Government of the Republic of Montenegro

Foundation Open Society Institute
Representative Office Montenegro

United Nations
Development Programme

INFLUENCE OF INDEPENDENCE OF MONTENEGRO ON SENSITIVE SOCIAL GROUPS

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Independence of the Republic of Montenegro, that is withdrawal from the former state union and gaining the status of an independent state on 3 June 2006, after calling the referendum on constitutional status of Montenegro on 21 May 2006, imposed the need to give the answers to many questions closely related to sensitivity of certain social groups concerning the issues of property, education, health care, pension etc. in both member states of the State Union. Those issues are relevant to the citizens of one member state who live in the other one or have certain material interests in the other member state. Those citizens are significant in dimension even though reliable data do not exist but can be determined based on statistical records.

Purpose of the project ***"Strengthening Capacities for Democratic Participation of Sensitive groups in Montenegro",*** *which is a part of the Capacity Development Program (joint initiative of the Government of the Republic of Montenegro, Foundation Open Society Institute and UNDP), is to reinforce the dialogue within Montenegro and between the governments of Montenegro and Serbia about critical issues in the post-referendum period such as plans for resolution of the issues of pensions, social security , medical treatment, studying, property and like. The Strategic Consultative Group has been established within the Project and its major task is development of the strategic document which would express impartial and professional analysis of the present state, and to propose practical solutions for the problems which influence sensitive social groups in the context of relations of Montenegro and Serbia following the independence of Montenegro.*

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1 LEGAL PROCEDURE OF INDEPENDENCE

1. LEGAL PROCEDURE OF INDEPENDENCE

Referendum in Montenegro[1] was held on May 21, 2006 and the independence of the Republic of Montenegro in a legal sense can be qualified as another state succession in relation to the former SFRY. According to the most frequently used definition in the law, succession is the establishment of a full sovereignty[2] of the state in a certain territory in which the state predecessor used to enjoy sovereignty. Namely, until the moment of adoption of the decision on independence, Montenegro was a member state of the State Union Serbia and Montenegro, and did not have internationally recognized personality. That was grounded in Article 14 Paragraph 1 of the Constitutional Charter of the State Union of Serbia and Montenegro („Official Gazette of Serbia and Montenegro " No. 1/2003 and 26/2005): „Serbia and Montenegro is recognized as one subject of international law and a member of the international global and regional organizations whose membership is the condition for recognized international personality."

Legal grounds for independence of the Republic of Montenegro were as follows: (1) Article 60 of the Constitutional Charter of the State Union; (2) referendum, which was conducted in accordance with the Referendum Law of the Republic of Montenegro; (3) Decision on leaving the State Union, adopted after the referendum, on 3 June 2006.

(1) Article 60 of the Constitutional Charter of the State Union

Article 60 Paragraph 1, 2 and 3 of the Constitutional Charter reads as follows:

[1] According to unofficial results the electorate turnout on referendum in Montenegro was over 86 percent out of which was 55.5 percent voted for independence.

[2] See *Guggenheim,* Beitraege zur voelkerechtliche Lehre von Staatenwechsel (Staatensukzession), 1925., page. 241; *Andrassy,* International Public Law, Zagreb, 1971, page 203; *Magarašević,* Basis of International Law and International Relations, Novi Sad, 1974, page 333 et al.

„Upon the expiry of a three-year period the member states shall have the right to initiate the procedure for a change of the state status, i.e. for withdrawal from the State Union of Serbia and Montenegro.

A decision to withdraw from the State Union of Serbia and Montenegro shall be made after the referendum has been held.

The Law on Referendum shall be passed by a member state, taking into account recognized democratic standards."

This Paragraph was modified in 2005 by the amendment which reads as follows: „Rules on potential referendum must be based on internationally recognized democratic standards. The member state which organizes the referendum shall cooperate with the European Union for the purpose of observing the international democratic standards as defined by the Constitutional Charter."[3]

The following Paragraphs of Article 60 of the Constitutional Charter (Paragraphs 4, 5 and 6) are also of importance for the process of independence: "If Montenegro withdraws from the State Union of Serbia and Montenegro, the international documents related to the Federal Republic of Yugoslavia, particularly United Nations Security Council Resolution 1244 shall pertain and apply fully to Serbia as its successor.

The member state that exercises the right of withdrawal shall not inherit the right to international legal personality and all outstanding issues shall be regulated separately between the successor state and the state that has become independent.

If both member states declare in referendum that they are in favor of changing the state status, i.e. in favor of independence, all outstanding issues shall be resolved in the succession procedure was the case with the former Socialist Federal Republic of Yugoslavia."

Decision on calling the referendum on constitutional status of the Republic of Montenegro was published in the „Official Gazette of the Republic of Montenegro" No.13/2006 on 3 March 2006. Thus in sense of Article 60 Paragraph 1 of the Constitutional Charter, Montenegro as a member state initiated the procedure for change of its state status towards independence, that is, towards withdrawal from the state union.

(2) Law on Referendum of the Republic of Montenegro

The second condition refers to the obligation to conduct the referendum. In order to observe this condition in legal sense, the member state that initiated the procedure

[3] Decision on adoption of the Amendments to the Constitutional Charter of the State Union of Serbia and Montenegro was published in the "Official Gazette of Serbia and Montenegro" No. 26/2005 on 29 June 2005.

for withdrawal from the State Union (in this case Montenegro) passed Law on Referendum taking into account internationally recognized democratic standards (Article 60 Paragraph 2 of the Constitutional Charter), and, in cooperation with EU, all international democratic standards (Amendment II to Article 60 of the Constitutional Charter). The Law on Referendum on constitutional status of the Republic of Montenegro was published in the „Official Gazette of the Republic of Montenegro“ No. 12/2006, on 2 March 2006. In Article 5 of this Law defined was the referendum question which read as follows: "Do you want the Republic of Montenegro be an independent state with fully recognized international personality". Article 6, which regulates the issue of majority, reads as follows: "Decision in support to independence will be valid if the option "yes" was voted for by 55% of the number of valid votes, provided that majority of the total number of registered voters voted in referendum." International institutions confirmed that the Law herein was passed in line with internationally recognized standards. Referendum on independence of the Republic of Montenegro was held on 21 May 2006. According to the official results announced by the Referendum Commission, 55.5% of the citizens of the Republic of Montenegro voted for independence, while 44.50% of the citizens voted against. The referendum was officially declared successfully conducted in favor of independence of the Republic of Montenegro.

(3) Decision on withdrawal from the State Union

The third condition is adoption of the decision on withdrawal from the State Union following the referendum as defined in Article 60 of the Constitutional Charter. Even though this provision is not precise in language terms, since it does not have a subject („..decision on leaving .....**is adopted...“**), that is, it is not explicitly said who will be adopted by, based on linguistic, systemic and targeted interpretation, the conclusion is indisputably as follows:

a) After the referendum, the member state which initiated the procedure for withdrawal from the state union will adopt that decision unilaterally, that is, it will not need the consent of the other member state in order to adopt the decision.

b) The decision on withdrawal from the State Union will be adopted by the body appointed according to the law of the member state which leaves the State Union, that is, according to its Constitution, and that body will be the Parliament of the Republic of Montenegro.

c) The decision will be adopted in a form of a parliamentary decision, that is, no law needs to be passed for that.

d) The decision will be adopted legitimately if the decision is *valid* in sense of Article 6 of the Law on Referendum on constitutional status of the Republic of Montenegro, that is, if the majority requirement prescribed by Article 6 of the Law is met.

Only if conditions of Items (1), (2) and (3) are cumulatively met, state succession in

the territory of Montenegro will be conducted, which means that the succession herein will be legal and not only actual.[4] That condition was met on June 03, 2006 when the Parliament of Montenegro adopted the Decision on withdrawal of Montenegro from the former State Union of Serbia and Montenegro with majority vote. In this way, in a legally valid form, with all conditions set by the Constitutional Charter of the State Union met, the Republic of Montenegro became an independent sovereign state. Recognition by many countries after independence was gained actually confirmed that Montenegro gained the status of an independent, autonomous, sovereign state with its own international personality, which can be stated to have indisputably been recognized at the end of June 2006, since Montenegro in the meantime became 192. member state of the United Nations.

EXPERIENCE OF THE SLOVAK REPUBLIC

At the time of disintegration of the CSFR, the Constitution of the Czechoslovak Socialistic Republic no. 100/1960 Coll. was valid and possible disintegration of the CSFR by the way of referendum was regulated by the constitutional act no. 327/1991 Coll. on referendum. The socialistic constitution of 1960 did not allow for a disintegration of the common state, but the constitutional act on referendum allowed for several ways of disintegration by the way of referendum. As a result of the elections in the CSFR in summer 1992, by an agreement of the winning parties, a referendum on disintegration was not held, although it was legally possible.

After this political decision, a constitutional solution was applied and the disintegration was accomplished by the way of a constitutional act on the cessation of the CSFR no 542/1992 Coll. (see the act in the Annex 2). Referring to this constitutional act, a constitutional act no. 541/1992 Coll. on separation of the state property of the federation was adopted. Referring to these two constitutional acts, the constitutions as basic legal documents of both states were adopted (in the SR by the way of constitutional act no. 460/1992 Coll., in the CR by the way of constitutional act no1/1993 Coll.).

In the Slovak territory, these constitutional acts were adopted to solve these issues:

- -constitutional prerequisites of division of common state
- -creation of the independent Slovak Republic and the continuity of state power bodies
- -creation of the independent Slovak Republic and conditions concerning the reception of the legal order

After adoption of the aforementioned constitutional acts, the disintegration of the CSFR was settled by adoption of legal acts in both republics which regulated primarily state citizenship and building of institutions and new legal rules and in the fields, where an agreement was necessary, international treaties were concluded, either at the level of the governments of both states or at the level of respective ministries. A positive feature of these treaties was their broader framework, solution of transitional period and mutual expediency. In the interest of solving up-to-date problems, the mentioned treaties were amended several times in the past years and a part of them (if not replaced by the EU legislation) is still valid today.

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[4] See “Prestanak SFRJ pravne posledice” (End of SFRJ legal consequences), Belgrade 1995, groupd of authors, editors Gašo Knežević and Vesna Rakić-Vodinelić, pages 15, 16.

2 LEGAL CONSEQUENCES OF INDEPENDENCE

2. LEGAL CONSEQUENCES OF INDEPENDENCE

Consequences of independence of one of the member states are defined in Article 60, Paragraphs 4, 5 and 6 of the Constitutional Charter of the State Union of Serbia and Montenegro and can be divided into **general consequences**, valid in case any of the member states becomes independent, and to **special consequences**, applied only in case of independence of the Republic of Montenegro. Since referendum on independence of Montenegro was held and decision on withdrawal from the State Union was adopted, both general and separate consequences prescribed in Article 60 Paragraphs 4 and 5 of the Constitutional Charter are valid in the case of the Republic of Montenegro.

General consequences first of all refer to the fact that the state which exercises the right to withdraw from the State Union (in this case Montenegro) will not inherit the international personality of the state predecessor (in this case the state predecessor is the State Union of Serbia and Montenegro). Practically, the fact is that Montenegro is not a state successor of the State Union which means that independent Montenegro will:

a) wait for a certain period of time to become internationally recognized by other countries; in this case this refers to *unilateral acts* of foreign countries and international organizations; in case of Montenegro that period of time was very short : until the end of June (and once again mentioned should be that independence was proclaimed on June 03, 2006) Montenegro was officially recognized by many European and non-European countries - first recognition (three days upon independence) came form Island and then other recognitions followed quickly one after another, since Montenegro was recognized by EU and its member states, all neighboring countries, the USA, Russian Federation etc; the Republic of Serbia now being independent and sovereign state and legal successor of the previous state

union recognized Montenegro on June 17, 2006 and on the same date it decided to establish diplomatic relations with Montenegro; diplomatic relations between Serbia and Montenegro were established on June 22; today, at the beginning of July 2006, Montenegro is widely internationally recognized sovereign and independent state;

b) will submit the request for accession to UN and to other international organizations; in this case this refers to *unilateral act of Montenegro and a decision of the authorized body of OUN, that is, other international organizations;* Montenegro became a OSCE member on June 22, 2006 and on June 28, 2006 it became a UN member, which is a significant step towards its general international recognition; at this moment Montenegro has not become a member of the Council of Europe yet;

c) will have to declare whether it will access multilateral international conventions and whether it will sign bilateral conventions[5];

d) will have to decide about the manner of accepting as its own the former federal legislation, that is, passed by or inherited by the State Union of Serbia and Montenegro[6]; Montenegro has already reacted to that claim on the date of its independence: on 3 June 2006 the Parliament of Montenegro adopted the Declaration on Independence of the Republic of Montenegro whose one provision states that the previous legislation of the state unions will be accepted provided that it is in not in contradiction to the laws and other regulations of the Republic of Montenegro;

e) will have to adjust temporarily and then permanently its internal legal order to the newly established constitutional status, that is its independence.

The above mentioned Paragraph 5 Article 60 of the Constitutional Charter leaves unresolved the issue of the **moment of independence,** that is, whether the moment of independence should be the day of adoption of the decision on withdrawal from the state union or, the day of recognition of the state by other countries. Even though there is no unique practice in the world, there is a practice related to dissolution of former SFRY which can be taken as a serious argument. According to the so-called Badinter's Committee[7] , the independence days of former SFRY republics were the dates of adoption of decisions on independence (for Slovenia and Croatia 8 October 1991; for Macedonia 17 November 1991, and for Bosnia and Herzegovina 6

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5 Joining multilateral conventions is defined by the Viennese Convention on Succession of States in relation to the treaties from 1978. Former SFRJ ratified this Convention by adopting the Law on Ratification of Viennese Convention on Succession of States in relation to treaties in 1980 („Official Gazette of SFRJ International Treaties“, No. 1/1980), but this Convention has not come into effect yet.

6 In regard with succession of the federal legislation this refers to legislation of former Socialist Federal Republic of Yugoslavia which is still valid.

7 Up. *International Conference on the Former Yugoslavia, Arbitration Commission No 11,* in book: “Prestanak SFRJ pravne posledice” (Disintegration of SFRY legal consequences) quotation, page 51.

March 1992). Based on that, the independence day of Montenegro should be **3 June 2006, as the date of adoption of the Decision on withdrawal from the State Union after conducting the referendum which was held in the sense of the law and whose results are in accordance with the law.** After that moment Montenegro in relation to Serbia (and in relation to all other countries) became a foreign country with all the consequences arising form that condition.

Special consequences of independence defined in Article 60 Paragraph 4, were determined in case the Republic of Montenegro decides withdraw from the State Union, which is the case here. For such case only defined is a consequence of independence concerning the *international documents*": „If Montenegro withdraws from the State Union of Serbia and Montenegro, the international documents related to the Federal Republic of Yugoslavia, particularly United Nations Security Council Resolution 1244 shall pertain and apply fully to Serbia as its successor." Such formulation means that Serbia appears as a state successor of the documents which were unilaterally passed by the international organizations in relation to the State Union, which was concretized by calling upon the UN Security Council Resolution 1244. This formulation **may not apply to** international treaties. However, according to Paragraph 5 of Article 60 of the Constitutional Charter successor of international personality of the State Union is the Republic of Serbia at the moment when the Republic of Montenegro exercises the right to withdraw from the State Union. In other words, Serbia will preserve the *continuity* of international personality of the State Union of Serbia and Montenegro, and Montenegro will have a *discontinuity* in regard to the State Union of Serbia and Montenegro by becoming independent.

As in cases of any other state power changes in a certain state territory, basic legal consequences of discontinuity may be as follows:

1. Acquiring the state territory: even though the independent state of Montenegro remains in the same territory in which it was while being a member state of the State Union, it will gain that territory as a sovereign state, that is, the state which establishes its own original sovereignty without deriving it from the previous sovereignty of the State Union, but based on the will of its citizens, that is, based on the results of referendum on independence and the decision on withdrawal from the State Union.

2. Population of the Republic of Montenegro, under the circumstances of the new, original Montenegrin sovereignty is now facing the issue of citizenship; inhabitants of Montenegro who until the independence day were holding the state citizenship of both Montenegro and the State Union will keep Montenegrin state citizenship without any changes (which is a usual consequence of dissolution of federations), while the population without a state citizenship of the Republic of Montenegro, regardless whether they hold the state citizenship of Serbia or any other foreign country, will not acquire Montenegrin state citizenship automatically. Instead they will come into a new positions which in comparative law and in the laws of the countries formed after dissolution of SFRY will be resolved in regard to gaining the

state citizenship of the newly founded state, as a rule, by favoring the individuals who have residence in the territory of that state as compared to other foreigners in regard. Also, a common practice is to give to certain categories of individuals the option to apply for multiple citizenship or to opt for one. That is defined by a relevant international standard formulated in the past by a European movement in Serbia:

1) persons who are citizens of the state predecessor (in this case this is the State Union, that is, SRJ) are protected persons;

2) those persons must have the right to the state citizenship of the state in which they have permanent residence, that is, the right to opt for citizenship of another state or to have both citizenships;

3) choice of citizenships must not result with obligation to move out of the state neither to lose the status of a protected person;

4) succession must not cause the phenomenon of persons with no citizenship.

3. Legal order of independent state is the internal matter of the state: the state can change its legal order immediately or gradually. In case of Montenegro gradual, that is no turbulent changes should be expected, that is no dramatic ones, because it was a member state of the State Union which had very low legal competences and thus Montenegrin internal legal order had already been built to a good extent as if it had existed for a longer period a legal order of an independent and sovereign state. However worth mentioning is that during the time of gaining the independence of Montenegro, as a part of the legal order of the state union, in force were some significant federal legal grounds such as: Charter on Human and Minority Rights of the State Union (known as «small charter»), Law on Copyright and Rights of Industrial Property, Law on Obligation Relations, Law on Basic Property Rights. These laws are still valid in the Republic of Serbia and no special act is needed to confirm their validity because Serbia according to Article 60 of the Constitutional Charter of the State Union is a state successor of the former state union. But in order to be valid in Montenegro, needed is a special act to support their validity, and such act was passed by the Parliament of Montenegro in a form of a Declaration, on the date of Montenegrin independence, that is, on 3 July 2006. Therefore those and other laws which were in force at the moment of gaining independence, and were a part of the legal order of the state union, prolonged their legal life as if they were legal sources of the Republic of Montenegro provided that they are in line with the Constitution, laws and other regulations of the Republic of Montenegro.

Acts which should have priority after independence are:

- Act on former federal legislation takeover (most important among them is the Charter on Human and Minority Rights of the State Union); the act, as mentioned before, was passed in a form of a Declaration; the previous legislation was taken over by the way of a general formula with exception of non applying the provisions which are in contradiction with the legislation of the Republic of Montenegro (as it

was done in Slovenia). Another model could have been individual enumeration (as it was partly done in Croatia);

- Adoption of the act which follows the decision on independence in a form of a declaration or a charter, whose purpose is to define the character of the state (e.g. republican state), accepting democracy and the rule of law; expressing the intention to access the UN and to observe all the UN documents; accession to the Council of Europe and observing the European Convention on Protection of Human Rights and Fundamental Freedoms and other conventions; statement on taking into account all multilateral agreements signed and ratified by all states predecessors of Montenegro; statement on development of good relations with neighboring countries; to waive territorial pretensions towards neighboring countries etc.

- Adoption of the new constitution or amendments to the present one; if the Constitution is modified, then elements of sovereignty in regard to the state apparatus need to be pointed out (including defense and foreign affairs and like), in regard to the territory (specially recognition of the present territory of Montenegro) etc.

4. International treaties are a significant matter of succession. This primarily refers to inter-government treaties and not to private agreements signed by physical and legal entities which due to the change of the state status became the agreements signed with a foreign element. Rules of international private law apply to the latter. In international law and practice a difference is made between multilateral and bilateral agreements. This matter is defined by the Viennese Convention on the State Succession in relation to the treaties from 1978, which has not come into effect yet, but there is a compliance to apply solutions from that Convention as common rules of international law. Significant rules are encompassed by Articles 34 and 35 of this Convention. Basics of Article 34 is that a multilateral agreement which was in force in the whole territory of the state predecessor (in this case the State Union, that is, Federal Republic of Yugoslavia), will remain to be valid in relation to each state formed after that state predecessor (which means that it remains to be in force in Montenegro). As for bilateral agreements, Article 24 sets a discontinuity: "A two-party treaty which was in force on the day of succession concerning the territory to which succession of the state refers, is considered valid between the state which gained the independence and the other state signatory if they agreed upon that mutually (that is, the agreement is valid in case of succession, which is a rare contractual clause in bilateral agreements), or if behavior of the aforementioned states leads to conclusion that they agreed upon the matter herein."

Experiences after dissolution of SFRY show that the newly formed sovereign states in a form of a general formula state that they would keep taking into account all multilateral and bilateral agreements signed by all states predecessors. Therefore, in sense of international treaties signed by the states predecessors mentioned are not only the treaties concluded by the former SFRY but also the Kingdom of Yugoslavia, the Kingdom of Serbs, Croats and Slovenians, the State of Serbs,

Croats and Slovenians and the Kingdom of Serbia[8]. In case of Montenegro this list should be added the treaties concluded by the Federal Republic of Yugoslavia and the State Union of Serbia and Montenegro.

5. Accession to international organizations is in case of independence of Montenegro, based on Article 60 of Constitutional Charter of the State Union, treated as a matter of discontinuity, that is Montenegro applied for the admission to those organizations among which the priority are UN, Council of Europe and OSCE. At the time of completion of this Report, Serbia and Montenegro as independent states are still negotiating about their admission into IMF. Once again mentioned should be that admission to international organizations means taking into account all acts of that organization either international treaties or unilateral acts of the organization at minimum those accepted by all the states preceded the newly established sovereign state.

6. Property of the state predecessor, that is public goods, public debts and government archive is transferred to the successor states. The issue of separation of the property will be resolved more easily in this case than in cases of previous successions, since the Agreement on Succession of the states formed in the territory of the former SFRY has already been concluded, signed and by majority ratified[9]. The principles defined in this document and its solutions need to be taken into account in Montenegro, that is, Montenegro, as an independent sovereign state needs to observe this Agreement which has a significance of the international multilateral treaty. The Agreement is ratified by the former Federal Republic of Yugoslavia and the act of ratification is binding for Serbia. At this moment the Agreement on Succession is still not valid for Serbia and Montenegro since Montenegro has not accessed that Agreement as an independent sovereign country yet.

[8] All of these states predecessors signed very important agreements and treaties. All the countries formed on the territory of former SFRJ accepted the agreements which the Kingdom of Serbia signed (or only some of them), mostly because among all of those agreements there is a significant one signed with the USA.

[9] In addition to this document attached is text of the Agreement on Succession of the states formed in the territory of the former SFRY.

EXPERIENCE OF THE SLOVAK REPUBLIC

Unlike the situation in Serbia and Montenegro, after the disintegration of the CSFR, two succession states originated, both with the same competencies under the international public law. The succession was formulated in the constitutional act on the cessation of the CSFR. Of importance are provisions concerning transfer of the legal order from the federal state to the two republics and the process of its takeover.

The provisions are as follows:
1. Creation of the independent Slovak Republic and the continuity of state power bodies
-31 December 1992 is CSFR terminated and its successors are the Czech Republic and Slovak Republic. The transition of the state power passed on to both successive countries.
-31 December 1992 terminated legislative and executive bodies of the ČSFR, armed forces, police corps and organizations depending on the federal state budget
-transition of federation state power bodies to the state power bodies of the republic /Supreme Account office, Constitutional Court, Supreme Court, prosecutors/
- dissolution of the federal parliament and transition of powers to national parlia-ments
- ban of using state flag and CSFR state symbols
2. Creation of the independent Slovak Republic and conditions concerning the reception of the legal order
Constitutional act No. 542/1993 Coll. does not cover special provisions about derogation clause /implied derogation lex posteriori derogat priori but solution is in the Slovak constitution adopted earlier implied lex posteriori derogat priori/

From 1 January 1993 in the territory of the Slovak Republic /according art. 152 of new Slovak constitution/ remain in validity constitutional laws and law which are not in contradiction with the Constitution of the Slovak Republic. It is possible to amend them by the acts of the competent bodies or they can be abolished by the decision of the Constitutional Court / 90 days after this decision of the Constitutional Court.

As far as the **territory** of both new republics is concerned, it has remained the same as determined, but the borders were definitely specified in accordance with an international agreement between both republics. Of importance is existence of the international Czecho-Slovak delimitation commission, as determined by a treaty between both republics; its aim was to determine borders on the ground in detail.
The population of both republics was determined by the citizenship of both republics according to the territorial principle, but with a different regulation in the SR (the possibility of dual citizenship) and in the CR (the necessity to opt for one citizenship).
The property of the federation was divided on the basis of a separate federal legal act which was supplemented by several international treaties.
According to this Constitutional act No 541/1992 Coll. about the separation of the state property of CSFR between the SR and CR regulated
1. Solution how to separate common federal state property
- funds and properties
- state financial assets and debts
- currency assets and debts including state reserves
- other property rights and obligations
2. Principle of the separation-funds by the territorial principle
- other property by the principle of the share of citizens (2:1)
- creation of the committee for the state property settlement.

Exception principle of the functionality and principle of the seat /headquarter of the state enterprise/ and specific organizations /state TV, state airlines, etc./.

The succession in respect to international treaties and to international organizations was settled according to the concept of the constitutional act on cessation of the federation. This concept was based on the principle that both states are successors of the disintegrates federation. Therefore, it was not necessary to apply for the admission to international organizations, as in the case of Montenegro.

In relation to international treaties concluded by the disintegrated state, of importance is an act of the Slovak parliament from 12 December 1992, where it declared that the SR is bound by all treaties concluded by the CSFR as one of the succession states.

EXPERIENCE OF THE REPUBLIC OF SLOVENIA

In regard with constitutionally segregated competences of the Federation and the republics in regard to independence, one of the **key legal issues** in the Republic of Slovenia was the issue of federal laws and competences of federal bodies and organizations. Since not the whole republic legislation was ready, and the in order to observe the rules of the legal state, the Republic of Slovenia on the independence day adopted a Basic Constitutional Charter (Fundamental Constitutional Document on sovereignty and independence of the Republic of Slovenia, Official Gazette of Republic of Slovenia, 1/91-I), which needed to define some constitutional institutions and rights due to lack of the new constitution: that Republic of Slovenia is independent and sovereign state, that Constitution of SFRY ceased to be valid for Republic of Slovenia, that Republic of Slovenia takes over all rights and duties transferred according to Constitution from 1974 to federal bodies, Republic of Slovenia defined the international borders, guaranteed human rights and basic freedoms for all in the territory of the Republic of Slovenia regardless national affiliation, without discrimination and in accordance with international treaties, it guaranteed all the rights to Italian and Hungarian minorities as defined by the valid Constitution and international treaties.

For implementation of independence even more important might have been the Constitutional Law on Implementation of Basic Constitutional Document (Off. Gazette of Republic of Slovenia, No. 1/91-I) which was simultaneously adopted by the Parliament of Republic of Slovenia and enabled independence *de iure* and *de facto.* Among other things this law stipulated that in the Republic of Slovenia territory all international treaties signed by SFRY referring to Republic of Slovenia are valid (that is not all treaties, but only the ones where Republic of Slovenia expected to become a contractual party since some international treaties referred only to concrete investments or issues (e.g. borders issues in other republics and like). (Another peculiarity is that Republic of Slovenia as of 1999 has applied about 50 federal laws, and even today, after becoming the EU member some of the federal laws are still in force.) Apart form that, by the way of this law all competencies of federal bodies are transferred to republic bodies, and all the employees of the federal bodies in the territory of Republic of Slovenia are enabled to continue to work in the republic bodies without any additional conditions required. However, deadline will be determined by when requirements for work in the republic administrative bodies need to be met.

Together with Basic Constitutional Document and Constitutional Law the Parliament of Republic of Slovenia passed the following laws which were fundamental for establishment of the state: law on citizenship, on foreign citizens, travel documents, on control of the state border, on registration of motor vehicles, on foreign affairs, on customs service, on foreign credit relations, on foreign exchange operations, on Bank of Slovenia, on banks and savings, on bankruptcy and liquidation, on prices. All of these laws are published in the Official Gazette of Republic of Slovenia no. 1/91-I).

3

METHODOLOGY OF TRANSITIONAL ISSUES RESOLUTION

3. METHODOLOGY OF TRANSITIONAL ISSUES RESOLUTION

In order to regulate legal position of sensitive social groups in a civilized legal manner, a combination of unilateral legal solutions should be applied (laws and by laws of Montenegro as a sovereign state); solutions which come from the international acts on human rights (especially from the European Convention on Protection of Human Rights and Basic Freedoms), as well as from bilateral agreements which, in sense of Article 60 of Constitutional Charter of the State Union, should be signed by Serbia and Montenegro as independent , sovereign, internationally recognized states in order to resolve disputable matters.

a) Unilateral arrangement of legal relations

In majority the state power areas Montenegro established its own legal order. Legal competencies of the former Federal Republic of Yugoslavia were relatively narrow and Montenegro did not take them into account after 2000, due to unconstitutionally conducted change of the Federal Constitution by Milosevic's regime. The Constitutional Charter diminished legal competences of the State Union as much as possible. Therefore most of the legal matters concerning sensitive social groups are legally defined. However, legal problems within the sensitive groups arise when the state power change causes the state citizenship which may cause instable legal status of a person or a group. At that point necessary is that authorized bodies of the Republic of Montenegro make in laws and bylaws transitional provisions, that is, the provisions to represent a reaction of the state to a difficult position of a group or individual.

When developing and applying the transitional rules the following legal principles should be taken into consideration:

1) Gained rights have to be respected. In terms of positive law the concept of gained rights was not defined neither in Serbia nor in Montenegro and even the relevant science has no unique definition of this concept. However, there are three major interpretations of this concept: (a) a gained right is the right acquired only by the will of the legal holder (mostly by the means of a treaty); (b) a gained right exists only when the legal situation is completed, that is, when all legal facts by law required for legitimate gaining of rights are fulfilled, and (c) third interpretation represents a combination of the first two, that is, necessary is to gain the right by the will of legal holder and that legal situation is completed.[11] Disputable is the area in which those rights are gained and protected that is, the field of civil law which has not been sufficiently defined. In recent times accepted is the formulation of the concept of *„civil rights and duties"* by the European Court for Human Rights in sense of Article 6 of the European Convention on Protection of Human Rights and Basic Freedoms, which is much broader then the concept of civil rights and duties is understood in our context.

2) When arranging transitional relations, human rights must be respected in line with the standards of the European Convention on Protection of Human Rights and Basic Freedoms and practice of the Commission and European Court when applying this Convention.

3) When interpreting the laws and other legal documents in case of conflict of different interests, advantage should be given to the interests of sensitive social groups.

4) Temporary conditions must be time limited, that is, a transitional regime needs to be arranged, including its time duration. On the other hand within the transitional regime strict deadlines should be set to the state power bodies for acts adoption, completion of certain procedures and like.

b) International treaties

General legal principles and the principles deriving from international treaty law should apply to non-defined issues (legal gaps) and to conclusion of agreements with Serbia.

c) Bilateral agreements with Serbia

The Constitution of Serbia from 1990, which is in force today, contains the elements of the constitution of an independent state. Also, that Constitution contains the clause on protection of the interests of Serbia (Article 135 Paragraph 2), which

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[10] Instead of all other, Vodinelic, V.V, Civil Law introductory topics (Građansko pravo uvodne teme), Beograd, 1991page 94 and O Connell, D.P, The Law on State Succession, Cambridge, 1956, p. 81,82

empowers the republic lawmaker to protect the interests of the Republic by the way of unilateral methods. Before the referendum in Montenegro was held and prior to adoption of the decision on independence, there were no signs that Serbia was preparing for future status of independent and sovereign state. However, as soon as the referendum was held, the President of the Republic of Serbia visited Montenegro and after a short hesitation other state power bodies of Serbia began preparations for independent life of Serbia, and significant steps were taken in relation to Montenegro as well. As mentioned before, Serbia recognized Montenegro as an independent sovereign state and made a decision to establish diplomatic relations with it. Also the Ministry of Foreign Affairs of Serbia has taken over representation of interests of the Republic of Montenegro until diplomatic representative offices of Montenegro are established in certain countries. Most important reactions of the Republic of Serbia as an independent state in regard to the new situation are as follows:

(1) Official recognition of the new name and identity of the Republic of Serbia in international relations. Even though the Republic of Serbia will continue the international personality of the former state union, it has symbolically announced its new name and the state identity by pointing out the flag of Serbia first in the UN and then in other international organizations. At the same time, it publicly announced its anthem and other state symbols.

(2) As a legal state successor of the state union, the Republic of Serbia through its Government passed certain acts. First such act is the Decision on duties of the state power bodies of the Republic of Serbia in exercising competencies of the Republic Serbia as a successor of the state union of Serbia and Montenegro[11], then the Decree on Position of Certain Institutions of Former Serbia and Montenegro[12], then the Decree on Financing of Competencies transferred to the Republic of Serbia from the former Serbia and Montenegro.[13]

(3) Due to the change of constitutional status, the Government of the Republic of Serbia reacted to the issue of citizenship. Namely, on 27 June 2006 the Government adopted the Declaration on Gaining Citizenship which enables to initiate and process the administrative procedure before the authorized body for the purpose of gaining citizenship of the Republic of Serbia for all the citizens of the Republic of Montenegro with permanent residence in the territory of the Republic of Serbia.

(4) Bilateral negotiations on the level of individual ministries started. After establishment of diplomatic relations, negotiations between the Ministers of Foreign Affairs of the two states started in order to arrange conducting of certain

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[11] The Official Gazette of Republic of Serbia no. 48/2006 as of 5. VI 2006.
[12] The Official Gazette of Republic of Serbia no. 49/2006 as of 9. VI 2006.
[13] The Official Gazette of Republic of Serbia no. 49/2006 as of 9. VI 2006.

operations in some of the diplomatic representative offices in the third countries. Also, negotiations between the Ministers of Finance regarding the IMF membership and liabilities towards that institution are underway. Under preparation are the negotiations of other respective ministries about preparations of bilateral agreements on social security, citizenship and like. Ministry of Education and Sport of the Republic of Serbia decided unilaterally to treat the students from Montenegro as the students from Serbia.

In near future it is recommended to: (1) enlarge the fields of bilateral negotiations, particularly in order to protect sensitive citizens and social groups; (2) undertake preparations in order to sign bilateral agreements in all the areas where necessary taking as a model agreements signed by the Check and the Slovak Republic after dissolution of Czechoslovakia.

EXPERIENCE OF THE SLOVAK REPUBLIC

The fundamental feature of the Slovak and Czech practice in disintegration of the federal republic was (1) the constitutional framework of the disintegration, (2) mutual interest to settle all relations between the both republics during disintegration of the common state, (3) the preference of conclusion of bilateral treaties and (4) an effort to preserve all present rights of the citizens and thereby also the protect sensitive groups at the time of the transitional period and at the time after disintegration.

With regard to the disintegration of the CSFR, three federal constitutional acts, two constitutions of both republics and over 20 acts were adopted in the Slovak Republic in the period between 1992 and 1993. An assumption for a good mutual cooperation was the basic Treaty on Good Neighborhood, Friendly Relations and Cooperation of November 23, 1992. Referring to this Treaty, other agreements and treaties were concluded, either at the level of the governments of either states or their respective ministries (over 130 agreements and treaties during the period 1992 1997)

These legal instruments concerned mainly: constitutional nature, complexity and legal certainty of citizens, tempo and step by step system, institutions building and their immediate operability, issue of currency, customs union, international aspects, EU horizon.

4 CONSEQUENCES OF INDEPENDENCE OF MONTENEGRO FOR SENSITIVE SOCIAL GROUPS AND RELATIONS

4. CONSEQUENCES OF INDEPENDENCE OF MONTENEGRO FOR SENSITIVE SOCIAL GROUPS AND RELATIONS

Before the referendum in Montenegro was held, the Strategic Consultative Group identified the areas where potential endangered or sensitive groups might appear after independence. Such sensitive groups were identified in both Montenegro and Serbia. This document does not highlight sensitive social groups by themselves, but the ones that may become sensitive due to the new constitutional status, that is, the state succession. When the criteria of "sensitivity" (increased social sensitivity) of citizens were selected, the Group decided that these criteria need to be defined:
(1) in regard to the new status of citizens deriving from changed or uncertain state citizenship;
(2) in regard to the new social status of citizens also deriving from either changed or uncertain status of state citizenship, and
(3) in regard to the present and expected future overall economic status, as well as the individual economic status of citizens which is not necessarily neither predominantly related to the state citizenship status.

On the basis of the criteria defined in such a manner, the issue of citizenship will be considered in the same way as the previous matter, in relation to the groups covered by the criteria (1) and (2), while the issue of four freedoms (freedom of movement o goods, people, capital and services), being the matter that predominantly influences economic general and individual status, will be considered as the previous one in relation to the groups covered by the criterion (3).

At the event of discussing each sensitive group pointed will be the methodology of solution of that problem that is, whether the matter can be resolved unilaterally (by the Republic of Montenegro by the way of its legislation) or bilaterally (by the way

of inter-government agreement of Montenegro and Serbia) or multilaterally, that is, by accession of Montenegro to certain multilateral international agreements or through one of several options above or more.

4.1. LEGAL STATUS OF CITIZENS

On the basis of the previous experiences of dissolution of former SFRY, and our knowledge about the relations in the state union concluded may be that the basic change which influences the personal status of individuals or their groups is related to the changes occurring in the domain of **citizenship**. The fact that a person, instead of a national became a foreign citizen can significantly influence that person's legal status. Therefore a citizenship can be defined as a key factor of future legal and social status of all potentially sensitive social groups. Change of citizenship influences or may influence numerous aspects of legal status of an individual. So, whether the person is a national or a foreign citizen many significant issues of his/her status will depend on that.

Only a **national** has or can exercise the following rights:

- active, that is passive right to vote;
- unconditional property right to real estate;
- unconditional right to settlement in the territory of the national state;
- right to free education in state owned schools;
- unconditional right to enroll universities and other higher schools;
- unconditional right to employment and rights deriving from the status of the employee ;
- rights to social allowances in case of unemployment ;
- right to performing duties related to a national's status (office of a judge, public prosecutor, that is his/her deputy, gaining powers of attorney and membership in the state's barrister chamber etc);
- unconditional right to access to court (without paying caution and like);
- right to use the state's official documents without additional certification or authorization;
- right to military service and gaining the status of military officer;
- gaining the status of displaced person;
- and like.

Foreign citizen either does not enjoy some of these rights (for example: active, that is, passive right to vote; right to military service and gaining the status of a military officer: right to hold certain offices) or may enjoy them only partially (based on constitutive decisions of the authorized state power body e.g.: the right of settlement in the territory of the given state, or under the conditions of reciprocity; e.g: gaining the real estate property right).

4.1.1. Citizenship

State found

According to the former legal order of the state union, every citizen of the republics of Serbia and Montenegro who had citizenship of either of the republics, was at the same time a citizen of the state union, which means that in each of them s/he was a **national** (in other words, a citizen of Serbia was a national in Montenegro and vice versa). This situation changed after Montenegro became independent and sovereign state in relation to Serbia. As already mentioned, some categories of former nationals who became foreigners are privileged at the moment of succession. As a rule, those are the citizens of the state predecessor with the residence in the territory of the newly founded state, and vice versa, citizens of the newly founded state, who keep their residence in the territory of the state in reference to which the independence was exercised. In other words, a citizen of Serbia with the residence in the territory of Montenegro should have a better status in relation to other foreigners, and vice versa a citizen of Montenegro with the residence in Serbia should also enjoy a better status position as compared to other foreigners.

The issue of citizenship for the citizens of Montenegro was not disputable in past even though this issue reflects through many others such as employment, displaced persons and refugees, health care and others. The Government of the Republic of Montenegro has recently adopted the Declaration which guarantees that the citizens of Serbia will have all rights as the citizens of Montenegro, except the right to vote. However, disputable is despite the Declaration whether citizens of the Republic of Serbia may hold the offices of a judge in Montenegro, that is, of public prosecutors and generally may they holders of the offices which require a national citizenship. Also, as mentioned before, the Government of Serbia adopted the Declaration on the Procedure of Gaining Citizenship of the Republic of Serbia for the citizens of Montenegro with permanent residence in Serbia.

However, these two declarations are not a sufficient legal basis for resolution of citizenship issue, not even in the transitory period. Namely, Declaration may not change the laws on citizenship. The rule on citizenship may be changed in two ways:

(1) by signing bilateral agreement between Serbia and Montenegro on the conditions for privileged gaining of citizenship for the citizens of one state with the residence in the other state and on dual citizenship[14] or

2) by amendments to the present law. However, apart from that, necessary is to have wider guarantees which should be defined through new legal solutions.

Today in Serbia, as, in Montenegro the following laws are in force: Law on

[14] A possible model of a bilateral agreement would be the Agreemnt signed by FRY and B&H on recognition of dual citizenship. Ratified agreement was published in the „Official Gazzette of FRY“ No . 2/2001.

Citizenship of the Republic of Serbia[15] and the Law on Montenegrin Citizenship[16]. Apart from them, valid are supporting regulations in a form of a decree or the rules on keeping records. New Draft Law on Citizenship of the Republic of Montenegro is in the Parliament procedure.

The model of gaining dual citizenship, as far as numerous experts in this matter who are either close to the Government or are independent are concerned, opens more disputable issues than it resolves the present ones. Namely, broad issue of dual citizenship is not common in comparative practice and has given little concrete good solutions. Comparative examples of Macedonia and especially in Slovenia show that this matter is very restrictively comprehended.

Recommendations

For the purpose of mutual privileged citizenship, first of all recommended is to conclude a bilateral agreement, taking as a model the agreement concluded by FRY and B&H. Also, it would be good to consult legal solutions from the former SFRY countries.[17] At this point attention is attracted to solutions from Macedonian law

15 The Official Gazzette of Republic of Serbia No. 135/2004

16 The Official Gazzette of Republic of Serbia No/ 41/1999

17 At the event of dissolution of former SFRJ this matter of acquiring citizenship was resolved mainly in a similar manner:

- In Slovenia (Articles 39 and 40 of the then valid Law on Citizenship, „Official Gazette of the Republic of Slovenia" No. 1/1881)) differed two categories of persons. The first group included the persons who had federal SFRJ citizenship and at the same time Slovenian citizenship. Citizenship of the Republic of Slovenia was granted to all those persons ex lege at the moment of gaining independence The second group includes the citizens of SFRY who did not have citizenship of the Republic of Slovenia, but they had permanent residence in the territory of Slovenia on the date of 23 XII 1990 (the date of holding the referendum on independence and sovereignty of Slovenia). These persons could not gain Slovenian citizenship immediately, but if they were to gain it in the following six months as of the date of this Law on Citizenship coming into effect, they would submitted the request for citizenship to the authorised body. Persons who did not have Slovenian citizenship neither permanent residence were treated as foreigners, that is, could gain citizenship of Slovenia under the same conditions as foreign citizens.
- In Macedonia (Article 26 of the Law on Citizenship, („Official Gazette of the Republic of Macedonia" No. 67/1992) similar solution was applied as in Slovenia but still more strict: persons who had a citizenship of SFRY but not of the Republic of Macedonia could gain Macedonian citizenship if they lived in Macedonia for minimum 15 years and if they had means for living. Therefore it was not enough for them to have on the referendum day permanent residence in that country.
- In Croatia the legal solution was somewhat more complex. I category includes the persons who had citizenship of SFRY and of the Republic of Croatia as well. These persons, like in Slovenia and Macedonia, automatically, *ex lege* gained their citizenship of the Republic of Croatia as a sovereign country. II group includes persons who are of Croatian ethnicity (ethnical principle), even though they do not have citizenship of the Republic of Croatia but they have permanent residence in the territory of the Republic of Croatia registered so they could submit the written statement to the authorised body (see Art30 of the Law on Citizenship „National Newspaper of the Republic of Croatia" No. 53/1991). All other persons including the citizens of former republics of SFRJ could gain that national citizenship as all other foreigners.

which is among practices of the former SFRY countries the most restrictive. Dual citizenship is a regular consequence of the state succession. However, it may have some unfavorable effects which arise from the fact that the person with dual citizenship is a citizen of each of these countries a **national** and thus this person may have dual duties. Most often mentioned is the duty of dual military service in the countries which are familiar with the obligation of general military service. Also, dual citizenship raises the issue of dual loyalty, especially if a minority great in number lives in the other state. Therefore, privileged citizenship of one state for the citizens of the other state with the residence in the first one is a natural civilization consequence of the state succession. The same is with dual (multiple) citizenship. But with both institutes necessary is to find a good measure of protection of endangered persons and of interests of the state which could get into a situation to have more foreign citizens living in it than its nationals. The same is valid for Serbia and Montenegro in this case of state succession.

Right to fast and efficient gaining of Montenegrin citizenship for the persons who meet the requirements to gain Montenegrin citizenship, apart form the normative guarantees, should be easily exercised in practice as well. Sometimes inefficiency of government services can endanger some of the rights and freedoms related to gaining citizenship. Efforts in creation of fast and efficient action of government services needs to be visible to all interested individuals.

EXPERIENCE OF THE SLOVAK REPUBLIC

Within the frame of disintegration of the CSFR, the SR adopted an act no. 40/1993 Coll. and the CR the act no. 40/1993 Coll. According to the Slovak concept, a Slovak citizen became a citizen who was a Slovak citizen as per December 31, 1992 or a CSFR citizen who was not a Slovak citizen as per December 31, 1992 but opted for the Slovak citizenship. This possibility was limited to a 12-months transitional period and enabled a dual citizenship of the SR and the CR. But, in the CR, a similar act was not adopted and therefore a Czech citizen, if he wanted to be a Slovak citizen, had to waive his Czech citizenship. This was the case until 1999; since then it is possible for a Czech citizen to have a dual citizenship.

The act no. 40/1993 Coll. was amended twice and it regulates all aspects of gaining and losing of citizenship, including the competencies of state administration bodies (Ministry of the Interior, Regional offices).

Referring to this act, an agreement was concluded in 1994, under which both states shall exchange the records of citizens who gained citizenship of another country, even retroactively.

In regard with relations between Montenegro and Serbia, wide enjoying the rights of dual citizenship could be misused for the purpose of having dual residence, which, from the aspect of exercising the rights and duties of citizens could cause huge problems and opportunities for misuse. Each citizen must have a permanent residence in one country only. The matter of dual citizenship needs to be seen in the

EXPERIENCE OF THE REPUBLIC OF SLOVENIA

In Republic of Slovenia foreign citizens did not have the right to vote, and according to the law on local elections from 2005 (Off. Gazette of RS, No.100/2005) that right have only the citizens of EU countries with permanent residence in Slovenia, while all other foreigners with permanent residence have the right to vote but do not have the right to be elected.

light of duties of the countries in international legal assistance. This first of all because legislation of Montenegro and Serbia could be different even if they are obliged to take into account international standards.

Also, the new laws should insist on tendency of minimizing the role of citizenship in everyday life of citizens. For example: the right to vote at the local level should be guaranteed to all those individuals who have residence for a longer period of time in that local community even though they do not have Montenegrin citizenship. In that sense, best European legislation and practice from the domain of exercising voting rights at the local level should be studied and accordingly incorporated in the Montenegrin legislation on the local elections. One more reason for such decision refers to the fact that if some individuals are obliged, for example, to pay taxes to the local self-governance, they should also be given decision-making rights.

4.1.2. Family relations

State found

The right of foreigners to get married. Montenegrin independence shall not have any influence on marriage. According to the numerous sources of human rights (for example, the Article 16 of the Universal Declaration of Human Rights), the citizenship must not affect the right to enter into marriage. However, some countries limit this right with the aim to prevent fictive marriages which are made not for the reasons of creating family community, but for acquiring citizenship. Montenegro should not seek to limit the right of foreigners to marry in any way.

The right of foreigners to adoption. According to the current theories, the key principle in the case of adoption should be the interest of the child. For this reason, the right to adoption should not be related to the citizenship of the adopted child or the adoptive parent, although some countries forbid foreigners from adopting a child who is a national.[18] In the case of already closed adoption, it stays in force if, due to the succession, an adopted child or an adoptive parent or both change their citizenship.

Relations between parents and children. Possible change of citizenship of

[18] Up. Panov, Dissolution of SFRY legal consequences (“Prestanak SFRJ pravne posledice ”), p. 133 and 141

parents (one or both, or a child, or only one of children), must not affect the exercising of the parental right or the relation between parents and children in general. However, in the case of divorce, due to which or due to any other reason, one of the parents becomes responsible for bringing up the child and taking care of his/her education, which occurs within one state, the event thereto is then the matter of the local legal problem. If, due to succession, one state falls apart into two states, apart from other problems related to giving the child to one parent, there are also problems of recognition and exercising of judicial or administrative decision. These issues are considered to be more difficult legal issues from the domain of the international private law.

Guardianship. Practical question of influence of the change of the state on the guardianship is set:

- In relation to minors without parental guardianship, who are neither adopted nor institutionalized, but housed either at sustainers' families or at tutors: whether the change of citizenship of the child, and/or sustainer or tutor affects the new relation. In general, the answer should be the following: once made relation shall be continued, although the issue of recognition of the decision of the competent organ may be raised, if, for example, sustainer's family lives in one country and because of the citizenship the decisions are made in another country. In such cases, the rules of the international private law come into force;

- In relation to majors who are not able to take care of themselves, and who are not institutionalized but placed in tutor's family. The same solutions should be applied as in the above-mentioned case.

In the future, the following question could be raised: whether the tutor of a minor or a major could be a foreigner? The answer to the question depends on the fact whether the tutor is a relative of a child (in this case the citizenship is of no significance) or some other person is appointed as the tutor (there are some countries where in such case it is only allowed for the local resident to be the tutor).[19]

Recommendations

Change of constitutional status does not require significant changes of family legislation neither in the Republic of Montenegro nor in the Republic of Serbia under condition that privileged gaining of citizenship is provided if, due to the change of constitutional status, parents, that is, adoptive parents and children turn to have different citizenship. Still, as mentioned before, this issue should be resolved either by concluding a bilateral agreement on citizenship or by change of the law on citizenship. The cases of citizenship change due to family status needs to be

[19] See Panov, p. 133 and 141

EXPERIENCE OF THE SLOVAK REPUBLIC

At the time of disintegration of the CSFR, legal regulation of the family law was embodied in the Act on Family (no.94/1963 Coll.) and Act on Foster Care (no. 50/1973 Coll.). Legal relations of the third country nationals in civil relationships were regulated sufficiently by the Act on International Law Private and Procedural (no. 97/1963 Coll.) and in combination with legal rules concerning citizenship (enabling dual citizenship), there was no need to amend these acts as they did not threaten citizens´ interests after the disintegration of the CSFR. However, there was a need to solve the functioning of state institutions acting in the judicial proceedings in family matters and in the functioning of the Register Office in application of family law between both states.

EXPERIENCE OF THE REPUBLIC OF SLOVENIA

In the field of family relations Slovenia did not pass any special regulations due to independence, but in practice there were some problems with families consisting of parents who were citizens of different countries. In those cases the children could not exercise the right to children's allowance which was related to the issue of citizenship.

resolved urgently and should be given priority compared to resolution of the matters on citizenship due to other reasons.

4.1.3. Refugees and internally displaced persons

State found

Internally displaced persons and refugees are recognized as a special group of individuals whose rights and interests could be negatively affected by separation of Serbia and Montenegro. This group is quite relevant in dimension, since most recent sources provide the figure of 8,474 refugees and 18.047 IDPs, which makes 26,531 persons in total or 4,28% of the Montenegrin population.[20] Characteristic of both groups is unemployment[21] and lack of access to basic facilities, which is related again to mutually related legal and material factors, partly conditioned with specific Montenegrin context and partly with complex relation between UNMIK administration in Kosovo and Serbian authorities.

Government of the Republic of Montenegro after the session held on June 20, 2006 announced that the issue of refugees and internally displaced persons would resolve after adoption of the Law on Citizenship, Law on Asylum and Law on Foreign Citizens. Until then everything will be the same, as it was so far, in regard to the rights and status of these persons.

[20] Republic of Montenegro, Misnistry of Labour and Social Welfare, Natinal Strategy for Permanent Resolution of the Issue of Refugees and Internaly Displaced Pwersons in Montenegro, 2005, p.

[21] International Committee of the Red Cross, *The Situation of Internationally Displaced Persons in Serbia and Montenegro. Issues Paper*, Belgrade, 2005.

Internally displaced persons. Internally displaced persons are the individuals who, after the conflict in the territory of Kosovo, left their homes and moved in the territory of Montenegro or Serbia. With the independence of Montenegro, those with residence in the territory of Montenegro will lose their status of internally displaced persons and will get the status of refugees (The "Decree on status assistance for Displaced persons (Official Gazette No.37/92) recognises only the "displaced persons" expression). Within this number we should distinguish two following subgroups:

a) Internally displaced persons who are citizens of the Republic of Serbia, and who will get the status of refugees with foreign citizenship after Montenegro gets its independence,
b) Internally displaced persons with residence in the territory of Montenegro, having no personal documents. Most often these are members of the Roma, Ashkaelia, Egyptians Community (RAE). In principle, they should also obtain the status of refugees (without citizenship) after Montenegro gets its independence. However, in their case the formal problem of citizenship is absorbed by a broader issue and that is their "legal invisibility" because of the lack of personal identification documents. Although the Montenegrin government and different international agencies are trying to a great extent to provide different forms of support to "legally invisible" subjects, such condition of uncertainty makes impossible any strategic planning and a stable social integration of these subjects. The problem of the lack of personal documents is quite complex in its origin, being linked to the disruption of the administrative structure in Kosovo and the redistribution of population in and outside its territory. Complete or partial absence of documents can be due to the destruction or transfer of administrative archives or to the difficulties experienced by sensitive groups in reaching the relevant offices. In other cases, specific groups of persons, most often of the RAE Community, were able even before 1999 to have a relatively stable life without formalized contacts with the state administration, making a living out of the informal economy and without access to educational structures. The disrup-tion of Kosovo society has in the latter case simply brought to attention a situation which previously existed relatively unnoticed.

Refugees. Refugees are the individuals who fled from the territories of ex-Yugoslav republics during the war or upon the end of the war, and who got their present status in the territory of Montenegro. Within this number we should distinguish two following subgroups:

a) Refugees who changed their status in the meantime and became citizens of Serbia and Montenegro (SCG). Those with residence in the territory of Montenegro, but with the citizenship of the Republic of Serbia, will get the status of foreigners after Montenegro gets its independence.
b) Refugees who, while keeping their status, did not accept citizenship of SCG. They will not suffer negative consequences after Montenegro gets its independence.

The increase in the group of refugees (and the reduction of that of IDPs) following the independence implies that legal status of this group, and legal status of foreigners in general, will have most practical importance. In this respect, several international documents specially address the obstacle arose from the existence of non-residents employment taxation. This tax, in the amount of 2.5 euro per day, imposes a huge burden on those refugees who want to reach Montenegrin labor market.[22]

Recommendations

In order to improve the status of refugees and IDPs in Montenegro several actions of different political caliber should be taken into consideration. However since most of the IDPs/refugees is connected with Serbia and far less with other neighboring countries the legal status of such groups very much depends on the political decisions concerning the law on citizenship and the status of Serbian citizens in independent Montenegro. Certainly, the existence of such a consistent group of IDPs and refugees and the uncertain perspectives concerning the future of Kosovo impose visionary policies that could partly derogate to the ordinary legal regime on citizenship and immigration. Forms of "weaker" citizenship could, therefore, be taken into consideration in order to assimilate within Montenegrin society at a least a part of the refugees/IDPs. Such "weakness" could be in the form of limited political rights for a number of years, or possibility to withdraw citizenship in case of criminal offences or disclosure of false statements on one's own personal identity and background. The same can be thought concerning the award of permanent residence.

Rules on gaining citizenship/permanent residence in a transitional period could be even planned so as to act as "push factor" for the integration of marginal groups, using as requirements for simplified access to citizenship/permanent residence some form of active integration like schooling of children. Flexibility and "transitional regimes" to grant resident status to huge groups of foreign nationals are now part of the current experience of many Western countries dealing with a massive presence of illegal immigrants who have been for long periods de facto living in their territory (see Italy and Spain). Such legalization of formerly illegal immigrants has been done with several exceptions to ordinary rules of immigration law, and with the support of a complex bureaucratic structure, which had to deal with a mass of practical problems (like for instance cases uncertain identity) some of which are not unlike albeit with different numbers those met by Montenegro. Different best practices and practical solutions can be therefore easily identified in this field.

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[22] *International Committee of the Red Cross*, cit.; *ECRE Country Report 2003, Serbia and Montenegro*;, London, 2004; U.S. Department of State, *Country Reports on Human Rights Practices -Serbia and Montenegro,* 2004, Washington 2005**.**

The existence of a minimum degree of legal stability, like citizenship or permanent residence, is the precondition of any further legal step aimed at the protection of racial and ethnic minorities, which at this stage is overshadowed by the general legal weakness of the position of IDP (specially if "invisible") or refugee. Policies of this kind would be most effective if integrated by bilateral or multilateral agreements with Serbia, UNMIK, Croatia and Bosnia and Herzegovina, aimed at solving specific problems on the status of refugees and individuals without certain identity.

In line with the recommendations of international actors, great attention should be paid to application of non residents employment taxation to IDPs and refugees whether a lighter regime could be introduced for these categories, also considering the fact that these are stable groups not related to the problem of economic migration originating from taxes introduction.

4.1.4. Personal data

State found

Personal data, or data which refer to an individual personally, as a rule, are gathered and processed by the state bodies, or those who have public authorizations, but also other legal and physical entities (banks, trades, private institutions and others). The transfer or exchange of data between two or more processors of the collections of personal data is done according to the unique regime in the territory of the state union of Serbia and Montenegro. After Montenegro gets its independence, this unique regime will disappear, and there will be a need for establishing the new legal regulations with the aim to protect interests of individuals to whom those personal data refer, as well as the state bodies and organizations provided with strong authorizations, or other legal and physical entities.

Special practical problems of protection of personal data in the context of lack of a unique legal regime can arise after independence of Montenegro in the domain of exchange, that is trans-border transfer of personal data. Thus the issue remains what would happen if the police or judiciary bodies in Montenegro requested from the police in Serbia data about a criminal in the territory of that state, and the suspect is a citizen of Serbia. Or, what will happen in the health care institution in Serbia if medical data about the patient, a citizen of Serbia who got injured on the Montenegrin coast, are requested by a hospital in Montenegro. Many other similar cases are easy to imagine in practice of action of public authority 's bodies or other persons who process personal data in both Serbia and Montenegro.

There are two parts of legal regime in the field of trans-border transfer of personal data:

In the domain of action of public authorities' bodies. Within the frame of the unique legal regime of SCG, data about a majority of citizens were gathered and in a different way processed by the bodies of public authorities at the level of the state union and at the level of the Republic of Serbia and Montenegro as well. These data are collected in collections of personal data managed by, for example, military and police organs, judicial, tax services, register offices, school and health institutions and others. From the legal point of view, when Montenegro becomes independent, the unique legal regime in this area will disappear. Accordingly the possibility of undisturbed exchange of personal data between the individual in question and the body of public authorities, as well as between two or more bodies of public authorities will also disappear.

In other areas of gathering and further processing of personal data. In terms of data gathering and other activities referred to personal data processing which are out of competence of the bodies of public authorities, for example, in banking sector or other service sectors (commerce chains, private schools and hospitals, insurance companies and others), the disappearance of the unique legal regime of the transfer of personal data will cause the adoption of the rule on the trans-border flow of personal data, among which the rule on the equal or higher level of protection of personal data comes to the first place.

Recommendations

The independent Montenegro can solve the problem of transfer of personal data with Serbia by passing the new legislation which would be, above all, in accordance with the European Union directives from this area. In principle, by adoption of the highest European standards on protection of personal data, Montenegro, on its own, could solve the issue of trans-border transfer of personal data, not only with Serbia, but also with other countries.

Montenegro can also suggest to Serbia a conclusion of the bilateral agreement on the trans-border transfer of personal data, with obligation to respect basic rules of trans-border transfer. In that sense of great attention may be standard EU contractual clauses on transfer of personal data into the third countries.
Regarding to bilateral agreement with Serbia referring to transfer of personal data whose processing is conducted by the bodies of public authority, success of the activities in this field depends on political will of the Government in Belgrade as well.

All states established after dissolution of SFRY needed to understand how serious the issue of trans-border transfer of personal data is. Countries formed in the territory of former Russian Federation, and the Czech and Slovak Republic dealt with similar problems.

Two groups of legal documents are of special importance in this sense.

1. Standards of Council of Europe:

First group of rules is defined in the Convention of Council of Europe on protection of individuals in regard to automatic processing of personal data from 1981. Second group of rules refers to two separate cases of protection of personal data and primarily in regard to protection of individuals in secret overhearing that is intersection of communication, and according to the practice of the European Court for Human Rights just like in relation to gathering and other actions of processing of medical personal data, and according to Directive of Ministers Commission of Council of Europe R (97) 5 in regard to protection of medical personal data.

Since domestic legal regulations in these two fields are far below European standards, it is necessary to harmonize them with Council of Europe standards.

2. EU standards:

There are two major reasons why domestic law needs to be harmonized with EU standards on personal data protection:

a) According to self-assigned duties of the Republic of Montenegro domestic law needs to be harmonized with EU law in order to access valid EU membership. If this duty of supreme bodies of power is analyzed from the point of view of protection of personal data, it comes that Montenegro is obliged to harmonize its national legislation with the whole set of EU regulations, and especially with the rules encompassed by the following documents:

- EU Directive 95/46/EC, regulations on protection of individuals in regard to processing of personal data and free transfer of these data, which represents a fundamental document on protection of personal data in the EU legal system;
- EU Directive 2002/58/EC, regulation on processing of personal data and protection of privacy in the sector of electronic communications (Directive on privacy and electronic communications);
- Regulation (EC) No 45/2001, regulation on protection of individuals in regard to processing of personal data by the EU bodies and free transfer of these data;
- EU Directive 97/66/EC, regulation on protection of individuals in regard to personal data processing and protection of privacy in the field of telecommunications;
- The Europol Convention 1995, regulation which partly refers to the rules on use of personal data in the police department;

b) According to the rules of EU Directive 95/46/EC, member states are authorized to conduct transfer of personal data to the country which is not a EU member only if that country has provided adequate level of protection of personal data measured according to EU standards. If these conditions are not fulfilled in national legislation of the third country, the member state is authorized to conduct transfer of data to that country if there are guarantees of another kind in regard to protection of personal data.

In the EU law decisions have already been adopted on defining contractual clauses which in a direct way guarantee adequate protection of personal data at the event of their transfer from the EU member state into the third country. In that sense, European Commission directs the contractual parties to typical aspects of protection of personal data such as restrictions related to the purpose of processing and use of data, quality of data and request for proportionality, transparency, security and confidentiality of processing, rights of individuals to which these data refer, and like. In accordance with the a/m rules Montenegro in regard to transfer of personal data is obliged to observe criteria of adequacy or to take into consideration the following EU documents:

- 2002/16/EC: Commission Decision of 27 December 2001, Decision of EU Commission on standard contractual clauses in regard to transfer of personal data to the processor of the third country;
- 2001/497/EC: Commission Decision of 15 June 2001, Decision of EU Commission on standard contractual clauses in regard to transfer of personal data to third countries.

4.1.5. Files disclosure

State found

In the Republic of Montenegro and the Republic of Serbia in past adopted were the Regulations on files disclosing of the National Security Agency.[23] The Regulation of the Republic of Serbia (actually the Regulation on removing the confidentiality sign from the files of citizens of the Republic of Serbia kept by the National Security Agency was renamed into the Regulation on Availability of Files on Citizens of the Republic of Serbia kept by the National Security Agency)[24] ceased to be valid by the decision of the Constitutional Court of the Republic of Serbia since according to the Constitution of the Republic of Serbia the matter of personal data protection is regulated by the Law (and not by bylaws). It is not certain whether the Republic of Serbia will, if ever, regulate by the Law the so-called disclosure of political police files which would be in accordance with the recommendation of the Parliamentary Assembly of Council of Europe which „welcomes making files of secret services available to public in some of the ex communist totalitarian regimes. The Assembly invited all these countries to disclose the files to all interested individuals, at their request, made about theses individuals by former secret services " (paragraph 9. Resolution 1096 as of 27 June 1996 about measures for dissolution of heritage of former communist totalitarian systems).

The quoted regulations of the Republic of Serbia recognize the right on files disclosure only to the **citizens of Serbia**, and not to the others, regardless the fact that others were victims of political police as well and that the victim does not recognize a state affiliation. If the future law of the Republic of Serbia makes files available also only to individuals with Republic of Serbia state citizenship, then such a solution would endanger the rights and interests of all those citizens of the Republic of Montenegro about who files were made in the Republic of Serbia. On one hand, they will not be able to exercise their right to have dossiers available and thus purpose of files disclosure will not be fulfilled. On the other hand in order to enjoy other different rights related to authoritarian regimes in a former united state, access to files is necessary. Files contain the name, address, numerous data and proofs, without which exercising other rights would not be possible, like the right to rehabilitation, and accordingly the right to restitution or compensation for damaged property the individual was deprived of by confiscation as a means of side punishment.

Recommendation

Bilateral agreement represents a potential way of resolution.

[23] The Official Gazette of the Republic of Serbia No. 30/2001,
[24] The Official Gazette of the Republic of Serbia No. 31, 2001

4.1.6. Courts legal assistance between the courts

State found

The matter of legal assistance between the courts in Serbia and Montenegro, as a matter of **internal** legal assistance, is defined by the Law on Civil and Criminal Procedure in both republics. Due to constitutional change, internal legal assistance between the courts was transformed into **international legal assistance.** Legal assistance itself usually consists of: deriving conclusions (hearing of witnesses or experts) before the court of a foreign country; obtaining dossiers from the court or another government body for the needs of a court proceeding in the country which requests for legal assistance, in protection of witnesses or victims of criminal act, in providing defendant's presence in court etc. This is however very complex and can endanger status of citizens before the court of both countries since that **proceeding would prolong and be even more expensive** compared to internal legal assistance unless it is simplified by signing multilateral and bilateral agreements. Namely, if it is conducted according to internal laws, without any relieves, international legal assistance is requested by the means of diplomatic ways, and its results are mainly forwarded to interested parties also by the means of diplomatic ways. Legal assistance is given according to proceeding rules of the country requested to provide it. In the case of Serbia and Montenegro those process rules are almost totally the same. The problem is therefore in prolonging and making the proceeding more expensive due to diplomatic mediation between the countries which requests the legal assistance and the country which should provide it.

Recommendations

Best way to avoid prolonging and making the process of international legal assistance expensive is to sign a bilateral agreement which would define a direct communication between the courts of both countries without mediation by the means of diplomatic channels and without any mediation by the Ministry of Justice.[25]

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[25] State Union SCG, and its states predecessors (FRY, SFRY, FNRY, Kraljevina Jugoslavija (Kingdom of Yugoslavia), Kneževina Srbija (Princedom of Serbia) and Kraljevina Crna Gora (Kingdom of Montenegro)) signed over 35 bilateral agreements on international legal assistance with European and non European countries. Detailed data see in the book *V. Todorović,* International Treaties *(*Međunarodni ugovori), Beograd, 1999 2005, volumes I and II. Also, former federation and its countries predecessors were signatories of numerous multilateral conventions about legal assistance. All multilateral conventions mentioned here deal with legal assistance and related fields, regardless whether they came into force and whether the State Union of Serbia and Montenegro and its states predecessors signed them and ratified them or not. Which were signed and ratified by all Yu states predecessors see in International Treaties (*Međunaronim ugovorima*) as a supplement to “Official Gazettes” of SCG, FRY, SFRY and FNRJ. Montenegro as an independent and sovereign state has to decide which of them it is going to put into force and in cases of conventions signed and ratified by one of the states predecessors it should give a unilateral statement saying that validity of that

4.1.7. Mutual recognition of official documents

State found

Until Montenegro got independent, all official documents issued by the federal bodies or organizations entrusted to execute public authorizations (certificates, diplomas, certificates from register of births, marriages and deaths, court verdicts and decisions and like) were, due to the so-called federal clause from the Constitutional Charter of the State Union SCG **domestic official documents.** Being domestic, they were not subjected to any procedure of recognition

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convention is extended in the territory of Montenegro as an independent and sovereign state. Multilateral conventions which deal with legal assistance are: Convention on easier international access to courts, Hague, 1980; Convention on civil procedure, Hague, 1954; Convention on civil court procedure, Hague 1905; Convention on termination of needed legalization of foreign official documents , Hague 1961; Convention on certificates issuing in several languages from register of births, marriages and deaths, Vienna, 1976, Convention on issuing some of certificates from the register of birth, marriages and deaths for use in another country , Paris 1956; European Convention on information on foreign law, , London 1968; Convention on execution of alimony claims in a foreign country, , New York, 1956; Convention on civil proceeding aspects of international kidnapping of children, Hague, 1980; Convention on entering into marriage, minimal age to enter into marriage and marriage registering, New York, 1973; Convention on uniform law on a form of international will, Washington, 1973; Convention on collision of the laws in regard with the form of a will provisions, Hague, 1961; Convention on the law applied to traffic accidents, Hague, 1971; Europeans Convention on surveillance of probationally sentenced or probationally relieved individuals, Strasbourg, 1981; European Convention on international consequences of deprivation of the right to drive a motor vehicle, 1976; Convention on criminal acts and some other acts conducted in aeroplanes, Tokyo, 1963; Convention on prevention of illegal abduction of aeroplane, Hague, 1970; Convention on prevention of of illegal acts against safety of civil aeroplanes, Montreal, 1988; Convention of UN against illegal trading with drugs and psychotropic substances, Vienna, 1988; Convention on prevention and punishment of criminal acts against individuals under international protection, New York, 1973; Convention on UN privileges and immunities, New York, 1974; Convention on special missions, New York, 1969; Viennese Convention on o diplomatic relations, Vienna 1961; Viennese Convention on consular relations, Vienna 1963; Viennese Convention on states representation in relations with organizations of universal character, Vienna 1975; Viennese Convention on contractual law, Vienna, 1969; Viennese Convention on state succession in regard with contracts, Vienna , 1978; Convention on recognition and execution of foreign arbitration decisions, New York, 1958; European Convention on international trade arbitration, Geneva , 1961, Protocol on arbitration clauses, Geneva, 1923; Convention on execution of foreign arbitration decisions, Geneva, 1927; European Convention on international provision of legal assistance in criminal matters, Strasbourg 1958; European Convention on extradition , Paris, 1957; European Convention on transfer of proceedings in criminal matters , Strasbourg , 1972; European Convention on transfer of sentenced individuals , Strasbourg , 1983; European Convention on international validity of criminal verdicts, Hague, 1970; European agreement on submitting the claims for legal assistance, Strasbourg, 1977; Convention on forwarding the acts to a foreign country in civil and trade matters ,Hague 1970; Convention on recognition and execution of foreign court orders in civil and trade matters ,Hague 1971; Viennese Convention on state succession in regard with state owned property , archive and debts , Vienna 1983. Regarding bilateral agreement on legal assistance between Serbia and Montenegro for good recommendation is the Agreement on legal assistance in civil and criminal matters signed by former FRY and the Republic of Croatia on 15 September 1997.

(validation) neither to the procedure of equivalency. However, in principle, official documents issued by a body or organization of a foreign state are foreign official documents and being such are subjected to validation unless the states reach any other bilateral or multilateral agreement. In order to determine until when a document is not considered a domestic but a foreign official document relevant will be the time of independence of the state. According to this criterion 3 June 2006, a date of independence of Montenegro should be taken as the decision date.

Departures from the rule, however, need to be predicted. Therefore, regarding court verdicts and solutions: **the ones which became valid before June 3, 2006 will be considered in both states (Serbia and Montenegro) as domestic verdicts, that is, decisions, and the ones which became valid after that moment will be considered foreign in both states and will be subjected to the procedure of recognition as a condition for enforced execution. In both states the rules on recognition and execution of foreign court verdicts are the same and are defined by the Law on international civil law which is a Yugoslav law.** The same should be valid for administrative acts adopted by administrative organs, except that in their case it is not sufficient that they became final before June 3, 2006 in order to be considered domestic acts. Open is the issue whether other acts (especially the certificates of government bodies such as certificates from births, marriage and death registers and other public records) need to be subject to the procedure of international legalization according to the former federal law on legalization of official documents.

In regard with education certificates and diplomas, and the appraisals and marks obtained, certified semesters and like, the date of June 3, 2006 should not be taken as the decision date since the constitutional change occurred **during the school year, and** therefore certificates and diplomas acquired in the school year 2005/2006 **should be recognized as domestic without any formal procedure of validation or equivalency**. This can be done unilaterally by the laws of Montenegro and Serbia and best method would be to sign separate bilateral agreements.

Recommendations

For the purpose of definition of the status of court decisions and the orders of administrative bodies, necessary is to sign a bilateral agreement on legal assistance (see the previous item) and encompass a simplified procedure of mutual recognition of court and administrative decisions. In the same agreement inserted should be a clause stating that certificates are recognized without international legalization of official documents. Establishment of notary public should be accelerated in both states since a public notary's certification makes trans-border traffic of official documents easier. Recognition of certificates, passed exams, certified semesters and diplomas obtained after independence during the current school year or in a longer period of time can be resolved unilaterally by changes or amendments of

certain laws which regulate different stages and types of education.

4.1.8. Rehabilitation

State found

Republic of Montenegro has not passed the Law on Rehabilitation of persons who were the victims of political repression conducted by the means of legal ways with violation of human rights authoritarian regimes. Instead, the Republic of Serbia has passed such law (Law on Rehabilitation, "Official Gazette of the Republic of Serbia", No. 33/2006). Rehabilitation by the court can be requested by the person him/herself, interested entity if the victim was deprived of life, freedom or other rights due to political or ideological motives. When the person is rehabilitated by revoking a sentence, all other consequences of sentencing are made out of force including confiscation pronounced as a side punishment. Also the property is restituted to such person and compensation for damage provided which will be, as prescribed by the law, defined by a separate law.

Risks

This Law endangers rights and interests of the citizens of Montenegro since the right to rehabilitation and accordingly to other rights arising form rehabilitation right are recognized only to the persons „who without any court or administrative decision, or by the court or administrative decision are due to political or ideological reasons deprived of life, freedom, or some other rights as of April 6, 1941 until the date of this law coming into force, while the persons herein had permanent residence in the territory of the Republic of Serbia “ (Article 1). This makes unjustified discrimination since without any reasonable and justified reason difference is made between the victims of political repression of the same power depending on at the time being place of residence.

Recommendation

Problem could be resolved by concluding a separate bilateral agreement or within a bilateral agreement on legal assistance.

4.2. SOCIAL RELATIONS

Introduction

As in the case of matters of legal status, for the social relations and social position of individuals, of major importance is the consequence of the constitutional status which is expressed through potential change of citizenship. Apart form citizenship, however, other characteristics of a citizen or a social group are also important, first of all related to funds of health or pension insurance.

EXPERIENCE OF THE SLOVAK REPUBLIC

The field of pensions is regulated by a bilateral agreement concluded October 29, 1993 (supplemented by the co-called administrative executive agreement concluded January 28, 1994) and these agreements were supplemented by executive agreements between respective ministries in 1995 (51/D). This agreement regulated relations between both institutions in the field of pensions, sickness insurance, welfare benefits and benefits and services of social care (the agreement was concluded in the process of transformation of social security system).

The agreement determines the principle of equality of citizens of both states and allows for providing social benefits regardless of the residence of citizens in one state or another. Application of legal acts is limited to a territory of a state where undertaking takes place (with specific exceptions). The agreement regulates issues concerning the genesis of a claim, mutual inclusion of time periods of working performance in the territory of another state, process of surviving relatives´ pensions calculation (paid by the state which disbursed the pension of the deceased), but also issues regarding collision of claims. They are granted by the state where a citizen resided for the last time.

In the field of sickness insurance, benefits are regulated by the law of the state where a citizen is insured. The agreement determines mutual inclusion of time periods necessary to grant benefits and benefits concerning children are disbursed by the state where the recipient permanently resides. The same procedure applies concerning funeral expenses.

State social benefits and benefits of social care are granted and disbursed under the law of the state where the citizen permanently resides.

Both states bound themselves to provide themselves mutual assistance in the field of social security to the extent as if it was their own citizens.

Social security of soldiers and other members of armed forces is a special part of the agreement and is based on the same principles and reciprocity.

4.2.1. Pensions

State found

Right of pension is one of fundamental acquired rights. The matter of right of pension is regulated by the provisions of the Law on Pension and Disability

Insurance, which was adopted in Montenegro in 2003 and modified in 2004[26]; The Law on Pension and Disability Insurance in Serbia was adopted in 2003.[27]

In Serbia the category of **mandatory insured persons** refers to the employees (in private and public sector including elected and appointed individuals officials), self-employees and agricultural producers. The Law prescribes a separate legal regime for certain categories: officers engaged in Internal Affairs operations and employees of Security Agency, employees of the Ministry of Interior whose years of service at specific positions, that is jobs, are multiplied (Article 42) for these categories pension amount is increased by 20%.

In Montenegro the same category of persons are insurance holders (employees, the self-employed and agricultural producers), where the category of employee, which is a new provision, encompasses the persons who has temporary and casual employment, as well as the members of boards of directors and management boards under condition they are not insured based on another regulation (Article 9 of the Law). According to this, years of service can be gained based on increased rate of contribution for the jobs in hard or hazardous conditions, and based on that age limit requirement is reduced (Art. 18).

In EU there are no standards related to the matter of pensions but there are different national solutions referring to exercising this right. However, this right is a part of the right of social security stated as one of the original 19 social rights (31 of these nowadays) within the European Social Charter of the Council of Europe.[28]

According to the data of Ministry of Labor and Social Welfare of Montenegro there are 1.596 pensioners in Montenegro who acquired the right to pension in Montenegro and have residence in Serbia. There are 3.000 pensioners who acquired the right to pension in Serbia and have residence in Montenegro. Along with the a/m Montenegro has taken over the duty to pay pensions to 3.065 military pensioners who were paid from the State Union budget.

Risks

In the conditions of independence of Montenegro, the pension issue will become disputable for those individuals who will gain the right to retirement after 3 June

[26] Law on Pension and Disability Insurance, Official Gazette of RCG No. 54/03, amendments 39/04 ad 79/04.
[27] Law on pension and disability insurance, Official Gazette of Serbia No. 24/2003.
[28] European Social Charter was adopted in 196 but the amendments to it were adopted through the Protocol from 1988. Amended Charter was adopted in 1996 and is in force now. Specificity of this international instrument is the fact that the countries which want to ratify it are obliged to accept 16 out of 31 items of the new social right, that is 6 out of 9 of basic provisions at their choice.

2006 as the day of independence of Montenegro, especially if they have already gained a portion of years of service and years of insurance cumulatively in Serbia and Montenegro; the problem arises with the so called military pensions and with the pensions of the employees in institutions of the State Union and with pensioners of former FRY.

In regard to the fact that the present definition of persons insured does not encompass the persons who are currently employed in the institutions of the State Union of Serbia and Montenegro potential problem could be recognition of years of service and years of insurance. Regulation of the Republic of Serbia about the status of certain institutions of former Serbia and Montenegro[29] predicted that service in institutions of Serbia to which powers of the bodies of ex state union were transferred shall be continued by those persons who had a permanent residence in the territory of the Republic of Serbia at least three years before independence of Montenegro (3 June 2006) regardless of their citizenship. For their years of service they will receive 60% of the earnings they used to be paid in the time of existence of the state union. Cases of other persons who this Regulation does not refer to will probably not be resolved by unilateral acts of the Republic of Serbia, and thus Montenegro will have to resolve this issue in regard to its citizens, or this will be subjected to a bilateral agreement. Also, all other outstanding issues can be resolved by a unilateral act of Montenegro, that is Serbia, by recognizing years of service to the citizens of Montenegro, that is Serbia by determining that employees of the institutions in the State Union of Serbia and Montenegro will be recognized their years of service and that they would be added to the years of service in Serbia, that is in Montenegro.

Separate is the issue of military pensions which may be resolved as the issue of military property. Special issue are holders of pensions of ex SFRY and FRY proposal is to have both countries accept the duty to continue to pay pensions to their residents, which would be defined by the Agreement concluded by Serbia and Montenegro.

Special problem is lack of access to information about the employees (even though such register is a requirement according to the Law on Records in the Field of Labor and Employment).

Recommendations

In order to resolve these disputable matters Pension and Disability Insurance Funds of Serbia and Montenegro, that is, authorized bodies of the two countries need to make an agreement. Negotiations on this matter, although initiated several times as

[29] The Official Gazette of RS No. 49/2006

of 2003, were not achieved and certain problems were noted in the period of functioning of the State Union.

It seems that the right to disability and family pension does not represent a problem in the conditions of independence of Montenegro, because in huge number of cases it is not related to the years of insurance (accumulation is not required as in the case of retirement pension). In the cases which require adding of years of service and years of insurance, especially in conditions of disability pensions, the matter should be successfully resolved by a bilateral agreement, whose purpose is to address the issue of the right to pension between the states of Serbia and Montenegro.

In regard to the existing experience with bilateral agreements on social insurance **proposed is to conclude the Agreement on Social Insurance by Montenegro and Serbia**.

These agreements[30] stipulate: rights in the field of health insurance, rights in the field of pension and disability insurance, rights in case of unemployment, right to children's allowance and administrativelegal assistance. In that way, by incorporating the experiences of the countries formed in the territory of former SFRY referring to social insurance and concerning the need to have such agreement concluded by Montenegro and Serbia[31], which imposed as a necessity in the State Union of Serbia and Montenegro, the issues of pension, health and employment can be resolved.

EXPERIENCE OF THE REPUBLIC OF SLOVENIA

Due to independence of Slovenia disputable were pensions of certain groups which did not have a status of insurance holders in Republic of Slovenia. That is why the right to pension to war veterans, military invalids, members of families of killed participants in war and of military pensioners with permanent residence in Republic of Slovenia, Slovenia guaranteed based on the Constitutional Law (Art 18) in the scope and under conditions valid until 25 June 1991. This means that Republic of Slovenia applied the principle of acquired rights and later on it could not have changed certain conditions since that would represent retroactivity of legal norms. In regard to the issue of pensions worth mentioning is that Republic of Slovenia signed an international treaty on social protection only with the Republic of Croatia and negotiations with Bosnia and Herzegovina and the Republic of Macedonia are still underway. Since Republic of Slovenia did not have adequate records about the retired officers and other servants of Yugoslav National Army (JNA) Executive Council defined by its Regulation the amount of pension in a form of advance, and only after two years the law was passed which defined these advances as a permanent solution.

[30] Yugoslavia signed the Agreement on Social Insurance with Austria, Belgium, Bulgaria, the Czech Republic (applied in both cases - Czech and Slovakia), France, Italy, Luxemburg, Hungary, Holland, Norway, Germany, Poland, Sweden, GB, Denmark, Egypt, Libya, Romania and Panama. SCG signed the Agreements on Social Insurance with Macedonia (2002), Croatia (2003) and B&H (2004)

[31] The present Pension and Disability Insurance Laws in Serbia and Montenegro indicate urgent adoption of a bilateral agreement of that kind that is the Agreement on Social Insurance between Serbia and Montenegro.

4.2.2. Employment

State found

The issue of employment was addressed on the level of employment of civil servants and is covered by the Law on Civil Servants and Public Administration Employees in Montenegro, and the Law on Labor Relations in the Government Bodies in Serbia. The Law on Civil Servants and Public Administration Employees in Article 6 stipulates that a government body may employ the individual who is a citizen of Montenegro.[32] The provision herein referring to both employment in government bodies and citizenship defines the matter as if the county had already been independent.

Compared to Montenegro, the Law on Labor Relations in Government Bodies currently in force in Serbia, in Article 6 stipulates that a requirement for employment in government bodies is SFRY citizenship. This solution, with citizenship as requirement, at first seems to offers broad options for employment in government bodies, but this provision may change since state succession has already occurred.

Montenegrin or FRY citizenship is required for appointment of judges according to the Law on Courts in Montenegro, Article 31. This condition may change. After being elected for a judge, that function becomes permanent. However, if one of by the law prescribed conditions for acquiring a judge position is canceled, a judge can be relieved from his/her duty. Nevertheless, for a judge and other officials positions, who will be required in future to be nationals, a transitory deadline should be set for the purpose of acquiring Montenegrin citizenship. This *mutatis mutandis*, will be valid for Serbia and its regulations.

Out of all professions defined as *licensed*, that is, requiring membership in a professional chamber in order to perform duties, the most interesting is the right of attorneys to perform duty in both republics. Requirement to be registered on the list of attorneys according to the Law Practice and Legal Assistance Service in Montenegro required is SFRY citizenship as defined by Article 11. Article 13 also prescribes actions of attorneys registered in the list of attorneys of the Bar Chamber of Serbia or Autonomous Regions before the courts in Montenegro. Common practice was to have attorneys from Serbia represent physical or legal entities before the courts in Montenegro. It was a common practice that attorneys from Serbia represent physical and legal entities before the courts in Montenegro. A difference

[32] This provision is clear and cannot be interpreted differently than stated but in order to prevent certain problems which might occur in practice I would like to quote provision of the Law on Civil Servants valid in Montenegro until October 2004. Namely this Law prescribed in Article 4 SFRJ citizenship is the requirement for employment in the government body.

should be made for the following: (1) the right to register an attorney with the Bar Chamber of the domestic state (Montenegro or Serbia), and to fulfill the conditions for acquiring the powers of the attorney related to citizenship and (2) right to representation before the court. Competence states in item (1) can be recognized only to **nationals or persons with multiple citizenship, out of which at least one is national state citizenship.** However the state's right to representation before the court as defined in item (2) should be recognized to foreign citizens since that right has already become an international legal standard.

Job and employment in free labor market in *private sector* are legally and actually conditioned with the employers' needs. All the problems related to *illegal work* are not related with the matter of constitutional status and therefore they are not of specific interest of this project.

Risks

In case of Montenegro the problem of employment and work in government bodies in a hypothetical situation would be the situation where an employee of the government body, who has been enjoying that right for years, does not have Montenegrin citizenship. In that case the presumption should be that already gained rights cannot be deprived of but instead ways of establishing them through the system of the independent state need to be found. This could be resolved in two ways:
- double citizenship,
- quick gaining of Montenegrin citizenship without long bureaucratic procedures.

In both cases a reasonable transitional period should be determined in order to solve the problem.

Montenegro could start resolving this issue first of all *unilaterally,* that is through amendment of regulations or adoption of new ones and at the same time negotiations should be started with Serbia in order to resolve the issue *bilaterally* and according to the principle of reciprocity, that is, equal legal solutions.

EXPERIENCE OF THE REPUBLIC OF SLOVENIA

In the field of employment Republic of Slovenia offered according to the constitutional law employment to all the employees of federal organs in the territory of Republic of Slovenia who were capable to continue to work, to be servants in the state bodies without any additional requirements. Later on the law was passed which defined requirements for work in public administration. The issue of court expert witnesses has not arisen since the courts could have engaged even before foreign physical or legal entities for expert witnessing in a concrete case.

EXPERIENCE OF THE SLOVAK REPUBLIC

Economic cooperation and free movement of workers between the SR and the CR after the disintegration of the CSFR was settled by a bilateral agreement of October 29, 1992 (3/D)

The basic principle of this agreement is that mutual employment of citizens of one contracting state is regulated by legal acts of the state where the seat of the employer is located. Mutual employment does not require a working permission (only registration is required). Citizens who are employed have the right to reside in the state during the time of working.

This agreement also regulates taxation of salaries, conditions of providing financial resources during unemployment, inclusion of time periods of employment, employment contributions, all according to the law of the state of the seat of the employer.

At the same time, it was agreed that financial performance resulting from the mutual employment and benefits should be realized by a special payment agreement (in the currency convertible in the state of the seat of the employer).

This agreement is only of framework character and was supplemented by an administrative agreement between the respective ministries (of March 31, 1993), as amended in 1995. This administrative agreement regulated practical application of employment of citizens in practice

Potential problem might be granting licenses to *sailors and maritime trade officers operating with foreign companies.* This is because until now FRY was recognized as a country of origin of this profession and therefore Montenegro should quickly find a *legal internationally recognized solution* in order to avoid consequences of losing, that is, suspension of their employment rights due to cessation of affiliation to a certain country, until Montenegro becomes a member of this international system.

Recommendations

The field of unemployment can be regulated in respect to relations between these two sovereign states with a standard bilateral Agreement on Social Insurance, but such agreement in principle does not encompass some issues which should be specially addressed.

After independence of Montenegro special attention should be paid to preserving already gained rights among which first of all rights of the employees in public administration. It is possible to have cases of civil servants or public administration employees working for a long period of time in government bodies who apart for having permanent residence in Montenegro might not have Montenegrin citizenship. In that case transitional period should be determined in order to resolve these issues efficiently concerning the fact that individuals cannot be deprived of already gained rights.

Through the process of legal framework modifications, and the Law on Law Practice is now in force, the citizens of Montenegro should be granted the right to engage or continue using services of attorneys from Serbia, and foreign attorneys in general. In such case a foreign attorney is required to be fluent in the official language of the court or any other government body in Montenegro in which the attorney undertakes any actions on behalf of or for the account of a party. This is fist of all because form the aspect of efficient exercising of human right it is not acceptable that after creation of an independent state the right to efficient defense or to representation of citizens who engaged or from another justifiable reason want to be represented by the attorney from Serbia are deprived of that right or their right is violated. Such years lasting practice should be continued as a guarantee of a qualitative system of the rule of law. This should be regulated first of all *bilaterally* but if Serbia, due to any reason, does not accept it, Montenegro should resolve that issue *unilaterally* by a decision.

Montenegro should, in order to have its judicial system function efficiently, *unilaterally* resolve the issue of using services of *expert witnesses* from Serbia, considering the fact that due to some deficiencies or required supervision findings, sometimes due to lack of certain institutions in Montenegro, expert witnesses from Serbia need to be engaged. This means that expert witnesses from Serbia can act in courts of Montenegro quickly and efficiently and special consideration should be paid to taxation of their income earned in Montenegro. This issue can be regulated by a *bilateral* agreement. Resolution of this issue has a dimension of fundamental human rights since that is of crucial importance for fair trial in reasonable period of time.

Special attention should be paid to enabling continuous work to the individuals performing duties in other licensed professions, such as *doctors, pilots, flight control officers, pharmacists etc,* whose licenses were issued by an institution on the State Union level. All of them need to enjoy gained rights and Montenegro should *unilaterally* define granting and control of these licenses under its jurisdiction according to international standards. *Bilateral* solution implies mutual recognition of licenses between the two sovereign states.

4.2.3. Health care system

State found

Health care system in Montenegro provides health care on primary, secondary and tertiary level with the purpose to preserve and improve health of citizens, to prevent sickness and injures, early detection o illness, forehand treatment and rehabilitation.[33] Medical care of citizens in Montenegro is provided in 30 public and

[33] The Law on Health Care Portection Art 1 (Offf. Gazette RCG no 39/04)

in 246 private health care institutions. Biggest amount of health care needs are addressed in public health care institutions especially on the level of primary and secondary health care. Total number of annually treated patients in hospitals of Montenegro is about 70.000. Out of that number to other health care institutions out of Montenegro directed are about 3400 people. Out of total number of medically treated patients only 5% of patients will have medical treatment continued out of Montenegro, mostly in Serbia, while the number of treated patients at foreign clinics is up to 70 cases per year.

Health care treatments of citizens of Montenegro in Serbia, for the purpose of continuation of medical treatment or diagnostic checks, are conducted based on medical orders of authorized commissions of the Health Insurance Fund according to the procedure defined by the Rules of Procedure. Most frequent services provided are: transplantation (liver, kidneys, hearth and like); field of children's surgery; radio-therapy (*brahitheraphy*), specific neurosurgery; services from the field of orthopedic surgery of spine or other bone related illnesses. All costs of treatments, control or diagnostically services are financed from the funds of the Health Insurance Fund as prescribed by the law.[34] Total amount of expenses for medical treatment of citizens of Montenegro in health care institutions in the year 2005 was 3.3 mil €. Health Insurance Fund has contracts signed on providing medical treatment to health insurance holders with the following institutions in Serbia: VMA, Clinical Center of Serbia, Institute for Oncology and Radiology, Institute for Mother and Child, Children's Clinic «Tirsova» , Institute for cardio-vascular illnesses «Dedinje» and specialized hospital of Banjica. These are indefinite period of time contracts and terms of the contracts will be changed with consent of all signatories. Apart from the a/m institutions Fund's insurance holders may exercise the right to medical treatment in other health care institutions if medical doctors commission and Fund's commissions prescribe it. Prices of health care services provided by health care institutions in Serbia are the same as prices for citizens of Serbia. Prices include a medical part which includes compensation for medical interventions, medicaments or implants (with surgery interventions), and accommodation part for accommodation expenses. Prices of medicaments and componible material are market prices but under control of the state and may not be increased. Since most patients are directed to those institutions due to complicated surgeries, componible materials costs or the costs of medicaments used for therapy purposes are biggest. Prices of health care services, which are higher for certain categories of foreign patients, will not be increased for the expenses of medicaments or componible material, which are calculated according to their real costs.

Reforms of health care system which started in May are directed towards improvement of health care in most acceptable and on most equal footing manner. Improvement of efficiency and accessibility of health care started with reform of

[34] Law on Health Insurance, Art 16 (Off. Gazette of the Republic of Montenegro No). 39/04

primary health care which needs to solve the biggest part of health care needs of population. Improvement of scientific and technological development and raising the quality of services represent strategic goals of the reform which would enable biggest scope and successful treatment of patients. Introduction of modern surgery (cardio-surgery) enabled less dependence of the health system on other health centers out of Montenegro. New investment cycle will make the existing equipment modern, in order to provide comprehensive diagnostics and complete treatment of sick people. This would enable citizens to satisfy all their medical needs in health care institutions of Montenegro. For a small number of specific diagnostic and therapeutic services in future used will be services of the centers in which such specific treatments are successfully conducted.

Having in mind that fact that there are some citizens of Montenegro who are at the same time holders of the right to obligatory insurance have temporary residence in Serbia and among them most numerous are students and partly individuals older than 65, mostly due to family reasons, and therefore it is necessary to solve the issue of undisturbed exercising of their rights to health care.[35] Constitution of the Republic of Montenegro in Article 57 guarantees the right to all to health protection and Paragraph 2 of that Article guarantees the right to children, pregnant women and old people to health protection. The UN Human Rights Convention, Convention on Children's Rights and European Convention on Human Rights, international rules of the World Health Organization are the documents which guarantee the right to health care especially to sensitive groups among which children, mothers in relation to maternity and old people.[36] Special care of health care and socially endangered and sensitive categories of population are prescribed by the Law on Health Care[37], and treatment of contagious illnesses and emergency state patients.

[35] Change of European Social Charter Art 13 Para 1:
In order to provide efficient exercising of rights to social and medical assistance the contractual parties agree to: enable that any individual who does not have a proper means and is not capable to provide such means for him/herself by own efforts or to provide them from other sources, especially the bonuses from the scheme of social insurance is obliged to be provided adequate medical assistance in case of illnesses, that is the assistance which is needed at that moment.

[36] Universal Convention on Human Rights UN, Art 25;
International Treaty on Civil and Political Rights UN;
International Treaty on economic, Social and Cultural Rights;
European Convention on Human Rights protection and Fundamental Freedoms CoE.

[37] Law on Health Care Art 2, Off. Gazette RCG No. 39/04

EXPERIENCE OF THE SLOVAK REPUBLIC

After the disintegration of the CSFR, the very important field of health care of the citizens of the SR and the CR was regulated by the agreement of October 29, 1992 (concluded 2 months before the disintegration). This agreement is based on the principle of reciprocity and the health care is provided to an insured citizen of another state upon his request if necessary in case of a sudden illness or accident or upon request of a specialist medical institution of one state to provide special medical treatment.
Health care is provided following a prior approval of a health care insurance company of another state, if an accident or sudden illness is not concerned. All incurred costs are charged mutually. This agreement regulates the procedure of providing special medical services, medical transport, vaccination and performing land and air rescue service.
In case of any difficulties, provision of health care services is regulated by the law of the country where the medical treatment was provided.
The agreement, in such wording, was valid until 1998 and this field is regulated by an international treaty also at present.

Recommendations

Law on Health Insurance[38] stipulates that citizens of the countries which have signed international treaty on social insurance will enjoy health insurance in the scope define by that contract. After independence of Montenegro, Montenegrin citizens will enjoy the right to health services while sensitive categories of citizens, and these are students and old people, who are citizens of Montenegro with temporary residence in Serbia, might get into a specific situation. International Treaty on Economic, Social and Cultural Rights[39] and Protocol No 4[40] define that citizens have the same rights and treatment in regard to health care. The so far practice and ethical principles which do exist in medical profession show that those categories of citizens in principle may not be endangered. After 21 May no citizen of Montenegro in Serbia was deprived of medical help that the authorized bodies were informed about. Needs for hospital treatment in cases of such categories will be regulated according to determined procedures for directing a patient to hospital treatment or in urgent cases. Already signed contracts on medical treatment between health care institutions of Serbia and Health Insurance Fund are not expected to be changed since they were signed based on market, that is, contractual criteria with mutual benefit.

Apart from the a/m categories, a separate sensitivity is expressed with the category of internally displaced people who after the independence got the status of refugees. In this case, based on Art 13 of the Law on Health Care, Item 14 the Republic of Montenegro takes over the duty of financing health care of those individuals from the budget.

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[38] Law on Health Care Art 9, Off. Gazette RCG No 39/04.
[39] International Treaty on Economic , Social and Cultural Rights Art 12
[40] Protocol No 4 whcih provides certain rights and freedoms not included into the Convention nad First Protocol Art 2 Item 3

EXPERIENCE OF THE REPUBLIC OF SLOVENIA

Republic of Slovenia in time of independence had a separate law on health care of foreign citizens (Official Gazette of SRS, No. 28/71), which is valid even today, and it guarantees unconditional medical help to foreign citizens. In 1992 the new law on health insurance was passed and the law on health service. The new laws define the status of insurance holders and their rights and the issue of citizenship was not raised again since all inhabitants of Republic of Slovenia have obligatory health insurance and difference is only in the rights they can use. The issue of prices of health care services in international relations Republic of Slovenia has defined by a n international treaty with the Republic of Croatia by which it resolved the issues of mutual relations of health care insurance.

Based on the previously mentioned conclusion is that there is no grounds for depriving the citizens of Montenegro of rights to use health services in Serbia. The only risk is that political decisions may make a pressure on health care institutions signatories of the contracts despite the autonomy of these institutions, which is regulated by the law.[41]

In regard to international documents and by the law stipulated duties and the so far professional cooperation between health care institutions in Serbia and Montenegro, recommendations is that in accordance with principles and postulates of health care and equal treatment of the citizens of Montenegro and citizens of Serbia a bilateral agreement is signed which would confirm application of national health legislation in both states.

4.2.4. Education

State found

The areas of education and scientific and research activity are entirely within the competence of individual states, which has been the legacy of former Yugoslavia. In the Republic of Montenegro the listed areas have been regulated by new legal provisions specifying all degrees of education and areas of activity. The entire legal framework has been introduced with the support or expertise of European programs for the support of the process, i.e. relevant Council of Europe experts, rendering these areas compatible to European educational and research space. The implementation of the adopted legislation is carried out in compliance with the strategic documents defined in Montenegro for these areas. The Law on Higher Education[42] and the Law on Scientific and Research Activity in the Republic of Montenegro[43] regulate these areas in accordance with the strategic documents passed at EU level, i.e. the Lisbon Recognition Convention, the Bologna

[41] Zakon o zdravstvenoj zaštiti, Sl. glasnik RS 18/02
[42] "The Official Gazette of the Republic of Montenegro", No. 60/03
[43] "The Official Gazette of the Republic of Montenegro", No. 71/05

Declaration and the Lisbon Strategy. In compliance with the conditions prescribed by laws regulating the area of education in Montenegro, education is available to all people regardless of their race, sex, marital status, color, language, faith, political or other beliefs, national or other origin, affiliation to a national community, financial standing, or invalidity.

According to the valid laws and bylaws both in Montenegro and in Serbia, the status of students from one Republic, in terms of enrolment, fee and the use of accommodation and food facilities in student halls of residence, equals the status of local students in another Republic.

Despite such legal framework, on 21 March 2006 the Government of Serbia put a Notice that it issued a Decision of enrolment at Serbian universities in the academic year of 2006/07 which, among other things, stipulates: **that members of Serbian nationalities from neighboring countries may enroll under the same conditions with Serbian citizens.** This Decision may be considered to be the act of positive discrimination of national minorities of certain ethnical background in neighboring countries. However, except for the cases of positive discrimination, different treatment of students in regard with citizenship on the basis of national (ethnic) affiliation is a violation of Article 14 of the European Convention on Human Rights and Fundamental Freedoms, Article 21 of EU Charter of Fundamental Rights (2000/c, 364/01), as well as Council Directive 2004/43/EC Articles 2 and 8. Namely, in compliance with Article 16 of the Constitutional Charter of the State Union of Serbia and Montenegro, ratified international agreements on human rights and the generally accepted principles of international law have primacy over national legislation. **This decision has been changed by interpretation of the Ministry of Education and Sport which was confirmed by the Government of the Republic of Serbia that students from Montenegro have the right to enroll state universities and higher schools in Serbia under that same conditions as the citizens of Serbia and therefore conclusion is that at least in the following academic year no discrimination of this type will occur.**
According to the analysis performed by the Montenegrin Ministry of Education and Science on the enrolment of Montenegrin students who have completed high school, for the period 2000-2005 (6 academic years), 21,641 students enrolled in Montenegro, around 4,085 enrolled in Serbia, and around 2,200 students enrolled in Bosnia and Herzegovina and other countries. Our estimate is that in Serbia in the year of 2006/07 an approximate number of 800 old government funded students may be expected. Other students pay for their fee (self-financing students) in the same amount as local students. Serbian students, i.e. Serbian citizens studying in Montenegro, enjoy the same study-related rights in Montenegro with local students, their number being around 300 (government funded and self-financing).

Accordingly, in the period to follow we do not expect to face a particularly tough problem in the relations between Montenegro and Serbia in this area, given the intensive development of the system of higher education in Montenegro and the

number of scholarships offered to Montenegro by foreign governments and foreign funds intended for the purpose.

Montenegro's state bodies and institutions of higher education have already announced that the previously acquired rights of Serbian citizens studying in Montenegro will be respected. On no grounds should Montenegro's independence affect their status.

The previously acquired rights of Montenegrin citizens studying in Serbia, guaranteed to them by Articles 123 and 124 of the Law on Higher Education in Serbia,[44] should not be threatened in terms of financing in the period stipulated by Articles 123 and 124 of the Law after independence of Montenegro.

The rights pertaining to student living standards in Montenegro are personal and nontransferable. This means that a student of a public institution is entitled to:

1) accommodation and food in the student hall of residence;
2) student loan;
3) grants for the best students;
4) subsidized tickets for public transportation for government funded students;
5) professional development;
6) health protection.

The criteria, manner, conditions and the amount of the allowance for the realization of the right from Paragraph 1 of this Article for students studying in Montenegro are prescribed by the Ministry. Paragraphs 1, 4, 5 and 6 apply to students from Serbia too.

Upon gaining independence, Montenegro may first start defining the position of students not having Montenegrin citizenship on a *unilateral* basis, i.e. by amending old or adopting new regulations, while concurrently conducting negotiations with Serbia in order for the problem to be solved *bilaterally* too, on the principle of reciprocity and equal legal solutions.

Serbia and Montenegro are signatories to the Lisbon Recognition Convention. The document was ratified and stored at the Council of Europe and UNESCO, coming into effect on 1 May 2005. With a view to implementing the Lisbon Convention Montenegro established its own ENIC centre with the Ministry of Education and Science. An ENIC centre was also set up in Serbia within the Ministry of Education and Sports. The development of the ENIC centre in Montenegro is being carried out with the support of EU TEMPUS program, i.e. its partner institutions, such as the

[44] "The Official Gazette of Serbia", No. 76/25

Ministry of Higher Education, Science and Technology of the Republic of Slovenia and ENIC/NARIC Holland. It has been planned that this project should legally regulate the competence and responsibilities of the ENIC centre, as has been done in other countries too, and that legislation should be passed related to recognition of diplomas and foreign qualifications, in order that the implementation of EU Directives may commence.

Publicly valid diplomas of all levels in Serbia and Montenegro were not subject to the process of recognition. With Montenegro gaining its independence, no major difficulties are expected in this area in Montenegro, as ENIC Montenegro will be fully equipped for operation by the end of this year.

The National Qualifications Framework (NQF) has already been created in Montenegro for pre-university education, in compliance with the European Qualifications Framework (EQF). The preparations for the development of the NQF for higher education are currently under way in Montenegro, and a contact has been established and consent obtained from the German Rector's Conference and the competent institution in Latvia for partnership in the development of this document.

Risks

The risk may imply that the fee for foreigners (in which case the majority of foreign students in Serbia will be from Montenegro) is not established in the amount of the economic fee for certain study programs, but several times as much as that. Should such a situation occur, students might be offered to continue their studies in Montenegro or in some other state where fees are significantly lower, the studying conditions more favorable and the quality system of the educational process higher?

EXPERIENCE OF THE REPUBLIC OF SLOVENIA

In the Republic of Slovenia the problem of education was basically the issue of validation of diplomas since all diplomas acquired after 26 June 1991 were treated as foreign diplomas. Students in other republics of SFRY did not have any problems with financing of studies neither did have them the students from other republics in Slovenia. However, at the end of studies potential problem might have been recognition of diploma.

In the domain of recognition of diplomas, professional qualifications or part of education for the sake of continued education, there can be no risks incurred by the competent bodies of the state of Montenegro or its institutions of higher education, but if that happens thanks to the competent bodies of the state of Serbia or its institutions of higher education, it would slow down the process of mobility of students and academic staff, as well as the workforce flow. The problem could be successfully resolved through good cooperation between the competent ministries, i.e. their ENIC centers, with the support of "Bologna Follow-Up Group".

Recommendations

The Government of the Republic of Montenegro should propose to the Serbian Government the development of a common Action Plan (alternatively: Memorandum of Understanding) towards overcoming the problem of change of status of Montenegrin citizens studying in Serbia. The Action Plan should contain mutual obligations in terms of financing students in accordance with the valid legislation in countries, new circumstances, as well as the validity period of the stipulated solutions.

In parallel with this, it is necessary to create bilateral agreement(s) in the area of education and scientific and research activity.

In the bilateral agreement in the area of education it is necessary to offer a solution of equal validity of diplomas of all levels of education, which have been publicly recognized in certain countries. It would be advisable to establish stronger cooperation between competent institutions in Serbia and Montenegro with a view to producing equal legal solutions.

The bilateral agreement should also serve to determine mutual annual quotas for student enrolment as follows:

- quotas based on the principle of reciprocity;
- quotas based on special demands of individual states, which will be financed from the budget of the student's country of origin, and not the budget of the host country.

Special attention could be paid to bilateral agreements between universities in Montenegro and universities in Serbia, with the aim of promoting exchange of students, young scholars and professors, and respecting the achieved levels of

EXPERIENCE OF THE SLOVAK REPUBLIC

The field of education of citizens of both republics after the disintegration of CSFR was generously regulated by an agreement of October 29, 1992 (7/C). The agreement embodied transitional period (education started at all levels which was enabled to finish under the unchanged conditions, including possibility to use own language), further continuation of studies was not limited to citizenship, but to a long-term or permanent residence and both parties obliged to enable education to another country nationals under the same conditions as to its own nationals, while respecting international standards. In order to respect differences in language and literature teaching, a three-year transitional period was imposed and the agreement was amended by special protocols once a year.
Another agreement (10/C) regulated mutual recognition of documents regarding education and documents on academic degrees and titles awarded in the SR and in the CR. An agreement on notification of documents and degrees is a future solution (new specimen documents exchange) with the possibility to amend this agreement.

education in order to help continue students' education and enable their mobility.

The valid legislation in Montenegro cannot threaten the engagement of academic staff from Serbian universities in Montenegrin institutions of tertiary education.

4.2.5. Special forms of social protection of the elderly and individuals with special needs

State found

Neither in Montenegro nor in Serbia the issue of protection of **the old** has been resolved in legislation in a systematized way. Two basic issues here are of special relevance: (1) the right to accommodation in a specialized institution (homes for the elderly) on burden of the health insurance fund, as a part of the right to health care and social protection and (2) special medical care of old people related to everyday care. Both cases include accommodation of persons in suitable institutions. Montenegro lacks institution of that kind and the ones existing in Serbia are financed from the budget or (and) on burden of the old people themselves, and do not have sufficient capacities to accommodate all the interested people. One relatively successful model of resolution of both matters is implemented in the Republic of Slovenia. In short, from the state funds financed is accommodation of old people who are nationals, while foreign citizens need to pay for their accommodation. In order to address this issue of the extremely sensitive social group necessary is to determine a precise number of persons who would be interested in one of the two forms of special care; number of persons who have health insurance and are interested in one of the two forms of care; the number of old persons from Montenegro accommodated in institutions of Serbia. Then it would be possible to start planning accommodation capacities, construction of the capacities and legislative definition of a part of the costs coverage born by health care funds, that is those individuals themselves.

Persons with **special needs** first of all include those persons who due to serious physical or mental problems need to be put in a specialized institution. Even though there are some institutions, it is clear that Montenegro lacks some specialized institutions. It is of special importance to mention that all the persons against who criminal charges were brought but with confirmed mental illness are placed in specialized institutions in Serbia.

Recommendation

In this field the following two ways should be followed: first of all Montenegro should pass its own laws through building up institutions for taking care and looking after the old, and by including them into the system of health care and social

security, that is bilaterally, i.e. by signing the agreement with the Republic of Serbia in regard to the a/m categories of individuals with special needs.

4.3. ECONOMIC RIGHTS AND RELATIONS

The issue of exercising four basic freedoms movement of labor, capital, services and goods is defined by the Agreement on Establishment of European Community.[45] This basically means that one of the conditions for EU membership (proclaimed foreign policy goal of both Serbia and Montenegro) is to minimize the importance of borders between the states in sense of free trade of goods, and free flow of people, capital and services. However, prior to accession to EU (which will not be before 2013 neither for Montenegro nor for Serbia)[46] necessary is:

- to join multilateral treaty on free trade (improved CEFTA)
- to sign a bilateral agreement between Montenegro and Serbia about free

EXPERIENCE OF THE SLOVAK REPUBLIC

As far as classification of the four basic freedoms which create the common market in the EU (free movement of goods, persons, services and capital) is concerned, the disintegration and subsequent steps of both states were focused on enforcement of these freedoms. All measures of both governments lead to fulfillment of the Maastricht criteria, but not for the reason of their such classification in the Maastricht treaty, but because the practical life required so. The measures were taken at the bilateral level by the way of:

-free movement of goods Treaty on establishing the customs union, subsequent implementation agreements, agreements on provenance of goods, agreements in the field of transportation etc.

-free movement of persons abolishing of the visa requirement, agreement on mutual employment of citizens, agreements in the field of social security, education etc.

-free movement of capital treaties in the field of system of payment, act on foreign exchange

-free movement of services Treaty on establishing the customs union, agreements in the field of taxation, system of payments, tradesmen etc.

The prevalent majority of these treaties were concluded between October 1992 and the year 1995, they were amended and supplemented later on. Legal acts regulating four basic freedoms were in both republics adopted in successive steps, with regard to approximation of their legal orders with the EU legal order in connection with the EU accession and it is not quite possible to assess them only as a result of the CSFR disintegration.

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[45] Treaty on Establishemnt of EEC was adopted in 1957 and it predicts creation of a unique market for EU member states. Currently in force is the Traty on EC sinc eit was changed by adoption of Traty From Nice. (2003).

[46] Appraisal is subjective but based on indicators which say taht neither in the new budget perspective 2007-2013 predicted are funds for further enlargement of the Union and there are no institucional mechanisms in the structure of the Union bodies which would enable work with more than 27 members (Bulgaria and Romania), and currently discussed is in the EU members the issue of future enlargement.

trade, avoiding double taxation, potential common customs area and like.

- and in the end EU accession.

Therefore, exercising four basic freedoms represents the most important issue of future relations of two sovereign states.

4.3.1. Free movement of people

State found

In the session of the Government of the Republic of Montenegro held on 20 June 2006 it was decided that citizens of Serbia would travel to Montenegro like before which means without passport and visas. As for travel of foreign citizens to Montenegro valid is the non-visa regime for the citizens of the countries under the same regime before. For the citizens of those countries that needed to meet visa requirements, visas will be issued on border crossings according to a simple procedure.

Residence and work permits for foreign citizens in Montenegro will like until now be issued by the authorized body of the Ministry of Internal Affairs. Necessary documents will be issued to foreign citizens in mission in Montenegro by the Ministry of Internal Affairs.

Recommendation

The issue of transitory use of airport in Belgrade should be solved by a bilateral agreement referring to those citizens who travel from the countries which are required visas to enter either Serbia or Montenegro where Montenegro is a final destination. This is first of all because for those citizens it is quite difficult to get visa to enter Montenegro since there are no consular-diplomatic representative office in those countries and it would be quite simple to issue visa on the border crossing of Montenegro.

4.3.2. Free flow of goods

State found

Free movement of goods between Serbia and Montenegro within the State Union of Serbia and Montenegro is defined by special regulations[47] on treatment of goods in

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[47] Decree on the treatment of goods for trade with Montenegro (Official Gazette of the Republic of Serbia, No. 45/2003); Decree on the treatment of goods for trade and treatment of passengers on the border between Montenegro and Serbia (Official Gazette of the Republic of Montenegro No. 26 as of April 19, 2003.)

mutual trade and in procedures of customs entry, monitoring and goods of domestic and foreign origin registering. In the field of customs entry procedure, a special Treaty on Customs Operations and Mutual Assistance[48] is in force established by the Governments of Montenegro and Serbia.

However, the Government of Montenegro is preparing the document (Agreement) which would be offer as the basis of negotiations the option to preserve the present status of free movement of people, flow of goods, services and capital between Montenegro and Serbia.

Proposal of this Agreement predicts:

- that freedom of movement and settlement of people is in line with the present legal solution in regard to entering the country and settling, that is, registering and canceling residence. Proposed is obligatory cooperation of the authorized bodies of contractual parties to cooperate and regularly exchange data on registration and canceling of residence;
- that turnover of commodities is conducted in line with the valid Regulation on procedure with goods and passengers on the border between Montenegro and Serbia ("Official Gazette of the Republic of Montenegro " No. 26/03 and 54/05), i.e. without paying customs to goods with domestic status. The only possible change is change of statement on goods origin - EUR 1, that is, change of the level of documents to international level, which is in line with future Unique Agreement on free Trade whose signatories will independently be the Republic of Montenegro and the Republic of Serbia;
- that the matters of flow of services are generally defined by stipulating that contractual parties will provide in their territory the same treatment to service providers from the territory of another state as the ones provided to services providers in their own territory;
- in regard to flow of capital proposed is that contractual parties provide in their territory the same treatment to the investors from the territory of another state as they provide to investors in their own territory in accordance with valid promises which define that filed of capital flow;
- predicted is to preserve the system of customs and control points for the purpose of execution of the procedure with goods and passengers on the border. .

Recommendations

As a possible transitional model until the new trade relations between Montenegro and Serbia are introduced most simple is to adopt the decision on extension of validity of the Decree on treatment of goods for trade on the border of Montenegro

[48] Agreement between the Customs Administration of Serbia and Customs Administration of Montenegro on customs cooperation and mutual assistance. (6 May 2003).

and Serbia, that is, to preserve the present state of free movement of people, services and capital. This can be achieved by signing two unilateral, but harmonized decisions of the two Governments, which implies bilateral cooperation in the field of development and adoption of the decisions herein. These regulations also relatively simply encompass transitional aspects of freedom of movement of goods, capital and people.

However, the essential solution for free trade is the **Free Trade Agreement (FTA) between Serbia and Montenegro.** Compared to the existing agreements which do exist in the region of South-East Europe,[49] this Agreement could establish the preferential treatment for contractual parties first of all due to special interests and relations of Serbia and Montenegro. The model which could be accepted is the model of the Agreement on Stabilization and EU Accession (since it regulates not only the four fundamental freedoms but also necessary additional elements required for gaining these freedoms.)[50]

* Goal of the Agreement usually FTA creates the zone of free trade between the contractual parties in transitional period. It is the matter of the agreement whether bigger integration is possible, that is, whether a free market can be created between Serbia and Montenegro in the period up to EU membership. In this way the contractual parties would determine more intensive correlation (even more than it is currently the case).

EXPERIENCE OF THE SLOVAK REPUBLIC

One of the basic freedoms and successes of the common market is free movement of goods. The presumption for the free movement of goods is removal of all tariff (duties and charges) and non-tariff barriers (import quotas, administrative barriers).
This was the case in the disintegration of the CSFR, when a customs union between the Slovak Republic and the Republic of Czechoslovakia was established (treaty no. 199/1993 Coll.) and it has remained, after some amendments, valid until the accession of the SR to the EU. The treaty-based mechanism of the custom union is a flexible mechanism based on the principle of mutual cooperation of both sides of the customs union. Practically, the customs union meant free movement of goods and services (without rates of duty) and common customs policy towards the third countries. The treaty comprised eight titles which contain more detailed parts of the document: Aims and Principles, Free Movement of Goods, Agriculture, Competition, Other Economic Provisions and Harmonization of Legal Acts, Commercial Policy, Services, Customs Union Bodies, General and Final Provisions.
Free movement of persons between the SR and the CR in the customs union was possible until the accession of both states to the EU.

* Products FTA should refer to all industrial and agricultural products for which duty and all other types of restrictions should gradually be abolished (in technical terms and terms of quality). That would

[49] See SRY FTA with Bosnia and Herzegovina .
[50] See Serbia and Montenegro Stabilization and EU Accession Draft.

require accepting the complied standards and introduction of diagonal accumulation of origin of goods.

* Other freedoms FTA regulates the freedoms of movement of services and capital which are gradually liberalized, but it does not refer to the freedom of movement of labor. The Agreement between Serbia and Montenegro could release the freedom of movement totally, which implies national treatment of labor in both countries. This would encompass mutual recognition of diplomas, licenses and all additional activities and the rights (e.g. pension right), which have to become a subject of a bilateral agreement.

4.3.3. Real estate ownership

State found

Acquired rights. Property right is the acquired right and all the property rights acquired before 3 June 2006 regardless the later changes in citizenship or residence of the owner remain the same. This right is guaranteed in Article 1 of the Protocol 1 with the European Convention on Protection of Human Rights and Basic Freedoms.

Future conditions of property rights. Property right in Montenegro is acquired by the means of legal operation, heritage or the law. All physical and legal persons in Montenegro may have property right to movables and real estate. A foreign citizen in Montenegro acquires the property right under conditions of reciprocity mutuality, where there are a few exceptions for foreign citizens in regard to the ban of acquiring the property right (ban of gaining immovable cultural goods and ban of gaining land by the persons without citizenship).

In Serbia ownership of building land may not be acquired neither by nationals nor by foreign citizens. This regulation, constitutional in its nature, needs to be changed since it is not in accordance with the EU standards. Agricultural land may be the property of foreign citizens and in both republics national treatment is accepted. A foreign citizen may also inherit real estate, but basic condition in this case is reciprocity/mutuality.

In Montenegro underway is development of the Draft Law on Basis of Property Relations in the Republic of Montenegro which will regulate the matter herein and its provisions will encompass the mechanisms which will enable foreign citizens to acquire real estate in the Republic of Montenegro. This Law will fully be harmonized with legal regulations of EU which refer to movement of capital, that is, acquiring of real estate, and it is planned to be passed by the end of 2006.

Risks

The issue of ownership of movable assets is not a matter which could cause problems the problem arises with real estate ownerships. According to EU standards, in relation to the right to acquire real estate in the EU member states national treatment is applied, except in some exceptional cases which were subjected to the agreement in the process of new members accession to the Union.[51] Also potential increase of taxes on real estate for the owner who in the meantime became a foreign citizens or who due to the state status change got permanent residence abroad, could be potentially raised as a matter of discrimination or violation of gained rights. New phenomenon could also be dual ownership, i.e., the cases of persons whose real estate is on both sides of the state border.

EXPERIENCE OF THE SLOVAK REPUBLIC

The issue of ownership after the disintegration of the federal state should be considered in two ways. One way is the division of ownership of the common state (principle of division, practical steps and settlement of possible disputes) and the other way is to accept ownership of citizens of one state in the territory of another one. The first issue is regulated by the constitutional act no. 541/1992 Coll. on division of the state property of CSFR between the SR and the CR and its transfer to the SR and the CR.

When settling ownership relations after the disintegration of a common state, the second issue is ownership of natural and legal persons in the territory of new states. The Slovak Constitution, in its Article 20, guarantees the protection of all ownership rights in the Slovak territory regardless of ethnicity or citizenship of owners. In the period after the disintegration of the CSFR, citizens of both states could dispose of their property without any special limitations.

Acquirement of property by aliens was a particular problem. After the disintegration of the CSFR, aliens were considered to be citizens of different countries than CFSR and their treatment was regulated by the act on foreign exchange no. 528/1990 Coll. In After 1995, the new act on foreign exchange was adopted at the level of both republics and required this treatment also for the Czech citizens (who were considered to be the so-called foreign exchange aliens), but there were also possibilities to gain property in a different way (e.g. inheritance).

This treatment was changed after the accession to the EU, when a new regime of property acquisition was determined in the so-called transitional period.

At the same time, it is necessary to note that at the time of disintegration of the CSFR, the process of property restitutions was under way. It was regulated by federal legal acts and provided equal rights to restitution to citizens of both states.

[51] Property on Malta is totally exempted from being the property of a foreign citizen; also there are exceptions in regard to the property referring to agricultural land in Poland where within a transitional period of 7 years foreign physical and legal entities are not entitled to have the right to buy that land. See the Treaties on Accession of Malta, that is Poland.

Recommendations

Gaining the ownership rights to real estate in both states is a constitutional matter, which is a consequence of restriction of gaining the property right which comes from socialistic period or from the total or partial ban of gaining the property right to real estate in favor of foreign citizens. As presented, these derogations are abolished today, but for acquiring the property right in favor of foreign citizens reciprocity is still required. The question is how much reciprocity is questioned at the events of trading with real estate. Both states need to harmonize their rights on gaining property rights to real estate with the standards which arise from EU rights. This is valid for taxes on real estate. Legal position of dual owners is best to define through a bilateral agreement following the model of the agreement signed by SFRY and Italy. Previously it would be good to check if there is any dual ownerships on the border between Serbia and Montenegro.

EXPERIENCE OF THE REPUBLIC OF SLOVENIA

Slovenia guaranteed by the constitutional law to all physical persons with citizenship of Republic of Slovenia and legal persons with main offices out of Republic of Slovenia with the condition of reciprocity, right of property and other real rights to real estate in the scope which existed in the time of adoption of constitutional law (Article 16). Until the property rights to real estate for foreign citizens were regulated, property could not be gained neither other real right, other than based on heritage and with condition of reciprocity. Ban to foreign citizens to gain property entered the Constitution which was adopted at the end of 1991 and in 1997 for the first time this provision was changed due to EU rules and later on once again in 2003 when the Constitution was harmonized with European Treaties. Republic of Slovenia took over all real estate and other things which were managed until the day of independence by the federal bodies and YNA (Yugoslav National Army).

4.3.4. Denationalization

State fond

Unlike the Republic of Montenegro which has already adopted the Law on Denationalization[52] the Republic of Serbia only now needs to define by the means of the law the issues of restitution and compensation for the property taken away before without any reasonable compensation. This has been done by the way of nationalization, confiscation, expropriation, legal acts which were not valid according to the valid order of those times, acts based on the law on investigating the origin of the property and like. The Republic of Serbia needs to pass the Law on

[52] Law on Restitution of Taken Away Property Rights and Compensation, «Official Gazette of RS» No. 21/2004

Denationalization. According to the obligatory standpoint of European Court for Human Rights in Strasbourg there are no duties of the states to conduct denationalizations yet (restitution of property taken away or compensation for deprived property without a reasonable compensation): that duty does not exist, on one hand, if the state has conducted nationalization, expropriation, confiscation and other measures against taking the property away without reasonable compensation before it signed and ratified the European Convention on Protection of Human Rights and Basic Freedoms (and first protocol with that Convention whose Article 1. guarantees the undisturbed enjoying of property, ownership and other property rights), and, on the other hand, if from the time of nationalization , confiscation and other measures so much time has passed that previous owners do not have legitimate expectations that denationalization will be conducted.[53] But, the Republic of Serbia imposed the duty of denationalization to itself. Namely, according to obligatory stand of the European Court for Human Rights in Strasbourg, if a state through it actions causes grounded, legitimate expectance that denationalization is going to be conducted, then it needs to conduct it.[54] The Republic of Serbia created such legitimate expectation by adopting the Law on Privatization[55] based on which a fund was provision of compensations for individuals whose property was denationalized, confiscated and other property taken away without any reasonable compensation, the Law on Reporting and Registering the Property Taken Away[56], which determines the deadline until when the citizens may submit the claim for restitution, that is, for compensation for taken away property, the Law on rehabilitation[57] which predicted that restitution and compensation for confiscated property to rehabilitated persons will be defined by a special law, and the Law on Restitution of the property to churches and religious communities which defines the rules on returning and compensation for churches and religious communities[58] for taken away property. For those reasons the Law on Denationalization needs to be passed.

Risks

There is a risk that the future law on restitution and compensation may regulate such legal regime which would endanger rights and interests of the citizens of Montenegro who became foreign citizens as of independence of Montenegro. Interest of Serbia could potentially be not to restitute the property taken away without a reasonable compensation, that is, not to provide compensation for it, since foreign citizens might be the biggest claimers of restitution, that is, compensation

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[53] Stand of ECHR in decision in case of Jasiûnienė against Litvania 41510/98.
[54] Stand of ECHR in case Broniowski against Poland 31443/96 as of 22 June 2004
[55] The Official Gazette of RS No.38/2001, 18/2003, 45/2005
[56] The Official Gazette of RS No. 45/2005
[57] TheOfficial Gazette of RS No. 33/2006
[58] The Official Gazette of RS No. 46/2006

since greatest number of goods was taken away without reasonable compensation from individuals who are now foreign citizens, that is, from individuals whose legal successors are foreign citizens. This means that, for example, from the land nationalized without any reasonable compensation (which in Serbia is about 700.000 hectares out of which about 660.000 in Vojvodina), about 60% (land in Vojvodina) makes the land which was owned by the so called Volksdeutscher-a (Donauschwaben), who were nationals at those times. Only about 1% of the former owners remained (after volksdeutchres were expelled from the country) in the country and have Serbian citizenship. If there is no readiness to return all that confiscated property or to provide compensation for it, new legal regime will be prescribed according to which foreign citizens shall have no right to restitution, that is, compensation for the taken away property, but only the citizens of the Republic of Serbia.

Recommendations

In Croatia in the phase of preparation on now valid law on denationalization (the Law on Compensation for the Property Taken Away during Yugoslav Communist Power), National Papers No. 92/1996, 39/1999, 42/1999, 43/2000, 131/200, 27/2001, 65/2001, 118/2001, 80/2002), it was planned to recognize the right to restitution of property, that is, the right to compensation only to nationals, but since the Council of Europe and EU intervened, that solution has not become the law, which might be the most efficient recommendation not to repeat something like that after formation of independent states of Montenegro and Serbia.

4.4. SPECIAL RECOMMENDATIONS

4.4.1. Public promotion of the rights of members of sensitive groups in new conditions

Strategic Consultative Group assumes that the process of independence of Montenegro will be accomplished based on scenario most favorable for exercising the newly established rights of the citizens of Montenegro and of the citizens of Serbia. However, stressed should be that legal solution, unilateral, bilateral and multilateral decisions, and the will of structures in power in both sovereign states, insufficient to protect sensitive groups of citizens

That process needs to be supported by a strong **public informative campaign** in which, in a simple and understandable way, citizens would be informed about their

rights, that is, how to exercise newly established rights. In that sense a program should be made in which the government bodies, media, NGOs and associations of citizens should participate, which would help to remove rational and irrational fears which cause sensitivity.

Also it is necessary to develop detailed instructions or actions in general and individual cases for the needs of servants of the republic level and other bodies, which are directly included in exercising the rights of citizens. This, first of all, refers to counter and other servants who directly communication with citizens. Also, introduced should be the obligation of the bodies to set in all visible places information and announcements for all the citizens referring to the procedures of execution of their rights.

The faster the aforementioned programs begin, the less danger from creation of situation of sensitivity will be.

APPENDICES

PRINCIPLES OF THE AGREEMENT ON SUCCESSION OF STATES OF FORMER SFRY

5. APPENDIX: PRINCIPLES OF THE AGREEMENT ON SUCCESSION OF STATES OF FORMER SFRY

Bodies established by the Agreement

Major body (established by Article 4 of the Agreement) is a Permanent Mixed Committee which consists of high representatives of each of the State Successors, and can be assisted by experts. (Major task of this Committee is to monitor efficiency of application of the Agreement and to represent a forum in which discussed can be the issues arising during its application. The Committee may, if necessary, give adequate recommendations to the governments of the State Successors. The Committee will establish its own rules of procedure.

Disputes resolution bodies are established by the mechanism prescribed in Article 5 of the Agreement.
Differences which may arise and which refer to interpretation and application of the Agreement will first of all be resolved by negotiations between interested States. If those differences may not be resolved by negotiations within a month as of the moment of receiving such announcement, the interested States will, based on negotiations, forward the case for resolution to authoritative personality at their choice with the purpose to reach faster and more authoritative resolution, which would be observed and which may, if necessary, define the time framework for undertaking actions, or will forward the case for resolution to the Permanent Mixed Committee. Differences arose in practice regarding interpretation of the terms used in this Agreement or any other agreement which can arise during implementation of the Appendices of this Agreement may be additionally forwarded, as proposed by any interested party, that is, the state, to obligatory expert resolution conducted by one expert (who is not a citizen of any of the contractual party of the Agreement) appointed in consent, mutually by both parties in dispute, or in case of not reaching a

consent, by the OSCE President of the Court for Peaceful Resolution and Arbitration. The expert will determine all the matters of the procedure after consulting with the parties that required such professional resolution, if s/he considers it necessary with strong intention to provide fast and effective settlement of differences.

Issues defined in the Agreement

The Agreement defines the following issues:

(1) Distribution of funds with the Bank for International Settlements (Appendix to Agreement which is a constituent part of the Agreement);
(2) Movable property and real estate (Appendix A, which is a constituent part of the Agreement);
(3) Diplomatic and consular property (Appendix B which is a constitutional part of the Agreement), including the supplement to Appendix B, which includes register of diplomatic consular representative offices which are a subject of succession);
(4) Financial assets and liabilities (Appendix C which is a constituent part of the Agreement);
(5) Archive (Appendix D which is a constituent part of the Agreement);
(6) Pensions (Appendix E)
(7) Other rights, interests and duties (Appendix F which makes a constituent part of the Appendix) and
(8) Private property and acquired rights (Appendix G which is a constituent part of the Agreement)

For the groups whose status is considered here important are pensions and private property and acquired rights.

Principles of the agreements referring to pensions

Each State takes the responsibility for legally based pensions and their regular payment financed by that State while having the status of a constitutive republic of SFRY, regardless ethnicity, citizenship, temporary or permanent citizenship of beneficiary.

Each State takes the responsibility to regularly pay pensions to its citizens who were civil or military employees in SFRY, regardless where they have temporary or permanent residence, if these pensions were financed from the federal budget or other federal resources of SFRY provided that, in case of an individual who is a citizen of more than one State:

(i) if the person has a permanent residence in one of these States, pension will be paid by that State, and

(ii) if that person does not have permanent residence in neither of these States whose citizen this individual is, pension will be paid by the State in whose territory that individual had residence on 1 June 1991.

The State will, if necessary sign bilateral agreements for the purpose of providing payment of pensions in accordance with the above mentioned Articles 1 and 2, to individuals who are in the State different from the one which does not provide pension payment to those individuals, in order to transfer funds for pensions payment, and for payment of pensions proportionally to payment of contributions. Where necessary, signing of such final bilateral agreements may be preceded by signing of temporary arrangements for the purpose of payment of pensions. Bilateral agreements signed by any two States will have greater power that the provisions of Appendix E and will resolve the issues of mutual liabilities between the pension funds of these States in regard to payment of pensions paid before such agreements came into force.

Principles of the Agreement referring to gained rights and private property

Private property and acquired rights of citizens or other legal entities of SFRY will be protected by the state successor in accordance with provisions of Appendix E.

Rights to movable and immovable property in the territory of the State Successor which the citizens or other legal entities of SFRY had on the date 31 Dec1990 will be recognized, protected and returned to previous condition by the State in accordance with defined standards and norms of international law, and regardless of ethnicity, citizenship, permanent or temporary residence of such persons. This encompasses the persons who after 31 Dec 1990 gained citizenship or new permanent or temporary residence in the State different from the State Successor. Individuals who could not exercise such rights will have the right to compensation in accordance with civil and international legal norms.

Each transfer of rights conducted on purpose referring to movable or immovable property conducted after 31 December 1990 and signed under pressure or not in line with Sub Paragraph (a) of this Article will be invalid.

All contracts signed by the citizens or other legal entities of SFRY starting with 31 December 1990, including the ones signed by public companies will be respected without any discrimination. Each state successor will enable fulfillment of duties based on the agreements hereto, in cases where dissolution of SFRY disabled realization of such agreements.

State successors will respect and protect the rights of all physical and legal persons of SFRY in regard to intellectual property, including patents, brands, copyrights and other related rights (e.g. *tantijeme*) in accordance with international conventions in that field.

State successors will undertake such activities which may be required by general legal principles and other prescribed principles in order to provide efficient application of principles stated in the Appendix G, such as signing of bilateral agreements and to informing the courts and other authorized bodies.

Previously mentioned provisions of this Appendix will not abolish the provisions of bilateral agreements stipulating the same matters concluded by the states successors, which, for some matters, may be final between those states.

Domestic legislation each of the states successors which refers to the "tenancy rights" will applied equally to all the persons who were citizens of SFRY, who had such rights, without any discrimination based on sex, race, color, language, religion, political or other opinion, national or social origin, affiliation to national minorities, ownership condition, birth or any other status.

All physical and legal entities from the state successor will, based on reciprocity, have the same right to access to courts, administrative courts and bodies of that state and other states successors with the purpose to protect their rights.

The above mentioned provisions of the Appendix hereto will have no influence on any of the guarantees in regard to absence of discrimination in relation to private property and gained rights which exist in domestic legislation of the state successor.