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**Part I – Ethical and Property Dilemma**



**Part II – The Political Roles in the Restitution**



**Part III – THE LEGAL ASPECTS: Rehabilitation and Restitution**

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# HOLOCAUST AND RESTITUTION

## Part III

## THE LEGAL ASPECTS: Rehabilitation and Restitution

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# RESTITUTION AS THE LEGAL VACUUM IN THE SYSTEM OF LAW

*Original scientific article*
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***One of the clear examples of the existence of legal gaps in the legislation of the Republic of Serbia is the problem of restitution of property of Holocaust victims, which is shown as a separate problem that remains unregulated. The academic community of experts deserves serious scientific criticism for tolerating legal gaps in the legal system. Criminological phenomena of hate crime and hate speech which in the past resulted in the adoption of racial laws, civil rights and confiscation of property and physical liquidation – Holocaust –are such unique instances of evil that they exceede the limits of one life span and affect generations to come, unprepared to deal with them due to the unwillingness of our generation to act preventively regulating social relations based on modern principles and standards in order to prevent recurrence of the past. This is considered to be the essential (symbolic) inadequacy of the security systems from the perspective of knowledge management and diplomacy. Wrong attitude of the academic community towards the problem of increasing the capacity within the security system to protect the public interest and towards the reform of the security system can be critically assessed through present profiling of the security community outside of executive power – in the judiciary, in the status of law enforcement agencies, although the nature of their work and the principle of secrecy is incompatible with the principle of transparency in the work of law enforcement agencies. Unfortunately, it is likely that all these problems will be crashing down on the future generations.***

***Key words***: legal vacuum, self-limitation, constitutionality, relapse into authoritarian past

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## *Introduction*

The concept of Legal Vacuum commonly includes "social relations that are not regulated by law, although they should be regulated because of social interest." (Lukić, Košutić and Mitrović 2001, 402) They exist when there is no legal norm which applies to a particular case, although there is a social need – a social interest and a goal to be achieved by the adequate regulation. Legal Vacuum occurs in absence of Legal Source with preset legal rules for the resolution of a legally relevant issue, although it should exist, because of the public interest. It is the lack of possibility to resolve a legal situation on the basis of existing legal norms.

In contrast to classic examples of legal vacuums – social relations that are not regulated by law and for which it's estimated that there's no social interest to regulate them – they represent classic empty space. One of the clear examples of the existence of Legal Vacuum in the National Legislation of the Republic of Serbia is the problem of:

a) Quality of actual regulation for the restitution of property in general, and in particular;
b) Restitution of property of the Holocaust victims, which remains unregulated as the specifically stated problem, despite the existence of clear public interest, primarily the interests of holders of the right of ownership and their successors. It is also represents a necessity for society that aspires to be considered legally regulated and stable.

Since the question of fair return of wrongfully seized property in the past is obviously not a social issue deserving to be regulated by standards, judging by the opinion of politicians and considering their inactivity regarding this problem, we have to look at the reasons why this important area remains insufficiently legally regulated.

It is methodologically logical (respecting normative hierarchical method) to start the analysis from the fundamental law of the state – the Constitution. Unfortunately, the regulation of the constitutional judiciary, as the only protection from legal gaps, is plagued by Legal Vacuums that we consider that are not random. Namely, the Constitutional Court is not competent to fill the legislative gaps. The Supreme Court of Cassation is even less so, because it was deprived of the abil-

ity to decide by precedent, in order to prevent application of some of the unjust legislative solutions. The Constitutional Court had this ability by the provisions of Articles 57 and 58 of the earlier Law on the Constitutional Court Proceedings and Legal Effect of Decisions (Službeni glasnik RS 32/91, 101/2005).[1] In recent years, this Court has sent a large number of letters to the National Assembly in which the existence of certain Legislative Vacuums and deficiencies was emphasized, along the need to enact certain laws or amendments to the laws and other by-laws passed by the National Assembly.

However, when the Constitutional Court, in the process of deliberating upon the constitutionality of a disputed law, noted the existence of certain gaps or Legislative Vacuums and determined the existence of problems in exercising constitutionality and legality in the Republic of Serbia, because of these legislative gaps and voids, the National Assembly was informed about it. This is the most common form of the activity of the Constitutional Court in the elimination of legislative omission or absence of any regulation, when the Constitutional Court pointed out the need for the adoption of laws or amendments to the law, or some other by-laws enacted by the National Assembly.

Therefore, the first case study of the Legal Vacuum is dedicated to the Constitutional Court, being the most responsible judicial authority. The issue of protection of human rights is inseparable from the right on private property. Tycoon privatization affected the changes in the regime of capital accumulation, which in turn resulted in an increase of unemployment, marginalization of social groups, discrimination of victims of the authoritarian past, stigmatization and ghettoization of socially deprived strata of the population, including majority of pensioners, unemployed, poor farmers etc. It can be concluded that the delay of restitution makes the services in the state more expensive, rather than cheaper in the consumption of social capital.

## *Self-limitation of constitutionality*

The problem of the constitutional protection of citizens guaranteed by the Constitution may be addressed by the systematic removal of formal and substantive limitation of constituent authority. These restrictions can be explicit and implicit. In the first case, it is a logical consequence of a rigid constitution, and these

1 The Law on the Constitutional Court proceedings and legal effect of its decisions.

limits are designed to preserve the constitutional identity by forbidding the alteration of the constitution, which is in some cases done in such a drastic manner that causes the inability to implement constitutionality. In the second case, the restrictions follow the spirit of the constitutional regime, and they can be so numerous that they are practically unlimited, because it is not possible to exhaust this type of regulation in legal practice. Therefore, this aspect of limitation to the constitutionality is the phenomenon of current nature. An obvious example is exactly the constitutional and legal regulation as a basis for resolving the problem of restitution.

These implicit constraints absolutely prevent enforcement of constitutionality, as opposed to substantive limitations which cannot be absolute, because the change in state policy may lead to change of constitution or constitutional norms through several successive amendments. Therefore, in connection with these changes, the thesis of restrictive interpretation, and even the theory of double standards may be accepted, but only regarding the substantive constitutionality restrictions. However, mechanisms needed to implement the constitutionality and to protect the constitution are entrusted to the parliamentary majority. These mechanisms are the major controlling mechanisms of the constitutionality, whose control parameters are called Immutable Constitutional Clauses or Constitutional Inviolability.

We draw attention of the Constitutional Court to the implicit limitations of the constitutionality that are enforced by the Law on Property Restitution and Compensation. So, we turn to the Constitutional Court, which is the authority to control the implicit forms of restrictions of constitutionality and legality. Unfortunately, from the current practice of the Constitutional Court, we could see that the Court imposes this kind of self-limitation of constitutionality on itself in the form of oscillations in its legal opinions that are not related to changes in the political regime of the country. We are confident of that.

The self-limitation of the Constitutional Court regarding the rejection of examination of constitutionality of the Constitutional Law on the Constitution from 2006 are the example of implicit constitutional limits of power of the Constitution, which favored political decisions of the Government of the Republic of Serbia expressed in the constitutional regime changes which were not based on respect for the sovereignty of the constituent authority, but almost as if it were the manifestation of the constituent authority. What makes us even more dismayed is that the Constitutional Court, in its practice of the protection of social rights, fluc-

tuated in legal opinions while considering implicit constraints of implementation of constitutionality and legality. In particular case, the Court had refused requests for examination of implicit limitation of constituent power, particularly when parties complained that the Government had reduced the basic rights of citizens. In particular, considering the norm of decrees of the Government of the Republic of Serbia, it happened as if the citizens legitimately explicit and voluntarily denied rights to themselves, or rather did so by the will of their representatives – MPs i.e. parliamentary majority, as if the constitutional inviolability was protected, although there were no conditions for that, because both democratic articulation and constitutional deregulation were absent.

Therefore, the Constitutional Court of Serbia completely unfoundedly applies the dual view theory on the implicit violation of the constitutionality and legality (double standards for one group of citizens in relation to the other group of citizens), although it is clear that this theory can only be applied to material limitations of constituent authority, bearing in mind that they are not absolute in practice.

We strive, having stronger moral and theoretical legal argumentative force, to draw the attention the Constitutional Court to the fact that the policy of double standards cannot be allowed when it comes to implicit constraints, along with justifying the application of double view on the problem of achieving equality of citizens in the use of fund assets that arose from unfairly deprivation of private property and in the use of all other forms of social rights. Government of the Republic of Serbia has Constitutional right to have a dual view of social rights guaranteed by the Constitution only in the cases of the explicit restrictions to the constitutionality or restrictions of constitutional authority.

For further consideration of the cosequences, we note that we start from the hypothesis that the unequal treatment of citizens with regard to their Right to Restitution led to an increase in the price of services that the state provides to citizens in favor of tycoons, and therefore this must be prevented by deregulation and the abandonment of programs that apply to all citizens and to insist on the privatization of almost all public services. However, this should be done through the social capital which must be divided along the principle of equality, unlike similar broader concept of deregulation in the neoliberalism where the austerity measures are also applied. Otherwise, the application of the principle of double

standards belongs to the highest stage in the development of capitalism, to the stage that our society has not reached yet.

## *Return of property of Holocaust victims as a part of legal vacuum*

During the preparation of legislative process and the adoption of the Law on Restitution of Property and Compensation, published in the "Official Gazette of RS" (*Službeni glasnik* RS 72/2011) on 28th September 2011, and coming into force on 6th October 2011, the President of the Federation of Jewish Communities of Serbia, Mr. Aleksandar Nećak, has placed the proposal for certain amendments to the current Law. We consider this proposal significant, considering it pointed at existence of significant and serious legal loopholes in our legal system. Also, the existence of legislative was pointed out in the Initiative to Review the Constitutionality of certain provisions of the Law on Restitution of Property and Compensation submitted to the Constitutional Court by the League for the Protection of Private Property and Human Rights in Belgrade and the Association for Reconstruction of the Merchant Fund from Belgrade.

In connection with the Law on Restitution of Property and Compensation, the question arises as to whether this decision is inconsistent with certain constitutionally guaranteed rights,[2] as well as with guaranteed minority rights of both individually and collectively aggrieved group of citizens under the international Conventions.[3] In particular, the question arises whether mentioned Law allows that discriminated persons, who were unjustly deprived of their property prior to an arbitrarily specified date, effectively challenge the provisions of the Law? We should start our analysis with Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms – ECHR (Official Gazette of

2 Article 36 of the Constitution of the Republic of Serbia: "The right to the equal protection of rights and legal remedy shall be guaranteed equal protection of rights before courts and other state bodies exercising public powers and provincial or local governments. Everyone has the right to appeal or other legal remedy against any decision on his rights, obligations or lawful interests."

3 European Convention on Human Rights (*Službeni list Srbije i Crne Gore – Međunarodni ugovori* 9/2003, 5/2005, 7/2005 – correction; *Službeni glasnik RS – Međunarodni ugovori* 12/2010).

Serbia and Montenegro – International Treaties).[4] Here we point out a possible procedural violation of Human Rights, specifically the provisions of Article 13 of the Convention. Also, this does not pose any special request to the signatory states on the types of remedies that domestic law must provide, but it is a claim for respect of the rights to human dignity and equality.

The fundamental universally accepted principles of human rights, established by the UN Declaration on Human Rights, are clearly promulgated in the Constitution of the Republic of Serbia – paragraph 2 of Article 16. That means that they are under the Constitution, but above all other laws with which they might be in legislative collision. All subsequently established conventions, which are also adopted as laws of the Republic of Serbia, should be viewed as a logical link in the chain that elaborates the basic ideas in more detail. Bearing this in mind, we just want to point out the obvious procedural violation of human rights, because it is an obvious consequence of substantial violation of the provisions of the Protocol to the ratified European Convention for the Protection of Human Rights and Fundamental Freedoms, namely: the provision in Article 1 of the Protocol No. 1 (protection of property), Article 3 of the Protocol No. 7 (compensation for wrongful conviction), Article 1 of the Protocol No. 12 (general prohibition of discrimination) and Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Article 1 provides that the Law regulates the conditions, manner and procedure of restitution and compensation for expropriated property, which is taken from certain natural and legal persons on the territory of the Republic of Serbia and transferred to national, state, social or cooperative property after 9th March 1945, by applying regulations on agrarian reform, nationalization, sequestration, and other regulations, based on the Acts of nationalization. "It is unclear why 9th March 1945 was chosen as the start date, since no significant events happened in Serbia at that time. At the same time, there is a discrimination against persons who claimed that their property was taken prior to the said date. They indicate the fact that the property was forcibly taken away since the beginning of the dissolution

4 Article 13 of the ECHR regulating the right to an effective remedy: "Everyone whose rights and freedoms set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity." (*Službeni list Srbije i Crne Gore – Međunarodni ugovori* 9/2003, 5/2005, 7/2005)

of previous socio-political system (the Kingdom of Yugoslavia) on 18th April 1941, after the capitulation of the Kingdom of Yugoslavia and occupation of parts of its territory by other invading armies, with all of the consequences for all former residents of the Kingdom of Yugoslavia." The only explanation for the selected date is the following: it is a recurrence of the past in a worse form than in the previous system, taking the form of pure recalcitrant bureaucracy that was not allowed to act in such way even during socialism (they choose and marked the important dates carefully then).

This criticism is based on an empirical analysis of the elements that are suitable for determining the existence of the type and scope of legal gaps in the legal system, which was established after the adoption of the Law on Restitution of Property and Compensation. Objections are briefly explained and reduced to the problem of the transition of whole society towards a stable democracy. Destabilizing factors for democracy and the Rule of Law in our society are the recurrences of the authoritarian past. When we say recurrences, we think on the phenomenon resulting from insufficient distancing from the past. Symbols of our authoritarian past are known and have been marked by, among other things, nationalization, forced collectivization, deprivation of citizenship, various restrictions of civil and human liberties, etc. Recidivism of such past exists today in the remains of the so-called corporative minded or dogmatic minded consciousness, which affects the current legislative solutions, without definite regulation (Thinking in a vicious circle – *circulus vitiosus*: "All this is 'ours', 'social' or 'common' and it should become 'theirs', 'private'; 'ours' was 'only ours' before, which means that now 'we' have to lose it and 'they' will get it". And so on, to the eternity).

Unfortunately, the Legislator is affected today by certain connections between individuals among the executive branch, organized crime and tycoons, who act as a network of power and influence, that borrows "knowledge" from various spin-doctors; they embed various errors in drafts of the laws, for example in the Law on Restitution of Property and Compensation. For removal of these errors amendments are needed, and that takes time. The absence of adequate norms of the statutory and obligation law creates a Legal Vacuum of huge proportions in the most important part of the legal system – property relations. We even suggest an enactment of a special Law on Restitution of Property of the Holocaust victims, as if it could not have been solved by a single Law.

Unresolved property relations are the main generating factor of crime in our society, and they are also a factor of destabilization of whole society, even the Security System Reform (SSR) factor of negligence and irresponsibility. Everything is done for the purpose of buying time. During that time this network (actors who suspiciously acquired political power, "controversial" private businessmen and actors of the civil society "made artificial by media") will sell property that does not belong to them, and will give a very "logical" explanation that the property now belongs to private persons and that it cannot be taken from a private person now. Therefore proposals of the new legislative solutions plead for abolition of clauses that allow restitution to be conducted in natural substitution. It is well known that if the state sold the property and if that is the reason why it cannot be returned, and if clause of natural restitution remains, the whole "business" is meaningless. It is meaningless because they are bound to return something, at least of approximately equivalent value, and which is owned by the state. It is undisputed that the whole process of tycoon privatization took into account the insufficiently controlled appropriation of state property, one way or another.

## *Other case studies*

1. As an illustration of these games that can be easily seen through, we give the following case study: The Federation of Jewish Communities of Serbia (FJCS) had a dispute with one state and one natural person before the Municipal Court on the complaint of FJCS in determining the rights of ownership of the "Prčanj" resort, that has been built by the Jewish Women's Society. This Society was founded at the Jewish Community in Belgrade back in 1874. Immobility was stripped by the Decision No. 3553 of the National Liberation Committee of the Municipality from March 21st 1956. This decision was unlawful and contrary to the rules under which the nationalization was carried out in 1956 (Society was not declared the public enemy, the property wasn't donated nor taken away; the reasons given in the Decision were not provided even by revolutionary legislation). So, rather than to comply with a rule of the Roman law: "*Quod ab initio vitiosum est...*", Municipal Court has awarded the private property to natural person as the "last buyer." However, the Court hasn't previously confirmed whether the state did possess the right of ownership at all. That could be achieved only by the lawful way through tradition: by transfer of ownership from the Jewish Women's Society, or from its

legal successor – the Federation of Jewish Communities of Yugoslavia. Above all, the Court had failed to determine whether bankrupt state-owned company could acquire ownership from a non-owner and so on.

2. The study of the hypothetical case of sanctioning of the tolerance of application of the principle of impunity. Does anyone think that the Court of Justice in Strasbourg would hesitate to determine to whom the property rights will be awarded? When the judges see the year of establishment of the Jewish Women's Society (1874), they will believe that today it must be so rich to be an owner of a space station, let alone some modest one-story building in the resort. Unfortunately, this accumulated injustice will be corrected before international courts and at the expense of all taxpayers. All of this is happening according to the old rule defined by Karl Marx, which tells us that the character of production (state, cooperative or corporate asset) is always social, but the appropriation of capital is private and often illegal, especially by the fledgling capitalists. Non-sanctioning of the consequences of initial accumulation of capital in the unfair and unjust way by the Civil Sector of the System of Law is a Legal Vacuum that erodes the Law on Restitution of Property and Compensation and the whole Rule of Law.

In fact, despite the fact that the Law provided the return by natural restitution as a basic model, the adopted "primary" principle of natural restitution will not be applicable in many cases, due to the large number of exceptions to this principle (Articles 18, 22 and 25 of the Law). Also, the privatization of social and state enterprises unlawfully treated the property that originated from unilateral confiscation.

3. Case study which is related to deficiencies in institutional capacity for restitution of illegally sized property. Owing to the "controlled" media in our society, the neoliberal concept of the State Regulator and the Regulatory Agencies that are only capable to professionally solve the problems now faced by the Government of the Republic of Serbia was ridiculed. These Regulatory Agencies regulate social relations in advanced capitalism by applying different standards and knowledge. Regulation or deregulation through Regulatory Agencies (transfer of government functions to the actors of civil society) as a measure of controlling the influence of political voluntarism, authoritarianism and arbitrariness of the relevant ministries in the Serbian Government, is coupled with enormous difficulties. Above all, no one in the academic community has seriously dealt with this problem, fearing

those who act as Goering did in political public life, who "draw the gun whenever someone mentions the word 'culture', or in our case – the word 'civil society'".

4. The case study related to the obstruction within the bureaucracy. Let us consider, for example, attempts to prevent citizens and their civic organizations to acquire private ownership of agricultural land, as it happened in the case of decision of the Agency for Restitution regarding the return of agricultural land to Diocese of Bačka within the Serbian Orthodox Church. State Attorney's Office appealed against the decision to the Supreme Court. The Supreme Court of Cassation issued a historic ruling that upheld the decision of the Agency. Director of the Agency for Restitution gave an interview to TV Station B92 and replied to the question of what would happen if the Supreme Court had by any chance annulled the decision of the Agency: "Then there would be no restitution of agricultural land!" The part of the Legal Vacuum in this area is unregulated position of state bodies which do know that the state owns five times more land than all natural and legal persons claim (non-classified data from "controlled" media), and yet they delay the process of restitution by appealing on decisions, thus slowing the restitution.

5. Case study related to the strife between the Anti-Corruption Council of Serbia and Government of the Republic of Serbia or the case of failure of the Anti-Corruption Agency to coordinate the work of state organs, leading to the establishment of a Supreme Auditing Body to fight corruption. We believe that criminal privatization was not sanctioned enough in previous years by the competent authorities – Privatization Agency, Republic Directorate for Property of the Republic of Serbia, Anti-Corruption Agency, Anti-Corruption Council etc. – in order to help individuals and certain interest groups to obtain land and objects, whose market value far exceeds the purchase price. These facts are notorious and explain the reason why the law does not stipulate the obligation for buyers in the privatization, the natural restitution for property in possession of subjects of privatization at the time of privatization.

## *"Black holes" in the system of law*

For those reasons these and other legal loopholes swallow every justice and human dignity like "black holes" does in natural sciences. In jurisprudence, the regulation seeks to arrange the society and oppose the general entropy of the

world, but in our legal system great chaos has been reigning because of the size and frequency of these Legal Vacuums, that shake the very foundations of regulation. The dignity and welfare of the common man are incorporated into the concept of Social Security, as it is confirmed by the Article 22 of the Universal Declaration of Human Rights that explicitly guarantees the enjoyment of "rights indispensable for dignity and the free development of personality". This legal theory of Constitutional Law gives the task to the judiciary in the sense that "justice requires that the survival of human dignity is ensured to every citizen" (Jovanović 1924, 448), i.e. "life without fear, uncertainty and deprivation." (Trninić 1977, 233)

The absence of the Fund of Confiscated Property of Holocaust Victims is such an enormous Legal Vacuum that it represents a monument – a memorial wound of our society. This wound reinforces our memory of the large number of people who would, have they remained alive, give that property to the future generations themselves. In their absence, we must take special care in relation to their behest, endowments and ownership over immovable and movable assets. We must posthumously allow a part of that social wealth to be designated as their legacy for the future.

Even the process of compensation represents a Legal Vacuum. According to the observation of Aleksandar Nećak, the Law effectively delays a solution of the restitution by unclear provisions on compensation. Solutions are designed as in a general sense without serious analysis and without parameters, resulting in practical insolvability of the issue of compensation. It creates the impression that the practical solution of restitution is delegated to the next Government, while, at the same time, domestic and international public was informed that the question of restitution in Serbia was resolved. Even in cases where natural restitution is immediately possible, no deadline was prescribed for restitution *in natura*, which only confirms the thesis that the Legislator has not precisely standardized "primary" principle of return – natural restitution.

A policy based on the provisions of the Constitution and laws, in its positive sense, represents a temporary prescription intended to compensate for the lack of rights in certain situations in which discrimination or restriction appear, which are applicable in cases of so-called factual inequalities. This policy must be based on standards designed in such way that they always promote the human dignity and enable the effective enjoyment of fundamental rights and freedoms.

## *The ultimate insecurity of property relations*

The academic community deserves a serious scientific criticism for tolerating Legal Vacuums in the Legal System. Part of the data obtained in the empirical analysis or by analysis based on the unclassified literature may be incorrect (the size of state assets and the size of the property claimed by various victims of persecution caused by sectarian hatred and intolerance) because there's no public scrutiny and competition among researchers in the Academic Community to document errors in legal theory. At the same time, security systems continue to operate in unmodified fashion, perhaps concealing accurate information or even revealing them, but without sufficient scientific criticism. Social relations resulting from social conflicts in the past remain unregulated even in the present, so the lawmakers leave the solution to coming generations. Thus, the duration of Legal Uncertainty is prolonged, and consequently the instability of the state and society to which the state is supposed to serve. Criminological phenomena of hate crime and hate speech, which resulted in the enactment of racial laws in the past, along with deprivation of civil rights and property and even physical liquidation – the Holocaust – represent one of a kind appearance of evil that goes beyond human lifespan. It will affect coming generations, who are unable to cope with it because of the unwillingness of our generation to act preventively by regulating social relations based on modern principles and standards in order to prevent recurrence of the past.

This is considered as an essential (symbolic) capacity inadequacy of the security system from the perspective of knowledge management and knowledge diplomacy. If anything is certain, it is the truth that no one has the monopoly on knowledge, and not even the security agencies, and vice versa, the academic community. It is known that the ancient Venice began to lose power when it tried to achieve monopoly in science and crafts of their time. The same thing happens in 21st century with security system reforms, where information is used for exchange instead of storage. Those who keep secrets, for example the secrets of a certain political regime, in a historical sense are quickly becoming autistic and useless in security sense or even dangerous to others. Despite the huge number of books and articles in the literature, there is actually very little available analysis, much less a comparative analysis of the organization of intelligence services. It must be immediately said that there are limitations of capacity of security services to

prevent recurrence of the authoritarian past, especially the various deviations in their work, along with their role as the law enforcement agencies by the Criminal Proceedings Act. The academic community, among others, is extremely responsible for this. First of all, because it is itself a part of the intelligence community; second, because it kept silent due to fear; third, because of the fact that academic community indulged members of intelligence community by bestowing them with various academic degrees and ranks.

The property relations in any society are the most important concerns and therefore they must be based on anthropocentric legislation. Property rights and human rights are inextricably linked. States have no greater public interest then the interests of its citizens. But during drafting of a law, the academic community should take care that the public interest is articulated in such a way so that the citizens can effectively control the bureaucracy in terms of understanding what the public interest in each case is. Public interest is to ensure that private property is inviolable. Has the Criminal Justice System created a mechanism for the effective protection of private property?

As a striking example of such erroneous attitude of the academic community regarding the problem of capacity expansion within the security system in order to protect the public interest and security system reform, we can specify the current profiling of intelligence community outside the executive branch in the status of law enforcement agencies. Although the nature of their work is the principle of secrecy – intelligence agencies that conduct special covert operations, tactics, techniques and methods, including so-called splinter or dissuasive operations, propaganda and misinformation, which demand special control of the legislative, executive and judicial authorities – all of which are incompatible with the principle of transparency in the work of law enforcement agencies, such as FBI, Scotland Yard, Police specifically authorized for investigation in Germany, France, or Judicial Police (that we lack), Customs, the Anti-Corruption Agency, Directorate for prevention of money laundering etc.

After the Constitutional Law System, the Criminal Law System is the most important for any country. However, it does not have sufficient protective function for our society and state due to such erroneous reform of the Criminal Justice System, because there was an impermissible interference of the intelligence community with the judicial community (Criminal Justice System), which is not

tolerated in developed countries for a long time.[5] The investigative actions that would relate to the research of the network of tycoons, organized crime and certain public policy, by current System of Criminal Proceedings, would incorporate intelligence agencies. That has already created a sort of "reality show" before the judicial authorities, because of the inevitable discreditation of their resources in the court proceedings.

It is necessary to discover how this network influenced the design of the Constitution of 2006 (which does not guarantee equality of the executive, legislative and judicial branches) along with drafts of number of laws, including the Law on Restitution and Compensation. That law was used at the beginning of this century only as a means to "purchase time", while the lawmakers' dogmatic consciousness stayed in the 19th century. In fact, the problem has been transferred to the new Governments, along with a growing burden of mortgages of the past. Is

5 "This domestic focus followed naturally from the statutory responsibilities of the law enforcement agencies and the structure of U.S. criminal law. The intelligence agencies could not have been more different, in terms of both geographical responsibility and subject matter. Unlike the FBI, Department of Justice, and the other federal law enforcement agencies, the CIA was expressly prohibited by the National Security Act from exercising any "police, subpoena, or law enforcement powers or internal security functions" from the moment of its creation in 1947. 12 The primary reasons for that "law enforcement" proviso were twofold. First, the nation had recently witnessed in Hitler's Germany, and was continuing to observe in Stalin's Soviet Union, the abuses that can arise from the combination of intelligence collection activities and law enforcement authority. And second, the FBI was jealous of its own prerogatives: Although the Bureau did close its Latin American field offices in the late 1940s in deference to the nascent CIA, the FBI was not prepared to accept any challenge to its own core function of domestic law enforcement. The strict delineation between intelligence and law enforcement was facilitated by the fact that, simply stated, there was relatively little overlap between the two in 1947. Such overlap as there might be was addressed primarily by the FBI, which continued to exercise its counterespionage functions within the United States as it had done during the Second World War. Espionage within the United States and against the United States clearly was a criminal offense and, therefore, a matter for law enforcement, and so the Bureau (or, in appropriate instances, the military) would continue to address it. Events abroad, however, were another matter (To be sure, the FBI for decades has maintained Legal Attaches at selected U.S. diplomatic outposts, and in recent years the Drug Enforcement Administration has undertaken a largely transnational role, in some ways foreshadowing the issues that now arise with greater frequency), for there the primary U.S. concern normally was not crime, but Communism, against which American activities consisted primarily of military and intelligence operations (Section 103(d)(l) of the National Security Act of 1947, as amended, 50 U.S.C. § 403- 3(d)(l) (1994)." (Friedman 1998, 331, 335)

such investigation possible, if the use of special techniques, tactics and methods is entrusted to the intelligence agencies?

Unfortunately, the probability that these mortgages of the past will be crashing down on future generations is also increasing, and the judiciary will not be able to protect them by wisdom, since all judges are forced to retire at the age of 65 because of a discriminatory law in relation to the elderly. Was this Law passed in order to deprive the country of a chance to achieve the higher level of stability, which is characteristic of developed countries, where the development is the result of the conservative judiciary (amongst many other things)?

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## *Rezime:*
## *Pravna praznina u procesu restitucije*

**Jedan od jasnih primera postojanja pravne praznine unutar zakonodavstva Republike Srbije jeste problem povraćaja imovine žrtava Holokausta, koji je kao posebno iskazan problem ostao neregulisan. Akademska zajednica**

**stručnjaka zaslužuje ozbiljnu naučnu kritiku zbog tolerisanja pravnih praznina u pravnom sistemu. Kriminološki fenomeni kriminaliteta mržnje i govora mržnje koji su u prošlosti rezultirali donošenjem rasnih zakona, oduzimanjem građanskih prava i imovine i fizičke likvidacije – Holokausta –takvi su da predstavljaju jedinstvene slučajeve pojave takvog Zla da prevazlaze ljudski vek, pogađaju naraštaje koje dolaze, nespremne da se sa tim suoče zbog nespremnosti naše generacije da preventivno delujemo regulišući društvene odnose na temelju modernih principa i standarda radi sprečavanja recidiva prošlosti. Ovo se smatra suštinskom (simboličkom) nedovoljnošću kapaciteta sistema bezbednosti sa stanovišta upravljanja znanjem i diplomatije znanja. Pogrešan odnos akademske zajednice prema problemu proširenja kapaciteta sistema bezbednosti u sklopu zaštite javnog interesa i reforme sistema bezbednosti može se kritički oceniti kroz sadašnje profilisanje bezbednosne zajednice izvan izvršne vlasti – u pravosuđe, u statusu agencija za sprovođenje zakona iako je priroda njihovog rada i načelo tajnosti u radu nespojivo sa principom javnosti u radu agencija za sprovođenje zakona. Nažalost, raste i verovatnoća da se ova hipoteka prošlosti obruši na buduće generacije, ali koje pravosuđe neće moći da zaštiti mudrošću, pošto će sve sudije otići u penziju sa 65 godina starosti zbog jednog diskriminatorskog zakona u odnosu na stara lica. Da li je zakon donet da liši državu mogućnosti da dostigne nivo stabilnosti razvijenih zemalja koje svoj razvoj duguju, između svega ostalog, konzervativnom pravosuđu?**

***Ključne reči***: pravna praznina, samoograničenje ustavnosti, recidiv autoritarne prošlosti

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