).[3] This crime is committed by a person who commits sexual intercourse with another by taking advantage of one's mental illness, mental retardation, other mental disorder, disability or any other condition due to which the person is incapable of resistance. The prescribed punishment for the commission of this criminal offence is a term of imprisonment ranging from 5 to 12 years; thus, the legislator equates the range of punishment for the basic form of this criminal offense with the basic form of the criminal offense of rape (Article 178 CC). Such a legislative solution can be assessed as positive because it prevents the negative practice of awarding lenient punishment to the perpetrators of sexual intercourse against helpless persons in relation to rapists; it also serves as a deterrent to the perpetrators of such offences.

Economic violence *against persons with disabilities* is a special form of violence which implies the lack of opportunity for persons with disabilities to use their income. In most cases, it refers to their earnings or compensation for the care and assistance of another person. The perpetrators of this form of violence are most frequently family members and people who take care of people with disabilities. Apart from people with disabilities, frequent victims of economic violence are the elderly as well. Elderly people have a number of difficulties in terms of integration into the society, primarily due to inactivity, retirement, complicated family relationships, and lack of social support (Kostić, 2010: 48). Another significant problem related to people with disabilities is their dependence on other persons in order to meet their daily needs, which can result in violence against this risk group.

Workplace violence *(mobbing) against persons with disabilities* is a specific form of violence which is reflected not only in the unavailability of adequate jobs for persons with disabilities but also in creating an environment that has a disincentive effect on their further advancement. This form of violence is the least frequently reported one because very few people with disabilities are employed. The results of the 2011 census in the Republic of Serbia show that only 12.4% of the total number of persons with disabilities (71,107 people) were economically active, while only 9.0% of all persons with disabilities had a job at the time (Marković, 2014: 72). In particular, it is important to point out to the very low percentage of the working population among persons with disabilities in relation to the general population. If we consider the most economically active age category (aged 30 to 49), which includes people who have finished their education, entered economic activity and got integrated into economic flows and business, we notice that the percentage is economically active persons in the general population is over 80%, while the percentage of economically active persons with disabilities (who are employed, have been employed, or are looking for their first job) is only 40%. This means that the share of economically active people with disabilities is half as low as the share of economically active persons in the total population. Therefore, not even half of people with disabilities aged 30 to 49 are economically active, i.e. they do not work, have never worked, and are not looking for their first job (Marković, 2014: 76). Taking into account these unfavorable data on the economic

[3] The Criminal Code of the Republic of Serbia (CC), *Official Gazette of RS,* 85/2005, 88/2005-corr., 107/2005-corr. 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, 35/2019

activity of persons with disabilities and their aggravated employability in comparison to the general population, it can be reasonably assumed that persons with disabilities often do not report cases of mobbing in the workplace for fear of losing their jobs, even though there is a satisfactory legislative framework for prosecuting and punishing workplace mobster within the Act on Prevention of Harassment at Work (2010). [4]

Multiple (mixed) violence *against people with disabilities* entails cases when a person is subject to multiple forms of violence (physical, sexual, psychological/emotional, economic). This form of violence is very difficult to detect because it often remains within the domain of "family privacy", and people with disabilities are not always able to recognize it and react adequately. Therefore, disability can be a factor in victimization of persons with disabilities, which will be discussed in more detail in the next part of paper.

3. Disability as a Factor of Victimization of People with Disabilities in Violence Crimes

Disability can be a significant factor in victimization of persons with disabilities in criminal offences involving elements of violence. How are disability and violence co-related? According to our understanding of this problem, it is not easy to give a concise and precise answer to this question because the correlation can be multiple. The most prominent factors that may influence the occurrence of victimization of persons with disabilities are as follows:

1. increased dependence on the help of others;
2. type of disability;
3. gender and age of the victim;
4. denial of human rights (in terms of inconsistent application of the law and lengthy court proceedings),
5. suppression of violence due to the victim's fear to report the violence (which remains in the domain of "family privacy");
6. difficulties in proving acts of violence;
7. social and societal isolation of persons with disabilities is conducive to violence;
8. prejudices about disability;
9. lack of information on effective ways to combat specific forms of violence;
10. economic and any other dependence of the victim on the perpetrator;
11. lower level of education;
12. increased risk of institutional care (Milić Babić, 2009: 603-604).

The simultaneous impact of all these factors increases the risk of victimization of persons with disabilities. The negative social position of persons with disabilities is a consequence of "prejudice, stereotypes, underestimation of abilities, misunderstanding of human rights and equality issues" (Vasiljević-Prodanović, Stojković, 2012: 281). A protective factor that can contribute to reducing the risk of victimization is the social inclusion of persons with disabilities, which essentially implies the acceptance of diversity. It can contribute to overcoming prejudices, annulling insufficient or bad communication between people, and promoting equal opportunities as the society strives for prosperity (Vasiljević-Prodanović, Markov, Kojić, 2010: 67). Creating a truly inclusive society is a civilizational obligation of every democratic society.

[4] The Act on Prevention of Harassment at Work, *Official Gazete of RS,* 36/2010.

This ongoing process implies raising the (already) attained level of respect for human rights, which is the best indicator of justice within each community (Mirić, 2015b: 124).

At this point, it seems appropriate to point out to the problem of the "dark number" of crime, which implies the number of committed but undetected criminal offences (Konstantinović-Vilić, Nikolić-Ristanović, Kostić, 2012: 64). Taking into account the aforesaid victimogenic factors, we can assume that there is a large number of cases of unreported cases of violence against persons with disabilities in Serbia. Based on the previous short presentation on disability as a factor of victimization of persons with disabilities, one can understand the importance of equal treatment for all. It means that persons with disabilities shall not be discriminated and excluded from established legal mechanisms, nor subjected to undemocratic practices (Beker, Milošević, 2017: 120-121; Mirić, Vasiljević-Prodanović, 2018: 55; Nikolajević, 2019: 23), which is the basis for their prosperity.

4. VIOLENCE AGAINST PEOPLE WITH DISABILITIES IN RESIDENTIAL INSTITUTIONS

Violence against people with mental disabilities has been present throughout history, but it is only in recent years that society has begun to tackle this important problem by instituting the first targeted research on this issue. Although the number of studies is still very small, they can map some causes of the problem concerning violence against people with disabilities, especially those who are exposed to violence in residential institutions.

History shows that the abuse of people who are accommodated in residential institutions is a common phenomenon, and that the risk of abuse for people with mental disabilities increases from the moment of being placed in an institution. It is estimated that 82% of all cases of violence and neglect occur in residential institutions (Beker, Milošević, 2017: 644). The most alarming fact is that violence in institutions is often considered acceptable, which reinforces the "culture of institutional violence" that is becoming commonplace. Each residential institution creates its own specific culture of violence by isolating and intimidating the users, and exercising very poor control over the employees' conduct. It contributes to creating an environment where institutional violence and abuser are accepted as a common pattern of behaviour, which new employees in residential institutions are encouraged to practice. Therefore, the causes of violence in residential institutions should be sought in insufficient control of the employees' work which legitimizes various illegal behaviors, particularly taking into account the nature and manner of functioning of residential institutions, but also the employees' personal attitudes. Most residential institutions were created for the purpose of providing care and support to persons with disabilities. This approach is a consequence of the medical model (approach) to disability, which is treated as a disease that needs to be cured. In this process, persons with disabilities have the status of passive subjects whose status and rights are decided by the medical staff, rather than the service-users themselves.[5] It should be emphasized that the very act of placing persons with disabilities in institutions against their will is an act of violence. It is also known that residential institutions provide the same services to all users. without due attention to individual user needs; thus, every detail of the users' life is subject to control, including the

[5] Although this model has been replaced by the social model, where disability is treated as a consequence of the impact of social factors preventing persons with disabilities from participation in social life, the remnants of the medical model are still visible in residential institutions.

control and arrangements of their daily activities, as well as decision that users should make independently (e.g. the scope of control includes decisions about what users will eat, when they will eat, and how they will eat). As the lives of dependent service users are completely subject to scrutiny, they are deprived of the basic human rights. Thus, it is very easy for potential abusers to perform acts of violence in situations where a person does not have the right to privacy and emotional support, where employees have a legitimate right to violate one's privacy and enter his/her bedroom at any time, and where they have unrestricted access to their body. Another aspect of this problem has been highlighted by research showing that users of residential institutions feel that employees in institutions are much more important than them, and have a greater range of rights than they actually have. Instead of emphasizing the users' needs and insisting on the quality of provided services, the focus is primarily on ensuring employment in residential institutions. Thus, the institution exists for its own sake, rather than for the sake of its users, which largely affects the employees' perception in terms of neglecting the primary purpose of these institutions and their own role in the institutions. If employees in residential institution completely dehumanize people with mental disabilities and perceive them as objects incapable of understanding what is happening to them, it is clear why employees see their own conduct as wrong and completely unacceptable to people without disabilities living outside residential institutions (Beker, Milošević, 2017: 644-651). Preventing violence against persons with disabilities in institutions is a very complex task. In addition to detecting, prosecuting and punishing the perpetrators, prevention is a key factor in combating this form of crime.

5. Integrative Approach to Violence against People with Disabilities

Violence is manifested in a specific social context, which also has its historical aspect. Some anthropological studies have shown that, in the period preceding the emergence of the state, the position of persons with disabilities was directly related to the interpretation of disability as a consequence of "being marked by supernatural powers". As such, people with disabilities enjoyed certain benefits stemming from common belief in magic cults. Due to their ability to communicate with the supernatural, they enjoyed certain reputation in society, regardless of their incapacity to participate in economic activities. In ancient times, the position of persons with disabilities deteriorated because disability was incompatible with the ancient ideal of beauty. The position of people with disabilities in the Middle Ages did not improve because disability was perceived as "a sin"; thus, contrary to the true essence of Christianity, "Christian charity" bypassed people with disabilities (Petrović, 2012: 866). The modern age has led to significant changes in the normative framework for the protection of persons with disabilities. Nowadays, anti-discrimination laws are in force in most countries worldwide. It implies that all categories of the population, regardless of their personal characteristics, deserve equal treatment before public authorities, both in public and private life. But, have these changes led to significant improvement in the position of people with disabilities and contributed to their protection from violence? Unfortunately, the answer to this question is negative. Although no extensive research has been conducted in Serbia on the phenomenological and etiological characteristics of violence against persons with disabilities, we can assume that the "dark number" of crime is substantial, and that detecting such cases and prosecuting perpetrators is a great challenge for all social actors. We believe that the best method for researching

violence against people with disabilities is the case study method.[6] The study of this criminological phenomenon is an important task for all criminologists and victimologists in Serbia. The application of case analysis methods in Serbia will be possible when people with disabilities, who have experienced some form of violence, are empowered to seek help and protection in appropriate court and out-of-court proceedings. Keeping records on victims of crime may also enable state institutions to help them in a timely manner. The introduction of mandatory court records on all victims of crime would contribute to improving the position of victims and reducing the risk of secondary victimization.

What can be done to prevent violence against people with disabilities? Raising awareness of the entire society about the real and positive capacities of this category of people to contribute to the development of the community in which they live can be singled out as a measure of primary prevention. This should be a permanent task of the whole society, rather than an incidental project activity of an association of persons with disabilities. In cases where violence has already occurred, the response of the judicial system must be swift and timely. This is the only way to ensure legal security, not merely as a legal principle but also as the cornerstone for the application of legal norms.

6. CONCLUSION: RECOMMENDATIONS FOR IMPROVING THE POSITION OF CRIME VICTIMS WITH DISABILITIES

Instead of concluding and summarizing the views expressed in the paper, we may offer some recommendations for protecting people with disabilities from violence and improving the position of crime victims with disabilities. In that context, we consider that it would be very useful to attend to in the following activities:

1) amend Article 54a of the Criminal Code by envisaging a special aggravating circumstance if the criminal offense has been committed out of hatred towards persons with disabilities;
2) improve court records on final judgments in terminated criminal proceedings, including relevant data on the victim (his/her social status and medical records); it would diminish the harmful consequences of the non-existence of a special state body that would be in charge of keeping a single record of all victims of crime, including those with disabilities;
3) provide continuous education for employees in residential institutions to recognize and adequately respond to institutional violence, and ensure adequate staff selection based on expertise; as an important measure against violence, these activities are aimed at providing protection to people with disabilities in residential institutions and ensuring relevant professional support to the beneficiaries which is incompatible with any act of violence;
4) encourage empirical research on violence against persons with disabilities, in order to reduce the "dark number" of this form of crime (the number of undetected cases);
5) empower persons with disabilities to recognize and report various forms of violence which they are exposed to (by organizing various forums, workshops, educational programs, providing free legal and psycho-social assistance and support).

[6] Thus, special attention would be paid to each case of violence (i.e. each victim), and in-depth interviews would lead to identifying factors that enabled such acts of violence. A specific reason for choosing this approach is the sensitivity and vulnerability of people with disability, particularly considering the treatment they are exposed to in residential institutions.

These are some possible solutions for combating violence against people with disabilities, which is a separate criminal-law, criminological and sociological phenomenon. Cases of violence against persons with disabilities are most often part of domestic violence, but such cases also occur in residential (social protection) institutions. Violence leaves serious psycho-social consequences on every victim, but people with disabilities are particularly vulnerable because violence can deteriorate their health in some cases. Therefore, we urge for a more systematic scientific research on violence against persons with disabilities. The scientific research in this area and expertise of different professionals who work with persons with disabilities on a daily basis and for their benefit is essential for promoting the rights of persons with disabilities (Mirić, Vasiljević-Prodanović, 2018: 56). A comprehensive multidisciplinary approach to this problem can contribute to creating a supportive climate for combating violence against people with disabilities and empowering the vulnerable categories. The presented recommendations may motivate all social actors to actively contribute to the creation of a fair and desirable living environment for persons with disabilities. On the other hand, the recommended activities may empower people with disabilities and free them from fear of reporting violence. Therefore, the study of violence against persons with disabilities should be approached holistically. The criminological approach to violence against persons with disabilities enables to observe this phenomenon through the prism of causes and manifestations, whereas the sociological approach enables to observe this phenomenon in a broader social context. We believe that the criminological-sociological approach to violence against persons with disabilities is eclectic enough to ensure a comprehensive examination of all aspects of this problem and provide a solid basis for further research in this area.

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NASILJE NAD OSOBAMA SA INVALIDITETOM: KRIMINALITET "TAMNE BROJKE"

Osobe sa invaliditetom predstavljaju posebno vulnerabilnu grupu za viktimizaciju nasiljem. Ovaj rizik se povećava zbog prisutne zavisnosti od drugih članova porodice. Da bi se ova negativna pojava sagledala, pored kriminološkog, neophodan je i sociološki pristup problemu jer se nasilje ne dešava van društva i njegovih okvira. U radu će autori ukazati na „tamnu brojku" kriminaliteta nasilja nad osobama sa invaliditetom (broj neprijavljenih slučajeva), dok će posebna pažnja biti posvećena nasilju nad osobama sa invaliditetom u rezidencijalnim ustanovama. Cilj rada jeste ukazivanje na moguće društvene odgovore na nasilje nad osobama sa invaliditetom i preporuke za njihovu prevenciju.

Ključne reči: *nasilje, osobe sa invaliditetom, viktimizacija, prevencija*

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Review Paper

DEVELOPMENT OF UNITED NATIONS AND EUROPEAN UNION POLICY ON AIR POLLUTION

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Abstract. *The aim of this paper is to briefly present the nature of air pollution as part of environmental law with reference to its scientific background, the history of development of this branch of law through activity of the United Nations and the European Union, the most significant regulations adopted by these organisations and measures for fighting air pollution. In the first part of the paper, the author focuses on the nature of environmental law, particularly on air pollution, the most common pollutants, its sources, and effects on human health and environment. The second part contains the review of the most important regulations regarding ozone depletion and climate change. In the third part, the author provides information on ambient air quality legislation, followed by specific measures imposed by this legislation. Finally, the fourth part reviews the contribution of the International Court of Justice and the European Court of Human Rights to the development of international environmental law.*

Key words: *environment, air pollution, emissions, monitoring, assessment*

1. ENVIROMENTAL LAW AND AIR POLLUTION

1.1. Nature of ‘law in the area of air pollution

Air pollution is a scientific, social and legal challenge. The branch of law dealing with this phenomenon is highly complex and still developing. Its complexity is driven by the fact that air pollutants can be of both local and transboundary character since the human activity in one country can affect the environment and cause air pollution elsewhere (Fisher, Lange, Scotford, 2013: 603). This fact raises a question about the adequate regulation for dealing with air pollutants and their environmental and health consequences. Regulating air pollution has always been a challenge since pollutants or their effects are invisible at first. Therefore, legal actions have largely been taken *ad hoc* and with delay, while some solutions used decades ago included just a hope that the problems would go

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away (Fisher, *et al.,* 2013: 605). As further explained, in the period between the 1930s and 1970s, the UK Government used strategy to clean up local air by introducing taller chimneystacks for industrial installations; taller chimneys allowed air pollutants to be dispersed at higher levels in the atmosphere which resulted in considerable local air quality improvement. However, pollutants carried by prevailing winds and reacting in the atmosphere caused disastrous environmental consequences in Northern and Central Europe. The so-called German and Scandinavian 'forest death' occurred in the 1960s, when acid rain partly caused by SO_2 emissions from the UK destroyed plant life as well as the ecology of surface waters (Fisher, *et al.,* 2013: 605).

The fact that there is '*no straightforward linear relationship'* between air pollutants and the environmental degradation only contributes to the regulatory complexity of these problems (Fisher, *et al.,* 2013: 606). As noted by Fisher *et al.* (2013), ecosystems are affected not only by air emissions but also by other human activity (e.g., tropical deforestation), Pollutants move fast with prevailing winds, reacting with other elements in the atmosphere and among themselves; hence, the casual chain between emissions and environmental damage is unpredictable (Fisher, *et al.,* 2013: 603).

The nature of environmental law, particularly the area of air pollution has particular characteristics, such as: very few judicial decisions; dependence on scientific knowledge; many different regulations, some of which overlap, while others introduce contradictory strategies (Fisher, *et al.,* 2013: 614). Yet, the most challenging issue is the administrative implementation of regulations. If the national administrative mechanism lacks flexibility, the potential for public law disputes arises (Fisher, *et al.,* 2013: 614). Furthermore, improvement of air quality is possible only if environmental policy is ranked higher in the political priority (Kraemer, 2012: 281). As noted by Kraemer (2012), where a Member State is determined to improve air quality by reducing emissions and working with clean-up programmes that are provided in EU legislation, then this legislation besides its complexity will lead to reduction of pollutants, air quality improvement and will reflect on climate change and the ozone layer (Kraemer, 2012: 281).

1.2. Air pollutants: origin, types and effects

Air pollution refers to "air that contains gases, dusts, fumes, chemicals, particulates or odour in harmful amounts", which "are or could potentially be harmful to the health and comfort of humans and animals, or could cause damage to plants and materials" (Australian Academy of Science, 2019)[1].

Air pollutants can be of both anthropogenic and of natural origin. Volcanic eruptions, windblown dust, sea-salt spray and emissions of volatile organic compounds from plants are examples of natural emission sources. Anthropogenic sources of hazardous air pollutants include burning of fossil fuels in electricity generation, transport, industry and households, agriculture, waste treatment, industrial processes and solvent use, etc (EEA, 2020)[2]. Notably, air pollution is a common problem but sources differ depending on the economic and social development of each state (Secretariat for Environment Protection, City of Niš, 2017: 45).

[1] Australian Academy of Science (2019): Where does Air Pollution come from? https://www.science.org.au/curious/people-medicine/where-does-air-pollution-come

[2] European Environment Agency (2020): *Air Pollution*; https://www.eea.europa.eu/themes/air/intro

As cited in Fisher *et al.* (2013), the most common anthropogenic pollutants affecting human health, air quality, cause climate change or other environmental problems are:

- SO_2 and NO_x cause acid rain (a process of removing these acid pollutants from the atmosphere by wet deposition, causing the death of flora and fauna, corrosion of buildings and degradation of soils); sulphur dioxide can travel hundreds of kilometres on prevailing winds, causing acid rain beyond borders of the country of origin;
- Greenhouse gases (water vapour, carbon dioxide, methane, nitrous oxide, ground level ozone and chlorofluorocarbons); these gases “work together with clouds” and create “the greenhouse effect” which maintains a constant temperature on Earth; if their concentrations increase, their balance is changed, causing distortion to Earth’s climate system and leading further to climate change;
- Heavy metal particulates (cadmium, lead, mercury); these metals are highly toxic and harmful to human health, causing kidney, bone and lung problems;
- Benzene, polycyclic aromatic hydrocarbons, dioxins and furans; these pollutants are present in fossil fuels; many of them have toxic and carcinogenic effects, sometimes causing birth defects or altering DNA;
- Persistent organic pollutants, which can pass on to new generations due to their resistance to environmental degradation processes, causing harmful effects on neurological, reproductive and immune systems;
- Volatile organic compounds;
- Particulate matter (PM) which refers to any very small matter in the air, such as dust particles (Fisher, *et al.,* 2013: 607-610).

2. Air Pollution in the Policy of the EU and the UN

2.1. The rising problem of air pollution – first measures and conventions

Even though scientists had anticipated in the 19th century that increasing concentration of carbon dioxide in the atmosphere could affect Earth’s climate, the international community became aware of this rising problem in the mid–1980s (Beyerlin, Marauhn, 2011: 147). The first action in regulating air pollution issues in the UK was triggered by the 1952 killer smog in London, which resulted in the death of thousands of people. The first measures included restrictions or ban on the production of smoke, grit and dust (Fisher, *et al*., 2013: 604-605).

The first EU measures on combating air pollution were taken in 1970, concerning emission limit values from products. Unfortunately, as noted by Kraemer (2012), the purpose of taking these first measures was not to reduce air emissions but to provide the free circulation of products. These first provisions, contained in the Council Directive 70/220/EEC[3] concentrated mainly on cars, while emissions from trucks, airplanes, ships and railways were set aside (Kraemer, 2012: 287). It should be noted that each action on combating air pollution is strongly influenced by several basic factors, including the EU energy policy on the use of nuclear energy, oil, gas, coal and lignite, impossibility to separate air emissions from other environmental problems, dependence on the level of

[3] Council Directive 70/220/EEC of 20 March 1970 on the approximation of the laws of the Member States relating to measures to be taken against air pollution by gases from positive-ignition engines of motor vehicles.

economic development and, lastly, the absence of readiness in European society to change habits concerning private passenger and truck transport (Kraemer, 2012: 280-281).

The turning point in the EU environmental policy was the acid damage caused to Scandinavian lakes and rivers in the late 1970s and early 1980s, which resulted in signing the 1979 UNECE Convention on Long-Range Transboundary Air Pollution (LRTAP).[4] This framework convention was signed by European states, the USA and Canada, and Central Asian states. Interestingly, it remains the only regional multilateral instrument which regulates transboundary air pollution (Beyerlin, Marauhn, 2011: 146).

From the late 1970s, the EU started to introduce emission standards for vehicles. Three Directives[5] were introduced, concerning minimum air quality standards for sulphur dioxide and suspended particulates, lead and nitrogen dioxide in the air (Fisher *et al*., 2013: 618). In 1983, the Heads of State and Governments suggested effective action against air pollution which led to proposals for directives which would include air pollution from industrial installations, large combustion plants and quality objectives for Nox; ultimately, the action included the introduction of a catalytic converter for cars (Kraemer, 2012: 279).

2.2. Ozone depletion and climate change

By the time the LRTAP Convention was signed, states and scientists were unaware that stratospheric ozone layer was disappearing as a result of increasing concentration of noxious anthropogenic gases. But, in the early 1980s, it became clear that *the ozone depletion was the global environment treat* (Beyerlin, Marauhn, 2011: 146). According to Beyerlin and Marauhn (2011:146), the 1985 Vienna Convention on the Protection of the Ozone Layer was a prompt response of the international community to this issue.[6] This framework convention was the first convention of any kind to be signed by every State Party involved (UN EPOS, 2020). Countries were committed to '*protect human health and the environment against the adverse effects of human-induced modifications of the ozone layer*' (Article 2, para.1, Vienna Convention 1985).[7] The Convention promoted cooperation among countries in exchanging information, systematic observations and research. The creators of the Convention hoped that, thus, the community and scientists would better understand '*the effects of human activities on the ozone layer and the effects on human health and the environment from modification of the ozone layer*' (Article 2, para.2a, Vienna Convention 1985). Unfortunately, its rules were considered 'vague and abstract' (Beyerlin, Marauhn, 2011: 146); moreover, countries involved were not required to take any control actions to protect the ozone layer (UN EPOS, 2020).

It was the Montreal Protocol on substances depleting the ozone layer (1987) that incorporated stronger measurements regarding the production of greenhouse gases. It included the phase-out plan for the production and consumption of these gases (UN EPOS,

[4] The UNECE Convention on Long-Range Transboundary Air Pollution of 13 November 1979, Geneva.
[5] Council Directive 80/779/EEC of 15 July 1980 on air quality limit values and guide values for sulphur dioxide and suspended particulates (1980) OJ L229/30; Council Directive 82/884/EEC of 3 December 1982 on a limit value for lead in the air (1982) OJ L378/15; Council Directive 85/203/EEC of 7 March 1985 on air quality standards for nitrogen dioxide (1985) OJ L87/1.
[6] Vienna Convention for the Protection of the Ozone Layer of 22 March 1985.
[7] UN Environment Programme Ozone Secretariat (2020). Treaties: Vienna Convention for the Protection of the Ozone Layer; https://ozone.unep.org/treaties/vienna-convention/articles/article-2-general-obligations

2020)[8]. Countries were required to limit production and consumption of ozone-depleting substances by quantitatively specified amounts (Beyerlin, Marauhn, 2011: 146). According to Kraemer (2012: 327), measurements provided were less stricter for developing countries than for industrialised ones. Based on new scientific studies, the Protocol has undergone nine revisions in the past years. There is an assumption that the ozone layer may recover by 2050, only if states continue applying the present measures (Kraemer, 2012: 327).

The UN Conference on Environment and Development (UNCED) was the first major conference regarding climate change. An important achievement of this Conference was the UN Framework Convention on Climate Change (UNFCCC),[9] which entered into force in 1994 and was ratified by 197 countries (UN Climate Change, 2021a)[10]. The main object of the Convention was '*to achieve stabilization of greenhouse gas concentration in the atmosphere at the level that would prevent dangerous anthropogenic interference with the climate system*' (Kraemer, 2012: 310). By the time the Convention was signed, it was clear that the countries were not determined in their intention to combat global warming, which called for both economic and political changes. Thus, the UNFCCC incorporated only general and abstract requirements for State Parties (Lilić, Drenovak-Ivanović, 2014: 82-83). The requirements included the state obligation to submit an annual inventory of their greenhouse gas emissions and to report regularly on their climate change policies and measures. Besides, industrialised states agreed to support climate change activities in developing countries by providing financial and technological assistance (UN Climate Change, 2021).

The UNFCCC was followed by the Kyoto Protocol[11], a legally binding implementing protocol which contained more specific requirements (Beyerlin, Marauhn, 2011: 147). It was signed in 1997 and entered into force in 2005 (UN Climate Change, 2021b)[12]. The reason for a delayed entry into force were '*highly controversial negotiations*' between groups of states including European Union, the so-called Umbrella Group (the USA, Canada, Japan, Australia and Russia), the Group 77 (China), and the Alliance of Small Island States (Beyerlin, Marauhn, 2011: 148). The Protocol committed industrialised countries to reduce and limit their greenhouse gases emissions in accordance with agreed individual targets within a fixed period (Beyerlin, Marauhn, 2011: 147). Industrialised countries were committed to reduce their greenhouse gases emissions up to 5%, while this target for EU amounted 8% compared to the 1990 levels (Todić, 2010: 159). Countries were committed to reduce their emissions not only through national measures but also through three market-based mechanisms: international emission trading, clean development mechanism, and joint implementation. To ensure transparency and accountability, the Protocol established a rigorous monitoring, review and verification system, as well as a compliance system (UN Climate Change, 2021). Yet, many issues were still to be resolved by subsequent decision-making of the Conference of the Parties (COP), the supreme decision-making body of the UNFCCC (Beyerlin, Marauhn, 2011: 147-148).

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[8] Montreal Protocol on Substances that Deplete the Ozone Layer of 16 September 1987, which entered into force in 1989; https://ozone.unep.org/treaties/montreal-protocol

[9] The United Nations Framework Convention on Climate Change, Rio de Janeiro, 9 May 1992.

[10] UN Climate Change (2021a): *What is the United Nations Framework Convention on Climate Change?;* https://unfccc.int/process-and-meetings/the-convention/what-is-the-united-nations-framework-convention-on-climate-change

[11] The Kyoto Protocol of 11 December 1997.

[12] UN Climate Change (2021b): What is the Kyoto Protocol? https://unfccc.int/kyoto_protocol

Given that the Kyoto Protocol '*fulfilled its implementing function at best imperfectly'*, it was obvious that a new legally binding international treaty had to be adopted (Beyerlin, Marauhn, 2011: 147). The Paris Agreement was adopted by 196 State Parties at the 21st Conference of the Parties to the UNFCCC in 2015 and entered into force in 2016 (UN Climate Change, 2021c).[13] Its long-term goal is to '*limit global warming to well below 2°C, preferably to 1.5 degrees Celsius, compared to pre-industrial levels*' (Johnston, 2018: 69). The Paris Agreement (Art.4) states that this target should be reached by reducing emissions as soon as possible in order to '*achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century*' (Johnston, 2018: 69). Thus, countries were invited to formulate and submit their plans for climate action known as nationally determined contributions (NDC) and long-term low greenhouse gas emission development strategies (LT-LEDS) by 2020 (UN Climate Change, 2021c). As both mitigation and adaptations require huge finance resourcing, the developed countries were committed to provide financial assistance to less developed ones (UN Climate Change, 2021c). The Paris Agreement also provided a framework for technological support and capacity building for developing countries (UN Climate Change, 2021c). Countries are obliged to report every two years on their mitigation efforts and progress toward their climate targets. These reports are peer reviewed by a team of experts (Huang, 2017).[14] Additionally, countries should establish an enhanced transparency framework (ETF), which should start 2024; thus, all measures and actions taken by countries, as well as provided or received support, will be reported under the ETF (UN Climate Change, 2021c).

3. Ambient Air Quality

Ambient air quality is a term used to describe levels of harmful pollutants in the outdoor environment. The sources of these pollutants are mostly anthropogenic, including industry and energy production, road traffic, other means of transport, construction, waste sites, etc. (Fisher, *et al.,* 2013: 616). According to the World Health Organisation (WHO), particulate matter (PM) has the greatest effect on human health of all harmful pollutants. There is a close relationship between exposure to high concentration of small particulates and increased mortality or morbidity (WHO, 2018).[15] As polluting emissions act '*in unpredictable ways and at unpredictable locations*', ambient air quality concerns both local and transboundary pollution levels (Fisher, *et al.,* 2013: 616). Each air quality problem is specific, thus requiring different kinds of regulatory instruments (such as: environmental quality standards and national pollutant emission ceilings) to limit hazardous pollutants (Fisher, *et al*., 2013: 616).

[13] The Paris Agreement of 22 April 2016; UN Climate Change (2021c): What is the Paris Agreement? https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement

[14] Huang, J., (2017). *Why transparency makes the Paris Agreement a good deal;* Center for Climate and Energy Solutions; https://www.c2es.org/2017/07/why-transparency-makes-the-paris-agreement-a-good-deal/

[15] World Health Organisation (2018): *Ambient (outdoor) air pollution;* https://www.who.int/news-room/fact-sheets/detail/ambient-(outdoor)-air-quality-and-health

3.1. Legislation and Aspects

The most important EU instrument on ambient air quality is Directive/2008/50,[16] which deals with sulphur dioxide, nitrogen dioxide, benzene, carbon monoxide, lead, particulate matters, and tropospheric ozone. Article 1 specifies the general aims of this Directive: to define and establish objectives for ambient air quality; to assess the ambient air quality in the Member States; to obtain relevant information; to ensure that such information is transparent; to maintain and improve ambient air quality where it is not polluted; and to promote cooperation between Member States in reducing air pollution (Jans, Vedder, 2012: 419-420).

There are four main aspects of the Directive: monitoring and assessment obligations; mandatory environmental quality standards and targets; obligations to introduce air quality plans; and publicity and communication obligations (Fisher, *et al*., 2013: 622). Air quality standards can be met and implemented only by collecting relevant data regarding air pollution. Thus, Member States are required to establish 'zones or agglomerations', to place a broad web of measuring stations throughout their territory, and to use international scientific measurement methods as references. Thus, acceptable air quality levels will be ensured over the territory of each State (Fisher, *et al.*, 2013: 622).

The Directive also provides series of air quality standards and targets with regulatory obligations and consequences, including allowed margins of tolerance for exceeding limit values (Fisher, *et al.,* 2013: 623-624). Considering the obligation of Member State to drew up air quality management plans, the Directive envisages that short-term action plans could include measures which would lead to reducing air pollution in the short term by limiting operations of industry plants or preventing heavily polluting vehicles on roads, etc. (Fisher, *et al.*, 2013: 625). Notably, such action plans may be limited by other EU laws, as seen in the case *Commission v Austria* (Fisher *et al.,* 2013: 625). This case[17] concerned alleged breach of the TFEU[18] and unlawful restriction of free movement of goods by the Austrian Government. In particular, the Austrian Government banned vehicles over 7.5 tonnes carrying certain goods (waste, rubber, building steel, etc.) to use a section of the Austrian A1 motorway, which is part of a major European transport route. The Government argued that this ban was adopted in order to improve air quality levels and to meet EU air quality standards especially for NO_2. The Court held that the ban was unlawful since the proportionality principle was breached and the Austrian Government failed to explore other less restrictive measures in order to improve air quality (Fisher, *et al.,* 2013: 628-629).

Due to the so-called 'daughter directives', the Directive contains limit values and target values. Furthermore, the Directive distinguishes between alert values, limit values, and critical levels regarding the effects of pollution on different ecosystems, but not on humans (Jans, Vedder, 2012: 420). Jans and Vedder (2012) consider that alert and limit values are relevant for effects on human health. Serious exceedances of the limit values may result in a duty to inform the public (information threshold) if some part of the population is at risk from brief exposure, or a duty to alert the public (alert threshold) if there is a risk for the population as a whole (Jans, Vedder, 2012: 420-421). Notably, under the Directive, Member States are allowed to claim that exceedances are caused by natural sources. In that case, such exceedances will not trigger any information duties for Member States. Despite

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[16] Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe; https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32008L0050

[17] CJEU Case C-320/03 *Commission v Austria* (2005) ECR I-9871 paras 66, 70-72, 73-77, 82-84.

[18] The Treaty on the Functioning of the European Union *of* 25 March 1957.

this provision, it does not necessarily mean that such exceedances will '*fall outside the scope of the Directive'* since the Commission is not obliged to approve or accept the notification given by a Member State (Jans, Vedder, 2012: 421). Moreover, Member States may also be exempt from the limit values in case of transboundary contributions, adverse climatic conditions, etc. This will trigger a duty for a Member State to draw up an air quality plan and provide evidence that all appropriate measures have already been taken. If there is a risk of exceeding alert thresholds, established action plans must contain '*the measures to be taken in the short term in order to reduce the risk or duration of the exceedance*' (Jans, Vedder, 2012: 422).

Finally, Fisher *et al.* (2013) emphasize that one of the main disadvantages of introducing air quality standards as a regulatory tool is the technological and administrative difficulty in their implementation and enforcement. According to the Commission's report, one-sixth of environmental infringement cases relate to air quality, mostly involving failure to meet PM_{10} limit values (Fisher, *et al.*, 2013: 626). Beyond infringement proceedings, another significant enforcement tool is individual legal action in Member States. In *Janecek v Freistaat Bayern,*[19] the EU Court of Justice held that '*an individual can require the competent national authorities to draw up an action plan in case where there is a risk that the limit values or alert thresholds may be exceeded*'. Individuals are also entitled to '*rely on the provisions of a directive which are unconditional and sufficiently precise…*' (Fisher, *et al.*, 2013: 627).

3.2. Introduction of national emission ceiling and limitations on industrial emissions

Another important step in the process of improving air quality is the regime of national emissions ceilings for various pollutants. The crucial EU instrument regulating this issue is Directive 2001/81/EC on national emission ceilings for certain atmospheric pollutants[20], which covers SO_2, NO_x, VOCs and ammonia. The Directive set emission ceilings and prescribed '*the total amount of emissions for each pollutant from any source within the national geographical area*' but Member States are to decide which measurement they will use in order to control polluting emissions and keep them beyond the critical limits (Fisher, *et al*, 2013: 630). Despite this provision, States are still required to draw up national emission reduction programmes and make an inventory of national emissions. These must be reported to the Commission and the European Environment Agency (Jans, Vedder, 2012: 424). In part, the Directive was adopted to implement the Gothenburg Protocol[21] to the UNECE Convention on long-range transboundary air pollution. The Directive covers all anthropogenic emissions, except for international maritime traffic and aircraft emissions beyond the landing and take-off cycle (Jans, Vedder, 2012: 423).

As of 1st July 2018, the Directive 2001/81/EC was repealed by the new National Emission Reduction Commitments Directive (EU/2016/2284), the so-called NEC Directive.[22] The NEC Directive transposes the reduction commitments for 2020 taken by the EU and its Member States at the international level, and sets more stringent emission reduction commitments as

[19] CJEU Case C-237/07 *Janecek v Freistaat Bayern* (2008) ECR I-06221, paras 34,36.
[20] Directive 2001/81/EC of the European Parliament and of the Council of 23 October 2001 on national emission ceilings for certain atmospheric pollutants.
[21] The Gothenburg Protocol to Abate Acidification, Eutrophication and Ground-level Ozone (known as the Multi-effect Protocol or the Gothenburg Protocol) of 30 November 1999.
[22] Directive (EU) 2016/2284 of the European Parliament and of the Council of 14 December 2016 on the reduction of national emissions of certain atmospheric pollutants.

from 2030 to reduce the impacts of air pollution on human health by half compared with 2005 (EC, 2020a).[23]

Directive 2010/75 on emissions from industrial installations (the Industrial Emissions Directive, IED) is the main EU instrument regulating pollutant emissions from industrial installations.[24] This Directive sets out rules on integrated prevention and control of pollutant emissions, covering sources such as combustion plants, waste incineration plants and installations and activities using organic solvents as well as installations producing titanium dioxide (UNFAO, 2010)[25]. It aims to achieve a high level of protection of the human health and environment by reducing harmful industrial emissions across the EU (IMPEL, 2021).[26] The IED is based on five main principles: an integrated approach, the use of best available techniques, flexibility, site inspections, and public participation (IMPEL, 2021). These '*pillars*' are explained in more detail by the European Commission:

1) *The integrated approach* means that regulation of industrial installations (plants) must take into account environmental impacts as a whole, "covering emissions to air, water and land, generation of waste, use of raw materials, energy efficiency, noise, prevention of accidents, and restoration of the site upon closure".
2) Permits given to installations and emission limit values must be based on *the Best Available Techniques* (BAT). The Commission organises an exchange of information with relevant experts in order to define BAT and the BAT-associated environmental performance. This process results in BAT Conclusions and BAT Reference Documents which are published by the European Commission.
3) The IED allows some flexibility to competent authorities in order to set less strict emission limit values. This is possible only if "*an assessment shows that achieving the emission levels associated with BAT described in the BAT conclusions would lead to disproportionately higher costs compared to the environmental benefits due to the geographical location or the local environmental conditions or the technical characteristics of the installation"*. The IED also includes other flexibility instruments, such as: Transitional National Plan, limited lifetime derogation, etc.
4) Member States are required to set up a *system of environmental inspections* and draw up inspection plans. Site visits are required to take place at least every 1 to 3 years, using risk-based criteria.
5) *The public* has the right to participate in the decision-making process and to be informed of its consequences. This is possible only if data concerning permit applications, the issued permits, the results of the monitoring of releases and the inspection actions are available to the public (EC, 2020b).[27]

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[23] European Commission (2020a): *Reduction of National Emissions*; https://ec.europa.eu/environment/air/reduction/index.htm

[24] Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control).

[25] UN Food and Agriculture Organization (2010): *FAOLEX Database;* http://www.fao.org/faolex/results/details/en/c/LEX-FAOC109066

[26] IMPEL-European Union Network for the Implementation and Enforcement of Environmental Law (2021): *Industrial Emissions Directive 2010/75/EU*; https://www.impel.eu/doing-the-right-things/legislation/industrial-emissions-directive-2010-75-eu/

[27] European Commission (2020b): *Industrial Emissions Directive*; https://ec.europa.eu/environment/industry/stationary/ied/legislation.htm

Under this Directive, installations are obliged to obtain an environmental permit in order to operate. Those permits set limit values for emissions to air, land and water. Moreover, permits include provisions regarding energy efficiency, waste minimisation, site restorations, and emission monitoring requirements (Croner-I, 2020).[28] Around 50,000 installations are required to operate in accordance with these permits (EC, 2020b). Notably, in the period 2008-2012, the cost of damage caused by industrial emissions, primarily by the main air pollutants and CO_2, was estimated to at least 329 billion EUR (EEA, 2014).[29]

3.3. Environmental impact assessment

Environmental impact assessment (EIA) is a procedure of identification and characterisation of the most likely impacts of proposed actions and an assessment of the environmental significance of those impacts (IAIA, 2021)[30]. The EIA aims to provide a high level of environment protection by ensuring that a local planning authority is informed and aware of the probable environmental implications of their specific decisions (EC, 2020)[31]. This process should be undertaken in the early decision-making stage when there is still opportunity to modify, adjust or abandon the proposal (IAIA, 2021). It can be applied to individual projects and to public plans or programmes based on Directive 2011/92/EU[32] and Directive 2001/42/EC[33]. Sheate (2014)[34] provides an overview of the EIA process stages:

- Screening: considering whether the proposed project is likely to have a significant impact on environment; if those impacts are certain, the EIA process is required.
- Scoping: identifying the key issues that need to be addressed; this step is crucial for focusing the available resources on relevant issues.
- Baseline study: collecting '*all relevant data on the current status of the environment*'.
- Impact prediction: estimating the most likely effects which are expected to occur as a result of planned action.
- Impact assessment: assessing the identified effects by taking into account their importance and significance.
- Mitigation: considering measures which could reduce or remove damaging impacts on environment.
- Environmental Impact Statement (EIS): a formal and public document containing all relevant data gathered in the previous phases.
- EIS Review: examination of the EIS by competent authority in order to prevent possible omissions.
- EIA Follow-up: the post-approval phase which includes monitoring of project implementation, operation and impact auditing.

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[28] Croner-i (2020): IED; https://app.croneri.co.uk/topics/industrial-emissions-directive-ied/quickfacts

[29] European Environment Agency (2014). *Costs of air pollution from European industrial facilities 2008–2012;* https://www.eea.europa.eu/publications/costs-of-air-pollution-2008-2012.

[30] International Association for Impact Assessment (2021): *Impact Assessment – overview and history;* https://www.iaia.org/wiki-details.php?ID=4

[31] EC (2020c): Environmental Assessment; https://ec.europa.eu/environment/eia/index_en.htm

[32] Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment.

[33] Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment.

[34] Sheate, W. (2014). Overview of the stages of the EIA process, In:*Environmental Assessment* (course), SOAS University of London, https://www.soas.ac.uk/cedep-demos/000_P507_EA_K3736-Demo/unit1/page_14.htm

4. The Influence Of The ICJ And The ECtHR

The contribution of the International Court of Justice (ICJ) to the development of international environmental law has been quite modest, considering the small number of cases. Most of these concerned Latin American countries and '*law profile issue areas',* with an exception of the *Whaling case* (*Australia v. Japan).*[35] This case concerned Japan's alleged breach of obligations '*under the International Convention for the Regulation of Whaling as well as its other international obligations for the preservation of marine mammals and the marine environment'* (Andresen, 2016: 73). Although the whaling case was considered '*a high-level, politicized environmental issue*', another dispute is said to have contributed much more to the development of international environmental law. In the case *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*[36], Argentina claimed that Uruguay had breached its obligations under the 1975 bilateral statute of the River Uruguay by constructing two pulp mills on the river which '*would affect the quality of the water and the areas influenced by the river'*(Andresen, 2016: 73). The significance of this case is in the Court's recognition of environmental impact assessments as a duty under international law (Payne, 2010).[37]

The role and the influence of the European Court of Human Rights in creating and developing international environmental law is far more notable. The ECtHR has so far ruled on approximately 300 environment-related cases (CoE, 2021).[38] Although the European Convention on Human Rights (ECHR)[39] does not recognize a right to a healthy environment, the analysis of the ECtHR case-law indicates that this right is indirectly protected by applying other fundamental rights, such as the right to life, free speech and family life, which were applied to '*a wide range of issues including pollution, man-made or natural disasters and access to environmental information*' (CoE, 2021). Moreover, the ECtHR '*had paved the way for an enforcement of air quality directives by individual persons'*, but States still have a large discretion in choosing the number and location of measuring stations, measuring methods, the frequency of measuring, etc (Kraemer, 2012: 281). In addition, late publication of data is still quite common. *De facto,* it all leads to the situation that '*EU air quality values constitute policy guidance standards rather than legal instruments*' (Kraemer, 2012: 281).

5. Conclusion

Air pollution problems are a global, ongoing challenge which should be considered not only by international organizations, their Member States and local governments but also by individuals. As long as there is a reluctance and hesitation on individual level to act in relation to air pollution by changing daily habits, the political process of implementing the envisaged measures will stagnate. On the other hand, individuals' resolutions are insufficient

[35] ICJ: Whaling in the Antarctic (*Australia v. Japan*: New Zealand intervening), Judgment of 31 March 2014.
[36] ICJ: Pulp Mills on the River Uruguay (*Argentina v. Uruguay*), Judgment of 20 April 2010, ICJ Reports 2010.
[37] Payne, C. R. (2010). Pulp Mills on the River Uruguay: The ICJ Recognizes Environmental Impact Assessment as a Duty under International Law, *ASIL Insights,* American Society of International Law; https://www.asil.org/insights/volume/14/issue/9/pulp-mills-river-uruguay-international-court-justice-recognizes
[38] Council of Europe (2021). *Protecting the environment using human rights law,* https://www.coe.int/en/web/portal/human-rights-environment
[39] The European Convention on Human Rights of 4 November 1950, Council of Europe.

without strong political determination to fight air pollution and climate change. Air pollution problems are connected and '*are feed in to wider systemic environmental processes and effects*' (Fisher, *et al.,* 2013: 604). Thus, they should be considered with respect to other environmental issues. It is important to include the principle of inter-generational equity when formulating environmental policies; otherwise, future generations will bear the burden of rising environmental problems (Fisher, *et al.*, 2013: 605-606). Environmental policy must be ranked higher in the political priority, while actions concerning air pollution should be less influenced by policies on the use of gas, oil, nuclear energy, etc. (Kraemer, 2012: 281). Despite the activity of EU governing bodies, a satisfactory number of different directives covering almost all relevant issues concerning air pollution, and precise provisions and measurements provided in these directives, Member States still seem to be omitting or delaying their obligations. However, the rising number of infringement cases instituted before national and international courts gives a hope that economic and political interests will not always be seen as having priority over environmental issues.

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RAZVOJ POLITIKE UJEDINJENIH NACIJA I EVROPSKE UNIJE U OBLASTI ZAGAĐENJA VAZDUHA

Cilj rada je da predstavi prirodu grane prava koja se bavi zagađenjem vazduha kao delom ekološkog prava, uz osvrt na naučnu osnovu, istoriju razvoja ove grane prava kroz aktivnost Ujedinjenih Nacija i Evropske Unije, najznačajniju regulativu koja je nastala kao rezultat rada ovih organizacija kao i mere koje su njima predviđene sa ciljem zaštite vazduha od daljeg zagađenja. U prvom delu rada autor se fokusira na prirodu samog ekološkog prava, tačnije dela koji se tiče zagađenja vazduha, najčešće zagađujuće materije, njihove izvore i uticaj na ljudsko zdravlje i životnu sredinu. Drugi deo sadrži pregled najvažnijih dokumenata koji se tiču oštećenja ozoskog omotača i klimatksih promena. U trećem delu autor pruža dodatne informacije o zaštiti ambijentalnog vazduha, legislativi i pratećim merama. Konačno, četvrti deo sadrži uticaj međunarodnih sudova na razvoj međunarodnog ekološkog prava.

Ključne reči: *životna sredina, zagađenje vazduha, emisije, monitoring, procena*

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Review Paper

MECHANISMS OF CITIZEN PARTICIPATION IN THE LOCAL GOVERNMENT: THE NORMATIVE FRAMEWORK OF THE REPUBLIC OF SERBIA

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Abstract. *A prerequisite for the development of the local community are different forms of citizen participation in achieving goals of interest to the local community and meeting their personal needs at the local level. Citizens can participate in the local community activities directly or indirectly. The direct participation in local life is exercised on the basis of strictly formal legal framework, including civic initiative, referendum, and citizens' assembly. The quality of the relationship between the local community and the citizens largely determines the degree of citizens' indirect participation in political life. This paper will address the mechanisms of citizen participation at the local level, with specific reference to public debate and public hearings as mechanisms enabling citizens to participate in local decision-making processes, draw attention to problems and difficulties, and insist on the obligation of local self-government bodies to transparently implement some procedures envisaged in the 2018 amendments to the Local Self-Government Act. The paper also elaborates on other forms of citizen participation, such as consultations, information requests, petitions, surveys, and other available forms of citizen participation in public life.*

Key words: *local self-government, participation, public debate, public hearings, good governance*

1. INTRODUCTION

Within the framework of the European Union integration process, local self-government units aspire to reform and establish certain institutes that will ensure transparency and create appropriate capacities for adopting and implementing practical policy. Building a community on the principles of democracy and decentralization of power calls for increasing citizens' involvement in local decision-making process. In order to ensure citizens' active participation

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in local life, personally and not only through political representatives, it is necessary to form institutions that will facilitate such participation, enable communication with people in public services, mediate between local community residents, and hear their proposals for improving the quality of life at the local level.

Decades of activity and the aspiration of state institutions towards a greater involvement of citizens in the life of the local community (especially the activities of the Standing Conference of Cities and Municipalities and numerous legal experts) have raised awareness of political actors about the importance of finding ways to increase citizen activity at the local level. These activities also contributed to introducing the 2018 amendments to the Local Self-Government Act, which provides a basic framework for decision-making and formation of new institutes, such as: public debate and public hearings.

In this paper, we will also refer to the constitutionally guaranteed right of citizens to participate in local decision-making processes, including the possibility of consulting and informing citizens through panels and round tables, proposals, cooperation with associations and humanitarian organizations, and obtaining information through official websites.

2. PUBLIC DEBATE - CONCEPT AND TYPES

At the national (republic) level, public debates have been conducted for years within the process of adopting laws, action plans and other public policy documents. At the local level, public debates are usually held in the process of preparing and drafting certain administrative and regulatory acts. Its implementation is obligatory when making the statute of a local government unit, budget decisions, plans, strategies, and other decisions of local importance, according to the applicable law or at the proposal of the body responsible for passing the act.

In the positive law of the Republic of Serbia, the public debate was first explicitly envisaged in the State Administration Act (2005)[1], where the public debate was mainly related to the procedure of preparing and drafting new laws (Article 77, para.1 SAA 2005). Thus, the interested public was more closely informed about this new institute through the portal of the Ministry which was responsible for passing the law. Under the current version of the State Administration Act,[2] Ministries, state administration authorities and special organizations are obliged to inform the public through their website and e-government portal about initial activities in drafting new legislation, and publish basic information on the planned legal solutions that will be proposed (Article 77, para.2 SAA)

As part of the legislative reform in the Republic of Serbia, a major shift took place in April 2013, when the provisions referring to the public debate contained in the Rules of Procedure of the Government of the Republic of Serbia[3] were changed. With these changes, the procedure for conducting a public debate has been regulated in detail. The public debate has become mandatory and proceedings for conducting a public debate have been specified; thus, this institution has gained practical significance.

Local self-government units initially organized public debates only in the process of adopting or amending the statute of a local administration unit and adopting the budget; however, these processes were formal, insufficiently regulated, and insufficiently transparent,

[1] State Administration Act , *Official Gazette RS*, no. 79/05

[2] State Administration Act (SAA), *Official Gazette RS*, no. 79/05, 101/07, 95/10, 99/14, 30/18-another act, 47/18

[3] Rules of Procedure of the Government of the RS, *Official Gazette RS,* br. 61/2006, 69/2008, 88/2009, 33/2010, 69/2010, 20/2011, 37/2011, 30/2013, 76/2014, 8/2019.-

both in terms of publishing information on Internet portals and in terms of setting deadlines for their implementation. With the amendments to the Local Self-Government Act in 2018, the public debate received its legal framework and became a mandatory procedure when adopting numerous documents at the municipal level.

2.1. The concept of a public debate

A public debate is a set of different activities, undertaken in a pre-determined time frame, in order to obtain proposals and citizens opinion in the process of implementing an act.[4]

At the local self-government level, a public debate is conducted in the process of preparing or drafting a certain act (e.g. a statute, a decision, a plan or any other act). A public debate can also be conducted when a certain act is in the working version phase, at the proposal of the body responsible for preparing and determining the draft.

During the public debate, proposals, suggestions and opinions of citizens and other participants in the public debate are collected, in written or electronic form. It is necessary to organize at least one open meeting of interested parties with representatives of the competent local self-government authorities, and the body responsible for conducting the public debate is obliged to provide open access to all citizens from the territory of the municipality interested in participating in the debate. The body responsible for preparing regulations is obliged to inform the public on the official website of the municipality that the work on the preparation of the act passed by the Assembly, which is of general interest for the local population, has begun.

Under the Statute of the Municipality of Aleksinac[5], The Municipal Council organizes the public debate, determines the manner of conducting the debate, the place and duration of the public debate. The Municipal Council sends a public invitation to citizens, associations, the professional public, representatives of bodies, organizations, associations and individuals who are considered to be interested in the draft act under consideration. The public invitation is also published on the Municipality website, alongside with the draft act under consideration and the program for conducting the public debate. In this way, the general public is informed about the public debate.

The time frame for a public debate should last at least 20 days. The Municipal Council determines the specific date and time of organizing and conducting the debate. However, during the adoption of the Decision on Public Debates, the Assembly relativized this deadline by introducing a provision stating that, in case of justified urgency, the competent body which organizes the public debate may set a shorter deadline, and explain the reasons for urgency. Given that the "reasons for urgency" are not legally specified, nor prescribed by the Statute of a local self-government unit, they in fact represent a discretionary political right of the Municipal Council to set a shorter deadline for conducting a public debate.

The organizer shall keep formal record (minutes) on the conducted public debates; the records shall contain the date, time and place of the public debate, the chairperson or the person coordinating the public debate, the present parties, suggestions and proposals submitted at the public debate (through the Municipal Administration office or electronically), and the reasons for their acceptance or non-acceptance. The report is published on the official

[4] Decision on public debates, *Official Gazette of the Municipality of Aleksinac*, no 5/19.
[5] Statute of the Municipality of Aleksinac, *Official Gazette of the Municipality of Aleksinac*, no 29/18.

website of the Municipality, and the body responsible for determining the proposals is obliged to take into account the given suggestions and proposals.

2.2. Types of public debates

Generally, public debates fall into two basic groups: mandatory (obligatory) and optional ("facultative") public debates. The holding of a mandatory public debate is explicitly prescribed by the law, the Statute, and the Decision on public debates, it is necessary when adopting certain documents. The holding of an optional public debate is related to the request or proposal of a certain body or person.

2.2.1. Mandatory public debate

The mandatory public debate is organized and conducted by the Municipal Council according to the procedure for conducting a public debate on the draft act, and at the request of a municipal body, a working group, or a working body of the Assembly in charge of preparing the general act. The public debate must be organized and conducted as follows: [6]

1) in the process of preparing the Statute of a local self-government unit;
2) in the process of preparing the budget of the Municipality;
3) in the process of preparing the Development Plan and public policy documents of the Municipality (a strategy, a program, a policy concept, and an action plan);
4) in the process of determining the rates of source revenues of the Municipality;
5) in the process of preparing spatial and urban plans;
6) in other cases, provided by the law and the Statute

2.2.1.1. Public debate in the process of preparing the Statute

The highest legal act of a local self-government unit is the Statute (Article 11 LGA).[7] Public debate in the process of adopting the Statute was envisaged in previous legal solutions, but without specific legal framework regarding the time, place, manner of holding a debate, transparency, form and inclusion of a certain circle of people.

When adopting a new or amending the existing statute, the public debate is conducted in the phase of drafting the Statute, or a draft decision on amending the Statute. The Assembly forms an expert working body, the Commission for drafting the Statute or a draft decision on amending the Statute, which is the body in charge of preparing this act and providing the necessary information to interested parties at the public debate.

The invitation for a public debate is published on the bulletin board of the Municipal Administration and on the Municipality website, and it is also delivered to the interested legal and natural persons who the provisions under consideration refer to.

The organizer is obliged to keep formal record (minutes) of the public debate, which are published on the Municipality website after the public debate is over; then, all remarks and suggestions have to be considered, and the competent Commission is obliged to determine the final text of the Draft Statute within three days of the public debate and submit it to the Municipal Council for further action.

A public debate is not held when the change of the Statute refers to harmonization with the law, transposing more precise legal solutions, unless otherwise provided by law.

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[6] Decision on public debates, *Official Gazette of the Municipality of Aleksinac*, no 5/19.
[7] Local Government Act (LGA), *Official Gazette RS,* no 129/07, 83/14 (othr. law), 101/16 (othr. law), 47/2018.

2.2.1.2. Public debate in the process of preparing the budget

For many years, the public debate on the adoption of the draft budget decision was the only public debate that was held regularly because the legislator envisaged that the adoption of the budget must be preceded by a public debate. According to the new legal solutions, the public debate in the budget preparation procedure can be conducted in two cases: 1) on the draft public investment plan, when the direct budget user decides to consult citizens on a capital project, and 2) on the draft budget decision.

The planned budget reforms envisage (among other things) the reform of the capital investment management system, in order to ensure correlation with sect oral strategies, i.e. with realistic plans and needs of a local community. Therefore, the authorized proposer is given the opportunity to consult citizens on capital projects within its jurisdiction, through a public survey or in another way, after which a public debate is held, which also contains information on the results of the consultations.

The public debate on the draft public investment plan is conducted before the public debate on the draft budget decision because it must also contain a financial analysis, especially when it comes to medium and large-value capital projects.

The invitation for a public debate on the draft budget decision is announced by the Municipal Council, by publishing the draft decision, accompanying presentation, and the form which may be used by interested persons to send a remark, proposal or suggestion, at least ten days before the public debate. However, the Decision on Public Debates[8] stipulates that this deadline may be shorter, with an explanation of the reasons for urgency. After holding a public debate, the Municipal Council prepares a Report, which is published on the official Municipality website.

2.2.1.3, Public debate in the process of preparing Municipality planning documents

In the process of preparing Municipality planning documents, a public debate is conducted in case of adopting: a) Municipal Development Plan; and b) public policy documents (strategies, programs, policy concepts and action plans).

The Municipal Development Plan is a comprehensive and long-term development planning document, which is adopted in order to realistically review the current situation and identify priority problems in defining real, clear and achievable goals. After reviewing the state of existing resources, information on the current state of affairs, the list of basic problems and shortcomings of local self-government, the public debate provides for individual proposals of stakeholders to be integrated into a functional whole.

Spatial plans of the local self-government unit are adopted for the territories of local self-government units; they determine guidelines for the development activities of specific areas, as well as conditions for sustainable and even development on the territory of the local self-government unit. Urban plans are adopted for parts of the territory (populated areas) for which spatial plans envisage the development of an urban plan (Ivanišević, 2012: 34).

In order to determine and develop public policy and achieve the desired goals in certain areas, local self-government units operate through planning and management of the system of public policies. The types of public policy documents are:1) a strategy; b) a program; c) a policy concept, and d) an action plan (Article 10 PSA).[9]

The authority responsible for the preparation of planning documents is obliged to inform the public within seven days that it has started work on the preparation of a certain

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[8] Decision on public debates, *Official Gazette of the Municipality of Aleksinac„* br. 5/19

[9] Planning System Act, *Official Gazette RS,* no. 30/18

planning document. After consultations have been conducted in preparation of public policy documents, the Municipal Council announces a public invitation to participate in the public debate on the Municipality website. The public invitation must contain data on the proposer of the documents, the name of the documents, the area of planning and implementation of public policy, and information on the composition of the working group that participated in preparing the document.

The invitation for a public debate must contain a draft document, deadline for conducting and holding a public debate, information on planned activities (such as: round tables, forums, presentations), their date, time and place, as well as information on how to submit comments, suggestions, remarks, suggestions and other relevant information.

The public debate lasts at least 20 days, and the deadline for submitting proposals in written or electronic form is at least 15 days. After the public debate, and before submitting the document to the Assembly, the Municipal Council publishes the public debate report on the Municipality website. The report which must contain information on the time and place of the public debate, representation of the public sector, NGOs, businessmen and entrepreneurs, given suggestions and their implementation in the document, or reasons for refusing the suggestions. The Municipal Council also publishes an updated version of the document with the report, and submits the document to the Municipal Assembly for further consideration and adoption.

2.2.1.4. Public debate in the process of determining Municipality source revenue rates

Local self-government units are entitled to receive public revenues they generate on their territory: municipal administrative fees; local utility fees; residence taxes; fees for the use of construction land; fees for the use of natural and medicinal herbs; fees for environment protection and improvement; income from leasing, i.e. the use of real estate; income from the sale of moving goods, income from concession fees, interest income on their assets, fines for violations prescribed by an act of the Municipal Assembly and confiscated property; revenues generated by municipal bodies, services and organizations; local self-contribution; revenues from donations and other public revenues (Dimitrijević, Vučetić, 2011: 260).

In the process of determining the rates of source revenues, public debates are conducted on draft decisions determining the rates of source revenues and on draft decisions regulating the method of determining the amount of local utility fees and charges. As this is the same scope of regulation, a unified public debate may be held on all draft decisions. These public debates may also be held concurrently with the public debate on the draft budget decision.

2.2.1.5. Public debate in the process of applying spatial and urban plans

Spatial and urban planning documents contain measures for the improvement and preparation of the territory for the needs of the state defense, as well as data on areas and zones of facilities of special importance and interest for the country's defense (Article 10 PCA).[10] When preparing and adopting spatial and urban plans, public debate is conducted in the process of creating a draft development plan. These plans include: the Spatial Plan, the General Urban Plan, the General Regulation Plan, the Detailed Regulation Plan, and others.

When a public debate is organized on a document concerning environmental protection, the opinion of the environmental authority is published on the need to draft a strategic environmental impact assessment. Reliable and timely information is the basis of a quality

[10] Planning and Construction Act, *Official Gazette R*S, no 72/09, 81/09-corr., 64/10- CC decision , 50 / 13- CC decision, 98 / 13- CC decision, 132/14, 145 / 14, 83/18, 31/19, 37/19 (other law), 9/20.

decision-making process in the field of environment protection, better environmental risk management, improving public awareness, transparency, public participation in decision-making processes and sustainable development (Bogdanović, 2012: 45).

The Planning and Construction Act stipulates that spatial and urban documents shall be subject to early public insight into the documents. The public debate on these documents is conducted by the Planning Commission, the debate is advertised through the media and the Municipality website, and it lasts for 15 days. The debate is followed by another expert examination of the documents by the Planning Commission, after which the public insight into the documents is announced. The public insight (scrutiny) lasts 30 days, and the notification on the presentation of the planning document is done through the media, the local newspaper and on the Municipality's website.

2.2.2. Optional public debate

The optional (non-obligatory) public debate can be conducted in the process of passing general acts, at the request of the proposer of the document, one third of the municipal representatives (deputies), or at the proposal of at least 100 citizens. In order to conduct a public debate, the citizens' proposal has to be supported by at least 100 citizens with the right to vote on the territory of the municipality. Collecting citizens' signatures for a public debate is conducted in accordance with regulations governing the citizens' initiative (Dimitrijević, Lončar, Vučetić, 2020: 248).

The public debate initiative is the latest form of civic initiative established after the 2018 amendments to the Local Self-Government Act. In order to submit a request or a proposal to the competent authority, citizens form an initiative committee, comprising at least three members (citizens with the right to vote). The competent authority confirms the receipt of the proposal, for which signatures are collected on the first page of the text of the proposal, and certifies each page of the text of the proposal in the number of copies submitted by the initiative committee.[11] The competent authority shall keep one copy of the proposal for itself, and the proposed request may no longer be amended.

Upon verification of the proposal, the initiative committee reports the collection of signatures to the Ministry of Internal Affairs -Police Administration, no later than three days before the start of the signature collection, with a detailed explanation of the submitted proposal, place, time and manner of collecting signatures and information about the member of the initiative committee responsible for coordination. The Initiative Committee may also organize special committees for collecting signatures in certain places.

Collecting citizens' signatures for submitting proposals for a public debate takes up to seven days from the start date of the signature collection, which is stated in the letter submitted to the Ministry of Internal Affairs when applying for the event. Citizens (who have a voting right and residence in the territory of local self-government) can give only one signature, which they can withdraw (in written form) by the end of the last day for collecting signatures. The citizen also has the right to point out to committee the existence of certain omissions or shortcomings in the collection of signatures.

In order to ensure that citizens are fully aware of the initiative they wish to support with their signatures, the proposal should be posted in clear sight at the signature collection point. Upon completion of the signature collection, the signatures are submitted to the competent authority for decision.

[11] Referendum and People's Initiative Act, *Official Gazette RS,* no 48/94 and 11/98.

The Commission for Statute and Regulations has to decide on the received request of citizens, proposers or one-third of municipal representatives/deputies within a period of 15 days from the date of the application, by taking into account the competence and justification of the request. In case of acceptance, the Commission sends the request to the Municipal Council, for further processing and decision-making.

In case the proposer is the authority in charge of drafting the document or municipal representatives, the request is not governed by the law or the Decision on public debates. In case of rejection of citizens' proposals, the Referendum and Popular Initiative Act stipulates that the initiative committee can appeal to the Supreme Court, whose decision is final.

2.3. Ex-ante effect analysis

Effect analysis is an analytical process based on relevant facts, data and information. It may be an *ex-ante* analysis of effects, which is carried out during the planning, formulation and adoption of public policies and regulations in order to understand the change that needs to be achieved, its elements and causal links between them, and to select the optimal measures for achieving the public policy objectives. It may also be an *ex-post* effect analysis, which is carried out during and after the implementation of already adopted public policies and regulations to evaluate performances and review and improve these policies and regulations.[12]

An *ex-ante* analysis of the effects of public policies analysis must be carried out in the process of preparing public policy documents. It has a multiple role, which is reflected in data collection, better perception, understanding, and listening to the citizens' needs in order to solve the problem more adequately. The process of conducting an impact analysis begins before the start of drafting a public policy document, for the purpose of establishing what changes are being sought and whether the adoption of a specific document can achieve these changes. Therefore, this analysis is a continuous process, composed of a series of actions, with the aim of adopting an effective public policy document.

The effect analysis comprises several phases. A current situation analysis is conducted before the starting the document drafting process; it includes a description of the indicators being monitored, assessment of the situation in that area and the effect of the previous public policy document, and an explanation of what was expected and why. After obtaining the necessary data, general and specific goals are defined, which have to be precise, realistic, and acceptable. Their number should be limited, their implementation measurable, and their time frame specified. The document also defines the performance indicators, which are monitored during the implementation of the public policy document.

When conducting the analysis of effects, special attention is paid to:

a) ***analysis of financial effects*****:** finances are one of the most important factors in the adoption of public policy documents because the limitation in terms of finances is one of the burning issues, especially in underdeveloped municipalities; this analysis assesses the necessary funds for the implementation of the public policy document and the real funds, provided by the budget, as well as possible alternative sources of revenue;

[12] Decree on Public Policy Management, Policy and Regulatory Impact Assessment, and Content of Individual Public Policy Documents, *Official Gazette RS,* no 8/19.

b) ***analysis of economic effects*****:** the impact of public policy documents on the economy, economic entities, agricultural production and infrastructure development, with special emphasis on the impact on small and medium-sized economic entities;
c) ***analysis of the effects on society***: the effect of public policy measures on different social categories, taking into account sensitive categories of society and the principles of gender equality, especially when it comes to documents implemented in the field of social protection, health, education, urbanism and spatial planning;
d) ***analysis of the effects on the environment*****:** the impact of public policy and implementation measures on water and air quality, flora and fauna, food quality, waste management, energy efficiency, life and health;
e) ***analysis of management effects:*** the implementation of public policy documents in line with the legal, organizational, institutional and management capacities;
f) ***risk analysis*****:** the perception of the risks of public policy implementation and uncertainty in the implementation of public policies.

In the process of conducting these analyses, the consultation technique is used (by organizing focus groups, round tables, semi-structured interviews, panels, surveys, collecting written suggestions and comments), with the aim of selecting the best options contained in the policy document submitted to the competent authority for approval.

The authority responsible for preparing public policy documents is obliged to inform the participants of the consultations, especially when it comes to proposals that have not been accepted. The results of all implemented techniques and analyses are published on the Municipality website within a period of 15 days from the completion of the consultation. In particular, the published report has to include data on objections, suggestions, proposals and comments, which were taken into consideration, accepted or not accepted, with an explanation of the reasons for their non-acceptance. The authority responsible for preparing documents may also decide to include representatives of interested parties or civil groups in the working group for drafting a public policy document. After reporting on the course and results of the consultation process, the proposer of the public policy document submits the document to the competent authority, in order to conduct a public hearing.

2.4. Organization, implementation and shortcomings of the public debate

The Municipal Council is the authority responsible for organizing, conducting, setting deadlines and specifying the time, date and place of the public debate. The public debate begins by inviting citizens, authorities and organizations, associations, interested entities and the public. The call for a public debate is also published on the Municipality website, together with a public debate program and the draft act which is to be discussed. The shortest period from the day of publishing the call to the beginning of the public debate is five days.

The Municipal Council determines the public debate program in agreement with the authority responsible for preparing the general act. The program contains information on the deadline for conducting the public debate, data and contacts on persons in charge of providing additional information and clarifications on the subject matter of the public debate, information on planned activities within the public debate (such as: forums, presentations, round tables, meetings) and information on the person in charge of coordinating these activities, the postal address and deadline for submission of proposals, remarks and suggestions in written and electronic form, and other relevant information.

During the public debate, the authority responsible for preparing the document or the person responsible for providing additional information publishes all comments, remarks, proposals and suggestions on the Municipality website. The organizer is obliged to keep record (minutes) of the public debate meetings, make a report within a period of 15 days from date of the public debate, and publish the report on the Municipality website.

The attitude of local government officials (towards the institute of public debate, towards the aspiration and desire to increase transparency and participation of the local population in decision-making processes, and towards conducting the public debate) is not benevolent. Thus, we are often confronted with situations that the public debate is conducted only *ad hoc* in order to observe the prescribed formal requirements, that calls or invitations for citizen participation are not properly announced or sent in an adequate manner, that the minimum deadline for conducting of a public debate is not observed, that the public debate is designated and conducted as "urgent procedure" (without justifying the reasons for urgency), that there is no adequate postal address for comments, proposals and suggestions, and that there is no possibility to make online submissions (which is contrary to the principle of economy). In that way, we are equal in terms of democratization of ideas but not in law.

3. PUBLIC HEARINGS

The public hearing is an institute established with the aim of providing missing information, expert opinions, clarifications, comments on the proposed act, and information on the work of the appointed commission or committee to other commissions members, board members and other elected officials at the national or local level. A public hearing at the local level is another novelty that was introduced into the local self-government system with amendments of the Local Self-Government Act in 2018.

Public hearings have been used in the Serbian parliamentary practice for more than a decade (since 2009). They are conducted in order to obtain information and expert opinions on the draft act that is in the parliamentary procedure, to clarify certain solutions regarding the current act or act in preparation, to monitor the implementation and application of the law, i.e. to achieve the control function of the National Assembly. A proposal for organizing a public hearing can be submitted by any committee member.[13]

In local self-government units, public hearings are organized by the permanent working bodies of the Municipal Assembly, i.e. the Assembly Commission. A proposal for organizing a public hearing may be submitted by any member of the commission; it shall include an explanation of the topic of the proposed public hearing and a list of persons who would be invited (in order to provide them the necessary information and explanation).

The decision to hold a public hearing is made by the commission whose member submitted the proposal for a public hearing. The Speaker of the Assembly shall be informed about the initial activities in the organization of the public hearing; the commission members and other persons whose presence is important for conducting the public hearing are formally invited to attend the public hearing. The public hearing is conducted regardless of the number of commission members present. After the public hearing, a report is submitted to the Speaker of the Assembly, the commission members and all participants in the public hearing. The

[13] Rules of Procedure of the National Assembly, *Official Gazette RS,* no 52/10 and 13/11.

report contains information on the time and place of the public hearing, the number of participants present, discussions, proposals, presentations and views. A written objection to the submitted report may be filed by the committee members and other stakeholders.

A number of features distinguish public hearings from public debates. First, public hearings, as a participatory mechanism, represent an opportunity to gather the necessary information and to improve the decisions made by the Assembly. Unlike public debates which rest on explicitly prescribed legal provisions, a public hearing is an opportunity in the hands of the members of parliamentary committees. Second, a public debate is conducted by the executive body (the Municipal Council), in cooperation with the proposer of the document, while a public hearing is reserved for members of the legislative authority, i.e. members of the permanent assembly bodies. However, these two institutes are not mutually exclusive, which means that the conducted public debate does not preclude the committee members to ask for a public hearing on the same issue.

The downside of public hearings is that the decision to hold a public hearing is made by a majority of votes of the committee members present, which means that the will (authority) rests in the hands of the ruling majority. A public hearing is commonly reserved for a certain circle of people; as a rule, the invitation for a public hearing is not sent to the interested citizens or general public, and a report from the conducted public hearing is not published on the municipality website or elsewhere.

4. Other Participation Mechanisms at the Local Level

The aspiration of citizens to strengthen the responsibility of local authorities and increase the transparency of their activities has contributed to the development of various models and mechanisms of participation, which are rooted in the Constitution, laws and bylaws. In practice, they have become part of good practices and customs.

The right of citizens to participate in the management of local life is the original right and the fundamental principle of a democratic society. It is a precondition for the reform of local self-government and the development of good governance at the local level. In a state governed by the rule of law, the main type of legitimacy of state government is its legality (Weber, 1964: 159), which means that citizens have absolute sovereignty in exercising power, which no authority (state or local) can appropriate. The greater the citizens' activism (through various individual or joint actions in the form of petitions, initiatives, consultations, gatherings), the greater the responsibility of the local self-government.

Citizen participation in the local community decision-making processes implies that citizens gather and unite in order to detect community problems, get informed and find ways to solve them, and present the problem and a potential solution to local authorities. Citizen participation is at the very core of democracy: it is the essence of democracy and the rule of citizens (Jerinić, Vučetić, Stanković, 2020: 206).

4.1. Petition

Under Article 56 of the Constitution of the Republic of Serbia, "everyone has the right to put forward petitions and other proposals (alone or together with others) to state bodies, organizations entrusted with public authority, bodies of the autonomous province and bodies of the local self-government units, and to receive an answer from them when

requested. No person may suffer detrimental consequences for putting forward a petition or proposal".[14]

A petition is a collective address to local representatives. It is a written address of citizens who ask the holders of local authorities to take certain action within their competence, to initiate proceedings or to be a link between citizens and state bodies in resolving issues of general, public interest. General interests are a dynamic expression of the common good, while the public interest represents a regulatory determinant and a static expression of the common good (Petrović, Prica, 2020: 54-55).

The legal form of a petition is not explicitly prescribed. The mandatory parts that the petition are: name and seat of the body which the petition is submitted to, the legal ground for submission, a clearly formulated request, question, proposal for submission of the petition and its explanation, a request for authorities to respond to the petition, the representative of the petitioner, and necessary contact information of the petition signer(s), including name and surname, address and registration number.

As for local problems which are not within the jurisdiction of local authorities, a petition is often the only way in which citizens can organize themselves and draw attention to the need for involvement of local government bodies to serve as mediators between citizens and national (republic) authorities. For citizens, good and efficient administration is much more than fast and efficient service at the counter (Jerinić, Tarbuk, Damjanović, 2017: 52).

In practice, citizens often encounter situations and real problems which are inadequately addressed by the local leadership and administration. Thus, a petition is an instrument that encourages the activity of the local population but, at the same time, it "awakens" the holders of power and urges them to stand up for the inhabitants of their municipality.

4.2. Public meetings

A public meeting is as a gathering of at least three persons whose prevalent form of communication is information exchange, whereby the role of participants is separated from the role of meeting leader (Petrović, 2011: 189).

Public meetings are informal and flexible means of exchanging information between local government representatives and interested citizens. At these meetings, local authorities can inform and educate citizens on certain issues of importance to the municipality, and citizens have the opportunity to get acquainted with the work of local government bodies, to ask additional questions, seek additional clarifications, give suggestions and remarks, etc. Thus, local authorities listen to the needs of their citizens, while citizens have a sense of belonging to the community and restore their trust in the local government.

Public meetings which are held at the local level have various names, depending on the form, procedure and manner of implementation: round tables, presentations, panels, etc.

4.2.1. Brainstorming

The *Brainstorming* technique is a common form of "creative problem-solving"[15], which entails a spontaneous way of generating ideas in order to solve problems. It is applied in many developed European countries, corporations, and it is increasingly used

[14] Constitution of the Republic of Serbia, *Official Gazette RS*, no 98/2006.

[15] The brainstorming technique was first developed by Alex Faickney Osborn in 1953 in his book *Applied Imagination.* See: https://samoobrazovanje.rs/brainstorming/,(accessed 7.11.2021.)

in democratically open local communities in Serbia. This technique is of great importance when adopting strategic and development public policy documents because it encourages creative thinking and expressing different views on a specific problem of local importance.

4.3. Interviews

An interview is the most commonly used method for collecting data. Local governments often decide to conduct an interview, due to its practicality and ability to quickly, easily and economically obtain the views and attitudes of citizens on a particular topic by using the existing resources, An interview can be conducted by an official on the premises of the municipality, or an official person while performing the duties of public services It can also be conducted through the official website of the local government unit in the form of a survey or questionnaire.

4.4. Proposals and Representations

Citizens may also participate at the local level by submitting written proposals to relevant local bodies or presenting them to the competent commission. Citizens have the right and opportunity to submit an appropriate proposal on an issue of local importance to a (local) government representative or head of the organizational unit. The disadvantage of this type of communication is that the submitted proposal does not oblige the competent authority to act.

The Commission for Representations and Proposals is a permanent working body within the Assembly of the local self-government unit, established with the aim of considering citizens' proposals and providing appropriate solutions. The Commission for Petitions and Proposals considers petitions submitted to the Assembly, the President of the Municipality, the Municipal Council, as well as petitions submitted by the republic bodies.[16]

The Commission examines the merits of the petitions, proposes to the Assembly decisions and measures to be taken, collects reports from bodies, organizations, institutions, companies within a determined period, and informs the Assembly and the applicant about the undertaken activities. As citizens are largely unaware of its existence, it happens that this Commission does not sit at any time during its four-year mandate.

4.5. Electronic communication and social networks

Some of the informal means of involving citizens in local community activities are electronic communication, web presentations, social networks, YouTube channels, etc.

Although electronic communication has not been regulated by positive-law framework, it is an important instrument for ensuring citizen participation. In addition to the official municipality websites, where citizens can find information about the local government activities and plans, citizens can personally contact the city mayor by e-mail or through applications (such as "ask the president"). There are also official Facebook and Instagram pages, which can be a great place for information and interaction with local government officials, especially for young people.

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[16] Rules of Procedure of the Municipal Assembly of Aleksinac, *Official Gazette of the Municipality of Aleksinac,* 05/19

Like many other areas, local self-government has experienced ups and downs in line with changes in the state system and tendencies towards decentralization and centralization of public affairs management (Milosavljević, 2015: 9). Joint co-operation and awareness, exchange of information and providing support are the only way to finding a balance and attaining mutual satisfaction..Strengthening institutional capacities, monitoring current social trends, overcoming obstacles and building a "bridge" between citizens, authorities and services are focal points in solving problems and improving the work of local governments.

5. CONCLUSION

In a local environment, democracy is best exercised by ensuring citizens' participation in the process of reaching the goals of good governance and adopting public policy documents.

The primary goal of local self-government should be the readiness of local authorities to provide support to the local population in taking citizen initiatives, instead of pursuing the formal fulfillment of legal obligations. Local self-government belongs to all its citizens; all residents of a local community have a stake in local life and should be involved in community activities. An active society should and must use all available participatory mechanisms (such as public debates, public hearings, public meetings, surveys, electronic forms of communication, etc) to encourage citizens participation in local self-government and further reforms within it.

The aim of the public debate is to increase the transparency of the work of local self-government bodies and to encourage the inhabitants of a local community to take an active part in the economy, health care, culture, economic development and other areas that are important for the quality of life of a local community. The very aspiration for the reform of the local self-government is based on the idea of "rapprochement" and symbiosis of people and local authorities, in order to create a sense of belonging and mutual cooperation.

Introducing public debate in the legal order of local self-government, establishing a general legal framework, and establishing organizational obligations are a good start, and a preventive tool in combating corruption, increasing the accountability of politicians, and taking preventive action against lobbying, corruption and abuse. At the same time, these activities enable citizens to organize life in their community according to their own needs.

Methodologies applied at the local level when adopting public policy documents, including *ex-ante* analysis of effects, are currently characterized by a bureaucratic approach and insufficient involvement of citizens in the process of planning and adopting public policy documents. Thus, good theoretical design and absence of practical application are common features of this process at the local government level.

The democratic system of local self-governments is not reflected in the declarative involvement of citizens in local community activities but in their essential, factual and practical involvement in local decision-making processes, without aggravation or disruption.

The biggest problem in ensuring citizen participation is reflected in the citizens' lack of trust towards local self-government, the preconception that it is pointless to seek an answer that will not be provided, and the habit of "keeping silent, being obedient and respecting the government". On the other hand, another aggravating circumstance is a bureaucratic approach of the local administration, which often does not provide relevant information to citizens, either out of habit acquired through years of negative practice or due to problems of organizational nature.

Citizens’ activism in a local community does not end in local elections, and this fact should be etched in the consciousness of the people and the holders of local government. Citizen participation in decision-making processes at the local level is their original right and the basic principle of democratic organization. In order to achieve, strengthen and promote citizen participation at the local level, it is necessary to raise citizens' awareness of the importance of active participation in local community activities and to ensure that citizens are better acquainted with their rights.

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MEHANIZMI PARTICIPACIJE GRAĐANA NA LOKALNOM NIVOU U POZITIVNOPRAVNOM SISTEMU SRBIJE

Preduslov za razvoj lokalne zajednice čine različiti načini učešća građana u ostvarivanju ciljeva od interesa za lokalnu zajednicu i zadovoljenja ličnih potreba na lokalnom nivou. Građani svoje učešće mogu ostvariti na posredan i neposredan način. Neposredan način u ostvarivanju lokalnog života sprovodi se na osnovu strogo formalnih zakonskih okvira, putem građanske inicijative, referenduma i zbora građana. Kvalitet odnosa između lokalne zajednice i građana u velikoj meri određuje stepen posrednog učešća građana u ostvarivanju političkog života. Ovaj rad obrađivaće mehanizme participacije građana na lokalnom nivou, sa posebnim akcentom na javnu raspravu i javno slušanje, kao mogućnost građana da ostvari učešće, ukaže na probleme i poteškoće, ali i obavezu organa lokalne samouprave da transparentno sprovede određene postupke predviđene izmenama i dopunama Zakona o lokalnoj samoupravi 2018. godine. Takođe, u narednim redovima biće opisani i ostali načini participacije građana, poput mogućnosti konsultovanja, informisanja, peticija, anketa i ostalih dostupnih načina učešća građana u javnom životu.

Ključne reči: *lokalna samouprava, participacija, javna rasprava, javno slušanje, dobro upravljanje*

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Review Paper

LEGAL PROTECTION AGAINST ADMINISTRATIVE SILENCE

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Abstract. *The subject matter of this paper is legal protection against administrative silence, i.e. non-performance of the administration. The first part of the paper explores the concept of administrative silence and presents two dominant models of administrative silence: the negative model and the positive model. The second part focuses on administrative proceedings dealing with administrative silence, with specific reference to statutory time limits pertaining to legal protection against administrative silence. The third part elaborates on the consequences and effects of initiated proceedings, including available legal options and solutions for resolving such disputes in the future. The fourth part provides an example of proceedings in an administrative silence case. In conclusion, the author sums up the key issues that are have to be addressed in order to improve the efficiency and effectiveness of proceedings in such cases. The problem of legal protection against administrative silence is surely not an important subject in the legal science but it certainly has a huge practical effect on the establishment of the legal system and citizens' trust in it.*

Key words: *administrative silence, omission to act, positive model, negative model, proceedings before the administrative court*

1. INTRODUCTION

The concept of administrative silence and the possible ways of dealing with this problem are explored in a number of scientific papers. This paper explores how legal protection against administrative silence actually works in the Republic of Serbia, and what kind of protection is provided in administrative proceedings related to omission to act or non-performance of the administration. The negative model of administrative silence prevails in Serbian administrative practice, which means: when no individual administrative act is issued in a prescribed statutory time limit, it is assumed to be a fictitious rejection. This negative model has a long tradition in Serbia and neighboring

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countries. After exploring the conceptual framework of administrative silence, the author examines administrative proceedings on this subject matter, focusing on the negative aspects of administrative silence, real examples illustrating those negative aspects, and possible solutions.

2. The Concept of Administrative Silence

In determining the concept of administrative silence, we should start from the imprecision of this phrase. Namely, administrative silence is quite common and allowed in the work of a public administration. Due to the protection of the public interest, there are cases where the administration is both entitled and obliged not to inform citizens about certain data, even though it is obliged to keep records and collect such data. However, the concept of administrative silence that is the subject matter of this article does not refer to this kind of administrative "silence". Here, we explore administrative silence that represents a non-performance, a failure or an omission to act in a prescribed statutory time limit, in cases where the public administration has the obligation to act.

Given that the public interest represents the sum of the common interest and the (possible) private interest of an individual who can encounter such a situation, it raises the question whether administrative silence should be allowed or not. If we assume that administrative silence should be allowed, the next question is whether waiting for an individual administrative act is in the public interest. As the answer is negative, we consider that administrative silence should not be allowed from the aspect of protection of the public interest.

Non-performance of the administration is legally impermissible because it is against the basic legal principles. An omission to act constitutes a substantial violation of the administrative procedure which can have a negative impact on exercising the rights, responsibilities and legal interest of citizens and other legal subjects (Dimitrijević, 2005:54). Hence, "administrative silence" should not be allowed because it is a negation of legal principles, unlawful behavior, and a special case of administrative unlawfulness which may be redressed by filing legal remedies. In order to fight against the "silence" of the administration, responsibility for an omission to act should be established (Fatić, 1975:23).

Administrative silence is an infringement of the constitutional principle of equality since an administrative body does not reject to decide in all cases but only in some of them, which is a direct breach of the principle of legal equality (Petrović, 1981:271).

The Constitution does not explicitly envisage legal provisions related to timeliness of administrative decisions. It does not provide general administrative time limits, nor specific provisions on legal protection against untimely decision-making by government authorities. Administrative time limits are commonly regulated in a general administrative-law act or administrative procedure act, usually in combination with sector-specific laws (Dragos, Kovač, Tolsma, 2020:6). In the process of writing a constitution, legislators usually do not regulate the concept of protection against administrative silence, nor do they prescribe statutory time limits obliging an administrative body to issue an act (either a negative or a positive one). All these issues are regulated in the general administrative law or administrative procedure acts.

2.1. Models of administrative silence

In the process of solving the problem of administrative silence, there are two dominant models. The first one is called the negative model; it entails a presumption of a negative response to the request within a statutory time limit. The second one is called the positive model, which entails a presumption of a positive response to the request. In the text below, these two issues will be explored in more detail.

2.1.1. Negative model of administrative silence

The negative model of administrative silence stands for a legal presumption that, if an administrative body does not decide in the legally prescribed time limit, it will be considered that the request has been negatively solved, i.e. rejected. It safeguards the principle of legal protection, only for the benefit of the inefficient administration. This model of administrative silence is said not to have any negative consequences either for a party or for the administration; it only leads to the same legal situation that was present before making of a request (Dimitrijević, 2005:64-68).

In effect, a party can never be in the same situation. The situation is actually far worse because a party has lost valuable time, sustained some damage, etc. The administration seems to be in the same situation because it has not done anything; in fact, it seems to be in a better situation because, if a decision was negative, they would have to invest some time and effort, incur "unnecessary" costs, etc. By taking no action, they have the same effect, or even a better one. The interested party is still waiting for the decision, and he/she is ready to pay civil servants to accelerate the procedure. Thus, the administration only buys time, which clearly illustrates the elements of misuse of power (Dimitrijević, 2005:65)

The negative model of administrative silence seems to be based on the assumption that a party's request is *a priori* unfounded, that a party does not have the right that he/she is legally entitled to until the right has been approved by relevant authority, and that the given rights depend on the mercy of the administration. Administrative conduct based on such assumptions puts citizens in an inferior position when compared to the administration (Matović, 1982:166)

In the late 19th and early 20th century, there was a good legal solution for the problem of administrative silence. The solution was designated as "a legal need" or "a valuable civilization achievement" since it allowed a citizen to get a legally binding decision for a request that he could not possibly get from the administration (Sagadin, 1934: 353). Nowadays, due to a huge number of legal issues, the aforesaid solution seems outdated; considering that a citizen is vested with an individual right, he/she is not required to ask for a legally biding decision.

2.1.2. Positive model of administrative silence

Legal theory and positive-law regulations provide a different model of dealing with of administrative silence. It is based on the assumption that a request is (tacitly) accepted after the prescribed time limit and that a citizen can use and enjoy the legally prescribed rights/. The administration is responsible for all possible consequences of failing to fulfill its respective administrative duties. This conception challenges a deeply ingrained *a priori* presumption that the administration is always right, turning it into a presumption that it is always right until proven otherwise (Matović, 1982:167).

2.1.3. Characteristics of negative and positive models of administrative silence

Although neither of these two models of administrative silence seems to be dominant, we should sum up their positive and negative aspects, which point to their similarities and differences. Table 1 provides a comparative overview of their key characteristics.

Table 1 Two main models of administrative silence and their characteristics

	Negative model or deemed refusal	Positive model or tacit (silent) authorisation/approval/consent
Social context	The model tries to insure that conflicting interests are balanced in the decisions; it relies on the pre-eminence of the public interest.	The model tries to deal with administrative red tape and speed up administrative procedures; it is business oriented, and it relies on deregulation, legal certainty.
Legal context	The model is based on the fact that accountability lies with the public authority and that administrative competence is exclusive; it requires a merit review of the matter to insure that conditions to grant a right are fulfilled.	The model relies on the principle that the burden of administrative inactivity must not be ascribed to the party, hence, any claim not refused in due time is deemed granted
Basic characteristics	Non-observance of the time limit by the administration leads to an application to be deemed to be rejected. The party can lodge an administrative appeal and/or court action, leading to a devolution of competence	If there is a deadline breach in issuing an act, the application is deemed granted and rights claimed is acknowledged. However, some further procedural steps may be required in order to get the proof of that
Exceptions	When the system is mainly based on this model, exceptions are usually those cases in which sector-specific laws regulate the positive model, mainly based on the Service Directive	Exceptions seem to be numerous, stipulated in general and sector-specific laws for sensitive cases where tacit approval is considered to be risky: international obligations, public finances, environment, heritage, social matters, urban planning
Advantages	There is no danger that public interest and third parties' rights may not be balanced during the decision making process. Also, there is a long tradition in some legal systems to employ this model	It stimulates authorities to comply with deadlines by "threat" that they will need to allow enforcement of private rights otherwise and then be held accountable.
Disadvantages	Long procedures ("late decisions"); the principle of reasonableness is ineffective alone; the model legitimizes inactivity and equalizes situations of delays due to objective and subjective reasons; possible intentional delays in order to transfer accountability to decide to the courts	Potential recognition of rights disregarding the public interest; risk of corruption; problems with operational enforcement (e.g. no proofing document, no clear dates); false expectations of the beneficiaries; alleged speeding up of procedures does not happen, as the administration quickly adapts to the model and requests new documents before the deadline expires; the assumption that deadlines cannot be observed for lack of resources is a false premise for establishing a system of decision-making.

Source: Table 1. Dragos, *et al.*, 2020:13

3. Administrative Silence Proceedings

3.1. Administrative silence proceedings before the first-instance administrative body

In order to take relevant action, an administrative proceeding should be initiated before an administrative body. It can be done in two ways: a) at a party's request, or b) *ex officio*.

An administrative proceeding is initiated when personal interests of a party have been confirmed, or when it is prescribed by the law, or when it is a condition without which the proceeding cannot be initiated. The initiation of proceedings required by law is strictly prescribed in the legislative rules. Such a proceeding can be initiated either when an administrative body is authorized to do so, or when the body determines that the protection of the public interest is necessary (Tomić, 2019: 429)

Article 145 of the General Administrative Procedure Act (GAPA)[1] prescribes a time limit during which a decision should be reached and a party should be informed about it. The GAPA actually differentiates two possible time limits (applicable either in case of a party's request or *ex officio).* The first one is a 30-day time limit which applies if the administrative body decides within its own jurisdiction. The second one is a 60-day time limit which applies when an administrative body decides outside its own jurisdiction (Tomić, 2019: 583-588).

In practice, the provisions raise a real question: what will happen if the issue has not been decided in a prescribed time limit, and how should such a situation be addressed? First, there is always the possibility of a judicial intervention. Second, there is an attempt to persuade an administrative body to decide. Third, there is a threat that they will be reported to a superior body by filing an appeal or a criminal complaint. However, only the second method will be further explored in this section.

This omission to act is a daily problem and it can be defined as a regular practice of administrative bodies, or as a system anomaly. It is caused by a number of factors, which *inter alia* include: unskilled public servants, disorganized administrative bodies, contradictory provisions in legislative acts and bylaws, and making requests which cannot be decided upon (due to contradictory provisions) or requests made by some disinterested parties.

Under Article 161 of the GAPA, a party may file an appeal with the second-instance authority if a decision has not been issued within the prescribed time limit by the first-instance authority. It should be noted that this legal provision is in collision with Article 159 of GAPA, which provides that an appeal has to include the decision which is being challenged, the name of the body that issued the decision, the number and the date of the decision, and the signature of the appellant. If an appeal does not have at least one of these element, the appeal will be considered incomplete, and it will be rejected as incomplete. Notably, when an appeal is submitted to the second-instance authority, these elements cannot be included because the decision of the first-instance authority has never been issued (Tomić, 2019:647-651). This inconsistency can be solved by amending Article 159 of the GAPA, by adding that the elements listed in Article 15 (para.1) do not refer to appeals lodged for non-performance of the first-instance administrative body.

After submitting an appeal to the second-instance authority, the first-instance authority has an option to decide on its own initiative. That decision will be considered issued after the prescribed deadline. This appeal cannot be transformed into an appeal on

[1] The General Administrative Procedure Act (GAPA), *Official Gazette RS,* nos.18/2016, and 95/2018

the merits because the appellant does not know the content of the first-instance decision at the time when it is issued. If an appellant is dissatisfied with the decision after it has been issued, there is a prescribed deadline for initiating legal action against the decision.

However, Article 173 of the GAPA states that, if the first-instance authority has not issued a decision within the prescribed time limit, the second-instance authority will insist on receiving justification by the first-instance body on the reasons for not issuing the decision in time. If the second-instance authority finds the reasons justifiable, it will extend the deadline for issuing the decision for as long as the justified reason(s) lasted, but no longer than 30 days. On the other hand, if the second-instance authority finds that there was no justifiable reason for not issuing the decisions, it will decide on the administrative matter or order the first-instance authority to issue a decision within a period 15 days (Art 173, para.1 and 2 GAPA).

Moreover, Article 210 of the GAPA states that the Ministry of Public Administration is obliged to initiate a disciplinary action against a civil servant who does not issue a decision within a legally prescribed time limit. Although it is a novelty in our legislative system, it seems to have already given some results.

Administrative silence is quite common and an omission to act is something we should fight against. However, it is subject to statutory limitations. According to Article 153 (para.2) of the GAPA, in case an administrative body does not issue a decision within a legally prescribed time limit, an appeal may be filed after the expiry of that time limit, but not later than one year after the expiry. The legislator has made the right decision by envisaging a one-year statute of limitation period; thus, if parties are not interested in the decision within a one-year period, they will not have the right to seek legal protection against administrative silence.

There are also cases where an appeal against the first-instance authority cannot be lodged. In such a case, the Administrative Disputes Act (ADA)[2] prescribes the possibility of seeking judicial protection before the Administrative Court. Thus, in case the first-instance body has not issued a decision (on an issue which is not subject to appeal) within the prescribed time limit, nor within the additional period of 7 days after receiving the party's subsequent request, the party may initiate legal action against the administrative body for failure to issue the requested act (Article 19, para.2 ADA).

3.2. Administrative silence proceedings before the second-instance administrative body

The proceeding can be initiated in two ways: a) by a party's appeal, and b) *ex officio* (when the body notices that a legal act has been issued in an unlawful manner). However, the second-instance administrative body is not immune to administrative silence or an omission to act within a prescribed period. Article 174 of the GAPA states that the decision on appeal has to be issued without delay, within 60 days from the appeal submission date, unless the law prescribes a shorter deadline.

In case of administrative silence or omission to act, the Administrative Disputes Act envisages the possibility of pursuing judicial protection before the Administrative Court. Thus, in case the second-instance administrative body does not issue a decision on appeal within the 60-day time limit (or within a shorter period prescribed by the law), nor within an additional 7-day period following the party's subsequent request for decision, the party

[2] The Administrative Disputes Act (ADA), *Official Gazette RS, no.*111/2009

may file a complaint (initiate legal action) before the administrative court on the grounds of administrative silence (Article 19 para.1 ADA). Moreover, Article 153 (para.2) of the GAPA envisages a one-year statute of limitation for instituting proceedings on administrative silence.

3.3. Administrative silence proceedings before the Administrative Court

The Administrative Court is a forum for resolving administrative disputes (Article 8 ADA). Yet, similar problems may be encountered by the Administrative Court in handling the problems caused by administrative silence or an omission to act of the lower-instance bodies. As everyone is entitled to equal protection of rights in court proceedings, particularly the right to an appeal and other legal remedies (Article 36 of RS Constitution)[3], we may also refer to proceedings on an omission to act instituted before the Administrative Court.

An administrative dispute is initiated by filing a precisely written legal complaint. After it is submitted, there is a time limit for a reasonable judicial protection. During this period, relying on the right to a trial within a reasonable time, a party may seek some legal remedies.

The Act on the Right to a Trial within a Reasonable Time (RTRT)[4] envisages a number of legal remedies for the protection of this right, including: 1) an objection (aimed at speeding up the court proceeding); 2) an appeal; and 3) a request (motion) for just satisfaction (Article 3 RTRT Act). The proceeding on this issue starts by filing an objection with the court in charge of the court proceedings. This proceeding can be initiated only if the final decision has not been rendered by the Administrative Court. The decision on the objection is rendered by the president of the court, who may also appoint one or two judges to assist him. The time limit for rendering the decision is two months for the date of submitting an objection (Article 7 RTRT Act). In the decision, the court should state the reasons why the party's rights were violated, order procedural actions to accelerate the proceedings, and determine a time limit for specific actions which have to be taken by the judge adjudicating the case. The time limit cannot be shorter that than 15 days, nor longer than 4 months (Article 11 RTRT Act).

A party has a right to appeal in case the objection has been rejected, or if the president of the court has not decided on the objection within a period of two months from the objections submission date (Article 14 RTRT Act). The appeal shall be filed within 8 days from the date of expiry of the prescribed two-month period (Article 15). The appeal is submitted to the president of the court who decided on the objection, who forwards it to the president of an immediately higher court, who conducts the appeal procedure and decides on appeal (Article 17 RTRT Act).

4. CONSEQUENCES AND LEGAL EFFECTS OF ADMINISTRATIVE SILENCE: SUGGESTIONS FOR A MORE EFFECTIVE ADMINISTRATION

4.1. Non-systemic legal solutions

A great number of legal systems envisage time limits for administrative silence, as well as the effects of non-performance and legal options available to an interested party. Considering that this subject matter is regulated by the General Administration Procedure Act, can such regulation be designated as a systemic solution? In order to have a legal

[3] The Constitution of the Republic of Serbia, *Official Gazette* , no.98/2006
[4] The Act on the Right to a Trial within a Reasonable Time (RTRT Act), *Official Gazette,* no. 40/2015.

solution perceived as a systemic solution, that solution has to provide a legal procedure, and it also has to be effective and implemented in due time.

Even though the Administrative Court can be involved in solving the issue of administrative silence in Serbia, we cannot completely rely on its efficiency. Namely, if we establish the proceedings and state the deadlines for meritorious administrative decision-making, we are still faced with long time frames and inefficiency of public servants.

Article 173 of the GAPA prescribes a time limit of 30 days or 60 days (respectively) for the first-instance administrative body to render and issue a decision. If the decision has not been issued within the prescribed time, an appeal may be filed with the second-instance administrative body that has a legal obligation to decide within a period of 60 days (Article 174 of the GAPA). If the decision has not been issued by the second-instance administrative body within the 60-day time limit, a party has to submit a request for intervention. After the expiry of a 7-day time limit, the party has the right for to initiate a legal action in the Administrative Court on the ground of administrative silence. The Administrative Court has a deadline of 2 years to decide; if the complaint is complete, the decision is usually issued within a period of several months. In some rare cases, the Administrative Court issues a decision on merits, which means that the second-instance authority has to decide within the legally prescribed 60-day time limit. If the authority does not decide again, the party may request intervention again and, after a new 7-day period, the party may initiate an administrative dispute proceeding. The next decision is expected to be issued within a few months, but it may extend to 6 months due to the Administrative Court caseload. After all this, the Administrative Court cannot reverse the case to the second-instance authority but has to deal with this administrative situation on its own. At that moment, the party can actually understand the real legal effect of administrative silence.

If we sum up all the deadlines pertaining to administrative silence, we may come up with the following account: first, there is a 60-day time limit for the decision of the first-instance authority; then, there is a 60-day time limit for the decision of the second-instance authority plus a 7- day period for intervention, plus a subsequent period of a few months (let's say 6 months) for returning the decision to the second-instance authority, which is followed by a 60-day time limit for rendering the decision at second instance, plus a 7-day period for intervention; after that, the case goes to the Administrative Court, which has a few months to decide (let's say 6 months), after which we come to a decision on the merits.

Therefore, the entire process lasts around 18 months and half, for which reason it cannot be considered effective. This is the average length of proceedings, not the longest possible length. The longest period to get a decision on the merits is 54 months after a party's appeal.

From all the above, we can conclude that the prescribed 60-day or 30-day time limit is a reasonable deadline for an administrative body to decide. However, we cannot consider a period of about 18 months and a half to be a systemic solution; it is a solution that has been made in favor of the first-instance body, the second instance body, or the Administrative Court. Thus, there is no legal protection for parties but only a formal right to initiate administrative silence proceedings; a party is misled by the promise that the issue will be decided in a few months. By analogy, if a party makes a misleading promise in company law or civil law, penalties are quite strict but, in administrative law, it is quite common and taken for granted. We should never forget the constitutional rights calling for equality. It is morally wrong to keep a party intentionally misled, which surly happens in case of administrative silence. In case of justified delays, a party may at least be notified of the reasons, instead of having no response at all.

4.2. Low quality of the issued decisions

Considering the tradition deeply rooted in administrative bodies, we may raise the following question: will the quality of decisions issued in the prescribed time limits be good enough?

The answer to this question is not an easy one. Apart from rendering and delivering decisions, there is a possible lack of competence of the decision-making body. It is generally assumed that the administrative body has true and up-to-date facts and data about the issued decision, that the body is in contact with the other bodies involved in the proceeding and that a civil servant has a monthly or annual quota of cases that have to be processed; however, it is rarely the case.

From all the above, it can be concluded that it would not be fair to initiate a disciplinary action against a civil servant for an omission to act within the prescribed time limit because there is a high probability that the facts and decisions are out of civil servants' control. However, this problem may lead to a situation in which a civil servant just issues a decision in the prescribed time limit without focusing on the content and possible consequences of that decision. Such action of a civil servant, taken under the "pressing" time limits, brings the party back to square one again. Given that the party's interest is to resolve the problem (not just to get a decision), these administrative proceedings are often perceived as a vicious circle, where a wrong decision is followed by a new action aimed at rectifying the wrongly and unlawfully issued decision. This process takes as long as the previous one, and sometimes even longer. In such a situation, the administrative body can resort to the privilege of administrative silence.

The main reasons for inefficiency of administrative bodies are non-systemic solutions and low quality of the issued decisions. In addition, it is necessary to provide some solutions for fixing the problems related to administrative silence. Firstly, we have to understand that the first-instance body cannot make an administrative act, which calls for providing some appropriate time limit. However, the problem is that the second-instance body has the same or even longer time limit, plus an additional time limit of 7 days as if the initial 60-day time limit is not enough. The solution to this problem would be a 15-day time limit for the second-instance body, whose job is to supervise the first-instance body. Moreover, in some cases dealing with substantive rights (e.g. getting a pension), we may suggest the use of a positive model of administrative silence (after the prescribed time limit); thus, a party should be able to demand a pension payoff as if the request has been accepted. This solution can be also applied in other administrative proceedings involving dominant material gain.

5. AN EXAMPLE OF ADMINISTRATIVE SILENCE PROCEEDINGS

5.1. A party's request

In a tax administration case[5], the party made a request for tax exemption for inheritance by authorizing an attorney on 23 December 2019. All the necessary documents were provided. In that request, the lawyer asked for exemption of administrative act charges but receive no reply

[5] Case no. 073-432-00-17820/2019-0000; the first-instance proceeding conducted by theTax Administration, Sector for separate activities, Department for control of separate activities Nis, Ministry of Finance, RS.

from the competent body. The party made an appeal for an omission to act on 25 February 2020.

5.2. The first instance decision of Tax Administration

On 18 June 2020, Tax Administration issued the first instance decision and exempted the heir from tax payment, stating that heirs of the first line of succession are excluded from tax payment irrespective of the administrative act charges.

5.3. A request for a supplementary decision

In order to accelerate the proceeding, the attorney made a request for a supplementary decision, which seemed more effective than filing an appeal. The request was submitted on 30 June 2020. However, given that the administrative act charges had not been decided on yet, on 16 October 2020, the attorney submitted an appeal on the grounds of failure to issue the supplementary decision. On 28 October 2020, the first instance authority finally decided on the matter (10 months after the request was submitted) and rejected the request for charges.

5.4. The proceeding before the second instance authority

Based on this decision, the attorney made a meritorious appeal against the supplementary decision.[6] The appeal was filed on 18 November 2020. As the second instance authority did not act, the attorney submitted a request for intervention on 26 January 2021. As no action was taken after the expiry of the 7-day time limit, the attorney initiated an administrative dispute proceeding before the Administrative Court of the Republic of Serbia on 4 February 2021.[7]

5.5. The proceeding before the Administrative Court

The second-instance authority's decision was issued on 6 March 2021, and it was delivered to the attorney on the 1 April 2021. In this decision, the second-instance authority annulled the decision of the first-instance authority. The first-instance decision was incomplete, which may possibly be a result of the speed of issuing it. After this decision, the proceeding before the Administrative Court was dismissed, and the 60-day time limit was given again to the first-instance authority to issue a new decision.

Taking into account that these proceedings started on 23 December 2019, and that the first-instance authority was required to issue a new decision on 1 April 2021, we come up to 18 months as the total length of proceedings (as previously noted). It also has to be emphasized that this is not a complex administrative proceeding, but a simple one (involving a request to exempt an heir from tax payment and from paying the charges of the proceeding).

Notwithstanding the reasons for administrative silence, such conduct cannot be justified. Although these administrative bodies are funded by the government and have a number of qualified employees, it seems that they have difficulty in decision-making. In the author's opinion, every administrative body has to stand the consequences of non-performance,

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[6] Case no. 401-00-05598 / 2020-39; the second instance proceeding conducted by the Sector for second-instance tax and customs procedure, Department for second-instance tax procedure Nis, Ministry of Finance, RS..

[7] Case no. II-3 U.2552 / 2021; the administrative dispute proceeding conducted by the Administrative Court RS.

including a failure or an omission to act. Having a dominant position, an administrative body should not act recklessly or negligently in performing its duties; instead, it should be responsive and capable of handling the workload.

6. CONCLUSION

Considering all the above, we can conclude that legal protection against administrative silence is slower than the legislator intended. Administrative silence seems to be widespread and a violation of related rights is quite common. Thus, the rights related to protection against administrative silence should be fully acknowledged and effectively protected.

Apart from the violation of rights and inefficiency of the administration as the most important issues, there are also negative consequences and effects of administrative silence. Some of them are the lack of trust (which seems to be increasing due to corruption) and abandoning certain rights that cannot be easily obtained.

Moreover, the rights that are directly related to issuing an administrative act are not always administrative by nature. The rights which are essential for the economy are intellectual property rights, industrial property rights, and property rights (e.g. the right to a fee for an expropriation of land which directly depends on the land owner and the municipality where the land is located). In addition, “delays” in decision-making may potentially cause pecuniary losses (e.g. the time spent for getting a building permit). All the mentioned situations are not to be easily disregarded. Their economic value increases on a daily basis, which leads to the conclusion that the inefficiency in the functioning of the administration is the leading problem in the economic development of the Republic of Serbia.

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PRAVNA ZAŠTITA OD ĆUTANJA UPRAVE

Predmet ovog rada je pravna zaštita stranka od nepostupanja uprave. Najpre je predstavljeno pojmovno određenje pojma ćutanja uprave, a nakon toga postupak zaštite od ćutanja uprave. U radu su navedeni i određeni nedostaci trenutnog načina zaštite od ćutanja uprave, kao i mogući modeli za rešavanje ovog pitanje u budućnosti. Kao dominatni modeli rešavanja ćutanja uprave predstavljeni su i upoređeni pozitivni i negativni model. Poseban akcenat je stavljen na vremenski protek od pokretanja postupka do dobijanja željenog razultata. Problem pravne zaštite od ćutanja uprave definitivno nije dominantna tema u pravnoj nauci ali zasigurno je da ima veliki praktični uticaj na uspostavljanje pravnog sistema i poverenja građana u isti.

Ključne reči: *ćutanje uprave, nedonošenje rešenja od strane upravnog organa, pozitivni model ćutanja uprave, negativni model ćutanja uprave, upravni spor*

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