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1.02 Pregledni znanstveni članek

1.02 Review Article

THE ACCESSIBILITY OF ARCHIVAL MATERIAL IN CROATIAN AND SLOVENIAN ARCHIVAL LEGISLATION - A COMPARISON

Dr. Jasna POŽGAN

State Archives for Međimurje, Štrigova, Croatia

jasna.pozgan@dram.hr

Ivana POSEDI

State Archives in Varaždin, Croatia

ivana.posed@gmail.com

Abstract:

This paper deals with the issue of availability of archival material prescribed by the provisions in Croatian and Slovenian archival legislation comparing similarities and differences regarding the regulation of the problem of availability of archival material in both countries.

Key words:

archive, archival material, Croatia, Slovenia, law, documentary material

Izvleček:

Dostopnost arhivskega gradiva v hrvaški in slovenski zakonodaji - primerjava

Prispevek obravnava problematiko dostopnosti arhivskega gradiva, kot jo določajo določbe hrvaške in slovenske arhivske zakonodaje, ter primerja podobnosti in razlike glede regulacije dostopnosti arhivskega gradiva v obeh državah.

Ključne besede:

arhiv, arhivsko gradivo, Hrvaška, Slovenija, zakon, dokumentarno gradivo

1. Introduction

For a better understanding of the topics dealt with in this paper, it is necessary to define the meaning of certain terms.

An *archive* is a legal entity or organizational unit within a legal entity whose primary task is to preserve, process and enable the use of archival material in accordance with the provisions of this law (The Law on Archival material and archives, Official Gazette, No 61/2018). The term *documentary material* refers all information recorded on any medium, which was created, received or collected in the course of the activities of legal entities and natural persons and can provide insight into the activities and facts related to their activities (Law, OG 61/2018). The archives are chosen from among current material because of their lasting value for culture, history, science and other social

activities: archives are permanently preserved for the protection of the rights and interests of individuals and the community.

The Republic of Croatia and the Republic of Slovenia, as two neighbouring countries, are connected by several common points of contact, such as being connected by having belonged to the same state unions in the past (The Austro-Hungarian Monarchy, Kingdom of Yugoslavia, Socialist Federal Republic of Yugoslavia), susceptibility to the influences of Central European cultural traditions (Italy, Austria, Hungary), membership in the same Euro-Atlantic organizations, such as the North Atlantic Treaty Organization and the European Union (republics, districts, counties, municipalities), the same level of economic development (Slovenia has been a member of both organizations since 2004, and Croatia has been a member of NATO since 2009 and the European Union since 2013) and having gained independence in 1992.

In terms of practices regarding the protection of cultural heritage and thus archival material, both countries practice similar approaches in terms of attitudes toward cultural heritage. How this is looked from the aspect of legislation will be presented in the following chapters.

2. Archival legislation in the Republic of Croatia

The Republic of Croatia is an independent and autonomous state that gained its independence by seceding from the Socialist Federal Republic of Yugoslavia (SFRY) on June 25, 1991, or by international recognition by the members of the European Community on January 15, 1992. As a newly formed state, it became a member of the United Nations on May 22, 1992, and later became a full member of Euro-Atlantic organizations such as NATO (as of April 1, 2009) and the European Union (as of July 1, 2013).

As an independent state, Croatia, following the example of Western European countries, accepted the introduction of the achievements of liberal democracy and market economy and, accordingly, the establishment of a legal order which, along with all other aspects of public life, regulates the issue of cultural heritage and the protection of archives.

The first Law on Archival Materials and Archives was adopted and entered into force in 1997, and it regulated the protection, preservation and use of archival material in accordance with the provisions of the Constitution of the Republic of Croatia, political, legal and economic system, and democratic changes (Law, OG 105/1997). This Law defined various aspects related to the performance of basic tasks of the archival profession, such as the collection, protection, preservation and processing of archival material, records in the archives, and, among other things, the availability and use of archives. Given that the primary topic of this paper is the availability and use of archival material below, the focus will be on these aspects.

According to the Law of 1997, public archival material was available for use, as a rule, 30 years after its creation, and could be used for various purposes, from scientific and journalistic to official, for purposes of exhibitions to the realization or protection of personal rights of individuals (Law, OG 105/1997). As for the availability of public archival material that contained data related to defence, international relations, national security and economic interests of the state, as well as classified and other confidential information, the same is available 50 years from its creation. According to the Law, archival material containing personal data was available 70 years after its creation, i.e., 100 years from the birth of the person to whom the data referred (Law, 1997). Said Act,

with some minor changes, was in force for the next 20 years (Law, OG, 64/2000, 65/2009, 125/2011).

A significant amendment to the Law was adopted in 2017, amending provisions related to the delivery, use, and availability of materials, and the obligation to compile a list of public archival material. The aforementioned amendment stipulates that public archives are available without restriction if created before December 22, 1990, by former judicial institutions, administrative institutions (internal affairs), the security intelligence system and socio-political organizations (Law, OG 46/2017). It is also stipulated that the holders of archival material are obliged to make a list of such material and submit it to a competent archival institution within 6 months of its entry into force of law, which is obliged to make it available to the public and submit it to the Ministry of Culture and the State Attorney's Office.¹

Thanks to changes in the environment in which archival material is created, such as the transition to electronic or digital business at the proposal of the Government of the Republic of Croatia, the Croatian Parliament adopted a new Law on archival material and archives in June of 2018 (Law, OG 61/2018) whose priority is the transformation of the archive service, protection of materials in electronic form, and the availability and use of material. The new Law from 2018 introduced changes regarding the terms of availability of materials for use and, for example, abolishes the period of availability of 30 years for public archival material that become available for use from the very beginning, unless otherwise prescribed by Law. Public archival material containing classified and other confidential information, as well as information concerning state and public security, defence, foreign affairs, security and intelligence activities, economic interests, and material not classified in accordance with the regulations governing the confidentiality of information becomes available for use 40 years after its inception. Public archival material containing personal data is available for use 100 years after the birth of the person or after the death of the person to whom the data relates, and if the data is not known, public material with personal data becomes available 70 years after its creation. The law also provides for the possibility of providing the use of public archival material containing personal data before the deadline, in which case the competent archival institution is obliged to take technical procedures for concealing the identity of the person to whom the data relates or to anonymize the data. (Law, OG 61/2018). The 2018 Law prescribed the availability of material created until 30 May 1990 without restrictions, except for material containing information relating to national security, defence, foreign affairs, security and intelligence activities, economic interests and material containing personal data.

It should be noted that the provisions of the 1997 and 2018 Act regarding the availability of materials for use were not in the focus of scientific interest except in exceptional cases such as comparisons in the review of archival norms (Markezić, 2020) or syntheses of a review of archival legislation in Croatia (Ivanović, 2017). As far as the public is concerned, certain provisions were caused by the provisions of the 1997 Law which referred to the material of former socio-political organizations such as the League of Communists of Croatia and related organizations such as the Socialist League of the Working People, the Union of People's Liberation War Veterans and similar organizations whose use was conditional, based on the consent of the legal successor of the former League of Communists of Croatia, today's political party of the Social

¹ *It should be noted that the aforementioned Law from 2017 provided a relatively short deadline for taking over that material, since the legal provision did not take into account the spatial and personnel capacities of public state archives, as well as the fact that only certain state archives could take over the same material.*

Democratic Party of Croatia / SDP, given the agreement concluded between the Croatian State Archives and the SDP.²

Similar controversies were caused by the material of the highest state institutions from the socialist period, the use of which was also conditioned by the consent of legal successors such as the Government of the Republic of Croatia, the Office of the National Security Council and the like, the legal successors of the creators of the socialist period were required to be declassified.³

Regarding the practice in regulating the issue of availability of archival material in the Republic of Slovenia, the approaches were similar, but there were also differences regarding solution for this issue.

3. Archival legislation in the Republic of Slovenia

The Republic of Slovenia is an independent and sovereign state that gained independence from the SFRY on June 25, 1991, and international recognition from members of what was then the European Community on January 15, 1992. Since May 22, 1992, it has been a member of the United Nations. As an independent state, it became a member of Euro-Atlantic organizations such as NATO / North Atlantic Treaty Organization (since March 29, 2004) and the European Union (since May 1, 2004). Like Croatia, Slovenia has accepted the introduction of a liberal democratic order, a market economy, and respect for human rights and freedoms. Among other things, like all other aspects of public life, it regulated the issue of protection of cultural heritage and archival material.

The first Law on Archival Materials and Archives (Law, OG 20/1997) was adopted in 1997. As in the case of Croatia, this Law regulated various aspects related to the performance of basic tasks of the archival profession, such as the collection, processing and protection of materials, and accessibility and use. According to this Law, the material is available for use 30 years after its creation if it was not intended for the public at the time of its creation. In cases such as the protection of national interests (defence, international relations, security) or economic interests, the Law prescribed the availability of materials 40 years after their creation. With regard to public material containing personal data, the same Law prescribes its availability 75 years after its occurrence or 10 years after the death of the person to whom the material relates if the data is known and unless otherwise defined by other regulations.

In accordance with tendencies in Slovenia at the time, the principles contained in the Code of Ethics for Archivists from 1996, as well as the recommendations of the Council of Europe and the International Council for Archives from the 2000s, an effort was made to strike a balance between the greatest possible availability of archival material for the general public and the limitation of the availability of material containing data related to the national interests of the state and personal data of individuals. This situation lasted until 2006, when the new Law on the Protection of documentary and archival materials and archives / The Law of the Protection of Documents and Archives and Archival Institutions Act / PDAAIA (OG, 30/2006) was adopted. The new Law introduced certain changes regarding the deadlines for the availability of archival material for use.

² See the following sources: <https://slobodnadalmacija.hr/vijesti/hrvatska/arhivi-su-prazni-sve-što-vrijedi-je-uništeno>; <https://www.vecernji.hr/vijesti/drazen-kusen-tko-manipulira-arhivom-udbe>. Retrieved 7/21/2021.

³ See: <https://www.vecernji.hr/vijesti/drazen-kusen-tko-manipulira-arhivom-udbe>. Retrieved 7/21/2021.

The same Law, prescribed in article 65, denotes the term of availability of archival material containing data related to national security, security-intelligence activity, economic interests, business secrets as 40 years after its creation. As for archival material containing sensitive personal data, it should have become available 75 years after its creation or 10 years after the death of the person to whom the material referred if the data is known and unless otherwise prescribed by other regulations. The same legal article 65, paragraph 4, prescribed that the material of former socio-political organizations (League of Communists of Slovenia, League of Socialist Youth of Slovenia...), and repressive apparatus such as police, courts and security and intelligence services, is available without restrictions except for material containing sensitive personal data collected in violation of human rights and freedoms, and refers to the victims of the former regime.

The Government of the Republic of Slovenia in 2007 and 2008 had already created a separate regime with a Regulation and Agreement regarding the storage of materials of the former State Security Service, i.e., it derogated from the valid Law. This situation lasted until the summer of 2010, when the "Omerza affair"⁴ broke out, which caused a series of events, starting with intensive communication through official channels between the Archives of the Republic of Slovenia and SOVA (Slovenian Intelligence and Security Agency) and the Government of the Republic of Slovenia, consulting legal experts regarding the constitutionality of the Law itself, Government intervention through the amendment of Article 65 and its adoption in parliament, initiating a referendum on the disputed article and its rejection in said referendum by citizens. As an epilogue to the affair, I. Omerza was allowed to use the materials of the former State Security Service / SDB. After a referendum in 2011, the initiation of legislative amendments to the Law of 2006 was decided upon, which required better regulation of many aspects of the archival profession. During 2012 and 2013, proposals to amend the Law went through regular parliamentary procedures when passed in Parliament. At the beginning of 2014, Parliament, in ordinary session, adopted the PDAAIA Law on Amendments. Due to controversial provisions regarding the availability of materials⁵ to which access would be difficult launched the process for a referendum on the controversial legal Article and at the beginning of 2014, Parliament passed a decision to call a referendum on the Law on Amendments PDAAIA. The referendum was held on June 8, 2014, and due to the low turnout of the electorate (11.68%), it failed, i.e., the disputed law was not rejected (Matić, 2013; Melik, 2016; Melik, 2012; Klasinc, 2014).

The Law on Amendments to the PDAAIA in Article 26 of the Law prescribes the availability of public archival material that contains secret data, i.e., data concerning national security 40 years after its creation. The same legal article prescribes the availability of material containing personal data 75 years after the creation or 10 years after the death of the data subject if the data is known. With regard to the availability of public archival material created before May 17, 1990,⁶ the same is available without restriction unless it contains personal data. In the case of the use of material that is limited by the availability period of 40 or 75 years from its creation, documents containing data that protect the deadlines of unavailability should have been separated, and not larger units of material. If individual documents contain data that were protected by deadlines for unavailability, as well as data that were made available for them, the

⁴ *The affair is named after the publicist and researcher Igor Omerza, who appeared in the Archives of the Republic of Slovenia in August 2010.*

⁵ *Regarding the availability of materials under the disputed Art. 65 of the Law on this topic can also be read in the works of A. Škoro Babič, G. Šmida and Ž. Štrumbla, P. P. Klasinac listed in the list of sources.*

⁶ *This date is significant because it was then that the first constituent session of the Slovenian parliament was held after the first multi-party democratic elections.*

anonymization is obligatory (Law Amending the Law of the Protection of Documents and Archives and Archival Institutions Act, OG 51/2014). The above provisions regarding the availability and deadlines for the use of materials are currently still legally valid under the aforementioned law from 2014.

4. Comparison of archival legislation in Croatia and Slovenia

The previous two chapters described basic features regarding archival legislation in the Republic of Croatia and the Republic of Slovenia, i.e., provisions concerning the availability and use of archival material.

Both countries, today members of Euro-Atlantic and world organizations (UN, EU, NATO, WTO ...) are connected by several common points of contact such as belonging to the same state communities in the past (Austro-Hungarian monarchy, Kingdom of Yugoslavia, SFRY), susceptibility to the same cultural centres (Austria, Italy, Hungary), belonging to the same language group of peoples (Slavs), richness of cultural heritage (material, movable, archival material...), related institutional and legal traditions, and implementation of similar practices regarding the protection of cultural heritage and, thus, archival material .

Both states adopted the first laws related to archival material and its protection as sovereign and independent in 1997, and in accordance with the circumstances of the time and the recommendations and guidelines, they also regulated the issue of the availability of archival material. Both laws from 1997 prescribed a general period of availability of material 30 years after its creation, unless otherwise provided by regulations, as well as a restriction on the availability of material containing data related to national security (defence, public safety, security, classified and classified information) and protection; also, economic interests, for which a period of 40 years is prescribed in Slovenia, while a period of 50 is prescribed in Croatia. Regarding the availability of archival material with personal data, in Slovenia a deadline of 75 years from the creation of the material or 10 years after the death of the data subject was prescribed, and in Croatia 70 years from the creation of the material or 100 years from the person's birth.

In line with technological development and the transition to electronic or digital business, new technologies began to be introduced in office business in both countries. Given the new circumstances, in addition to analog / classic documentary / archival material, digital material began to be created and it also required a special system of protection and preservation as well as a change in archival legislation.

In accordance with the aforementioned changes in office operations as well as the introduction of electronic business, the Republic of Slovenia adopted the new Law of the Protection of Documents and Archives and Archival Institutions Act in 2006. The new Law partially liberalizes the deadlines for the availability of archival material for use and, among other things, prescribes the use of material without restrictions after its creation, except in cases involving things such as the protection of national security, economic interests, protection of classified information, or personal data. In such cases, a period of 40 years is prescribed (national interests, classified information...) and a period of 75 years after the occurrence, i.e., the stated restrictions on availability, remained the same as in the previous Law from 1997. The new law regulated the use of materials from former socio-political organizations as well as the repressive system (Ministry of the Interior, courts, prosecutor's offices, security intelligence services) from the period before May 17, 1990, without restrictions unless it contained personal data of victims of the former regime or documented violations of human rights and freedoms. Legal article 65 of PDAAIA, which regulates the use of archival material, was controversial due to the provision relating to the use of material from former socio-political organizations and

security intelligence services (State Security Service / SDB). As there was an increased interest in the material of the former SDB for use by domestic and foreign users, in the next two years SOVA, as the legal successor of the former SDB, tried to derogate from the Law through legal acts, i.e., significantly hinder its availability. Due to such provisions, an affair broke out in the summer of 2010, which had far-reaching consequences in the form of increased media interest in the proposed legislative amendment and the 2011 referendum, in which the proposal was rejected and repeated amendments to the law and its adoption in 2014, as well as a repeated referendum on the law in the same year, which failed due to the low turnout of the electorate.

As for the Republic of Croatia, the situation was less turbulent in terms of archival legislation. After the adoption of the first Law on Archival Materials and Archives in 1997 and the adoption of accompanying legal acts (regulations) at the beginning of 2000s, the situation has not changed significantly over the years in terms of protection and use of archival material. The law from 1997 regulated the use of materials of former socio-political organizations (SK Hrvatske, SUBNOR...) through the obligation to obtain a permit for the use of the same material by the legal successor, the Social Democratic Party of Croatia, or in the case of institutions of the repressive apparatus of the former state from their legal successors (Government of the Republic of Croatia, Office of the National Security Council, Ministry of the Interior...). Although with a small delay, Croatia gradually began to switch to electronic / digital business in the late 2000s, and thus the need to regulate the protection of digital material, i.e., to modernize the existing archival legislation, arose. It should be noted that although there was no strong media interest in Croatia regarding archival legislation, i.e., the issue of availability of archival material for users, from time to time, depending on the interests of certain political parties and pro-media, topics mostly related to the availability of materials of the former State Security Administration / UDBA or materials of the Central Committee of the SC of Croatia, such as in the case of the trial in Munich of former UDBA employees Zdravko Mustač and Josip Perković.⁷

The problem of access to the materials of the former Security intelligence service / UDBA was in the focus of media interest in the adoption of amendments to the Law on Archival Materials and Archives in the spring of 2017.⁸ Apart from the occasional media interest and possible debate in the Croatian Parliament due to daily political needs, the topic related to the protection of archival material and its accessibility remained the subject of rare scientific discussions among the Croatian archival community.⁹ It should also be noted that both countries, after gaining independence from the former state in 1991, chose a nonviolent transition from a totalitarian to a democratic system due to the circumstances and that neither carried out lustration, which can be interpreted as a reflection of a transition of state and society.

⁷ See the following sources: <https://slobodnadalmacija.hr/vijesti/hrvatska/arhivi-su-prazni-sve-što-vrijedi-je-uništeno>. Retrieved 7/21/2021.

⁸ See the following sources: <https://www.jutarnji.hr/naslovnica/arhivi-se-mogu-otvoriti-potpuno-ili-nikako>; <https://vecernji.hr/vijesti/drazen-kusen-tko-manipulira-arhivom-Udbje>. Retrieved 7/21/2021.

⁹ More about the issue of archival legislation can be found in the works of Ž. Hedželi in the journal *Atlanta* and in the synthesis on Croatian archival legislation in the work of K. Markežić in the *Proceedings of the Conference of Croatian Archivists in 2020*.

5. Conclusion

Croatia and Slovenia, two neighbouring and independent states that are now members of a number of international organizations, are connected by a number of points of contact, such as belonging to the same state communities in the past, similar cultural traditions, etc., and which implement similar practices regarding cultural materials. Both countries adopted their first laws on archival material in 1997, and they prescribed similar availability deadlines depending on the type of data contained in the material. Thanks to the transition to digital business and the introduction of information and telecommunication technologies in the public system and the economy, the need has arisen to regulate the protection and use of electronic documentary material in both countries. In accordance with the requirements of the time, Slovenia adopted its modernized law in 2006. The aforementioned law caused controversy and attention due to the legal article 65, which prescribed the deadline for access to materials of the former state, such as the repressive apparatus and socio-political organizations, and the same article was the cause of a media scandal in 2010. In the end, due to the disputed provision, two referendums were held in Slovenia, which failed due to poor voter turnout, and in 2014, the amended Art. 65 introduced a provision on the anonymization of material under certain circumstances. In Croatia, the provisions on the deadlines for access to archives did not attract as much public and media attention, except in exceptional cases such as the trial of Z. Mustač and J. Perković for the murder of Croatian dissident and emigrant Stjepan Đureković or during discussions at general sessions of the Croatian Parliament between ruling and opposition parties for daily political needs. Croatia adopted a more modern law on archival material in 2018, which more clearly regulates the deadlines for the availability of material, and as for the availability of material with personal data, the same is available 100 years from the birth or death of the data subject; early expiration of such material and the obligation to anonymize the same material is prescribed. The attitude towards archival material through the prism of archival legislation can be described as a reflection of the transitional processes of society that Croatia and Slovenia are going through.

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POVZETEK

DOSTOPNOST ARHIVSKEGA GRADIVA V HRVAŠKI IN SLOVENSKI ZAKONODAJI - PRIMERJAVA

Dr. Jasna POŽGAN

Državni arhiv Medžimurje, Štrigova, Hrvaška
jasna.pozgan@dram.hr

Ivana POSEDI

Državni arhiv v Varaždinu, Hrvaška
ivana.posedi@gmail.com

Hrvaška in Slovenija sta sosednji državi, ki sta svojo samostojnost pridobili v začetku 90. let 20. stoletja, povezuje pa ju tudi pripadnost nekdanji skupni državi in srednjeevropski tradiciji.

Po pridobitvi neodvisnosti v letih 1991 in 1992 sta Hrvaška in Slovenija glede zaščite kulturne dediščine in arhivskega gradiva sledili smernicam in praksam Mednarodnega arhivskega sveta kot avtoriteti v svetovni arhivski skupnosti.

Kot neodvisni državi sta Hrvaška in Slovenija sprejeli prve arhivske zakone v letu 1997. Leta 2006 je Slovenija sprejela nov zakon Zakon o varovanju dokumentarnega in arhivskega gradiva ter arhivih (ZVDAGA). V novem ZVDAGA je člen, ki ureja dostopnost

gradiva, ki vsebuje osebne podatke, tj. gradiva, nastalega pri delu nekdanjih družbenopolitičnih organizacij, javne uprave itd., ki je postalo dostopno brez omejitev, postal problematičen, saj ne zajema le arhivskega gradiva, ampak tudi osebne podatke oseb, katerih človekove pravice in svoboščine so bile kršene. Kmalu zatem, v letih 2007 in 2008, je bil člen kršen. V letih 2010, 2011 in 2014 je bil ZVDAGA predmet javnih razprav in pogovorov, ki so problematizirale omenjeni člen v smislu njegove skladnosti z ustavo. V letih 2011 in 2014 je bil ta člen predmet referendumov, zadnji je bil neuspešen zaradi prenizke volilne udeležbe.

Leta 2018 je bil sprejet nov Zakon o arhivskem gradivu in arhivih na Hrvaškem, ki dostop do gradiva z osebnimi podatki omejuje na 100 let po rojstvu posameznika oz. po njegovi smrti ali, če podatek ni znan, 70 let po nastanku gradiva. Zakon predvideva anonimizacijo identitete posameznika, na katerega se podatki nanašajo, če je gradivo v uporabi, preden roki dostopnosti potečejo. Zakon prav tako določa dostopnost gradiva nekdanjih družbenopolitičnih organizacij, sodstva itd., ki je nastalo pred 30. majem 1990, brez omejitev, razen gradiva, ki vsebuje osebne podatke posameznikov, ki niso bili javni uradniki ali so bili žrtve preganjanja. Zakon iz leta 2018 ni postal predmet medijske pozornosti na Hrvaškem, razen v primerih, kot je bilo sojenje nekdanjim članom varnostne službe v Nemčiji.

Čeprav sta Hrvaška in Slovenija preživeli turbulentna obdobja, sta glede zaščite arhivskega gradiva, nastalega pred letom 1990, zavzeli podobna stališča in prakse. Trenutne določbe hrvaške in slovenske zakonodaje lahko opišemo kot zrcalo tranzicijskih procesov v obeh državah.