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MEĐUNARODNA KAZNENOPRAVNA POMOĆ – TEORIJSKI I PRAKTIČNI ASPEKTI

SAŽETAK

U BiH nisu do sada vršena nikakva sveobuhvatna istraživanja u vezi s funkcioniranjem međunarodne pravne pomoći, pa se kroz ovaj rad daje prikaz stvarnog stanja u ovoj oblasti. Rad se prvenstveno usredotočuje na problematiku iz ove oblasti u BiH, što znači da se bavi postupanjem i ulogom domaćih tijela koja sudjeluju u postupcima pružanja međunarodne pravne pomoći, a istovremeno obrađuje i usporednu praksu država regije i drugih država s kojima se ova pomoć ostvaruje.

Instituti međunarodne pravne pomoći su često obrađivani od mnogih autora, ali sama primjena tih instituta u BiH nije nikada sveobuhvatno analizirana. U pripremi ovoga rada vršena su dugogodišnja istraživanja i analiza tisuća predmeta svih oblika međunarodne pravne pomoći, analiza pravnih osnova za ovu pravnu pomoć, te konzultirana znanstvena misao glede ove materije.

Na osnovi provedenih istraživanja osnovni zaključak ovoga rada se sastoji u tome da je međunarodna kaznenopravna pomoć u BiH, i pored određenih nedostataka koji su obrađeni u ovome radu, kvalitetnije pravno uređena nego što se ovi postupci odvijaju u praksi. Kod ovako utvrđenog činjeničnog stanja istraživani su razlozi za neadekvatnu primjenu pravnih osnova u međunarodnoj pravnoj pomoći od nositelja pravosudnih funkcija (sudaca i tužitelja).

Utvrđeno je da u BiH ne postoji kontrolna funkcija (dvostupanjsko odlučivanje) u vezi s odlukama postupajućih sudaca i tužitelja u većini postupaka međunarodne pravne pomoći, pa tako u slučajevima kada Ministarstvo pravde BiH u skladu s člankom 5. st. 2. Zakona o MPP-u zamolnicu vrati prvostupanjskom tijelu, jer ista nije sukladna međunarodnom ugovoru i očito je da bi je strano tijelo odbilo, po istoj zamolnici ponovno postupa isti sudac ili tužitelj, koji slijedom principa neovisnosti u odlučivanju često takvu (neizmijenjenu) zamolnicu ponovo vrati Ministarstvu pravde BiH radi proslijeđivanja stranoj državi.

Slijedom navedenog istraživani su i razlozi neupitnog autoriteta sudaca i tužitelja u ovim postupcima i različita postupanja u istim ili sličnim pravnim situacijama (što je kroz primjere opisano u radu), pa je utvrđeno da pored nepostojanja institucionalne kontrole u tim

postupanjima od nadređenog tijela, ne postoji ni njihova obveza da u pogledu tumačenja određene norme međunarodnog ugovora uvaže i stav neposredno nadređenog ili bilo kojeg drugog tijela. Dodajući prednjem da je utvrđeno da je sudac početnik na najnižoj razini (općinski i osnovni sudovi) kroz plaću više vrednovan za svoj rad od akademskog profesora kod kojega je stjecao znanje za posao koji obavlja ili od najvišeg ranga rukovodnog državnog službenika u Ministarstvu pravde BiH koji kreira zakonska rješenja po kojima sudovi postupaju u ovoj oblasti, nije teško izvući zaključak da se autoritet kroz odlučivanje u ovim predmetima gradi i na osnovi pravila vrednovanja u sustavu.

Zbog izostanka institucionalne kontrolne funkcije u ovim postupcima, kroz istraživanja u vezi ovoga rada utvrđena su mnoga neadekvatna postupanja pa i potpuno različita postupanja u istim ili sličnim pravnim stvarima, za što su nužne hitne intervencije. Mnogi problemi koji su izneseni u ovome radu, ranije od drugih autora nisu identificirani na način da se prikažu javnosti ili tijelima koja bi ih trebala rješavati, pa su istraživanja kroz ovaj rad prilika da se na te probleme skrene veća pozornost, a veliki broj tih problema se može otkloniti i bez reformi i bez izmjene zakona.

Kroz istraživanja u vezi s ovim radom su prepoznati i drugi problemi, koji su rezultat nedovoljne suradnje i koordinacije u pripremi odgovarajućih zakonskih rješenja koja kroz različite zakone regulišu istu oblast. Tako jedna radna skupina učestvuje u izradi teksta Zakona o MPP, a ni jedan član te skupine ne učestvuje u izradi ZKP-a, koji sadrži materiju iz oblasti uređene Zakonom o MPP-u, pa se pojavljuju različita zakonska rješenja u vezi istih pravnih stvari.

Ukupni rezultati istraživanja kroz ovaj rad mogu dati doprinos i u teorijskom smislu, posebno kroz pojedinačnu obradu oblika međunarodne pravne pomoći i u situacijama kada neke države ne uvažavaju stavove drugih država (BiH) u pogledu primjene određenih normi ugovora. U tim situacijama kao jedna od opcija može slijediti recipročno uzvraćanje, što dovodi do nove ravnoteže i uspostave kvalitetnijih odnosa, jer u ovim odnosima u praktičnom smislu ne postoje tijela koja mjerodavno rješavaju navedene sporove između tijela dviju država.

Teorija se u BiH više bavi uvažavanjem pravila i tumačenjem tih pravila, a praksa ukazuje i na drugačija postupanja glede izvršenja obveza iz međunarodnih ugovora, koji reguliraju ove odnose. Iz navedenih razloga teorijska misao treba uvažavati i stanje u praksi, tj. osvrnuti se na ono kako se događa u ovoj oblasti, a ne samo kako bi trebalo biti, te u tome smjeru

ponuditi rješenja, koja bi mogla biti i drukčija od zaključaka ovoga rada, a sve u cilju prevladavanja nagomilanih problema u ovoj oblasti.

INTERNATIONAL CRIMINAL ASSISTANCE - THEORETICAL AND PRACTICAL ASPECTS

SUMMARY

No comprehensive research has been carried out, to date, in relation to the functioning of mutual legal assistance in BiH, hence this paper gives an overview of the real situation in this area. The paper primarily focuses on issues in this area in BiH, which means that it deals with the treatment and role of domestic bodies involved in mutual legal assistance procedures and at the same time with the comparative practice of the countries in the region and other countries with which this assistance is being carried out.

Mutual legal assistance institutes were often reviewed by many authors, but the very application of these institutes in BiH has never been comprehensively analyzed. Many years of research and analysis of thousands of cases of all forms of mutual legal assistance as well as analysis of the legal bases for this legal assistance were employed during the course of preparation of this paper. Scientific views on this matter were also taken into account.

Based on the research carried out, the basic conclusion of this paper is that, despite some of the shortcomings discussed in this paper, mutual legal assistance in criminal matters in BiH is better regulated than it is implemented in practice. With such an established factual situation, the reasons for inadequate application of legal bases in mutual legal assistance by the judicial function holders (judges and prosecutors) were researched.

It was found that there is no control function in BiH (second instance decision-making) regarding the decisions of the acting judges and prosecutors in most of the procedures of mutual legal assistance, hence in cases when the Ministry of Justice of BiH, in accordance with Article 5 (2) of the Law on Mutual Legal Assistance returns the MLA request to the first-instance body, because it is not in line with the international treaty and it is obvious that the foreign body would reject it, the same judge or prosecutor again acts in the matter, and often just resubmits in accordance with the principle of independence in decision-making the same (unchanged) Request to the Ministry of Justice of BiH for the purpose of forwarding it to a foreign country.

Consequently, the reasons for unquestioned authority of the judges and prosecutors in these proceedings and different undertakings in the same or similar legal situations were researched (which is illustrated by the examples described in the paper). It was found that in addition to

the absence of institutional control by a superior body in these undertakings, there is no obligation to comply with the interpretation of a specific regulation or an opinion on the matter of a superior or any other body. Adding to the aforementioned, it is established that a new judge working at the lowest-level (municipal and basic courts) is better rewarded, if we look at the salary rage, for his/her work than an academic professor with whom he/she studied to obtain knowledge for the job he/she is performing or more than the highest ranking civil servant in the BiH Ministry of Justice who creates legal solutions pursuant to which the courts act in this area, it is not difficult to draw the conclusion that the authority, through decision-making in these cases, is also built in accordance with the rule of rewards in the system.

Due to the lack of institutional control function in these procedures, a number of inadequate procedures and even completely different undertakings in the same or similar legal matters have been identified through research on this paper, hence urgent interventions are necessary. Many of the problems presented in this paper were not previously identified by other authors in a way that they are shown to the public or the authorities that should solve them, therefore the research in this paper provides an opportunity to draw more attention to these problems, as a large number of these problems can be removed without reform and without amendments to the law.

The research in this paper identified other problems which are the result of insufficient cooperation and coordination in the preparation of appropriate legal solutions that regulate the same area through different laws. Thus, one working group participates in drafting the text of the Law on MLA, and no member of that group participates in the drafting of the CPC, which contains matters in the area regulated by the Law on MPP, and hence different legal solutions in relation to the same legal matters appear.

The overall results of the research in this paper can also contribute in theoretical sense, especially through individual review of forms of mutual legal assistance and in situations where some states do not respect the views of other states (BiH) regarding the application of certain treaty norms. In these situations, one of the options can be reciprocity, which leads to a new balance and establishment of better relations, because in these types of relations there are no bodies, in practical terms, that are competent to resolve disputes between the bodies of the two states.

The theory in BiH is more concerned with compliance and interpretation of the rules and practice points to a different treatment regarding the fulfillment of obligations from

international treaties that regulate these relations. For the above reasons, theoretical thought should also take into account the situation in practice, i.e. reflect on what is happening in this area and not just concentrate on how it should be and then accordingly offer solutions, which could be different from the conclusions of this paper, all in order to overcome the accumulated problems in this area.