1. INTRODUCTION

Legal communication occurs in different legal procedures – administrative, civil (litigation, non-litigation and enforcement procedure) and criminal procedure. It is the basis of nomotechnical judicial hearing of participants in all legal procedures. Legal communication is presented in this paper only in one of legal procedures, that is, in non-litigation procedure. Contrary to litigation procedure that is the basic and homogenous procedure relating to the protection of subjective rights within civil law matter, non-litigation procedure is a specific legal procedure and presents a very heterogeneous structure whose elements make it different not only from litigation procedure, but also from other legal procedures.

In the scientific explanation of the specificity of non-litigation procedure in comparison to litigation procedure, it should be necessarily emphasized that there are great many elements that make the basis of this differentiation. The analysis of these specificities starts
from different methods of judicial work, different subject matters of the procedure, different goals due to which the procedure takes place, different interests that are protected in the procedure, and the difference between litigation and non-litigation procedure regarding their nature and character etc.

In the non-litigation procedure, there is no stay of proceedings. The proceedings in which status issues are decided are closed to the public. The hearing is held only when it is stipulated by the law or when the court estimates that it is necessary. The failure of certain participants to appear in the hearing does not prevent the court from proceeding further in the non-litigation procedure. The participants may be heard even in the absence of other participants in the proceedings. The court of first instance may itself, on account of appeal, modify or repeal the previous ruling, while it may also refer the participants to litigation or administrative proceedings in order to resolve the previous issues.

In addition to this theoretical difference, there is also a practical difference which points to the fact that if some subject matter relating to civil procedure is solved in the proceedings, in which there is no dispute, that is, the parties do not act with opposing interests, then one may say that these legal situations are resolved in the non-litigation procedure (Blagojevic Danilovic 2016: 137).

It is precisely this difference between these two procedures in civil law matter that presents a general dividing line between the litigation and non-litigation procedure. The non-litigation procedure, which has a heterogeneous structure according to its nature and character, demands a more subtle approach to the analysis of the procedure, which cannot be generalized in the mentioned way and whose numerous specificities have to be taken into account. Namely, there are different types of non-litigation procedures that are classified according to different criteria, first of all, according to: contents of legal protection (cognition and evidence-technical); number of participants (one party, two parties or multiple parties); nature of the relation to be protected (status, family, property, relating to documents and other); initiation of procedure (official and unofficial); contentiousness/non-contentiousness of the relation (contentious and non-contentious).

These non-litigation proceedings are specific in many ways and different from litigation proceedings, regardless of the fact whether this procedure refers to:

A. Proceedings for the regulation of personal status including:
1) proceedings for the removal of legal capacity,
2) proceedings for the detention in a neuropsychiatric healthcare institution,
3) proceedings for the declaration of death of a missing person and pertaining evidence;

B. Proceedings for the regulation of family relations, which includes:
1) proceedings for the extension of parental rights,
2) proceedings for the termination and return of parental rights or:

C. Proceedings regulating property relations, which include:
1) probate proceedings,
2) determining compensation for expropriated real property,
3) regulation of managing and using a common asset,
4) division of common assets or property,
5) regulation of boundary lines,
6) proceedings relating to drawing up, authentication, custody and cancellation of documents, and
7) proceedings regulating placing things in court deposit.

Within these proceedings, there are many different procedures and nomotechnical-methodological proceedings, which point to the complexity of regulating relations in non-litigation proceedings. In such constellation of relations, it is difficult to find common elements that would be characteristic of all specific types of proceedings and which would be valid generally speaking. It would be more
natural to analyze each of non-litigation procedures separately and emphasize those specificities. Thus, we could determine the subject matter, character and methodology of judicial proceedings relating to all of them (Blagojevic Danilovic 2016:137).

Considering the fact that the main topic of this paper is legal communication in non-litigation procedure, the specificities of this kind of procedure will not be analyzed in detail. However, common elements will be searched for in order to scientifically explain legal communication in non-litigation procedure, first of all, hearing as material evidence, which is used and applied in legal communication in a specific field of civil law – non-litigation law.

2. PRINCIPLES OF NON-LITIGATION PROCEDURE

In order to find common elements for all types of non-litigation proceedings, one may necessarily start from basic principles, general principles and rules, which non-litigation procedures are based on, and which are different from principles in other civil judicial proceedings.

In essence, legal principles in proceedings before domestic and international courts offer the parties and other participants in the proceedings ability to state facts, which their claims are based on, and to state their attitudes related to the protection of their interests (Miladinovic Bogavac 2019: 207-220).

2.1. The principle of official proceeding

In contrast to the principle of disposition, which is dominant in the litigation procedure, the principle of official proceeding is dominant in the non-litigation procedure. It is due to the fact that this procedure most frequently refers to some common interest or that it is a procedure which involves one party, and therefore, there is no need to apply the disposition maxim. Other differences relating to the character of non-litigation procedure are reflected in the institution and course of the proceedings, which is instituted by a petition of a party, and ex officio, as well. Namely, according to all laws on non-contentious proceedings from 1982 to 2022 “The non-contentious proceedings shall be instituted by a petition of a natural or legal person, as well as a petition of a body” specified by the Law on non-contentious proceedings, while “the non-contentious proceedings shall be instituted by the court ex officio in cases and under conditions specified by the Law (Law on non-contentious proceedings 2015: Article 2).

A significant characteristic of the principle of official proceeding is reflected in the fact that already instituted proceedings, regardless of the subject who initiated it, will take place ex officio until its termination. Thus, the court shall be responsible for the time limit of the proceedings and its content, while parties are not authorized to influence the cancellation of proceedings (Blagojevic Danilovic 2016: 138).

In some kinds of specific non-litigation proceedings, the participants may not waive their claims, admit the claim of their opponent, nor reach the court settlement. It is particularly the case in status non-litigation matters, as well as in matters relating to the rights and legal interests which the participants may not dispose of. In some other kinds of non-litigation proceedings, parties can manage their legal authorizations, especially in proceedings regulating property relations, where the parties have the right to withdraw the petition, to acknowledge the claim of the other party, that is, to renounce their own claim, as well as to reach the settlement, while the court shall take into consideration the reached agreement between parties when rendering a ruling. In certain non-litigation proceedings, the agreement between parties is allowed, but only conditionally, that is, if it finds that it is not contrary to the mandatory legislation and the morality, for example in cases relating the compensation for the expropriated real property. The comparative analysis of regulations in all laws since 1982 till the present day showed the following: “If the expropriation beneficiary and the previous owner of the property reach agreement on the form and extent or amount of compensation, the court shall render its ruling based
on their agreement, if it finds that it is not contrary to the mandatory regulations, public order and fair practices” (Blagojevic Danilovic 2016: 138-139).

The main rule of the principle of official proceedings is that parties do not have the right to terminate the proceedings with their procedural actions, temporarily or definitely, except when such possibility is stipulated by law. The failure of the party to appear in the hearing, which in other legal proceedings most frequently leads to the preclusion, that is, the inability of further proceeding, in non-litigation proceedings it is applied only in specific cases.

2.2. The principle of investigation

In the non-litigation procedure, the nature and character of this legal procedure determine the predominant application of the principle of investigation during the procedure of collecting the procedural material and court’s initiatives regarding other procedural actions in the process of proceedings and its termination.

The main reason lies in the character of substantive law norms that regulate relations in this subject matter, which are most frequently coercive in nature.

Thus, contrary to the litigation procedure, the court is authorized to establish facts that were not disclosed by parties, as well as facts that are not disputed among parties if it finds it relevant to render a ruling. These rules are not equally valid in all non-litigation proceedings, especially not in those situations when “the public order is not interested in the ways how mutual legal relations between legal subjects are regulated, and therefore, in proceedings about such non-litigation issues the principle of hearing is dominant” (Stankovic 2007: 26).

2.3. The principle of orality

In legal communication in non-litigation proceedings, during the collection of procedural material, the application of the principle of orality is significant. In non-litigation proceedings, this principle is not as significant and applicable as in litigation proceedings. Namely, in all kinds of non-litigation proceedings, legal communication is not necessarily maintained in the form of oral hearing, and therefore, according to this principle, rulings may be rendered without previously led legal communication during the oral hearing. In cases, when it is explicitly stipulated by law, oral hearing may be mandatory, and more rarely optional. In that sense, all laws on non-litigation procedure since 1982 have stipulated that “The court shall decide on the claims of participants based on the oral hearing only in the cases provided by this or other laws, or when it assesses that holding a hearing is necessary to clarify or establish decisive facts or when it deems that holding of a hearing is appropriate for other reasons”. For example, the Law estimates that “in housing matters in which tenancy rights or specific powers that make up the tenancy right are decided, the decision shall always be rendered on the basis of oral hearing” (Law on non-contentious proceedings 2015: Article 11).

In most cases, the judge shall decide how he will carry out certain procedural actions, that is, how he will collect the procedural material (whether he will schedule the oral hearing or the procedural material will be collected out of the hearing). If he decides not to hold the oral hearing, the court will order parties to make written statements and responses to questions, and thus, according to the written communication, that is, written submissions of parties and other participants in the proceedings, the judge will render the appropriate ruling (Blagojevic Danilovic 2016: 140).

Therefore, the nature of non-litigation procedure results in the fact that written form of legal communication becomes dominant in non-litigation proceedings, that is, such form of communication has priority compared to oral communication, and this fact makes this kind of procedure different from litigation procedure.

3. Hearing of participants in non-litigation procedure

From the epistemological point of view, hearing of participants in the non-litigation
procedure was analyzed according to different types of this legal procedure. In some non-litigation procedures, the oral hearing is not necessary, and therefore, in such cases the need to hold a hearing as means of evidence will be excluded, in the way in which this procedural action is carried out in non-litigation procedure.

This need for the hearing comes from the court’s role in the non-litigation procedure directed at determining facts of the case, and therefore, the court in that legal procedure is not bound or obliged to confine itself to the offered evidence or to cite them. Actions of the participants of non-litigation procedure, regardless of the fact whether they state some facts, negate or admit them, do not influence the court’s ruling, which is, with those statements (if it accepts them) or without them (if it does not accept them), obliged to establish facts of the case that are significant for rendering a ruling in the specific case. Truth to tell, there are cases stipulated by law, in which participants in non-litigation proceedings have the right to dispose of their rights and legal interests, and then the court is obliged to take into consideration the evidence stated by the participants (Blagojevic Danilovic 2016: 140).

In these cases, the court itself determines the scope and form of evidence and collects the procedural material in non-litigation proceedings. Therefore, there is no need to hear the participants of the proceedings, and they do not have to disclose facts on which their claims are based on. The court may take into consideration the participants’ proposals and use their proposals to the extent that helps the court to establish the real facts of the case. The court may also ignore proofs offered by participants in the procedure, but it can establish those facts that were not proposed or disclosed by participants, or that they did not wish to establish in order to complete the material (Blagojevic Danilovic 2016: 141).

The characteristics of hearing in non-litigation proceedings result from the principles, nature and character of non-litigation procedure, which does not necessarily involve two parties. In this procedure, as well as in other legal procedures, the court is authorized to hear the participants before it renders a decision about their rights and interests. However, the hearing is not always necessary for achieving legal protection sought by the participant in non-litigation proceedings. In some non-litigation proceedings, for example in proceedings that have technical or evidence character, parties are not heard because there is no need to hold a hearing. It is the case in the certification of signatures, and when translations from a foreign language into Serbian and from Serbian into a foreign language are certified.

If a participant in the non-litigation procedure wants to dispose of some authorizations or to do something with the help of the court that is significant for the participants in the procedure, he is obliged to make appropriate statements. It is done most frequently with the help of a hearing. For example, it would be necessary if minors have to be heard in the proceedings for permitting the conclusion of marriage, when during the hearing the court examines whether there exists free wish of the minor to conclude marriage. The participants in non-litigation proceedings may be heard when they have to provide the court with certain explanations of some facts and statements connected with the claim initiated by those participants. This hearing will be held in the form of informative hearing. Also, the participants in the procedure may be heard when they have to give statements about facts on which they base their claims to be decided in the proceedings. It is a common situation characteristic for initiating the proceedings according to participants’ claims, in which a party, with the help of a hearing, discloses relevant facts and data which may be helpful when rendering the right decision. In such cases, a party in non-litigation proceedings disposes of information relevant for rendering a decision. In addition to the above mentioned cases, a party in non-litigation proceedings may be heard in the procedure according to the claims of another party, as well as when the court needs to render a decision (Blagojevic Danilovic 2016: 141).
The main purpose of collecting evidence with the help of a hearing of parties and other participants in non-litigation proceedings is to establish objective facts of the case relating to the subject matter of non-litigation procedure. Due to the principle of fairness, the court gives the participants of non-litigation proceedings the possibility to disclose facts that they dispose of during the hearing process. However, epistemological principles of non-litigation procedure point to the fact that the court is not obliged to accept the statement of participants in the procedure. In addition to this ability offered to parties and other participants in non-litigation proceedings to disclose facts on which they base their claims, the Law on non-contentious proceedings allows them to disclose their attitudes relating to the protection of their interests (Blagojevic Danilovic 2016: 142).

Considering very heterogeneous interests and goals of participants in non-litigation proceedings that they wish to accomplish with the help of filed petitions, there are different ways of hearing participants in non-litigation proceedings. Due to the specific (heterogeneous) character of non-litigation procedure, the legislator did not define precisely the formal rules of legal communication, and therefore, the court acts in a formal and informal way in the presentation of evidence. Rules that regulate the presentation of evidence in non-litigation procedure are specific and most frequently different from those applied in litigation procedure. In non-litigation proceedings, it is possible to hold a hearing without the presence of other participant and without formal record of the presentation of evidence, while if it is prepared then only oral hearing is included.

If procedures, which are necessary to apply specific legal norms, are not stipulated by the Law on non-contentious proceedings, rules, norms, and procedures stipulated by the Law on Litigation Procedure are applied. The formal presentation of evidence is mandatory when parties do not agree on facts, which the decision about the main issue in non-litigation proceedings depends on. When the manner of holding a hearing is stipulated by the Law on non-contentious proceedings, the court is obliged to act in a way stipulated by this law. If certain ways of hearing are not stipulated by law, the court itself decides how it will hear the participant in the procedure – orally or in a written form. The court’s estimate of the way of hearing that will be applied in a specific case depends on participant’s personality. Namely, the court will assess whether participant’s intellectual and other abilities enable him to make a written statement about the issue or the participant is not able to do that. If the court estimates that it might be done in a written form, the court will summon the participant to present a written statement and deliver it to the court (Blagojevic Danilovic 2016: 142).

In case of the process of hearing of participants in non-litigation proceedings, parties do not have the need or the right to be present during the hearing of other participants, because the participant of non-litigation proceedings is heard in order to establish the truth of irrefutable legally relevant facts. Therefore, this manner of giving statements in non-litigation procedure has the character of evidence. Considering that all sources of knowledge have the equal treatment in the process of establishing relevant facts, the hearing of parties in non-litigation proceedings has the legal force of other means of evidence. Thus, the legal force of statements of parties in non-litigation proceedings has been equalized with the testimony of witnesses, for example.

The reasons for the exclusion of hearing of participants in non-litigation proceedings may be classified into two main groups, factual and legal. Factual reasons primarily relate to cases when hearing cannot be held. These reasons may be associated with the physical unavailability of participants that have to be heard (if they are abroad) or they cannot be heard because they are not able to make a statement (diseases due to which they cannot make statements or making statements would worsen the health condition). If in non-litigation it is not possible to hear participants in the proceedings, the court will decide not to hear that...
person although it has decided to perform this procedural action before. In addition to factual inability, there are legal reasons which lead to the impossibility to hear the participant in non-litigation proceedings. For example, if there is a need to hear a minor, it would be impossible because minors cannot make statements personally before the court. In such cases, instead of hearing a minor, legal representatives of minors make statements. Thus, legal representatives do not gain the status of participants in the procedure, but are given the right to take only some actions in non-litigation proceedings (Blagojevic Danilovic 2016: 143).

In some specific cases, hearing of parties in non-litigation proceedings may not be possible due to factual or legal reasons. It happens in cases of removal of legal capacity when a person cannot be heard. Then the court may abandon the action of hearing the person involved in the proceedings because it could be harmful for his health or mental or physical state. The research that was conducted in 2011 and that included the sample of 889 cases of removal of legal capacity showed that in 87% of cases the court did not hear the person, while in 84% of cases the judge even did not see the person that was deprived of legal capacity.

Evidence in non-litigation and litigation proceedings may be presented directly or indirectly. Hearing is held directly in a way that involves oral and written hearing of participants and third parties. If state of affairs has not been determined completely, and the court estimates that some facts are uncertain, that is, if it has doubts about their accuracy, it will hear the participants in the non-litigation procedure that according to the Law on non-contentious proceedings may be: “person that initiated the non-litigation proceedings; person whose rights and legal interests are to be decided about in the proceedings, as well as authorities that take part in the proceedings on the basis of legal authorization to initiate the proceedings, regardless of the fact whether they initiated the proceedings or later entered into the proceedings” (Blagojevic Danilovic, 2016: 144).

In non-litigation proceedings, a party presents means of evidence in case when the court examines the accuracy of facts, about which the party can offer the information. In addition, the party has the characteristics of means of evidence when they know about certain circumstances that are significant for the matter of non-litigation proceedings. In other words, if circumstances are not well determined because certain facts are contested or uncertain, that is, when the court has doubts about the truth of certain facts, the court presents evidence with the help of a hearing which is aimed at proving the truth of certain facts, that is, it hears the participant in non-litigation proceedings as a party.

Starting from the principle of official proceeding and investigation, the court has the right to hear a witness in the procedure of presentation of evidence in non-litigation proceedings. It will be the case when the court intends to establish legally relevant facts through the presentation of evidence which it may use when rendering a decision in the specific case in non-litigation proceedings. Witnesses have the status of evidence, that is, the status of third parties who help the court to clarify the circumstances (Danilovic, N, Danilovic, A, 2019: 164). How the court will use the knowledge of witnesses depends on each concrete case. Sometimes it will be the situation in which a witness will have the procedural position of a witness in litigation, that is, a person who “will be able to perceive a fact or circumstance through senses and to report it later, that is, to reproduce it” (Lilic 2004:310), whereas sometimes it will be a qualified witness, or the person that provides the court with “different information which is supplementary for the state of affairs or which clarifies it or give the court opinion regarding the decision to be rendered” (Stankovic 2007:52). In the first case, the witness most frequently makes a statement in litigation proceedings, whereas in the second case the witness is a participant in non-litigation proceedings.

This specific role of a witness in non-litigation proceedings enable him to make a
statement that is assessed by the court not only as a sensual perception of some event that happened in the past, but as the “opinion about the suitability of some act or event because he knows about circumstances and facts that are significant for the decision to be rendered” (Stankovic 2007: 52).

This means that the role of a witness in non-litigation proceedings in the process of giving evidence is more significant than in litigation proceedings. This happens because these persons are most frequently in family relations with other participants in the proceedings and they know about circumstances that are significant for clarifying the state of affairs. Since family relations, status issues and similar issues are involved, it is logical that members of a household, as well as close and distant relatives have most information about circumstances significant for the matter in non-litigation proceedings. For example, family and other relatives know about circumstances and ambience, and the state of a person involved in the proceedings relating to the removal of legal capacity, and therefore, they may provide the court with useful information about facts and circumstances that are significant for the matter in non-litigation proceedings (Blagojevic Danilovic 2016: 145).

Hearing of a legal assessor in non-litigation proceedings is applied only according to the legal rules stipulated for the litigation procedure. Non-litigation procedure regulates only fragmentarily certain legal issues in regard with the legal procedures, while in all other cases it applies procedural rules regulated by the Law on Litigation Procedure. This Law regulates only specific rules, including hearing of participants in the proceedings, in specific situations that demand a specific approach of the court to finding out legally relevant facts necessary to clarify state of affairs. Thus, for example, the law regulates that the hearing of a legal assessor relating to the removal of legal capacity is mandatorily done in the presence of a judge. Also, as far as the removal of legal capacity is concerned, the opinion of two medical specialists is required, and the assessment is done in an appropriate healthcare institution, where the judge does not have to be present. One may conclude that a special matter of non-litigation proceedings demands a special manner of hearing of experts as professionals who provide the court with the professional help (which it does not have), and which contributes to establishing facts and circumstances significant for resolving the non-litigation issue (Blagojevic Danilovic 2016: 146).

4. CONCLUSION

The theoretical foundations of legal communication in non-litigation procedure were offered to the scientific public in this paper, with the focus on scientific description, classification and scientific explanation of legal communication in non-litigation proceedings. When we opted to analyze this topic in the form of a scientific article, we were aware that we could not perceive completely all important factors of this complex social and legal phenomenon. The starting premise of this paper was that reaching truth and justice as basic principles of contemporary society is necessarily conditioned by consistent application of legal procedure, whose important factor is legal communication, especially during the process of hearing that makes the foundation of judicial procedure in all legal procedures. Legal communication in the hearing process in non-litigation proceedings presents the main source of information and at the same time an important factor and determinant of legal procedure that is necessarily carried out in this specific legal procedure.

In non-litigation proceedings, legal communication that is strictly formal is necessarily applied. This civil legal procedure is a heterogeneous procedure and in many ways specific when compared to other legal procedures. It unfolds according to the principles of official proceeding, investigation and orality that are different from principles in other civil procedures (litigation and enforcement). In non-litigation proceedings, in accordance with its principles, procedures stipulated by law are carried out and they are based on
nomotechnical procedure of hearing that is realized through codified forms of legal communication between the judge of the acting court (panel of judges), parties, witnesses, and legal assessors. The hearing of parties, witnesses and legal assessors in non-litigation procedure is significant procedural legal means that is directed at establishing material truth in this procedure before non-litigation courts. The final outcome of legal communication in the process of hearing in non-litigation proceedings is judicial resolving of personal, family, property and other legal matters that do not belong to the litigation procedure.

Considering the basic principles and various definitions from different periods made by authors of different provenance, an acceptable working definition of legal communication in non-litigation procedure was offered in the paper: “Legal communication in non-litigation procedure is the activity of communication between the petitioner and other participants in the proceedings (guardianship authority, public attorney) that are in legal relations aimed at efficient exchange of information and understanding in the process of rendering a judicial ruling about personal, family, property and other legal issues in the non-litigation proceedings”.

Two components make the epistemological basis of the definition of legal communication in non-litigation procedure and they are the following: the activity of communication between the participants in non-litigation proceedings that are in a legal relation and the final outcome of that communication – court ruling about personal, family, property and other legal matters in non-litigation proceedings.

The above mentioned definition has the epistemological cognitive value because it contains the fundamental meaning of the notion of legal communication in non-litigation procedure. It relates the subject in a twofold manner: it speaks of the categorical notion of legal communication and subject that is designated by this term (Danilovic N, Danilovic A, 2018: 5). According to its form, it presents a statement of the key determinants of legal communication. It is nominal and fulfills eight criteria for defining theoretical notions in social sciences: it is positively expressed in the form of a statement; it is subject-related and informative because it shows important regulations and characteristics of the subject that is defined; it is comprehensive and includes the entirety of the subject that is defined in all its aspects; it is essential and contains important regulations and characteristics according to which the notion of legal communication may be identified; it is complex and developmental, because legal communication as the subject of defining is complex and developmental; it is equivalent and proportional – not to wide nor too narrow; it is accurate and contains only important and essential factors of the term legal communication in non-litigation procedure and finally, it is dialectical, because social and legal reality that it designates is dialectical (Danilovic, N, Danilovic A, 2018: 5).

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