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ROLE OF LEGAL SCIENCE IN PROCESS OF ALIGNMENT OF NATIONAL LAW WITH EU STANDARDS³

TIESĪBU ZINĀTNES LOMA NACIONĀLĀS LIKUMDOŠANAS SASKAŅOŠANAS PROCESĀ AR ES STANDARTIEM

Kopsavilkums

Eiropas Savienība ir balstīta unikālā vērtību sistēmā: tā ietver cilvēka cieņu un cilvēktiesības, brīvību, demokrātiju, vienlīdzību un likuma varu. Tāpēc visām kandidātvalstīm ir pienākums pieņemt šīs vērtības un iekļaut tās nacionālajā likumdošanā. Tomēr šis process nenozīmē citu dalībvalstu noteikumu transkripciju valsts nacionālajos tiesību aktos. Dažās jomās, piemēram, tiesiskuma jomā, ES standarti ir “nesaistoši likumi”, kas kandidātvalstīm izvirza sarežģītu uzdevumu. Lai nodrošinātu pareizu saskaņošanas procesu, jāpatur prātā katras valsts ģeogrāfiskās, vēsturiskās un kultūras īpatnības. Turklāt valsts tiesību aktu saskaņošana ar ES standartiem ir ne tikai kandidātvalstu, bet arī dalībvalstu pienākums. Pēc jaunu Eiropas tiesību aktu pieņemšanas vai spēkā esošo tiesību aktu izmaiņām katrai dalībvalstij ir pienākums noteiktajā termiņā saskaņot savus tiesību aktus ar tiem.

Tiesību zinātnei ir nozīmīga loma nacionālās likumdošanas saskaņošanā ar ES *acquis*, tās uzdevums ir nodrošināt pārdomātu lēmumu pieņemšanu. Tiesību zinātne sniedz ieguldījumu lēmumu pieņemšanas procesā, piedāvājot priekšlikumus nacionālās likumdošanas saskaņošanai ar noteiktu ES *acquis*, no citām jurisdikcijām gūto pieredzi, zināšanas par praksē pastāvošiem izaicinājumiem, kā arī ar starpdisciplināru pieeju, veicot izmaksu un ieguvumu analīzi.

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Raksta autores uzsver tiesību zinātnes nozīmi nacionālās likumdošanas saskaņošanas procesā ar ES standartiem un tās nozīmi ekonomiskajā izaugsmē. Viens no galvenajiem priekšnoteikumiem juridiskās zinātnes iesaistei tiesību aktu saskaņošanā ar ES standartiem un lēmumu pieņēmēju informēšanai ir pietiekams zinātnisko pētījumu finansējuma līmenis.

Atslēgvārdi: nacionālā likumdošana, ES standarti, tiesību zinātne, saskaņošana

Summary

The European Union is based on unique system of values: human dignity and human rights, freedom, democracy, equality and the rule of law. Therefore, all candidate countries are obliged to accept these values and incorporate them into national legislation. However, this process does not mean transcription of provisions prescribed by other Member States into the country's own national legislation. In some areas, like in the rule of law, the EU standards are provided in the form of 'soft law' which poses a complex task to candidate countries. To ensure that process of alignment is proper, it is necessary to keep in mind geographical, historical and cultural specificities of each country. In addition, alignment of national law with EU standards is not only an obligation of candidate countries, but also of the Member States. Following the adoption of new European legislation or changes of existing one, each Member State is obliged to align national legislation with them in the prescribed timeframe.

Legal science has a very important role in the process of alignment of national legislation with the EU *acquis*. Role of legal science is to ensure informed decision-making by national authorities. Legal science contributes in decision-making process by providing options and recommendations on alignment of national legislation with specific EU *acquis*, lessons learned from other jurisdictions, challenges in practice, but also in interdisciplinary approach through cost-benefit analysis.

The authors in the paper highlight the importance of legal science in the process of alignment of national legislation with EU standards, and its relevance for economic growth. One of the key preconditions for involvement of legal science in alignment of legislation with EU standards and inform of decision-makers is an adequate level of funding for scientific researches.

Keywords: national law, EU standards, legal science, alignment

Introduction

In the process of accession to the European Union candidate countries should harmonize its national legislation with the EU *acquis*. This involves primarily harmonization with the Copenhagen criteria, which were defined in 1993 and relates to the legal, economic and political conditions. In addition, they are expanded in 1995 with 'administrative criteria', which refers to the adoption of the *acquis* and capacities of national administrative and judicial authorities to apply new rules in the practice. In the accession process, the European Commission monitors results achieved by one country in the fulfilment of commitments and inform the Council and the European Parliament. The accession of certain countries to the European Union depends on compliance with these standards. However, accession is not an easy or simple process, since new rules and legislation should be incorporated in the already existing legal framework and tradition. For the new EU enlargement, it is necessary to provide

additional financial resources to increase capacities of national authorities to align legislation, increase capacities of institutions and staff working in public administration. Since the last enlargement in 2013, the European Union has 28 Member States. However, the financial and budgetary system of the Union, which is set at a relatively stable basis, always shake when it comes to membership. One reason thereof is that the new members of the EU are economically weaker compared to the oldest members. Therefore, the significant resources are allocated to assist the new Member States. This means an additional financial burden not only for the budget of the European Union, but also for the budgets of Member States.⁴

Looking at the EU accession process it is necessary to take into account the cultural and historical characteristics of each country. Harmonization of legislation to meet the obligations of membership is not an easy task. This process does not involve coping with the regulations of other countries, but preparation of national legislation to implement the new standards.

Despite the fact that some countries already are members of the European Union, the need remains to continue harmonization of their national legislation with the *acquis* in different areas, since the EU *acquis* is a moving target. In the process of harmonization, legal science should have a paramount role. However, it seems that in recent years efforts are present to connect science with the economy. This may contribute to favouring natural and technical sciences. Additionally, a certain commercialization of science is also present. It mostly comes down to the economic viability of language and productivity, as well as the quantification of the impact and costs and the competitiveness of the quality and efficiency.⁵

Independence of scientific research

Nowadays, the process of alignment, analysis of the achieved degree of harmonization with *acquis* mainly deals with various non-governmental organizations. However, European standards are precisely designed for implementation and improving the protection of the values upon which the European Union is traditionally based. One component of these values permeates the other. Achievement of those goals requires various steps on different levels. Therefore, in the process of analysing compliance with the Union's standards and guiding legislation and legal practice, legal doctrine should have an eminent role.

Freedom of scientific research is guaranteed by international standards. International Covenant on Economic, Social and Cultural Rights stipulates the obligation of Member States to respect the freedom indispensable for scientific research and creative

⁴ Stojanović S. *Finansiranje Evropske unije*, Beograd: Službeni glasnik, 2008, p. 32.

⁵ Pavlović Breneselović D., Krnjaja Ž. *Obrazovanje i nauka u neoliberalnom lavirintu: gde stanuje kvalitet?* In: *Zbornik za percepciju naučnog rada i poznavanje rekvizita njegove ocene*, (book 1), Beograd: Institut za uporedno pravo, 2017, p. 3.

activity.⁶ Also, the Charter of Fundamental Rights of the European Union guarantees the right to freedom of science. This freedom is guaranteed by the highest national legal acts as one of the basic human rights.⁷ However, scientific studies must take into consideration the entire society. Therefore, it is necessary to keep this in mind when targeting these studies. Moreover, research should meet the current social needs.

Therefore, one of the priorities of each country should be to ensure an adequate level of resources for financing and development of legal and social sciences. However, care should be taken regarding independence of scientific research to ensure informed decision-making by state authorities. The legal research should provide insight into application of national legislation, challenges in practice, as well as a comparative overview of solutions. Nevertheless, complete independence is not justified. Scientific research would have to adapt to practical needs. Harmonization of national legislation with EU standards is of a great practical importance for the candidate countries, as well as for the members of the European Union. This should be one of the priority matters in legal research, especially in the countries that are in the process of EU accession, where in a relatively short period of time it is necessary to adopt or amend hundreds of laws and bylaws. Legal science should also help national legislators to ensure that new solutions are in line with national legislative framework.

According to the Treaty on the Functioning of the European Union, the Commission in its proposals to the European Parliament and the Council relating to health, safety, environmental and consumer protection must be taken as a baseline for high level protection, taking into account the scientific facts.⁸ This is one of the indicators that attest to importance of the role that science has in decision-making. It is essential for the Member States of the European Union. This subtly suggests the necessity to adapt the teachings contributed by practical requirements.

Policy making and legislative drafting process in Serbia and role of legal science

The relevance of science and scientific knowledge in support of policy development and legislative drafting is widely accepted as a part of transparency standards and informed decision-making.⁹ Governments all over the world have increased their commitment to ensure informed policy making based on scientific advice. Over the last two decades, EU Member States increased their efforts to improve the quality of

⁶ Article 15. of the International Covenant on Economic, Social and Cultural Rights. Available at: <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx> [last viewed May 10, 2019].

⁷ Article 13. of the Chapter of Fundamental Rights of the European Union [2000] OJ C364/01 Available at: https://www.europarl.europa.eu/charter/pdf/text_en.pdf [last viewed May 10, 2019].

⁸ Article 114. (former 95, paragraph 2 of the EC Treaty) of the Treaty on European Union [2012] OJ C 326/01. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2012:326:FULL&from=EN> [last viewed May 9, 2019].

⁹ OECD (2015), *Scientific Advice for Policy Making: The Role and Responsibility of Expert Bodies and Individual Scientists*. OECD Science, Technology and Industry Policy Papers, No. 21, Paris: OECD Publishing.

regulatory governance and policy making through application of regulatory impact assessments and public consultations. Both tools are presenting an arena for involvement of science and academic professionals.

OECD¹⁰ draws a distinction between four possible models of involvement of science in policy development process: a) statutory mandated committees to advise governments on policy for science – in some cases coupled with technology and/or innovation; b) permanent or ad hoc scientific or technical advisory structures that are mandated or commissioned to address specific issues for which scientific input can be helpful; c) academic institutions that provide policy relevant reports and advice that may or may not have been explicitly requested; and d) individual advisors or counsellors that may have more or less formalised advisory functions.

We conclude that in Serbian context a mixture of models c) and d) are applied. Academic institutions (scientific institutes) prepare scientific studies in different areas and identify options and recommendations for decision-makers. These studies, although state funded, are not targeted by state to be used in policy design or decision-making process. Possible users of the research are not consulted in the process of research design, and there is no established mechanism of communication or coordination. Also, institutions lack budget resources to request targeted research from scientific institutes that would inform policy-making or legislation-drafting processes. Model d) is applied through individual engagements of researchers in different working groups, usually for drafting policy documents (i. e. strategies, action plans) or preparing laws and bylaws. However, all these individual engagements are of ad hoc nature.

Involvement of scientific researchers and institutes in policy-making and legislative drafting process is a part of broader challenges that Serbia faces within legislative drafting process.¹¹ The OSCE ODHIR Assessment already in 2011 identified the concern that legislation is drafted without a sufficient prior development of the policy which should be expressed in a particular law. This is the stage where science should step in, be actively involved and consulted by government (the relevant ministry). Scientific institutes are equipped to prepare assessment of the situation in specific area and provide recommendations based on previous results and the best international practice and experience. In addition, scientific institutes have memories of failed reforms and the reasons for failure, they are aware of human resource capacities of national institutions, as well as budgetary constraints as the issues that are relevant for assessment of feasibility of proposed recommendations.

The lack of consultation at the pre-legislative stage is also one of the issues that is repeatedly mentioned in assessments and report, including the EU reports on Serbia's

¹⁰ OECD (2015), *Scientific Advice for Policy Making: The Role and Responsibility of Expert Bodies and Individual Scientists*. OECD Science, Technology and Industry Policy Papers, No. 21.

¹¹ Shortcomings in legislative drafting process are identified in SIGMA, *Serbia Policy Making and Coordination Assessment*, May 2008, Available at: <http://www.gs.gov.rs/doc/ostala/Sigma.pdf> [last viewed May 10, 2019]; OSCE/ODHIR *Law drafting and legislative process in the Republic of Serbia – an Assessment*, Legis Paper-Nr. 200/2011 YA, Warsaw, December 2011; GIZ < Analysis on enhancement of legislative process in Serbia, June 2012. Available at: <https://www.osce.org/odih/87870> [last viewed May 10, 2019].

progress in the accession process. One of the recent challenges in consultation process was related to the amendments of the Constitution of Serbia.¹²

All the abovementioned challenges escalate in the process of transposition of EU *acquis*. The task of enacting domestic legislation to implement EU legislation is complex and fast-moving. Despite the governmental coordination of this task, the function of preparing the necessary domestic legislation is largely devolved to individual ministries. EU *acquis* often set the minimum standards that the EU Member States should reach or define the goal that should be achieved, but Member States have a freedom to determine national modality regarding establishment of a specific institute. This transposition of EU *acquis* is the second stage, where scientific institutes should contribute to legislative drafting process in Serbia. Serbian authorities very often decide to introduce specific model, based on limited information that model is successful in another EU country. The decision-makers usually do not have an information on all the aspects relevant for decision, including the context in which specific instrument functions, including the support provided by others, bylaws or other laws relevant for specific question. So, for example, the Criminal Procedure Code was adopted in September 2011 and introduced prosecutor-led investigation without establishing a cooperation mechanism between police and prosecution or amending hierarchical structure of prosecution system that is now entitled to defer prosecution for all the crimes that are punishable with up to five years of imprisonment.

The scientific institutes are well-positioned to conduct the assessment of financial and administrative implications of the legislation. Research institutes have a network of stakeholders in their specific area of expertise and have a capacity to assess financial and administrative implications before draft legislation enters the Parliamentary procedure.

Although Serbia has invested the efforts to enhance the quality of legislative drafting for a decade,¹³ European Parliament's resolution of 29 November 2018 stressed that quality of the "legislative process need[s] to be further improved and that frequent use of urgent procedures undermines parliamentary and public scrutiny".¹⁴

These shortcomings resulted in poor quality of laws and bylaws, frequent amendments to legislation and problems in application by professionals (judges, prosecutors and lawyers). For example, Criminal Code that was adopted in 2005 was amended eight times since then. Particularly, the chapter dedicated to economic crimes was amended several times to remove challenges to collecting evidence, especially regarding abuse of office. The definition of a 'responsible officer' was loose and included public officials, as well as owners and managers of private companies. The definition of wrongful conduct was also vague, and encompassed anything from misrepresentation

¹² Serbia 2018 Report, Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2018, Communication on EU Enlargement Policy, {COM(2018) 450 final.

¹³ In 2010, the National Assembly adopted the Unified Drafting Methodology Rules, Official Gazette No. 21/2010, to be applied to legislation, as well as other general acts enacted by the National Assembly.

¹⁴ European Parliament, Resolution A8-0331/2018. Available at: http://www.europarl.europa.eu/doceo/document/TA-8-2018-0478_EN.html?redirect [last viewed May 10, 2019].

to fraud, corruption to embezzlement, inside trading and the operation of Ponzi schemes. Thus, abuse of office has thus been used as a fallback to alternative charge in a large number of cases.¹⁵ In 2013, the Criminal Code was amended to define separate offences for public and private actors, but the implementation challenges remained unresolved. Having that in mind, the Criminal Code was amended again in 2016 to address the challenges in implementation and to ensure that the text of the law was precise and clear. The inflation of law-making has an impact upon end users, the business sector. Thus, the National Alliance for Local Economic Development (NALED) tracks 30 laws important for business and reports that over the last five years these laws have been amended or overhauled in total 98 times.

The influence of these changes upon the professionals can be illustrated by results of the Multi-Stakeholder Justice Survey, where judges, prosecutors and lawyers expressed some reservations about the precision and clarity of Serbian legislation. Only four percent of judges, three percent of prosecutors and five percent of lawyers stated that Serbia's laws are precise or clear.¹⁶

How science can meet demands of policy-making dynamics

One of the reasons for failure to include researchers or research institutes in policy-making and legislative drafting process is the very ambitious and tight agenda for harmonization of legislation, where full harmonization is envisaged by the end of 2021.¹⁷ The ambitious timeline does not allow for comprehensive planning, assessment and consultative process. However, examples of multiple amendments to the same legislation and creation of legal uncertainty in practice cause more delays than would a proper planning and consultation process. Still, the advisory and scientific institute requires a sophisticated understanding of policy-making process mechanisms. Policy-making and advising the legislator present researchers with a unique opportunity to diminish the distance between legal science, legislative drafting process and practice.¹⁸

Legal science also has an accountability aspect with regard to policy making and legislative drafting, both in situation of unapplicable advice or silence in the situations when politicians are advocating for solutions that are not feasible in specific

¹⁵ World Bank, Serbia Judicial Functional Review, 2014. Available at: <http://documents.worldbank.org/curated/en/942951468092974379/Executive-summary-with-recommendations> [last viewed May 10, 2019].

¹⁶ World Bank, Experiences and Perceptions of Justice in Serbia, 2014. Available at: <http://documents.worldbank.org/curated/en/913951468179665797/Perceptions-of-the-judiciary-s-performance-in-Serbia-results-of-the-survey-with-the-general-public-enterprises-lawyers-judges-prosecutors-and-court-administrative-staff> [last viewed May 10, 2019].

¹⁷ National Plan for the Adoption of the Acquis (NPAA) by end of 2021. More information is available on: <http://www.mei.gov.rs/eng/information/questions-and-answers/national-programme-for-adoption-of-the-acquis-npaa/> [last viewed May 10, 2019].

¹⁸ More about this in: Kenny C., Washbourne L. C., Tyler C., Blackstock J. J. Legislative science advice in Europe: the case of international comparative research, Palgrave Communications, 2017, 10 May, No. 3. DOI: 10.1057/palcomms.2017.30 [last viewed May 10, 2019], pp. 1–9.

environment or stand against EU standards and the best practices.¹⁹ Legal science is especially important in the areas like rule of law, where standards are defined but different models exist across EU Member States. For example, an ongoing discussion in Serbia is focussed on Constitutional amendments in the area of judiciary. The national professional judicial associations, as well as a part of civil society criticize the proposed amendments that are not aligned with the standards of independence of judiciary and prosecution service.²⁰

Scientific advisory mechanism at the level of European Commission could be one of the examples of good practice that would provide good national results.²¹ The scientific advisory mechanism can be compared to the models and approaches that are already tried and tested in other countries.²²

The role of legal science in policy making and legislative process is comprehensive. The researchers and scientific institutes provide support in the process of debate, scrutiny and legislative drafting. Support and advice to legislative drafting process should be given in a manner that enables adoption and use of advice by diverse users. In addition, the decision-making requires evidence, and thus legal science within this process should ensure the evidence base, indicate different options and policy alternatives.

Conclusions

To address the identified challenges, the Government Rule Book on legislative process should be amended to include scientific research institutes in the legislative drafting process, and also in policy development.²³ Specifically, to ensure alignment of legislation with EU *acquis*, the scientific research institutes should be introduced into the process of giving opinion of draft laws at the same time when the Ministry for European Integration prepares the opinion on the draft law. The specific moment when law is being drafted should be obligatory for involvement of scientific institutes and opening the draft to comments, however, prior to the drafting process the studies and analysis should be prepared to ensure the informed decision regarding the direction of reforms and to provide the input to the working group drafting the law.

¹⁹ On May 21, 2019, Serbian Parliament adopted amendments to the Criminal Code and introduced life imprisonment without parole although it is against European standards and practice of the European Court of Human Rights (Vinter and Others against UK, judgement of 9 July 2013).

²⁰ European Movement in Serbia, publication. Available at: <http://www.emins.org/wp-content/uploads/2018/10/Changing-the-Constitution-on-the-Way-to-the-European-Union-web.pdf> [last viewed May 10, 2019]. Association of Public Prosecutors, Statement. Available at: <https://uts.org.rs/aktivnosti/vesti/1598-promenom-ustava-do-ne-zavisnog-pravosuda> [last viewed May 10, 2019].

²¹ More about this in: Wilsdon J., Doubleday R. Future directions for scientific work in Europe. Cambridge: Centre for Science and Policy, 2015.

²² Ibid.

²³ Poslovnik Vlade („Official Gazette of the Republic of Serbia“ No. 61/2006-revised text, 69/2008, 88/2009, 33/2010, 69/2010, 20/2011, 37/2011, 30/2013 and 76/2014).

The EU standards for involvement of non-governmental sector in the legislative consultation process are well-developed²⁴ and included in the legislative drafting rules of Serbia. There is no reason for a weaker position of science in the policy making and legislative drafting process. Scientific institutes as well as particular studies are funded from the state budget, thus, there is a need to establish a clear link between the planned studies and legislative initiatives of the country. However, it is necessary to ensure the independence of scientific studies and strengthen the integrity of researchers, since the result of the research sometimes would not conform with the authorities' vision of legislative amendments.

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²⁴ European Governance – White Paper, 2001; Fundamental Principles on the Status of Non-Governmental Organizations in Europe, Available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2001:0428:FIN:EN:PDF> [last viewed May 10, 2019], 2004; Communication from the Commission Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission, Available at: http://ec.europa.eu/governance/docs/comm_standards_en.pdf [last viewed May 10, 2019], Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions Smart Regulation in the European Union, 2010. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010DC0543&from=EN> [last viewed May 10, 2019].

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