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REPORT ON THE INTERDISCIPLINARY SYMPOSIUM ON "LEGAL TRANSFORMATION IN SOUTHEAST EUROPE: THE EXAMPLE OF FORMER YUGOSLAVIA: PRECONDITIONS, PARTIES INVOLVED, SUCCESSES/FAILURES – A PRELIMINARY REVIEW" HELD ON 16 NOVEMBER 2017 IN BERLIN

On 16 November 2017, the international symposium on "Legal Transformation in Southeast Europe: The Example of Former Yugoslavia: Preconditions, Parties Involved, Successes/Failures – A Preliminary Review" took place in Berlin; this was also the first event organized jointly by the *Südosteuropa-Gesellschaft* (SOG) [Southeast Europe Association] and the *Deutschen Stiftung für internationale rechtliche Zusammenarbeit e.V.* (IRZ) [German Foundation for International Legal Cooperation e.V.].

The IRZ was founded in 1992 at the initiative of the German Federal Ministry of Justice and on the mandate of the Federal Government to assist transformation states in reforming their legal systems. Activities in Southeast Europe began in 2000 with funds from the Foreign Office allocated to Germany's contribution to the Stability Pact. Since then, there have been thematic interfaces with the work of the Southeast Europe Association (SOG). Numerous personal contacts have been made through on-location activities. The vice-president of the SOG, Ambassador Gudrun Steinacker, had contact with the IRZ during her work as ambassador and as deputy ambassador in Bulgaria, Macedonia, and Montenegro. So it was quite natural that the idea of co-sponsoring an interdisciplinary event arose during the regular dis-

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cussions of IRZ activities. At its centre, intersecting the activities of the two organizations, should be the transformation of the legal systems as a process which still characterizes social life in the states of the former Yugoslavia today, 25 years after the end of socialism.

1. QUESTIONS POSED

The result was the idea of an interdisciplinary (preliminary) review of transformation in the legal field, in which the following questions were particularly to be addressed:

- What was the general and what the specifically Yugoslav starting point for legal transformation?
- How is the situation in the countries of the former Yugoslavia comparable to that today?
- And how is it different?
- Where have there been improvements? Where have there been failures?
- Are there areas that have hitherto been neglected?
- What lessons have been learned from the previous history?
- What further lessons should be learned?

2. THE CONCEPT OF THE SYMPOSIUM

In order to permit direct discussion in German, German-speaking solicitors with relevant expertise from the countries concerned were invited as speakers. However, such people are extremely hard to find among judicial practitioners in the states of former Yugoslavia that are not yet members of the EU; therefore, the speakers who came to Berlin, although some had considerable practical experience, were all from academia (which brought with it an equally objective and critical view of the law and justice situation in their home countries). Speakers from Germany were chosen, who, from diverse positions (ambassador, consultant), have insight into the local legal transformations. Because of these different starting positions, one might have expected contrary opinions on many points, but that was not the case.

3. CONTENT OF THE PRESENTATIONS

In their introductory remarks, IRZ Managing Director *Veronika Keller-Engels* and Prof. Dr. Dr. h.c. *Herbert Küpper*, SOG vice-president and Managing Director of the *Institut für Ostrecht* [Institute for Eastern Law], who also moderated the event, stressed the above-mentioned intersection of the two sponsoring organizations' activities. Ms Keller-Engels pointed out that there are also interfaces with the Institute for Eastern Law, which was represented by Professor Küpper.

Former Ambassador *Gudrun Steinacker* pointed out in her presentation that she was able to observe the work of the IRZ in Southeast Europe from her post as ambassador in three countries – Bulgaria, Macedonia, and Montenegro. She found that some responsible persons at the IRZ were distinguished by their considerable linguistic and country knowledge, acquired while the socialist Yugoslav state still existed. She described the willingness to implement reform in some of the partner states as at least questionable; the involvement of the non-governmental sector in work on the rule of law therefore plays an important role. In this context, she emphasized that the IRZ always followed up suggestions from the Embassy on possible cooperation with appropriate NGOs. The lack of involvement of civil society in legal reforms in the framework of EU projects, however, was one of the criticisms made in a report by the European Court of Auditors on the use of the IPA (Instrument for Pre-Accession Assistance) funds in the legal field.

The second introductory presentation, entitled "Framework conditions for transformation from the point of view of a consultant: Starting situation, parties involved, and external influencing factors", was also by a speaker from Germany, Dr. *Stefan Pürner* of the IRZ, who likewise gave a transnational overview. He explained that the law of the states in the territory of the former Yugoslavia is today more heterogeneous and unsystematic than it was right at the end of socialism. He described the reasons for this in the lack of a master plan for transformation, and also in the competition among advisers and legal systems involved with the transformation. This led, in particular, to the states giving up their traditional continental European legal orientation. Pürner's topic also figured significantly in the contributions of the subsequent speakers. Because of such circumstances, the process

of transformation is taking longer than expected. There have also been failures in the legal transformation.

Anyone who wants to assess the successes and failures of legal consultation must, however, question their own expectations, Pürner said. After all, in the Federal Republic of Germany, despite much more favourable overall conditions, in some instances it took decades to eliminate the legal as well as personal remnants of the (il)legal system of the Nazi period. One must also be aware that legal transformation is only *one* aspect of change that encompasses all of society. In particular, the parties involved should not be asked to influence political conditions in their partner countries. That is a task for (foreign) policy.

The presentations with a predominantly regional focus were followed by exemplary presentations of the situation in three selected countries – Bosnia and Herzegovina, Macedonia, and Serbia – which were given by German-speaking scholars from those three states.

Lecturer *Aleksander Spasov*, legal theorist and legal philosopher at the Faculty of Law in Skopje, spoke first. He spoke on the topic "Dealing with the past as a precondition for transformation". He welcomed the idea of lustration in principle, but pointed out that it would only have made sense if it had been done immediately after the end of the socialist era. Waiting until later meant that the resulting stresses would outweigh the hoped-for benefits. He further explained that in Macedonia there were also disruptions of the continental European legal tradition. Here he mentioned the Penal Procedure Code as well as the earlier Company Law Act, which was drafted with the participation of US organizations. However, the Company Law Act was repealed after a short time, as it turned out not to be compatible with the situation, tradition, and mentality in Macedonia. Finally, Spasov addressed the current situation in Macedonia. He introduced the report on the situation of the judiciary in Macedonia prepared by the German solicitor and former director of the European Commission, Reinhard Priebe, on behalf of the EU, which reached very critical conclusions. The aim of the new government in Macedonia is now, the speaker said, to eliminate the abuses identified there.

The next presentation, by Professor Dr. *Zlatan Meškić* of the Zenica Faculty of Law, on legal transformation in Bosnia and Herzegovina, showed differences and similarities to what the previous speaker from Macedonia had depicted. Among the differences, he

said, is that Bosnia and Herzegovina has a specific internal order under the Dayton Constitution, which is not comparable to that of the other states. This means that the transformation has to be carried out at three levels of government (the umbrella state, the entities or the District of Brčko, and – in the Federation of Bosnia-Herzegovina – at the cantonal level). There is strong US influence in Bosnia and Herzegovina, as there is in Macedonia. This begins with the Constitution itself. American organizations are very active in legislative consulting, and they advise in areas of law such as consumer protection, which are rather strongly influenced by European law.

Another striking feature of the laws for which American organizations are advisers is that they are generally adopted at the level of the state as a whole, even if the relevant constitutional questions actually pertain to the level of the entities. By contrast, German consultants have adhered strictly to the Constitution's jurisdictional rules. Since several laws already drafted with the help of German organizations have not yet been passed, the German organizations are increasingly withdrawing from legislative consulting in Bosnia and Herzegovina. This is regrettable, he said, because it increases the danger that law in Bosnia and Herzegovina will develop in the opposite direction from the previous continental European orientation.

The last of the country-specific reports was from Prof. Dr. *Miloš Živković* of the Belgrade Faculty of Law, who spoke about the legal transformation in Serbia. Živković stressed that Serbia, because of well-known political circumstances, only began its legal transformation ten years after most of the other states of former Yugoslavia. This offered the opportunity to learn from and to avoid the mistakes of the others, but this was unfortunately not done, so Serbia was also influenced by US Common Law, and hybrid laws were adopted. In the field of criminal procedure law, a new law that had already been adopted and was strongly oriented toward German law, was replaced during the *vacacio legis* by a new penal procedure code with strong American elements.

Živković focussed on the extra judicially enforceable mortgage, which was incorporated into Serbian law ten years ago and is based on Common Law models. In Živković's opinion, this does not correspond to the Serbian legal tradition. The example poses a general problem for the combination of legal institutions from two different legal systems: Such an approach does not lead to better laws – as would result from

combining "the best of both worlds" – but to regulations whose application causes additional problems. Such laws notably required legal practitioner to have twice as much knowledge. In order to be able to apply such hybrid regulations, these practitioners would have to be exceptionally knowledgeable about both "mixed" laws. However, he said, this is not the case in practice. Therefore Živković advocated the use of consultants from countries with a similar legal tradition. He also called for greater inclusion of experts from the home country in the drafting of reform laws.

The lecture portion concluded with the contribution of Higher Regional Court Judge *Norbert Koster*, from Hamm, who spoke about "Practical problems of interpretation in the context of the new criminal law norms emerging in the transformation states." Koster stated at the outset that the structural problems he has encountered in the Balkans correspond to those in Afghanistan, notably the fact that the success of legal transformation depends on many factors. In Afghanistan, for example, a key factor is security; in all states it is the general social climate, social well-being, and the like. Koster divided his talk into two parts, asking: What (what new law) is needed in the transformation? And what (what new law) is actually being "delivered"?

Addressing the first question, he pointed out that in the context of the transformation, society is changing on all levels. Therefore, a new law should introduce as few changes as possible. Since legal practitioners also have to be "brought along", that is, won over to the reforms, the starting point for each new regulation should correspond to the previous horizon of their experience. It follows that what is needed is not "the best, the most perfect, or the newest", but simply the most practical. Unfortunately, this is often blatantly disregarded in what is "delivered", that is, in the drafting of new regulations. This becomes particularly clear in criminal procedure law, where slight changes, he said, can render the little bit of existing secondary literature useless. The introduction of hybrid criminal procedure codes has further negative effects, since they introduce a completely new system, with completely new roles for all participants, which might glaringly contradict previous traditions. It is also a misconception to think the two systems can be combined. This is particularly clear for the role of the judge, which is so different in American and continental European law that it is impossible to combine "the best of both".

In continental law, the criminal judge ultimately bears the entire responsibility for a case. His task is to ascertain the material truth, as far as possible. The continental European judge is, therefore, an active judge. In Common Law, however, he is only an arbiter, who has to make sure that the parties (the prosecution and defence) abide by the rules. For the citizen, who is accustomed to having a criminal judge concern himself with the truth, such a new role for the judge is incomprehensible. In a little jab, Koster pointed out that the word "hybrid" derives from "hubris", i.e., from haughtiness and arrogance. In conclusion, he stressed a further paradox: German organizations, in their recommendations to those they are advising, attach significantly greater importance to existing legal traditions than do those from the United States. Since the latter are more aggressive, however, they are usually more successful.

4. THE MODERATOR'S QUESTIONS TO THE SPEAKERS

After the presentations, there was a question and answer session with the speakers and moderator Prof. Dr. Dr. h. c. *Heribert Küpper*. First came two fundamental questions that proceeded from the fact that all legal systems are subject to constant change and therefore are in motion, or we might say, "in transformation". Therefore, the question arises whether using the term "(legal) transformation" for what is currently taking place in the formerly socialist states is really a correct one or whether another term could be found. Küpper linked this to the question of what actually distinguishes changes in the law of states that do not have a socialist past from changes in the former socialist states.

Most of the speakers concentrated on the second question: Their most common response was that states without a socialist past might have a "frequency" of legal change similar to that in transformation states, but the changes in the former move temporarily in a different direction. In these states, legal changes serve primarily to further develop the law with a view to the future. Legal transformation, on the other hand, is in a sense backward-looking. It is an attempt to eliminate a certain "layer" that had been incorporated into the law of these states, namely (pseudo-)socialist law.

After this came the only answer offered for the first, terminological question: Another possible word for transformation, sticking to the English jargon of international legal consulting, would be "*resetting*" or "*rewinding*" the legal system. Translated into German legal terminology, one could say that legal transformation is primarily "restoration to the previous state". This thesis followed from that of the presentation by Judge Koster, who had postulated that it was not the purpose of the transformation to provide the "most modern, etc." law, which was intended simply to eliminate the "socialist legacy", but at the same time to require the least effort from legal practitioners.

This discussion addressed another important point: The impact of legislative changes on legal practitioners is obviously given scarcely any consideration by those who initiate, draft, and adopt the legislative changes (the term "experts" is intentionally avoided in this context). The legal practitioners are mainly generalists and must therefore keep track equally of all changes in all areas of law – without there being any explanatory literature. There was also discussion of which projects are the most sustainable. Here the perhaps surprising conclusion was reached that this is not actually legislative consulting. As several examples show, laws in the transformation states unfortunately often do not last long. On closer inspection, therefore, the most sustainable activities are training programmes. If young prospective solicitors are trained, these measures may have positive effects even 25 or 30 years from now.

Measures were particularly welcomed and recommended that promote the creation of networks both of Southeast European solicitors with foreigners, as well as of Southeast European solicitors among themselves. Examples were mentioned in which German and Southeast European participants in IRZ programmes have established independent professional contact, which they maintain to the present day. Professor Meškić pointed out that it sometimes makes more sense to change a few paragraphs of a law than to enact a completely new one. But he was not sure whether such an approach, focused on just a few points, and which requires a great deal of expertise and prior detailed analysis of existing laws, would actually be appreciated in the public image or, for example, in evaluations.

5. DISCUSSION

Afterwards the participants, including representatives of various German ministries (BMJV, AA, BMWi) [Federal Ministry of Justice and Consumer Protection, Foreign Office, Ministry for Economic Affairs and Energy] and the GIZ [German Corporation for International Cooperation GmbH], scientists, members of the judiciary, and experts of the IRZ, had the opportunity to ask the experts questions and talk with them. The speakers were glad to oblige and the discussion went beyond the planned cut-off time. During the discussion as well as in the presentations it became clear that more active and comprehensive support from Germany would be more than welcome in the partner states.

However, this would have to be tied in with the situations in the partner states. In this context, one speaker from Southeast Europe noted that by no means all German experts and speakers satisfied or would have satisfied this requirement. Here too, there are cases in which advice was given without knowledge of the initial situation or of the needs and possibilities on the ground, and was presented in training programmes. It was added that these cases no longer occur in IRZ practice.

The Southeast European and German participants were united in their view that American influences must be confronted more assertively. As a positive example of how this could happen, participants highlighted the journal "*Kontinentalno pravo – časopis za održiv i skladan razvoj prava*" ("Continental law – a journal for sustainable and appropriate legal development"), co-published by IRZ and appearing in Serbia. A clear and self-confident orientation on behalf of the continental European tradition was demanded repeatedly. The German experience was described as of particular importance in this connection. Many desire a more active German role in advising states. Of course, this could only be provided if additional funds were available for relevant bilateral programmes.

It was explicitly stated in the discussion that the role of the legal consulting organizations is naturally limited. On the one hand, they have no influence on whether their advice actually finds its way into the final legislative product. One of the reasons for this is the simple fact that in democracies, the Parliament ultimately decides on the con-

tent of the laws. On the other hand, appropriate new legislation does not guarantee the success of a reform. New laws are, as one of the discussants put it, "like a baby who is starting to walk". As for international legal consulting, it follows that this should not be limited to legislative consulting, but after the enactment of a law, its practical application must also be supported.

Another topic of discussion was the difficult relationship between different organizations that are advising on legal and judicial reforms in a country, and the dominant political forces there. Ambassador Steinacker pointed out in this context that due to the internal political situation in many former Yugoslavian partner states, there were poorly qualified solicitors sitting in various posts, although there were enough suitable persons available for these offices. Judge Koster went one step further and pointed out that it would be difficult to support the development and upgrading of the judiciary without cooperation with the partner state and thus with local politics. If power is in questionable hands, as is the case in many transformation states, then one always has to make a "pact with the devil".

Professor *Herwig Roggemann* congratulated the co-organizers on the successful joint event. He also highlighted the role of encouraging young solicitors, in order to achieve success in legal transformation. His decades-long professional experience shows, he said, that "long-term effects come about through minds". Dr. *Lothar Jahn,* who travelled from Eschborn and is a representative of the GIZ, which also supports legal reform projects in Southeast Europe, also took part in the symposium. He confirmed that many of the experiences reported corresponded to those of the GIZ. He emphasized the importance of events like this one, also because they would help detect mistakes and avoid their repetition.

6. WRITE-UP AND CONTINUATION PLANNED

The presentations from the event are expected to be published soon in a supplement to the "*Südosteuropa-Mitteilungen*" (SOM), the journal of the SOG. Due to the great success of the pilot event, the IRZ and SOG have decided to continue their cooperation by organizing similar public events.