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EXPIRIENCE WITH HARMONISATION OF LAWS OF COUNTRIES FROM THE FORMER YUGOSLAVIA WITH EUROPEAN UNION LAW[1]

Dimitar Gelev[2]

Apstract

All states emerging after the dissolution of the former SFRY started to reform their legal systems. At the beginning this was mostly a tendency towards modernization of the legal systems and acceptance of different legal solutions appropriate to market economy (which had been a tendency in the period before dissolution of the former state also). Later on, all these states tried to harmonize their legal systems with the rules of EU.

In establishing its legal solutions the European Union was in many respects inspired by the USA law, although a large number of EU countries with longer legal tradition jealously tried to retain some specific features of their own legal tradition.

Experience with harmonization of laws of countries from the former Yugoslavia shows that they did not fully manage to cope with legal terminology and with understanding of a large number of legal notions which were uncritically accepted in their legal systems. With the adoption of laws which they treated as most fundamental for the reform of their society, these countries did not take into account different inconsistencies of some legal solutions with the rest of their legal system, which created huge legal uncertainty for common citizens.

The aim of this work is to analyze some of these legal inconsistencies and inaccurate legal understanding of a number of legal notions, especially in the area of civil, commercial and financial law.

Key words: *law, harmonization, European Union, civil law, commercial law, financial law.*

JEL classification: F5, K2

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DOSADAŠNJA ISKUSTVA U HARMONIZACI PRAVA ZEMALJA BIVŠE JUGOSLAVIJE SA PRAVOM EVROPSKE UNIJE[1]

Dimitar Gelev[2]

Sažetak

Sve države nastale nakon raspada bivše SFRJ pokušale su da reformišu svoje pravne sisteme. Taj pokušaj je na početku više bio trend ka osavremenjavanju pravnog sistema i prihvatanja pravnih rešenja koji odgovaraju tržišnoj privredi (što je bio trend i pre raspada bivše države). Malo kasnije sve te države počinju faznu i postupnu harmonizaciju svojih pravnih sistema sa pravilima Evropske Unije.

U mnogo čemu je Evropska unija u izgradnji vlastitih pravnih rešenja uzor videla u pravu SAD, i pored toga što je veoma velik broj zemalja Evropske unije ,sa dužom pravnom tradicijom ,pokušavao ljubomorno da sačuva neke specifične crte svoje pravne tradicije.

Iskustva dosadašnje harmonizacije prava zemalja bivše Jugoslavije pokazuju da se te zemlje nisu baš najbolje snašle sa pravnom terminologijom i razumevanjem velikog broja pravnih pojmova koje su nekritički prihvatale u svoj pravni sistem. Usvajanjem određenog broja zakona koje su one smatrale najbitnijim za reformu društva, te zemlje nisu mnogo vodile računa o nekonzistentnosti određenih pravnih rešenja sa ostalim delovima pravnog sistema, što je dovelo do velike pravne nesigurnosti za običnog građanina.

Cilj ovog rada je da analizira neke takve pravne nekonzistentnosti i pogrešna pravna tumačenja, naročito u oblastima građanskog, trgovačkog i finansijskog prava.

Ključne reči: *pravo, harmonizacija, Evropska unija, građansko pravo, trgovačko pravo, finansijsko pravo*

JEL klasifikacija: F5, K2

Sve države nastale nakon raspada bivše SFRJ pokušale su da reformišu svoje pravne sisteme. Taj pokušaj je na početku više bio trend ka osavremenjavanju pravnog sistema i prihvatanja pravnih rešenja koji odgovaraju tr-

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All states created after the dissolution of the former SFRY tried to reform their legal systems. At first that attempt was mainly a trend to modernize them and accept legal solutions favoring market economy (which was a tendency before the dissolution as well). Shortly afterwards, all states started a phased and gradual harmonization of their legal systems with the rules of the European Union.

Within the EU, except for the major division between civil law or continental European legal systems and common law or Anglo-Saxon (or Anglo--American) legal systems, there are several "legal families", such as the German legal family, French legal family, legal systems of Nordic countries, legal systems of the former Soviet republics, as well as the legal systems of the countries of the former Yugoslavia. Although a prevailing number of them belongs more or less to the so-called civil law systems, there are some striking differences among them. Since its inception the European Union tries to copy to a certain degree the federal structure of the US legal system and is inspired over again by the legal solutions of the USA, in particular when it comes to the legal clash between the federation and federal states, the-so called "original competences" of the federation and federal states and alike, but also in respect of certain material-legal rules, in particular in the area of financial transactions, bankruptcy, security (security rights), e-commerce, registries and other rules linked primarily to trade and finances. The European Union, however, rarely enters the sphere of material law and endeavors to find some minimum common grounds among various legal systems on its territory which are transposed into different directives or regulations. Basically, directives and regulations rarely enter the essence of material laws of individual member states.

Independently from numerous attempts by various groups within the EU (mainly composed of law professors) trying to identify some "common grounds" ("common core", "jus commune europaeum" etc.) for a more unified EU legal system, for the time being it is a difficult and slow process.[3] All legal systems of the EU states are based on the so-called "Roman law", but in principal it is a legal ruse. The so-called Roman law is essentially from the ancient Egypt and there are at least two variants of that law: Roman and Byzantine (Hellenic), depending on the fact which of them and in which period they conquered Egypt and took over its legal system. This is most notably apparent in the difference between legal solutions contained in the Institutes of Gaius and in the Justinian's Institutes. That division is additionally complicated by a different legal development at the time of Feudalism, when "Byzantine law" remained petrified due to the fall of the state, while

3 See different books published in editions like "Common Core of European Private Law", "Ius Commune Europaeum", "Study Group on a European Civil Code" etc.

žišnoj privredi (što je bio trend i pre raspada bivše države). Malo kasnije sve te države počinju faznu i postupnu harmonizaciju svojih pravnih sistema sa pravilima Evropske Unije.

U okviru Evropske unije osim velike podele na *civil law* ili kontinentalno-evropske pravne sisteme i *common law* ili anglo-saksonske (ili anglo-američke) pravne sisteme, postoje nekoliko tzv. "pravnih familija", kao što su nemačka pravna familija, francuska pravna familija, pravni sistemi nordijskih zemalja, pravni sistemi bivših sovjetskih republika, kako i pravni sistemi zemalja sa prostora bivše Jugoslavije. Mada veoma veliki deo njih manje ili više spada u tzv. *civil law* sisteme, postoje manje ili veće razlike između njih. Evropska unija još od svojih početaka nastoji da u izvesnoj meri kopira federalnu strukturu pravnog sistema SAD i uvek se iznova i iznova nadahnjuje pravnim rešenjima SAD-a naročito oko sukoba zakona između fedracije i pojedinih federalnih država, tzv. "izvornim nadležnostima" federacije i pojedinih federalnih država i slično, ali i nekim materijalno-pravnim pravilima, naročito u sferi finansijskih transakcija, stečaja, obezbeđenja (razlačnih prava), elektronske trgovine, registara i drugih pravila pre svega vezanih za trgovinu i finansije. Međutim, Evropska unija veoma retko zalazi u sferu materijalnog prava i nastoji da pronađe neke minimalne tačke "jedinstva" između različitih pravnih sistema na njenoj teritoriji, koje su pretočene u razne direktive ili propise. U osnovi retko kada te direktive i propisi zadiru u srž materijalnog prava individualnih zemalja članica.

Nezavisno od brojnih pokušaja raznih grupa na nivou Evropske unije (uglavno sastavljenih od profesora prava) koji bi hteli da iznađu neke "zajedničke osnove" za neki jedinstveniji pravni sistem Evropske Unije, to zasada ide veoma teško i sporo.[3] Sve zemlje EU svoje pravne sisteme u osnovi baštine na tzv. "rimskom pravu", ali i to je u osnovi varka. Tzv. "rimsko pravo" je u suštini pravo drevnog Egipta i postoje najmanje dve varijante toga prava: Rimska i Vizantijska (helenistička) u zavisnosti od toga u kom je periodu koja od tih sila pokorila drevni Egipat i preuzela njegov pravni sistem. To se najbolje može videti u razlici između pravnih rešenja Institucija Gaja i pravnih rešenja Institucija Justinijana. Ta je podela dodatno zakomplikovana različitim pravnim razvojem u vremenu feudalizma, kada je vizantijsko pravo ostalo "okamenjeno" zbog propasti države, a zapadni feudalizam je dao trajan pečat daljneg razvoja prava, koji se i pored kasnijih promena nakon buržoaskih revolucija, nikada nije vratio na "original". Današnji evropski pravnici baš u tim "feudalnim" tumačenjima prava glosatora i post-glosatora nalaze inspiraciju za tzv. "zajedničke osnove" evropskog prava, ali to

3 Pogledaj različite knjige koje se objavljuju u izdanjima kao "Common Core of European Private Law", "Ius Commune Europaeum", "Study Group on a European Civil Code" itd.

Western Feudalism made a permanent impact on the further development of law, which never returned to the "original" despite later changes after the bourgeois revolution. Today's European lawyers find inspiration for the so-called "common grounds" in the "feudal" interpretation of law by glossators and post-glossators. They may be common grounds for the Western development pattern, but not of the eastern part of Europe.

For a few years at the Law Faculty Justinian I in Skopje, we have been engaged in a project on origins of the Justinian's Digests. What may be concluded for the time being is that the Digests are not a code, but a preparatory work for the elaboration of the Justinian's Institutes. They constitute an anthology of legal knowledge irrespective of its source. We assume that that work was carried out by people gathered by a person historically known as Joannes Stobaeus. However concrete results on this assumption require much future work. This is primarily owed to the fact that today's supporters of "common grounds" ("common core" or "jus commune europaeum') of European law frequently refer to the Digests in a non-selective manner, in a way similar to Savigny and his legal school.

These are for now "intellectual analyses" which do not influence real development of concrete solutions in European law. It continues to rely on the so-called minimum shared elements of various systems not entering much into the material-legal solutions of individual member states. That is why expectations of EU candidate countries that their accession will contribute to putting their legal systems in order are too high. That is why the work and effort invested into harmonization of domestic law with EU law is multiplied by ten when it comes to fixing their own legal systems for regulation of everyday life relations. However, we all see lack of efforts in the countries of the former Yugoslavia in this area.

Last generations of people who remember "the socialist self-management system" as a starting point for transformation of legal systems in the territory of the former Yugoslavia are now in their fifties. These are the last generation who studied that system at law faculties of the former state. Today's generation hardly understand it. Therefore those who remember that system are better suited to compare and follow development and transformation of law in the territory of the former state. The legal system of the SFRY was specific, but also inconsistent in many respects. I will give just a few examples. We all remember different "notes" existing at that time: commercial notes, treasury notes, state notes etc. Although I do not know the history of their introduction into the then legal system it is rather probable that it was an "error in translation" of an international instrument or a convention. A promissory note is an English term which was translated as "zapis" (not as "menica"). Perhaps those instruments functioned in practice but in laws of

su možda zajedničke osnove zapadne grane tog razvoja, a ne i "zajedničke osnove" za istočni deo Evrope.

Na Pravnom fakultetu "Justinijan I" u Skoplju već nekoliko godina se bavimo projektom izvorišta Justinijanovih Digesta. Ono što se dosad može zaključiti je da Digeste nisu bile zakonik, već pripremni rad za izradu justinijnovih Instituta i da predstavljaju antologiju dotadašnjeg pravnog znanja nezavisno od izvora toga prava. Po našim pretpostavkama to su radili ljudi iz okruženja osobe koju istorija poznaje kao Jovana iz Stobija (Joannes Stobaeus), ali do konkretnih rezultata u vezi toga ima još mnogo rada. Ovo pre svega zato što se današnji pobornici "zajedničkih osnova" evropskog prava veoma često neselektivno pozivaju na Digeste, na način veoma sličan Savinjiju i njegovoj pravnoj školi.

Ali sve to su zasad "profesorske analize", koje sada i nemaju nekog naročito velikog uticaja na realni razvoj konkretnih rešenja evropskog prava. Ono se i dalje drži do tzv. minimalnih tačaka spajanja različitih sistema, u osnovi ne zadirući mnogo u "materijlno-pravna" rešenja svake zemlje članice. Tačno iz tih razloga prevelika su očekivanja zemalja-kandidata za članstvo u Evropskoj uniji da će ulazak tih zemalja u Uniju doprineti sređivanju pravnog sistema te konkretne zemlje. Zato, koliko truda i napora one moraju uložiti na harmonizaciji domaćeg prava sa pravom EU, deset puta više moraju da rade na sređivanju vlastitih pravnih sistema za regulaciju svakodnevnih životnih odnosa, a svi smo svedoci da se zemlje bivše Jugoslavije i ne trude mnogo oko toga.

Zadnje generacije ljudi koji se seћaju "sistema socijalističkog samoupravljanja" kao polazne osnove za transformaciju pravnih sistema na prostoru bivše Jugoslavije danas su pedesetogodišnjaci. To su zadnje generacije koje su taj sistem učili na pravnim fakultetima u tadašnjoj državi. Današnje generacije teško da išta od toga razumeju. Zbog toga oni koji pamte taj sistem su u mnogo boljoj poziciji da vrše uporedbe i prate razvoj i transformaciju prava na teritoriji te bivše države. Pravni sistem SFRJ je bio specifičan, ali isto tako i nekonzistentan u mnogim sferama. Samo kao primer ću navesti nekolkiko slučajeva. Svi pamtimo različite "zapise" koji su postojaliu to vreme: komercijalni zapisi, blagajnički zapisi, državni zapisi itd. Iako ne znam istoriju ulaska tih zapisa u tadašnji pravni sistem, sasvim je verovatno da je reč o "grešci u prevodu" nekog međunarodnog instrumenta ili konvencije. Vlastita menica se na engleskom zove tako promissory note, a note se može prevesti kao zapis. Možda su ti instrumenti funkcionisali u praksi, ali u tadašnjim zakonima (kao i u sadašnjim, tamo gde su se zadržale) nema skoro nikakvih odredbi o definisanju tih instrumenata, na koje nikad niko nije primenjivao odredbe koje se odnose na menice. Stoga ako su i funkcionisa-

that time (as in today's where they were retained) there are almost no provisions defining these instruments for which, on the other hand, no provisions on promissory notes were applied. Therefore, if they functioned in practice, they functioned without defined rules.

A similar case is today's "zaduznica", where it exists, together with waybill and bill of lading and their chaotic and erroneous interpretation in naval, air and river transport. If there was a justification for them at the time of the former Yugoslavia because of the existence of the Social Accountancy Service (later on the Payment Bureau), today their existence is rather dubious. In almost all states established after the dissolution of Yugoslavia, the former Social Accountancy Services changed their name but not the way of their work and largely undermined the financial system reform. Today they still function in a similar way everywhere masking the old system of communist payment and essentially covering up the "results of privatization". In Macedonia, for instance, that service have taken over a large chunk of judicial competences and contributed to a major legal chaos in the country.

The socialist self-management system was based on "unity of law", i.e. there was no official distinction between public and private law, neither between civil and commercial law within the so-called private law. Although all lawyers were aware of the differences and the subjects taught at law faculties were structured accordingly, the differences were not studied and all laws were flooded with phrases about working class, self-management, working people etc. However, when law was transformed and modern approaches to regulating legal relations were accepted, no due account was paid to the fact that basic classifications were extremely important. On the contrary, the moment in time and daily needs were the basis for resolution of economic, but primarily of privatization problems. What was in the beginning a "division by subjective criteria" between civil and commercial law in Croatia and Macedonia (after the German example, which is a directly taken-over Byzantine pattern), remained only on paper in laws on trading companies, while the logic was not consequently followed in other laws. What was a bit higher degree of maintaining the "unity of law" (for instance in Serbia) with the acceptance of notion of "enterprises", was also not reflected in other laws. Or in short in all countries of the former Yugoslavia transformation of law was conducted without a clear concept, by frequent application of solutions from totally different legal systems which has frequently created legal chaos.

A concrete impact on everyday life may be seen on the Macedonian example of definition of the notion of "trader". The initial Law on Trading Companies defines a distinction from civil law according to "subjective

le u praksi, funkcionisale su na tzv. "nervnoj bazi" bez definisanih pravnih pravila.

Sličan je slučaj sa današnjom "zadužnicom" tamo gde ona postoji, sa tovarnim listom (waybill) i konosmanom (bill of lading) i njihovim haotičnim i pogrešnim tumačenjima u pomorskom, vazdušnom i rečnom saobraćaju itd. Ako je u vreme bivše Jugoslavije možda i postojalo opravdanje za to, zbog postojanja Službe za društveno knjigovodtvo (ili kasnijim zavodima za platni promet), danas je njihovo daljnje postojanje prilično sumnjivo. Ali u skoro svim državama nastalim nakon raspada Jugoslavije, te su bivše Službe za društveno knjigovodstvo u osnovi samo promenile ime, ali ne i način rada i u mnogome su doprinele kočenju reformi u finansijskom sistemu. One i danas svuda funkcionišu veoma slično maskirajuĥi stari sistem komunističkog plaćanja i suštinski prikrivajuĥi "rezultate privatizacije". U Makedoniji je na primer ta služba preuzela ogromni deo sudskih nadležnosti i doprinela velikom pravnom haosu u zemlji.

Sistem socijalističkog samoupravljanja se bazirao na "jedinstvu prava", to jest nije bilo oficijalne razlike između javnog i privatnog prava, niti oficijalne razlike između građanskog i trgovačkog prava u okvirima tzv. privatnog prava. Mada su svi pravnici znali za te razlike i predmeti koji su se predavali na pravnim fakultetima su bili strukturirani na taj način, ipak te se razlike nisu izučavale i svi zakoni su bili prepuni fraza o radničkoj klasi, samoupravljanju, radnom narodu itd. Međutim prilikom transformacije prava i prihvatanjem nekih savremenijih pristupa regulisanja pravnih odnosa nije se uvek vodilo računa o tome da su bazične klasifikacije strašno bitna stvar, već se polazilo od trenutnih potreba u rešavanju nekih ekonomskih i pre svega privatizacionih problema. Ono što je na početku bio primerice "subjektivni sistem razgraničenja" građanskog i trgovačkog prava u Hrvatskoj i Makedoniji (po nemačkom uzoru, koji je direktno preuzet vizantijski obrazac), ostalo je samo na papiru u zakonima o trgovačkim društvima, ali se logika nije konsekventno sledila i u ostalim oblastima. Ono što je bio malo veći stepen zadržavanja "jedinstva prava" (kao na primer u Srbiji) sa prihvatanjem pojma "preduzeĥa" isto taka se nije odrazilo u drugim sistemskim zakonima. Ili ukratko sve zemlje nastale na prostoru bivše Jugoslavije su tu transformaciju prava izvodile bez nekog jasnog koncepta, često pozajmljujući rešenja iz sasvim različitih pravnih sistema, koja isto toliko često vode kreiranju pravnog haosa.

Kako se to konkretno odražava u svakodnevnom životu može se videti na makedonskom primeru definisanja pojma "trgovac". Prvobitni Zakon o trgovačkim društvima je razgraničenje sa građanskim pravom definisao

criterion" (registration in the trade registry – similar to the German approach).[4] But that law stood in solitude in this regard. After the transfer of trade registries from courts to a special trade register (which is a masked part of the former Social Accountancy service) incredible developments occurred. Today no one in the country knows exactly who the trader is and how to define him. Under separate laws, traders are for example artisans, architects, accountants, surveyors, sometimes doctors and pharmacists, and sometimes even artists. The exact definition of trader is necessary to know what person may go to bankruptcy (trader) and what person is a subject of regular rules of civil procedure (citizen). But regulations on bankruptcy and regulations on issuance and realization of payment orders clearly show that the country did not have a clear picture about it. Traders go to bankruptcy, while citizens are subject to executory civil proceedings. But if you have a payment order and request the bank to collect a payment from a classical trader, if he has no money on account, bankruptcy proceedings is instituted rarely, but the creditor continues with execution as in case of ordinary citizen. In that manner, the entire system of payment security and priority was ruined and the country came again to the situation to cover up the existence of the Social Accountancy Service, with its special working methods, instead of solving problems. When politics and its priorities on "who to be saved and who to be ruined" meddle in, the product is everything but not the rule of law and market economy.

In addition to the Social Accountancy Service, another institution which masked managed to survive all these years in all former republics is the former Self-managing Housing Interest Community. Flats were and are an important matter and no authority escaped to seize these institutions. But the needs for housing privatization and different frauds that followed the process ruined the notion of condominium property, which had not had a stronghold in the previous system as well.

The lack of clear concept in the development of a legal system is very often complemented with "errors in translation". This is most apparent in countries which have already become part of the EU – Slovenia and Croatia. Numerous directives and regulations were translated by translators who know perfectly the language they translated from, but do not know legal terminology and frequently do not understand legal institutions in question. I will give example of the Croatian translation of the Financial Collateral Directive.[5] We translate the English word collateral as "subject of security"

4 See: Law on commercial companies, Off. Gazz R.M. no 28/04, 84/05, 25/07, 87/08, 42/10, 48/10, 24/11, 166/12.

5 Directive 2002/47/EC of the European Parliament and of the Council od 6 June 2002 on financial collateral arrangements, (English and Croatian translation of the Directive)
http://eur-lex.europa.eu/legal-content/EN/ALL/;ELX_SESSIONID=zxLQTwmLK6t8ph545YY4yrQwv

prema "subjektivnom kriterijumu" (registracija u trgovačkom registru – slično nemačkom pristupu).[4] Ali taj je zakon ostao usamljen u tome. Nakon prebacivanja trgovačkih registra iz sudova u neki poseban trgovački registar (koji je umaskirani deo bivše Službe za društveno knjigovodstvo) došlo je do neverovatnih obrta. Danas se u zemlji realno ne zna ko je trgovac i kako se on definiše. Posebnim zakonima se kao trgovci računaju primerice zanatlije, arhitekti, knjigovođe, geodete, ponekad lekari i farmaceuti, pa nekad čak i umetnici. Tačna definicija trgovca je na primer potrebna da se zna koje lice ide u stečaj (trgovac), a koje podpada pod redovna pravila građanskog izvršnog postupka (građanin). Ali propisima o stečaju ili propisima o izdavanju i realizaciji platnog naloga se jasno vidi da zemlja nije imala jasnu pretstavu o tome. Trgovci idu u stečaj, nad građanima se sprovodi građanski izvršni postupak. Ali ako imate platni nalog i tražite od banke klasičnog trgovca naplatu, ako on nema novca na računu retko kada se otvara stečajni postupak, nego poverioc veoma često produžava izvršenje kao da ja reč o najobičnijem građaninu. Na taj način je ruiniran ceo sistem obezbeđenja i prioriteta naplate i zemlja je opet došla u fazu da prikriva postojanje Službe društvenog knjigovodstva, sa njenim posebnim metodama rada, umesto da rešava probleme. Kada se u sve to umeša politika i njeni prioriteti "ko treba da bude spašen, a ko treba da propadne", dobija se sve samo ne pravna država i tržišna ekonomija.

Pored Službe društvenog knjigovodstva, druga institucija koja je zamaskirano preživela svih ovih godina u svim bivšim republikama je bivši SIZ za stanovanje (Samoupravna interesna zajednica za stanovanje). Stanovi su bili i ostali bitna stvar i nije bilo vlasti koja se nije dokopala tih institucija. Ali potrebe privatizacije stanova i raznih malverzacija prilikom tog procesa dovele su do ruiniranja pojma etažnog vlasništva, koji ni u bivšoj državi nije imao nekog jakog uporišta.

Nedostatak jasne koncepcije u razvoju pravnog sistema veoma često se dopunjava sa "greškama u prevodu". To se naročito može videti u zemljama koje su već postale članice Evropske unije kao što su Slovenija i Hrvatska. Brojne direktive i propise su prevodili prevodioci, koji znaju odlično jezik sa kojeg su prevodili, ali ne poznaju pravnu terminologiju i veoma često potpuno ne razumeju pravne institucije o kojima je reč. Kao primer samo navodim hrvatski prevod direktive o finansijskom obezbeđenju.[5] Engleska reč "collateral" kod nas bi se prevela kao "predmet obezbeđenja" ili predmet

4 Pogledaj Zakon o trgovačkim društvima, Službeni list R.M. broj 28/04, 84/05, 25/07, 87/08, 42/10, 48/10, 24/11, 166/12.

5 Directive 2002/47/EC of the European Parliament and of the Council od 6 June 2002 on financial collateral arrangements, (engleski i hrvatski prevod direktive)
http://eur-lex.europa.eu/legal-content/EN/ALL/;ELX_SESSIONID=zxLQTwmLK6t8ph545YY4yrQwvX7cFLgnGJcVH1lHchpvy8hl2p3D!2061451643?uri=CELEX:32002L0047

or a good subject of security. The insertion of the word collateral into the domestic vocabulary is totally unnecessary. But in article 2 of the Directive, the Croatian translation missed the topic. The English version relates to two situations: 1. Title transfer (ownership or possession or another form of possession) of subject of security and 2. security purposes transfer. Since the English word security is also used for *Wertpapier* (in Anglo-Saxon sense of the word) the translator translated "financial collateral security arrangement" as "contract for financial collateral in securities - *Wertpapier*", whereby the meaning of the entire directive was lost.

This is further complicated by the problem stemming from the time of the former Yugoslavia. In all former republic the term "thing" in property law meant only "corporal thing" as part of material nature. Within that concept, claims are not things because they are incorporeal. Someone may be owner and have property rights over something defined as a "thing". If a claim is incorporeal, it is not a thing and consequently our vocabulary did not use the terminology "ownership of claims" but "I have claims" (in the sense "I have a right"). It was a result of the situation in which a property right did not exist in respect of something that was not material ("thing"). But in the Law on Obligations of the former SFRY, there was a reverse conception (division of things into material and non-material, corporeal and incorporeal) where we encounter the notion of "sale of rights". In order to sell something, I have to own a thing I am selling or at least to have authorization to do so by the owner. If a claim is not a thing according to property law, then I could not sell it because I did not own claims. But this was not the case in the Law on Obligations and that dual "thing" regime was in place all the way. If an unclear concept of cession is added to that situation, one may imagine how it all function in practice.

If we again revert to the Croatian translation of the Financial Collateral Directive, we may follow the whole problem. Article 2, paragraph 1(b) of the English version speaks about "title transfer" and the exact translation would be "title transfer financial collateral arrangement" what means an arrangement, including repurchase agreements, under which a collateral provider transfers full ownership of financial collateral to a collateral taker for the purpose of securing or otherwise covering the performance of relevant financial obligation". The phrase "title transfer" itself is unknown to lawyers from the former republics and is rarely used in continental European legal systems because it is a concept with specific meaning is common law systems. Title is any legal grounds on the basis of which a person holds a thing: ownership, lease, possession, fiduciary (trust) etc. So it is apparent that the term "title transfer" was the minimum agreement" among various legal sy-

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nad kojim se kreira razlačno pravo. Samo unošenje reči "kolateral" u domaći vokabular je sasvim nepotrebno. Ali u članu 2 direktive hrvatski prevod je promašio temu. Engleski tekst se odnosi na dve situacije: 1. situacija u kojoj se prenosi titula (vlasništvo ili vladanje ili neki drugi osnov držanja predmeta) nad predmetom obezbeđenja i 2. situacija u kojoj se predmet prenosi kao obezbeđenje. Ali pošto se engleska reč "security" koristi za označavanje obezbeđenja isto kao i za označavanje "hartija od vrednosti" (u anglo-saksonskom smislu te reči), prevodioc je "aranžman za prenos finansiskog predmeta kao obezbeđenje" preveo kao "ugovor o finansijskom kolateralu u vrijednosnim papirima" čime se izgubio sav smisao direktive.

Ovome ćemo dodati problem koji se vuče još iz vremena bivše Jugoslavije. U svim bivšim repubikama u stvarnom pravu pod terminom "stvar" se podrazumevala samo "telesna stvar" kao deo materijalne prirode. U toj koncepciji na primer potraživanja nisu stvar, jer su bestelesna. Neko može biti vlasnik i imati vlasničko pravo samo nad nečim što je definisano kao "stvar". Ako je potraživanje bestelesno, ono nije "stvar", te prema tome u našem se rečniku nije koristila terminogija "vlasništvo nad potraživanjem", nego "imam potraživanje" (u smislu "imam neko pravo"). To je bilo zbog toga što pravo vlasništva nije moglo da postoji nad nečim što nije materijalno ("stvar"). Ali u Zakonu o obligacionim odnosima bivše SFRJ postojala je obrnuta koncepcija (podela stvari na materijalne i nematerijalne) i susrećemo pojam "prodaja prava". Da bih nešto prodao, moram biti vlasnik stvari koju prodajem ili bar da imam ovlašćenje za to od vlasnika. Ako potraživanje prema stvarnom pravu nije bilo "stvar" onda njega nisam mogao ni da prodajem, zato što nisam imao vlasništvo nad potraživanjem. Ali to nije bio slučaj u Zakonu o obligacionim ili obveznim odnosima i taj dupli režim "stvari" se vukao svo vreme. Ako se na to doda nejasna koncepcija "cesije" u to vreme, može se zamisliti kako je sve to funkcionisalo u praksi.

Ako se sad vratimo na hrvatski prevod direktive o "finansijskom kolateralu" možemo da pratimo ceo problem. U članu 2 stav 1(b) engleskog prevoda je reč o "prenosu titule" i tačan prevod bi bio: "aranžman za prenos titule finansiskog predmeta obezbeđenja" znači aranžman, uključujući i ugovor o ponovnom otkupu, sa kojim lice koje je obezbedilo predmet obezbeđenja prenosi puno vlasništvo nad finansisjkim obezbeđenjem na primaoca obezbeđenja sa ciljem obezbeđivanja ili drugačijeg vida pokrivanja (pokriha) ispunjavanja relevantnih finansisjkih obaveza (obligacija). Sama reč "prenos titule" je nepoznata pravnicima iz bivših republika i ona se retko koristi u kontinentalno-evropskim sistemima zbog toga što je koncepcija koja ima specifično značenje u *common law* sistemu. Titula je bilo koji pravni osnov na osnovu čega neko drži neku stvar: vlasništvo, zakup, vladanje, fiducijarni odnos (trust) itd. Te je očigledno da je ovde sam termin

stems to describe a transaction under which "title" is transferred to someone else (what may also mean a relevant change in the registries, for instance registry of the owner of the thing).

An entirely different situation is described in paragraph 1(c) of Article 2 which defines collateral transfer for security purposes as a concept not including "title" transfer. Since the notion financial collateral implies high liquidity things, that is to say something that may easily be converted into money, I will give two examples. If a subject of collateral is a security *(Wertpapier)* and if collateral relates to "title transfer", that means that a collateral taker steps into the shoes of a collateral giver. If a collateral giver was an owner of securities, then a creditor is registered as owner in securities register. If a collateral giver held securities in another capacity, then a collateral taker would assume the same position instead of his legal predecessor (in legal possession on a legal basis and alike). In the second situation, a security is transferred as collateral, but if the giver is an owner, the taker does not become an owner of the security.

If the subject of collateral is a claim, in the first case, cession or sale of claims would apply in systems in which claims are considered "things", while in the second case claims would be transferred as collateral, the claimant keeping the claim in respect of the debtor. However, the entire situation was lost in translation. To make it even more ridiculous, amendments to the Bankruptcy Law were made in Macedonia on the basis of that directive and the Law provides different definitions for the notions "subject of collateral" and "financial collateral" totally unrelated. It even provides three definitions for the notion "settlement" as a translation of the English term netting.[6]

There is an endless number of such examples in almost all translations of directives and regulations of the European Union into Slovenian and Croatian. Furthermore, one must take into account that different notions do not have a universal meaning in all legal systems. Basic notions such as ownership, possession, mortgage, contract, transfer, collateral, security etc may have a totally different interpretation depending on a country's specific legal system and therefore they should not be taken for granted. Therefore, people who carry out corrections of translations must have basic knowledge of comparative law or otherwise legal texts become incomprehensible.

If one examines European law curricula of law faculties in countries of Western Europe, they study law as defined by European institutions, but more frequently they focus on comparative law of different member states (mainly German, French, British, Dutch, Italian and alike). Legal expertise does not concentrate only on European law in literal sense (directives, re-

6 See: Insolvency Law, Off. Gazz R.M. no 34/06, 126/06, 84/07, 47/11 and Decisions of the Counstitutional Court U no. 63/06, 11/09.

"prenos titule" bio "minimalna tačka saglasnosti" između raznih pravnih sistema da se opiše transakcija u kojoj se prenosi "titula" na drugoga (što može značiti i relevantna izmena u registrima primer vlasnika te stvari).

Sasvim je druga situacija opisana u tački 1(v) člana 2 gde je definisan prenos stvari kao obezbeđenje, kao koncepcija u kojoj ne dolazi do prenosa "titule". Pošto se pod pojmom "finansijski predmet obezbeđenja" (finansijski kolateral) podrazumevaju stvari sa velikom likvidnošhu, to jest nešto što se lako može pretvoriti u novac daću dva primera. Ako je predmet obezbeđenja hartija od vrednosti i ako se pri obezbeđenju "prenosi titula", to znači da razlačni poverioc stupa na mesto lica koje je dalo obezbeđenje. Ako je davalac bio vlasnik hartije od vrednosti onda u registre gde se registruju hartije od vrednosti kao vlasnik hartije navodi se poverioc. Ako je davaoc držao hartiju u nekom drugom svojstvu, onda će i primalac obezbeđenja biti u tom svojstvu umesto svog pravnog prethodnika (u zakonitom vladanju zbog nekog pravnog osnova i sl.). U drugoj situaciji hartija od vrednosti se prenosi kao obezbeđenje, ali ako je prenosioc vlasnik, poverioc ne postaje vlasnik hartije od vrednosti.

Ako je predmet obezbeđenja potraživanje, u prvom slučaju bi se dogovorila cesija ili prodaja potraživanja u sistemima u kojima je potraživanje "stvar", a u drugom slučaju bi došlo do prenosa potraživanja kao obezbeđenje, pri čemu imaoc potraživanja i dalje ima to potraživanje u odnosu na dužnika. Međutim cela se ta situacija "izgubila u prevodu". Da stvar bude smešnija u Makedoniji je neko na osnovu te direktive na primer vršio izmene u Zakonu o stečaju, pa je u definicijama dao različete definicije za pojam "predmet obezbeđenja" i za pojam "finansijski kolateral" koje su međusobno totalno nepovezane ili čak tri definicije za pojam "saldiranje" (poravnanje) kao prevod engleskog termina netting.[6]

Takvih primera ima bezbroj u skoro svakom prevodu direktiva i propisa Evropske unije na hrvatskom ili slovenačkom jeziku. Na to se mora dodati da različiti pojmovi nemaju univerzalno značenje u svim pravnim sistemima. Bazični pojmovi vladanje, hipoteka, ugovor, prenos, obezbeđenje, hartija od vrednosti itd. mogu imati sasvim različito tumačenje u zavisnosti od konkretnog pravnog sistema zemlje, pa zato nijedan pojam ne treba uzimati zdravo za gotovo. Upravo zbog toga, ljudi koji vrše korekcije prevoda tih direktiva moraju da imaju elementarna poznavanja uporednog prava, jer bez toga su tekstovi tih akata nerazumljivi.

Ako se pogledaju kurikulumi pravnih fakulteta u zemljama Zapadne Evrope na kojim se izučava Evropsko pravo, to su kurikulumi koji ili proučavaju pravo onako kako ga definišu evropske institucije ili mnogo češće

6 Pogledaj Zakon o stečaju. Službeni list R.M. broj 34/06, 126/06, 84/07, 47/11 i odluke Ustavnog suda broj 63/06, 11/09.

gulations, EU treaties etc.) but also on areas where there is no harmonization, because you cannot understand European legal rules if there is no prior knowledge on what has been harmonized, that is to say which were the "minimum points of common grounds and harmonization". That tendency has become more notable after the adoption of directives and regulations on recognition of diplomas and qualifications and on possibility for attorneys from one member state to practice law in another EU member state.[7]

All law faculties in the territory of the former Yugoslavia are far behind. They do not manage to define their legal systems not to mention to engage in comparative law. This is additionally complicated by the fact that universities in almost all these countries lost their importance ("pestering politicians too much").

My own experience in trying to changes something made me conclude the following: first, in no country originating from the former Yugoslavia, transformation of law was a coordinated activity aimed at creation of a coherent and correctly classified legal system. It was an activity to meet the needs of the day and financial difficulties of the countries. Second, all of these countries accepted various legal solutions from different legal systems frequently contradictory in full, what created a specific legal chaos. Apparently politicians contributed to the chaos for the purpose of easier implementation of privatization and other fraudulent activities. That tendency today spreads to criminal and criminal procedure regulations, what is by far more dangerous situation (privatized property must be "guarded"). In this context, we witness an inflow of "US rules" into domestic criminal procedure, what produces totally meaningless situations and arbitrary conduct by the government. Third, despite formal acceptance of various solutions contained in European directives and regulations, all these solutions float in the air and are decorations on a Christmas tree placed there for holidays, not to be really applied. Various government bodies established on the basis of these directives and regulations (in the area of competition, protection of consumers, social rights etc.) may be heard only in pre-election campaigns and no living soul knows what they are engaged in and what they really do. Fourth, when a country is to be admitted to the EU, headlines for politicians are "big topics": delineation between Croatia and Slovenia, the issue of Kosovo, the Deyton agreement, country's name (in Macedonia) and alike, while European Union law is of secondary importance. When the entire circus of a "big topic" leaves the town, ordinary people remain to live with

7 See: Aalt Willem Heringa, Bram Akkermans (editors), Educating Europen Lawyers, Intersentia, 2011 and A. Uzelac, C.H. van Rhee (editors), The Landscape of Legal Professions in Europe and the USA: Continuity and Change, Intersentia, 2011.

izučavaju uporedno pravo različitih zemalja članica (uglavnom nemačko, francusko, englesko, holandsko, taljansko i slično). To jest ekspertiza pravnika se ne zadržava samo na ono što je "evropsko pravo" u bukvalnijem smislu (direktive, propisi, ugovor o EU itd.) nego i na oblasti gde nema harmonizacije, jer se i sami evropski propisi ne mogu razumeti ako ne postoji predznanje za ono "što je bilo harmonizovano", to jest za ono o čemu su nalažene "minimalne tačke spajanja i usaglašavanja". Ta je tendencija naročito naglašena nakon donošenja direktiva i propisa o priznavanju diploma i kvalifikacija i mogućnosti advokata iz jedne zemlje članice da obavlja advokatski rad u drugoj zemljli članici Evropske Unije.[7]

Svi pravni fakulteti na prostorima bivše Jugoslavije su danas još uvek daleko od toga. Oni još uvek ne mogu da definišu vlastite pravne sisteme, a kamo li da se bave uporednim pravom. Sve je to dodatno komplikovano sa gubljenjem značaja univerziteta u skoro svim tim zemljama ("jer previše zanovetaju političarima").

Iz vlastitog iskustva pokušaja da se nešto promeni mogu da izvučem sledeće zaključke. Prvo, da ni u jednoj državi nastaloj na teritoriji bivše Jugoslavije transformacija prava nije pretstavljala koordinisanu aktivnost usmerenu prema stvaranju koherentnog i korektno klasifikovanog pravnog sistema, nego je bila aktivnost koja je odgovarala trenutnim potrebama i finansijskim poteškoćama tih zemalja. Drugo, da su sve te zemlje prihvatale različita rešenja iz različitih pravnih sistema, koja su često totalno međusobno neusaglašena, čime je stvoren svojevrsni pravni haos. Svi su izgledi da su političari i sami doprinosili tom haosu, zbog lakšeg sprovođenja privatizacije i raznih malverzacija. Danas se ta tendencija proširuje i na krivične propise i propise o krivičnom postupku, što je mnogo opasnija tendencija (privatizovano se mora "sačuvati"), te smo svedoci uplivu "američkih pravila" u domaće krivične postupke, što dovodi do totalnog besmisla i samovolje vlasti. Treće, i pored formalnog prihvatanja različitih rešenja evropskih direktiva ili propisa, sva ta rešenja lebde u vazduhu i predstavljaju lampione na novogodišnjoj jelki, koja je tu zbog praznika, a ne zbog njihove realne primene. Razna vladina tela koja su formirana na osnovu tih direktiva i propisa (u sferi konkurencije, zaštite potrošača, socijalnih prava itd.) možemo da čujemo samo u predizbornim kampanjama, i niko živ u zemlji nema pojma čime se oni bave i šta oni realno rade. Četvrto, pri prijemu neke zemlje u Evropsku Uniju političari u prvi plan ubacuju neku "veliku temu": razgraničenje Hrvatske i Slovenije, problem Kosova, Dejtonski sporazum, ime zemlje (u Makedoniji) i slično i u drugi plan stavljaju sve ono što pretstavlja

7 Pogledaj: Aalt Willem Heringa, Bram Akkermans (editors), Educating Europen Lawyers, Intersentia, 2011 i A. Uzelac, C.H. van Rhee (editors), The Landscape of Legal Professions in Europe and the USA: Continuity and Change, Intersentia, 2011.

"what is of lesser importance", and what is actually of vital meaning for them. Are they going to live in a state governed by the rule of law in which human rights and freedoms are respected and market economy is operating? And naturally the answer is – no. Citizens of Croatia and Slovenia (as EU member states) are well aware of this, but I will provide an example for better understanding by candidate countries. All of them ratified the European Convention of Human Rights of the Council of Europe. We may ask ourselves what were the changes in our human rights situations since its application. Rather insignificant, if anything. In some countries originating from the former Yugoslavia the situation is even worse. The same goes for the application of European law. It is like "waiting for Tito's letter" we all know will not change anything.

My experience so far prompt me recommend the following: Building a consistent and harmonized legal system is a long-term and painstaking work. It requires much effort and time. This process must be carried out by countries themselves because answers cannot be found in European directives and regulations. One should also have in mind that Eastern European law was and is still different and that it is hard if not almost impossible to accept everything offered today as the academic common ground of European law ("common core" or "ius commune europaeum"), simply because Eastern countries did not go through that type of feudalism. We cannot change that, as the time cannot be reverted. But each and every country must understand that without the rule of law, it sinks deeper, leaving politicians to occasionally "put up fires" here and there, acting normal, pretending to defend the rule of law and market economy. That is hard part of the work. Building your own legal system which is coherent and is not an "intentional creation of legal chaos" to fish in the dark. The transformation which distorted all normal legal notions about possession, ownership, urban planning, banking system, insurance and everything else has taken too much time.

Another matter is the study of law of the European institutions and of comparative law. Without knowledge of comparative law, all EU directives and regulations will be misinterpreted and will have no effect. But that is also a difficult and hardworking process that lasts for years and no one is grateful for your work, including your own students. It must, however, be done. And not much effort is invested in that.

In one word, rely on yourself. The work on building your own legal system which will not deviate much from your own legal tradition is yet to come for the countries originating from the former Yugoslavia. Much time has been lost in vain. And none of them achieved the progress necessary and what was the cause for dissolution of the former state: rule of law, market economy and respect for human rights and freedoms. A glance on their laws

pravo Evropske Unije. Kad celi cirkus "velike teme" prođe, običan narod ostaje da živi sa onim "što je bilo manje bitno", a što svima njima život znači. Da li će živeti u normalnoj pravnoj državi u kojoj se poštuju ljudska prava i slobode i postoji tržišna privreda. I normalno odgovor je – ne. Ako to sad dobro zna narod u Hrvatskoj i Sloveniji (kao zemlje članice Evropske Unije), da damo samo jedan primer koji bolje mogu da razumeju zemlje--kandidati. Sve te zemlje su ratifikovale Evropsku konvenciju za ljudska prava Saveta Evrope. Ostaje da se zapitamo što se to u vezi naših ljudskih prava i sloboda promenilo od primene te konvencije. Mnogo malo, čak ništa. U nekim državama bivše Jugoslavije stanje je još i gore nego pre. Isto je i sa primenom "evropskog prava". To je kao čekanje "pisma druga Tita" za koje svi znamo da neće ništa rešiti.

Zato iz dosadašnjeg ličnog iskustva mogu da poručim sledeće. Da je izgradnja konzistentnog i usaglašenog pravnog sistema dugotrajan i mukotrpan proces koji traži mnogo napora i vremena. To mora da završi svaka zemlja za sebe, jer se odgovori na ta pitanja ne nalaze po evropskim direktivama i propisima. Pri tome se mora imati u vidu da je pravo Istočne Evrope bilo i ostalo različito i da je teško i skoro nemoguće prihvatiti sve ono što se danas nudi kako akademska "zajednička osnova" evropskog prava, iz prostog razloga što istočne zemlje nisu prošle taj tip feudalizma. To mi sada ne možemo da vratimo, jer se vreme ne može vratiti unazad. Ali svaka zemlja mora razumeti da bez pravne države samo tone sve dublje i dublje, ostavljajući političarima da s vremena na vreme "gase požare" tu i tamo, glumeći normalnost, pravnu državu i tržišnu privredu. To je teži deo posla. Izgradnja vlastitog pravnog sistema koji je koherentan i nije "namerno kreiranje pravnog haosa" u zemlji da bi se lovilo u mutnom. Predugo traje ta transformacija koja je izvitoperila sve normalne pravne pojmove o vladanju, vlasništvu, urbanizmu, bankarskom sistemu, osiguranju i svemu ostalome.

Druga je stvar izučavanje prava evropskih institucija i uporednog prava. Bez osnovnog znanja uporednog prava sve te direktive i propisi Evropske unije će biti sasvim pogrešno protumačene i neće imati nikakvog efekta. Ali i to je težak i mukotrpan posao koji traje godinama i za koji Vam niko nikad neće reći hvala, čak ni vaši vlastiti studenti, ali se mora završiti. A na tome se veoma malo radi.

Jednom rečju "u se i svoje kljuse". Rad na izgradnji vlastitog pravnog sitema koji neće mnogo odstupati od onoga što pretstavlja vlastita pravna tradicija još čeka sve zemlje bivše Jugoslavije, koje su izgubile mnogo vremena nizašta. Nijedna od njih nije došla do onoga zbog čega se raspala i prethodna država: do pravne države, tržišne ekonomije i poštovanje ljudkih prava i sloboda. Samo površan prelaz njihovih zakona dovoljno govore o tome. Razne maske i maskiranja ranije postojećih intitucija koje su kočile

suffices as a testimony to that. Various masks and masquerades of former institutions which hindered progress and sufficient development of the state are an indicator that their basic systems of work and thinking did not change much.

European directives and regulations do not interfere into the core of material legal notions and concepts: ownership and all other property rights, contracts, possession, collateral rights, court procedures (both (civil and criminal), urban planning, construction etc. Everyday life of people in a country is depending on these issues. That is why every state must work on them on its own without waiting somebody else to finish the work instead. Foreign consultants and various projects for advancement of law in certain areas have only made things worse. Because if a country does not have a precise concept about the development of a coherent legal system, the extraction of different solutions from different legal systems (depending on a preference of a foreign consultant) only makes things worse. Solutions contained in the EU directives and regulations are just minimum harmonization points, but if you want to harmonize, you need to have something to be harmonized. A hope that everything will settle fine with the accession to the EU is a self-deception. The same as advancement of human rights and freedoms with the ratification of the European Convention of Human Rights or of any other international treaty or instrument.

Politicians in all countries established after the dissolution of the former Yugoslavia have become quite skilled in using "harmonization" as an excuse to settle things. Moreover, they ever more frequently use various "European justifications" to ruin the existing legal system and create legal chaos on the "way to a brighter future" on which they insist for more than 70 years. As we may see, they are quite skillful at that. Law applies to people. And all people in the world know that Christmas decorations are placed for a week and all the remaining time is life. In this story, law and legal system must not turn into Christmas decorations for a much worse reality.

CONCLUSION

Countries of Eastern Europe and particularly the Balkan countries (among which those established following a dissolution of the former Yugoslavia), as countries with a specific legal tradition may align with what has been offered today as "common grounds" of European law, which is basically relying on Western Feudal tradition, or may go their own way by advancing and developing their own legal tradition. For the time being, the first option is prevailing, but no one knows how things would develop in the future. Sometimes it is perhaps recommendable to pursue own tradition, something

državu da ide napred i da se razvija dovoljno govere da se njihovi osnovni sistemi poslovanja i razmišljanja nisu mnogo promenili.

Evropske direktive i propisi ne zadiru u srž materijalno-pravnih pojmova i koncepcija: u vlasništvo i sva ostala stvarna prava, ugovore, vladanje, prava obezbeđenja, sudske postupke (građanske i krivične), urbanizam, građenje itd. A sve su to stvari od kojih zavisi svakodnevni život ljudi u nekoj zemlji. Iz tih razloga svaka država mora da poradi na tome i ne može čekati da im neko drugi to završi. Strani konsultanti i razni projekti za poboljšanje prava u nekim oblastima samo su pogoršale stvari. Jer ako zemlja nema preciznu koncepciju o razvoju koherentnog pravnog sistema, čupanje raznih rešenja iz različitih pravnih sistema (u zavisnosti od preferencija stranog konsultanata) samo pogoršava stvari. Rešenja iz direktiva i propisa Eropske Unije su samo minimalne tačke harmonizacije, ali da bi nešto harmonizovali morate imati šta da harmonizujete. Nada da će se sve to srediti ulaskom u Evropsku Uniju je samo-zavaravanje. Isto kao i poboljšanje ljudskih prava i sloboda ratifikacijom Evropske konvencije o ljudskim pravima ili bilo kojim međunarodnim aktom ili instrumentom.

Političari u svim zemljama nastalim raspadom bivše Jugoslavije su se prilično izveštili u korišћenju "harmonizacije" kao izgovor za sređivanje stanja. Još više, sve češće koriste razne "evropske izgovore" za ruiniranje kakvog-takvog pravnog sistema i kreiranje pravnog haosa na "putu u svetliju budućnost" na kome uporno istrajavaju već više od sedamdeset godina. Kako svi vidimo, tu su se baš izveštili. Pravo se odnosi na ljude. A svi ljudi na svetu znaju da se lampioni kače samo na nedelju dana, a ostalo je život. U celoj toj priči pravo i pravni sistem ne smeju postati lampioni i ukrasi za neku mnogo lošiju realnost.

ZAKLJUČAK

Zemlje Istočne Evrope, a naročito zemlje Balkana (među kojima i države nastale nakon raspada SFRJ), kao zemlje sa posebnom pravnom tradicijom mogu se prikloniti onome što se danas nudi kao "zajednička osnova" evropskog prava, koja u osnovi baštini zapadnu feudalnu tradiciju ili može krenuti svojim putem, usavršavanja i razvoja vlastite pravne tradicije. Zasad se čini da preovladava prva opcija, ali niko ne zna kako će se sve to razvijati u budućnosti. Možda ponekad i nije loše ustrajati na onome što je vlastito i što je nekako uhvatilo korena na nekom tlu kao pravno rešenje koje je poznato običnim ljudima. To ne znači da te zemlje ne trebaju da transformišu svoj pravni sistem i da ne treba da konačno izvedu tržiše reforme, jer jedno je pravna država, a nešto sasvim drugo faktička ravnoteža sila u nekom društvu. U suprotnom prihvatanje rešenja iz "evropskog prava" samo kao

that has taken root in your soil as a legal solution known to your people. This does not mean that these countries should not transform their legal systems and finally carry our market reforms, because the rule of law and factual balance of power in a society are two different things. Otherwise, acceptance of solutions of European law, only as a condition for EU accession, will not bring any special results, and expectations of ordinary people will be failed as always. Lack of motivation is the worst kind of illness in today's world. We all remember it from the time of dissolution of the former state.

This paper deals with general issues of harmonization of law of EU candidate countries and the author's experience in that regard. The author tries to show that development of a coherent legal system of a country is the best way to establish the rule of law. If this is achieved, it is much easier to fulfill "conditions" for EU accession than to take a different path. Therefore, law faculties must engage more in studying European Union and comparative law, but also in building their own legal systems. The weak side of this approach is that almost all law faculties gradually lose their power in society, relinquishing their position to those who emerged from various privatizations with "money filled brains".

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uslova za ulazak u EU neće dovesti do nekih naročitih rezultata, a obični ljudi će kao i uvek ostati iznevereni u svojim očekivanjima. A gubitak motivacije je nastrašnija bolest današnjice. Svi je pamtimo iz vremena raspada bivše države.

Ovaj rad se bavi nekim opštim pitanjima harmonizacije prava zemalja kandidata za članstvo u Evropskoj uniji i dosadašnjim iskustvima na tom putu iz vlastitog iskustva autora. Autor nastoji da pokaže da je izgradnja koherentnog pravnog sistema jedne zemlje najbolji put za kreiranje pravne države. Ako se to postigne, ispunjavanje "uslova" za ulazak u Evropsku Uniju je daleko lakše, nego poći obrnutim putem. Zato pravni fakulteti moraju mnogo više da rade na izučavanju prava Evropske unije i uporednog prava, ali i na izgradnji vlastitog pravnog sistema u zemlji. Slaba strana tog pristupa je što skoro svi takvi fakulteti postepeno gube moć u društvu, prepuštajući je onima koji su isplivali iz raznih privatizacija "sa parama prepunim mozgom".

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