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A Study on Legal Formalism in the Former Yugoslavia and its Successor States

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By Prof. Dr. Fikret Karčić

Centre for Integrity in the Defence Sector

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FOREWORD

CIDS is proud to publish CIDS Report nr. 1/2020, report "A Study on Legal Formalism in the Former Yugoslavia and its Successor States".

The aim of this paper is to investigate the phenomenon of legal formalism in the former Yugoslavia and its successor states. The report is primary focusing on answering a number of questions:

- first and foremost, what is legal formalism?
- what are its historical roots in former Yugoslavia and its successor states?
- how did this phenomenon survived the regime changes in the Balkans?
- how does this approach influence today's interpretation of law?
- in what way has the education system and legal scholars responded to the challenges of legal formalism?

Finally, prospects of overcoming legal formalism is discussed.

The author proposes, as one of his main findings, to strengthen the comparative study of cultures and their transformation, as this could to rise the awareness of legal formalism as a part of specific legal cultures. Furthermore, efforts should put in place to support the study of existing legal cultures in former Yugoslav countries, and to follow a model of guided changes in the process of their inclusion into European legal culture. This could include supporting changes in curriculum of law schools and bar exams in ex-Yugoslavia with the aim to include more courses on "law and society", including strengthening of legal clinics.

The report was written by Prof. Dr. Fikret Karčić.

CIDS is happy to receive feedback to the report.

Oslo, 24. February 2020

Per A. Christensen
Director

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INTRODUCTION

The aim of this paper is to investigate the phenomenon of legal formalism in the former Yugoslavia and its successor states. In order to achieve this aim, the following questions will be addressed: what is legal formalism, what are its historical roots in former Yugoslavia and its successor states, how it survived regime changes in this area, what is its role in the contemporary approaches to interpretation of law, its impact and how legal scholarship responded to its challenge. Finally, prospects of overcoming legal formalism will be discussed.

The theoretical framework which will be pursued in this study, is the state of the legal culture and its potential for transformation. Legal formalism is seen as a central element in the struggle to transform the legal cultures in the former Yugoslav countries: civil law, socialist law and transitional legal culture. The term legal culture possesses several different connotations. In this study, it is used as a synonym for a legal family or legal tradition. According to Mark van Hoecke and Mark Warrington, legal culture or tradition consists of six elements: legal terminology, legal sources, legal methods, theory of argumentation, legitimising of the law and common general ideology.[1]

Civil law culture, also known as the Continental or Romano-Germanic legal family, is historically based on Roman law with some influence of canon law, local customs and culture. One of its main characteristics is codification. The role of the judge is to apply law. In terms of content, its focus is on the individual.[2] Socialist legal culture is based on the Marxist-Leninist view of law; the Law is determined by its political function. It does not set limits to political action neither guarantee the individual citizen a sphere of freedom. It also uses codification, and the judiciary is controlled by political factors.[3] A transitional legal culture is a phenomenon which is defined as a culture which exists in post-socialist countries characterized by the introduction of pluralistic democracy, rule of law, as well as legal transplants from Western countries.

This study is based on existing literature which up to the present time dealt with the phenomenon of legal formalism in former Socialist countries of Central and Eastern Europe, and in rare cases with its existence in the former Yugoslavia. When local studies of this phenomenon were not available, the author drew conclusions based on similarity of historical experience between countries of South Eastern Europe and Central and Eastern Europe.

1 Ralf Michaels, Legal Culture, in **Oxford Handbook of European Private Law** (Basedow, Hopt, Zimmermann eds., Oxford University Press, forthcoming). Available at: https://scholarship.law.duke.edu/faculty_scholarship/2390

2 H.Patrick Glenn, Legal Traditions of the World, (Oxford: Oxford University Press: 2000), p.116.

3 Konrad Zweigert and Hein Kotz, *Introduction to Comparative Law*, Vol. I., (Oxford: Clarendon Press, 1987) p. 296-303.

1. HISTORICAL AND POLITICAL ROOTS OF LEGAL FORMALISM IN FORMER YUGOSLAVIA

In this section, we will discuss the emergence of legal formalism in Yugoslavia and its survival across changing legal cultures. Prior to that, legal formalism is defined.

1.1. Legal Formalism

The term *legal formalism* possesses different meanings including characteristics of the conception of law, legal science and the way of interpreting law. This last meaning known as interpretative formalism is understood as a method in which meanings of the norms are sought in inner elements ignoring historical, teleological, economic, functional and other factors which are considered as external to the norm.[4]

In the field of adjudication, formalism is understood as claim that "(1) the law is "rationally" determinate, i.e., the class of legitimate legal reasons available for a judge to offer in support of his decision justifies one and only one outcome either in all cases or in some significant and contested range of cases (e.g., cases that reach the stage of appellate review); and (2) adjudication is thus "autonomous" from other kinds of reasoning, that is, the judge can reach the required decision without recourse to non-legal normative considerations of morality or political philosophy. It also noted that "formalism" is sometimes associated with the idea that judicial decision-making involves nothing more than mechanical deduction on the model of the syllogism."[5]

Opposite to formalism is the theory of realism, according to which "(1) legal reasoning is indeterminate (i.e., fails to justify a unique outcome) in those cases that reach the stage of appellate review; (2) appellate judges, in deciding cases, are responsive to the "situation types"- recurring factual patterns (e.g., 'seller of a business promises not to compete with the buyer, and then tries to break the promise') - that elicit predictable normative responses ('this is unfair' or 'this is economically foolish') from most jurists, responses that are not, however, predictable based on existing 'paper' rules and doctrine; and (3) in the commercial law context (a primary focus of the Realists), judges look to the "normal" practices in the existing business culture in deciding what is the right outcome (that is, the judges treat normal economic practice as the normative benchmark for decision)."[6]

Legal formalism is a kind of a bound or "inevitable" judicial decision-making. As Zdenek Kuhn observed:" judges employ arguments of the plain meaning of a statutory text and present their analysis as a sort of inevitable logical deduction from this text".[7] The basic tool for this operation is syllogism.

In legal theory formalism has been perceived in different ways. Some authors see it as a proper approach to law.[8] They are of the opinion that legal formalism enables courts and other institutions to arrive at correct decisions. Legal formalism could serve as a barrier to arbitrary application of norms. On the other hand, there are scholars who see it as a negative phenomenon which enables the interpreter of law to discover limited meaning of a particular norm. However, application of legal norms implies realizing its goals, and this cannot be achieved without taking into account the social context of the norm. Thus, when speaking of legal formalism, it is understood as an excessive formalism.[9]

Legal formalism was influential in Europe in the 19th century. It was related with "conceptual and mathematical orientation in jurisprudence" known as *Begriffsjurisprudenz* or jurisprudence of concepts. This school teaches "(1) that the given law contains no gaps, (2) that the given

4 Giovani Tarello, "Pravni formalizam", translated by Nikola Visković, *Zbornik radova Pravnog fakulteta u Splitu*, Split: 1971, p. 215.
5 Brian Leiter, "Legal Formalism and Legal Realism: What Is the Issue?", *Public Law and Legal Theory Working Papers*, University of Chicago Law School Chicago Unbound, p. 1
6 Ibid. p. 3.
7 Zdenek Kühn, *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?* (Leiden,Boston: Martinus Nijhoff Publishers, 2011), p. 75.
8 Peter Scerne, „Discourses on Judicial Formalism in Central and Eastern Europe- Symptom of an Inferiority Complex", avaliable on: https://www.academia.edu/10178306/Discourses_on_Judicial_Formalism_in_Central_and_Eastern_Europe_Symptom_of_an_Inferiority_Complex?auto=download. Accessed: 23 December 2018.
9 Frane Staničić, „Pretjerani pravni formalizam i postupci javne nabavke", *Zbornik Pravnog fakulteta u Zagrebu*, vol. 67, no. 3-4, 2017, pp. 534-541.

law can be traced back to a logically organized system of concepts ("pyramid of concepts"), (3) that new law can be logically deduced from super ordinate legal concepts, which themselves are found inductively ("method of inversion")."[10]

Around 1900 anti-formalist tendencies were developed in the Western world. Among these tendencies was the school of free law (*Freirechtsschule*) which asked the judge to take into account non-codified values and personal evaluations in making his judgement.[11] This anti-formalist evolution in Europe in the first half of the twentieth century was missed by Socialist countries due to establishment of *the Iron Curtain* between them and the capitalist world. In this way Socialist legal culture continued to adhere to the old concept of legal formalism. As Inga S. Markovits observed: "The combination of a civil law system (with its emphasis on the general rule over the individual case and its formally deductive rather than inductive method) and Marxist ideology (with its belief in one right answer and intolerance for compromises and tentative definitions) occasionally produces a formality and scholasticism in legal thought reminiscent of nineteenth-century *Begriffsjurisprudenz*."[12]

Another source which re-enforced formalism was Hans Kelsen and his Pure Theory of Law. Kelsen relied on Herman Cohen who stated that "Only the formal is objective; the more formal a methodology, the more objective it can become. And the more objectively a problem is formulated in all the depths of the issue, the more formally it must be grounded."[13] The views of Hans Kelsen attracted attention of some Yugoslav Marxist scholars who tried to connect his views with Socialist ideology. [14]

1.2. Emergence of Legal Formalism in Yugoslavia

Legal systems of ex-Yugoslav countries entered into civil law sphere during the 19th and first decades of the 20th century. The Slovenian lands were part of the Habsburg Empire since the 13th -14th century and Croatia since the 16th century. Serbia and Montenegro began Europeanization of their legal system during the 19th century. Bosnia and Herzegovina experienced legal transplants from Austria-Hungary during 1878-1918. Finally, Macedonia and Kosovo were incorporated into the Serbian legal system after the Balkan wars of 1912-1913.

The first Yugoslav state was established on 1 December 1918 under the name Kingdom of Serbs, Croats and Slovenes (*Kraljevina Srba, Hrvata i Slovenaca*) which was renamed in 1929 into the Kingdom of Yugoslavia (*Kraljevina Jugoslavija*). It included into its structure lands which had a different historical destiny. A consequence of this was a legal pluralism in private law and the unification of law in public law sphere.[15] Legal pluralism was manifested in the existence of six legal regions. These were: (1) Croatia-Slavonia, where Croatian autonomous law, Hungarian and Austrian laws were applied; Dalmatia and Slovenia, where Austrian law, including Austrian Civil Code, was applied; Vojvodina and Medjumurje, where Hungarian law was applied; Serbia, Macedonia, Kosovo and Montenegro, where Serbian and Montenergin Civil Codes were respectively applied, and Bosnia and Herzegovina, where Ottoman-Islamic law and Austrian laws were applied.

In public law, the Yugoslav kingdom started to unify the law. This project included the adoption of constitution, rules on organization of state organs and the like. Special attention was given to regulation of courts, substantive and procedural laws. Among others, the Criminal Code (*Krivični zakonik Kraljevine SHS*) was adopted on 27 January 1929, followed by the Code on Criminal Procedure (*Zakonik o sudskom postupku u krivičnim stvarima*) adopted on 16 February 1929, as well as the Code of Civil Procedure (*Zakonik o sudskom postupku u građanskim stvarima*) adopted 13 July the same year. All these codes were a result of the centralization and unification policy of King Alexander Karađorđević. They had origins in European civil law tradition. The criminal law was under the influence of German scholarship, civil law was under the influence of Austrian legal thought, while administrative

10 Prof. Dr. Hans-Peter Haferkamp, Begriffsjurisprudenz / Jurisprudence of Concepts, Enzyklopaedie zur Rechtsphilosophie, http://www.enzyklopaedie-rechtsphilosophie.net/inhaltsverzeichnis/19-beitraege/105-jurisprudence-of-concepts. Accessed: 2 December 2018.

11 Ibid.

12 Inga S. Markovits, "Civil Law in East Germany - Its Development and Relation to Soviet Legal History and Ideology", 78 *Yale L.J.* (1968) p.2. Available at: http://digitalcommons.law.yale.edu/ylj/vol78/iss1/1

13 Hermann Cohen, Logic of Pure Cognition [*Logik der reinen Erkenntnis*], p.587 cited by Hans Kelsen, Legal Formalism and The Pure Theory of Law in Weimar: A Jurisprudence of Crisis, Arthur J. Jacobson and Bernhard Schlink (eds.), University Of California Press, Berkeley:2000, p.77. https://publishing.cdlib.org/ucpressebooks/view?docId=kt209nc4v2&chunk.id=ch01&toc.depth=1&toc.id=ch01&brand=ucpress. Accessed: 2 December 2018.

14 For instance see: Zdrvako Grebo, *Marx i Kelsen : kritička analiza Kelsenove kritike naučne osnovanosti Marxovog shvatanja društva, države i prava* (Sarajevo: Svjetlost: Novinsko-izdavačka organizacija Službeni list SRBiH : Republički zavod za javnu upravu, 1979).

15 Avdo Sućeska, *Istorija države i prava naroda SFRJ* (Sarajevo: Svjetlost 1988) p. 234-236.

law was predominantly under the influence of Austrian and French legal scholarship.[16] For instance, the Yugoslav Administrative Law was modelled after the Austrian Law on Administrative Procedure (*Verwaltungsverfahrensgesetz*) of 1925.

Thus, the Yugoslav Criminal Code was designed following an example of Serbian Criminal Code, and the latter was based on Criminal Code of Prussia of 14 April 1851.[17] The Code of Civil Procedure was based on Austrian Code of Procedure of 1 August 1895 which already was in force in Slovenia and Dalmatia since they were part of the Austrian empire.[18]

Once the Yugoslav lands entered a civil law legal culture, they adopted legal formalism as its constituent part especially related to the role of judges. This is best explained by John Henry Merryman in his book *The Civil Law Tradition*:[19]

> The picture of the judicial process that emerges is one of the fairly routine activity. The judge becomes a kind of expert clerk. He is presented with a fact situation to which a ready legislative response will be readily found in all except the extra ordinary case. His function is merely to find the right legislative provision, couple it with the fact situation, and bless the solution that is more or less automatically produced from the union. The whole process of judicial decision is made to fit into the formal syllogism of scholastic logic. The major premise is in the statute, the facts of the case furnish the minor premise, and the conclusion inevitably follows. In the uncommon case in which some more sophisticated intellectual work is demanded of the judge, he is expected to follow carefully drawn directions about the limits of interpretation.

The net image is of the judge as an operator of a machine designed and built by legislators. His function is a mechanical one.

16 This is visible from references cited in two textbooks of administrative law in the Kingdom of Yugoslavia: Laza M. Kostić, *Administrativno pravo Kraljevine Jugoslavije*, Vol. I, (Beograd: Knjižarnica Gece Kona, 1933), and Ivo Krbek, *Upravno pravo* (Zagreb: Jugoslovenska štampa 1929). References cited include French, German and Austrian authors such as Ancoc, Otto Mayer and Walter Jellinek.

17 Toma Živanović, *Osnovi krivičnog prava – opšti deo* (Beograd: Izdavačka knjižarnica Gece Kona, 1922), p. 43.

18 Dragoljub Arandelović, *Građansko procesno pravo*, Vol. I (Beograd, 1932), p. 4.

19 John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (Stanford, Carlifornia: Stanford University Press: 1985), p. 36

1.3. Formalism as a part of Socialist Legal Culture

After the Second World War, a Socialist regime was established in Yugoslavia. It marked the transition from a civil law tradition into a socialist legal culture. "Legal culture" is a term which is, among others, used in comparative law as a synonym for legal families or grouping of legal systems which possesses the same legal style. According to Konrad Zweigert and Hein Kotz, there are several factors which are crucial for the style of the legal system or legal family: (1) its historical background and development, (2) its predominant mode of thought, (3) distinctive institutions and (4) acknowledged legal sources and ideology.[20]

The Socialist legal culture developed from the Bolshevik experience in Russia. In the first phase of 1920's Bolshevik legal scholars denied the existence of Socialist law. They claimed that the state will "wither away".[21] Since 1936 Soviet scholars led by Andrei Vyshinski recognized the existence of Socialist law and the Socialist state. Anti-formalism of the first phase was replaced by formalism of the second one. Legal formalism became predominant and a characteristic mode of legal thought. It was realized that the law can fulfil the task of preserving the Socialist political order. The idea of vanishing law in Socialism was abandoned. As it has been observed: "Stalinist theory of law developed clear, textualist, positivist, and formalist features".[22] This developed shows a link between legal formalism and authoritarianism. Authoritarian regimes wished to establish a total control over society. According to socialist legal theory, law is emanation of the will of the ruling class which is formulated in the form of law passed by legislative branch controlled by the Party. Judges are asked to apply law formulated in this way. Similar development could be traced in Nazi Germany where "horrors of Nazi regime has been associated with legal positivism."[23]

As for sources of law, Socialist scholars limited the concept of law to "written law". Socialist legality was introduced, customary law proclaimed as conservative and judge-made law as an anachronism.[24] The role of courts was not to create, but to interpret and apply the law. From

20 Konrad Zweigert and Hein Kotz, *Introduction to Comparative Law*, Vol. I., (Oxford: Clarendon Press, 1987) p. 69.

21 Zdenek Kuhn, op.cit., p.89.

22 *Ibid.* p.94.

23 *Ibid.* p.81.

24 Ajani, Gianmaria, "Formalism and Anti-formalism under Socialist Law: the Case of General Clauses within the Codification of Civil Law". *Global Jurist Advances*. 2(2), p. 1.

an ideological point of view, the main principle was that the law should be a politically and socially functional mechanism. As Zweigert and Kotz observed, "Law is determined exclusively by its political function for it is not only determined by the social and economic relations at the time but it also has an effect back on the social structure so as to advance and propel it along the line of development laid down for it." They further stated that

> "Marxism rejects the view that law may aim at the realisation of other independent values, be they established by a God-given law of nature, by an idea of justice, or by the particular legal tenets of a given culture; in particular Marxism opposes the view that the law may set limits to political action by guaranteeing to the individual citizen certain spheres of freedom immune from control by the state, even if such control seemed justified by the needs and demands of politics and society."[25]

A.G. Chloros, comparing common law, civil law and socialist law observed that in Socialist legal culture:

> "The machinery of justice, designed to give effect to the law, differs fundamentally from that of the civil law systems. For this machinery is not considered, though, it often acts as if it had a different function from that of executive. It rather looks as a means of giving effect to the policies of the executive."[26]

In this culture, judges are agents of mechanical application of legal text to facts. Legal syllogism is the main method of this process. Judges especially employed procedural formalism that is deciding cases on formal ground rather than merits.[27]

Soviet-style Socialist culture was brought into Yugoslavia. In the first post-war years, it had an anti-formalist orientation expressed in the existence of *narodni sudovi* (people's courts). After the stabilization of the Socialist regime, it became formalistic. This development is visible from the history of a theory of law and state in Socialist Yugoslavia. According to Ivan Padjen, after 1948 (Tito-Stalin Split) legal thought was developed along two lines: Marxist inspired and Hans Kelsen's theory.[28] In the first line, we may include a view that it is possible to develop Marxist theory of law, as well an opposite view that state and law are a product of bourgeoisie society. In the second line, we may find a view which aimed to integrate Western theories in Marxist-based theories of law.

The most influential Yugoslav theoretician of law during the 1950-1970 period was Radomir Lukić whose views are similar to Soviet theory of law. For instance, his definition of law was "totality of general norms sanctioned by state which preserve way of production in the interest of ruling class".[29] In 1988, the general assessment of Yugoslav legal theory by Ivan Padjen was pessimistic: "Yugoslav theory of law does not possess any characteristic which will qualify it as a major stream of contemporary legal thought such as phenomenological, Marxist-Leninist or critical legal study."[30]

Legal formalism was not shared only by practitioners but also by academicians. Law professors were not eager to deal with social context and to clash with authorities. They employed a method which Rafal Manko described as "escapism" by which they left social context of law and began to deal with logic and language.[31] Legal scholarship in Socialist Yugoslavia was rigid, authoritarian and formalistic. In general it was below the level of legal thought developed during the inter-war period in Yugoslavia. The connections and exchange with Western Europe deterioated, some academicians were excluded from universities and others changed their views due to ideological reasons. For example, the concept of *Rechtsstaat* (*pravna država*), which was praised during the Yugoslav Monarchy was qualified as an "anachronism" by some authors in the Socialist era.[32]

No analytical study of case law was done. Within this framework, legal formalism survived the end of Socialism and was transmitted to the next generation. This phenomenon can be explained by the Path dependence theory. This theory was developed by Brian Arthur (1988, 1989) and Paul David (1985), to explain the path of technological change. Douglas C. North used it to explain institutional change. The main thesis of this theory is that

25 Konrad Zweigert and Hein Kotz, Vol. I, p. 302.
26 A.G. Chloros, "Common Law, Civil Law and Socialist Law: Three Leading Systems of the World, Three Kinds of Legal Thought" in *Comparative Legal Cultures*, ed. Csaba Varga, (Dartmouth Publishing Company Ltd. 1992) p. 92.
27 Mańko, Rafał, "Survival of the Socialist Legal Tradition? A Polish Perspective", *Comparative Law Review* 4.2 (2013), p.6. Available at SSRN: https://ssrn.com/abstract=2332219. Accessed 2 December 2018.
28 Ivan Padjen. "Teorija prava u socijalističkoj Jugoslaviji." *Hrvatska i komparativna javna uprava*, 13, br. 4 (2013)., p. 1204, https://hrcak.srce.hr/130529. Accessed 2 December 2018.
29 Ibid.p. 1206
30 Ibid. p. 1203
31 Mańko, Rafał, op.cit, p. 10.
32 For instance: Ivo Krbek, *Osnovi upravnog prava FNRJ* (Zagreb: Izdavački zavod JAZU, 1959), p. 115-6.

"history matters". Applied to history of law and institutions, path dependence theory explains that institutions do not change as much as might be expected. Changes in institutions are subject to considerable inertia.[33] The basic characteristic of institutions is their persistence, due to path dependence and transaction costs. According to North, institutions change when there are gains of doing so, and they persist when the cost of change is higher. Beliefs do not change quickly.

1.4. Survival of Socialist Legal Culture

The fall of the Iron Curtain in 1990s prompted some respected comparatists to proclaim the Socialist legal culture as "dead and buried". However, authors like Alan Uzelac and Rafael Manko have shown that a "third legal tradition" survived. According to Manko, the continuation of a Socialist legal culture in former Socialist countries could be seen in three various aspects: institutional, methodological and normatively.[34]

Institutional continuity means that major legal institutions of the Socialist states continue to exist in post-socialist times, such as in the courts, the prosecution services, bar associations, and the like. In most of the post-Socialist countries, councils of judiciary and prosecution (*sudska i tužilačka vijeća*) as judicial self-government bodies, continued to reproduce the same types of judges and prosecutors like in the previous regime. This continuity can be explained by views of Douglass C. North who defines institutions as "humanly devised constraints that structure political, economic and social interaction. They consist of both informal constraints (sanctions, taboos, customs, tradition, and codes of conduct) and formal rules (constitutions, laws, property rights).[35] The function of institutions is to provide stability and predictability, and because of that they persist.

Methodological continuity means that legal experts continue to follow same concept of law limited to "written law", to prefer linguistic interpretation, to follow adjudication on formal grounds rather than entering into merits and understanding that the role of judges is to "apply" law. It also includes the use of old textbooks in legal education. In most of the cases, textbooks from Socialist time are still used, just adding separate chapters on changes of law in post-socialist times. From some textbooks on positive law used in Bosnia and Herzegovina, we may see that the theoretical part of them still belongs to socialist ideology with quotations from Marxist authors, followed by mere exposition of organizational changes from post-socialist times. These textbooks in their theoretical part do not follow contemporary development in European legal thought. For example, the textbook *Građansko procesno pravo* (Civil Procedural Law) used at the Law Faculty University of Sarajevo, published in 2000, includes a theoretical part which has not been changed for several decades. In the chapter which deals with relationship between form and formalism, the only author who was referred to was nineteen-century German scholar Rudolf von Jhering (1818 – 1892).[36]

Normative continuity means that identities of states in post-Socialist times are built upon the idea of continued existence of the state, legal system, substantive and procedural laws. Critical studies of the socialist past are rarely done, including legal history textbooks, some of which still follow Marxist-Leninist teaching on historical materialism.

Alan Uzelac has identified main features of the survived socialist legal tradition in the former Yugoslavia.[37] They are:

1) The instrumentalist approach to law. This approach focuses on the legal process as a tool for the protection of the interest of political elites. Uzelac says:[38]

> "Legal professionals, especially judges and law professors, had to be skilful technicians who would always find an adequate legal form and justification for the desired (and already known) outcome. It should come as no surprise, therefore, that those who were the most successful under that definition could be readily adopted by the new political elites when they came to power after the fall of Communism."

33 "Path dependency", https://www.britannica.com/topic/path-dependence. Accessed 10 February 2019.
34 Rafael Manko, op.cit., p. 10.
35 Douglass C. North, *Institutions*, Journal of Economic Perspectives, Vol. 5, No.1, Winter, 1991, p. 97.
36 Dr.Branko Čalija and Dr.Sanjin Omanović, *Građansko procesno pravo* (Sarajevo: Pravni fakultet: 2000), p. 19.
37 Uzelac, Alan, "Survival of the Third Legal Tradition?", *Supreme Court Law Review* (2010), 49 S.C.L.R. (2d), p. 377-396. Available at SSRN: https://ssrn.com/abstract=2498760.
38 Ibid. p. 382.

2) Fear of decision-making, according to which decision-makers try to evade responsibility for final judgements:[39]

> "Therefore, most of the socialist judiciary has developed, over time, numerous methods aimed at evading responsibility for decision-making. Unlike the heroic figure of the common law judge, who strives to contribute to legal history through prudent, brave and well-reasoned judgments, socialist judges, in the fear of eventual retribution, always desired to remain as anonymous as possible. In this respect, they were akin to their counterparts from civil law traditions. This went even further, however: a safer alternative to an anonymous decision was no decision at all, and, hence, no settlement of the issue for which to bear responsibility, either one way or the other."

The most important method used in this strategy was legal formalism i.e. deciding on formal grounds without "entering into their merits". In addition, Uzelac adds that "various formal objections and trivial procedural issues were always welcome as a means to dismiss a case on formal grounds, or as a trigger to transfer the case to some other authority (or to a less fortunate colleague)."[40]

3) Low but comfortable social status of judiciary. In Socialist countries judiciary was frequently seen as a clerical position. Judges were elected according to the principle of "moral-political suitability" (*moralno-politička podobnost*). They did not belong to the highest echelon of political elites but their life was comfortable if they follow the Party line. Judges in Nazi Germany behaved in a similar fashion as shown by Hanns Peter Graver who stated that loyal German judges volunterally transformed the liberal German law into a means of oppression and that this "was achieved without substantially interfering with the operation of the courts and without applying disciplinary measures on the judges."[41] These survived elements of the Socialist legal culture blended with post-Socialist ideology and interventions into legal system.

Historians used to say that law lasts longer than state. For instance, it has been proven that Ottoman Islamic law survived the end of Ottoman rule in Bosnia and Herzegovina in 1878, after the Austro-Hungarian occupation and in 1908 after the Annexation. It continued to exist in Bosnia and Herzegovina up to 1946, when the socialist government abolished the Shariah courts.[42]

Similarly, legal formalism survived major political shifts across the territory of ex-Yugoslavia. This phenomenon can be explained as a consequence of three factors:

1. There was no radical change of legal culture. Elements of the civil law culture firmly stabilized in Yugoslav lands by the first half of the twentieth century were incorporated into the socialist legal culture. The latter survived the end of socialism in the 1990s as a part of the transitional legal culture in ex-Yugoslavia. If one applies the classification of Ugo Mattei with regard to legal culture in ex-Yugoslav states, it could be said that political legal culture has not been transformed into professional one.[43] This culture is based on two big ideological separations: (a) of law and politics and (b) of law and religion. While the latter was done, separation of law from politics remains the biggest challenge for law reform in ex-Yugoslavia.

2. Continuity of the legal education. The main law schools in former Yugoslavia established before World War II continued to function after the establishment of the Socialist Yugoslavia. The curriculum of these schools was modified, with inclusion of elements of Marxist ideology. However, legal sciences dealing with procedural laws were spared from this modification. In the transitional period after the 1990s, there were no radical changes in the way how procedural laws were taught. Professors of law were educated in a socialist legal culture and continued teaching the same subjects, curricula

39 Ibid. p. 383.
40 Ibid. p. 383
41 Hans Petter Graver, "Why Adolf Hitler Spared the Judges: Judicial Opposition Against the Nazi State", *German Law Journal*, Vol.1, No.04, p. 845.

42 Fikret Karčić, " Survival of the Ottoman-Islamic Laws in Post-Ottoman Times In Bosnia and Herzegovina", in *Konflikt und Koexistenz Die Rechtordnungen Sudosteuropas in 19. Und 20. Jahrhundert*, Band II, Serbien, Bosnien-Herzegowina, Albanien, Hereausgegeben von Thomas Simon unter Mitarbeit von Gerd Bender und Jani Kirov (Frankfurt am Main: Vittorio Klostermann, 2017), pp.43-69.

43 Ugo Mattei, "Three Patterns of Law: Taxonomy and the Change in World's Legal System," *The American Journal of Comparative Law*, Vol. 45, No.1 (Winter 1997), p. 10-11.

and textbooks after the collapse of socialist Yugoslavia. It was only a decade after the war in Bosnia and Herzegovina in 1995, that reforms aimed at changing curricula were undertaken. Courses taught at law faculties, including sociology, theory of state and law, and history were heavily influenced by Marxist ideology. The de-ideologization began in the 2000s. Furthermore, the structure of academia ensures that professors choosing their assistants and future successors replicate the socialist culture in a post-socialist period. Lack of knowledge of foreign languages among a number of law professors prevents the influence of new ideas through new literature. This language barrier perpetuates the inherited socialist legal culture.

3. Self-reproduction of legal profession. As mentioned previously in this paper, during the transitional period in ex-Yugoslavia, the councils of judiciary and prosecution (*sudska i tužilačka vijeća*) continued to reproduce the same types of legal actors as during previous years. A clear illustration of this practice can be found in the biographies of the members of the Higher Judicial and Prosecution Council (VSTV) in Bosnia and Herzegovina. By a short analysis of their biographies we can notice that all of them gained their formal education in ex-Yugoslavia, passing the Bar exam, and some of them completing their post-graduate studies. Only two out of 15 completed certificate-level education in Western Europe.[44] As in the case of perpetuation of legal culture at universities, VSTV is also faced with the same challenges. Furthermore, many have pointed to political influences in the election to the VSTV. A corresponding issue is the lack of accountability of VSTV members who have the deciding voice in appointing prosecutors and judges.

44 Članovi VSTV-a BiH, https://vsts.pravosudje.ba/vstv/faces/kategorije.jsp?ins=141&modul=1172&kat=1174&kolona=1257. Accessed 23 December 2019.

2. MAIN FEATURES OF CONTEMPORARY APPROACHES TO THE INTERPREATION OF LAWS

2.1. Transitional legal culture

Contemporary approaches to the interpretation of laws represent a manifestation of the transition policy which blended old and new. According to Uzelac, there are several "mutually intertwined elements that create a specific procedural blend, especially in the context of civil procedure":[45]

(1) deconcentrated proceedings, and a lack of trial in the proper sense;

(2) orality as a pure formality;

(3) excessive formalism;

(4) the pursuit of material truth;

(5) lack of planning and procedural discipline;

(6) appellate control as an impersonal and anonymous process;

(7) multiplicity of legal remedies that delay enforceability;

(8) endless cycles of remittals; and

(9) disproportionate efforts for reaching ephemeral and socially insignificant results.

Two of these elements are related to formalism: orality as a pure formality and excessive formalism. In the practice of courts in former Yugoslavia, Uzelac explained, orality is practiced as a mere exchange of documents and evidentiary proposals. Sometimes even written documents are not exchanged, but their electronic form copied by an USB stick from one party to the judge's secretary. Oral hearings are very short followed by adjournments for several months. Excessive formalism is manifested in the practice when courts are not summoned in the proscribed way, or if a party do not appear in court. Both could be enough causes for adjournment.

Frane Staničić dealt with the phenomenon of legal formalism and public procurement procedures in contemporary Croatia.[46] He has found that legal formalism is evidently present in the legal system of Croatia: in all branches of judiciary and in public administration. These bodies very often employ very restrictive, mainly grammatical, interpretation of norms.

This practice came to the attention of the Constitutional Court of the Republic of Croatia, which in one judgement observed:

> "...This case is an obvious example of constitutionally unacceptable excessive formalism, which, generally speaking is still burden on the activities of relevant bodies of government public administration, but also jurisdiction of domestic courts which determine rights and duties of parties in legal procedures. The Constitutional Court for years constantly repeats that the relevant bodies, including courts, are obliged to interpret and apply laws, always and without exception, in the light of circumstances of each case."[47]

Staničić has cited a number of cases of legal formalism in the practice of governmental bodies and courts in Croatia. Some of them will be mentioned here.

In one case before the Constitutional Court, there was an issue whether a party is obliged to pay a tax on the sale of immovable property which is meant to be a religious object. According to Article 17 Section 5 of the Law on Legal Status of Religious Communities of Croatia (*Zakon o pravnom položaju vjerskih zajednica*), religious communities

45 Uzelac, op.cit. p. 390.

46 Frane Staničić, „Pretjerani pravni formalizam i postupci javne nabavke", *Zbornik Pravnog fakulteta u Zagrebu*, vol. 67, no. 3-4, 2017, pp. 531-564.

47 Ibid, p.545.

are exempted from that tax. However, administrative bodies and Administrative Courts were of the opinion that exemption is given only to "objects which already *have* a characteristic of the place of worship" not those which *are going to become* places of worship. The Constitutional Court dismissed this type of reasoning, saying that in such a case no religious community would ever acquire property which is already not a place of worship.[48]

The State Commission for the Control of Public Procurement Procedures in Croatia (*Državna komisija za kontrolu postupaka javne nabave*) also followed a legal formalist approach in a number of cases. In one case this Commission accepted the complaint of a party claiming that the contract was awarded to a party which in its tender documents included membership in *Ingenieurkammer- Bau Nordrhein- Westfalen*, a German language name, while rules of procedure say that tender documentation should be in Croatian language. The complainant also objected to the use of English expressions such as *know-how*, *team spirit*, *basic* and *premium*. The Commission accepted this line of reasoning.[49]

Another case is related to the submission of a complaint. According to rules, the date of a complaint submitted through post-office in the form of a registered letter (weight up to 2 kg) is the date of reception of the letter in the post-office. However, a party sent a complaint through the post-office weighing 2 kg and 324 grams. Due to this extra weight, the complaint was not considered as a registered letter but rather as a parcel. The rule for submission of parcels is that they are submitted when handed over to recipient. Consequently, the complaint was submitted late and thus rejected.[50]

A more recent example of excessive formalism in Bosnia and Herzegovina is the case of Esed Radeljaš, a former Cantonal minister from Goražde and delegate in the Sarajevo Canton Assembly. He was sentenced to one year imprisonment for fraud, forgery of documents, and verifying untruthful content of documents. In 2005, the Municipal Court in Sarajevo issued a subpoena for him to serve the sentence. Judicial police arriving at his home address realized that the name written in the subpoena was Esad while the culprits name is Esed and thus, due to this spelling error, were not able to take him into custody. Sarajevo Municipal Court tried to correct this error but it prolonged and the sentence fell under the statute of limitations. In this way, Esed Radeljaš dodged serving his sentence.[51]

One of the most striking cases from Bosnia and Herzegovina is related to so-called "missing evidence". Namely, Bosnian courts do not accept copies of documents as evidence. Due to that policy several defenders were acquitted on the basis of loss of original documents in the correspondence between courts and prosecutors' offices. One of these cases is the case of Dragan Čović and others.[52] Dragan Čović, the then member of the Presidency of Bosnia and Herzegovina was accused of abuse of power, organized crime, taking and giving bribes and tax evasion. The trial started in March 2005 before the Court of Bosnia and Herzegovina. In November 2006, Dragan Čović was sentenced to five years in prison pending appeal.

in June 2008, following the appeal, the Court of Bosnia and Herzegovina decided, that it had no jurisdiction in this case and turned it to the Sarajevo Cantonal Prosecutor's office. Transfer of the case took two and a half years. On the way between the Court of Bosnia and Herzegovina, B&H Prosecutor's Office and Cantonal Prosecutor's Office, the documents were transferred nine times between March 2009 and February 2011. During this process, some important documents were lost or intentionally misplaced and later on replaced by copies. This is highly suspect given the short distance between the courts in question in the capital city. Since the court does not accept copies but original documents, Dragan Čović and others were acquitted.

Lack of original documents was also the main reason for acquittal of two more high-ranking officials – Edhem Bičakčić and Nedžad Branković - charged with the abuse of power.[53] Both Bičakčić and Branković were former prime ministers of the Federation of Bosnia and Herzegovina. At issue was an apartment in central Sarajevo that was bought for Branković by the Government of Federation of Bosnia and Herzegovina and the government-controlled company Energoinvest. The trial of Bičakčić and Branković

48 Ibid, p.543-544, n.44.
49 Ibid, p.554.
50 Ibid, p. 550.

51 "Ko je Esad Radeljaš koji se ustvari zvao Esed?", N1 BiH, 09.11.2016., http://ba.n1info.com/Vijesti/a121562/Ko-je-Esad-Radeljas-koji-se-ustvari-zvao-Esed.html. Accessed 16 December 2018.
52 "Evidence Missing from Čović and Lijanović File", *Center for Investigative Reporting*, 16 March 2012, https://www.cin.ba/en/nestali-dokazi-iz-predmeta-covic-lijanovici/. Accessed 13 January 2019.
53 Ibid.

began in 2009. The former politicians were acquitted in 2010. Following the verdict, the presiding judge stated that the prosecution presented an unstamped decision of the Government of Federation of Bosnia and Herzegovina, and that this unstamped decision was inadmissible as evidence in court.[54]

What is common in the Čović, Bičakčić and Branković cases is that these involved former high-ranking politicians who are still politically active. Whether the frequency of losing official documents is as common with non-political individuals on trial has yet to be researched in detail. What was described as inadmissible evidence in the 2009-2010 trial of Branković can be classified as a typical example of legal formalism.

A Sarajevo-based lawyer provided another example for excessive formalism. Namely, according to criminal procedure in Bosnia and Herzegovina, the preliminary hearing judge is authorized to make the decision on confirming the indictment. However, in practice, according to the attorney Mirsad Crnovršanin, some judges at preliminary hearings confirm indictments ranging from 500 to 1000 pages within a day.[55] This is also highly suspect in view of the workload of courts. This leads to a new trend that observers have pointed out that confirmed indictments do not correspond to convictions. While this trend warrants detailed research, it does point out to the necessity of fulfilling production/work quotas of prosecutors and judges. This case illustrates that even the best practices adopted from Western legal cultures are turning into their opposites, since adoption of foreign legal institutes is not followed by adoption of the same culture.

Dr. Milan Blagojević, a judge at the District Court in Banja Luka, wrote a short essay on legal formalism in a Sarajevo-based daily *Oslobođenje*.[56] He writes that in December 2017 and January 2018, he submitted an application to the Constitution Court of Bosnia and Herzegovina (No.U1/18), questioning the constitutionality of the Article 433 Section 1 of the Civil Procedure Code of *Republika Srpska* (*Zakon o parničnom postupku Republike Srpske*). According to that Article, in cases of little value (under 5000 BAM) parties are not allowed to question established facts while in cases worth above 5000 BAM it is permissible. As an acting judge of District Court in Banja Luka, he was of the opinion that this provision of Civil Procedure Code is discriminatory and constitutes a breach of the right to effective remedy protected by Article 13 of the European Convention. However, the Constitutional Court rejected his application and did not accept the claim about the breach of the right to effective remedy since reference to Article 13 was not mentioned in the application.

A huge legal chaos appeared with the European Court of Human Rights (ECHR) ruling in the case of *Maktouf and Damjanović vs. Bosnia and Herzegovina*. This ruling was in relation to the non-retroactive application of criminal law for war crimes cases. In 2003, the new International-backed Criminal Code was adopted. In a nutshell, the new Criminal Code contained certain war-related crimes which were not present in the Yugoslav Criminal Code. The ECHR ruled that the retroactive application of the new Criminal Code was a violation of Article 7 of the European Convention of Human Rights.

The Bosnian authorities misinterpreted the ruling and temporarily released convicted war criminals including those sentenced for the crime of genocide, and also reduced their sentences. This was followed with appeals to the Bosnian and Herzegovinian Constitutional Court by convicted war criminals whose appeals were accepted, and their sentences were found to be "violation of the principle of legality".

As a result, a confusing and illogical legal practice had been established. The Yugoslav Criminal Code started to be applied to the crimes of genocide and war crimes, while the 2003 Criminal Code was applied to crime against humanity. The Yugoslav Criminal Code had lighter sentences (excluding the death sentence), which meant that genocide convictions received lighter sentences than those convicted for crimes against humanity.[57]

Some convicted war criminals, while on temporary release, used the opportunity to flee the country. The most notorious case is that of General Novak Đukić, sentenced by the Court of Bosnia and Herzegovina, for the Kapija Massacre in Tuzla in 1995. He fled to Serbia and has ever

54 "Kantonalni sud oslobodio Brankovića i Bičakčića," *Klix*, 13 October 2010, https://www.klix.ba/vijesti/crna-hronika/kantonalni-sud-oslobodio-brankovica-i-bicakcica/101013013. Accessed 10 March 2019.

55 Zinaida Dželilović and Adnan Demić, "Optužnicu od 1000 stranca potvrde za dan", *Oslobođenje*, 10 December 2018, p. 2-3.

56 Dr.Milan Blagojević, "Formalizam u pravosuđu", *Oslobođenje*, 21. Decembar 2018, p.12.

57 Maja Kapetanovic, "The Impact of the ECtHR Ruling in the Case of Maktouf and Damjanovic v Bosnia and Herzegovina: Transitional Justice in B-H", *Lancaster University Law School*, 5 March 2015, https://lancslaw.wordpress.com/2015/03/05/transitional-justice-in-b-h/. See also: Valerie Hopkins, "Justice Undone", *Foreign Policy*, 27 November 2013, https://foreignpolicy.com/2013/11/27/justice-undone/.Accessed 10 March 2019.

since evaded justice. Since there is no mutual extradition agreement between Serbia and Bosnia and Herzegovina, Đukić has been using legal formalities in order to evade serving his sentence. The Higher Court in Belgrade requested case materials from the Court of Bosnia and Herzegovina in order for him to continue serving his sentence in Serbia. The court hearing has for several years been going back and forth, with the court in Belgrade arguing that it received "incomplete" documentation on one hand, and the accused Đukić on other occasions had to undergo "medical treatment". The case is still ongoing and Đukić is still a free man.[58]

These were examples of the use of grammatical and formal logical interpretation as the main methods of interpretation of rules. Other methods, external to the norm, such as historical, teleological, were not given a proper attention.

2.2. Other Examples of Legal Formalism

Legal formalism is not only limited to judicial institutions and public administration but is also found in other institutions such as those of higher learning. Several examples will be provided. Formalism in education is evident in:

(a) course offerings and their innovation,

(b) recognition of degrees obtained outside Bosnia and Herzegovina,

(c) local government oversight of public universities.

These forms of formalism will be elaborated through the following examples.

At public universities in Bosnia, syllabi for courses taught need to be approved by the senate of a given university. While individual lecturers are free to introduce new courses and introduce new teaching units, it is not sufficient for relevant departments and faculties to approve the new courses. These need the approval of other faculties before reaching the university senate for a final approval. The senate comprises of representatives from all faculties, institutes, libraries and academies of the university. Approval for courses is thus required from representatives of all faculties, most of whom are not specialized in the fields of study being discussed for approval.

The challenge of this form of formalism is not only excessive bureaucratization but also time-consuming procedures which may prevent innovation in teaching of rapidly developing new areas of interest. For example, teaching about ISIS and its impact on Middle East security may not be formally taught in 2014 if a given course syllabus was approved in 2012. The procedure for innovating courses and introducing new ones are time-consuming, and the procedure for gaining approval may hamper the ability of lecturers to teach and discuss the most pressing issues.

Similarly, the migrant crisis that peaked in 2015, may not be formally taught if it was not predicted and included in course syllabi when those courses were approved. If a lecturer decides to introduce current pressing issues such as the impact of migrant crisis on Southeast Europe, the procedure for innovating a course may take up to one year. By this time, the crisis may cease to be as pressing as it was when the lecturer decided to discuss newly emerging issues. This does not mean that there is no flexibility at institutions of higher learning. Study programs are scheduled for revision and innovation three years after the introduction of a new program. The challenge of formalism manifests itself in the form of procedures for new courses, but also constrains on lecturers who are limited in the scope of what they can innovate.[59]

In addition to examples noted above, a major form of unnecessary formalism is the requirement that Bosnian citizens who are graduates of universities outside Bosnia and Herzegovina, need to pass through a lengthy, time-consuming and costly process of having their degrees officially translated and recognized by a university. This applies to Bosnian citizens who seek employment in the public sector. The process of recognition of foreign degrees applies to degrees obtained from all universities outside Bosnia and Herzegovina. The procedure does not differentiate between reputed and best-ranked universities from some that may be of questionable quality. This means that public sector may not benefit from highly qualified Bosnian graduates of reputed international universities.

58 Emina Dizdarević, "Serbia Delays Djukic Trial in Row Over Documents", *Detektor.ba*, 14 June 2016, http://detektor.ba/en/serbia-delays-djukic-trial-in-row-over-documents/. See also: Filip Rudic, "Serb General's Tuzla Massacre Case Delayed Again", *Balkan Insight*, 8 September 2017, https://balkaninsight.com/2017/09/08/serb-general-s-trial-for-tuzla-massacre-delayed-again-09-08-2017/. Accessed 10 March 2019.

59 Interviews with lecturers from public universities in Bosnia. February/March 2019.

Those who opt to have their degrees and diplomas recognized, are subject to a more expensive process for the purpose of working in public administration. For example, a graduate of Georgetown University had to get his degree translated into Bosnian language and recognized by a university in Bosnia for the purpose of being able to apply for a job at a public institution. Furthermore, in this case, the job position required a certificate confirming that the individual is fluent in English language. The fact that education at Georgetown University was in English was not deemed sufficient and the job applicant needed to be tested at an English language center in Sarajevo. It was only with this center's ceritificate of knowledge of English language that the individual could apply for employment. The formalism in this case went both ways: translating the graduation documents from English to Bosnian and, at the same time, taking a test to prove that the individual indeed is fluent in English language.[60]

Local government oversight of universities represents another instance of formalism. Law on Higher Education of the Canton of Sarajevo, adopted in August 2017, introduced several forms of oversight. Article 63 (2) provides that results of written and/or verbal midterms and final exams must be announced five work days from the day of the exam. If a professor fails to meet this deadline, Article 172 (1) (k) provides for a fine ranging from 2500 Euros to 7500 Euros. The fine will be billed to the faculty at which the professor works. Article 171 of this Law elaborates how the oversight will be conducted. Article 172 and 173 lists the fines that the universities, faculties and individual professors will be subject to for failing to comply with procedures defined by the law. These fines range from 2500 Euros to 5000 Euros. For instance, Article 173 1 (i) states that these fines apply to those faculties and individuals whose course schedules are not available on the faculty's official website.[61] Following the adoption of this law, some academics have argued that this excessive oversights limited academic freedoms and the university's autonomy. The oversight is mainly conducted by cantonal employees with BA (and in some cases MA) degrees. The problem, from the perspective of academic staff, is that recent graduates are in a position to conduct oversight of professors, deans, and university management. This translates into bureaucratization of academic life and less time for academic staff to conduct serious scientific research.

The previously mentioned Sarajevo Canton's recent Law on Education from 2017 establishes yet another formalism which will prove a challenge to meet. The Law's Article 57 and 59 introduces a new requirement: student practice in their field of study. Organizing practical work for students is required of each faculty/institute/academy. At least 30 ECTS of study program should be practical work.[62] There are justifiable reasons for practical work to be requirement of faculties of applied sciences. However, this Law treats all faculties equally and imposes the same requirements of all. Some unanswered questions are: How are students of philosophy to conduct practical work? How will faculties with thousands of students organize practical work? Faced with shortages of class space and frequently teaching and conducting exams over weekends as mentioned above, academic staff will now have the additional challenge of implementing Article 57 and 59. The practical implications of these article on public administration are equally daunting. Is there capacity in the Ministry of Foreign Affairs to offer internships to at least several dozen students of diplomacy? Do schools have the capacity to host for internships several hundred students of pedagogy? Will private firms have incentives to offer internships to hundreds of students of economics and finance?

This formalism of Article 57 and 59 of the Law can lead in two ways: (a) requiring of public administration institutions to admit hundreds and perhaps thousands of students for practical work and internships and (b) if and when this proves untenable, placing additional burdens on faculties and academic staff to devise ways of conducting practical work for students in their fields of study. This case illustrates how a blanked requirement turned into a formalism that failed to take into account what is realistically achievable.

Formalism is also evident in the relations between public administration and cultural institutions. A case in point is a public library in Sarajevo. Established in 1537, the library has functioned for almost five hundred years. This library's manuscript collection was inscribed into the UNESCO Memory of the World.[63] A manuscript held at

60 Interview with a graduate of Georgetown University in Bosnia. March 2019.
61 Zakon o visokom obrazovanju, Službene novine Kantona Sarajevo, XXII, 33, 27. August 2017.
62 Zakon o visokom obrazovanju, Službene novine Kantona Sarajevo, XXII, 33, 27. August 2017.
63 UNESCO Memory of the World, http://www.unesco.org/new/en/communication-and-information/memory-of-the-world/register/full-list-of-registered-heritage/registered-heritage-page-5/manuscript-collection-of-the-gazi-husrev-beg-library. Accessed 9 March

this library was declared a movable heritage of Bosnia and Herzegovina in 2013 by the state Commission on Preservation of National Heritage.[64]

Yet, when applying for grants from different ministries at the cantonal and federal level, a document confirming the existence and registration of the library is a requirement. For the application to be complete and considered, this document should be issued no more than three months before the submission of the application. This library is a well-known and respected place for academic and cultural activities in the capital city. Even when applying at the same ministry for more than one project, it is required to submit over and over the same document confirming the existence and registration of the library. While this requirement may be expected for newly established institutions or organizations, the necessity of proving the existence of a five-hundred-year-old cultural institution qualifies as an example of formalism.[65]

A further instance of formalism is evident when a citizen of Bosnia and Herzegovia seeks employment in public administration. A case in point is a special separate document that all applicants for civil service at the state level need to complete and submit. Each applicant, among other documents, needs to submit a written statement in which the applicant states that he/she is aware with Article IX paragraph (1) of the Constitution of Bosnia and Herzegovina which states:

"No person who is serving a sentence imposed by the International Tribunal for the Former Yugoslavia, and no person who is under indictment by the Tribunal and who has failed to comply with an order to appear before the Tribunal, may stand as a candidate or hold any appointive, elective, or other public office in the territory of Bosnia and Herzegovina."[66]

Furthermore, the applicant needs to declare that this part of the Constitution does not apply to him/her. While this made sense in the post-war period with a view to prevent war criminals from seeking and being appointed to civil service, two and a half decades later, this requirement has produced an absurd situation. This also means that citizens of Bosnia and Herzegovina born years after the war, are require to submit this written statement declaring that they are not under investigation and have not been convicted for war crimes that were perpetrated in a war before they were born.

2.3. Impact of Formalism

One of the main impacts of legal formalism is the negative influence on the efficiency of courts, rule of law and the protection of individual rights and freedoms. That is visible from court backlogs, delays and extended lengths of proceeding. Courts in former Yugoslav republics are flooded with court cases which they are not able to solve within reasonable time due to formalistic procedures and lack of judges. As an example, the following case from Bosnia and Herzegovina is presented below.

On February 23, 2018, the Ombudsman Institution for Human Rights of Bosnia and Herzegovina received a complaint by Emira Bakić, as a reaction to the duration of the court proceedings by the Municipal Court in Lukavac. The plaintiff's case was submitted to the court on 5 September 2013, and no procedural action was taken by the court since.

The Ombudsmen of Bosnia and Herzegovina found there had been a violation of the human rights and fundamental freedoms of the complainant and requested a statement from the Municipal Court in Lukavac. The Municipal Court in Lukavac responded:[67]

> "... It is undeniable that the case is too old, but this court has more than 39,000 cases in total of seven judges, which makes the court unpredictable, although it has an extremely high collective norm of the previous years. In this particular case, I am also in charge of older cases under an initial act, and the said case is not covered by the Plan for the elimination of old cases for 2018, so that I do not have the possibility to determine the deadline for handling it."

Similarly, A Sarajevo-based daily *Oslobodjenje* reported in 20 December 2018 that the Cantonal Court of Sarajevo, at

2019.

64 "Odluka - Pokretno dobro - Mushaf Fadil-paše Šerifovića, vlasništvo Gazi Husrev-begove biblioteke u Sarajevu," Službeni glasnik Bosne i Hercegovine, XVII, broj 69, 9. rujna/septembra 2013. godine, http://sllist.ba/glasnik/2013/broj69/glasnik069.pdf. Accessed 9 March 2019.

65 Interview with an employee of a public library in Sarajevo. February 2019.

66 Constitution of Bosnia And Herzegovina, http://www.ccbh.ba/public/down/USTAV_BOSNE_I_HERCEGOVINE_engl.pdf. Accessed 10 March 2019.

67 A Large Number Of Cases Before The Courts In Bosnia And Herzegovina Can Not Be An Obstacle To The Conduct Of Proceedings Within A Reasonable Time, Press statement , 27 November 2018, http://ombudsmen.gov.ba/Novost.aspx?newsid=1125&lang=EN. Accessed: 23 December 2018.

the end of this year had approximately 24000 unresolved cases.[68] The problem here is two-fold: a large number of unsolved cases and the unrealistic timeframe for confirmation of indictments as indicated in the example above.

Another negative consequence is the lack of trust and reputation of courts among the general public. According to a study by Duško Sekulić and Željka Šporer, in Croatia, in 2004, 26,3% did not have any confidence in courts. 49,1% had little confidence. In 2010, the number of people who did not have any confidence in courts lowered to 21,9% and little confidence to 45,1%.[69]

Following Croatia's entry into the European Union in 2013 , it would be useful to conduct new research on whether the membership had altered public confidence in the country's judicial system more than five years later. While a similar research has yet to be undertaken in Bosnia and Herzegovina, it is likely that a similar finding would also apply in a post-Yugoslav, post-socialist country.

Legal formalism has a direct impact on the rule of law. This very concept of the *Rechstaat* principle or the rule of law was understood in formalist way. As Siniša Rodin stated: "One of the drastic examples of such understanding is the often repeated (since the 1980s) statement of Slobodan Milošević, that public protests of the Albanian population must be crushed by means of the *Rechstaat* ("*sredstvima pravne države*"), meaning by naked police force."[70]

Legal formalism in ex-Yugoslavia has not been, until recently, neither on national level nor on a smaller scale, been a subject of specific studies. One of the rare cases of dealing with formalism as a part of the survival of socialist legal culture the work of Alan Uzelac.[71] Another scholar from the Faculty of Law in Zagreb, Frane Staničić, examined the issue of excessive legal formalism in the field of public procurement in Croatia.[72]

In the curriculum of law schools in ex-Yugoslavia after the year 2000, important changes have been introduced with the aim to instil open-mindedness and sensitivity to emerging social problems. These changes include the introduction of courses which emphasise "Law in action" approach, legal sociology and anthropology, legal cultures, comparative law, law and gender, legal clinics and the like.

Here we will elaborate on the introduction of legal clinics in ex-Yugoslavia. As it is known, a legal clinic is

> "a legal teaching method based on experiential learning, which fosters the growth of knowledge, personal skills and values as well as promoting social justice at the same time. As a broad term, it encompasses varieties of formal, non-formal and informal educational programs and projects, which use practical-oriented, student-centered, problem-based, interactive learning methods, including, but not limited to, the practical work of students on real cases and social issues supervised by academics and professionals."[73]

Legal clinics were introduced into Central and East European countries during the 1990s and after that they became accepted in ex-Yugoslav countries.[74] The role of this type of legal education was twofold – to enable students to acquire practical knowledge and skills in the legal spheres and to support a system of free legal aid.

However, these changes were not introduced into Bar exams (*pravosudni ispit*). These exams are still confined to positive legal branches. For instance, according to the Law on Bar Exams in the Federation of Bosnia and Herzegovina, the exam is consisted of a written and oral part of the exam. The written part is composed of questions related to criminal law and civil law, or family law and labour law. The oral part of the exam is composed of questions related to Criminal law (substantive and procedural), Civil law (substantive and procedural), Family law, Commercial law, Administrative law, Labour law, Constitutional system and Organization of Judiciary.[75] As it is seen, in this program there is no single area which may develop a "Law and Society" approach among the candidates making them critical towards the existing law.

68 "Sud zatrpan sa 24000 predmeta", *Oslobodjenje*, 24 December 2018.
69 Sekulić, Duško; Šporer, Željka, „Gubimo li povjerenje u institucije? /Korupcija i povjerenje", Kregar, Josip ; Sekulić, Duško ; Šporer, Željka (ur.) (Zagreb: Centar za demokraciju i pravo, 2010), pp. 77-117.
70 Rodin, Siniša. "Discourse And Authority In European And Post-Communist Legal Culture." *Croatian Yearbook of European Law* & Policy 1., No. 1. (2005): p.7-8. https://hrcak.srce.hr/21111. Accessed 16 December 2018.
71 See note 27.
72 See note 35.
73 European Network for Clinical Legal Education, Definition of a Legal Clinic, http://encle.org/about-encle/definition-of-a-legal-clinic. Accessed 23 December 2018.
74 Jelinić, Zvonimir. "Integrirano kliničko obrazovanje studenata prava i ekonomije prikaz projekta pravno-ekonomske klinike pravnog i ekonomskog fakulteta u osijeku." *Pravni vjesnik* 30, no. 3-4 (2014), pp. 285-292. https://hrcak.srce.hr/134269.
75 Article 3 and 4, Zakon o pravosudnom ispitu, Federacija Bosne i Hercegovine, "Službene novine Federacije BiH", no. 2/95, 35/98 i 29/03, http://www.fmp.gov.ba/bs/pravosudni-ispit.html. Accessed 23 December 2018.

Lately, a legal positivist approach started to be critically examined in legal theory. For instance, a Ph.D. dissertation was defended in the Law School of Sarajevo University in 2018 supporting thesis that sociological theories are important means for the critic of legal positivism.[76]

Over the last decade, there are also visible improvements in chipping away at excessive formalism. Until 2010, birth certificates, marriage certificates and citizenship certificates were valid if these documents were issued no more than six months earlier. The formalism present in this regulation manifested itself most absurdly in the case of birth certificates. Citizens of Bosnia and Herzegovina applying for jobs, scholarships, funding needed to present their birth certificates issued no earlier than six months from the date of application. Otherwise, applications were deemed insufficient and incomplete. This requirement translated into long queues and a waste of time on the part of citizens. There was no logical explanation for this requirement, given that birth certificates could not be changed. Yet, it was only in 2010 that the EU convinced Republika Srpska to introduce procedures that removed this six-month requirement.[77] This EU conditionality was also linked to Bosnia and Herzegovina's effort to achieve EU visa liberalisation regime.

The Federation of Bosnia and Herzegovina undertook similar changes in 2011.[78] By 2013, these documents were issued without the six-month validity period. These changes applied to marriage and citizenship certificates as well.[79] While there may have been objective reasons for requiring marriage and citizenship certificates that were issues in the not-too-distant past, the public administration's similar requirements for birth certificates were completely unfounded. The practice had constituted a major case study of formalism devoid of purpose and logic. Its reform represents a positive instance of how EU conditionality prodded public administration in Bosnia and Herzegovina into undertaking a small but pragmatic and substantial reform. These reforms were taken further with streamlining record books and their gradual digitalization and integration into electronic databases.

76 Banović Damir, „Savremena sociološko-pravna teorija kao kritika pravnog pozitivizma", Pravni fakultet Univerziteta u Sarajevu, 2018. (unpublished PhD dissertation)

77 Milorad Milojević, "Dokumenti u RS-u bez roka važenja," *Radio Slobodna Evropa*, 2. September 2010, https://www.slobodnaevropa.org/a/republika_spska_dokumenti_rok_vazenja/2145706.html. Accessed 10 March 2019.

78 "Nacrt zakona stigao do Parlamenta: Rodni listovi bez roka važenja i u Federaciji," *eKapija*, 24 October 2011, https://ba.ekapija.com/news/489319/nacrt-zakona-stigao-do-parlamenta-rodni-listovi-bez-roka-vazenja-i-u. Accessed 10 March 2019.

79 "Bez roka važenja: Ovo su novi rodni listovi i uvjerenja o državljanstvu," *Klix*, 11. June 2013, https://www.klix.ba/vijesti/bih/bez-roka-vazenja-ovo-su-novi-rodni-listovi-i-uvjerenja-o-drzavljanstvu/130611059. Accessed 10 March 2019.

3. HOW TO CHANGE A SYSTEM TO BECOME MORE CAPABLE OF FOSTERING INDIVIDUAL FREEDOMS AND ECONOMIC DEVELOMENT

An answer to this question at a paradigmatical level would be a "Europeanization" of national legal culture. This process started in the 1990s when a large part of former Socialist countries adopted a significant part of Western European laws as a condition for joining the EU.[80] Even though Western Europe is a not homogenous entity, there are some fundamental values which represent the bedrock of this legal culture. According to Franz Wieacker, these basic foundations are: personalistic trait, i.e. the primacy of the individual as a subject; legalism or need to base decisions about social relationship and conflicts on a general rule of law; and, intellectualism or the particular way in which the phenomenon of law is understood.[81]

During the transition period, former Socialist countries have incorporated a new legal language, concepts and doctrines. A similar development has also started in ex-Yugoslavia. European legal values have been proclaimed as leading ideas of national legal systems. These values include individual freedom, the rule of law and perception of the neutrality of law.[82]

However, since Europe is not a homogenous unity as far as legal culture is concerned, it is a question how ex-Yugoslav countries can be identified in this sense. This question was posed recently by Rafael Manko, Martin Škop and Marketa Štepanikova when they suggested that Central Europe is a separate legal culture within Europe.[83] They claim that the non-German successors of the former Austro-Hungarian Empire constitute a single legal culture. Within this context they pose the question: what is the status of the Western Balkans, i.e. those countries of former Yugoslavia which are not part of the EU (Serbia, Montenegro, Bosnia and Herzegovina and North Macedonia). They added that this question requires further study.

Several years ago, the The South East European Law School Network (SEELS) was founded "with the aim of improving cooperation between the Law Faculties in the region and thus improving their scientific, teaching and administrative capacities." This network is composed of twelve Law Faculties from Albania, Bosnia and Herzegovina, Croatia, North Macedonia and Serbia, supported by the *Deutsche Gesellschaft für Internationale Zusammenarbeit* (GIZ) (Open Regional Fund for South East Europe – Legal Reform). One may say that this project is founded on the idea of a South East European legal culture which could be an answer to the question posed by central European scholars.

Since the creation of a homogenous European civil law culture is considered as unachievable, it is possible to see the emergence of a South East European legal culture within the family of civil law. This could be a new paradigm within which the issue of excessive formalism could be addressed and hopefully solved, with less focus on text and more on other social and cultural factors.[84]

80 More on this see: Van Hoecke, Mark, and Mark Warrington."Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law." *In Legal Theory and the Legal Academy*, ed. Maksymilian Del Mar, Vol. 3 (Farnham UK: Ashgate Publishing 2010) pp. 291–332.

81 Franz Wieacher, „Foundations of European Legal Culture", *The American Journal of Comparative Law*, Vol. 38, No.1, Winter, 1990, p. 1-29.

82 Gibson, James L., and Gregory A. Caldeira. "The Legal Cultures of Europe." *Law & Society Review* 30, no. 1 (1996): 55-85. doi:10.2307/3054034.

83 Mańko, Rafał and Škop, Martin and Štěpáníková, Markéta, "Carving Out Central Europe as a Space of Legal Culture: A Way Out of Peripherality?" *Wroclaw Review of Law, Administration and Economics* 6.1 (2018), p.9.

84 Hesselink, Martijn W., "The New European Legal Culture" in *The New European Private Law: Essays On The Future Of Private Law In Europe*, Martijn W. Hesselink, ed. (Kluwer Law International, 2002). Available at SSRN: https://ssrn.com/abstract=1029573, pp. 11-75. Accessed 22 December 2028.

CONCLUSION AND RECOMMENDATIONS

Legal formalism is one of the characteristics of European continental culture of civil law. As such, legal formalism was introduced into the legal system of ex-Yugoslav countries, when they became an integral part of European empires or nation states which experienced politics of "Europeanization".

After World War II, when Yugoslavia entered the Socialist legal culture, legal formalism was retained as a part of a new culture. Even after the fall of Socialism in the 1990s, formalism survived. This process was facilitated by the interplay of several factors: survival of elements of Socialist legal culture, continuity of legal education and the same foundation of legal thought.

Formalism affects the rule of law, functioning of courts and public administration. In order to respond to this challenge, the following steps are recommended:

1) To strengthen the comparative study of cultures and their transformation in order to rise awareness of legal formalism as a part of specific legal cultures.

2) To support study of existing legal cultures in former Yugoslav countries and to follow a model of guided changes in the process of their inclusion into European legal culture.[85]

3) To support changes in curriculum of law schools and bar exams in ex-Yugoslavia with the aim to include more courses on "law and society", including strengthening of legal clinics.

4) To support writing of new textbooks and research which will follow contemporary trends in legal sciences, especially in the field of positive legal sciences.

5) To initiate workshops and conferences on this topic in order to discuss and disseminate critical views on legal formalism.

The intention of this research paper was to shed light on the complex issue of legal formalism which exists in ex-Yugoslav countries. This is a matter which deserves and requires further research and a deeper insight into the causes, trends and solutions of this issue. The above stated recommendations represent the most crucial actions which can be implemented in order to tackle the issue of legal formalism.

85 An example of this type of research is the study by Danilo Vuković and Slobodan Cvejić, „Legal Culture in Contemporary Serbia: Structural Analysis of Attitudes Toward the Rule of Law", *Anali Pravnog fakulteta u Beogradu*, vol.62, no.3, 2014.

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