

(IN)VISIBLE HAND(S)

Predrag Zima, University of Osijek

ABSTRACT

In this paper, the author discusses the regulatory role of the state and legal norms, in market economy, especially in so-called transition countries. Legal policy, and other questions of the state and *free market* economy are here closely connected, because the state must ensure with legal norms that economic processes are not interrupted: only the state can establish the legal basis for a market economy. The free market's *invisible hand* is acting in questions such as: what is to be produced, how much is to be produced, for whom it is to be produced, how it is to be produced. During the transition period but also in the establishnig EU, the role of legal norms is much more important then it (is) would be expected: problems of transition are more connected with ethics and psychology, then with legislation.

Keywords: Law and economics, legal norms, (de)regulation, State

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1. INTRODUCTION *

Aside from this, *triumphing liberalism*¹ puts especially transitional countries before the dilemma: to rely, and how much, on the *invisible hand of the market* (Smith), that should regulate everything, or to deem it impossible to develop a free market or democracy without the existence of a minimum of social cohesion and solidarity for all and equality of initial opportunities², especially having in mind the problem of the need to adjust the legal system with the regulations in the states of the European Union in the conditions of globalization. Thinking about legal norms today, about the transition or transitions and about the role of legal standards in these processes actually means to mention a more or less coherent set of political, economic and legal *Gospels*. Some of these *gospels*, which have not changed since the middle of the 20th century, and some

¹ * This paper is inspired by the Slavoj Žižek's preface to the Communist Manifest on the occasion of its 150th publishing anniversary, Arkzin, Zagreb, 1998.

Šimac, N.: *Europski principi javne uprave*, UDD, Zagreb, 2002, p. 13.

² Šimac, *ibid.* p. 14

are even older, where the syntagm *Gospels* should be understood as the *folklore of capitalism* (Arnold) or in the postmodern sense as *discourse* (Berger and Luckman) or *concept*³. Also, the term *transitions* has also not been thought out in a uniform way, which makes it difficult to define terms in determining the subject of analysis. Different authors will, namely, define the transition quite diversely, and some, even respectable experts (B. Horvat)⁴ will even put it in question when it concerns the countries of south-eastern Europe. Here, it is certainly necessary to distinguish contractual obligations imposed by the possible membership in international organizations, which are, of course, a legal problem (adjustment of the legal system), from the issues relating to the problems arising from the polysemantic (fashionable), *postmodern* concept of globalization⁵, although a significant number of connections can be found between them.

Basic premise of transition are: 1/ mechanical determinism connected with 2/ the idea of progress (progressive evolutionism), which enables the making of epochal changes by means of the method of *rational* social engineering. These premises are not only theoretically unsustainable but also historically unfounded.⁶

One of the meanings of the term law⁷ is that, that the law is understood as one of the social orders which in its essence include **value**, **relation** and **coercion** embodied in the legal rule (norm)⁸. Law is a special form of norms important for questions of social regulation⁹, and it differs from other manifestations of norms in its aim, content and method. Legal rule should be looked at as the “formal framework of value contents (needs-values-aims)”, while social relation is taken as the “actual framework”¹⁰. On the

³ Županov, J.: Tranzicija i politički kapitalizam, Hrvatska gospodarska revija, December 1997, pp.1-9

⁴ Horvat, B.: Tranzicija i restauracija: Dvije alternativne strategije, Ekonomija/Economics, Year 6, Nr.1/1999, p. 1.

⁵ Cf. Pusić, E.: Globalizam i državna uprava, Politička misao, 1/1999 pp. 3-9.; Paić, Ž.: Globalizacija - postmoderna utopija, in Milardović: Globalizacija, Pan liber, 1999 “...It is clear to everyone that this is a new enchanting term, new all comprising spiritual “mantra” of fin de siècle - globalization. But, while postmodernism was an exclusive myth for chosen intellectuals, it seems that has a planetary power of fascination...” p. 202.; ...”The concept of globalization, as opposed to globalism and globality, denotes the state of transition and transformation of the world’s economic, political and cultural system. Globalization is therefore not the found situation but a process characterized by the movement towards some (un)determined goal...”p. 202.; similar ideas are found in Rosenau, J.: Kompleksnost i kontradikcije globalizacije, Third Program of the Croatian Radio, 53/54, translation: Boršić, M., published in Current History, 613/1997 “... understood as a process that lies in the very foundation, globalization is not the same as globalism that points towards the desire for such state of affairs, where values are accepted by or where they concern 5 billion people in the whole world...”

⁶ Županov, J., ibid.

⁷ The term “law” certainly has more meanings (both in everyday as well as in professional language). On different meanings of the term and of the concept, v.: Fletcher G.P.: Basic Concepts of Legal Thought, stipulative definition - Visković, N.: Pojam prava, Logos, Zagreb, 1981, p. 47. “Law is the process of mutual conditioning and implying of interpersonal behaviors and value and normative points of view that qualify and direct this behavior. Law is a specific social reality, normatively arranged according to historical values “.; further: Miličić, V.: Opća teorija prava i države, Pravni fakultet Sveučilišta u Zagrebu, vol. I, 1994; Pavčnik, M.: Teorija prava, Cankarjeva založba, Ljubljana, 2001; Vrbanić, D.: Država i pravo, Golden marketing, Zagreb, 2003.

⁸ Miličić, V. Opća teorija prava i države, Pravni fakultet Sveučilišta u Zagrebu, vol. I, 1994, p.10

⁹ Pusić, E.: op.cit., 1986, p. 102

¹⁰ Miličić, V., op.cit., p. 40

other hand, the unity of the system of rules and social relations following these rules (understood as positive law) that exist in the modern society and relate to the creation and distribution of important economic, political, cultural and other goods and loads.¹¹

The term regulation (Lat. *regulatio*, management, setting in order) is used¹² for the activity of systematic legitimate influencing on the behavior of people according to previously set criteria. Ever since the beginning of their existence, human societies have been trying to regulate the behavior of their members, mainly in three¹³ ways: 1/through establishment of rules and their stabilization in expectations, under the pressure of uncertainty in natural surroundings; 2/through establishment of rules and their selection by the authorities in the political subsystem of the society; 3/through the establishment of rules and their acceptance for rational reasons.

All of these three ways are existing and feasible in the circumstances of the so-called globalization, so that Pusić's *trichotomy* proves to be a constant value even and in the circumstances of changing paradigms and radical breaking of the bonds between *postmodernity* and *modernity*. It is emphasized that all three ways are equally original and that they are not mutually exclusive, but that, on the contrary, they function side by side. Regulation itself is an activity marked by durability, and it derives from the conscience of people, and thus carries tracks of all subsystems of consciousness: normative, cognitive, aesthetic, amalgamated in the connative motivation, under circumstances, frequently charged with emotions.¹⁴ Every human activity, even the spontaneous one, is characterized by some direction; therefore direction is inherent to the notion of activity. All this nevertheless does not mean that actions will actually function in this way, but, anyway, it will mark the expectations. In the world of regional and global interdependence, it is necessary to raise the questions of coherence, of sustainability and responsibility of national entities (states) which make decisions (laws) or *regulate*.¹⁵ This direction can be previously determined with regard to some criterion, so that this preliminary orientation *determines* the direction of human activities.¹⁶

2. NEW SOCIETIES, INFORMATION TECHNOLOGY AND LEGAL PROBLEMS

In short, the origin of legislative politics must necessarily be connected with the state, i.e. with its legislative activity and with the character of law as the most important legal act, while today it could also be conditionally spoken about the legislative politics of the

¹¹ Padjen, I.: Pravne pretpostavke znanosti o modernim društvima, Naše teme, 7-8/1988. p. 1878

¹² Pusić, E.: Društvena regulacija, Globus, Zagreb, 1989:149

¹³ Pusić, E.: Država kao institucija, RAD-HAZU, 473/1986

¹⁴ Op.cit., Pusić, E.: 1989:149

¹⁵ Held, D.: Democracy and The Global Order: From the Modern State to Cosmopolitan Governance, Polity Press, Cambridge, 1995, Filip Višnjić, Beograd, 1997. p. 33

¹⁶ Petković, S., et.al.: Prilozi za studij sociologije, Pravni fakultet Zagreb, 1987

European Community. Legal standards are the means by which people make efforts (and partially succeed) to achieve such a position in legal relations that will satisfy their interest, their values and the aims of justice, peace, security, legality, etc. in the organization and distribution of social powers and goods¹⁷. Directly related to the above problems, there is also the issue of legislative politics, under which concept we could understand a conscious, planned and directing human activity of creating law (regulations and other general legal acts). Principally, it has its wider and its narrower meaning, where the wider meaning could consist of the formulation of basic goals (values) that are intended to be realized, while the narrower meaning could be relating to the very preparation and creation of legal rules making their contents.

Here, in the conditions of transition and globalization, the *range of decisions* is reduced; namely, decisions of *quasi*-regional or *quasi*-supranational organizations, such as the European Union, NATO or International Monetary Fund, determine specific limitations in decision making, which is of course questionable from the viewpoint of the fundamental ideas of democratically constituted societies.¹⁸ Especially prominent here is the European Union, i.e. the Council of Ministers that has at its disposal legal instruments (regulations and directives) allowing it to create and conduct the politics characterized by a minimum of responsibility towards national states.¹⁹ Globalization should be observed as a process, and it is frequently understood as the last stage in the process of constant social change. Reasoning about globalism today go in the two directions²⁰: one holds globalism to be the radicalized continuation of the European modern, while others consider globalism as a *new historical paradigm* as defined by Kuhn. One of the basic issues of both sides is the analysis of a national, liberally and democratically organized state where the first consider that the national state will spread into a universal cosmopolis, while the other believe that the national state will disappear as the model of organization of society (Rodin, 1999:83.) In the first phase of the European information society, European Community and its member countries have directed their attention towards the creation of essential legal regulations. Next phase has been directed towards deregulation and liberalization. Through abolition of monopoly in this field, new legal and political frameworks will be created that will enable an efficient market competition.²¹ Realization of the new legal framework for telecommunications from 1st January 1998²² and opening important market segments (mobile and satellite connections, use of cable TV network for telecommunications and alternative infrastructures) have made the economic development more favorable.

¹⁷ Visković, N. op.cit. 1981:258

¹⁸ Held, D., op.cit. p. 33.

¹⁹ Held, D., op.cit. p. 137 "... most important of all are regulations that have the status of law, regardless of further negotiations between member states..."

²⁰ Rodin, D.: Globalizam: nastavak moderne ili nova paradigma, Polit. misao, 1/1999, p. 83

²¹ Bodiroga-Vukobrat, N.: Informatičko društvo i Europska unija, Informatologija 32, 1999, 1-2, 85-88

²² Europa i globalno informatičko društvo, Preporuke Vijeća Europe (Bangemann Report) Bruxelles, 1994

The efficacy of law (laws) is seen as the measure of influence on legal consequences (effects) in some social relations, and towards some individuals in law, whereby some values²³ are being confirmed or denied. Which values are being confirmed or denied in the conditions of globalization and transition? Problems arise if these values on the levels of national states (communities) differ more significantly from those promoted by globalization processes; these are problems concerning the efficacy²⁴ of legal standards, either through preventive efficacy – by portending coercion, or by application of coercion subsequently (*ex post facto*). In such situations of incoherence of protected values, the problem is the efficacy of standards arising from the “feeling”, consciousness about the culture of law (Miličić, 1999:171). It is quite clear that the efficacy in indicated situations will disputable to a significant extent. Legislative systems of the states are under significant influence of multinational companies because of the growing mobility of international capital, globalization of the market and integrated economy²⁵, which also *distorts* their task to regulate, among other things, the activities of these companies, so that any form of regulation becomes the victim of the market, because the transnational companies are motivated and guided by profit (Robinson²⁶). Global capital has set the requirements before national states and they have answered by creation of new forms of legality, which is by no means interpreted only as the loss of certain state control (Sassen²⁷), but these new forms of legality are the crucial mechanism of intergovernmental consensus on the globalization path, and the sovereignty remains one of the characteristics of the system but is located in more *institutional arenas*.

2. 1. Route 66 or

Here, of course, the issue of the **reach of state regulation**, or of intervention (through legislature) arises, namely, according to the opinions of some authors, this issue should vary, in the ideal case, in consistence with the degree of progress in the constitution of the civil society²⁸, meaning primarily that it should be in consistence with the degree of (re)capitalization of management, depending upon the possibility to maintain the national community as an independent subject in the world community of nations. The today's situation could be described as the existence two tendencies: on one hand, legislature remains the most important state function, and legal act remains the most significant form of creating law²⁹, the tendency is to codify the sources of law and to unify civil, commercial and penal legislature, and on the other hand, it is expected of the state to restrict itself to

²³ Miličić, V., 1994. op.cit. p. 170

²⁴ Miličić, V. ibid. p. 170. “Efficacy of law means the law as it really is in the nature”

²⁵ Benoist, de A.: Suočavanje s globalizacijom, translation (Lehpamer, M.) of the text: Confronting Globalization, Telos, 108/1996, published in Third Program of Croatian Radio, 53/54, 1998

²⁶ Cit. prema Benoist, supra., p. 115

²⁷ Sassen, S.: Losing control? - Sovereignty in an Age of Globalization, New York, Columbia Univ. Press, 1996, cit. According to Meštrović, M.: Formalna ekonomija i stvarni povijesni svijet, in Globalizacija i njene refleksije u Hrvatskoj, Ekonomski institut, Zagreb, 2001

²⁸ Babac, B.: Obnova hrvatskog građanskog društva...supra, 1994:139

²⁹ Comprehensive code books are created in particular fields (branches) of law.

the establishing of rules applicable on types of situations, and to leave individuals the freedom in everything that depends on the circumstances of time and place³⁰. It is further emphasized (Babac 1994:140) that, in this sense, it would be possible to distinguish three classes of empowerment and responsibility of the state as an institution, which would be of value for the constitution of the Croatian civil society as a project: 1/guarantee powers and responsibilities relating to a) maintaining order and safety of the community or group, b) securing the value of work, i.e. of money, in other words, providing a monetary and legal framework for the most effective and fairest entrepreneurial and market freedom, c) ensuring equality and fairness in bearing public duties and burdens; 2/ protective authorities and responsibilities relating to special protection provided by the state for endangered individuals, business companies or other specific kinds of national wealth, under the assumption that this does not take place at the expense/detriment of personal and market freedom of individuals; 3/ structural authorities and responsibilities relating to the constitution of various structures, i.e. of the *rules of the game*, for reaching a consensus, which would provide *just* external conditions for contests and for open competition³¹. Growing importance belongs to comparative research of law as well as to mutual bilateral or multilateral contracting between states for the purpose of standardization of legal rules.

In determining the area of stability, the law, namely, directs the rational human action, and in this way it also directs social order³², which actually takes place through these human actions. There are two different problems that may arise here: 1/the question of optimal volume of social relations regulated through legal rules and 2/the question of adaptation of the contents of legal rules to a specific place and time (Šimonović, 1990:695).

A simplified but unusual opinion about the legal system was given by Hart³³, according to whom the legal system is the machine (the device) for solving problems (*problem solving machine*). In regulation through law, there are two basic questions that may come up³⁴: 1/what is the **content** of these normative requirements that are put forward, or, respectively, what is the nature of the criterion by which standards intend to coordinate the behavior of the addressees, and 2/which **methods** are thereby applied in order to influence the behavior of people in the sense of specific regulatory criteria.

³⁰ Hayek, F. A.: Put u ropstvo, Kruzak, Zagreb, 2001, p. 104

³¹ Babac, B., *ibid.*, 1994:140

³² What is usually called social order "includes, as a minimum, relatively large chances of those comprised by that order to have their expectations fulfilled regarding the actions of other participants in that order, i.e., that the others behave according to certain inter-subjectively valid reasons or rules " and further, v. Padjen, I.: Pravne pretpostavke znanosti o modernim društvima, Naše teme, 7-8/1988. p. 1877

³³ H. L. A.: The Concept of Law, 92 in: J. Cohen and T. Gleason: Social research in communication and law, Sage Pub. 1990:33

³⁴ Pusić, E.: Sistematizacija iskustva u regulaciji pravom, Naše teme, Zagreb, 33 (12) 1989: 3472-3480

The degrees of the state's intervention into economically oriented activities can be divided³⁵ into:

a/ **regulation** (in its narrower sense) – when the state brings universally obligating rules and moreover controls the observation of these rules, for example within the complex of classic state functions;

b/ **intervention** – when the state passes the “the most varied” measures in which it not only acts as the **controller**, but also influences general terms of earning money and generally the distribution of values;

c/ **management** – when, as it is asserted, the state itself performs economic and other work, for example through state-owned companies.

All are these degrees are, more or less, liable to the influence of global mutual relations (of nation states), the result of which is a decision making process that takes into consideration all these mutual influences (Held, 1997:35). This is not considered as a special *novelty*, because this *network* of global interrelatedness has started to appear or began to be realized with the beginning of expansion of the world economy and the *modern state*: trade and wars have already 400 years ago shaped every aspect of both national politics and of the international system³⁶. New information and communication technologies have weakened the exclusiveness of state control over its territory, changing its power of *cultural control* and homogenization, and digitized communications, satellites and computer networks have weakened the state's control over the media³⁷.

3. RECHTSSTAAT AND THE RULE OF LAW³⁸

Regulation in general, and particularly the regulation through legal standards, is appreciated (evaluated) according to the extent in which it fulfills its *purpose* and according to the *price* paid for it. The most important achievement of the modern state is the establishment of the regime of **legal state**, the rule of law³⁹, meaning that in the relation between the individual and the authority there is the increasingly applied principle that all (both citizens and state bodies) are bound by the standards of one system of law. This assertion applies to all those states that strive towards the ideals of the *western civilization*, in spite of all critiques arising in this context.

³⁵ Babac, B.: Samoupravno odlučivanje i birokratska struktura, Pravni fakultet Osijek, 1986:158

³⁶ Gourevitch, P.: The second image reversed: the international sources of domestic politics, International Organizations, 1978, cit. According to Held, D. 1987, op.cit.”...Domestic and foreign politics are interlaced throughout the modern era: domestic policy must always be understood with respect to the background of international politics; the first is frequently the source of the latter. If we think about the politics of a monarch in the 16th or 17th century (for example, if we contemplate whether the king of France should be a Catholic or a Protestant), or if we want to understand why merchant routes from the East to the West have changed and how their change has influenced the structure of the cities, urban complexes and social balance...”

³⁷ Hirst, P. i Thompson, G.: Globalizacija, Liberata, Zagreb, 2001

³⁸ Title is the same as the translation of a part of the doctoral dissertation of F. Neumann: The Rechtsstaat and the Rule of Law, published in Vladavina prava, 3-4/1998

³⁹ Cf. Pusić, E.: Odgovornost za državu, Erasmus 22/1997

The syntagm *legal state* is frequently used in daily as well as in professional, oral and written communication, and it still cannot be claimed that the content of this syntagm is completely clear and unambiguous, and there are even some authors who suggest that it is pointless to emphasize such a syntagm⁴⁰. It is unquestionable that the term *legal state* has originated from German literature (*der Rechtsstaat*), from where it has expanded into other languages and cultures. Synchronously, in the Anglo-American theory appeared a term of similar content which was expressed by the syntagm *Rule of Law*^{41,42}. Both concepts emerged parallel with bourgeois revolutions, and were based on the ideas of rational and natural law, i.e. on the ideas of liberalistic foundations of the civil society, so that their meanings must be understood in that context. Understandably, both ideas have evolved throughout centuries, they have been adjusted to the new social circumstances, so that today it is frequently spoken about the *civil legal state*, or the *democratic legal state*. Furthermore, a more detailed research into the contents of these notions (their genesis) points to their existence “before them themselves”⁴³. For a more complete understanding of this concept it should certainly be kept in mind that: 1/ the rule of law, from the viewpoint of the individual, citizens, is regarded as the corpus of civil rights and freedoms which are guaranteed for everyone, through legal institutions and procedures; 2/ the legal system which is created by the state and whose implementation is guaranteed by the state, must satisfy the requirements of the legal order under the rule of law (not any legal system, but the one that satisfies the requirements of generality, availability, publicity, consistence, clearness, intelligibility, non-retroactivity, etc.); 3/ there must be principles for the bringing of general legal standards that will be applied equally (the legislative procedure under the assumptions of publicity, the existence of parliament and of an argumentation process).

G. Fletcher⁴⁴ emphasizes that continental (European) languages use one term to denote the idea of law in the sense of implementation of the laws passed by the legitimate authority (*Gesetz, loi*), and another term to denote the idea of law in a higher sense, the law that is being upheld because behind it there is the idea of law (*Recht, droit*). These different terms cause different concepts of the idea of rule of law: those who think that the rule of law means that the government is limited by rules, made by predetermined legitimate legislators, will be satisfied with the regulations that have been passed by the body determined for that purpose. This is what the Germans call *Gesetzesstaat* - rule of

⁴⁰ Cf. Ibid. Miličić, V.:1994, p.31: “However, I emphasize that the foundation, constitution and acting of the state is and should be formed and organized in legal rules and practically realized in keeping with the sense and the purposes determined by the principal social group – the authority of power in the state (in so far it is superfluous to extract, use and emphasize the syntagm of the so-called “legal state”, because if a state already in its suggested fundamental framework and content, in idea and in reality, does not contain the characteristics of “legality”, then it is not a state....”

⁴¹ Introductory on the rule of law v.: Miličić, V.: *Takozvana vladavina prava*, in: *Vladavina prava*, 3-4/1998, str 15-21

⁴² Which is a specifically English product and the combination of the ideas of superiority of the Parliament and the rule of law. v.: Neumann, F. *ibid.* p. 151

⁴³ Babić, D.: *Teorija i tehnika zakonodavstva*, unpublished manuscript, Osijek 1991

⁴⁴ For more details Cf. Fletcher, G.: *Basic Concepts of Legal Thought*, Oxford University press, 1996:12-”In English, we are never quite sure what we mean by the “rule of law”...

laws, where it is expected that the law be respected regardless whether it is “good or bad”. Those, on the other hand, who think that the rule of law is ideal for good management of the state, emphasize the role of **right** in the rule of law. The vision of a state founded on the rule of law is comprised in the German term *Rechtsstaat* - legal state. When we speak about the rule of law, we actually (according to the European terminology) speak about the rule of law in the higher sense, i.e. about the legal state. Unlike this, the English language is not so precise in determining the concept of the rule of law⁴⁵, namely, the only term used here is the term *law*, whereas the possible use of the term *right* is inadequate. Nevertheless, there is no doubt that the idea itself about the legal state emerged parallel with bourgeois revolutions, together with the idea of rational natural law so that it was the foundation of the liberalistic structure of civil society, and this is its classic meaning. Clearly, the concept of legal state can not be limited to this liberalistic principle. It can be said that legal state existed even before the “legal state”, that is, the idea existed even before the term itself that is related to *liberalism*. For the rule of law it is not of importance who had the most influence on the passing of the legal standard, whether it was the lobbies on the national level, or whether it was the international standard, a multilateral or bilateral contract between states. National states are the basic precondition for regulations, regardless whether these regulations are national (conditionally said autonomous) rules, or whether they are the implementation of international standards, the more so because only they have the possibility to coercively apply the standard.

4. “CUTTING (THE) ...HAND”: FRAMEWORKS OF STATE REGULATION

State is the central point for the rule of law, because it is the source of constitutional order by which it limits its own power and the powers of others through laws and regulations, thus insuring the minimum of (legal) safety.

The questions of true efficacy and the scope of state intervention have frequently been reduced to the question of all questions: *the purpose of the state*, and in that sense, it has been emphasized that this purpose can be twofold: promotion of happiness on one hand, or prevention of misfortune, on the other hand⁴⁶. As it can be concluded from what has been said so far, there is a strong bond between legal concepts and economic reality; law provides that necessary framework, creates the conditions, determines the rules of the game, it is a form of social regulation, and there is therefore the question of justification of use of the term state *intervention*⁴⁷, because in principally every form of regulation through laws by the state, i.e. the legitimate body, the legislator, one can speak about a specific form of intervention. Nevertheless, for conventional reasons, we shall keep the term *intervention*. Especially when the concept of the legal state is joined with the

⁴⁵ Ibid. Cf. Fletcher, G.: 1996:12

⁴⁶ W. von Humboldt, *supra* 1993:11

⁴⁷ Intervention, f. – is interfering with a process, changing of a situation through action; intrusion 2. operation, action by which the found situation is altered – according to: Anić/Goldštajn: Rječnik stranih riječi

concept of *social* state, which is found in the majority of democratic constitutions. Furthermore, in discussions about regulation and *intervention*, one must not forget some *fundamental regulatory* principles for the long-term moral strategy of any individual⁴⁸, and then also of communities (states): every activity must be directed at insuring the *survival* of human kind as a real communication community... Here, it is predominantly spoken about the state influence, although certain authority of regional and local communities in the bringing of legal standards can not be denied; however, the issues arising in that sense should be the topic of a separate analysis.

In the beginning of the 20th century, it has come to significant distancing from the ideals of legal state in democratic countries: most frequently because of class conflicts, with the intention to alleviate social differences, the states have intervened⁴⁹ more or less openly in areas that were previously out of their reach. On the other hand, some services were privatized and they received some powers that were earlier reserved only for the state. In the *great crisis*, the myth about rational self-regulation of capitalist economy was destroyed, and to eliminate its consequences, it was necessary to apply measures of state intervention. The power of political parties, bureaucratic organizations, corporations and their influence, are among the forces exercising pressure on the decision making process within the framework of the state-nation (Held, 1997:123), and on the international level, there are contradictions between ideas about the state that decides alone for itself on one side and the world economy, international organizations, military alliances, international rights on the other side, which impose restrictions upon the state in its decision making. In the new conditions, the power of the states as administrative and political agencies has reduced⁵⁰, which does not mean that their legislative and constitutional functions will be reduced in the same measure: one aspect of the state is directed towards results and it is a matter of political decision and enforcement (implementations) of such decisions through the administration, while the other aspect is procedural (adjectival) and concerns the role of the state as the regulator of social action in the widest sense, rules as the guide for all activities and constitutional order as the verdict between the competitive rights of corporative entities and citizens (Hirst/Thompson, 2001:291). Today, the opinion has prevailed about the necessity of some form of care for the so-called *positive prosperities*. In theoretical elaborations, the term state intervention is used as the synonym for industrial

⁴⁸ Apel, K.-O.: Das Apriori der Kommunikationsgemeinschaft (1976) cit. according to: Padjen, I.: (Ne) čudorednost (međunarodnog) prava, Dometi, Rijeka, 1988 p. 157

⁴⁹ The economist J. M. Keynes, whose ideas were implemented by American President Roosevelt (new Deal) with the purpose to overcome the consequences of the economic crisis 1929 – 1933, is believed to be the creator of the idea of state interventionism. These economic measures have generally been functioning until the mid 1970's. Especially important are Keynes' books: The End of Laissez Faire (1926), Treatise of Money (1930), Theory of Employment, Interest and Money (1936)

⁵⁰ Hirst, Thompson, 2001, op.cit. p. 291

politics⁵¹ in the sense of “planned effort of the state to change the production structure of the nation, i.e. to insure structural adaptation to changed conditions”⁵². A specific compromise has been established between the use of the *laissez faire* theory and the so-called structuralists, that is supporters of a larger influence of state on the economy⁵³. Decline of the influence of laissez-faire supporters began in 1873 after the crash of the Viennese stock exchange. This event was not given greater importance at that time, but later its true meaning was realized⁵⁴. Soon after this event, large liberal parties that have represented the idea of free market started to gradually come loose and to divide, while new groups have appeared: socialists-Marxists and socialists-anti-Semites, both anti-liberally oriented, and both opposing free market⁵⁵. Today, there are frequent demands for legal and efficient state, which is being connected with a number of facts: 1/ participating and living in the organized social community of state form; 2/ arranging internal relations through legal regulations; 3/ implementation of legal regulations in the manner in which they have been formulated and in adequate, for these regulations envisaged factual circumstances⁵⁶. In this, economic sense, the content of the notion of state intervention is polysemantic and on one occasion it is possible to subsume under it a number of measures of economic policy of a state, whereas on other occasions this concept can comprise only some specified activities, for example those aiming at the protection of national economy from foreign competition, and the like. The aim of industrial politics itself would be to redirect the course of private investments from some companies and branches towards some other companies and branches, i.e., to change the allocation of investments, supporting those branches and companies in which the private market disinvests⁵⁷. In this way (within some states) economic growth is targeted in the desired direction. This directing is frequently performed by selecting the branches that are going to be supported, and these are: either the winner branches, that is those that are expected to achieve high results or the loser branches, where the state support is actually used for their rehabilitation. In that sense, state measures undertaken for that purpose usually consist of the use of direct state investments, tax relieves, subventions, subsidized loans, and regulatory measures

⁵¹ Especially in the texts: Zagorka Brunsko: Suvremena kapitalistička država i njezin intervencionizam, Politička misao, 1/1990.; M. Kesner-Škreb: Teorijski okviri državne intervencije, Financijska praksa 19 (5) 1995:407-420; Ž. Kordej De Villa: Instrumenti i metode provođenja državne intervencije u Austriji, Financijska praksa 19 (5) 1995:421-437; D. Kuliš: Instrumenti i metode provođenja državne intervencije u Njemačkoj, Financijska praksa 19 (5) 1995:438-458; D. Jurlina-Alibegović: Prikaz državne intervencije u gospodarstvu Hrvatske, Financijska praksa 19 (5) 1995:561-570; etc.

⁵² F.G.Adams i L.R.Klein (Editors): Industrial Policies for Growth and Competitiveness - An Economic Perspective, 1985, cit. according to: M. Kesner-Škreb, supra 1995:407-420

⁵³ J.A.Vieg: The Role of Public Administration, in: Elements of Public Administration, Ed. F.Morstein Marx, Prentice-Hall, 1959:14

⁵⁴ For more details Cf.: Drucker, P.: Nova zbilja, Novi Liber, Zagreb 1992: 6 ff.

⁵⁵ Already in 1888, Chancellor Bismarck introduced state health insurance and compulsory pension insurance, which meant, in fact, the beginning of the realization of the “welfare state”, however, the first politician who had realized a socialist program and expropriated private gas factory, electric power plant and tram was not a Marxist but the anti-Semitic socialist Karl Luger, mayor of Vienna in 1896.

⁵⁶ Jelinić, S.: Kako izbjeći pravni vakuum, Privreda i pravo, 11-12 (30) 1991:740

⁵⁷ Kesner-Škreb, M.: supra, p.407

or nationalization⁵⁸. These regulations most frequently range between two extremities: on one hand neo-liberalism, understood in the tradition of laissez-faire, and on the other hand structuralism which emphasizes the imperfection of the market and, in that sense, the importance of state intervention. Keynes himself has emphasized that the state must also take care about the realization and maintaining of full employment, that it must use its measures to increase the inclination towards consumption and encourage investment activity, organize public works, while through the implementation of tax measures, the state can exercise influence on the redistribution of national income, etc⁵⁹. In the creation and setting up of rules, the state must restrict itself only to such rules that are applicable to *types of situations*, and individuals must be given the freedom in everything that depends on the circumstances of time and place (Hayek, 2001:104).

In terms of legal theory, here we need to recall the social function of legal standards in general, that is, of *legal aims* as the ingredients of law, where legal standards are the principal means (technique) for the realization of legal relations⁶⁰; however, it is here necessary to distinguish the *effective* role from the *intended* role of the legal standard in legal relations, which is actually the difference between the aim and the functions of norms in the society. Special is the question of legal standardization and state intervention in the conditions of the so-called transition and globalization⁶¹, it is, namely, the question whether the role of the state will become more significant or will it grow less in respect to other producers of legal standards if under globalization we consider the process of economic, social, cultural and political activity which exceeds the borders of national states⁶². The states of Central and Eastern Europe are in the phases of *re-modernization* and *re-rationalization* of their societies following the example of the western model, and they are now undergoing the process of transition in order to become similar to the Western European countries⁶³. Within this process, it is important to emphasize four elements significant for the economic success of a state⁶⁴: natural wealth, capital, technology and expert knowledge. Through law, states gain influence on all four elements of their development, with the remark that the latter two are in active changes, so that the law has not comprised comprehensively, and there is therefore permanent need to regulate relations arising from these elements. This process does not flow without difficulties and the role of law (state standards) in it is significant if not even crucial, in real, and especially in formal sense considering the adjustment of legal systems of particular states to the law of the European Community. Here *the circle could close*, because as sources of globalization the following are usually

⁵⁸ Ibid, p.408

⁵⁹ Zagorke Brunsko: *Suvremena kapitalistička država i njezin intervencionizam*, Politička misao, 1/1990, p. 81

⁶⁰ Visković, N., op.cit., 1981, p. 258

⁶¹ Globalization is written about in more detail by many authors and in Croatia a prominent place belongs to the editor Dr Anđelko Milardović who compiled and published the texts on globalization written by Robertson, Beck, Tapscott, Brzezinski, Lechner, Paić etc.: *Globalizacija*, Pan liber, 1999

⁶² Milardović, A./ Njavro, Đ.: *Globalizacija*, Pan liber, 1999, p. 10

⁶³ Milardović, A./ Njavro, Đ. supra, p. 13

⁶⁴ Thurow, L.: *Glavom u glavu*, Mladost, Zagreb, 1993, p. 33-45

mentioned: economy, ideology and technology. After the World Wars, the economies of industrially developed states were under the influence of state politics which was trying to balance the relations between the capital and the workers and to ease their mutual tensions, so that Keynesian welfare state means direct efforts to mitigate undesirable effects of free market, and at the same time it is expected that conditions for economic growth and accumulation⁶⁵ will be created. The prevailing characteristic of most developed economies was the strong state regulation although the economies and the (national) role of the state in legal standardization mutually differed: the USA have had a relatively deregulated economy, while on the other side there were Sweden and Germany with markedly strong regulation, especially of social protection. Even in the economies of the countries of *four Asian tigers* and Japan, state regulations did not play a small role, but nevertheless it could not be said that they followed the model of the European *welfare states* (Šporer, 2001:19). Implementation of these principles would mean that the states of south-eastern Europe that have recently come out of the war must have a more significant influence and a greater importance than expected when the tasks of liberalization and introduction of market principles of transition are placed before them.

One of the basic tasks of the state today is to make the national environment more attractive for business operations and investment of capital, so that transparent regulations are made and laws that are in harmony with the laws of other states; road infrastructure and communications are being developed and labor force is being educated (Šporer, 2001:17).

Consequences (fundamental) of transition for the states which are passing through it could be reduced to those that also appear in globalization, and they can be classified as economic and political, where both categories have influence and significantly touch legal standardization. Economic consequences would be: growing inequality in incomes and growing differences in salaries, while, at the same time, in developing countries the number of people living in poverty is declining (Kearney, 2000; Šporer, 2001:16); the economic growth in the larger part of the world in the past three decades was positive, where greatest influence belongs to the *openness of economy* which must be made possible through legal norms and through their transparency. The problem is the high unemployment rate, especially in Europe, and the security of the employed persons is at a very low level and a special problem (Cohen, 1998) lies in the fact that the unemployed have no influence on negotiations (understandably) about wages. On the other hand, political consequences manifest themselves in the spreading of crises from one place to other⁶⁶, a part of the authority of national states is undermined due to the process of deregulation and internationalization of labor markets and capital, and the economic power of the states is endangered as well so that they can no longer perform their social role.

⁶⁵ Šporer, Ž., op.cit., p.8

⁶⁶ Ibid. p. 16

The question whether free flow of capitals is possible without unfavorable effects and insecurity, does not offer an unambiguous answer, but there is no dispute about the fact that new relations require new normative solutions, both on the level of national states and on the international level. On the other hand, *publishers' bestsellers* about globalization (Thurow, Rifkin, Greider) prove that the *idea laissez faire* of economic globalization has not kept the promise about the general growth of welfare⁶⁷, but has as the consequence quite the opposite from what had been promised: mass unemployment, stagnant salaries, erosion of arrangements of the politics of labor market, aggravation of social inequalities, growing tax load and expenditures on one hand and limitation of state transfers and services on the other hand. Today's societies are *nonmeritocratic* and one frequently comes across direct obvious injustices⁶⁸ or chaotic rewarding in the whole system, and the omnipresent uncertainty functions destructively on the social system.

5. CONCLUSIONS

The opinion that the role of the state, especially in legal standardization, will significantly diminish in the so-called global era is certainly questionable. It can be discussed (and it is being discussed) which of the state's function are going to diminish⁶⁹, which, after all, was happening in the 20th century as well, especially through the so-called public sector; it is also unquestionable that the process of globalization somehow transfers *the power* (responsibility) from the state to the companies (corporations)⁷⁰, but as far as the creation of legal standards (public law) is concerned, it is not visible that the state loses its powers, it is not visible who could – beside the state, or in stead of it - bring general regulations; on the contrary, these reasons could lead towards the strengthening of the legal regulation of precisely this (missing) responsibility. National states nevertheless do not lose the power of passing and implementing (enforcing) law and *order*, nor do these lose their territorial validity.

By accepting international standards, regulations, *laws*, globalization as a process *bites into* a part of the structures of modern statehood; this especially applies to standards

⁶⁷ Rieger, E. and Leibfried, S.: *Socijalnopolitičke granice globalizacije*, translation (Bilić, B.) of the article published in *Politische Vierteljahresschrift* (4/1997), *Treći program hrvatskog radija*, 53/54, 1998, in which the author supplements his thesis emphasizing that the situation is not the same in all countries, upon which he pays special attention to Germany "... The necessity of reforms in the social policies of developed welfare states was by no means caused by globalization, it only surfaced more clearly and more urgently thanks to the help of globalization..." p. 12.

⁶⁸ Young, J.: *The Exclusive Society-Social Exclusion, Crime and difference in Late Modernity*, London/Thousand Oaks/New Delhi, SAGE Pub., 1999, cit. According to: *Globalizacija i njene refleksije u Hrvatskoj*, translated by Matko Meštrović, Ekonomski institut Zagreb, Zagreb, 2001

⁶⁹ Mazlish, B.: *A Tour of Globalization*, *Indiana Journal of Global Legal Studies*, 1/1999

⁷⁰ Strange, S.: *Erozija države*, translation (Boršić, M.) of the text published in the periodical *Current History* 61/1997, *Treći program hrvatskog radija*, 53/54, 1998, "... there is also political doubt in relation to globalization. Long struggle for freedom and responsibility has made some countries responsible to their people, but globalization has also allowed international bureaucracies to undermine responsibility. None of the new non-state authorities is responsible; some are even transparent. Lack of democracy does not exist only in Europe, but also in the United States, in Japan and in the entire globalized economy.

relating to human rights, protection of the environment, free flow of capital, and the like. The created standards (international) make it easier for investors to place their money and successfully make profits, but the control of governments over the international trade has been reduced; through these standards, significant deregulations of economic branches have been achieved, collective property (public goods) has been transformed into goods, and the pressure on the states has been intensified for the purpose of reducing the support for social services (Carrier)⁷¹. Societies are becoming more mutually dependent because the problems that need to be solved are also becoming more universal. States have less control over ideas, but remain controllers of their own borders, of the movement of people and of the mobility of work force⁷², which can be observed even within the European Union itself, where national markets protect themselves from free flow of work force, at least for a defined period. Aside from this, the international law has in its establishment (enforcement) always relied on the states and their institutions⁷³, and there are no indications that this might change in the near future, because the *international community* does not possess legal mechanisms for the implementation of its order.

It can be concluded that no giant *leaps*⁷⁴ are to be expected in the development of law; here, we do not only have in mind national laws, i.e. laws of states-nations, but also the possible *supranational* laws. Legal pluralism, as a significant point of reference in *western* legal tradition, actually fits into the idea of *postmodernism* (individualization, rights of minorities and so on), and it can therefore not be expected of the lawyers to make any revolutionary moves⁷⁵ while writing laws; laws codify, i.e. systematize the existing legal practice, through laws, foreign legal solutions are received, or legal solutions that are compulsory due to the hierarchy of legal regulations or international conventions (EU). The development of technology, especially of computer technology (computer society) requires new legislative activity, and the problem which appears here is that the computer society and the so-called global society demand liberalization of the markets, while at the same time it imposes the need for uniform legal standardization. Liberalization influences the abolishing of monopoly in technological sphere but new requirements are being set for the purpose of a more complete protection of copyrights, protection of personality, protection of personal data, of children and youth and the like.

Certainly, the borders of state regulation (national) will partially determine the standards of European law, which, however, does not mean losing the role of the state as the addresser of legal standards. For example, it is pointed out that the threat for the

⁷¹ Carrier, G. J.: *Virtualism - A new Political Economy*, Oxford, NY: Berg, 1998, cit. According to: Meštrović, M.: *Formalna ekonomija i stvarni povijesni svijet*, in: *Globalizacija i njene refleksije u Hrvatskoj*, Ekonomski institut, Zagreb, 2001

⁷² Hirst, Thompson, op.cit., 2001 p. 280. ff. "...except for a class of internationally mobile, highly qualified professionals and desperate poor migrants and refugees who will suffer any hardship just to get away from unendurable conditions, the majority of the world's population can not move easily..."

⁷³ Fox, G. H.: *Strengthening the State*, *Indiana Journal of Global Legal Studies*, 1/1999

⁷⁴ Padjen, I., 1993:62, op.cit.

⁷⁵ Padjen, I., 1993:63, op.cit

workers (stability of the working relation) in the European Community does not come (as it is usually thought) from the market or investments, but from the decrease of the legitimate role of the state in an efficacious organization of the market⁷⁶.

In the same way in which, at the end of the 20th century, privatization, deregulation and liberalization were the dominant topics, the discussions at the beginning of the 21st century, after the failure of significant projects⁷⁷, are more and more lead about how to arrange efficacious public (state) regulation⁷⁸, which then means primarily legal regulation. Another question, however, is that of *reducing the powers of states-nations*⁷⁹, of the change of conditions in the surroundings founded on what is called *economic globalization*. In discussing these questions (Benoist) emphasizes the decrease of the possibility of state influence at the macro-economic level⁸⁰.

It is to be concluded that there is increasing diversity of methods of social regulation and diversity of sources of social standards, as well as of the modalities of their implementation⁸¹. It is the unquestionable task of politics (legitimate centers of power) to determine legal, social and ecological conditions that make economic activity socially possible and legitimate⁸², while the states are required (for example) to standardize and apply sophisticated scientific regimes in international trade and in the protection of human environment (ecology), in electronic trade, in digital communication; furthermore, expectations include the protection of human rights according to international standards, struggle against corruption, terrorism and organized crime, all of which suggests that the role of the state in legal standardization will not diminish significantly, but that it will be limited both by objective reasons, *global market* and the international (world) order, as well as by its own (subjective) weaknesses.

⁷⁶ Evans, J.: The rules of globalisation, OECD Observer, 19th November 2002

⁷⁷ Energy crisis (reductions) in California, British Railroads... Evans, J.: The rules of globalisation, OECD Observer, 19th November 2002

⁷⁸ Ibid., p.3.

⁷⁹ Benoist, de A.: Suočavanje s globalizacijom, translation (Lehpamer, M.) of the text *Confronting Globalization*, Telos, 108/1996, published in: Treći program hrvatskog radija, 53/54, 1998

⁸⁰ Benoist, de A., ibid., p. 115.: "From the point of view of money, state influence is almost invisible because independent central banks control the interest/trade ratio and make decisions depending on the market. A country that decides to unilaterally raise its interest rates will influence a higher inflow of capital from those countries that offer higher profit. The scope of monetary mobilization of central banks is higher than the volume of transactions... When budget is concerned, the limitations of state freedom are similarly reduced due to an increased public debt that stops every stimulation not determined by the law. Finally, concerning industrial policy, the government has no other solutions for resisting the competition but to attract foreign businesses with special fiscal privileges, which leaves it at the mercy of multinational companies."

⁸¹ Pusić, E., op.cit. 1999, p. 5

⁸² Beck, In: Što je globalizacija, in: Milardović: Globalizacija, Pan liber, 1999, p. 64., emphasizes that we must distinguish between globalism, globality and globalization "...This distinction serves the purpose of breaking the territorial orthodoxy of the political and the social, that has come to existence with the project of national state of the first modernity, set up in terms of categories and institutionally as absolute..."

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