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THE RULE OF LAW AND HUMAN RIGHTS IN POST-COMMUNIST EUROPE

(WITH SPECIAL REFERENCE TO YUGOSLAVIA - SERBIA AND MONTENEGRO)

INTERNATIONAL CONFERENCE
ON COMMUNIST AND POST-COMMUNIST SOCIETIES
MELBOURNE, JULY 7-10, 1998.

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I.
The Legal State and Human Rights

The concept of ***Legal State*** and the principle of the ***Rule of Law*** are paramount moral and legal values that are incorporated in the very foundation of Western, and particularly European civilization.[1] In respect to human rights their significance is essential for implementing the notion of ***legality*** of government decisions, as without the framework of the legal state and the rule of law, no modern political and legal system can be imagined.

Originating in the mid-19th century, the concept of the ***Rechtsstaat*** rests on a normativistic legal model of regulating social relations. According to this model, general legal norms (materialized in statutes and other general legal acts, e.g. laws and regulations) prescribe the rules of social behavior. General legal norms are subsequently decomposed into concrete legal provisions contained in individual legal acts (e.g. administrative decisions, judicial ruling, etc.) that directly effect the behavior of individuals and legal entities. The main feature of the normativistic model is that the legitimacy of legal action (including the legitimacy of legislative,

[1] Cf.: Lord Lloyd of Hampstead, M.D.A. Freedman, *Lloyd's Introduction to Jurisprudence*, Stevens Carswell, London/Toronto, 1985.

judicial and administrative action), ***derives*** from the legality of the legal acts. In other words, a legal decision (i.e. legal act) is legitimate by virtue of its legality.[2]

This model in its initial form, however, cannot be implemented today without peril to the idea of fundamental human freedoms and rights and the concept of political pluralism and democracy (one needs only to have in mind racist or any other totalitarian regime that rests on "law and order"). As consequence, the values of the *Rechtsstaat* concept today can only be seen as a *precondition* of democratic political and legal systems.

As opposed to this formal concept of legality, modern concepts of legal legitimacy base their fundamental principles on the ***idea of the rule of law and human rights***. The legality of government and administrative action, therefore, does not *ipso facto* include the legitimacy of these actions. In order to achieve legitimacy, government bodies, courts, administrative and para-statal agencies must also achieve *in concreto* legitimacy of each action they undertake or decision they render, through various instruments and mechanisms of parliamentary, judicial and administrative control (e.g. parliamentary debate, hearings, judicial review, ombudsman interventions, etc.). Consequently, modern concepts of legal legitimacy, based on the idea of the rule of law and human rights derives from the premise that a government action is legitimate not by virtue of the status of the subject or legality of the procedure, but by virtue ***of substantial values incorporated in these actions and decisions***.[3]

Modern concepts of the legal system rest on models of government as a complex and dynamic system of human inter-action.[4] In this model the government is projected as a complex and dynamic "relatively closed" system of structures and procedures within itself, as well as an "open system" that communicates with other systems (e.g. the political and economic system) active in the social environment

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[2] Alexander Blankenagel, Denis Galligan, Stevan Lilić, Sanford Levison, Andras Sajo, ***Law, Public Administration and Social Change***, CEU Summer University, Budapest, 1997 (course material).

[3] Serge Alain Mescheriakoff, ***The Vagaries of Administrative Legitimacy***, International Review of Administrative Sciences, vol. 56, no. 2, 1990.

[4] Eugen Pusić, *Upravni sistemi I* (*Administrative Systems I*), Zagreb, 1985, p. 9-11.

surrounding it. As a system of human inter-action that derives from the fact that individuals in society achieve their interests either through mutual cooperation, or through mutual conflict, the main social function of the legal system, actively integrated into various patters and forms of human behavior, is to regulate social processes. As realization of individual or group interests can either be achieved by domination or by compromise, the function of social regulation of a legal system plays a essential role in ***neutralizing contingency*** effects of illegitimate social behavior or conflict.[5]

The *Rule of Law* and the modern concept of the *Legal State* based on substantial legitimacy and human rights are particularly reflected within the framework of ***government administrative action***.

Traditional political theories define administrative action as ***administrative function***. Administrative function is defined as one of the legal functions of the state, i.e. as a modality of *Staatsrecht* ("state law").[6] According to these concepts, the administrative function is a specific, legally regulated, function of state power that features the formulation of individual compulsory orders and commands and is authorized to perform acts of legally permitted physical repression. This traditional concept of state law, modified by the Marxist definition of the role of state and law "after the proletarian revolution" has been widely circulated in all Central and Eastern European countries under communism, particularly under the influence of the Soviet legal theory.[7]

On the other hand, the concept of the administration as a ***public service*** originated at the turn of the century in conditions of social, cultural and economic development of highly industrialized nations of Western Europe. Administrative activity is now perceived, not as a function of state power, but as *public service*, an activity focused on the realization of the welfare of society.[8] This lead to the

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[5] Niklas Luhmann, *Soziale Systeme, Grundriss einer allgemeinen Theorie*, Suhrkamp, Frankfurt am Main, 1984.

[6] Georg Jellinek, *Allgemeine Statslehre*, Berlin, 1914.

[7] Hugh Collins, *Marxism and Law*, Oxford University press, Oxford/New York, 1976.

[8] Roberto Mangabeira Unger, *Law in Modern Society - Toward a Criticism of Social Theory*, Free Press, New York, 1976.

concept that the essence of administrative activity is to render public service, i.e. activities that play a "vital" role in the everyday life and work of individuals (e.g. education, medical care, etc.) and society as a whole (e.g. transportation, communication, etc.).[9] According to this model of the administrative system, in conditions of developed social structures and functions, government administration undergoes a substantial transformation, as administrative activity no longer represent only a legal instrument of government. Administrative activity is now a product of a complex government administrative system charged with rendering public services with the goal of undertaking actions aimed at securing the welfare of its citizens, as well as the cultural development and economic progress of society.[10]

II.
Post-Communism and Human Rights

Western European integration and transition processes in Central and Eastern European post-communist cannot be interpreted only as compulsory responses to economic and technological competition and pressures.[11] Integration in Europe is also the result of autonomous development patters of both economic and political systems in this region. The developed countries in Europe have achieved the level of social, human rights and technological development, that sets them within the general framework of post-industrial[12] and information societies[13].

On the other hand, post-communist countries in Europe still on levels of mid and late industrial development, as well as those in early stages of high technology developments, will doubtlessly need to consider present European integration tendencies, not only in respect to their general social and economic

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[9] Leon Diguit, *Les transformations de droit public*, Paris, 1913.

[10] David Rosenbloom, *Public Administration and Law*, New York/Basel, 1982.

[11] Randal Baker, Julie Bivin Raadschelders, *Reshaping the Old Order - The European Community, The United States and the New Century*, International Review of Administrative Sciences, Volume 56, No. 2, June 1990.

[12] John Kenneth Galbreith, *The Affluent Society* (3rd, revised edition), Penguin Books, Harmondsworth, 1979.

[13] Daniel Bell, *The Coming of The Post-Industrial Society*, Basic Books, New York, 1973.

development strategies, but also in regard to their government systems and actions as well. Within this dynamic social and economic environment, the recognition of the need of the social systems of European post-communist countries to adapt to integration processes is prerequisite for the active participation, cooperation and integration of these systems into European integration processes. In this context, in the Central and East European post-communist countries government legislation reforms and their compatibility to West European integration processes should be the basis for the future transformation of the respective post-communist social systems and their organizational and functional development.[14] Comparatively speaking,[15] the transformation of these legislative, judicial and administrative systems should also be aimed at undertaking functional and organizational,[16] as well as technological[17] and personnel[18] reforms that are in line with achieving higher standards of social efficiency and human rights protection.[19]

Another result of the transition process, is the consequent de-centralization and de-concentration of centralized government administrative systems into organizational and functional forms of a higher order. This is due to the fact that increased complexity, and particularly the "informatization" of society, have practically rendered centralized directing, management and control of social processes obsolete, as the traditional government structure is inflexible, inefficient

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[14] Stevan Lilić, *European Integration, Administrative Legislation Reform and Administrative System Compatibility* (Report), International Institute of Administration Sciences, International Conference: "Administrative Implication of Regional Economic Integration", Madrid, November 1990.

[15] Gerard Timsit, *Administrations et des etats: étude comparé*, Presses Universitaires de France, Paris, 1987.

[16] James Emery (Ed), *Organizational Planning and Control Systems - Theory and Technology*, Columbia University, Collier-Macmillan Limited, London, 1969.

[17] Jean-Paul Baquiast, *Nouvelles Technologies et Reforme Administrative*, Revue Francçais d'Administration Publique, No. 37, Paris, 1986.

[18] Heinrich Reinemann, *Organization and Information Management*, in "New Technologies and Management - Training The Public Service For Information Management", IIAS, Brussels, 1987.

[19] Thomas Buergental, ***International Human Rights*** (Second edition), West Publishing Co., St. Paul, 1995.

and unadaptable to the dynamics of the changing environment.[20] To achieve substantial integration of legal and political systems that are compatible with tendencies in the developed European countries, hierarchical models must be substituted by new forms of organizational, functional, technological, human resource and financial integration patterns that enable multiple communication not only with internal government subsystems, but with external and international political, economic and legal systems, as well.[21]

Transition and integration processes in Europe also have a significant impact on the perception and quality of human rights, that should be taken into account in the present and future reforms of these systems.[22] The legalistic principle of legality, expressed through the ideal "that all citizens are equal before the law", has historically played a crucial role in institutionalizing (particularly in regard to judicial and administrative procedure), the relation between the citizen and the state (administration)[23]: the greatest moral value and practical effect of the "equality" principle being the (legal) protection of the citizen from the foul actions of the state.[24] Today, however this traditional principle is considered one-sided and obsolete: it is argued that for the principle of legality to be legitimate in a modern political and legal environment, apart from the law, the consent of the citizen is also needed. This is the result of the higher level of information and knowledge the citizen has access to, as well as ideological and interest independence of the citizen in communicating with the legislative, judicial and administrative system.

Due to the need of efficient regulation of social, economic and technological processes, modern government administrative action show a general tendency

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[20] Jean-Paul Baquiast, Wim van de Donk, *Cultural Impact on Informatization in Public Administration*, International Review of Administrative Sciences, Volume 55, No. 4, December 1989.

[21] Herbert Simon, Donald Smithburg, Victor Thompson, *Public Administration*, Transaction Publishers, New Brunswick/London.

[22] Allan Rosas, Jan Helgesen, Donna Gomien, *Human Rights In a Changing East-West Perspective*, Printer Publishers, London/New York, 1990.

[23] Stevan Lilić, ***Information Technology and Public Administration in Yugoslavia - The Citizen's Influence***, Information Age, London, Völ. 12, No. 1, 1990.

[24] Cf.: Alex P. Schmid, Albert J. Jongman, ***Monitoring Human Rights Violations***, Publication no. 43, Center for Study of Social Cultures, Faculty of Social Sciences, Leiden University,Leiden, 1992.

towards substituting traditional authoritative instruments of administrative power, with higher forms of achieving micro and macro level social regulation.[25] *Grosso modo*, it may be concluded that the use of administrative force is counter-proportional to the level of general social and economic development.[26] It can be said that government and administrative repression today is a feature of underdeveloped social and economic systems, and leads to the phenomena of "*vicious bureaucratic circles*" (once applied, repression leads to more repression, which agitates the problem even more, then more repression is applied, and so on).[27] Thus, the tendency of development of modern government action is less and less oriented toward the use of power and force, as there is objectively less possibility of compulsory social regulation.

A specific question to be addressed in the context of post-communist government and administrative system reform is the issue of the efficiency. Generally speaking, the more there are technological factors present in government action, the higher the level of the efficiency of the legal and administrative system. Nevertheless, particularly in countries that are experiencing political and social "turbulence", an opposite tendency in the development of government administrative systems can be detected. Times of crisis generate a tendency of extensive "administrating", primarily due to the general inefficiency of the social and economic system. Inefficiency gives rise to the need of more authority, but authority itself does not resolve the problem. This model, logically, requires authoritative government administrative action, as authoritative administrative decisions can only be implemented by means of political force and repression. Consequently, authoritative government administrative action cannot substantiate and resolve economic, social turbulence by mere "authoritative administrative efficiency". Such situations, particularly receiving active political support, can easily

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[25] Eugen Pusić, *Društvena regulacija: granice znanosti i iskustva* (*Social Regulation - The Limits of Science and Experience*), Globus, Zagreb, 1989.

[26] V.V. Moharir, *Administration Without Bureaucratization - What Alternatives*, International Review of Administrative Sciences, Volume 55, No. 2, June 1989; Onorato Sepe, *Administration Without Bureaucratization*, International Review of Administrative Sciences, Volume 55, No. 2, June 1989.

[27] Michel Crozier, *The Bureaucratic Phenomenon*, University Press, Chicago, 1963.

become the main obstacle for general social, political, economic, legislative, judicial administrative reform (as is the case with present Yugoslavia).

III.
The Fall of The Berlin Wall

With the fall of the Berlin wall, socialism was giving way to nationalism all over Eastern Europe. The collapse of the communist system in Eastern Europe brought new forms of nationalism, most explosive in cases of disintegration of former socialist federations - The USSR, Czechoslovakia, and particularly dramatic and tragic in Yugoslavia.[28] In Serbia and Montenegro the ex-communist parties managed double transformation, first turning themselves into socialist parties, then - "...turning nominally socialist parties into openly nationalist ones...".[29] In Croatia, Slovenia and Bosnia and Herzegovina, and to some extent in Macedonia, nationalists used anti-communism to bolster their appeal and their international legitimacy.

The events, the crisis and the tragedy of the "Third Balkan War"[30] that came upon former Yugoslavia in the course of the past several years focus world attention and concern.[31] A study on the topic of inter-ethnic conflicts and war in the former Yugoslavia prepared by experts of the Institute for European Studies in Belgrade, concludes why Yugoslavia, as a country that has been identified as an advocate of peace in the efforts of surpassing divisions of the cold war, has ceased to exist: "In its first appearance, Yugoslavia was created as a kingdom that fell apart with the consequences of World War Two. In its second appearance, it was a

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[28] Mark Wheeler, *The New Yugoslav People's War*, Journal of Contemporary Soviet and East European Affairs, Vol. 4, No. 2, March 1992.

[29] Robert M. Hayden, *Constitutional Nationalism in The Formerly Yugoslav Republics*, Paper presented at the conference on "Nation, National Identity, Nationalism", University of California at Berkeley Sept. 10-12, 1992.

[30] Misha Glenny, *The Fall of Yugoslavia - The Third Balkan War*, Penguin Books, London, 1992.

[31] Aleksa Djilas, *The Contested Country - Yugoslav Unity and Communist Revolution 1919-1953*, Harvard University Press, 1990; Sabrina Ramet, *Nationalism and Federalism in Yugoslavia 1962-1991* (Second edition), Indiana University Press, 1991; Milica Bakić-Hayden & Robert M. Hayden, *Orientalist Variations on the Theme "Balkans": Symbolic Geography in Recent Yugoslav Cultural Politics*, Slavic Review, Vol. 51, pp. 1-15 (1992), etc.

communist republic in the form of a party state that fell apart with the fall of socialism and the post-war bi-polar European and world order. Cradled on the concept of war's end and the beginning of peace, the country disintegrated in the worst possible way - through war and destruction determined by inter-ethnic and religious conflicts in the central area of the former state (i.e. Bosnia and Herzegovina)".[32] As for the causes of the conflict in Bosnia and Herzegovina, other studies by this Institute indicate that in Bosnia and Herzegovina, as in all of Yugoslavia, "...communism resolved the ethnical issue and inter-ethnic relations in a contradictory matter. (...) The ruling communists thought that nationalism was some kind of a "cultural" phenomenon, and they did not see that by their power, which had no economic foundation, they themselves were producing the causes for the future ethnic tensions and armed conflicts."[33]

In this context, international factors, notably the European Community and the leading nations of the West, willingly or not, contributed to the deterioration of the situation. In could be argued that these efforts (particularly the recognition of Slovenia and Croatia in January 1992, and soon after Bosnia and Herzegovina), far from bringing peace to this region, opened the depressive perspectives of perpetual inter-ethnic and inter-state conflicts: "...The responsibility for the Yugoslav disaster must rest, first with those Yugoslav leaders who have harnessed the chauvinism of their individual nations to destroy not only their fellow Yugoslavs, but also their own several nations, in whose interests they claimed to act. However, the responsibility for the complete breakdown of the Yugoslav state, which has condemned the region to long-term instability and military confrontation, rests with the European Community and the US".[34]

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[32] L.Basta-Podunavec, R.Nakarada, S.Samardžić, J.Teokarević, Dj.Kovačević, *Medjunacionalni sukobi i rat na prostorima bivše Jugoslavije i mogućnost njihovog rešavanja, (International Conflicts and War in Former Yugoslavia and Possible Solutions),* Institut za evropske studije, Beograd, 1992, p. 3.

[33] Slobodan Inić, *Razbijeno ogledalo: Jugoslavija u Bosni i Herzegovini* (*Broken Mirror: Yugoslavia in Bosnia and Herzegovina*), in "Raspad Jugoslavije - produžetak ili kraj agonije" ("Dissolution of Yugoslavia - Continuing or Ending the Agony"), Institut za evropske studije, Beograd, 1991, p. 121.

[34] Robert M. Hayden, *Yugoslavia's Collapse - National Suicide With Foreign Assistance*, Economic and Political Weekly, Bombay, Vol. XXVII, July 4, 1992, p. 1377.

IV.
Yugoslavia - History and Constitutional Framework

Yugoslavia, established as the independent Kingdom of Serbs, Croats and Slovenes on 1 Dec. 1918, changed its name to the ***Kingdom of Yugoslavia*** in 1929. On 6 April 1941, Yugoslavia was attacked by the Axis Powers, and was involved in the Second World War until Victory Day, 9 May 1945. After the war, ***Democratic Federal Yugoslavia*** was proclaimed and on 29 November 1945, after a referendum and elections, became the ***Federal People's Republic of Yugoslavia***. The Constitution of April 1963 proclaimed the ***Socialist Federal Republic of Yugoslavia***.

Being the most liberal of the European socialist countries, particularly in the late eighties, Yugoslavia initiated various economic, social and political reforms. However, soon after the fall of the Berlin Wall in 1989, the existing Yugoslav federation of six republics (Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Slovenia and Serbia) disintegrated as a result of ethnic conflict. In 1991, first Slovenia and then Croatia proclaimed independence, to be followed by Bosnia and Herzegovina and Macedonia in 1992. Serbia and Montenegro, the two remaining republics, which claimed continuity with the former Yugoslavia, established the ***Federal Republic of Yugoslavia*** (FRY). The Security Council of the United Nations implemented economic sanctions against the Federal Republic of Yugoslavia in May 1992, and these were suspended after the ***Dayton Peace Accords*** and the signing of the ***Paris Peace Agreement*** between Bosnia and Herzegovina, Croatia and Yugoslavia in December 1995.

According to the ***Constitution of the Federal Republic of Yugoslavia of 27 April 1992,*** Yugoslavia[35] is a two-member federation composed of Serbia and Montenegro (Art. 2). The Constitution no longer presupposes that the political system is based upon socialism. Instead it has embraced the ideal of political pluralism (Art. 14). Other fundaments principles contained in the new Constitution are the *Rule of Law* (Art. 9), *respect for and guarantee of*

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[35] *The Constitution of the Federal Republic of Yugoslavia* (English version), Srboštampa, Belgrade, 1992.

internationally acknowledged human rights (Art. 10), *separation of powers* (Art. 12), *market economy* (Art. 13), *respect for the rights of national minorities* (Art. 46-50), as well as (tax and defense) *duties of citizens* (Art. 64).

The Constitution has established new institutions of the Federation, including: the Federal Assembly (Art. 78-95) the President of the Republic (Art. 96-98), the Federal Government (Art. 99-107), the Federal Court (Art. 108-110), the Federal Constitutional Court (Art. 124-132) and the Yugoslav Army (Art. 133-138).

The *Federal Assembly* has two chambers: a) the *Chamber of Citizens* which is consists of 138 deputies, with a provision that a member republic may not have less than 30 deputies elected by general ballot, and b) the *Chamber of Republics* that consists of 20 deputies from each member-republic (i.e. Serbia and Montenegro), elected respective member-republic parliaments. The Federal Assembly has exclusive legislative jurisdiction over amendments to the Constitution, enacting federal laws (including the Federal Budget) and ratification of international agreements. It elects and dismisses the President of the Republic, the Prime Minister, the judges of the Federal Constitutional Court and of the Federal Court, the Federal State Prosecutor and the Governor of the National Bank.

The *President of the Republic, inter alia,* represents the Federal Republic of Yugoslavia at home and abroad, proposes a candidate for Prime Minister and calls federal elections. The President is elected by the Federal Assembly for a four-year term and cannot be elected for a second term.

The *Federal Government* manages domestic and foreign political affairs, implements federal laws and statutes, establishes and abolishes federal ministries and other federal agencies and offices, orders general mobilization, organizes defense preparations and carries out such other duties as are its constitutional responsibility. The candidate for Prime Minister submits to the Federal Assembly his government's program and proposes candidates for minister offices.

The *Federal Constitutional Court* has jurisdiction, *inter alia,* over the compatibility of the constitutions of member-republics with the Federal

Constitution, constitutional complaints concerning the alleged infringement of rights and freedoms. the prohibition of political parties and breaches of electoral rights. The Court consists of seven judges who serve for nine-year terms. They elect the Chief Justice for a three-year term.

The *Federal Court* is the court of last instance when designated by federal law, decides on extraordinary legal remedies against decisions of courts in the republics concerning the implementation of federal laws, decides on property matters between the Federation and the republics and decides federal administrative suits. Judges of the Federal Court are appointed for nine-year terms by the Federal Assembly.

V.
The Rule of Law and Human Rights in Yugoslavia (The Case of Conscientious Objection)

The inconsistent state of the rule of law and human rights in Yugoslavia are well illustrated by the case of conscientious objection. Although internationally acknowledged as a fundamental human right and explicitly prescribed by the 1992 Yugoslav Constitution, conscientious objection is subject to legislative and administrative restrictions that significantly limit its concrete realization.

I. ***Conscientious objection*** is a new institution of international law and national legislation. Today it is considered not only a religious right,[36] but ***a fundamental human right*** as well.[37] This was formally acknowledged by the documents of several international organizations, including the United Nations. According to The *United Nations Commission on Human Rights*: "...everybody has the right to refuse military service in accordance with the acknowledged right to freedom of opinion, conscience and religion, according to Article 18 of the

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[36] Cf.: *European Churches and Conscientious Objection to Military Service,* Proceedings, Loccum, 1989.

[37] Cf.: Sam Biesemans, *The Right to Conscientious Objection and The European Parliament,* EBCO, Bruxelles, 1994.

Universal Declaration on Human Rights and Article 18 of the *International Covenant on Civil and Political Rights*".[38]

The ideological basis for conscientious objection lies in the idea of refusing to participate in the killing of other people.[39] However, conscientious objection, in its narrow sense, is usually considered as refusing compulsory military service,[40] but other forms of conscientious objection exist that are not legally regulated. Conscientious objection in its broader sense encompasses, *inter alia*, cases related to persons working in companies producing or distributing products intended for military use, products that can damage environment, and persons refusing to pay taxes to the military budget.[41] Besides that, conscientious objection refers to ***civilian service***, or in cases of armed conflicts, the possibility of compulsory military service without carrying or using weapons.

II. Conscientious objection as a ***legal institution*** originated at the turn of the century and after World War II it developed into a fundamental human right. The first European institution which articulated an accurate political attitude regarding conscientious objection was ***The European Parliament***. *Resolution no. 337 of the Parliament Assembly of the Council of Europe* (adopted in 1967) defined the range and specific basic principles of the legal regulation of conscientious objection. According to this Resolution, persons who are subject to military service, but who refuse to serve it for reasons of conscience or other religious, ethical, moral, humanitarian, philosophical or other convictions, are recognized to be exempted from obligation of compulsory military service.[42]

Historical roots of today's conscientious objection are related to European religious communities, especially the Protestant movements in The Netherlands and England in the XVI and XVII century. According to the latest

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[38] United Nations Economic and Social Council, ***Commission on Human Rights***, 51st session, March 1995.

[39] Cf.: *The Right to Refuse to Kill*, Commission for Human Rights, United Nations, 49th session, December 4 1992, E/CN.4/1993/68.

[40] Sam Biesemans, *The Right to Conscientious Objection and The European Parliament*, EBCO, Bruxelles, 1994, p. 6.

[41] *Ibidem.*

[42] *Ibidem.*

studies in this field, countries with Protestant religious tradition (except Switzerland), were the first countries which legally regulated conscientious objection.[43] Countries with Roman-Catholic and Orthodox religious tradition acknowledged conscientious objection later. The first European countries which legally regulated conscientious objection were Nordic countries of Protestant traditions, namely, Norway (1990), Denmark (1917) and Sweden (1920), as well as Great Britain (1916) and The Netherlands (1992). On the other hand, European countries with Roman-Catholic traditions - France (1963), Belgium (1964), Italy (1972), Portugal (1976) and Spain (1978) - legally regulated conscientious objection almost half a century later.

III. During the ***communist regimes*** in Central and Eastern European countries, conscientious objection was not legally acknowledged. Their denial of conscientious objection was supported by the argument that individual human rights and the ideas of free choice of citizens were incompatible with official ideological doctrines. However, there were two exceptions. An ordinance of the Soviet Deputies (signed by Lenin in 1919) acknowledged conscientious objection on the basis of religious motifs, but since 1929-30 until the end of Stalin's rule it was not applied.[44] On the other hand, contrary to the attitude of other communist countries and in spite of a strong Russian influence, the German Democratic Republic recognized a possibility for civilian service since September 1964. Presumably this was due to the influence of the Protestant religious community in this country.[43]

IV. In recent times, question of conscientious objection from the legal and ethical point of view have become relevant, especially when related to ***conflicts in former Yugoslavia***. According to the data of several NGO's, since the beginning of the hostilities in former Yugoslavia, at least 200,000 draftees refused to take part in conflicts, seeking asylum in European countries.[45] The *former Yugoslav*

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[43] *Ibidem.*

[44] *Ibidem.*

[45] Cecilia de Rosa, *Conscientious Objectors, Draft Evaders and Deserters from Former Yugoslavia: An Undefined Status,* European Bureau for Conscientious Objection, Bruxelles 1995, p. 4.

[46] Criminal offences prescribed in Articles 202 and 214 remained unchanged in the existing

state (1945-1991), even though signatory of numerous international declarations and conventions on human rights, legally and in practice never acknowledged or recognized conscientious objection. According to the previous Yugoslav legislature, refusal of reception and use of arms, or refusal of military service was subject to stiff criminal punishment. However, under the influence (and pressure) of new ideas on human rights, and in accordance with obligations deriving from international documents that proclaim freedom of conscience, numerous states, including the Federal Republic of Yugoslavia, recognized conscientious objection and introduced it in their constitutions and statutes. Nevertheless, the right to conscientious objection proclaimed by The Federal Constitution is seriously limited, the main obstacle being the administrative procedure dealing with the right to conscientious objection in concrete cases.

V. Formally, The Federal Republic of Yugoslavia ***acknowledged*** the right to conscientious objection as a legal category by *The Federal Constitution (1992).* According to Article 137. of the Federal Constitution: *Compulsory military service shall be universal and performed in the manner established by federal statute. A citizen who is a conscientious objector for religious or other reasons and does not wish to fulfill his military obligation under arms shall be permitted to serve in the Army of Yugoslavia without bearing arms or in civilian service, in accordance with federal law.*

The Federal Constitution acknowledges and recognizes conscientious objection on the normative level. A legal analysis of this Constitutional provision (Art. 137, Para. 1) points to two grounds for conscientious objection: religious or other conscience reasons. The Constitution, however, *does not* recognize the right to conscientious objection as a fundamental human right in light of European and world standards. This derives from the fact that the Federal Constitution regulates conscientious objection in the chapter on the Yugoslav Army of Yugoslavia (Art. 137), as *a way of fulfilling military service*, and not in the chapter on rights and freedoms. According to the Federal Constitution (Art. 137, Para. 2) all issues related to conscientious objection, especially those dealing

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Criminal Code of the Federal Republic of Yugoslavia.

with the conscientious objection procedure, are to be regulated by appropriate *federal law*. In this context, the provisions of Articles 10 and 16 of the Federal Constitution are important. According to them, Yugoslavia recognizes and guarantees freedoms and rights recognized by international law, and recognizes and promises to fulfill internationally taken responsibilities and accepted rules of international law that are a constituent part of its internal legal order.

VI. The relevant federal legislation dealing with conscientious objection federal *Yugoslav Army Law*, (enacted in May 1994). This Law regulates that all Yugoslav citizens are subject to military obligation (Art. 14); that military service includes draft obligation, military and reserve obligation (Art. 282); as well as that women are not subject to draft or military obligation (Art. 283). Conscientious objection is more concretely regulated by the provisions of Articles 296-300 of the federal Yugoslav Army Law.

According to the to the provision of Article 297 of the Yugoslav Army Law, military service lasts 12 months. For those draftees refusing military service under weapons for religious or other conscience reasons or that want to serve a civilian service, military service lasts 24 months. A draftee who initially took up conscientious objection, but changed his attitude and later decided to take weapons during military service, continues military service within the same program as soldiers carrying weapons, but not less than 12 months.

According to the provision of Article 297 of the Yugoslav Army Law, civilian military service is served in "*military-economic, health-care, general salvation organizations, organizations for rehabilitation of invalids and in other organizations and institutions of general interest*". The organization or institution where civilian military service is served is obliged to provide free accommodation, food, soldier's income, and persons responsible for work control and civilian military service control. During civilian military service, the person has the same rights and obligations as soldiers serving military service in the Army.

According to the provision of Article 298 of the Yugoslav Army Law, the draftee who does not want to serve military service under arms must submit a

written request to the military-district organ within 15 days, as of the day of receiving the recruitment call. This request must state the reasons why the draftee does not want to serve military service under arms, as well as the work places in the Army or the civilian service where the draftee would like to serve military service.

According to the provision of Article 299 of the Yugoslav Army Law, the *Draft Board* is obliged to reach a decision on the written request within 60 days. While deciding the request, the Draft Board can consult social workers, pedagogues, representatives of religious communities, etc.

According to Article 300 of the Yugoslav Army Law, the applicant can file an ***appeal*** to the decision of Draft Board within 15 days after receiving it. This appeal is decided by the ***military-district organ*** which is the appellate instance to the military-district organ which had reached the first instance decision. This decision is final, and no administrative proceeding can be pursued after it).

VII. The analyses of the provisions of the federal Yugoslav Army Law regulating the implementation of the constitutional right to conscientious objection point out that the constitutionally recognized right to conscientious objection ***is restricted by the procedural administrative provisions*** of the Yugoslav Army Law. This can be confirmed by the following.

The Yugoslav Army Law provides that draftees calling on conscientious objection must submit a written request within 15 days, as of the day of receiving the recruitment call (Art. 298). The time limit regarding the expiration of the right to submit requests related to conscientious objection is ***preclusive***. This means that in case the time limit is exceeded, the applicant looses the constitutional right to conscientious objection. Besides that, in case once submitted and rejected, the request for conscientious objection cannot be presented again.

A proceeding for judicial review of the constitutionality of the Yugoslav Army Law, had been brought before *The Federal Constitutional Court*. The Court ruled that persons who were in active military service or reservists before or at the time the new Yugoslav Army Law was enacted, have no right to

conscientious objection. Thus, the Yugoslav Army Law and this decision of the Federal Constitutional Court placed all those who refused to take part in armed conflicts in former Yugoslavia in an unequal position with persons subject to the new legal situation.

The same applies to persons who, by using their fundamental human right to freedom of opinion, conscience and religion ***changed*** their religion or belief. This right is expressly formulated by the provision of Article 18 of the *Covenant on Civil and Political Rights* (1966). The Covenant states that the right to freedom of opinion, conscience or religion implies freedom of accepting another religion or belief as of one's own free choice. The Yugoslav Army Law and the decision of the Federal Constitutional Court, however, are not in accordance with the previously mentioned attitude. Provision of Article 4 of the Covenant does not allow the signatories possibility for exception from the provision of Article 18 of the Covenant even in cases of a direct threat of war. Since the right to conscientious objection falls under those freedoms, it cannot be limited.

Subsequently, in the Yugoslav case, the mentioned attitudes imply that all who refused to take part in armed conflicts in the former Yugoslavia cannot call on a conscientious objection to military and other governmental agencies. Besides that, such legal solutions mean that criminal charges ***can*** be taken against those who refused to take part in armed conflicts. The Criminal Code of 1976 (still in legal force with numerous changes and amendments) has a separate chapter which regulates in detail the *criminal offence against armed forces.* The two most characteristic ones are: the criminal offences of *refusal of reception and use of arms* sanctioned by imprisonment (Art. 202) and the criminal offence of *draft and military service evasion* sanctioned by fine and/or imprisonment. (Art. 214). These criminal offences are liable to special qualifications during war times or in case of direct threat of war (e.g. imprisonment up to ten years).[46]

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Concluding on the issues of the rule of law and human rights, as illustrated by the case of conscientious objection in Yugoslavia, it can be stated

that there is a need to bridge the wide "normativity gap" still existing between the formally proclaimed and acknowledged human rights in the Yugoslav Constitution and the concrete possibilities of actually implementing them. By means of restrictive legislation and administrative procedures, fundamental human rights in this country still remain "dead letters on paper". What is needed is an extensive and substantial reform of the legal system, including legislative, judicial and administrative reform in order to initiate the process of compliance of the Yugoslav legal system with the essential values of the rule of law and international standards in human rights protection.

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(WITH SPECIAL REFERENCE TO YUGOSLAVIA - SERBIA AND MONTENEGRO)

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SUMMARY

The concept of *Legal State* and the principle of the *Rule of Law* are paramount moral and legal values that are incorporated in the very foundation of Western, and particularly European civilization. In respect to human rights their significance is essential for implementing the notion of *legality* of government decisions, as without the framework of the legal state and the rule of law, no modern political and legal system can be imagined. As opposed to this formal concept of legality, modern concepts of legal legitimacy base their fundamental principles on the *idea of the rule of law and human rights*. The legality of government and administrative action, therefore, does not *ipso facto* include the legitimacy of these actions. In order to achieve legitimacy, government bodies, courts, administrative and para-statal agencies must also achieve *in concreto* legitimacy of each action they undertake or decision they render, through various instruments and mechanisms of parliamentary, judicial and administrative control (e.g. parliamentary debate, hearings, judicial review, ombudsman interventions, etc.). Consequently, modern concepts of legal legitimacy, based on the idea of the rule of law and human rights derives from the premise that a government action is legitimate not by virtue of the status of the subject or legality of the procedure, but by virtue *of substantial values incorporated in these actions and decisions*.

Transition and integration processes in Europe also have a significant impact on the perception and quality of human rights, that should be taken into account in the present and future reforms of these systems.

The inconsistent state of the rule of law and human rights in Yugoslavia are well illustrated by the case of conscientious objection. Although internationally acknowledged as a fundamental human right and explicitly prescribed by the 1992 Yugoslav Constitution, conscientious objection is subject to legislative and administrative restrictions that significantly limit its concrete realization. As illustrated by the case of conscientious objection in Yugoslavia, it can be stated that there is a need to bridge the wide "normativity gap" still existing between the formally proclaimed and acknowledged human rights in the Yugoslav Constitution and the concrete possibilities of actually implementing them. By means of restrictive legislation and administrative procedures, fundamental human rights in this country still remain "dead letters on paper". What is needed is an extensive and substantial reform of the legal system, including legislative, judicial and administrative reform in order to initiate the process of compliance of the Yugoslav legal system with the essential values of the rule of law and international standards in human rights protection.