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Consumer Bankruptcy and the Western Balkan Countries: Why Do They Need It?

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***“And forgive us our debts as we have also forgiven our debtors”
(Luke 6:37)***

I. INTRODUCTION

Consumer debt and consumer credit have a centuries-old legacy, while the concept of consumer bankruptcy is relatively recent.¹ Just three decades ago, it wasn't even a discussion point across the European continent as most countries lacked any consumer bankruptcy legislation. However, the evolution of consumer credit accessibility, the rise of consumerism, shifting economic landscapes, and transformations in welfare systems over the past thirty years have compelled numerous European nations to rethink and reconsider their attitude on consumer bankruptcy legislation.²

Today we seem to be faced with a paradox. Despite the widespread global explosion of consumer bankruptcy laws, 11 European countries still lack consumer bankruptcy legislation.³ Nine months ago, this number was 13, but in the meantime, Uzbekistan and Kazakhstan adopted new consumer bankruptcy legislation by following the well-structured version of the Russian framework. Looks like this eastward wave of consumer bankruptcy legislation somehow missed some central and eastern European countries which were also part of the socialist and post-communist bloc. Unfortunately, little scientific attention is dedicated to the reasons behind this gap in some jurisdictions. Throughout my years of legal practice in one of said jurisdictions, I have often found myself asking two basic research questions: (1) Why policymakers in developing countries such as the Western Balkans are hesitant to adopt a consumer bankruptcy regime?; and (2) why do these countries need consumer bankruptcy in the first place? This paper aims to answer them.

¹ Niemi, J., Ramsay, I., & Whitford, W. C.,(2003). *Consumer bankruptcy in global perspective*. Hart Publishing.

² Danes opened the floodgates in 1984 (Niemi-Kiesilainen 1999). Scotland passed the Bankruptcy Act of 1985, and England and Wales substantially liberalized their consumer bankruptcy laws in 1986 and then again in the Enterprise Act of 2002 (Ramsay 2003a; Walters 2005; Ziegel 2003). On the continent, France passed a sweeping bankruptcy act, the Loi Neierz, on the last day of the decade of the 1980s, enabling consumer debtors to pursue bankruptcy debt relief for the first time in a meaningful way (Kilborn 2005a; Niemi-Kiesilainen 1999). Likewise, Germany moved in 1999 in the Insolvenzordnung (Insolvency Act) to offer overburdened debtors their first opportunity for debt relief (Kilborn 2004). In Scandinavia, each of Norway, Finland, and Sweden moved toward more generous debtor relief in 1992, 1993, and 1994, respectively (Niemi-Kiesilainen 1999; Ziegel 2003).

³ Those countries are Albania, Belarus, Bosnia and Herzegovina, Kosovo, Malta, Moldova, Montenegro, North Macedonia, Serbia, Turkey, and Ukraine

II. COUNTRIES WITHOUT CONSUMER BANKRUPTCY REGULATION: THE CASE OF THE WESTERN BALKANS

Central and Eastern Europe was not the best place to live in the early 1990s. This period challenged the survival skills of the people coming from the post-communist and post-socialist societies. Ordinary consumers had to contend with hyperinflation which eroded their savings, transformed basic necessities into mission impossible, and eroded confidence in the banking system.⁴ Fast forward fifteen years, and we find that Russia, along with other Central and Eastern European nations, has introduced national consumer bankruptcy legislation as a weapon against consumer over-indebtedness.⁵ Some countries from the former “European socialist bloc” today remain excluded from this group and still do not have any consumer bankruptcy legislation. For some reason, there are rare, or no academic debates at all about the reasons behind this non-existence. These countries are not immune to modern diseases after all, which makes it quite challenging to understand why they appear resistant to contemporary remedies for excessive over-indebtedness, like consumer bankruptcy legislation. The reasons can be grouped depending on the costs and the benefits from its implementation, on social and administrative aspects, or institutional and procedural designs.

1. No ex-ante or ex-post benefits

The first reason i.e. challenge that these countries are facing is the skepticism that such a regime would not provide ex-ante or ex-post benefits. Another reason is that consumer over-indebtedness in these countries has not yet reached a point to justify the cost of adopting consumer bankruptcy.⁶ In the attempt of establishing a new infrastructure of officials and intermediaries for an effective personal insolvency system, emerging economies experiencing a rising number of indebted individuals may face significant costs.⁷

Officials and policymakers in nations lacking a contemporary framework for consumer bankruptcy may perceive their societies as unprepared, both institutionally and socially, for such a system. The reality, however, is that over the past decade, prompted by global economic shifts, Western Balkan countries have contemplated revising their policies to incorporate consumer bankruptcy into their domestic legislation. Yet, they remain distant from taking concrete steps in that direction.

⁴ Campbell, S. (1993). Brother, Can You Spare a Ruble: The Development of Bankruptcy Legislation in the New Russia. *Bankr. Dev. J.*, 10, 343;

⁵ Guseva, A. (2008). Into the red: The birth of the credit card market in post-communist Russia. *Stanford University Press*.

⁶ Feibelman, A. (2009). Consumer bankruptcy as development policy. *Seton Hall L. Rev.*, 39, 63.

⁷ Kilborn, J. J., Garrido, J., Booth, C. D., Niemi, J., & Ramsey, I. D. (2013). World Bank Report on the Treatment of the Insolvency of Natural Persons. Insolvency and Creditor/Debtor Regimes Task Force, Working Group on the Treatment of the Insolvency of Natural Persons

2. The choice of the right institutional framework

One of the numerous challenges faced by both legal professionals and the general public in developing countries is the fear surrounding bankruptcy often viewed as a Pandora's box because they will be overwhelmed by legal and administrative mess and a confrontation with moral principles.⁸ So, the second reason and an even bigger challenge is choosing the right institutional framework or model for the enactment of consumer insolvency legislation. It is widely agreed upon that it would be premature to select one best scenario for personal bankruptcy law creation.⁹ Policymakers should be aware of the social, legal, and economic circumstances of the specific country that may affect the functioning of a consumer bankruptcy regime. The Western Balkan countries are one of those that do not have any consumer bankruptcy system and whose policymakers should create new or adopt an existing institutional framework. Research focused on various areas of the law suggests that it may not be advisable to transplant complex procedures from richer to poorer countries as the judicial systems in these countries may lack the administrative or financial capacity to effectively handle such complexities. Hence, it would be beneficial to build upon existing institutional infrastructures and keep procedures as simple as possible.¹⁰

3. The diversity of legal traditions and the use of legal transplants

Henry Kissinger once noted that when he wanted to talk to Europe, he was not sure whom to call.¹¹ While this may be slowly changing, Europe still consists of many diverse cultures, has a huge variety of insolvency systems, and contains a lot of different philosophies about debt. Over the centuries, the presence of legal traditions has significantly shaped the development of legal systems in continental European countries.¹² Historically, the legal systems in Central and Eastern Europe were heavily influenced by the Roman-Germanic legal tradition, with legal literature and statutes often drawing from German, Austrian, and French law.¹³ However, even today, Western legal traditions, many of which are part of the broader European continental legal framework, kept their influence. The fundamental question that persists is whether the

⁸ Costa, J. V. (1974). Bankruptcy: The Legal Whipping Boy. *John's L. Rev.*, 49, 52.

⁹ Kilborn, J. J., Garrido, J., Booth, C. D., Niemi, J., & Ramsey, I. D. (2013). World Bank Report on the Treatment of the Insolvency of Natural Persons. Insolvency and Creditor/Debtor Regimes Task Force, Working Group on the Treatment of the Insolvency of Natural Persons.

¹⁰ Kilborn, J. J., Garrido, J., Booth, C. D., Niemi, J., & Ramsey, I. D. (2013). World Bank Report on the Treatment of the Insolvency of Natural Persons. Insolvency and Creditor/Debtor Regimes Task Force, Working Group on the Treatment of the Insolvency of Natural Persons

¹¹ Pearson, S., Successful Restructuring Requires Sensitivity, *The Financial News*, Dec.1, 2002, available at 2002 WL24141004

¹² Martin, N. (2005). The role of history and culture in developing bankruptcy and insolvency systems: the perils of legal transplantation. *BC Int'l & Comp. L. Rev.*, 28, 1.

¹³ Ajani, G. (1995). By chance and prestige: legal transplants in Russia and Eastern Europe. *The American Journal of Comparative Law*, 43(1), 93-117

current model, represented by "x," adequately meets the contemporary needs of the "y" country and its economy. That being said, the last reason for hesitance is that different policymakers may well come to different conclusions as to the proper methods and places to guide and influence behavior through social or economic regulation. Many countries have only recently, since 1990, implemented insolvency procedures exclusively for individuals, which means they do not have an extensive legal history of managing the challenges of such proceedings. This absence of established tradition has given rise to diverse and innovative procedural approaches that differ from one country to another. The complexity escalates further when policymakers in these nations face even more formidable challenges, as they lack a foundation or an existing model for reference or comparison.

III. CONSUMER BANKRUPTCY AND THE WESTERN BALKAN COUNTRIES: WHY DO THEY NEED IT?

Bankruptcy as practiced in market economies was unknown and unneeded in centrally planned ones. After the fall of the Berlin Wall, there is almost no Eastern European country that has not implemented a new consumer bankruptcy law. In light of the special needs in Eastern and Central Europe (and in the former Soviet Union) it is questionable whether the initial bankruptcy laws for these countries should have followed so faithfully the laws of a developed country. However, they did, and in 2004 new consumer bankruptcy law was enacted in Estonia, in 2006 in the Czech Republic and Slovakia, in 2008 in Slovenia and Latvia, in 2009 in Poland, in 2013 in Lithuania, in 2015 Russia, Hungary, and Croatia joined the group, Romania in 2018, Bulgaria in 2019, and finally Kazakhstan and Uzbekistan were the last members joining the group in January and March 2023. Despite the differences between the law on the books and the law in action, evidence shows that these countries, many of them historically sharing similar economic, social, and legal backgrounds as former members of the communist bloc, are positive examples of bankruptcy law implementation. Even in the face of various challenges (administrative complexity and compliance costs, system administration and filing fees, case administration and trustee compensation, and private advisor fees for guidance in preparing and pursuing a relief application.), they seem to be successfully managing.¹⁴ The slowly establishing practice in the last decade presents the functionality of consumer bankruptcy as a remedy for over-indebtedness in these countries.

¹⁴ Paseková, M., Fišerová, Z., & Bařinová, D. (2016). Bankruptcy in Czech Republic—from the perspectives of debtors, creditors, and the judiciary, 2008-2013. *Journal of International Studies*.
Adamus, R., (2011) Consumer Bankruptcy in Poland, *International and Comparative Law Review*
Mironov, A. N., Kolesnikova, Y. P., & Redkous, V. M. (2021). Private bankruptcy in the Russian Federation: reality and perspectives. In SHS Web of Conferences (Vol. 108, p. 01008). EDP Sciences.
See Russian Federation & IBRD, Report on the Status of Protection of Consumer Rights in the Financial Sphere in 2016, at 26-27 (2017), https://www.rosпотреbnadzor.ru/deyatelnost/zpp/?ELEMENT_ID=9091

The common arguments and rationales *about why the Western Balkan countries need consumer bankruptcy* are primarily rooted in *economic, socio-cultural, and legal considerations*. The link between bankruptcy and economic factors, such as GDP, inflation, interest rate, household debts, and credit markets has been examined many times in the literature and the effects of the so-called economics of bankruptcy has already been carefully elaborated by many authors.¹⁵ When it comes to microeconomic aspects, the most common factors include age, education, gender, homeownership, type and number of debts, income and number of dependent children¹⁶ The existing literature is also offering various evidence that social, moral, and cultural factors such as moral hazard, stigmatization, resocialization, culture influence, unemployment, divorce, illness are very high related to the need of consumer bankruptcy and its implementation.¹⁷

The status quo and the danger of the “new constitutional courts” wave

The Western Balkan countries share both notable distinctions and remarkable similarities among themselves. The differences among them stem from specific factors like nationalities, territories, religions, and the complete collapse of the planned economy and socialism as its foundation, particularly during the 1990s. Conversely, shared challenges have emerged, including issues like unemployment, poverty, excessive over-indebtedness, privatization of publicly owned enterprises, and the transition to an entirely new economic system unfamiliar to the Balkan population. Today, when considering the enactment of consumer bankruptcy laws, these differences come back, and while one country does not even talk about the topic, the other one already has legal practice with unsuccessful implementation of this law.

I remember that I was only 14 when the first credit cards were introduced in Macedonia by commercial banks to the citizens. New consumer loans that opened the way to fast spending were more than attractive for the average Macedonian citizen living from paycheck to paycheck and dreaming of a better life. In 2006, people also started to

¹⁵ The literature on macroeconomic variables focus on inflation (Acosta et al., 2009; Contreras et al., 2018; Croix & Liu, 2009), interest rates (Everett & Watson, 1998; Tomas, 2016), credit availability (Altman, 1983; Liu, 2004; Tomas, 2016), and GDP (Benito et al., 2009; Carling et al., 2007; Contreras, 2016; Everett & Watson, 1998; Hol, 2007; Ptak-chmielewska & Matuszyk, 2019; Tomas, 2016; Santoro & Gaffeo, 2009).

¹⁶ Personal bankruptcy prediction using decision tree model (Syed Nor et al. 2019); Externalities among creditors and personal bankruptcy (Dawsey 2014); An economic analysis of the consumer bankruptcy crisis (Zywicki 2004)

¹⁷ Do we cure a market failure or a social problem? (Niemi-Kiesiläinen J., 1999); The Fragile Middle Class: Americans in Debt (Sullivan, Warren, and Westbrook 2000); Economic Versus Sociological Approaches to Legal Research: The Case of Bankruptcy (White 1991); The effect of unemployment benefits, welfare benefits, and other income on personal bankruptcy (Fisher J.D. 2005); Till debt do us part: A model of divorce and personal bankruptcy (Fisher J.D.2006); Consumer Bankruptcy in Global Perspective (Ramsey, I., Kiesilainen, J.N. & Whitford, W,2003) The evolution of Bankruptcy stigma (Efrat R, 2006); The top twenty issues in the history of consumer bankruptcy (Tabb, C.J.,2007); Consumer debt and social exclusion in Europe (Micklitz, H.W, Domurath, I,2015)

receive their salary on a debit card. In the same year, the Macedonian government introduced the new, completely reformed enforcement law and enforcement legal procedure.¹⁸ The reason behind this reform was the complete ineffectiveness of the small number of completely unmotivated judges who had thousands of cases and were supposed to bring money back to the creditors at a time when people were using primarily cash and were still mentally living in a socialist society where the state was supposed to somehow magically resolve all their problems. The Enforcement law is still in force today as the only solution for over-indebtedness for Macedonian consumers, which resulted in thousands of cases, thousands of euros in debt, and blocked bank accounts of the debtors.¹⁹

The Republic of Serbia had quite a different transitional period and circumstances during the 1990s, but two things are in common: rising credit demand from the population and the enforcement legal system similar to the Macedonian one. The enforcement system in Serbia was established in 2012, and since then more than 4 million requests have been submitted to the enforcement agents in the country, which is exactly half of the population of Serbia.²⁰ Macedonia, Serbia, and Montenegro are currently the countries that are operating with private enforcement and have established private enforcement agents appointed by the Ministry of Justice. In Bosnia and Herzegovina as well as Albania, from the aspect of valid bankruptcy regulations, bankruptcy is still carried out almost exclusively on the assets of legal entities. An exception exists in terms of the liability of members of companies that are unlimited and jointly responsible for the company's obligations, in the way that its property can be covered by bankruptcy proceedings. As we see, provisions of bankruptcy regulations do not apply to all natural persons, so the institute of consumer bankruptcy in the Bosnian and Albanian legal systems is currently unknown.

The Curious Case of the Republic of Montenegro

While these countries struggle to take a step forward or even table the discussion of consumer bankruptcy, another country in the Western Balkan, the Republic of Montenegro already has a very dangerous judicial practice related to consumer bankruptcy.

In 2015, following the Croatian example, and inspired by the same reasons as many other countries, the leaders of the Liberal Party in Montenegro proposed a consumer

¹⁸ This was done by partial "privatization" of the judicial system and by replacing the judges with private enforcement agents appointed by the Ministry of justice. These agents are working after a request for enforcement submitted by the creditors. The court is still included in the procedure deciding after debtor's and creditor's appeals or other relevant facts during the procedure.

¹⁹ According to the report of the Chamber of Enforcement Agents from 2021, a total of 1.670.873,00 requests were submitted by the creditors, 623.759,00 of them are realized which is 37,33% of realization, and the total amount of debt is EUR 1.618.684.458,00

²⁰ <https://komoraizvrsitelja.rs/javni-izvrsitelji/>

bankruptcy law in the Parliament, hoping that this law would receive the necessary support and votes from its members. On 14.08.2015 a new consumer bankruptcy law was enacted.²¹ However, the happiness did not last very long, because only three months later, on 11.12.2015 the validity and constitutionality of the law were challenged by two lawyers from Podgorica who submitted a request for judicial review to the Constitutional court. A year later, on 30.11.2016 the Constitutional Court decided that there were enough arguments for further investigation and decided to start a procedure for examining the constitutionality of the consumer bankruptcy law.²² Finally, on 24.02.2017 the court adopted a final decision by majority vote repealing the law as unconstitutional.²³ Why is this case so interesting, important, and dangerous at the same time? Because of the overgeneralized, ultra-formalistic, and senseless argumentation of the petitioners and its acceptance and poor interpretation by the court.

The very first argument of the petitioners is related to *the right of property* as a basic constitutional right and whether its limitation with the consumer bankruptcy law is to the extent necessary to satisfy the purpose for which the limitation is allowed in a free democratic society²⁴ Specifically, they emphasize that the law in question restricts a consumer's ability to manage their property when bankruptcy proceedings are initiated.²⁵ The second argument of the petitioners is related to the *inconsistency and conflict with the Civil Procedure Law*²⁶ This inconsistency between the Consumer Bankruptcy Law and the Civil Procedure Law they said, makes the bankruptcy law inapplicable for corresponding court proceedings. The last argument of the petitioners is *the formal unconstitutionality*. Namely, the law has not been passed with a qualified majority which they claim is needed for law concerning the property rights and consumer bankruptcy rights of foreign citizens.²⁷

²¹ Official Gazette number 46/15; <https://www.gov.me/dokumenta/9536d519-f5f2-4b2b-b2b4-f2175fbbc93b>

²² Number of the case: U-I br.37/15 from 11.12.2015 (Postupak za ocjenu saglasnosti zakona sa Ustavom i potvrđenim i objavljenim međunarodnim ugovorima) <https://www.ustavisud.me/ustavisud/arhiva.php> ;

²³ Official Gazette number 24/17 <http://sluzbenilist.me/pregled-dokumenta/?id={B8EBF165-6381-4D9E-AF91-E4271EAC5533}>

²⁴ Article 24 of the Constitution of Montenegro.

²⁵ In this scenario, the consumer's actions become legally ineffective, as specified in Article 47, due to the liquidation of their property by the bankruptcy trustee.

²⁶ Article 29, which states that decisions are made without a public hearing and that the court determines the facts ex officio, conflicts with several articles of the Law on Civil Procedure. Additionally, Article 32 of the aforementioned law specifies that decisions take the form of conclusions and decisions, whereas the Law on Civil Procedure dictates that the form should be of verdicts and decisions. Furthermore, Article 33 of the same law outlines a legal remedies procedure that is entirely unfamiliar within the national Montenegrin legal framework.

²⁷ The law did not garner the requisite majority support as stipulated by Article 91, paragraph 3 of the Montenegrin Constitution, which mandates a two-thirds majority vote of all deputies for laws governing the property rights of foreigners.

In the decision²⁸, the court elaborates that: “is deciding on the law compatibility with the Constitution and published International treaties: Protocol number 1 of the European Convention of Human Rights.²⁹ In the specific case, due to the absence of the constitutionally prescribed majority for its adoption, the Constitutional Court established its formal unconstitutionality and repealed the challenged law as a whole.³⁰”

IV. CONCLUSION

The rapid expansion of the consumer credit market, along with the issue of consumer over-indebtedness, is a subject that warrants increased scholarly attention, particularly in regions where there is no existing remedy for this problem. The exclusion of Western Balkan countries from this trend is both challenging to accept and comprehend. This paper represents a modest step in the ongoing discourse aimed at removing Western Balkan countries from this list. Equally important is the task of developing the appropriate institutional framework for these nations, which currently stands as an unexplored area within academic research.

The view of the Constitutional Court of Montenegro is a challenge for all other Western Balkan countries and their constitutional courts and judges who undoubtedly will be more than interested in the case of their Montenegrin colleagues. Re-examining the historical evolution of bankruptcy is not only absurd but also dangerous. The metamorphosis from “punishment” to “rehabilitation” is a hard-won battle through the centuries. The last thing that these countries need today is constitutional courts that will open questions and debates that were closed several decades ago. Instead of negotiating the best practices and frameworks for consumer bankruptcy implementation, ten steps backward were made. This can and has to be changed, and is also one more reason and argument about why the Western Balkan countries need consumer bankruptcy.

²⁸ Official Gazette n.24/17 from 10.04.2017

²⁹ Official Gazette of the Republic of Montenegro number 9/03 and 5/05

³⁰ From the Article 72 of the contested law, according to the opinion of the Constitutional Court, it follows that, in addition to other things, this law regulates the property rights of foreigners in the case of consumer bankruptcy, which is one of the basic economic rights and freedoms guaranteed by the provisions of Article 58 of the Constitution and Article 1 of Protocol 1 to the European Convention and that in accordance with the provisions of Article 91, Paragraph 3 of the Constitution, a two-thirds majority of all deputies in the assembly, or at least 54 deputies, was required for their adoption. On the basis of the evidence from the assembly session from 31.07.2015, the constitutional court found that out of a total of 81 deputies of the assembly, 71 deputies voted on the bill, namely: 41 for, 3 against, and 27 abstained, i.e. that the contested law it was not adopted with a two-thirds majority of votes of all deputies in the assembly in the manner established by provision 91 paragraph 3 of the constitution.

<http://sluzbenilist.me/pregled-dokumenta/?id={B8EBF165-6381-4D9E-AF91-E4271EAC5533}>